IN THE SUPREME COURT OF THE STATE OF NEVADA

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Elizabeth A. Brown
Clerk of Supreme Court

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,

vs.

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,

Case No. 81924

INC., a Nevada nonprofit corporation; and
RETAIL ASSOCIATION OF NEVADA,
a Nevada nonprofit corporation,

Respondents/Cross-Appellants.
_____/

RESPONDENTS/CROSS-APPELLANTS' RESPONSE TO JOINT REPLY TO RESPONSE TO ORDER TO SHOW CAUSE

Respondents/Cross-Appellants, by and through their counsel, ALLISON MacKENZIE, LTD., pursuant to the Orders entered herein on February 19, 2021 and March 4, 2021, hereby respond to Appellants/Cross-Respondents' Joint Reply to Respondents/Cross-Appellants' Response to Order to Show Cause. In accordance with the aforementioned Orders, this Response shall serve to brief the Court more fully on the merits of the Cross-Appeal and is Respondents/Cross-Appellants' Opening Brief.

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certified that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

Great Basin Engineering Contractors, LLC

Goodfellow Corporation

Kimmie Candy Company

Keystone Corp.

National Federation of Independent Business

Nevada Franchised Auto Dealers Association

Nevada Trucking Association, Inc.

Retail Association of Nevada

1. All parent corporations and publicly-held companies owning 10 percent or more of any of Respondents/Cross-Appellants' stock:

None of the entities have a parent corporation, nor is there a publicly held company that owns 10% or more of their stock.

2. Names of all law firms whose attorneys have appeared for Respondents/Cross-Appellants in this case, including proceedings in the district court, or are expected to appear in this Court:

Allison MacKenzie, Ltd.

3. If any litigant is using a pseudonym, the litigant's true name:

Not applicable.

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DATED this 22nd day of March, 2021.

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I.

JURISDICTIONAL STATEMENT

This is a cross-appeal from certain portions of the Order after Hearing on September 21, 2020, and Final Judgment (the "Final Order") entered by the district court on October 7, 2020. Joint Appendix ("JA") Vol. VI at 1178-91. The Final Order is an appealable order pursuant to NRAP 3A(b)(1). Notice of entry of the Final Order was filed and served on October 8, 2020. JA Vol. VI at 1192-1213. Appellants/Cross-Respondents filed their Notices of Appeal on October 9, 2020 and November 3, 2020. JA Vol. VI at 1214-21; JA Vol. VII at 1328-81. Notice of the cross-appeal was timely filed and served pursuant to NRAP 3(a) and NRAP 4(a) on October 23, 2020. JA Vol. VI at 1319-22.

II.

ROUTING STATEMENT

This cross-appeal is presumptively retained by the Supreme Court under NRAP 17(a)(11) and (12) where the principal issues on appeal include questions of first impression and/or questions of statewide public importance relating to whether the Legislature of the State of Nevada, individual legislators and legislative officers, State executive officers, and State executive agencies can be made to pay attorneys' fees incurred by other individual legislators whose legislative votes were nullified and taxpayers and fee payers whose property was taken in violation of the Nevada

and United States Constitutions in order to pass and enact legislation which the district court has ruled to be unconstitutional.

III.

STATEMENT OF ISSUES IN CROSS-APPEAL

1. The district court erred in dismissing from this matter Cross-Respondents, the Honorable Nicole Cannizzaro, Claire J. Clift, Governor Steve Sisolak, and Lieutenant Governor Kate Marshall, where these individuals do not qualify for the protections of either legislative immunity or discretionary function immunity and where dismissal of these individuals as Defendants denies the Plaintiffs in this action a remedy for the actions taken to nullify legitimate legislative votes through circumvention of clear constitutional mandates.

2. The district court erred in denying Respondents/Cross-Appellants' claims for attorneys' fees as damages where the individuals named as Defendants herein acted in bad faith to circumvent the supermajority voting requirement set forth in Article 4, Section 18(2) of the Nevada Constitution.

IV.

STATEMENT OF THE CASE

This a cross-appeal from the Order after Hearing on September 21, 2020, and Final Judgment (the "Final Order") entered by the district court on October 7, 2020. JA Vol. VI at 1178-91.

Respondents/Cross-Appellants, Plaintiffs below, are (1) a group of Republican State Senators who sued in their official capacities and as individual fee and taxpayers ("Plaintiff Senators"); and (2) various business interests, including individual business organizations who conduct business in Nevada and state and federal business and trade associations representing a conglomerations of Nevada businesses impacted by the legislation at issue in this matter ("Plaintiff Businesses"). JA Vol. I at 16-20.

Plaintiffs filed a First Amended Complaint in this matter on July 30, 2019 and asserted constitutional claims arising from the manner of passage and approval of Senate Bill 542 ("SB 542") and Senate Bill 551 ("SB 551") during the 80th Session of the Nevada Legislature in 2019. JA Vol. I at 15-31. Plaintiffs named state officers of the legislative branch and state officers and agencies of the executive branch as Defendants. JA Vol. I at 20-21. The state officers were named based upon their statutory and constitutional duties and functions in approving SB 542 and SB 551. JA Vol. I at 20-21. The state agencies were named based on their roles in enforcing

the pertinent provisions of SB 542 and SB 551. JA Vol. I at 21. The Legislature of the State of Nevada (the "Legislature") was not named as a party and there are no allegations in the First Amended Complaint against the Legislature. The Legislature intervened as a Defendant-Intervenor and voluntarily brought itself into Plaintiffs' action. JA Vol. II at 382-417.

The Executive Branch Defendants were (1) the Honorable Kate Marshall, in her official capacity as Lieutenant Governor of the State of Nevada and as President of the Senate; (2) the Honorable Steve Sisolak, in his official capacity as Governor of the State of Nevada; (3) the Nevada Department of Taxation; and (4) the Nevada Department of Motor Vehicles (collectively the "Executive Defendants"). JA Vol. I at 20-21.

The Legislative Branch Defendants were (1) the Honorable Nicole Cannizzaro, in her official capacity as Senate Majority Leader and (2) Claire J. Clift, in her official capacity as the Secretary of the Senate (collectively the "Legislative Defendants"). JA Vol. I at 20-21. The Executive Defendants, the Legislative Defendants, and Defendant-Intervenor the Legislature are sometimes referred to collectively herein as Defendants.

The First Amended Complaint contained four separate and distinct claims for relief: (1) violation of Plaintiff Senators' constitutional rights based upon the dilution and nullification of the Plaintiff Senators' constitutional right to cast an

effective legislative vote; (2) violation of the Plaintiff taxpayers' and fee payers' constitutional rights based upon the deprivation of property without due process as a result of collection of unconstitutional taxes and fees; (3) declaratory relief related to the constitutionality of SB 542 and SB 551; and (4) injunctive relief regarding enforcement of SB 542 and SB 551. JA Vol. I at 15-31. The First Amended Complaint challenged the constitutionality of SB 542 and SB 551 as well as the constitutionality of the manner in which SB 542 and SB 551 were passed into law. JA Vo. I at 21, ¶ 23.

On September 16, 2019, the Legislative Defendants filed an Answer to Plaintiffs' First Amended Complaint and Executive Defendants filed a Motion to Dismiss the First Amended Complaint. JA Vol. I at 101-224; JA Vol. II at 445-456. On September 30, 2019, Plaintiffs filed an Opposition to Motion to Dismiss or, in the Alternative, a Motion for Summary Judgment. JA Vol. II at 225-381. The briefing of these two motions was stayed while a separate Motion to Disqualify the Legislative Defendants' counsel was resolved. On August 19, 2020, the Legislative Defendants and the Legislature filed an Opposition to Plaintiffs' Motion for Summary Judgment and a Counter-Motion for Summary Judgment. JA Vol. III at 603-670. On August 21, 2020, the Executive Defendants filed a Joinder to the Counter-Motion for Summary Judgment. JA Vol. III at 671-674. On September 4, 2020, Plaintiffs filed a Reply in Support of their Motion for Summary Judgment and

an Opposition to the Counter-Motion for Summary Judgment. JA Vol. IV at 675-724. On September 15, 2020, the Legislative Defendants and the Legislature filed a Reply in Support their Counter-Motion for Summary Judgment. JA Vol. V at 1076-1100.

On September 21, 2020, the district court heard oral argument from the parties on the pending dispositive motions – Plaintiffs' Motion for Summary Judgment, Executive Defendants' Motion to Dismiss; and Legislative Defendants' and the Legislature's Counter-Motion for Summary Judgment in which the Executive Defendants joined. JA Vol. VI at 1101-77.

On October 7, 2020, the district court entered the Final Order in which it granted summary judgment in favor of Plaintiffs on their Second, Third, and Fourth Claims for Relief – invalidating SB 542 and SB 551 on constitutional grounds, enjoining the Department of Taxation and the Department of Motor Vehicles from collecting the taxes and fees imposed thereby, and ordering those agencies to refund all taxes and fees already collected pursuant to the unconstitutional bills. JA Vol. VI at 1188-89. The district court granted summary judgment against Plaintiffs, however, on their First Claim for Relief and in favor of all individual defendants – Senator Cannizzaro, Secretary Clift, Lieutenant Governor Marshall, and Governor Sisolak (the "Individual Defendants"), by dismissing the Individual Defendants from Plaintiffs' action. JA Vol. VI at 1189. The district court also granted summary

judgment against Plaintiffs on their claims for attorneys' fees as damages against all Defendants. JA Vol. VI at 1188.

The Legislature, the Department of Taxation, and the Department of Motor Vehicles have appealed from the district court's (1) pronouncement that SB 551 and SB 542 were passed unconstitutionally, (2) injunction against collecting the taxes and fees imposed thereby, and (3) order that all fees and taxes already collected pursuant thereto be refunded. JA Vol. VI at 1214-21; JA Vol. VII at 1328-31. The Individual Defendants did not appeal from the Final Order.

Plaintiffs have cross-appealed from the district court's (1) dismissal of the Individual Defendants and (2) the denial of Plaintiffs' claim for attorneys' fees as damages. JA Vol. VI at 1319-22.

V.

STATEMENT OF FACTS

A. Statutory and constitutional duties of Individual Defendants.

The Majority Leader of the Senate determines which bills will be heard by the Senate pursuant to Senate Standing Rule 6. The official duties of the President of the Senate during the 80th Session of the Nevada Legislature included signing bills that had been passed by the Senate in conformity with the Nevada Constitution. Article 4, Section 18(1) of the Nevada Constitution; NRS 218D.640; and Senate Standing Rule 1. The official responsibilities of the Secretary of the Senate during

the 80th Session of the Nevada Legislature included signing bills that had been passed by the Senate in conformity with the Nevada Constitution. Article 4, Section 18(1) of the Nevada Constitution; NRS 218D.630; NRS 218D.640; and Senate Standing Rule 1.

Legislative Counsel then delivers enrolled bills to the Governor. NRS 218D.660. The official responsibilities of the Governor include approving and signing bills passed by the Legislature in conformity with the Nevada Constitution and to see the laws of the State of Nevada are faithfully executed. Article 4, Section 35; Article 5, Section 7 of the Nevada Constitution; NRS 218D.675.

B. Adoption of constitutional two-thirds supermajority requirement.

The voters of Nevada approved an amendment to the Nevada Constitution via ballot initiative during the 1994 and 1996 general elections. JA Vol. II at 249-53. The amendment added to the Constitution what is now Article 4, Section 18(2), which provides, pertinently:

> …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.

JA Vol. II at 250, 253. The 1994 ballot initiative included arguments for passage of the proposed amendment, which provided "[t]his [measure] could limit increases in taxes, fees, assessments and assessment rates." JA Vol. II at 249. In 1994, the

measure passed with 283,889 "yes" votes to 79,520 "no" votes. JA Vol. II at 249. In 1996, the arguments for and against the ballot initiative were the same as in 1994 and the measure passed again with 301,382 "yes" votes to 125,969 "no" votes. JA Vol. II at 252.

A similar constitutional amendment had previously been proposed as Assembly Joint Resolution (AJR) 21 by Assemblyman Jim Gibbons during the 67th Legislative Session in 1993. JA Vol. II at 255-56. Assemblyman Gibbons offered testimony in support of AJR 21, but the measure was not passed by the Legislature. JA Vol. I at 119-36.

C. Background and history of SB 551.

A portion of SB 483, passed during the 78th Legislative Session in 2015, amended NRS 360.203 to provide a mechanism by which the Department of Taxation was to compute the combined revenue from the taxes imposed by the Payroll Tax under NRS 363A and the Modified Business Tax (MBT) under NRS 363B. JA Vol. II at 258-65. Thereafter, NRS 360.203(2) provided:

> The Department shall determine the rate at which the taxes imposed pursuant to NRS 363A.130 and 363B.110, in combination with the revenue from the commerce tax imposed by chapter 363C of NRS, would have generated a combined revenue of 4 percent more than the amount anticipated. In making the determination required by this subsection, the Department shall reduce the rate of the taxes imposed pursuant to NRS 363A.130 and 363B.110 in the proportion that the actual amount collected from each tax for the preceding fiscal years bears to the total

> combined amount collected from both taxes for the preceding year.

JA Vol. II at 285-86; JA Vol. V at 1099. Thus, NRS 360.203(2), as amended by SB 483, required the Department of Taxation to reduce the rate of certain taxes imposed pursuant to provisions of NRS 363A.130 and NRS 363B.110. Passage of SB 483 was subject and passed pursuant to the required two-thirds constitutional majority mandated by Article 4, Section 18(2) of the Nevada Constitution.

SB 551 was introduced by Senator Cannizzaro during the 2019 Legislative Session. JA Vol. IV at 739-71. Section 39 of SB 551 repealed NRS 360.203 in its entirety. JA Vol. IV at 771. Section 37 of SB 551 indicated the existing MBT and Payroll Tax rates would be maintained without regard for the computation bases previously included in NRS 360.203. JA Vol. IV at 770-71. Sections 2 and 3 of SB 551 eliminated the rate adjustment provisions contained in NRS 363A.130 and NRS 363B.110, respectively. JA Vol. IV at 741-42, 744-45.

In a June 2, 2019 Senate Finance Committee hearing on SB 551, Senator Cannizzaro submitted Proposed Amendment No. 6101 and stated "[t]his bill, although it is not reflected in Proposed Amendment No. 6101, will be stamped with a two-thirds majority requirement." JA Vol. IV at 803-37, 841. On the same date, the Senate Finance Committee circulated Amendment No. 1111, which provided that adoption "of this amendment will ADD a 2/3 majority vote requirement for final passage of S.B. 551 (§§ 2, 3, 37, 39)." JA Vol. IV at 845-74.

On June 3, 2019, members of the Senate were provided Amendment No. 1120 to SB 551, which was proposed by Senator Cannizzaro. JA Vol. IV at 876-903. Senator Cannizzaro indicated to the Senate that Amendment No. 1120 had the two-thirds majority stamp on it for Sections 2, 3, 37, and 39 of SB 551. JA Vol. IV at 876; JA Vol. V at 988. After discussion on June 3, 2019, the Senate voted on SB 551 as amended by Amendment No. 1120. The vote was 13 in favor and 8 opposed. JA Vol. II at 370; JA Vol. V at 994. Lieutenant Governor Marshall, in her capacity as Senate President, declared SB 551 lost for failure to attain the affirmative vote of two-thirds of the members of the Senate. JA Vol. V at 994. Senator Cannizzaro then called a recess. JA Vol. V at 994.

Fifteen minutes later, the Senate re-convened and members of the Senate were given Amendment No. 1121 to SB 551, which was prepared at the request of Senator Cannizzaro. JA Vol. IV at 907-24; JA Vol. V at 925-50, 994. Senator Cannizzaro indicated the two-thirds majority requirement would not be applied to SB 551 despite Sections 2, 3, 37, and 39 remaining unchanged by this final amendment. JA Vol. V at 1047. After comment, another vote was taken with the same result – 13 in favor and 8 opposed. JA Vol. II at 370; JA Vol. V at 1050. Lieutenant Governor Marshall, however, declared the bill passed by constitutional majority and Senate Secretary Clift confirmed the bill's passage. JA Vol. V at 1050. Governor Sisolak

signed SB 551 into law on June 12, 2019 and Sections 2, 3, 37, and 39 of SB 551 became effective.

D. Background and history of SB 542.

SB 502 of the 78th Legislative Session in 2015 amended NRS 481.064 to provide that the "Department [of Motor Vehicles] shall add a nonrefundable technology fee of $1 to the existing fee for any transaction performed by the Department for which the fee is charged." JA Vol. II at 372-74. The fee imposed by SB 502 was to expire, by the bill's express terms, on June 30, 2020. JA Vol. II at 374. SB 502 was subject to and passed pursuant to the constitutional two-thirds majority requirement.

SB 542 of the 80th Legislative Session in 2019 extended the expiration of the technology fee from June 30, 2020 to June 30, 2022. JA Vol. IV at 730. The two-thirds majority requirement was not imposed on SB 542 and it was declared passed by simple majority, with 13 Senators voting for the measure and 8 Senators voting against. Governor Sisolak signed SB 542 into law on June 5, 2019 and it became effective. Plaintiffs initiated this action on July 19, 2019. JA Vol. I at 1-14.

VI.

SUMMARY OF ARGUMENT

This Court has jurisdiction of this cross-appeal under NRAP 3A where Plaintiffs seek to alter the rights of various parties under the Final Order,

notwithstanding they prevailed on the substantive issues of the constitutional challenge to SB 542 and SB 551.

The Individual Defendants should not have been dismissed because they are not entitled either to legislative immunity or discretionary-function immunity. They are not entitled to legislative immunity because the act of violating the Nevada Constitution is not within the sphere of legitimate legislative activity. They are not entitled to discretionary-function immunity because their actions violated the Nevada Constitution and were not based on any policy considerations for which Nevada's discretionary-function statute was narrowly designed to protect.

Plaintiffs are entitled to recover attorneys' fees incident to declaratory and injunctive relief entered in their favor because Defendants' actions complained of herein were taken in bad faith and the district court erred in determining it had no other basis to award attorneys' fees to Plaintiffs.

VII.

STANDARD OF REVIEW

A. Standard of review for district court decision denying attorneys' fees.

In *Pardee Homes of Nevada v. Wolfram*, 135 Nev. 173, 176, 444 P.3d 423, 425–26 (2019) the Court stated: "Generally, we review decisions awarding or denying attorney fees for a manifest abuse of discretion. But when the attorney fees matter implicates questions of law, the proper review is de novo." *Thomas v. City*

of N. Las Vegas, 122 Nev. 82, 90, 127 P.3d 1057, 1063 (2006) (internal citations omitted). Because the issue of attorney fees as special damages involves a question of law, we review this issue de novo. *Id.*"

B. Standard of review for dismissal of Individual Defendants.

Questions of standing and jurisdiction are questions of law, which are reviewed de novo. *Chandra v. Schulte*, 135 Nev. 499, 500-01, 454 P.3d 740, 742-43 (2019). All conclusions of law, including interpretation and construction of statutes, are also reviewed de novo. *Id.* Where statutes are clear and unambiguous, this Court will give effect to the ordinary and plain meaning of the statutory language. *Id.* Where a statute is ambiguous, this Court will construe the statute by looking at legislative intent and construes the statute consistent with public policy. *Id.*

C. Standard for reviewing entry of summary judgment.

In reviewing entry of summary judgment against Plaintiffs on their first claim for relief and on their claims for attorneys' fees, this Court conducts a de novo review without deference to the findings of the district court. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is appropriate only when the pleadings and record "demonstrate that no genuine issue as to any material fact remains and that the moving party is entitled to a judgment as a matter of law."

Id. (internal quotations omitted). The "evidence, and any reasonable inferences drawn from it, must be viewed in a light most favorable to" Plaintiffs. *Id.*

VII.

ARGUMENT

A. This Court has jurisdiction over the cross-appeal.

In their Reply to Plaintiff's Response to this Court's December 7, 2020 Order to Show Cause, the Individual Defendants do not address the Court's question of whether Plaintiff's are aggrieved by the Final Order, pursuant to *Ford v. Showboat Operating Co.*, 110 Nev. 752, 877 P.2d 546 (1994) in which this Court stated "[a] party who prevails in the district court and who does not wish to alter any rights of the parties arising from the judgment is not aggrieved by the judgment." 110 Nev. at 756, 877 P.2d at 549.

Rather than address the question of whether Plaintiffs are aggrieved by the Final Order, the Defendants simply assert Plaintiffs lack jurisdictional standing on appeal because the Individual Defendants are immune from suit under various theories and then Defendants argued the merits of Plaintiffs' cross appeal. Joint Reply to Response to Order to Show Cause, generally, pp. 7-28. To be clear, and as noted by the Court in its February 19, 2021 Order, the Defendants did not argue with respect to the Order to Show Cause the standard set forth in *Ford* or respond to Plaintiffs' arguments that, by this cross-appeal, they seek to alter the rights of the

parties under the Final Order. By failing to oppose Plaintiffs' arguments and to address the Court's Order to Show Cause, the Defendants concede the merits of Plaintiffs' arguments that they seek to alter the rights and obligations of the parties from the district court's October 7, 2020 judgment and have therefore properly filed their cross-appeal. *See Ozawa v. Vision Airlines, Inc.*, 125 Nev. 556, 563, 216 P.3d 788, 793 (2009) (treating a party's failure to respond to an argument as a concession that the argument is meritorious); *Bates v. Chronister*, 100 Nev. 675, 682, 691 P.2d 865, 870 (1984) (treating the failure to respond to an argument as a confession of error).

Moreover, the idea that the Individual Defendants are not subject to the personal jurisdiction of this Court based on immunity is something that would also be true below and, therefore, should have been raised below as an affirmative defense or in a pre-answer motion to dismiss. *See Hansen v. Eighth Judicial Dist. Court ex rel. Cty. Of Clark*, 116 Nev. 650, 656-57, 6 P.3d 982, 986 (2000) (holding the defense of lack of personal jurisdiction is waived unless it is raised "either in an answer or pre-answer motion"). The Legislative Defendants asserted six affirmative defenses in Answer to the First Amended Complaint, none of which include the assertion that Legislative Defendants are not subject to the personal jurisdiction of the district court by reason of immunity or otherwise. JA Vol. I at 98. The Executive Defendants filed a Motion to Dismiss in response to the First Amended Complaint

but focused their arguments entirely on the constitutionality of SB 542 and SB 551, leaving to a footnote an unsupported assertion merely that the individual Executive Defendants are not proper parties to a constitutional challenge. JA Vol. I at 102-14. Therefore, the Individual Defendants have waived any argument that the district court or this Court lack personal jurisdiction over them.

This Court has jurisdiction over this cross-appeal, under *Ford*, as Plaintiffs seek to alter the rights of the parties from Ordering Paragraphs 3 and 4 contained on pages 11 to 12 of the Final Order. Plaintiffs seek attorneys' fees as a result of the unconstitutional dilution and nullification of Plaintiff Senators' votes, which was proximately caused by the actions of the Individual Defendants in enacting SB 542 and SB 551 into law. Moreover, Plaintiffs seek attorneys' fees arising from (1) the legal effort to demonstrate the unconstitutionality of those bills and (2) the legal effort to reverse and enjoin the collection of the unconstitutional taxes and fees imposed by SB 542 and SB 551.

B. The Individual Defendants are not entitled to legislative immunity.

The Defendants acknowledge the Legislature has conditionally waived the State's sovereign immunity and further appear to acknowledge this waiver applies not just to the State, its agencies, and political subdivisions, but also to the Individual Defendants. Joint Reply to Response to Order to Show Cause, pp. 14-15. *See* NRS 41.0305 to 41.039, inclusive. They contend, however, the Individual Defendants are

"protected from liability by several statutes which expressly provide for governmental immunity" as contemplated in NRS 41.031(1). Joint Reply to Response to Order to Show Cause, pp. 15-16.

First, the Individual Defendants claim to be entitled to "absolute legislative immunity" under NRS 41.071(5). That statute, however, does not in any way use or imply the term "absolute legislative immunity" and, instead, provides that immunity granted to the legislative branch is limited rather than absolute. NRS 41.071 provides, in pertinent part:

> 1. The Legislature hereby finds and declares that:
>
> (a) The Framers of the Nevada Constitution created a system of checks and balances so that the constitutional powers separately vested in the Legislative, Executive and Judicial Departments of State Government may be exercised without intrusion from the other Departments.
>
> (b) As part of the system of checks and balances, the constitutional doctrines of separation of powers and legislative privilege and immunity facilitate the autonomy of the Legislative Department by ***curtailing*** intrusions by the Executive or Judicial Department into the sphere of ***legitimate legislative activities***.
>
> (c) The constitutional doctrines of separation of powers and legislative privilege and immunity protect State Legislators from having to defend themselves, from being held liable and from being questioned or sanctioned in administrative or judicial proceedings for speech, debate, deliberation and other actions performed within the sphere of ***legitimate legislative activity***.

(emphasis added). *See also*, NRS 41.071(1)(g) and (h) and NRS 41.071(5), limiting application of legislative immunity to actions within the sphere of "legitimate legislative activity."

Thus, legislative immunity does not mean the judiciary may never intrude into the sphere of legislative activity, only that such intrusions must be curtailed with respect to ***legitimate legislative activities***. Clearly implied in this language is both the authority and the expectation that the judiciary will intrude where the legislative activities at issues are outside the sphere of legitimate legislative activity.

Indeed, the cases cited by the Defendants reinforce the idea that legislative immunity is qualified and applies only where the actions at issue in litigation fall within the "sphere of legitimate legislative activity." *See, e.g.*, *Supreme Ct. of Va. v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 733 (1980) (providing that legislators should be protected from the consequences of litigation and from the burden of defending themselves only where they are "engaged in the sphere of legitimate legislative activity").

Defendants entirely ignore this qualifying language and ask this Court simply to cloak the Individual Defendants in immunity because of their status as legislators with respect to their roles regarding the passage and enactment of SB 542 and SB 551. However, if this Court concludes the actions of the Individual Defendants are

not within the sphere of legitimate legislative activity, legislative immunity does not attach.

Many courts have contributed to defining the bounds of the sphere of legitimate legislative activity and this Court should conclude the Individual Defendants' actions to circumvent the constitutional two-thirds majority requirement in passing and enacting SB 542 and SB 551 are well outside the sphere of legitimate legislative activity.

The United Supreme Court, in analyzing the analogous "speech or debate" immunity provision of the federal constitution, has noted legislative immunity should not be extended "beyond its scope, its literal language, and its history, to include all things in any way related to the legislative process." *U.S. v. Brewster*, 408 U.S. 501, 516 (1972). The Supreme Court, in *Brewster*, also noted that "[i]n no case has this Court ever treated the [speech and debate] Clause as protecting all conduct relating to the legislative process" and that every case in which the Supreme Court has applied constitutional legislative immunity, it "has been limited to an act which was clearly a part of the legislative process—the due functioning of the process." *Id.* at 515-16. In *Brewster*, a former United States Senator was indicted for accepting a bribe while in office and the Supreme Court held that the former Senator was not immune from prosecution under the speech and debate clause

because accepting a bribe is not within the sphere of legitimate legislative activity. *Id*. at 501.

The United States Supreme Court has also noted, generally, that legislative immunity may reach beyond congressional speech or debate, but it does not reach matters that are not "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution placed within the jurisdiction of either House." *Gravel v. U.S.*, 408 U.S. 606, 625 (1972). Legislative immunity has been extended beyond pure speech or debate but "only when necessary to prevent indirect impairment of such deliberations." *Id.* (internal quotations omitted).

The Third Circuit Court of Appeals has determined that legitimate legislative activity include actions "that directly affect drafting, introducing, debating, passing or rejecting legislation" and that such actions "are an integral part of the deliberative and communicative process, and are properly characterized as legislative nonpolitical patronage," but that "[a]ctivities that are casually or incidentally related to legislative affairs but not part of the legislative process itself are not" legitimate legislative activity. *Baraka v. McGreevey*, 481 F.3d 187, 196 (3rd Cir. 2007) *citing Gravel* and *Brewster*.

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The Colorado Supreme Court has opined:

> When the General Assembly is engaged in legitimate legislative activity, the speech or debate clause protects individual legislators and the legislature as a whole from being named defendants in an action challenging the constitutionality of legislation. When, on the other hand, an action challenges the constitutionality of the procedure employed to enact the legislation, it is incumbent on the judiciary to resolve whether the challenged actions fall within the sphere of legitimate legislative activity. If not, the speech and debate clause does not apply.

Romer v. Colorado General Assembly, 810 P.2d 215 (Colo. 1991). In *Romer*, the Colorado governor vetoed certain provisions of an appropriations bill. The general assembly simply ignored the governor's vetoes and declared the entire bill to be valid law. The governor sued the general assembly, the speaker of the house, and the president of the senate for declaratory relief related to the constitutionality of the legislation as well as the constitutionality of the actions of the general assembly and the individual members in ignoring his line item vetoes. *Id.* at 217-18. A lower court dismissed the suit on the basis of absolute legislative immunity. *Id.* at 218. The Colorado Supreme Court reversed and reasoned the governor had a legally protectible interest in his vetoes being honored. *Id.* at 220. It recognized that the Colorado constitution provided the legislative mechanism for overriding vetoes – a vote of two-thirds of the legislature. *Id.* at 225. Finally, the Court held that the assembly's ignoring of the constitutional provisions regarding vetoes and nullifying the governor's legally protected veto rights fell outside the sphere of legitimate

legislative activity. *Id.* *See also Philpot v. Patton*, 837 S.W.2d 491, 493-94 (Ky. 1992) (recognizing legislative immunity does not protect individual legislators from being named as defendants, in their official capacity, where there is a question of whether the actions of the legislators, in their official capacity, violated constitutional mandates), *citing Rose v. Council for Better Education, Inc.*, 790 S.W.2d 186, 203-04 (Ky. 1989) (noting legislators are not immune from claims for declaratory relief just because they were acting in their official capacity).

The United States Supreme Court has also specifically recognized that constitutional or statutory immunity does not confer "a concomitant right to disregard the Constitution." *Alden v. Maine*, 527 U.S. 706, 754-55 (1999) (recognizing further that sovereign immunity "does not bar certain actions against state officers for injunctive or declaratory relief").

Thus, legislative immunity protects those activities which are integral to the drafting, consideration of, and voting on proposed legislation. It does not extend to activity beyond those legitimate legislative actions and cannot shield the Individual Defendants' actions to ignore and actively circumvent the Nevada Constitution's two-thirds majority requirement, which the district court here found to clearly and plainly apply to SB 542 and SB 551. Moreover and particularly with respect to SB 551, legislation was proposed, debated, considered, and voted upon. The legislation did not garner the requisite votes for passage. Subsequent activity by Senator

Cannizzaro to change the rules for no reason other than to bypass the constitutional supermajority requirements, which she herself had previously acknowledged applied, is certainly beyond the scope of what could be considered integral to the consideration of and voting on the proposed legislation. Ratification and acceptance of that activity by Lieutenant Governor Marshall, Secretary Clift, and Governor Sisolak likewise fall outside the sphere of legitimate legislative activity.

Finally, to be clear, it is not the act of Senator Cannizzaro's voting "yes" on SB 551 or SB 542 or the actions of the other Individual Defendants in ratifying the passage of those bills that is at issue here. Where the Defendants emphasize on page 18 of their Joint Reply to Response to Order to Show Cause that individual legislators cannot be penalized for voting in a particular way, relying on *Guinn v. Legislature (Guinn II)*, 119 Nev. 460, 472, 76 P.3d 22, 30 (2003), the issue here is whether the actions taken by Senator Cannizzaro and ratified by the other Individual Defendants to remove SB 551 from and not subject SB 542 to the requirements of Article 4, Section 18(2) of the Nevada Constitution can be considered legitimate legislative activity. Respectfully, based on the legal authority discussed herein, this Court should conclude that those actions are not within the sphere of legitimate legislative activity and the Individual Defendants, therefore, are not immune from liability under NRS 41.071.

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C. The Individual Defendants are not protected by discretionary-function immunity.

Next, the Defendants assert NRS 41.032 shields the Individual Defendants from suit on the basis of discretionary-function immunity. NRS 41.032 provides, in pertinent part:

> …no action may be brought under NRS 41.031 or against an immune contractor or an officer or employee of the State or any of its agencies or political subdivisions which is:
> …
> (2) Based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the State or any of its agencies or political subdivisions or of any officer, employee or immune contractor of any of these, whether or not the discretion involved is abused.

This Court has adopted a two-part test for determining whether the State or its officers or employees are protected by discretionary-function immunity under NRS 41.032(2):

> to fall within the scope of discretionary-act immunity, a decision must (1) involve an element of individual judgment or choice and (2) be based on considerations of social, economic, or political policy.

Martinez v. Maruszczak, 123 Nev. 433, 445-47, 168 P.3d 720, 728-29 (2007). The focus of the second prong is not on the "subjective intent in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken and on whether they are susceptible to policy analysis." *Id.* (internal quotations omitted).

Courts in Nevada have provided several useful examples of where the second prong would eliminate certain actions from protection. For instance, in *Martinez*, this Court recognized that a public body's decision to create and operate a public hospital is a discretionary act based on social and economic policy. *Id.* at 447, 168 P.3d at 729. A public hospital doctor's diagnostic and treatment decisions, however, while discretionary, are not based on policy considerations and therefore remove the doctor from the immunity offered by NRS 41.032(2). *Id.*

In *Andolino v. State*, 97 Nev. 53, 624 P.2d 7 (1981), this Court recognized that a decision to construct a highway is a discretionary policy decision but that subsequent decisions to safely maintain the highway are not. Indeed, the Court in *Andolino* further outlined that NRS 41.032(2) provides immunity for policy actions, but not for operational acts such as how a highway will be maintained. *Id.* at 55, 624 P.2d at 9.

Decisions regarding the amount of force a police officer should use is not a policy decision for which NRS 41.032(2) was designed to protect. *Vasquez-Brenes v. Las Vegas Metropolitan Police Dept.*, 51 F.Supp.3d 999, 1013 (D.Nev. 2014) (noting further that purpose of discretionary-function immunity is to prevent judicial second guessing of legislative decisions grounded in social, economic, and political policy) *rev'd on other grounds,* 670 Fed.Appx. 617, unpub. (9th Cir. 2016). Similarly, a teacher's decisions about what equipment or materials to use in the

classroom are not policy decisions, in contrast with decisions regarding curriculum. *Clark County School Dist. v. Pavo*, 133 Nev. 626, 403 P.3d 1270 (2017).

This Court and others have held that decisions made by public officials in bad faith or which amount to intentional torts, resulting, in some instances, from willful or deliberate disregard for another's rights, are not protected under Nevada's discretionary-function immunity statute. *See Franchise Tax Bd. of Cal. V. Hyatt*, 130 Nev. 662, 681-82, 335 P.3d 125, 138-39 (2014) *vacated and remanded on other grounds by Franchise Tax Bd. of California v. Hyatt*, 136 S.Ct. 1277 (2016); *see also Tuuamalemalo v. Greene*, 946 F.3d 471 (9th Cir. 2019); *Jones v. Las Vegas Metropolitan Police Dept.*, 873 F.3d 1123 (9th Cir. 2017). Actions taken by a public official in bad faith "cannot, by definition, be within the actor's discretion." *Falline v. GNLV Corp.*, 107 Nev. 1004, 1009, 823 P.2d 888, 891-92 (1991). Bad faith and intentional torts for which discretionary function immunity should not shield a public official from liability include actions constituting constitutional torts. *See Martinez v. State of Cal.*, 444 U.S. 277, 283-85 (1980) (cited with favor by this Court in *Craig v. Donnelly*, 135 Nev. 37, 439 P.3d 413 (2019)).

Where a public officer's actions are attributable to bad faith, statutory immunity does not apply whether the act is discretionary or not. *Estate of Sauceda v. City of North Las Vegas*, 380 F.Supp.3d 1068 (D.Nev. 2019). Finally, acts taken in violation of the Nevada Constitution cannot be considered discretionary and will

not be protected by NRS 41.032(2). *Koiro v. Las Vegas Metropolitan Police Dept.*, 69 F.Supp.3d 1061 (D.Nev. 2014) *aff'd,* 671 Fed.Appx. 671, unpub. (9th Cir. 2016).

While many of the cases interpreting NRS 41.032(2), discussed herein, involve complaints of police brutality, the principles underlying the decisions in those cases can be applied here. The Senate Majority Leader's actions switching the constitutional requirements for passage of SB 551 were not as a matter of law based on considerations of social, economic or political polity. The district court found that SB 542 and SB 551 were passed in a manner that violated Article 4, Section 18(2) of the Nevada Constitution. It was the actions of the Individual Defendants, in violation of their statutory and constitutional duties, that caused the constitutional violations. Thus, under the many cases analyzing NRS 41.032(2), such actions are not of the type discretionary-function immunity was designed to protect. Plaintiff Senators' votes were nullified and taxpayers' and fee payers' property was taken by the direct and proximate actions of Senator Cannizzaro to remove SB 551 and SB 542 from the constitutional two-thirds majority requirement. Those actions were ratified by the actions of the other Individual Defendants, which further cemented the damage caused to Plaintiff Senators and to Nevada tax and fee payers, generally, whose interests are represented here by the Plaintiffs. Because those actions were unconstitutional and not based on any policy considerations, there is no discretionary-function immunity.

D. NRS 218F.720 does not shield legislators from liability for attorneys' fees when their actions are determined not to have been taken on behalf of the Legislature.

In *State ex rel. Cannizzaro v. First Jud. Dist. Ct. in and for Cty. of Carson City*, 136 Nev. Adv. Op. 34, 466 P.3d 529 (2020), this Court analyzed NRS 218F.720 and implied that NRS 218F.720(6)(c) definition of "Legislature" includes individual members and officers of the legislature only when such members and officers have been determined to act on behalf of the Legislature as a whole. 466 P.3d at 532-33. And, while this Court, in that case stated that Senator Cannizzaro and Secretary Clift were sued here for "acts taken on behalf of the Legislature as a whole," that conclusion was premature where, as shown herein, those individuals took actions outside the sphere of legitimate legislative activity and, therefore, cannot be said to have acted on behalf of the Legislature as a whole. Thus, if this Court agrees with Plaintiffs that Senator Cannizzaro and Secretary Clift acted outside their legislative authority, the prohibition in NRS 218F.720(1) against an award of fees to be paid by the Legislature cannot be held to apply to the Legislative Defendants.

Moreover, it must be noted that NRS 218F.720(1) has no application to the Executive Defendants and no similar prohibition has been urged by the Defendants to apply to the Executive Defendants.

Furthermore, while the Legislature is "empowered to define substantive legal remedies, the judiciary has the inherent power to govern its own procedures."

Borger v. Eighth Jud. Dist. Ct. ex rel. County of Clark, 120 Nev. 1021, 1029, 102 P.3d 600, 606 (2004) (internal quotations omitted). Thus, where the Legislature purports to create a mandatory procedural rule such as the prohibition on awarding fees and costs against the Legislature or its members and officers, the statute is merely permissive so long as it does "not unduly impinge upon the ability of the judiciary to manage litigation." *Id.*

Moreover, this Court has invalidated statutes infringing upon the judiciary's separate constitutional powers. In *Tate v. Bd. of Medical Examiners*, 131 Nev. 675, 680, 356 P.3d 506, 510 (2015), this Court held NRS 630.356(2)'s prohibition on injunctive relief to be invalid as such a prohibition violated the judiciary's inherent constitutional powers to award such relief. Indeed, this Court recognized that courts have the inherent power to do all things necessary to administer justice and that the Legislature may not encroach. *Id.* at 678, 356 P.3d at 509.

Thus, it is improper legislation which denies the judiciary the power to administer justice. Here, where the Legislature enacts a statute to protect itself and its members and officers from having to pay fees and costs even where the district court found the Legislature and its members and officers to have acted in contravention of clear constitutional mandates, such a prohibition violates the judiciary's inherent powers especially in light of the fact the Plaintiffs here lack any other meaningful remedy for the Legislative Defendants' constitutional violations.

Thus, NRS 218F.720 is an unconstitutional infringement upon the judiciary's separate powers.

E. Plaintiffs did not waive their right to claim attorneys' fees as damages.

This Court has stated "when a party claims it has incurred attorney fees as foreseeable damages arising from the tortious conduct or a breach of contract, such fees are considered special damages" and that these special damages "must be pleaded as special damages in the complaint pursuant to NRCP 9(g) and proved by competent evidence just as any other element of damages." *Sandy Valley Assocs. v. Sky Ranch Estates Owners Ass'n*, 117 Nev. 948, 956, 35 P.3d 964, 969 (2001) *overruled on other grounds by Horgan v. Felton*, 123 Nev. 577, 170 P.3d 982 (2007).

This Court also recognized, however, that "actions for declaratory or injunctive relief may involve claims for attorney fees as damages when the actions were necessitated by the opposing party's bad faith conduct." *Sandy Valley*, 117 Nev. at 958, 35 P.3d at 970.

However, NRS 30.100 authorizes a court to grant supplemental or "further relief based on a declaratory judgment or decree…whenever necessary or proper." Further, this court has approved awarding fees as compensatory damages in association with injunctive relief in *Am. Fed'n of Musicians v. Reno's Riverside Hotel, Inc.*, 86 Nev. 695, 699, 475 P.2d 220, 222 (1970) *overruled on other grounds by Sandy Valley*, 117 Nev. at 955, 35 P.3d at 969 n. 7. Thus, attorneys' fees may be

awarded as supplemental relief incident to declaratory relief and as compensatory damages incident to injunctive relief, rather than narrowly as special damages to which the heightened pleading standard of NRCP 9(g) might otherwise apply.

Moreover, this Court has recognized that attorneys' fees may be awarded as an element of damages where damages have been requested incident to claims for equitable relief where the litigation and incurring of fees were necessary as a result of the defendants' bad conduct. *See McIntosh v. Knox*, 40 Nev. 403, 165 P. 337, 339 (1917) *overruled on other grounds by Sandy Valley*, 117 Nev. at 955, 35 P.3d at 969 n. 7; *City of Las Vegas v. Cragin Indus., Inc.*, 86 Nev. 933, 940, 478 P.2d 585, 590 (1970) (recognizing the propriety of an award of fees as damages where the plaintiff asked for damages in an action arising from the improper action of the defendants, rendering necessary the hiring of counsel to pursue the plaintiff's claims) *overruled on other grounds by Sandy Valley*, 117 Nev. at 955, 35 P.3d at 969 n. 7.

Here, the district court denied Plaintiffs attorneys' fees as damages on the basis that Defendants did not act in bad faith. The question on appeal, therefore, is not whether Plaintiffs' preserved the right to assert a claim for attorneys' fees as damages but, rather, whether the district court erred in determining that there was no bad faith. For the reasons given below, Plaintiffs submit the Individual Defendants acted in bad faith by deliberately circumventing the constitutional two-thirds majority requirement in passing and enacting SB 551 and SB 542.

F. Plaintiffs were not required to plead or prove damages, including special damages, in their declaratory relief action and can request such supplemental relief pursuant to NRS 30.100.

Defendants maintain Plaintiffs did not preserve or plead special damages in their declaratory relief action. However, pleading or proving damages is not required in the original declaratory relief action. It is well settled that a "district court may grant further relief, including monetary damages, whether or not it 'ha[d] been demanded, or even proved, in the original action for declaratory relief.'" *Fred Ahlert Music Corp. v. Warner/Chappell Music, Inc.*, 155 F.3d 17, 25 (2d Cir. 1998)[1] citing *Edward B. Marks Music Corp. v. Charles K. Harris Music Publ'g,* 255 F.2d 518, 522 (2d ir.1958); *accord Insurance Servs. of Beaufort, Inc. v. Aetna Cas. and Sur. Co.,* 966 F.2d 847, 851–52 (4th Cir.1992); *Horn & Hardart Co. v. National Rail Passenger Corp.,* 843 F.2d 546, 548–49 (D.C.Cir.1988); *see also Beacon Constr. Co. v. Matco Elec. Co.,* 521 F.2d 392, 399–400 (2d Cir.1975) ("further relief" under § 2202 includes damages); *Alexander & Alexander, Inc. v. Van Impe,* 787 F.2d 163, 166 (3d Cir.1986); *Security Ins. Co. v. White,* 236 F.2d 215, 220 (10th Cir.1956). *See also*, *Farley v. Missouri Dept. of Natural Resources*, 592 S.W.2d 539, 541 (Mo.

[1] In *Rosemere Ests. Prop. Owners Ass'n v. Lytle*, Nos. 63942, 65294, 65721, 2015 WL 6175946 (Table) 131 Nev. 1340 (October 19, 2015) (unpublished disposition) this Court cited *Fred Ahlert Music Corp.* with approval to support its order that district courts have authority under NRS 30.100 to award monetary damages as "further relief" in a declaratory judgment action.

Court of Appeals 1979). The reason for allowing further relief whenever necessary or proper is that the weight of authority does not view the plaintiff in a declaratory action as seeking to enforce a claim against the defendant, rather the plaintiff is requesting a judicial determination as to the existence and nature of the relation between the plaintiff and the defendant. *Id.* at 541. "A plaintiff may go on to seek further relief, even in an action on the same claim which prompted the action for a declaratory judgment." *Id.* The further relief may include damages and it is irrelevant that the further relief could have been requested initially. *Id.* This Court has recognized that declaratory relief does not carry with it the element of coercion to either party. *See Aronoff v. Katleman*, 75 Nev. 424, 432, 345 P.2d 221, 225 (1959).

Thus, Defendants' argument that Plaintiffs did not preserve a claim for damages, including special damages as allowed by law, in their action and this Court is without jurisdiction to consider it, is without merit. Plaintiffs made a claim for declaratory relief in their Third Claim for Relief. JA Vol. I at 28-29. The allegations of their declaratory relief claim included the constitutional rights violations alleged in their First and Second Claims for Relief. JA Vol. I at 28, ¶72. Plaintiffs are entitled to further relief, including monetary damages, by seeking supplemental relief pursuant to NRS 30.100 if this Court upholds the declaratory relief granted in Plaintiffs' favor.

There will be further proceedings in this case to address attorneys' fees and costs. The Executive Agency Defendants asked the district court to brief the attorneys' fees issue further. JA Vol. VI at 1152-53. The district court ordered such briefing would be allowed post-judgment. JA Vol. VI at 1175, 1187-89. The Defendants did not object to this procedure, notwithstanding their position attorneys' fees should not be awarded. Further, it was clear as the district court noted at oral argument, the district court's determination would be appealed no matter which party prevailed in the lower court. JA Vol. VI at 1170. Thus, full evidentiary proceedings on damages would be better addressed in supplemental proceedings after this Court has made its determination as to the constitutionality of SB 542 and SB 551.

In sum, any argument that Plaintiffs failed to properly plead and preserve the issue of special damages is without merit because NRS 30.100 allows such further relief as is necessary and proper. Monetary damages are allowed as supplemental relief whether or not it 'ha[d] been demanded, or even proved, in the original action for declaratory relief.'" *Fred Ahlert Music Corp. v. Warner/Chappell Music, Inc.*, 155 F.3d 17, 25 (2d Cir. 1998). This Court has jurisdiction to consider Plaintiffs' cross-appeal notwithstanding Defendants' argument that Plaintiffs failed to plead and preserve the issue of special damages.

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G. This Court's previous holdings regarding special damages do not prohibit an award of attorneys' fees in this case and the district court erred in determining Plaintiffs were not entitled to recover their attorneys' fees as special damages.

Plaintiffs properly appealed the district court's determination that Plaintiffs are not entitled to recover attorneys' fees as special damages for bringing their claims for declaratory and injunctive relief. JA Vol. VI at 1188, 1319-22. This Court most recently discussed attorneys' fees as special damages in *Pardee Homes of Nevada v. Wolfram*, 135 Nev. 173, 177-178, 444 P.3d 423, 426-427 (2019). The Court noted that *Sandy Valley Assocs. v. Sky Ranch Estates*, 117 Nev. 948, 35 P.3d. 964 (2001), receded from by *Horgan v. Felton*, 123 Nev. 577, 170 P.3d 982 (2007), discussed three scenarios in which attorneys' fees as special damages may be appropriate. In *Pardee Homes*, the Court also noted: "*Sandy Valley*, however, does not support an award of attorney fees as special damages where a plaintiff merely seeks to recover fees incurred for prosecuting a breach-of-contract action against a breaching defendant." *Liu*, 130 Nev. at 155 n. 2, 321 P.3d at 880 n. 2 (observing *Sandy Valley* did not permit a plaintiff to recover attorney fees as special damages in a suit for breach of contract). *Pardee Homes of Nevada v. Wolfram*, 135 Nev. at 177–78, 444 P.3d at 426. This Court held that any breach of contract suit does not warrant attorneys' fees as special damages because it would be foreseeable that an aggrieved party would retain the services of an attorney to remedy a breach.

Further, this Court noted in *Pardee Homes* where equitable relief is sought, an award of attorneys' fees is proper if awarded as an item of damages. *Pardee Homes of Nevada v. Wolfram*, 135 Nev. 173, 178, 444 P.3d 423, 427 (2019) citing *Von Ehrensmann v. Lee*, 98 Nev. 335, 337-38, 647 P.2d 377, 378-79 (1982). In this case, Plaintiffs pled a claim for injunctive relief in their Fourth Claim for Relief and pled they incurred attorneys' fees to pursue their rights under the Nevada Constitution and were entitled to reasonable attorneys' fees and costs of suit. JA Vol. I at 29-30. Plaintiffs' Fourth Claim for Relief incorporated by reference their claim for declaratory relief and constitutional violation claims. JA Vol. I at 29, ¶80. Since injunctive relief was awarded in their favor, an award of attorneys' fees as damages would have been proper. Again, monetary damages are allowed as supplemental relief whether or not it 'ha[d] been demanded, or even proved, in the original action for declaratory relief.'" *Fred Ahlert Music Corp. v. Warner/Chappell Music, Inc.*, 155 F.3d 17, 25 (2d Cir. 1998).

This Court has only considered special damages in real property slander of title actions or breach of contract actions. The Court has never considered an award of attorneys' fees as special damages or compensatory damages in a constitutional tort action or where equitable relief has been granted to enforce constitutional rights.

Here, Plaintiffs alleged in their First and Second Claims for Relief violation of their constitutional rights. JA Vol. I at 26-27. "The law of torts attempts primarily

to put an injured person in a position as nearly as possible equivalent to his position prior to the tort." Restatement (Second) of Torts § 901 cmt. a (1979); *see also id.* § 903 cmt. a ("[C]ompensatory damages are designed to place [the plaintiff] in a position substantially equivalent in a pecuniary way to that which he would have occupied had no tort been committed."). In *Grosjean v. Imperial Palace, Inc.*, 125 Nev. 349, 371, 212 P.3d 1068, 1083 (2009) the Court noted the purpose of allowing the recovery of money damages for the violation of a constitutional right, like that of common law tort damages, is to compensate the plaintiff for his or her injury caused by the defendant's breach of duty or intentional tort. For example, in actions for false imprisonment, a plaintiff may recover for any reasonable and necessary expense incurred as a result of the unlawful imprisonment, including attorney's fees for services in procuring discharge. *See Barnes v. D.C.*, 452 A.2d 1198, 1199 (D.C. 1982); *Berberian v. Mitchell*, 115 R.I. 149, 150, 341 A.2d 56, 58 (1975) (reasonable legal fees shown to have been incurred in a person's defense against criminal prosecution resulting directly from his false arrest may be includible among the natural and probable consequences of that wrong and hence may be recoverable as damages).

In *King v. Zamiara*, 788 F.3d 207, 213–16 (6th Cir. 2015) the Court discussed at length damages for the violation of a constitutional right. The Court stated:

> A plaintiff who alleges the violation of a constitutional right is not entitled to compensatory damages unless he can prove actual injury

> caused by the violation. *Carey v. Piphus,* 435 U.S. 247, 264, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978). Moreover, "damages based on the abstract 'value' or 'importance' of constitutional rights are not a permissible element of compensatory damages." *Memphis Cmty. Sch. Dist. v. Stachura,* 477 U.S. 299, 310, 106 S.Ct. 2537, 91 L.Ed.2d 249 (1986); *see also Parrish v. Johnson,* 800 F.2d 600, 607 (6th Cir.1986). The *Stachura* court made clear, however, that "[w]hen a plaintiff seeks compensation for an injury that is likely to have occurred but difficult to establish, some form of presumed damages may possibly be appropriate." *Stachura,* 477 U.S. at 310–11, 106 S.Ct. 2537. In these cases of difficult-to-establish injuries, "presumed damages may roughly approximate the harm that the plaintiff suffered and thereby compensate for harms that may be impossible to measure." *Id.* at 311, 106 S.Ct. 2537. As an example of such a situation, the Supreme *214 Court "cited with approval the long line of cases which uphold money damages as compensation for persons deprived of their right to vote." *Walje v. City of Winchester,* 827 F.2d 10, 12 (6th Cir.1987). The Supreme Court explained that in one of these cases, *Nixon v. Herndon,* 273 U.S. 536, 47 S.Ct. 446, 71 L.Ed. 759 (1927), the award of damages "did not rest on the 'value' of the right to vote as an abstract matter; rather, the Court recognized that the plaintiff had suffered a particular injury—his inability to vote in a particular election—that might be compensated through substantial money damages." *Stachura,* 477 U.S. at 311 n. 14, 106 S.Ct. 2537.

Accordingly, courts have allowed plaintiffs to recover presumed damages for injuries caused by constitutional violations that are "likely to have occurred" but difficult to measure, even when the injury claimed is neither physical harm nor mental or emotional distress. *Id.*

Here, Plaintiffs set forth in their First and Second Claims for Relief their injury for violation of their constitutional rights – attorneys' fees and costs of suit to pursue

their rights. JA Vol. I at 27, ¶¶ 67, 71.[2] Plaintiffs alleged the same in their Third and Fourth Claims for Relief seeking declaratory and injunctive relief. JA Vol. I at 29-30, ¶¶ 79, 87. Senator Settelmeyer's affidavit is evidence that Plaintiffs incurred attorneys' fees and costs of suit to bring their action to pursue their rights and continue to accrue fees and costs in the prosecution of the action. JA Vol. IV at 723, ¶ 4. This evidence was admitted without objection by Defendants. Attorneys' fees are the actual injury or damages caused to Plaintiffs by the Defendants' constitutional violations. "Actual damages" is simply another way of stating "compensatory damages". *See Davis v. Beling*, 128 Nev. 301, 316, 278 P.3d 501, 512 (2012). The Court should allow Plaintiffs to recover their actual damages or their presumed damages that roughly approximate the harm that Plaintiffs have suffered, that is their attorneys' fees, caused by the constitutional violations. An award to Plaintiffs of their attorneys' fees is the amount of damages to put Plaintiffs in a position substantially equivalent, in a pecuniary way, to that which they would have occupied had no tort been committed. Thus, the district court erred in

[2] In *Sandy Valley*, the complaint merely mentioned attorney fees as a part of the general prayer for relief and not in the claims for relief. *Sandy Valley*, 119 Nev. at 958, 35 P.3d at 970.

concluding that Plaintiffs were not entitled to recover attorneys' fees as damages, including special damages, for the violation of their constitutional rights.[3]

Plaintiff Senators are aggrieved by the dismissal of the Individual Defendants because the right to an effective vote is fundamental in a free democratic society and Plaintiff Senators cannot recover attorneys' fees as a remedy for the violation of their constitutional rights without the Individual Defendants as parties. A voter has the constitutional right to have his vote given as much weight as any other vote and not to have his vote denied, debased, or diluted in any manner. *Clark Cty. v. City of Las Vegas*, 92 Nev. 323, 342, 550 P.2d 779, 792 (1976) *citing Hadley v. Junior College District*, 397 U.S. 50, 52 (1970). Legislators, like private citizens, have a constitutional right to have their votes counted and made effective. *Biggs v. Cooper*, 323 P.3d 1166, 1172 (Ariz. Ct. App. 2014), *aff'd in part, vacated in part sub nom. Biggs v. Cooper ex rel. Cty. Of Maricopa*, 341 P.3d 457, 462 (Ariz. 2014) (Plaintiff legislators request for an award of attorneys' fees was denied without prejudice because there had been no determination on the merits and plaintiff legislators could seek an award from the superior court should they ultimately prevail in the lawsuit). Prospective relief alone is not sufficient as a meaningful remedy for the

[3] The evidence supporting Plaintiffs' claims of a violation of their constitutional rights, and in support of declaratory and injunctive relief and bad faith by the Individual Defendants and the Legislature is discussed in Section H *infra*.

unconstitutional deprivation of a party's rights. *See State, Nevada Department of Taxation v. Scotsman Mfg. Co., Inc.*, 109 Nev 252, 256, 849 P.2d 317, 320 (1993).

Finally, a party's failure to properly plead special damages "does not necessarily bar an award of attorney fees when evidence of attorney fees as damages has been litigated at trial." *Sandy Valley Assocs. v. Sky Ranch Estates,* 117 Nev. 948, 959, 35 P.3d 964, 971 (2001) *receded from on other grounds in Horgan v. Felton,* 123 Nev. 577, 586, 170 P.3d 982, 988 (2007). In such a case, motions under NRCP 54(c) or NRCP 15(b) may be appropriate mechanisms for resolving a conflict between the pleadings and the trial evidence. *Id.* The failure to comply with NRCP 9(g) does not deprive a court of the power to award such fees as damages. *See Summa Corp. v. Greenspun*, 96 Nev. 247, 607 P.2d 569 (1980), on rehearing 655 P.2d 513, 98 Nev. 528 (1982).

In this case, the district court was bothered by the fact that the Plaintiff Senators had to bring this action in order to bring this matter to the Court's attention and to enforce the Constitutional provision binding on very member of the Legislature. JA Vol. VI at 1174-75, 1187-88. The district court allowed Plaintiffs to take appropriate actions to request an award of post-judgment attorneys' fees and costs payable by the Nevada Department of Taxation and/or the Department of Motor Vehicles. JA Vol. VI at 1175, 1188-89. Such actions have been stayed based on this appeal. JA Vol. VI at 1238-39; JA Vol. VII at 1393-94. However, in this

instance, as acknowledged by the Executive Agency Defendants, it is not clear the remaining executive branch agency Defendants enforcing SB 542 and SB 551 are the parties who violated Plaintiffs' constitutional rights. *See* JA Vol. VI at 1166-69. The common law provides a remedy for every wrong, particularly for one whose state constitutional rights have been abridged. *See Corum v. University of North Carolina*, 413 S.E. 2d 276, 289. 291-291 (1992); *cf. Badillo v. American Brands, Inc.*, 117 Nev. 34, 42, 16 P.3d 435, 440 (2001) (The Court cannot recognize a remedy absent an underlying cause of action). The Court should recognize that Plaintiffs are entitled to a remedy for the wrongs committed against them, against the parties actually committing the wrong. The district court erred in holding that Plaintiffs are not entitled to recover attorneys' fees and costs as damages.

H. The district court erred in determining there was no bad faith in this matter.

This Court has discussed bad faith in the context of immunity in *Falline v. GNLV Corp.*, 107 Nev. 1004, 1009, 823 P.2d 888, 892 (1991). "Bad faith, the converse of good faith, has been defined as 'the absence of a reasonable basis for denying benefits ... and the defendant's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim." *Id.* The Court noted that bad faith involves an "implemented attitude that completely transcends the circumference of authority granted the individual or entity." *Id.* The Court stated:

> "In other words, an abuse of discretion occurs within the circumference of authority, and an act or omission of bad faith occurs outside the circumference of authority. Stated otherwise, an abuse of discretion is characterized by an application of unreasonable judgment to a decision that is within the actor's rightful prerogatives, whereas an act of bad faith has no relationship to a rightful prerogative even if the result is ostensibly within the actor's ambit of authority. For example, if an administrator decides to delay or deny a claimant's benefits because of a personal dislike for the claimant, the delay or denial would be attributable to an unauthorized act of bad faith despite the fact that a denial or delay could be otherwise among the rightful prerogatives of the administrator."

Id. at n.3. The Court has also indicated that an intentional disregard for the rights and property of others or a deliberate indifference constitutes oppression and legal and express malice. *Nevada Cement Co. v. Lemler*, 89 Nev. 447, 452, 514 P.2d 1180, 1183 (1973).

In their action, Plaintiffs challenged the constitutionality of SB 542 and SB 551 as well as the constitutionality of the manner in which each bill was passed into law. JA Vol. I at 21, ¶ 23. In this instance, the conduct of the Individual Defendants, particularly Senate Majority Leader Cannizzaro, constitutes bad faith based upon the intentional disregard for the rights and property of others and deliberate indifference to those rights by the competing "constitutional" votes on SB 551 amendments on June 3, 2019. The two-thirds constitutional requirement either applied or did not apply to SB 551. The constitutional requirements of Article 4, Section 18(2) of the Nevada Constitution did not change between the successive votes on SB 551 on June 3, 2019 and no waiver of the Senate rules could waive constitutional requirements.

There was intentional and deliberate action by the Senate Majority Leader and Senate President to hold successive votes on SB 551 with different constitutional standards. The same vote of 13 Senators in favor and 8 Senators opposed first defeated SB 551 and an amendment pursuant to the constitutional two-third majority requirement, and then fifteen minutes later, the same 13-8 vote passed SB 551 and an amendment by a constitutional majority, all of which constituted a deliberate indifference to the constitutional rights and property rights of others. The actions of the Majority Leader and Senate President by holding the second vote to pass SB 551 with a constitutional majority, after the Senate President had already officially held the same vote defeated the bill, diluted and nullified the Plaintiff Senators' votes and denied their rights guaranteed by Article 4 of the Nevada Constitution to cast an effective vote. As Senator Settelmeyer said during the SB 551 amendment votes, "[t]he Constitution is not something that can be easily changed by pencil" and he disagreed with the concept of the Majority Leader that the Constitution is something "you can just pick and choose whether to obey it or not." JA Vol. V at 988, 1047. There was no reasonable basis to hold two votes on SB 551 with different constitutional requirements or change the constitutional requirement between votes in disregard of the rights and votes of the Plaintiff Senators and the property rights of the taxpayers of Nevada. The Senate Majority Leader and the Senate President have no authority to violate Plaintiffs' constitutional rights.

The evidence supporting bad faith is found in the exhibits and affidavits submitted by Plaintiffs in support of their motion for summary judgment. The Senate Committee on Finance Minutes for May 29, 2019 reflect a disagreement by Senator Kieckhefer and Senator Cannizzaro regarding whether a two-thirds vote was required for SB 551 with Senator Cannizzaro calling the issue an "illusory Constitutional question.". JA Vol. IV at 785. On June 2, 2019, Senator Cannizzaro addressed the Senate Committee on Finance on SB 551 and indicated the bill would be stamped with a two-thirds majority requirement even though that was not reflected in Proposed Amendment No. 6101 that was before the Committee. JA Vol. IV at 841. (Proposed Amendment No 6101 is found at JA Vol. IV at 803-837). Amendment No. 1111 to SB 551 was an emergency request of Senator Cannizzaro dated June 2, 2019 and required a two-thirds majority vote for §§ 2, 3, 37 and 39 of the bill as set forth on the face sheet of the amendment. JA Vol. IV at 845, 847. Amendment No. 1120 to SB 551 was presented to the Senate as an emergency request of Senator Cannizzaro on June 3, 2019 and again required a two-thirds majority vote for §§ 2, 3, 37 and 39 of the bill as set forth on the face sheet of the amendment. JA Vol. IV at 876, 878; JA Vol. V at 953-54, 987-88. When voted on by the full Senate, Amendment No. 1120 to SB 551 received a vote of 13 in favor and 8 opposed and the President of the Senate declared the bill lost as failing to receive the two thirds constitutional requirement. JA Vol. V at 994.

Fifteen minutes later, Senator Cannizzaro introduced Amendment No. 1121 to SB 551. JA Vol. V at 994. Amendment No. 1121 to SB 551 was presented to the Senate as an emergency request of Senator Cannizzaro on June 3, 2019 and required a majority vote for §§ 2, 3, 37 and 39 of the bill as set forth on the face sheet of the amendment. JA Vol. IV at 907, 909; JA Vol. V at 994. When voted on by the full Senate, Amendment No. 1121 to SB 551 received a vote of 13 in favor and 8 opposed and the President of the Senate declared the bill passed with a constitutional majority for §§ 2, 3, 37 and 39. JA Vol. V at 1049-50. The second vote diluted and nullified the Plaintiff Senators' first votes and denied their rights guaranteed by Article 4 of the Nevada Constitution to cast an effective vote. The NELIS records for SB 551 accessed on September 30, 2019 show the bill did not pass on the first 13-8 vote on June 3, 2019 because it was not passed by two-thirds of the Senate members and on the same page shows SB 551 passed by a constitutional majority on June 3, 2019 with a 13-8 vote. JA Vol. II at 370. The foregoing events set forth in the Senate Journal for June 3, 2019 were approved by the President of the Senate and attested to by the Senate Secretary. JA Vol. V at 1051.

Intentionally diluting and nullifying the Plaintiff Senators' votes in violation of their constitutional right to cast an effective vote constituted bad faith. The actions of the Senate Majority Leader and the Senate President were taken in intentional disregard for the rights and property of others with a deliberate indifference to the

Plaintiffs' legislative voting rights and taxpayer property rights. Accordingly, this Court should reverse the district court's determination there was no bad faith. If this Court reverses the district court's determination there was no bad faith, the district court's determination that attorneys' fees are not appropriate under NRS 18.010(2)(b) because there was not bad faith in regard to this matter should also be vacated. JA Vol. VI at 1187.

I. Attorneys' fees can be awarded in declaratory relief actions.

In their reply in support of their counter-motion for summary judgment, the Legislative Defendants argued the statutory provisions of the Uniform Declaratory Judgment Act did not authorize a court to award attorneys' fees, the supplemental relief provisions of the Uniform Declaratory Judgment Act did not provide such authority to the district court and absent a statutory provision authorizing attorneys' fees in Chapter NRS 30, the district court could not award attorneys' fees to Plaintiffs. JA Vol. V at 1091-92. Plaintiffs did not get an opportunity to brief this issue before the district court and do not waive their opposition to or appeal of this argument to the extent it was accepted by the district court in its determination not to award attorneys' fees to Plaintiffs.

Generally, attorneys' fees in Nevada must be awarded under a statute, rule, or contract authorizing the award. *Thomas v. City of N. Las Vegas*, 122 Nev. 82, 90, 127 P.3d 1057, 1063 (2006). However, there are judicially created exceptions to the

American Rule which this Court has recognized whether the request for attorneys' fees has been pled in an original action for relief or requested post-judgment. *See Jesseph v. Digital Ally, Inc.*, 136 Nev. Adv. Op. 59, 472 P.3d 674, 677 (2020) and cases cited therein.

In *Jesseph v. Digital Ally, Inc.*, 136 Nev. Adv. Op. 59, 472 P.3d 674, 677 (2020), the Court recently reviewed the substantial benefit doctrine, a judicially created exception to the American Rule. The doctrine allows recovery of attorneys' fees when a successful party confers "a substantial benefit on the members of an ascertainable class, and where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them." *Id.* The substantial benefit exception is typically applied in cases involving shareholders or unions. In those actions, the successful plaintiff confers a benefit on all shareholders or union members, and thus, attorneys' fees assessed against the corporation or union are easily and equitably spread among the shareholders or members who are the beneficiaries of the litigation. What is important in those instances is that "the class of beneficiaries is before the court in fact or in some representative form." *Thomas v. City of N. Las Vegas*, 122 Nev. 82, 90–91, 127 P.3d 1057, 1063 (2006). And the claim is not untenable solely because the claim is titled as "one for attorney fees, rather than as a claim for relief under the substantial benefit doctrine. Indeed, 'this court has consistently analyzed a claim

according to its substance, rather than its label.' *Otak Nev., LLC v. Eighth Judicial Dist. Court,* 129 Nev. 799, 809, 312 P.3d 491, 498 (2013)." *Jesseph v. Digital Ally, Inc.*, 136 Nev. Adv. Op. 59, 472 P.3d 674, 677 (2020). Further, the claim must be predicated on successful litigation not just a demand. *Id.*

Likewise, the "private attorney general theory" or the "substantial benefits doctrine" has been adopted by numerous courts as an exception to the American Rule. *See Arnold v. Arizona Dep't of Health Servs*., 775 P.2d 521, 537 (Ariz. 1989); *Serrano v. Priest,* 569 P.2d 1303 (Ca. 1977); *Montanans for the Responsible Use of the School Trust v. State ex rel. Board of Land Commissioners,* 989 P.2d 800 (Mont.1999), *Hellar v. Cenarrusa,* 682 P.2d 524, 530–31 (Idaho 1984); *Stewart v. Utah Public Service Commission,* 885 P.2d 759 (Utah 1994).

As noted by the Arizona Supreme Court, the private attorney general doctrine is an equitable rule which permits courts in their discretion to award attorneys' fees to a party who has vindicated a right that: (1) benefits a large number of people; (2) requires private enforcement; and (3) is of societal importance. *Id*. citing Comment, *Important Rights and the Private Attorney General Doctrine,* 73 Calif.L.Rev. 1929 (1985). The purpose of the doctrine is "to promote vindication of important public rights." Comment, *Equitable Attorney's Fees to Public Interest Litigants in Arizona,* 1984 Ariz.St.L.J. 539, 554. *Id.*

Courts have recognized that attorneys' fees awards are also permitted in a declaratory action when justified by special equity even though there is no express statute, rule, or contract authorizing the award. *See Progressive Specialty Ins. Co. v. Univ. of Alabama Hosp.*, 953 So. 2d 413, 417 n. 2 (Ala. Civ. App. 2006) citing *Lee v. Baldwin County Elec. Membership Corp.,* 853 So.2d 946, 952 (Ala. 2003) (discussing the "common fund" and "common benefit" exceptions to the American Rule that each party bears the responsibility of paying its own attorney fees).

Such an award of attorneys' fees is justified in this case notwithstanding the American Rule. Plaintiffs have vindicated rights that: (1) benefit a large number of people; (2) required private enforcement; and (3) are of societal importance. Alternatively, Plaintiffs by their action conferred a substantial benefit on the members of an ascertainable class, and the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among the member of the class.

In *Schwartz v. Lopez*, 132 Nev. 732, 743, 382 P.3d 886, 894–95 (2016), this Court recently recognized an exception to the injury requirement for standing in certain cases involving issues of significant public importance. Under the public-importance exception, the Court indicated it 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. Plaintiffs pled public importance

in bringing their action. JA Vol. I at 22, ¶ 24-26. In line with this reasoning, the Court, based on equitable principles, should recognize the substantial benefit doctrine or private attorney general exception to the American Rule governing an award of attorneys' fees in this action and overturn the district court's denial of attorneys' fees.

As set forth above, there are other exceptions to the American Rule and legal grounds for an award of attorneys' fees either as special damages or post judgment to Plaintiffs based upon public importance in bringing their action challenging the constitutionality of SB 542 and SB 551. To the extent the district court determined Plaintiffs were not entitled to recover attorneys' fees as special damages or post-judgment based upon the American Rule as urged by Legislative Defendants below, the district court's ruling should be reversed.

J. Defendants were on notice and knew Plaintiffs claimed attorneys' fees as damages.

The Defendants were on notice by the specific allegations of Plaintiffs' First Amended Complaint that Plaintiffs claimed recovery of their attorneys' fees as a result of having to bring their action for violation of their constitutional rights and their declaratory relief and injunctive actions. JA Vol. I at 27 ¶¶67, 71; 29 ¶79; 30 ¶87. Plaintiffs did not allege any other damages. In their Answers, the Legislative Defendants denied the allegations that Plaintiffs were required to incur attorneys' fees as a result of their actions. JA Vol. I at 96 ¶¶ 67, 71; 97 ¶ 79; 98 ¶ 87; JA Vol.

II at 410 ¶ 67; 411 ¶¶ 71, 79; 412 ¶ 87. Defendants knew Plaintiffs claimed their attorneys' fees as damages because Defendants argued they were not liable for attorneys' fees as damages based upon numerous immunity theories and NRS 218F.720. JA Vol. V at 1081, 1085-93. They argued attorneys' fees should not be awarded at oral argument. JA Vol. VI at 1134-37, 1149-50. Senator Settelmeyer's affidavit is evidence that Plaintiffs incurred attorneys' fees and costs of suit to bring their action to pursue their rights and continue to accrue fees and costs in the prosecution of their claims and their action. JA Vol. IV at 723, ¶ 4. While Defendants argued they were not liable for attorneys' fees and costs, this evidence as to incurring the fees and costs, was admitted without objection.

Finally, Plaintiffs' claim is not untenable solely because it is one for attorneys' fees and does not use the words "special damages". In the context of claims, including attorneys' fees requests, this court has consistently analyzed a claim according to its substance, rather than its label. *Jesseph v. Digital Ally, Inc.*, 136 Nev. Adv. Op. 59, 472 P.3d 674, 677 (2020) citing *Otak Nev., LLC v. Eighth Judicial Dist. Court,* 129 Nev. 799, 809, 312 P.3d 491, 498 (2013). For these reasons, the Court should hold Defendants waived any argument that attorneys' fees were not pled as special damages.

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IX.

CONCLUSION

For the reasons given herein, Plaintiffs respectfully request this Court reverse the district court's dismissal of the Individual Defendants and its entry of summary judgment against Plaintiffs on their first claim for relief and on their claims for attorneys' fees.

DATED this 22nd day of March, 2021.

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CERTIFICATE OF COMPLIANCE (BASED UPON NRAP FORM 9)

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 Office Word 2007 in 14 point Times New Roman type style.

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 12,701 words.

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.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(1)(c), I hereby certify that I am an employee of ALLISON MacKENZIE, LTD., Attorneys at Law, and that on this date, I caused the foregoing document to be served on all parties to this action by:

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