IN THE SUPREME COURT OF THE STATE OF NEVADA

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Clerk of Supreme Court

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

Appellants/Cross-Respondents,

vs.

THE HONORABLE JAMES A. SETTELMEYER; THE HONORABLE JOE HARDY; THE HONORABLE HEIDI SEEVERS GANSERT; THE HONORABLE SCOTT T. HAMMOND; THE HONORABLE PETE GOICOECHEA; THE HONORABLE BEN KIECKHEFER; THE HONORABLE IRA D. HANSEN; THE HONORABLE KEITH F. PICKARD, in their official capacities as members of the Senate of the State of Nevada and individually; GREAT BASIN ENGINEERING CONTRACTORS, LLC., a Nevada limited liability company; GOODFELLOW CORPORATION, a Utah corporation qualified to do business in the State of Nevada; KIMMIE CANDY COMPANY, a Nevada corporation; KEYSTONE CORP., a Nevada nonprofit corporation; NATIONAL FEDERATION OF INDEPENDENT BUSINESS, a California nonprofit corporation qualified to do business in the State of Nevada; NEVADA FRANCHISED AUTO DEALERS ASSOCIATION, a Nevada nonprofit corporation; NEVADA TRUCKING ASSOCIATION,

Case No. 81924

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

Respondents/Cross-Appellants.
_____/

RESPONDENTS/CROSS-APPELLANTS' ANSWERING BRIEF

Respondents/Cross-Appellants, by and through their counsel, ALLISON MacKENZIE, LTD., hereby submit this Answering Brief in response to the Opening Briefs filed by Appellants/Cross-Respondents.

NRAP 26.1 DISCLOSURE

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

Great Basin Engineering Contractors, LLC

Goodfellow Corporation

Kimmie Candy Company

Keystone Corp.

National Federation of Independent Business

Nevada Franchised Auto Dealers Association

Nevada Trucking Association, Inc.

Retail Association of Nevada

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

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

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

Allison MacKenzie, Ltd.

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

Not applicable.

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DATED this 5th day of April, 2021.

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I.

STATEMENT OF ISSUES ON APPEAL[1]

1. The district court correctly concluded Senate Bill 542 ("SB 542") and pertinent provisions of Senate Bill 551 ("SB 551"), considered during the 80th Session of the Nevada Legislature in 2019, required the affirmative vote of not fewer than two-thirds of the Nevada Senate under Article 4, Section 18(2) of the Nevada Constitution because both bills, if passed, would generate public revenue. Thus, the district court correctly held SB 542 and Sections 2, 3, 37, and 39 of SB 551 were passed unconstitutionally, should be stricken from the law, and all revenues collected thereunder must be refunded.

2. The district court properly concluded the principle of legislative deference does not extend to allow the Legislature or any of its members and officers to violate the clear meaning of the Nevada Constitution.

[1] Respondents/Cross-Appellants are satisfied with the Jurisdictional Statements and Routing Statements contained in the Opening Briefs of the Appellants.

II.

STATEMENT OF THE CASE

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

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

Plaintiffs filed a First Amended Complaint in this matter on July 30, 2019 and asserted constitutional claims arising from the manner of passage and approval of SB 542 and SB 551 during the 80th Session of the Nevada Legislature in 2019. JA Vol. I at 15-31. The Legislature of the State of Nevada (the "Legislature") was not named as a party and there are no allegations in the First Amended Complaint against the Legislature. The Legislature intervened as a Defendant-Intervenor and voluntarily brought itself into Plaintiffs' action. JA Vol. II at 382-417.

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

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

The First Amended Complaint contained four separate and distinct claims for relief: (1) violation of Plaintiff Senators' constitutional rights based upon the dilution and nullification of the Plaintiff Senators' constitutional right to cast an effective legislative vote; (2) violation of the Plaintiff taxpayers' and fee payers' constitutional rights based upon the deprivation of property without due process as a result of collection of unconstitutional taxes and fees; (3) declaratory relief related to the constitutionality of SB 542 and SB 551; and (4) injunctive relief regarding enforcement of SB 542 and SB 551. JA Vol. I at 15-31. The First Amended

Complaint challenged the constitutionality of SB 542 and SB 551 as well as the constitutionality of the manner in which SB 542 and SB 551 were passed into law. JA Vol. I at 21, ¶ 23.

On September 16, 2019, the Legislative Defendants filed an Answer to Plaintiffs' First Amended Complaint and Executive Defendants filed a Motion to Dismiss the First Amended Complaint. JA Vol. I at 101-224; JA Vol. II at 445-456. On September 30, 2019, Plaintiffs filed an Opposition to Motion to Dismiss or, in the Alternative, a Motion for Summary Judgment. JA Vol. II at 225-381.[2] The briefing of these two motions was stayed while a separate Motion to Disqualify the Legislative Defendants' counsel was resolved. On August 18, 2020, the Executive Defendants filed their Reply Supporting Motion to Dismiss and Opposition to Plaintiffs' Motion for Summary Judgment. JA Vol. II at 457-73. On August 19, 2020, the Legislative Defendants and the Legislature filed an Opposition to Plaintiffs' Motion for Summary Judgment and a Counter-Motion for Summary Judgment. JA Vol. III at 603-670. On August 21, 2020, the Executive Defendants filed a Joinder to the Counter-Motion for Summary Judgment. JA Vol. III at 671-674. On September 4, 2020, Plaintiffs filed a Reply in Support of their Motion for Summary Judgment and an Opposition to the Counter-Motion for Summary

[2] The Legislature filed it Answer to the First Amended Complaint on December 26, 2019. JA Vol. II at 445-456.

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

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

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

Defendants. JA Vol. VI at 1188. The declaratory and injunctive relief granted by the district court's Final Order were stayed pending this appeal. JA Vol. VI at 1236-39; JA Vol. VII at 1391-94.

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

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

III.

STATEMENT OF FACTS

A. Adoption of constitutional two-thirds supermajority requirement.

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

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

JA Vol. II at 250, 253. There are two types of bills subject to the two-thirds constitutional provision: a bill which creates, generates, or increases any public revenue in any form such as to taxes, fees, assessments and rates, or a bill which creates, generates, or increases any public revenue by making changes in the computation bases for taxes, fees, assessments and rates.

The 1994 and 1996 ballot questions specifically noted Question No. 11 was "An Initiative Relating to Tax Restraint" and the Condensation (ballot question) was: "Shall the Nevada Constitution be amended to establish a requirement that at least a two-thirds vote of both houses of the legislature be necessary ***to pass a measure which generates or increases a tax, fee, assessment, rate or any other form of public revenue?***". (Emphasis added). JA Vol. II at 249, 252.

In 1994, the measure passed with 283,889 "yes" votes to 79,520 "no" votes. JA Vol. II at 249. In 1996, the measure passed again with 301,382 "yes" votes to 125,969 "no" votes. JA Vol. II at 252.

A supermajority constitutional amendment had previously been proposed as Assembly Joint Resolution (AJR) 21 by Assemblyman Jim Gibbons during the 67th

Legislative Session in 1993. JA Vol. II at 255-56. Assemblyman Gibbons offered testimony in support of AJR 21, but the measure was not passed by the Legislature. JA Vol. I at 119-36.

B. Prior Legislative Counsel opinions and constitutional vote requirements.

On May 5, 1997, Legislative Counsel issued an opinion responding to certain questions posed by then Speaker Dini regarding the effect on the Legislature from the recent amendment of Section 18, Article 4 of the Nevada Constitution. JA Vol. V at 1063-1068. In response to the question whether the two-thirds constitutional majority applies to a bill creating, generating or increasing the revenue of a local government, the 1997 opinion stated: "***Because of the broadness of the wording of subsection 2, it would be difficult to exclude, with any confidence, any bill or joint resolution which in any way 'creates, generates or increases any public revenue in any form' from the requirement for a two-thirds majority vote.***" (Emphasis added). JA Vol. V at 1065. The 1997 opinion specifically addressed whether changes in a computation base for taxes, fees, assessments or rates required a two-thirds majority vote. JA Vol. V at 1067. The opinion concluded: "***Therefore, it is the opinion of this office that the requirement for a two-thirds majority vote only applies to measures which change the computation bases for taxes, fees, assessments or rates in a manner that will have the effect of creating, generating or increasing state or local revenue.***" (Emphasis added). JA Vol. V at 1065. Failure

to comply with the two-thirds majority provision would likely be that the provision or provisions that create, generate or increase public revenue, if challenged, would be void and therefore unenforceable. JA Vol. V at 1065. There is no mention in the 1997 opinion of any exception for 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 operating and binding yet. In fact, the 1997 opinion opined just the opposite, that is, "because of the broadness of the wording of subsection 2, it would be difficult to exclude, with any confidence, any bill or joint resolution which in any way creates, generates or increases any public revenue in any form from the requirement for a two-thirds majority vote." JA Vol. V at 1065.

On April 16, 2019, Legislative Counsel issued an opinion in response to the question from a legislator whether the First Reprint of SB 201 required a two-thirds majority vote for final passage pursuant to Section 18(2) of Article 4 of the Nevada Constitution. JA Vol. II at 376-81. SB 201 required the Commissioner of Financial Institutions to enter into a contract with a vendor or other entity to develop and maintain a database regarding certain loans, required licensees to report and update certain information and required the Commissioner to establish a fee to be charged and collected by the vendor or other entity from a licensee who is required to report the information using the database. JA Vol. II at 376. Legislative Counsel opined

based upon the normal and ordinary meanings of the terms "creates, generates, or increases" and "public", it was clear that the terms all refer to the Legislature taking legislative action that directly brings into existence, produces or enlarges public revenue in the first instance, rather than contracting with a business to perform a quasi-governmental function for which fees are paid by licensees directly to the private entity that created, maintains and operates the required database. JA Vol. II at 380. The opinion concluded the First Reprint of SB 201 did not generate revenue for the state or any other public entity and therefore, a two-thirds majority vote was not required to pass the First Reprint of SB 201 out of the Senate. JA Vol. II at 380-81.

Since Article 4, Section 18(2) was approved by the voters in 1996, and prior to 2019, Legislative Counsel has required a two-thirds majority vote of each house to pass a bill extending a sunset provision or extending a tax or fee. *See* for example, AB 561 of the 76th (2011) Legislative Session, SB 475 of the 77th (2013) Legislative Session and SB 483 of the 78th (2015) Legislative Session. JA Vol. IV at 788-801. In addition, since 2006 when Senator Settelmeyer became a member of the Legislature, all extensions of taxes that were going to sunset or were to be extended required a two-thirds majority of each house to pass. JA Vol. II at 419, ¶4. There has been no change in Article 4, Section 18(2) of the Nevada Constitution regarding extension of taxes or sunset provisions justifying a reversal of Legislative Counsel's

position that the two-thirds majority is required for extensions of taxes or extending sunset provisions of taxes.

There also appears to have been a longstanding and continued policy implemented by Legislative Counsel and understood by Legislators and others testifying on bills from the time the constitutional language requiring a two-thirds majority was put into place until 2019 that any revenue-generating measure or change in a formula related to revenue required a two-thirds majority vote. JA Vol. IV at 788-801. For example:

> - At a Joint Meeting of the Senate Committee on Taxation and Senate Committee on Transportation and Homeland Security on June 1, 2007, Brenda Erdoes, LCB Legal Counsel stated: "This bill takes 25 percent of that money and gives it to the State Highway Fund. The constitutional provision says any change in the formula that results in a revenue increase to the State must have a two-thirds majority." JA Vol. IV at 793-94.
>
> - Senate Committee on Judiciary February 11, 2009, Senator Terry Care stated: "I investigated further, and it turns out it said it required a two-thirds majority vote because it meant additional revenue for the State. It is not, when you see two-thirds, that it means taxes; it means more revenue coming in." JA Vol. IV at 794.
>
> - Senate Committee on Taxation May 7, 2009, Senator Terry Care stated: "The test on the two-thirds is if it means additional revenue for the State, it is not a tax or fee." JA Vol. IV at 795.
>
> - Assembly Committee on Transportation April 30, 2015, Assemblywoman Marilyn Kirkpatrick

stated: "In all the years that I have been here, I have never seen anybody take a two-thirds off of a bill." JA Vol. IV at 798-99.

- Assembly Committee on Taxation May 14, 2015, State Controller Ron Knecht: "We have checked with LCB general counsel and if the details are implemented correctly, the BPfG revenue proposal, this session is the only one that will pass with a simple majority vote in each house. The extension of the sunset taxes, the modified business tax (MBT), and the business license fee all require two-thirds." JA Vol. IV at 799.

- Assembly Committee on Corrections, Parole, and Probation on February 14, 2017, Julie Butler, then Administrator, General Services Division, Department of Public Safety, testified: "I emailed Brenda Erdoes and asked her that question. It has the potential to increase the Repository's revenue by opening it up to employers out of state, and per the Constitution of the State of Nevada, it will require a two-thirds majority vote." JA Vol. IV at 800.

- Senate Committee on Transportation on February 23, 2017, Darcy Johnson, LCB Legal Counsel: "Anything that potentially raises the cost to the public triggers a two-thirds vote." JA Vol. IV at 800-01.

C. Background and history of SB 551.

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

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

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

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

At the Senate Committee on Finance hearing on May 29, 2019, LCB's own fiscal analyst testified the effect of SB 551 was to "generate" public revenue of approximately $98.2 million from MBT and payroll taxes over two years. The relevant testimony was:

> SENATOR KIECKHEFER: … The Economic Forum considered existing law when projecting revenue. What would the provisions of S.B. 551 mean for State revenue?
>
> RUSS GUINDON (Principal Deputy Fiscal Analyst, Fiscal Analysis Division, Legislative Counsel Bureau): Based on the Economic Forum's May 1, 2019, forecast and the assumption of the lower rates occurring, we calculate that if we maintain the current rates, the State will ***generate*** approximately $48.2 million in FY 2020 and approximately $50 million in FY 2021, a total of approximately $98.2 million over the biennium.
>
> SENATOR KIECKHEFER: If we pass S.B. 551, will we have $98.2 million more in General Fund revenue than we would have if we did not pass S.B. 551?
>
> MR. GUINDON: That is correct. If S.B. 551 is passed, the Fiscal staff will add this as a legislative action adjustment to the Economic Forum's May 1 forecast.

(Emphasis added). JA Vol. IV at 776. The Senate Majority Leader, Senator Cannizzaro, also used the word "generate" in her testimony before the Senate Committee on Finance on June 2, 2019 concerning the revenue effect of Proposed Amendment 6101 to SB 551: "However, after reviewing the changes and in looking at where money would go for schools within this bill, the bill has some changes to

the amounts and the designated place for the overall money which would be ***generated*** from the buydown of the MBT." (Emphasis added). JA Vol. IV at 841.

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

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

Fifteen minutes later, the Senate re-convened and members of the Senate were given Amendment No. 1121 to SB 551, which was prepared as an emergency measure at the request of Senator Cannizzaro. JA Vol. IV at 907-24; JA Vol. V at 925-50, 994. Senator Cannizzaro indicated the two-thirds majority requirement would not apply to Amendment No. 1121 to SB 551 despite Sections 2, 3, 37, and 39 remaining unchanged by the amendment. JA Vol. V at 1047. After comment, another vote was taken with the same result – 13 in favor and 8 opposed. JA Vol. II at 370; JA Vol. V at 1050. Lieutenant Governor Marshall, however, declared the bill passed by constitutional majority and Senate Secretary Clift confirmed the bill's passage. JA Vol. V at 1050. Governor Sisolak signed SB 551 into law on June 12, 2019 and Sections 2, 3, 37, and 39 of SB 551 became effective. SB 551, 2019 Nev. Stat., ch 537, at 3271.

D. Background and history of SB 542.

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

SB 542 of the 80th Legislative Session in 2019 extended the expiration of the technology fee from June 30, 2020 to June 30, 2022. JA Vol. IV at 730. The Director of the DMV testified the DMV collects about $7 million per year from the technology fee. JA Vol. IV at 733-34. It was noted in the Minutes of the Senate Committee on Finance on May 25, 2019 when the bill was voted on in committee: "The DMV estimated technology fee ***revenue*** collections would total $6.9 million in each year of the upcoming biennium." (Emphasis added). JA Vol. IV at 736. The two-thirds majority requirement was not imposed on SB 542 and it was declared passed by simple majority, with 13 Senators voting for the measure and 8 Senators voting against. Governor Sisolak signed SB 542 into law on June 5, 2019 and it became effective. SB 542, 2019 Nev. Stat., ch 400, at 2501.

E. Legislative Counsel's May 8, 2019 Opinion Letter.

During the 80th Legislative Session in 2019, legislative leaders from both parties requested the Legislative Counsel provide an analysis of Article 4, Section 18(2). JA Vol. II at 420, ¶¶7-8. Legislative Counsel framed the requests as whether Article 4, Section 18(2) applies generally to (a) "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 operating and binding yet" or (b) "a bill which reduces or eliminates available tax exemptions or tax credits applicable to existing state taxes." JA Vol. I at 147. In response,

Legislative Counsel provided a 24-page memorandum, in letter form, in which it attempted to justify removing such bills from the two-thirds supermajority mandate contained in Article 4, Section 18(2) of the Nevada Constitution. JA Vol. I at 147-70. Legislative Counsel's Opinion Letter does not specifically reference SB 542 or SB 551 as said bills were introduced subsequent to the date of Legislative Counsel's Opinion Letter.

The Opinion Letter began its analysis with background on the original majority provision of the Nevada Constitution and the history of Nevada citizens' adoption of the two-thirds supermajority provision in 1994 and 1996. JA Vol. I at 148-53. The Opinion Letter noted the absence of Nevada appellate decisions directly answering the questions it sought to answer and asserted, therefore, it was required to address the questions 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 majority 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.

JA Vol. I at 153.

While the Opinion Letter acknowledged the language of the supermajority requirement should be given its plain and ordinary meaning, it concluded the terms

"creates, generates, or increases" as used therein mean a bill which "directly brings into existence, produces or enlarges public revenue in the first instance by imposing new or increased state taxes." JA Vol. I at 158. The words "directly," "new," and "first instance" are not used in Article 4, Section 18(2) of the Nevada Constitution or in any of the definitions Legislative Counsel pointed to in the Opinion Letter. JA Vol. I at 158.

In looking at contemporaneous extrinsic evidence of the purpose and intent of the constitutional supermajority requirement, the Opinion Letter analyzed the testimonial support of AJR 21 in 1993 as well as the 1994 and 1996 ballot materials. JA Vol. I at 160-61. Relying on 1993 testimony from Assemblyman Gibbons in support of AJR 21, the Opinion Letter concluded the supermajority provision "was not intended to impair any existing revenues" and that the supermajority requirement does not apply to bills that do not alter revenue streams existing at the time of passage, notwithstanding their imminent expiration or statutory scheduled reduction in rates. JA Vol. I at 161.

In looking to other jurisdictions, the Opinion Letter relied exclusively on judicial interpretations of supermajority provisions in Oregon and Oklahoma. JA Vol. I at 162-65. As recited by the Opinion Letter, Oklahoma's constitutional supermajority provision provides, in pertinent part:

> 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.

JA Vol. I at 162. *See also* Okla. Const. art. V, § 33. As recited by the Opinion Letter, Oregon's constitution provides, in pertinent part:

> bills for raising revenue shall originate in the House of Representatives.
> …
> Three-fifths of all members elected to each House shall be necessary to pass bills for raising revenue.

JA Vol. I at 164. *See also* Or. Const., art. IV, §§ 18 and 25.

Notwithstanding important differences in the Nevada, Oklahoma and Oregon constitutional language, and clear distinctions from the issues presented to Legislative Counsel in this instance and the cases interpreting Oregon's and Oklahoma's constitutional language, the Opinion Letter concluded:

> 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 levy new or increased state taxes as described in the cases from Oklahoma and Oregon.

JA Vol. I at 165.

Although the Legislature originally considered an amendment to SB 551 subject to the two-thirds majority requirement, as noted above, the Legislative Defendants removed that requirement from a subsequent similar amendment to the bill after it failed to garner the vote of 14 Senators. As also noted above, the Legislative Defendants did not subject SB 542 to the two-thirds majority requirement.

IV.

SUMMARY OF ARGUMENT

The language of Article 4, Section 18(2) of the Nevada Constitution is not ambiguous and must be given its plain and ordinary meaning. All of the words in Article 4, Section 18(2) should be applied to SB 542 and SB 551 in their ordinary and plain understanding, consistent with the intent of the drafters and voters in enacting the supermajority provision. Article 4, Section 18(2) of the Nevada Constitution unambiguously requires a two-thirds majority vote apply to any bill which generates (brings into existence or produces) any public revenue in any form.

SB 551 and SB 542 are both bills which generated public revenue and required the affirmative vote of two-thirds of the Senate for passage. SB 551 altered computation bases for calculating the rate for MBT and payroll taxes and would generate $98.2 million in revenue over two years. SB 542 would generate

approximately $7 million per year in revenue. But for the existence and passage of those bills, that public revenue would not exist.

The Court should only consider contemporaneous extrinsic evidence if the clear textual meaning of the subject ballot measures cannot be ascertained. However, if the Court were to consider contemporaneous extrinsic evidence, there is ample contemporaneous extrinsic evidence to support Plaintiffs' position that SB 551 and SB 542 are the kind of bills to which the drafters and voters intended the constitutional supermajority provision apply.

Defendants' reliance on Oklahoma and Oregon cases does not reveal support for their narrow view of Nevada's constitutional supermajority requirement. Oklahoma's and Oregon's constitutional supermajority provisions differ significantly from Nevada's. To the extent the Court finds any utility in reviewing the Oklahoma and Oregon cases cited by Defendants, those cases support Plaintiffs' view that SB 542 and SB 551 required the vote of not less than two-thirds of the members of the Senate.

The judiciary is empowered to review the constitutionality of the Legislature's actions in this matter and is not required to defer to the Legislature's or Legislative Counsel's interpretation of Nevada's constitutional supermajority provision. Legislative Counsel's interpretation prior to 2019 was that the supermajority provision applied to all bills extending sunsets and to all bills bringing revenue into

the State's treasury. Legislative Counsel's abrupt reversal of this position without any change in the constitutional provision removes any consideration of deference.

Defendants' arguments with respect to operative versus effective dates is not compelling and should be rejected. None of the cases cited by Defendants support the idea that an expiration date in a statute is not operative. A sunset provision or statutory expiration date is the opposite of an operative date and none of the many cases cited by Defendants supports any conclusion otherwise.

The district court properly granted summary judgment as to Plaintiffs' claims that a two-thirds majority vote was required under Article 4, Section 18(2) to pass SB 542 and SB 551.

V.

ARGUMENT

A. The language of Article 4, Section 18(2) is not ambiguous and must be given its plain and ordinary meaning.

This court reviews a district court's grant of summary judgment de novo, without deference to the findings of the lower court. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). This court reviews questions of constitutional interpretation de novo. *In re Contested Election of Mallory*, 128 Nev. 436, 438, 282 P.3d 739, 741 (2012) (citing *Lawrence v. Clark County,* 127 Nev. 390, 393, 254 P.3d 606, 608 (2011)).

This Court, in *Nevada Mining Ass'n v. Erdoes*, 117 Nev. 531, 538, 26 P.3d 753, 757 (2001), summarized the rules of constitutional construction. The Court noted when construing constitutional provisions, it uses the same rules of construction used to interpret statutes. *Id.* (citing *Rogers v. Heller*, 117 Nev. 169, 176 n. 17, 18 P.3d 1034, 1038 n. 17 (2001)). A court's primary task is to ascertain the intent of those who enacted the constitutional provision and to adopt an interpretation that best captures their objective. *Id.* (citing *McKay v. Bd. of Supervisors*, 102 Nev. 644, 648, 730 P.2d 438, 441 (1986); *State v. Glenn*, 18 Nev. 34, 42, 1 P. 186, 189 (1883)). A court must give words their plain meaning unless doing so would violate the spirit of the provision. *McKay,* 102 Nev. at 648, 730 P.2d at 442.

To determine a constitutional provision's meaning, a court turns to the language and gives that language its plain effect. *Miller v. Burk*, 124 Nev. 579, 590-91, 188 P.3d 1112, 1119-20 (2008). If the language is ambiguous, the court may look to the provision's history, public policy, and reason to determine what voters intended. However, when the language of the constitutional provision is clear on its face, the court will not go beyond the language in determining the voters' intent or to create an ambiguity when none exists. *Id.* Whatever meaning is attributed to a constitutional provision may not violate the spirit of that provision. *Id.*

This Court has also commented on the authority of the Legislature vis-a vis the Nevada Constitution. In *City of Fernley v. State, Dep't of Tax*, 132 Nev. 32, 41–42, 366 P.3d 699, 706 (2016), the Court noted:

> The Legislature has considerable law-making authority, but it is not unlimited. *Clean Water Coal.,* 127 Nev. at 309, 255 P.3d at 253 (interpreting the constitutionality of legislation under Nev. Const. art. 4, §§ 20–21); *We the People Nev. ex rel. Angle v. Miller,* 124 Nev. 874, 890 n. 55, 192 P.3d 1166, 1177 n. 55 (2008). "The Nevada Constitution is the 'supreme law of the state,' which 'control[s] over any conflicting statutory provisions.' " *Thomas v. Nev. Yellow Cab Corp.,* ––Nev. ––––, 327 P.3d 518, 521 (2014) (quoting *Clean Water Coal.,* 127 Nev. at 309, 255 P.3d at 253). "It is fundamental to our federal, constitutional system of government that a state legislature 'has not the power to enact any law conflicting with the federal constitution, the laws of congress, or the constitution of its particular State.' " *Thomas,* –– Nev. at ––––, 327 P.3d at 520–21 (quoting *State v. Rhodes,* 3 Nev. 240, 250 (1867)).
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> …
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> "Statutes are construed to accord with constitutions, not vice versa." *Thomas,* –– Nev. at ––––, 327 P.3d at 521. "If the Legislature could change the Constitution by ordinary enactment, no longer would the Constitution be superior paramount law, unchangeable by ordinary means. It would be on a level with ordinary legislative acts, and, like other acts, alterable when the legislature shall please to alter it." *Id.* at 522 (internal quotations omitted). Therefore, "the principle of constitutional supremacy prevents the Nevada Legislature from creating exceptions to the rights and privileges protected by Nevada's Constitution." *Id.*

Id., 132 Nev. at 41–42, 366 P.3d at 706.

In *Thomas v. Nevada Yellow Cab Corp.*, 130 Nev. 484, 489–90, 327 P.3d 518, 521–22 (2014), the Court further stated with regard to ballot initiatives approved by the voters:

> Moreover, our recent precedents have established that we consider first and foremost the original public understanding of constitutional provisions, not some abstract purpose underlying them. "The goal of constitutional interpretation is 'to determine the public understanding of a legal text' leading up to and 'in the period after its enactment or ratification.' " *Waymire,* 126 Nev. at ——, 235 P.3d at 608–09 (quoting 6 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law* § 23.32 (4th ed.2008 & Supp.2010)). To seek the intent of the provision's drafters or to attempt to aggregate the intentions of Nevada's voters into some abstract general purpose underlying the Amendment, contrary to the intent expressed by the provision's clear textual meaning, is not the proper way to perform constitutional interpretation. *See generally District of Columbia v. Heller,* 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008) (interpreting the Second Amendment by seeking the original public understanding of the text, with majority and dissent disagreeing on content of public understanding). "The issue ought to be not what the legislature," or, in this case, the voting public, "meant to say, but what it succeeded in saying." Lon L. Fuller, *Anatomy of the Law* 18 (Greenwood Press 1976).

Courts should give effect to the words actually used in a constitutional provision and should neither delete words used nor insert words not used in the relevant language during the statutory construction process. The courts lack authority to add words that the drafters themselves left out and the rules of construction compel a court to read the provision as written without expanding,

inserting, or deleting words. *Midrex Technologies, Inc. v. N.C. Department of Revenue*, 794 S.E. 2d 785, 792 (N.C. 2016) (noting courts should give effect to the words actually used in a statute and should neither delete words used nor insert words not used in the relevant statutory language during the statutory construction process).

Both the Executive Agency Defendants and the Defendant Legislature argue the common dictionary meanings for the words "creates, generates or increases" support a conclusion that the supermajority requirement did not apply to either SB 542 or SB 551. Executive Appellants' Opening Brief, pp. 13-19; Appellant Legislature's Opening Brief, pp. 27-30. Their contortions of the dictionary definitions should not be accepted by this Court, however.

The following definitions are suggested by these Defendants:

- "Create" means to bring into existence or produce. *Create*, *Webster's New Collegiate Dictionary* (9th ed. 1991); *Create*, *Merriam-Webster's Collegiate Dictionary* (10th ed. 1995).

- "Generate" means to bring into existence or produce. *Generate*, *Webster's New Collegiate Dictionary* (9th ed. 1991); *Generate*, *Merriam-Webster's Collegiate Dictionary* (10th ed. 1995).

- "Increase" means to make greater, enlarge, or to become progressively greater. *Increase*, *Webster's New Collegiate Dictionary* (9th ed. 1991); *Increase*, *Merriam-Webster's Collegiate Dictionary* (10th ed. 1995).

Executive Appellants' Opening Brief, pp. 13-14; Appellant Legislature's Opening Brief, p. 28.

Defendant Legislature argues the normal and ordinary meaning of these terms supports a conclusion that the supermajority 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." Appellant Legislature's Opening Brief, pp. 28-29. Executive Agency Defendants argue the provision applies only to a bill that brings into existence a tax or fee or increases an existing tax or fee. Executive Appellants' Opening Brief, pp. 13-14.

To accept the Defendant Legislature's interpretation would require insertion of several words to the Constitution. The Constitution says nothing about limiting the supermajority requirement to bills that "directly" produce taxes or fees "in the first instance." Defendant Legislature also spends time arguing about effective and operative dates of a statute and that those terms must be given consideration when determining whether the supermajority provision applies. Appellant Legislature's Opening Brief, pp. 30-36.[3] Defendant Legislature's construction requires an exception be read into Article 4, Section 18(2) for bills that "maintain" an "existing source of revenue". Such an exception is not found in Article 4, Section 18(2).

There is nothing in Article 4, Section 18(2) of the Constitution which states the supermajority requirement is not required for or applied to bills which extend

[3] Plaintiffs provide a complete response to the operative versus effective date argument below.

until a later date or revise or eliminate a future decrease in or future expiration of existing state taxes when the future decrease or expiration is not yet legally operative and binding. The Legislature's and Executive Agency Defendants' construction requires that this Court construe Article 4, Section 18(2) to provide that only *new* taxes or a bill *in the first instance imposing new or increased* taxes is subject to the supermajority requirement and that an exception is contained in the constitution provision for bills that *maintain* an *existing source of revenue*. That is not the language the drafters used, or the voters supported in amending the Nevada Constitution to add the supermajority requirement.

Regarding the Executive Agency Defendants' interpretation, the Court need only note the supermajority provision does not say it only applies to bills that create, generate or increase "taxes, fees, assessment and rates", or that revenue generated must be compared from one fiscal year to the next, or that existing fees are exempted from the language "which creates, generates, or increases any public revenue in any form" of the constitutional provision. Executive Appellants' Opening Brief at 10, 12, 18, 19, 21. The constitutional language plainly states it applies to bills that create, generate, or increase *public revenue in any form.* The constitutional supermajority provision does not include the terms "new taxes" or "existing taxes and fees". The question here is simply whether SB 542 and SB 551 created, generated, or increased *any public revenue*.

Moreover, just as they did below, the Executive Agency Defendants "assume" Plaintiffs are relying on the term "increase" rather than on the words "create" or "generate" in the constitutional provision and then they launch a discussion about whether "increase" has any application to public revenue increasing or decreasing from one fiscal year to the next, irrespective of legislative action. Executive Appellants' Opening Brief, p. 14. The Executive Agency Defendants' position is simply nonsensical and Plaintiffs clearly addressed Executive Agency Defendants' faulty assumption below. *See* JA Vol. IV at 702-03.

In addition to considering the definitions of "creates," "generates," and "increases," Plaintiffs suggest definitions of the following additional terms from Article 4, Section 18(2) are useful:

- "Any" means "one, some or all indiscriminately of whatever quantity" or "unmeasured or unlimited in amount, number or extent." *Any*, *Merriam Webster's New Collegiate Dictionary* (10th ed. 1994); *see also In re Opinion of the Justices*, 575 A.2d 1186, 1189 (Del. 1990) (determining in the context of a supermajority provision the term "any" is all inclusive and unambiguous).

- "Change" means "to make different in some particular" or "alter." *Change*, *Merriam Webster's New Collegiate Dictionary* (10th ed. 1994).

- "Computation" means "the act or action of computing" or "calculation." *Merriam Webster's New Collegiate Dictionary* (10th ed. 1994).

- "Revenue" means "the total income produced by a given source" or "the yield of sources of income (as taxes) that a political unit (as a nation or state) collects and receives into the treasury for public use." *Revenue*, *Merriam Webster's New Collegiate Dictionary* (10th ed. 1994).

- "Base" means "a number that is multiplied by a rate or of which a percentage or fraction is calculated." *Base*, *Merriam Webster's New Collegiate Dictionary* (10th ed. 1994).

- "Bill" means "a draft of a law presented to a legislature for enactment". *Bill*, *Merriam Webster's New Collegiate Dictionary* (10th ed. 1994); *See also* "Bill" means a "draft of a proposed law presented for enactment." 2019 *Nevada Legislative Manual Eightieth Session of the Nevada Legislature*: Appendix F—Legislative Terminology, at 263.[4]

Regarding the phrase "changes in computation bases," the word "base" is plural, indicating there could be many numbers used in the act of computing or determining by mathematical means a tax, fee, assessment, or rate. The word "change" is also broad and specifically includes alterations. Changes to computation bases, therefore, include alterations like removal or repeal of the computation or mathematical means of determining a tax, fee, assessment, or rate.

Likewise, the definition of "any" defeats the Defendants' narrow view of the supermajority's application. "Any public revenue in any form" necessarily includes more than revenue generated in the first instance from the imposition of new taxes or from increasing existing taxes. Nor does the phrase exclude bills extending or altering existing sources of revenue. "Any" is all inclusive, unlimited in scope. If a bill produces any public revenue in any form, it is clearly subject to the constitutional

[4] The entire 2019 Nevada Legislative Manual may be accessed at: https://www.leg.state.nv.us/Division/Research/Content/items/nevada-legislative-manual-2019.

supermajority provision. The question to ask regarding any proposed bill and whether it requires a supermajority for passage under the Nevada Constitution is – But for this bill, would there exist public revenue in any form? If the answer is no, the supermajority provision applies.

The definition of "bill" does not support the conclusions reached in the Opinion Letter which depend on adding the words "operative" and "effective" to the provisions of Article 4, Section 18(2). The word "bill" means, by the Legislature's own *Legislative Manual*, a "draft of a proposed law presented for enactment". There is nothing in the definition of the word "bill" that requires an analysis of existing law to determine if a future decrease or expiration is not legally operative and binding yet, nor is there any restricting language in Article 4, Section 18(2) that "bill" means anything other than "a draft of a law presented to a legislature for enactment". General words are to be accorded their full and fair scope to produce general coverage and not to leave room for courts to recognize ad hoc exceptions. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 101 (2012) quoted with approval in *Wilson v. Pahrump Fair Water, LLC*, 137 Nev. Adv. Op. 2, 481 P.3d 853, 857 (2021). Legislative Counsel failed to follow its own definition of the word "bill" in reaching its conclusions in its Opinion Letter.

There is nothing in Article 4, Section 18(2) which states the two-thirds majority requirement is not required or applied to bills which extend until a later

date or revise or eliminate a future decrease in or future expiration of existing state taxes when the future decrease or expiration is not legally operative and binding yet. None of the words used by Legislative Defendants to support their interpretation are in the constitutional provision. "Extend", "later date", "revise", "eliminate", "future decrease", "future expiration", "existing state taxes", "operative" or "binding" are not found in Article 4, Section 18(2). Likewise, there is no exception contained in Article 4, Section 18(2) for bills which "maintain" an "existing source of revenue" and the Court should not read words into the constitutional provision which are not there as Defendants urge.

SB 542 and SB 551 were "drafts of proposed laws presented for enactment" which generated public revenue. Defendants' tortured analysis of the constitutional provision, based upon adding words to Article 4, Section 18(2) of the Nevada Constitution to limit the full and fair scope of the word "bill", should be disregarded by the Court.

Lastly, the Legislature's own adopted norms, processes, rules, and guidelines support Plaintiffs' view that Article 4, Section 18(2) should be applied based upon its plain and ordinary meaning and there is no deference to the Legislature in determining if constitutional provisions have been complied with. Under Article 4, Section 6 of the Nevada Constitution, each House of the Nevada Legislature, in 2019, adopted the 10th Edition (2010) of *Mason's Manual of Legislative Procedure*

("*Mason's Manual*") as parliamentary authority. *See* Assembly Standing Rule No. 100 and Senate Standing Rule No. 90.[5] The following provisions of *Mason's Manual* are instructive here:

- Section 6(2): "A constitutional provision regulating procedure controls over all other rules of procedure."

- Section 7(1): ". . . Constitutional provisions prescribing exact or exclusive time or methods for certain acts are mandatory and must be complied with."

- Section 7(2): "If Congress or a state legislature violates a constitutional requirement, the courts will declare its enactment void."

- Section 72(2): ". . . It is for the courts to decide whether there has been compliance with constitutional provisions and whether a bill of the legislature has become a law."

- Section 72(3): "Where the constitution declares certain forms indispensable to the passage of laws, the courts will declare acts invalid unless passed according to those provisions."

- Section 73(2): "Insofar as legislative acts and actions are restrained by constitution, courts may examine the same and have the authority to rule upon the validity of such acts or actions."

- Section 511(3): "Constitutional provisions as to the number of votes required for the final passage of bills are mandatory."

- Section 512(1): "When a two-thirds vote is required for any purpose by a constitution or controlling provision of law, that vote must be obtained for the vote to be effective."

[5] Assembly Standing Rules for the 80th (2019) Legislative Session may be accessed at: https://www.leg.state.nv.us/Session/80th2019/Docs/SR_Assembly.pdf; Senate Standing Rules for the 80th (2019) Legislative Session may be accessed at: https://www.leg.state.nv.us/Session/80th2019/Docs/SR_Senate.pdf.

- Section 740(3): "In presenting legislation to the [Governor] for approval, constitutional or other controlling provisions must, of course, be strictly followed."

The Legislature's own adopted rules and processes require strict application of the constitutional mandates regarding voting and counting of votes. The Defendants' strained interpretation is against the rules of constitutional and statutory construction and Defendants' proposed construction should be rejected by the Court. *See Midrex Technologies, Inc. v. N.C. Department of Revenue*, 794 S.E.2d 785, 792 (N.C. 2016). The Court should, instead, honor the objective of the drafters and voters of Article 4, Section 18(2) and the spirit of the supermajority provision, which must be applied for passage of any bill which generates any public revenue in any form. *See Nevada Mining Ass'n v. Erdoes*, 117 Nev. 531, 538, 26 P.3d 753, 757 (2001); *Miller v. Burk*, 124 Nev. 579, 590-91, 188 P.3d 1112, 1121 (2008).

B. SB 551 was a bill which generated public revenue and required the affirmative vote of at least two-thirds of the Senate for passage.

SB 551 was an emergency measure brought at the specific request of Defendant below, Senate Majority Leader Nicole Cannizzaro. It was a bill whose provisions generate public revenue through taxation and changes to computation bases for certain taxes. Section 39 of SB 551 repealed NRS 360.203, which provided the computation base for the tax rate adjustment for MBT and payroll taxes. Section 37 of SB 551 set forth the intent and purpose of SB 551, which was to maintain and

continue the existing MBT and payroll tax rates by eliminating scheduled and calculated reductions that were to be performed pursuant to the repealed computation base provisions of NRS 360.203. Sections 2 and 3 of SB 551 permanently fixed the tax rates set forth in NRS 363A.130 and NRS 363B.110 by eliminating the rate adjustment calculations to be performed under the repealed NRS 360.203. JA Vol. IV at 805-06, 808-09.

The Legislative Defendants admitted in their Answers to the First Amended Complaint that Sections 2 and 3 of SB 551 eliminated the rate adjustment provisions contained in NRS 363A.130 and NRS 363B.110, that Section 39 repealed NRS 360.203 and that NRS 360.203 included a rate adjustment procedure used by the Department of Taxation to determine whether the rates of certain taxes should be reduced in future fiscal years under certain circumstances. JA Vol. I at 93-94, ¶¶ 43, 47-48; JA Vol. II at 450-451, ¶¶ 43, 47-48; Appellant Legislature's Opening Brief, p. 9.

Section 37 of SB 551 is especially telling. On October 11, 2018, the Department of Taxation announced that rates under NRS 363A.110 and NRS 363B.130 would be reduced effective July 1, 2019, pursuant to the calculations performed pursuant to NRS 360.203. JA Vol. V at 1053-56. Section 37(2)(a)(1) and (2) of SB 551 "superseded, abrogated and nullified" all determinations and decisions of the Department of Taxation pursuant to NRS 360.203 and provided that

all calculations made by the Department thereunder should have "no legal force and effect." JA Vol. IV at 835. Section 37(2)(b) of SB 551 further provided the Department of Taxation "shall not, under any circumstances, apply or use those determinations, decisions or actions as a basis, cause or reason to reduce the rates of the taxes imposed pursuant to NRS 363A.130 and 363B.110 for any fiscal year beginning on or after July 1, 2015." JA Vol. IV at 835.

Defendants argue there was no rate or computation base adjustment that was legally operating and binding until July 1, 2019. Why, then, did Section 37 of SB 551 devote multiple subsections to making sure the calculations to determine reductions in the taxes were superseded, abrogated, nullified, and of no force and effect and that the calculations already made by the Department of Taxation were not to be used under any circumstances? SB 551 clearly altered the computation bases for the taxes imposed by NRS 363A.130 and 363B.110.

Moreover, the effect of SB 551 was to generate public revenue of approximately $98.2 million from MBT and payroll taxes over two years as stated by the LCB's own fiscal analyst during hearings on SB 551 in response to the questioning by Senator Kieckhefer. JA Vol. IV at 776.

Therefore, it is unquestionable that SB 551, if deemed passed, generates revenue for the State. If SB 551 did not exist or was not passed, the projected $98.2 million would not exist. But for the deemed passage of SB 551, $98.2 million in

public revenue would not exist. SB 551, therefore, generated (brought into existence or produced) public revenue. The district court correctly deemed SB 551 unconstitutional as it did not garner the vote of two-thirds of the Senate.

C. SB 542 is a bill which generated public revenue and required the affirmative vote of at least two-thirds of the Senate for passage.

SB 542 generated public revenue through fees by extending the expiration date of a DMV technology fee from June 30, 2020 to June 30, 2022. JA Vol. IV at 730. SB 542 retained the effective and operative date of the original imposition of the technology fee – July 1, 2015. There was a one-digit date change in SB 542 from SB 502 of the 78th Legislative Session enacted in 2015. JA Vol. IV at 730. SB 502 in 2015 required a two-thirds majority vote under Article 4, Section 18(2), but the one-digit date change in SB 542 in 2019 did not require such a two-thirds majority vote. SB 502 and SB 542 were bills that generated public revenue.

The purpose of SB 542 was to generate public revenue from DMV fees for two more years. The Director of the DMV testified the DMV collects about $7 million per year from the technology fee. JA Vol. IV at 733-34, 736. Thus, SB 542 generates public revenue through fees. If SB 542 did not exist or was not deemed passed, there would be no revenue from the DMV technology fee after June 30, 2020. Thus, SB 542, if deemed passed, would generate (bring into existence or produce) public revenue between June 30, 2020 and June 30, 2022. Therefore, the

district court correctly deemed SB 542 unconstitutional as it did not garner the vote of two-thirds of the Senate.

D. The Court should only consider contemporaneous extrinsic evidence if the clear textual meaning of a ballot measure cannot be ascertained.

Defendants rely heavily on testimony given by former Assemblyman Jim Gibbons in support of AJR 21, which he sponsored during the 1993 legislative session. Executive Appellants' Opening Brief, pp. 19-21; Appellant Legislature's Opening Brief, pp. 39-42. Defendants also point to this Court's prior consideration of Gibbons' testimony in *Guinn v. Legislature (Guinn II)*, 119 Nev. 460 (2003). Executive Appellants' Opening Brief, p. 6, n. 2; Appellant Legislature's Opening Brief, pp. 39-42.

This Court, in an opinion given after *Guinn II*, noted, however, that the judiciary must:

> Consider first and foremost the original public understanding of constitutional provisions, not some abstract purpose underlying them […] To seek the intent of the provision's drafter or to attempt to aggregate the intentions of Nevada's voters into some abstract general purpose underlying the Amendment contrary to the intent expressed by the provision's clear textual meaning, is not the proper way to perform constitutional interpretation.

Thomas v. Nevada Yellow Cab Corp., 130 Nev. 484, 490, 327 P.3d 518, 521 (2014). The Court had no legislative bill before it in *Guinn II* and the case's broad statements

as to the general abstract purpose of Article 4, Section 18(2) related to the constitutional budgetary stalemate in that case. *Guinn II*, 119 Nev. at 477, 76 P.3d at 33. In *Guinn II*, this Court did state the language of Article 4, Section 18(2) was clear on its face. *Id.* at 471, 76 P.3d at 29. Further, Defendants acknowledge in their Routing Statements this is a case of first impression for the Nevada Constitution or their appeals are issues of first impression in Nevada. *See* Executive Appellants' Opening Brief at 1; Appellant Legislature's Opening Brief at x. Thus, this Court should first turn to the provision's language, which is clear on its face, give that language its plain effect and not go beyond that language in determining the voters' intent or create an ambiguity where none exits. *Miller v. Burk*, 124 Nev. 579, 590-91, 188 P.3d 1112, 1120 (2008).

To be clear, this Court must not look to contemporaneous extrinsic evidence unless it first determines the plain language of the supermajority provision is ambiguous. Further, the Court must not accept the Defendants' attempt to create ambiguity when none exists.[6] The insertion or deletion of words, to create ambiguity

[6] Moreover, the May 8, 2019 Opinion Letter analyzed the constitutional supermajority provision primarily by looking to the plain and ordinary language of the provision, implying the provision was unambiguous. JA Vol. I at 157-59; 165-66. The arguments and references to extrinsic evidence that followed the plain and ordinary meaning analysis were presented only as a means of supporting the conclusions reached on the plain and ordinary meaning of the provision. JA Vol. I at 160-65; 166-69. At the hearing in the district court, in attempting to justify the constitutional irregularities surrounding the two votes taken on SB 551, Legislative Counsel asserted those irregularities demonstrate the Legislature's struggle "with

and to force the provision to fit the Defendants' desired outcome, is improper. The provision at issue here is quite clear. If a bill creates, generates, or increases any public revenue, in any form, it must be passed by a two-thirds majority. The terms "create" and "generate" mean "to bring into existence" or "produce". Both SB 542 and SB 551 bring into existence or produce public revenue that, but for the passing of those bills, would not exist.

However, even if the Court does determine there is ambiguity in the supermajority provision, more compelling contemporaneous extrinsic evidence exists to support application of the supermajority provision to bills like SB 542 and SB 551. First, the ballot language by its own terms stated: "Shall the Nevada Constitution be amended to establish a requirement that at least a two-thirds vote of both houses of the legislature be necessary to pass a measure which generates or increases a tax, fee, assessment, rate or any other form of public revenue?". JA Vol. II at 249, 252. There is nothing in the ballot language which limits the applicability of the constitutional provision to new taxes or new revenue sources.

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the ambiguity of this constitutional provision." JA Vol. VI at 1137. In its Opening Brief, the Legislature again asserts "the terms 'creates, generates, or increases' must be given their normal and ordinary meanings," again implying it does not believe those terms to be ambiguous. Appellant Legislature's Opening Brief, p. 28. Legislative Counsel's back and forth with respect to the question of ambiguity to fit the Legislature's various arguments, from time to time, should give this Court pause, particularly with respect to the question of whether the interpretations of Legislative Counsel or the Legislature are entitled to any deference in this matter.

Defendants quote extensively from Assemblyman Gibbons' testimony on AJR 21, given before the Assembly Committee on Taxation on May 4, 1993, but they omit portions of his testimony that support Plaintiffs' view of the plain meaning of the supermajority provision. For instance, Gibbons testified the proposed supermajority provision "would ensure greater stability and preserve certain statutes from constant tinkering of transient majorities." *Leg. History of AJR 21*, 67th Leg. (Hearing on AJR 21 before Assembly Comm. On Taxation, 67th Leg., at 13 (Nev. May 4, 1993).[7] This language cuts against revisions made by the 2019 Legislature of bills first enacted by the 2015 Legislature.

Further, testimony from the business community in support of the proposed two-thirds provision suggested the purpose of the provision would be to "minimize fluctuations in the tax structure." *See* testimony from Steve Stucker, Laughlin Associates, Inc. *Id.* at 16. Several individual Nevada taxpayers testified in support of AJR 21 and suggested the supermajority provision was necessary to "creat[e] tax structural fiscal reform." *Id.* at 18. Thus, if the Court accepts contemporaneous extrinsic evidence, it should look to evidence that supports the broad purpose of the constitutional supermajority provision and the intent of the voters who approved it.

[7] This legislative history of AJR 21 is available at https://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/1993/AJR21,1993.pdf.

Finally, this Court has questioned whether legislative intent can be gleaned from a previous Legislature's non-action on a proposed bill. *See, Salaiscooper v. Eighth Judicial District Court ex rel. County of Clark*, 117 Nev. 892, 905, 34 P.3d 509, 518 (2001).

E. Nevada's supermajority requirement differs from those analyzed by Defendants and this case must be distinguished from cases interpreting other states' constitutional supermajority provisions.

Defendant Legislature points to statements from Assemblyman Gibbons that AJR 21 was modeled on other states' constitutional provisions. Appellant Legislature's Opening Brief, p. 40. It asserts, therefore, that this Court may review and rely on court cases from other jurisdictions that analyze those other states' provisions. First, AJR 21, which proposed a constitutional two-thirds supermajority for certain tax measures, was not approved in 1993. The language at issue before this Court is the language adopted by the voters of this State subsequent to the 1993 consideration of AJR 21. The language of AJR 21 differs significantly from the language ultimately adopted by the voters and codified in Article 4, Sec. 18(2) of the Nevada Constitution. *Cf.* Nev. Const. Art. 4, Sec. 18(2) to AJR 21, 67th Leg. (1993), JA Vol. 255-56. Therefore, Assemblyman Gibbons' statements that he modeled AJR 21 on other states' provisions is of no moment when analyzing the actual language adopted by the voters and codified in Art. 4, Sec. 18(2) of the Nevada Constitution.

Moreover, even if the Court accords value to an analysis of other states' judicial review of their own constitutional supermajority provisions, the cases cited by the Defendants are distinguishable from what is before this Court.[8] Defendants rely exclusively on cases analyzing Oklahoma's and Oregon's constitutional supermajority provisions. Those states' supermajority provisions, quoted above, however, are in no way the same as Nevada's. Therefore, it simply makes no sense to rely upon Oklahoma and Oregon jurisprudence, construing an entirely different and narrower legislative restriction, than is at issue here.

Defendants twist the facts and misstate the holding of *Fent v. Fallin*, 345 P.3d 1113 (Okla. 2014). Defendants state the bill in question, in *Fent*, merely deleted the "expiration date of specified tax rate levy." *Id.* at 1116 n. 6. What they leave out of their analysis, however, is, critically, that the effect of the bill was to *decrease* taxes and, therefore, reduce revenue to the state. *Id.* at 1118. The Oklahoma Supreme Court concluded, appropriately, that the intent of the voters in adopting the constitutional supermajority provision was to provide tax relief to the voters and that

[8] *Apa v. Butler*, 638 N.W.2d 57 (S.D. 2001) cited by Executive Agency Defendants and Defendant Legislature in their Opening Briefs is likewise distinguishable from what is before this Court. In *Apa*, the Court determined the South Dakota Constitution provision applied only to final *passage* of any special appropriations bills and not to the repeal or amendment of an existing special appropriation. *Id.* at 69-70. There is no such limiting language in Article 4, Section 18(2) which plainly provides the two-thirds vote requirement is applicable to any bill which creates, generates or increases any public revenue in any form.

it is "extremely doubtful that the people intended the…super-majority approvals to apply to a Legislative measure providing further relief by a reduction in the income tax rate." *Id.* at 1117.

Here, if this Court places any value in *Fent*, it should conclude that Nevada voters, like Oklahoma voters, intended the constitutional supermajority amendment to provide tax relief and, therefore, Article 4, Section 18(2) should be applied in every situation where the effect of a bill is to do the opposite of provide tax relief. Both SB 551 and SB 542 are just such bills – they both extend taxes and fees where, if those bills did not exist or are deemed unpassed, the voters would have been relieved from the taxes and fees at issue therein.

Defendants also misstate the holding in *Naifeh v. State ex rel. Okla. Tax Comm'n*, 400 P.3d 759 (Okla. 2017) when they emphasize that only "new taxes" are subject to Oklahoma's supermajority provision. Indeed, the narrow holding of *Naifeh* supports Plaintiffs' view that the extension of the sunset in SB 542 is subject to Nevada's supermajority requirement. *Naifeh* concerned a bill whose primary purpose was to reduce the use of cigarettes by Oklahomans, but that purpose was to be accomplished by imposing a "tobacco cessation fee" on cigarette sales, resulting in significant revenue to the state. *Id.* at 761. The narrow holding in *Naifeh* was that the "tobacco cessation fee" raises revenue and "levies taxes in the strict sense of the word" and is, therefore, subject to the supermajority requirement despite the primary

regulatory purpose of the bill. *Id*. at 766. Defendants improperly emphasize the Oklahoma cigarette tax was a new tax and that this was the justification for applying the supermajority provision. That was not at all, however, the question or concern before the Oklahoma Supreme Court. The phrase "new tax" is used three times in the opinion and none of those instances are tied to the narrow holding of the case. If anything, *Naifeh* supports the idea that a regulatory fee that generates revenue to the state, like the DMV technology fee at issue in SB 542, is subject to the supermajority requirement.

Defendants also mischaracterize a statement on the holding in *Naifeh* contained in *Okla. Auto Dealers Ass'n v. State ex rel. Okla. Tax Comm'n*, 401 P.3d 1152 (Okla. 2017). That court recognized that the cigarette bill discussed in *Naifeh* had been invalidated because it qualified as a revenue bill and levied a tax "in the strict sense of the word." *Id*. at 1153. Defendants get hung up on the fact that the court used the phrase "new tax" but that was not the issue, as discussed above. Instead, what the court, in *Okla. Auto Dealers*, was emphasizing was that the "tobacco cessation fee" was a tax in the strict sense of the word. That it was a "new" tax was irrelevant to the Court's discussion in *Naifeh* and in *Okla. Auto Dealers*, which held that the removal of an exemption from an existing tax was not subject to the supermajority requirement because, under Oklahoma's long history of cases analyzing "revenue bills," bills that provide exemptions or remove exemptions from

existing taxes are not considered "revenue bills." *Id*. at 1155-56. That analysis has no application in Nevada because Nevada's supermajority requirement is not narrowly applied to bills that raise or increase revenue ("revenue bills"), but to any bill that creates, increases, or generates revenue through taxes, fees, assessments or rates. Similarly, the Oklahoma Supreme Court also considered whether a bill imposing a fee was a "revenue bill" subject to Oklahoma's supermajority provision in *Sierra Club v. State ex rel. Oklahoma Tax Comm'n*, 405 P.3d 691 (2017). The question there was simply whether a bill imposing a fee is one which levies a tax "in the strict sense of the word." While such questions have no place here because Nevada's provision applies on its face to bills creating or generating revenue through fees or taxes, the Oklahoma court deemed such a fee in *Sierra Club* to be a revenue bill subject to supermajority approval.

Defendants also cite an Oregon case, which is very similar to the Oklahoma cases cited, but also differs significantly from the issues here. In *Bobo v. Kulongoski*, 107 P.3d 18 (Or. 2005), the Oregon Supreme Court recognized a similar two-part test to that employed in Oklahoma. A bill, in Oregon, is subject to the supermajority requirement if it brings money into the treasury and if it levies a tax. *Id.* The question in *Bobo* concerned a bill that transferred Medicaid funds out of the state's general fund, which impacted a tax refund scheme based on how much money was in the general fund. *Id.* at 19. The court appropriately concluded that, under

Oregon's "bills raising revenue" language, the bill in question did not raise revenue through taxation and was, therefore, not subject to Oregon's constitutional supermajority provision. *Id.* at 23. *Bobo* has no application here.

As noted herein, both SB 542 and SB 551 generate revenue to the State consistent with the plain language of Nevada's constitutional supermajority provision. It is not necessary in Nevada that a bill levy a tax, new or otherwise, in order to fall within the supermajority requirement. Any bill that generates revenue, *in any form*, is subject to the two-thirds requirement of the Nevada Constitution.

Many states have supermajority provisions in their Constitutions. Another state's judicial interpretation of its own constitution may be instructive, but it cannot be controlling on this Court's construction of the Nevada Constitution because the Nevada constitutional language is easily distinguished in every such circumstance argued by Defendant Legislature and Executive Agency Defendants.[9] The language in Nevada's constitutional supermajority provision is clearly and certainly intended to be broader than the mere raising of revenue. Plaintiffs reject any suggestion that

[9] The Executive Agency Defendants' citation to *La Chem. Ass'n v. State ex rel. La Dep't of Revenue*, 217 So. 3d 455 (La. Ct. App. 2017) is inapposite. That case involved the suspension, not the repeal, of an existing tax exemption. A supermajority vote is explicitly required for the repeal of an existing tax exemption under the Louisiana Constitution. Because the legislative action was a suspension of the tax exemption and not the repeal of the tax exemption, the Court held a supermajority vote was not required. This case does not involve the suspension or repeal of a tax exemption.

their "failure to find contrary persuasive authority supporting its interpretation of the Supermajority Provision highlights the reasonableness of the Legislature's interpretation." *See*, Executive Appellants' Opening Brief, p. 24. Thus, Defendants' request that this Court adopt the reasoning from Oklahoma and Oregon is simply not appropriate.

F. The judiciary is empowered to review the constitutionality of legislative actions.

Defendants contend the Legislature is entitled to deference when its actions are based on an opinion issued to it by Legislative Counsel. This contention is based entirely on *Nevada Mining Association v. Erdoes*, 117 Nev. 531, 26 P.3d 753 (2001). In *Erdoes*, the issue under review was whether the Legislature's constitutional mandate to conclude its regular session by midnight Pacific standard time on the 120th day was the same as 1 a.m. Pacific daylight savings time. The 2001 Legislature passed two bills between midnight and 1 a.m. on the 120th day of the Session and Brenda Erdoes, then Legislative Counsel, declined to enroll the two bills and did not deliver them to the Governor for his action. *Id.* at 534-35.

This Court's opinion does not explain why Ms. Erdoes declined to enroll the bills given that Legislative Counsel had issued an *unwritten* opinion to the Legislature that "it could reasonably interpret midnight Pacific standard time to mean one hour later than midnight Pacific daylight savings time, so that it could

work an additional hour." *Id.* at 538, n. 12. The deference issue is confusing as Legislative Counsel apparently acted contrary to its own legal opinion by not enrolling the bills and delivering them to the Governor. Notwithstanding, this Court made its statement the Legislature acted on Legislative Counsel's *unwritten* opinion, that this was a reasonable construction of the provision, and the Legislature is entitled to deference in its counseled selection of this interpretation. *Id.* at 540. Unfortunately, the Court's opinion does not address Legislative Counsel's failure to follow its own opinion given to the Legislature.

The Court did not, however, simply go along with Legislative Counsel's opinion – it performed, instead, its own analysis. *Id.* at 539-42. The Court's conclusion was also based on (a) a historical analysis of time zones and daylight savings time and (b) a simple accounting of the exact number of hours in 120 days based on 24 hours per day. *Id.* at 540-42.

Thus, the statement in *Erdoes* relied upon by Defendants appears to non-controlling dictum. *St. James Vill., Inc. v. Cunningham*, 125 Nev. 211, 216, 210 P.3d 190, 193 (2009) (Dictum is not controlling and a statement in a case is dictum when it is "unnecessary to a determination of the questions involved." (cites omitted)). The Court's holding in *Erdoes* does not stand for the principle that if the Legislature relies upon a Legislative Counsel's opinion, a district court's construction of a constitutional provision must be reversed as argued by the

Defendant Legislature. *See* Appellant Legislature's Opening Brief, pp. 38, 51-52. Defendant Legislature cites no authority to support this argument. Defendant Legislature essentially argues its Legislative Counsel's opinions have more weight than a court's and urges that its opinions should be given deference even though this Court reviews questions of constitutional interpretation from a lower court de novo.

Here, the district court's independent analysis of the Legislature's refusal to comply with Nevada's constitutional supermajority mandate was appropriate and this Court may do the same and should reach the same conclusion. First, as set forth above, the plain and ordinary meaning of the constitutional provision mandates that SB 542 and SB 551 are subject to the two-thirds majority constitutional requirement. The constitutional provision is not ambiguous and Legislative Counsel's opinion is not reasonable. Legislative Counsel's opinion today is inconsistent with its position over the last several decades, where between 1997 and 2017, LCB consistently interpreted Article 4, Section 18(2) to apply to extensions of tax or fee sunsets or to any bill resulting in revenue coming to the State. JA Vol. II at 418-22; JA Vol. IV at 788-801.

Article 6, Section 1 of the Nevada Constitution vests the judicial power of the State in a court system "comprising a Supreme Court, a court of appeals, district courts and justices of the peace." The judiciary is empowered to construe Nevada's Constitution. *See Erdoes*, 117 Nev. at 538. Nevada's government is based on a

system of separation of powers by and among the judiciary, the legislative, and the executive branches of government, with each branch exercising certain checks against the others. *Galloway v. Truesdell*, 83 Nev. 13, 19, 422 P.2d 237, 241-42 (1967). The Supreme Court, in *Galloway*, recognized that "[t]he division of powers is probably the most important single principle of government declaring and guaranteeing the liberties of the people." *Galloway*, 83 Nev. at 18.

This Court has also recognized that it is the judiciary's responsibility to interpret the Nevada Constitution and cannot abdicate that responsibility to another branch of government. *See MDC Restaurants, LLC v. The Eighth Judicial Dist. Court of the State of Nevada in and for Cty of Clark*, 134 Nev. 315, 320, 419 P.3d 148, 152-53 (2018) (citing *Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.")). The same principle must necessarily apply to the Legislature and to Legislative Counsel, which is a creation of the Legislature, governed by the provisions of NRS Chapter 218F. Legislative Counsel is not part of Nevada's judiciary and therefore is not the final authority on constitutional construction.

While the Legislature "necessarily must attempt to interpret the Constitution in carrying out its duties, the judiciary is not bound to the legislative judgment concerning the proper interpretation of constitutional terms." *Mesivtah Eitz Chaim of Bobov, Inc. v. Pike Cty Bd. of Assessment Appeals*, 44 A.3d 3, 7 (2012) (internal

quotations omitted). In *Mesivtah*, the Supreme Court of Pennsylvania held that its Legislature "cannot displace our interpretation of the Constitution because the ultimate power and authority to interpret the Pennsylvania Constitution rests with the Judiciary." *Id.*

And, again, the Legislature's own rules provide for the judiciary's review of the Legislature's constitutional acts and interpretations. *See Mason's Manual of Legislative Procedure* §§ 7(2); 72(2)-(3); and 73(2) (each of which specifically empowers judicial review of legislative acts constrained by the constitution).

Therefore, any measure of deference Legislative Counsel's opinion might deserve is outweighed entirely by the province of this Court to interpret the constitutional provisions in question. As such, this Court is in no way bound by the Legislature's and Legislative Counsel's interpretation of Nevada's constitutional supermajority provision.

G. The Legislature is not entitled to deference in relying on Legislative Counsel's May 8, 2019 Opinion.

This Court has declined to apply deference to a constitutional officer's interpretation of a statute when the plain language of the statute contradicts the constitutional officer's interpretation. *See Independent American Party v. Lau,* 110 Nev. 1151, 1154–55, 880 P.2d 1391, 1393 (1994). In addition, deference should not be applied when a constitutional officer has interpreted the law differently in the past

without a corresponding change in the law to justify reversing his position. *Nevada State Democratic Party v. Nevada Republican Party*, 256 P.3d 1, 6 (Nev. 2011) (citing *State v. Brodigan,* 35 Nev. 35, 39, 126 P. 680, 682 (1912) (explaining that courts will give weight to the Secretary of State's interpretation of an election statute but suggesting that deference should not be applied when the Secretary of State had interpreted the law differently in the past without a corresponding change in the law to justify reversing its position)).

Since Article 4, Section 18(2) was approved by the voters in 1996, and prior to 2019, a two-thirds majority vote of each house has been required to pass a bill extending a sunset provision or extending a tax or fee. *See* for example, AB 561 of the 76th (2011) Legislative Session, SB 475 of the 77th (2013) Legislative Session and SB 483 of the 78th (2015) Legislative Session. *See also* JA Vol. IV at 788-801. In addition, since 2006, when Senator Settelmeyer became a member of the Legislature, all extensions of taxes that were going to sunset or were to be extended required a two-thirds majority of each house to pass. JA Vol. II at 419, ¶4.

There has been no change in Article 4, Section 18(2) of the Nevada Constitution or other applicable law regarding extension of taxes or sunset provisions justifying a reversal of Legislative Counsel's position that the two-thirds majority is required for extensions of taxes or extending sunset provisions of taxes. Accordingly, the Court should not defer to the Legislature's action regarding SB 542

and SB 551 because the plain language of the constitutional provision contradicts the Legislature's and Legislative Counsel's interpretation and they interpreted the law differently in the past without a corresponding change in the law to justify the reversal. The Defendant Legislature's argument that Legislative Counsel's prior positions were not in writing is irrelevant, unsupported by any legal authority and contrary to its position that the unwritten Legislative opinion in *Erdoes* was properly given deference by this Court. Appellant Legislature's Opening Brief, pp. 36-37. Legislative Counsel's tacit admission that it took a different view prior to 2019 clearly moves this matter under the precedent of *Nevada State Democratic Party v. Nevada Republican Party*, 256 P.3d 1, 6 (Nev. 2011).

As outlined above in the Statement of Facts (Section III.B), until 2019 there was a longstanding and continued policy implemented by Legislative Counsel and understood by Legislators and others testifying on bills from the time the constitutional language requiring a two-thirds majority was put into place that any revenue-generating measure or change in a formula related to revenue required a two-thirds majority vote. This Court should take note of the list of measures to which a two-thirds supermajority was required prior to 2019 and the general understanding of both Legislative Counsel and individual legislators with respect to the broad application of the constitutional supermajority provision. *See* JA Vol. IV at 788-801.

Moreover, the Defendant Legislature's argument these prior legislative positions should not be given effect because they were not in writing is defeated by Legislative Counsel's own recent contradictory statements and the Bill Drafting section of Chapter III entitled *Legislative Procedure and Action* of the *Legislative Manual*. Legislative Counsel testified on July 16, 2020, during a meeting of the Assembly Committee of the Whole Floor Session of the 31st (2020) Special Legislative Session:

> To answer the Assemblyman's question, every piece of legislation is potentially subject to challenge. Therefore, as part of the drafting process, LCB Legal analyzes each piece of legislation to determine whether or not it is more likely than not to be constitutionally defensible. We make that initial analysis for every piece of legislation, this piece of legislation, or any other piece of legislation. Based on our interpretation of existing case law in Nevada, we believe that this legislation is more likely than not constitutional and is therefore constitutionally defensible. But we don't approach this legislation [video interrupted] this is not us preparing for litigation. This is us providing the assembly and the other house, when necessary, with a legal opinion on whether we think this is constitutionally defensible. We do that with every piece of legislation.[10]

The Bill Drafting section of the *Legislative Manual* likewise provides that after obtaining the facts and objectives of a bill from a sponsor, the bill "must be checked for conformance with the . . . Nevada Constitution." 2019 *Nevada Legislative*

[10] Video of this testimony can be accessed at: http://sg001-harmony.sliq.net/00324/Harmony/en/PowerBrowser/PowerBrowserV2/20200716/-1/?fk=6427&viewmode=1 at approximately 8:33:45-8:34:40.

Manual Eightieth Session of the Nevada Legislature at 143. Thus, this Court can and should conclude Legislative Counsel analyzed each of the bills included in the list at JA Vol. IV at 788-801 for constitutional conformance and concluded that each required a constitutional two-thirds supermajority vote. With respect to SB 542 and SB 551, Legislative Counsel, in 2019, reversed nearly two decades of holding the same position without a corresponding change in the law.[11]

In sum, deference should not be applied to the Legislature or Legislative Counsel's opinion because there had been a longstanding interpretation requiring a two-thirds majority vote for any sunset extension, revenue generating measure, or change in a formula related to revenue. The sudden and impromptu change in 2019 is entitled to no deference.

Finally, this Court should decline to defer specifically to the Legislature's or any of the Individual Defendants' actions in enacting and passing SB 551 based upon the constitutional irregularities existing in connection therewith, identified in the Statement of Facts (Section III.C).

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[11] The Court may, pursuant to NRS 47.130, also take judicial notice of the fact that during the ongoing 81st (2021) Legislative Session, there is a two-third supermajority requirement on SB 367, a bill which removes the pro sports exemption from the live entertainment tax. This supermajority requirement is inconsistent with the conclusion of the written Opinion Letter and the position taken by the Defendants in the *Morency* appeal pending before this Court (Case No. 81281) that the removal of exemptions only requires a simple majority vote.
https://www.leg.state.nv.us/Session/81st2021/Bills/SB/SB367.pdf

A discussion of the constitutional duties of the Individual Defendants is included in Plaintiff's Opening Brief in support of their Cross-Appeal, filed herein on March 22, 2021 and will not be repeated here. On June 3, 2019, the Majority Leader, President of the Senate, and Secretary of the Senate made conflicting constitutional determinations regarding the two-thirds majority constitutional requirement for SB 551. For the first vote of SB 551, they did not act on Legislative Counsel's opinion and determined by law and their official duties that a two-thirds majority requirement was constitutionally necessary to pass SB 551. When the bill did not pass by the two-thirds constitutional majority, they determined fifteen minutes later that by law and their official duties a two-thirds majority requirement was not necessary to pass SB 551 and only a simple majority was required by the Nevada Constitution. Defendant Legislature argues repeatedly throughout its Opening Brief the Legislature is entitled "to deference in its counseled selection of this [Legislative Counsel's Opinion Letter] interpretation". However, in the first vote on SB 551, the Legislature obviously did not select the interpretation of Legislative Counsel and the Legislature's interpretation cannot be "reasonable" when its "interpretation" manifested itself in two votes on the same bill provisions with different constitutional results. Both "interpretations" cannot be reasonable. Based upon these constitutional irregularities and Legislative Counsel's admission at the oral argument before the district court that the Legislature was struggling with

"ambiguity" of the constitutional provision (JA Vol. VI at 1137), no deference should be provided to the Legislature's action on SB 551 or to Legislative Counsel's opinion.

H. The Defendants' argument about effective and operative dates should be rejected.

The case law cited by Defendants regarding effective and operative dates of statutes is not relevant. Indeed, first and foremost the term "bill," defined by the Nevada Legislature's 2019 *Legislative Manual* to mean a "draft of a proposed law presented for enactment" renders the whole discussion on operative dates versus effective dates entirely useless. Article 4, Section 18(2) of the Nevada Constitution requires a two-thirds vote to pass a "bill or joint resolution." A bill, being only a draft of a proposed law, has no effective or operative date until it is passed by the constitutionally required vote. Thus, in determining whether a bill creates, generates, or increases public revenue, there is no consideration as to when the bill becomes effective or operative. If it creates, generates, or increases public revenue, in any form, it is subject to the two-thirds majority requirement regardless of the effective or operative dates of the bill or any existing statutes to which the bill applies or has an impact.

Moreover, even if an analysis of operative dates versus effective dates is useful, the Defendants confuse these terms beyond comprehension. The operative

part of the statutes in the cases cited by Defendant Legislature is what the statute actually mandates or requires. None of the cases support the idea that an expiration date in a statute is not operative. An expiration date is the opposite of an operative date. Both apply to the actual requirements contained in the statutes. An operative date is when the requirement goes into effect or begins to apply to the statute's subjects and the expiration date is when those requirements end and go away.

Defendants confuse the issues when discussing the difference between effective and operative dates of a statute and the application of that purported principle to this case. They correctly note that "[t]he existence of a law, and the time when it shall take effect, are two separate things. The law exists from the date of approval, but its operation [may be] postponed to a future day." Appellant Legislature's Opening Brief, p. 30 (quoting from *People ex rel. Graham v. Inglis*, 43 N.E. 1103, 1104 (Ill. 1896)). It is a correct principle that a law may exist but may not be operative until a future date. The principle for which *Graham* stands is that a bill becomes law upon execution by the governor but may not be effective or operative until a later date.

In support of their claims, Defendants cite from several sources, none of which support the nonsensical idea that an expiration date can be the same as an operative date. In *Graham*, an 1896 case, the Supreme Court of Illinois recognized that a law becomes a law immediately upon approval and execution by the governor after it is

passed by the general assembly and presented to the governor, but that the law does not go into effect, under the Illinois Constitution, until the next July 1st. 43 N.E. at 1103. The law in question authorized the establishment of a school and for the governor to appoint a board of trustees to govern the school. *Id.* The bill was passed by the general assembly and signed by the governor on May 22, 1895. *Id.* The governor appointed a board of trustees on June 5, 1895 and they began acting as a board on July 27, 1895. *Id.* A petition for writ of mandamus was filed, challenging the governor's appointment before the law could have gone into effect. *Id.* The Supreme Court of Illinois merely recognized that the law was in place upon the governor's execution thereof on May 22, 1895 and that, therefore, he could appoint the board, but that the board had no power to act until the law went into effect on July 1, 1895. *Id.* at 1105. That the board did not act until after July 27, 1895 was enough to defeat the writ petition. *Id.* There is nothing in this case about whether a statutory expiration date is equal to an operative or effective date.

82 C.J.S. Statutes § 549 does not support Defendant Legislature's arguments either and provides as follows:

> 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.

The authors of this treatise discuss the difference between a law existing and law being operative and binding. Several cases are cited, though none address the idea that a statute's expiration date is not operative or effective once the law exists. The directive of a statute is not its expiration but the actions the statute compels. In the case of SB 542, for example, the directive of the statutes it amends is to impose and collect the DMV technology fee. The expiration date contained therein is not the directive.

In *Preston v. State Bd. of Equal.*, 19 P.3d 1148 (Cal. 2001), the Supreme Court of California analyzed a sales tax law clarifying certain exemptions, with retrospective effect, but in which the law was not to be implemented until "the first day of the first calendar quarter commencing more than 90 days after the effective date." *Id.* at 1167. The Court reasoned that there are several reasons for postponing the operation of a statute, even when the statute has retroactive application. Among those reasons are to delay the operation so as to allow persons and agencies affected by the law time to become aware of its terms and to comply therewith, to allow government authorities to establish regulations for the implementation of the new law, or to allow time for emergency amendments and cleanup of related legislation. *Id.* (internal citations omitted). This case does not support the idea that a statutory expiration date is equal to a future operative date.

In *Longview Co. v. Lynn*, 108 P.2d 365 (Wash. 1940), the Supreme Court of Washington recognized that a tax law with a stated future effective date cannot be applied to transactions that occurred between the date the law was enacted and the stated effective date, even though the transacting parties may have been put on notice of the tax by reason of the enactment of the law. *Id.* at 373. Again, this case does not support the idea that a tax's future expiration date is not operative when the tax is operative.

In *Levinson v. City of Kansas City*, 43 S.W.3d 312 (Mo. Ct. App. 2001), a Missouri court of appeals recognized a tax statute has no force until its effective date and that the purpose of the delay in making this particular tax statute effective was to put the public on notice of the tax changes. *Id.* at 316-17. Again, there is nothing in this case to support the contention that a tax's expiration date is not operative or effective.

Defendant Legislature concedes that the technology fee extended by SB 542 and the computation rate adjustment repealed by SB 551 were passed into law and effective in 2015. Appellant Legislature's Opening Brief, pp. 5-6, 9, 10. The distinction between "effective" and "operative" is not relevant to whether SB 542 and SB 551 created, generated or increased any public revenue in any form. As the Legislature says, a law is "effective" on the date it legally goes into effect. If a law is "effective," it is the law, unless the Legislature changes it by properly passing a

new law. The Defendants cannot simply ignore the law, even if the law may not have been "operative." In other words, to change an existing effective law, a new law is required. It is telling that Defendants do not cite any case—from Nevada or elsewhere—holding a statute does not raise taxes if the tax does not operate until the following fiscal year. No such authority exists.

Defendants argue that by preventing the Legislature from amending future expiration dates or repealing future reduced rates, the supermajority provision would violate the principle that a past legislature cannot bind a future legislature. Appellant Legislature's Opening Brief, pp.32-33; Executive Appellants' Opening Brief, pp. 17-18. This case is not about one Legislature binding another. It is about Article 4, Section 18(2) binding the Legislature. Article 4, Section 18(2) requires a two-thirds majority for any bill that creates, generates or increases public revenue in any form. Plaintiffs' argument is not based on a prior Legislature binding a future Legislature; it is rather the Constitution that binds every Legislature. And the Constitution requires the Legislature to obtain a supermajority vote for any bill that generates revenue.

The problem with Defendants' argument is that it focuses on the sunset or expiration provision of the old bill being amended instead of focusing on the bill being considered by the Legislature at the time of the vote—which is required by Article 4, Section 18(2). Defendants have provided no legal support for their

proposition that a sunset or expiration provision in a bill is not operative or effective when the bill becomes law. Accordingly, Defendants' arguments regarding a bill's effective date versus its operative date are without merit and should be rejected by the Court.

VI.

CONCLUSION

For the reasons given herein, the district court's Final Order should be affirmed with regard to its determinations that SB 542 and SB 551 required a two-thirds vote for passage and that no deference should be provided to the Legislature or to Legislative Counsel's May 8, 2019 Opinion Letter.

The Defendants' construction of Article 4, Section 18(2) frustrates the intent of the voters and the purpose of the constitutional provision and creates an exception to the broad language adopted in Article 4, Section 18(2) that the careful, intelligent voter did not ascribe to and would never have envisioned based upon the public's understanding of the legal text. *See MDC Restaurants, LLC v. The Eighth Jud. Dist. Ct. of the State of Nevada in & for Cty. of Clark,* 134 Nev. 315, 323–24, 419 P.3d 148, 155 (2018). The district court's construction of Article 4, Section 18(2) should be upheld.

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CERTIFICATE OF COMPLIANCE (BASED UPON NRAP FORM 9)

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in 14 point Times New Roman type style.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 15,827 words.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

///

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CERTIFICATE OF SERVICE

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

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4839-6778-2372, v. 1