No. 03-

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Hon. Sharron E. Angle, Hon. Walter Andonov, Hon. Bob Beers, Hon. David F. Brown, Hon. John C. Carpenter, Hon. Chad Christensen, Hon. Peter J. Goicoechea, Hon. Thomas J. Grady, Hon. Donald G. Gustavson, Hon. Lynn C. Hettrick, Hon. Ronald L. Knecht, Hon. R. Garn Mabey, Jr., Hon. John W. Marvel, Hon. Roderick R. Sherer, Hon. Valerie E. Weber, members of the Assembly of the State of Nevada; Hon. Mark E. Amodei, Hon. Barbara K. Cegavske, Hon. Warren B. Hardy II, Hon. Mike McGinness, Hon. Dennis Nolan, Hon. Ann O'Connell, Hon. Dean A. Rhoads, Hon. Sandra J. Tiffany, Hon. Maurice E. Washington, members of the Senate of the State of Nevada,

Plaintiffs/Appellants,

vs.

The Legislature of the State Of Nevada; The Senate of the State of Nevada; Hon. Lorraine T. Hunt, President of the Nevada Senate; The Assembly of the State of Nevada; Hon. Richard D. Perkins, Speaker of the Nevada Assembly; Jacqueline Sneddon, Chief Clerk of the Nevada Assembly; Diane Keetch, Assistant Chief Clerk of the Nevada Assembly; Brenda Erdoes, Legislative Counsel of the Nevada Legislature; Claire J. Clift, Secretary of the Nevada Senate; Hon. Kenny Guinn, Governor of the State of Nevada; Hon. Dean Heller, Secretary of State of the State of Nevada; Hon. Charles E. Chinnock, Executive Director, Nevada Department of Taxation,

Defendants/Appellees.

U.S. District Court No. CV-N-03-0371-HDM-(VPC)

Appellants' Emergency Motion for
Preliminary Injunction Pending Appeal
Pursuant to Circuit Rule 27-3.

Circuit Rule 27-3 Certificate

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Facts showing the existence and nature of the emergency:

On July 13, 2003, the Nevada State Assembly conducted a floor vote on SB 6, a bill that would, among other things, impose a gross receipts tax on certain businesses in the State of Nevada. Although the vote in favor of the bill, 26 to 16, fell short of the 2/3 vote required by Article 4, Section 18(2) of the Nevada Constitution, the Speaker of the Assembly, Defendant Richard D. Perkins, nevertheless ruled that the bill had "passed." A point of order by Appellant Heltrick, the Assembly Minority Leader, was rejected by the Speaker, based on mandamus from the Supreme Court of Nevada issued Thursday, July 10, 2003, directing that the legislature consider measures to obtain revenue for the funding of the public education budget by simple majority vote rater than the 2/3 vote that the Nevada Supreme Court expressly acknowledged to be required by the Nevada Constitution. *Guinn v. Legislature of the State of Nevada*, 119 Nev., Advance Op. 34 (July 10, 2003).

As a result of the Assembly's actions, certain Appellants have been, and other Appellants are soon to be, irreparably harmed in the exercise of rights protected by the Federal Constitution. Specifically, Assembly Appellants (15 members of the State Assembly who were amount those voting against SB 6) have had their legislative vote diluted, in violation of the Equal Protection and/or Due Process clauses of the Fourteenth Amendment. The Voter Appellants (individual voters of the State of Nevada, some residing in the districts of the Assembly Appellants) have had their right to undiluted representation infringed, in violation of the Equal Protection and/or Due Process clauses of the Fourteenth Amendment. Those Voter Appellants who voted in 1996 for the Gibbons Constitutional Tax Initiative, which added Article 4, Section 18(2) to the Nevada Constitution, have also had their constitutionally-protected right to vote (and to have their votes

counted and given effect) infringed, in violation of the Equal Protection and/or Due Process clauses of the Fourteenth Amendment and the Republican Guarantee Clause of Article IV.

On July 14, 2003, the United States District Court, District of Nevada granted Appellants' Emergency Application for a Temporary Restraining Order ("TRO") so that the entire district court, sitting en banc, could consider the issues raised by the Appellants in a comprehensive manner. Hence, in order to maintain the status quo, the district court ordered that the Defendants be temporarily restrained from giving effect to SB 6 as "passed," without the two-third vote required by Article IV, § 18(2) of the Nevada Constitution. On July 18, 2003, the district court entered its ruling granting Defendants/Appellees' Motion to Dismiss Appellants' Complaint for violation of Appellants' Civil and Constitutional Rights. It also dismissed the complaints of non-legislative plaintiffs, without prejudice to refile a new complaint without the legislative plaintiffs; as a result, the non-legislative plaintiffs are not parties to this appeal.

Immediately, the Nevada Assembly renewed its efforts to pass a tax increase by simple majority vote, in violation of the 2/3 vote requirement of the Nevada Constitution.

This Court should grant Appellants' Motion for a Preliminary Injunction Pending Appeal, enjoining Defendants from taking any action to increase taxes by simple majority vote, in violation of the 2/3 vote requirement of the Nevada constitution. As explained more fully below, the balance of hardships and the public interest tilts decidedly in Appellants' favor. The claimed constitutional violations at issue here are the infringement of fundamental constitutional rights, including the right to vote, which is a "fundamental political right, because preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. at 370. Moreover, the "enrolled bill doctrine" provides that at least in some circumstances, courts are not

permitted to look behind a bill that has been enrolled and certified as law to challenge underlying procedural violations, the very violations that have given rise to the vote dilatation and Republican Guarantee Clause claims at issue in this case. As a result, it is at least possible, perhaps even likely, that those claims will forever be lost to Plaintiffs/Appellants (although Plaintiffs/Appellants will certainly continue to contend otherwise). In contrast, Defendants will likely suffer no harm, much less irreparable harm, if they are enjoined from violating the provisions of the Nevada Constitution during the pendency of an appeal.

Notification of Opposing Counsel:

Opposing counsel was notified by on July 18, 2003 that Appellants were filing an emergency motion under Circuit Rule 27-3. Opposing counsel have also been served with a copy of this motion via facsimile machine and a second copy by U.S. mail.

Appellants' Corporate Disclosure Statement

Plaintiffs/Appellants ("Appellants" herein) are individual legislators in Nevada, none of whom are corporations.

MOTION

Appellants hereby move pursuant to Federal Rule of Appellate Procedure 8(a)(2) and Circuit Rule 27-3, for a preliminary injunction pending appeal of the district court's denial of injunctive relief. Alternatively, Appellants move for an expedited hearing and briefing schedule, pursuant to Circuit Rule 27-12. This Court has Jurisdiction pursuant to 28 U.S.C. § 1291. The district court had jurisdiction pursuant to 28 U.S.C. § 1331.

This motion was not first filed in the district court, as "ordinarily" required by FRAP 8(a)(1), because that would have been impracticable, both because of the urgency of the motion and the fact that the district court has just denied Appellants' motion for a preliminary injunction, asserting lack of jurisdiction. A copy of the complaint, temporary restraining order, and order of dismissal are attached as Exhibits A, B and C, respectively.

The district court's ruling in favor of Defendants does not preclude entry of a preliminary injunction pending appeal. In *City of Tenakee Springs v. Franzel*, for example, the district court – in procedural circumstances similar to those presented here – granted plaintiffs' motion for preliminary injunction pending appeal after it had issued a final judgment denying plaintiffs' request for a permanent injunction and granting defendants' motion for summary judgment. 960 F.2d 776, 778 (9th Cir. 1992); see also *Cabazon Band of Mission Indians v. City of Indio, Cal.*, 694 F.2d 634, 636 (9th Cir. 1982) (noting that district court granted plaintiff's motion for preliminary injunction pending appeal after granting defendant's motion for summary judgment).

POINTS AND AUTHORITIES
IN SUPPORT OF PRELIMINARY INJUNCTION

I. Standard of Review

The standard for assessing whether Appellants are entitled to a preliminary injunction pending appeal is similar to that governing the issuance of a preliminary injunction itself. *City of Tenakee Springs v. Block*, 778 F.2d 1402, 1407 (9th Cir. 1985); *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983); *Tribal Village of Akutan v. Hodel*, 859 F.2d 662, 663 (9th Cir. 1988). The moving party must demonstrate either (1) a combination of probable success on the merits and the possibility of irreparable injury if the relief is denied, or (2) that serious questions are raised and the balance of hardships tips sharply in favor of the movant. *Tillamook County v. U.S. Army Corps of Engineers*, 288 F.3d 1140, 1143 (9th Cir. 2002); *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 634 F.2d 1197, 1201 (9th Cir. 1980); *Janra Enterprises, Inc. v. City of Reno*, 818 F. Supp. 1361, 1363 (D. Nev. 1993). The showing need not be as strong to satisfy the second test as it must be to satisfy the first. *Caribbean Marine Services Co., Inc. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988).

II. Appellants Have Raised Serious Questions on which They Are Likely To Succeed.

Appellants continue to believe that they are likely to succeed on the merits of their various claims, but at the very least, Plaintiffs have demonstrated "that serious questions are raised" by their challenge to the attempted circumvention of the 2/3 vote required by Article 4, Section 18(2) of the Nevada Constitution for passage of tax bills. An applicant for preliminary injunctive relief raises a serious question on the merits if its claim poses a substantial, difficult and doubtful question that constitutes a fair ground for litigation. *Gilder v. PGA Tour, Inc.*, 936

F.2d 417, 422 (9th Cir. 1991). That threshold is met here, for the reasons previously stated in Appellants' July 14, 2003 Application for a TRO and Order to Show Cause filed in the district court and further elaborated at the hearing on that Application.

Indeed, the district court, in granting a TRO pending an expedited preliminary injunction hearing implicitly recognized that the issues raised here were sufficiently weighty and difficult to require maintaining the status quo while proceeding with further review. The exact same logic applies to the limited relief of a preliminary injunction pending appeal. See *Tribal Village of Akutan v. Hodel*, 859 F.2d 662, 663 (9th Cir. 1988) (district court granted preliminary injunction pending appeal where the case presented "close and troubling questions").

A. Plaintiffs/Appellants Claims Are Not Barred by the *Rooker-Feldman* Doctrine.

The Rooker-Feldman abstention doctrine bars a party who lost in state court from seeking in federal district court what in substance would be appellate review of the state court judgment. *See District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416 (1923). The proper course of action in such cases is for the party to appeal the state court judgment, through a petition for a writ of certiorari to the United States Supreme Court. As a result, Rooker-Feldman does not apply to cases involving parties who were not involved in the state court proceedings. *Johnson v. De Grandy*, 512 U.S. 997, 1006 (1994); *Southern California Edison Co. v. Lynch*, 307 F.3d 794, 805 (9th Cir. 2002).

The Legislator Plaintiffs who are parties to this appeal were party to the suit, but they believe they are unable to petition the Supreme Court of the United States for a writ of certiorari because the federal claims presented in the complaint filed in the Nevada District Court were not raised, and indeed could not have been

raised, in the action before the Nevada Supreme Court. *See Godchaux Co. v. Estopinal*, 251 U.S. 179, 181 (1919); *Beck v. Washington*, 369 U.S. 541, 550-54 (1962). Many of the federal claims only arose as the result of a decision by the Nevada Supreme Court granting relief that had not been requested by any party to the suit. *See Guinn v. The Legislature of the State of Nevada*, slip op. at 6, 16 (July 10, 2003). The remaining federal claims arose only as the action of the Nevada State Assembly following that decision.

The Rooker-Feldman doctrine simply does not bar federal court actions raising federal claims that were not litigated in the state court proceedings. As the Supreme Court noted in *Rooker* itself, the abstention is only applicable to bar claims that "actually arose" in the state court action, for which there was a full hearing and where the judgment was responsive in the issues. 263 U.S. at 415; *Robinson v. Ariyoshi*, 753 F.2d 1468, 1469 (9th Cir. 1985), *judgment vacated and remanded on other grounds*, 477 U.S. 902 (1986). As this Court has recognized, "If no consideration has been given ... it is unlikely that the issues presented to the state high court and to the federal court are so 'inextricably intertwined' that the federal court cannot take jurisdiction." *Robinson*, 753 F.2d at 1472. None of the federal claims presented in this case were raised in the Nevada Supreme Court, nor could they have been, because the federal violations were the result of action taken by the Nevada State Assembly (albeit in reliance on the decision of the Nevada Supreme Court). Indeed, Governor Guinn, petitioner in the Nevada Supreme Court, forcefully acknowledged before the district court that he did not ask for the relief actually granted—the directive that the Legislature ignore the 2/3 vote requirement of the Nevada Constitution. *See Governor's Opp.* at 6 ("The Governor never requested that the two-thirds legislative voting requirement of Article 4, Section 18, Clause 2 be declared unconstitutional or that it should be stricken); *id.* at 2, 8.

B. The Merits of the Legislative Plaintiffs' Vote Dilution Claim

The Supreme Court of the United States has expressly recognized that a state legislator has a federal cause of action to challenge actions by the state legislature that dilute or render nugatory the legislator's vote. In *Coleman v. Miller*, 307 U.S. 433, 438 (1939), the Supreme Court held that state legislators "have a plain, direct, and adequate interest in maintaining the effectiveness of their votes." *Cf. Skaggs v. Carle*, 110 F.3d 831, 833 (D.C. Cir. 1997) (noting that "the harm worked by [a rule changing the amount of votes necessary to pass legislation]—diluting the Representatives' votes and diminishing their ability to advocate a position—is apparent, as is the command of the Constitution that we remedy that harm").

Although Coleman involved a federal constitutional amendment, several courts, including the Ninth Circuit, have recognized that a State legislature's failure to comply with its own procedures may violate federal Due Process. See, e.g., *Rea v. Matteucci*, 121 F.3d 483, 485 (9th Cir. 1997) (quoting *Atkins v. Parker*, 472 U.S. 115, 130 (1985)); *Conway v. Searles*, 954 F. Supp. 756, 767 (D. Vt. 1997). "Fairness (or due process) in legislation is satisfied when legislation is enacted in accordance with the procedures established in the state constitution and statutes for the enactment of legislation," *Richardson v. Town of Eastover*, 922 F.2d 1152, 1158 (4th Cir. 1991), not by legislation enacted in violation of the procedures mandated by the state constitution, as here. "Legislative rules are judicially cognizable, and may therefore be enforced by the Courts." *Conway*, 954 F. Supp. at 769 (citing *Yellin v. United States*, 374 U.S. 109, 114 (1963); *Christoffel v. United States*, 338 U.S. 84 (1949)). Moreover, the Supreme Court has expressly suggested, albeit in dicta, that members of state legislative bodies have standing to bring a vote dilution claim that arises from violations of state law. *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 544 n.7 (1986) ("if ... state law authorized School Board action solely by unanimous consent," a

disenfranchised school board member "might claim that he was legally entitled to protect 'the effectiveness of [his] vot[e]'") (quoting *Coleman*, 307 U.S. at 438) (brackets in original). A legislator in such circumstances "would have to allege that his vote was diluted or rendered nugatory under state law," and "he would have a mandamus or like remedy against the Secretary of the School Board." *Id.*

The Legislator Appellants in this case who together provided enough votes to defeat the tax increase pursuant to the 2/3 vote requirement of Article 4—can and do claim that they are legally entitled to protect the effectiveness of their vote.

Defendants' claimed below, essentially, that the legislature may ignore the State Constitution and their own independent obligations to abide by that Constitution simply by relying on a collusively manufactured and facially absurd opinion of the State Supreme Court does not resolve the serious issues presented by this case. Federal courts may be required to make independent assessments of both facts and state law when such assessments are bound up in a question of federal right, as they are in this case. The plain language of the State Constitution is cognizable by this and other federal courts, and the disregard of that language through the thin artifice employed in this case cannot avoid claims of vote dilution and violations of due process. *See Cooper v. Aaron*, 358 U.S. 1, 18 (1958) ("[n]o state legislator or executive or judicial officer can [wage] war against the Constitution without violating his undertaking to support it"); *cf. Meredith Corp. v. FCC*, 809 F.2d 863, 874 (D.C. Cir. 1987) ("Federal officials are not only bound by the Constitution, they must also take a specific oath to support and defend it").

III. The Dilution of their Constitutionally-Protected Right to Vote and Infringement of Other Constitutionally-Protected Rights Constitutes Irreparable Injury.

Having demonstrated a likelihood of success on the merits, Appellants need only demonstrate a possibility of irreparable harm in order to be entitled to a preliminary injunction pending appeal. *Meredith v. Oregon*, 321 F.3d 807, 815 n. 8 (9th Cir. 2003); *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 (9th Cir. 2001). Here, Appellants can demonstrate much more than a mere possibility of irreparable harm.

The constitutional violations at issue in this litigation are the infringement of Appellants' constitutionally protected rights to vote and to have those votes counted fully and equally (and not diluted), in accord with the structural provisions of the Nevada Constitution. "[I]rreparable injury ... is assumed where constitutional rights have been alleged to be violated." *Associated General Contractors of California, Inc. v. Coalition for Economic Equity*, 950 F.2d 1401, 1412 (9th Cir. 1991); see also Charles A. Wright, Arthur R. Miller & Mary Kay Kane, 11A Federal Practice and Procedure § 2948.1 (Where the deprivation of a constitutional right is involved, courts generally hold that no further showing of irreparability is required); *Coalition for Economic Equity v. Wilson*, 946 F.Supp. 1480, 1519 (N.D.Cal.,1996) (same), *overruled on other grounds*, 110 F.3d 1431 (1997).

Even if this Court believes that Appellants have not established a likelihood of success on the merits, a preliminary injunction pending appeal is still warranted if Appellants' contentions raise "serious questions" and "the balance of hardships tips sharply in favor of the movant." *Meredith*, 321 F.3d at 815; *A & M Records*, 239 F.3d at 1013.

At the very least, Appellants have demonstrated "that serious questions are raised" by the claims they have brought. An applicant for preliminary injunctive relief raises a serious question on the merits if its claim poses a substantial, difficult and doubtful question that constitutes a fair ground for litigation. *Gilder v. PGA Tour, Inc.*, 936 F.2d 417, 422 (9th Cir. 1991); *Tribal Village of Akutan v. Hodel*, 859 F.2d 662, 663 (9th Cir. 1988). That threshold is easily met here, for the reasons stated above.

The balance of hardships and the public interest also tilts decidedly in Appellants' favor. As noted above, the claimed constitutional violations at issue here are the infringement of fundamental constitutional rights, including the right to vote, which is a "fundamental political right, because preservative of all rights." *Yick Wo*, 118 U.S. at 370. Furthermore, in the absence of an injunction, the legislature will be able to move forward with its unconstitutional actions in the hopes of insulating its disregard of the structural requirements of the Nevada Constitution from federal court review. Should it succeed, as is expected, it is at least arguable that, under the enrolled bill rule, courts will not look behind the statute once certified to assess the validity of the procedures that led to its adoption. *Field v. Clark*, 143 U.S. 649 (1892); *United States v. Stahl*, 792 F.2d 1438, 672 (9th Cir. 1984).

In contrast, Defendants will likely suffer no harm, much less irreparable harm, if they are enjoined from violating the provisions of the Nevada Constitution during the pendency of an appeal. Defendants remain free to act in accord with the Constitution. Defendant Legislature remains free to revisit the entirety of the state's budget in order to comply with the constitutional mandate for a balanced budget and the constitutional mandate to provide adequate funding for education. (Indeed, such action alone would have avoided the fictional "conflict" between constitutional provisions and hence any alleged injury to defendants is entirely

self-inflicted.) Other Defendants remain free to fulfill all of their legislative, executive, or ministerial responsibilities in accord with the provisions of the Nevada Constitution.

Finally, the "basic function of a preliminary injunction [and, when circumstances warrant, a preliminary injunction pending appeal] is to preserve the status quo pending a determination of the action on the merits." *Chalk v. U.S. Dist. Court, Cent. Dist. of Cal.*, 840 F.2d 701, 704 (9th Cir. 1988). Appellants' request for a Preliminary Injunction here would do just that—preserve the status quo until this Court has time to consider the merits of their contentions in an orderly fashion.

IV. Because the balance of hardships weighs heavily in favor of Appellants, this Court should exercise its discretion to waive any bond requirement.

Just as with the TRO granted by the district court on Monday, there would be no need for the posting of a bond pursuant to FRAP 8(a)(2)(e). The courts have waived the bond requirement in noncommercial cases such as this where there is "no risk of monetary loss to the Defendants if the injunction is granted" or where, as here, Plaintiffs have demonstrated a strong likelihood of success on the merits. *Colin ex rel. Colin v. Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135, 1151 (C.D. Cal. 2000); see also *Hoechst Diafoil Co. v. Nan Ya Plastics Corp.*, 174 F.3d 411, 421, n.3 (4th Cir. 1999); *Elliott v. Kiesewetter*, 98 F.3d 47, 60 (3rd Cir. 1996); *Doctor's Assocs., Inc. v. Stuart*, 85 F.3d 975, 985 (2d Cir. 1996); *Scherr v. Volpe*, 466 F.2d 1027, 1035 (7th Cir. 1972).

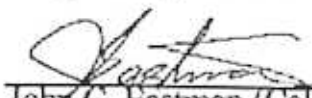
Because in this case the granting of a preliminary injunction pending appeal would result in no risk of monetary loss to Defendants, Appellants respectfully request that this Court exercise its discretion and waive the bond requirement of FRAP 8(a)(2)(E).

CONCLUSION

For the reasons stated above, Appellants' motion for a preliminary injunction pending appeal should be granted.

Dated: July 18, 2003

Respectfully submitted,



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