No. 04-542

IN THE

Supreme Court of the United States

HON. SHARRON E. ANGLE, *et al.*,

Petitioners,

v.

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

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Seeking to dissuade this Court from granting the petition for certiorari, the Legislative Respondents[1] raise a handful of immunity and jurisdictional claims that they either 1) failed to raise below; or 2) raised and lost, and then failed to preserve here by way of a cross-petition. Respondents' immunity claims have been waived by not being raised or preserved below. As for their jurisdictional contentions, the Ninth Circuit below reached the merits of one of petitioners' claims, necessarily rejecting the jurisdictional problems now erroneously asserted by the Legislative Respondents; this Court should reject those contentions as well, as they are without merit and nothing new has transpired that would undermine the jurisdiction already exercised by the Ninth Circuit or that Petitioners seek to invoke in this Court.

I. Respondents' Standing Arguments Are Misplaced.

First and principally, Respondents assert for the first time that *none* of Petitioners had standing to press their constitutional claims below. All do, as this Court's precedents make amply clear.

A. *Coleman* Establishes Standing for Legislators "Whose Votes Would Have Been Sufficient to defeat" a Bill Absent Unlawful Vote Dilution.

Respondents somehow finds support in *Raines* v. *Byrd*, 521 U.S. 811 (1997), for their contention, raised for the first

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[1] Petitioners note that only certain respondents—the Legislature of the State of Nevada; the Nevada Senate; the Nevada Assembly: President of the Senate Lorraine T. Hunt; Speaker of the Assembly Richard D Perkins; Jacqueline Sneddon, Chief Clerk of the Nevada Assembly; Diane Keetch, Assistant Chief Clerk of the Nevada Assembly; Brenda Erdoes, Legislative Counsel of the Nevada Legislature; and Claire J. Clift, Secretary of the Nevada Senate—filed an opposition to the petition for a writ of certiorari. The Executive Branch Respondents chose not to file brief in opposition to the petition. Nevertheless, for simplicity, we refer to the Legislative Respondents simply as "Respondents" herein.

time here, that the Legislator Petitioners did not have standing to pursue their vote dilution claims. The holding of *Raines*, of course, was merely that a group of legislators too small in number to control a legislative outcome does not have standing to challenge the Line Item Veto Act because it was not sufficient in number to affect the outcome of any legislative action under the Act. *Id*., at 824. The number of legislators who were plaintiffs in *Raines*—4 United States Senators and 2 members of the United States House of Representatives—was woefully short of the number required to pass (or defeat) legislative action in either house.[2] *Id*., at 814.

In contrast, Petitioners here include a sufficient number of legislators from each house of the Nevada Legislature to prevent adoption of tax-increase bills under the two-thirds vote requirement of the Nevada Constitution. The Nevada Assembly has 42 members, 28 of whom must vote in the affirmative in order on any bill raising taxes in order to meet the constitutional requirement. The 15 Petitioners who are members of the Nevada Assembly are thus sufficient to block tax-increase bills.[3] Similarly, the Nevada Senate is

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[2] *Campbell* v. *Clinton*, 203 F.3d 19 (CADC 2000), also relied upon by Respondents, is inapposite for the same reason. There, 31 members of the 435-member House of Representatives were held *not* to have standing to challenge the exercise of the Presidents' war powers.

[3] Five of the Assembly Petitioners will no longer be members of the Assembly when the Nevada Legislature reconvenes in February 2005: One, Bob Beers, was elected to the Nevada Senate on November 2, 2004; two retired (Walter Andonov and David Brown); and two were defeated in the November election (Donald Gustavson and Ronald Knecht). The November 2004 election does not effect these Petitioners' legal claim for nominal damages resulting from unconstitutional action that occurred during the 2003 legislative session, of course, and Petitioners anticipate that at least five of the new members of the Assembly would join this litigation on any remand to press the equitable claims, once the new legislative session convenes.

comprised of 21 members, so 8 votes are required to defeat tax-increase bills. The 9 Petitioners who are members of the Senate are thus sufficient in number to defeat any tax-increase bill.[4] This Court's holding in *Coleman* v. *Miller*, 307 U.S. 433 (1939), which was re-affirmed (albeit distinguished) in *Raines*, fully supports Petitioners' standing.

Respondents argue instead that, in *Raines*, this Court essentially read *Coleman* as establishing that legislator standing requires not just a sufficient number of legislators to adopt (or defeat) legislation, but also that the "legislative action goes into effect." BIO at 8 (quoting *Raines*, 521 U.S., at 823). Respondents' argument is not based on the holding, or even the *dicta*, from *Raines*, but rather on their own misconstruction of an offhand descriptive phrase in *Raines* regarding *Coleman* that had nothing to do with the holding in either case.

The "legislative action" in *Coleman* to which *Raines* was referring was the action by the Kansas Senate voting in favor of a federal constitutional amendment over the negative vote of 20 of the Senate's 40 members. The "action" was given effect and forwarded to the Kansas House of Representatives for further consideration (and ultimate ratification) because of a tie-breaking vote cast by the Kansas Lieutenant Governor, presiding over the Senate. The Senators had standing because, as this Court recognized in *Raines*:

> [T]he twenty senators were not only qualified to vote on the question of ratification but *their votes*, if the Lieutenant Governor were excluded as not being a

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[4] One of the Senate Petitioners, Ann O'Connell, was defeated in the Nevada primary election in September 2004, but one of the Assembly Petitioners, Bob Beers, was elected to the Senate in the November general election. The number of plaintiffs/petitioners in this case therefore remains sufficient to defeat tax-increase legislation.

> part of the legislature for that purpose, *would have been decisive in defeating the ratifying resolution.*

Raines, 521 U.S., at 823 (quoting *Coleman*, 307 U.S., at 441, emphasis added in *Raines*). Subsequent passage by the Kansas House of Representatives was not a pre-requisite to the Senators' standing, but was merely mentioned parenthetically by the *Coleman* Court as a fact of subsequent history. The vote dilution suffered by the Kansas Senators was complete once the ratification resolution was deemed "passed" by the Senate itself, just as the vote dilution suffered by the Assembly Petitioners here was complete once the Assembly deemed SB6 (and later SB5)[5] as "passed" without the requisite two-thirds vote. In both cases, the legislators suffered harm to their constitutional voting rights sufficient to confer on them standing to challenge the unconstitutional legislative actions already taken, and in this case to seek injunctive and declaratory relief against the likely repetition of such actions in the future as well. Further action by the Kansas House of Representatives would have afforded the Kansas Senators the additional *remedy* of recalling the State's ratification had the Senators been correct on the merits of their claim (and the further remedy of invalidating the federal Child Labor Amendment itself had it passed with the marginal vote of Kansas), just as

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[5] Respondents' contention that SB5, which increased the business license tax from $25 to $125, was not a tax increase subject to the two-thirds requirement of the Nevada Constitution because taxes were not increased overall and because it merely amended the tax increase already imposed by SB6, is nonsensical. *See* BIO at 4 and n.7. The two-thirds vote requirement contained in the Nevada Constitution applies to every "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." Nev. Const. Art. 4, § 18(2). The increase in the business license "fee" thus subjected the bill to the two-thirds vote requirement, even if other fees and taxes in the bill were reduced.

subsequent approval of the *bill* by the Nevada Senate would have given the Assembly Petitioners the additional *remedy* of recalling the approved *Act* from the Governor (and the further remedy of invalidating the *statute* itself had the Act been signed by the Nevada Governor). But again, in neither case is the subsequent history a prerequisite to Article III standing.

Respondents essentially concede standing for the Legislator Plaintiffs in footnote 12, where they acknowledge that this Court in *Coleman* "noted that the ratification of the proposed amendment by an adequate number of states was an ongoing possibility." BIO at 9 n.12. So too here. At the time this case was filed, adoption of SB6 "was an ongoing possibility," and therefore the circumstances of this case with respect to legislator standing is no different than the circumstances that existed in *Coleman*, in which this Court recognized legislator standing.[6]

B. The Voter Petitioners Likewise Have Standing.

Respondents' principal ground for asserting that the Voter Petitioners do not have standing is that the Legislator Petitioners, from whom the Voter Petitioners' claims are derived, did not have standing. That contention fails for the reasons stated in Part I.A above.[7]

Respondents' second argument fares no better. Respondents' claim is essentially that the Voter Petitioners

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[6] The termination of the possibility of the adoption of SB6 would raise mootness issues, not destroy the Article III standing that already existed. For the reasons described in Part II below, however, the fact that SB6 could no longer be adopted would not moot the legal damages claim, and the equitable claims remain viable with respect to the ongoing likelihood of future unconstitutional tax votes.

[7] Respondents' contention, BIO at 22, that Petitioners' supposed lack of standing eliminates the split with the Seventh Circuit's decision in *Crue* v. *Aiken*, 370 F.3d 668 (CA7 2004), fails for the same reason.

do not have a particularized harm because the Nevada Legislature's failure to comply with the two-third vote requirement effected all Nevada voters equally, but the opposite is true. Voters who favored tax increases had their representation enhanced beyond that afforded by the Nevada Constitution, while voters who opposed tax increases had their representation diluted. That gives the class of voters who oppose tax increases a particularized harm sufficient to confer standing. *See Michel* v. *Anderson*, 14 F.3d 623 (D.C. Cir. 1994).[8] Similarly, voters who voted in favor of the successful Gibbons tax initiative had their votes effectively nullified, while voters who opposed the initiative had their votes given dispositive weight. Again, the voters in the former camp had a sufficiently particularized injury to support standing.[9]

C. Respondents' Contention That the Taxpayer Petitioners Lack Standing is Really a Ripeness Claim.

Finally, Respondents contend that because SB6 never became law, the taxpayer petitioners "never suffered a cognizable injury in fact" and therefore did not have standing

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[8] Respondents' attempt to distinguish *Michel* is unavailing. While the voter plaintiffs in *Michel* were Illinois residents of Representative Michel, the unlawful vote dilution they claimed was shared by every voter in every congressional district in the United States.

[9] The Voter Petitioners were not parties in the *Guinn* state court litigation, so their claims are clearly not barred by the *Rooker-Feldman* doctrine, as Respondents contend. *Johnson v. De Grandy*, 512 U.S. 997, 1006 (1994). Nor does *Rooker-Feldman* bar the claims of the Legislator Petitioners, which directly challenge only unconstitutional actions taken by the state legislature, not the decision by the Nevada Supreme Court in *Guinn* which supposedly "authorized" them without ever considering the federal claims pressed here. *See Nelson v. Murphy*, 44 F.3d 497, 503 (7th Cir. 1995) ("Plaintiffs avoid this [*Rooker-Feldman*] rule, however, because they challenge the alteration of their passes independently of the courts' approval of that alteration").

to press their claims. BIO, at 14. Respondents' contention is one of ripeness, not standing; the relevant issue is not whether *these* particular taxpayers could challenge an unlawful tax imposed upon them as a deprivation of their property without due process—they clearly could—but whether the proposed tax was sufficiently imminent to support their claim for declaratory relief.[10] Although SB6 was "passed" by the Assembly only 3 days after the Nevada Supreme Court's decision in *Guinn*, and was scheduled for a vote in the Senate the very day this lawsuit was filed, Petitioners conceded before the Ninth Circuit below that the Taxpayer Plaintiffs' legal challenge to the anticipated tax was not ripe. Ninth Circuit Reply Br. at 12 n.9. Nevertheless, the taxpayer petitioners are also voters, so their claims of unlawful vote dilution were ripe as soon as the Assembly deemed a tax-increase bill as "passed" without the requisite two-thirds vote.

II. Petitioners' Claims are not Moot.

Petitioners' requests for declaratory and injunctive relief are also not moot. Petitioners sought from the district court a declaration that violations of the 2/3 vote provision of the Nevada Constitution unconstitutionally dilute their votes (for the Legislator Plaintiffs) or the votes of their representatives (for the Non-Legislator Plaintiffs), in violation of the Fourteenth Amendment, and also deprive them of the ability to define the structural provisions of their own constitution, in violation of the Republican Guarantee clause. Those violations have already occurred and, as Respondents' *amici* NSEA candidly admitted before the Nevada Supreme Court, the conditions that led to them are likely to recur every

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[10] Petitioners conceded before the Ninth Circuit that the Taxpayer Plaintiffs' claim for nominal damages was not ripe, but continued to press the claims for declaratory and injunctive relief. Ninth Circuit Reply Br. at 12 n.9.

legislative session. Indeed, the unlawful conduct of the Nevada Assembly in deeming SB6 and SB5 as passed without the requisite 2/3 vote "was merely a sample of what might be repeated elsewhere if not prohibited." *United Brotherhood of Carpenters & Joiners v. NLRB*, 341 U.S. 707, 715 (1951).[11] This Court rejected a claim of mootness under such circumstances in *United Brotherhood*; it should not entertain it now as a barrier to granting the petition for certiorari.

Respondents' contention to the contrary is based in part on the fact that Plaintiffs in their complaint sought to enjoin further consideration of SB6 (the only bill which at that time had been passed in violation of the 2/3 vote provision), and that bill died with the 2003 legislative sessions. But Respondents omit a critical fact from their argument: In response to a request from Plaintiffs counsel during oral argument before the en banc district court on July 16, 2003, to expand the requested relief to cover all tax bills, the district court expressly amended its TRO to include all bills passed by the Legislature without the 2/3 vote required by the Nevada Constitution. Pet. App. 17a. This action thus covers all attempts by the Legislature to pass tax increases without the requisite 2/3 vote—those that twice already occurred and those that are likely to occur during the upcoming legislative session.

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[11] Beyond Nevada, the precedent that was set by the State Assembly here is being closely watched in other states, at least 15 of which have supermajority requirements for tax increases similar to the Nevada provision at issue here. *See, e.g.*, Az. Const. Art. IX § 22; Cal. Const. Art. XIIIA, § 3; Ore. Const. Art. IV, § 25. Jack O'Connell, the California Superintendent of Education held a news conference last July, for example, announcing in the midst of that state's own budget difficulties that he would be bringing suit to challenge California's supermajority requirement. *See* Alexa H. Bluth, "Court's help eyed in budget impasse," Sacramento Bee (July 17, 2003).

Respondents further contend that Petitioners' equitable claims are moot because the Nevada Supreme Court's mandate in *Guinn* v. *Legislature of State of Nevada*, 71 P.3d 1269 (Nev. 2003) ("*Guinn I*"), *reh'g denied and opinion clarified*, 76 P.3d 22 (Nev. 2003) ("*Guinn II*"), *cert. denied sub nom.*, *Angle v. Guinn*, 124 S.Ct. 1662 (March 22, 2004), which "authorized" the unconstitutional vote dilution, was good only for the 20th Special Session of the Legislature, now concluded. While novel, the contention is without merit. The Nevada Supreme Court in *Guinn* purported to interpret the Nevada Constitution so as to nullify the two-thirds vote requirement. Respondents have cited no authority, and Petitioners are unaware of any, that supports their proposition of short-term constitutional interpretation. Moreover, as Petitioners noted in their petition, Senator Dina Titus, a member of Respondent Nevada State Senate, certainly has a different view: "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" in *Guinn*. Steve Kanighe, *Landmark Ruling Likely to Affect Future Sessions*, Las Vegas Sun, July 12, 2003 at 1 (available at http://www.lasvegassun.com/sunbin/stories/sun/2003/jul/12/515333226.html).

III. Respondent Waived Any Immunity Defenses by Failing to Raise or Preserve Them.

Respondents also contend that they enjoy Eleventh Amendment immunity, absolute immunity, or both. Such immunity can be waived, and Respondents' failure to raise or preserve the immunity defenses below amounts to a waiver of those defenses. *See Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234, 241 (1985). A litigant cannot pursue his claims to success in one court and then seek to insulate that success from further review by a claim of immunity.

IV. *Guinn* Does Not Preclude Certiorari Here.

Finally, Respondents appeal to this Court's general and long-standing policy of "avoiding the revisiting and overturning of a state supreme court's interpretation of its own state constitution." BIO at 27. But the question presented here is not whether that policy should be reversed, but rather whether the egregious disregard of the Nevada Constitution that occurred in this case presents one of the rare exceptions to that policy. This Court's denial of certiorari in the *Guinn* case was not a ruling on the merits of that question, of course (or on any question, for that matter). The federal constitution guarantees to the people of each state certain rights that can no more be infringed by government actions that are "authorized" by clever constitutional interpretations by the state courts than by those that do not have that judicial cover. *See Bouie v. City of Columbia, South Carolina*, 378 U.S. 347, 361-62 (1964); *Bush v. Gore*, 531 U.S. 98, 115 (2000).

CONCLUSION

For the reasons stated above and previously, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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