

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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Elizabeth A. Brown
Clerk of Supreme Court

Case No. 81281

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

**RESPONDENT NEVADA LEGISLATURE'S MOTION TO
EXCEED WORD LIMIT IN NRAP 40 FOR ANSWER TO
APPELLANTS' PETITION FOR REHEARING**

KEVIN C. POWERS

General Counsel

Nevada Bar No. 6781

LEGISLATIVE COUNSEL BUREAU,

LEGAL DIVISION

401 S. Carson St.

Carson City, NV 89701

Tel: (775) 684-6830

Fax: (775) 684-6761

Email: kpowers@lcb.state.nv.us

Attorneys for Respondent

Legislature of the State of Nevada

MOTION

Respondent Legislature of the State of Nevada (Legislature), by and through its counsel the Legal Division of the Legislative Counsel Bureau (LCB Legal) under NRS 218F.720, hereby files this motion to exceed the word limit in NRAP 40 for the Legislature's answer to Appellants' petition for rehearing. On December 6, 2021, the Legislature filed its answer that contains 5,099 words, which exceeds by 432 words the type-volume limit of 4,667 words in NRAP 40(b)(3).

The Legislature's motion to exceed the word limit is necessary so that the Legislature can properly address several complex issues of constitutional and statutory law, state financial administration, legislative procedure and jurisdictional standing presented in the petition for rehearing, 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).

In its published opinion, this Court 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 determined that AB 458 changes only the amount of money that the Legislature appropriates from the

Modified Business Tax (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 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. First, 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, which 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. (*Pet.* at 4-5.) Second, Appellants contend that this Court overlooked, misapplied or failed to consider the constitutional provisions which 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.) Third, Appellants contend that this Court overlooked, misapplied or failed to consider procedural rules, statutes and practices relating to appropriations bills which “upends the distinct legislative and executive procedures governing appropriations on the one hand and tax credits on the other.” (*Pet.* at 6-8.)

In order to respond properly to these complex issues of constitutional and statutory law, state financial administration and legislative procedure in a cogent manner that includes adequate citations to relevant authorities, the Legislature was required to provide a comprehensive discussion regarding the pertinent constitutional and statutory provisions—along with caselaw interpreting those provisions—and a comprehensive discussion regarding state financial administration and the rules of constitutional and parliamentary law governing state legislative procedures.

In addition, because Appellants contend that the NECSP tax credit is not a legislative appropriation to the Department of Taxation, the petition for rehearing also raises issues of jurisdictional standing. Specifically, although this Court determined that Appellants “fail to meet the personalized-injury requirement for general standing,” this Court also held that Appellants qualify under Schwartz v. Lopez, 132 Nev. 732, 743 (2016), for the public-importance exception to standing.

Morency, 496 P.3d at 588-89. 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, it would present an issue of jurisdictional standing as to whether 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 order to respond properly to the petition for rehearing, the Legislature was required to provide a comprehensive discussion addressing this issue of jurisdictional standing in a cogent manner that includes adequate citations to relevant authorities.

In filing the Legislature’s motion to exceed the word limit, LCB Legal is respectful of this Court’s admonition to appellate counsel to observe reasonable limitations on arguments filed with this Court. See Hernandez v. State, 117 Nev. 463 (2001). However, LCB Legal is asking to exceed the word limit to meet this Court’s high standards of appellate practice in which this Court “expects all

appeals to be pursued with high standards of diligence, professionalism, and competence.” Barry v. Lindner, 119 Nev. 661, 671 (2003); Polk v. State, 126 Nev. 180, 184 (2010). This duty requires counsel to avoid inadequate appellate practices, such as discussing issues without including “cogent argument and citation to relevant authority.” Berkson v. Lepome, 126 Nev. 492, 501-02 (2010) (“It is well established that this court need not consider issues not supported by cogent argument and citation to relevant authority.”). Therefore, the additional words in the Legislature’s answer are necessary to discuss the complex issues of constitutional and statutory law, state financial administration, legislative procedure and jurisdictional standing raised by the petition for rehearing in a cogent manner that includes “adequate supporting law.” Barry, 119 Nev. at 672.

Finally, LCB Legal wants to stress that it takes no pleasure in asking this Court for permission to exceed the word limit or in preparing any answer, brief or other document that exceeds the word limit. However, in light of the statewide importance of the issues presented by this case, LCB Legal believes that the Legislature’s answer to the petition for rehearing will facilitate a more comprehensive and thorough presentation of the controlling law and a better understanding of the issues and will ensure that the views of the Legislature are fairly and adequately represented and are not prejudiced by this case. Therefore,

the Legislature asks this Court to grant its motion to exceed the word limit in NRAP 40 for its answer to the petition for rehearing.

DATED: This 7th day of December, 2021.

By: /s/ Kevin C. Powers

KEVIN C. POWERS

General Counsel

Nevada Bar No. 6781

LEGISLATIVE COUNSEL BUREAU, LEGAL DIVISION

401 S. Carson St.

Carson City, NV 89701

Tel: (775) 684-6830; Fax: (775) 684-6761

Email: kpowers@lcb.state.nv.us

Attorneys for Respondent

Legislature of the State of Nevada

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Nevada Legislative Counsel Bureau, Legal Division, and that on the 7th 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 Motion to Exceed Word Limit in NRAP 40 for Answer to Appellants' Petition For Rehearing, by means of the Nevada Supreme Court's electronic filing system, directed to:

JOSHUA A. HOUSE, ESQ.

INSTITUTE FOR JUSTICE
901 N. Glebe Rd., Suite 900
Arlington, VA 22203
jhouse@ij.org

ROBERT GALL, ESQ.

INSTITUTE FOR JUSTICE
816 Congress Ave., Suite 960
Austin, TX 78701
bgall@ij.org

MATTHEW T. DUSHOFF, ESQ.

SALTZMAN MUGAN DUSHOFF
1835 Village Center Cir.
Las Vegas, NV 89134
mdushoff@nvbusinesslaw.com
Attorneys for Appellants

AARON D. FORD

Attorney General
CRAIG A. NEWBY
Deputy Solicitor General
OFFICE OF THE ATTORNEY GENERAL
100 N. Carson St.
Carson City, NV 89701
CNewby@ag.nv.gov
*Attorneys for Respondents State of
Nevada ex rel. Department of
Education, et al.*

/s/ Kevin C. Powers

An Employee of the Legislative Counsel Bureau