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### **Flor Morency et. al. v. State, Dep't of Edu., 137 Nev. Adv. Op. 63 (Oct. 7, 2021)**

Kassandra Acosta

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State Constitutions: Challenging the Constitutionality of Assembly Bill (A.B.) 458

**Summary:**

The Nevada Supreme Court considered whether Assembly Bill (A.B.) 458 was constitutional and subject to the supermajority voting requirement. Article 4, of §18(2) of the Nevada Constitution states that under the supermajority voting provision, at least two-thirds of the members' votes in each house of the Nevada Legislature are required to pass any bill "which creates, generates, or increases any public revenue in any form."<sup>2</sup> Appellants argued that the bill was unconstitutional because it was passed even though it failed to meet the supermajority voting requirement. The Court found that Appellants had standing to challenge the legislation constitutionality and the bill was not subject to the supermajority requirement. Therefore, the Court held that the A.B.458 was constitutional.

**Facts:**

In 2015, the 78<sup>th</sup> Nevada Legislature passed a bill establishing the Nevada Educational Choice Scholarship Program (NECSP). Under the NECSP, businesses can receive credits against the modified business payroll tax (MBT) for their donations to NECSP. The money received by scholarship organizations from NECSP donations must be given to low-income students through a scholarship.

In 2019, A.B.458 was proposed during the 80<sup>th</sup> legislative session. The bill eliminated the 10 percent annual increase in the amount of available NECSP tax credits, indefinitely capping the total available credits at \$6,655,000. While A.B.458 was in the Assembly, the State Department of Taxation explained that A.B.458 would "increase general fund revenue by \$655,500 in 2019-2020 and \$1,397,550 in 2020-2021. At least two-thirds of the assembly members voted in favor of A.B.458. Once A.B.458 reached the Senate, the legislative leadership asked the Legislative Counsel Bureau (LCB) if the bill was subject to the Nevada Constitution's supermajority provision. The LCB opined that A.B.458 was not subject to the supermajority provision because limiting tax exemptions and credits, neither changes the existing statutory tax formulas nor the existing computational bases. The Legislature did not subject A.B.458 to the supermajority vote. The Senate passed A.B.458 with only a simple majority. Then Governor then signed it into law.

**Procedural History:**

After A.B. 458 was passed, the appellants filed a complaint seeking declaratory relief challenging the constitutionality of A.B. 458 against respondents, including the State of Nevada Department of Education, Department of Taxation and several state employees.

Appellants argued that A.B. 458 violated the supermajority voting requirement because 1) it did not pass the required two-thirds vote in the Senate and 2) it increased revenue for the State General Fund.

The State moved to dismiss the case on the ground that appellants lacked standing. The District Court denied the motion. The Court found that appellants lacked general standing.

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<sup>1</sup> By Kassandra Acosta

<sup>2</sup> Nev. Const. art. 4, §18(2)

However, the Court concluded that, in the alternative, the public-importance exception to standing applied.

Both parties filed cross-motions for summary judgement. After a hearing, the District Court found that A.B.458 does not increase public revenue, and therefore, the supermajority provision did not apply. Thus, the District Court granted the State’s motion for summary judgement.

### **Discussion:**

#### *Appellants have standing*

State argued that appellants lack standing because they fail to demonstrate that the State caused them harm and they do not meet the requirements under *Schwartz v. Lopez*. Standing “concerns whether the party seeking relief has sufficient interest in the litigation.”<sup>3</sup> Thus, “a requirement of standing is that the litigant personally suffer injury that can be fairly traced to the allegedly unconstitutional statute, and which would be redressed by invalidating the statute.”<sup>4</sup>

Appellants claim that the enactment of A.B. 458 caused them each harm in the form of lost scholarships, scholarship funding, and tax credits and that their injuries are fairly traced to the State because it enforces the bill and is responsible for administering the NECSP. In the alternative, Appellants argue that the public-importance exception to standing under *Schwartz* applies. The Court concluded that the Appellants have standing under the *Schwartz* public-importance exception.

#### *Appellants lack personal harm for general standing*

The Court found that the Appellants failed to meet the personalized injury requirement for general standing. The State argued that the Appellants could not demonstrate harm because the Legislature passed another bill during the 2019 session, Senate Bill (S.B.) 551, which provided NECSP with additional funding. S.B. 551 allowed NECSP to recuperate part of the loss of funding caused by A.B. 458. The Court agreed with the State and found that §2.5 and §3.5 of S.B. 551 did provide additional allotment of \$4,745,000 in tax credits. As a result, the Court concluded that appellants failed to show actual harm from A.B. 458’s tax credit cap and consequent decrease in funding for NECSP.

#### *The Schwartz public importance exception applies*

According to *Schwartz*, the Court may grant standing “to a Nevada citizen to raise constitutional challenges to legislative expenditures or appropriations without a showing of a special or personal injury.”<sup>5</sup> A plaintiff must demonstrate that (1) “the case involves an issue of significant public importance”; that (2) “the case involves a challenge to a legislative expenditure or appropriation on the basis that it violates a specific provision of the Nevada Constitution”; and that (3) “there is no one else in a better position than the plaintiff who will likely bring an action and the plaintiff is capable of fully advocating his or her position in court.”<sup>6</sup>

The Court found that appellants have satisfied *Schwartz*’s public-importance exception requirements. First, this case is of significant public importance because it requires the Court to determine the constitutionality of legislation affecting the financial concerns of a significant

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<sup>3</sup> *Schwartz v. Lopez*, 132 Nev. 732, 743 (2016).

<sup>4</sup> *Elley v. Stephens*, 104 Nev. 413, 416 (1988).

<sup>5</sup> *Schwartz*, 132 Nev. at 743.

<sup>6</sup> *Id.*

number of businesses, organizations, and individuals through-out the state and the state’s budget. Second, Appellants challenge the Legislature’s appropriations for the NECSP under A.B. 458 on the basis that the bill did not meet the supermajority vote. Third, there is no one else in a better position to challenge A.B. 458 than Appellants because they all benefit from the NECSP and are interested in maintaining those benefits. Furthermore, the record indicates that appellants have the “ability to competently and vigorously advocate their interests in court and fully litigate their claims.”<sup>7</sup>

The Court concluded that Appellants have standing under *Schwartz’s* public-importance exception and have standing to challenge the constitutionality of A.B. 458.

*A.B. 458 is not subject to the supermajority provision*

Article 4 of §18(2) of the Nevada Constitution states that under the supermajority voting provision, at least two-thirds of the members’ votes in each house of the Nevada Legislature are required to pass any bill “which creates, generates, or increases any public revenue in any form.”<sup>8</sup> The Court must first determine whether A.B. 458 “creates, generates, or increases any public revenue in any form.”<sup>9</sup>

The State argues that A.B. 458 does not increase public revenue, but rather reallocates existing tax funds that support the NECSP. Appellants argue that A.B. 458 is subject to the subject supermajority provision because it increased the State General Fund. The State General Fund is the default account that receives tax revenue. Within the State General Fund there are designated accounts. The State General Fund may increase for a variety of reasons. However, redirecting funds previously designated for a specific use (an appropriation) back to the State General Fund does not increase public revenue, even if it increases the unrestricted revenue available in the General Fund. This is because the amount of public revenue—the amount of taxes collected—does not increase as the result of such a reversion.

The NECSP tax credit is an appropriation. According to *Schwartz*, “an appropriation is the setting aside from the public revenue of a certain sum of money for a specified object, in such a manner that the executive officers of the government are authorized to use that money, and no more, for that object, and no other.”<sup>10</sup> The State funds the NECSP tax credits by setting aside a specified portion of tax money owed. Thus, the Court concludes that the NECSP tax credits is an appropriation because it is in effect funded with tax revenue that is set aside.

Finding that the NECSP tax credits are an appropriation, the Court concluded that A.B. 458’s reduction of the total amount of available tax credits is simply a reallocation of a portion of the total MBT revenue available, rather than something that increases the MBT tax that produces new or additional public revenue. The A.B. 458 reduces future appropriations to the NECSP tax-credit program. A.B. 458 increases the amount of unrestricted revenue in the State General Fund by redirecting funds that would have previously gone to tax credit for donors to NECSP scholarship organizations. Therefore, the total public revenue collected under the MBT has not changed. Thus, A.B. 458 does not increase public revenue.

Under A.B. 458, MBT payroll taxpayers tax liability has not increased. The reduction of tax credit only changes how much of the MBT payroll tax money is allocated to fund the NECSP credits. The Court concluded that A.B. 458 is not subject to the supermajority provision because

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<sup>7</sup> *Id.* at 744

<sup>8</sup> NEV. CONST. art. 4, §18(2)

<sup>9</sup> *Id.*

<sup>10</sup> *Schwartz*, 132 Nev. at 753.

it merely reduces funding for the NECSP program, rather than “creat[ing], generat[ing], or increase[ing] any public revenue.”<sup>11</sup> Therefore, A.B. 458 is constitutional.

**Conclusion:**

The Nevada Supreme Court found that the district court properly granted the State’s motion for summary judgement. Although Appellants had standing to challenge the constitutionality of the bill, A.B. 458 was not subject to the supermajority provision of Article 4, §18(2) of the Nevada Constitution because it does not generate, create, or increase public revenue. Therefore, the Court held that A.B. 458 is constitutional. Accordingly, the Court affirmed the district court’s decision.

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<sup>11</sup> *Id.*