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Legislature of Nev. v. Settlemeyer, 137 Nev. Adv. Op. 21 (May 13, 2021)

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CONSTITUTIONAL CHALLENGE TO LEGISLATION

SUMMARY

The Court affirmed that two bills are unconstitutional because they did not pass by a supermajority vote as required in Article 4, Section 18(2) of the Nevada Constitution.² The supermajority provision applied to the bills because they generated public revenue.³ Senate Bill 542 generated public revenue by suspending a sunset provision on a bill adding a \$1 technology fee to every Department of Motor Vehicles (DMV) transaction with fees already attached. Bill 551 generated public revenue by repealing a bill that reduced the payroll tax rate under Nevada's modified business tax (MBT) if tax revenues substantially exceeded fiscal expectations.

The Court also affirmed the district court's conclusion that legislative immunity extended to the individual parties in question because they were performing legislative duties.⁴ Therefore the individuals were protected from all claims, including attorney's fees and costs.

FACTS

Senate Bill 542: The Department of Motor Vehicles technology fee

Senate Bill 542 extended the sunset provision of a 2015 bill set to expire on June 30, 2020. The bill added a \$1 technology fee to every DMV transaction that had fees already attached. Bill 542 would generate approximately \$13.8 million total throughout the two-year extension. The Senate passed Bill 542 despite being one vote shy of a supermajority.

Senate Bill 551: Payroll tax computation under the modified business tax

Senate Bill 551 repealed NRS 360.203. NRS 360.203, passed in 2015, reduced payroll tax rates under Nevada's MBT when tax revenues exceeded a certain threshold. Because 2018 tax revenues exceeded that threshold, reduced payroll tax rates were scheduled to go into effect on July 1, 2019. Repealing NRS 360.203 would generate approximately \$98.2 million total over the course of two years. Only four sections of the bill required a supermajority vote. The bill initially failed when it fell one vote short of a supermajority. The Senate subsequently passed the bill after reconsideration without the supermajority requirement.

¹ By Allison Mann

² The supermajority provision of Article 4, section 18 of the Nevada Constitution states, "Except as otherwise provided in subsection 3, an affirmative vote of not fewer than *two-thirds* of the members elected to each House is necessary to pass a bill or joint resolution which creates, *generates, or increases any public revenue in any form*, including but not limited to taxes, fees, assessments and rates, or changes in the computation bases for taxes, fees, assessments and rates. (emphasis added).

³ NEV. CONST. art. 4, § 18(2).

⁴ NEV. REV. STAT. § 41.071 (2021).

Proceedings in the district court

The senators and entities in opposition to the bills sued the senate majority leader, senate president, senate secretary, and the governor in their official capacities. They also sued the Nevada Department of Taxation and the DMV. The senators requested that the court invalidate the bills because they were not passed by a supermajority. They requested injunctive relief to prohibit the collection of revenue that the bills would generate. They also requested attorney's fees and costs.

The State argued the supermajority provision did not apply. They urged the court to follow a 2019 Legislative Counsel Bureau memorandum stating the provision did not apply to the bills at issue. The senate majority leader and senate secretary asserted that they were covered under legislative immunity.

The district court determined that both bills must be passed by a supermajority because they generate revenue. The court reasoned that the State would have generated around \$112 million in two years due to the passage of these two bills. The district court severed the sections within Bill 551 that did not require a supermajority from the remainder of the bill and invalidated only the four severed sections. The district court denied all claims against the individual senator defendants and the governor, including claims against them for attorney's fees and costs. The individual defendants were dismissed from the case.

The State opposed the district court's judgement that the bills at issue require a supermajority. The senators opposed the denial of their claims against the individual defendants, including their claims for attorney's fees and costs.

DISCUSSION

The supermajority provision applies based on its plain language

The bills clearly fall under the Nevada Constitution provision requiring a supermajority vote. Under the Nevada Constitution, all bills, or any of their sections that generate or increase revenue, must pass by a 2/3 supermajority vote in both houses of the legislature.⁵ The Court found the plain language in the Nevada Constitution clear on its face. Any bill that results in the State receiving more public revenue than it would have without the bill clearly "generates" or "increases" public revenue for the State. The Court also found this provision of the Nevada Constitution to be broad when it states that the supermajority provision applies to "*any* public revenue in *any* form."⁶ This broad, clear language encompassed Bill 542 even though the Legislature passed the bill before the original sunset clause expired. Similarly, the provision applies to Bill 551 even though the reduced payroll tax rate had not yet taken effect. Because the bills created public revenue that otherwise would not exist, they were unconstitutionally passed without a supermajority vote.

⁵ NEV. CONST. art. 4, § 18(2).

⁶ NEV. CONST. art. 4, § 18(2).

In an effort to uphold the constitutionality of legislative enactments where possible⁷, the four provisions in Bill 551 requiring the supermajority were severed before being invalidated, leaving the remainder of Bill 551 intact.

Legislative immunity protects the individual defendants

Under NRS 41.071(1)(h), individual legislators performing their official functions are protected from having to defend themselves in actions regarding their legitimate legislative activities.⁸ This legislative immunity applies to legislative acts such as drafting, amending, supporting, or voting in any form.⁹ The Court found the legislators' actions regarding the passage of the bills were basic and legitimate legislative functions. Because the individual legislators were performing legitimate legislative functions, their actions are protected by legislative immunity.

CONCLUSION

The supermajority provision of the Nevada Constitution¹⁰ applies to both bills because they generate public revenue. The Legislature was required to pass the bills by a two-thirds vote in both houses. Neither bill was passed by a supermajority. Therefore, the bills are unconstitutional. The four offending sections of Senate Bill 551 were properly severed, leaving the remainder of the bill intact.

The individual defendants are covered by legislative immunity while performing the functions of their position.¹¹ As such, they are also protected from claims for attorney's fees and costs.

⁷ *Rogers v. Heller*, 117 Nev. 169, 177 (2001) (requiring the judiciary to sever the unconstitutional sections of a legislative enactment where possible in order to uphold the enactment's constitutionality).

⁸ NEV. REV. STAT. § 41.071(1)(h) (2021).

⁹ NEV. REV. STAT. § 41.071(5)(a), (6) (2021).

¹⁰ NEV. CONST. art. 4, § 18(2).

¹¹ NEV. REV. STAT. § 41.071 (2021).