No. _____

IN THE

Supreme Court of the United States

HON. SHARRON E. ANGLE, *et al.* MEMBERS OF THE NEVADA STATE ASSEMBLY AND NEVADA STATE SENATE,*

Petitioners,

v.

KENNY GUINN, Governor of the State of Nevada, *et al.*,*

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Nevada

PETITION FOR WRIT OF CERTIORARI

EDWIN MEESE III
214 Massachusetts Ave., NE
Washington D.C. 20002

HUGH HEWITT
STEVEN B. IMHOOF
HEWITT & O'NEIL LLP
19900 MacArthur Blvd.,
Suite 1050
Irvine, CA 92612

JOHN C. EASTMAN
Counsel of Record
The Claremont Institute Center
For Constitutional Jurisprudence
c/o Chapman University
School of Law
One University Drive
Orange, CA 92866
(714) 628-2587

ERIK S. JAFFE
ERIK S. JAFFE, P.C.
5101 34th Street, N.W.
Washington, DC 20008

Counsel for Petitioners

* Full list of Parties on page ii.

QUESTIONS PRESENTED

1. Whether the effective nullification of a key, recently-enacted structural provision of the Nevada State Constitution violates the Republican Guarantee Clause of Article IV of the United States Constitution?

2. Whether *federal* due process imposes *any* limits on a state court's ability to "interpret" its own state constitution and, if so, whether due process is violated by the Nevada State Supreme Court decision granting a remedy that no party had requested, which effectively nullified a structural provision of the State's Constitution and violated several well-established canons of constitutional construction?

3. Whether deeming a bill raising taxes as "passed" by simple majority vote rather than the 2/3 vote required by an amendment to the Nevada Constitution dilutes the votes of legislators and their constituents and nullifies the votes of those who supported the state constitutional amendment, in violation of the Due Process and/or Equal Protection Clauses of the Fourteenth Amendment?

PARTIES TO THE PROCEEDING

Petitioners: Hon. Sharron E. Angle, Hon. Walter Andonov, Hon. Bob Beers, Hon. David F. Brown, Hon. John C. Carpenter, Hon. Chad Christensen, Hon. Peter J. Goicoechea, Hon. Thomas J. Grady, Hon. Donald G. Gustavson, Hon. Lynn C. Hettrick, Hon. Ronald L. Knecht, Hon. R. Garn Mabey, Jr., Hon. John W. Marvel, Hon. Roderick R. Sherer, Hon. Valerie E. Weber, Members of the Nevada State Assembly; 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, and Hon. Maurice E. Washington, Members of the Nevada State Senate

Respondents: Hon. Kenny Guinn, Governor of the State of Nevada; The Legislature of the State of Nevada; Hon. Richard D. Perkins, Speaker of the Nevada Assembly; Hon. Bernie Anderson, Hon. Morse Arberry, Jr., Hon. Kelvin D. Atkinson, Hon. Barbara E. Buckley, Hon. Vonne S. Chowning, Hon. Jerry D. Claborn, Hon. Tom Collins, Hon. Marcus Conklin, Hon. Jason Geddes, Hon. Dawn Gibbons, Hon. Chris Giunchigliani, Hon. David Goldwater, Hon. Josh Griffin, Hon. Joe Hardy, Hon. William C. Horne, Hon. Ellen M. Koivisto, Hon. Sheila Leslie, Hon. Mark A. Manendo, Hon. Kathy McClain, Hon. Bob McCleary, Hon. Harry Mortenson, Hon. John Oceguera, Hon. Genie Ohrenschall, Hon. David R. Parks, Hon. Peggy Price, Hon. Wendell P. Williams, Members of the Nevada State Assembly; Hon. Lorraine T. Hunt, President of the Senate; Hon. Terry Care, Hon. Maggie Carlton, Hon. Bob Coffin, Hon. Bernice Mathews, Hon. Joseph M. Neal, Jr., Hon. William J. Raggio, Hon. Raymond D. Rawson, Hon. Michael Schneider, Hon. Raymond C. Shaffer, Hon. Dina Titus, Hon. Randolph Townsend, Hon. Valerie Wiener, Members of the Nevada State Senate.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Constitutional Provisions

Other Authorities

No. _____

IN THE

Supreme Court of the United States

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

Petitioners,

v.

KENNY GUINN, Governor of the State of Nevada, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Nevada

PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

Less then eight years ago, the voters of Nevada overwhelming amended their state Constitution to restrict their Legislature from raising taxes without a 2/3 vote in each house. This past July, in response to an extraordinary suit brought by the Governor of Nevada against the Legislature, the Nevada Supreme Court issued an even more extraordinary order, directing the Legislature to ignore that constitutional provision, not because it violated any federal constitutional right, but simply because it had proved an impediment to the Legislature's ability to adopt appropriations larger than the existing revenue streams would support. The court reached its conclusion by what can only be described as a complete and willful disregard for the language and structure of the Constitution and for virtually every single cannon of

constitutional construction heretofore guiding Nevada judicial functions. The decision stands as an unvarnished usurpation of the authority of the Nevada Constitution, a shameful violation of the judicial oath, and a repudiation of the principle that Nevada's is a government of laws rather than men.

This Court in *New York v. United States* recognized that attempts by state governmental officials to alter "the form or the method of functioning" of the state government might well give rise to a justiciable Republican Guarantee Clause challenge. 505 U.S. 144, 186 (1992). This case presents such a viable challenge if ever a case did. Particularly when considered together with the significant vote dilution, vote nullification, and due process claims that Petitioners raised below, claims which, like the Republican Guarantee Clause claim itself, go to the very essence of republican self-government, a writ of certiorari is warranted to review (and reverse) the egregious disregard of the people's will manifested in the opinion of the Nevada Supreme Court below.

OPINIONS BELOW

The opinion of the Supreme Court of Nevada, dated July 10, 2003, is reported at 71 P.3d 1269 (Nev. 2003) and is reproduced at pages 1a-22a of the appendix to this petition ("Pet. App."). That Court's order denying Petitioners' motion for rehearing, dated September 17, 2003, is reported at 76 P.3d 22 (Nev. 2003) and is reproduced at Pet. App. 23a-50a. There are no opinions from the Nevada trial or intermediate appellate courts, as Respondent Governor Guinn brought his petition for a writ of mandamus against the Nevada Legislature directly to the Nevada Supreme Court under that court's original jurisdiction.

STATEMENT OF JURISDICTION

The decision of the Supreme Court of Nevada ordering the Legislature of Nevada to consider tax increases "under

simple majority rule" rather than the 2/3 vote required by the Nevada Constitution was entered on July 10, 2003. The court denied a petition for rehearing on September 17, 2003—Constitution Day. A timely request for extension, filed on December 4, 2003, was granted by Justice O'Connor on December 8, 2003, extending the time in which to file this petition until January 17, 2004, and thus to January 20, 2004 by operation of Rule 30.1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

PERTINENT CONSTITUTIONAL PROVISIONS

The Republican Guarantee Clause of Article IV, § 4 of the United States Constitution provides:

> The United States shall guarantee to every State in this Union a Republican Form of Government . . . .

The Due Process Clause of the Fourteenth Amendment provides:

> No State shall . . . deprive any person of life, liberty or property, without due process of law . . . .

The Equal Protection Clause of the Fourteenth Amendment provides:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Article 4, § 18 of the Nevada Constitution, adopted by voter initiative in 1996, provides, in relevant part:

> 2. Except as otherwise provided in subsection 3, an affirmative vote of not fewer than two-thirds of the members elected to each house is necessary 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.

> 3. A majority of all of the members elected to each house may refer any measure which creates, generates, or increases any revenue in any form to the people of the State at the next general election, and shall become effective and enforced only if it has been approved by a majority of the votes cast on the measure at such election.

Article 9, § 2(1) of the Nevada Constitution provides:

> The legislature shall provide by law for an annual tax sufficient to defray the estimated expenses of the state for each fiscal year; and whenever the expenses of any year exceed the income, the legislature shall provide for levying a tax sufficient, with other sources of income, to pay the deficiency, as well as the estimated expenses of such ensuing year or two years.

Article 11, § 2 of the Nevada Constitution, adopted in 1864, provides:

> The legislature shall provide for a uniform system of common schools, by which a school shall be established and maintained in each school district at least six months in every year, ...

Article 11, § 6 of the Nevada Constitution provides:

> In addition to other means provided for the support and maintenance of said university and common schools, the legislature shall provide for their support and maintenance by direct legislative appropriation from the general fund, upon the presentation of budgets in the manner required by law.

STATEMENT OF THE CASE

In 1994 and again in 1996,[1] Nevada voters overwhelmingly approved an amendment to their state Constitution, which prohibited the state Legislature from imposing new or increased taxes without the concurrence of 2/3 of the Members of each house of the Legislature. Nev. Const. Art. 4 § 18(2). Tax measures that do not receive the necessary 2/3 vote may still be adopted, but must be submitted to the voters for approval before they can take effect. *Id*. § 18(3).

At the outset of the 2003 legislative session, Nevada Governor Kenny Guinn, the lead Respondent here, proposed to the Legislature a budget which included a $980 million tax increase, Pet. App. 7a, 32a, by far the most massive tax increase in the State's history. Unable to garner the 2/3 vote required to approve the Governor's requested tax hike, the Legislature adjourned its session on June 3, 2003, having approved appropriations totaling more than $3.2 billion—without a dime for education, arguably the only spending item actually mandated by the Nevada Constitution. Pet. App. 7a, 32a. Governor Guinn then immediately called the Legislature into special session to consider a tax increase and a couple of education funding bills.

Because the Nevada Constitution mandates a balanced budget, and because the previously-approved spending bills had left only $700 million to cover a proposed education budget of $1.6 billion, any appropriation for education approved during the special session by the Legislature that was anywhere near the amounts proposed was going to require a

---

[1] Nev. Const. Art. 19, § 2(4) provides that a constitutional amendment requires the approval of a majority of the voters at two general elections. The 2/3 vote tax initiative at issue here, also known as the "Gibbons Tax Restraint Initiative" after its chief sponsor, Jim Gibbons (now a member of the U.S. House of Representatives from Nevada's 2nd District), was supported by more than 70% of the voters in each of the two elections.

tax increase of somewhere between $800 and $900 million. The Legislature could not consider reductions elsewhere in the budget because the Governor's special session proclamation did not give the Legislature such authority, and the Governor ignored requests to expand the special session to allow consideration of spending cuts or even reductions in the rate of spending increases already approved. *See* Nev. Const. Art. 5, § 9 ("the Legislature shall transact no legislative business [in a special session convened by the Governor], except that for which they were specially convened"); Pet. App. 34a. The Nevada Assembly was unable to muster a 2/3 vote for any of the tax increases that reached the Assembly floor, either during the 19th Special Session or the 20th, convened by the Governor on June 25, 2003, although it was widely believed that a smaller tax increase would receive the necessary 2/3 vote. *See* Pet. App. 36a ("The issue, according to these legislators, was not whether there would be a tax increase, but the necessity of a particular amount. Each scenario envisioned a several hundred million dollar tax increase").

Minutes after midnight on July 1, 2003, the first day of the new fiscal year for the Nevada state government, Governor Guinn brought suit against the Nevada Legislature and every one of its Members. He petitioned the Supreme Court of Nevada for a writ of mandamus, seeking to compel the Legislature to take legislative action on his tax increase and thereby balance the budget and fund education by the means he had proposed but for which he had been unable to obtain the constitutionally-required level of support.

A group of legislators—Petitioners here—field a counter-petition, seeking an order directing the Governor to expand the special session so that the Legislature could also consider reductions in the spending increases already approved. Pet. App. 36a. Roughly fifty different organizations and individuals filed nearly a dozen *amicus curiae* briefs either in support of or opposition to the Governor's petition.

On July 10, 2003, the Nevada Supreme Court issued a truly extraordinary Opinion and Writ of Mandamus directing the Nevada Legislature to consider tax-increase legislation by "simple majority rule" rather than the 2/3 vote required by Article 4, § 18(2) of the Nevada Constitution, Pet. App. 6a, 14a, unexpectedly granting a remedy that had not been requested by Governor Guinn or by any of the parties in the litigation, Pet. App. 15a (Maupin, J., dissenting). Although the court acknowledged the constitutional validity of the 2/3 vote provision of Article 4, § 18(2), it found, without evidentiary hearing, that the provision was preventing the Legislature from raising the taxes the court thought necessary to meet the education funding provisions of Article 11. And although the 2/3 vote provision was much more recent than the century-old education provisions, the court found the structural limitation imposed by Nevada voters on its Legislature to be a mere "procedural and general constitutional requirement" that had to "give way to the substantive and specific constitutional mandate to fund public education." Pet. App. 6a.

Three days later, on Sunday, July 13, the Nevada Assembly conducted a floor vote on Senate Bill 6 ("SB6"), a bill that sought to increase taxes in the State by $788 million. Although the bill failed to garner the 2/3 vote required by Article 4, § 18(2), the Speaker of the Assembly gaveled the bill "passed." The next morning, the legislative Petitioners here, joined by individual citizens, taxpayers, trade groups and tax policy organizations, filed suit in the United States District Court for the District of Nevada, contending that the Assembly's action amounted to vote dilution and vote nullification in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and ignored the structural commands of the state Constitution in violation of the Republican Guarantee Clause of Article IV, § 4 of the United States Constitution. Although the district court, sitting *en banc*, granted plaintiffs request for a temporary re-

straining order that same day, by week's end it held that it was without jurisdiction to consider the legislators' claims under the *Rooker-Feldman* doctrine and dismissed the action. *Angle v. Legislature of State of Nevada*, 274 F.Supp. 2d 1152, 1155 (D. Nev. July 18, 2003). The district court suggested that the *Rooker-Feldman* doctrine also barred the claims of the non-legislators, but dismissed those claims under Rule 12(b)(6), without prejudice to re-filing in state or federal court. *Id.*, at 1156.[2]

Late in the evening of the next day, a Saturday, with the TRO lifted, the Nevada Assembly proceeded to consider another bill raising taxes, Senate Bill 5 ("SB5"). SB5 also failed to garner a 2/3 vote, but the Assembly Speaker nevertheless deemed the bill "passed," this time over a point of order objection that, in violation of parliamentary procedure, he refused to submit to a requested roll-call vote of the body.

The following Monday, July 21, 2003, the group of Legislators—again, Petitioners here—filed a Petition for Rehearing with the Nevada Supreme Court requesting that the court reconsider its ruling and recall its writ of mandamus. Pet. App. 51a-74a. Petitioners specifically raised the federal vote dilution, vote nullification, due process and Republican Guarantee Clause claims that are the subject of this petition for a writ of certiorari. Pet. App. 66a-73a. The group of Legislators also filed an application for an emergency stay, which the court set over for additional briefing and did not decide until summarily denying it on September 17, 2003. The citizens and taxpayers who had joined them in the federal action filed a motion to intervene on July 21, 2003, seeking to present their federal claims to the Nevada Supreme Court as well. That motion was denied less than an hour

[2] The federal action is currently pending before the Ninth Circuit Court of Appeals, focusing on the *Rooker-Feldman* jurisdictional issue.

later, in an order hurriedly signed by only four of the court's seven Justices.

Late that evening, by its own account because of the changed dynamic in the Legislature produced by the Nevada Supreme Court's writ of mandamus, the Nevada Legislature adopted tax legislation by a two-thirds supermajority, in conformity with the Nevada Constitution. Pet. App. 27a-28a. Although Petitioners then filed a motion to vacate the Nevada Court's original decision on the Nevada equivalent of *Munsingwear* grounds, *see United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950); *City of Las Vegas v. Sunward Sales, Inc.*, 843 P.2d 1207, 1208 (1982), the Nevada Supreme Court refused. It denied the petition for rehearing as moot and also summarily denied the motion to vacate on September 17, 2003. Pet. App. 45a, 47a n.46. Justice Maupin, dissenting, would have granted the petition for rehearing, dissolved the mandamus, and vacated the prior majority opinion.

REASONS FOR GRANTING THE WRIT

Briefly stated, this Court's review is warranted because, as described in Part I below, the extraordinary writ issued by the Nevada Supreme Court violated the Republican Guarantee Clause of Article IV of the United States Constitution, and diluted the votes of Legislators and their constituents, in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. Although Petitioners first raised those claims in their petition for rehearing before the Nevada Supreme Court, this Court has jurisdiction where, as here, the federal issues arose as the result of an unexpected decision by a state's highest court and petitioners therefore had no prior opportunity to raise the federal claims. *See Brinkerhoff-Faris Trust Co. v. Hill*, 281 U.S. 673, 677-78 (1930). The Nevada Supreme Court's refusal even to address, much less put to rest, Petitioners' significant federal claims, in the context of its extraordinary or-

der for the state Legislature to ignore a key structural provision of the state Constitution, presents important questions of federal constitutional law that have not been, but should be, addressed by this Court.

Relying on the Nevada Supreme Court's extraordinary decision, the Nevada Assembly twice deemed as "passed" tax increases that failed to receive the 2/3 vote required by the Nevada Constitution. As will be discussed at greater length in Part II, *infra*, the fact that the Legislature ultimately achieved a 2/3 majority on another tax bill does not render this case moot. First, the Nevada Supreme Court's decision remains on the books, where it will continue to affect the dynamic in the Legislature, "authorize" unconstitutional vote dilution, and undermine the structural limits imposed by the people of Nevada. Second, the Nevada Assembly already took unconstitutional action in reliance on the decision below, violating federal constitutional rights of Petitioners and their constituents. Third, voluntary cessation of unlawful conduct does not moot a case where the actor remains free, as here, to begin the unlawful conduct anew. Moreover, even if legislative approval of a tax increase somehow mooted Petitioners' challenge to the ongoing effects of the Nevada Supreme Court decision authorizing such conduct, the unlawful vote dilution is certainly capable of repetition yet evading review. Finally, had the case truly become moot in the midst of petitioners' effort to have the Nevada Supreme Court address the significant violations of federal constitutional rights caused by its decision, the proper course for the Nevada Supreme Court would have been to vacate its decision. That it chose not to confirms not only the lingering effect of the decision, but also the court's intent to have such an effect.

I. The Nevada Supreme Court's Order, and Subsequent Action by the Assembly in Reliance on It, Violated Fundamental Federal Constitutional Rights that Require this Court's Protection.

Most fundamentally, the writ of mandamus issued by the Nevada Supreme Court directing the Legislature to ignore a key structural provision of the Nevada Constitution altered the way the Nevada Legislature has been authorized by the people of Nevada to do business, in violation of the federal constitutional guarantee that the people may choose the particulars of their republican form of government. Moreover, the manner in which the court reached its decision, granting a remedy never requested by any party and ignoring or misapplying its own well-established canons of construction, raises serious due process concerns.

The specific actions taken under the supposed "authority" of the decision below resulted in the unconstitutional dilution of Petitioners' votes when, on July 13, 2003 and again on July 19, 2003, the Nevada Assembly deemed as "passed" a bill increasing taxes without the 2/3 vote required by the Nevada Constitution. Derivatively, the actions by the Assembly, again under the "authority" of the decision below, diluted the representation to which the constituents of Petitioners were entitled by the clear command of the Nevada Constitution and effectively nullified the votes of the hundreds of thousands of Nevada citizens who in 1994 and 1996 overwhelming approved the 2/3 vote provision as an amendment to their state Constitution. These actions violate voting rights protected by the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

Because of the strength and significance of these claims, which were never addressed by the Nevada Supreme Court below (nor by the district court in the parallel federal action, which held it was jurisdictionally barred), this Court's review is now warranted.

A. Republican Guarantee Clause 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 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)).

In the wake of this Court's decision in *New York*, several lower courts have acknowledged that the Republican Guarantee Clause might present justiciable questions, but thus far all have 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*, 179 F.3d 29 (2nd Cir. 1999); *Kelley v. United States*, 69 F.3d 1503, 1511 (10th Cir. 1995). Others, in conflict, have held that Republican Guarantee Clause claims remain

nonjusticiable. *See State ex. rel. Huddleston v. Sawyer*, 932 P.2d 1145 (Or. 1997).

This case presents one of the rare instances in which a Republican Guarantee claim must be viable. The essence of the republican guarantee is the right of a State's citizens to "structure their government as they see fit." *Kelley*, 69 F.3d, at 1511. In *New York* itself, this Court dismissed the Guarantee Clause claim only because the statute in that case did not "pose any realistic risk of altering the form or the method of functioning of New York's government." 505 U.S., at 186. But here, the decision below has already altered "the method" by which the Legislature functions when undertaking to impose new or increased taxes. Such claims should be viable under *New York*, and have specifically been recognized as viable in the Third and Fifth Circuits. *See Texas*, 106 F. 3d, at 667; *New Jersey*, 91 F.3d, at 468-69; *cf. Brzonkala v. Virginia Polytechnic Institute and State Univ.*, 169 F.3d 820, 895 (4th Cir. 1999) (noting that the federal courts are supposed to protect the structural preferences of a State's citizens, serving as a sort of "structural referee"), *aff'd sub nom. United States v. Morrison*, 529 U.S. 598 (2000).

The receptiveness of these courts to Republican Guarantee Clause claims for structural constitutional violations stands in stark contrast to the treatment afforded the claim by the Nevada Supreme Court below. Indeed, the Nevada Court's order was such an extraordinary departure from the judicial office, that one can hardly imagine a more apt case for pressing a Republican Guarantee Clause claim than this.

"We must accept the duly enacted constitution and laws of this state, whether they are well or ill advised …." That statement, which captures the essence of the federal guarantee that the people may choose the particulars of the republican form of government under which they wish to live, was surprisingly made not by Justice Maupin in dissent but by Justice Shearing in her opinion concurring in the denial of

the petition for rehearing below. Had Justice Shearing and her colleagues paid heed to her own admonition, the State of Nevada would not be in the midst of the constitutional crisis that it is.

Instead, the majority of the Nevada Supreme Court, the Governor of the State, and a majority of the State's Legislature refused to accept the clear, unambiguous and perfectly constitutional command of the Nevada Constitution that had twice been approved by the overwhelming majority of Nevada voters.

This was no mere state court interpretation of ambiguous state law, which as a general rule is beyond the supervisory authority of this Court. *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70, 76 (2000). No; the Nevada Supreme Court candidly admitted that the 2/3 vote provision was unambiguous, that it was validly enacted, and that it did not violate any command of the federal Constitution. *See, e.g.*, Pet. App. 8a, 10a, 12a. The court's ensuing cavalier treatment of a binding state constitutional amendment, however, undermines government by consent, which is the essence of the guarantee of republican government.

B. Due Process Violations

Not surprisingly, a decision such as the Nevada Supreme Court's below that undermines the very notion of constitutional government also violates the commands of federal due process, particularly where, as here, the Court ordered a remedy that had not been requested by any party. State courts simply do not have a free hand to interpret state law beyond what a "fair reading" would permit, without violating due process. *Bouie v. City of Columbia, South Carolina*, 378 U.S. 347, 361-62 (1964); *Bush v. Gore*, 531 U.S. 98, 115 (2000). The Nevada Supreme Court's decision is thus susceptible to—and, given the seriousness of the threat to constitutionalism, warrants—this Court's review.

1. The Remedy Afforded by the Nevada Supreme Court Had Not Been Requested, or Even Suggested, by Any Party.

One of the most curious aspects of the Nevada Supreme Court's decision was that no party ever asked the court to invalidate Art. 4 § 18(2) or even to suspend its operation in this session.[11] Justice Maupin, in dissent, expressly noted without contradiction that "none of the parties directly named in this litigation, including the Governor, have requested the specific relief we provide today." Pet. App. 15a. The Governor, too, admitted during the parallel proceedings in the federal District Court that he "never requested that the two-thirds legislative voting requirement of Article 4, Section 18, Clause 2 be declared unconstitutional or that it should be stricken." *Angle*, Governor's Opp. Br., at 6. The remedy was raised for the first time by the Nevada Court's decision, without argument or hearing, contrary to the most basic precepts of due process. *See Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281 (1974) (holding that parties need "to know the issues on which decision will turn and to be apprised of the factual material" so that they may rebut claims against them) (citing *Ohio Bell Telephone Co. v. Public Utilities Comm'n*, 301 U.S. 292 (1937); *United States v. Abilene*, 265 U.S. 274 (1924)).

---

[11] Although an *amicus* brief of the NEA questioned whether this state constitutional provision violated the federal Constitution, the court did not decide the case based on the federal constitutional issues presented by those *amici*. To do so, moreover, would have been procedurally improper, for a number of reasons. Even assuming NEA had been granted leave to file its brief, *amici* cannot raise new issues on their own. The parties were not called on to brief the *amici*'s points. Although the Court ordered the Governor and other counter-respondents to respond to the counter-petition filed the same day as the *amicus* brief, no response was ordered to any issues raised by the *amici*.

2. "Unconstitutional" constitutional amendments

The Nevada Court gave life to the old law-school hypothetical notion of "unconstitutional constitutional amendmens." The notion posits that there are some provisions of a constitution so fundamental, so central to basic principles of political theory, that they simply cannot be amended. *See, e.g.*, Walter F. Murphy, THE NATURE OF THE AMERICAN CONSTITUTION (1989); Mark A. Graber, *Old Wine in New Bottles: The Constitutional Status of Unconstitutional Speech*, 48 VAND. L. REV. 349, 380 (1995). Even if it would *ever* be appropriate for a court to invalidate a constitutional amendment on such grounds, this is not the case. Unlike the examples typically used in the hypothetical context—separation of powers restrictions, for example, or supermajority requirements for the adoption of amendments—the Nevada Supreme Court here *rejected*, rather than protected, a structural provision in favor of a non-structural one.

3. Canons of Construction

As expressly noted by Petitioners in their petition for rehearing below, Pet. App. 64a, the Nevada Supreme Court also ignored or misapplied a number of longstanding interpretative canons in the course of rendering its extraordinary and unexpected decision, including:

- More recently enacted constitutional provisions prevail over older provisions;
- Specific provisions will prevail over generalized provisions on the same subject matter;
- A court is, to the maximum extent possible, supposed to reconcile apparently conflicting provisions;
- A court must give effect to unambiguous provisions;
- A court sitting in equity will not render equity to a party coming with "unclean hands."

The Nevada Court's utter refusal to follow or consistently apply any one of those traditional canons of interpretation would raise serious due process concerns, but its failure faithfully to apply any of them in this particular case surely must warrant this Court's consideration.

Last In Time Prevails. Nevada has long subscribed to the interpretative canon that "if there is an irreconcilable conflict between two statutes, the statute which was most recently enacted controls the provisions of the earlier enactment." *Marschall v. City of Carson*, 464 P.2d 494, 500 (Nev. 1970) (citing, e.g., *State ex rel. Eggers v. Esser*, 129 P. 557 (Nev. 1913)).

Nevada applies the same rules of construction when construing constitutional provisions that it applies when construing statutes. *Nevada Mining Ass'n v. Erdoes*, 26 P.3d 753, 757 (2001). Indeed, in the context of constitutional provisions, the "last in time" principle is more than just an interpretive canon; it is compelled by the very nature of constitutional government and the recognition in the Declaration of Independence that governments are established by the consent of the governed. Decl. of Ind. ¶ 2; *see also* Nevada Enabling Act, 13 Stat. 30 (1864) (requiring conformity with the principles of the Declaration). As a result, the Nevada Supreme Court has given the principle particularly strong application in the context of constitutional provisions:

> [I]t is an oxymoron to state that a duly-ratified constitutional amendment can, at the time of its passage, violate that same constitution. It is one of the best-established principles of constitutional interpretation that in the case of a clear conflict between a constitutional amendment and another constitutional provision already existing at the time the amendment is ratified, the amendment, being the later expression of will of the lawmaker, must prevail.

Whitehead v. Nevada Commission on Judicial Discipline, 878 P.2d 913, 938 (Nev. 1994) (citing *Schick v. United States*, 195 U.S. 65, 68-69 (1904)).

That "oxymoronic" proposition is precisely the holding of the Nevada Supreme Court below. Although the Court did not go so far as to actually declare the 2/3 vote provision *unconstitutional*, as some of the *amici* had urged, Pet. App. 40a, it did deprive the provision of any effect, which is even worse, for it effectively negated a duly-enacted act of the people without even the pretense of a holding of unconstitutionality: "Our opinion did not eliminate the two-thirds requirement, but it did indicate that the supermajority provision could not be used to avoid other constitutional duties." Pet. App. 45a.

Specific provisions prevail over general. The Nevada Supreme Court sought to avoid the clear import of the last-in-time rule by manufacturing a new rule of interpretation that "substantive" provisions trump "procedural" provisions of the Constitution. Although it attempted to portray that new rule as of a piece with the longstanding rule that general provisions must yield to specific provisions, Pet. App. 11a, the court's new dichotomy was actually a bastardization of the older rule, treating a core structural provision of the State's Constitution as a mere "procedural" rule and treating as "specific" the very general provision that "the legislature shall provide for [the] support and maintenance [of at least one common school in each district] by direct legislative appropriation from the general fund, upon the presentation of budgets in the manner required by law." Pet. App. 12a; Nev. Const. Art. 11, §§ 2, 6. Indeed, had it looked to the "specific" requirements of the education provisions, it would have been immediately apparent that the only obligation is to fund a limited number of schools for half a year; a requirement that could easily have been met with the approximately $700 million already available in the budget without need for

further appropriations and without conflict with the exceptionally specific requirement that new taxes be approved by a 2/3 vote.

Under the court's new reasoning, other "procedural" provisions of the Nevada Constitution are just as susceptible to judicial nullification as was the 2/3 vote provision, including the requirement of bicameralism, presentment, the 120-day restriction on legislative sessions, and even the limitation on matters that can be considered in special session. *See* Nev. Const. Art. 4, §§ 2, 18(1), 35; Art. 5, § 9. The Nevada Supreme Court has already acknowledged that these provisions, too, contribute to the supposed conflict between the 2/3 tax provision, on the one hand, and the education funding and balanced budget provisions, on the other. Pet. App. 33a (noting that other problems contributing to the conflict included the "abbreviated nature of the legislative session" and "policy disagreements between the Senate and Assembly").

These provisions are every bit as "procedural" and "general," in the Nevada Supreme Court's newly manufactured hierarchy of constitutional commands, as was the 2/3 vote provision. The Senate had already voted to approved the tax increase by the requisite 2/3 vote, so the bill could have been deemed as "passed" by the Nevada Court without any Assembly input to avoid the "conflict" between the "general" bicameralism provision and the "specific" education funding provision. Indeed, the Court could just as easily have ordered the Legislature to ignore the requirement of Article 4, Section 19, which bars the State Treasurer from releasing funds without a legislative appropriation.

Such absurdities are no different than the court's nullifying the 2/3 requirement for new taxes, which represents, more than anything else, an abandonment of constitutional government and a court run amok.

Reconcile conflicting provisions. Another long-standing interpretive canon followed in Nevada is that, whenever pos-

sible, courts are to interpret rules or statutes in harmony with other rules and statutes. Pet. App. 11a (citing *Bowyer v. Taak*, 817 P.2d 1176, 1177 (1991)). Indeed, the Nevada Court has frequently noted that it is "obligated" to reconcile conflicting provisions to the maximum extent possible. *Id.*; *Weston v. Lincoln County*, 643 P.2d 1227, 1229 (Nev. 1982).

The Nevada Supreme Court here disregarded several obvious means of reconciling the supposed conflict between the 2/3 vote provision, on the one hand, and the balanced budget and education funding provisions, on the other. It refused Petitioners' request to remit the matter back the Governor, who possessed the power to expand his special session proclamation to permit the Legislature to consider spending reductions, which very likely would have solved the impasse. It broadly read the education provisions to mandate a level of funding that necessitated a tax increase beyond the level for which there was the support of 2/3 of the Legislature, when nothing in those clauses remotely suggests any specific level of funding. Indeed, the only requirement is found in Art. 11, § 2, which mandates only that the Legislature provide one school in each district for a minimum of six months each year—a mandate that was easily met without violating the 2/3 vote provision. Neither of these obvious ways of reconciling the supposed conflict was considered by the court,[3] which instead simply rendered nugatory the later-enacted 2/3 vote provision.

Unambiguous Provisions. Finally, the Nevada Court gave only lip service to a key restriction on the judicial role that it has in the past repeatedly applied:

---

[3] A third alternative, resort to Article 4, section 18(3), which specifically provides that tax increases failing to garner a 2/3 vote could nevertheless take effect if approved by a simple majority of the voters, was completely discounted by the Court as "inadequate." Pet. App. 10a n.12.

> Where the language of a statute is plain and unambiguous, and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself.

State, Div. of Ins. v. State Farm Mut. Auto. Ins. Co., 995 P.2d 482, 485 (Nev. 2000).

Despite its own repeated treatment of the 2/3 vote provision as "clear on its face," the Nevada Supreme Court looked beyond the clear text to other materials to try and ascertain a different voter intent, concluding, essentially, that the voters were too ignorant to have understood what effect the initiative would actually have on the functioning of state government. Pet. App. 31a.

"Unclean Hands." The Nevada Supreme Court has long subscribed to "the well-established defense to equitable claims that litigants seeking equity must come with 'clean hands.'" *Tracy v. Capozzi*, 642 P.2d 591, 593 (Nev. 1982).

Here, the legislative standstill that led Governor Guinn to invoke the equity jurisdiction of the Nevada Supreme Court was at least in part of his own making, the result of his refusal to expand his special session proclamation to permit the Legislature to consider reductions in previously-approved appropriations. Petitioners' counter-petition, asking the Nevada Supreme Court not to consider the Governor's petition because of the Governor's unclean hands, was denied; the Court inexplicably asserted that it had "no authority, under the separation of powers doctrine, to compel either the Governor or the Legislature to employ such methods to resolve any impasse." Pet. App. 9a n. 9. Such faux concern for separation of powers presents particularly bitter irony given the court's ensuing disregard for Nevada's Constitution.

By such cavalier disregard of, and contempt for, unambiguous voter will, the Nevada Supreme Court substituted its

judgment for that of the voters. By itself, that undermines republican government. Joined with the other canons of construction disregarded by the court below, due process also was violated to such a degree as to warrant this Court's attention.

C. Legislator Vote Dilution Claims

This Court 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. *See Coleman v. Miller*, 307 U.S. 433, 438 (1939) (holding that state legislators "have a plain, direct, and adequate interest in maintaining the effectiveness of their votes"). At issue in *Coleman* 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").

Although *Coleman* involved a federal constitutional amendment, several courts have recognized that a state legislature's failure to comply with its own procedures may violate federal Due Process. *See, e.g., Rea v. Matteucci*, 121 F.3d 483, 485 (9th Cir. 1997) (quoting *Atkins v. Parker*, 472 U.S. 115, 130 (1985)); *Conway* v. *Searles*, 954 F. Supp. 756, 767 (D. Vt. 1997). "Fairness (or due process) in legislation is satisfied when legislation is enacted in accordance with the procedures established in the state constitution and statutes

for the enactment of legislation," *Richardson v. Town of Eastover*, 922 F.2d 1152, 1158 (4th Cir. 1991), not by legislation enacted in violation of the procedures mandated by the state constitution, as here. "Legislative rules are judicially cognizable, and may therefore be enforced by the Courts." *Conway*, 954 F. Supp. at 769 (citing *Yellin v. United States*, 374 U.S. 109, 114 (1963); *Christoffel v. United States*, 338 U.S. 84 (1949)).

Moreover, this Court has expressly suggested, albeit in *dicta*, that members of state legislative bodies have standing to bring a vote dilution claim that arises from violations of *state law*. *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 544 n.7 (1986) ("if … state law authorized School Board action solely by unanimous consent," a disenfranchised school board member "might claim that he was legally entitled to protect 'the effectiveness of [his] vot[e]'") (quoting *Coleman*, 307 U.S. at 438) (brackets in original). A legislator in such circumstances "would have to allege that his vote was diluted or rendered nugatory under state law," and "he would have a mandamus or like remedy against the Secretary of the School Board." *Id*.

The hypothetical case described in *Bender* is nearly identical to the case here. State law—Article 4, § 18(2) of the Nevada Constitution—authorizes legislative action on tax increases "solely" by 2/3 vote. The disenfranchised legislators—Petitioners here, who together provided enough votes to defeat the tax increase pursuant to the 2/3 vote requirement of Article 4—claimed in their petition for rehearing that their vote was diluted below the weight required by state law. Under the provisions of the Nevada Constitution, the vote of a Member of the State Assembly is 1/15 of the votes necessary to defeat a tax increase. Under the procedure "authorized" by the Nevada Supreme Court's decision below, an Assemblyman's vote was only 1/21 of the votes necessary to defeat a tax increase—a classic case of vote dilution, in vio-

lation of the Due Process Clause. This Court should grant certiorari in this case to consider what was only *dicta* in *Bender*, and to address the implicit split on this issue between the Nevada Supreme Court in this case, on the one hand, and the Fourth and Ninth Circuits and the District of Vermont, in *Richardson*, *Rea*, and *Conway*, respectively, on the other.

D. Constituent Representation Dilution Claims

This Court has repeatedly recognized vote dilution claims by voters. *See Westberry v. Sanders*, 376 U.S. 1 (1964); *Franklin v. Massachusetts*, 505 U.S. 788 (1992). "'[T]he 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.'" *Roe v. State of Ala. By and Through Evans*, 43 F.3d 574, 580 (11th Cir. 1995) (quoting *Reynolds v. Sims*, 377 U.S. 533, 554 (1964)).

That the dilution occurs after the voters' representative is elected, and is therefore derivative of the legislator's own vote dilution claim, is immaterial. *Michel v. Anderson*, 14 F.3d 623, 626 (D.C. Cir. 1994); *see also Skaggs*, 110 F.3d, at 834. As the D.C. Circuit noted in *Michel*: "It could not be argued seriously that voters would not have an injury if their congressman was not permitted to vote at all on the House floor." 14 F.3d, at 626. Depriving voters of representation with the full weight guaranteed their representatives' votes by the Nevada Constitution's 2/3 requirement is only a difference in degree from the hypothetical embraced in *Michel* as a self-evident constitutional violation.

Here, by operation of Article 4, § 18(2) of the Nevada Constitution, Petitioners' constituents were entitled to representation with a vote sufficient to block a tax increase unless supported by 2/3 of the legislature. The Nevada Supreme Court's order "authorizing" the Legislature to ignore that constitutional provision, and to deem as "passed" a tax in-

crease that failed to garner the necessary 2/3 vote, diluted the representation to which Petitioners' constituents were entitled, and therefore diluted their right to vote.

The Nevada Supreme Court's decision below thus is fundamentally in conflict with well-established precedent of this Court, and in conflict with holdings of the D.C. Circuit in *Michel* and *Skaggs*. Certiorari is warranted.

E. Vote Nullification Claims

The Nevada Supreme Court's decision has also effectively nullified the votes successfully cast in support of the Gibbons Constitutional Tax Initiative in 1994 and 1996, by which an overwhelming percentage of Nevadans approved the 2/3 vote amendment to the state Constitution. The right to vote constitutes more than just the right to show up at a voting booth. It encompasses 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 authorizing the Nevada Legislature to adopt tax increases by "simple majority rule," the Nevada Supreme Court 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 Nevada Supreme Court's decision deprived Nevada voters of their right to an effective vote, a right protected by the Fourteenth Amendment of the U.S. Constitution.

In addition, the Court's mandamus essentially authorized the State Assembly to give 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)).[4]

Because these fundamental federal voting rights are so clearly established, and so clearly violated here, the Nevada Supreme Court's order is clearly contrary to the decisions of this Court and certiorari is warranted.

II. The Legislature's Adoption of a Tax Bill Did Not Moot this Case, and the Nevada Court's Refusal to Vacate Its Decision Only Perpetuates the Ongoing Republican Guarantee Problem.

The Nevada Court denied the petition for rehearing on mootness grounds, but because the Legislature's adoption of a tax bill did not moot this case, that erroneous decision does not present a vehicle problem to this Court's review.

There are several reasons why the case is not moot. First, the decision "authorizing" the Legislature to ignore the 2/3 vote provision of the Nevada Constitution remains on the books, where it "lies about like a loaded weapon ready for the hand of any authority that can bring forth a plausible claim of an urgent need." *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

Second, the Assembly already took action on two bills, SB5 and SB6, in violation of the 2/3 vote provision. That the Legislature ultimately approved another bill by a 2/3 vote does not alter the vote dilution that occurred with respect to those bills.

Third, a case is not rendered moot by the voluntary cessation of complained-of conduct. When a party ceases

---

[4] 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).

wrongful action, but remains able to repeat it in the future, the controversy remains alive and subject to adjudication. Thus, "however much the new regulation may reduce the practical importance of this case, it does not completely remove the controversy." *United States v. Concentrated Phosphate Export Assn.*, 393 U.S. 199, 203 (1968); *see also Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 189 (2000).

The Nevada Supreme Court itself acknowledged not just the possibility, but the likelihood, that the Legislature again will again ignore the 2/3 vote provision: "Because the State Distributive School Account is such a large component of the general fund, difficulties concerning the supermajority provision's application were certain to arise with respect to public school funding, no matter when addressed." Pet. App. 33a n.15. So did Senator Dina Titus, one of the Respondents here: "In the future when we do taxes, and we don't do them very often, they will always be tied to the DSA [education funding bill] because of this ruling." Las Vegas Sun (July 12, 2003). And the Nevada State Education Association ("NSEA"), one of the Governor's *amici* below, made the same point. In its brief opposing Counter-Petitioners' motion to vacate, the NSEA contended—repeatedly—that the Nevada Supreme Court should *not* vacate its decision precisely because the legislative stand-off that resulted from the 2/3 vote requirement of the Nevada Constitution was so capable of repetition every budget cycle. NSEA Br. at 5 (noting that the damage allegedly inflicted upon school districts by the 2/3 vote provision "has not somehow been undone by the recent passage of the school funding bill"); *id.* at 6 ("The [July 10] opinion should not be withdrawn, because the crisis that precipitated it is otherwise likely to recur"); *see also* NSEA Initial Br. at 6 n.7 ("it is *highly probably* that this [legislative] session will not be the last in which the Gibbons initiative will result in a budget crisis" (emphasis added)).

Even if this case were moot despite the Legislature's voluntary cessation, those same concessions demonstrate that the case is capable of repetition yet evading review, an exception to the mootness bar. *See Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911).

Moreover, the Nevada Court's holding of mootness, based on action by Respondents, deprived Petitioners of the ability to challenge the Court's decision via their petition for rehearing. Vacatur of the decision was thus required under the Nevada equivalent of *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). *See Sunward Sales*, 843 P.2d, at 1208 (1982) ("we must dispose of the entire proceeding, not merely the appeal" when new legislation makes a case moot); *see also De La Teja v. United States*, 321 F.3d 1357, 1364 (11th Cir. 2003) ("when an issue in a case becomes moot on appeal, the court not only must dismiss as to the mooted issue, but also vacate the portion of the district court's order that addresses it"). The Nevada Supreme Court's refusal to vacate its decision in accord with its customary practice thus causes ongoing harm and exacerbates the due process problems, leaving in place a decision that concededly will continue to undermine a key structural limitation that the citizens of Nevada have imposed on their government.

CONCLUSION

The decision below has generated "public outrage" among Nevada citizens, as well it should, given the court's contempt for its own citizens and the Constitution they have established to reign in their government. *See, e.g.*, Martha Bellisle, "Activists want to oust justices who set Legislature back to work," Reno Gazette-Journal (July 18, 2003).[5]

---

[5] Available at http://www.rgj.com/news/printstory.php?id=47301 (last visited Jan. 19, 2004) (noting the "public outrage").

Whether or not their anger ever erupts in a way comparable to Shay's Rebellion or the Whisky Rebellion, which gave rise to the protections of the Republican Guarantee Clause of Article IV, it is critically important that this Court issue a writ of certiorari to review the Nevada Supreme Court's decision. A judicial insurrection such as that manifested by the decision below may well be even more dangerous to the principles of republican government than the insurrections of farmers and debtors that gave the framers of our Constitution such cause for concern.

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

EDWIN MEESE III
214 Massachusetts Ave., NE
Washington D.C. 20002

HUGH HEWITT
STEVEN B. IMHOOF
HEWITT & O'NEIL LLP
19900 MacArthur Blvd.,
Suite 1050
Irvine, CA 92612

JOHN C. EASTMAN
Counsel of Record
The Claremont Institute Center
For Constitutional Jurisprudence
c/o Chapman University
School of Law
One University Drive
Orange, CA 92866
(714) 628-2587

ERIK S. JAFFE
ERIK S. JAFFE, P.C.
5101 34th Street, N.W.
Washington, DC 20008

Counsel for Petitioners

Dated: January 20, 2004.

APPENDICES