IN THE SUPREME COURT OF THE STATE OF NEVADA

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Elizabeth A. Brown
Clerk of Supreme Court

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

Appellants/Cross-Respondents,

vs.

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

Case No. 81924

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

Respondents/Cross-Appellants.
_____/

RESPONDENTS/CROSS-APPELLANTS' FINAL REPLY TO JOINT SURREPLY IN THE CROSS-APPEAL

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

NRAP 26.1 DISCLOSURE

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

Great Basin Engineering Contractors, LLC

Goodfellow Corporation

Kimmie Candy Company

Keystone Corp.

National Federation of Independent Business

Nevada Franchised Auto Dealers Association

Nevada Trucking Association, Inc.

Retail Association of Nevada

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

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

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

Allison MacKenzie, Ltd.

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

Not applicable.

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DATED this 19th day of April, 2021.

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I.

ARGUMENT

A. The Individual Defendants are not entitled to legislative immunity because the actions complained of were not taken within the sphere of legitimate legislative activity.

Defendants misconstrue Plaintiffs' argument that legislative immunity should not be applied absolutely simply because the Individual Defendants were sued in their official capacity, which required them to act in a legislative manner. The question here is whether the Individual Defendants are entitled to the protections of legislative immunity where their actions were not within the sphere of legitimate legislative activity. Rather than address any of the numerous legal authorities Plaintiffs cited in support of arguments the Individual Defendants' actions were outside the sphere of legitimate legislative activity, they assert the Individual Defendants were required to determine the number of votes required to pass SB 551 and to count the number of votes taken. This simplistic argument entirely ignores the issue at bar.

The question here is whether the Individual Defendants' constitutional violation of the mandatory procedure to subject SB 551 and SB 542 to the supermajority provision is legitimate legislative activity. In an analogous case from the Colorado Supreme Court, the conclusion was clearly such activity is not legitimate legislative activity and the members of congress engaged in such behavior

were not entitled to legislative immunity. *See Romer v. Colorado General Assembly*, 810 P.2d 215 (Colo. 1991); Plaintiffs' Response (Opening Brief), pp. 20-21.

Defendants do not address *Romer* at all in their Surreply. Similarly, Defendants fail to address any of the other examples given and case law cited by Plaintiffs of illegitimate legislative activity. Defendants, instead, try to distract this Court with irrelevant arguments about inquiry into the motives of the Individual Defendants or the purposes or merits of SB 551 and SB 542, none of which were raised by Plaintiffs and are simply not at issue here. Surreply, p. 37.[1]

In *Rose v. the Council for Better Educ., Inc.*, 790 S.W. 2d 186 (Ky. 1989), the appellants claimed it was the sole providence of the legislature to define the word "efficient" and thus determine the constitutionality of Kentucky's school system. *Id.* at 208. The court, while noting the importance of separation of powers, responded:

> The issue before us – the constitutionality of the system of statutes that created the common schools – is the only issue. To avoid deciding the case because of "legislative discretion," "legislative function," etc., would be a denigration of our own constitutional duty. ***To allow the General Assembly . . . to decide whether its actions are constitutional is literally unthinkable.***

Id. at 209 (emphasis added).

[1] Moreover, as noted above, courts have recognized the "legislature may not, even in the exercise of its 'absolute' internal rulemaking authority, violate constitutional limitations" nor may it "ignore constitutional restraints or violate fundamental rights." *Burt v. Speaker of the House of Representatives*, 243 A.3d 609, 613-14 (N.H. 2020) (citing *United States v. Smith*, 286 U.S. 6 (1932)).

Whether the judiciary may enforce the Constitution, even against legislators, was settled long ago by *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803). The logic then, as now, is clearly applicable:

> The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by any ordinary act.

Finally, the courts have long ago settled that "conduct cannot be discretionary if it violates the Constitution, a statute, or an applicable regulation" because officials "do not possess discretion to violate constitutional rights or federal statutes". *U.S. Fid. & Guar. Co. v. United States,* 837 F.2d 116, 120 (3d Cir.1988). Thus, Defendants' arguments that they can violate Plaintiffs' rights based upon their "unlimited authority and discretion" in their legislative or executive functions are without merit because the Nevada Constitution controls their actions, and they may not alter the Nevada Constitution by their actions.

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B. The Individual Defendants are not entitled to discretionary-function immunity.

Defendants' arguments regarding NRS 41.032(2) and discretionary-function immunity, if accepted, would essentially give legislators blanket immunity for any and all actions taken in their capacity as legislators. Plaintiffs argued extensively that a decision whether or not to apply mandatory constitutional provisions is not discretionary because it is not grounded in any social, economic, and political policy. Plaintiffs' Response (Opening Brief), pp. 23-26. Just because the bills in question deal with policy does not mean that every action taken by a legislator with regard to the bills in question deals with policy.[2] Again, Defendants fail to address the numerous examples and legal authorities cited by Plaintiffs in support of a finding that decisions about whether to apply the constitutional supermajority provisions were not grounded on considerations of social, economic or political policy such that discretionary-function immunity cannot apply. Defendants' actions simply do not meet the two-part test outlined in *Martinez v. Maruszczak*, 123 Nev. 433, 445-47 (2007).

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[2] Defendants recognize this in footnote 2 of their Surreply, p. 5, in which they acknowledge the wisdom or appropriateness of the Senate's decision in passing SB 551 "as a matter of policy is separate and distinct from interpreting the supermajority provision as adopted in 1996."

C. Defendants failed to address the countervailing authorities Plaintiffs raised in support of arguments that NRS 218F.720 does not protect the individual Legislative Defendants from liability.

Defendants do not address any of the authorities cited by Plaintiffs in support of a finding that NRS 218F.720 is unconstitutional or that it does not protect legislative officials whose actions were not taken on behalf of the Legislature as a whole. Defendants cite, instead, generic authorities in support of the idea that the Legislature is entitled, essentially, to protect itself from liability without any checks and balances exercisable by the other coequal branches of government.

Furthermore, the cases cited do not clearly support the Defendants' position. For example, in *Taylor v. State*, 73 Nev. 151, 153 (1957), cited by Defendants, this Court recognized that "[s]overeign immunity from suit based upon the ancient concept that the king can do no wrong has been severely criticized by the courts as an outmoded and unjust rule."

Thus, Plaintiffs would urge this Court to conclude that NRS 218F.720 does not apply to insulate a legislative official's unconstitutional actions nor does it infringe upon the judiciary's power to do all things necessary to administer justice. *See Tate v. Bd. of Medical Examiners*, 131 Nev. 675, 678 (2015); *see also Burt v. Speaker of the House of Representatives*, 243 A.3d 609 (2020).

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D. The Individual Defendants are necessary and proper parties to this litigation because Plaintiffs asserted more than just claims for declaratory and injunctive relief.

The Individual Defendants argue they are not necessary or proper parties because, under NRS Chapter 130, "state officers with statewide administrative functions under the challenged statute are the proper parties' defendant." *Serrano v. Priest*, 557 P.2d 929, 941-42 (Cal. 1976). First, Plaintiffs did name as defendants in this action the state agencies charged with statewide administrative enforcement functions regarding the taxes and fees as issue in SB 551 and SB 542.

Moreover, in *Serrano*, the California Supreme Court did not conclude that such officials are the only proper parties, only that it was not necessary for the plaintiffs in that action to bring in the California Legislature or the Governor. The California Supreme Court did not opine that, had the California Legislature and Governor been named, they would have to be dismissed. Indeed, the court recognized, specifically, the discretion afforded to plaintiffs in naming defendants. *Id.* at 942. While a plaintiff is obligated to name indispensable parties, he has discretion to name additional proper parties – "i.e., parties subject to permissive joinder or capable of intervention." *Id.*

Moreover, Plaintiffs are not merely challenging the constitutionality of SB 551 and SB 542 but also the manner in which they were passed. Plaintiffs asserted

additional constitutional tort claims against the Individual Defendants and, therefore, they are clearly necessary and proper parties to those claims.

E. Standard of review for reviewing decisions to award or deny attorneys' fees.

Defendants misconstrue the statement on the standard for reviewing an award or denial of attorneys' fees in *Pardee Homes v. Wolfram*, 135 Nev. 173, 176 (2019) in which this Court stated:

> Generally, we review decisions awarding or denying attorney fees for a manifest abuse of discretion. But when the attorney fees matter implicates questions of law, the proper review is de novo. Because the issue of attorney fees as special damages involves a question of law, we review this issue de novo.

(internal citations omitted).

F. Plaintiffs have not waived jurisdiction of this cross-appeal.

The Individual Defendants rely on *Matter of T.L.*, 133 Nev. 790 (2017) for the proposition that a party is not aggrieved by a final district court order "denying alleged rights and cannot claim appellate jurisdiction for an appeal or cross-appeal when the party does not properly invoke and preserve the party's rights in the district court." Surreply, p. 12. That case has no application to this matter and the Individual Defendants' reliance thereon is misplaced.

In *Matter of T.L.* a mother's parental rights were terminated pursuant to a voluntary stipulation. *Id.* at 790. The mother appealed from a subsequent order

placing the child with an adoptive family and this Court concluded she lacked standing to pursue the appeal because she had voluntarily surrendered her parental rights – the very rights necessary to challenge an adoptive placement. *Id*. at 791-92. The Court noted the mother specifically asserted in her appellate briefing that she was not contesting the termination of her rights. *Id*. at 792. Thus, the issue in *Matter of T.L.* was not, as the Individual Defendants insinuate, whether a party had "properly invoked" or "preserved" rights, but that the appellant had specifically relinquished her rights, therefore giving up standing to appeal a decision that would have impacted those rights had she retained them.

In contrast, here the Individual Defendants can point to no comparable affirmative relinquishment or waiver of the rights Plaintiffs assert by their cross-appeal based upon being aggrieved by the Final Order. Plaintiffs have not entered into a stipulation or made any kind of statement, on the record or otherwise, that they have waived their right to pursue attorneys' fees as damages or they are otherwise not aggrieved by the district court's Final Order.[3] *See* Respondents'/Cross-Appellants' Response to Order to Show Cause at 9-11, 13-14.

[3] Defendants also misconstrue important language from *City of Boulder City v. Boulder Excavating, Inc.*, 124 Nev. 749, 754 (2008) in reducing Plaintiffs' personal jurisdiction arguments narrowly to include only the question of whether legislative immunity should have been raised as a jurisdictional issue below. *Boulder Excavating* stands for the proposition that, while "issues of absolute governmental immunity implicate the subject-matter jurisdiction of Nevada courts, issues of qualified governmental immunity do not". None of the Defendants brought a motion

The Individual Defendants then assert attorneys' fees may not be awarded as damages incident to claims for declaratory or injunctive relief except where Plaintiffs have pleaded fraud, malice or wantonness. Surreply, pp. 12-13. They cite several cases in support of this narrow view, but only one of them – *City of Las Vegas v. Cragin Indus.*, 86 Nev. 933 (1970) – actually contains such a holding and *Cragin* was overruled, at least in part, by *Sandy Valley Assocs. v. Sky Ranch Estates Owners Ass'n*, 117 Nev. 948 (2001). In *Bd. of Cnt. Comm'rs v. Cirac*, 98 Nev. 57, 59 (1982), this Court recognized "attorneys' fees may be awarded as damages in a suit for injunctive relief when properly pleaded and proved." There was no requirement, in *Cirac*, to plead or prove fraud, malice, or wantonness.

Similarly, in *Young v. Nev. Title Co.*, 103 Nev. 436, 442 (1987), this Court held, narrowly, an award of fees is improper "in a case which does not contemplate monetary relief" unless the fees are pleaded and proven as damages. Here, Plaintiffs asserted constitutional torts in their first and second claims for relief and declaratory and injunctive relief in their third and fourth claims for relief, respectively. JA Vol. I at 9-13. The common law provides a remedy for every wrong, particularly for one whose state constitutional rights have been abridged. *See Corum v. University of North Carolina*, 413 S.E.2d 276, 289-91 (1992); *see also Barnes v. Sabron*, 10 Nev.

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to dismiss Plaintiffs' First Amended Complaint on subject-matter jurisdiction grounds and instead allowed Plaintiffs' claims to go forward to judgment.

217 (1875) (every violation of a right imports damage). In contrast, in *Young*, the plaintiff asserted only two equitable claims and did not seek recovery of damages for any contractual, tort or constitutional claims.

Moreover, in *Sandy Valley*, this Court (a) disapproved of *Cragin* and (b) held that attorneys' fees as damages in actions for declaratory relief are appropriate upon a showing of bad faith. *Sandy Valley*, 117 Nev. at 958. Thus, the Defendants' repeated assertions that Plaintiffs waived their right to obtain attorneys' fees as damages because they did not plead fraud, malice, or wantonness is in error.

In their First Amended Complaint, Plaintiffs specifically alleged notwithstanding Legislative Counsel's Opinion Letter, at various stages of the Senate's consideration of SB 551, the bill's documentation showed that two-thirds of the Senate would have to vote to approve the bill and at other stages of the Senate's consideration of SB 551, the two-thirds requirement was removed from SB 551; that Senator Cannizzaro's actions on June 3, 2019 on the Senate floor show that if there was not two-thirds support for SB 551, the majority party would pass SB 551 by simple majority; and that in previous sessions, a two-thirds majority was required to extend the prospective expiration of certain taxes and fees. JA Vol. I at 25, ¶¶ 55, 56 and 58. Plaintiffs also alleged in the first and second claims for relief

Defendants by their actions violated Plaintiffs' constitutional rights. JA Vol. I at 26-27. Plaintiffs sufficiently pled and alleged bad faith conduct by the Defendants.[4]

Plaintiffs' constitutional rights have been violated. They are entitled to a remedy and the measure of their damages is the amount of attorneys' fees they have incurred in pursuit of their rights.

G. Defendants had notice of Plaintiffs' pursuit of attorneys' fees as damages.

Defendants assert Plaintiffs "failed to provide Defendants with proper or sufficient notice of their claims for attorney's fees" in either the First Amended Complaint or in Plaintiffs' Motion for Summary Judgment. Surreply, pp. 14-15. Ignoring that Plaintiffs asserted two constitutional tort claims for which attorneys' fees are the only measure of damages, the Defendants' claim is disingenuous when considering the Legislative Defendants spent enormous amounts of their own argument in support of their counter-motion for summary judgment arguing they are immune from claims for attorneys' fees as damages under state and federal statutes and under NRS 218F.720. JA Vol. IV at 1081, 1085-93.

[4] In their Answers, Defendants Cannizzaro, Clift and the Legislature contended they "lack knowledge or information sufficient to form a belief about the truth of the allegations" regarding the Senate's consideration of SB 551 and Senator Cannizzaro's actions on June 3, 2019 as alleged above and denied the allegations. JA Vol. I at 95, ¶¶ 55, 56 and 58; JA Vol. II at 451-52, ¶¶ 55, 56 and 58.

Defendants' ongoing reliance on arguments that Plaintiffs failed to give notice to Defendants of any fraud, malice, and wantonness is simply misplaced. *See* Surreply, pp. 15-16. As shown above, Plaintiffs argued vigorously below and continue to argue on appeal that attorneys' fees are warranted in this matter. *See* JA Vol. II at 230-31, 239; JA Vol. IV at 706-07, 710-14;[5] Plaintiffs' Response (Opening Brief), pp. 41-46.

Next, Defendants seek to avoid the application here of the holding this Court entered in *Summa Corp. v. Greenspun*, 96 Nev. 247, 255 (1980), wherein this Court recognized that while "NRCP 9(g) requires the specific pleading of special damages…it does not follow that a failure to do so deprives the court of power to award such fees as damages." Indeed, this Court recognized that "NRCP 54(c) commands the court to grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

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[5] Defendants improperly suggest Plaintiffs "belatedly argued that they were entitled to attorney's fees in their reply in support of their motion for summary judgment and opposition to the counter-motion for summary judgment." Surreply, p. 15. However, it is worth noting that the pages of Plaintiffs' moving papers to which Defendants cite (JA Vol. IV at 713-14) are contained in the section dedicated to opposing the Legislative Defendants' Counter-Motion for Summary Judgment and are therefore in response to Legislative Defendants' arguments that the Individual Defendants are immune from an award of monetary damages, the only measure of which is the fees incurred by the Plaintiffs in pursuit of these claims.

Id. (internal quotations omitted). Defendants would have the Court ignore this principle based on the following language from *Sandy Valley*:

> *Summa Corp*. merely stands for the proposition that failure to properly plead special damages pursuant to NRCP 9(g) does not necessarily bar an award of attorney fees when evidence of attorney fees as damages has been litigated at trial. In such a case, motions under NRCP 54(c) or NRCP 15(b) may be appropriate mechanisms for resolving a conflict between the pleadings and the trial evidence. *Summa Corp*. does not, however, permit the award of post-trial attorney fees in contravention of *Young*.

Defendants improperly emphasize the Court's use of the phrase "at trial" and claim that NRCP 54(d), pursuant to *Summa Corp*., comes into play only if there has been a trial at which the issue of attorneys' fees as damages has been litigated. This, however, was not the point of the above-quoted language of *Sandy Valley*. Whether the issue is litigated at trial or in a dispositive motion makes no difference under NRCP 54(c) or under *Summa Corp*. The principle is the same – NRCP 54(c) commands the district court to award appropriate relief to a party entitled to such relief even if the relief was not specifically demanded in its pleadings. Plaintiffs maintained in their papers for summary judgment and at the September 21, 2020 hearing on all dispositive motions, their request for attorneys' fees as damages and the district court ruled on that request. Thus, an award of such fees as damages was not waived and should be entered.

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H. Plaintiffs are entitled to seek supplemental relief, including attorneys' fees as damages, in connection with declaratory relief entered in their favor.

Defendants focus on the fact that NRS Chapter 30, Nevada's Uniform Declaratory Judgments Act, does not specifically authorize an award of attorneys' fees and that the authorization to award costs in NRS 30.120 does not imply an ability to award such fees. Surreply, p. 19. Plaintiffs do not rely on NRS 30.120 for an award of attorneys' fees as damages to them. Plaintiffs cited several cases in which courts addressing the Uniform Declaratory Judgments Act have specifically recognized that damages may be pled and awarded through the supplemental relief provisions, which are codified in Nevada in NRS 30.100, and attorneys' fees are the only measure of damages available to Plaintiffs for such relief. Plaintiffs gave an extensive list of cases in Plaintiff's Response (Opening Brief) at pages 31 to 32. Defendants did not address any of them directly and merely note this Court has not previously addressed the issue of whether NRS 30.100 authorizes an award of attorneys' fees as damages. This Court should adopt the long-standing precedent interpreting the declaratory judgment act that money damages may be properly awarded under the supplemental relief provision even though such relief may not have been demanded, pled or even proved in the original action for declaratory relief. *Fred Ahlert Music Corp. v. Warner/Chappell Music, Inc.*, 155 F.3d 17, 25 (2d Cir. 1998).

Defendants cite *Schell v. OXY USA Inc.*, 814 F.3d 1107, 1127 (10th Cir. 2016). Defendants fail to note, however, that the Tenth Circuit agreed a request for fees as damages under the federal supplemental relief provision would be appropriate if such an award was authorized by state law or to effectuate the declaratory relief granted. *Id.* at 1127-28.[6] In contrast, when the Tenth Circuit did consider a request for fees as damages under the supplemental relief provision which had not been demanded or proved in the original declaratory judgment action, it concluded a court has the power in a diversity case to award fees as damages under section 2202 even though they are not recoverable under state law. *Gant v. Grand Lodge of Texas*, 12 F.3d 998, 1002-03 (10th Cir. 1993); *see also Security Ins. Co. v. White*, 236 F.2d 215, 220 (10th Cir. 1956) (concluding the "grant of power contained in [the supplemental relief provision] is broad enough to vest the court with jurisdiction to award damages where it is necessary or proper to effectuate relief based upon the declaratory judgment rendered in the proceeding" and then awarding fees as damages). Any additional facts or pleading that may be necessary to support the award of further relief can be proved at the hearing provided by statute. *Edward B. Marks Music*

[6] Defendants also cited, without discussion, *Nat'l Merch. Ctr. v. MediaNet Grp. Techs.*, 893 F.Supp.2d 1054 (C.D. Cal. 2012), but the court recognized section 2202 does not prohibit an award of attorneys' fees otherwise available by state law in a diversity action noting the holding in *Gant infra* and recognizing the court may still award attorneys' fees if there is bad faith, vexation, wantonness or oppression citing *Alyeska Pipeline Co. v. Wilderness Soc'y*, 421 U.S. 240, 257-59 (1975).

Corp. v. Charles K. Harris Music Pub. Co., 255 F.2d 518, 522 (2nd Cir. 1958); *see also* 10B CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2771 (4th ed. 2016). Because of Defendants' appeal, Plaintiffs do not know if they have a claim for attorneys' fees as damages unless they prevail on their claims that SB 542 and SB 551 are unconstitutional. If this Court affirms the Final Order on Plaintiffs' declaratory relief claims, Plaintiffs are entitled to seek supplemental relief under NRS 30.100, and at that time plead and prove attorneys' fees as monetary damages, even though Defendants contend it had not been demanded or proved in the original action for declaratory relief.

I. Plaintiffs have shown that the Individual Defendants acted in bad faith.

Defendants grossly mischaracterize Plaintiffs' assertions regarding the Individual Defendants' bad faith and diminish the record. Surreply, p. 23. The Individual Defendants engaged in bad faith specifically in the manner in which they deemed SB 551 constitutionally passed. The conduct of the Individual Defendants, particularly Senate Majority Leader Cannizzaro, constitutes bad faith because they intentionally chose two different constitutional mandates and deprived the Plaintiff Senators of their constitutional right to cast effective votes and deprived the Nevada taxpayers of their property and due process rights. The taking of two votes, whose vote totals were identical, but applying two separate and distinct constitutional

approval requirements can be regarded as nothing more than bad faith unconstitutional conduct.

The idea that there was a simple disagreement among some of the senators about the meaning and applicability of the constitution and that Senator Cannizzaro was merely attempting to avoid this litigation by agreeing to subject SB 551 to the two-thirds requirement is untenable. The supermajority requirement either applied to SB 551 or it did not apply. Senator Cannizzaro chose to disregard Legislative Counsel's Opinion Letter and subject SB 551 to the supermajority requirement. This was not a compromise position. No individual senator or even the entire body is empowered to compromise with the constitution. The constitution is supreme law, and the Senate is absolutely bound to comply with its precepts. *See e.g., Mason's Manual of Legislative Procedure* ("*Mason's Manual*") § 6(2) (constitutional provisions regulating legislative procedure are supreme to any other rules of procedure); *see also Burt v. Speaker of the House of Representatives*, 243 A.3d 609, 613-14 (N.H. 2020); *United States v. Smith*, 286 U.S. 6, 33 (1932) (Congress may not by its rules ignore constitutional restraints or violate fundamental rights). It was, therefore, not within Senator Cannizzaro's power, to use the constitutional supermajority provision as a tool or weapon of compromise and Defendants' arguments in this regard should be rejected. It was, rather, her duty (and the duty of the other Individual Defendants) to ensure the constitution was strictly applied - -

whichever version she thought was the constitutional requirement - - but not both versions. Senator Cannizzaro knew she would propose another bill with a different constitutional passage requirement if her first vote did not get the required two-thirds votes. She had another bill prepared, waiting and printed that was introduced fifteen minutes after the first vote which contained a different constitutional voting majority on the cover and different provisions other than the same sections 2, 3, 37 and 39 of Amendment No. 1120. JA Vol. IV at 907-24; JA Vol. V at 925-50, 994. Senator Cannizzaro could not choose both constitutional provisions as valid for her legislation; Senator Cannizzaro knew one of the votes was going to be unconstitutional and thus, violate Plaintiffs' constitutional rights. Plaintiffs contend this constituted bad faith because constitutional requirements are not "fluid" based upon the motives of a member of the Legislature.

Defendants attempt to justify the two votes with a reference to Section 450 of *Mason's Manual*, which authorizes a legislative body to reconsider a vote. What happened however, was not reconsideration. The vote after reconsideration was exactly the same – 13 yeas to 8 nays. No individual senator changed his or her vote from the first vote to the second. *Mason's Manual* allows a legislative body to reconsider a vote, but there is no provision of *Mason's Manual* or any other legislative procedure that allows a legislative body to reconsider, after a vote resulting in a declaration of non-passage, whether a constitutional supermajority

provision should not apply to the bill under reconsideration when they had already deemed the provision to apply. Further, *Mason's Manual* § 451(1)(b) provides rights cannot be constitutionally or legally taken away on reconsideration.

Moreover, the second vote was taken on a different question than the first (Amendment No. 1120 versus Amendment No. 1121) and *Mason's Manual* and other parliamentary authorities do not authorize this. *See Mason's Manual* § 468(2) ("When a motion to reconsider has been passed, the question immediately recurs upon the question reconsidered"); LUTHER S. CUSHING, MANUAL OF PARLIAMENTARY PRACTICE, § 256 (Project Gutenberg ed. 2019) (1887) ("…if this [reconsideration] motion prevails, *the matter stands before the assembly in precisely the same state and condition, and the same questions are to be put in relation to it, as if the vote reconsidered had never been passed*.") (Emphasis added).

Defendants also assert there can be no finding of bad faith where the Individual Defendants relied on the advice of counsel. They rely on a Mississippi case to support this proposition but leave out key factors from that case and ignore more pertinent law on this matter. In *Mann Agency, LLC v. Miss. Dep't of Pub. Safety*, 306 So.3d 656, 663 (Miss. 2020), the court found no bad faith because of several additional factors, including the party's reliance on contractual and statutory provisions. *Id.* It is also well-established law that courts have refused to allow reliance on unfounded advice of counsel to prevent imposition of damages. *See*

Murphree v. Federal Ins. Co., 707 So.2d 523, 533 (Miss. 1997) (concluding a finding of bad faith may be made by a trier of fact even where the allegedly bad acting party relied on counsel's advice where said counsel "misread the plain language of the statute" and provided bad advice to his client); *see also Szumigala v. Nationwide Mut. Ins. Co.*, 853 F.2d 274, 282 (5th Cir. 1988) (where advising attorney concocts an imagined loophole in a policy whose plain language extends coverage, the carrier heeds advice of counsel at the carrier's risk). Thus, reliance on advice of counsel does not avoid liability for bad faith if the attorney provided bad advice to his client.

Further, Defendants readily admit the Majority Leader did not follow the advice of counsel in proposing her amendments in committee meetings and for the first vote on the Senate floor. Senator Cannizzaro added "a two-thirds stamp on Senate Bill 551, even where LCB Legal had advised it was not required." Surreply, p. 5. Therefore the advice of counsel argument has no bearing on the Plaintiffs' bad faith argument regarding the two Senate votes intentionally taken with different constitutional passage requirements because Defendants admit counsel's advice was disregarded and not relied upon for the first constitutional vote.

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Legislative Counsel is not counsel to Governor Sisolak. Even if this Court concludes it was not bad faith for the Legislative Defendants to rely on Legislative Counsel's advice, Governor Sisolak has no attorney-client relationship with Legislative Counsel and is required to undertake his own independent evaluation of the constitutionality of Legislative measures. *See* Nev. Const. art. 4, § 35, art. 5, §7; NRS 218D.675.

Defendants argue the language of the constitutional supermajority provision is ambiguous and the Legislature was, therefore, entitled to deference in relying on Legislative Counsel's opinions. Surreply, pp. 24-28.[7] Defendants are unable to cite a Nevada case from within the last 120 years to support the idea that this Court should defer to the Legislature's construction of the constitutional supermajority

[7] The Opinion Letter analyzed the constitutional supermajority provision primarily by looking to the plain and ordinary language of the provision. 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 LCB's 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 the ambiguity of this constitutional provision." JA Vol. VI at 1137. In briefing here, the Defendants again assert "the terms 'creates, generates, or increases' must be given their normal and ordinary meanings," again implying they do not believe those terms to be ambiguous. Legislative Defendants' Opening Brief, p. 28; Surreply, pp. 25-27. Legislative Counsel's back and forth with respect to the question of ambiguity to fit Defendants' various positions, from time to time, should give this Court pause, particularly with respect to the question of whether Legislative Counsel or the Legislature are entitled to any deference in this matter.

provision. In 1994, this Court declined to defer to a constitutional officer's interpretation of a statute when the plain language thereof contradicted the official's interpretation. *See Independent American Party v. Lau,* 110 Nev. 1151, 1154–55 (1994). In 2011, this Court recognized that deference should not apply 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 (1912)). This litigation resulted from the Legislature's departure from its long-established constitutional position that a two-thirds vote is required for certain tax extensions and not any uncertainty, ambiguity or doubt as to the meaning of the constitutional provision. As discussed in Plaintiffs' Answering Brief in this appeal, the Legislature is not entitled to deference simply because it relied on the Opinion Letter and, therefore, this Court should reverse the district court's finding regarding bad faith.

J. Plaintiffs are entitled to recover fees as damages for constitutional tort claims alleged against the Individual Defendants.

Defendants assert Plaintiffs failed to raise, until its Opening Brief in support of their cross-appeal, they are entitled to recover attorneys' fees as damages for constitutional torts. Surreply, p. 30. This is incorrect. Plaintiffs alleged two constitutional torts in their first and second claims for relief. Damages are the remedy for torts and the only measure of damages here are the attorneys' fees

incurred by Plaintiffs in pursuit of these claims. Thus, the issue of attorneys' fees as damages was raised in the First Amended Complaint. Moreover, in all the time that Plaintiffs have argued for attorneys' fees as damages, they never limited the discussion solely to damages incident to their declaratory and injunctive relief claims. Defendants' claimed ignorance of Plaintiffs' pursuit of damages for all four of their claims for relief is not plausible and should be rejected.

Defendants cite *Implied Cause of Action for Damages for Violation of Provisions of State Constitutions*, 75 A.L.R.5th 619 (2000) for the general proposition that Plaintiffs cannot recover damages under Article 4, Section 18(2) of the Nevada Constitution because the Legislature has not enacted a statute to create a private cause of action thereunder. First, the Court should take notice that this is, in fact, the first time any of the Defendants have raised this issue notwithstanding that Plaintiffs clearly asserted such tort claims in their first and second claims for relief. Thus, under their own reasoning, this argument should be rejected.

Moreover, Defendants do not reference any specific provision of the cited annotation and the annotation simply does not support their position. In the cited ALR, the authors note there is a split among the states as to whether a person may bring a claim for damages under a constitutional tort claim if there is no explicit right of action. *Id.* at § 2[a]. Nevada is one of the jurisdictions that has not discussed this issue, but a number of jurisdictions have specifically recognized an implied right to

pursue damage claims for alleged constitutional torts, based on Restatement (Second) of Torts § 874A, which provides that a court may imply a civil remedy from constitutional provisions even though one is not expressly provided if the court determines the remedy is appropriate and necessary to assure the constitutional provision's effectiveness. *Id.* at § 3[a]. Other states have recognized the validity of damage claims under analogies to the United States Supreme Court's holding in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). *Id.* at § 3[b]. Finally, other jurisdictions have recognized an implied cause of action for money damages for constitutional torts based on historical common law principles. *Id.* at § 3[c]. The instances in which courts have declined to recognize an implied right to pursue damages for constitutional torts are limited and none of the cases in those jurisdictions are on point here. *Id.* at § 4. Nevada does appear to recognize a state tort claim for violation of constitutional rights based upon the State's waiver of sovereign immunity. *See Craig v. Donnelly*, 135 Nev. 37, 41 (2019). To the extent necessary, Plaintiffs urge the Court to adopt damage claims for constitutional torts violating Nevada's Constitution, and specific to this case, claims for violation of Article 4, Section 18(2).

In response to the authorities cited on page 31 of the Defendants' Surreply, there are also cases in which courts have recognized private causes of action even where a plaintiff may also and does seek declaratory and/or injunctive relief. *See*

e.g. Corum v. University of North Carolina, 413 S.E.2d 276, 289-91 (1992). Moreover, in *Kelley Prop. Dev. v. Town of Lebanon*, 627 A.2d 909, 924 (Conn. 1993), cited by Defendants, the Connecticut Supreme Court's primary reasoning for not creating a *Bivens* type implied damages remedy was that there were adequate statutory state administrative remedies available to the plaintiff. That is not the case here as there are no state administrative remedies for a violation of Article 4, Section 18(2).

Lastly, to clarify the holding in *Herrick's Aero-Auto-Aqua Repair Serv. v. State Dep't of Transp. & Pub. Facilities*, 754 P.2d 1111 (Alaska 1988), cited by Defendants, the court there declined to apply *Bivens* on the limited basis that injunctive relief is an adequate remedy for equal protection violations. That case has no application beyond considerations of equal protection claims and has no application here where Plaintiffs have asserted due process, deprivation of property and vote nullification claims. Many courts have recognized implied rights to pursue damages in due process cases. *See Dorwart v. Caraway*, 58 P.3d 128 (Mont. 2002); *Phillips v. Youth Development Program, Inc.*, 459 N.E.2d 453 (Mass. 1983); *Old Tuckaway Assocs. Ltd. Partnership v. City of Greenfield*, 509 N.W.2d 323 (Wis. Ct. App. 1993). While there do not appear to be any cases on vote nullification claims, such a claim is exactly the type of claim for which damages are appropriate and for which there is no adequate alternative remedy. *See Binette v. Sabo*, 710 A.2d 688,

693 (Conn. 1998) (noting "the great majority of state courts that have considered the question have recognized their authority" to create a private cause of action for constitutional torts to further the purpose of the subject constitutional provision and to accord an injured party a remedy); *In re Town Highway No. 20*, 45 A.3d 54, 65 (Vt. 2012) (recognizing that depriving individuals of a means to redress violations of their constitutional rights negates the will of the people in ratifying the constitution or any of its individual provisions and neither the courts or the legislature have the power to do that).

K. This Court may apply or adopt the private attorney general and/or substantial benefit doctrines here.

Defendants' sole argument against application or adoption of the substantial benefit and private attorney general doctrines is that Plaintiffs did not specifically raise these doctrines below. Defendants' reliance on *City of Boulder City v. Boulder Excavating, Inc.*, 124 Nev. 749 (2008) for this proposition is misplaced. The relevant holding in *Boulder Excavating* is merely that affirmative defenses are waived if not properly asserted or tried by consent. *Id.* at 755, n. 12. It is Plaintiffs' position that supplemental relief is available pursuant to NRS 30.100 for an award of attorneys' fees as damages and a post judgment award of attorneys' fees may be sought by Plaintiffs based upon the district court's Final Order. JA. Vol. VI at 1187-88. Further, Plaintiffs are entitled to seek attorneys' fees under the judicially created exceptions to the American Rule. Plaintiffs raised the substantial benefit and private

attorney general doctrines so Defendants could not argue they did not raise these issues in their Opening Brief. *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161, n.3, (2011). As stated in Plaintiffs' Opening Brief, the Legislative Defendants raised certain issues in their reply briefing below which Plaintiffs were not able to brief regarding the American Rule and an award of attorneys' fees. To the extent the district court relied upon those arguments in its determination not to award attorneys' fees to Plaintiffs, the district court's ruling should be reversed, and Plaintiffs did not want to waive any such arguments. Opening Brief, pp. 46, 50.

Moreover, Defendants' recitation of the holding from *Thomas v. City of N. Las Vegas*, 122 Nev. 82, 92 n. 20, (2006) is inaccurate and misleading. Here is what this Court said in *Thomas*:

> Whether the substantial benefit exception applies to a municipality is an issue of first impression for this court. Generally, in actions against municipalities, states and the United States, courts conclude that all citizen taxpayers of the municipality, state, or United States usually cannot share the benefit conferred, and therefore, the costs cannot be shifted with some exactitude to those benefitting. Thus, the substantial benefit doctrine does not apply.

In a footnote, this Court lists a few cases where federal courts have declined to apply the doctrine to the federal government and one case where a non-Nevada court declined to apply it to a municipality. *Id.* None of the cases referenced in *Thomas* state and nowhere in that case does this Court state a court cannot apply the substantial benefit doctrine to the State of Nevada. Indeed, this Court went on, in

Thomas, to note "there have been instances where courts have held that the substantial benefit exception applies to a municipality" and there is a line of authority to support extension of the doctrine to government entities. *Id*. at 92-93.

These doctrines are asserted by Plaintiffs in support of arguments that attorneys' fees as damages may be awarded in connection with successful claims for declaratory relief, which is a question the parties have litigated from inception of this case. Therefore, there is no impropriety in raising these additional arguments in support of Plaintiffs' claims for fees as damages. Plaintiffs respectfully request, for the reasons given here and in Plaintiffs Opening Brief in support of this cross-appeal, that the district court's denial of attorneys' fees be reversed.

II.

CONCLUSION

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

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DATED this 19th day of April, 2021.

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CERTIFICATE OF COMPLIANCE (BASED UPON NRAP FORM 9)

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

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 6,933 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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