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,

vs.

THE 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, SHARON RIGBY, CRAIG WITT, GEORGE KELESIS, ANN BERSI, RANDY BROWN, FRANCINE LIPMAN, AND ANTHONY WREN, IN THEIR OFFICIAL CAPACITY AS MEMBERS OF THE NEVADA TAX COMMISSION; MELANE 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.

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Case No. 81281

Appeal from Eighth Jud. Dist. Court, Clark County, Nevada, Case No. A-19-800267-C

RESPONDENT NEVADA LEGISLATURE'S ANSWER TO APPELLANTS' PETITION FOR REHEARING

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ANSWER

Respondent Legislature of the State of Nevada (Legislature), by and through its counsel the Legal Division of the Legislative Counsel Bureau under NRS 218F.720, hereby files its answer to Appellants' petition for rehearing under NRAP 40, which asks this Court to rehear and reconsider its published opinion in this matter. Morency v. State Dep't of Educ., 137 Nev. Adv. Op. 63, 496 P.3d 584, 590-92 (2021). The Legislature asks this Court to deny the petition for rehearing because this Court correctly decided this case and Appellants have not met the extraordinary standards for rehearing.

I. Introduction.

In its published opinion, this Court correctly concluded that Assembly Bill No. 458 (AB 458) of the 2019 legislative session was not subject to the two-thirds majority requirement in Article 4, Section 18(2) of the Nevada Constitution because the bill does not create, generate or increase public revenue in any form. Morency, 496 P.3d at 590-92. In reaching its conclusion, this Court correctly determined that AB 458 does not change the total amount of money that taxpayers owe under the payroll taxes known as the Modified Business Tax (MBT). Id. Instead, this Court correctly determined that AB 458 changes only the amount of money that the Legislature appropriates from the MBT to the Department of Taxation to fund the operation of the Nevada Educational Choice Scholarship

Program (NECSP) by reducing the funding designated for the NECSP and redirecting those funds back to the State General Fund. Id. Therefore, this Court correctly held that AB 458 does not create, generate or increase public revenue for purposes of the supermajority requirement because "the total public revenue collected under the MBT has not changed" and "redirecting funds previously designated for a specific use (an appropriation) back to the State General Fund does not increase public revenue, even if it increases the unrestricted revenue available in the General Fund." Id.

In their petition for rehearing, Appellants contend that this Court overlooked, misapplied or failed to consider legal authority in determining that the NECSP tax credit is funded by a legislative appropriation to the Department of Taxation. To support their contention, Appellants allege several adverse legal consequences that they hypothesize would result if this Court does not rehear and reconsider its determination that the NECSP tax credit is funded by a legislative appropriation to the Department of Taxation. As discussed below, because all of Appellants' alleged adverse legal consequences are incorrect as a matter of law, this Court should reject the petition for rehearing. However, if this Court were to grant the petition for rehearing and withdraw its published opinion based on Appellants' arguments that the NECSP tax credit is not a legislative appropriation to the Department of Taxation, this Court should dismiss this case for lack of standing

because, in the absence of any legislative appropriation or expenditure, Appellants would no longer qualify for the public-importance exception to standing.

II. Standards for reviewing petitions for rehearing.

Petitions for rehearing will be granted only when this Court has: (1) overlooked or misapprehended material facts in the record or material questions of law in the case; or (2) overlooked, misapplied or failed to consider legal authority directly controlling a dispositive issue in the case. NRAP 40(c)(2); Bahena v. Goodyear Tire & Rubber, 126 Nev. 606, 608 (2010). Under these standards, "rehearings are not granted to review matters that are of no practical consequence. Rather, a petition for rehearing will be entertained only when the court has overlooked or misapprehended some material matter, or when otherwise necessary to promote substantial justice." Gordon v. Eighth Jud. Dist. Ct., 114 Nev. 744, 745-46 (1998) (quoting In re Herrmann, 100 Nev. 149, 151 (1984)).

III. In determining that the NECSP tax credit is funded by a legislative appropriation to the Department of Taxation, this Court did not overlook, misapply or fail to consider the constitutional provisions of the Education First Initiative.

In their petition for rehearing, Appellants contend that this Court overlooked, misapplied or failed to consider the provisions of Article 11, Section 6 of the Nevada Constitution enacted by the Education First Initiative. (*Pet.* at 4-5.) In particular, Appellants contend that this Court's determination that the NECSP tax credit is funded by a legislative appropriation to the Department of Taxation would

invalidate any bill funding the NECSP tax credit during a legislative session if the Legislature enacted the bill before it first enacted appropriations sufficient to fund the operation of the public schools as required by the Education First Initiative. (*Pet.* at 4-5.) Appellants are wrong as a matter of law.[1]

The Education First Initiative was added to Article 11, Section 6 of the Nevada Constitution in 2006. Nev. Statewide Ballot Questions 2006, Question No. 1, at 4-8 (Nev. Sec'y of State 2006).[2] The Education First Initiative bars the Legislature from enacting **certain** appropriations during a legislative session unless the Legislature has first enacted one or more appropriations sufficient to fund the operation of the public schools for the next biennium. In relevant part, the Education First Initiative states:

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[1] Appellants argue broadly that this Court's published opinion "has constitutionally invalidated any Nevada tax credit that does not satisfy [the Education First Initiative]." (*Pet.* at 5.) However, under well-established rules governing appellate decisions, this Court's published opinion applies only to the NECSP tax credit and does not concern any other Nevada tax credits. See Steptoe Live Stock Co. v. Gulley, 53 Nev. 163, 172-73 (1931) ("[A] decision is only an authority for what is actually decided upon a given state of facts."). Therefore, Appellants' broad arguments regarding the alleged adverse effects of this Court's published opinion on other Nevada tax credits are of no practical consequence and must be disregarded.

[2] This Court may take judicial notice of the ballot materials as a public record. Jory v. Bennight, 91 Nev. 763, 766 (1975); Fierle v. Perez, 125 Nev. 728, 737-38 n.6 (2009). The public record of the ballot materials is available at: https://www.leg.state.nv.us/Division/Research/VoteNV/BallotQuestions/2006.pdf.

> During a regular session of the Legislature, before any other appropriation is enacted to **fund a portion of the state budget** for the next ensuing biennium, the Legislature shall enact one or more appropriations to provide the money the Legislature deems to be sufficient, when combined with the local money reasonably available for this purpose, to fund the operation of the public schools in the State for kindergarten through grade 12 for the next ensuing biennium for the population reasonably estimated for that biennium.

Nev. Const. art. 11, § 6(2) (emphasis added).

The Education First Initiative is not applicable to this case for several reasons. First, AB 458 is not subject to the Education First Initiative because the bill does not make any appropriations at all. Rather, "the bill reduces future appropriations to the NECSP tax-credit program." Morency, 496 P.3d at 591. Given that the Education First Initiative does not apply to bills that reduce future appropriations, the Education First Initiative is not applicable to this case.

Second, the Education First Initiative does not establish a blanket prohibition that bars the Legislature from enacting **all** appropriations before it first enacts appropriations sufficient to fund the operation of the public schools. Instead, the Education First Initiative only bars the Legislature from enacting appropriations that "**fund a portion of the state budget**" before it first enacts appropriations sufficient to fund the operation of the public schools. Nev. Const. art. 11, § 6(2) (emphasis added).

Based on well-established rules governing state financial administration, the Legislature's power to enact appropriations is not limited to appropriations that

"fund a portion of the state budget" within the meaning of the Education First Initiative. Rather, the Legislature has the power to enact appropriations for other specific purposes which do not fund a portion of the state budget but which serve other legislative objectives. Because such specific appropriations do not "fund a portion of the state budget" within the meaning of the Education First Initiative, such specific appropriations are not subject to the Education First Initiative.

Under Nevada law, the state treasury consists of all money which belongs to the state and which is not otherwise held in trust by the state in special funds, and "[n]o money shall be drawn from the [state] treasury but in consequence of appropriations made by law." Nev. Const. art. 4, § 19 & art. 9, § 2(2); NRS 226.115 & 353.249; State ex rel. Beebe v. McMillan, 36 Nev. 383, 387-89 (1913). For each biennium, the Legislature appropriates money from the state treasury to fund the state budget, which consists of the general expenses to operate the three departments of the state government. See Nev. Const. art. 9, § 2(1); NRS 353.150-353.246 (State Budget Act). In addition, the Legislature appropriates money from the state treasury to state agencies, local governments and other entities for various specific purposes which do not fund a portion of the state budget but which carry out other legislative objectives.

With regard to the specific purpose of funding the NECSP tax credit, the Legislature appropriated funding to the Department of Taxation for the NECSP tax

credit during the 2015, 2017, 2019 and 2021 regular sessions to carry out the legislative objective of encouraging donations to scholarship organizations under the NECSP, which would allow students of certain low-income families that meet the requirements for the scholarships to attend schools in Nevada chosen by their parents or legal guardians, including, without limitation, private schools. Assembly Bill No. 165, 2015 Nev. Stat., ch. 22, § 4, at 86-87; Senate Bill No. 555, 2017 Nev. Stat., ch. 600, §§ 1-2, at 4366-68; Senate Bill No. 551, 2019 Nev. Stat., ch. 537, § 2.5, at 3273-74, and § 3.5, at 3276-77; Assembly Bill No. 495, 2021 Nev. Stat., ch. 249, §§ 46-47, at 1282-84.

Because such specific appropriations to the Department of Taxation for the NECSP tax credit do not "fund a portion of the state budget" within the meaning of the Education First Initiative but serve other legislative objectives, such specific appropriations were not subject to the Education First Initiative. Nev. Const. art. 11, § 6(2). Furthermore, because this Court determined that AB 458 **reduces** future appropriations to the Department of Taxation for the NECSP tax credit, AB 458 was not subject to the Education First Initiative because the bill does not make any appropriations at all. Morency, 496 P.3d at 591 (explaining that "the bill reduces future appropriations to the NECSP tax-credit program."). Consequently, given that the specific appropriations to the Department of Taxation for the NECSP tax credit were not subject to the Education First Initiative, and given that

AB 458 was not subject to the Education First Initiative because the bill does not make any appropriations at all, this Court did not overlook, misapply or fail to consider the constitutional provisions of the Education First Initiative when it rendered its published opinion in this case.

IV. In determining that the NECSP tax credit is funded by a legislative appropriation to the Department of Taxation, this Court did not overlook, misapply or fail to consider the constitutional provisions that prohibit appropriations of public money from being used for certain religious or sectarian purposes.

In their petition for rehearing, Appellants contend that this Court overlooked, misapplied or failed to consider the constitutional provisions that prohibit appropriations of public money from being used for certain religious or sectarian purposes in violation of the Establishment Clause of the First Amendment and the provisions of Article 11, Section 10 of the Nevada Constitution. (*Pet.* at 5-6.) In particular, Appellants contend that this Court's determination that the NECSP tax credit is funded by a legislative appropriation to the Department of Taxation raises the specter that the tax credit is an invalid appropriation of public money to fund religious or sectarian schools or other institutions receiving scholarship money under the NECSP. (*Pet.* at 5-6.) To support their contentions, Appellants point to caselaw from other jurisdictions holding that tax credits generally are not considered to be appropriations of public money. (*Pet.* at 9-11.)

Appellants are wrong as a matter of law for several reasons. First, as discussed previously, this Court determined that AB 458 **reduces** future appropriations to the Department of Taxation for the NECSP tax credit. Morency, 496 P.3d at 591 (explaining that "the bill reduces future appropriations to the NECSP tax-credit program."). Therefore, because AB 458 does not make any appropriations at all, the bill does not implicate the constitutional provisions that prohibit appropriations of public money from being used for certain religious or sectarian purposes.

Second, because the specific appropriations to fund the NECSP tax credit are made to the Department of Taxation—not to any religious or sectarian schools or other institutions—such specific appropriations to the Department of Taxation do not implicate the constitutional provisions that prohibit appropriations of public money from being used for certain religious or sectarian purposes. See Mueller v. Allen, 463 U.S. 388, 392-403 (1983); Schwartz v. Lopez, 132 Nev. 732, 750-52 (2016).

In Mueller, the U.S. Supreme Court held that a state does not violate the Establishment Clause of the First Amendment by administering a program of tax credits or deductions which may benefit parents whose children attend nonpublic schools where "public funds become available only as a result of numerous, private choices of individual parents of school-age children" and the state is not involved

in "the direct transmission of assistance from the state to the schools themselves." Mueller, 463 U.S. at 399.

Similarly, in Schwartz, this Court held that the provisions of Article 11, Section 10 of the Nevada Constitution do not prohibit the State from administering a program of education saving accounts (ESA program) which may benefit parents whose children attend nonpublic schools where "[n]o public funds are paid directly to a sectarian school or institution under the ESA program." Schwartz, 132 Nev. at 751. In reaching its holding in Schwartz, this Court distinguished the valid ESA program from the invalid appropriation of public money directly to a sectarian school or institution, which this Court struck down in State v. Hallock, 16 Nev. 373, 378-88 (1882):

> The plaintiffs contend that State v. Hallock, 16 Nev. 373 (1882)—the only case in which this court has addressed the meaning of Section 10—prohibits any public funds from ending up in the coffers of a religious institution or school. We disagree with the plaintiffs' reading of Hallock. The Hallock decision concerned an appropriation of public funds from the State treasury **directly** to a **sectarian institution** and held that such a payment was prohibited by Section 10. The ESA program, however, provides for public funds to be deposited directly into an account belonging to a private individual, not to a sectarian institution. No public funds are paid directly to a sectarian school or institution under the ESA program. Rather, public funds are deposited into an account established by a parent, who may then choose to spend the money at a religious school or one of the other participating entities. Those funds, once deposited into the account, are no longer public funds, and this ends the inquiry for Section 10 purposes. Our holding in Hallock does not require a different conclusion. Accordingly, we conclude that the ESA program does not result in any public funds being

> used for sectarian purpose and thus does not violate Article 11, Section 10 of the Nevada Constitution.

Schwartz, 132 Nev. at 751-52 (emphasis in original).

With regard to the specific appropriations to fund the NECSP tax credit, the statutes governing the NECSP provide that such specific appropriations are made directly to the Department of Taxation which must administer the appropriations to carry out the legislative objectives of the NECSP. NRS 363A.139(4)-(5) & 363B.119(4)-(5). Because such specific appropriations are made directly to the Department of Taxation, they are not made directly to any religious or sectarian schools or other institutions under the NECSP.

In several cases, this Court has explained that "[a]n appropriation is the setting aside from the public revenue of a certain sum of money for a specified object, in such manner that the executive officers of the government are authorized to use that money, and no more, for that object, and no other." Schwartz, 132 Nev. at 753 (internal quotation marks omitted); Herbst Gaming, Inc. v. Heller, 122 Nev. 877, 890-91 (2006); Rogers v. Heller, 117 Nev. 169, 173 n.8 (2001). Under the NECSP, the Legislature has set aside a specific sum of money from the MBT for the NECSP tax credit, and the Department of Taxation is authorized to use that money, and no more, for that object, and no other. NRS 363A.139(4)-(5) & 363B.119(4)-(5). In particular, during the 2015, 2017, 2019 and 2021 regular sessions, the Legislature authorized the Department of Taxation to use the money

set aside from the MBT to approve applications from certain taxpayers who meet the qualifications to have the NECSP tax credit applied against their MBT tax liability for making donations to scholarship organizations under the NECSP. Id. However, the Department of Taxation cannot approve applications for any amounts exceeding the specific sum of money appropriated by the Legislature for the NECSP tax credit. Id. Under such circumstances, the specific appropriations that fund the NECSP tax credit are made directly to the Department of Taxation, and the Department administers the specific appropriations to carry out the legislative objectives of the NECSP.

Even though the Department administers the specific appropriations to carry out the legislative objectives of the NECSP, the taxpayers who qualify for the NECSP tax credit make the decision whether to apply for the NECSP tax credit and whether to donate to a particular scholarship organization under the NECSP. NRS 363A.139(1)-(3) & 363B.119(1)-(3). If the NECSP tax credit is approved, the scholarship organization makes the decision whether to approve applications for scholarship money submitted by parents or legal guardians of students, and the parents or legal guardians make the decision concerning the particular schools or programs chosen to receive the scholarship money for those students. NRS 388D.250-388D.280; NAC 388D.010-388D.130.

Under such circumstances, because the specific appropriations to fund the NECSP tax credit are made to the Department of Taxation, "public funds become available only as a result of numerous, private choices" and the state is not involved in "the direct transmission of assistance from the state to the schools themselves." Mueller, 463 U.S. at 399. As a result, "[n]o public funds are paid directly to a sectarian school or institution" under the NECSP. Schwartz, 132 Nev. at 751. Consequently, because the specific appropriations to fund the NECSP tax credit are made to the Department of Taxation—not to any religious or sectarian schools or other institutions—this Court did not overlook, misapply or fail to consider the constitutional provisions that prohibit appropriations of public money from being used for certain religious or sectarian purposes when it rendered its published opinion in this case.

V. In determining that the NECSP tax credit is funded by a legislative appropriation to the Department of Taxation, this Court did not overlook, misapply or fail to consider procedural rules, statutes and practices relating to appropriations bills.

In their petition for rehearing, Appellants contend that this Court overlooked, misapplied or failed to consider procedural rules, statutes and practices relating to appropriations bills. (*Pet.* at 6-8.) In particular, Appellants contend that this Court's determination that the NECSP tax credit is funded by a legislative appropriation to the Department of Taxation "upends the distinct legislative and

executive procedures governing appropriations on the one hand and tax credits on the other." (*Pet.* at 7-8.)

Appellants are wrong as a matter of law for several reasons. First, as discussed previously, this Court determined that AB 458 **reduces** future appropriations to the Department of Taxation for the NECSP tax credit. Morency, 496 P.3d at 591 (explaining that "the bill reduces future appropriations to the NECSP tax-credit program."). Therefore, because AB 458 does not make any appropriations at all, the bill does not implicate any procedural rules, statutes and practices relating to appropriations bills.

Second, based on well-established rules of constitutional and parliamentary law governing state legislatures—which have been followed by the courts for centuries—when the Legislature disregards or declines to follow any procedural rules, statutes and practices, the Legislature is presumed to have exercised its plenary and exclusive constitutional power to suspend or waive those procedural rules, statutes and practices either expressly or by implication. See Nev. Const. art. 4, § 6; State ex rel. La Follette v. Stitt, 338 N.W.2d 684, 687 (Wis. 1983); Mason's Manual of Legislative Procedure §§ 3, 15, 73, 284 (NCSL 2020) (Mason's Manual) (Courts have found that "Mason's Manual is a widely recognized authority on state legislative and parliamentary procedures." Gray v. Gienapp, 727 N.W.2d 808, 811 (S.D. 2007)).

As a result, even assuming that the Legislature disregarded or declined to follow any procedural rules, statutes and practices relating to appropriations bills when it enacted the specific appropriations to fund the NECSP tax credit, the Legislature must be presumed to have exercised its exclusive constitutional power to suspend or waive those procedural rules, statutes and practices either expressly or by implication.

Under the rules of parliamentary law governing state legislatures, in order to pass legislative measures, a state legislature must comply with the procedural requirements expressly set forth in the state constitution, and if a state legislature violates any constitutional procedural requirements in passing legislative measures, the courts are empowered to invalidate the legislative measures. Mason's Manual §§ 7, 12. However, because a state legislature possesses plenary and exclusive constitutional power to control its own legislative procedure and because a state legislature cannot be bound by any procedural rules and statutes adopted by it or a prior legislature, a state legislature is not required to comply with nonconstitutional procedural rules and statutes. Mason's Manual §§ 3, 15, 73, 284. Under such circumstances, the courts will not "declare an act of a legislature void on account of noncompliance with rules of procedure made by itself to govern its own deliberations and not involving any constitutional provision." Mason's Manual § 73(3).

These well-established rules of parliamentary law governing state legislatures have been followed by the courts for centuries. Mason's Manual § 73(3) (collecting cases). As explained by the Wisconsin Supreme Court:

> Although since Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), courts have had the authority to review acts of the legislature for any conflict with the constitution, courts generally consider that the legislature's adherence to the rules or statutes prescribing procedure is a matter entirely within legislative control and discretion, not subject to judicial review unless the legislative procedure is mandated by the constitution. 73 Am. Jur. 2d Statutes § 49, p. 296. If the legislature fails to follow self-adopted procedural rules in enacting legislation, and such rules are not mandated by the constitution, courts will not intervene to declare the legislation invalid. The rationale is that the failure to follow such procedural rules amounts to an implied *ad hoc* repeal of such rules. This principle has been expressed in 1 Sutherland, Statutory Construction (4th Ed.) § 7.04, p. 264, as follows:
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> > "The decisions are nearly unanimous in holding that an act cannot be declared invalid for failure of the house to observe its own rules. Courts will not inquire whether such rules have been observed in the passage of the act. Likewise, the legislature by statute or joint resolution cannot bind or restrict itself or its successors as to the procedure to be followed in the passage of legislation."

State ex rel. La Follette v. Stitt, 338 N.W.2d 684, 687 (Wis. 1983); Des Moines Register & Tribune Co. v. Dwyer, 542 N.W.2d 491, 496 (Iowa 1996) ("[T]he legislature has complete control and discretion whether it shall observe, enforce, waive, suspend, or disregard its own rules of procedure, and violations of such rules are not grounds for the voiding of legislation."); Baines v. N.H. Senate President, 876 A.2d 768, 776 (N.H. 2005) ("[B]ecause these statutes concern nonconstitutionally mandated legislative procedures and because the State

Constitution grants the legislature the authority to establish such procedures, the question of whether the legislature violated these statutes is nonjusticiable."); Westerfield v. Ward, 599 S.W.3d 738, 746 (Ky. 2019) ("[W]e have serious questions about our ability to invalidate a legislative act—in this case a constitutional amendment—based on a failure of the legislature to follow its own procedure, a procedure that it has full authority to change."); St. Louis & S.F. Ry. Co. v. Gill, 15 S.W. 18, 19 (Ark. 1891) ("The joint rules of the general assembly were creatures of its own, to be maintained and enforced, rescinded, suspended, or amended, as it might deem proper. Their observance was a matter entirely subject to legislative control and discretion, not subject to be reviewed by the courts.").

Accordingly, even assuming that the Legislature disregarded or declined to follow any procedural rules, statutes and practices relating to appropriations bills when it enacted the specific appropriations to fund the NECSP tax credit, the Legislature must be presumed to have exercised its exclusive constitutional power to suspend or waive those procedural rules, statutes and practices either expressly or by implication. Therefore, any alleged failure by the Legislature to follow any procedural rules, statutes and practices is of no practical consequence and cannot justify the petition for rehearing. See Gordon, 114 Nev. at 745-46 (explaining that rehearings are granted only to review material matters and "are not granted to review matters that are of no practical consequence." (quoting Herrmann, 100 Nev.

at 151)). Under such circumstances, this Court did not overlook, misapply or fail to consider any procedural rules, statutes and practices relating to appropriations bills when it rendered its published opinion in this case.

VI. If this Court were to grant the petition for rehearing and withdraw its published opinion based on Appellants' arguments that the NECSP tax credit is not a legislative appropriation to the Department of Taxation, this Court should dismiss this case for lack of standing because, in the absence of any legislative appropriation or expenditure, Appellants would no longer qualify for the public-importance exception to standing.

In its published opinion, this Court held that Appellants "fail to meet the personalized-injury requirement for general standing." Morency, 496 P.3d at 588. However, this Court also held that Appellants qualify under this Court's decision in Schwartz v. Lopez, 132 Nev. 732, 743 (2016), for the public-importance exception to standing. Morency, 496 P.3d at 589. 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." Morency, 496 P.3d at 589 (quoting Schwartz, 132 Nev. at 743) (emphasis added)).

If this Court were to grant the petition for rehearing and withdraw its published opinion based on Appellants' arguments that the NECSP tax credit is not a legislative appropriation to the Department of Taxation, Appellants would no longer qualify for the public-importance exception to standing because their constitutional challenge to AB 458 would not be based on any legislative

appropriation or expenditure. Under such circumstances, this Court should dismiss this case for lack of standing, especially since Appellants urge this Court to follow the U.S. Supreme Court's decision in Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125, 144 (2011), which Appellants tout as holding that "tax credits are not government appropriations that can be challenged under the taxpayer standing doctrine." (*Pet.* at 9.)

In Winn, the plaintiffs—who were a group of Arizona taxpayers—brought a constitutional challenge under the Establishment Clause against Arizona statutes which authorized the state to provide tax credits for contributions to school tuition organizations or STOs. Winn, 563 U.S. at 129. Because the plaintiffs did not meet the personalized-injury requirement for standing in federal court, the plaintiffs claimed that they qualified for the exception to standing created by the Supreme Court's decision in Flast v. Cohen, 392 U.S. 83 (1968), which allows taxpayers to challenge a legislative appropriation or expenditure under the Establishment Clause on the basis that tax money is being extracted and spent for certain religious or sectarian purposes. Winn, 563 U.S. at 138-45.

The Supreme Court held that the plaintiffs did not qualify for the Flast exception to standing because the Court found a "distinction between governmental expenditures and tax credits." Winn, 563 U.S. at 142. The Court determined that "[w]hen Arizona taxpayers choose to contribute to STOs [and

receive a tax credit], they spend their own money, not money the State has collected from [the plaintiffs] or from other taxpayers." Id. Under such circumstances, the Court found that the STO tax credit was not tantamount to a legislative appropriation or expenditure which would qualify for the Flast exception to standing, explaining that:

> When the government collects and spends taxpayer money, governmental choices are responsible for the transfer of wealth. In that case a resulting subsidy of religious activity is, for purposes of Flast, traceable to the government's expenditures. And an injunction against those expenditures would address the objections of conscience raised by taxpayer-plaintiffs. Here, by contrast, contributions result from the decisions of private taxpayers regarding their own funds. Private citizens create private STOs; STOs choose beneficiary schools; and taxpayers then contribute to STOs. While the State, at the outset, affords the opportunity to create and contribute to an STO, the tax credit system is implemented by private action and with no state intervention.

Winn, 563 U.S. at 143 (citations omitted). Consequently, in the absence of any legislative appropriation or expenditure, the Court concluded that the plaintiffs did not qualify for the Flast exception to standing.

Similar to the circumstances in Winn, if this Court were to grant the petition for rehearing and withdraw its published opinion based on Appellants' arguments that the NECSP tax credit is not a legislative appropriation to the Department of Taxation, Appellants would no longer qualify for the public-importance exception to standing because their constitutional challenge to AB 458 would not be based on any legislative appropriation or expenditure. Consequently, in the absence of any

legislative appropriation or expenditure under those circumstances, this Court should dismiss this case for lack of standing.

CONCLUSION

Based on the foregoing, the Legislature asks this Court to deny the petition for rehearing. However, if this Court were to grant the petition for rehearing and withdraw its published opinion based on Appellants' arguments that the NECSP tax credit is not a legislative appropriation to the Department of Taxation, this Court should dismiss this case for lack of standing because, in the absence of any legislative appropriation or expenditure, Appellants would no longer qualify for the public-importance exception to standing.

DATED: This **6th** day of December, 2021.

By: /s/ Kevin C. Powers

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CERTIFICATE OF COMPLIANCE

1. We hereby certify that this answer 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 it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14-point font and Times New Roman type.

2. We hereby certify that this answer does not comply with the type-volume limitations of NRAP 40 because it is proportionally spaced, has a typeface of 14 points or more and contains **5,099** words, which exceeds the type-volume limit of 4,667 words. **However, we certify that a motion to exceed the type-volume limitation for this brief will be filed pursuant to NRAP 32(a)(7)(D)**.

3. We hereby certify that we have read this answer, and to the best of our knowledge, information and belief, it is not frivolous or interposed for any improper purpose. We further certify that this answer complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in briefs 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. We understand that we may be subject to sanctions in the event that this answer is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: This **6th** day of December, 2021.

By: /s/ Kevin C. Powers

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Nevada Legislative Counsel Bureau, Legal Division, and that on the **6th** day of December, 2021, pursuant to NRAP 25 and NEFCR 9, I filed and served a true and correct copy of Respondent Nevada Legislature's Answer to Appellants' Petition for Rehearing, by means of the Nevada Supreme Court's electronic filing system, directed to:

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