FIN 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,

Electronically Filed
Oct 26 2020 02:54 p.m.
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' Reply Brief

Docket 81281 Document 2020-39179

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 October 26, 2020.

/s/Joshua A. House

Attorney of Record for Plaintiff-Appellants.

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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 Cath. 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

"The department has reviewed [A.B. 458] 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."

– Respondent Nevada Department of Taxation, April 4, 2019.[1]

Article 4, Section 18(2) of the Nevada Constitution requires that "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."

Plaintiffs-Appellants' opening brief demonstrated that A.B. 458 was a bill that increased general fund revenue. This Court has held that "when it appears from the Act itself that revenue is its main objective . . . the enactment is a revenue measure." *Clean Water Coal. v. The M Resort, LLC*, 127 Nev. 301, 316, 255 P.3d 247, 258 (2011). Here, everyone—including legislators and Respondent Department of Taxation—believed that A.B. 458 was going to increase revenue. The very point of the bill was shore to up Nevada's treasury, as the bill's sponsor

[1] 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.

made clear in the Assembly's committee on revenue: "We have to locate revenue . . . but every dollar we add to Opportunity Scholarships is a dollar we deplete from the General Fund." 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. Thus, A.B. 458 should have received a two-thirds majority vote in the Nevada Senate. Because it did not, it is unconstitutional.

Yet Respondents completely ignore that A.B. 458 was intended to increase revenue. Worse, they do not provide an alternative reason for the bill. Why pass A.B. 458 if not to raise revenue? Without a revenue motive, all A.B. 458 does is remove scholarships from low-income families.

Instead, Respondents argue three main points. First, the State Respondents argue that Plaintiffs-Appellants lack standing to bring their claims. Second, both Respondents argue that A.B. 458 did not raise revenue because it repealed fiscal year 2019–20 tax credits before July 1, 2019. And third, both Respondents argue that, even if A.B. 458 increased general fund revenue, tax-credit repeals like A.B. 458 are categorically excluded from Article 4, Section 18(2)'s reach. These arguments should be rejected.

First, the district court correctly determined that Plaintiffs have standing. This is particularly demonstrated by Plaintiff-Appellant Ybarra, whose family lost their scholarships as a direct result of A.B. 458 and, therefore, faced a $16,000

tuition shortfall, which she was forced to pay off by working for the school. And even if Plaintiffs-Appellants lacked standing to bring this case, this Court can nevertheless exercise jurisdiction under *Schwartz v. Lopez*¸132 Nev. 732, 743, 382 P.3d 886, 894 (2016), because both the State Respondents and Intervenor-Legislature recognize that this case raises a question of "statewide public importance." State Respondents' Answering Brief ("State RAB") 1; Intervenor-Legislature's Answering Brief ("Leg. RAB") ix.

Second, A.B. 458 increased general fund revenue by repealing tax credits and thereby forcing taxpayers to pay more in taxes. It thus should have received a two-thirds supermajority vote. It is irrelevant that A.B. 458 was enacted before July 1, 2019. And it is irrelevant that other bills passed at the same time might increase or reduce tax credits, or might spend more or less money on education.

Third, because A.B. 458 increases revenue, the text of Article 4, Section 18(2) requires a supermajority vote. The Legislative Counsel Bureau's contrary opinion is not entitled to deference because it goes against the provision's plain meaning. And every other state, even those that do not apply their supermajority provisions to tax credits, recognizes that tax-credit repeals increase revenue. Because A.B. 458 increases revenue, Article 4, Section 18(2) applies, and the bill should have received a two-thirds supermajority vote.

I. Plaintiffs-Appellants Have Standing to Challenge A.B. 458.

The State argues that Plaintiffs-Appellants lack standing. But, as the district court found, "[a]ll six Plaintiffs have alleged standing to bring this case because they have been directly affected by A.B. 458." 1 JA 52. And, even if they had not been directly harmed by the bill under traditional standing doctrines, "Plaintiffs also have standing under the public-importance exception" to the usual prohibition on generalized taxpayer standing. 1 JA 53 (citing *Schwartz v. Lopez*¸132 Nev. 732, 743, 382 P.3d 886, 894 (2016)).

A. Plaintiffs-Appellants have been directly harmed by A.B. 458.

Although only one plaintiff needs standing for a lawsuit to proceed,[2] here the district court found that all Plaintiffs-Appellants have standing to challenge A.B. 458. 1 JA 52–53. Plaintiff-Appellants Morency, Ybarra, and Newell have standing because A.B. 458 has directly resulted in their children's scholarships being cancelled (or, in the case of Newell, will result in scholarships being unavailable in the future). Appellants' Opening Brief ("AOB") 9–11. Plaintiff-Appellant AAA has standing because A.B. 458 has and will continue to eliminate funds from which it could have granted more scholarships. AOB 8–9. And Plaintiff-Appellants Sklar

[2] *See Deal v. 999 Lakeshore Ass'n*, 94 Nev. 301, 304–05, 579 P.2d 775, 777–78 (1978) (holding that "*the standing issue [is] without merit*" even when some plaintiffs lacked standing); *see also In re Zappos.com, Inc.*, 888 F.3d 1020, 1028 n.11 (9th Cir. 2018) (stating that "only one Plaintiff needs to have standing").

Williams and Environmental Design Group have standing because A.B. 458 has eliminated tax credits from which they have benefited in the past and from which they would like to benefit in the future. AOB 8. Thus, each of the Plaintiffs is a "person . . . whose rights, status ***or other legal relations*** are affected by a statute." NRS 30.040 (emphasis added); *see also Tam v. Colton*, 94 Nev. 453, 456, 581 P.2d 447, 450 (1978) (same).

The State argues that there is no harm traceable to the Departments of Education or Taxation because private scholarship organizations, not the State, award the program's scholarships. State RAB 15. This argument is wrong because it is the State that enforces A.B. 458. *See* 1 JA 58 ¶¶ 10–11 (admitting the State "is responsible for administering the Scholarship Program" and "is responsible for administering various taxes in accordance with Nevada law"). The State is therefore responsible for reducing the number of tax-credit-eligible donations that private scholarship organizations, like Plaintiff-Appellant AAA, can receive.[3] The mission of Plaintiff-Appellant AAA "is to provide economic and other assistance to economically disadvantaged families and families of disabled students[.]" 2 JA

[3] In particular, the Department of Education may investigate "a violation of state law or regulation concerning the Nevada Educational Choice Scholarship Program" and sanction violators by "revok[ing] the right of the person . . . to participate" or "require money to be returned to the Department of Taxation." NAC 388D.130(1), (3)(b)(4).

94. Because the State, by enforcing A.B. 458, harms AAA's mission, AAA has standing to bring this suit.

The State also argues that, even if A.B. 458 removes funding for the program, another bill added short-term funding for the next two years, so there is no immediate harm to the Plaintiffs-Appellants. State RAB 16. This argument is incorrect for two reasons.

First, the other funding bill to which the State refers, Senate Bill 551 (2019), has been enjoined by a Carson City district judge, and therefore is not in effect.[4]

Second, even were S.B. 551 still in effect, Plaintiffs-Appellants have standing because A.B. 458 has immediately harmed them. Even if S.B. 551 added some tax credits through the 2020–2021 fiscal year, A.B. 458 removed millions in tax credits for all years thereafter. *See* AOB 3, 27. And those long-term financial effects matter even for near-term scholarship decisions: For instance, a scholarship organization can award a scholarship only if the organization believes it can award the same amount every year until the student graduates from high school. NRS 388D.270(6).

A.B. 458 thus immediately harmed low-income Nevada families. As the district court found, "Plaintiffs' claims are ripe because they alleged that they have

[4]*See* Reply Appendix 1 (*Settelmeyer v. State*, No. 19 OC 00127 1B, slip op. at 11 (Nev. 1st Jud. Dist. Ct., Oct. 7, 2020)).

already been harmed by A.B. 458 . . . . Plaintiff Ybarra alleges her family currently has a $16,000 shortfall in tuition to her children's school." 1 JA 53. The record supports the district court's finding: Plaintiff-Appellant Ybarra received a letter from her scholarship organization stating that A.B. 458 "has made it statistically impossible" to renew her daughters' scholarships. 2 JA 87 ¶ 18. (Plaintiff-Appellant Morency received a similar letter. 2 JA 84 ¶ 19.) Because Ybarra's family's scholarships were not renewed, she had to work at the school and pay $240 each month out-of-pocket to afford tuition. 2 JA 88 ¶ 22. And this year, her daughter's school had to shut down completely because so many families lost their scholarship funding—totaling over $240,000 in lost scholarships. 2 JA 88 ¶ 25; 4 JA 464 ¶ 3. Plaintiffs-Appellants have a ripe claim.

B. Plaintiffs-Appellants may bring this suit because it concerns an issue of significant public importance.

The State also argues that, if Plaintiffs-Appellants cannot meet traditional standing rules, this Court should not apply the "public-importance" exception to hear the case. "Generally, a party must show a personal injury and not merely a general interest that is common to all members of the public." *Schwartz*, 132 Nev. at 743, 382 P.3d at 894. However, under the "public-importance exception, [this Court] may grant standing to a Nevada citizen to raise constitutional challenges to legislative expenditures or appropriations without a showing of a special or personal injury." *Id.* The district court held that, even if Plaintiffs-Appellants

lacked traditional standing, they could bring this case under the public-importance exception, noting that education is a priority of the State. 1 JA 53.

As argued above, this Court need not address this exception, because the district correctly decided that Plaintiffs-Appellants have standing. But even if they did not, this case would qualify for the public-importance exception.

The State argues that the Scholarship Program "is not a matter of significant public importance" because "[o]nly 2,330 students" were awarded scholarships as of March 2018. State RAB 17. But that statement directly contradicts both the State's and the Legislature's statements that this case "raises a question of statewide public importance." State RAB 1; Leg. RAB ix.

The State's attempts to distinguish *Schwartz* are without merit. There, this Court held that the issue raised was one "of significant statewide importance" because the plaintiffs there alleged "millions of dollars of public funds to be diverted from public school districts" and that this violated the state constitution.

Similar to *Schwartz*, this case involves millions of dollars of additional taxes that will be paid by Nevada taxpayers, millions of dollars in reduced scholarships for low-income families, and a challenge under the state Constitution. Plaintiffs-Appellants have alleged (and shown) that A.B. 458 repeals millions of dollars of tax credits, resulting in millions of dollars of lost donations that will not be made to scholarship organizations and millions of dollars in scholarships that will no longer

go to low-income families. AOB 3, 8–9, 27. And Plaintiffs-Appellants have alleged that this violates the Nevada Constitution. Plaintiffs-Appellants' constitutional claims are therefore just as important as those raised in *Schwartz* and satisfy the public-importance exception.

II. A.B. 458 Increased Public Revenue for Fiscal Year 2019-2020 and Will Increase Public Revenue Every Fiscal Year Thereafter.

As Plaintiffs-Appellants' opening brief showed, A.B. 458 was intended to increase revenue. AOB 22–24. And it did in fact did raise those revenues. AOB 21–22. By repealing tax credits, Nevadans have paid more in taxes and more money will be deposited into the State's general fund. AOB 20. Because A.B. 458 increased Nevada tax revenue, it should have received a two-thirds supermajority vote under Article 4, Section 18(2).

Neither the State nor the Legislature seriously disputes that A.B. 458 was intended to increase general fund revenue. Instead, they argue that A.B. 458 did not raise revenue because the tax credits it repealed were not "operative." Thus, Respondents argue, A.B. 458 did not really repeal any tax credits at all, and no revenue was raised. Respondents also argue that the Legislature cannot be prohibited from repealing tax credits because that would violate the principle that the Legislature cannot be bound by past legislatures.

The State makes two additional arguments: it argues that A.B. 458 did not increase revenues because Nevada will have to spend more money educating

families in public schools. And it argues that A.B. 458 did not raise revenue because another bill passed in 2019 increased the number of tax credits available in the current biennium.

Respondents' arguments should be rejected. ***First***, deciding whether tax credits were "operative" or "effective" or "effective, but not operative" is not relevant to determining whether A.B. 458 raises revenue. ***Second***, it is not a past legislature, but rather Article 4, Section 18(2), that requires a supermajority vote to increase revenues by repealing tax credits. ***Third***, the Legislature's passage of Senate Bill 551, which injected extra tax credits into the current biennium but does nothing for the millions of long-term tax credits missing in future biennia, is not relevant to whether A.B. 458 is constitutional. ***Fourth***, even if the State increases expenditures elsewhere, A.B. 458 increases revenue and therefore must receive a two-thirds supermajority vote.

A. It is irrelevant that A.B. 458 was enacted before July 1, 2019.

Respondents argue that A.B. 458 did not raise any revenue because it repealed tax credits that were not yet "operative." Because the repealed tax credits were not available to taxpayers until July 1, 2019, and because A.B. 458 was passed before July 1, 2019, Respondents argue that A.B. 458 did not really repeal any tax credits at all. Leg. RAB 14–15 ("By eliminating . . . credits before they became legally operative and binding [on July 1, 2019], the Legislature did not

change—but maintained—the existing legally operative amount of subsection 4 credits . . . ."); State RAB 8 n.3, 22–23 ([N]o one could have applied for . . . tax credits for the 2019 fiscal year until the 2019 fiscal year began.").

As Plaintiffs-Appellants showed in their opening brief, this Court should reject this "July 1" argument. AOB 24–32. The Legislature concedes that the tax credits repealed by A.B. 458 were passed into law and effective in 2015. Leg. RAB 34. Those tax credits were guaranteed by law to be available—and ***those tax credits would be available today***—had A.B. 458 not repealed them. And by repealing them, the State raised tax revenue. That increase in revenue triggers Article 4, Section 18(2)'s supermajority requirement.

The distinction between "effective" and "operative" is not relevant to whether A.B. 458 increased revenue. As the Legislature says, a law is "effective" on the date it legally goes into effect. Leg. RAB 30. If a law is "effective," it is the law, unless the Legislature changes it by properly passing a new law. The government cannot simply ignore the law, even if the law may not have been "operative." In other words, to change an existing effective law, a new law is required.

Respondents' argument boils down to this: If the government raises taxes on you, but the tax increase does not go into effect until the next fiscal year, then it did not actually raise your taxes. Those taxes were not yet operative, so it is as if they

never existed. To Respondents, any reliance Nevada taxpayers may have had—that their "existing tax structure" would not change unless a bill is properly passed by a two-thirds supermajority—was a "mistaken expectation." State RAB 8 n.3, 22.

That argument, of course, is wrong. Any business assessing their tax situation would rightfully say "the Legislature raised our taxes for next year." It is telling that neither the State nor the Legislature cites any case—from Nevada or elsewhere—holding a statute does not raise taxes if the tax increase does not operate until the following fiscal year. No such authority exists.

Finally, Respondents' "July 1" argument is in a sense moot. Since the bill's passage, July 1, 2019 has come and gone. The tax credits repealed by A.B. 458 would exist today, were it not for A.B. 458. If A.B. 458 were enjoined, those tax credits would immediately be available, and taxpayers who donate to the Scholarship Program would get to pay lower taxes to the State. Even if those tax credits were not operative when the Legislature passed A.B. 458, they would immediately become operative today if A.B. 458 were enjoined. For those reasons, and for those explained in Plaintiffs-Appellants' opening brief, this Court should reject Respondents' "July 1" argument.

B. The Legislature needs a supermajority to raise next year's revenues because the Constitution requires it, not because it is bound by a former Legislature.

Respondents argue that by preventing the Legislature from repealing these tax credits, the supermajority provision would violate the principle that a past legislature cannot bind a future legislature. State RAB 23; Leg. RAB 4, 34. Respondents argue that "[i]t is unlawful . . . 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." State RAB 23; Leg. RAB 34.

But as Plaintiffs-Appellants' opening brief made clear, there is no authority for this interpretation. AOB 30–31. This case is not about one Legislature binding another. It is about Article 4, Section 18(2) binding the Legislature.

Article 4, Section 18(2) requires a two-thirds majority to increase public revenue. It does not require a two-thirds majority to lower public revenue. That means, under the Constitution, that lowering revenue requires a bare majority, but raising revenue requires a supermajority. If one Legislature lowers revenue, ***Nevada's Constitution*** requires future Legislatures to get a supermajority to raise that revenue back up. This one-way street is precisely what Article 4, Section 18(2) contemplated: "A simple majority is necessary to approve the budget . . . [but a] two-thirds supermajority is needed to determine what specific changes would be

made to the existing tax structure to increase revenue." *Guinn v. Legislature*, 119 Nev. 460, 472, 76 P.3d 22, 30 (2003).

It is not the prior Legislature that is binding anything; it is rather the Constitution that binds. And the Constitution requires the Legislature to get a supermajority to raise revenue.

C. Because A.B. 458 was not constitutionally passed, it cannot be combined with other bills.

The State argues that, even if A.B. 458 removed tax credits, the Legislature also added tax credits by subsequently passing Senate Bill 551 (2019), which provided additional tax credits for the next biennium. State RAB 26–27. As an initial matter, S.B. 551 has been enjoined, so it is not in effect.[5] But even if S.B. 551 were still in effect, this argument is still wrong.

As the district court correctly held, the Legislature cannot save an unconstitutionally passed bill by later passing a separate bill. *See* 4 JA 550 (holding that "AB 458 must be reviewed separately and on its own"). If the first bill was not passed constitutionally, it is not law and has no effect: "When a statute is held to be unconstitutional, it is null and void *ab initio*; it is of no effect, affords no protection, and confers no rights." *Nev. Power Co. v. Metro. Dev. Co.*, 104 Nev. 684, 686, 765 P.2d 1162, 1163–64 (1988); *State v. Malone*, 68 Nev. 32, 43, 231

[5] *See* n.4, *supra*.

P.2d 599, 602 (1951) ("It is elementary that an unconstitutional law is no law at all."). If a bill was never constitutionally passed, it has no effect, and therefore cannot become constitutional later unless it is properly passed. A.B. 458, having never received sufficient votes, "is therefore a nullity." *State v. City of Oak Creek*, 182 N.W.2d 481, 494 (Wis. 1971) (holding tax assessment bill did not satisfy procedural requirements).

Under Nevada's Constitution, the correct unit of analysis is the particular bill at issue, A.B. 458. The Constitution asks whether a particular bill received a two-thirds majority. The plain text does not say "bills" or "group of bills," but rather "a bill." "[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 . . . ." Nev. Const. art. 4, § 18(2) (emphasis added). If a bill does not receive the necessary votes, it does not ever become law.

D. A.B. 458 raises *revenue*, regardless of how much the State then *spends* on education.

The State argues that A.B. 458 does not raise revenue because repealing tax credits increases the State's expenses: By removing families' scholarships, the State must spend more public money to educate those students. State RAB 24–25. It suggests that the Scholarship Program was saving the State money and that

eliminating the tax credits will require it to spend more on public education than it will collect in additional revenue.[6] State RAB 24.

This argument is wrong because it confuses expenses with revenues.[7] Time will tell if the state's expenses go up because of A.B. 458. But ***revenue***—with which Article 4, Section 18(2) is concerned—refers to income, not expenses. Even if expenses increase because Nevada spends more on public schools, that does not mean that revenues decrease. The Legislature can increase revenue while increasing expenses. Here, even if expenses go up under A.B. 458, it is still a bill that generates revenue. And because it generates revenue, it must receive a supermajority of votes to pass.[8]

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[6] Contrary to the State's claims, counsel for Plaintiffs-Appellants has never opined on whether A.B. 458 would "result[] in a net decrease in Nevada revenue." State RAB 24.

[7] The State repeatedly refers to the reduction of tax credits as a "reduction[] in tax expenditures[.]" *E.g.*, State RAB 28. As a matter of definitions, there is no difference—tax credits are simply one type of tax expenditure. The State itself considers deductions, abatements, credits, deferrals, exemptions, exclusions, subtractions, and preferential tax rates all to be categories of tax expenditures. Dept. Tax'n, 2017-2018 Tax Expenditure Report at iii, https://tax.nv.gov/uploadedFiles/taxnvgov/Content/TaxLibrary/Expenditure-Report-2017-18(1).pdf. But by arguing that Article 4, Section 18(2) should not apply to "reductions in tax expenditures," State RAB 28, which include preferential tax rates, the State contradicts the provision's clear text, which includes tax "rates" as one example of the many ways in which a supermajority is required to raise revenue. Thus, it cannot be right that Article 4, Section 18(2) does not cover tax expenditures. And, if the provision covers some tax expenditures, Respondents have not explained why others, such as tax credits, would be outside its purview.

[8] The State is also incorrect that "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." State RAB 6. As the U.S. Supreme Court has held, tax-credit-eligible donations are private funds, freely donated. *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 144 (2011). In other words, taxpayers are making donations of their own free will; the State simply reduces their tax liability because of it. Those donations do not belong to the government and are

III. Article 4, Section 18(2) Requires that Bills Repealing Tax Credits Receive a Supermajority Vote.

Respondents argue that, even if A.B. 458 raised revenue, the supermajority requirement does not apply to tax-credit repeals because tax-credit repeals do not change existing tax rates or computation bases. State RAB 21; Leg. RAB 40. But, as Plaintiffs-Appellants' opening brief showed, Article 4, Section 18(2)'s text covers all forms of revenue increases, including tax-credit repeals. AOB 32–41. Article 4, Section 18(2) is not limited to "rates" or "computation bases"—those are just two examples in a non-exhaustive list of revenue increases. AOB 37–38. Repealing tax credits increases general fund revenue, just as the State recognized before this litigation began.[9]

Respondents then make three additional arguments. First, they argue that this Court should defer to the interpretation of the Legislative Counsel Bureau. State RAB 34–36; Leg. RAB 23–25. Second, they argue that, under the canons of textual construction, Article 4, Section 18(2) does not apply to tax credits because

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not expended by the government. *See Kotterman v. Killian*, 972 P.2d 606, 618 (Ariz. 1999) (en banc) ("For us to agree that a tax credit constitutes public money would require a finding that state ownership springs into existence at the point where taxable income is first determined, if not before.").

[9] The State occasionally states that Article 4, Section 18(2) applies only to "new taxes." *E.g.*, State RAB 28. This argument is belied by the State's (and Legislature's) recognition that Article 4, Section 18(2) also applies to an "increase" in existing taxes. State RAB 19–20; Leg. RAB 27. Thus, as Plaintiffs-Appellants showed in their opening brief, the district court erred by limiting the provision to new taxes. AOB 32–34. Nothing in the statute's text or history limits it to new taxes.

it does not mention tax credits. State RAB 21; Leg. RAB 36–41. Third, Respondents argue that some states have refused to apply their supermajority requirements to tax-credit repeals. State RAB 29–31; Leg. RAB 46–55.

Respondents' arguments should be rejected. ***First***, the Legislative Counsel Bureau's opinion—that A.B. 458 did not trigger Article 4, Section 18(2)—is not due any special deference because its interpretation conflicts with the provision's plain text. ***Second***, Respondents misapply the canons of statutory construction. By including "any public revenue in any form," and by stating it was "not limited to" the examples of revenue provided, Article 4, Section 18(2) cannot reasonably be limited to the examples it provides. And ***third***, Respondents fail to appreciate that all other states—even those that do not ultimately apply their supermajority provisions to tax credits—consider tax-credit repeals to be a form of raising revenue. For those reasons, and because A.B. 458 increases revenue, Article 4, Section 18(2) requires A.B. 458 to pass by a two-thirds supermajority.

A. The Legislative Counsel Bureau's interpretation is not entitled to deference where its interpretation conflicts with the Constitution's plain text.

Respondents argue that this Court should defer to the Legislative Counsel Bureau's "reasonable interpretation" of Article 4, Section 18(2), and that it was reasonable for the Legislature to believe the provision excludes tax-credit repeals. State RAB 36; Leg. RAB 41.

But the Legislative Counsel Bureau is not entitled to deference if their interpretation directly conflicts with the provision's plain meaning. "Deference is given . . . only if the interpretation is within the language of the statute." *Vill. League to Save Incline Assets, Inc. v. State*, 133 Nev. 1, 11, 388 P.3d 218, 226 (2017) (quotation marks omitted); *see also United States v. State Eng'r*, 117 Nev. 585, 589–90, 27 P.3d 51, 53 (2001) ("An agency's interpretation . . . does not control if an alternative reading is compelled by the plain language of the provision." (quotation marks and citation omitted)).

Here, the provision's plain meaning is that it applies to all "increases [of] any public revenue in any form." Nev. Const. art 4, § 18(2). That includes the repeal of tax credits. Because the Legislature's interpretation contradicts the provision's ordinary meaning, its interpretation is not entitled to deference.

Both the State and the Legislature agree with Plaintiffs-Appellants that, in interpreting Article 4, Section 18(2), this Court should "first examine the language of the constitutional provision to determine whether it has a plain and ordinary meaning." Leg. RAB 19; State RAB 12. Indeed, because Article 4, Section 18(2) was a ballot measure and there is no traditional legislative history, the text is especially important: "It would be impossible" to ask every Nevadan why they did or did not "vote[] in favor of the provision[.]" *Thomas v. Nev. Yellow Cab Corp.*, 130 Nev. 484, 490, 327 P.3d 518, 522 (2014).

The Legislature also agrees with Plaintiffs-Appellants that this Court should interpret the supermajority provision using the everyday, common meanings of its words. "[T]his Court has emphasized that 'the Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.'" Leg. RAB 26 (citing *Strickland v. Waymire*, 126 Nev. 230, 234, 235 P.3d 605, 608 (2010)). When interpreting other recent constitutional amendments, this Court has applied "the simplest and most straightforward meaning" of the text. *MDC Restaurants, LLC v. Eighth Jud. Dist. Court*, 134 Nev. 315, 325, 419 P.3d 148, 156 (2018). "It must be very plain—nay, absolutely certain—that the people did not intend what the language they have employed . . . imports, before a Court will feel itself at liberty to depart from the plain reading of a constitutional provision." *State v. Doron,* 5 Nev. 399, 412 (1870).

Under the "the simplest and most straightforward meaning" of Article 4, Section 18(2), it applies to tax-credit repeals because they increase revenue. As Plaintiffs-Appellants' opening brief showed, repealing tax credits makes public revenue go up. AOB 19–22. And because revenue goes up, Article 4, Section 18(2) applies. This is exactly what State Respondent Department of Taxation concluded before this litigation began: "The department has reviewed the bill and determined it would increase 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/Fiscal Notes/9327.pdf.

Yet instead of applying the ordinary meaning of "a bill that . . . increases any form of any public revenue," Nev. Const. art 4, § 18(2), Respondents get mired in technical definitions of "computation bases," "revised statutory formulas," and whether the "'existing tax structure' of decreased revenues from increased tax credits . . . had not yet become operative." State RAB 22; Leg. RAB 27–28. This Court should reject Respondents' attempts to overcomplicate the provision "beyond [its] simple meaning found within the text[.]" *MDC Restaurants, LLC*, 134 Nev. at 324, 419 P.3d at 155.

B. Respondents misapply the canons of construction to Article 4, Section 18(2).

Next, Respondents argue that if the supermajority provision's framers wanted to include tax-credit repeals, they "would have included a limitation upon the Legislature's ability to repeal . . . changes to tax rates, deductions, or exemptions." State RAB 21; Leg. RAB 36. The Legislature therefore goes on to argue that applying the canons of statutory construction "unravels" Plaintiff-Appellants' arguments. Leg. RAB 36. But Respondents misapply these canons of construction.

1. "Refusal to imply what is not explicit" does not apply because the provision explicitly includes an entire category, such as "any form" of revenue increase.

First, the Legislature argues that, under the rule of construction that courts "refuse[] to imply provisions not expressly included," this Court should not imply that A.B. 458's repeal of tax credits is a form of raising public revenue. Leg. RAB 36–37. They argue that the supermajority provision could have, but did not, include the term "tax credits." *Id.*

Yet when a provision expressly covers an entire category—here, "any form of public revenue"—the provision necessarily includes every item within that category. Indeed, to create a statute that is expansive and inclusive, legislatures will often use phrases like "other such" and "includes," indicating that a list is non-exhaustive. *See United States v. Gundy*, 842 F.3d 1156, 1175 (11th Cir. 2016) (stating "[t]he phrase 'other such [. . .]' cannot be part of a finite list because it is necessarily expansive"); *White v. Mederi Caretenders Visiting Servs. of Se. Fla., LLC*, 226 So. 3d 774, 783 (Fla. 2017) ("[T]he qualifying phrase 'includes, but is not limited to' made clear that the Legislature intended to allow the protection of more interests than simply those set forth in the non-exhaustive list."). Although some states have expressly listed tax credits or tax exemptions as one "form" of revenue, Nevada's supermajority provision is broader than those states' provisions because it includes "any form." *See* Part III.C., below. Nevada's Article 4, Section

18(2) requires a supermajority for bills that raise "any public revenue ***in any form***" (emphasis added). Nothing is being "implied" or added to the text by concluding that repealing tax credits is one "form" of revenue generation.

2. Ejusdem Generis *and* Expressio Unius *do not apply because the provision expressly states it is* "not limited to" *the examples provided.*

Second, the Legislature argues that this court should apply the "of the same kind or class" (*ejusdem generis*) and "expression of one means exclusion of others" (*expressio unius*) rules of construction. Leg. RAB 37–38. It argues that "[b]ecause changes in tax credits do not change the existing 'computation bases' . . . , changes in tax credits are not of the same kind, class or nature as changes in 'taxes, fees, assessments and rates[.]'" Leg. RAB 40.[10]

The Legislature's conclusion, however, does not follow from those rules of construction. The relevant category or kind is not "computation bases." Instead, it is bills that "create[], generate[], or increase[] any public revenue." Nev. Const. art. 4, § 18(2). Taxes, fees, assessments, rates, and changes in computation bases are merely examples of increases in public revenue. Repealing tax credits is a form of increasing public revenue because such repeals cause more taxes to be paid into the

[10] The Legislature also describes a third canon, "Noscitur a Sociis" or "known by its associates." But it does not apply this canon to Article 4, Section 18(2) or explain what term must be defined by relation to certain associate terms. *See* Leg. RAB 37–38.

public treasury. It does not matter that A.B. 458 does not change computation bases; what matters is that it "increases any public revenue in any form[.]" *Id*.

Further, the narrowing rules of construction relied upon by the Legislature do not apply when the text says "including but not limited to." As the Ninth Circuit has held, courts "need not apply *ejusdem generis* because [the Legislature] modified its list of examples with the phrase 'including, but not limited to.' That phrase mitigates the sometimes unfortunate results of rigid application of the ejusdem generis rule." *United States v. Migi*, 329 F.3d 1085, 1089 (9th Cir. 2003) (quotation marks omitted). Here, the constitutional text, by expressly stating it is "not limited to" the enumerated examples, demands that courts not construe it rigidly. Likewise, *expressio unius*—which limits a text to only the items listed in the text—cannot apply if the text itself says it is "not limited to" the listed revenues.[11] Nev. Const. art. 4, § 18(2).

[11] *See, e.g.*, *Soc'y for Advancement of Educ., Inc. v. Gannett Co.*, *Inc.*, No. 98 CIV. 2135 LMM, 1999 WL 33023, at *7 (S.D.N.Y. Jan. 21, 1999) ("The *expressio unius* maxim has no force in the face of directly contradictory language in the contract, such as the clause 'including but not limited to . . . .'"); *Kissane v. City of Anchorage*, 159 F. Supp. 733, 736 (D. Alaska 1958) ("It will be noted that the Act provides that the 'public works' contemplated shall include but are not limited to those specifically named; hence the rule of 'expressio unius est exclusio alterius' does not apply."); *City of Santa Ana v. City of Garden Grove*, 160 Cal. Rptr. 907, 910 (Ct. App. 1979) ("The 'expressio unius est exclusio alterius' canon of statutory construction is inapplicable . . . . The attempted application of the canon overlooks the phrase 'but not limited to' . . . . Use of those words manifests a legislative intent that the statute not be given an 'expressio unius' construction.").

C. Other states consider tax-credit repeals to be one "form" of raising public revenue.

Plaintiffs-Appellants' opening brief showed that the district court erred by applying Oklahoma law to Article 4, Section 18(2). AOB 41–47. It demonstrated that Nevada's provision was instead closer in text to Arizona's supermajority provision, which considers tax-credit repeals to be one form of raising revenue. *Id*. at 44–47. And it explained that Oklahoma law is distinguishable because it applies a two-part test stemming from a centuries-old technical definition of "revenue bill." *Id.* at 42–44.[12]

Respondents argue that Arizona's supermajority provision (along with Florida's and Louisiana's provisions) is distinguishable because it expressly mentions repeals of tax credits or tax exemptions. State RAB 32 & n.9; Leg. RAB 48.

But Respondents' argument misses the point. Plaintiffs-Appellants are not arguing that Nevada's Constitution must be interpreted the same as Arizona's or Florida's[13] or Louisiana's provisions. Instead, Plaintiffs-Appellants' point was that

[12] The State argues that "[t]here is no textual reason why Nevada should not recognize the same distinction between revenue bills and tax exemptions for purposes of its supermajority provision." State RAB 30. But Plaintiffs-Appellants showed that there is. Not only does Nevada's provision—unlike Oklahoma's—expressly apply to "any public revenue in any form," but also Oklahoma's definition of "revenue bill" is a technical term which Respondents make no effort to distinguish. AOB 42–44.

[13] The State says it "do[es] not understand Appellants' arguments pertaining to Florida" because "Florida's supermajority provision was adopted in 2018." State RAB 32. Plaintiffs-Appellants did not argue that Florida's provision pre-dates Nevada's. But even if they had, the State forgets

those state's provisions consider tax-credit repeals to be one "form" of raising revenue. Indeed, Plaintiffs-Appellants argued that Nevada's provision was broader than Arizona's: Arizona's provision only applies to eight "form[s]" of revenue increase. Ariz. Const. art. 9, § 22(B). Nevada's provision applies to "increases [of] any public revenue in ***any*** form." Nev. Const. art. 4, § 18(2) (emphasis added).

In fact, even Oklahoma and Oregon, which do not apply their supermajority provisions to tax-credit repeals, recognize that such repeals are forms of raising revenue. The Oklahoma Supreme Court has held that it "isn't seriously in doubt" that repealing tax exemptions increased state revenue. *Okla. Auto. Dealers v. State*, 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."). Likewise, the Oregon Supreme Court has said that tax exemption repeals "do[] generate revenue—as [the bill] does indeed here." *City of Seattle v. Dep't of Revenue*, 357 P.3d 718, 988 (Ore. 2015) (en banc). The only reason those states do not apply their supermajority provisions to tax credits is that they apply a two-part test—after asking whether a bill raises revenue, they also ask whether the bills "possess[] the essential features of a bill levying a tax." *Id.* at 987; *Okla. Auto. Dealers*, 401 P.3d

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that Florida's earlier supermajority provisions were enacted in 1996 and 1971, respectively. *See* Fla. Const. art. 11, § 7; Fla. Const. art. 7, § 5.

at 1156 (stating its decision "turns on the second prong: whether the measure 'levies a tax in the strict sense of the word.'").

The Legislature suggests that this Court should adopt the two-part test used in Oregon and Oklahoma. Leg. RAB 54. But as Plaintiffs-Appellants' opening brief explained, that test is incompatible with Article 4, Section 18(2). AOB 43–44. Under the two-part test, the provision would only apply to bills that both (1) raise revenue and (2) levy a "tax." *Okla. Auto. Dealers*, 401 P.3d at 1156; *City of Seattle*, 357 P.3d at 986. Because of its second part, that test excludes things like changes in rates, fees, assessments, or other bills that raise revenue—all of which are mentioned as examples of "revenue" in Article 4, Section 18(2). Accordingly, Oregon and Oklahoma courts have held that the two-part test necessarily excludes forms of revenue that are not new taxes. *See City of Seattle*, 357 P.3d at 986–87 (stating two-part test excludes "a bill exacting . . . fees" and "bills . . . that collaterally provide for an assessment"); *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").

Thus, the two-part test cannot be reconciled with the language of Article 4, Section 18(2), and this Court should reject the Legislature's call to import it from Oklahoma and Oregon. Instead, this court need only consider a single question: Does a bill raise public revenue? If so, Article 4, Section 18(2) applies and the bill must receive a supermajority to pass. Because A.B. 458 did not receive a supermajority in the Senate, it is void.

CONCLUSION

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 26th day of October, 2020.

By */s/ Joshua A. House*

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RULE 28.2 CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

[X] This brief has been prepared in a proportionally spaced typeface using Microsoft Word 365 in 14-point, Times New Roman font; or

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2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

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3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada 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 October 26, 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 26th day of October, 2020, I caused to be served, via the Court's electronic filing service, a true and correct copy of the foregoing **APPELLANTS' REPLY BRIEF** to the following parties:

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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,

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' Reply Appendix

and

THE LEGISLATURE OF THE STATE OF NEVADA,

Respondent-Intervenors.

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REPLY APPENDIX INDEX

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

THE HONORABLE JAMES SETTELMEYER, THE HONORABLE JOE HARDY, THE HONORABLE HEIDI GANSERT, THE HONORABLE SCOTT HAMMOND, THE HONORABLE PETE GOICOECHEA, THE HONORABLE BEN KIECKHEFER, THE HONORABLE IRA HANSEN, and THE HONORABLE KEITH PICKARD, in their official capacities as members of the Senate of the State of Nevada and individually; GREAT BASIN ENGINEERING CONTRACTORS, LLC, a Nevada limited liability company; GOODFELLOW CORPORATION, a Utah corporation qualified to do business in the State of Nevada; KIMMIE CANDY COMPANY, a Nevada corporation; KEYSTONE CORP., a Nevada nonprofit corporation; NATIONAL FEDERATION OF INDEPENDENT BUSINESS, a California nonprofit corporation qualified to do business in the State of Nevada; NEVADA FRANCHISED AUTO DEALERS ASSOCIATION, a Nevada nonprofit corporation; NEVADA TRUCKING ASSOCIATION, INC., a Nevada nonprofit corporation; and RETAIL ASSOCIATION OF NEVADA, a Nevada nonprofit corporation,

Plaintiffs,

vs.

STATE OF NEVADA *ex rel.* THE HONORABLE NICOLE CANNIZZARO, in her official capacity as Senate Majority Leader; THE HONORABLE KATE MARSHALL, in her official capacity as President of the Senate; CLAIRE J. CLIFT, in her official capacity as Secretary of the Senate; THE HONORABLE STEVE

Case No: **19 OC 00127 1B**

Dept. No: **I**

ORDER AFTER HEARING ON SEPTEMBER 21, 2020, AND FINAL JUDGMENT

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SISOLAK, in his official capacity as Governor of the State of Nevada; NEVADA DEPARTMENT OF TAXATION; NEVADA DEPARTMENT OF MOTOR VEHICLES; and DOES I-X, inclusive,

Defendants.

and

THE LEGISLATURE OF THE STATE OF NEVADA,

Defendant-Intervenor.

_____/

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ORDER AFTER HEARING ON SEPTEMBER 21, 2020, AND FINAL JUDGMENT

This matter is before the Court on the following dispositive motions: (1) Executive Defendants' Motion to Dismiss; (2) Motion for Summary Judgment filed by Plaintiffs; (3) Counter-Motion for Summary Judgment filed by Legislative Defendants and Defendant-Intervenor Legislature; and (4) Executive Defendants' Joinder to Legislative Defendants' Counter-Motion for Summary Judgment.

The Court, having read the papers and pleadings on file herein, having heard oral argument on September 21, 2020, and good cause appearing therefore, finds and orders as follows:

Relevant Procedural History

Plaintiffs, a group of Republican State Senators ("Plaintiff Senators"), in their official capacity and individually, and various business interests, filed a First Amended Complaint herein on July 30, 2019, challenging the constitutionality of Senate Bill No. 542 (SB 542) and Senate Bill No. 551 (SB 551) of the 80th (2019) Session of the Nevada Legislature as well as the constitutionality of the manner in which each bill was passed into law. Plaintiffs allege four claims for relief, including that SB 542 and SB 551 were each subject to the two-thirds majority requirement in Article 4, Section 18(2) of the Nevada Constitution and that SB 542 and SB 551 are unconstitutional because the Senate passed each bill by a majority of all the members elected to the Senate under Article 4, Section 18(1) of the Nevada Constitution, instead of a two-thirds majority of all the members elected to the Senate under Article 4, Section 18(2) of the Nevada Constitution. Plaintiffs ask for, among other relief, a declaration that SB

542 and SB 551 are unconstitutional in violation of Article 4, Section 18(2), and Plaintiffs also ask for an injunction against enforcement of SB 542 and SB 551.

Plaintiffs named state officers and agencies of the executive branch and legislative branch as defendants in the First Amended Complaint. The executive branch defendants are: (1) the Honorable Kate Marshall, in her official capacity as Lieutenant Governor of the State of Nevada and President of the Senate; (2) the Honorable Steve Sisolak, in his official capacity as Governor of the State of Nevada; (3) the Nevada Department of Taxation; and (4) the Nevada Department of Motor Vehicles (collectively the "Executive Defendants"). The Executive Defendants are represented by the Office of the Attorney General.

The legislative branch defendants are the Honorable Nicole Cannizzaro, in her official capacity as Senate Majority Leader, and Claire Clift, in her official capacity as the Secretary of the Senate (collectively the "Legislative Defendants"). The Legislative Defendants are represented by the Legislative Counsel Bureau, Legal Division ("LCB Legal"), under NRS 218F.720. The Legislature of the State of Nevada ("Legislature") intervened as a Defendant-Intervenor and is represented by LCB Legal under NRS 218F.720.

On September 16, 2019, Executive Defendants filed a Motion to Dismiss Plaintiffs' First Amended Complaint, and Legislative Defendants filed an Answer to Plaintiffs' First Amended Complaint. On September 30, 2019, Plaintiffs filed their Opposition to Executive Defendants' Motion to Dismiss or, in the Alternative, Plaintiffs' Motion for Summary Judgment.

On October 24, 2019, Plaintiff Senators James Settelmeyer, Joe Hardy, Heidi Gansert, Scott Hammond, Pete Goicoechea, Ben Kieckhefer, Ira Hansen and Keith Pickard (collectively "Plaintiff Senators") filed a Motion to Disqualify LCB Legal as counsel for Defendants Senator Cannizzaro and Secretary Clift. Defendants Senator Cannizzaro and Secretary Clift filed an Opposition to the Motion to Disqualify.

Because the Court's resolution of the Motion to Disqualify could have affected whether LCB Legal could continue to provide legal representation to Defendants Senator Cannizzaro and Secretary Clift against the claims of Plaintiff Senators in this action, including providing such legal representation regarding the parties' dispositive motions, the parties entered into a Stipulation and

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Order to stay proceedings regarding the parties' dispositive motions pending the Court's resolution of the Motion to Disqualify.

On November 2, 2019, the Legislature, also represented by LCB Legal, filed a motion to intervene as a defendant-intervenor under NRCP 24 and NRS 218F.720 to protect the official interests of the Legislature and defend the constitutionality of SB 542 and SB 551.

On December 19, 2019, the Court entered an order which granted the Plaintiff Senators' motion to disqualify LCB Legal from representing the Legislative Defendants in their official capacity as their statutorily authorized counsel under NRS 218F.720. The Court's order also denied a stay of the district court proceedings requested by LCB Legal to address the consequences of the order requiring the Legislative Defendants to obtain separate outside counsel to represent them in their official capacity in this litigation.

Also, on December 19, 2019, the Court entered a separate order which granted the Legislature's motion to intervene as a defendant-intervenor. In that order, the Court also denied the Plaintiff Senators' motion to disqualify LCB Legal from representing the Legislature as its statutorily authorized counsel under NRS 218F.720. On December 26, 2019, the Legislature filed an Answer to Plaintiffs' First Amended Complaint.

On January 10, 2020, the Nevada Supreme Court issued an Order staying the District Court's proceedings in this matter pending resolution of the Legislative Defendants' Petition for Writ of Mandamus seeking the Supreme Court's review of the District Court's Order disqualifying LCB Legal as counsel for the Legislative Defendants. *State ex rel. Cannizzaro v. First Jud. Dist. Ct.*, No. 80313 (Nev. Jan. 10, 2020) (Order Directing Answer, Granting Stay, and Scheduling Oral Argument). The Supreme Court's stay was granted while the parties were in the process of briefing dispositive motions on the merits of the constitutional claims. Additionally, as a result of the stay, the District Court vacated the hearing set in this matter for March 9, 2020, on the parties' dispositive motions on the merits of the constitutional claims.

On June 26, 2020, the Supreme Court issued an Opinion and Writ of Mandamus directing the District Court to vacate its Order disqualifying LCB Legal as counsel for the Legislative Defendants.

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State ex rel. Cannizzaro v. First Jud. Dist. Ct., 136 Nev. Adv. Op. 34, 466 P.3d 529 (2020). The Supreme Court also lifted its stay of the District Court's proceedings in this matter. *Id.*

On July 7, 2020, LCB Legal served the District Court, by regular U.S. Mail, with the Supreme Court's Opinion and Writ of Mandamus. An Order Vacating Order Disqualifying LCB Legal was entered by the Court on July 9, 2020.

On August 13, 2020, the parties entered into a Stipulation and Order regarding a briefing schedule to complete briefing on their dispositive motions. On August 18, 2020, Legislative Defendants and Defendant-Intervenor Legislature filed an Opposition to Plaintiffs' Motion for Summary Judgment and a Counter-Motion for Summary Judgment. On August 21, 2020, Executive Defendants filed a Joinder to Legislative Defendants' Counter-Motion for Summary Judgment. On September 4, 2020, Plaintiffs filed a Reply in Support of their Motion for Summary Judgment and an Opposition to the Counter-Motion for Summary Judgment. On September 14, 2020, Legislative Defendants and Defendant-Intervenor Legislature filed a Reply in Support of their Counter-Motion for Summary Judgment. Finally, on September 21, 2020, the Court held a hearing to receive oral arguments from the parties on their dispositive motions.

Factual Background

The parties agreed at the hearing herein there are no material disputes of fact regarding the passage of SB 542 and SB 551. The Court agrees and finds, with respect to the passage of SB 542 and SB 551, the following facts.

Article 4, Section 18(2) of the Nevada Constitution is the result of a ballot initiative approved by Nevada voters during the 1994 and 1996 general elections and provides, in pertinent part:

> ...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.

During the 2015 Legislative Session, the Legislature enacted two revenue-generating measures, SB 483 and SB 502. SB 483 amended NRS 360.203 to provide a computation mechanism by which the Department of Taxation would compute the payroll tax rate for the Modified Business Tax (MBT) under NRS Chapter 363A and NRS Chapter 363B based upon the combined revenue from

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the taxes imposed by the commerce tax and the MBT. SB 483 required a reduction in the payroll tax rate for the MBT if the calculation required by NRS 360.203 yielded certain results. The payroll tax rate computation codified in NRS 360.203 became effective and operative on July 1, 2015. SB 502 added a $1 technology fee to every transaction for which the Department of Motor Vehicles (DMV) charged fees. SB 502 provided the DMV technology fee was effective and operative July 1, 2015 and expired on June 30, 2020. Both SB 483 and SB 502 were subject to the two-thirds supermajority provision of the Nevada Constitution and were approved by more than two-thirds of both Houses of the Legislature in 2015.

SB 542 proposed, during the 2019 Legislative Session, to extend the expiration date of the DMV technology fee to June 30, 2022 and would allow the DMV to collect approximately $6.9 million per year during the extended period. The Legislature determined that SB 542 was not subject to the two-thirds majority requirement, and the Senate passed the measure by a majority of all the members elected to the Senate under Article 4, Section 18(1) of the Nevada Constitution, with 13 Senators voting for the bill and 8 Senators voting against the bill. On June 5, 2019, the Governor approved SB 542.

During the 2019 Legislative Session, Defendant Senate Majority Leader Nicole Cannizzaro sponsored numerous amendments to SB 551, which amendments would repeal NRS 360.203 in its entirety, allowing the Department of Taxation to collect approximately $98.2 million during the subsequent biennium. Sections 2 and 3 of the amendments to SB 551 eliminated the tax rate calculation provided by NRS 360.203 to the provisions of NRS 363A.130 and NRS 363B.110, respectively. Sections 37(2)(a)(1) and (2) of SB 551 superseded, abrogated and nullified the determinations, decisions or actions made by the Department of Taxation under the computation base provided in NRS 360.203 and provided any such calculations under NRS 360.203 shall have no legal force or effect. Section 37(2)(b) further provided the Department shall not under any circumstances apply or use those determinations, decisions or actions as a basis, cause or reason to reduce the rates of the taxes imposed pursuant to NRS 363A.130 and NRS 363B.110 for any fiscal year beginning on or after July 1, 2015. Section 39 of SB 551 repealed NRS 360.203, which contained the tax rate computation for the MBT. Three of the proposed amendments to SB 551 sponsored by Senate

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Majority Leader Cannizzaro stated that Sections 2, 3, 37 and 39 of the amendment to SB 551 would require a two-thirds majority vote to pass. When SB 551 was first put to a vote in the Senate on June 3, 2019, it failed to garner the support of two-thirds of the members of the Senate, with 13 Senators voting in favor and 8 voting against. SB 551, having failed to receive a two-thirds majority, was declared lost by the Senate President. Senate Majority Leader Cannizzaro called a brief recess and fifteen minutes later introduced a new amendment to SB 551, containing the same Sections 2, 3, 37, and 39, but the printed amendment left off the two-thirds majority vote requirement and a new vote was taken. The vote remained the same – 13 Senators for and 8 Senators against – but the Senate President declared SB 551 passed, as amended, by a majority of all the members elected to the Senate under Article 4, Section 18(1) of the Nevada Constitution. On June 12, 2019, the Governor approved SB 551.

During the 2019 Legislative Session, members of the Legislative Leadership requested the Legislative Counsel's opinion on whether the Constitutional two-thirds supermajority requirement applies to a bill which extends until a later date – or 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. On May 8, 2019, the Legislative Counsel provided the requested opinion to the Legislative Leadership. The Legislative Counsel's opinion stated that "[i]t is the opinion of this office that Nevada's two-thirds majority requirement does not apply to a bill which extends until a later date—or 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, because such a bill does not change—but maintains—the existing computation bases currently in effect for the existing state taxes."

Conclusions of Law

1. SB 542 and SB 551 are unconstitutional.

This case is not about a political issue but is about a constitutional issue that affects all members of the Legislature. Additionally, the issues before the Court are not whether funds for education or technology fees for the DMV are appropriate or worthy causes. The Court's task is not to rule upon

the merits or worthiness of SB 542 and SB 551. This case is about Article 4, Section 18(2) of the Nevada Constitution and whether it applies to SB 542 and SB 551.

Article 4, Section 18(2) of the Constitution was adopted by the citizens of the State of Nevada by initiative and for a very specific reason – to make revenue-generating measures more difficult to enact. The people's intent and the language of the Constitutional provision are clear. The Constitutional provision provides, in pertinent part:

> 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.

All the language of the Constitutional provision must be given effect and the Court finds the language to be clear and unambiguous. To determine a constitutional provision's meaning, a court turns to the language and gives that language its plain effect. *Miller v. Burk*, 124 Nev. 579, 590-91, 188 P.3d 1112, 1119-20 (2008). A court must give words their plain meaning unless doing so would violate the spirit of the provision. *McKay v. Bd. of Supervisors*, 102 Nev. 644, 648, 730 P.2d 438, 442 (1986).

The plain meaning of the term "generates," as set forth in multiple dictionaries consulted by the Court, is to "cause to exist" or "produce." The Court's emphasis in analyzing the Constitutional provision was focused upon the plain meaning of the term "generates" and the phrase "any public revenue in any form."

With respect to SB 542, regarding the DMV technology fee, the bill extended the imposition of this fee from June 30, 2020 to June 30, 2022. The Court finds the purpose of SB 542 was to generate public revenue for two more years at an estimated $6.9 million per year. It is clear to the Court that SB 542 was intended to generate public revenue to the State in the form of fees to be collected by the DMV. But for the passage of SB 542, those funds would not have been produced; they just would not exist. The public revenue would not otherwise exist without the passage of SB 542 and, therefore, SB 542 generates public revenue in any form and should have been subject to a two-thirds majority vote. SB 542, therefore, was passed unconstitutionally and is void and stricken from the law.

As to SB 551, NRS 360.203, passed by more than two-thirds of the 2015 Legislature, provided a mechanism whereby the Department of Taxation would calculate the payroll tax rate for the MBT.

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The calculated tax rate, based on NRS 360.203, was to go into effect on July 1, 2019 and was a reduction in the payroll tax rate. Sections 2, 3 and 39 of SB 551 repealed NRS 360.203 and related provisions in NRS 363A.130 and 363B.110 concerning the computation of the MBT and, therefore, deleted the computation mechanism for the affected taxes. The deletion of this computation base was estimated to generate an additional $98.2 million in revenue for the State of Nevada in the coming biennium. But for the repeal of NRS 360.203 and the related provisions, that public revenue would not exist. Section 37 of SB 551 changed the computation base for the MBT by repealing the payroll tax rate computation made by the Department of Taxation. Therefore, SB 551 generates public revenue in any form by a change in computation base for a tax and should have been subject to a two-thirds majority vote. As a result, SB 551 was passed unconstitutionally.

Because Sections 2, 3, 37, and 39 of SB 551 are the sections that generate public revenue, Legislative Defendants and Defendant-Intervenor Legislature asked the Court to invalidate and strike only those sections and sever the remaining provisions of SB 551 and, at the hearing, Plaintiffs did not oppose that request. The Court finds that the remaining provisions of SB 551 can be severed and shall remain in effect. *See* NRS 0.020; *Flamingo Paradise Gaming v. Chanos*, 125 Nev. 502, 515, 217 P.3d 546, 555 (2009) ("Under the severance doctrine, it is 'the obligation of the judiciary to uphold the constitutionality of legislative enactments where it is possible to strike only the unconstitutional portions.'") (quoting *Rogers v. Heller*, 117 Nev. 169, 177, 18 P.3d 1034, 1039 (2001))). Therefore, Sections 2, 3, 37, and 39 of SB 551 are void and are stricken from the law, but the remaining provisions of SB 551 can be severed and shall remain in effect.

While there is a concept of legislative deference, that deference does not exist to violate the clear meaning of the Constitution of the State of Nevada. The Court's primary task is to ascertain the intent of those who enacted the Constitutional provision and adopt an interpretation that best captures that objective. *Nevada Mining Ass'n v. Erdoes*, 117 Nev. 531, 538 n. 14, 26 P.3d 753, 757 n. 14 (2001) citing *McKay v. Bd. of Supervisors*, 102 Nev. 644, 648, 730 P.2d 438, 441 (1986). The Nevada Supreme Court clearly stated: "A simple majority is necessary to approve the budget and determine the need for raising revenue. A two-thirds supermajority is needed to determine what specific changes

would be made to the existing tax structure to increase revenue." *See Guinn v. Leg. of Nevada*, 119 Nev. 460, 472, 76 P.3d 22, 30 (2003).

The Court does not put much weight in or credence to the operative versus effective date argument of the Defendants. That argument became moot when SB 542 and SB 551 went into effect and generated public revenue that came into existence from the fees or taxes or changes in the computation bases for the fees or taxes.

Consequently, the Court concludes that SB 542 and Sections 2, 3, 37, and 39 of SB 551 are unconstitutional in violation of Article 4, Section 18(2) of the Nevada Constitution, but the remaining provisions of SB 551 can be severed and shall remain in effect.

2. Plaintiffs are not entitled to recover attorney's fees as special damages.

As a general rule, "Nevada adheres to the American Rule that attorney['s] fees may only be awarded when authorized by statute, rule, or agreement." *Pardee Homes of Nev. v. Wolfram*, 135 Nev. 173, 177, 444 P.3d 423, 426 (2019). But the Nevada Supreme Court has "recognized exceptions to this general rule; one such exception is for attorney['s] fees as special damages." *Id.*

In actions for declaratory or injunctive relief, a party may plead and recover attorney's fees as special damages "when the actions were necessitated by the opposing party's bad faith conduct." *Sandy Valley Assocs. v. Sky Ranch Estates Owners Ass'n*, 117 Nev. 948, 958, 35 P.3d 964, 970 (2001), *disapproved on other grounds by Horgan v. Felton*, 123 Nev. 577, 170 P.3d 982 (2007), *and Pardee Homes of Nev. v. Wolfram*, 135 Nev. 173, 444 P.3d 423 (2019).

The Court concludes that Plaintiffs are not entitled to recover attorney's fees as special damages because there was not bad faith in regard to this matter. The Court further concludes that as to an award of attorney's fees and costs, the individual Executive and Legislative Defendants should be dismissed, and Defendant-Intervenor Legislature cannot be assessed attorney's fees and costs pursuant to NRS 218F.720, notwithstanding Plaintiffs' claim that NRS 218F.720 presents an unconstitutional infringement upon the judiciary. The Court also concludes that attorney's fees are not appropriate under NRS 18.010(2)(b) because there was not bad faith in regard to this matter.

However, the Court is bothered by the fact the Plaintiff Senators had to bring this action in order to bring this matter to the Court's attention and to enforce the Constitutional provision binding

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on every member of the Legislature. Therefore, Plaintiffs may take appropriate actions to request an award of postjudgment attorney's fees and costs, if they desire, and the parties, in that event, may brief the Court further on the issue of whether the Court can grant to Plaintiffs an award of postjudgment attorney's fees and costs, payable by the Nevada Department of Motor Vehicles and/or the Nevada Department of Taxation.

Order and Final Judgment

Good cause appearing therefor,

1. IT IS HEREBY ORDERED THAT summary judgment is granted in favor of the Plaintiffs' on their claims for declaratory and injunctive relief and violation of the taxpayers' constitutional rights. The Court declares that: (1) SB 542 and SB 551 are bills that create, generate or increase public revenue by fees or taxes or changes in the computation bases for fees or taxes; (2) Article 4, Section 18(2) of the Nevada Constitution required that two-thirds of the Senate vote to pass both SB 542 and SB 551; (3) the votes of the eight Plaintiff Senators should be given effect; and (4) SB 542 and Sections 2, 3, 37, and 39 of SB 551 must be invalidated and are void and stricken for lack of supporting votes of two-thirds of the members of the Senate in the 80th (2019) Legislative Session, but the remaining provisions of SB 551 can be severed and shall remain in effect.

2. IT IS HEREBY FURTHER ORDERED THAT Defendant Nevada Department of Motor Vehicles and Defendant Nevada Department of Taxation are immediately enjoined and restrained from collecting and enforcing the unconstitutional fees and taxes enacted by SB 542 and Sections 2, 3, 37, and 39 of SB 551, respectively, and that all fee payers and taxpayers from whom such fees and taxes have already been collected are entitled to an immediate refund thereof with interest at the legal rate of interest from the date collected.

3. IT IS HEREBY FURTHER ORDERED THAT Plaintiffs are not entitled to recover attorney's fees as special damages for bringing their claims for declaratory and injunctive relief and summary judgment is granted in favor of Defendants on any claims to recover attorney's fees as special damages.

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4. IT IS HEREBY FURTHER ORDERED THAT the individual Executive and Legislative Defendants, the Honorable Nicole Cannizzaro, the Honorable Kate Marshall, the Honorable Claire J. Clift, and the Honorable Steve Sisolak, are dismissed from this action.

5. IT IS HEREBY FURTHER ORDERED THAT, except as otherwise provided in paragraphs 3 and 4 of this Order, the Counter-Motion for Summary Judgment of the Legislative Defendants and Defendant-Intervenor Legislature, and the Executive Defendants' Joinder thereto, are denied.

6. IT IS HEREBY FURTHER ORDERED THAT the Executive Defendants' Motion to Dismiss is denied.

7. IT IS HEREBY FURTHER ORDERED THAT a final judgment is entered in this action adjudicating all the claims of all the parties as set forth in this Order.

8. IT IS HEREBY FURTHER ORDERED THAT Plaintiffs may take appropriate actions to request an award of postjudgment attorney's fees and costs, if they desire, and the parties, in that event, may brief the Court further on the issue of whether the Court can grant to Plaintiffs an award of postjudgment attorney's fees and costs, payable by the Nevada Department of Motor Vehicles and/or the Nevada Department of Taxation.

9. IT IS HEREBY FURTHER ORDERED THAT Plaintiff's attorneys, Allison MacKenzie, Ltd., will serve a notice of entry of this Order on all other parties and file proof of such service within 7 days after the Court sends this Order to said attorneys.

IT IS SO ORDERED.

DATED this 7th day of October, 2020.

DISTRICT COURT JUDGE

Submitted by:

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By: */s/ Karen A. Peterson*
KAREN A. PETERSON, ESQ.
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JUSTIN TOWNSEND, ESQ.
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CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I certify that I am an employee of the First Judicial District Court, and that on this 8th day of October, 2020, I deposited for mailing, postage paid, at Carson City, Nevada, and emailed a true and correct copy of the foregoing Order addressed as follows:

Karen A. Peterson, Esq.
Allison Mackenzie, Ltd.
402 N. Division St.
Carson City, NV 89701

Kevin C. Powers, Esq.
General Counsel
Nevada Legislative Counsel Bureau, Legal Division
401 S. Carson St.
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Craig Newby, Esq.
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Law Clerk, Dept. 1

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Attorneys for Plaintiffs

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

THE HONORABLE JAMES SETTELMEYER, THE HONORABLE JOE HARDY, THE HONORABLE HEIDI GANSERT, THE HONORABLE SCOTT HAMMOND, THE HONORABLE PETE GOICOECHEA, THE HONORABLE BEN KIECKHEFER, THE HONORABLE IRA HANSEN, and THE HONORABLE KEITH PICKARD, in their official capacities as members of the Senate of the State of Nevada and individually; GREAT BASIN ENGINEERING CONTRACTORS, LLC, a Nevada limited liability company; GOODFELLOW CORPORATION, a Utah corporation qualified to do business in the State of Nevada; KIMMIE CANDY COMPANY, a Nevada corporation; KEYSTONE CORP., a Nevada nonprofit corporation; NATIONAL FEDERATION OF INDEPENDENT BUSINESS, a California nonprofit corporation qualified to do business in the State of Nevada; NEVADA FRANCHISED AUTO DEALERS ASSOCIATION, a Nevada nonprofit corporation; NEVADA TRUCKING ASSOCIATION, INC., a Nevada nonprofit corporation; and RETAIL ASSOCIATION OF NEVADA, a Nevada nonprofit corporation,

Plaintiffs,

vs.

STATE OF NEVADA *ex rel.* THE HONORABLE NICOLE CANNIZZARO,

Case No: **19 OC 00127 1B**

Dept. No: **I**

NOTICE OF ENTRY OF ORDER AFTER HEARING ON SEPTEMBER 21, 2020, AND FINAL JUDGMENT

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in her official capacity as Senate Majority Leader; THE HONORABLE KATE MARSHALL, in her official capacity as President of the Senate; CLAIRE J. CLIFT, in her official capacity as Secretary of the Senate; THE HONORABLE STEVE SISOLAK, in his official capacity as Governor of the State of Nevada; NEVADA DEPARTMENT OF TAXATION; NEVADA DEPARTMENT OF MOTOR VEHICLES; and DOES I-X, inclusive,

Defendants.

and

THE LEGISLATURE OF THE STATE OF NEVADA,

Defendant-Intervenor.

_____/

NOTICE OF ENTRY OF ORDER AFTER HEARING ON SEPTEMBER 21, 2020, AND FINAL JUDGMENT

NOTICE IS HEREBY given that on the 7th day of October, 2020, the Court duly entered its **ORDER AFTER HEARING ON SEPTEMBER 21, 2020, AND FINAL JUDGMENT** in the above-entitled matter. A copy of said Order is attached hereto as **Exhibit "1"**.

AFFIRMATION

The undersigned does hereby affirm that the preceding document DOES NOT contain the social security number of any person.

DATED this 8th day of October, 2020.

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By: _____
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CERTIFICATE OF SERVICE

Pursuant to NRCP Rule 5(b), I hereby certify that I am an employee of ALLISON, MacKENZIE, LTD., Attorneys at Law, and that on this date, I caused the foregoing document to be served on all parties to this action by:

_____ Placing a true copy thereof in a sealed postage prepaid envelope in the United States Mail in Carson City, Nevada [NRCP 5(b)(2)(B)]

_____ Hand-delivery - via Reno/Carson Messenger Service [NRCP 5(b)(2)(A)]

__X__ Electronic Transmission

_____ Federal Express, UPS, or other overnight delivery

_____ E-filing pursuant to Section IV of District of Nevada Electronic Filing Procedures [NRCP 5(b)(2)(D)]

fully addressed as follows:

Kevin C. Powers, Esq.
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Aaron D. Ford, Esq.
Craig A. Newby, Esq.
Office of the Attorney General
CNewby@ag.nv.gov

DATED this 8th day of October, 2020.

Sheila Contreras
SHEILA CONTRERAS

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INDEX OF EXHIBITS

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4852-0549-6270, v. 1

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Attorneys for Plaintiffs

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

THE HONORABLE JAMES SETTELMEYER, THE HONORABLE JOE HARDY, THE HONORABLE HEIDI GANSERT, THE HONORABLE SCOTT HAMMOND, THE HONORABLE PETE GOICOECHEA, THE HONORABLE BEN KIECKHEFER, THE HONORABLE IRA HANSEN, and THE HONORABLE KEITH PICKARD, in their official capacities as members of the Senate of the State of Nevada and individually; GREAT BASIN ENGINEERING CONTRACTORS, LLC, a Nevada limited liability company; GOODFELLOW CORPORATION, a Utah corporation qualified to do business in the State of Nevada; KIMMIE CANDY COMPANY, a Nevada corporation; KEYSTONE CORP., a Nevada nonprofit corporation; NATIONAL FEDERATION OF INDEPENDENT BUSINESS, a California nonprofit corporation qualified to do business in the State of Nevada; NEVADA FRANCHISED AUTO DEALERS ASSOCIATION, a Nevada nonprofit corporation; NEVADA TRUCKING ASSOCIATION, INC., a Nevada nonprofit corporation; and RETAIL ASSOCIATION OF NEVADA, a Nevada nonprofit corporation,

Plaintiffs,

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Dept. No: **I**

NOTICE OF ENTRY OF ORDER AFTER HEARING ON SEPTEMBER 21, 2020, AND FINAL JUDGMENT

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in her official capacity as Senate Majority Leader; THE HONORABLE KATE MARSHALL, in her official capacity as President of the Senate; CLAIRE J. CLIFT, in her official capacity as Secretary of the Senate; THE HONORABLE STEVE SISOLAK, in his official capacity as Governor of the State of Nevada; NEVADA DEPARTMENT OF TAXATION; NEVADA DEPARTMENT OF MOTOR VEHICLES; and DOES I-X, inclusive,

Defendants.

and

THE LEGISLATURE OF THE STATE OF NEVADA,

Defendant-Intervenor.

_____/

NOTICE OF ENTRY OF ORDER AFTER HEARING ON SEPTEMBER 21, 2020, AND FINAL JUDGMENT

NOTICE IS HEREBY given that on the 7th day of October, 2020, the Court duly entered the **ORDER AFTER HEARING ON SEPTEMBER 21, 2020, AND FINAL JUDGMENT** in the above-entitled matter. A copy of said Order is attached hereto as **Exhibit "1"**.

AFFIRMATION

The undersigned does hereby affirm that the preceding document DOES NOT contain the social security number of any person.

DATED this 8th day of October, 2020.

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CERTIFICATE OF SERVICE

Pursuant to NRCP Rule 5(b), I hereby certify that I am an employee of ALLISON, MacKENZIE, LTD., Attorneys at Law, and that on this date, I caused the foregoing document to be served on all parties to this action by:

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fully addressed as follows:

Kevin C. Powers, Esq.
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Aaron D. Ford, Esq.
Craig A. Newby, Esq.
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DATED this 8th day of October, 2020.

_____
SHEILA CONTRERAS

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IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

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Plaintiffs,

vs.

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Case No: **19 OC 00127 1B**

Dept. No: **I**

ORDER AFTER HEARING ON SEPTEMBER 21, 2020, AND FINAL JUDGMENT

SISOLAK, in his official capacity as Governor of the State of Nevada; NEVADA DEPARTMENT OF TAXATION; NEVADA DEPARTMENT OF MOTOR VEHICLES; and DOES I-X, inclusive,

Defendants.

and

THE LEGISLATURE OF THE STATE OF NEVADA,

Defendant-Intervenor.

_____/

ORDER AFTER HEARING ON SEPTEMBER 21, 2020, AND FINAL JUDGMENT

This matter is before the Court on the following dispositive motions: (1) Executive Defendants' Motion to Dismiss; (2) Motion for Summary Judgment filed by Plaintiffs; (3) Counter-Motion for Summary Judgment filed by Legislative Defendants and Defendant-Intervenor Legislature; and (4) Executive Defendants' Joinder to Legislative Defendants' Counter-Motion for Summary Judgment.

The Court, having read the papers and pleadings on file herein, having heard oral argument on September 21, 2020, and good cause appearing therefore, finds and orders as follows:

Relevant Procedural History

Plaintiffs, a group of Republican State Senators ("Plaintiff Senators"), in their official capacity and individually, and various business interests, filed a First Amended Complaint herein on July 30, 2019, challenging the constitutionality of Senate Bill No. 542 (SB 542) and Senate Bill No. 551 (SB 551) of the 80th (2019) Session of the Nevada Legislature as well as the constitutionality of the manner in which each bill was passed into law. Plaintiffs allege four claims for relief, including that SB 542 and SB 551 were each subject to the two-thirds majority requirement in Article 4, Section 18(2) of the Nevada Constitution and that SB 542 and SB 551 are unconstitutional because the Senate passed each bill by a majority of all the members elected to the Senate under Article 4, Section 18(1) of the Nevada Constitution, instead of a two-thirds majority of all the members elected to the Senate under Article 4, Section 18(2) of the Nevada Constitution. Plaintiffs ask for, among other relief, a declaration that SB

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542 and SB 551 are unconstitutional in violation of Article 4, Section 18(2), and Plaintiffs also ask for an injunction against enforcement of SB 542 and SB 551.

Plaintiffs named state officers and agencies of the executive branch and legislative branch as defendants in the First Amended Complaint. The executive branch defendants are: (1) the Honorable Kate Marshall, in her official capacity as Lieutenant Governor of the State of Nevada and President of the Senate; (2) the Honorable Steve Sisolak, in his official capacity as Governor of the State of Nevada; (3) the Nevada Department of Taxation; and (4) the Nevada Department of Motor Vehicles (collectively the "Executive Defendants"). The Executive Defendants are represented by the Office of the Attorney General.

The legislative branch defendants are the Honorable Nicole Cannizzaro, in her official capacity as Senate Majority Leader, and Claire Clift, in her official capacity as the Secretary of the Senate (collectively the "Legislative Defendants"). The Legislative Defendants are represented by the Legislative Counsel Bureau, Legal Division ("LCB Legal"), under NRS 218F.720. The Legislature of the State of Nevada ("Legislature") intervened as a Defendant-Intervenor and is represented by LCB Legal under NRS 218F.720.

On September 16, 2019, Executive Defendants filed a Motion to Dismiss Plaintiffs' First Amended Complaint, and Legislative Defendants filed an Answer to Plaintiffs' First Amended Complaint. On September 30, 2019, Plaintiffs filed their Opposition to Executive Defendants' Motion to Dismiss or, in the Alternative, Plaintiffs' Motion for Summary Judgment.

On October 24, 2019, Plaintiff Senators James Settelmeyer, Joe Hardy, Heidi Gansert, Scott Hammond, Pete Goicoechea, Ben Kieckhefer, Ira Hansen and Keith Pickard (collectively "Plaintiff Senators") filed a Motion to Disqualify LCB Legal as counsel for Defendants Senator Cannizzaro and Secretary Clift. Defendants Senator Cannizzaro and Secretary Clift filed an Opposition to the Motion to Disqualify.

Because the Court's resolution of the Motion to Disqualify could have affected whether LCB Legal could continue to provide legal representation to Defendants Senator Cannizzaro and Secretary Clift against the claims of Plaintiff Senators in this action, including providing such legal representation regarding the parties' dispositive motions, the parties entered into a Stipulation and

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Order to stay proceedings regarding the parties' dispositive motions pending the Court's resolution of the Motion to Disqualify.

On November 2, 2019, the Legislature, also represented by LCB Legal, filed a motion to intervene as a defendant-intervenor under NRCP 24 and NRS 218F.720 to protect the official interests of the Legislature and defend the constitutionality of SB 542 and SB 551.

On December 19, 2019, the Court entered an order which granted the Plaintiff Senators' motion to disqualify LCB Legal from representing the Legislative Defendants in their official capacity as their statutorily authorized counsel under NRS 218F.720. The Court's order also denied a stay of the district court proceedings requested by LCB Legal to address the consequences of the order requiring the Legislative Defendants to obtain separate outside counsel to represent them in their official capacity in this litigation.

Also, on December 19, 2019, the Court entered a separate order which granted the Legislature's motion to intervene as a defendant-intervenor. In that order, the Court also denied the Plaintiff Senators' motion to disqualify LCB Legal from representing the Legislature as its statutorily authorized counsel under NRS 218F.720. On December 26, 2019, the Legislature filed an Answer to Plaintiffs' First Amended Complaint.

On January 10, 2020, the Nevada Supreme Court issued an Order staying the District Court's proceedings in this matter pending resolution of the Legislative Defendants' Petition for Writ of Mandamus seeking the Supreme Court's review of the District Court's Order disqualifying LCB Legal as counsel for the Legislative Defendants. *State ex rel. Cannizzaro v. First Jud. Dist. Ct.*, No. 80313 (Nev. Jan. 10, 2020) (Order Directing Answer, Granting Stay, and Scheduling Oral Argument). The Supreme Court's stay was granted while the parties were in the process of briefing dispositive motions on the merits of the constitutional claims. Additionally, as a result of the stay, the District Court vacated the hearing set in this matter for March 9, 2020, on the parties' dispositive motions on the merits of the constitutional claims.

On June 26, 2020, the Supreme Court issued an Opinion and Writ of Mandamus directing the District Court to vacate its Order disqualifying LCB Legal as counsel for the Legislative Defendants.

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State ex rel. Cannizzaro v. First Jud. Dist. Ct., 136 Nev. Adv. Op. 34, 466 P.3d 529 (2020). The Supreme Court also lifted its stay of the District Court's proceedings in this matter. *Id.*

On July 7, 2020, LCB Legal served the District Court, by regular U.S. Mail, with the Supreme Court's Opinion and Writ of Mandamus. An Order Vacating Order Disqualifying LCB Legal was entered by the Court on July 9, 2020.

On August 13, 2020, the parties entered into a Stipulation and Order regarding a briefing schedule to complete briefing on their dispositive motions. On August 18, 2020, Legislative Defendants and Defendant-Intervenor Legislature filed an Opposition to Plaintiffs' Motion for Summary Judgment and a Counter-Motion for Summary Judgment. On August 21, 2020, Executive Defendants filed a Joinder to Legislative Defendants' Counter-Motion for Summary Judgment. On September 4, 2020, Plaintiffs filed a Reply in Support of their Motion for Summary Judgment and an Opposition to the Counter-Motion for Summary Judgment. On September 14, 2020, Legislative Defendants and Defendant-Intervenor Legislature filed a Reply in Support of their Counter-Motion for Summary Judgment. Finally, on September 21, 2020, the Court held a hearing to receive oral arguments from the parties on their dispositive motions.

Factual Background

The parties agreed at the hearing herein there are no material disputes of fact regarding the passage of SB 542 and SB 551. The Court agrees and finds, with respect to the passage of SB 542 and SB 551, the following facts.

Article 4, Section 18(2) of the Nevada Constitution is the result of a ballot initiative approved by Nevada voters during the 1994 and 1996 general elections and provides, in pertinent part:

> ...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.

During the 2015 Legislative Session, the Legislature enacted two revenue-generating measures, SB 483 and SB 502. SB 483 amended NRS 360.203 to provide a computation mechanism by which the Department of Taxation would compute the payroll tax rate for the Modified Business Tax (MBT) under NRS Chapter 363A and NRS Chapter 363B based upon the combined revenue from

the taxes imposed by the commerce tax and the MBT. SB 483 required a reduction in the payroll tax rate for the MBT if the calculation required by NRS 360.203 yielded certain results. The payroll tax rate computation codified in NRS 360.203 became effective and operative on July 1, 2015. SB 502 added a $1 technology fee to every transaction for which the Department of Motor Vehicles (DMV) charged fees. SB 502 provided the DMV technology fee was effective and operative July 1, 2015 and expired on June 30, 2020. Both SB 483 and SB 502 were subject to the two-thirds supermajority provision of the Nevada Constitution and were approved by more than two-thirds of both Houses of the Legislature in 2015.

SB 542 proposed, during the 2019 Legislative Session, to extend the expiration date of the DMV technology fee to June 30, 2022 and would allow the DMV to collect approximately $6.9 million per year during the extended period. The Legislature determined that SB 542 was not subject to the two-thirds majority requirement, and the Senate passed the measure by a majority of all the members elected to the Senate under Article 4, Section 18(1) of the Nevada Constitution, with 13 Senators voting for the bill and 8 Senators voting against the bill. On June 5, 2019, the Governor approved SB 542.

During the 2019 Legislative Session, Defendant Senate Majority Leader Nicole Cannizzaro sponsored numerous amendments to SB 551, which amendments would repeal NRS 360.203 in its entirety, allowing the Department of Taxation to collect approximately $98.2 million during the subsequent biennium. Sections 2 and 3 of the amendments to SB 551 eliminated the tax rate calculation provided by NRS 360.203 to the provisions of NRS 363A.130 and NRS 363B.110, respectively. Sections 37(2)(a)(1) and (2) of SB 551 superseded, abrogated and nullified the determinations, decisions or actions made by the Department of Taxation under the computation base provided in NRS 360.203 and provided any such calculations under NRS 360.203 shall have no legal force or effect. Section 37(2)(b) further provided the Department shall not under any circumstances apply or use those determinations, decisions or actions as a basis, cause or reason to reduce the rates of the taxes imposed pursuant to NRS 363A.130 and NRS 363B.110 for any fiscal year beginning on or after July 1, 2015. Section 39 of SB 551 repealed NRS 360.203, which contained the tax rate computation for the MBT. Three of the proposed amendments to SB 551 sponsored by Senate

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Majority Leader Cannizzaro stated that Sections 2, 3, 37 and 39 of the amendment to SB 551 would require a two-thirds majority vote to pass. When SB 551 was first put to a vote in the Senate on June 3, 2019, it failed to garner the support of two-thirds of the members of the Senate, with 13 Senators voting in favor and 8 voting against. SB 551, having failed to receive a two-thirds majority, was declared lost by the Senate President. Senate Majority Leader Cannizzaro called a brief recess and fifteen minutes later introduced a new amendment to SB 551, containing the same Sections 2, 3, 37, and 39, but the printed amendment left off the two-thirds majority vote requirement and a new vote was taken. The vote remained the same – 13 Senators for and 8 Senators against – but the Senate President declared SB 551 passed, as amended, by a majority of all the members elected to the Senate under Article 4, Section 18(1) of the Nevada Constitution. On June 12, 2019, the Governor approved SB 551.

During the 2019 Legislative Session, members of the Legislative Leadership requested the Legislative Counsel's opinion on whether the Constitutional two-thirds supermajority requirement applies to a bill which extends until a later date – or 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. On May 8, 2019, the Legislative Counsel provided the requested opinion to the Legislative Leadership. The Legislative Counsel's opinion stated that "[i]t is the opinion of this office that Nevada's two-thirds majority requirement does not apply to a bill which extends until a later date—or 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, because such a bill does not change—but maintains—the existing computation bases currently in effect for the existing state taxes."

Conclusions of Law

1. SB 542 and SB 551 are unconstitutional.

This case is not about a political issue but is about a constitutional issue that affects all members of the Legislature. Additionally, the issues before the Court are not whether funds for education or technology fees for the DMV are appropriate or worthy causes. The Court's task is not to rule upon

the merits or worthiness of SB 542 and SB 551. This case is about Article 4, Section 18(2) of the Nevada Constitution and whether it applies to SB 542 and SB 551.

Article 4, Section 18(2) of the Constitution was adopted by the citizens of the State of Nevada by initiative and for a very specific reason – to make revenue-generating measures more difficult to enact. The people's intent and the language of the Constitutional provision are clear. The Constitutional provision provides, in pertinent part:

> 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.

All the language of the Constitutional provision must be given effect and the Court finds the language to be clear and unambiguous. To determine a constitutional provision's meaning, a court turns to the language and gives that language its plain effect. *Miller v. Burk*, 124 Nev. 579, 590-91, 188 P.3d 1112, 1119-20 (2008). A court must give words their plain meaning unless doing so would violate the spirit of the provision. *McKay v. Bd. of Supervisors*, 102 Nev. 644, 648, 730 P.2d 438, 442 (1986).

The plain meaning of the term "generates," as set forth in multiple dictionaries consulted by the Court, is to "cause to exist" or "produce." The Court's emphasis in analyzing the Constitutional provision was focused upon the plain meaning of the term "generates" and the phrase "any public revenue in any form."

With respect to SB 542, regarding the DMV technology fee, the bill extended the imposition of this fee from June 30, 2020 to June 30, 2022. The Court finds the purpose of SB 542 was to generate public revenue for two more years at an estimated $6.9 million per year. It is clear to the Court that SB 542 was intended to generate public revenue to the State in the form of fees to be collected by the DMV. But for the passage of SB 542, those funds would not have been produced; they just would not exist. The public revenue would not otherwise exist without the passage of SB 542 and, therefore, SB 542 generates public revenue in any form and should have been subject to a two-thirds majority vote. SB 542, therefore, was passed unconstitutionally and is void and stricken from the law.

As to SB 551, NRS 360.203, passed by more than two-thirds of the 2015 Legislature, provided a mechanism whereby the Department of Taxation would calculate the payroll tax rate for the MBT.

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The calculated tax rate, based on NRS 360.203, was to go into effect on July 1, 2019 and was a reduction in the payroll tax rate. Sections 2, 3 and 39 of SB 551 repealed NRS 360.203 and related provisions in NRS 363A.130 and 363B.110 concerning the computation of the MBT and, therefore, deleted the computation mechanism for the affected taxes. The deletion of this computation base was estimated to generate an additional $98.2 million in revenue for the State of Nevada in the coming biennium. But for the repeal of NRS 360.203 and the related provisions, that public revenue would not exist. Section 37 of SB 551 changed the computation base for the MBT by repealing the payroll tax rate computation made by the Department of Taxation. Therefore, SB 551 generates public revenue in any form by a change in computation base for a tax and should have been subject to a two-thirds majority vote. As a result, SB 551 was passed unconstitutionally.

Because Sections 2, 3, 37, and 39 of SB 551 are the sections that generate public revenue, Legislative Defendants and Defendant-Intervenor Legislature asked the Court to invalidate and strike only those sections and sever the remaining provisions of SB 551 and, at the hearing, Plaintiffs did not oppose that request. The Court finds that the remaining provisions of SB 551 can be severed and shall remain in effect. *See* NRS 0.020; *Flamingo Paradise Gaming v. Chanos*, 125 Nev. 502, 515, 217 P.3d 546, 555 (2009) ("Under the severance doctrine, it is 'the obligation of the judiciary to uphold the constitutionality of legislative enactments where it is possible to strike only the unconstitutional portions.'") (quoting *Rogers v. Heller*, 117 Nev. 169, 177, 18 P.3d 1034, 1039 (2001))). Therefore, Sections 2, 3, 37, and 39 of SB 551 are void and are stricken from the law, but the remaining provisions of SB 551 can be severed and shall remain in effect.

While there is a concept of legislative deference, that deference does not exist to violate the clear meaning of the Constitution of the State of Nevada. The Court's primary task is to ascertain the intent of those who enacted the Constitutional provision and adopt an interpretation that best captures that objective. *Nevada Mining Ass'n v. Erdoes*, 117 Nev. 531, 538 n. 14, 26 P.3d 753, 757 n. 14 (2001) citing *McKay v. Bd. of Supervisors*, 102 Nev. 644, 648, 730 P.2d 438, 441 (1986). The Nevada Supreme Court clearly stated: "A simple majority is necessary to approve the budget and determine the need for raising revenue. A two-thirds supermajority is needed to determine what specific changes

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would be made to the existing tax structure to increase revenue." *See Guinn v. Leg. of Nevada*, 119 Nev. 460, 472, 76 P.3d 22, 30 (2003).

The Court does not put much weight in or credence to the operative versus effective date argument of the Defendants. That argument became moot when SB 542 and SB 551 went into effect and generated public revenue that came into existence from the fees or taxes or changes in the computation bases for the fees or taxes.

Consequently, the Court concludes that SB 542 and Sections 2, 3, 37, and 39 of SB 551 are unconstitutional in violation of Article 4, Section 18(2) of the Nevada Constitution, but the remaining provisions of SB 551 can be severed and shall remain in effect.

2. Plaintiffs are not entitled to recover attorney's fees as special damages.

As a general rule, "Nevada adheres to the American Rule that attorney['s] fees may only be awarded when authorized by statute, rule, or agreement." *Pardee Homes of Nev. v. Wolfram*, 135 Nev. 173, 177, 444 P.3d 423, 426 (2019). But the Nevada Supreme Court has "recognized exceptions to this general rule; one such exception is for attorney['s] fees as special damages." *Id.*

In actions for declaratory or injunctive relief, a party may plead and recover attorney's fees as special damages "when the actions were necessitated by the opposing party's bad faith conduct." *Sandy Valley Assocs. v. Sky Ranch Estates Owners Ass'n*, 117 Nev. 948, 958, 35 P.3d 964, 970 (2001), *disapproved on other grounds by Horgan v. Felton*, 123 Nev. 577, 170 P.3d 982 (2007), *and Pardee Homes of Nev. v. Wolfram*, 135 Nev. 173, 444 P.3d 423 (2019).

The Court concludes that Plaintiffs are not entitled to recover attorney's fees as special damages because there was not bad faith in regard to this matter. The Court further concludes that as to an award of attorney's fees and costs, the individual Executive and Legislative Defendants should be dismissed, and Defendant-Intervenor Legislature cannot be assessed attorney's fees and costs pursuant to NRS 218F.720, notwithstanding Plaintiffs' claim that NRS 218F.720 presents an unconstitutional infringement upon the judiciary. The Court also concludes that attorney's fees are not appropriate under NRS 18.010(2)(b) because there was not bad faith in regard to this matter.

However, the Court is bothered by the fact the Plaintiff Senators had to bring this action in order to bring this matter to the Court's attention and to enforce the Constitutional provision binding

on every member of the Legislature. Therefore, Plaintiffs may take appropriate actions to request an award of postjudgment attorney's fees and costs, if they desire, and the parties, in that event, may brief the Court further on the issue of whether the Court can grant to Plaintiffs an award of postjudgment attorney's fees and costs, payable by the Nevada Department of Motor Vehicles and/or the Nevada Department of Taxation.

Order and Final Judgment

Good cause appearing therefor,

1. IT IS HEREBY ORDERED THAT summary judgment is granted in favor of the Plaintiffs' on their claims for declaratory and injunctive relief and violation of the taxpayers' constitutional rights. The Court declares that: (1) SB 542 and SB 551 are bills that create, generate or increase public revenue by fees or taxes or changes in the computation bases for fees or taxes; (2) Article 4, Section 18(2) of the Nevada Constitution required that two-thirds of the Senate vote to pass both SB 542 and SB 551; (3) the votes of the eight Plaintiff Senators should be given effect; and (4) SB 542 and Sections 2, 3, 37, and 39 of SB 551 must be invalidated and are void and stricken for lack of supporting votes of two-thirds of the members of the Senate in the 80th (2019) Legislative Session, but the remaining provisions of SB 551 can be severed and shall remain in effect.

2. IT IS HEREBY FURTHER ORDERED THAT Defendant Nevada Department of Motor Vehicles and Defendant Nevada Department of Taxation are immediately enjoined and restrained from collecting and enforcing the unconstitutional fees and taxes enacted by SB 542 and Sections 2, 3, 37, and 39 of SB 551, respectively, and that all fee payers and taxpayers from whom such fees and taxes have already been collected are entitled to an immediate refund thereof with interest at the legal rate of interest from the date collected.

3. IT IS HEREBY FURTHER ORDERED THAT Plaintiffs are not entitled to recover attorney's fees as special damages for bringing their claims for declaratory and injunctive relief and summary judgment is granted in favor of Defendants on any claims to recover attorney's fees as special damages.

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4. IT IS HEREBY FURTHER ORDERED THAT the individual Executive and Legislative Defendants, the Honorable Nicole Cannizzaro, the Honorable Kate Marshall, the Honorable Claire J. Clift, and the Honorable Steve Sisolak, are dismissed from this action.

5. IT IS HEREBY FURTHER ORDERED THAT, except as otherwise provided in paragraphs 3 and 4 of this Order, the Counter-Motion for Summary Judgment of the Legislative Defendants and Defendant-Intervenor Legislature, and the Executive Defendants' Joinder thereto, are denied.

6. IT IS HEREBY FURTHER ORDERED THAT the Executive Defendants' Motion to Dismiss is denied.

7. IT IS HEREBY FURTHER ORDERED THAT a final judgment is entered in this action adjudicating all the claims of all the parties as set forth in this Order.

8. IT IS HEREBY FURTHER ORDERED THAT Plaintiffs may take appropriate actions to request an award of postjudgment attorney's fees and costs, if they desire, and the parties, in that event, may brief the Court further on the issue of whether the Court can grant to Plaintiffs an award of postjudgment attorney's fees and costs, payable by the Nevada Department of Motor Vehicles and/or the Nevada Department of Taxation.

9. IT IS HEREBY FURTHER ORDERED THAT Plaintiff's attorneys, Allison MacKenzie, Ltd., will serve a notice of entry of this Order on all other parties and file proof of such service within 7 days after the Court sends this Order to said attorneys.

IT IS SO ORDERED.

DATED this 7th day of October, 2020.

DISTRICT COURT JUDGE

Submitted by:

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By: /s/ *Karen A. Peterson*
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Attorneys for Plaintiffs

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CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I certify that I am an employee of the First Judicial District Court, and that on this 8th day of October, 2020, I deposited for mailing, postage paid, at Carson City, Nevada, and emailed a true and correct copy of the foregoing Order addressed as follows:

Karen A. Peterson, Esq.
Allison Mackenzie, Ltd.
402 N. Division St.
Carson City, NV 89701

Kevin C. Powers, Esq.
General Counsel
Nevada Legislative Counsel Bureau, Legal Division
401 S. Carson St.
Carson City, NV 89701

Craig Newby, Esq.
Deputy Solicitor General
Office of the Attorney General
555 E. Washington Ave., Ste. 3900
Las Vegas, NV 89101

Kimberly M. Carrubba, J.D.
Law Clerk, Dept. 1

FIRST JUDICIAL DISTRICT COURT MINUTES

CASE NO. 19 OC 00127 1B TITLE: THE HONORABLE JAMES SETTELMEYER ET AL. VS STATE OF NEVADA ex rel. ET AL.

09/21/20 – DEPT. I – HONORABLE JAMES T. RUSSELL
J. Higgins, Clerk – Not Reported

MOTION FOR SUMMARY JUDGMENT
Present: Hon. James Settelmeyer with counsel Karen Peterson and Justin Townsend; Craig Newby, Deputy A.G.; Kevin Powers, LCB, counsel for Respondents Cannizzaro and Clift.

Statements were made by Court and Newby regarding Mo/Dismiss.
Court inquired counsel if they stipulate there are no factual issues in dispute and that we are concerned with legal issues. Peterson and Powers in response and agreed.
Statements were made by Court.
Peterson presented argument.
Peterson requested Exhibits 1 through 13 in their Reply and Exhibits 1 through 8 in their original Motion be admitted. Upon inquiry by Court, Powers stipulated to their admission.
COURT ORDERED: They will all be admitted.
Powers and Newby presented arguments.
Court stated its findings of fact and conclusions of law.
COURT ORDERED: Summary judgment is granted for the Plaintiffs. Injunctive Relief is granted as to the payment of the unconstitutional fees and taxes. Taxpayers are entitled to a refund with interest for the overpayment of fees and taxes.
Statements were made by Court.
COURT ORDERED: It is going to allow the individual Defendants to be dismissed.
Statements were made by Court regarding the attorney's fees and costs.
COURT ORDERED: It allows the parties to brief that being, the State of Nevada and the Plaintiff, in respect to whether or not it can award any attorney's fees in respect to the Department of Taxation and whether it can award any in respect to the Nevada Department of Motor Vehicles.
COURT ORDERED: As to the Motion to Dismiss, it's denied.
Statements were made by Court.
Peterson to prepare Order.

The Court minutes as stated above are a summary of the proceeding and are not a verbatim record. The hearing held on the above date was recorded on the Court's recording system.

FIRST JUDICIAL DISTRICT COURT MINUTES

CASE NO. 19 OC 00127 1B

TITLE: THE HONORABLE JAMES SETTELMEYER ET AL. VS STATE OF NEVADA ex rel. ET AL.

11/19/19 – DEPT. I – HONORABLE JAMES T. RUSSELL
J. Higgins, Clerk – Not Reported

MOTION TO DISQUALIFY THE LEGISLATIVE COUNSEL BUREAU AND MOTION TO INTERVENE

Present: Hon. James Settelmeyer with counsel Karen Peterson and Justin Townsend; Craig Newby, Deputy A.G.; Kevin Powers, LCB, counsel for Respondents Cannizzaro and Clift.

Statements were made by Court.
Peterson presented argument.
Statements were made by Court and Newby.
Powers presented argument.
Statements were made by Townsend, Court and Powers.
Court stated its findings of fact and conclusions of law.
COURT ORDERED: It grants the Motion with the understanding that LCB can stay in this particular action under the Motion to Intervene, it is granting the Motion to Intervene.
Statements were made by Court.
Powers inquired about the Motion to Disqualify LCB Legal as Counsel for the Legislature.
COURT ORDERED: It is denying that portion. It is allowing LCB to stay in.
Further statements were made by Court.
Peterson and Court discussed dismissing certain Defendants or allowing them to stay in with separate counsel by Pltfs. choice.
Peterson inquired if the Legislature caption could be Defendant/Intervenor.
COURT ORDERED: They can be Defendant/Intervenors. If LCB is going to stay in the action stay in as Defendant/Intervenor.
Statements were made by Newby, Powers and Court regarding new briefing schedule and staying action.
COURT ORDERED: It is not staying anything.
Further statements were made by Court, Powers and Peterson regarding schedule.
COURT ORDERED: It is going to establish a schedule and the reason it is going to establish a schedule is because it is always subject to change. If it can't be done within the time period, and things happen, somebody can file a motion.
Peterson to prepare Order on the denial of Second Motion to Disqualify.
Powers to prepare the Order in regards to the Motion to Intervene.

CASE NO. 19 OC 00127 1B TITLE: SETTELMEYER VS STATE

11/19/19 – Cont.'d

Statements were made by Court, Powers and Peterson.
COURT ORDERED: It sets the hearing for April 1, 2020 at 9:00 a.m. for half a day. All briefs filed no later than February 28, 2020, and then any reply briefs or anything else that needs to be done filed by March 20, 2020.
Further discussion by Court, Peterson and Powers on schedule. Court, Newby and Peterson discussed when taxes go into effect and potential refunds.
Court indicated that if the briefs are filed earlier it can set the hearing sooner. Statements by Powers.

CONTINUED TO: 4/1/20 – 9:00 A.M. – Declaratory and Injunctive Relief

The Court minutes as stated above are a summary of the proceeding and are not a verbatim record. The hearing held on the above date was recorded on the Court's recording system.

CIVIL COVER SHEET

Carson City, Nevada

Case No. 19OC00127 1B

(Assigned by Clerk's Office)

I. Party Information

REC'D & FILED
2019 JUL 19 PM 2:36
AUDREY ROWLATT
CLERK
BY
DEPUTY

Plaintiff(s) (name/address/phone):
PLEASE SEE ATTACHED

Attorney (name/address/phone):
KAREN A. PETERSON, Esq. and JUSTIN M. TOWNSEND, Esq.
ALLISON MacKENZIE, LTD.
402 NORTH DIVISION STREET
CARSON CITY, NV 89703 (775) 687-0202

Defendant(s) (name/address/phone):
PLEASE SEE ATTACHED

Attorney (name/address/phone):
Unknown

II. Nature of Controversy (Please check applicable bold category and applicable subcategory, if appropriate) ☐ Arbitration Requested

Civil Cases

Real Property

☐ **Landlord/Tenant** - LT
- ☐ Unlawful Detainer - UD

☐ **Title to Property**
- ☐ Foreclosure - FC
- ☐ Liens - LE
- ☐ Quiet Title - QT
- ☐ Specific Performance - SP

☐ **Condemnation/Eminent Domain** - CD

☐ **Other Real Property** - RO
- ☐ Partition - PT
- ☐ Planning/Zoning - PZ

Torts

Negligence

☐ **Negligence – Auto** - VP

☐ **Negligence – Medical/Dental** - MD

☐ **Negligence – Premises Liability** - SF (Slip/Fall)

☐ **Negligence – Other** - NO

☐ **Product Liability**
- ☐ Product Liability/Motor Vehicle - VH
- ☐ Other Torts/Product Liability - PL

☐ **Intentional Misconduct**
- ☐ Torts/Defamation (Libel/Slander)- DF
- ☐ Interfere with Contract Rights - IR

☐ **Employment Torts** (Wrongful term) - WT

☐ **Other Torts** - TO
- ☐ Anti-trust - AI
- ☐ Fraud/Misrepresentation - FM
- ☐ Insurance - IN
- ☐ Legal Tort - LG
- ☐ Unfair competition - UC

Probate

☐ **Summary Administration** - SU

☐ **General Administration** - FA

☐ **Special Administration** - SL

☐ **Set Aside Estates** - SE

☐ **Trust/Conservatorships**
- ☐ **Individual Trustee** - TR
- ☐ **Corporate Trustee** - TM

☐ **Other Probate** – OP

Other Civil Filing Types

☐ **Construction Defect** - CF
- ☐ Chapter 40
- ☐ General

☐ **Breach of Contract**
- ☐ Building & Construction - BC
- ☐ Insurance Carrier - BF
- ☐ Commercial Instrument - CI
- ☐ Other Contracts/Acct/Judgment - CO
- ☐ Collection of Actions - CT
- ☐ Employment Contract - EC
- ☐ Guarantee - GU
- ☐ Sale Contract - SC
- ☐ Uniform Commercial Code - UN

☐ **Civil Petition for Judicial Review**
- ☐ Other Administrative Law - AO
- ☐ Department of Motor Vehicles - DM
- ☐ Worker's Compensation Appeal - SI

☐ **Appeal from Lower Court** *(also check applicable civil case box)*
- ☐ Transfer from Justice Court - TJ
- ☐ Justice Court Civil Appeal - CA

☐ **Civil Writ**
- ☐ Other Special Proceeding - SS

☐ **Other Civil Filing**
- ☐ Compromise of Minor's Claim- CM
- ☐ Conversion of Property - CN
- ☐ Damage to Property - DG
- ☐ Employment Security - ES
- ☐ Enforcement of Judgment - EJ
- ☐ Foreign Judgment – Civil - FJ
- ☐ Other Personal Property - PO
- ☐ Recovery of Property - RE
- ☐ Stockholder Suit - ST
- ✓ Other Civil Matters - GC
- ☐ Confession of Judgment - CJ
- ☐ Petition to Seal Criminal Records -PS

III. Business Court Requested (If you check a box below, you must check an additional box above to determine case type)

☐ NRS Chapters 78-88
☐ Commodities (NRS 90)
☐ Securities (NRS 90)
☐ Investments (NRS 104 Art. 8)
☐ Deceptive Trade Practices (NRS 598)
☐ Trademarks (NRS 600A)
☐ Enhanced Case Mgmt/Business
☐ Other Business Court Matters

July 19, 2019
Date

Signature of initiating party or representative

See other side for family-related case filings.

PLAINTIFFS:

THE HONORABLE JAMES SETTELMEYER,
THE HONORABLE JOE HARDY,
THE HONORABLE HEIDI GANSERT,
THE HONORABLE SCOTT HAMMOND,
THE HONORABLE PETE GOICOECHEA,
THE HONORABLE BEN KIECKHEFER,
THE HONORABLE IRA HANSEN, and
THE HONORABLE KEITH PICKARD,
in their official capacities as members of the Senate of the State of Nevada and individually; GREAT BASIN ENGINEERING CONTRACTORS, LLC, a Nevada limited liability company; GOODFELLOW CORPORATION, a Utah corporation qualified to do business in the State of Nevada; and KIMMIE CANDY COMPANY, a Nevada corporation

DEFENDANTS:

STATE OF NEVADA *ex rel.* THE HONORABLE NICOLE CANNIZZARO, in her official capacity as Senate Majority Leader; THE HONORABLE KATE MARSHALL, in her official capacity as President of the Senate; CLAIRE J. CLIFT, in her official capacity as Secretary of the Senate; THE HONORABLE STEVE SISOLAK, in his official capacity as Governor of the State of Nevada; NEVADA DEPARTMENT OF TAXATION; NEVADA DEPARTMENT OF MOTOR VEHICLES; and DOES I-X, inclusive

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Institute for Justice, and that on the 26th day of October, 2020, I caused to be served, via the Court's electronic filing service, a true and correct copy of the foregoing **APPELLANTS' REPLY APPENDIX** to the following parties:

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Attorneys for Respondent Legislature of the State of Nevada

/s/ Claire Purple
An Employee of INSTITUTE FOR JUSTICE