IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Appellants/Cross-Respondents,

vs.

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

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Case No. 81924

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

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

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

Respondents/Cross-Appellants.

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

KEVIN C. POWERS
General Counsel
Nevada Bar No. 6781
LEGISLATIVE COUNSEL BUREAU, LEGAL DIVISION
401 S. Carson St.
Carson City, NV 89701
Tel: (775) 684-6830
Fax: (775) 684-6761
Email: kpowers@lcb.state.nv.us
Attorneys for Appellant/Cross-Respondent Legislature of the State of Nevada

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INTRODUCTION

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

ARGUMENT

I. Under well-established rules of parliamentary law, the Senate and its members had unlimited authority and discretion to reconsider the first vote on SB 551 and the body's prior determination of the constitutional question regarding the two-thirds requirement.

Plaintiffs contend that the Legislature is not entitled to deference in relying on the Legislative Counsel's legal opinion interpreting the two-thirds requirement because there were "constitutional irregularities" in the passage and approval of SB 551. (*Pls.' Ans. Br. 11-15, 56-58.*) In particular, Plaintiffs contend that there were "constitutional irregularities" in the passage and approval of SB 551 because: (1) there was a disagreement among the Senators whether SB 551 was subject to the two-thirds requirement; (2) the Senate and its members voted for the first time on SB 551 and the bill was declared lost because it was not approved by a two-thirds majority of all the members elected to the Senate; (3) under well-established rules of parliamentary law, the Senate and its members reconsidered the body's

first vote on SB 551 and reconsidered the body's interpretation of the two-thirds requirement; (4) after reconsideration, the Senate and its members relied on the advice of counsel, concluded that SB 551 was not subject to the two-thirds requirement, voted a second time on SB 551, and declared that the bill passed by a majority of all the members elected to the Senate; and (5) the bill was signed by Secretary Clift, Lt. Governor Marshall and Governor Sisolak in their official capacities. (*Pls.' Ans. Br. 11-15, 56-58.*) Contrary to Plaintiffs' contentions, all of this conduct consisted of the regular and reasonable exercise by the Senate and its members of official authority and discretion. None of this conduct consisted of "constitutional irregularities" as a matter of law.

In this case, Plaintiffs acknowledge that there was a disagreement among the Senators whether SB 551 was subject to the two-thirds requirement. (*Pls.' Resp. to Jt. Reply on Cross-Appeal 44.*) In light of that disagreement, the interpretation of the two-thirds requirement was subject to uncertainty, ambiguity or doubt. When the Senate and its members voted for the first time on SB 551, the body resolved that uncertainty, ambiguity or doubt by rejecting the advice of counsel, and the body determined that the bill was subject to the two-thirds requirement.

At this stage in the legislative process, Plaintiffs contend that there were "constitutional irregularities" because the Senate and its members reconsidered the first vote on SB 551. However, it is a well-established rule of parliamentary law

that "every legislative body has the inherent right to reconsider a vote on an action previously taken by it." *Mason's Manual of Legislative Procedure* § 450(1) (2020) ("*Mason's Manual*").[1] As further explained in *Mason's Manual*, "all legislative bodies have a right during the session to reconsider action taken by them as they think proper, and it is the **final result only** that is to be regarded as the thing done." *Mason's Manual* § 450(2) (emphasis added).

In this case, when the Senate and its members decided to reconsider the first vote on SB 551, there was no binding precedent from this Court addressing whether a bill like SB 551 was subject to the two-thirds requirement. As a result, the application of the two-thirds requirement to SB 551 was an open and unresolved question of law. At this stage in the legislative process, the Senate and its members had unlimited authority and discretion to reconsider the body's prior determination of the constitutional question and exercise "the right of the body to change its mind." *Mason's Manual* § 450(6). Thereafter, the Senate and its members had every right to rely on the advice of counsel, conclude that SB 551

[1] In determining the rules of parliamentary law applicable to its proceedings under Article 4, Section 6 of the Nevada Constitution, the Senate has adopted *Mason's Manual* as parliamentary authority. *See* Senate Standing Rule No. 90. In addition, courts have found that "*Mason's Manual* is a widely recognized authority on state legislative and parliamentary procedures." *Gray v. Gienapp*, 727 N.W.2d 808, 811 (S.D. 2007). In this brief, all citations to *Mason's Manual* are to the 2020 edition, which is the most recent edition published by the National Conference of State Legislatures (NCSL).

was not subject to the two-thirds requirement, vote a second time on SB 551, and declare that the bill passed by a majority of all the members elected to the Senate. After such passage, Secretary Clift, Lt. Governor Marshall and Governor Sisolak also had every right to perform their official duties and sign the bill.

All of this conduct consisted of the regular and reasonable exercise by the Senate and its members of official authority and discretion. None of this conduct consisted of "constitutional irregularities" as a matter of law. Accordingly, there is no basis in law or fact to support Plaintiffs' contentions that the Legislature is not entitled to deference in relying on the Legislative Counsel's legal opinion interpreting the two-thirds requirement because there were "constitutional irregularities" in the passage and approval of SB 551.

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

Plaintiffs contend that the Legislature is not entitled to deference in relying on the Legislative Counsel's legal opinion issued on May 8, 2019, because: (1) the Legislative Counsel interpreted the two-thirds requirement differently in past sessions without a corresponding change in the law to justify a change in the legal opinion; and (2) from the time the two-thirds requirement became effective in 1996 until the Legislative Counsel's legal opinion in 2019, there had been a long-

standing and continued policy implemented by the Legislative Counsel and understood by Legislators and others testifying on bills that any revenue-generating measure or change in a formula related to revenue required a two-thirds vote. (*Pls.' Ans. Br. 7-11, 52-56.*) Plaintiffs are wrong as a matter of law.

First, to support their contentions, Plaintiffs improperly cite and rely on an unpublished order by this Court from 2011 that generally cannot be cited or considered as having any authoritative value under Nevada's appellate rules. NRAP 36(c). Specifically, Plaintiffs improperly cite and rely on the unpublished order in Nevada State Democratic Party v. Nevada Republican Party, No. 58404, Order of Affirmance (Nev. July 5, 2011) (unpublished disposition), which was not published in the *Nevada Reports*.

Because the unpublished order in this case was not published in the *Nevada Reports*, it cannot be properly cited or considered as a published disposition by this Court. NRAP 36(c)(1) ("A published disposition is an opinion designated for publication in the *Nevada Reports*."). Furthermore, because the unpublished order in this case was issued before January 1, 2016, it generally cannot be cited or considered as having any authoritative value. NRAP 36(c)(3) ("A party may cite for its persuasive value, if any, an unpublished disposition issued by the Supreme

Court on or after January 1, 2016."). Therefore, Plaintiffs' contentions are not supported by any relevant legal authority.[2]

Second, Plaintiffs' contentions are simply wrong as a matter of law because "[a]gencies are free to change their existing policies as long as they provide a reasoned explanation for the change." Encino Motorcars, LLC v. Navarro, 136 S.Ct. 2117, 2125 (2016). As further explained by the U.S. Supreme Court:

> The fact that the agency has from time to time changed its interpretation of the term [in the statute] does not, as respondents argue, lead us to conclude that no deference should be accorded the agency's interpretation of the statute. An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis.

Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 863-64 (1984). This Court has followed Chevron and given deference to legal opinions issued by agencies. See Thomas v. City of N. Las Vegas, 122 Nev. 82, 101 & n.50 (2006) ("We give deference to [such] administrative interpretations."). Thus, contrary to Plaintiffs' unsupported contentions, the Legislative Counsel was free to change any

[2] It appears that West Publishing Co. included this Court's unpublished order in West's Pacific Reporter at 256 P.3d 1 (Nev. 2011). However, it also appears that West did not assign an electronic database citation to the unpublished order. Under such circumstances, the format used by Plaintiffs to cite the unpublished order also contravened NRAP 36(c)(3) ("When citing such an unpublished disposition, the party must cite an electronic database, if available, and the docket number and date filed in the Supreme Court (with the notation 'unpublished disposition')."

prior opinions or policies interpreting the two-thirds requirement so long as the Legislative Counsel provided "a reasoned explanation for the change." Encino Motorcars, 136 S.Ct. at 2125.

In this case, prior to the written legal opinion issued by the Legislative Counsel under NRS 218F.710(2) on May 8, 2019, the Legislative Counsel had not issued any other written legal opinions which interpreted and applied the two-thirds requirement to bills similar to SB 542 and SB 551 and which included citation to authority and an explanation of the legal reasoning used to support the legal opinion. However, to the extent that the Legislative Counsel's 2019 written legal opinion may have constituted a change in any previous legal advice, opinions or policies interpreting the two-thirds requirement, the 2019 legal opinion is still entitled to deference because the opinion's comprehensive legal research and analysis clearly provided "a reasoned explanation for the change." Encino Motorcars, 136 S.Ct. at 2125.

During the 2019 legislative session, members of the Majority and Minority Leadership in both Houses made requests under NRS 218F.710(2) for the Legislative Counsel to give a written legal opinion concerning the applicability of the two-thirds requirement to potential legislation similar to SB 542 and SB 551. For example, Senate Minority Leader Settelmeyer, who is a Plaintiff in this case, stated in his affidavit in the district court that he "asked LCB Legal to issue an

opinion on the issue of whether cancellation of a proposed reduction in the payroll tax or extension of a tax rate would require a two-thirds majority to pass under the Nevada Constitution." (*JA2:000420*, ¶ *7*.)

As a result of these requests, the Legislative Counsel had an official duty as the Legislature's legal counsel under NRS 218F.710(2), and a professional duty as an attorney under the Nevada Rules of Professional Conduct, to comprehensively research and analyze the current state of the law, including any developments in case law in other states interpreting similar supermajority provisions. See ABA Model Rules of Prof'l Conduct Ann. § 1.1 cmt. [8] (providing that an attorney has a professional obligation to "keep abreast of changes in the law"); Carol M. Bast & Susan W. Harrell, Ethical Obligations: Performing Adequate Legal Research and Legal Writing, 29 Nova L. Rev. 49, 49-50 (2004) (explaining that "an attorney's failure to perform adequate legal research and write well can violate the attorney's professional responsibility.").

After comprehensively researching and analyzing the current state of the law, the Legislative Counsel was compelled to provide an updated legal opinion during the 2019 legislative session that was guided by developments in case law in other states interpreting similar supermajority provisions, all of which was extensively

discussed in the Legislative Counsel's written legal opinion issued on May 8, 2019.[3] (*JA3:000647-70.*)

Thus, to the extent that the Legislative Counsel's 2019 written legal opinion may have constituted a change in any previous legal advice, opinions or policies interpreting the two-thirds requirement, the 2019 legal opinion is still entitled to deference because the opinion's comprehensive legal research and analysis clearly provided "a reasoned explanation for the change." Encino Motorcars, 136 S.Ct. at 2125. Accordingly, based on the Legislative Counsel's 2019 legal opinion interpreting the two-thirds requirement, the Legislature could reasonably conclude that SB 542 and SB 551 were not subject to the two-thirds requirement, and "the Legislature is entitled to deference in its counseled selection of this interpretation." Nev. Mining Ass'n v. Erdoes, 117 Nev. 531, 540 (2001).

Plaintiffs also contend that it is irrelevant that when the Legislative Counsel issued the written legal opinion under NRS 218F.710(2) during the 2019 legislative session, the Legislative Counsel had not issued any other prior **written**

[3] See, e.g., Fent v. Fallin, 345 P.3d 1113 (Okla. 2014); Okla. Auto. Dealers Ass'n v. State ex rel. Okla. Tax Comm'n, 401 P.3d 1152 (Okla. 2017); Naifeh v. State ex rel. Okla. Tax Comm'n, 400 P.3d 759 (Okla. 2017); Sierra Club v. State ex rel. Okla. Tax Comm'n, 405 P.3d 691 (Okla. 2017); Bobo v. Kulongoski, 107 P.3d 18 (Or. 2005); City of Seattle v. Or. Dep't of Revenue, 357 P.3d 979 (Or. 2015); La. Chem. Ass'n v. State ex rel. La. Dep't of Revenue, 217 So.3d 455 (La. Ct. App. 2017).

legal opinions which interpreted and applied the two-thirds requirement to bills similar to SB 542 and SB 551 and which included citation to authority and an explanation of the legal reasoning used to support the legal opinion. (*Pls.' Ans. Br. 54-56.*) Plaintiffs are wrong as a matter of law.

The weight and deference given to any legal opinion is based on the soundness of its legal reasoning and the citation to authority that supports the legal opinion. For example, as a general rule, the California Supreme Court has found that the written opinions of the Legislative Counsel are entitled to "great weight," and in the absence of any controlling authority, such opinions are given deference and considered to be persuasive. Cal. Ass'n of Psychology Providers v. Rank, 793 P.2d 2, 10-11 (Cal. 1990). The court has stated that this interpretive "rule is particularly compelling as to opinions of the Legislative Counsel, since they are prepared to assist the Legislature in its consideration of pending legislation." Id. at 11. However, the court has also recognized that "[w]hile we give due deference to the opinions of the Legislative Counsel . . . like any such opinion—even that of an appellate court—it is only as persuasive as its reasoning." Grupe Dev. Co. v. Superior Ct., 844 P.2d 545, 551 (Cal. 1993).

In this case, when the Legislative Counsel issued the 2019 legal opinion, that written legal opinion did not contradict any other prior **written** legal opinions issued by the Legislative Counsel under NRS 218F.710(2) which interpreted and

applied the two-thirds requirement to bills similar to SB 542 and SB 551 and which included citation to authority and an explanation of the legal reasoning used to support the legal opinion. As such, the weight and deference given to the Legislative Counsel's 2019 legal opinion must be based on the soundness of its legal reasoning and the citation to authority that supports the legal opinion. As thoroughly discussed in the Legislature's opening brief, based on the soundness of that legal reasoning and the extensive citation to authority that supports the 2019 legal opinion, the Legislature could reasonably conclude that SB 542 and SB 551 were not subject to the two-thirds requirement. Under such circumstances, "the Legislature is entitled to deference in its counseled selection of this interpretation." Nev. Mining, 117 Nev. at 540.

Despite the fact that in passing SB 542 and SB 551, the Legislature acted on the Legislative Counsel's 2019 legal opinion interpreting the two-thirds requirement, Plaintiffs contend that the Legislative Counsel's 1997 legal opinion interpreting the two-thirds requirement has application to this case. (*Pls.' Ans. Br. 7-8.*) However, the 1997 legal opinion has no application to this case because it did not apply the two-thirds requirement to bills similar to SB 542 and SB 551. (*JA5:001063-68.*) In the 1997 legal opinion, the Legislative Counsel addressed whether the two-thirds requirement applied to a bill—Senate Bill No. 223 (SB 223)—which authorized counties to impose a tax on aviation fuel. SB 223,

1997 Nev. Stat., ch. 155. The Legislative Counsel concluded that the two-thirds requirement did not apply to SB 223 because the bill did not "create, generate or increase public revenue" but merely enabled another body to impose or increase a tax. (*JA5:001067-68.*)

Even though the 1997 legal opinion did not apply the two-thirds requirement to bills similar to SB 542 and SB 551, Plaintiffs contend that the 1997 legal opinion contradicts the 2019 legal opinion interpreting the two-thirds requirement. (*Pls.' Ans. Br. 7-8.*) In particular, Plaintiffs highlight the Legislative Counsel's statements that:

> Because of the broadness of the wording of [the two-thirds requirement], it will 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. * * *
>
> 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.

(*JA5:001065, 1067.*)

However, neither of these statements from the 1997 legal opinion addresses or answers the pertinent constitutional question in this case of whether SB 542 or SB 551 is a bill which: (1) "creates, generates, or increases any public revenue in any form"; or (2) "change[s] 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." (*JA5:001065, 1067.*) By contrast, the 2019 legal opinion directly addresses and answers the pertinent constitutional question. (*JA3:000647-70.*) Specifically, the 2019 legal opinion concludes that bills similar to SB 542 and SB 551 are not subject to the two-thirds requirement because "such a bill does not change—but maintains—the existing computation bases currently in effect for the existing state taxes." (*JA3:000670.*)

If the 1997 legal opinion has any relevance to this case, it is because the opinion illustrates the absence in 1997 of any specific case law in Nevada or other states providing legal guidance as to the application of the two-thirds requirement, with the Legislative Counsel noting that "[n]o specific precedent exists as to the manner in which the courts will construe the language of this constitutional requirement." (*JA5:001064.*) Since then, the development of case law in other states interpreting similar supermajority provisions has provided significant legal guidance for interpreting Nevada's two-thirds requirement. As thoroughly discussed in the Legislature's opening brief, based on the Legislative Counsel's 2019 legal opinion analyzing and applying that case law, the Legislature could reasonably conclude that SB 542 and SB 551 were not subject to the two-thirds requirement. Under such circumstances, "the Legislature is entitled to deference in its counseled selection of this interpretation." Nev. Mining, 117 Nev. at 540.

Finally, Plaintiffs take issue with the Legislative Counsel's placement of the two-thirds designation on Senate Bill No. 367 (SB 367) of the 2021 legislative based on their mistaken belief that the two-thirds designation was triggered by the bill's proposed removal of the "pro sports exemption" in NRS 368A.200(4)(o). (*Pls.' Ans. Br. 56 n.11.*) However, the Legislative Counsel placed the two-thirds designation on SB 367 solely because the bill proposed changing the existing and legally operative computation base in NRS 368A.200(2)(a) for calculating the live entertainment tax imposed on certain nonprofit organizations in a manner that will have the effect of creating, generating or increasing state revenue. Therefore, contrary to Plaintiffs' contentions, the placement of the two-thirds designation on SB 367 is consistent with the Legislative Counsel's 2019 legal opinion and the position taken by Defendants in the Morency appeal pending before this Court (Case No. 81281) that a bill removing tax exemptions is not subject to the two-thirds requirement.

SB 367 proposes two primary amendments to the live entertainment tax in NRS Chapter 368A. First, SB 367 proposes changing the existing and legally operative computation base in NRS 368A.200(2)(a) for calculating the amount of live entertainment tax that must be paid by certain nonprofit organizations. Specifically, under the existing and legally operative computation base, the nonprofit organizations must pay a tax on admission charges to a facility where

live entertainment is provided if the number of tickets offered for sale or other distribution to patrons is 7,500 or more. SB 367 proposes changing the existing and legally operative computation base by requiring the nonprofit organizations to pay the tax on admission charges if the number of tickets offered for sale or other distribution to patrons is 5,000 or more. Because SB 367 proposes changing the existing and legally operative computation base for the live entertainment tax in a manner that will have the effect of creating, generating or increasing state revenue, the Legislative Counsel placed the two-thirds designation on the bill.

Second, SB 367 proposes removing from the live entertainment tax the existing "pro sports exemption" in NRS 368A.200(4)(o) for an athletic contest, event or exhibition conducted by a professional team based in this State if the professional team based in this State is a participant in the contest, event or exhibition. However, the Legislative Counsel's placement of the two-thirds designation on SB 367 was not based on the removal of the "pro sports exemption" in NRS 368A.200(4)(o). It was based exclusively on the bill's proposed changes to the existing and legally operative computation base in NRS 368A.200(2)(a) for calculating the live entertainment tax imposed on certain nonprofit organizations in a manner that will have the effect of creating, generating or increasing state revenue. Therefore, contrary to Plaintiffs' contentions, the placement of the two-thirds designation on SB 367 is consistent with the Legislative Counsel's 2019

legal opinion and the position taken by Defendants in the Morency appeal pending before this Court (Case No. 81281) that a bill removing tax exemptions is not subject to the two-thirds requirement.

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

Plaintiffs contend that SB 542 and SB 551 were subject to the two-thirds requirement because each bill "generated (brought into existence or produced) public revenue." (*Pls.' Ans. Br. 22-64.*) To support their contentions, Plaintiffs propose an interpretation of the two-thirds requirement that disregards the **actual effect** of each bill on the existing computation bases and legally operative rates currently in effect for the DMV technology fee and the MBT. In addition, their interpretation of the two-thirds requirement would violate the spirit of the provision and would lead to absurd and unreasonable results.

By amending the future expiration of the DMV technology fee before that future expiration had become legally operative and binding, SB 542 did not create, generate or increase any public revenue in any form because it maintained the rate of the DMV technology fee at $1 per transaction, which is the rate that was legally in effect before the passage of SB 542 and which is the rate that is now legally in effect after the passage of SB 542. Therefore, the Legislature could reasonably

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

Similarly, by eliminating the future application of the rate adjustment procedure before any future reduced rates for the MBT had become legally operative and binding, the challenged provisions of SB 551 did not create, generate or increase any public revenue in any form because they maintained the rates of the MBT at 2 percent and 1.475 percent, as applicable to each affected business, which are the rates that were legally in effect before the passage of SB 551 and which are the rates that are now legally in effect after the passage of SB 551. Therefore, the Legislature could reasonably conclude that SB 551 was not subject to the two-thirds requirement because the **actual effect** of the challenged provisions of SB 551 did not create, generate or increase any public revenue in any form and, in fact, did not alter existing public revenue at all, which was the Legislature's clear intent when it passed SB 551.

Plaintiffs contend that there is nothing in the language of the two-thirds requirement that "requires an analysis of existing law to determine if a future decrease or expiration is not legally operative and binding yet." (*Pls.' Ans. Br. 31.*) Plaintiffs also contend that the Legislature is not entitled to follow the rules of

construction which govern statutes that are not legally operative and binding yet. (*Pls.' Ans. Br. 58-64.*) Plaintiffs are wrong as a matter of law.

In determining whether the two-thirds requirement applies to a particular bill, the Legislature must first ascertain the **actual effect** of the bill on existing public revenue because the two-thirds requirement was not intended to impair any existing public revenue. See Legislative History of AJR 21, 67th Leg. (Nev. LCB Research Library 1993) (Hearing on AJR 21 before Assembly Comm. on Taxation, 67th Leg., at 11-13 (Nev. May 4, 1993) (testimony of Assemblyman Gibbons stating that the two-thirds requirement "would not impair any existing revenues.")). Furthermore, in order to ascertain the **actual effect** of the bill on existing public revenue, the Legislature is entitled to consider the rules of construction which govern statutes that are not legally operative and binding yet. See 82 C.J.S. Statutes § 549 (Westlaw 2019) (explaining that "[a] statute's effective date is considered that date upon which the statute came into being as existing law, while a statute's **operative date** is the date upon which the directives of the statute may be actually implemented." (emphasis added)).

In this case, even though the DMV technology fee was potentially subject to future expiration, any such future expiration was not legally operative and binding when the Legislature passed SB 542 during the 2019 legislative session because the expiration clause would not become legally operative and binding until

completion of the State's future fiscal year ending on June 30, 2020, under well-established rules governing the operation of statutes. Consequently, SB 542 did not change—but maintained—the existing computation base and legally operative rate currently in effect for the DMV technology fee at $1 per transaction, which is the rate that was legally in effect before the passage of SB 542 and which is the rate that is now legally in effect after the passage of SB 542.

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

Similarly, even though the former rate adjustment procedure in NRS 360.203 existed in the law on July 1, 2015, no future reduced rates for the MBT had ever gone into effect and become legally operative and binding under the former rate adjustment procedure when the Legislature passed SB 551 during the 2019

legislative session because any future reduced rates for the MBT would not go into effect and become legally operative and binding until July 1, 2019, which was the beginning of the State's next fiscal year.[4] As a result, when the Legislature passed SB 551 during the 2019 legislative session, the existing computation bases and legally operative rates currently in effect for the MBT were set at 2 percent and 1.475 percent, respectively, which are the rates that were legally in effect before the passage of SB 551 and which are the rates that are now legally in effect after the passage of SB 551.

Therefore, because SB 551 did not change—but maintained—the existing computation bases and legally operative rates currently in effect for the MBT, the existing source of revenue collected by the Department of Taxation from the MBT was not changed by the passage of SB 551. Instead, that existing source of revenue remained exactly the same after the passage of SB 551. Accordingly, based on the Legislative Counsel's opinion interpreting the two-thirds requirement, the Legislature could reasonably conclude that SB 551 was not subject to the two-thirds requirement because SB 551 did not change—but maintained—the existing computation bases and legally operative rates currently in effect for the MBT.

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

Finally, under the rules of construction, this Court will consider the practical effects and consequences of each possible interpretation and will strive to avoid any interpretation which leads to unreasonable or absurd results. Nev. Tax Comm'n v. Bernhard, 100 Nev. 348, 351 (1984) ("Where the meaning of a particular provision is doubtful, the courts will give consideration to the effect or consequences of proposed constructions. If the language of the provision fairly permits, the courts will avoid construing it in a manner which will lead to an unreasonable result.") (citations omitted); State ex rel. Hunting v. Brodigan, 44 Nev. 306, 311 (1921) ("[W]e must be guided by certain cardinal rules of interpretation, among which are that such an interpretation must be sought as will avoid absurd consequences, and as will be least likely to produce mischief.") (citations omitted); State ex rel. Lewis v. Doron, 5 Nev. 399, 411 (1870) ("It cannot with propriety be claimed that an absurd meaning should be given any constitutional clause, when such result can properly be escaped."). Thus, when this Court is faced with two possible interpretations of a constitutional provision and one of those interpretations would produce results that are unreasonable or absurd in light of the purpose of the constitutional provision or the intent of the Framers, this Court will reject the unreasonable or absurd interpretation. State ex rel. Hunting v. Brodigan, 44 Nev. 306, 311 (1921) ("Should we give to the article

the interpretation sought by the petitioner, it might result not only in absurd, but in disastrous, consequences."); Nev. Mining, 117 Nev. at 539-42.

In this case, Plaintiffs' interpretation of the two-thirds requirement would violate the spirit of the provision and would lead to absurd and unreasonable results because it would open the door for one Legislature, by a majority vote of all the members elected to each House, to bind all existing sources of revenue in the state budget with expiration clauses and thereby require future Legislatures to comply with the two-thirds requirement to fund the operations of state government at existing levels, even though the extension of such expiration clauses would not create, generate or increase public revenue by a single cent. Given that the two-thirds requirement was not intended to impair any existing public revenue, this Court should reject Plaintiffs' interpretation of the two-thirds requirement because to "give to the article the interpretation sought by the petitioner, it might result not only in absurd, but in disastrous, consequences." State ex rel. Hunting v. Brodigan, 44 Nev. 306, 311 (1921).

CONCLUSION

The Legislature asks this Court to reverse that portion of the district court's order: (1) granting summary judgment in favor of Plaintiffs on their claims for declaratory and injunctive relief; (2) declaring that SB 542 and SB 551 were bills which create, generate or increase any public revenue in any form and were passed

in violation of the two-thirds requirement; (3) invalidating the provisions of SB 542 and sections 2, 3, 37 and 39 of SB 551 as unconstitutional; and (4) enjoining the Department of Motor Vehicles and Department of Taxation from collecting and enforcing the fees and taxes under the invalidated provisions and ordering an immediate refund of those fees and taxes to the affected fee payers and taxpayers with interest at the legal rate of interest from the date collected.

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

However, if this Court finds that the challenged provisions of sections 2, 3, 37 and 39 of SB 551 are unconstitutional because they were enacted in violation of the two-thirds requirement, the Legislature asks this Court to find that, under the severance doctrine, the remaining provisions of SB 551 are severable and remain

in effect because: (1) the remaining provisions, standing alone, can be given legal effect without the invalidated provisions; and (2) preserving the remaining provisions would accord with legislative intent. Therefore, under such circumstances, the Legislature asks this Court to affirm that portion of the district court's order declaring that "the remaining provisions of SB 551 can be severed and shall remain in effect." (*JA6:001188, ¶ 1.*)

DATED: This **19th** day of April, 2021.

By: /s/ Kevin C. Powers

KEVIN C. POWERS
General Counsel
Nevada Bar No. 6781
LEGISLATIVE COUNSEL BUREAU, LEGAL DIVISION
401 S. Carson St.
Carson City, NV 89701
Tel: (775) 684-6830; Fax: (775) 684-6761
E-mail: kpowers@lcb.state.nv.us
Attorneys for Appellant/Cross-Respondent
Legislature of the State of Nevada

ADDENDUM

NRS 360.203 (repealed effective June 12, 2019)

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

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

2. Except as otherwise provided in subsection 4, if the combined revenue determined pursuant to subsection 1 exceeds by more than 4 percent the amount of the combined anticipated revenue from those taxes for that fiscal year, as projected by the Economic Forum for that fiscal year pursuant to paragraph (e) of subsection 1 of NRS 353.228 and as adjusted by any legislation enacted by the Legislature that affects state revenue for that fiscal year, the Department shall determine the rate at which the taxes imposed pursuant to NRS 363A.130 and 363B.110, in combination with the revenue from the commerce tax imposed by chapter 363C of NRS, would have generated a combined revenue of 4 percent more than the amount anticipated. In making the determination required by this subsection, the Department shall reduce the rate of the taxes imposed pursuant to NRS 363A.130 and 363B.110 in the proportion that the actual amount collected from each tax for the preceding fiscal year bears to the total combined amount collected from both taxes for the preceding fiscal year.

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

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

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

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

(Added to NRS by 2015, 2896)

CERTIFICATE OF COMPLIANCE

1. We hereby certify that this reply brief on appeal complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14-point font and Times New Roman type.

2. We hereby certify that this reply brief on appeal complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of this brief exempted by NRAP 32(a)(7)(C), this brief is proportionately spaced, has a typeface of 14 points or more, and contains **5,728** words, which is less than the type-volume limit of 7,000 words.

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

DATED: This **19th** day of April, 2021.

By: /s/ Kevin C. Powers

KEVIN C. POWERS
General Counsel
Nevada Bar No. 6781
LEGISLATIVE COUNSEL BUREAU, LEGAL DIVISION
401 S. Carson St.
Carson City, NV 89701
Tel: (775) 684-6830; Fax: (775) 684-6761
E-mail: kpowers@lcb.state.nv.us
Attorneys for Appellant/Cross-Respondent
Legislature of the State of Nevada

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Nevada Legislative Counsel Bureau, Legal Division, and that on the **19th** day of April, 2021, pursuant to NRAP 25 and NEFCR 9, I filed and served a true and correct copy of Appellant/Cross-Respondent Nevada Legislature's Reply Brief on Appeal, by means of the Nevada Supreme Court's electronic filing system, directed to:

KAREN A. PETERSON, ESQ.
JUSTIN TOWNSEND, ESQ.
ALLISON MACKENZIE, LTD.
402 N. Division St.
Carson City, NV 89703
kpeterson@allisonmackenzie.com
jtownsend@allisonmackenzie.com
Attorneys for Respondents/Cross-Appellants

AARON D. FORD
Attorney General
CRAIG A. NEWBY
Deputy Solicitor General
OFFICE OF THE ATTORNEY GENERAL
555 E. Washington Ave., Ste. 3900
Las Vegas, NV 89101
CNewby@ag.nv.gov
Attorneys for Appellants/Cross-Respondents State of Nevada Department of Taxation and State of Nevada Department of Motor Vehicles

/s/ Kevin C. Powers
An Employee of the Legislative Counsel Bureau