No. 12-16881, 12-16882

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WENDY TOWNLEY, et al.,
Plaintiffs/Appellees,

v.

ROSS MILLER, Secretary of State of Nevada,
Defendant/Appellant.

and

KINGSLEY EDWARDS,
Intervenor/Defendant/Appellant

On Appeal from the United States District Court for the District of Nevada Robert C. Jones, District Judge
Case No. 3:12-cv-00310-RCJ-WGC

APPELLEES/PLAINTIFFS' OPPOSITION TO APPELLANT/DEFENDANT ROSS MILLER'S AND APPELLANT EDWARDS' EMERGENCY MOTION FOR STAY OF ORDER GRANTING PRELIMINARY INJUNCTION

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INTRODUCTION

The district court's preliminary injunction barring Defendant Secretary of State Ross Miller from including "None of these candidates" as a ballot option in statewide races during the pendency of this case has not created an "emergency" under 9th Cir. R. 27-3(a)(3)(ii), and will not inflict "irreparable injury" on either Defendant Miller, Intervenor Kingsley Edwards, or the voting public, *see Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983) (establishing standard for a stay of a preliminary injunction). Defendants therefore do not satisfy the requirements for obtaining a stay of the district court's preliminary injunction, much less a stay on an "emergency" basis.[1]

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[1] Defendants' requests for a stay are likewise improper because the district court has not yet entered a written order, which is necessary for this Court to exercise jurisdiction. Moreover, Plaintiffs have not been given adequate time to prepare this Opposition. Defendant Edwards filed a 45-page stay motion on August 28, which Plaintiffs did not receive until August 29. Mr. Edwards' attorney sent Plaintiffs' counsel an e-mail on August 28 declaring his intent to file a stay motion, but he did not attach his motion to that communication or provide information about timing. The clerk's office agreed to allow Plaintiffs to file their opposition memorandum on the morning of Wednesday, September 5.

Two days later, on August 30, the State filed its own 40-page stay motion (along with a new affidavit), raising many arguments that differed from Defendants Edwards', and additionally incorporating his arguments by reference. The clerk's office then contacted Plaintiffs' counsel, and informed them that their brief in opposition to ***both*** stay motions would now be due the next day, on Friday August 31, at 5:00 Pacific Standard Time. Plaintiffs requested a short extension until Monday September 3, Saturday September 1, or even until 11:59 PST on August 31, but were refused. This Court should decline to adjudicate the stay motions at this time and allow Plaintiffs an opportunity to fully research and brief this motion, and respond specifically to each

It is difficult to imagine a court order that would be less susceptible to an emergency stay. Under Nevada law, votes cast for "None of these candidates" are not counted in determining the outcome of an election; rather, they are treated as legal nullities and ignored. Nev. Rev. Stat. § 293.269(2). Indeed, that is the very deficiency that led the district court to declare that Nevada's "None of these candidates" statute is unconstitutional and enjoin its enforcement. Hearing Trans. at 50 (statement of Jones, C.J.).[2] The district court neither caused an "emergency" nor inflicted "irreparable harm" upon anyone by preventing the State from offering an official ballot option in statewide races that, as a matter of state law, leads to qualified electors' properly cast votes being ignored.

Under the injunction, a person who does not wish to vote for any of the candidates running for a particular statewide office remains free to "undervote" that race—that is, refrain from casting a vote in that particular race and move on to the next race on the ballot. *See* Hearing Trans. at 4-5 (statement of Jones, C.J.). Thus, even without a ballot option for "None of these candidates," each voter still remains free to decline to vote for any of the candidates in a particular race. *See id*. at 53, 55 (statement of Jones, C.J.) (noting that a person has "the ability to

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argument Defendants make, instead of relying on research and excerpts from previous briefing. Especially given the intervening holiday weekend, such an allowance would prejudice no one.

[2] Supplemental Exhibit to Appellant Edwards' Motion for Stay Pending Appeal, *Townley v. Miller*, No. 3:12-CV-310-RCJ-WGC, Transcript of Motion Hearing (Aug. 22, 2012) (hereafter, "Hearing Trans.").

express I don't like either of these candidates" by "voting all the other races but . . . not voting in this one, and that's an expression").

Furthermore, the challenged statute allows people to vote for "None of these candidates" only in statewide races. *See* Nev. Rev. Stat. § 293.269(1). Even prior to the injunction, voters never had the ability to vote for "None of these candidates" in elections for the U.S. House of Representatives, state senate, state assembly, countywide offices, or local offices. Given voters' inability to select "None of these candidates" in the vast majority of races at both the state and federal levels, it defies credulity to assert that it would cause "irreparable injury" to likewise remove that ballot option in the small handful of statewide races.

Indeed, Nevada is the only state in the country to allow voters to select "None of these candidates" in statewide races. Hearing Trans. at 22 (statement of Jones, C.J.) (noting that "[f]orty-nine other states haven't felt the need" to include "None of these candidates" on their ballots). Far from inflicting irreparable injury on Nevada voters or creating an "emergency," the district court's preliminary injunction simply brings the ballot for statewide offices in Nevada in line with the ballots of every other state in the nation.

Defendants contend that the preliminary injunction removes a valuable means through which voters may express their disdain for the entire slate of candidates running for a particular statewide office. The U.S. Supreme Court repeatedly has held, however, that "ballots serve to elect candidates, not as forums for political expression," *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363 (1997), or as "a means of giving vent to . . . pique," *Burdick v. Takushi*, 504 U.S. 428, 438 (1992).

Thus, a person's inability to use his ballot to convey his disappointment with everyone running for a particular office can hardly be considered irreparable harm. Moreover, as mentioned above, a person who is displeased with the entire field of candidates for an office remains free to convey his displeasure by declining to vote for any of those candidates and simply skipping down to the next race on the ballot. Hearing Trans. at 4-5. Additionally, a nearly limitless range of alternative methods of expressing distaste at the candidates for a particular office exist—from writing letters, to uploading Internet postings, to undervoting that race, to organizing protests, and beyond.

Finally, as the district court itself found, a person might have had "a multitude of reasons for casting . . . a vote" for "None of these candidates"—for example, because he was not interested in a particular race, did not "know either candidate," or even for the sheer novelty of it. Hearing Trans. at 14-15. It therefore is specious to contend that votes for "None of these candidates" invariably are understood as conveying any particular message—much less a message that differs from simply undervoting that race.

Thus, a stay is inappropriate because Defendants cannot meet their heavy burden of demonstrating that the district court's preliminary injunction either will inflict irreparable injury on them or has created an "emergency" situation. The only adverse consequence of the injunction for Defendants is that, instead of being able to affirmatively vote for "None of these candidates," and have that vote illegally and unconstitutionally ignored by Defendant Miller, *see* Nev. Rv. Stat. § 293.269(2), voters who are not pleased with any of the candidates for a particular statewide office may simply undervote that

race, instead—as is the case in every other state in the country, as well as in non-statewide races in Nevada.

The district court's preliminary injunction was a valid exercise of its broad discretion. *See Dish Network Corp. v. FCC*, 653 F.3d 771, 776 (9th Cir. 2011). Allowing the State to include in statewide races a ballot option for "None of these candidates"—which appears as an "equivalent" choice to the named candidates, and which a voter may select "in the same manner" as he would a named candidate, Nev. Rev. Stat. § 293.269(1)—while simultaneously refusing to count any votes cast for that ballot option in determining the outcome of that election, *id*. § 293.269(2), unconstitutionally and illegally disenfranchises all who vote for that option. A State is not free to decide to simply ignore properly cast votes from duly qualified and registered voters, based solely on which of the officially presented, legally permissible ballot options the voter selects.

Moreover, requiring other candidates—such as Plaintiffs Bruce Woodbury and James DeGraffenreid, who are Republican candidates for the office of presidential elector—to run against such an invalid ballot alternative imposes substantial, direct, and irreparable harm on them, as well. *See Drake v. Obama*, 664 F.3d 774, 783 (9th Cir. 2011) (reaffirming the doctrine of "competitive standing," which recognizes that a candidate is harmed by "the inclusion of an allegedly ineligible rival on the ballot, on the theory that [the invalid option] hurts the candidate's or party's own chances of prevailing in the election"), *quoting Hollister v. McCain*, 566 F. Supp. 2d 63, 68 (D.N.H. 2008); *see also Schultz v. Williams*, 44 F.3d 48, 53 (2d Cir. 1994); *Texas*

Democratic Party v. Benkiser, 459 F.3d 582, 587-88 (5th Cir. 2006); *Fulani v. Hogsett*, 917 F.2d 1028, 1030 (7th Cir. 1990).

The undisputed record evidence shows that, if "None of these candidates" is omitted from the ballot, some people who would have selected that ballot alternative instead would vote for named candidates such as Plaintiffs Woodbury and Degraffenreid,[3] rather than choosing to waive their right to vote in the race by skipping that election. *See* Declaration of Todd Dougan, ¶¶ 6-7, Dist. Ct. Dock #15 (June 28, 2012). Thus, including an invalid ballot alternative in a race can improperly affect the outcome of the election, which would be squarely contrary to the public interest.

Furthermore, the court properly chose to enjoin the statute as a whole, rather than effectively re-writing the law to allow the State to retain "None of these candidate" on the ballot, and declare a vacancy should that option prevail for a particular office. At a minimum, that alternative would have been prohibited under federal law as applied to U.S. Senate races. Federal law provides that, at "the ***regular election***" in any year in which a sitting Senator's term expires, "a United States Senator from each said State ***shall be chosen*** by the people thereof," for a term commencing the following January. 2 U.S.C. § 1 (emphasis added). Thus, Congress has barred states from establishing an electoral process that may not result in an election of a Senator.

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[3] Under Nevada law, a vote for a presidential candidate is counted as a vote for the presidential electors nominated by that candidate's political party. *See* Nev. Rev. Stat. § 298.025. A vote for the Republican candidate for President therefore is, in effect, a vote for Woodbury and Degraffenreid for the office of presidential elector. *Id.*

A similar statute applies to presidential electors. In presidential election years, "[t]he electors of President and Vice President ***shall be appointed***, in each State, on the Tuesday next after the first Monday in November." 3 U.S.C. § 1 (emphasis added). Although federal law appears to contemplate the possibility of electors not being selected on Election Day, *id.* § 2, this Court has held that § 1 requires the "'consummation' of the process of selecting an official," and the "'final selection of an officeholder," to occur in presidential elections on Election Day. *Voting Integrity Proj., Inc. v. Kiesling*, 259 F.3d 1169, 1175 (9th Cir. 2001), *quoting Foster v. Love*, 522 U.S. 67, 60-70 (1997). Thus, allowing "None of these candidates" to prevail in the Nevada presidential election likely would violate 3 U.S.C. § 1.

Aside from these federal statutory restrictions, the court's decision to enjoin the entire statute presents a severability question, which is governed exclusively by state law. *Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996). "Despite the wording of . . . [Nevada's] general severability clause, "it is a function of this court to consider whether the remainder of the statute can stand independently and whether the Legislature would have intended it to do so." *Desert Chrysler-Plymouth v. Chrysler Corp.*, 600 P.2d 1189, 1191 (Nev. 1979); *see also Flamingo Paradise Gaming, LLC v. Chanos*, 217 P.3d 546, 555 (Nev. 2009) (holding that a statute is severable only if "the remaining portion of the statute, standing alone, can be given legal effect, and if the Legislature intended for the remainder of the statute to stay in effect when part of the statute is severed").

Other provisions of Nevada law confirm that the legislature likely would not want "None of these candidates" to be a legally effective

choice in Nevada in presidential elections, thereby allowing for the potential of vacancies in the Nevada electoral college. For example, Nevada's vacancy statute for presidential electors provides that, "if the number of presidential electors shall from any cause by deficient," those vacancies shall be filled by the national committeeman, national committeewoman, and state chair "of the party whose nominees for President and Vice President received the greatest number of votes." Nev. Rev. Stat. § 298.040. If votes cast for "None of these candidates" in presidential elections are given legal effect and that option prevails, however, it would be impossible to comply with that procedure (since "None of these candidates" belongs to no party). This suggests that the legislature would not have intended for a federal court to remedy the constitutional deficiencies with the "None of these candidates" law by allowing for the creation of vacancies in the electoral college.

Ultimately, such vacancies likely would be subject to being filled by the Governor. *See* Nev. Const., art. V, § 8. The district court quite properly chose to invalidate the entire "None of these candidates" statute, rather than selectively editing it to allow for the possibility that the Governor could wind up unilaterally determining the State's presidential electors—potentially even directly contrary to the will of the electorate.

More broadly, nothing in the law's admittedly limited legislative history suggests that the legislature would have intended "None of these candidates" to be made a legally effective ballot option in either state or federal races. The purpose of the statute was merely to "provide for voters[] expression of nonconfidence in candidates for any elected office." Nevada Assembly, Election Comm. Minutes, *attached at*

Declaration of Paul Prior, Ex. 1, Dist. Ct. Dock. #15-1 (June 28, 2012).[4] The Chair of the Assembly Elections Committee, who co-sponsored the legislation, stated that it was simply "a way to tell [a candidate] to 'clean up your act,' if you get in office." *Id.* at 2. The testimony of numerous witnesses confirms that the only intent was to allow for a non-binding expression of "nonconfidence." *Id.*; *see also* Letter from Norma Joyce Scott to Assemblyman Daniel J. Demers, at 1 (Mar. 7, 1975), *attached at* Prior Decl., Ex. 3, Dist. Ct. Dock. #15-1 (June 28, 2012) ("If a person does not wish to vote for either or any candidate the spaces may be left blank. This certainly indicates nonconfidence."); Letter from Clark County Registrar of Voters Stanton B. Colton, at 1 (Mar. 7, 1975), *attached at* Prior Decl., Ex. 2, Dist. Ct. Dock. #15-1 (June 28, 2012) ("[W]e already have an adequate expression of no-confidence that is readily visible.").

Turning "None of these candidates" from a way of "sending a message" into a legally effective vote is not merely allowing other provisions of the "None of these candidates" statute to remain in effect, but rather fundamentally changing those other provisions' nature and effect. Although superficially an act of judicial restraint, it actually is a "Procrustean restructuring of the law." *County of Clark v. Las Vegas*, 550 P.2d 779, 788 (Nev. 1976). This court should not "presume" the legislature would have intended for "None of these candidates" to be given such legal effect. *Jiminez v. State*, 644 P.2d 1023, 1024-25 (Nev. 1982); *see also County of Clark*, 550 P.2d at 787 (holding that a law

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[4] *Available at* http://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/1975/ AB336,1975.pdf

should not be deemed severable unless "the Legislature as a body would intend" that result); *Brewery Arts Ctr. v. State Bd. of Examiners*, 843 P.2d 369, 373 (Nev. 1992) ("[B]ecause it does not appear the Legislature intended A.B. 590 to stand alone without subsection 5 of section 5, we decline to sever it."). Defendants have no basis for attempting to disturb the district court's determination that the statute was not severable.

For these reasons, this Court should not disturb the district court's reasonable exercise of discretion to enjoin the State from including "None of these candidates" as a ballot option in statewide races, pending final resolution of this matter.

STATUTORY BACKGROUND

The Nevada law governing "None of these candidates," 1975 Nev. Stat. 475, *codified at* Nev. Rev. Stat. §§ 293.269, 293B.075, is comprised of two main subsections. Subsection 1 requires the State to include a line on the ballot reading "None of these candidates" for each race for statewide office and for President and Vice President of the United States (*i.e.*, for Nevada's presidential electors, *see* Nev. Rev. Stat. § 298.025). *Id.* § 293.269(1); *see also id.* § 293B.075 (requiring mechanical voting systems to allow voters to "indicate a vote against all candidates").

Subsection 1 specifies that the line for "None of these candidates" must be "equivalent to the lines on which the candidates' names appear," and appear immediately after the lines for those named candidates. *Id.* § 293.269(1). It further requires that the line for "None of these candidates" must "contain a square in which the voter may express a choice of that line in the same manner as the voter would

express a choice of a candidate." *Id.* Thus, "None of these candidates" appears on the ballot as an "equivalent" choice to each of the named candidates, and a person may cast his vote for it "in the same manner" as he would vote for any of those candidates. *Id.*; *see also id.* § 293.269(3) (explaining that voters may not vote for both "None of these candidates" and one of the named candidates).

Subsection 2 provides that "[o]nly votes cast for the named candidates shall be counted in determining nomination or election to any statewide office . . . or the selection of presidential electors," although the Secretary of State must report the number of votes cast for "None of these candidates" in "every posting, abstract and proclamation of the results of the election." *Id.* § 293.269(2). Thus, votes cast for "None of these candidates" are treated as legal nullities, and are not counted in determining election results. Under Subsection 2, even if "None of these candidates" were to receive a plurality or majority of votes in a particular race, the Secretary of State must ignore those votes and declare one of the losing candidates—the one with the next-highest number of votes—to be the winner. *Id.* There is no set of circumstances under which votes for "None of these candidates" are given any legal effect.

It reasonably would have been possible for the legislature to have accorded some legal effect to votes cast for "None of these candidates." The legislature could have provided, for example, that if a plurality or majority of people cast their votes for "None of these candidates," the office would be deemed vacant at the commencement of its term. That is how state law treats votes cast for candidates who die shortly before Election Day. *Id.* §§ 293.165(4), 293.368.

Alternatively, the legislature could have required that a follow-up election be held for that office, similar to run-off elections that sometimes must be held shortly after Election Day in states that require candidates to receive an absolute majority, rather than simple plurality, of votes in order to prevail, *see, e.g.*, Ga. Code § 21-2-501(a); Tex. Elec. Code § 2.021. The legislature could have decided whether to allow a candidate who lost to "None of these candidates" to participate in any such follow-up election. Instead, the State chose to present "None of these candidates" as a choice "equivalent" to the named candidates in statewide races, Nev. Rev. Stat. § 293.269(1), allow people to vote for "None of these candidates" in "the same manner" as they would vote for a named candidate, *id.*, and then treat those votes as legal nullities, *id.* § 293.269(2).

ARGUMENT

Defendants have not come close to satisfying the requirements for obtaining a stay of the district court's preliminary injunction. "The standard for evaluating stays pending appeal is similar to that employed by district courts in deciding whether to grant a preliminary injunction." *Lopez v. Heckler*, 713 F.2d 1432 (9th Cir. 1983). Thus, a party seeking a stay of a preliminary injunction must show "establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat'l Resources Def. Council*, 555 U.S. 7, 20 (2008). Defendants do not satisfy any of these elements.

I. A STAY IS NOT NECESSARY TO PROTECT THE DEFENDANTS FROM IRREPARABLE INJURY

Defendants have not articulated any coherent way in which they will suffer "irreparable injury" if "None of these candidates" does not appear on the ballot in the November election. ***First***, Defendants argue that, unless this court stays the injunction, that order will bar "Appellant and every other Nevada voter from voting for 'None of these candidates.'" Edwards Mot. at 35;[5] *see also* Miller Mot. at 32[6] (arguing that voters will suffer irreparable injury "by losing the longstanding ability" to vote for "None of these candidates"). Ninth Circuit law is clear, however, that a person suffers "no irreparable harm" if his "other remedies are quite adequate to provide relief for his alleged injuries." *Houghton v. South*, 743 F.2d 1438, 1439 (9th Cir. 1984); *Camping Constr. Co. v. District Council of Iron Workers*, 915 F.2d 1333, 1349 (9th Cir. 1990) (holding that harm to a party "would scarcely qualify as irreparable injury" if it has "a perfectly adequate" alternate remedy); *see also Elias v. Connett*, 908 F.2d 521, 527 (9th Cir. 1990). Although the injunction will prevent voters from selecting "None of these candidates" in statewide races, voters still may refrain from voting for the entire slate of candidates running in a particular election by simply undervoting—*i.e.*, skipping—that race and moving on to the next race on the ballot. Hearing Trans. at 4-5 (statement of Jones, C.J.). Thus,

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[5] Intervenor-Defendant Kingsley Edwards' Emergency Motion Under Circuit Rule 27-3, D.I. #3 (Aug. 28, 2012).

[6] Defendant Ross Miller's Emergency Motion Under Circuit Rule 27-3, D.I. #6-1 (Aug. 30, 2012).

voters retain the ability to refuse to vote for any of the named candidates in a particular statewide race.

Second, Intervenor Edwards incongruously asserts that, "[u]nless a stay issues, the preliminary injunction . . . will cause [him] the immediate and irreparable harm of ***disenfranchisement***." Edwards Mot. at 34-35 (emphasis added). This argument is not only wrong, but nonsensical. The main reason the district court ordered that "None of these candidates" be stricken from the ballot is precisely because it disenfranchises those who select it; votes cast for "None of these candidates" are ignored, and treated as legal nullities, in determining the outcome of statewide races. Nev. Rev. Stat. § 293.269(2). Mr. Edwards cannot reasonably contend that he has been "disenfranchised" because he has lost out on the opportunity for the State to ignore and disregard his vote.

Third, Defendants contend that the preliminary injunction supposedly deprives him of the ability to "send a powerful message to his elected officials." Edwards Mot. at 35; *see also* Miller Mot. at 32 (arguing that the injunction prevents voters from "clearly expressing their dissatisfaction with the candidates"). As the district court noted, however, a person may vote for "None of these candidates" for a wide variety of reasons, including because he was not interested in a particular race, did not "know either candidate," or even for the sheer novelty of it. Hearing Trans. at 14-15. Thus, as a matter of both law and actual practice, a vote for "None of these candidates" does not send any particular message, and any message it does send certainly is not distinguishable from the message sent by undervoting. Moreover, voters retain a virtually limitless range of other, much more effective

and unambiguous ways in which they may "express[] dissatisfaction" with public officials and candidates. Miller Mot. at 33. As the U.S. Supreme Court recognized, "ballots serve to elect candidates, not as forums for political expression," *Timmons*, 520 U.S. at 363, or as "a means of giving vent to . . . pique," *Burdick*, 504 U.S. at 438.

In short, any harm that Mr. Edwards and other voters allegedly suffer by having to skip a particular race on the ballot in order to avoid voting for any of the candidates, rather than being able to vote for "None of these candidates" and have that vote ignored, is "slight" and "scarcely qualif[ies] as irreparable injury." *Camping Constr. Co.*, 915 F.2d at 1349.

Finally, the State attempts to go a step further, and argue that ***the State itself*** will be irreparable injured if voters are unable to vote for "None of these candidates" (and have those votes ignored). Miller Mot. at 34. It contends that "None of these candidates" "communicate[s] to officials when voters disapprove of them." *Id.* Given the wide range of much clearer and more direct ways in which voters may individually or collectively express their displeasure—such as through letters to public officials, phone calls to public officials, office visits, public opinion polls, publicly distributing flyers or handbills, holding protests, submitting letters to the editor or op-eds, internet postings, websites, making calls to radio talk shows, interviews with reporters, or donating money for adverse mailers or negative advertisements—it defines credulity to argue that Nevada's statewide officials (and ***only*** statewide officials) have a critical need to know, once every few years, how many people vote for "None of these candidates," as opposed to simply undervoting their race.

The State cannot credibly contend, for example, that as a result of "None of these candidates," Nevada's U.S. Senators have access to critical information about the satisfaction of their constituents that the State's members of the House of Representatives are lacking. Whether a large percentage of voters in a particular election abstains from a particular race by undervoting, or instead votes for "None of these candidates," the anomaly is equally apparent and the disturbing message is sent.

Thus, the preliminary injunction will not inflict irreparable injury on Defendants. Rather, it puts Nevada voters and statewide public officials in the same position as voters and public officials in every other state in the nation.

II. THE BALANCE OF EQUITIES TIPS IN FAVOR OF THE PLAINTIFFS

A closely related reason why Defendants are not entitled to a stay of the district court's injunction is because the balance of equities tips against them. As discussed at length above, a person who wishes to convey his dissatisfaction with the entire slate of candidates for a particular office and refuses to vote for any of them may do so, simply by undervoting (*i.e.*, skipping), that particular race on the ballot. Thus, the elimination of "None of these candidates" inflicts minimal, if any, legally cognizable injury on Defendants.

Conversely, allowing "None of these candidates" to remain on the ballot causes substantial harm to everyone who votes for it (including Plaintiffs Riedl and Dougan), because they are disenfranchised. Votes cast for "None of these candidates" are ignored and treated as nullities

in determining the outcome of an election. Nev. Rev. Stat. § 293.269. Individuals should be free to validly select from among the legally available ballot alternatives, without fearing that their vote will be discounted or ignored.

Allowing "None of these candidates" to remain on the ballot also harms the other candidates on the ballot (including Plaintiffs Woodbury and Degraffenreid, *see* Nev. Rev. Stat. § 298.025), because they are forced to run against an invalid ballot option. Courts—including the Ninth Circuit—repeatedly have recognized that "the inclusion of an allegedly ineligible rival on the ballot . . . hurts the [other] candidate[s'] or part[ies'] own chances of prevailing in the election." *Drake v. Obama*, 664 F.3d 774, 783 (9th Cir. 2011), *quoting Hollister v. McCain*, 566 F. Supp. 2d 63, 68 (D.N.H. 2008); *see also Schultz v. Williams*, 44 F.3d 48, 53 (2d Cir. 1994) (holding that the improper inclusion of an additional ballot alternative in a particular race inflicted "actual injury" on other candidates in that race due to the additional "competition . . . and a resulting loss of votes"); *Texas Democratic Party v. Benkiser*, 459 F.3d 582, 587-88 (5th Cir. 2006); *Fulani v. Hogsett*, 917 F.2d 1028, 1030 (7th Cir. 1990).

As noted earlier, the undisputed record evidence shows that, if "None of these candidates" is omitted from the ballot, some people who would have selected that ballot alternative instead would vote for named candidates such as Plaintiffs Woodbury and Degraffenreid, rather than choosing to waive their right to vote in the race by skipping

that election. *See* Dougan Decl., ¶¶ 6-7.[7] Thus, the balance of equities strongly favors allowing the injunction to stand.

III. THE PUBLIC INTEREST SUPPORTS IMMEDIATE ENFORCEMENT OF THE INJUNCTION

A third reason why Defendants are not entitled to a stay is because the preliminary injunction promotes the public interest. As discussed below, *see infra* Part IV, the district court properly concluded that Nevada's "None of these candidates" law violates both the U.S. Constitution and federal law. This Court has held that "'it is always in the public interest'" to prevent constitutional violations, *Sammartano v. First Judicial Dist. Ct.*, 303 F.3d 959, 974 (9th Cir. 2002), *quoting G&V Lounge, Inc. v. Mich. Liquor Cont. Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994), while it "would not be . . . in the public's interest to allow the state to continue to violate the requirements of federal law," *Cal. Pharms. Ass'n v. Maxwell-Jolly*, 563 F.3d 847, 853 (9th Cir. 2009) (Order). Particularly in light of the fact that the presence of this invalid, illegal, and unconstitutional ballot option potentially could have a distorting impact on the outcome of statewide races, it is in the public

[7] Todd Dougan swore in his declaration that, if "None of these candidates" is presented as a ballot option in the presidential race, he will select it. Conversely, if "None of these candidates" is not available as a ballot option in the presidential race, then he will vote for Mitt Romney rather than declining to participate in the race. Dougan Decl. ¶¶ 6-7. This belies Secretary Miller's assertion that it is "merely conjectural and speculative" that removing "None of these candidates" from the ballot would result in any additional votes for Plaintiffs Woodbury and Degraffenreid for the office of presidential elector. Miller Mot. at 35.

interest to enforce the district court's decision to remove it from the ballot.

IV. DEFENDANTS DO NOT HAVE A LIKELIHOOD OF SUCCESS ON THE MERITS

Finally, Defendants are not entitled to a stay because they are unlikely to succeed on the merits of their appeal. The district court ruled in the Plaintiffs' favor on all five claims in their Complaint, any one of which would have been an independently sufficient basis for issuing an injunction. Hearing Trans. at 50 (statement of Jones, C.J.) (holding that "None of these candidates" is "violative . . . on ***all of the grounds*** suggested by the plaintiffs") (emphasis added). To prevail on appeal, Defendants will have to obtain reversal on all five claims; it is highly unlikely they will be able to surmount this hurdle.

Section A demonstrates that ballots cast for "None of these candidates" qualify as votes under state law, federal law, and the U.S. Constitution. Section B shows that, assuming ballots cast for "None of these candidates" are votes, Nevada's refusal to count them violates both the U.S. Constitution and federal law. Section C goes on to explain how, even if they are not "votes," most of Plaintiffs' claims remain valid. Section D reiterates that the proper remedy for these constitutional and statutory violations is invalidation of the whole statute. Section E confirms that Plaintiffs have standing to pursue these claims, while Section F briefly shows that the court did not abuse its discretion in rejecting Defendant Edwards' proposed laches defense.

A. The District Court Correctly Determined That Ballots Cast for "None of These Candidates" are Votes

Defendants are unlikely to obtain a reversal of the district court's determination that ballots cast for "None of these candidates" are votes. *Cf*. Miller Mot. at 7. The district court found, "It is a vote. It's a mark in a box. It's a specific vote against either one of the two above persons. It's an expression of intent regarding the election. It seems to me it meets all the tests for a vote." Hearing Trans. at 8.

1. Ballots cast for "None of these candidates" are votes under state law

State law expressly recognizes provide that ballots cast for "None of these candidates" are votes, stating:

> *§ 293B.075. Full choice of candidates for offices;* ***vote against all candidates.***
>
> A mechanical voting system must permit the voter to vote for any person for any office for which he or she has the right to vote, but none other, or indicate ***a vote against all candidates***.

Nev. Rev. Stat. § 293B.075 (emphasis added). The term "mechanical voting system," as used in this provision, includes electronic voting machines, mechanical voting machines, and paper ballots that are counted by machines. *Id*. § 293B.033(1)-(2). Thus, regardless of the medium a Nevada voter uses to vote for "None of these candidates," state law expressly recognizes that he or she is, in fact, casting a vote. *Id*. § 293B.075.

Admittedly, Nev. Rev. Stat. § 293.269(1) does not expressly use the term "vote" in connection with "None of these candidates." *Cf*.

Miller Mot. at 11 n.2. Instead, that section provides that "voter may express a choice of ['None of these candidates'] in the same manner as the voter would ***express a choice of a candidate***." Nev. Rev. Stat. § 293.269(1) (emphasis added). Because there is no dispute that "express[ing] a choice" for a named candidate constitutes voting under Nevada law, "express[ing] a choice" for the ballot line for "None of these candidates" likewise must qualify as voting.

The Secretary of State's own regulations likewise recognize that a ballot cast for "None of these candidates" is a vote:

> *§ 293B.090. Testing of equipment and programs; reporting and correction of certain errors; use of mechanical recording devices which directly record votes electronically.*
>
> A county clerk shall . . . conduct a test to ascertain that the [voting machine] correctly records on the paper record the selection made on the mechanical voting device for all offices and all measures on the ballot. . . . A county clerk shall conduct the test . . . by [p]rocessing on a mechanical recording device . . . a group of logic and accuracy test ballots voted so as to record:
>
> (1) A vote for each candidate and a vote for and against each measure on the ballot;
>
> (2) ***A vote for "None of these candidates"*** for all statewide contests;
>
> (3) "No selection made" for each contest and ballot measure; and

> (4) In all contests in which a voter may vote for more than one candidate, each option available to the voter, from "No selection made" to the total number of candidates a voter may select.

Nev. Admin. Code § 293B.090(2)-(3)(a)(1)-(4) (emphasis added).

Furthermore, the Nevada Supreme Court has recognized that, under the Nevada Constitution, when a person properly selects from among the officially presented ballot options for a particular office, that selection counts as a "vote" which must be given legal effect, even if the selected ballot option does not contain the name of a qualified, eligible candidate. In *Ingersoll v. Lamb*, 333 P.2d 982 (Nev. 1959), the court construed a provision of the Nevada Constitution that provides, "The persons having the highest number of ***votes*** for the respective offices shall be elected." *Id.* at 983, *citing* Nev. Const., art. V, § 4 (emphasis added). The *Ingersoll* Court had to determine whether ballots cast for a deceased candidate whose name appeared on the ballot (who obviously was ineligible to assume office) qualified as "votes" under this provision, or if they instead should be disregarded, which would make the candidate with the next-highest number of votes the winner (before there was any state statute addressing the issue).[8]

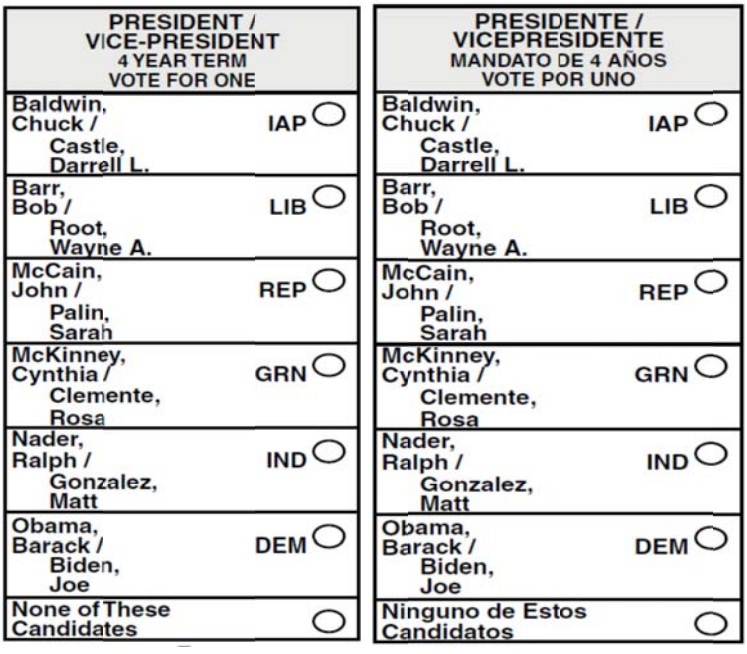
The court recognized that votes cast for the deceased candidate "were ineffective to elect him to office," but did not believe that such

[8] The legislature since has enacted statutes confirming that votes cast for deceased candidates must be counted and given legal effect. *See* Nev. Rev. Stat. §§ 293.165(4), 293.368. If a deceased candidate receives a plurality of votes in an election, "a vacancy exists" in that office at the commencement of the following term. *Id.*

votes should "be treated as void[] [and] thrown away, not to be counted in determining the result with regard to . . . the opposing candidate." *Id.* at 983. It ***rejected*** the claim that a voter who does not cast his ballot for an eligible candidate "is not voting at all," and that his ballot is "a nullity[] [that] cannot be counted and cannot be given any effect in determining the result of the election." *Id.* (quotation marks omitted). The Court concluded that any ballots on which the voter legally selected from among the officially presented alternatives—even if the voter's choice was "deceased, disqualified, or ineligible" to assume office—are legal votes that must "be counted in determining the result of the election as regards the other candidates." *Id.* at 984. Thus, under Nev. Const., art. V, § 4, as construed in *Ingersoll*, 333 P.2d at 983-84, ballots cast for "None of these candidates" are "votes."

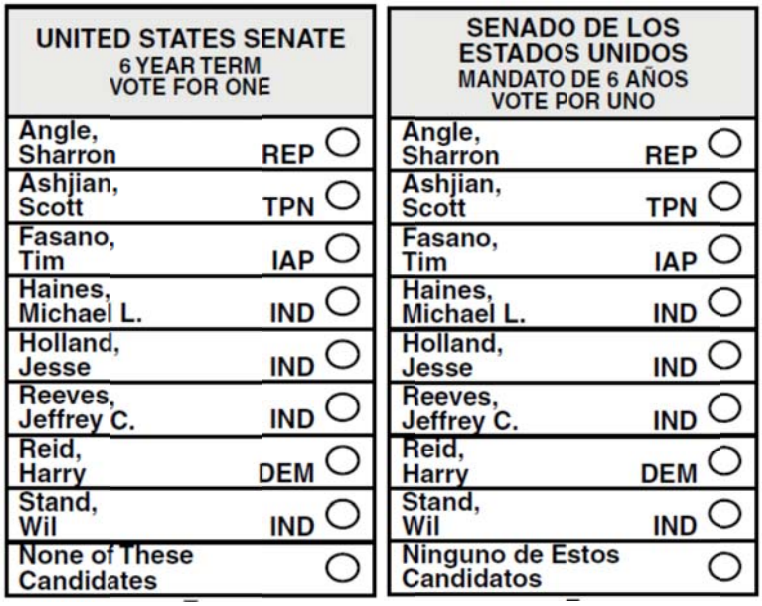
Finally, as a matter of past practice and interpretation, "None of these candidates" has been presented as a vote:

2008 general election:



PRESIDENT / VICE-PRESIDENT 4 YEAR TERM VOTE FOR ONE		PRESIDENTE / VICEPRESIDENTE MANDATO DE 4 AÑOS VOTE POR UNO	
Baldwin, Chuck / Castle, Darrell L.	IAP ○	Baldwin, Chuck / Castle, Darrell L.	IAP ○
Barr, Bob / Root, Wayne A.	LIB ○	Barr, Bob / Root, Wayne A.	LIB ○
McCain, John / Palin, Sarah	REP ○	McCain, John / Palin, Sarah	REP ○
McKinney, Cynthia / Clemente, Rosa	GRN ○	McKinney, Cynthia / Clemente, Rosa	GRN ○
Nader, Ralph / Gonzalez, Matt	IND ○	Nader, Ralph / Gonzalez, Matt	IND ○
Obama, Barack / Biden, Joe	DEM ○	Obama, Barack / Biden, Joe	DEM ○
None of These Candidates	○	Ninguno de Estos Candidatos	○

2010 general election:



UNITED STATES SENATE 6 YEAR TERM VOTE FOR ONE		SENADO DE LOS ESTADOS UNIDOS MANDATO DE 6 AÑOS VOTE POR UNO	
Angle, Sharron	REP	Angle, Sharron	REP
Ashjian, Scott	TPN	Ashjian, Scott	TPN
Fasano, Tim	IAP	Fasano, Tim	IAP
Haines, Michael L.	IND	Haines, Michael L.	IND
Holland, Jesse	IND	Holland, Jesse	IND
Reeves, Jeffrey C.	IND	Reeves, Jeffrey C.	IND
Reid, Harry	DEM	Reid, Harry	DEM
Stand, Wil	IND	Stand, Wil	IND
None of These Candidates		Ninguno de Estos Candidatos	

Whether in English or Spanish—"VOTE FOR ONE" or "VOTE POR UNO"—the ballot itself has made clear that a ballot cast for "None of these candidates" (or "Ninguno de Estos Candidatos") is a "vote." Tellingly, the ballot does ***not*** say "VOTE FOR A NAMED CANDIDATE OR INSTEAD SEND A NON-VOTE EXPRESSIVE MESSAGE."

Thus, from virtually every perspective, a vote cast for "None of these candidates" is just that, a vote, under Nevada law.

2. Ballots cast for "None of these candidates" are votes under federal law

Even if this Court concluded that ballots cast for "None of these candidates" are not votes under Nevada law, it still must conduct an independent examination to determine whether they are entitled to be treated as votes for purposes of the U.S. Constitution and federal law. This Court has held that, when a plaintiff alleges that state officials are violating his right to vote, but the act at issue does not constitute "voting" under state law, the court has an independent obligation to

consider whether it nevertheless constitutes "voting" under federal law and the U.S. Constitution. *See Green v. City of Tuscon*, 340 F.3d 891, 897 (9th Cir. 2003) (holding that "signatures on a petition for direct incorporation . . . are the constitutional equivalent of votes"); *Hussey v. City of Portland*, 64 F.3d 1260, 1263 (9th Cir. 1995) (holding that written "consents" to annexation "legally . . . must be treated as votes"). "Labeling cannot be dispositive," the court explained, "otherwise a state could escape the laws protecting voters in a gubernatorial election, for example, merely by declaring that the governorship would be determined by which candidate has the most 'consents.'" *Hussey*, 64 F.3d at 1263.

In determining whether something "must be treated as [a] vote" for federal constitutional or statutory purposes, the court must consider whether it is "analytically like," *Hussey*, 64 F.3d at 1265, or "sufficiently similar to," *Green*, 340 F.3d at 897, a vote. Federal courts have recognized, "In common parlance 'vote' is defined as 'the expression of one's will, preference, or choice,' Black's Law Dictionary 1576 (6th ed. 1990), or 'to express the will or a preference in a matter by ballot, voice, etc.,' Webster's New World Dictionary 1593 (2d College ed. 1984)." *United States v. Cole*, 41 F.3d 303, 308 (7th Cir. 1994); *Montero v. Moyer*, 861 F.2d 603, 607 (10th Cir. 1988) ("The word 'vote' involves actions pertinent to registering one's choice at a special, primary, or general election. . . . [It is] '[the] formal expression of opinion or will in response to a proposed decision.'"), *citing* Webster's Third New International Dictionary 2565 (3rd ed. 1981); *see also Duke v. Cleland*, 954 F.2d 1526, 1535 (11th Cir. 1992) ("The right to vote embraces not only a voter's access to the ballot, but also his access to alternative

viewpoints and positions presented on that ballot."). A ballot cast for "None of these candidates" easily falls within these definitions, because it reflects the voter's will, preference, and choice.

"None of these candidates" appears on the ballot for each statewide office on a line "***equivalent***" to the lines for each of the named candidates running for that office. Nev. Rev. Stat. § 293.269(1) (emphasis added). A person may "express a choice" for "None of these candidates" in "***the same manner***" as he would "express a choice of a candidate." *Id.* (emphasis added). The acts that a person must perform in order to select "None of the candidates" are the exact same acts that, if applied to any other ballot option for that office, indisputably would be considered "voting." The paper or electronic record that is generated as a result of such acts would, had the person selected any other option for that office, indisputably be considered a "vote." Thus, a ballot cast for "None of these candidates" is "analytically like," *Hussey*, 64 F.3d at 1265, and "sufficiently similar to," *Green*, 340 F.3d at 897, a vote, and therefore must be considered a vote under the U.S. Constitution and federal law.

Relying on this Court's ruling in *Hussey v. City of Portland*, 64 F.3d 1260, 1263 (9th Cir. 1995), the Secretary attempts to argue that ballots cast for "None of these candidates" do not constitute votes, but his three-prong test subtly misstates this Court's analysis. As an initial matter, the *Hussey* Court was not purporting to identify necessary or sufficient factors for whether something constitutes a vote, but rather merely analyzing the particular facts of that case. *Hussey*, 64 F.3d at 1263. In any event, the court observed that "consents by electors" should be treated as votes because "[1] Both must be returned by

registered voters; [2] both are official expressions of an elector's will; [3] both are required to resolve political issues; and [4] both require a majority for success." *Id.*

In this case, ballots for "None of these candidates" may be cast only by "registered voters." *Id.* Such ballots clearly are "official expressions of an elector's will." *Id.* Moreover, they are aimed at "resolv[ing] [the] political issue[]" of whether any of the named candidates should assume the office at issue. The Secretary relies primarily on the last element of this test—arguing that ballots cast for "None of these candidates" are not votes because he is not legally required to count them, and therefore "there is no threshold at which [they] become effective." Miller Mot. at 11.

The district court properly rejected this tautological reasoning, expressly stating to counsel for Secretary Miller, "[Y]ou've got a circular argument. You're saying it's not a vote because the state statute says you don't count it." *See* Hearing Trans. at 8. As the district court astutely recognized, the gravamen of Plaintiffs' claims is that Secretary Miller is unconstitutionally and illegally refusing to count certain votes. The Secretary cannot rely on his own allegedly improper refusal to count ballots cast for "None of these candidates" as evidence that such ballots are not "votes" that are entitled to be counted. The ***descriptive*** fact that § 293.269(2) does not allow him to count such ballots does not help resolve the ***normative*** question of whether those votes ***should*** be counted under the U.S. Constitution or federal law. Thus, as a matter of both state and federal law, ballots case for "None of these candidates" are votes.

B. Because Ballots Cast for "None of These Candidates" are Votes, Secretary Miller's Refusal to Count Them is Unconstitutional and Illegal.

As the district court properly recognized, because ballots cast for "None of these candidates" are votes, Plaintiffs are entitled prevail on each of their claims. Hearing Trans. at 8, 50.

1. Due Process—Most basically, a State's intentional refusal to count votes cast by properly registered and duly qualified voters for a ballot option that the State itself presents to those voters violates the fundamental right to vote. "It has been repeatedly recognized that all qualified voters have a constitutionally protected right to vote, and to ***have their votes counted***." *Reynolds v. Sims*, 377 U.S. 533, 554 (1964) (emphasis added); *see also United States v. Classic*, 313 U.S. 299, 315 (1941) ("Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted."); *United States v. Mosley*, 238 U.S. 383, 386 (1915) (equating "the right to have one's vote counted" with "the right to put a ballot in a box").

Under these cases, "[e]very voter's vote is entitled to be counted once. It must be correctly counted and reported." *Gray v. Sanders*, 372 U.S. 368, 380 (1963). This Court has never upheld an election law that allows election officials to intentionally disregard legally cast votes by properly registered and duly qualified voters in determining the outcome of an election. *Cf. Dudum v. Arntz*, 640 F.3d 1098, 1111 (9th Cir. 2011) (rejecting due process challenge to a city's instant-runoff voting system because no one's votes were "disregarded in tabulating election results," and the plaintiff's claim that "the system discards

votes is incorrect"); *Bennett v. Yoshina*, 140 F.3d 1218, 1227 (9th Cir. 1998) (rejecting due process challenge to State's method of treating blank ballots because "there was no disenfranchisement" and "[e]very ballot submitted was counted"), *as amended* No. 97-16408, 1998 U.S. App. LEXIS 13350 (9th Cir. June 23, 1998); *see also Crowley v. Nevada*, No. 3:08-CV-0618 (LRH) (VPC), 2010 U.S. Dist. LEXIS 123737, at *7 (D. Nev. Nov. 19, 2010) (rejecting due process claim because "[t]here is no evidence . . . that any votes were not counted"). As the district court concluded, Hearing Trans. at 34 (statement Jones, C.J.) ("I think I agree with his argument on this one."), where properly registered and duly qualified voters affirmatively have exercised their right to vote by selecting from among the alternatives on the ballot, the State is not free to ignore those votes and treat them as legal nullities. *Reynolds*, 377 U.S. at 554; *Classic*, 313 U.S. at 315; *Gray*, 372 U.S. at 380.

Even if this Court declines to apply a *per se* rule, and instead applies the sliding scale analysis that the Supreme Court often applies in election-related contexts, this Court still should invalidate the "None of these candidates" statute. The Supreme Court has recognized, "[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer v. Brown*, 415 U.S. 724, 730 (1974). Consequently, the "rigorousness" of a court's inquiry "into the propriety of a state election law depends upon the extent to which a challenged regulation burdens . . . Fourteenth Amendment rights." *Burdick*, 504 U.S. at 434; *see also Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). When a law, such as Nevada's "None of these candidates" statute, imposes "severe restrictions" on a

person's right to vote, it is subject to strict scrutiny. *Burdick*, 504 U.S. at 434.

In *Hussey v. City of Portland*, 64 F.3d 1260, 1262 (9th Cir. 1995), a state law allowed a city to annex an adjacent area if it received written consent from a majority of the residents there. One city enacted an ordinance providing "a subsidy, or reduction in hook-up costs, for mandated sewer connections" to people who submitted their written consent. This Court held that this consent process was "the constitutional equivalent of 'voting,'" with the submission of a written consent constituting a "yes" vote, and the refusal to provide consent constituting a "no" vote. *Id*. at 1263. Indeed, the written consents themselves stated that they "shall count as yes votes." *Id*. The court went on to rule that the ordinance, which conditioned a subsidy "on how an elector votes," was subject to strict scrutiny because it "severely and unreasonably interferes with the right to vote." *Id*. at 1266.

If conditioning a subsidy on whether a person votes a certain way qualifies as a "severe" burden on the right to vote that warrants strict scrutiny, then wholly disregarding a person's vote based on which of the legally permissible ballot options she selects likewise must be considered a severe restriction. The State's intentional refusal to count or accord any legal effect to votes cast for "None of these candidates"—even if such votes constitute a plurality or majority of those cast in a particular election—is a *de jure* nullification of the right to vote that should be subject to strict scrutiny.

To survive strict scrutiny, an election law must be "'narrowly drawn to advance a state interest of compelling importance.'" *Burdick*, 504 U.S. at 434, *quoting Norman v. Reed*, 502 U.S. 279, 289 (1992).

Nevada's "None of these candidates" provision satisfies neither prong of this test. Even assuming that the State has a valid interest in allowing voters to express disdain at the entire field of candidates running for a particular office, that interest hardly rises to the level of "compelling." *See* Hearing Trans. at 22 (Jones, C.J.) ("I just don't buy the argument that there's any compelling need.").

More importantly, the State need not disenfranchise anyone to allow voters to express such sentiments. As discussed earlier, there are several ways in which the legislature could have given some legal effect to votes cast for "None of these candidates" if they constituted a plurality or majority of the vote, such as by treating the office at issue as being vacant upon the commencement of its term, or instead requiring that a follow-up election be held, perhaps with different candidates. Thus, Nevada's "None of these candidates" violates the Due Process Clause.[9]

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[9] Even if this Court determines that Nevada's "None of these candidates" statute does not impose a "severe" restriction on the right to vote, and chooses to review it under a more lenient standard of review, it still violates the Due Process Clause. To adjudicate a Due Process challenge to an election statute that does not trigger strict scrutiny, the court "must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule," determine "the legitimacy and strength of each of those interests," and "consider the extent to which those interests make it necessary to burden the plaintiff's rights." *Anderson*, 460 U.S. at 789; *see also Burdick*, 504 U.S. at 434; *Weber*, 347 F.3d at 1106.

Here, the only interest underlying Nevada's "None of these candidates" statute is to allow voters to use their votes to "express [their] nonconfidence" in the entire field of candidates running for a particular office, and to tell each candidate "to 'clean up your act' if you

2. Equal Protection—Nevada's "None of these candidates" law also violates the Equal Protection Clause, U.S. Const., amend. XIV. The U.S. Supreme Court has held:

> The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. 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.

Bush v. Gore, 531 U.S. 98, 104-05 (2000) (per curiam); *accord S.W. Voter Regis. Educ. Proj. v. Shelley*, 344 F.3d 882, 894 (9th Cir. 2003), *overruled in part on other grounds*, 344 F.3d 914 (9th Cir. 2003) (en banc). Under this time-honored concept of one person, one vote, "all who participate in the election are to have an equal vote," *Gray v.*

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get into office." Nevada Assembly, Election Comm. Minutes, at 1-2 (Mar. 18, 1975), *attached as* Prior Decl., Ex. A. The strength of this interest is minimal. As noted earlier, the U.S. Supreme Court has held that "ballots serve to elect candidates, not as forums for political expression," *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363 (1997), or as "a means of giving vent to . . . pique," *Burdick*, 504 U.S. at 438 (quotation marks omitted). Moreover, people have a virtually limitless range of alternate ways of either expressing their overall dissatisfaction with the candidates running for a particular office, or attempting to persuade government officials to perform better. Thus, the State's interest in placing "an unnecessary stigma upon the winning candidate, who may prove himself to be a very valuable and worthy public official," if any, is insubstantial. Letter from Clark County Registrar of Voters Stanton B. Colton to Assemblyman David Demers, at 1-2 (Mar. 7, 1975), *attached as* Prior Decl., Ex. B. It certainly is not sufficient to warrant the total disregard of legally cast votes by properly registered and duly qualified voters.

Sanders, 372 U.S. 368, 379 (1963), meaning that "each person's vote counts as much, insofar as it is practicable, as any other person's," *Hadley v. Jr. Coll. Dist. of Metro. Kansas City*, 397 U.S. 50, 54 (1970).

Nevada's "None of these candidates" law directly violates these principles by intentionally treating voters differently based on which ballot option they select in statewide and presidential races. A person who chooses to cast his vote for one of the named candidates is entitled to have his vote counted, while a person who chooses to cast his vote for "None of these candidates" is not. Nev. Rev. Stat. § 293.269(2). If a State may not give a vote lesser weight based on the county in which the voter lives, *see Reynolds v. Sims*, 377 U.S. 533, 568 (1964), it likewise should not be permitted to give a vote lesser weight—or deliberately refuse to count it at all—based on which of the legally permissible ballot options the voter selects. Thus, Nevada's "None of these candidates" statute violates the Equal Protection Clause.

3. Elections Clauses—Nevada's "None of these candidates" law also is unconstitutional, at least as applied to elections for presidential electors and U.S. Senators, under the U.S. Constitution's Elections Clauses. The Constitution provides, "The times, places, and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof." U.S. Const., art. I, § 4, cl. 1. It likewise states that "[e]ach state shall appoint" presidential electors (*i.e.*, members of the electoral college) "in such manner as the Legislature thereof may direct." *Id.* art. II, § 1, cl. 2

When a state enacts a law that applies to elections for presidential electors or the U.S. Senate, it is acting "only within the exclusive

delegation of power under the Elections Clause[s]," and not any inherent authority. *Cook v. Gralike*, 531 U.S. 510, 523 (2001); *see also Bush v. Palm Beach Cnty. Canvassing Bd.*, 531 U.S. 70, 76 (2000). The Elections Clauses give states broad "authority to provide a complete code for congressional elections," *Smiley v. Holm*, 285 U.S. 355, 366 (1932), as well as elections for presidential electors, *Oregon v. Mitchell*, 400 U.S. 112, 124 (1970), including matters such as "counting of votes," *Smiley*, 285 U.S. at 366. The U.S. Supreme Court has emphasized, however, that although these provisions are a grant of "authority to issue procedural regulations," they are "not a source of power to dictate electoral outcomes." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 832-34 (1995). Nevada's "None of these candidates" statute exceeds the scope of the State's power under these provisions in two ways.

First, the Supreme Court has held that the Elections Clauses do not permit states to put derogatory labels next to certain lines on the ballot for federal office, such as "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" or "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" *Cook*, 531 U.S. at 514-15, 525-26. If the Election Clauses do not "authorize[]" a state to place a disadvantageous label next to a particular ballot choice in federal races, *id.* at 525-26, they certainly cannot allow a state to go even further and wholly disregard votes cast for a particular ballot choice.

Second, as mentioned above, the Court has explained that the Elections Clauses grant states "authority to issue procedural regulations" concerning federal elections, but are "not a source of power to dictate electoral outcomes." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 832-34 (1995). Nevada's "None of these candidates" statute,

however, effectively "dictate[s] electoral outcomes" by requiring Secretary Miller to ignore votes cast for "None of these candidates," even if they constitute a plurality or majority in an election. Nev. Rev. Stat. § 293.269(2). The district court expressly stated that it was "inclined to agree with" this argument. Hearing Trans. at 43. Thus, Plaintiffs properly prevailed under the Elections Clauses, and Defendants are unlikely to succeed in defeating these claims.

4. Help American Vote Act ("HAVA")—The district court also properly ruled in Plaintiffs' favor on their claims under the "Help America Vote Act," 42 U.S.C. § 15481(a)(6). HAVA provides, in relevant part, "Each State shall adopt uniform and nondiscriminatory standards that define what constitutes a vote and ***what will be counted as a vote*** for each category of voting system used in the State." *Id.* (emphasis added).

State law requires "None of these candidates" to appear on the ballot on a line "equivalent" to those for the named candidates, Nev. Rev. Stat. § 293.269(1), and allows voters to select that option "in the same manner" as they would select a named candidate, *id.*, but provides that such ballots may not be counted in determining the outcome of the election, *id.* § 293.269(2). That does not constitute a "uniform . . . standard[]" for "what will be counted as a vote." 42 U.S.C. § 15481(a)(6).

Secretary Miller argued that this Court should not consider Plaintiffs' HAVA claims, because the statute does not create a private right of action. This argument fails for two reasons—Plaintiffs may bring their HAVA claim under § 1983 and, in the alternative, this Court may consider whether § 15481(a)(6) preempts Nevada's "None of these

candidates" statute under the Elections Clauses, U.S. Const., art. I, § 4, cl. 1; *id*. art. II, § 1, cl. 2.

First, Plaintiffs properly brought their HAVA claim against Secretary Miller for violating § 15481(a)(6) under 42 U.S.C. § 1983. Although some sections of HAVA, such as its requirement that states cross-check voter registration records with motor vehicle records, 42 U.S.C. § 15483(a)(5)(B)(i), do not create private rights of action, *see Brunner v. Ohio Republican Party*, 555 U.S. 5, 5 (2008) (per curiam), courts across the nation have held that other provisions are enforceable in § 1983 suits. Most notably, courts have permitted plaintiffs to maintain § 1983 suits for alleged violations of 42 U.S.C. § 15482(a), which requires states to allow people to cast provisional ballots. *See, e.g.*, *Sandusky Cnty. Democratic Party v. Blackwell*, 387 F.3d 565, 572-73 (6th Cir. 2004); *Bay Cnty. Democratic Party v. Land*, 347 F. Supp. 2d 404, 425-26 (E.D. Mich. 2004).

The Supreme Court has held that a plaintiff may bring a § 1983 suit only to enforce his "rights," not mere "interests." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002). The Court applies a three-prong test in determining whether a statute satisfies this requirement:

> First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so "vague and amorphous" that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms.

Blessing v. Firestone, 520 U.S. 329, 340-41 (1997). Plaintiffs here satisfy these requirements:

- Section 15481(a)(6) was enacted to benefit voters such as Plaintiffs, by ensuring that states do not wrongfully refuse either to recognize their lawfully cast ballots as votes or to count their votes. Like the plaintiffs in *Blackwell*, 387 F.3d at 572, and *Land*, 347 F. Supp. 2d at 425-26, who were permitted to challenge the state's refusal to allow them to vote provisionally, Plaintiffs challenge the State's refusal to count ballot casts for "None of these candidates" as votes. This section differs from the HAVA provision that the plaintiffs in *Brunner*, 555 U.S. at 5, unsuccessfully attempted to invoke, which required states to cross-reference their voter registration records against their drivers' license records, *see* 42 U.S.C. § 15483(a)(5)(B)(i). In this case, § 15481(a)(6) protects Plaintiffs' fundamental right to vote in statewide and presidential races by requiring the State to determine the validity of their ballots and count them based on uniform standards, rather than refusing to give those ballots legal effect based on the particular ballot option (*i.e.*, "None of these candidates") Plaintiffs select.

- The right Plaintiffs seek to enforce is neither vague nor outside the scope of judicial competence. To the contrary, the principle at issue is narrow and specific—when an eligible and registered voter validly selects from among the formally presented ballot options and properly submits his ballot, the state must apply a single, uniform standard in deciding whether to treat that ballot as a vote, count it, and

give it legal effect, 42 U.S.C. § 15481(a)(6), and may not disregard the ballot based on which of the legally available options the person chose.

- Section 15481(a)(6) is written in mandatory terms—it specifies that each state "shall adopt uniform and nondiscriminatory standards" defining what constitutes a vote and what will be counted as a vote. *Cf. Blackwell*, 387 F.3d at 573 (holding that a provision of HAVA stating that states "shall" offer provisional ballots was cast in "mandatory" terms) (quotation marks omitted). Thus, Plaintiffs may enforce this provision through 42 U.S.C. § 1983.

Second, regardless of whether § 15481(a)(6) creates a private right of action or is enforceable through § 1983, it preempts Nevada's "None of these candidates" statute under the Elections Clauses, U.S. Const., art. I, § 4, cl. 1; *id.* art. II, § 1, cl. 2. This Court, sitting *en banc*, has recognized that, under the Elections Clauses, "state governments are given the initial responsibility for regulating the mechanics of federal elections, but Congress is given the authority to 'make or alter' the states' regulations." *Gonzalez v. Arizona*, 677 F.3d 383, 390 (9th Cir. 2012) (en banc). A federal law, "so far as it extends and conflicts with the regulations of the State, necessarily supersedes them." *Ex Parte Siebold*, 100 U.S. 371, 384 (1879).

Congress' power to preempt state election laws under the Elections Clauses is even broader than its ability to do so under the Supremacy Clause, U.S. Const., art. VI, § 2. Under the Supremacy Clause, there is a presumption against preemption, *Altria v. Good*, 555 U.S. 70, 77 (2008), and a court generally will find that a federal law preempts a state law only if the statute contains a "clear and manifest"

statement to that effect, *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991), or it is impossible to reconcile the state and federal laws, *Altria*, 555 U.S. at 76-77.

The Elections Clauses, in contrast, "affect[] only an area in which the states have no inherent or reserved power: the regulation of federal elections. . . . Because states have no reserved authority over the domain of federal elections, courts deciding issues raised under the Elections Clause[s] need not be concerned with preserving a 'delicate balance' between competing sovereigns." *Gonzalez*, 377 F.3d at 392. Congress has "plenary authority" to "supplant state rules," and neither the presumption against preemption nor the "plain statement" rule applies in determining whether a federal election law preempts a state law, *id.* at 393-94; *see also Foster v. Love*, 522 U.S. 67, 69 (1997) (holding that a federal statute establishing "Election Day" preempted a state law that allowed the outcome of federal elections to be determined a month before); *Harkless v. Brunner*, 545 F.3d 445, 454 (6th Cir. 2008) (holding that the "plain statement" requirement does not apply to preemption under the Article I Elections Clause).

To determine whether a federal election law preempts a state law under the Elections Clauses, a court need only consider whether, "under a natural reading, the state and federal enactments address[] the same procedures and [a]re in conflict." *Gonzalez*, 677 F.3d at 394. "If the two statutes do not operate harmoniously in a single procedural scheme . . . then Congress has exercised its power to 'alter' the state's regulation, and that regulation is superseded." *Id.*; *see, e.g.*, *Wash. Ass'n of Churches v. Reed*, 492 F. Supp. 2d 1264, 1269-70 (W.D. Wash. 2006) ("[P]laintiffs have demonstrated a strong likelihood of success on the

merits of their argument that [a state election law] stands as an obstacle to achieving the purposes and objectives of HAVA, and is therefore preempted by federal law.").

Here, HAVA conflicts with Nevada's "None of these candidates" law, Nev. Rev. Stat. § 293.269(2). HAVA requires states to apply "uniform and nondiscriminatory standards" in "defin[ing] what constitutes a vote and what will be counted as a vote." 42 U.S.C. § 15481(a)(6). Nevada law provides that "darkening a designated space on the ballot," or making a "writing" such as "a cross or check" in that space constitutes a vote, Nev. Rev. Stat. §§ 293.3677(2)(a), 293B.180, but then purports to either disregard certain such votes, or refuse to recognize such ballots as constituting votes, because the voter selected "None of these candidates." Thus, the district court properly concluded that Nevada's "None of these candidates" statute is preempted by HAVA under the Elections Clauses, and therefore unenforceable. *See* Hearing Trans. at 42 (noting that this preemption argument raised "a very good point").

5. Voting Rights Act ("VRA")—Finally, Nevada's "None of these candidates" law flatly violates the plain text of the federal Voting Rights Act, 42 U.S.C. § 1973i(a). That statute provides, in relevant part, "No person acting under color of law shall fail or refuse to permit any person to vote who is entitled to vote under any provision of this Act or is otherwise qualified to vote, or ***willfully fail or refuse to*** tabulate, ***count***, and report ***such person's vote***." 42 U.S.C. § 1973i(a) (emphasis added). Contrary to Plaintiffs' claims during the hearing, noting in § 1973i(a)'s plain text requires a plaintiff to allege or demonstrate that the State's refusal to count votes is due to racial

discrimination. Thus, the district court properly ruled in Plaintiffs' favor on this argument, and Defendants are unlikely to prevail on this point.

C. Even If Ballots Cast for "None of These Candidates" are Not Votes, Secretary Miller's Refusal to Count Them is Unconstitutional and Illegal.

Even if this Court were to reject the district court's determination, and conclude that ballots cast for "None of these candidates" are not votes, Defendants still do not have a substantial likelihood of success on the merits (except for Plaintiffs' Voting Rights Act claim).

1. Due Process—Even if ballots cast for "None of these candidates" are not "votes" and are not required to be counted, Plaintiffs still are likely to prevail on their Due Process claim, because Nev. Rev. Stat. § 293.269(3) imposes an unconstitutional condition. Under the doctrine of unconstitutional conditions, "the government may not deny a benefit to a person because he exercises a constitutional right." *Regan v. Taxation with Representation*, 461 U.S. 540, 545 (1983); *see also Perry v. Sindermann*, 408 U.S. 593, 597 (1972). This Court has elaborated that the Constitution "bars the government from attaching unconstitutional conditions even to benefits the government has no right to bestow." *San Francisco Cnty. Democratic Cent. Comm. v. March Fong Eu*, 826 F.2d 814, 823 (9th Cir. 1987).

Defendants argue that the ability to select "None of these candidates" is a unique means of expressing displeasure with all of the candidates running in a particular race. A person is not permitted to take advantage of this purportedly valuable opportunity to "send a message" and convey his disappointment with those candidates,

however, unless he sacrifices his right to vote for any of the named candidates running for that office. Nev. Rev. Stat. § 293.269(3) ("[T]he voter may mark the choice of the line 'None of these candidates' only if the voter has not voted for any candidate for the office.").

Nevada law therefore imposes an unconstitutional condition, by requiring a person to forego his fundamental constitutional right to vote for a named candidate in order to take advantage of the opportunity to "express[] displeasure with all the candidates" by selecting "None of these candidates." Opp. at 11. A person reasonably could wish to convey his disappointment with the entire field of candidates running for an office, yet also exercise his fundamental constitutional right to vote by selecting what he perceives to be the least distasteful choice. Nevada law deprives him of that alternative. Thus, even if ballots cast for "None of these candidates" are not votes, the underlying statute remains unconstitutional.

2. Equal Protection—Likewise, even if this Court accepts the Secretary's argument that ballots cast for "None of these candidates" are not "votes," that does not eliminate the Equal Protection problem, but merely changes the nature of it. "None of these candidates" appears on the ballot on a line "equivalent" to those for the named candidates, Nev. Rev. Stat. § 293.269(1), and a person may select that option "in the same manner" as he would select any of the named candidates, *id.* The Equal Protection Clause therefore forbids the State from treating selections for named candidates as "votes," while discarding selections for "None of these candidates" as non-vote expressive choices.

The Secretary argues that the State is justified in distinguishing between those types of ballots, because a named candidate who receives a plurality of votes may assume office, whereas some further action—such as an interim appointment or a follow-up election—would be required if "None of these candidates" were to receive a plurality of votes (or "choices," in the Secretary's parlance). Miller Mot. at 17. As noted earlier, however, a deceased candidate obviously may not assume office, yet Nevada law treats a person's selection of a deceased candidate whose name appears on the ballot as a "vote" that must be counted and given legal effect in determining the outcome of an election. Nev. Rev. Stat. § 293.368. The State's refusal to afford similar treatment to ballots cast for "None of these candidates" therefore violates the Equal Protection Clause.

3. Elections Clauses—The State's decision to include "None of these candidates" as a ballot choice in federal elections also exceeds the scope of its authority under the U.S. Constitution's Elections Clauses, U.S. Const., art. I, § 4, cl. 1; *id.* art. II, § 1, cl. 2. The Secretary does not provide a shred of evidence to suggest that the Constitution's Framers intended to allow states to litter ballots in federal elections with non-vote expressive alternatives such as "None of these candidates." Instead, he merely declares that allowing the option of 'None of these candidates' is "well within the broad powers of the State to prescribe the 'manner' of holding elections." Miller Mot. at 18.

To the contrary, the inclusion of a non-vote ballot alternative such as "None of these candidates" is "not among 'the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right'" of voting, *id.*

at 533, *quoting Smiley v. Holm*, 285 U.S. 355, 366 (1932), and therefore "bears no relation to the 'manner' of elections" under the Constitution's Elections Clauses. *Cook*, 531 U.S. at 523.

Moreover, under the Secretary's reasoning, the State would be free to add other, even more specific non-vote choices to the ballot in races for federal offices, to allow voters to send even clearer messages to government officials. For example, it could offer voters the opportunity to select non-vote alternatives to named candidates such as:

- "Lower my taxes more" or "None of these candidates will reduce taxes enough";
- "Restore the Constitution's original meaning" or "None of these candidates adhere to the Framers' original intent";
- "More social services" or "None of these candidates care about the needy";
- "Save the Earth" or "None of these candidates care enough about the environment"; or
- "Bring home our troops" or "None of these candidates will do enough to help our troops."

As these examples demonstrate, presenting voters with non-vote ballot choices in federal races interferes with, and can have a substantial distorting effect on, the outcomes of those elections. Moreover, the U.S. Supreme Court expressly has held that "ballots serve to elect candidates, not as forums for political expression," *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363 (1997), or as "a means of giving vent to . . . pique," *Burdick v. Takushi*, 504 U.S. 428, 438 (1992). Thus, the Elections Clause does not permit States to include non-vote ballot alternatives in races for federal office.

4. HAVA—Finally, even if ballots cast for "None of these candidates" are not votes, Defendants are unlikely to defeat Plaintiffs' claim under HAVA, 42 U.S.C. § 15481(a)(6). As discussed earlier, Plaintiffs may bring a cause of action under § 15481(a)(6) because that provision either creates personal rights that are enforceable under 42 U.S.C. § 1983, or preempts inconsistent state laws under the U.S. Constitution's Elections Clauses, U.S. Const., art. I, § 4, cl. 1; *id*. art. II, § 1, cl. 2.

HAVA provision states, in relevant part, "Each State shall adopt uniform and nondiscriminatory standards that define what constitutes a vote." 42 U.S.C. § 15481(a)(6). Nevada law squarely violates this requirement. As discussed earlier, it requires "None of these candidates" to appear on the ballot on a line "equivalent" to those for the named candidates, Nev. Rev. Stat. § 293.269(1), and allows voters to select that option "in the same manner" as they would select a named candidate, *id*. Under the Secretary's interpretation of the law, however, ballots cast for named candidates constitute votes, whereas ballots cast for "None of these candidates" do not constitute votes. This is the exact opposite of having a "uniform . . . standard[]" for "what constitutes a vote." 42 U.S.C. § 15481(a)(6).

Plaintiffs do not dispute that HAVA allows each state to decide for itself "what constitutes a vote"; the gravamen of their complaint is that HAVA requires these standards to be "uniform." 42 U.S.C. § 15481(a)(6). Nevada law specifies that an individual casts a vote by "darkening a designated space on the ballot," or making a "writing" such as "a cross or check" in that space. Nev. Rev. Stat. §§ 293.3677(2)(a) (rules for paper ballots), 293B.180 (same for ballots on

mechanical voting systems, including electronic voting machines, *id.* § 293B.033). Having established the standard that darkening, checking, or otherwise indicating a selection of a "designated space" on the ballot constitutes a vote, Nev. Rev. Stat. §§ 293.3677(2)(a), 293B.180, the State may not declare that certain ballots properly marked in that manner do not "constitute . . . vote[s]" on the grounds that the voter selected "None of these candidates," 42 U.S.C. § 15481(a)(6). Thus, Defendants are unlikely to prevail on the HAVA claim.

D. Under Nevada Law, the Proper Remedy is Striking the Entire Statute, Rather Than Fundamentally Altering It In Ways the Legislature Never Intended and that Violate Federal Law

Defendant Miller spends a substantial amount of time arguing that the preliminary injunction is overbroad, because it suspends enforcement of the "None of these candidates" statute as a whole, 1975 Nev. Stat. 475, *codified at* Nev. Rev. Stat. §§ 293.269, 293B.075, rather than merely the provision stating that votes for "None of these candidates" may not be counted or given legal effect, *see* Nev. Rev. Stat. § 293.269(2). *See* Miller Mot. at 36-40.

The district court's decision to enjoin the statute as a whole, *see* Hearing Trans. at 50, was required by federal law, at least as to Presidential and U.S. Senate races. As mentioned earlier, 2 U.S.C. § 1 (emphasis added) provides that "a United States Senator from each said State ***shall be chosen*** by the people thereof" at "the regular election" in any year in which a sitting Senator's term expires. This statute not only requires states to hold Senate elections, but also to ensure that a

new Senator is actually elected. Under this law, the State may not give legal effect to votes cast for "None of these candidates," and simply declare a vacancy if that ballot option prevails in the U.S. Senate race.

A similar statute applies to presidential electors. In presidential election years, "[t]he electors of President and Vice President ***shall be appointed***, in each State, on the Tuesday next after the first Monday in November." 3 U.S.C. § 1 (emphasis added). Although federal law appears to contemplate the possibility of electors not being selected on Election Day, *id.* § 2, this Court has held that § 1 requires the "'consummation' of the process of selecting an official," and the "'final selection of an officeholder," to occur in presidential elections on Election Day. *Voting Integrity Proj., Inc. v. Kiesling*, 259 F.3d 1169, 1175 (9th Cir. 2001), *quoting Foster v. Love*, 522 U.S. 67, 60-70 (1997). Thus, allowing "None of these candidates" to prevail in the Nevada presidential election likely would violate 3 U.S.C. § 1.

Aside from these federal statutory restrictions, the issue of whether the statute is severable turns on what the legislature "would have intended." *Desert Chrysler-Plymouth v. Chrysler Corp.*, 600 P.2d 1189, 1191 (Nev. 1979); *Flamingo Paradise Gaming, LLC v. Chanos*, 217 P.3d 546, 555 (Nev. 2009). The statute the legislature enacted to address vacancies in the electoral college strongly suggests that it would not have wanted the "None of these candidates" law modified to allow a presidential election to end in any such vacancies. Under Nevada law, "if the number of presidential electors shall from any cause by deficient," those vacancies shall be filled by the national committeeman, national committeewoman, and state chair "of the party whose nominees for President and Vice President received the greatest

number of votes." Nev. Rev. Stat. § 298.040. If votes cast for "None of these candidates" in presidential elections are given legal effect and that option prevails, however, it would be impossible to comply with that procedure (since "None of these candidates" belongs to no party).

It is unlikely that the legislature would have wanted a federal court to remedy the constitutional deficiencies with the "None of these candidates" law by allowing for the creation of vacancies in the electoral college that are impossible to fill under the statute specifically enacted to address such vacancies. It is even less likely that the legislature would have intended to create the possibility, through the "None of these candidates" statute, that the Governor could wind up unilaterally determining the State's presidential electors, *see* Nev. Const., art. V, § 8, potentially even contrary to the will of the electorate. The district court quite properly chose to invalidate the statute as a whole, rather than allowing for such dramatic and unforeseen changes in Nevada election law.

More broadly, nothing in the law's admittedly limited legislative history suggests that the legislature would have intended "None of these candidates" to be made a legally effective ballot option in either state or federal races. The purpose of the statute was merely to "provide for voters['] expression of nonconfidence in candidates for any elected office." Nevada Assembly, Election Comm. Minutes, *attached at* Declaration of Paul Prior, Ex. 1, Dist. Ct. Dock. #15-1 (June 28, 2012).[10] The Chair of the Assembly Elections Committee, who co-sponsored the legislation, stated that it was simply "a way to tell [a candidate] to

[10] *Available at* http://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/1975/ AB336,1975.pdf

'clean up your act,' if you get in office." *Id.* at 2. The testimony of numerous witnesses confirms that the only intent was to allow for a non-binding expression of "nonconfidence." *Id.*; *see also* Letter from Norma Joyce Scott to Assemblyman Daniel J. Demers, at 1 (Mar. 7, 1975), *attached at* Prior Decl., Ex. 3, Dist. Ct. Dock. #15-1 (June 28, 2012) ("If a person does not wish to vote for either or any candidate the spaces may be left blank. This certainly indicates nonconfidence."); Letter from Clark County Registrar of Voters Stanton B. Colton, at 1 (Mar. 7, 1975), *attached at* Prior Decl., Ex. 2, Dist. Ct. Dock. #15-1 (June 28, 2012) ("[W]e already have an adequate expression of no-confidence that is readily visible.").

Turning "None of these candidates" from a way of "sending a message" into a legally effective vote is not merely allowing other provisions of the "None of these candidates" statute to remain in effect, but rather fundamentally changing those other provisions' nature and effect. Although superficially an act of judicial restraint, it actually is a "Procrustean restructuring of the law." *County of Clark v. Las Vegas*, 550 P.2d 779, 788 (Nev. 1976). This court should not "presume" the legislature would have intended for "None of these candidates" to be given such legal effect. *Jiminez v. State*, 644 P.2d 1023, 1024-25 (Nev. 1982); *see also County of Clark*, 550 P.2d at 787 (holding that a law should not be deemed severable unless "the Legislature as a body would intend" that result); *Brewery Arts Ctr. v. State Bd. of Examiners*, 843 P.2d 369, 373 (Nev. 1992) ("[B]ecause it does not appear the Legislature intended A.B. 590 to stand alone without subsection 5 of section 5, we decline to sever it."). Thus, the injunction was not overbroad.

E. Plaintiffs Have Standing to Pursue These Claims.

Defendants both challenge Plaintiffs' standing in this case. *See* Edwards Mot. 7-21; Miller Mot. 15 n.4. In considering this argument, this Court need not determine the standing of each individual plaintiff, but rather must decide only whether at least one of them has standing. "The general rule applicable to federal court suits with multiple plaintiffs is that once the court determines that one of the plaintiffs has standing, it need not decide the standing of the others." *Leonard v. Clark*, 12 F.3d 885, 888 (9th Cir. 1993). This is especially true in a case such as this, where the plaintiffs seek injunctive and declaratory relief. *Nat'l Ass'n of Optometrists & Opticians Lenscrafters, Inc. v. Brown*, 567 F.3d 521, 522 (9th Cir. 2009). Subsection 1 demonstrates that Plaintiffs have suffered injuries-in-fact, while Subsection 2 shows that those injuries are fairly traceable to Defendants' acts and omissions. Subsection 3 explains that a favorable ruling would redress Plaintiffs' claimed injuries.

1. Injury—"[W]hen standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue." *Flast v. Cohen*, 392 U.S. 83, 99 (1968). The Plaintiffs in this lawsuit include: (i) candidates who would be facing "None of these candidates" on the ballot; (ii) eligible and registered voters who intend to vote for "None of these candidates" in the presidential race; (iii) eligible and registered who intend to vote for some other candidate in the presidential race; and (iv) eligible and registered voters who do not yet know how they will vote in the presidential race, but wish to be able to have their vote counted, regardless of which of the officially presented ballot options

they ultimately decide to select. Particularly since Defendant Edwards does not suggest who would have made a more appropriate Plaintiff to maintain this lawsuit, this Court should conclude that at least one of these Plaintiffs is the "proper party" to pursue these claims.

- **Candidate Plaintiffs**—As mentioned above, this case may proceed if this Court finds that even a single Plaintiff has standing. At a minimum, candidates forced to run against "None of these candidates" are harmed by having to compete against an allegedly illegal and unconstitutional ballot option. *See* Am. Compl. ¶¶ 12-13 (Plaintiffs Woodbury and Degraffenreid; collectively, the "Candidate Plaintiffs"). This Court has adopted the doctrine of "competitive standing," under which a candidate has standing to "challenge the inclusion of an allegedly ineligible rival on the ballot, on the theory that doing so hurts the candidate's or party's own chances of prevailing in the election." *Drake v. Obama*, 664 F.3d 774, 782 (9th Cir. 2011) (quotation marks omitted); *see also Fulani v. Hogsett*, 917 F.2d 1028, 1030 (7th Cir. 1990) (holding that "the increased competition" that a candidate faces from allegedly illegal alternatives on the ballot "is an injury which gives [him] sufficient standing to bring" a challenge); *Schultz v. Williams*, 44 F.3d 48, 53 (2d Cir. 1994) (holding that a political party and its candidates would suffer "a concrete, particularized, actual injury" from "competition on the ballot from candidates" who did not comply with the law); *Owen v. Mulligan*, 640 F.2d 1130, 1132-33 (9th Cir. 1981) (holding that "potential loss of an election" constitutes an injury-in-fact). Thus, the Candidate Plaintiffs have standing to seek to have "None of these candidates" removed from the ballot.

Defendant Edwards argues that Plaintiffs Woodbury and Degraffenreid have nothing more than a "generalized grievance shared by the public," because their only interest is making it more likely that other people vote for their "desired candidate." Edwards Mot. at 17. To the contrary, Plaintiffs Woodbury and Degraffenreid are the Nevada Republican Party's nominees for the state office of Nevada presidential elector (*i.e.*, member of the electoral college). As a matter of law, a vote for Mitt Romney is a vote for Plaintiffs Woodbury and Degraffenreid for that office. Nev. Rev. Stat. § 298.025. Thus, they have a substantial, direct, and personal interest in whether other, invalid ballot alternatives, such as "None of these candidates" appear on the presidential election ballot; such invalid alternatives would improperly injure them by impeding their efforts to prevail and become presidential electors.

Furthermore, the Candidate Plaintiffs have alleged (and produced evidence) that at least one person who otherwise would vote for "None of these candidates" will instead vote for them if "None of these candidates" is removed from the ballot. *See* Am. Compl. ¶ 11; *see also* Dougan Decl., ¶¶ 6-7. Thus, the harm they suffer from having "None of these candidates" appear on the ballot is real and concrete, rather than hypothetical and speculative, and is sufficient to allow this case to proceed.

- **Individuals voting for "None of these candidates"**—Voters who intend to cast their ballots for "None of these candidates" also will be harmed by not having their ballots treated as votes and counted. *See* Am. Compl. ¶¶ 10-11 (Plaintiffs Riedl and Dougan). Clearly, a person who intends to cast his ballot for "None of these

candidates" is a "proper party" to litigate whether it is proper for Secretary Miller to present "None of these candidates" as a ballot alternative, and then disregard ballots cast for it. Crucially, the fact that, as a matter of state law, the proper remedy is to invalidate the statute as a whole, does ***not*** deprive these Plaintiffs of standing. *See Orr v. Orr*, 440 U.S. 268, 292 (holding that a plaintiff in an Equal Protection lawsuit who claims he has been unconstitutionally deprived of a particular benefit does not lack standing, simply because his lawsuit may lead to the elimination of the challenge benefit for everyone, rather than extension of the benefit to him); *see, e.g.*, *Stanton v. Stanton*, 421 U.S. 7, 17 (1975) (holding that an 18-year-old male could bring an Equal Protection challenge to a state law declaring that males become legal adults at age 18, and females become legal adults at age 21, even if, as a matter of state law, the proper remedy was to reduce the age of adulthood for females).

- **Individuals unsure how they will vote**—Finally, the voter Plaintiffs who have not yet settled on a particular presidential candidate are harmed by the prospect of their ballots not being counted or given legal effect, depending on whether they cast their ballots for "None of these candidates." The inclusion of a choice on the ballot that, if chosen, would result in the voter Plaintiffs being disenfranchised constitutes injury-in-fact; they therefore have standing to seek the elimination of ballot alternatives that the State refuses to count as valid votes.

2. **Causation**—Intervenor Edwards also contends that any injuries that Plaintiffs suffer as a result of Secretary Miller's refusal to count or give legal effect to ballots cast for "None of these

candidates" are not attributable to either the Secretary or Nevada law, but rather the "individual voters who independently choose NOTC." Edwards Mot. at 22. That is palpably false. Secretary Miller does not ignore votes cast for "None of these candidates" because of anything that Plaintiffs or any other voters have done, but rather because Nev. Rev. Stat. § 293.269(2) unconstitutionally requires him to do so.

Even assuming that § 293.269(2) puts voters on constructive notice that votes cast for "None of these candidates" will not be counted, that does not absolve the State or Secretary Miller of responsibility for disenfranchising voters. The State may not ignore the votes of people who select a particular valid ballot option, simply because it tells them ahead of time that it will do so. Under Intervenor Edwards' reasoning, if Secretary Miller announces during his next re-election campaign that he will not count any votes cast for his opponent, ***he*** would not be disenfranchising anyone, but rather the voters who "independently chose" to vote for that opponent would be disenfranchising themselves. Edwards Mot. at 22. Such reasoning is specious.

3. **Redressability**—Despite Intervenor Edwards' claims to the contrary, Edwards Mot. at 22, a favorable ruling would redress Plaintiffs' injuries by eliminating the illegal and unconstitutional alternative from the ballot. This would eliminate the competitive injury Plaintiffs Woodbury and Degraffenreid race (regardless of whether some voter may choose to simply undervote the race, rather than vote for Governor Romney, *cf. id.* at 22, which as a matter of law counts as a vote for them, Nev. Rev. Stat. § 298.025). Indeed, Plaintiffs Woodbury and Degraffenreid submitted an affidavit from Todd Dougan affirming that, if "None of these candidates" is removed from the ballot,

he will vote for Governor Romney (and hence for Woodbury and Degraffenreid for presidential elector) rather than waive his right to vote by skipping the race entirely. *See* Dougan Decl. ¶¶ 6-7. Likewise, other voters will be assured that, no matter which ballot option they select, their votes will be counted and given full legal effect. Thus, Plaintiffs have standing.

F. Plaintiffs' Claims Are Not Barred by Laches

Finally, Intervenor Edwards maintains that Plaintiffs' claims are somehow barred by laches, because this law was enacted 35 years ago. On the one hand, he appears to argue that it is now too late for anyone to challenge the statute; the Plaintiffs should have brought this claim decades ago, before some of them were even born. On the other hand, he sometimes seems to claim that the Plaintiffs brought this lawsuit too close to an election (*i.e.*, only five months in advance). Plaintiffs Woodbury and Degraffenreid, however, could not have asserted their claims as presidential electors until after they were officially nominated by the Republican party; they filed this lawsuit shortly thereafter. Thus, they acted with reasonable speed.

Furthermore, the gravamen of a laches claim is prejudice. Laches "requires a showing that a defendant was prejudiced by the plaintiff's unreasonable delay." *Petrella v. Metro-Goldwyn-Meyer, Inc.*, No. 10-55834, 2012 U.S. App. LEXIS 18322, at *12-13 (9th Cir. Aug. 29, 2012). Plaintiffs brought this lawsuit before the ballots for the November 2012 election were printed or even finalized (indeed, the Republican Party nominated Mitt Romney for President only a few days ago, and the Democratic Party has yet to formally nominate Barack Obama); they

filed a motion in the district court seeking expedited consideration, but that was ultimately denied.

Neither Defendant identifies any defense they have been unable to bring as a result of Plaintiffs' alleged delay, or any relevant evidence that has been spoiled. *Cf. Petrella*, 2012 U.S. App. LEXIS 18322, at *13. Because Defendants have not suffered any articulable or material prejudice in their defense of these claims, their laches defense must fail. Although proceedings at the appellate level have been expedited, that is common in appeals from preliminary injunctions, and more broadly is a typical feature of election-related litigation. This is not an eleventh-hour, last minute attempt to rush into court to change an established ballot; rather, it is a timely, reasonable challenge to an unconstitutional and illegal state law.

CONCLUSION

For these reasons, Plaintiffs respectfully request that this Court deny Defendants' motions for a stay of the Preliminary Injunction.

DATED this 31st day of August, 2012.

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CERTIFICATE OF COMPLIANCE

I certify that:

This brief complies with the enlargement of brief size permitted by Ninth Circuit Rule 28-4. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6). The brief is 15,564 words, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(b)(iii), if applicable.

DATED this 31st day of August, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **APPELLEES/PLAINTIFFS' OPPOSITION TO APPELLANT/DEFENDANT ROSS MILLER'S AND APPELLANT EDWARDS' EMERGENCY MOTION FOR STAY OF ORDER GRANTING PRELIMINARY INJUNCTION** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 31, 2012. I further certify that all parties are registered users of the CM/ECF system.

Dated: August 31, 2012

/s/ ***Brandy L. Sanderson***

An employee of Snell & Wilmer L.L.P.

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