No. 81281

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Appellants,

v.

THE STATE OF NEVADA DEPARTMENT OF EDUCATION; JHONE EBERT; THE DEPARTMENT OF TAXATION; JAMES DEVOLLD, SHARON RIGBY; CRAIG WITT; GEORGE P. KELESIS; ANN BERSI; RANDY BROWN; FRANCINE LIPMAN; ANTHONY WREN, IN THEIR OFFICIAL CAPACITY AS MEMBERS OF THE NEVADA TAX COMMISSION; MELANIE YOUNG, IN HER OFFICIAL CAPACITY AS THE EXECUTIVE DIRECTOR AND CHIEF ADMINISTRATIVE OFFICER OF THE DEPARTMENT OF TAXATION; AND THE LEGISLATURE OF THE STATE OF NEVADA,

Respondents.

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

EXECUTIVE RESPONDENTS' ANSWER TO PETITION FOR REHEARING

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INTRODUCTION

The Executive Respondents (all named Defendants other than the Legislature for the State of Nevada) oppose Appellants' petition for rehearing.

In this case, Appellants challenged Assembly Bill 458, which "eliminated future increases in the amount of tax credits available to businesses that donate to certain scholarship organizations." *Morency v. Dept. of Educ.*, 137 Nev. ____, 496 P.3d 584, 586 (2021). Based on passage of a second bill, which ensured that tax credits increased from the prior biennial budget, Appellants failed to show actual harm from Assembly Bill 458. *Id.* at 588. This court rejected Appellants' constitutional challenge, concluding that "Article 4, Section 18(2) of the Nevada Constitution does not apply to A.B. 458 because it does not generate, create, or increase public revenue." *Id.* at 592.

Under the undisputed facts of this case, Appellant Businesses had two options:

- pay the modified business tax they otherwise owed; or
- apply for the tax credits on a first-come, first-go basis.

Even if Appellant Businesses applied, but the tax credits had been claimed by other businesses first, they would have to pay the modified business tax they otherwise owed. There is no third option where Appellant Businesses get to keep these monies for their private purposes.

Nevada's supermajority provision requires heightened consensus amongst the Nevada Legislature before increasing public revenue, which decreases the monies Nevadans keep for their own private purposes. It specifically requires supermajority approval for any bill that "creates, generates, or increases any public revenue in any form." NEV. CONST., art. 4, § 18(2). This court correctly interpreted the supermajority provision in accordance with its plain language and its purpose when applied to this case, which did not increase public revenue and did not decrease private monies otherwise earned by Nevada's taxpayers. This alone warrants denial of the petition for rehearing.

Further, Appellants ignore this court's standards regarding petitions for rehearing, simultaneously asserting that they had previously argued that tax credits are not expenditures, while making eight pages of new arguments premised on the Nevada Constitution, Nevada statute, legislative rules, and how states outside of Arizona have addressed this question. Not only do none of these arguments change the correctness of this court's opinion, but none are proper for belated consideration under this court's standards regarding petitions for rehearing. Appellants could have made these arguments in this appeal but did not do so. This further supports why the petition for rehearing should be denied.

The Executive Respondents submit that rehearing should be denied.

ARGUMENT

I. Review of this Court's Correct Opinion

Following full briefing and argument on a motion to dismiss and cross-motions for summary judgment, the district court granted the State Defendants summary judgment. *Id.* at 588. Subsequently, after the parties fully briefed and argued this appeal, this court affirmed the district court's award of summary judgment. *Morency*, 496 P.3d at 592. As noted by Appellants, this briefing included the argument that tax credits are not expenditures of public funds. Pet. at 3 n.1.

Based on the passage of a second statute by the Legislature that further increased funding for these tax credits, this court concluded that "appellants failed to show actual harm arising from [the bill's] tax credit cap." *Morency*, 496 P.3d at 588. However, this court concluded that Appellants had demonstrated standing under the public-importance exception set forth in *Schwartz v. Lopez*, 132 Nev. 732, 744, 382 P.3d 886, 895 (2016). *Id.* at 589. Specifically, this court held that "appellants challenge[d] the Legislature's appropriations for the NECSP."[1] *Id.*

On the merits, this court had to determine whether Assembly Bill 458 "creates, generates, or increases any public revenue in any form." *Id.* It considered Assembly Bill 458 in contrast to Senate Bill 551, "which proposed to repeal NRS 360.203, a

[1] But for this determination, Appellants did not meet this requirement for the *Schwartz* public-importance exception for standing, and the case would have dismissed for lack of standing.

statute that reduce the rate of payroll taxes under the MBT if tax revenues exceed fiscal projections by a certain amount." *Id.* at 591. In a separate case, this court determined that Senate Bill 551 was subject to the supermajority provision because "'but for the MBT bill, the State would not receive … increased revenue' of $98.2 million." *Morency*, 496 P.3d at 591. (citing *Legislature of State v. Settelmeyer*, 137 Nev. ____, 486 P.3d 1276, 1281 (2021)). That bill, unlike this one, "required taxpayers to pay taxes that they would not otherwise owe." *Id.* at 591-92. Instead, here, under Assembly Bill 458, "MBT payroll taxpayers' tax liability has not increased – the reduction of the tax credit only changes how much of the MBT payroll tax money is allocated to fund the NECSP credits." *Id.* at 592.

Under such circumstances, this court held that Assembly Bill 458 "does not create, generate, or increase public revenue, but rather redirects MBT taxes owed to the General Fund except those set aside as tax credits to support the NECSP." *Id.* Because this opinion is correct, rehearing should be denied.

II. Legal Standard Applicable to a Petition for Rehearing

In Nevada, "rehearings are not granted to review matters that are of no practical consequence." *Matter of Est. of Herrmann*, 100 Nev. 149, 151, 679 P.2d 246, 247 (1984). A "petition for rehearing may not be utilizes as a vehicle to reargue matters considered and decided in the court's initial opinion." *Id.* "Nor may a litigant raise new legal points for the first time on rehearing." *Id.*

Here, Appellants seek to reargue their citations that "tax credits are not expenditures of public funds." Pet. at 3 n.1. As previously argued, Appellants' primary authorities of *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 142 (2011) and *Kotterman v. Killian*, 972 P.2d 606, 620-21 (Ariz. 1999) are inapposite to this case. Appellants' dissatisfaction with the outcome of this case does not entitle them to reargue matters considered and decided by this court in its opinion.

At the same time, for the first time in this case (whether before the district court or this court), Appellants make arguments premised on the Nevada Constitution, Nevada statute, and legislative rules pertaining to the difference between tax credits and appropriations. Pet. at 4-8. Appellants also attempt to argue for the first time that other states' consideration of tax credits requires rehearing in this case. Pet. at 9-11. Appellants cannot raise new legal points for the first time on rehearing, particularly authorities that were available to them throughout this case.

Appellants' failure to meet Nevada standards for rehearing also warrants denial of this petition.

III. Appellants' Reiteration of Prior-Argued Authority Such as *Ariz. Christian* and *Kotterman* does not Change the Outcome or Analysis of this Case

Appellants seek to reargue their citations that "tax credits are not expenditures of public funds." Pet. at 3 n.1. Each of the two cases cited by Appellants does not

change this court's analysis of the supermajority requirement, as explained in more detail below.

A. Appellants' Reliance on *Ariz. Christian* is Misplaced

Appellants' prior argument relies on *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 142 (2011). However, review of this opinion reveals multiple reasons why it is not applicable to this case.

First, Appellants' citation is not in the context of whether or how a State differentiates between tax credit expenditures and legislative appropriations for purposes of interpreting "public revenue" with the supermajority provision. Instead, the Supreme Court considered the narrow question of whether a non-tax credit receiving citizen qualified for a limited exception for taxpayer standing in Establishment Clause cases. *Id.* at 145-46; *see also* Pet. at 9. The Supreme Court made that distinction for purposes of denying a significant expansion to standing, not for the issues set forth in this case.[2]

Second, Nevada's supermajority provision was adopted by Nevadans in the 1990s, without consideration of the subsequent 2011 *Ariz. Christian* decision.

[2] Similarly, Appellants' belated citations to *McCall v. Scott*, 199 So. 3d 359, 370-71 (Fla. Dist. Ct. App. 2016); *Gaddy v. Ga. Dep't of Revenue*, 802 S.E.2d 225, 230 (Ga. 2017); *Manzara v. State*, 343 S.W.3d 656, 660 (Mo. 2011); and *Olson v. State*, 742 N.W.2d 681, 683 (Minn. Ct. App. 2007) are similarly focused on maintaining narrow taxpayer standing versus the issues set forth in this case. None constitute anything new warranting rehearing.

Indeed, as addressed in prior briefing to this court, the supermajority provision was focused on new or increased taxes, with no reference to tax credits. Answering Br. at 4-6. The purpose of the supermajority provision was to require consensus amongst the Nevada Legislature before burdening Nevadans with providing increased public monies. As set forth earlier, nothing associated with this case increases or decreases the burden to Appellant Businesses.

Third, *Ariz. Christian*'s tax credit, which was one of dozens applicable to Arizona taxpayers, is easily distinguished from this Nevada tax credit, which is one of only two of which that could be directed to third party spending at the time, with the only other exception being prepaid college tuition programs.[3] *See* JA at 386-97 (relevant portions of the 2017-2018 Tax Expenditure Report).[4]

Under such circumstances, the court correctly rejected Appellants' argument premised on this case.

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[3] Appellants' professed concern that this decision "has constitutionally invalidated any Nevada tax credit that does not satisfy those rules" ignores the limited nature of tax credits within Nevada. Pet. at 5.

[4] Further, Appellants' reliance on *Ariz. Christian* ignores their argument there (and elsewhere) that decreasing these tax credits decreases public revenue. There, Appellants' counsel in this case (Institute of Justice) represented successful parties. Specifically, IOJ argued that Arizona's Voucher Program "*ultimately saves the state money*." JA 364-365 (IOJ Br. (10/15/2010) at 13–14) (emphasis added). It does so by providing "savings the state realizes from being *relieved of the duty to pay* for participating children's educations." *Id.* at 364 (emphasis added). Perhaps based on IOJ's arguments, the Supreme Court similarly stated that such tax credits "may not cause the State to incur any financial loss." *Ariz. Christian*, 563 U.S. at 137.

B. Appellants' Reliance on *Kotterman* is Misplaced

Appellants' prior briefing also cited *Kotterman v. Killian*, 972 P.2d 606, 620-21 (Ariz. 1999). There, the Arizona Supreme Court distinguishes a challenged tax credit from an appropriation for the purpose of analyzing whether it constituted a "tax" for purposes of the Arizona Constitution's "religious clauses." The Arizona Supreme Court, relying on the plain language of the "religious clause" provision, determined that the tax credit was not a tax. *Id.* at 621.

Appellants' reliance on *Kotterman* is misplaced for multiple reasons.

First, this court is considering the meaning of "public revenue" for purposes of the supermajority provision. That is different than the *Kotterman* court addressing whether a tax credit was a "tax" for purposes of the Arizona Constitution's religious clauses. Here, this court determined whether Assembly Bill 458 "creates, generates, or increases any public revenue in any form." A sister state's determination on what constitutes a tax has no authority over how this court interprets "public revenue" as set forth in the Nevada Constitution.[5]

Second, these challenged tax credits are limited to an allocated certain amount by the Nevada Legislature, unlike those contemplated in *Kotterman*.[6] Indeed, the

[5] Indeed, none of the citations within the petition address supermajority provisions such as Nevada's.

[6] Appellants' belated citations to *Magee v. Boyd*, 175 So.3d 79, 121 (Ala. 2015); *Toney v. Bower*, 744 N.E.2d 351, 357 (Ill. App. Ct. 2001); *Griffith v. Bower*, 747 N.E.2d 423, 426 (Ill. App. Ct. 2001); *Tax Equality All. For Mass., Inc. v. Comm'r*

allocation of a set certain amount for the tax credits is the basis for Appellants' constitutional challenge. This differs from *Kotterman*, where the Arizona tax credits had no total monetary limit. This limit also differs from what this court considered in *Schwartz*, where a school voucher program was enjoined in part because no specific amount was allocated by the Legislature to limit the program's size. 132 Nev. at 754. Specifically, the court held that "surely the Legislature would have specified the number of education savings accounts or set a maximum sum of money to fund those accounts if the Legislature had intended SB 302 to include an appropriation." *Id.* This court cites to *Schwartz* when reaching its opinion on whether the freeze in future tax credits constituted a reallocation. *Morency*, 496 P.3d at 489-90.

Third, *Kotterman* is inapposite to this case because this court has no need to reach the question addressed in *Kotterman* regarding the state constitution's "religious clauses" because this court has already held that similar "religious clauses" in the Nevada Constitution did not prohibit school vouchers being used for religious schools. *Schwartz*, 132 Nev. at 752.

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of Revenue, 516 N.E.2d 152, 155-56 (Mass. 1987); and *State Bldg. & Constr. Trades Council v. Duncan*, 162 Cal. App. 4th 289, 294, 313 (2008) are similarly inapposite because none considered tax credits limited in total allocated amount as those limited here by the Nevada Legislature.

Under such circumstances, the court correctly rejected Appellants' arguments premised on this case.

CONCLUSION

For the foregoing reasons, the petition for rehearing must be denied.

Dated this 6th day of December, 2021.

AARON FORD
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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:

☒ This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 pt. font and Times New Roman; 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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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 6th day of December, 2021.

AARON FORD
Attorney General

By: /s/ *Craig A. Newby*
Craig A. Newby
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CERTIFICATE OF SERVICE

Pursuant to NEV. R. APP. P. 25(5)(c), I hereby certify that I electronically filed the foregoing document with the Clerk of the Court by using the electronic filing system on the 6th day of December, 2021. I certify that the participants in this case are registered electronic filing systems users and will be served electronically.

/s/ *Traci Plotnick*
Traci Plotnick, an employee of the
Office of the Attorney General