

BRIAN SANDOVAL
Attorney General
Nevada Bar No. 3805
Litigation Division
100 N. Carson St.
Carson City, NV 89701-4717
(775) 684-1

Attorney for Defendants The Honorable Kenny Guinn,
and The Hon. Charles E. Chinnock

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

HON. SHARRON E. ANGLE, et al.,

Plaintiffs,

v.

THE LEGISLATURE OF THE STATE OF
NEVADA, et al.,

Defendants.

Case No. CV-N-03-0371-HDM-VPC

**DEFENDANTS' MOTION TO DISMISS
and RESPONSE TO EMERGENCY
APPLICATION FOR TEMPORARY
RESTRAINING ORDER AND ORDER
TO SHOW CAUSE RE PRELIMINARY
INJUNCTION**

Defendants¹ The Hon. Kenny Guinn and The Hon. Charles E. Chinnock ("Defendants" unless
identified individually), by and through their attorney, Brian Sandoval, Nevada Attorney General,
hereby move this Court for an order dismissing Plaintiffs' Complaint (#2), and respond to Plaintiffs'
Application For Temporary Restraining Order and Order To Show Cause Re Preliminary Injunction.
This Motion and Response is based upon the following Points and Authorities and all of the papers and
pleadings on file.

MEMORANDUM OF POINTS AND AUTHORITIES

MOTION TO DISMISS

I. NATURE OF THE MOTION TO DISMISS

Court action on Plaintiffs' prayer for relief or their Applications as to the legislative
Defendants would not affect the Governor or the Executive Director of the Nevada Department of
Taxation. These Executive Branch Defendants are only empowered to act after legislation has been

¹ Defendants object that they have not been served with the Complaint (#2) or an application for temporary restraining order
or preliminary injunction.

1 lawfully approved by the legislature. Thus, Plaintiffs' pleadings are properly directed to the lawfulness
2 of the actions of the Legislative Defendants, not these Executive Branch Defendants.

3 Plaintiffs, by way of both their Complaint (#2) and their Emergency Applications for Temporary
4 Restraining Order and Order to Show Cause Re Preliminary Injunction, seek to remedy alleged
5 violations of their federal constitutional rights caused when other state Legislative Defendants purported
6 to "pass" SB 6 out of the Nevada Assembly without the 2/3 vote required by Art. 4, Sec. 18(2) of the
7 Nevada Constitution. While the Governor did not seek the invalidation of the two-thirds super majority
8 requirement of Article 4, Section 18(2) of the Nevada Constitution, the Governor does respect the
9 Opinion of the Nevada Supreme Court and the Supreme Court's role as the final arbiter of disputes
10 regarding the Nevada Constitution.

11 **II. BACKGROUND**

12 On July 14, 2003, Plaintiffs filed their Complaint for Violation of Civil and Constitutional
13 Rights (#2), Emergency Applications for Temporary Restraining Order and Order to Show Cause Re
14 Preliminary Injunction and a Memorandum of Points and Authorities in Support thereof.

15 In their Complaint (#2), Plaintiffs prayed for relief as follows

16 1 For Nominal Damages of \$1 from each defendant;

17 2. For the declaratory judgment of this Court, declaring that the action by the State
18 Assembly to deem SB 6 as "passed" without the 2/3 vote required by Art. 4, Sec. 18(2) of the Nevada
19 Constitution infringed Plaintiffs' constitutional rights, and that the action is thereby null and void;

20 3. For the declaratory judgment of this Court, declaring that the anticipated action by
21 Defendants the State Senate, its presiding officer, its secretary, the Legislative Counsel, the Governor,
22 the Secretary, and the Executive Director of the Nevada Department of Taxation, to treat SB 6 as
23 validly passed by the State Assembly, would further infringe Plaintiffs' constitutional rights;

24 3. [sic] For a temporary restraining order restraining Defendants from violating Art. 4, Sec.
25 18(2) of the Nevada Constitution and from taking any action that would give effect to the action of the
26 Nevada Assembly deeming SB 6 as "passed" without the 2/3 vote required by Art. 4, Sec. 18(2) of the
27 Nevada Constitution;

28 ///

4. For preliminary and permanent injunctive relief enjoining Defendants from violating Art. 4, Sec. 18(2) of the Nevada Constitution and from taking any action that would give effect to the action of the Nevada Assembly deeming SB 6 as "passed" without the 2/3 vote required by Art. 4, Sec. 18 of the Nevada Constitution;

5. That pursuant to 42 U.S.C. Sec. 1988, Plaintiffs be awarded their costs and attorneys' fees incurred in this action; and

6. For such other and further relief as this Court deems just and proper.

Complaint (#2), p. 12, ll. 4 – 25.

Plaintiffs' only allegations as to these specific Defendants, whether in their Complaint or in support of their Application, are as follows:

4. At the outset of the 2003 legislative session, Defendant Kenny Guinn, the Governor of the State of Nevada, submitted to the Nevada Legislature a request for \$980 million in tax increases to balance the budget he proposed for the 2003-2005 biennium.

Complaint (#2), p. 3, ll. 3 – 5.

6. The Governor convened a special legislative session on June 3, 2003, in order for the Legislature to appropriate funds for the K-12 public school system and to approve a tax increase to provide revenues for the appropriation. The Governor's order [sic] convening the special session did not allow the legislature to reconsider its previously-approved appropriations.

Complaint (#2), p. 3, ll. 11 – 15.

7. After the Assembly was unable to muster the 2/3 vote necessary to approve a tax increase, and at the request of the Senate Majority Leader and the Speaker of the House [sic], the Governor adjourned the special session on June 12, 2002, and convened the Legislature for a second special session to begin on June 25, 2003.

Complaint (#2), p. 3, ll. 16 – 19.

8. The Assembly was again unable to muster the 2/3 vote necessary to increase taxes and, barred from considering reductions in previously-approved spending by virtue of limitations in Governor's order [sic] convening the special session, the Legislature was unable to appropriations to fund public education by the beginning of the 2004 fiscal year on July 1, 2003.

Complaint (#2), p. 3, ll. 20 – 24

9. On July 2003 the Governor filed in the Supreme Court for [sic] the State of Nevada a Petition for Writ of Mandamus, asking the Court to order the Legislature to provide the funding for public education required by Art. 9 Sec. 6 of the Nevada Constitution and to submit the balanced budget required by Art. 9 Sec. 3 of the Nevada Constitution.

Complaint (#2), p. 3, ll. 25 – 27 – p. 4, ll. 1 – 2.

should the legislature pass tax increase without the constitutionally mandated two thirds majority and should the Governor sign such tax increase into law, as they are set to do...

Complaint (#2), p. 5, ll. 16 – 19

32. At all times relevant to the allegations contained herein, Defendant Hon. Kenny Guinn was the Governor of the State of Nevada.

Complaint (#2), p. 8, ll. 15 – 16

34. At all times relevant to the allegations contained herein, Defendant Hon. Charles E. Chinnoch was the Executive Director of the Nevada Department of Taxation, whose official duties include overseeing the Nevada Department of Taxation, which administers the duly-enacted tax statutes of the State of Nevada.

Complaint (#2), p. 8, ll. 22 – 25.

4. Plaintiffs further entitled to the declaratory judgment of this Court that the anticipated action by Defendants the State Senate, its presiding officer its Secretary, the Legislative Counsel, the Governor the Secretary sic and the Executive Director of the Nevada Department of Taxation, treating SB 6 as validly passed by the State Assembly would further infringe Plaintiffs' constitutional rights

Complaint (#2), p. 11, ll. 1 – 5

44 and The Plaintiffs are informed and believe and therefore allege that Defendants, and each of them, intend to treat the action of the Nevada Assembly as valid, and thereby proceed to enact SB 6 into law and give it full force and effect.

Complain (#2 p. 10, 7 and

III. ARGUMENT

A. STANDARD FOR MOTION TO DISMISS

In considering a motion to dismiss for failure to state a claim upon which relief can be granted, all material allegations in the complaint are accepted as and are to be considered in the light favorable to the non-moving party. *Russell v. Landrieu*, 621 F.2d 1037 (9th Cir. 1980). A dismissal under Fed.R.Civ.P. 12(b)(6) is essentially a ruling on a question of law. *North Star International v. Arizona Corp. Comm.*, 720 F.2d 578 (9th Cir. 1983). For a defendant-movant to succeed, it must appear to a certainty that a plaintiff will not be entitled to relief under any set of facts that could be proved under the allegations of the complaint. *Halet v. Wand Investment Co.*, 672 F.2d 1305 (9th Cir. 1982). Dismissal can be based on the lack of a cognizable legal theory. *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 533-534 (9th Cir. 1984).

B. PLAINTIFFS HAVE NO CAUSE OF ACTION AS TO THESE

Plaintiffs are correct that "[a]n actual controversy has...developed between Plaintiffs Defendants concerning the binding effect of Art. 4, Sec. 18(2) of the Nevada Constitution" (Complaint, p. 10, ll. 23 -24) (#2) only as it relates to the vote of the Nevada Assembly. However, if this fit to adjudicate this actual controversy between Plaintiffs and the legislative Defendants, "anticipated action" (Complaint, p. 11, l. 2) (#2) alleged by Plaintiffs as to these executive defendants, i.e., treating SB 6 as validly passed by the State Assembly, will either not occur because Plaintiffs have prevailed, or will occur and not be actionable by Plaintiffs, if the Legislative have prevailed. In either case, Plaintiffs are not entitled to relief as to the Governor, or the Director of the Nevada Department of Taxation under any set of facts alleged in the Complaint (#2).

IV. CONCLUSION

Based on the foregoing, Defendants HON. KENNY GUINN, Governor of the State of Nevada, and CHARLES E. CHINNOCK, Executive Director, Nevada Department of Taxation, respectfully request that this Honorable Court enter an Order granting their Motion to Dismiss as to them, and for such other and further relief as this Court may deem just and proper. Such Order would be proper and just, and should be issued before consideration of Plaintiffs' Emergency Applications, because Plaintiffs' allegations go to the actual acts of other legislative Defendants and because these

1 branch Defendants will act on any bill(s) determined by the Court to be lawfully approved by the
2 Legislature of the State of Nevada.

3
4 **RESPONSE TO EMERGENCY APPLICATION FOR TEMPORARY RESTRAINING ORDER
AND ORDER TO SHOW CAUSE RE PRELIMINARY INJUNCTION**

5 **I. NATURE OF RESPONSE**

6 According to the Order (#8²), Plaintiffs have filed an "Emergency Application for Temporary
7 Restraining Order and Order to Show Cause Re Preliminary Injunction." Because Plaintiffs have failed
8 to meet the requirements for injunctive relief their "Emergency Application for Temporary Restraining
9 Order and Order to Show Cause Re Preliminary Injunction." should be denied.

10 **II. FACTS**

11 On July 1, 2003, Governor Guinn filed his Petition for Writ of Mandamus. In his Petition, the
12 Governor sought, inter alia, that despite a voting impasse whereby a two-thirds majority vote of the
13 Legislature must be obtained with respect to a plan of taxation and education funding, the Legislature be
14 ordered to fulfill its constitution duties of balancing the budget and funding education pursuant to
15 Article 9, Section 2, and Article 11, Section 6. The Governor never requested that the two-thirds
16 legislative voting requirement of Article 4, Section 18, Clause 2 be declared unconstitutional or that it
17 should be stricken.

18 Subsequently, Governor Guinn filed his Supplemental Brief in Support of Mandamus arguing
19 that the result of the Legislature's failure to fulfill its constitutional duties resulted in the failure to fund
20 Nevada's K-12 educational system, the inability to hire teachers for 2003-2004, the inability to operate
21 important educational programs such as special education and textbook funding, and potential prejudice
22 to the state's bond rating.

23 Washoe and Clark County School Districts filed an amicus curiae brief confirming the harm to
24 education demonstrated by Petitioner.

25 On July 10, 2003, the Supreme Court of the State of Nevada issued its Opinion that the two-
26 thirds voting requirement of Article 4, Section 18, Clause 2, was a procedural provision and must
27 therefore yield to the substantive requirement to fund education set forth in Article 11, Section 6 of the
28

² These numbers refer to the Court's Docket numbers.

1 Nevada Constitution. See *Guinn v. The Legislature of the State of Nevada*, 119 Nev. Advance Opinion
2 34, at 15.

3 On July 14, 2003, Plaintiffs in the present action filed their Complaint (#2) and Memorandum of
4 Points and Authorities In Support of Application for Temporary Restraining Order and Order To Show
5 Cause Re Preliminary Injunction. Plaintiffs did not formally serve these documents on Governor Kenny
6 C. Guinn or Charles E. Chinnock, Executive Director, Nevada Department of Taxation. Plaintiffs'
7 Complaint (#2) seeks, in addition to other relief, that the named Defendants be enjoined from taking
8 action in furtherance of the Nevada Supreme Court's July 10, 2003 Opinion.

9 This Court issued and filed its Order (#2) on July 14, 2003 giving Defendants to 12:00 noon on
10 Tuesday, July 15, 2003 to file in the United States District Court at Reno, Nevada any memorandum of
11 authorities in response to Plaintiff's Application for Injunctive Relief.

12 **III. ARGUMENT**

13 **A. Standard of review for preliminary injunction.**

14 The Ninth Circuit uses two alternative tests to determine whether a preliminary injunction
15 should issue. According to the "traditional test":

16 The traditional equitable criteria for granting preliminary injunctive relief
17 are: (1) a strong likelihood of success on the merits; (2) the possibility of
18 irreparable injury to the plaintiffs if injunctive relief is not granted; (3) a
19 balance of hardships favoring the plaintiffs; and (4) advancement of the
public interest.

20 *Textile Unlimited, Inc. v. A.B.M.H. & Co. Inc.*, 240 F.3d 781, 786 (9th Cir. 2001) (citing *Los Angeles*
21 *Mem'l Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1200 (9th Cir. 1980) A preliminary
22 injunction is "a device for preserving the status quo and preventing the irreparable loss of rights before
23 judgment." *Id.* (citing *Sierra On-Line, Inc. v. Phoenix Software, Inc.* 739 F.2d 1415 (9th Cir. 1984)).

24 In the alternative, the Ninth Circuit uses a "sliding scale" or balancing test: Preliminary
25 injunctive relief is available to a party who demonstrates either: (1) a combination of probable success
26 on the merits and the possibility of irreparable harm; or (2) that serious questions are raised and the
27 balance of hardships tips in its favor. *A & M Records, Inc. v. Napster, Inc.* 239 F.3d 1004, 1013 (9th
28 Cir. 2001) (citing *Prudential Real Estate Affiliates, Inc. v. PPR Realty, Inc.* 204 F.3d 867, 874 (9th Cir.

2000)). Under either test, Plaintiffs are not entitled to a preliminary injunction.

B. Plaintiffs will not suffer irreparable injury if injunctive relief is not granted.

Plaintiffs have not met their substantial burden of establishing irreparable injury if injunctive relief is not granted.

The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.

Sampson v. Murray, 415 U.S. 61, 90 (1974) (citing *Virginia Petroleum Jobbers Assn. v. FPC*, 259 F.2d 921.) In addition, speculative injury does not constitute irreparable injury sufficient to warrant granting a preliminary injunction. *Goldie's Bookstore, Inc. v. Superior Court*, 739 F.2d 466, 472 (9th Cir. 1984). A plaintiff must do more than merely allege imminent harm sufficient to establish standing; a plaintiff must demonstrate immediate threatened injury as a prerequisite to preliminary injunctive relief. *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 634 F.2d 1197, 1201 (9th Cir. 1980).

Plaintiffs allege they "can demonstrate much more than a mere possibility of irreparable harm." See Memorandum Of Points And Authorities In Support Of Plaintiff's Application For Temporary Restraining Order and Order To Show Cause Re Preliminary Injunction, Page 9, Lines 26 - 27. Yet, Plaintiffs merely allege "[t]he constitutional violations at issue in this litigation are the infringement of Plaintiff's constitutionally protected rights to vote, to have those votes counted fully and equally (and not diluted), to choose the structure for their own government and have that republican structure guaranteed to them, and to not have their property taken without due process of law." *Id.*, at Page 10, Lines 1 - 4. Such conclusory allegations are insufficient to establish irreparable injury. Plaintiffs have failed to allege any violation of their federal voting rights inasmuch as they still vote with such votes being counted fully and equally. Similarly, Plaintiffs have not even alleged that their remedy in the ordinary course of law is inadequate.

C. Plaintiff's should not prevail on the merits because the Nevada Supreme Court has final authority to interpret and enforce the Nevada Constitution.

At all times throughout the litigation of this matter, Governor Guinn requested only that the Nevada Supreme Court "order the Legislature to provide the funding for public education required by

1 Article 11, Section 6 of the Nevada Constitution, and to submit the balanced budget required by Article
2 9, Section 2 of the Nevada Constitution.” Plaintiffs’ Memorandum in Support of Petition, etc., p. 3, l. 9
3 – p.4 l. 1-2. The Court independently determined a conflict existed in the various provisions of the
4 Nevada Constitution, and ruled that the supermajority requirement of *Nev. Const. Art. 4, Sec. 18(2)*
5 must “give way.” *Guinn v. The Legislature, Id.* at 16. This determination was beyond any relief sought
6 by the Governor. However, the decision was within the Nevada Supreme Court’s sole authority to
7 definitively interpret the Nevada Constitution. See *People v. Cahill*, 5 Cal. 4th 478, 545 (1993) and
8 *Utah County by County Bd. Of Equalization vs. Intermountain Health Care, Inc.*, 709 P.2d 265, 268
9 (Utah 1985).

10 It is Plaintiffs’ burden to show a strong likelihood of success on the merits. *Michel v. Bare*, 230
11 F. Supp. 1147 (D. Nev. 2002). Plaintiffs assert that the Nevada Assembly’s vote on S.B. 6 was
12 inconsistent with the Nevada Constitution, citing only to Art. 4, Sec. 18(2) of that Constitution.
13 Meanwhile, Plaintiffs intentionally avoid the Supreme Court’s Opinion interpreting the entire document
14 (See *Guinn v. The Legislature, Id.*). While Defendants Guinn and Chinnock did not seek the
15 invalidation of the supermajority requirement by the Nevada Supreme Court in *Guinn v. The*
16 *Legislature*, it is settled law that the supreme court of any state is the authoritative interpreter of its
17 constitution. See *People v. Cahill*, 5 Cal. 4th at 545 (1993) and *Utah County by County Bd. Of*
18 *Equalization vs. Intermountain Health Care, Inc.*, 709 P.2d at 268. In addition, the Rooker-Feldman
19 doctrine recognizes that, with the exception of habeas corpus petitions, lower federal courts lack subject
20 matter jurisdiction over challenges to state court judgments. *District of Columbia Court of Appeals v.*
21 *Feldman*, 460 U.S. 462, 476 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416, (1923).

22 1. Legislators’ Vote Dilution Claim.

23 The Nevada Supreme Court has authoritatively determined that the supermajority
24 provisions of *Nev. Const. Art. 4, Sec. 18(2)* must give way to conflicting provisions providing for the
25 substantive right under the same Constitution to public education, even if it is only by majority vote,
26 under the deadlocked circumstances prevailing upon passage of S.B. 6. *Guinn v. Legislature, Id.* at 15.

27 Therefore, Plaintiffs’ argument that “under the provisions of the Nevada Constitution
28 the vote [of] a member of the State Assembly is 1/15 of the votes necessary to defeat a tax increase.

1 Under the procedure employed by the Assembly...an assemblyman's vote was only 1/21 of the votes
2 necessary" (Plaintiffs' Memorandum in Support of Petition, etc., p. 4, l. 28 – p. 5, l. 3, emphasis added)
3 rests on a misapprehension as to the requirements of the Nevada Constitution, as interpreted by the
4 State's highest court. To succeed on the merits, Plaintiffs would have to succeed on the novel theory
5 that the Nevada Supreme Court is not the final authority as to the meaning of the various provisions of
6 the Nevada Constitution, contrary to well-established precedent. See *People v. Cahill*, 5 Cal. 4th at 545
7 (1993) and *Utah County by County Bd. Of Equalization vs. Intermountain Health Care, Inc.*, 709 P.2d
8 at 268. This position constitutes an extreme extension of existing law and cannot be said to be likely to
9 succeed.

10 2. Voter Plaintiff's Derivative Vote Dilution Claim

11 The Voter Plaintiffs admit that they rely on extension of a hypothetical example, "it
12 could not be argued seriously that voters would not have an injury if their congressman was not
13 permitted to vote at all." Plaintiffs' Memorandum in Support of Petition, etc., p. 5, l. 11-12, quoting
14 *Michael v. Anderson*, 14 F.3d 623, 262 (D.C. Cir. 1994).

15 Once again, Plaintiffs erroneously assert that the Assembly failed to abide by a Nevada
16 constitutional provision, purporting to substitute their reading of the Nevada Constitution for the
17 definitive interpretation of the Nevada Supreme Court. Ironically, Plaintiffs point to elimination of the
18 supermajority requirement as violating the "one man, one vote" standard, when the effect of so doing is
19 to count each legislative vote equally.

20 In any case, it cannot be said that it is likely that this Court will find that the process has
21 reached the point of patent and fraudulent unfairness, such that a violation of the due process clause
22 should be found. See *Reynolds v. Simms*, 377 U.S. 533, 554 (1964).

23 3. Voter Plaintiffs' Effective Vote Claims

24 Plaintiffs persist in their collateral attack on the authority of the Nevada Supreme Court
25 to interpret the Nevada constitution by asserting that "the State Assembly essentially treated the
26 successful votes for the Gibbons Constitutional Tax Initiative as without any effect..." Plaintiffs'
27 Memorandum in Support of Petition, etc., p. 6, l. 12-13. By this logic, there would be a violation of the
28 Equal Protection Clause any time that a state's highest court found an amendment passed by initiative to

1 be unconstitutional. For example, were an electoral majority to vote to bar male students from public
2 education by amendment to a state's constitution, it would clearly not be a violation of that majority's
3 "right to an effective vote" for a state supreme court to rule such amendment unconstitutional.

4 Plaintiffs have not in any way demonstrated any violation of federal voting rights, let
5 alone demonstrated likelihood of success on this claim.

6 4. Plaintiffs' Republican Guarantee Claim

7 Plaintiffs once again falsely claim that the State Assembly ignored the governing
8 structure imposed upon it. Plaintiffs' Memorandum in Support of Petition, etc., p. 8, l. 18-19. To the
9 contrary, the Assembly was fulfilling the requirements enunciated by the Nevada Supreme Court.
10 Plaintiffs concede that "claims based on the Republican Guarantee Clause have long been viewed as
11 nonjusticiable political questions," *Id.*, p. 7, l. 6 - 8, and then argue that their complaint embodies the
12 rare instance where this is not the case. This is only because Plaintiffs fail to acknowledge the authority
13 of the Nevada Supreme Court to harmonize what it finds to be conflicting provisions of the Nevada
14 Constitution. Plaintiffs' own argument is replete with cases showing that they are unlikely to succeed
15 on the merits. *Id.* p. 7, l. 20 - 24; p. 8, l. 2.

16 5. Taxpayer Plaintiffs' Due Process Claims

17 Plaintiffs finally make the claim that when and if any tax pursuant to S.B. 6 is imposed,
18 citizens and business will have their property taken without due process of law. It is inaccurately
19 asserted that such tax or taxes will have been "adopted without compliance with constitutionally
20 mandated process" *Id.* p. 9, l. 15 - 16. This assertion ignores the undisputed fact that the Nevada
21 Assembly acted in compliance with the judicial mandate that the supermajority requirement of *Nev.*
22 *Const.* Art. 4, Sec. 18(2) must "give way to the simple majority requirement of Article 4, Section 18(1)
23 in order that the specific provisions concerning education are not defeated." *Guinn v. Legislature*, at 14.
24 Only the Nevada Supreme Court may authoritatively interpret the Nevada constitution, and once it has
25 done so, neither Plaintiffs nor Defendants may disturb the rule of law and substitute their interpretation
26 of the Constitution for that of the duly-elected and lawfully constituted Nevada Supreme Court. There
27 has been no showing that Plaintiffs are likely to prevail in any contrary argument.

D. In balancing the equities, Defendants will be harmed in their public duty more than the Plaintiffs helped by the injunction.

It is the long-standing and salutary policy of courts of equity to balance the equities of the parties before it in determining whether or not to issue injunctive relief. *Coffee Dan's, Inc. v. Coffee Don's Charcoal Broiler*, 305 F. Supp. 1210, 1216 (N.D. Cal. 1969). The court will consider the advantage to be gained by plaintiff if it is granted the injunction against the hardship to be suffered by defendant. *Id.* at 1216 (citing *Hamilton Watch Co. v. Benrus, Watch Co.* 206 F.2d 738, 740; *Clairol Incorporated v. Gillette Company*, 270 F. Supp. 371, 381 (E.D.N.Y.1967); *aff'd* 389 F.2d 264 (2d Cir. 1968); *Helena Rubinstein, Inc. v. Frances Denney, Inc.*, 286 F. Supp. 132, 133 (S.D.N.Y.1968); *Chips 'N Twigs, Inc. v. Blue Jeans Corp.*, 146 F. Supp. 246, 248 (E.D.Pa.1956)). Absent malicious conduct, if the burden of a preliminary injunction is "all out of balance" with the benefit to be obtained by plaintiff, it should be denied. *See Alpha Distributing Co. v. Jas. Barclay & Co.*, 215 F.2d 510, 511 (9th Cir. 1954).

One of the factors taken into account in balancing the equities is the nature of the injunctive relief sought, that is, will it merely proscribe a course of action (prohibitory injunction) or will it require defendant to take affirmative, costly remedial steps (mandatory injunction). *Id.* at 1217-19. Mandatory injunctions are disfavored by the courts, especially before trial, and therefore such injunctions will be issued with great caution and only in exceptional cases. *Id.* at 1217 (citing 42 Am. Jur. 2d 753, § 21 *Black v. Jackson*, 177 U.S. 349, 363, 20 S. Ct. 648, 44 L. Ed. 801 (1900))

In the present action, the seriousness of the harm to the Defendants and the citizens of Nevada is undisputed. As the Nevada Supreme Court previously found, Defendants inability to fulfill their duties:

has precipitated an imminent fiscal emergency. Nevada now faces an unprecedented budget crisis. Schools have not been funded for the upcoming school year. Teachers have not been hired. Educational programs have been eliminated. Planning for the academic year is not possible, and the state's bond rating may be jeopardized.

Guinn, supra at 9 – 10.

E. Granting the injunction is not in the public interest.

A court must always consider whether the public interest would be advanced or impaired by issuance of an injunction in any action in which the public interest is affected. *Caribbean Marine Services Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988).

1 Plaintiffs' seeking of a preliminary injunction arises from the State Assembly's compliance with
2 the Nevada Supreme Court's writ of mandamus "directing the Legislature to proceed expeditiously with
3 the 20th Special Session under simple majority rule." See *Guinn v. The Legislature Of the State of*
4 *Nevada, et al*, 119 Nev. Advance Opinion 34, Page 16.

5 The Nevada Supreme Court reviewed the constitutional history of Nevada Constitution, with
6 respect to education. *Id.*, at Pages 12 and 13. It found that Article 11, Section 6³ compels the
7 Legislature to support and maintain the public school system. *Id.*, at Page 7. It further found that the
8 Nevada Constitution's framers strongly believed that each child should have the opportunity to receive a
9 basic education. *Id.*, at Page 13. As set forth above, any harm to these Defendants in their official
10 capacities is intertwined with their duty to act in the public interest.

11 ///

12 ///

13 ///

14 ///

15 ///

16 ///

17 ///

18 ///

19 ///

20 ///

21 ///

22 | ///

23 ///

24 | ///

25 | ///

26 | ///

27

28 ³ Nev. Const. art 11, § 6 provides that "[i]n addition to other means provided for the support and maintenance of [the state] university and common schools, the legislature shall provide for their support and maintenance by direct legislative appropriation from the general fund."

1 IV. CONCLUSION

2 Based on the foregoing, Defendants Kenny C. Quinn and Charles E. Chinnock respectfully
3 request that this Court deny Plaintiffs' Application for Temporary Restraining and Order To Show
4 Cause Re Preliminary Injunction.

5 DATED this 15th day of July, 2003.

6
7 BRIAN SANDOVAL
Attorney General

8
9 By: 

10 BRIAN SANDOVAL
Nevada Attorney General
Nevada State Bar No. 3805
11 JEFF PARKER
Solicitor General
Nevada State Bar No. 3187
100 North Carson Street
12 Carson City, NV 89701-4717
Telephone (775) 684-1100
13 Facsimile (775) 684-1108

14
15 Attorneys for Defendants Kenny C. Guinn, and
16 Charles E. Chinnock
17
18
19
20
21
22
23
24
25
26
27
28

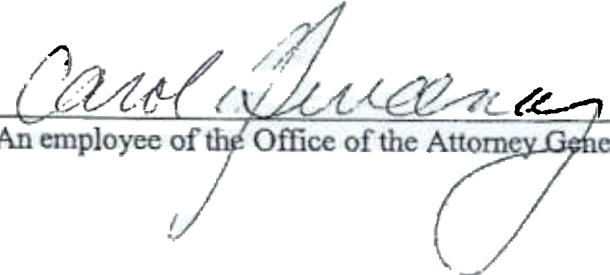
1
2 **CERTIFICATE OF SERVICE**

3 hereby certify that I am an employee of the Office of the Attorney General and that on the 15th
4 day of July, 2003, I faxed a true copy of the foregoing **DEFENDANTS GUINN'S AND**
5 **CHINNOCK'S MOTION TO DISMISS and RESPONSE TO EMERGENCY APPLICATION**
6 **FOR TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE RE**
7 **PRELIMINARY INJUNCTION** to:

8 **JEFFERY A. DICKERSON, ESQ.**
9 9655 Gateway
10 Reno, Nevada 89511
11 Tel (775) 786-6664
12 Fax (775) 786-7466
13 Attorney for Plaintiffs

14 **BRENDA J. ERDOES, ESQ.**
15 Legislative Counsel
16 401 S. Carson Street
17 Carson City, Nevada 89701
18 Tel (775) 684-6830
19 Fax (775) 684-6761
20 Attorney for Defendants

21 **THE LEGISLATURE OF THE STATE OF NEVADA;**
22 **THE SENATE OF THE STATE OF NEVADA;**
23 **HON. LORRAINE T. HUNT, President of the Senate;**
24 **THE ASSEMBLY OF THE STATE OF NEVADA;**
25 **HON. RICHARD D. PERKINS, Speaker of the Nevada Assembly;**
26 **JACQUELINE SNEDDON, Chief Clerk of the Nevada Assembly;**
27 **DIANE KEETCH, Assistant Chief Clerk of the Nevada Assembly;**
28 **BRENDA ERDOES, Legislative Counsel of the Nevada Legislature;**
and CLAIRE J. CLIFT, Secretary of the Nevada Senate

21
22 
23 An employee of the Office of the Attorney General
24
25
26
27
28

C:\P\Public\Governor's Withdrawal to App for TRQ.doc

1 BRIAN SANDOVAL
2 Nevada Attorney General
JEFF PARKER
3 Solicitor General
4 Nevada Bar No. 3187
RICHARD C. LINSTROM
5 Assistant Solicitor General
State Bar No. 5407
6 100 N. Carson Street
7 Carson City, NV 89701
Tel (775) 684-1100
8 Fax (775) 684-1108
Attorneys for Defendant
9 HON. DEAN HELLER, Secretary of State of the State of Nevada

10
11 UNITED STATES DISTRICT COURT
12 DISTRICT OF NEVADA

13 HON. SHARRON E. ANGLE, ET AL.,

14 Plaintiffs,

15 v.

16
17 THE LEGISLATURE OF THE STATE OF
NEVADA, ET AL.,

18 Defendants.

Case No: CV-03-0371-HDM(VPC)

MOTION TO DISMISS

19 DEFENDANT HON. DEAN HELLER, Secretary of State of the State of Nevada, by and
20 through counsel, Nevada Attorney General BRIAN SANDOVAL, hereby submits his Motion to
21 Dismiss Plaintiff's Complaint. This Motion is made and based upon Fed.R.Civ.P.12(b)(6), the papers

22 ///

23 ///

24 ///

25 ///


26 ///

27 ///

28 ///

1 and pleadings on file herein, the attached Memorandum of Points and Authorities, and any facts as may
2 be adduced at oral argument hereon.

3 DATED this 15th day of July, 2003.



6 BRIAN SANDOVAL
Nevada Attorney General

7 JEFF PARKER
8 Solicitor General

9 RICHARD C. LINSTROM
10 Assistant Solicitor General

11 Attorneys for Defendant
12 HON. DEAN HELLER,
13 Secretary of State of the State of Nevada

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

MEMORANDUM OF POINTS AND AUTHORITIES

I. NATURE OF THE MOTION

Plaintiffs, by way of both their Complaint and their Emergency Applications for Temporary Restraining Order and Order to Show Cause Re Preliminary Injunction, seek to remedy alleged violations of their federal constitutional rights caused when other state legislative Defendants purported to "pass" SB 6 out of the Nevada Assembly without the 2/3 vote required by Art. 4, Sec. 18(2) of the Nevada Constitution. Court action on Plaintiffs' prayer for relief or their Applications as to the legislative Defendants would not affect this executive branch Defendant. The Secretary of State is only empowered to act after legislation has been lawfully approved by the legislature. Thus, Plaintiffs' pleadings are properly directed to the lawfulness of the actions of the legislative defendants, not this defendant.

II. BACKGROUND

On July 14, 2003, Plaintiffs filed their Complaint for Violation of Civil and Constitutional Rights, Emergency Applications for Temporary Restraining Order and Order to Show Cause Re Preliminary Injunction and a Memorandum of Points and Authorities in Support thereof.

In their Complaint, Plaintiffs prayed for relief as follows:

33. At all times relevant to the allegations contained herein, Defendant Hon. Dean Heller was the Secretary of State of the State of Nevada, whose official duties include retaining laws passed by the Legislature and signed by the Governor in conformity with the Nevada Constitution, and assigning to such laws a chapter number in the compilation of the Statutes of Nevada.

Complaint (#2), p. 8, ll. 17 – 21.

III. ARGUMENT

A. STANDARD FOR MOTION TO DISMISS

In considering a motion to dismiss for failure to state a claim upon which relief can be granted, all material allegations in the complaint are accepted as and are to be considered in the light most favorable to the non-moving party. *Russell v. Landrieu*, 621 F.2d 1037 (9th Cir. 1980). A dismissal under Fed.R.Civ.P. 12(b)(6) is essentially a ruling on a question of law. *North Star International v. Arizona Corp. Comm.*, 720 F.2d 578 (9th Cir. 1983). For a defendant-movant to succeed, it must appear

to a certainty that a plaintiff will not be entitled to relief under any set of facts that could be proved under the allegations of the complaint. *Halet v. Wand Investment Co.*, 672 F.2d 1305 (9th Cir. 1982). Dismissal can be based on the lack of a cognizable legal theory. *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 533-534 (9th Cir. 1984)

B. PLAINTIFFS HAVE NO CAUSE OF ACTION AS TO THIS DEFENDANT

Plaintiffs are correct that "[a]n actual controversy has...developed between Plaintiffs and Defendants concerning the binding effect of Art. 4, Sec. 18(2) of the Nevada Constitution" (Complaint, p. 10, ll. 23 -24) but only as it relates to the vote of the Nevada Assembly. However, if this Court sees fit to adjudicate this actual controversy between Plaintiffs and the legislative Defendants, the "anticipated action" (Complaint, p. 11, l. 2) alleged by Plaintiffs as to this executive branch defendant, i.e., treating SB 6 as validly passed by the State Assembly, will either not occur because Plaintiffs have prevailed, or will occur and not be actionable by Plaintiffs, if the legislative Defendants have prevailed. In either case, Plaintiffs are not entitled to relief as to the Secretary of State under any set of facts alleged in the Complaint.

IV. CONCLUSION

Based on the foregoing, Defendant HON. DEAN HELLER, Secretary of State of the State of Nevada, respectfully requests that this Honorable Court enter an Order granting his Motion to Dismiss as to him, and for such other and further relief as this Court may deem just and proper. Such Order would be proper and just, and should be issued before consideration of Plaintiffs' Emergency Applications, because Plaintiffs' allegations go to the actual acts of other legislative Defendants and

///

///

///

///

///

///

///

///

1 because this executive branch Defendant will only act on any bill(s) determined by the Court to be
2 lawfully approved by the Legislature of the State of Nevada.

3 DATED this 15th day of July, 2003.

5 BRIAN SANDOVAL
6 Attorney General

7 By: 

BRIAN SANDOVAL
Nevada Attorney General

9 JEFF PARKER
10 Solicitor General

11 RICHARD C. LINSTROM
12 Assistant Solicitor General
13 100 North Carson Street
14 Carson City, Nevada 89701
15 Tel. (775) 684-1100
16 Fax (775) 684-1108

17 Attorneys for Defendant
18 HON. DEAN HELLER,
19 Secretary of State of the State of Nevada
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

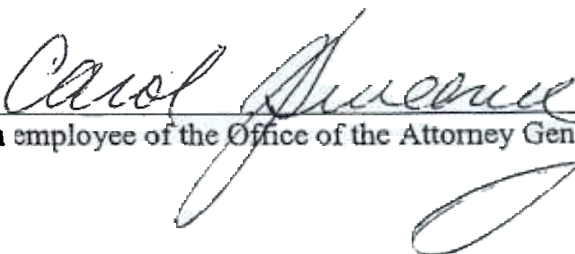
CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Office of the Attorney General and that on the 15th day of July, 2003, I faxed a true copy of the foregoing **MOTION TO DISMISS** to:

JEFFERY A. DICKERSON, ESQ.
9655 Gateway
Reno, Nevada 89511
Tel (775) 786-6664
Fax (775) 786-7466
Attorney for Plaintiffs

BRENDA J. ERDOES, ESQ.
Legislative Counsel
401 S. Carson Street
Carson City, Nevada 89701
Tel (775) 684-6830
Fax (775) 684-6761
Attorney for Defendants

THE LEGISLATURE OF THE STATE OF NEVADA;
THE SENATE OF THE STATE OF NEVADA;
HON. LORRAINE T. HUNT, President of the 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;
and CLAIRE J. CLIFT, Secretary of the Nevada Senate


An employee of the Office of the Attorney General

C:\Work\Parbat\Governor's Writ\MTD to Angie re Heller.doc