



1 Jeffrey A. Dickerson  
 (Nev. Bar No. 2690)  
 2 9655 Gateway  
 Reno, NV 89511  
 3 (775) 786-6664  
 (775) 786-7466 FAX

4 John C. Eastman, *Of Counsel*  
 5 (Cal. Bar No. 193726)  
 The Claremont Institute Center  
 6 For Constitutional Jurisprudence  
 c/o Chapman Univ. School of Law  
 7 One University Drive  
 Orange, CA 92866  
 8 (714) 628-2587  
 (714) 844-4817 FAX

9 Attorneys for Plaintiffs  
 10

11 UNITED STATES DISTRICT COURT  
 DISTRICT OF NEVADA

12 Hon. Sharron E. Angle, Hon. Walter Andonov, Hon. Bob  
 13 Beers, Hon. David F. Brown, Hon. John C. Carpenter, Hon.  
 Chad Christensen, Hon. Peter J. Goicoechea, Hon. Thomas  
 14 J. Grady, Hon. Donald G. Gustavson, Hon. Lynn C.  
 Hettrick, Hon. Ronald L. Knecht, Hon. R. Garn Mabey, Jr.,  
 15 Hon. John W. Marvel, Hon. Roderick R. Sherer, Hon.  
 Valerie E. Weber, members of the Assembly of the State of  
 16 Nevada; Hon. Mark E. Amodei, Hon. Barbara K.  
 Cegavske, Hon. Warren B. Hardy II, Hon. Mike  
 17 McGinness, Hon. Dennis Nolan, Hon. Ann O'Connell,  
 Hon. Dean A. Rhoads, Hon. Sandra J. Tiffany, Hon.  
 18 Maurice E. Washington, members of the Senate of the  
 State of Nevada; Ira Victor Spinack, Eddie Floyd, Dolores  
 19 Holets, Janine Hansen, Lynn Chapman, O.Q. Chris  
 Johnson, Thomas Jefferson, David Schuman, Joel Hansen,  
 20 Jonathan Hansen, Christopher Hansen, John Lusk, Ray  
 Bacon, Greg White, Mary Lau, Larry Martin, Nanette  
 21 Moffitt, Richard Ziser, Robert Larkin, Jill Dickman,  
 Thomas Cox, Stan Paher and Judith Moss, taxpayers and  
 22 citizens of, and voters in, the State of Nevada; Nevada  
 Manufacturers Association; Retail Association of Nevada;  
 23 Nevadans for Tax Restraint; Nevada Concerned Citizens,

24 Plaintiffs,

25 vs.

26 The Legislature of the State Of Nevada; The Senate of the  
 State of Nevada; Hon. Lorraine T. Hunt, President of the  
 27 Nevada Senate; The Assembly of the State of Nevada; Hon.  
 Richard D. Perkins, Speaker of the Nevada Assembly;  
 28 Jacqueline Sneddon, Chief Clerk of the Nevada Assembly;

) Case No.

) COMPLAINT FOR  
 VIOLATION  
 OF CIVIL AND  
 CONSTITUTIONAL  
 RIGHTS

) (42 U.S.C. § 1983; 28  
 U.S.C. §§ 1331, 1343,  
 2201)

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; DOES 1 through 10 inclusive; all in )  
 both their official and individual capacities, )

Defendants.

### COMPLAINT

COME NOW, Plaintiffs, by and through their attorneys of record, John C. Eastman, Esq., The  
 Claremont Institute Center for Constitutional Jurisprudence, and Jeffrey A. Dickerson, Esq.,  
 and for their causes of action and claims for relief against the Defendants, and each of them,  
 allege and complain as follows:

### JURISDICTION

1 This action arises under the Republican Guaranty Clause of Article IV, Section 4 of the  
 2 United States Constitution and the Fourteenth Amendment to the United States  
 3 Constitution and under 42 U.S.C. §§ 1983 and 1988. This Court has subject matter  
 4 jurisdiction of this action under 28 U.S.C. § 1331 (federal question jurisdiction) and  
 5 § 1343 (civil rights).

### VENUE

2. Venue is proper under 28 USC § 1391 as there is only one official district for Nevada,  
 defendants reside throughout Nevada, and all the events giving rise to this action  
 occurred in Nevada.

### INTRODUCTION

3. Article 4, Section 18(2) of the Nevada Constitution, adopted by voter initiative as a  
 constitutional amendment in 1996 (the "Gibbons Constitutional Tax Initiative"),  
 requires a two-thirds vote of each house of the Nevada legislature "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."

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

During its 2003 regular legislative session, the Nevada State Assembly was unable to muster the 2/3 vote necessary to adopt the proposed tax increase, but the Nevada Legislature instead passed appropriations totaling \$3,264,269,361 for various governmental functions, exclusive of public education, to be drawn from existing state revenues before its session concluded on June 3, 2003

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 convening the special session did not allow the legislature to reconsider its previously-approved appropriations.

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, 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

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 the Governor's order convening the special session, the Legislature was unable to provide appropriations to fund public education by the beginning of the 2004 fiscal year on July 1, 2003

On July 1, 2003, the Governor filed in the Supreme Court for 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 Article , § 6 of the Nevada Constitution,

1 and to submit the balanced budget required by Article 9, § 2 of the Nevada  
2 Constitution.

3 10 On Thursday, July 10, 2003, the Supreme Court of Nevada issued a writ of mandamus  
4 "directing the Legislature to proceed expeditiously with the 20th Special Session [to  
5 provide funding for public education] *under simple majority rule*," contrary to the  
6 express provisions of Article 4, § 18(2) of the Nevada Constitution, as the Court itself  
7 acknowledged.

8 11. The Nevada State Assembly held a floor session on Sunday, July 13, 2003, during  
9 which it held a vote on an amended version of SB 6, a tax increase measure previously  
10 approved by the State Senate on June 25 but which failed on two different occasions to  
11 receive the necessary 2/3 vote in the State Assembly.

12 12. The vote on SB 6 in the Assembly was 26 in favor, 16 against, short of the 2/3 majority  
13 required by Article 4, § 18(2) of the Nevada Constitution. Nevertheless, the Speaker of  
14 the Assembly, Defendant Richard D. Perkins, ruled that the measure had "passed."

15 13. After a point of order by Plaintiff Lynn C. Hettrick was not sustained, and a request for  
16 a roll-call vote on the point of order was rebuffed, Defendant Perkins gaveled the  
17 session adjourned.

18 14. The Nevada State Senate has scheduled a floor session for Monday, July 14, 2003, at  
19 12:00 Noon, at which it is scheduled to consider, and expected to approve by majority  
20 vote, the amendments to SB 6 approved by the State Assembly on July 13, 2003, in  
21 violation of Article 4, § 18(2) of the Nevada Constitution.

22 15. The order of the Nevada Supreme Court directing the Legislature to proceed to  
23 consider a tax increase by majority vote rather than the 2/3 vote required by the Nevada  
24 Constitution, and the action of the Nevada Assembly to adopt SB 6 without the  
25 requisite 2/3 vote, dilutes the votes of individual members of the State Legislature in  
26 violation of the Fourteenth Amendment of the U.S. Constitution, infringes the voting  
27 and equal protection rights of citizens of the State of Nevada in violation of the  
28

1 Fourteenth Amendment of the U.S. Constitution, and contravenes the Republican  
2 Guaranty Clause of Article IV of the U.S. Constitution

- 3 16. If adopted in violation of the Nevada Constitution, the tax increase proposed by SB 6  
4 on a certain segment of Nevada business would amount to a taking of property without  
5 due process of law, in violation of the Fourteenth Amendment of the U.S. Constitution.  
6

7 NATURE OF THE COMPLAINT

- 8 17. This Complaint alleges causes of action for injunctive, legal, and declaratory relief,  
9 including claims under 42 U.S.C. §§ 1983 and 1988, the Republican Guaranty Clause  
10 of Article IV of the Constitution of the United States, and the Due Process and Equal  
11 Protection Clauses of the Fourteenth Amendment to the Constitution of the United  
12 States. It alleges that the Nevada State Assembly has already violated the due process  
13 and equal protection rights of the Plaintiffs by acting in violation of the clear  
14 constitutional mandate of the people of Nevada as memorialized in the Nevada  
15 Constitution, Article 4 Section 18(2), and that as a result has violated the Republican  
16 Guarantee Clause of Article IV of the U.S. Constitution. It alleges further that should  
17 the legislature pass a tax increase without the constitutionally mandated two thirds  
18 majority, and should the Governor sign such a tax increase into law, as they are set to  
19 do, such action would violate the clear mandates of the Nevada Constitution and would  
20 violate the due process and equal protection rights of the Plaintiffs protected by the  
21 Fourteenth Amendment of the Constitution of the United States and the Republican  
22 Guarantee Clause of Article IV

- 23 18. This action is also brought pursuant to 42 U.S.C. § 1983 and 28 U.S.C. §§ 2201 and  
24 2202, to have declared unconstitutional the actions of the Nevada Assembly, and to  
25 enjoin any further violations of the Nevada Constitution that operate to deprive  
26 Plaintiffs of federally-protected civil, political, and constitutional rights  
27  
28

**PARTIES**

**PLAINTIFFS:**

19. At all times relevant to the allegations contained in this complaint, Plaintiffs 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, and Hon. Valerie E. Weber have been members of the Nevada State Assembly who have voted and intend to keep voting against certain bills that would increase taxes in Nevada, including SB 6. (The "Assembly Plaintiffs" herein).
20. At all times relevant to the allegations contained in this complaint, Plaintiffs 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 have been members of the Nevada State Senate who have voted and intend to keep voting against certain bills that would increase taxes in Nevada, including SB 6. (The "Senate Plaintiffs" herein; collectively, the Senate Plaintiffs and the Assembly Plaintiffs are referred to herein as the "Legislator Plaintiffs").
21. At all times relevant to the allegations contained in this complaint, Plaintiffs Ira Victor Spinack, Eddie Floyd, Dolores Holets, Janine Hansen, Lynn Chapman, O.Q. Chris Johnson, Thomas Jefferson, David Schuman, Joel Hansen, Jonathan Hansen, Christopher Hansen, John Lusk, Ray Bacon, Greg White, Mary Lau, Larry Martin, Nanette Moffitt, Richard Ziser, Robert Larkin, Jill Dickman, Thomas Cox, Stan Paher and Judith Moss have been taxpayers and citizens of, and voters in, the State of Nevada, at least some of whom who reside in the districts of, and voted for, one or more of the Legislator Plaintiffs, and at least some of whom voted for the "Gibbons Constitutional Tax Initiative" in 1996. (The "Individual Voter Plaintiffs" herein).



22. At all times relevant to the allegations contained in this complaint, Plaintiffs Nevada Manufacturers Association and Retail Association of Nevada have been trade associations whose members include business entities in the State of Nevada who will be subject to the gross receipts tax created by SB 6. (The "Taxpayer Association Plaintiffs" herein).

23. At all times relevant to the allegations contained in this complaint, Plaintiff Nevadans for Tax Restraint has been an organization whose members are taxpayers in the State of Nevada. (Together with the Individual Voter Plaintiffs and the Taxpayer Association Plaintiffs, the "Taxpayer Plaintiffs" herein).

24. At all times relevant to the allegations contained in this complaint, Plaintiff Nevada Concerned Citizens has been an organization whose members are voters in the State of Nevada. (Together with the Individual Voter Plaintiffs, the "Voter Plaintiffs" herein).

**DEFENDANTS:**

25. At all times relevant to the allegations contained herein, Defendant Legislature of the State of Nevada was the official legislative body in the State created by the Nevada Constitution to enact laws pursuant thereto.

26. At all times relevant to the allegations contained in this complaint, Defendant Lorraine T. Hunt was President of the Nevada Senate, whose official duties include signing bills that have been passed by the Senate in conformity with the Nevada Constitution.

27. At all times relevant to the allegations contained in this complaint, Defendant Richard Perkins was Speaker of the Nevada Assembly, whose official duties include signing bills that have been passed by the Assembly in conformity with the Nevada Constitution.

28. At all times relevant to the allegations contained in this complaint, Defendant Claire J. Clift was Secretary of the Nevada Senate, whose official responsibilities include transmitting to the Legal Division for enrollment bills passed by the Senate in conformity with the Nevada Constitution.

29. At all times relevant to the allegations contained in this complaint, Defendant Jacqueline Sneddon was Chief Clerk of the Nevada Assembly, whose official duties include signing bills that have been passed by the Assembly in conformity with the Nevada Constitution and transmitting the signed bills to the Legal Division for delivery to the Governor for his consideration.

30. At all times relevant to the allegations contained in this complaint, Defendant Diane Keetch was Assistant Chief Clerk of the Nevada Assembly, whose official duties including signing bills passed by the Assembly in conformity with the Nevada Constitution and transmitting the bills, together with any amendments passed by the Assembly, to the Senate for further consideration.

31. At all times relevant to the allegations contained in this complaint, Defendant Brenda Erdoes was the Legislative Counsel of the Nevada Legislature, whose official duties include enrolling bills passed by the Nevada Legislature in conformity with the Nevada Constitution.

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

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.

34. At all times relevant to the allegations contained herein, Defendant Hon. Charles E. Chinnock 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.

35. The true names and capacities of Defendants named herein as DOES through 10 are unknown to Plaintiffs, who therefore sue these Defendants by such fictitious names. Plaintiffs are informed and believe and thereon allege that the Defendants designated



1 herein as DOES 1 through 10 are responsible for the events and happenings herein  
2 referred and alleged and proximately caused damages to Plaintiffs as alleged herein.  
3 Plaintiffs will ask leave of Court to amend the Complaint to insert the true name and  
4 capacity of DOES 1 through 10 when the same have been ascertained, and to join such  
5 Defendants in this action.  
6

7 **FIRST CLAIM FOR RELIEF,**  
8 **BY THE LEGISLATOR PLAINTIFFS AND THE**  
9 **VOTER PLAINTIFFS, FOR NOMINAL DAMAGES**

- 10 36. Plaintiffs incorporate by this reference and re-allege paragraphs 1 through 35 of this  
11 Complaint.
- 12 37. The action of the Nevada Assembly to approve SB 6, a tax increase, without the 2/3  
13 vote required by Article 4, § 18(2) of the Nevada Constitution, diluted and rendered  
14 nugatory the votes of the Legislator Plaintiffs in violation of the Equal Protection and  
15 Due Process clauses of the Fourteenth Amendment of the United States Constitution.
- 16 38. The action of the Nevada Assembly to approve SB 6, a tax increase, without the 2/3  
17 vote required by Article 4, § 18(2) of the Nevada Constitution, diluted the  
18 representation to which Voter Plaintiffs are entitled, and therefore of their right to vote,  
19 in violation of the Equal Protection and Due Process clauses of the Fourteenth  
20 Amendment of the United States Constitution.
- 21 39. The action of the Nevada Assembly to approve SB 6, a tax increase, without the 2/3  
22 vote required by Article 4, § 18(2) of the Nevada Constitution, essentially eviscerated  
23 the votes cast by the Voter Plaintiffs in favor of the Gibbons Constitutional Tax  
24 Initiative, depriving the Voter Plaintiffs of an effective vote and giving greater—indeed  
25 dispositive—weight to the votes of opponents of the Initiative, in violation of the Due  
26 Process and Equal Protection Clauses of the Fourteenth Amendment.
- 27 40. The action of the Nevada Assembly to approve SB 6, a tax increase, without the 2/3  
28 vote required by Article 4, § 18(2) of the Nevada Constitution, ignored the

1 constitutional structure imposed by the people of Nevada on the legislature, including  
2 the Voter Plaintiffs, in violation of the Republican Guarantee Clause of Article IV of  
3 the U.S. Constitution.

- 4 41. Plaintiffs have therefore been deprived of their civil, political, and constitutional rights,  
5 for which they are entitled to nominal damages, pursuant to 42 U.S.C. § 1983.  
6

7 **SECOND CLAIM FOR RELIEF**

8 **FOR DECLARATORY RELIEF**

- 9 42. Plaintiffs incorporate by this reference and re-allege paragraphs 1 through 41 of this  
10 complaint.

- 11 43. The action of the Nevada Assembly to approve SB 6, a tax increase, without the 2/3  
12 vote required by Article 4, § 18(2) of the Nevada Constitution, diluted the votes of the  
13 Legislator Plaintiffs, diluted the representation to which the Voter Plaintiffs were  
14 entitled, and deprived the Voter Plaintiffs of the right to an effective vote, all in  
15 violation of the Equal Protection and Due Process clauses of the Fourteenth  
16 Amendment and/or the Republican Guarantee Clause of Article IV

- 17 44. The Plaintiffs are informed and believe and thereon allege that Defendants, and each of  
18 them, intend to treat the action of the Nevada Assembly as valid, and thereby proceed  
19 to enact SB 6 into law and give it full force and effect, despite the fact that it was  
20 enacted without the 2/3 vote required by Article 4, § 18(2) of the Nevada Constitution.  
21 Such action would impose an unlawful tax on the Taxpayer Plaintiffs, taking their  
22 property without due process of law, in violation of the Fourteenth Amendment.

- 23 45. An actual controversy has therefore arisen between Plaintiffs and Defendants  
24 concerning the binding effect of Article 4, § 18(2) of the Nevada Constitution, for  
25 which Plaintiffs desire a declaration of their rights.

- 26 46. Plaintiffs are entitled to the declaratory judgment of this Court that the action by the  
27 State Assembly to deem SB 6 as "passed" without the 2/3 vote required by Article 4,  
28 § 18(2) of the Nevada Constitution infringed Plaintiffs constitutional rights.

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

6  
7 **THIRD CLAIM FOR RELIEF,**  
8 **FOR INJUNCTIVE RELIEF**

9 48. Plaintiffs incorporate by this reference and re-allege paragraphs through 47 of this  
10 Complaint.

11 49. The Plaintiffs are informed and believe and thereon allege that Defendants, and each of  
12 them, intend to treat the action of the Nevada Assembly as valid, and thereby proceed  
13 to enact SB 6 into law and give it full force and effect, despite the fact that it was  
14 enacted without the 2/3 vote required by Article 4, § 18(2) of the Nevada Constitution.  
15 Such action would impose an unlawful tax on the Taxpayer Plaintiffs, taking their  
16 property without due process of law, in violation of the Fourteenth Amendment. It  
17 would also exacerbate the violation of constitutional rights already suffered by the  
18 Legislator Plaintiffs (whose votes have been diluted), the Voter Plaintiffs (whose right  
19 to representation has been diluted, and whose right to an effective vote has been  
20 abrogated), all in violation of the Equal Protection and Due Process clauses of the  
21 Fourteenth Amendment and/or the Republican Guarantee Clause of Article IV.

22 50. Plaintiffs have no adequate remedy at law to ensure compliance with Article 4, § 18(2)  
23 of the Nevada Constitution. Unless this court enjoins Defendants from violating that  
24 provision and giving effect to the action of the Nevada Assembly taken in violation of  
25 that provision, Plaintiffs will be irreparably damaged.

26 51. Plaintiffs are entitled to the judgment of this court restraining Defendants from  
27 violating Article 4, § 18(2) of the Nevada Constitution and from taking any action to  
28

1 give effect to the action of the Nevada Assembly deeming SB 6 as "passed," in  
2 violation of Article 4, § 18(2) of the Nevada Constitution.

3  
4 WHEREFORE, Plaintiffs pray:

5 1. For Nominal Damages of \$1 from each Defendant;

6 2. For the declaratory judgment of this Court, declaring that the action by the State  
7 Assembly to deem SB 6 as "passed" without the 2/3 vote required by Article 4, § 18(2) of the  
8 Nevada Constitution infringed Plaintiffs constitutional rights, and that the action is thereby null  
9 and void.

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

15 3. For a temporary restraining order restraining Defendants from violating Article  
16 4, § 18(2) of the Nevada Constitution and from taking any action that would give effect to the  
17 action of the Nevada Assembly deeming SB 6 as "passed" without the 2/3 vote required by  
18 Article 4, § 18(2) of the Nevada Constitution;

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

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

25 6. For such other and further relief as the court deems just and proper.

26 //

27 //

28 //


1 Dated: July 14, 2003

Respectfully submitted,

2 Jeffrey A. Dickerson, Esq.

3 John C. Eastman, Esq., *Of Counsel*  
4 The Claremont Institute Center  
For Constitutional Jurisprudence

5 By:

6   
Jeffrey A. Dickerson  
Attorneys for Plaintiffs

Feb 12 998 9:49PM

1 Jeffrey A. Dickerson  
 2 (Nev. Bar No. 2690)  
 3 9655 Gateway  
 4 Reno, NV 89511  
 5 (775) 786-6664  
 6 (775) 786-7466 FAX

7 John C. Eastman, *Of Counsel*  
 8 (Cal. Bar No. 193726)  
 9 THE CLAREMONT INSTITUTE CENTER  
 10 FOR CONSTITUTIONAL JURISPRUDENCE  
 11 c/o Chapman University School of Law  
 12 One University Drive  
 13 Orange, CA 92866  
 14 (714) 628-2587  
 15 (714) 844-4817 FAX

16 Attorneys for Plaintiffs

17 UNITED STATES DISTRICT COURT  
 18 DISTRICT OF NEVADA

19 Hon. Sharron E. Angle, *et al.*,

Case No.

20 Plaintiffs,

21 vs.

22 The Legislature of the State Of Nevada, *et al.*,

23 Defendants.

24 ) MEMORANDUM OF POINTS AND  
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Feb. 12 1998 9:00PM

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19	<i>Padavan v. United States</i> , 82 F.3d 23 (2nd Cir. 1996)	7
20	<i>Rea v. Matteucci</i> , 121 F.3d 483 (9th Cir. 1997)	4
21	<i>Reynolds v. Sims</i> , 377 U.S. 533 (1964)	6
22	<i>Richardson v. Town of Eastover</i> , 922 F.2d 1152 (4th Cir. 1991)	4
23	<i>Roe v. State of Ala. By and Through Evans</i> , 43 F.3d 574 (11th Cir. 1995).....	5
24	<i>Rosaly v. Ignacio</i> , 593 F.2d 145 (7th Cir. 1979).	9
25	<i>Scherr v. Volpe</i> , 466 F.2d 1027 (7th Cir. 1972)	12
	<i>Skaggs v. Carle</i> , 110 F.3d 831 (D.C. Cir. 1997)	3, 5

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	<i>State ex. rel. Huddleston v. Sawyer</i> , 932 P.2d 1145 (Or. 1997)	8
2	<i>Texas v. United States</i> , 106 F.3d 661 (5th Cir. 1997)...	7, 8
3	<i>Tillamook County v. U.S. Army Corps of Engineers</i> , 288 F.3d 1140 (9th Cir. 2002).....	2
4	<i>Tribal Village of Akutan v. Hodel</i> , 859 F.2d 662 (9th Cir. 1988)....	10
5	<i>United States v. Morrison</i> , 529 U.S. 598 (2000)	8
6	<i>United States v. Mosley</i> , 238 U.S. 383 (1915)	6
7	<i>Westberry v. Sanders</i> , 376 U.S. (1964)	5
8	<i>Yellin v. United States</i> , 374 U.S. 109 (1963) ....	4
9	<i>Fick Wo v. Hopkins</i> , 118 U.S. 356 (1886)	5

#### STATUTES AND CONSTITUTIONAL PROVISIONS

12	Gibbons Constitutional Tax Initiative, codified at Nev. Const. Art. 4, Sec. 18(2)	1, 6
3	Nevada Constitution, Art. 4, § 18(2)	passim
14	U.S. Const., Art. IV, Sec. 4	, 7, 8
5	U.S. Constition, Amend. XIV	.... passim

#### OTHER AUTHORITIES

18	Bonfield, <i>The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude</i> , 46 Minn. L. Rev. 513 (1962).....	7
19	Charles A. Wright, Arthur R. Miller & Mary Kay Kane, 11A Federal Practice and Procedure § 2948.1 .....	10
20	D. Merritt, 88 Colum. L. Rev. 1, 70-78 (Jan. 1988) ....	7
21	J. Ely, <i>Democracy and Distrust: A Theory of Judicial Review</i> (1980)	7
22	L. Tribe, <i>American Constitutional Law</i> 398 (2d ed. 1988).....	7
23	SB 6....	passim
24	W. Wiecek, <i>The Guarantee Clause of the U.S. Constitution</i> (1972)	7

## INTRODUCTION

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, ruled that the bill had "passed." A point of order by Plaintiff Hettrick, the Assembly Minority Leader, was rejected by the Speaker, based on a 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 rather 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). The bill has now been returned to the Nevada State Senate, where it is scheduled to be voted upon this afternoon.

As a result of the Assembly's actions, certain Plaintiffs have been, and other Plaintiffs are soon to be, irreparably harmed in the exercise of rights protected by the Federal Constitution. Specifically, the Assembly Plaintiffs (15 members of the State Assembly who were among 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 Plaintiffs (individual voters of the State of Nevada, some residing in the districts of the Assembly Plaintiffs) 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 Plaintiffs 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. If the Nevada Senate takes up consideration of SB 6, as it is scheduled to do this afternoon, under the same majority-vote rule that was applied in the Assembly, the Senate Plaintiffs (8 members of the Nevada Senate, more than 1/3 of the total)

1 will likewise be harmed in the same manner as the Assembly Plaintiffs have already been  
2 harmed. Should SB 6 be deemed to have become law without the constitutionally-required 2/3  
3 vote, Plaintiffs subject to it will be harmed by having their property taken without due process  
4 of law, in violation of the Due Process clause of the Fourteenth Amendment.

5 For the reasons described in greater detail below, there is a substantial likelihood that  
6 Plaintiffs will prevail on the merits of their challenge to the unconstitutional adoption of SB 6  
7 without the 2/3 vote required by the Nevada Constitution. Moreover, should this Court  
8 ultimately agree with Plaintiffs' contentions that the imposition of such a tax violates federal  
9 civil and constitutional rights, Plaintiffs will have suffered irreparable harm for which there is  
10 no adequate remedy at law, far in excess of any potential harm to the Defendants: Defendants  
11 simply cannot claim that they are harmed by being required to comply with the Nevada  
12 Constitution, nor that they are harmed by allegedly being unable to fund public education when  
13 there were alternatives available to them but for their own cynical manipulation of the  
14 budgetary process. A temporary restraining order, following by a preliminary injunction,  
15 barring Defendants from acting contrary to the Nevada Constitution, is therefore warranted.

#### 16 ARGUMENT

##### 17 I. Standard of Review

18 The standard in this Circuit for assessing whether Plaintiffs are entitled to a preliminary  
19 injunction is clear. The moving party must demonstrate either (1) a combination of probable  
20 success on the merits and the possibility of irreparable injury if the relief is denied, or (2) that  
21 serious questions are raised and the balance of hardships tips sharply in favor of the movant.  
22 *Tillamook County v. U.S. Army Corps of Engineers*, 288 F.3d 1140, 143 (9th Cir. 2002); *Los*  
23 *Angeles Memorial Coliseum Comm'n v. National Football League*, 634 F.2d 1197, 1201 (9th  
24 Cir. 1980); *Janra Enterprises, Inc. v. City of Reno*, 818 F. Supp. 1361, 1363 (D. Nev. 1993).  
25 The showing need not be as strong to satisfy the second test as it must be to satisfy the first.  
26 *Caribbean Marine Services Co., Inc. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988).

27 One of the tests for granting a temporary restraining order is identical to the test for  
28 granting a preliminary injunction: "[A] party may obtain a temporary restraining order, by



demonstrating either: (1) a combination of probable success on the merits and the possibility of irreparable injury if relief is not granted; or (2) the existence of serious questions going to the merits and that the balance of hardships tips sharply in its favor." *Byron M. v. City of Whittier*, 46 F. Supp. 2d 1032, 1034 (C.D. Cal. 1998) (citing *International Jensen, Inc. v. Metrosound U.S.A., Inc.*, 4 F.3d 819, 822 (9th Cir. 1993)). Alternatively, a "court may issue a temporary restraining order if it determines: (1) the moving party will suffer irreparable injury if the relief is denied; (2) the moving party will probably prevail on the merits; (3) the balance of potential harm favors the moving party; and depending on the nature of the case, (4) the public interest favors granting relief." *Id.* (citing *International Jensen*, 4 F.3d at 822). Under either of these standards, Plaintiffs are entitled to both a temporary restraining order and a preliminary injunction.

## II. Plaintiffs Are Likely To Succeed on the Merits.

### A. 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." At issue in the case was whether, in voting to ratify a federal constitutional amendment, the lieutenant governor of the state was permitted to cast a vote in the event of a tie. As the Court noted, "the twenty senators [who were petitioners in the case] were not only qualified to vote on the question of ratification but their votes, if the Lieutenant Governor were excluded as not being part of the legislature for that purpose, would have been decisive in defeating the ratifying resolution." *Id.* at 441; *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").

1 Although *Coleman* involved a federal constitutional amendment, several courts,  
2 including the Ninth Circuit, have recognized that a State legislature's failure to comply with its  
3 own procedures may violate federal Due Process. *See, e.g., Rea v. Matteucci*, 121 F.3d 483,  
4 485 (9th Cir. 1997) (quoting *Atkins v. Parker*, 472 U.S. 115, 130 (1985)); *Conway v. Searles*,  
5 954 F. Supp. 756, 767 (D. Vt. 1997). "Fairness (or due process) in legislation is satisfied when  
6 legislation is enacted in accordance with the procedures established in the state constitution  
7 and statutes for the enactment of legislation," *Richardson v. Town of Eastover*, 922 F.2d 1152,  
8 158 (4th Cir. 1991), not by legislation enacted in violation of the procedures mandated by the  
9 state constitution, as here. "Legislative rules are judicially cognizable, and may therefore be  
10 enforced by the Courts." *Conway*, 954 F. Supp. at 769 (citing *Yellin v. United States*, 374 U.S.  
1 109, 114 (1963); *Christoffel v. United States*, 338 U.S. 84 (1949)). Moreover, the Supreme  
12 Court has expressly suggested, albeit in *dicta*, that members of state legislative bodies have  
13 standing to bring a vote dilution claim that arises from violations of state law. *Bender v*  
14 *Williamsport Area Sch. Dist.*, 475 U.S. 534, 544 n.7 (1986) ("if state law authorized School  
15 Board action solely by unanimous consent," a disenfranchised school board member "might  
16 claim that he was legally entitled to protect 'the effectiveness of [his] vot[e]'" (quoting  
17 *Coleman*, 307 U.S. at 438) (brackets in original). A legislator in such circumstances "would  
18 have to allege that his vote was diluted or rendered nugatory under state law," and "he would  
19 have a mandamus or like remedy against the Secretary of the School Board." *Id.*

20 The hypothetical case described in *Bender* is identical to the case here. State law—  
21 Article 4, § 18(2) of the Nevada Constitution—authorizes legislative action on tax increases  
22 "solely" by 2/3 vote. The disenfranchised legislators—the Legislator Plaintiffs in this case  
23 who together provided enough votes to defeat the tax increase pursuant to the 2/3 vote  
24 requirement of Article 4—can and do claim that they are legally entitled to protect the  
25 effectiveness of their vote. They have alleged in their complaint that their vote was diluted or  
26 rendered nugatory under state law, and they have sought to enjoin the clerk of the Assembly  
27 and the Secretary of the Senate, among others, from certifying as passed a bill that did not  
28 receive the necessary 2/3 vote. Under the provisions of the Nevada Constitution, the vote a

1 member of the State Assembly is 1/15 of the votes necessary to defeat a tax increase. Under  
2 the procedure employed by the Assembly yesterday, an assemblyman's vote was only 1/21 of  
3 the votes necessary to defeat a tax increase—a classic case of vote dilution, in violation of the  
4 Due Process clause

5 **B. Voter Plaintiffs' Derivative Vote Dilution Claim**

6 The Supreme Court has repeatedly recognized vote dilution claims by voters. See  
7 *Westberry v. Sanders*, 376 U.S. 1 (1964); *Franklin v. Massachusetts*, 505 U.S. 788 (1992).  
8 That the dilution occurs after the voters' representative is elected, and is therefore derivative of  
9 the legislator's own vote dilution claim, is immaterial. *Michel v. Anderson*, 14 F.3d 623, 626  
10 (D.C. Cir. 1994); see also *Skaggs*, 10 F.3d at 834. As the D.C. Circuit noted in *Michel* with  
11 its characteristic flair: "It could not be argued seriously that voters would not have an injury if  
12 their congressman was not permitted to vote at all on the House floor." 4 F.3d at 626  
13 Depriving voters of representation with the full weight guaranteed their representatives' votes  
14 by the Nevada Constitution's 2/3 requirement is only a difference in degree from the  
15 hypothetical embraced in *Michel* as a self-evident constitutional violation

16 Here, by operation of Article 4, § 18(2) of the Nevada Constitution, the Voter Plaintiffs  
17 are entitled to representation with a vote sufficient to block a tax increase unless supported by  
18 2/3 of the legislature. The Legislature's failure to abide by that constitutional provision, and to  
19 deem as "passed" a tax increase that failed to garner the necessary 2/3 vote, has diluted the  
20 representation to which Voter Plaintiffs are entitled, and therefore of their right to vote. "The  
21 right of suffrage is 'a fundamental political right, because preservative of all rights.'" *Roe v.*  
22 *State of Ala. By and Through Evans*, 43 F.3d 574, 580 (11th Cir. 1995) (quoting *Yick Wo v.*  
23 *Hopkins*, 118 U.S. 356, 370 (1886)). Infringement on the right to vote, including infringement  
24 by dilution, violates the First and Fourteenth Amendments of the U.S. Constitution. *Id.*  
25 "[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's  
26 vote just as effectively as by wholly prohibiting the free exercise of the franchise. If,  
27 however, 'the election process itself reaches the point of patent and fundamental unfairness, a  
28

violation of the due process clause may be indicated and relief under § 1983 therefore in order.” *Id.* (quoting *Reynolds v. Sims*, 377 U.S. 533, 554 (1964)).

### C. The Voter Plaintiffs’ Effective Vote Claim

The Voter Plaintiffs also have a federal constitutional claim centered on the effectiveness of the votes they cast in support of the Gibbons Constitutional Tax Initiative in 1996, and by which they achieved an amendment to the State Constitution that was ignored by the Assembly’s actions yesterday. The right to vote constitutes more than just the right to show up at a voting booth and cast a meaningless vote. It includes the right to have that vote counted and, if successful, to have the results of the vote given effect. *Gray v. Sanders*, 372 U.S. 368, 380 (1963); *United States v. Mosley*, 238 U.S. 383, 386 (1915).

In deeming as “passed” a tax increase without the 2/3 vote required by the Nevada Constitution, the State Assembly essentially treated the successful vote for the Gibbons Constitutional Tax Initiative as without any effect, at least whenever there is a budget stand-off involving spending for education. By so doing, the Voter Plaintiffs were deprived of their right to an effective vote, protected by the Fourteenth Amendment of the U.S. Constitution. In addition, the action by the State Assembly essentially gave greater—indeed dispositive—weight to the votes of those who opposed the Gibbons Constitutional Tax Initiative, in violation of the Equal Protection Clause of the Fourteenth Amendment. *See Bush v. Gore*, 531 U.S. 98, 104-05 (2000) (“Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person’s vote over that of another”) (citing *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966)). “It must be remembered that ‘the right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise’” *Id.* at 105 (quoting *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)). “[T]he idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government.” *Id.* at 107 (quoting *Moore v. Ogilvie*, 394 U.S.

814, 819 (1969)).<sup>1</sup> Because these fundamental federal voting rights are so clearly established, and so clearly violated here, the Voter Plaintiffs have a strong likelihood of success on the merits of their claims.

#### D. Plaintiffs' Republican Guarantee Claim

Article IV, section 4 of the U.S. Constitution provides that "The United States shall guarantee to every State in the Union a Republican Form of Government." Although claims premised on the Republican Guarantee Clause have long been viewed as nonjusticiable political questions in most circumstances, *see Luther v. Borden*, 48 U.S. (7 How.) 1, 46-47 (1849), Justice O'Connor noted for the Court in *New York v. United States* "that perhaps not all claims under the Guarantee Clause present nonjusticiable political questions," 505 U.S. 144, 183 (1992). "Contemporary commentators," she noted, "have likewise suggested that courts should address the merits of such claims, at least in some circumstances. *Id.* at 185 (citing *L. Tribe, American Constitutional Law* 398 (2d ed. 1988); J. Ely, *Democracy and Distrust: A Theory of Judicial Review* 118, and n., 122-123 (1980); W. Wiecek, *The Guarantee Clause of the U.S. Constitution* 287-289, 300 (1972); D. Merritt, 88 Colum. L. Rev. 1, 70-78 (Jan. 1988); Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 Minn. L. Rev. 513, 560-565 (1962)). Several courts have acknowledged that the Republican Guarantee clause might present justiciable questions in the wake of *New York v. United States*, but found that the Clause had not been violated in the particular circumstances at issue in the cases. *See Texas v. United States*, 106 F.3d 661, 667 (5th Cir. 1997); *Adams v. Clinton*, 90 F.Supp.2d 35 (D.D.C. 2000); *New Jersey v. United States*, 91 F.3d 463, 468-69 (3rd Cir. 1996); *Padavan v. United States*, 82 F.3d 23, 27-28 (2nd Cir. 1996); *Deer Park Ind. Sch. Dist. v. Harris Cty. Appraisal Dist.*, 132 F.3d 1095, 1099-1100 (5th Cir. 1998); *City of New York v. United States*, 79 F.3d 29 (2nd Cir. 1999); *Kelley v. United States*, 69 F.3d 1503,

<sup>1</sup> The fact that the Nevada Supreme Court ratified this debasement of the initiative voters is of no moment. *See Bush*, 531 U.S. at 107 (finding an equal protection violation by disparate recount procedures that were "ratified" by the Florida Supreme Court).



2 (holding that Republican Guarantee claim is nonjusticiable).

3 This case presents one of the rare instances in which a Republican Guarantee claim is  
4 viable. The essence of the claim, drawn from *New York v. United States*, is whether a state's  
5 citizens may "structure their government as they see fit." *Kelley*, 69 F.3d at 1511. In *New*  
6 *York v. United States* itself, the Court dismissed the guarantee clause claim because the statute  
7 in that case did not "pose any realistic risk of altering the form or the method of functioning of  
8 New York's government." 505 U.S. at 186. By imposing, through a constitutional  
9 amendment, a 2/3 vote requirement for tax increases, the citizens of Nevada adopted a new  
10 structure for their government with a new method of functioning, making it more difficult to  
11 increase taxes. Actions that have a "realistic risk of altering the state's form of government"  
12 from what the citizens of the state have themselves adopted have been held to be amenable to  
13 Republican Guarantee Clause claims. *Texas*, 106 F. 3d at 667; *New Jersey*, 91 F.3d at 468-69.  
14 Essentially, the federal courts are supposed to protect the structural preferences of a state's  
15 citizens, serving as a sort of "structural referee." *Brzonkala v. Virginia Polytechnic Institute*  
16 *and State Univ.*, 169 F.3d 820, 895 (4th Cir. 1999), *aff'd sub nom. United States v. Morrison*,  
17 529 U.S. 598 (2000).

18 The State Assembly's decision to ignore the governing structure imposed upon it by the  
19 State's citizens, via a constitutional amendment, is just the kind of violation of the Article IV  
20 guarantee of a Republican form of government that the federal courts have begun to entertain.  
21 This court should do so, as well.

**22 E. The Taxpayer Plaintiffs' Due Process Claims**

23 Finally, the Taxpayer Plaintiffs—both individual Nevada citizens who will be  
24 indirectly taxed and the business entities that will be directly taxed by the gross receipts tax  
25 adopted by the Assembly yesterday—will, when the tax is imposed, have their property taken  
26 without due process of law in the most basic meaning of that provision of the Fourteenth  
27 Amendment.



1 Due process means, *inter alia*, some regular, settled, predictable rule of law. *Kent v.*  
 2 *United States*, 383 U.S. 541, 553-553 (1966); *Carter v. People of State of Illinois*, 329 U.S.  
 3 73, 175 (1946); *L C & S, Inc. v. Warren County Area Plan Com'n*, 244 F.3d 601, 602 (7th  
 4 Cir. 2001). "The words, 'due process of law,' were undoubtedly intended to convey the same  
 5 meaning as the words 'by the law of the land' in Magna Charta." *Murray's Lessee v. Hoboken*  
 6 *Land & Improv. Co.*, 59 U.S. (18 How.) 272, 276 (1856). "To be deprived of liberty or  
 7 property without due process of law means to be deprived of liberty or property without  
 8 authority of the law." *Rosaly v. Ignacio*, 593 F.2d 145, 150 (7th Cir. 1979). "[T]he  
 9 government operates with greater fairness, and thus greater legitimacy, when it does not  
 10 change the rules midway through the game," *Chambers v. Reno*, 307 F.3d 284, 296 (4th Cir.  
 2002), particularly when those rules are mandated in the state's own constitution.

12 The constitutional argument is thus simple and clear. Since 1996, the Nevada  
 13 Constitution—the relevant "law of the land" for present purposes—has specified the *process*  
 14 by which new taxes can be raised: A 2/3 vote of each house of the legislature is required  
 15 Nev. Const. Art. 4, § 18(2). Adopted without compliance with that constitutionally-mandated  
 6 process, the gross receipts tax will amount to the taking of the property of Nevada citizens and  
 17 businesses without the *process* that was due—it was enacted contrary to the clearly settled  
 18 requirements of the Nevada Constitution, in violation of the Due Process Clause of the  
 19 Fourteenth Amendment. On this claim, too, Plaintiffs are likely to succeed on the merits.

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

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

1 The constitutional violations at issue in this litigation are the infringement of Plaintiffs'  
2 constitutionally protected rights to vote, to have those votes counted fully and equally (and not  
3 diluted), to choose the structure for their own government and have that republican structure  
4 guaranteed to them, and to not have their property taken without due process of law.

5 "[I]rreparable injury is assumed where constitutional rights have been alleged to be  
6 violated." *Associated General Contractors of California, Inc. v. Coalition for Economic*  
7 *Equity*, 950 F.2d 1401, 1412 (9th Cir. 1991); *see also* Charles A. Wright, Arthur R. Miller &  
8 Mary Kay Kane, 11A Federal Practice and Procedure § 2948. (Where the deprivation of a  
9 constitutional right is involved, courts generally hold that no further showing of irreparability  
10 is required); *Coalition for Economic Equity v. Wilson*, 946 F.Supp. 1480, 1519  
1 (N.D.Cal., 1996) (same), *overruled on other grounds*, 110 F.3d 1431 (1997).

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

16 At the very least, Plaintiffs have demonstrated "that serious questions are raised" by the  
17 claims they have brought. An applicant for preliminary injunctive relief raises a serious  
18 question on the merits if its claim poses a substantial, difficult and doubtful question that  
19 constitutes a fair ground for litigation. *Gilder v. PGA Tour, Inc.*, 936 F.2d 417, 422 (9th Cir  
20 1991); *Tribal Village of Akutan v. Hodel*, 859 F.2d 662, 663 (9th Cir. 1988). That threshold is  
21 easily met here, for the reasons stated above.

22 The balance of hardships and the public interest also tilts decidedly in Plaintiffs' favor  
23 As noted above, the claimed constitutional violations at issue here are the infringement of  
24 fundamental constitutional rights, including the right to vote, which is a "fundamental political  
25 right, because preservative of all rights." *Yick Wo*, 118 U.S. at 370

26 In contrast, Defendants will likely suffer no harm, much less irreparable harm, if they  
27 are enjoined from violating the provisions of the Nevada Constitution during the pendency of  
28 this litigation. Defendants remain free to act in accord with the Constitution. Defendant

1 Legislature remains free to revisit the entirety of the state's budget in order to comply with the  
2 constitutional mandate for a balanced budget and the constitutional mandate to provide  
3 adequate funding for education. Other Defendants remain free to fulfill all of their legislative,  
4 executive, or ministerial responsibilities in accord with the provisions of the Nevada  
5 Constitution. The only thing the injunction will prevent is actions that are unconstitutional  
6 under the Nevada Constitution. Although some legislators might think it harmful to comply  
7 with the state constitution, and the will of the citizens of the state that it represents, that is  
8 hardly a harm that this Court—or any court—is permitted to recognize.

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

15  
16 IV. Because the balance of hardships weighs heavily in favor of Plaintiffs, this Court  
17 should exercise its discretion to waive any bond requirement.

18 Rule 65(c) of the Federal Rules of Civil Procedure provides that "[n]o restraining order  
19 or preliminary injunction shall issue except upon the giving of security by the applicant, in  
20 such sum as the court deems proper, for the payment of such costs and damages as may be  
21 incurred or suffered by any party who is found to have been wrongfully enjoined or  
22 restrained." Fed. R. Civ. P. 65(c). While the Rule normally requires the payment of a bond,  
23 courts have waived the bond requirement in noncommercial cases such as this where there is  
24 "no risk of monetary loss to the Defendants if the injunction is granted" or where, as here,  
25 Plaintiffs have demonstrated a strong likelihood of success on the merits. *Colin ex rel. Colin v.*  
26 *Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135, 151 (C.D. Cal. 2000); *see also Hoechst*  
27 *Diafoil Co. v. Nan Ya Plastics Corp.*, 74 F.3d 442, 421, n.3 (4th Cir. 1999); *Elliott v.*  
28

*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 temporary restraining order and a preliminary injunction would result in no risk of monetary loss to Defendants, and because Plaintiffs have demonstrated a strong likelihood of success on the merits, in the event this Court issues the requested temporary restraining order and/or preliminary injunction, Plaintiffs respectfully request that this Court exercise its discretion and waive the bond requirement of Rule 65(c).

CONCLUSION

For the reasons stated above, Plaintiffs' application for a temporary restraining order should be granted, without bond, and an order to show cause why a preliminary injunction should not issue should be entered


Dated: July 14, 2003

Respectfully submitted,

Jeffrey A. Dickerson, Esq.

John C. Eastman, Esq., *Of Counsel*  
The Claremont Institute Center  
For Constitutional Jurisprudence

By:

  
Jeffrey A. Dickerson  
Attorneys for Plaintiffs