No. 81924

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE LEGISLATURE OF THE STATE OF NEVADA; THE STATE OF NEVADA DEPARTMENT OF TAXATION; AND THE STATE OF NEVADA DEPARTMENT OF MOTOR VEHICLES,

Appellants/Cross-Respondents,

v.

THE HONORABLE JAMES A. SETTELMEYER; THE HONORABLE JOE HARDY; THE HONORABLE HEIDI SEEVERS GANSERT; THE HONORABLE SCOTT T. HAMMOND; THE HONORABLE PETE GOICOECHEA; THE HONORABLE BEN KIECKHEFER; THE HONORABLE IRA D. HANSEN; THE HONORABLE KEITH F. 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,

Respondents/Cross-Appellants.

On Appeal from the First Judicial District Court of the
State of Nevada, Carson City
Case No. 19 OC 00127 1B

EXECUTIVE APPELLANTS' OPENING BRIEF

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NRCP 26.1 DISCLOSURE

No such disclosure is required for the Executive Appellants.

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I. JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal under NRAP 3A(b)(1). In the proceeding below, notice of entry of the final judgment was entered October 8, 2020, in favor of Plaintiffs/Respondents. JA 1192–1213. The next day, the Executive Appellants filed its notice of appeal. JA 1218–1221. So did the Legislature. JA 1214–1217.

II. ROUTING STATEMENT

Pursuant to its March 3, 2021, scheduling order, this Court has already retained this appeal for *en banc* oral argument on Monday, May 3, 2021. The Executive Appellants submit that this routing was proper, as the appeal presents an issue of first impression for the Nevada Constitution.

III. ISSUES PRESENTED

Does Article 4, Section 18(2) of the Nevada Constitution apply to bills that that maintain taxes and fees at existing rates from the prior fiscal year into future fiscal years?

If not, is the Legislature Counsel's opinion interpreting Article 4, Section 18(2) of the Nevada Constitution reasonable, such that it is entitled to deference from this Court, even if it would not necessarily be the first choice of this Court?

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IV. STATEMENT OF THE CASE

The 2019 Legislature passed two bills that maintained existing taxes and fees at existing rates from the prior fiscal year into future fiscal years. The first, Senate Bill 551, repealed NRS 360.203, which contemplated a potential future Modified Business Tax ("MBT") rate recalculation should the Economic Forum underestimate total Commerce Tax, MBT, and Bank Branch Excise Tax revenues. *See* JA 172–204. The second, Senate Bill 542, amends a June 30, 2020, sunset provision for an existing DMV technology fee, extending it until June 30, 2022. *See* JA 224. Neither increases taxes and fees from the prior fiscal year into future fiscal years. Each was passed by majority vote after the Legislature's Counsel offered its opinion that only a majority vote was required. *See* JA 147–170.

Respondents sued the Executive Appellants on July 19, 2019. JA 1–14. Respondents subsequently amended their complaint on July 30, 2019. JA 15–31. Respondents are the eight Nevada State Senators from the 2019 Legislature who voted against the two bills along with businesses and trade organizations. *Id.* Respondents contend that the two bills increased public revenue, such that the bills required supermajority approval by the Nevada Legislature pursuant to Article 4, Section 18(2) of the Nevada Constitution.

The Executive Appellants moved to dismiss the complaint on September 15, 2019. JA 101–224. Respondents opposed the motion to dismiss and sought summary

judgment on its claims. JA 225–381. Briefing on the substantive dispute was stayed for more than ten months to address a writ petition pertaining to the Legislative Counsel Bureau's representation of Defendant Nicole Cannizzaro. *See State ex rel. Cannizzaro v. First Jud. Dist. Ct.*, 136 Nev. Adv. Op. 34, 466 P.3d 529, 534 (2020). After this Court resolved the writ petition, the Executive Appellants filed its opposition to Respondents' summary judgment motion and its reply supporting its motion to dismiss on August 18, 2020. The Executive Appellants joined the Legislative Appellants' opposition and countermotion for summary judgment as to dismissal of the individual Executive Defendants (the Governor and the Lieutenant Governor) on August 21, 2020.

The District Court, at a September 21, 2020, hearing, granted Respondents summary judgment and denied the motions filed by the Executive Defendants and the Legislative Defendants. JA 1200–1212. The District Court concluded that Article 4, Section 18(2) of the Nevada Constitution (the "Supermajority Provision") was clear and unambiguous, notwithstanding the Legislature Counsel's written opinion to the contrary. JA 1207. Even though Senate Bill 551 simply maintained existing taxes at existing rates between one fiscal year to another, the District Court concluded that it "changed the computation base for the MBT by repealing the payroll tax rate computation." JA 1208. Similarly, the District Court concluded that Senate Bill 542 "was intended to generate public revenue." JA 1207. The

District Court concluded that those bills that maintained existing taxes and fees at existing rates from the prior fiscal year into future fiscal years "are bills that create, generate or increase public revenue," such that they violated the Supermajority Provision. JA 1210.

The District Court further enjoined the Executive Appellants from collecting and enforcing the two bills, mandating that any taxes and fees paid subject to the two bills are entitled to immediate refund. JA 1210. The Executive Appellants successfully moved to stay enforcement of the District Court judgment pending resolution of this appeal. JA 1236–1239; 1391–1394.

Finally, the District Court rejected Respondents' request to recover attorneys' fees as special damages (JA 1209) and dismissed "the individual Executive and Legislative Defendants, the Honorable Nicole Cannizzaro, the Honorable Kate Marshall, the Honorable Claire J. Clift, and the Honorable Steve Sisolak" from this case. JA 1211. Respondents have cross-appealed this aspect of the District Court's judgment. JA 1319–1322.

This case has been scheduled for oral argument before the Court on the afternoon of Monday, May 3, 2021, less than one month before the scheduled end of the 2021 legislative session.

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V. STATEMENT OF FACTS

A. The Supermajority Provision's History, Public Policy, and Purpose

This case centers on Article 4, Section 18(2) of the Nevada Constitution (the "Supermajority Provision"), which reads as follows:

> 2. Except as otherwise provided in subsection 3, an affirmative vote of not fewer than two-thirds of the members elected to each House is necessary to pass a bill or joint resolution which creates, generates, or increases any public revenue in any form, including but not limited to taxes, fees, assessments and rates, or changes in the computation bases for taxes, fees, assessments and rates.

NEV. CONST. art. 4, § 18(1).

Under significantly different circumstances, the Nevada Supreme Court had the opportunity to review the Supermajority Provision. There, the Nevada Supreme Court recognized that the supermajority provision "was intended to make it more difficult for the Legislature to pass new taxes" or to turn "to new sources of revenue."[1] *Guinn v. Legislature*, 119 Nev. 460, 471 (2003) (emphasis added); *see also* JA 138–45.

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[1] The Court previously considered the Supermajority Provision in the 2003 *Guinn v. Legislature* cases, specifically its relationship to constitutional provisions prioritizing public education where the executive and legislative branches were gridlocked as they related to funding almost immediately prior to the start of the school year. *Guinn v. Legislature*, 119 Nev. 277 (2003) (overturned as to "procedural" and "substantive" requirements analysis by *Nevadans for Nev. v. Beers*, 122 Nev. 930, 944 (2006)); *Guinn v. Legislature*, 119 Nev. 460 (2003).

The Supermajority Provision, like many of its ilk from the 1990s, arose from the following, infamous political promise:

Read my lips: no new taxes!

> Vice President George H.W. Bush, at his August 18, 1988, speech accepting the Republican nomination for President.

When President Bush broke this promise, it provoked backlash throughout the United States. In response, governments attempted amending constitutions to require supermajority votes for new taxes, including here in Nevada.

Former Governor (then-Assemblyman) Jim Gibbons spearheaded the effort to adopt the Supermajority Provision, modeling it on similar provisions from other states, including Oklahoma. The former Governor first tried to add a supermajority provision to the Nevada Constitution as an Assemblyman in the 1993 Legislature but failed. At that time, he conveyed that it "would not impair any existing revenues." *See AJR 21 Legislative History* (1993) at 747 (JA 126) (emphasis added).[2] As part of the bill explanation, the provision was limited to efforts "to impose or increase" certain taxes. *Id.* at JA 133.

Subsequently, the former Governor successfully led the effort to pass the Supermajority Provision by initiative in the 1994 election (when he first ran

[2] The Court considered Assemblyman Gibbons' testimony when previously interpreting the supermajority provision. *Guinn v. Legislature*, 119 Nev. 460, 465–467 (2003).

unsuccessfully for Governor) and the 1996 election (when he successfully ran for Congress). The initiative materials provided to Nevada voters show that the provision was intended for "raising" or "increasing taxes," particularly from "new sources of revenue." *See Nevada Ballot Questions 1994* at Question No. 11; *State of Nevada Ballot Questions 1996* at Question No. 11 (JA 138-145). No reference was made in the initiative materials to these types of bills, which do not change—but maintain—the existing taxes and fees at the existing rates from the prior fiscal year, being subject to the supermajority provision.

B. The Passage of the Two Bills at the 2019 Legislature, Upon the Advice of the Legislative Counsel Bureau

During the 2019 Legislature, legislative leaders requested and received a written legal opinion from the Legislative Counsel Bureau's Legal Division regarding the Supermajority Provision's applicability to these two types of bills. *See* May 8, 2019, Memorandum (JA 147–70). The lengthy memorandum addressed the legal question by 1) applying several rules of construction followed by Nevada courts, 2) examining extrinsic evidence of the purpose and intent of the Supermajority Provision, and 3) considering case law interpreting similar constitutional provisions from other states. *Id.*

In conclusion, the Legislative Counsel Bureau determined 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.

Id. at JA 170.

Additionally, the Legislative Counsel Bureau earlier provided a memorandum regarding the applicability of the Supermajority Provision to Senate Bill 201, which authorized hiring of a vendor to collect fees to pay for the vendor's implementation of a title loan database. *See* April 16, 2019, Memorandum (JA 376–81). There, the Legislative Counsel Bureau opined that the Supermajority Provision is applicable for "legislative action that directly brings into existence, produces or enlarges public revenue in the *first instance*." *Id.* at JA 380. These Executive Appellants are unaware of how Senate Bill 551 or Senate Bill 542 "directly brings into existence, produced, or enlarges public revenue in the first instance," given that both bills continue existing taxes and fees at existing rates from one fiscal year to the next. In any event, because the Legislature's interpretation is reasonable and consistent, it is entitled to deference. *Nev. Mining Ass'n v. Erdoes*, 117 Nev. 531, 540 (2001).

Further consideration of Senate Bill 551's committee and floor testimony highlight the failed efforts by these parties to avoid litigation. For instance, Respondents attempt to distort colloquy with the Legislative Counsel Bureau at committee by emphasizing the word "generate," ignoring "the assumption of the

lower rates occurring" and the "*maintain*[ing of] current rates" preceding it. *See* Senate Finance Committee Minutes (5/29/2019) (JA 493) (emphasis added). Because the "lower rates" were never effective as a matter of law, no new taxes were "brought into existence."

Further, at committee, Respondent Nevada Trucking Association, Inc.'s lobbyist stated that "Just because you can do something does not mean that you should do something." *See id.* In this context, Senator Cannizzaro said that "[c]onstitutional questions do not exist if they are moot." *Id.* at JA 495. In response, Respondent Senator Kieckhefer expressed concern over passing Senate Bill 551 without a two-thirds stamp by a two-thirds majority, such that it sets "the precedent, going forward, that the Legislature acknowledges that a two-thirds was not necessary." *Id.* at JA 496. In response to Senator Kieckhefer's position, Senator Cannizzaro testified to her belief that it was "an illusory Constitutional question . . . [that] is merely speculative." *Id.*

It is in this context, recognizing Senator Kieckhefer's concern, that Senator Cannizzaro proposed amendments to meet this concern "halfway" by adding a two-thirds stamp on Senate Bill 551, even where the Legislative Counsel Bureau had advised it was not required. *See* Senate Finance Committee Minutes (6/2/2019) at

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JA 368; Senate Daily Journal (6/3/2019) at JA 544-45.[3] When Respondents rejected this "halfway" compromise, the Senate passed Senate Bill 551 by majority vote, consistent with the Supermajority Provision as interpreted by Legislative Counsel.

VI. SUMMARY OF ARGUMENT

The Executive Appellants submit that each bill complies with the plain language of Nevada's Supermajority Provision because neither bill "creates, generates, or increases" "taxes, fees, assessments and rates." Instead, the Legislature passed two bills to maintain existing taxes and fees at existing rates into the next fiscal year. Each bill is plainly constitutional because neither "creates, generates, or increases" "taxes, fees, assessments and rates."

To the extent there is any ambiguity requiring interpretation, this Court should interpret the Supermajority Provision narrowly in conjunction with the intent that it applies only to new or increased taxes relative to the prior fiscal year. This is consistent with how other states, including Oklahoma and Oregon, interpret their equivalent supermajority provisions. The Legislature's interpretation under these circumstances, upon the advice of its counsel, is reasonable and entitled to deference from this Court as the most responsive branch to the People.

[3] The parties to this case disagreed on the Senate Floor as to the wisdom of passing Senate Bill 551. However, the "appropriateness" of the Senate's decision as a matter of policy is separate and distinct from interpreting the Supermajority Provision as adopted in 1996.

VII. ARGUMENT

A. 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).

In Nevada, the constitutionality of a statute is a question of law. *Cornella v. Justice Ct.*, 132 Nev. ___, 377 P.3d 97, 100 (2016) (internal quotation marks omitted). "Statutes are presumed to be valid, and the burden is on the challenging party to demonstrate that a statute is unconstitutional." *Id.* (internal quotation marks omitted). In interpreting an amendment to our Constitution, courts look to rules of statutory interpretation to determine the intent of both the drafters and the electorate that approved it. *Landreth v. Malik*, 127 Nev. 175, 180, 251 P.3d 163, 166 (2011); *Halverson v. Sec'y of State*, 124 Nev. 484, 488, 186 P.3d 893, 897 (2008). Nevada courts first examine the provision's language. *Landreth*, 127 Nev. at 180, 251 P.3d at 166. If plain, a Nevada court looks no further, but if not, "we look to the history, public policy, and reason for the provision." *Id.*

Moreover, Nevada courts construe statutes, if reasonably possible, so as to be in harmony with the constitution." *Cornella*, 377 P.3d at 100 (2016) (internal quotation marks omitted). Stated differently, Nevada courts "adhere to the precedent that every reasonable construction must be resorted to, in order to save a statute from

unconstitutionality." *State v. Castaneda*, 126 Nev. 478, 481, 245 P.3d 550, 552 (2010) (internal quotation marks omitted). As a result, this Court must not invalidate a statute on constitutional grounds unless the statute's invalidity appears "beyond a reasonable doubt." *Cauble v. Beemer*, 64 Nev. 77, 101 (1947). "[W]hen a statute is derived from a sister state, it is presumably adopted with the construction given it by the highest court of the sister state." *Clark v. Lubritz*, 113 Nev. 1089, 1096–97 n.6, 944 P.2d 861, 865 n.6 (1997) (citing *Craigo v. Circus-Circus Enterprises*, 106 Nev. 1, 3, 786 P.2d 22, 23 (1990)).

Here, neither statute violates the plain terms of the Supermajority Provision because neither "creates, generates, or increases" any public revenue from one fiscal year to the next. Instead, by distinct methods, the statutes maintain existing public revenue at the same level for taxpayers and Nevada state government between fiscal years. In short, the statutes comply with the Supermajority Provision.

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

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

B. The 2019 Bills Comply with the Plain Language of the Supermajority Provision

Respondents contend that Senate Bill 551 and Senate Bill 542 did not comply with the Supermajority Provision because each bill "creates, generates, or increases" public revenue. This ignores the plain and ordinary meaning of "creates, generates, or increases."

"*Create*" means to "bring into existence" or to "produce." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, 272 (10th ed. 1995) (emphasis added). Similarly, "*generate*" also means to "bring into existence." *Id.* at 485 (emphasis added). Here, the bills at issue continue existing taxes and fees at existing rates into future fiscal years. The Modified Business Tax continues at the same rate as the prior fiscal year into future fiscal years. Neither bill "brings into existence" the challenged taxes or fees; they *already existed* in prior fiscal years. Instead, the terms "create" and "generate" apply to new taxes brought into existence by legislative action. The District Court erred in its reading of the Supermajority Provision when concluding that the two 2019 bill "generate" public revenue under such circumstances. JA 1207.

The Executive Appellants assume that any argument Respondents have on the plain language of the supermajority provision necessarily relies on the term "*increase*," which means "to become progressively greater" or to "make greater." *Id.* at 589 (emphasis added). Nothing within the Supermajority Provision defines how to measure an "increase" in "public revenue." Simple revenue increases do not require supermajority votes, as demonstrated by prior Economic Forum projections. *See* JA 206–222. For instance, the 2017 Economic Forum forecast shows a 7.6% increase in the total MBT before tax credits between FY 2016 and FY 2017. *See* JA 206–213. Continuing existing taxes and fees at existing rates from one fiscal year to the next does not "make greater" "public revenue." At worst for the Executive Appellants, the supermajority provision is ambiguous for failure to identify the appropriate baseline from which to measure an "increase."

With consideration of what the supermajority provision's terms mean, Respondents' argument that there is no distinction between new versus existing public revenue within the Supermajority Provision is simply wrong. Below are responses to specific arguments made against the two Senate Bills.

1. Senate Bill 551 Complies with the Plain Language of the Nevada Constitution

In relevant part, Senate Bill 551 repeals NRS 360.203. A true and correct copy of Senate Bill 551 as enrolled is located at JA 172–204. When passed by the 2015 Legislature, there was no specific contemporaneous commentary at committee or

during floor session on what was NRS 360.203.[4] Instead, it was part of the overall 2015 Legislature's efforts to provide greater fiscal stability for Nevada state government, specifically including public education.

As passed, NRS 360.203 required Taxation to calculate combined Commerce Tax, Modified Business Tax, and Bank Branch Excise Tax revenues. NRS 360.203(1). The repealed statute next required an apples-to-apples comparison between those revenues and what the Economic Forum had previously estimated for the same fiscal year. NRS 360.203(2). If the Economic Forum overestimated revenues compared to what was collected, nothing happened under the repealed statute. Stated differently, had the Economic Forum overestimated revenues for Fiscal Year 2018, the repealed statute would be inapplicable by its terms.[5] If the Economic Forum underestimated revenues relative to collections by more than 4%, the repealed statute provided a mechanism for the future recalculation of MBT tax rates, such that the underestimated revenue would result in a potential future decrease for the next fiscal year. NRS 360.203(2).

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

[5] Respondents have not argued that the Economic Forum's tax revenue projections are subject to the Supermajority Provision.

Below is a chart comparing actual versus projected revenue for the three taxes:[6]

	FY 2017 Economic Forum Projection	FY 2017 Actual	FY 2018 Economic Forum Projection	FY 2018 Actual
Commerce Tax	$203,411,000	$197,827,208	$186,046,000	$201,926,513
MBT (After Tax Credits)	$526,971,540	$575,232,919	$525,615,000	$581,843,729
Bank Branch Excise Tax	$2,772,000	$2,785,199	$2,789,000	$2,745,343
TOTAL	$733,154,540	$775,845,326	$714,450,000	$786,515,585

The Economic Forum presumed a downturn in revenue from these three taxes between FY 2017 and FY 2018. Instead, the Modified Business Tax significantly

[6] The forecast information was derived from *General Fund Revenues—Economic Forum's Forecast for FY 2017, FY 2018, and FY 2019 Approved at the May 1, 2017, Meeting, Adjusted for Measures Approved by the 2017 Legislature (79th Session)*, available at: https://www.leg.state.nv.us/Division/fiscal/Economic%20Forum/EF%20May%202017%20Forecast%20with%20Legislative%20Adjustments%20(updated%2011-9-2017).pdf and included as JA 206–13.

The actual information was derived from *General Fund Revenues–Economic Forum May 1, 2019, Forecast, Actual: FY 2016 through FY 2018 and Forecast: FY 2019 through FY 2021, Economic Forum's Forecast for FY 2019, FY 2020, and FY 2021 Approved at the May 1, 2019, Meeting (80th Session)*, available at: https://www.leg.state.nv.us/Division/fiscal/Economic%20Forum/EF_MAY_2019_FORECAST_5-1-2019.pdf and included as JA 215–22.

exceeded projections in both fiscal years. Had the projections been more accurate, NRS 360.203 would have remained dormant.

Senate Bill 551 repeals NRS 360.203. *See* JA 204. As argued by Respondents, repeal of NRS 360.203 required a supermajority vote because it eliminates a potential future decrease in the MBT tax rates. *See* First Amended Complaint (7/30/2019) at ¶ 43 (JA 24). In short, Respondents' constitutional claim relies on the Economic Forum's conservative underestimate of combined tax revenues from the last biennium.

In this context, Respondents' claim does not make sense. Repealed NRS 360.203(2)'s potential tax rate reduction would not have been in effect until July 1, 2019, at the earliest. NRS 360.203(3). Accordingly, as set forth by the Legislature's counsel in its May 8, 2019, memorandum, Senate Bill 551 maintains the existing tax rate and revenue structure because any potential tax rate reduction was never effective as a matter of statute. JA 156. Respondents' interpretation instead presumes an "existing tax structure" of reduced tax rates that had not ever yet existed. As a practical matter, Respondents argue that the "existing tax structure" should be deemed to include non-existent taxes.

This ignores the Nevada Constitution, which only allows a Legislature to commit public funds for each fiscal year it is in office, versus binding future Legislatures. *See* NEV. CONST. art. 9, § 2–3; *Employers Ins. Co. v. State Bd. of*

Exam'rs., 117 Nev. 249, 254–58, 21 P.3d 628, 631–33 (2001). It is unlawful for any state officer or agency to attempt to bind the state government to any fiscal obligation exceeding the specific amount provided by law for each fiscal year by the Legislature. NRS 353.260(2).

Under these circumstances, Senate Bill 551 does not change existing tax rates for the Business Respondents. Specifically, Section 37 of Senate Bill 551 makes it clear that the purpose and intent was "to maintain and continue the existing legally operative rates of the taxes." JA 203. Great Basin Engineering Contractors, LLC, Goodfellow Corporation, Kimmie Candy Company, and Keystone Corp. will pay the same MBT as the last four fiscal years premised on the same employee wages. Because this does not create, generate, or increase any public revenue in any form relative to the prior fiscal year, the Legislature's passage of Senate Bill 551 complies with the plain language of the Nevada Constitution.

The Court should enter judgment in the Executive Appellants' favor.

2. Senate Bill 542 Complies with the Plain Language of the Nevada Constitution

Senate Bill 542 continues the existing technology fee from June 30, 2020, until June 30, 2022. A true and correct copy of Senate Bill 542 as enrolled is attached hereto as JA 224. It does not bring the existing technology fee "into existence;" it already existed. It does not "make greater" the existing technology fee from one fiscal year to the next. By the plain language of the Supermajority Provision, Senate

Bill 542 does not "create, generate, or increase" public revenue from one fiscal year to the next.

Businesses such as the Business Respondents who have the same number of DMV transactions will owe the same amount of DMV technology fee as the last biennium, as well as the first year of this biennium (unaffected by this statute). At most, Senate Bill 542 eliminates a proposed, future end to the DMV technology fee almost one year from today. The DMV fee does not create, generate, or increase revenue from one fiscal year to the next. Instead, it maintains the existing rate into Fiscal Year 2020–2021.

The Court should enter judgment in favor of the Executive Appellants.

C. The Legislature's Counseled, Narrow Interpretation of the Supermajority Provision is Reasonable and Entitled to Deference

The parties to this case disagree as to the most reasonable interpretation of the Supermajority Provision. This Court ultimately gets to decide which interpretation is most reasonable as a matter of first impression. The Executive Appellants submit that the Legislature's interpretation, as provided by its counsel, is reasonable and entitled to deference by this Court for the following reasons.

1. The History, Public Policy and Reason Behind the Supermajority Provision Supports the Executive Appellants' Narrow Interpretation

As set forth above, the Supermajority Provision arose from anti-tax fervor associated with President Bush's broken promise of "no new taxes." Former

Governor Gibbons led the Nevada charge for the Supermajority Provision, emphasizing its effect on new or additional taxes, noting it did not apply to existing taxes. *See* JA 126, 133. The initiative information provided to Nevada voters similarly made it clear that they intended the provision for "raising" or "increasing taxes," particularly from "new sources of revenue." JA 138–45. The clear purpose and public policy behind the supermajority provision was to prevent "new taxes."

Prior implementation of Nevada Economic Forum projections is consistent with the clear intent for the Supermajority Provision to prevent "new taxes" rather than increased revenues from existing provisions. Specifically, prior Economic Forum projections relied upon by the Legislature for budgeting show significant increases in revenue from existing taxes, including the Commerce Tax and the Branch Bank Excise Tax, presumably based on Nevada's growing economy. *See* JA 206–22. These projections have never required supermajority approval because none creates a "new tax." To the extent this Court believes it needs to look beyond the plain language of the Supermajority Provision, it should interpret the provision relative to fiscal years, such that it can be easily determined whether a tax "creates, generates, or increases" revenue.

Further, there is no "slippery slope" and the narrow interpretation does not render the provision meaningless and inoperative. Instead, it narrowly interprets the Constitution as a limitation upon any legislative enactment that "creates, generates,

or increases" tax rates or revenue from the baseline of one fiscal year to the next. If the Supermajority Provision had been intended to apply to enactments that maintain tax rates or revenue through the repeal of yet-inoperative provisions of law, it would have included a limitation upon the Legislature's ability to repeal *prospective* and still inoperative changes to tax rates, deductions, or exemptions. But no such language appears anywhere in the text of the Nevada Constitution.

The Supermajority Provision, as intended, applies to existing rates and revenue streams, not projected rates and revenue streams. It would, for example, require supermajority support for creating a new tax that did not previously exist, such as a wealth tax. The Supermajority Provision, as intended, would require supermajority support for increasing rates on existing taxes, such as the MBT or the Commerce Tax. However, the Executive Appellants' interpretation, as intended by the initiative, would not apply to continuing existing taxes at existing rates from one fiscal year to the next. This interpretation is reasonable, based on the information before this court.

2. Other States Interpret Similar Supermajority Provisions Narrowly for No New Taxes

Nevada is not alone when attempting to interpret similar supermajority provisions. Other states have consistently interpreted these provisions narrowly as a limited exception to majoritarian rule. Respondents have not identified any state

interpreting a supermajority provision in a contrary fashion for continuing existing taxes at existing rates into future fiscal years.

For instance, in South Dakota, the supermajority provision applies to the passage of certain appropriations. S.D. CONST. art. 12, § 2. However, the South Dakota Supreme Court rejected challenges arguing that reappropriations require a supermajority vote, noting that the constitutional provision only governs passage of the appropriation, not repeal or amendment of an existing appropriation. *Apa v. Butler*, 638 N.W. 2d 57, 69–70 (S.D. 2001). Nevada's supermajority provision similarly applies only to passage of a bill, with no reference to repeal or amendment of a previously approved revenue generator. NEV. CONST. art. 4, § 18(2).

Further, as addressed earlier, "increase" is Respondents' sole possible plain language argument for their reading of the supermajority provision applying to the 2019 bills. In this context, there is no meaningful distinction between "raising revenue" and "increase public revenue." Seeing how other states interpret "raising revenue" may be instructive for a court when attempting to analyze Nevada's similar supermajority provision. Neither Oklahoma nor Oregon limits the term "raising," similar to how Nevada does not limit the term "increase." There is no conflict amongst these supermajority provisions.

Under such circumstances, Oklahoma's analysis that deleting the "expiration date of [a] specified tax rate levy" was not subject to its supermajority provision is

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

Oklahoma was not alone in its interpretation either. Similarly, Oregon's conclusion that eliminating a tax exemption for out-of-state electric utility facilities was not subject to its constitutional supermajority provision is persuasive authority supporting narrow interpretation of Nevada's supermajority provision. *City of Seattle v. Or. Dep't of Revenue*, 357 P.3d 979, 980 (Or. 2015). While Respondents may argue that Oregon's precedent is premised on a narrower supermajority

provision, Oregon's supermajority provision simply states that "Three-fifths of all members elected to each House shall be necessary to pass bills for raising revenue." OR. CONST. art. 4, § 25(2). For purposes of raising revenue, there is no textual difference between Nevada and Oregon's supermajority provision. This further supports the district court's order and justifies affirmance by this Court.

Likewise, Louisiana courts have not applied the supermajority provision to suspension of tax exemptions. *See La. Chem. Ass'n v. State ex rel. La. Dep't of Revenue*, 217 So. 3d 455, 462–63 (La. Ct. App. 2017). This is akin to the postponement of a sunset provision withing Senate Bill 542. This warrants judgment in the Executive Appellants' favor.

None of these other states would apply supermajority provisions onto the continuation of existing taxes and fees through the elimination of a potential future recalculation clause or the elimination of a not-yet applicable sunset provision. This Court should similarly interpret Nevada's provision as being inapplicable to the 2019 statutes. Respondents' failure to find contrary persuasive authority supporting its interpretation of the Supermajority Provision highlights the reasonableness of the Legislature's interpretation.

This warrants judgment in favor of the Executive Appellants.

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3. The Legislature is Entitled to Deference as the Branch Most Accountable to the People

Nevada courts construe statutes, if reasonably possible, so as to be in harmony with the constitution." *Cornella v. Justice Ct.*, 132 Nev. ___, 377 P.3d 97, 100 (2016) (internal quotation marks omitted). Stated differently, Nevada courts "adhere to the precedent that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *State v. Castaneda*, 126 Nev. 478, 481, 245 P.3d 550, 552 (2010) (internal quotation marks omitted). The Nevada Constitution "must be strictly construed in favor of the power of the legislature to enact the legislation under it." *In re Platz*, 60 Nev. 296, 308 (1940). This is particularly true where the Legislature acts upon the opinion of its Legislative Counsel. *Nev. Mining Ass'n v. Erdoes*, 117 Nev. 531, 540 (2001).

The District Court did not engage in this analysis, instead concluding that legislative "deference does not exist to violate the clear meaning of the Constitution of the State of Nevada." JA 1208. As set forth above, the Supermajority Provision is capable of multiple reasonable interpretations.

Nevada courts do not provide deference to the Legislature for just any reason. It does so because of the significant power vested in the Legislature under the Nevada Constitution, consistent with constitutional requirements for republican forms of government and majoritarian rule. Specifically, the United States Constitution guarantees that each State shall have "a Republican Form of

Government." U.S. CONST. art. IV, § 4. Nevada generally requires that "a majority of all of the members elected to each house is necessary to pass every bill or joint resolution." NEV. CONST. art. 4, § 18(1). Prior to the 1990s, all bills required majority support.

As noted by James Madison in the Federalist Papers:

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

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

Here, the People's elected representatives in the State Senate disagree on how to interpret Nevada's Constitution. Where both interpretations are reasonable and the majority Legislature relied upon the specific advice of its counsel, this Court should defer to the Legislature's interpretation. Even if it would not necessarily be this Court's preferred interpretation, deferring to the Legislature will allow Nevada's true sovereign, the People, to ultimately decide the wisdom of the 2019 Legislature's decisions.

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VIII. CONCLUSION

This Court should reverse the District Court's judgment and grant the Executive Appellants judgment in their favor because the passage of Senate Bill 542 and Senate Bill 551 comply with Article 4, Section 18(2) of the Nevada Constitution.

RESPECTFULLY SUBMITTED this 22nd day of March, 2021.

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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 10 in 14 pitch Times New Roman.

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 proportionately spaced, has a typeface of 14 points or more, and contains 5,904 words.

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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.

RESPECTFULLY SUBMITTED this 22nd day of March, 2021.

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CERTIFICATE OF SERVICE

I certify that I am an employee of the Office of the Attorney General and that on this 22nd day of March, 2021, I served a copy of the foregoing EXECUTIVE APPELLANTS' OPENING BRIEF, by electronic filing to:

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