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,

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

Electronically Filed
Mar 22 2021 11:55 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

Case No. 81924

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

APPELLANT/CROSS-RESPONDENT NEVADA LEGISLATURE'S OPENING BRIEF ON APPEAL

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

Respondents/Cross-Appellants.

APPELLANT/CROSS-RESPONDENT NEVADA LEGISLATURE'S OPENING BRIEF ON APPEAL

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JURISDICTIONAL STATEMENT

Under NRAP 3A(b)(1), this Court has jurisdiction to review a final judgment entered in an action or proceeding commenced in the court in which the judgment is rendered. On October 7, 2020, the district court entered an order and final judgment adjudicating all the claims of all the parties and granting final judgment in favor of Plaintiffs on their claims for declaratory and injunctive relief.

Under NRAP 3A(b)(3), this Court has jurisdiction to review an order granting or refusing to grant an injunction or dissolving or refusing to dissolve an injunction. On October 7, 2020, in its order and final judgment granting Plaintiffs' claims for injunctive relief, the district court enjoined Defendant Nevada Department of Motor Vehicles and Defendant Nevada Department of Taxation from collecting and enforcing the fees and taxes enacted by SB 542 and Sections 2, 3, 37 and 39 of SB 551, respectively, and ordered that all fee payers and taxpayers from whom such fees and taxes have already been collected are entitled to an immediate refund thereof with interest at the legal rate of interest from the date collected.

ROUTING STATEMENT

For purposes of appellate assignment, this appeal should be heard and decided by the Supreme Court under NRAP 17(a) and should not be assigned to the Court of Appeals under NRAP 17(b). The principal issues raised by this appeal present questions of state constitutional law that are of first impression in Nevada under NRAP 17(a)(10) and are of statewide public importance under NRAP 17(a)(11) regarding the Legislature's reasonable interpretation of the two-thirds majority requirement in Article 4, Section 18(2) of the Nevada Constitution, which provides that an affirmative vote of not fewer than two-thirds of the members elected to each House of the Legislature is necessary to pass a bill which creates, generates or increases any public revenue in any form.

STATEMENT OF THE ISSUES

This appeal involves a state constitutional challenge to provisions of Senate Bill No. 542 (SB 542) and Senate Bill No. 551 (SB 551) of the 2019 legislative session. SB 542, 2019 Nev. Stat., ch. 400, § 1, at 2501-02; SB 551, 2019 Nev. Stat., ch. 537, §§ 2, 3, 37, 39, at 3273, 3275, 3294. In the district court, Respondents/Cross-Appellants (hereafter "Plaintiffs") claimed that the challenged provisions of the bills created, generated or increased public revenue and that the Legislature passed the bills in violation of the two-thirds majority requirement in Article 4, Section 18(2) of the Nevada Constitution ("two-thirds requirement"), which provides that an affirmative vote of not fewer than two-thirds of the members elected to each House of the Legislature is necessary to pass a bill which creates, generates or increases any public revenue in any form.

Through the passage of SB 542, the Legislature amended the future expiration of the existing technology fee of $1 per transaction collected by the Department of Motor Vehicles ("DMV technology fee") and extended it for two fiscal years—from June 30, 2020, until June 30, 2022—before the future expiration of the DMV technology fee had become legally operative and binding. SB 542, 2019 Nev. Stat., ch. 400, § 1, at 2502. Based on the Legislative Counsel's legal opinion interpreting the two-thirds requirement, the Legislature could reasonably conclude that SB 542 was not subject to the two-thirds requirement because the bill did not

change—but maintained—the existing computation base and legally operative rate currently in effect for the DMV technology fee, which remains at $1 per transaction.

Through the passage of sections 2, 3, 37 and 39 of SB 551, the Legislature eliminated the future application of the rate adjustment procedure for the Modified Business Tax ("MBT") before any future reduced rates for the MBT had become legally operative and binding. SB 551, 2019 Nev. Stat., ch. 537, §§ 2, 3, 37, 39, at 3273, 3275, 3294. Based on the Legislative Counsel's legal opinion interpreting the two-thirds requirement, the Legislature could reasonably conclude that SB 551 was not subject to the two-thirds requirement because the challenged provisions of the bill did not change—but maintained—the existing computation bases and legally operative rates currently in effect for the MBT, which remain at 2 percent and 1.475 percent, as applicable to each affected business.

The principal issue of state constitutional law in this appeal is whether, based on the Legislative Counsel's legal opinion interpreting the two-thirds requirement, contemporaneous extrinsic evidence of the purpose and intent of the two-thirds requirement, and cases from other states interpreting similar supermajority requirements, the Legislature could reasonably conclude that: (1) SB 542 did not create, generate or increase any public revenue in any form because the bill did not change—but maintained—the existing computation base and legally operative rate

currently in effect for the DMV technology fee; and (2) sections 2, 3, 37 and 39 of SB 551 did not create, generate or increase any public revenue in any form because the challenged provisions of the bill did not change—but maintained—the existing computation bases and legally operative rates currently in effect for the MBT.

INTRODUCTION

Appellant/Cross-Respondent Legislature of the State of Nevada ("Legislature"), by and through its counsel the Legal Division of the Legislative Counsel Bureau ("LCB Legal") under NRS 218F.720, hereby files its opening brief on appeal pursuant to this Court's order on March 4, 2021, setting an expedited briefing schedule in this appeal and cross-appeal and scheduling oral argument before the en banc court on May 3, 2021.

The Legislature asks this Court to reverse the portion of the district court's order: (1) granting summary judgment in favor of Plaintiffs on their claims for declaratory and injunctive relief; (2) declaring that SB 542 and SB 551 were bills which create, generate or increase any public revenue in any form and were passed in violation of the two-thirds requirement; (3) invalidating the provisions of SB 542 and sections 2, 3, 37 and 39 of SB 551 as unconstitutional; and (4) enjoining the Department of Motor Vehicles and Department of Taxation from collecting and enforcing the fees and taxes under the invalidated provisions and ordering an immediate refund of those fees and taxes to the affected fee payers and taxpayers with interest at the legal rate of interest from the date collected. (*JA6:001188, ¶¶ 1-2.*)[1]

[1] Citations to "*JA*" are to volume and page numbers of the joint appendix.

In reversing that portion of the district court's order, the Legislature asks this Court to find that SB 542 and SB 551 were not subject to the two-thirds requirement because the Legislature could reasonably conclude that: (1) SB 542 did not create, generate or increase any public revenue in any form because the bill did not change—but maintained—the existing computation base and legally operative rate currently in effect for the DMV technology fee; and (2) sections 2, 3, 37 and 39 of SB 551 did not create, generate or increase any public revenue in any form because the challenged provisions of the bill did not change—but maintained—the existing computation bases and legally operative rates currently in effect for the MBT.

However, if this Court finds that the challenged provisions of sections 2, 3, 37 and 39 of SB 551 are unconstitutional because they were enacted in violation of the two-thirds requirement, the Legislature asks this Court to find that, under the severance doctrine, the remaining provisions of SB 551 are severable and remain in effect because: (1) the remaining provisions, standing alone, can be given legal effect without the invalidated provisions; and (2) preserving the remaining provisions would accord with legislative intent. Therefore, under such circumstances, the Legislature asks this Court to affirm that portion of the district court's order declaring that "the remaining provisions of SB 551 can be severed and shall remain in effect." (*JA6:001188, ¶ 1.*)

STATEMENT OF THE CASE AND FACTS

I. In passing SB 542 and SB 551, the Legislature acted on the Legislative Counsel's legal opinion interpreting the two-thirds requirement.

During the 2019 legislative session, members of the Majority and Minority Leadership in both Houses made requests under NRS 218F.710(2) for the Legislative Counsel to give a written legal opinion concerning the applicability of the two-thirds requirement to potential legislation.[2] On May 8, 2019, the Legislative Counsel provided the requested legal opinion. (*JA3:000647-70.*) In the legal opinion, the Legislative Counsel was asked whether the two-thirds requirement applies 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. (*JA3:000647.*)

In answering that legal question, the Legislative Counsel stated that in the absence of any controlling Nevada case law, the legal question must be addressed

[2] At the time, NRS 218F.710(2) provided: "Upon the request of any member or committee of the Legislature or the Legislative Commission, the Legislative Counsel shall give an opinion in writing upon any question of law, including existing law and suggested, proposed and pending legislation which has become a matter of public record." During the 32nd Special Session, the Legislature amended NRS 218F.710(2), but those amendments did not change the authority of the Legislative Counsel to give an opinion in writing upon any question of law. Assembly Bill No. 2, 2020 Nev. Stat., 32nd Spec. Sess., ch. 2, § 22 (effective Aug. 2, 2020).

by: (1) applying several well-established rules of construction followed by Nevada's appellate courts; (2) examining contemporaneous extrinsic evidence of the purpose and intent of the two-thirds requirement when it was considered by the Legislature in 1993 and presented to the voters in 1994 and 1996; and (3) considering case law interpreting similar constitutional provisions from other jurisdictions for guidance in this area of the law. (*JA3:000653.*) After discussing and analyzing these authorities, the Legislative Counsel provided the following interpretation of the two-thirds requirement:

> It is the opinion of this office 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.

(*JA3:000670.*)

After being provided with the Legislative Counsel's opinion interpreting the two-thirds requirement, the Legislature passed SB 542 and SB 551 by a majority of all the members elected to each House under Article 4, Section 18(1). Senate Daily Journal, 80th Sess., at 9 (Nev. May 27, 2019) (SB 542); Assembly Daily Journal, 80th Sess., at 6937 (Nev. May 31, 2019) (SB 542); Senate Daily Journal, 80th Sess., at 98-99 (Nev. June 3, 2019) (SB 551); Assembly Daily Journal, 80th

Sess., at 7768-69 (Nev. June 3, 2019) (SB 551).[3] Thus, in passing SB 542 and SB 551, "the Legislature acted on Legislative Counsel's opinion that this is a reasonable construction of the provision . . . and the Legislature is entitled to deference in its counseled selection of this interpretation." Nev. Mining Ass'n v. Erdoes, 117 Nev. 531, 540 (2001).

II. SB 542 did not change—but maintained—the existing computation base and legally operative rate currently in effect for the DMV technology fee.

During the 2015 legislative session, the Legislature enacted Senate Bill No. 502 (SB 502), which required the Department of Motor Vehicles to add a technology fee of $1 to the existing fee for any transaction performed by the Department for which a fee is charged and to use the money collected from the DMV technology fee to pay the expenses associated with implementing, upgrading and maintaining the platform of information technology used by the Department. SB 502, 2015 Nev. Stat., ch. 394, § 3, at 2211 (codified in NRS 481.064). The Legislature also provided that SB 502 would become effective on July 1, 2015, and

[3] For the 2019 legislative session, the Senate Daily Journal and Assembly Daily Journal prepared and printed under NRS 218D.930 serve as public records of the proceedings of each House until the Senate Journal and Assembly Journal have been prepared, printed and bound under NRS 218D.935. This Court may take judicial notice of legislative journals as public records. Jory v. Bennight, 91 Nev. 763, 766 (1975); Fierle v. Perez, 125 Nev. 728, 737-38 n.6 (2009). Those public records are available on the Legislature's website at: https://www.leg.state.nv.us/Session/80th2019/Journal/.

would expire by limitation on June 30, 2020. SB 502, 2015 Nev. Stat., ch. 394, § 7, at 2213.

However, even though the DMV technology fee was potentially subject to future expiration under SB 502, any future expiration of the DMV technology fee was not legally operative and binding yet because it would not become legally operative and binding until completion of the State's future fiscal year ending on June 30, 2020, under well-established rules governing the operation of statutes. 82 C.J.S. Statutes § 549 (Westlaw 2019) (explaining that "[a] statute's effective date is considered that date upon which the statute came into being as existing law, while a statute's **operative date** is the date upon which the directives of the statute may be actually implemented." (emphasis added)). Therefore, when the Legislature passed SB 542 during the 2019 legislative session, the future expiration of the DMV technology fee was not legally operative and binding yet because it would not become legally operative and binding until completion of the State's future fiscal year ending on June 30, 2020. Thus, through the passage of SB 542, the Legislature amended the future expiration of the DMV technology fee and extended it for two fiscal years—from June 30, 2020, until June 30, 2022—before the future expiration of the DMV technology fee became legally operative and binding. SB 542, 2019 Nev. Stat., ch. 400, § 1, at 2502.

Consequently, SB 542 did not change—but maintained—the existing computation base and legally operative rate currently in effect for the DMV technology fee. Because SB 542 did not change—but maintained—the existing computation base and legally operative rate currently in effect for the DMV technology fee, the existing source of revenue collected by the Department of Motor Vehicles from the DMV technology fee was not changed by the passage of SB 542. Instead, that existing source of revenue remained exactly the same after the passage of SB 542. Accordingly, based on the Legislative Counsel's opinion interpreting the two-thirds requirement, the Legislature could reasonably conclude that SB 542 was not subject to the two-thirds requirement because SB 542 did not change—but maintained—the existing computation base and legally operative rate currently in effect for the DMV technology fee.

After being provided with the Legislative Counsel's opinion interpreting the two-thirds requirement, the Senate introduced SB 542 on May 10, 2019. Senate Daily Journal, 80th Sess., at 2 (Nev. May 10, 2019). On May 27, 2019, the Senate voted 13-8 in favor of passage of SB 542, and the bill was declared passed by a constitutional majority of all the members elected to the Senate under Article 4, Section 18(1). Senate Daily Journal, 80th Sess., at 9 (Nev. May 27, 2019). On May 31, 2019, the Assembly voted 28-13 in favor of passage of SB 542 (with one seat vacant), and the bill was declared passed by a constitutional majority of all the

members elected to the Assembly under Article 4, Section 18(1). Assembly Daily Journal, 80th Sess., at 6937 (Nev. May 31, 2019). On June 5, 2019, the Governor approved SB 542, and it became law under Article 4, Section 35 of the Nevada Constitution. SB 542, 2019 Nev. Stat., ch. 400, at 2501.

III. SB 551 did not change—but maintained—the existing computation bases and legally operative rates currently in effect for the Modified Business Tax.

Under NRS Chapters 363A and 363B, the Department of Taxation collects payroll taxes that are imposed on certain financial institutions, mining companies and other business entities that engage in business activities in Nevada. These payroll taxes are more commonly known as the Modified Business Tax or MBT. See Educ. Initiative PAC v. Comm. to Protect Nev. Jobs, 129 Nev. 35, 51 (2013). For the financial institutions and mining companies subject to the MBT, the existing computation base for the taxes is calculated by multiplying a tax rate of 2 percent by the amount of the wages, as defined under Nevada's labor laws, paid by the financial institution or mining company during each calendar quarter with respect to employment in connection with its business activities. NRS 363A.130. For the other business entities subject to the MBT, the existing computation base for the taxes is calculated by multiplying a tax rate of 1.475 percent by the amount of the wages, as defined under Nevada's labor laws but excluding the first $50,000

thereof, paid by the business entity during each calendar quarter with respect to employment in connection with its business activities. NRS 363B.110.

During the 2015 legislative session, the Legislature enacted Senate Bill No. 483 (SB 483), which imposed an annual commerce tax on each business entity whose Nevada gross revenue in a fiscal year exceeds $4,000,000, with the rate of the commerce tax based on the industry in which the business entity is primarily engaged. SB 483, 2015 Nev. Stat., ch. 487, §§ 2-61, at 2878-96 (codified in NRS Chapter 363C). The Legislature also established a rate adjustment procedure in SB 483 to be used by the Department of Taxation to determine whether the rates of the MBT should be reduced in future fiscal years under certain circumstances. SB 483, 2015 Nev. Stat., ch. 487, § 62, at 2896-97. The rate adjustment procedure was codified in NRS 360.203 and became effective on July 1, 2015. SB 483, 2015 Nev. Stat., ch. 487, § 114, at 2955-56. The rate adjustment procedure codified in NRS 360.203 was repealed by SB 551, effective June 12, 2019. SB 551, 2019 Nev. Stat., ch. 537, §§ 2, 3, 37, 39, 40, at 3273, 3275, 3294.

Under the former rate adjustment procedure, on or before September 30 of each even-numbered year, the Department of Taxation was directed to determine the combined revenue from the commerce tax and the MBT for the preceding

fiscal year. NRS 360.203 (repealed effective June 12, 2019).[4] If that combined revenue exceeded a certain threshold amount, the Department of Taxation was directed to make additional calculations to determine future reduced rates for the MBT. Id. However, any future reduced rates for the MBT would not go into effect and become legally operative and binding until July 1 of the following odd-numbered year, which was the beginning of the State's next fiscal year. Id.

Even though the former rate adjustment procedure became effective on July 1, 2015, no future reduced rates for the MBT had ever gone into effect and become legally operative and binding under the former rate adjustment procedure when the Legislature passed SB 551 during the 2019 legislative session. Legislative Counsel's Digest, SB 551, 2019 Nev. Stat., ch. 537, at 3271. As a result, when the Legislature passed SB 551 during the 2019 legislative session, the existing computation bases and legally operative rates currently in effect for the MBT were set by NRS 363A.130 and 363B.110 at 2 percent and 1.475 percent, respectively, and SB 551 did not change—but maintained—the existing computation bases and legally operative rates set by NRS 363A.130 and 363B.110 for the MBT. SB 551, 2019 Nev. Stat., ch. 537, §§ 2, 3, 37, 39, at 3273, 3275, 3294. Accordingly, based on the Legislative Counsel's opinion interpreting the

[4] NRS 360.203 (repealed effective June 12, 2019) is reproduced in the Addendum to this brief.

two-thirds requirement, the Legislature could reasonably conclude that SB 551 was not subject to the two-thirds requirement because SB 551 did not change—but maintained—the existing computation bases and legally operative rates currently in effect for the MBT.

After being provided with the Legislative Counsel's opinion interpreting the two-thirds requirement, the Senate introduced SB 551 on May 27, 2019. Senate Daily Journal, 80th Sess., at 68-69 (Nev. May 27, 2019). On June 3, 2019, the Senate voted 13-8 in favor of passage of SB 551, and the bill was declared passed, as amended by the Senate, by a constitutional majority of all the members elected to the Senate under Article 4, Section 18(1). Senate Daily Journal, 80th Sess., at 98-99 (Nev. June 3, 2019). Also on June 3, 2019, the Assembly voted 28-13 in favor of passage of SB 551 (with one seat vacant), and the bill was declared passed, as amended by the Senate, by a constitutional majority of all the members elected to the Assembly under Article 4, Section 18(1). Assembly Daily Journal, 80th Sess., at 7768-69 (Nev. June 3, 2019). On June 12, 2019, the Governor approved SB 551, and it became law under Article 4, Section 35. SB 551, 2019 Nev. Stat., ch. 537, at 3271.

IV. Plaintiffs' state constitutional claims and the proceedings in the district court.

On July 19, 2019, Plaintiffs filed their original complaint. (*JA1:000001*.) Before serving their original complaint, the Plaintiffs filed their first amended

complaint on July 30, 2019. (*JA1:000015*.) In their first amended complaint, Plaintiffs claimed that SB 542 and SB 551 were each subject to the two-thirds requirement and that each bill is unconstitutional because the Senate passed each bill by a majority of all the members elected to the Senate, instead of a two-thirds majority of all the members elected to the Senate. (*JA1:000023-30*.)

Plaintiffs consist of: (1) eight members of the Senate ("Plaintiff Senators") who voted against SB 542 and SB 551 during the 2019 legislative session; and (2) several private businesses, associations and other entities that pay—or whose members pay—certain fees and taxes associated with SB 542 and SB 551 ("Plaintiff Businesses"). (*JA1:000016-20*, ¶¶ *1-13*.) Plaintiffs named several state officers and agencies of the executive branch and legislative branch as defendants in their official capacities. (*JA1:000020-21*, ¶¶ *16-21*.)

As named in the first amended complaint, the executive branch defendants are: (1) the Honorable Kate Marshall, in her official capacity as Lieutenant Governor of the State of Nevada and 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 "Executive Defendants"). (*JA1:000020-21*, ¶¶ *17, 19, 20, 21*.) The Department of Taxation is empowered by state law with statewide administrative functions under the challenged provisions of SB 551. 2019 Nev.

Stat., ch. 537, §§ 2, 3, 37, 39, at 3273, 3275, 3294. The Department of Motor Vehicles is empowered by state law with statewide administrative functions under the challenged provisions of SB 542. 2019 Nev. Stat., ch. 400, § 1, at 2501-02. The Executive Defendants are represented in their official capacities by the Office of the Attorney General.

As named in the first amended complaint, the legislative branch defendants are: (1) the Honorable Nicole Cannizzaro, in her official capacity as Senate Majority Leader; and (2) Claire Clift, in her official capacity as the Secretary of the Senate. (*JA1:000020-21*, ¶¶ *16, 18*.) Senator Cannizzaro and Secretary Clift are represented in their official capacities by LCB Legal under NRS 218F.720.[5]

On December 19, 2019, the district court granted the Legislature's motion to intervene as a Defendant-Intervenor and denied Plaintiff Senators' motion to disqualify LCB Legal as counsel for the Legislature. (*JA2:000433*.) The Legislature sought intervention to defend the constitutionality of SB 542 and SB 551 and its reasonable interpretation of the two-thirds requirement.

[5] On December 19, 2019, the district court granted Plaintiff Senators' motion to disqualify LCB Legal as counsel for Senator Cannizzaro and Secretary Clift. On January 10, 2020, this Court stayed the district court proceedings while LCB Legal sought mandamus review of the disqualification order. On June 26, 2020, this Court issued an opinion and writ of mandamus overturning the disqualification order and lifting the stay. State ex rel. Cannizzaro v. First Jud. Dist. Ct., 136 Nev. Adv. Op. 34, 466 P.3d 529, 534 (2020).

At a hearing on September 21, 2020, the district court received oral arguments on the following dispositive motions: (1) motion to dismiss filed by Executive Defendants; (2) motion for summary judgment filed by Plaintiffs; (3) counter-motion for summary judgment filed by Legislative Defendants and Defendant-Intervenor Legislature; and (4) Executive Defendants' joinder to Legislative Defendants' counter-motion for summary judgment. (*JA6:001107-08; JA6:001179.*)

On October 7, 2020, the district court entered an order and final judgment adjudicating all the claims of all the parties and granting final judgment in favor of Plaintiffs on their claims for declaratory and injunctive relief. (*JA6:001188-89, ¶¶ 1-7.*) The district court declared that SB 542 and SB 551 were bills which create, generate or increase any public revenue in any form and were subject to the two-thirds requirement. (*JA6:001188, ¶ 1.*) Because the Senate did not pass the bills by a two-thirds majority vote, the district court declared that the provisions of SB 542 and sections 2, 3, 37 and 39 of SB 551 are unconstitutional and invalid, and the district court enjoined the Department of Motor Vehicles and Department of Taxation from collecting and enforcing the fees and taxes under the invalidated provisions and ordered an immediate refund of those fees and taxes to the affected fee payers and taxpayers with interest at the legal rate of interest from the date collected. (*JA6:001188, ¶¶ 1-2.*) However, the district court declared that, under

the severance doctrine, "the remaining provisions of SB 551 can be severed and shall remain in effect." (*JA6:001188, ¶ 1.*)

In its order, the district court also concluded that "Plaintiffs are not entitled to recover attorney's fees as special damages because there was not bad faith in regard to this matter." (*JA6:001188, ¶ 3.*) As a result, the district court ordered that "Plaintiffs are not entitled to recover attorney's fees as special damages for bringing their claims for declaratory and injunctive relief and summary judgment is granted in favor of Defendants on any claims to recover attorney's fees as special damages." (*JA6:001188, ¶ 3.*)

In its order, the district court also concluded that "as to an award of attorney's fees and costs, the individual Executive and Legislative Defendants should be dismissed." (*JA6:001187.*) As a result, the district court ordered that "the individual Executive and Legislative Defendants, the Honorable Nicole Cannizzaro, the Honorable Kate Marshall, the Honorable Claire J. Clift, and the Honorable Steve Sisolak, are dismissed from this action." (*JA6:001189, ¶ 4.*)

On October 9, 2020, the Legislature filed a notice of appeal, and the Department of Taxation and Department of Motor Vehicles filed a notice of appeal to seek appellate review of the district court's order which declared SB 542 and sections 2, 3, 37 and 39 of SB 551 to be unconstitutional and invalid and which enjoined their enforcement. (*JA6:001214; JA6:001218.*)

On October 23, 2020, Plaintiffs filed a notice of cross-appeal to seek appellate review of the district court's order which: (1) concluded that Plaintiffs are not entitled to recover attorney's fees as special damages for bringing their claims for declaratory and injunctive relief; and (2) dismissed the Individual Legislative and Executive Defendants. (*JA6:001319.*)

On November 13, 2020, the district court granted Executive Defendants' and Defendant-Intervenor Legislature's joint motion for stay pending appeal. (*JA7:001391.*)

SUMMARY OF THE ARGUMENT

Based on the Legislative Counsel's legal opinion interpreting the two-thirds requirement, the Legislature could reasonably conclude that SB 542 was not subject to the two-thirds requirement because the bill did not change—but maintained—the existing computation base and legally operative rate currently in effect for the DMV technology fee. By amending the future expiration of the DMV technology fee before that future expiration had become legally operative and binding, SB 542 did not create, generate or increase any public revenue in any form because it maintained the rate of the DMV technology fee at $1 per transaction, which is the rate that was legally in effect before the passage of SB 542 and which is the rate that is now legally in effect after the passage of SB 542. Therefore, the Legislature could reasonably conclude that SB 542 was not

subject to the two-thirds requirement because the actual effect of the bill did not create, generate or increase any public revenue in any form and, in fact, did not alter existing public revenue at all, which was the Legislature's clear intent when it passed SB 542.

Similarly, based on the Legislative Counsel's legal opinion interpreting the two-thirds requirement, the Legislature could reasonably conclude that SB 551 was not subject to the two-thirds requirement because the challenged provisions of sections 2, 3, 37 and 39 of SB 551 did not change—but maintained—the existing computation bases and legally operative rates currently in effect for the MBT. By eliminating the future application of the rate adjustment procedure before any future reduced rates for the MBT had become legally operative and binding, the challenged provisions of SB 551 did not create, generate or increase any public revenue in any form because they maintained the rates of the MBT at 2 percent and 1.475 percent, as applicable to each affected business, which are the rates that were legally in effect before the passage of SB 551 and which are the rates that are now legally in effect after the passage of SB 551. Therefore, the Legislature could reasonably conclude that SB 551 was not subject to the two-thirds requirement because the actual effect of the challenged provisions of SB 551 did not create, generate or increase any public revenue in any form and, in fact, did not alter

existing public revenue at all, which was the Legislature's clear intent when it passed SB 551.

Finally, the Legislature's reasonable interpretation of the two-thirds requirement is supported by: (1) contemporaneous extrinsic evidence of the purpose and intent of Nevada's two-thirds requirement; and (2) case law from other states interpreting similar supermajority requirements that served as the model for Nevada's two-thirds requirement. In passing SB 542 and SB 551, the Legislature acted on the Legislative Counsel's legal opinion interpreting the two-thirds requirement in light of that contemporaneous extrinsic evidence and case law, and "the Legislature is entitled to deference in its counseled selection of this interpretation." Nev. Mining, 117 Nev. at 540.

ARGUMENT

I. The Legislature could reasonably conclude that SB 542 and SB 551 were not subject to the two-thirds requirement because: (1) SB 542 did not change—but maintained—the existing computation base and legally operative rate currently in effect for the DMV technology fee; and (2) SB 551 did not change—but maintained—the existing computation bases and legally operative rates currently in effect for the MBT.

A. Standards for reviewing the district court's summary-judgment order and Plaintiffs' state constitutional claims.

Because Plaintiffs' state constitutional claims raise only issues of law, the district court's decision granting summary judgment and providing declaratory and injunctive relief is reviewed de novo on appeal. Nevadans for Nev. v. Beers, 122

Nev. 930, 942 (2006). The question of whether a statute is constitutional is also reviewed de novo on appeal. Id. at 939. Under the de novo standard, this Court reviews the district court's interpretation and application of constitutional provisions de novo "without deference to the district court's decision." Sparks Nugget v. State Dep't of Tax'n, 124 Nev. 159, 163 (2008).

Furthermore, in reviewing the constitutionality of a statute, this Court presumes the statute is constitutional, and "[i]n case of doubt, every possible presumption will be made in favor of the constitutionality of a statute, and courts will interfere only when the Constitution is clearly violated." List v. Whisler, 99 Nev. 133, 137 (1983). The presumption places a heavy burden on the challenger to make "a clear showing that the statute is unconstitutional." Id. at 138. Consequently, this Court will 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); State ex rel. Lewis v. Doron, 5 Nev. 399, 408 (1870) ("[E]very statute is to be upheld, unless plainly and without reasonable doubt in conflict with the Constitution.").

Finally, it is a fundamental rule of constitutional review that this Court "will not declare an act void because it disagrees with the wisdom of the Legislature." Anthony v. State, 94 Nev. 337, 341 (1978). Thus, in reviewing the constitutionality of a statute, this Court is not concerned with the wisdom or policy

of the statute because "[q]uestions relating to the policy, wisdom, and expediency of the law are for the people's representatives in the legislature assembled, and not for the courts to determine." Worthington v. Dist. Ct., 37 Nev. 212, 244 (1914).

B. Rules of construction for state constitutional provisions.

This Court has long held that the rules of statutory construction also govern the interpretation of state constitutional provisions, including provisions approved by the voters through a ballot initiative. See Lorton v. Jones, 130 Nev. 51, 56-57 (2014) (applying the rules of statutory construction to constitutional provisions approved by the voters through a ballot initiative); State ex rel. Wright v. Dovey, 19 Nev. 396, 399 (1887) ("In construing constitutions and statutes, the first and last duty of courts is to ascertain the intention of the convention and legislature; and in doing this they must be governed by well-settled rules, applicable alike to the construction of constitutions and statutes.").

When applying the rules of construction to constitutional provisions, this Court's primary task is to ascertain the intent of the drafters and the voters and to adopt an interpretation that best captures their objective. Nev. Mining, 117 Nev. at 531. To ascertain the intent of the drafters and the voters, this Court will first examine the language of the constitutional provision to determine whether it has a plain and ordinary meaning. Miller v. Burk, 124 Nev. 579, 590 (2008). If the constitutional language is clear on its face and is not susceptible to any ambiguity,

uncertainty or doubt, this Court will generally give the constitutional language its plain and ordinary meaning, unless doing so would violate the spirit of the provision or would lead to an absurd or unreasonable result. Miller, 124 Nev. at 590-91; Nev. Mining, 117 Nev. at 542 & n.29.

However, if the constitutional language is capable of "two or more reasonable but inconsistent interpretations," making it susceptible to ambiguity, uncertainty or doubt, this Court will interpret the constitutional provision according to what history, reason and public policy would indicate the drafters and the voters intended. Miller, 124 Nev. at 590 (quoting Gallagher v. City of Las Vegas, 114 Nev. 595, 599 (1998)). Under such circumstances, this Court will look "beyond the language to adopt a construction that best reflects the intent behind the provision." Sparks Nugget v. State Dep't of Tax'n, 124 Nev. 159, 163 (2008). Thus, if there is any ambiguity, uncertainty or doubt as to the meaning of a constitutional provision, "[t]he intention of those who framed the instrument must govern, and that intention may be gathered from the subject-matter, the effects and consequences, or from the reason and spirit of the law." State ex rel. Cardwell v. Glenn, 18 Nev. 34, 42 (1883).

Furthermore, even when there is some ambiguity, uncertainty or doubt as to the meaning of a constitutional provision, that ambiguity, uncertainty or doubt must be resolved in favor of the Legislature and its general power to enact

legislation. When the Nevada Constitution imposes limitations upon the Legislature's power, those limitations "are to be strictly construed, and are not to be given effect as against the general power of the legislature, unless such limitations clearly inhibit the act in question." In re Platz, 60 Nev. 296, 308 (1940) (quoting Baldwin v. State, 3 S.W. 109, 111 (Tex. Ct. App. 1886)). As a result, the language of the Nevada Constitution "must be strictly construed in favor of the power of the legislature to enact the legislation under it." Id. Therefore, even when a constitutional provision imposes restrictions and limitations upon the Legislature's power, those "[r]estrictions and limitations are not extended to include matters not covered." City of Los Angeles v. Post War Pub. Works Rev. Bd., 156 P.2d 746, 754 (Cal. 1945).

For example, under the South Dakota Constitution, the South Dakota Legislature may pass its general appropriations bill to fund the operating expenses of state government by a majority of all the members elected to each House, but the final passage of any special appropriations bills to authorize funding for other purposes requires "a two-thirds vote of all the members of each branch of the Legislature." S.D. Const. art. III, § 18, art. XII, § 2. In interpreting this two-thirds majority requirement, the South Dakota Supreme Court has determined that the requirement must not be extended by construction or inference to include situations

not clearly within its terms. Apa v. Butler, 638 N.W.2d 57, 69-70 (S.D. 2001). As further explained by the court:

> [P]etitioners strongly urged during oral argument that the challenged appropriations from the [special funds] must be special appropriations because it took a two-thirds majority vote of each House of the legislature to create the two special funds in the first instance. Petitioners correctly pointed out that allowing money from the two funds to be reappropriated in the general appropriations bill would allow the legislature to undo by a simple majority vote what it took a two-thirds majority to create. On that basis, petitioners invite this Court to read a two-thirds vote requirement into the Constitution for the amendment or repeal of any special continuing appropriations measure. This we cannot do.
>
> Our Constitution must be construed by its plain meaning: "If the words and language of the provision are unambiguous, 'the language in the constitution must be applied as it reads.'" Cid v. S.D. Dep't of Social Servs., 598 N.W.2d 887, 890 (S.D. 1999). Here, the constitutional two-thirds voting requirement for appropriations measures is only imposed on the *passage* of a special appropriation. See S.D. Const. art. XII, § 2. There is no constitutional requirement for a two-thirds vote on the repeal or amendment of an existing special appropriation, not to mention a continuing special appropriation. Generally:
>
> > [s]pecial provisions in the constitution as to the number of votes required for the passage of acts of a particular nature . . . are not extended by construction or inference to include situations not clearly within their terms. Accordingly, a special provision regulating the number of votes necessary for the passage of bills of a certain character does not apply to the repeal of laws of this character, or to an act which only amends them.

Apa, 638 N.W.2d at 69-70 (quoting 82 C.J.S. Statutes § 39 (1999) (republished as 82 C.J.S. Statutes § 52 (Westlaw 2020))).

Lastly, in matters involving state constitutional law, this Court is the final interpreter of the meaning of the Nevada Constitution. Nevadans for Nev. v. Beers, 122 Nev. 930, 943 n.20 (2006) ("A well-established tenet of our legal system is that the judiciary is endowed with the duty of constitutional interpretation."); Guinn v. Legislature (Guinn II), 119 Nev. 460, 471 (2003) (describing this Court's justices "as the ultimate custodians of constitutional meaning."). Nevertheless, even though the final power to decide the meaning of the Nevada Constitution ultimately rests with the judiciary, "[i]n the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others." United States v. Nixon, 418 U.S. 683, 703 (1974).

Accordingly, this Court has recognized that a reasonable construction of a constitutional provision by the Legislature should be given great weight. State ex rel. Coffin v. Howell, 26 Nev. 93, 104-05 (1901); State ex rel. Cardwell v. Glenn, 18 Nev. 34, 43-46 (1883). This is particularly true when a constitutional provision concerns the passage of legislation. Id. Thus, when construing a constitutional provision, "although the action of the legislature is not final, its decision upon this point is to be treated by the courts with the consideration which is due to a co-ordinate department of the state government, and in case of a reasonable doubt as to the meaning of the words, the construction given to them by the legislature

ought to prevail." Dayton Gold & Silver Mining Co. v. Seawell, 11 Nev. 394, 399-400 (1876).

The weight given to the Legislature's construction of a constitutional provision involving legislative procedure is of particular force when the meaning of the constitutional provision is subject to any uncertainty, ambiguity or doubt. Nev. Mining, 117 Nev. at 539-40. Under such circumstances, the Legislature may rely on an opinion of its counsel which interprets the constitutional provision, and "the Legislature is entitled to deference in its counseled selection of this interpretation." Id. at 540. For example, when the meaning of the term "midnight Pacific standard time"—as formerly used in the constitutional provision limiting legislative sessions to 120 days—was subject to uncertainty, ambiguity and doubt following the 2001 legislative session, this Court explained that the Legislature's interpretation of the constitutional provision was entitled to deference because "[i]n choosing this interpretation, the Legislature acted on Legislative Counsel's opinion that this is a reasonable construction of the provision. We agree that it is, and the Legislature is entitled to deference in its counseled selection of this interpretation." Id.

Consequently, in determining whether the two-thirds requirement applies to a particular bill, the Legislature has the power to interpret the two-thirds requirement—in the first instance—as a reasonable and necessary corollary power

to the exercise of its expressly granted and exclusive constitutional power to enact laws by the passage of bills. See Nev. Const. art. 4, § 23 (providing that "no law shall be enacted except by bill."); State ex rel. Torreyson v. Grey, 21 Nev. 378, 380-84 (1893) (discussing the power of the Legislature to interpret constitutional provisions governing legislative procedure). Moreover, because the two-thirds requirement involves the exercise of the Legislature's lawmaking power, any uncertainty, ambiguity or doubt regarding the application of the two-thirds requirement must be resolved in favor of the Legislature's lawmaking power and against restrictions on that power. See Platz, 60 Nev. at 308 (stating that the language of the Nevada Constitution "must be strictly construed in favor of the power of the legislature to enact the legislation under it.").

Finally, when the Legislature exercises its power to interpret the two-thirds requirement in the first instance, the Legislature may resolve any uncertainty, ambiguity or doubt regarding the application of the two-thirds requirement by following an opinion of its counsel which interprets the constitutional provision, and this Court will typically afford the Legislature deference in its counseled selection of that interpretation. Nev. Mining, 117 Nev. at 40.

C. Based on the Legislative Counsel's legal opinion interpreting the two-thirds requirement, the Legislature could reasonably conclude that SB 542 and SB 551 were not subject to the two-thirds requirement, and the Legislature is entitled to deference in its counseled selection of this interpretation.

Under Article 4, Section 18(1), a majority of all the members elected to each House is necessary to pass every bill, unless the bill is subject to the two-thirds requirement in Article 4, Section 18(2), which provides:

> [A]n 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(2).

Based on the plain language in Article 4, Section 18(2), the two-thirds requirement applies to a bill which "creates, generates, or increases any public revenue in any form." The two-thirds requirement, however, does not provide any definitions to assist the reader in applying the terms "creates, generates, or increases." Therefore, in the absence of any constitutional definitions, those terms must be given their ordinary and commonly understood meanings.

As explained by this Court, "[w]hen a word is used in a statute or constitution, it is supposed it is used in its ordinary sense, unless the contrary is indicated." Ex parte Ming, 42 Nev. 472, 492 (1919); Seaborn v. Wingfield, 56 Nev. 260, 267 (1935) (stating that a word or term "appearing in the constitution must be taken in its general or usual sense."). To arrive at the ordinary and commonly understood meaning of the constitutional language, this Court will usually rely upon dictionary definitions because those definitions reflect the

ordinary meanings that are commonly ascribed to words and terms. See Rogers v. Heller, 117 Nev. 169, 173 & n.8 (2001); Cunningham v. State, 109 Nev. 569, 571 (1993). Therefore, unless it is clear that the drafters of a constitutional provision intended for a term to be given a technical meaning, this Court has emphasized that "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." Strickland v. Waymire, 126 Nev. 230, 234 (2010) (quoting Dist. of Columbia v. Heller, 554 U.S. 570, 576 (2008)).

Accordingly, in interpreting the two-thirds requirement, the terms "creates, generates, or increases" must be given their normal and ordinary meanings that are commonly ascribed to those terms. The common dictionary meaning of the term "create" is to "bring into existence" or "produce." Webster's New Collegiate Dictionary 304 (9th ed. 1991). The common dictionary meaning of the term "generate" is also to "bring into existence" or "produce." Id. at 510. Finally, the common dictionary meaning of the term "increase" is to "make greater" or "enlarge." Id. at 611.

Based on the normal and ordinary meanings of the terms "creates, generates, or increases," the Legislature could reasonably conclude that the two-thirds requirement applies to a bill which directly brings into existence, produces or enlarges public revenue in the first instance by imposing new or increased state

taxes. However, when a bill does not impose new or increased state taxes but simply maintains the existing "computation bases" or statutory formulas currently in effect for existing state taxes, the Legislature could reasonably conclude that the two-thirds requirement **does not** apply to the bill because it does not bring into existence, produce or enlarge any public revenue in any form.

Additionally, given its plain language, the two-thirds requirement applies to a bill which makes "changes in the **computation bases** for taxes, fees, assessments and rates." Nev. Const. art. 4, § 18(2) (emphasis added). Based on its normal and ordinary meaning, a "computation base" is a formula that consists of "a number that is multiplied by a rate or [from] which a percentage or fraction is calculated." Webster's New Collegiate Dictionary 133 & 271 (9th ed. 1991) (defining the terms "computation" and "base"). In other words, a "computation base" is a formula which consists of a base number (such as an amount of money) and a number serving as a multiplier (such as a percentage or fraction) that is used to calculate the product of those two numbers.

By applying the normal and ordinary meaning of the term "computation base," the Legislature could reasonably conclude that the two-thirds requirement applies to a bill which directly changes the statutory computation bases—that is, the statutory formulas—used for calculating existing state taxes, so that the revised statutory formulas directly bring into existence, produce or enlarge public revenue

in the first instance because the existing statutory base numbers or the existing statutory multipliers are changed by the bill in a manner that creates, generates, or increases public revenue. However, when a bill does not change—but maintains—the existing statutory base numbers and the existing statutory multipliers currently in effect for the existing statutory formulas, the Legislature could reasonably conclude that the bill **does not** create, generate or increase any public revenue in any form because the existing "computation bases" currently in effect are not changed by the bill.

In this case, the Legislature could reasonably conclude that SB 542 did not create, generate or increase any public revenue in any form because SB 542 did not change—but maintained—the existing computation base and legally operative rate currently in effect for the DMV technology fee. When the Legislature passed SB 542 during the 2019 legislative session, the future expiration of the DMV technology fee would not become legally operative and binding until completion of the State's future fiscal year ending on June 30, 2020, under well-established rules governing the operation of statutes.

It is well established that "[t]he existence of a law, and the time when it shall take effect, are two separate and distinct things. The law exists from the date of approval, but its operation [may be] postponed to a future day." People ex rel. Graham v. Inglis, 43 N.E. 1103, 1104 (Ill. 1896). Thus, because the Legislature

has the power to postpone the operation of a statute until a later time, it may enact a statute that has both an effective date and a later operative date. 82 C.J.S. Statutes § 549 (Westlaw 2019). Under such circumstances, the effective date is the date upon which the statute becomes an existing law, but the later operative date is the date upon which the requirements of the statute will actually become legally binding. 82 C.J.S. Statutes § 549 (Westlaw 2019); Preston v. State Bd. of Equal., 19 P.3d 1148, 1167 (Cal. 2001). When a statute has both an effective date and a later operative date, the statute must be understood as speaking from its later operative date when it actually becomes legally binding and not from its earlier effective date when it becomes an existing law but does not have any legally binding requirements yet. 82 C.J.S. Statutes § 549 (Westlaw 2019); Longview Co. v. Lynn, 108 P.2d 365, 373 (Wash. 1940). Consequently, until the statute reaches its later operative date, the statute is not legally operative and binding yet, and the statute does not confer any presently existing and enforceable legal rights or benefits under its provisions. Id.; Levinson v. City of Kansas City, 43 S.W.3d 312, 316-18 (Mo. Ct. App. 2001).

By its very nature, an expiration clause cannot become legally operative and binding any sooner than the future date of expiration set forth in the clause. Until that future date of expiration arrives, the expiration clause remains dormant and inoperative, it cannot be applied to any presently existing facts or circumstances,

and it does not confer any presently existing and enforceable legal rights or benefits under its provisions. In other words, the expiration clause is not legally operative and binding yet.

Therefore, when the Legislature passed SB 542 during the 2019 legislative session, the future expiration of the DMV technology fee was not legally operative and binding yet because it would not become legally operative and binding until completion of the State's future fiscal year ending on June 30, 2020. Given that the future expiration of the DMV technology fee was not legally operative and binding when the Legislature passed SB 542, this case involves several well-established principles of law governing the Legislature's power of controlling the public purse and the use of public funds for each fiscal year. See State of Nev. Employees Ass'n v. Daines, 108 Nev. 15, 21 (1992) ("[I]t is well established that the power of controlling the public purse lies within legislative, not executive authority.").

Under the Nevada Constitution, the state government operates on a fiscal year commencing on July 1 of each year. Nev. Const. art. 9, §§ 1-2. When the Legislature holds its regular biennial legislative session beginning on the first Monday of February of each odd-numbered year, the Legislature must enact legislation providing for public revenues to defray the estimated expenses of the state government for the next two fiscal years of the following biennium, which

begins on July 1 after the legislative session. Nev. Const. art. 4, § 2 & art. 9, §§ 1-3. However, the Nevada Constitution places restrictions on the Legislature's power to commit or bind public funds for each fiscal year, and the Legislature cannot enact statutory provisions committing or binding future Legislatures regarding public funds in future fiscal years, unless the Legislature complies with certain constitutional requirements. Nev. Const. art. 9, §§ 2-3; Employers Ins. Co. v. State Bd. of Exam'rs, 117 Nev. 249, 254-58 (2001); Morris v. Bd. of Regents, 97 Nev. 112, 114-15 (1981).

Consequently, when the Legislature enacts legislation concerning public funds, it cannot—through the enactment of an ordinary statute—bind or limit the legislative power of future Legislatures. See Fletcher v. Peck, 10 U.S. 87, 135 (1810) ("[O]ne legislature cannot abridge the powers of a succeeding legislature. The correctness of this principle, so far as respects general legislation, can never be controverted."); United States v. Winstar Corp., 518 U.S. 839, 872 (1996) ("[O]ne legislature may not bind the legislative authority of its successors."). As explained by the U.S. Supreme Court:

> Every succeeding legislature possesses the same jurisdiction and power with respect to [public laws] as its predecessors. The latter have the same power of repeal and modification which the former had of enactment, neither more nor less. All occupy, in this respect, a footing of perfect equality.

Newton v. Mahoning Cnty. Comm'rs, 100 U.S. 548, 559 (1879).

Therefore, when the Legislature passed SB 542 during the 2019 legislative session, the future expiration of the DMV technology fee was not legally operative and binding yet because it would not become legally operative and binding until completion of the State's future fiscal year ending on June 30, 2020. Thus, through the passage of SB 542, the Legislature amended the future expiration of the DMV technology fee and extended it for two fiscal years—from June 30, 2020, until June 30, 2022—before the future expiration of the DMV technology fee became legally operative and binding.

Under such circumstances, SB 542 did not change—but maintained—the existing computation base and legally operative rate currently in effect for the DMV technology fee. Because SB 542 did not change—but maintained—the existing computation base and legally operative rate currently in effect for the DMV technology fee, the existing source of revenue collected by the Department of Motor Vehicles from the DMV technology fee was not changed by the passage of SB 542. Instead, that existing source of revenue remained exactly the same after the passage of SB 542. Accordingly, based on the Legislative Counsel's opinion interpreting the two-thirds requirement, the Legislature could reasonably conclude that SB 542 did not create, generate or increase any public revenue in any form because SB 542 did not change—but maintained—the existing computation base and legally operative rate currently in effect for the DMV technology fee.

Similarly, based on the Legislative Counsel's opinion interpreting the two-thirds requirement, the Legislature could reasonably conclude that SB 551 did not create, generate or increase any public revenue in any form because SB 551 did not change—but maintained—the existing computation bases and legally operative rates currently in effect for the MBT. Under the former rate adjustment procedure repealed by SB 551, any future reduced rates for the MBT would not go into effect and become legally operative and binding until July 1 of the following odd-numbered year, which was the beginning of the State's next fiscal year. NRS 360.203 (repealed effective June 12, 2019).

Even though the former rate adjustment procedure became effective on July 1, 2015, no future reduced rates for the MBT had ever gone into effect and become legally operative and binding under the former rate adjustment procedure when the Legislature passed SB 551 during the 2019 legislative session. Legislative Counsel's Digest, SB 551, 2019 Nev. Stat., ch. 537, at 3271. As a result, when the Legislature passed SB 551 during the 2019 legislative session, the existing computation bases and legally operative rates currently in effect for the MBT were set by NRS 363A.130 and 363B.110 at 2 percent and 1.475 percent, respectively, and SB 551 did not change—but maintained—the existing computation bases and legally operative rates set by NRS 363A.130 and 363B.110 for the MBT. SB 551, 2019 Nev. Stat., ch. 537, §§ 2, 3, 37, 39, at 3273, 3275,

3294. Accordingly, based on the Legislative Counsel's opinion interpreting the two-thirds requirement, the Legislature could reasonably conclude that SB 551 did not create, generate or increase any public revenue in any form because SB 551 did not change—but maintained—the existing computation bases and legally operative rates currently in effect for the MBT.

Given that the Legislature acted on the Legislative Counsel's legal opinion interpreting the two-thirds requirement, "the Legislature is entitled to deference in its counseled selection of this interpretation." Nev. Mining, 117 Nev. at 540. Therefore, based on the Legislative Counsel's legal opinion interpreting the two-thirds requirement, the Legislature could reasonably conclude that SB 542 and SB 551 were not subject to the two-thirds requirement, and the Legislature is entitled to deference in its counseled selection of this interpretation.

In the proceedings below, Plaintiffs argued that the Legislative Counsel's legal opinion interpreting the two-thirds requirement should not be given deference because the Legislative Counsel interpreted the two-thirds requirement differently in the past without a corresponding change in the law to justify any change in the prior legal position. To support their argument, Plaintiffs contended that, prior to 2019, the Legislative Counsel advised the Legislature that the two-thirds requirement applies to a bill "extending a sunset provision or extending a tax or fee." (*JA4:00690-91.*) As examples of the Legislative Counsel's prior legal

position, Plaintiffs pointed to bills that were given the two-thirds designation by the Legislative Counsel in prior legislative sessions, and they also pointed to oral testimony provided by LCB Legal attorneys during committee proceedings in prior legislative sessions. (*JA4:00690-91*.)

However, these examples of the Legislative Counsel's prior legal position do not include a **prior written legal opinion** provided by the Legislative Counsel under NRS 218F.710 which interpreted and applied the two-thirds requirement to **bills similar to SB 542 and SB 551** and which included citation to authority and an explanation of the legal reasoning used to support the legal opinion. Thus, on May 8, 2019, when the Legislative Counsel provided the written legal opinion under NRS 218F.710 that is relevant to this case, the Legislative Counsel had not issued a prior written legal opinion under NRS 218F.710 which interpreted and applied the two-thirds requirement to bills similar to SB 542 and SB 551 and which included citation to authority and an explanation of the legal reasoning used to support the legal opinion. Thus, contrary to Plaintiffs' arguments in the proceedings below, when the Legislative Counsel provided the written legal opinion under NRS 218F.710 that is relevant to this case, that written legal opinion does not contradict any prior written legal opinion provided by the Legislative Counsel under NRS 218F.710 which interpreted and applied the two-thirds requirement to bills similar to SB 542 and SB 551.

Accordingly, in passing SB 542 and SB 551, the Legislature acted appropriately in relying on the Legislative Counsel's written legal opinion under NRS 218F.710 interpreting the two-thirds requirement. In doing so, "the Legislature acted on Legislative Counsel's opinion that this is a reasonable construction of the provision . . . and the Legislature is entitled to deference in its counseled selection of this interpretation." Nev. Mining, 117 Nev. at 540. Therefore, based on the Legislative Counsel's legal opinion interpreting the two-thirds requirement, the Legislature could reasonably conclude that SB 542 and SB 551 were not subject to the two-thirds requirement, and the Legislature is entitled to deference in its counseled selection of this interpretation. Consequently, because the Legislature could reasonably conclude that SB 542 and SB 551 were not subject to the two-thirds requirement, this Court should reverse the district court's order invalidating the provisions of SB 542 and sections 2, 3, 37 and 39 of SB 551 as unconstitutional.

D. The Legislature's reasonable interpretation of the two-thirds requirement is supported by contemporaneous extrinsic evidence of the purpose and intent of Nevada's two-thirds requirement.

When interpreting constitutional provisions approved by the voters through a ballot initiative, this Court may consider contemporaneous extrinsic evidence of the purpose and intent of the constitutional provisions that was available when the initiative was presented to the voters for approval. 42 Am. Jur. 2d Initiative &

Referendum § 49 (Westlaw 2020) ("To the extent possible, when interpreting a ballot initiative, courts attempt to place themselves in the position of the voters at the time the initiative was placed on the ballot and try to interpret the initiative using the tools available to citizens at that time."). This Court may find contemporaneous extrinsic evidence of purpose and intent from the legislative history surrounding the proposal and approval of the ballot measure. See Ramsey v. City of N. Las Vegas, 133 Nev. 96, 99-101 (2017). This Court also may find contemporaneous extrinsic evidence of purpose and intent from statements made by proponents and opponents of the ballot measure. See Guinn II, 119 Nev. at 471-72. Finally, this Court may find contemporaneous extrinsic evidence of purpose and intent from the ballot materials provided to the voters, such as the question, explanation and arguments for and against passage included in the sample ballots sent to the voters. See Nev. Mining, 117 Nev. at 539; Pellegrini v. State, 117 Nev. 860, 876-77 (2001).

Nevada's voters approved the two-thirds requirement at the general elections in 1994 and 1996. When the ballot initiative was presented to the voters, one of the primary sponsors of the initiative was former Assemblyman Jim Gibbons. See Guinn II, 119 Nev. at 471-72 (discussing the two-thirds requirement and describing Assemblyman Gibbons as "the initiative's prime sponsor"). During the 1993 legislative session, Assemblyman Gibbons sponsored Assembly Joint Resolution

No. 21 (AJR 21), which proposed adding a two-thirds requirement, but Assemblyman Gibbons was not successful in obtaining its passage. Legislative History of AJR 21, 67th Leg. (Nev. LCB Research Library 1993).[6]

Nevertheless, because Assemblyman Gibbons' legislative testimony on AJR 21 in 1993 provides some contemporaneous extrinsic evidence of the purpose and intent of the two-thirds requirement, this Court has reviewed and considered that testimony when discussing the two-thirds requirement that was ultimately approved by the voters in 1994 and 1996. Guinn II, 119 Nev. at 472. In his legislative testimony on AJR 21 in 1993, Assemblyman Gibbons stated that the two-thirds requirement was modeled on similar constitutional provisions in other states, including Arizona, Arkansas, California, Colorado, Delaware, Florida, Louisiana, Mississippi, Oklahoma and South Dakota. Legislative History of AJR 21, supra (Hearing on AJR 21 before Assembly Comm. on Taxation, 67th Leg., at 11-13 (Nev. May 4, 1993)). Assemblyman Gibbons testified that the two-thirds requirement would "require a two-thirds majority vote in each house of the legislature to increase certain existing taxes or to impose certain new taxes." Id.

[6] This Court may take judicial notice of such legislative histories as public records. Jory v. Bennight, 91 Nev. 763, 766 (1975); Fierle v. Perez, 125 Nev. 728, 737-38 n.6 (2009). Those public records are available on the Legislature's website at: https://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/1993/AJR21,1993.pdf.

However, Assemblyman Gibbons also stated that the two-thirds requirement "would not impair any existing revenues." Id. Instead, Assemblyman Gibbons indicated that the two-thirds requirement "would bring greater stability to Nevada's tax systems, while still allowing the flexibility to meet real fiscal needs" because "Mr. Gibbons thought it would not be difficult to obtain a two-thirds majority if the need for **new revenues** was clear and convincing." Id. (emphasis added).

In addition to Assemblyman Gibbons' legislative testimony on AJR 21 in 1993, the ballot materials presented to the voters in 1994 and 1996 also provide some contemporaneous extrinsic evidence of the purpose and intent of the two-thirds requirement. Guinn, 119 Nev. at 471-72. The ballot materials informed the voters that the two-thirds requirement would make it more difficult for the Legislature to enact bills "raising" or "increasing" taxes and that "[i]t may require state government to prioritize its spending and economize rather than turning to **new sources of revenue**." Nev. Ballot Questions 1994, Question No. 11, at 1 (Nev. Sec'y of State 1994) (emphasis added).[7]

[7] This Court may take judicial notice of such ballot materials as public records. Jory v. Bennight, 91 Nev. 763, 766 (1975); Fierle v. Perez, 125 Nev. 728, 737-38 n.6 (2009). Those public records are available on the Legislature's website at: https://www.leg.state.nv.us/Division/Research/VoteNV/BallotQuestions/1994.pdf.

Finally, based on Assemblyman Gibbons' legislative testimony on AJR 21 in 1993 and the ballot materials presented to the voters in 1994 and 1996, this Court has described the purpose and intent of the two-thirds requirement as follows:

> The supermajority requirement was intended to make it more difficult for the Legislature to pass **new taxes**, hopefully encouraging efficiency and effectiveness in government. Its proponents argued that the tax restriction might also encourage state government to prioritize its spending and economize rather than explore **new sources of revenue**.

Guinn II, 119 Nev. at 471 (emphasis added).

Thus, there is contemporaneous extrinsic evidence that the two-thirds requirement was intended to apply to a bill which directly brings into existence, produces or enlarges public revenue in the first instance by raising "new taxes" or "new revenues" or by increasing "existing taxes." Legislative History of AJR 21, supra; Nev. Ballot Questions 1994, Question No. 11, supra. However, the contemporaneous extrinsic evidence also indicates that the two-thirds requirement was not intended to "impair any existing revenues." Id.

Furthermore, there is nothing in the contemporaneous extrinsic evidence to indicate that the two-thirds requirement was intended to apply to a bill which does not change—but maintains—the existing computation bases currently in effect for existing state taxes. The absence of such contemporaneous extrinsic evidence is consistent with the fact that: (1) such a bill does not raise new state taxes and revenues because the bill maintains the existing state taxes and revenues currently

in effect by maintaining their existing legally operative rates; and (2) such a bill does not increase the existing state taxes and revenues currently in effect—but maintains them in their current state under the law—because the existing computation bases currently in effect are not changed by the bill.

Finally, there is nothing in the contemporaneous extrinsic evidence to indicate that the two-thirds requirement was intended to 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.

Accordingly, the Legislature could reasonably conclude that SB 542 did not create, generate or increase any public revenue in any form because SB 542 did not change—but maintained—the existing computation base and legally operative rate currently in effect for the DMV technology fee, which remains at $1 per transaction. Likewise, the Legislature could reasonably conclude that SB 551 did not create, generate or increase any public revenue in any form because SB 551 did not change—but maintained—the existing computation bases and legally operative rates currently in effect for the MBT, which remain at 2 percent and 1.475 percent, as applicable to each affected business. Under such circumstances, "the Legislature is entitled to deference in its counseled selection of this interpretation."

Nev. Mining, 117 Nev. at 540. Therefore, because the Legislature could reasonably conclude that SB 542 and SB 551 were not subject to the two-thirds requirement, this Court should reverse the district court's order invalidating the provisions of SB 542 and sections 2, 3, 37 and 39 of SB 551 as unconstitutional.

E. The Legislature's reasonable interpretation of the two-thirds requirement is supported by case law from other states interpreting similar supermajority requirements that served as the model for Nevada's two-thirds requirement.

Nevada's two-thirds requirement was modeled on constitutional provisions from other states. Legislative History of AJR 21, supra (Hearing on AJR 21 before Assembly Comm. on Taxation, 67th Leg., at 12-13 (Nev. May 4, 1993)). As confirmed by Assemblyman Gibbons:

> Mr. Gibbons explained AJR 21 was modeled on constitutional provisions which were in effect in a number of other states. Some of the provisions were adopted recently in response to a growing concern among voters about increasing tax burdens and some of the other provisions dated back to earlier times.

Id. at 12.

Under the rules of construction, "[w]hen Nevada legislation is patterned after a federal statute or the law of another state, it is understood that 'the courts of the adopting state usually follow the construction placed on the statute in the jurisdiction of its inception.'" Advanced Sports Info. v. Novotnak, 114 Nev. 336, 340 (1998) (quoting Sec. Inv. Co. v. Donnelley, 89 Nev. 341, 347 n.6 (1973)). Thus, if a provision in the Nevada Constitution is modeled on a similar

constitutional provision "from a sister state, it is presumably adopted with the construction given it by the highest court of the sister state." State ex rel. Harvey v. Second Jud. Dist. Ct., 117 Nev. 754, 763 (2001) ("[S]ince Nevada relied upon the California Constitution as a basis for developing the Nevada Constitution, it is appropriate for us to look to the California Supreme Court's interpretation of the [similar] language in the California Constitution.").

Consequently, in interpreting and applying Nevada's two-thirds requirement, this Court may consider case law from the other states where courts have interpreted similar supermajority requirements that served as the model for Nevada's two-thirds requirement. Furthermore, in considering that case law, it must be presumed that the drafters and voters intended for Nevada's two-thirds requirement to be interpreted in a manner that adopts and follows the judicial interpretations placed on the similar supermajority requirements by the courts from those other states.

In 1992, the voters of Oklahoma approved a state constitutional provision imposing a three-fourths supermajority requirement on the Oklahoma Legislature that applies to "[a]ll bills for raising revenue" or "[a]ny revenue bill." Okla. Const. art. V, § 33. In addition, Oklahoma has a state constitutional provision, known as an "Origination Clause," which provides that "[a]ll bills for raising revenue" must originate in the lower house of the Oklahoma Legislature. Id. The Oklahoma

Supreme Court has adopted the same interpretation for the term "bills for raising revenue" with regard to both state constitutional provisions. Okla. Auto. Dealers Ass'n v. State ex rel. Okla. Tax Comm'n, 401 P.3d 1152, 1158 n.35 (Okla. 2017). In relevant part, Oklahoma's constitutional provisions state:

> A. **All bills for raising revenue** shall originate in the House of Representatives. The Senate may propose amendments to revenue bills. * * *
>
> D. **Any revenue bill** originating in the House of Representatives may become law without being submitted to a vote of the people of the state if such bill receives the approval of three-fourths (3/4) of the membership of the House of Representatives and three-fourths (3/4) of the membership of the Senate and is submitted to the Governor for appropriate action. * * *

Okla. Const. art. V, § 33 (emphasis added).

In Fent v. Fallin, 345 P.3d 1113, 1114-15 (Okla. 2014), the petitioner claimed that Oklahoma's supermajority requirement applied to a bill which modified Oklahoma's income tax rates even though the effect of the modifications did not increase revenue. The bill included provisions "deleting expiration date of specified tax rate levy." Id. at 1116 n.6. The Oklahoma Supreme Court held that the supermajority requirement did not apply to the bill. Id. at 1115-18. In discussing the purpose and intent of Oklahoma's supermajority requirement for "bills for raising revenue," the court found that:

> [T]he ballot title reveals that the measure was aimed only at bills "intended to raise revenue" and "revenue raising bills." The plain, popular, obvious and natural meaning of "raise" in this context is

> "increase." This plain and popular meaning was expressed in the public theme and message of the proponents of this amendment: "No New Taxes Without a Vote of the People."
>
> Reading the ballot title and text of the provision together reveals the 1992 amendment had two primary purposes. First, the amendment has the effect of limiting the generation of State revenue to existing revenue measures. Second, the amendment requires future bills "intended to raise revenue" to be approved by either a vote of the people or a three-fourths majority in both houses of the Legislature.

Id. at 1117.

Based on the purpose and intent of Oklahoma's supermajority requirement for "bills for raising revenue," the court determined that "[n]othing in the ballot title or text of the provision reveals any intent to bar or restrict the Legislature from amending the existing revenue measures, so long as such statutory amendments do not 'raise' or increase the tax burden." Id. at 1117-18. Given that the bill at issue in Fent included provisions "deleting expiration date of specified tax rate levy," it must be presumed that, in rejecting the supermajority challenge to the bill, the court concluded that those provisions of the bill removing the existing expiration clause did not result in an increase in the tax burden which triggered the supermajority requirement even though those provisions of the bill eliminated the future expiration of existing state taxes.

In Naifeh v. State ex rel. Okla. Tax Comm'n, 400 P.3d 759, 761 (Okla. 2017), the petitioners claimed that Oklahoma's supermajority requirement applied to a bill which was intended to "generate approximately $225 million per year in new

revenue for the State through a new $1.50 assessment on each pack of cigarettes." The state argued that the supermajority requirement did not apply to the cigarette-assessment bill because it was a regulatory measure, not a revenue measure. Id. at 766. In particular, the state contended that: (1) the primary purposes of the bill were to reduce the incidence of smoking and compensate the state for the harms caused by smoking; (2) any raising of revenue by the bill was merely incidental to those purposes; and (3) the bill did not levy a tax, but rather assessed a regulatory fee whose proceeds would be used to offset the costs of State-provided healthcare for those who smoke, even though most of the revenue generated by the bill was not earmarked for that purpose. Id. at 766-68.

The Oklahoma Supreme Court held that the supermajority requirement applied to the cigarette-assessment bill because the text of the bill "conclusively demonstrate[d] that the primary operation and effect of the measure [was] to raise **new revenue** to support state government." Id. at 766 (emphasis added). In reaching its holding, the court reiterated the two-part test that it uses to determine whether a bill is subject to Oklahoma's supermajority requirement for "bills for raising revenue." Id. at 765. Under the two-part test, a bill is subject to the supermajority requirement if: (1) the principal object of the bill is to raise **new revenue** for the support of state government, as opposed to a bill under which revenue may incidentally arise; and (2) the bill levies a **new tax** in the strict sense

of the word. Id. In a companion case, the court stated that it invalidated the cigarette-assessment bill because:

> [T]he cigarette measure fit squarely within our century-old test for "revenue bills," in that it both had the primary purpose of raising revenue for the support of state government **and** it levied a **new tax** in the strict sense of the word.

Okla. Auto. Dealers Ass'n, 401 P.3d at 1153 (emphasis added); accord Sierra Club v. State ex rel. Okla. Tax Comm'n, 405 P.3d 691, 694-95 (Okla. 2017).

In 1996, the voters of Oregon approved a state constitutional provision imposing a three-fifths supermajority requirement on the Oregon Legislature, which provides that "[t]hree-fifths of all members elected to each House shall be necessary to pass **bills for raising revenue**." Or. Const. art. IV, § 25 (emphasis added). In addition, Oregon has a state constitutional provision, known as an "Origination Clause," which provides that "**bills for raising revenue** shall originate in the House of Representatives." Or. Const. art. IV, § 18 (emphasis added). The Oregon Supreme Court has adopted the same interpretation for the term "bills for raising revenue" with regard to both state constitutional provisions. Bobo v. Kulongoski, 107 P.3d 18, 24 (Or. 2005).

In determining the scope of Oregon's constitutional provisions for "bills for raising revenue," the Oregon Supreme Court has adopted a two-part test that is similar to the two-part test followed by the Oklahoma Supreme Court. Bobo, 107 P.3d at 24. In particular, the Oregon Supreme Court has stated:

> Considering the wording of [each constitutional provision], its history, and the case law surrounding it, we conclude that the question whether a bill is a "bill for raising revenue" entails two issues. The first is whether the bill collects or brings money into the treasury. If it does not, that is the end of the inquiry. If a bill does bring money into the treasury, the remaining question is whether **the bill possesses the essential features of a bill levying a tax**.

Id. (emphasis added).

In applying its two-part test in Bobo, the court observed that "not every statute that brought money into the treasury was a 'bill for raising revenue' within the meaning of [the constitutional provisions]." Bobo, 107 P.3d at 24. Instead, the court found that the constitutional provisions applied only to the specific types of bills that the framers had in mind—"bills to levy taxes and similar exactions." Id. at 23. Based on the normal and ordinary meanings commonly ascribed to the terms "raise" and "revenue" in the constitutional provisions, the court reached the following conclusions:

> We draw two tentative conclusions from those terms. First, a bill will "raise" revenue only if it "collects" or "brings in" money to the treasury. Second, not every bill that collects or brings in money to the treasury is a "**bil[l] for raising revenue**." Rather, the definition of "revenue" suggests that the framers had a specific type of bill in mind—**bills to levy taxes and similar exactions**.

Id. (emphasis added).

Based on the cases from the other states, the Legislature could reasonably interpret Nevada's two-thirds requirement in a manner that adopts and follows the judicial interpretations placed on the similar supermajority requirements from

those other states. Under those judicial interpretations, the Legislature could reasonably conclude that Nevada's two-thirds requirement **does not** apply to a bill unless it levies new or increased state taxes in the strict sense of the word or possesses the essential features of a bill that levies new or increased state taxes or similar exactions, "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(2).

Consequently, the Legislature could reasonably conclude that Nevada's two-thirds 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 levy new or increased state taxes as described in the cases from Oklahoma and Oregon. Instead, because such a bill maintains the existing computation bases and legally operative rates currently in effect for the existing state taxes, the Legislature could reasonably conclude that such a bill does not create, generate or increase any public revenue within the meaning, purpose and intent of Nevada's two-thirds requirement because the existing computation bases and legally operative rates currently in effect are not changed by the bill. Under such circumstances, "the Legislature is entitled to deference in its counseled selection of this interpretation." Nev. Mining, 117 Nev. at 540. Therefore,

because the Legislature could reasonably conclude that SB 542 and SB 551 were not subject to the two-thirds requirement, this Court should reverse the district court's order invalidating the provisions of SB 542 and sections 2, 3, 37 and 39 of SB 551 as unconstitutional.

II. Even if the challenged provisions of sections 2, 3, 37 and 39 of SB 551 are invalid because they were enacted in violation of the two-thirds requirement, the remaining provisions of SB 551 are severable from any invalid provisions and should be upheld under the severance doctrine.

In the proceedings below, the Legislature requested that if the district court invalidated sections 2, 3, 37 and 39 of SB 551 as unconstitutional because they were enacted in violation of the two-thirds requirement, the district court should sever the remaining provisions of SB 551 because: (1) the remaining provisions, standing alone, can be given legal effect without the invalidated provisions; and (2) preserving the remaining provisions would accord with legislative intent. (*JA3:000641-43; JA6:001186.*) At the hearing on September 21, 2020, Plaintiffs did not oppose the Legislature's request for severance. (*JA6:001121-22; JA6:001186.*) In its order, the district court decided that "the remaining provisions of SB 551 can be severed and shall remain in effect." (*JA6:001188, ¶ 1.*)

Under the severance doctrine, it is "the obligation of the judiciary to uphold the constitutionality of legislative enactments where it is possible to strike only the unconstitutional portions." Flamingo Paradise Gaming v. Chanos, 125 Nev. 502, 515 (2009) (quoting Rogers v. Heller, 117 Nev. 169, 177 (2001)). The Legislature

has adopted and codified the severance doctrine in Nevada's general severability statute in NRS 0.020, which provides:

> **NRS 0.020 Severability.**
> 1. If any provision of the Nevada Revised Statutes, or the application thereof to any person, thing or circumstance is held invalid, such invalidity shall not affect the provisions or application of NRS which can be given effect without the invalid provision or application, **and to this end the provisions of NRS are declared to be severable**.
> 2. **The inclusion of an express declaration of severability in the enactment of any provision of NRS** or the inclusion of any such provision in NRS, **does not enhance the severability of the provision so treated or detract from the severability of any other provision of NRS**.

NRS 0.020 (emphasis added).

Based on the plain language of the general severability statute in NRS 0.020, the Legislature has affirmatively expressed its intent in favor of several fundamental rules of severability. First, there is a legislative preference or presumption in favor of severability that must be applied to every statutory provision. NRS 0.020(1). Second, the legislative preference or presumption in favor of severability must be applied regardless of whether there is "an express declaration of severability" in the enactment of the statutory provision. NRS 0.020(2). Third, the inclusion of such an express declaration of severability in the enactment of the statutory provision "does not enhance the severability of the provision so treated or detract from the severability of any other provision." NRS 0.020(2). In other words, the inclusion or absence of a severability clause in

enacting legislation like SB 551 does not alter or affect NRS 0.020's legislative preference or presumption in favor of severability.

This Court has determined that by enacting the general severability statute, the Legislature has affirmatively expressed its intent in favor of severability and "[t]his preference in favor of severability is set forth in NRS 0.020(1), which charges courts with preserving statutes to the extent they 'can be given effect without the invalid provision or application.'" Sierra Pac. Power v. State Dep't of Tax'n, 130 Nev. 940, 945 (2014) (quoting NRS 0.020(1)). However, this Court has explained:

> [This] preference is not a mandate, and not all statutory language is severable. Before language can be severed from a statute, a court must first determine whether the remainder of the statute, standing alone, can be given legal effect, and whether preserving the remaining portion of the statute accords with legislative intent.

Id.; Flamingo Paradise, 125 Nev. at 515.

The challenged provisions of sections 2, 3, 37 and 39 of SB 551 were part of an act relating to "state financial administration." SB 551, 2019 Nev. Stat., ch. 537, at 3271. The remaining provisions of SB 551 revised and repealed other existing laws that were not affected by SB 551's repeal of the former rate adjustment procedure in NRS 360.203. Moreover, there is nothing in the legislative history of SB 551 to rebut the presumption in favor of severability or to suggest the Legislature intended for the remaining provisions of SB 551 to be

rendered unenforceable if the challenged provisions of sections 2, 3, 37 and 39 of SB 551 were invalidated. Legislative History of SB 551, 80th Leg. (Nev. LCB Research Library 2019).[8]

Therefore, even if the challenged provisions of sections 2, 3, 37 and 39 of SB 551 are unconstitutional because they were enacted in violation of the two-thirds requirement, the remaining provisions of SB 551 are severable because: (1) the remaining provisions, standing alone, can be given legal effect without the invalidated provisions; and (2) preserving the remaining provisions would accord with legislative intent. Consequently, because the remaining provisions of SB 551 are severable, this Court should uphold the remaining provisions of SB 551 under the severance doctrine even if the challenged provisions of sections 2, 3, 37 and 39 of SB 551 are unconstitutional because they were enacted in violation of the two-thirds requirement.

CONCLUSION

Based on the foregoing, the Legislature asks this Court to reverse that portion of the district court's order: (1) granting summary judgment in favor of Plaintiffs

[8] This Court may take judicial notice of such legislative histories as public records. Jory v. Bennight, 91 Nev. 763, 766 (1975); Fierle v. Perez, 125 Nev. 728, 737-38 n.6 (2009). Those public records are available on the Legislature's website at: https://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/2019/SB551,2019.pdf.

on their claims for declaratory and injunctive relief; (2) declaring that SB 542 and SB 551 were bills which create, generate or increase any public revenue in any form and were passed in violation of the two-thirds requirement; (3) invalidating the provisions of SB 542 and sections 2, 3, 37 and 39 of SB 551 as unconstitutional; and (4) enjoining the Department of Motor Vehicles and Department of Taxation from collecting and enforcing the fees and taxes under the invalidated provisions and ordering an immediate refund of those fees and taxes to the affected fee payers and taxpayers with interest at the legal rate of interest from the date collected.

In reversing that portion of the district court's order, the Legislature asks this Court to find that SB 542 and SB 551 were not subject to the two-thirds requirement because the Legislature could reasonably conclude that: (1) SB 542 did not create, generate or increase any public revenue in any form because the bill did not change—but maintained—the existing computation base and legally operative rate currently in effect for the DMV technology fee; and (2) sections 2, 3, 37 and 39 of SB 551 did not create, generate or increase any public revenue in any form because the challenged provisions of the bill did not change—but maintained—the existing computation bases and legally operative rates currently in effect for the MBT.

However, if this Court finds that the challenged provisions of sections 2, 3, 37 and 39 of SB 551 are unconstitutional because they were enacted in violation of the two-thirds requirement, the Legislature asks this Court to find that, under the severance doctrine, the remaining provisions of SB 551 are severable and remain in effect because: (1) the remaining provisions, standing alone, can be given legal effect without the invalidated provisions; and (2) preserving the remaining provisions would accord with legislative intent. Therefore, under such circumstances, the Legislature asks this Court to affirm that portion of the district court's order declaring that "the remaining provisions of SB 551 can be severed and shall remain in effect." (*JA6:001188, ¶ 1.*)

DATED: This **22nd** day of March, 2021.

By: /s/ Kevin C. Powers

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ADDENDUM

NRS 360.203 (repealed effective June 12, 2019)

NRS 360.203 Reduction of rate of certain taxes on business under certain circumstances; duties of Department.

1. Except as otherwise provided in subsection 4, on or before September 30 of each even-numbered year, the Department shall determine the combined revenue from the taxes imposed by chapters 363A and 363B of NRS and the commerce tax imposed by chapter 363C of NRS for the preceding fiscal year.

2. Except as otherwise provided in subsection 4, if the combined revenue determined pursuant to subsection 1 exceeds by more than 4 percent the amount of the combined anticipated revenue from those taxes for that fiscal year, as projected by the Economic Forum for that fiscal year pursuant to paragraph (e) of subsection 1 of NRS 353.228 and as adjusted by any legislation enacted by the Legislature that affects state revenue for that fiscal year, 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 year bears to the total combined amount collected from both taxes for the preceding fiscal year.

3. Except as otherwise provided in subsection 4, effective on July 1 of the odd-numbered year immediately following the year in which the Department made the determination described in subsection 1, the rates of the taxes imposed pursuant to NRS 363A.130 and 363B.110 that are determined pursuant to subsection 2, rounded to the nearest one-thousandth of a percent, must thereafter be the rate of those taxes, unless further adjusted in a subsequent fiscal year.

4. If, pursuant to subsection 3, the rate of the tax imposed pursuant to NRS 363B.110 is 1.17 percent:

(a) The Department is no longer required to make the determinations required by subsections 1 and 2; and

(b) The rate of the taxes imposed pursuant to NRS 363A.130 and 363B.110 must not be further adjusted pursuant to subsection 3.

(Added to NRS by 2015, 2896)

CERTIFICATE OF COMPLIANCE

1. We hereby certify that this opening brief on appeal 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 2010 in 14-point font and Times New Roman type.

2. We hereby certify that this opening brief on appeal complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of this brief exempted by NRAP 32(a)(7)(C), this brief is proportionately spaced, has a typeface of 14 points or more, and contains **13,789** words, which is less than the type-volume limit of 14,000 words.

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

DATED: This **22nd** day of March, 2021.

By: /s/ Kevin C. Powers

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Nevada Legislative Counsel Bureau, Legal Division, and that on the **22nd** day of March, 2021, pursuant to NRAP 25 and NEFCR 9, I filed and served a true and correct copy of Appellant/Cross-Respondent Nevada Legislature's Opening Brief on Appeal, by means of the Nevada Supreme Court's electronic filing system, directed to:

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