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Hon. Richard Perkins
9 Hon. Lorraine T. Hunt
Jacqueline Sneddon
10 Diane Keetch
Claire Jesse Clift
11 Brenda J. Erdoes

12 UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

13
14 HONORABLE SHARRON E. ANGLE, et al.,
15 Plaintiffs,
16 vs.
17 THE LEGISLATURE OF THE STATE OF
NEVADA, et al.,
18 Defendants.
19

CASE NO. CV-N-03-0371-HDM-(VPC)

**DEFENDANTS' MEMORANDUM OF
POINTS AND AUTHORITIES IN
RESPONSE TO PLAINTIFFS'
APPLICATION FOR INJUNCTIVE
RELIEF**

LEGISLATIVE COUNSEL BUREAU

20 Defendants Legislature of the State of Nevada, Assembly of the State of Nevada, Senate of
21 the State of Nevada, Hon. Richard Perkins, Hon. Lorraine T. Hunt, Jacqueline Sneddon, Diane
22 Keetch, Claire J. Clift and Brenda Erdoes (hereinafter "Legislative Defendants"), by and through
23 their counsel, William L. Keane, Principal Deputy Legislative Counsel, and Bradley A. Wilkinson,
24 Principal Deputy Legislative Counsel, hereby submit this Memorandum of Points and Authorities

1 in Response to Plaintiffs' Application for Injunctive Relief. Legislative Defendants understand and
2 interpret this Court's order dated July 14, 2003, in which it is stated that "Defendants shall have to
3 and including Tuesday, July 15, 2003, by 12:00 noon within which to file . . . any Memorandum of
4 Authorities in response to Plaintiffs' Application for Injunctive Relief," to allow the filing of a
5 memorandum of points and authorities with respect to the legal issues presented in Plaintiffs'
6 Complaint, but not to require Legislative Defendants to file an answer or other responsive pleading
7 pursuant to Rule 8 or 12 of the Federal Rules of Civil Procedure. Accordingly, by submitting this
8 Memorandum of Points and Authorities, Legislative Defendants neither admit nor deny any of the
9 averments contained within Plaintiffs' Complaint and do not intend to waive any applicable
10 affirmative defenses.

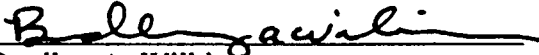
11 DATED: This 15TH day of July, 2003.

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13 By



William L. Keane
Principal Deputy Legislative Counsel

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16 By



Bradley A. Wilkinson
Principal Deputy Legislative Counsel

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. FACTUAL BACKGROUND

3 On July 10, 2003, the Nevada Supreme Court exercised its prerogative under the Nevada
4 Constitution to interpret the meaning of subsection 2 of Section 18 of Article 4 of the Nevada
5 Constitution. Guinn v. Legislature, 119 Nev. Adv. Op. 34, at p. 11 (July 10, 2003); *see also*
6 Galloway v. Truesdell, 422 P.2d 237, 242-43 (Nev. 1967). It is a fundamental principle of law that
7 the highest court in a state is the final arbiter with respect to the interpretation and application of
8 the laws and constitution of that state. *See* Knapp v. Cardwell, 667 F.2d 1253, 1260 (9th Cir.),
9 *cert. denied*, 459 U.S. 1055 (1982); People v. Cahill, 853 P.2d 1037, 1083 (Cal. 1993). In Guinn,
10 the Nevada Supreme Court interpreted subsection 2 of Section 18 of Article 4 of the Nevada
11 Constitution not to require a two-thirds vote to raise revenue for public education during the 20th
12 Special Session of the Nevada Legislature. Id. at 6 and 15-16. Instead, the Nevada Supreme Court
13 ruled that, to raise revenue for public education during the 20th Special Session, the Nevada
14 Legislature must “proceed expeditiously under simply majority rule.” Id. at 6 and 16.
15 Accordingly, the Nevada Supreme Court directed the Clerk of the Supreme Court to issue a writ of
16 mandamus directing the Legislature to proceed expeditiously with the 20th Special Session under
17 simple majority rule. Thus, it is the understanding of Legislative Defendants that for the purposes
18 of passing and enacting bills which raise revenue for public education during the 20th Special
19 Session, including bills that in whole or in part increase or impose taxes, subsection 2 of Section 18
20 of Article 4 of the Nevada Constitution does not require a two-thirds vote of the Nevada Senate
21 and of the Nevada Assembly. Instead, pursuant to the meaning of subsection 2 of Section 18 of
22 Article 4 of the Nevada Constitution as interpreted by the Nevada Supreme Court in Guinn, a bill
23 that raises revenue for public education, whether by increasing or imposing taxes or otherwise,

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1 must be considered passed and enacted during the 20th Special Session if it receives the affirmative
2 vote of a simple majority of the Nevada Senate and of the Nevada Assembly.

3 Senate Bill No. 6 of the 20th Special Session (“S.B. 6”) raises revenue for public education.
4 On July 13, 2003, S.B. 6 was passed by a simple majority of the Nevada Assembly. **Based upon**
5 Guinn, Legislative Defendants believe that S.B. 6 was passed by the Nevada Assembly in
6 accordance with subsection 2 of Section 18 of Article 4 of the Nevada Constitution.

7 II. JURISDICTION

8 All claims for relief set forth by Plaintiffs are premised upon the notion that subsection 2 of
9 Section 18 of Article 4 of the Nevada Constitution requires a two-thirds vote of the Nevada Senate
10 and of the Nevada Assembly to pass and enact S.B. 6 and any other bill that raises revenue for
11 public education during the 20th Special Session. As the Nevada Supreme Court in Guinn has
12 expressly ruled otherwise, Plaintiffs’ claims may succeed only if the Nevada Supreme Court
13 wrongly decided Guinn. Therefore, Legislative Defendants respectfully request this Court to
14 consider whether this Court should dismiss some or all of the claims for relief based on lack of
15 subject matter jurisdiction pursuant to the Rooker-Feldman doctrine. Fontana Empire Center,
16 L.L.C., v. City of Fontana, 307 F.3d 987, 992 (9th Cir. 2002) (“The [Rooker-Feldman] doctrine
17 also precludes a federal district court from exercising jurisdiction over general constitutional
18 challenges that are ‘inextricably intertwined’ with claims asserted in state court. A claim is
19 inextricably intertwined with a state court judgment if ‘the federal claim succeeds only to the
20 extent that the state court wrongly decided the issues before it.’” (citations omitted)).

21 III. IMMUNITY

22 A. Legislators and the Legislature

23 Plaintiffs have raised several claims, including alleged violations of 42 U.S.C. § 1983
24 (hereafter “section 1983”). It is well settled that state legislators are absolutely immune from

liability pursuant to section 1983 when acting in their legislative capacities. See Tenney v. Brandhove, 341 U.S. 367, 377 (1951) (explaining in the context of an action for damages under section 1983 that “[l]egislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good.”). See also Supreme Court of Va. v. Consumers Union of U.S., Inc., 446 U.S. 719, 732-33 (1980) (explaining that the holding in Tenney is equally applicable to section 1983 actions seeking declaratory or injunctive relief). Accord Star Distributors, Ltd. v. Marino, 613 F.2d 4, 6 (2d Cir. 1980). In determining whether a legislator is acting in his or her legislative capacity, the Ninth Circuit Court of Appeals considers “(1) whether the act involves ad hoc decisionmaking, or the formulation of policy; and (2) whether the act applies to a few individuals, or to the public at large.” Bechard v. Rappold, 287 F.3d 827, 829 (9th Cir. 2002).

There can be no doubt that the Legislators in the case at bar have acted and will continue to act in their legislative capacities with regard to raising revenue and funding education. The actions at issue in this case involve the quintessential legislative act—the legislative act of making decisions and formulating policies through the passing of legislation which affects the public at large. Thus, the Legislators in this case are absolutely immune from liability for the claims alleged by Plaintiffs.

Absolute legislative immunity applies not only to individual legislators, but also to the Legislature as a whole. Warden v. Pataki, 35 F. Supp. 2d 354, 358 (S.D.N.Y. 1999), *aff’d*, 201 F.3d 430 (2d Cir.), *cert. denied*, 531 U.S. 849 (2000) (“The well-settled doctrine of absolute legislative immunity bars actions against legislators or governors—and, *a fortiori*, legislatures—on the basis of their roles in enacting or signing legislation.”). Based on the foregoing reasons, Legislative Defendants respectfully urge this Court to dismiss all of the claims against the Legislators, the Assembly, the Senate and the Legislature.

1 **B. The Lieutenant Governor and the Named Legislative Officers and Employees**

2 A plaintiff fails to state a claim upon which relief can be granted if an affirmative defense or
3 other bar to relief, such as qualified immunity, is apparent from the face of the plaintiff's
4 complaint. Forsyth v. Eli Lilly & Co., 904 F. Supp. 1153, 1156 (D. Haw. 1995). With respect to
5 the Lieutenant Governor and Defendants Sneddon, Keetch, Clift and Erdoes, the legislative officers
6 and employees who are named in this action, they clearly do not exercise broad independence of
7 judgment with respect to performing their official duties, and therefore may raise as an affirmative
8 defense the fact that the alleged violation was not committed in bad faith. This affirmative defense
9 is raised as a type of qualified immunity. Gomez v. Toledo, 446 U.S. 635, 639-40 (1980). *See also*
10 Morales v. Vega, 483 F. Supp. 1057, 1060 (D.P.R. 1979). Thus, with regard to the Lieutenant
Governor and the named legislative officers and employees, this Memorandum of Points and
12 Authorities specifically raises the affirmative defense of good faith on behalf of those Legislative
13 Defendants who do not enjoy absolute immunity. These officials have merely complied with and
14 intend to continue to comply with the ruling of the Supreme Court of Nevada in Guinn v.
15 Legislature, 19 Nev. Adv. Op. 34 (July 10, 2003).

16 Moreover, various cases suggest that the type of immunity afforded to legislators in the
17 context of a section 1983 action will also be afforded to staff members who are not legislators as
18 such, but whose duties are intertwined with the legislative process. *See, e.g.,* Green v. DeCamp,
19 612 F.2d 368, 37 (8th Cir. 1980) (explaining that committee counsel to a legislative committee
20 shared legislative immunity from section 1983 suits to the extent of such acts as are essential to the
21 legislative process). *See also* Bostick v. Rappleyea, 629 F. Supp. 1328, 1331 (N.D.N.Y. 1985)
22 (holding that the position of a "Legislative Budget Analyst" was sufficiently closely connected to
23 the legislative process as to afford immunity from section 1983 actions). Based on the foregoing

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1 reasons, Legislative Defendants respectfully urge this Court to dismiss all of the claims against the
2 Lieutenant Governor and the named legislative officers and employees.

3 **IV. FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED**

4 If, alternatively, Plaintiffs are not implicitly asserting that the Nevada Supreme Court
5 decision in Guinn was wrongly decided, then Plaintiffs have failed to identify a wrongful action
6 taken (or proposed to be taken) by Legislative Defendants. In other words, if Guinn was properly
7 decided, then Plaintiffs' claims simply amount to an assertion that Legislative Defendants have
8 followed the law appear likely to continue doing so. In this circumstance, Legislative Defendants
9 respectfully request this Court to consider whether this Court should dismiss all of the claims for
10 relief because Plaintiffs have failed to state a claim upon which relief may be granted. Fed. R. Civ.
11 P. § 12(b)(6).

12 **V. CONCLUSION**

13 Legislative Defendants request this Court dismiss all of the claims for relief based upon
14 lack of subject matter jurisdiction, the immunity of Legislative Defendants and the failure to state a
15 claim upon which relief may be granted.

16 To the extent this Court determines that it is appropriate to address the merits of Plaintiffs'
17 claims, Legislative Defendants emphasize that they believe that their actions are in conformity with
18 the requirements of the Nevada Constitution as interpreted by the Nevada Supreme Court in Guinn,
19 and are therefore constitutional and proper. Legislative Defendants request that this Court act

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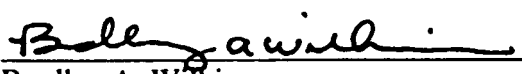
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1 clearly and quickly, so that Legislative Defendants may understand how to proceed and may do so
2 as expeditiously as possible.

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DATED: This 15th day of July, 2003.

By 
William L. Keane
Principal Deputy Legislative Counsel

By 
Bradley A. Wilkinson
Principal Deputy Legislative Counsel

