

Docket No. 12-16881

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

WENDY TOWNLEY, et al.,
Appellees,

v.

ROSS MILLER, in his official capacity as Nevada Secretary
of State, and KINGSLEY EDWARDS,
Appellants.

On Appeal From Preliminary Injunction Order Of The
United States District Court For The District Of Nevada
(Hon. Robert C. Jones, Presiding)

District of Nevada Case No. 3:12-cv-00310-RCJ-WGC

**EMERGENCY MOTION
UNDER CIRCUIT RULE 27-3
APPELLANT EDWARDS' MOTION FOR
STAY PENDING APPEAL**

JOHN P. PARRIS, ESQ.
Nevada Bar No. 7479
Law Offices of John P. Parris
324 South Third Street, Suite 1
Las Vegas, Nevada 89101
*Attorney for Appellant
Kingsley Edwards*

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CIRCUIT RULE 27-3 CERTIFICATE

(i) Telephone Numbers, Email Addresses, And Office Addresses Of All Attorneys For The Parties.

Paul Swenson Prior
Snell & Wilmer
3883 Howard Hughes Pkwy
Suite 1100
Las Vegas, NV 89169
702-784-5200
Fax: 702-784-5252
Email: sprior@swlaw.com
Attorneys for Plaintiffs

Michael T. Morley
616 E Street, N.W. #254
Washington DC 20004
860-778-3883
Email: michaelmoreleyesq@hotmail.com
Attorney for Plaintiffs

K. Kevin Benson
Office of the Attorney General
100 N. Carson Street
Carson City, NV 89701
775-684-1114
Fax: 775-684-1108
Email: kbenson@ag.nv.gov
Attorneys for Defendant Secretary of State

John P. Parris
Law Offices of John P. Parris
324 South Third Street,
Las Vegas, NV 89101
702-382-0905
Fax: 702-382-6903
Email: jparris@johnparrislaw.com
Attorney for Intervenor-Defendant Kingsley Edwards

(ii) Facts Showing The Existence And Nature Of The Claimed Emergency

On August 22, 2012, the District Court issued a Preliminary Injunction prohibiting the Nevada Secretary of State from printing ballots that let Nevada voters select “None of These Candidates” (“NOTC”) in statewide elections for state or federal office. This injunction was issued even though Nevada voters have had the option to choose NOTC for almost thirty-five years, even though a voter’s individual decision to exercise the NOTC option violates no one else’s constitutional rights, and even though the Plaintiffs challenging NOTC cannot satisfy the most basic requirements for federal jurisdiction.

The ballots for the November 6 Presidential election are scheduled to be sent to print by September 7, 2012. Hence, unless a stay is granted the November 2012 election will be held without voters being afforded an option that they have had under Nevada law for decades. This will change the state’s election rules at the eleventh hour, in an unpredictable and unprecedented manner. Indeed, that is precisely the result Plaintiffs seek—for their complaint is by its own terms motivated by the fear that Nevada voters may choose NOTC instead of the Republican nominee.

That fear may or may not be well-founded. But even if it is, Plaintiffs’ remedy is political, not judicial. If Plaintiffs are concerned about losing votes to NOTC, their remedy is to persuade the voters to choose their favored

candidate. It is not to come into a federal court at the eleventh hour and attempt to rewrite a state election law that suffers from no constitutional or statutory infirmity.

(iii) When And How Counsel For The Other Parties Were Notified And Whether They Have Been Served With The Motion; Or, If Not Notified And Served, Why That Was Not Done

On August 28, 2012, counsel for Edwards notified counsel for Plaintiffs and Defendant via telephone and e-mail that they would be filing this Motion for Stay Pending Appeal. Because all counsel have registered for Appellate ECF in the action, they will be served with the Motion and supporting papers upon their e-filing. Edwards is also serving counsel for Plaintiffs and Defendant with the Motion via e-mail and the supporting papers and exhibits by overnight delivery.

(iv) Whether All The Grounds Advanced In Support Of The Relief Sought In the Motion Were Submitted To The District Court

On August 22, 2012, at the hearing on the motion for preliminary injunction, the Nevada Secretary of State asked the District Court for a stay pending appeal of the preliminary injunction it had announced its intention to grant. This request was based, inter alia, on the harm to the State's election process that a preliminary injunction would cause. This request was summarily denied by the District Court. Then, when Appellant Edwards, who had not previously addressed the Court, likewise asked for a stay, and began to explain the reasons therefor, the District Court announced that a stay had already been

denied and that it would not entertain further argument on the stay issue. Accordingly, all arguments advanced in this motion have either been presented to the District Court or the District Court has declined to hear them notwithstanding Appellant's attempt to present them.

DATED: August 28, 2012.

Respectfully submitted,

/s/ John P. Parris
JOHN P. PARRIS, ESQ.
Nevada Bar No. 7479
Law Offices of John P. Parris
324 South Third Street, Suite 1
Las Vegas, Nevada 89101
Attorney for Appellant

INTRODUCTION

Just weeks before Nevada's ballots are to be printed, a district judge has issued an injunction altering the rules that have governed the state's elections for more than three decades. The injunction will deprive Nevada voters, including Appellant Kingsley Edwards, of the option to choose "None of These Candidates" ("NOTC") in statewide elections for state or federal office. Edwards has appealed from this order, and now moves for a stay of the preliminary injunction pending his appeal and that of Defendant Nevada Secretary of State.

The stay should be granted for multiple reasons. Edwards is likely to succeed in his appeal from the order granting a preliminary injunction. Plaintiffs cannot make the extraordinary showing necessary to justify the grant of mandatory preliminary relief. Their likelihood of success on the merits is negligible, because they lack standing and they have failed to plead valid constitutional or statutory claims. Allowing voters to choose to mark their ballots for "None Of These Candidates" causes no cognizable harm to the plaintiffs, and "disenfranchises" no-one. Nor can the plaintiffs show irreparable injury or a favorable balance of the equities.

The equities also favor granting a stay pending appeal. First, and foremost, the injunction will cause Appellant Edwards irreparable injury by taking away his right to exercise a voting option that has been a part of Nevada law for over thirty-five years. In contrast, the preliminary injunction is

unnecessary to protect Plaintiffs' rights because, as mentioned above, Edwards' ability to vote NOTC violates no one else's constitutional or statutory rights.

Injunctive relief was also unwarranted due to Plaintiffs' laches and the threat posed by the injunction to an orderly election process. Plaintiffs themselves have participated in numerous elections where NOTC was a legally permissible voter choice. Yet they waited until the eleventh hour to file this case, less than three months before the ballots for the November 2012 must go to the printer. This delay is inexcusable; indeed, the courts in similar cases have refused to grant preliminary injunctive relief precisely because the plaintiffs waited too long to file. Moreover, the injunction granted by the District Court ignores the State's interests in not having to implement significant changes in voting procedures at the last minute at the behest of Plaintiffs who could have and should have pressed their claims years earlier. Similarly, a stay would serve the unquestioned public interest in having a Presidential election that is not buffeted by judicial intervention at the eleventh hour, but that is conducted according to statutes that have been implemented without serious constitutional question for decades.

"The basic function of a preliminary injunction is to preserve the *status quo* pending a determination on the merits." *Chalk v. U.S. Dist. Ct. Cent. Dist. Of Cal.*, 840 F.2d 701, 704 (9th Cir. 1988). The preliminary injunction entered by the District Court does just the opposite; it requires Nevada state election

officials to change the status quo by removing from the ballot an option that Nevada voters have had for more than thirty-five years. Such an injunction is mandatory, as opposed to permissive or prohibitory, because it “orders a responsible party to take action.” *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 878 (9th Cir. 2009) (internal quotation and citation omitted). And when “a party seeks mandatory preliminary relief that goes well beyond maintaining the status quo *pendente lite*, courts should be extremely cautious about issuing a preliminary injunction.” *Id.* at 1319-20 (internal quotations and citations omitted). Indeed, because mandatory injunctions are “particularly disfavored,” the “the district court should deny such relief unless the facts and law clearly favor the moving party.” *Id.* at 1320.

The District Court disregarded these precepts in entering the injunction challenged here. But that error will go unremedied—at least for the November 2012 Presidential election—unless a stay issues. For the reasons set forth below, Appellant’s motion for stay pending appeal should be granted.

STATEMENT OF FACTS

A. Factual Background

Since 1975, Nevada has allowed voters in any election for statewide office or for President and Vice President to choose “None of these candidates” over any of the other names on the ballot. N.R.S. 293.269 (the “NOTC statute”). The

NOTC statute contains three relevant subsections. Subsection 1 creates the actual NOTC option, requiring

Every ballot upon which appears the names of candidates for any statewide office or for President and Vice President of the United States shall contain for each office an additional line equivalent to the lines on which the candidates' names appear and placed at the end of the group of lines containing the names of the candidates for that office. Each additional line shall 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, and the line shall read "None of these candidates."

N.R.S. 293.269(1). Subsection 2 describes how such NOTC votes shall be counted:

Only votes cast for the named candidates shall be counted in determining nomination or election to any statewide office or presidential nominations or the selection of presidential electors, but for each office the number of ballots on which the additional line was chosen shall be listed following the names of the candidates and the number of their votes in every posting, abstract and proclamation of the results of the election.

Id. N.R.S. 293.269(2). Finally, subsection 3 prescribes specific instructions that must be given the voter on each ballot: "Every sample ballot or other instruction to voters prescribed or approved by the Secretary of State shall clearly explain that the 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." *Id.* N.R.S. 293.269(3).

The effects of the NOTC statute have been well-studied by the academic literature. The law allows those individuals who wish to exercise their civic

right of participating in federal and state elections to do so. At the same time, the NOTC law “provide[s] voters with an unambiguous means to signal dissatisfaction with the status quo.” Damore, Waters, & Bowler, *Unhappy, Uniformed, or Uninterested?: Understanding “None of the Above” Voting*, XX(X) POL. RES. QUARTERLY 1, 9 (forthcoming). Such a message can be quite powerful, because if enough individuals vote NOTC such that no candidate takes 50 percent of the vote, the choice of a plurality of the electorate will “take office knowing that more of the state’s voters did not want them in power than did. As a consequence, any claims of a mandate by these winners must necessarily differ from those that election winners may make in the absence of a NOTC option.” *Id.* at 10. Furthermore, the NOTC statute has been widely used since its inception. A recent study found that, on average from 1976 until 2010, slightly more than 10 percent of the Nevada electorate, on average, has voted NOTC. Damore, *supra*, at 5.

It also bears noting that Nevada law contains numerous other provisions for rejecting other types of ballots. For example, Nevada requires that “if more choices than permitted by the instructions for a ballot are marked for any office or question, the vote for that office or question may not be counted.” N.R.S. 293C.369(1). Likewise, Nevada allows ballot counters to reject a “soiled or defaced ballot” where the defacing is intentional. N.R.S. 293C.367(2)(b).

B. Procedural History

The procedural history of this case is set forth in the Secretary of State's motion for stay pending appeal and is incorporated by reference. The original complaint named only Plaintiffs, the State of Nevada and the Nevada Secretary of State—the official responsible for elections—as parties; however, Plaintiffs later filed an amended complaint dropping the State as a party. Intervenor Kingsley Edwards timely moved to intervene on July 13, 2012. His intervention motion was granted on August 22, 2012.

C. The District Court's Denial Of A Stay Of Its Preliminary Injunction Order Pending Appeal

On August 22, 2012, at the hearing on the motion to dismiss and for preliminary injunction, the Nevada Secretary of State asked the District Court for a stay pending appeal of the preliminary injunction it had announced its intention to grant. This request was based, *inter alia*, on the harm to the State's election process that a preliminary injunction would cause. This request was summarily denied by the District Court. Then, when Appellant Edwards, who had not previously addressed the Court, likewise asked for a stay, and began to explain the reasons therefor, the District Court announced that a stay had already been denied and that it would not entertain further argument on the stay issue. Accordingly, all arguments advanced in this motion have either been presented to the District Court or the District Court has declined to hear them notwithstanding Appellant's attempt to present them.

ARGUMENT

I.

THE STANDARD FOR GRANTING A STAY PENDING APPEAL

A party seeking a stay pending appeal “must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of relief, that the balance of equities tip in his favor, and that a stay is in the public interest.” *Humane Society v. Gutierrez*, 558 F.3d 896, ___ (9th Cir. 2009). All these factors favor granting a stay in this case.

II.

EDWARDS IS LIKELY TO SUCCEED ON THE MERITS

Appellant is likely to succeed on the merits of his preliminary injunction appeal, for two separate and independent reasons. First, all of the Plaintiffs lack standing. Second, Plaintiffs cannot allege a valid cause of action against NOTC.

A. Each of the Plaintiffs Lacks Constitutional Standing

“In order to invoke the jurisdiction of the federal courts, a plaintiff must establish ‘the irreducible constitutional minimum of standing,’” *Lopez v. Candaele*, 630 F.3d 775, 785 (9th Cir. 2010) (quoting *Lujan v. Defenders of*

Wildlife, 504 U.S. 555, 560-61 (1992)). “First, the plaintiff must have suffered an ‘injury in fact,’ an invasion of a legally protected injury which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.” *Lujan*, 504 U.S. at 560. (citations and some quotation marks omitted). “Second, there must be a causal connection between the injury and the conduct complained of,” such that “the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party before the court.” *Id.* (quotation marks, brackets, and ellipses omitted). “Third, it must be ‘likely,’ as opposed to merely ‘speculative,’ that the injury will be redressed by a favorable decision.” *Id.* at 561 (some quotation marks omitted). The plaintiffs must prove these elements “‘in the same way as any other matter on which the plaintiff bears the burden of proof’”; “[t]herefore, at the preliminary injunction stage, a plaintiff must make a ‘*clear showing*’ of” each standing factor. *Lopez*, 630 F.3d at 785 (quoting *Lujan*, 504 U.S. at 560) (emphasis added).

Not one of the plaintiffs can satisfy any of these fundamental requirements, let alone all three. First, although Plaintiffs’ central claim—indeed the organizing basis for each and every cause of action—is that the NOTC statute unlawfully advantages the ballots cast for candidates over those

who mark “NOTC,” nine of the eleven plaintiffs do not even allege that they intend to cast a NOTC ballot. Indeed, one Plaintiff (Wesley Townley) affirmatively indicates an intention to vote for Mitt Romney (Am. Compl. ¶ 9), and two others (Woodbury and DeGraffenreid) seek to be chosen as Romney electors, and thus are highly likely to vote for Romney (*i.e.*, themselves) (Am. Compl. ¶¶ 12(b), 13(b) (“A vote for Mitt Romney ... is, by virtue of Nevada law, effectively a vote for Plaintiff [Woodbury or DeGraffenreid] for the office of presidential elector.”)).

Worse still, the two who do claim an intention to cast NOTC do not ask the Court to direct that their ballots be given *greater* effect: on the contrary, they expressly maintain that the Court cannot order such relief, and urge that they—and Appellant Edwards and the vast majority of NOTC voters who have not joined this suit—be denied the opportunity to knowingly select the ballot option they most prefer, and instead be forced to vote for a candidate or leave the ballot blank. Although there is no precedent for this sort of “stop me before I vote again” claim, the “relief” this suit seeks would do nothing to correct the supposed “disenfranchisement” (Am. Compl. At 2), and the extraordinary ruling would give these individuals literally nothing they do not already enjoy under existing law.

1. Each Plaintiff Lacks Constitutional Standing

Plaintiffs break down into two groups. Two Plaintiffs, Riedl and Dougan (the “NOTC Plaintiffs”), allege that they would vote NOTC in November’s election. Am. Compl. ¶¶ 10-11. Nine Plaintiffs (Wendy Townley, Whitlock, Gunson, Thomas, Wood, Linford, Wesley Townley, Woodbury, and DeGraffenreid) either give no indication as to how they will vote, or affirmatively allege that they will vote for Mitt Romney. Am. Compl. ¶¶ 3-9, 12-13. Because each group of plaintiffs suffers from distinct defects in their standing allegations, their claims are addressed separately.

a. Neither of the NOTC Plaintiffs Can Meet the Injury Or Redressability Requirements

Neither of the NOTC Plaintiffs, Riedl and Dougan, can properly allege standing. Although the NOTC Plaintiffs offer claims that create superficial resemblance to a voting rights law suit, none withstands scrutiny. First, the NOTC Plaintiffs do not allege constitutionally sufficient injury, because they are in complete control of whether they will suffer any alleged “injury.” This Court recently made this principle clear in addressing similarly spurious claims in *Drake v. Obama*, 664 F.3d 774 (9th Cir. 2011), a case on which Plaintiffs themselves relied below to try to establish standing (Plfs.’ Mem. Of Points &

Authorities in Opp. To Defs.’ Mot. To Dismiss at 24, Dkt. No. 23. (“MTD Opp.”)). In *Drake*, several active-duty military personnel sought to challenge President Obama’s fitness for office; they claimed they suffered injury because “were [a servicemember] to refuse to follow President Obama’s orders, despite his ineligibility for the presidency, [the servicemember] would face disciplinary action by the military.” 664 F.3d at 780. This Court rejected that claim as one that “failed to assert any concrete injury,” because the servicemember “has an ‘available course of action which subjects him to no concrete adverse consequences’—he can obey the orders of the Commander-in-Chief.” *Id.* (brackets omitted) (quoting *City of S. Lake Tahoe v. Cal. Tahoe Reg’l Planning Agency*, 625 F.2d 231, 237 (9th Cir. 1980)).

Like the servicemembers in *Drake*, the NOTC Plaintiffs have an available course of action which subjects them to no “adverse consequences”: they can simply vote for a candidate, any candidate, of their choosing. As discussed in more detail below, all voters in this nation are “guarantee[d] **the opportunity** for equal participation by all voters in the election” of their representatives. *Reynolds v. Sims*, 377 U.S. 533, 568 (1964) (emphasis added) (quoting in Mot. 12, 14, 18). Each NOTC Plaintiff has the same opportunity as every other voter: the fact that they choose to engage in a course of action in

which their ballot is treated differently than others (like that of a voter who leaves blank or intentionally defaces her ballot, see Nev. Rev. Stat. §§ 293C.367(2)(b), 293C.369(1)) does not confer a concrete injury for purposes of standing, because at all times the NOTC Plaintiffs may simply choose to take a different course of action presenting no adverse consequences, *Drake*, 664 F.3d at 780. Thus, the NOTC Plaintiffs cannot demonstrate constitutionally sufficient standing.

Even if the NOTC Plaintiffs could demonstrate standing, the preliminary injunction entered by the District Court does not redress--indeed, it causes--what the NOTC Plaintiffs themselves call “disenfranchisement” (Mot. 9). The NOTC Plaintiffs do not ask the courts to direct Defendant Miller to count their votes, and the District Court did not enter such an order. Instead, the NOTC Plaintiffs are bringing suit to *deprive* themselves—and Appellant Edwards and other voters throughout the State—of an available, desired choice: even though they wish to vote for NOTC, they have brought suit to have that statute declared unconstitutional. Am. Compl. ¶¶ 10-11. In short, the “injury” that the the NOTC Plaintiffs claim—that they will *knowingly* cast a ballot that will not affect an outcome when they could choose to do otherwise—is not legally

cognizable and, even if it were, has not been redressed by the relief they seek (and have obtained).

As Chief Justice Roberts recently reminded the nation, “It is not [the judiciary’s] job to protect the people from the consequences of their political choices.” *Nat’l Fed’n of Indep. Bus. v. Sebelius*, --- S. Ct. ----, 2012 WL 2427810, at *8 (2012). Nevada voters are informed, both in the NOTC statute itself and on the ballot, that the expression of dissatisfaction entailed in marking the NOTC option will be registered and reported but will not affect the declaration of the winning candidate. It is thus the NOTC Plaintiffs’ own, considered decision to vote NOTC; if they wish to have their votes treated differently, they are entitled, like every other Nevada elector, to choose another option on the ballot. It was not the District Court’s job as a court of limited jurisdiction to stop the NOTC Plaintiffs from picking the NOTC option before they vote again. The NOTC Plaintiffs lack standing.

b. None Of The Non-NOTC Plaintiffs Can Meet Any Of The Standing Requirements

Those Plaintiffs who have *not* alleged that they will choose NOTC lack standing as well.

(1) The Non-NOTC Plaintiffs Allege Only Generalized Grievances

First, each of the non-NOTC Plaintiffs alleges nothing more than a generalized grievance that is shared by every other Nevada voter. The Supreme Court has “consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen’s interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.” *Lance v. Coffman*, 549 U.S. 437, 439 (2007) (per curiam) (quotation marks omitted) (collecting cases). To have standing, ‘a plaintiff must have more than “a general interest common to all members of the public,”’ *id.* (quoting *Ex Parte Levitt*, 302 U.S. 633, 634 (1937)), because it is this “personal stake in the outcome of the controversy” that is necessary “to assure that concrete adverseness which sharpens the presentations of issues upon which the court so largely depends for illumination of difficult constitutional questions,” *Schlesinger v. Reservists Comm. To Stop the War*, 418 U.S. 208, 217-18 (1974).

Applying these principles, courts in this Circuit have rejected similarly unfocused challenges to state elections statutes. For example, in *Wasson v.*

Bradbury, the plaintiff challenged a state statute that prevented a citizen from voting for an independent candidate if the citizen had voted in a particular party's primary, alleging that the law would have prevented the plaintiff, "and[] other voters similarly situated, to directly participate in the nomination of independent candidates seeking access to the November 7, 2006 general election ballot." 2007 WL 1795997, at *1 (D. Or. June 20, 2007), *aff'd in relevant part sub nom. Wasson v. Brown*, 316 Fed. App'x 663, 664 (9th Cir. 2009). The district court held, and this Court affirmed, that the plaintiff "has alleged only a general concern that sometime in the future a candidate he may wish to vote for may not qualify for the ballot due to the application of the [Oregon statute]. Such an abstract disagreement with the statutory provision is insufficient to establish an injury in fact, to create a justiciable controversy or establish standing." *Id.* at *2; *see also Page v. Tri-City Healthcare Dist.*, --- F. Supp. 2d ----, 2012 WL 928465, at *11-13 (S.D. Cal. Mar. 19, 2012) (collecting additional cases and concluding that a plaintiff alleged no more than a generalized grievance where "Plaintiff was never denied meaningful representation").

As in *Wasson*, each of the non-NOTC Plaintiffs violates the core tenet of standing that they must allege more than an "abstract disagreement with the

statutory provision.” As a threshold matter, four of these Plaintiffs (Wendy Townley, Whitlock, Gunson, and Thomas) do not even allege that much, but rather allege that they are registered members of political parties and they plan to vote in the November 2012 election; none alleges a single identifiable interest or injury. *See* Am. Compl. ¶¶ 3-6. And while three of the other non-NOTC Plaintiffs (Wood, Linford, and Wesley Townley) allege interests, each of those interests is nothing more than “a general interest common to all members of the public,” *Lance*, 549 U.S. at 439. For example, these three non-NOTC Plaintiffs allege that they have an interest in “being able to cast [a] vote for any of the options listed for each race on the ballot, and having that vote be given full legal effect,” Am. Compl. ¶¶ 7(b), 8(b), and 9(b), or, in other words, an “interest in proper application of the Constitution and laws,” a quintessentially insufficient injury, *Lance*, 549 U.S. at 439.¹ Notably absent from these allegations is any claim that any of these non-NOTC Plaintiffs

¹ The other interests offered by these three non-NOTC Plaintiffs, that they “not be[] required to vote on a ballot in which one of the officially presented options in the races for President of the United States and U.S. Senator will legally nullify his vote and effectively disenfranchise him” and that they “hav[e] his properly cast vote be given equal legal effect to the properly cast vote of every other registered and duly qualified elector, regardless of which ballot options he, and those of the other electors, choose,” Am. Compl. ¶¶ 7(a) & (c), 8(a) & (c), and 9(a) & (c), are similarly shared by every single Nevada voter.

suffers in anything other than an “indefinite way in common with the people generally,” *Az. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1443 (2011). Moreover, if they want to cast a ballot that, in their view, has “full legal effect,” they need only cast a ballot for a non-NOTC alternative.

The final two non-NOTC Plaintiffs, Woodbury and DeGraffenreid (the “candidate Plaintiffs”), state only that they have an “interest in not having ‘None of these candidates’ appear as an option on the ballot for President of the United States in the November 6, 2012 general election.” Am. Compl. ¶¶ 12(c), 13(c). Though not alleged in the Complaint, presumably they believe that with the presence of NOTC on the ballot, voters might be tempted to exercise that option instead of voting for their desired candidate; Woodbury and DeGraffenreid evidently believe that without NOTC, voters will be more likely to vote for Mitt Romney. Missing from the Complaint, however, is any explanation as to why an interest to have others vote for your desired candidate is anything more than a generalized grievance shared by the public. Indeed, it is precisely because every other citizen shares this interest that we have elections.

In their opposition to the Secretary’s motion to dismiss, Plaintiffs argued that these candidate Plaintiffs suffered a “competitive injury” sufficient to

confer standing. See MTD Opp. 24 (citing *Drake*, 664 F.3d at 782 (dismissing candidate plaintiffs for lack of standing due to failure to allege sufficient injury)). This argument demonstrates Plaintiffs’ fundamental misunderstanding of NOTC: unlike in *Drake* and the other cases relied on by Plaintiffs in supporting their “competitive standing” argument in their MTD Opp., here it is entirely speculative that a vote for NOTC would create a “competitive injury,” because *NOTC cannot win an election*. As Plaintiffs’ own complaint demonstrates (Am. Compl. ¶¶ 34-35), even if NOTC garners the most votes, the candidate who gets the most votes is still deemed the winner of the election. Thus, a vote for NOTC is not equivalent to a vote for a candidate’s opponent. Instead, the candidate Plaintiffs can only speculate that they will suffer a “competitive injury” by assuming that, were NOTC not on the ballot NOTC voters would still vote in the election and their votes would change the outcome of the election in Romney’s favor. This chain of inferences is, however, precisely the type of injury that *Drake* rejected as “far too speculative and conjectural” to qualify as an injury for standing purposes. 664 F.3d at 781. The candidate Plaintiffs can thus no more demonstrate a concrete and particularized injury than any of the other non-NOTC Plaintiffs. And because the non-NOTC Plaintiffs’ alleged injury is one that they “suffer[] in some indefinite way in

common with the people generally,” *Winn*, 131 S. Ct. at 1443, none of the non-NOTC Plaintiffs can properly meet the injury requirement for standing purposes.

(2) The Non-NOTC Plaintiffs’ Injury, If Any, Is Not Caused By Nev. Rev. Stat. § 293.269(2)

A plaintiff “has standing to challenge only those provisions that [are] applied to it.” *Get Outdoors II, LLC v. City of San Diego*, 506 F.3d 886, 892 (9th Cir. 2007); *see also Bronson v. Swensen*, 500 F.3d 1099, 1112-13 (10th Cir. 2007) (concluding that plaintiffs failed the causation requirement because the defendant’s “statutory obligation to deny plaintiffs’ marriage application was governed by Title 30 of the Utah Code ... not by the challenged criminal provisions”); *Prime Media, Inc. v. City of Brentwood*, 485 F.3d 343, 354 (6th Cir. 2007) (rejecting “the argument ... that injury under one provision is sufficient to confer standing on a plaintiff to challenge all provisions of an allegedly unconstitutional ordinance”).

The non-NOTC Plaintiffs cannot satisfy this standing requirement. They suffer an alleged injury, if any, only under subsection 1 of Nev. Rev. Stat. § 293.269, the statute that makes the NOTC option available to Nevada voters. But they challenge only subsection 2, which describes how NOTC votes are

treated. But this statute will never apply to the non-NOTC Plaintiffs, who do not intend to exercise that option. Accordingly, they cannot claim that *their* vote will ever be, in Plaintiffs’ words, “disregard[ed].” Am. Compl. at 1; *see, e.g.*, Am. Compl. ¶ 9 (non-NOTC Plaintiff Wesley Townley alleging that he will vote for Mitt Romney). Rather, to the extent that any non-NOTC Plaintiff is “injured,” that injury derives solely from their “interest in not having ‘None of these candidates’ appear as an option on the ballot for President of the United States in the November 6, 2012 general election.” Am. Compl. ¶¶ 12(c), 13(c); *see also id.* at ¶ 8(a) (Plaintiff Linford alleging an interest in not voting on a ballot that includes NOTC as “one of the officially presented option in the races for President of the United States and U.S. Senator”). That injury is caused by Nev. Rev. Stat. § 293.269(1), not Nev. Rev. Stat. § 293.269(2). Indeed, Plaintiffs would be worse off if NOTC “votes” were given effect. In all events, Plaintiffs “cannot leverage [their] injuries under certain, specific provisions to state an injury under the [statute] generally,” *Get Outdoors II*, 506 F.3d at 892.²

² Plaintiffs claim that the NOTC law is not severable, but they are unlikely to succeed on the merits of such a claim. First, as Plaintiffs concede, Nevada law contains an express declaration that all laws under the NRS are severable, such that should “any provision of the Nevada Revised Statutes ... [be] held invalid, such invalidity shall not affect the provisions or application of NRS which can be given effect without the invalid provision (continued . . .)

In addition, as Defendant Miller made clear in his motion to dismiss, the non-NOTC Plaintiffs' claims fail the causation test because any alleged injury is not "fairly traceable to the challenged action of the defendant," but rather to "the independent action of some third party not before the court." Defendant's Motion to Dismiss at 7, *Townley v. Miller*, No. 12-CV-00310 (WGC) (D. Nev. July 2, 2012) (Dkt. No. 19) (quoting *Lujan*, 504 U.S. at 560). The non-NOTC Plaintiffs can only be injured by the presence of that alternative on the ballot if *other voters* choose it. Accordingly, whatever injury Plaintiffs can muster is

(. . . continued)

or application." Nev. Rev. Stat. § 0.020; *see also Flaming Paradise Gaming, LLC v. Chanos*, 217 P.3d 546, 555 (Nev. 2009) ("Under the severance doctrine, it is the obligation of the judiciary to uphold the constitutionality of legislative enactments where it is possible to strike only the unconstitutional portions.") (quotation marks omitted). Second, the remaining provisions can "stand alone," because subsection 2 of the NOTC statute is not its "central component." *See id.* at 557. As Plaintiffs recognize, the Nevada Legislature could have given a variety of treatments to NOTC votes, had it so decided. Mot. 9. The "central component" of the NOTC statute is its first subsection, which gives voters the options to choose "none of these candidates," because this is the provision that "provide[s] voters with an unambiguous means to signal dissatisfaction with the status quo." Damore, Waters, & Bowler, *Unhappy, Uniformed, or Uninterested?: Understanding "None of the Above" Voting*, XX(X) Pol. Res. Quarterly 1, 9 (forthcoming); *see also* Mot. 7 (recognizing that it the law's core purpose was expressed in the "State's decision to expand the ballot from a means of electing candidates into a forum for allowing voters to express disdain for those candidates"). As such, the statute is severable, and the non-NOTC Plaintiffs cannot leverage their alleged injury caused by the mere presence of the NOTC option under subsection (1) to strike down how Nevada treats such votes, as described in subsection (2).

due not to Defendant Miller, but to those individual voters who independently choose NOTC and who are not before this court. *Id.* at 7-8. That is yet another reason why Plaintiffs are unlikely to succeed on the merits.

2. The Non-NOTC Plaintiffs' Alleged Injuries Are Not Redressable By This Court

The non-NOTC plaintiffs also cannot demonstrate that it is “‘likely,’ as opposed to merely ‘speculative,’ that the injury will be redressed by a favorable decision” by the courts. *Lujan*, 504 U.S. at 561. Like the causation requirement, Plaintiffs cannot meet the redressability requirement where the provision they challenge (subsection 2 of Nev. Rev. Stat. § 293.269) is not the “predicate” for the claimed injury. *Bronson*, 500 F.3d at 1113; *see pp. _____, supra.*

Furthermore, there is no assurance that, were NOTC to be held unconstitutional, any of the non-NOTC Plaintiffs' preferred candidates would have a greater chance than otherwise of being elected. As Plaintiffs conceded below, even without NOTC “[v]oters would still be able to express their displeasure with the entire field of candidates in a particular race simply by declining to cast a vote in that race.” Mot. 7. Accordingly, it is pure speculation whether the relief they seek would remedy the “competitive injury”

they claim.

Courts have repeatedly found redressability to be “speculative” where an alleged injury “involves numerous third parties ... whose independent decisions may not collectively have a significant effect” on the challenged outcome. *Allen v. Wright*, 468 U.S. 737, 759 (1984). As in *Allen*, the non-NOTC Plaintiffs cannot show that they will obtain any redress to their alleged injuries, because they have no control over how voters who would have voted for NOTC will actually vote.

In sum, the Non-NOTC Plaintiffs cannot meet any of the three standing prongs. Accordingly, it is highly unlikely that any of these Plaintiffs will succeed on the merits.

B. Plaintiffs’ Claims Have Little Chance Of Success

Even if standing were not an insurmountable obstacle, Plaintiffs’ causes of action fail on the merits. While Plaintiffs purport to bring both due process and equal protection claims, as this Court recently recognized, “The Supreme Court has addressed such claims collectively using a single analytic framework.” *Dudum v. Arntz*, 640 F.3d 1098, 1106 n.15 (9th Cir. 2011) (citing *Anderson v. Celebrezze*, 460 U.S. 780, 787 n.7 (1983)). But whether couched

as a due process, equal protection, or any other type of cause of action, Plaintiffs' complaint fails to state a valid claim.

The standard of scrutiny is not high: "Election laws will invariably impose some burden upon individual voters." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). But "less exacting review" is warranted for laws "that are generally applicable, even-handed, [and] politically neutral." *Dudum*, 640 F.3d at 1098. NOTC is such a law, so it is subject to reduced scrutiny, under which "a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory [laws]." *Id.*

Plaintiffs' constitutional claims are largely foreclosed by *Dudum* and *Bennet v. Yoshina*, 140 F.3d 1218 (9th Cir. 1998). Indeed, in *Dudum*, this Court rejected a claim quite similar to those presented here. There the plaintiffs contended that San Francisco's system of "Instant Run-off Voting" (or "ranked choice" voting) unlawfully "discarded" their ballots, because the "exhausted" ballots of voters who chose only losing candidates were no longer counted in subsequent tabulation rounds once the candidates they had ranked were eliminated from contention. *See* 640 F.3d at 1109. But the court rejected the argument, concluding that "[e]xhausted' ballots are not disregarded in tabulating election results." *Id.* at 1111. "[I]t is no more accurate to say that

these ballots are not counted than to say that the ballots designating a losing candidate in a two-person, winner-take-all race are not counted.” *Id.* at 1111-12 (quotation mark omitted). The same is true here; it is undeniable that NOTC votes are “counted,” in the sense of “tabulated”; but like the votes for losing candidates in *Dudum* they play no role in the selection of the winning candidate.

Likewise, in *Bennett v. Yoshino*, this Court considered the effect of counting blank ballots as votes against calling a constitutional convention. The Court held that substantive due process was not violated because there had been no “reliance by voters on an established election procedure.” 140 F.3d at 1226. That factor weighs in Appellant’s favor here, because NOTC has been a part of Nevada law for some thirty-five years. Thus, here, as in *Bennett*, “there was no disenfranchisement or meaningful vote dilution Every ballot submitted was counted, and no one was deterred from going to the polls.” *Id.* At 1227. And here, as in *Bennett*, there is no constitutional violation.

Finally, if there were any legally cognizable burden imposed by NOTC, it is outweighed by the State interests. *See Dudum*, 640 F.3d at 1115-17. Plaintiffs repeatedly quote the Supreme Court’s statement that “elections are not about expression,” but they ignore the context in which this was said,

which makes clear that elections are not *primarily* about registering an opinion – so States are not *required* to provide maximal expression through the ballot. But it does not follow that voting has no expressive component. To the contrary, the State has a substantial and legitimate interest in providing an effective means of expression via the ballot. Accordingly, the reasons for subsection (1) are manifest: it provides an explicit way to express a sentiment of disapproval, encourages participation in other elections, and is intended to improve the quality of discourse and promote responsiveness to those in the electorate who are disaffected. (How well it accomplishes all these purposes is for the legislature, not a federal court, to decide.) As for subsection (2), as the State has explained, a special election is not only expensive, but it is by no means clear that votes in such an election would be representative. *See Dudum*, 640 F.3d at 1104, 1116 (noting expense and potential lack of representativeness of run-off elections).

Plaintiffs’ Elections Clauses claims and their analogy to *Cook* are a bridge too far – no candidate is being given a “disadvantageous” label. Instead, the State is creating an option for voters to express a fuller range of their preferences. *Damore, supra*. Furthermore, “every electoral system ... offers an amalgam of advantages and disadvantages,” *Dudum*, 640 F.3d at 1113, and the

fact that Nevada gives voters a formal option to inform all candidates that none of them are worth the elector's vote (as opposed to informal methods such as leaving ballot blank, filling out multiple options, or spoilation) is simply an outgrowth of that basic principle.

Due Process

Although plaintiffs in the District Court wrenched language from various cases applying the Due Process Clause in the elections context, see MTD Opp. at 9 (citing *Hoblock v. Albany Cnty. Bd. of Elections*, 422 F.3d 77 (2d Cir. 2005)). PI Mem. at 13 (citing *Griffin v. Burns*, 570 F.2d 1065 (1st Cir. 1978)), they ignore that the cases cited involved government actions that affirmatively and systematically misled voters. For example, *Hoblock* involved a claim by voters induced to cast absentee ballots by the elections board's having sent them, who learned after an election (and the opportunity to cast an in-person ballot had passed), that their ballots, which had been sent in error, would not be counted. 422 F.3d at 98. There is no allegation that any of these plaintiffs will cast a NOTC ballot in the mistaken expectation that if enough such ballots are cast, the office will remain vacant and/or a new election will be conducted – nor does any plaintiff claim that s/he *would* vote for Governor Romney (or

President Obama) in November but for the mistaken impression that a NOTC vote would “count.”

On the contrary, plaintiffs are charged with knowing what is in their own complaint, which again and again highlights the plain language of §293.269(2), *i.e.*, that “only votes cast for the named candidates shall be counted in determining nomination or election.” Nor did the plaintiffs ever allege that *other* voters are ignorant of the plain language and operation of this statute. It has been on the books for nearly 37 years, and there was no run-off or new election in the two election contests in which NOTC received more votes than the candidates.

In any event, the standard for finding a Due Process violation should not be risk of confusion, but rather affirmative, intentional misleading of voters. *Cf. Daniels v. Williams*. And even if confusion were enough, the Due Process remedy would not be to eliminate the option; but rather to eliminate *the confusion* – by providing greater information. Thus, had the voters in *Hoblock* been repeatedly and explicitly informed that the absentee ballots were mailed in error and that their votes would only count if they voted in person, there would have been no violation – and no basis for claiming that the federal Constitution entitled them to have these improper ballots counted.

In the District Court, plaintiffs tried to re-cast their Due Process claim as implicating the “unconstitutional conditions,” doctrine arguing that Nevada law impermissibly “pressures” voters to give up their “fundamental” right to vote for a candidate, in order to avail themselves of the opportunity to express dissatisfaction that casting a NOTC ballot provides. See Opp. MTD at 17-18. But they are unlikely to succeed on this late-breaking theory, either.

The focus of the unconstitutional conditions doctrine is inappropriate pressure/use of state power to cause a party to forego constitutional rights. There is no dispute that there is no First Amendment *right* to cast a NOTC ballot or to protest *by voting*. Here, of course, every plaintiff – and every voter – can vote for a candidate and help him or her win. In all 50 States, every available way to express dissatisfaction on election day entails not voting for any candidate: in some States, that means writing in another name; in others, it means leaving the ballot for that office blank. There is nothing coercive about Nevada affording its dissatisfied citizens a better, more effective way of expressing these same views.

The plaintiffs argue that the law is nonetheless unconstitutional because (1) it would be “physically and logically possible” for Nevada to provide both an opportunity to express disapproval for the candidate field and to vote for a

preferred candidate for that office; and (2) that a voter could “reasonably” want that “alternative.” But that misunderstands the unconstitutional conditions doctrine utterly: it does not limit government to only those conditions that are strictly necessary – it would have been “logically” possible for the government to grant tax exemptions to lobbying organizations in *Regan v. Taxation With Representation*, 461 U.S. 540 (1983), and those organizations would have preferred that “alternative.” Nevada permits those who want to cast ballots for offices *and* also express dissatisfaction with the candidate field many opportunities to do so – they may protest in the streets take to or the Internet, wear buttons, or organize political rallies denouncing the status quo. That it *also* provides an opportunity, which other states do not, for those who would rather express disapproval than help a candidate win, does not give rise to any plausible constitutional objection.

Equal Protection

Plaintiffs’ Equal Protection claim is that voters who opt to cast NOTC ballots, knowing precisely how they will be treated – *i.e.* tabulated, publicly reported, but not treated as “votes” that can prevent the candidate receiving the most votes from receiving the office or nomination – are similarly situated to those who vote for a candidate for office. In other words, they argue that the

Constitution *requires* that a State hold run-offs or re-votes when the number of votes for the candidate with the largest share is smaller than the number of ballots marked NOTC for that office.

That makes no sense. If that were the case, when a majority voters failed to mark a ballot – out of protest about the quality of the field – or when the frontrunner received a only plurality (with more votes going, collectively, for the other major party nominee, minor parties, write-ins, where those are allowed, and blank ballots), Equal Protection would likewise require that the candidate be treated as defeated and a new election held. But the Constitution certainly does not require run-offs. On the other hands, a State *could* – at least for state offices – require a majority of votes from among those who could have voted for the office, *i.e.*, ballot casters (or maybe even a majority of the eligible electorate); *see Bennett*, 140 F.3d 1218 (upholding state procedure effectively counting blank ballots as “no” votes for purposes of calling state constitutional convention). But the federal Constitution does not require Nevada or any other State to do so.

The fact that Nevada provides for further elections when a candidate whose name appears on the ballot dies before election day, see NRS 293.165(4) and NRS 293.166(1), is a red herring. The rationale for new elections in such

cases is that voter confusion and ignorance are substantial (some votes will be cast on the mistaken assumption that the candidate is alive, and it is impossible to know *how many* or which ones). But plaintiffs, intervenors, and other Nevada voters well know the consequences of voting NOTC.

In any event, there is no re-vote under Nevada law when the candidate who dies before an election finishes third, even if his vote total is “larger than the margin” separating the first- and second-place finishes. Here, Plaintiffs are not claiming – and could not plausibly claim – that they fear NOTC will “win” the November 2012 elections if “counted” (and they are not asking the Court to require such ballots *be counted* as “votes,” but rather that they be made *impossible*).

Voting Rights Act

Plaintiffs have no likelihood of succeeding on their Voting Right Act claim. The provision they invoke, 42 U.S.C. §1973i(a) makes it unlawful for government officials to “fail or refuse to permit any person to vote who is entitled to vote . . .to vote, or willfully fail or refuse to tabulate, count, and report such person’s vote.”

The Non-NOTC plaintiffs – who hope that others will be denied the opportunity to cast their preferred ballots – are not within the zone of interests

protected by the statute and are not entitled to bring suit. There is no conceivable claim that anyone will “willfully... refuse to tabulate, count, and report” *their votes* (e.g., for Mitt Romney or his electors). The NOTC plaintiffs affirmatively ask to be denied the opportunity to vote the way they – and others throughout the state – would prefer to. There is, suffice to say, no precedent under the Voting Rights Act for a claim remotely like this.

Moreover, it is not clear in any event that Congress conferred a cause of action on such individuals : The Voting Rights Act defines “vote” with reference to “votes cast with respect to *candidates* for public ... office” 42 U.S.C. § 1971(e). It does not confer, protect, or include a right to not vote or to “vote” for a non-candidate. But if it did, the remedy for the “violation” of §1973i asserted here would be to “tabulate, count, and report” the NOTC votes. But plaintiffs expressly abjure any interest in such relief. Congress could not have intended for the Voting Rights Act to extend a right to persons *who seek only to have their own preferred choice removed from the ballot*.

And even if the provision applied to “votes” for NOTC, it likely would not be violated by Nevada’s law. Nevada *does* “tabulate, count, and report” NOTC votes. It simply does not hold re-votes when NOTC gets more votes than a candidate. But every vote for a candidate counts.

Finally, plaintiffs' HAVA claims are without merit. Plaintiffs claim in their Motion To Dismiss that "no court squarely has addressed the issue" of whether HAVA § 301, 42 U.S.C. § 15481 creates an individually enforceable right of action. Opp. 13. That is false: one court in this Circuit, along with at least one court elsewhere, have already addressed this question and concluded that HAVA § 301 "does not unambiguously confer a federal right" because "Section 301 is directed at the requirements for voting systems used in federal elections," and "the language used is not explicitly rights-creating." *Paralyzed Veterans of Am. v. McPherson*, 2006 WL 3462780, at *8 (N.D. Cal. Nov. 28, 2006); *see also Taylor v. Onorato*, 428 F. Supp. 2d 384, 386 (W.D. Pa. 2006) ("Nowhere in section 301 or elsewhere in the Act, does Congress indicate an intention that section 301 may be enforced by private individuals."). Thus, HAVA is not individually enforceable through § 1983.

III.

THE EQUITIES WEIGH HEAVILY IN FAVOR OF GRANTING A STAY PENDING APPEAL.

A. Irreparable Injury Here Is Manifest: Absent A Stay Pending Appeal, Edwards Will Be Unable To Vote NOTC In Accordance With Nevada Law

Unless a stay issues, the preliminary injunction entered by the District Court will cause Appellant the immediate and irreparable harm of

disenfranchisement. Unless stayed, the injunction will bar Appellant and every other Nevada voter from voting for “None of these candidates, ” as Nevadans have been able to do for decades. Plaintiffs conceded below that the “[a]bridgement or dilution of a right so fundamental as the right to vote constitutes irreparable injury.” Mot. 23 (quoting *Cardona v. Oakland Unified Sch. Dist.*, 785 F. Supp. 837, 840 (N.D. Cal.1992)). Voting for “None of these candidates” allows Appellant to send a powerful message to his elected representatives while abstaining from voting for a candidate whom he does not support. Moreover, if that right is taken away for the November 2012 election, as the preliminary injunction does, it can never be restored.

B. Granting A Stay Will Cause No Irreparable Injury

Plaintiffs’ claims of injury, even if sufficient to give them Article III standing, cannot come close to satisfying the heavy burden necessary to obtain a mandatory preliminary injunction. *See supra*. As discussed above, none of the Plaintiffs can show that *their* constitutional or statutory rights are violated if Appellant votes NOTC; accordingly, the injury they claim will be caused by a stay is far outweighed by the injury that denying a stay will cause Appellant.

For example, Plaintiff Dougan alleges that “[i]f ‘None of these candidates’ appears as a ballot option in the race for President of the United

States, he intends to select that choice,” but “[i]f ‘None of these candidates’ did not appear as a ballot option . . . he would cast his vote in that election for Mitt Romney.” Am. Compl. 5, 6. However, the autonomous choices of voters such as Plaintiff Dougan do not violate their own constitutional or statutory rights, or those of electors such as Plaintiff Wesley. If Plaintiffs are concerned that voters would choose “None of these candidates” over Mitt Romney, the preliminary injunction entered against including “None of these candidates” on the ballot will not remedy this alleged injury, because even if “None of these candidates” is stricken from the ballot voters will still have the right *not* to vote for any of the candidates for President. The only way to avoid voters choosing to vote for no one rather than for Mitt Romney is for Mr. Romney and his supporters to convince them that he is worth voting for. “The fact that plaintiffs allege constitutional claims does not alter this result.” *Grudzinski*, 2007 WL 2733826 at *3.

Courts facing similar claims have often denied requests for preliminary injunctions. For example, in *Arizona Green Party v. Bennett*, the Court rejected the Arizona Green Party’s (“AGP”) request for an injunction preventing names of nine “alleged sham candidates” from appearing on general election ballots. No. CV 10-1902 PHX DGC, 2010 WL 3614649, *1 (D. Ariz. Sept. 9, 2010).

These were “not true members of AGP, but . . . persons who registered with AGP, applied to run as write-in candidates, and obtained one or more write-in votes in the August primary election solely for the purposes of appearing as AGP candidates in November and thereby drawing votes away from the Democratic Party.” *Id.* AGP claimed that the appearance of these candidates on the ballot would violate its constitutional rights to due process and the freedom of association secured by the First amendment. *Id.* at *2-*4. Despite the constitutional nature of the alleged injuries, the Court found that AGP would not suffer any irreparable injury from the printing of the ballots because any “burden to be placed on Plaintiffs by the appearance of the . . . ballot is not unlike the burden frequently encountered by political parties.” *Id.* at *5.

Likewise, in *Grudzinski*, Plaintiffs argued that the appearance of allegedly misleading language on the ballot would violate their constitutional rights and “render the election fundamentally unfair.” *Grudzinski*, 2007 WL 2733826 at *1. Nevertheless, the court found that Plaintiffs would not suffer any irreparable injury because they “may counter any alleged harm . . . through their own political speech.” *Id.* *3. As in *Grudzinski*, any harm Plaintiffs claim from the appearance of “None of these candidates” on the ballot is not irreparable and can be remedied by Plaintiffs themselves through the political

process.

Furthermore, Ninth Circuit jurisprudence is clear that “[S]peculative injury does not constitute irreparable injury sufficient to warrant granting a preliminary injunction.” *Caribbean Marine Serv. Co., Inc. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988). Plaintiffs have failed to show the required immediacy of their injury, having failed to allege that the presence of “None of these candidates” on the ballot would actually affect, let alone change, the results of Nevada’s 2012 general election vote for the President of the United States. Indeed, while Plaintiffs claim injury from the fact that there is no election do-over if “None of these candidates” receives a plurality or majority, their own complaint reveals that this has happened only twice in thirty-five years, and the chance of this occurring in a Presidential election is infinitesimal. In contrast, the injury to Appellant without a stay is certain.

C. Plaintiffs’ Delay in Bringing This Lawsuit Warrants Granting A Stay

The equities also tip sharply in favor of a stay because Plaintiffs’ claims are almost certainly barred by laches. Laches applies where “(1) there was an inexcusable delay in seeking the [injunction]; (2) an implied waiver arose from [Plaintiffs’] knowing acquiescence in existing conditions; and, (3) there were

circumstances causing prejudice to [defendant].” *Nevada v. Eighth Judicial Dist Ct.*, 994 P.2d 692, 697 (Nev. 2000). All three factors are present here, where Plaintiffs literally waited decades before deciding to file suit.

In the context of elections, considerations regarding “inexcusable delay” loom large. The Ninth Circuit, along with numerous other courts, has been particularly concerned about “sandbagging on the part of wily plaintiffs,” and thus has repeatedly applied the doctrine of laches “in order to create an appropriate incentive for parties to bring challenges to state election procedures when the defects are most easily cured.” *Soules v. Kauaians for Nukolii Campaign Committee*, 849 F.2d 1176, 1180 (9th Cir. 1988); *see also Williams v. Rhodes*, 393 U.S. 23, 34-35 (1968) (refusing to place Socialist party on the ballot where “it was impossible to grant the relief to the Socialist Labor Party without serious disruption of the election process”); *Nader v. Brewer*, 386 F.3d 1168, 1169 (9th Cir. 2004) (affirming denial of preliminary injunction because the “Appellants’ delay in bringing this action and the balance of hardships in favor of the Appellees were so great”); *In re Cook*, 882 P.2d 656, 669 (Utah 1994) (denying motion for preliminary injunction challenging content of ballots because “one who seeks to challenge the election process must do so at the earliest possibility”). A plaintiff’s delay in bringing suit also prejudices state

and local election officials, because “As time passes, the state's interest in proceeding with the election increases in importance as resources are committed and irrevocable decisions are made. The candidate's and party's claims to be respectively a serious candidate and a serious party with a serious injury become less credible by their having slept on their rights.” *Fulani v. Hogsett*, 917 F.2d 1028, 1031 (7th Cir. 1990) (cited in MTD Opp. 24)

Thus, for example, in a recent case on which Plaintiffs themselves rely (MTD Opp. 9), a district court refused to grant a motion for a preliminary injunction on laches grounds because “Plaintiffs were apparently content with the [challenged election procedure] when they faced, and presumably participated in, recent elections. Most significantly, the [previous] primary and elections came and went without Plaintiffs at any time asserting these claims or calling for injunctive relief.” *Sw. Voter Registration Educ. Project v. Shelley*, 278 F. Supp. 2d 1131, 1138 (C.D. Cal.), *aff'd*, 344 F.3d 914 (9th Cir. 2003) (en banc) (per curiam). Likewise, in *Fulani*, another case on which Plaintiffs rely, the Seventh Circuit denied a plaintiff's challenge to state election procedures where the plaintiff “waited eleven weeks after the [challenged procedures] were a matter of public record and two weeks after it received actual notice before filing suit. During this time the state proceeded with its election preparations,

printed ballots, and commenced absentee balloting. On the basis of these facts, the failure of [plaintiff] to press its case when it should have known that an injury occurred is fatal to it receiving any relief.” 917 F.2d at 1031.

This case presents an even starker call for application of the laches doctrine than did *Shelley* and *Fulani*. Unlike those cases, where the courts applied laches to bar claims by parties that had waited anywhere from eleven weeks to two years before filing suit, Plaintiffs have sat silently by for over 35 years while NOTC has been part of Nevada law. Indeed, Plaintiffs’ own complaint contains a list of past elections in which they could have challenged the law. Am. Compl. ¶¶ 29-34. Moreover, at least one of the Plaintiffs, Bruce Woodbury, ran for public office in 1982, 1984, 1988, 1992, 1996, 2000, and 2004,³ yet he has only now, in 2012, decided that NOTC “violates the U.S. Constitution and federal law,” Am. Compl. ¶ 1. Plaintiffs offer no reason to explain their delay in waiting decades to challenge this law. And to the extent that other Plaintiffs have, like Woodbury, have participated in past elections, *see* Am. Compl. ¶¶ 3, 4, 6, 7 (Plaintiffs Townley, Whitlock, Thomas, and Wood all registered members of political parties), their delay in bringing suit is an “an

³*See* <http://www.clarkcountynv.gov/Depts/parks/Documents/centennial/commissioners/commissioner-b-woodbury.pdf>.

implied waiver” based on their “knowing acquiescence in existing conditions,” *Eighth Judicial Dist Ct.*, 994 P.2d at 697.

In addition, Plaintiffs’ delay is almost certain to work substantial prejudice on Defendant Miller, on intervenors, and on the electorate at large. Ballots must be sent to print by September 7, 2012. Thus, as in *Williams*, “relief cannot be granted without serious disruption of election process,” because “at this late date it would be extremely difficult, if not impossible, for [Nevada] to provide still another set of ballots.” 393 U.S. at 35. Likewise, the “confusion that would attend such a last-minute change poses a risk of interference with the rights of other [Nevada] citizens, for example, absentee voters.” *Id.*; *see also Fulani*, 917 F.2d at 1031 (relying on same reasoning from *Williams* to deny plaintiffs’ claim based on laches). Requiring Defendant Miller to reprint every ballot to remove NOTC, even though it has gone unchallenged over the last 35 years, will cause the State considerable expense and its voters considerable confusion.

In contrast, Plaintiffs concede that court-ordered removal of NOTC from the ballot will have little, if any effect, both because “a voter remains free to express his disdain for the entire field of candidates running for a particular office simply by declining to cast a vote in that race,” Mot. 24, and because,

claims of “disenfranchise[ment]” (*id.* at 1) notwithstanding, any voter who prefers to cast a vote for a candidate (the only relief sought from this Court, see *infra*) may already do so. In view of the considerable delay and substantial prejudice wrought by Plaintiffs’ decades-long slumber on their “rights,” the balance of equities tips decisively against granting an injunction.

D. The Public Interest Favors A Stay

Finally, the public interest is best served by ensuring that Nevada’s elections proceed in a cost-efficient manner that complies with its long-standing statutes. As discussed *supra*, the time remaining before the election in which to print these ballots is extremely limited. Last minute judicial changes to electoral rules add expense, increase voter confusion, and disserve the appearance of justice. Voters, candidates, and political parties all deserve an election conducted under rules that have been in-place for decades, and that are not altered at the eleventh hour by a single district judge on the basis of claims of injury that are political rather than constitutional.

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CONCLUSION

For the foregoing reasons, the District Court's Preliminary Injunction should be stayed until disposition of the appeal.

DATED: August 28th, 2012.

Respectfully,

/s/ John P. Parris
JOHN P. PARRIS, ESQ.
Nevada Bar No. 7479
Law Offices of John P. Parris
324 South Third Street, Suite 1
Las Vegas, Nevada 89101
Attorney for Appellant
Kingsley Edwards

Docket No. 12-16881

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

WENDY TOWNLEY, et al.,
Appellees,

v.

ROSS MILLER, in his official capacity as Nevada Secretary
of State, and KINGSLEY EDWARDS,
Appellants.

On Appeal From Preliminary Injunction Order Of The
United States District Court For The District Of Nevada
(Hon. Robert C. Jones, Presiding)

District of Nevada Case No. 3:12-cv-00310-RCJ-WGC

**SUPPLEMENTAL EXHIBIT TO
APPELLANT EDWARDS' MOTION FOR
STAY PENDING APPEAL**

JOHN P. PARRIS, ESQ.
Nevada Bar No. 7479
Law Offices of John P. Parris
324 South Third Street, Suite 1
Las Vegas, Nevada 89101
*Attorney for Appellant
Kingsley Edwards*

Filed herein is a true and accurate copy of the Transcript of Motion Hearing occurring on August 22, 2012 before the Honorable Robert C. Jones in United States District Court of Nevada Case No 3:12-CV-310-RCJ-WGC.

DATED: August 29, 2012.

Respectfully submitted,

/s/ John P. Parris
JOHN P. PARRIS, ESQ.
Nevada Bar No. 7479
Law Offices of John P. Parris
324 South Third Street, Suite 1
Las Vegas, Nevada 89101
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on the 29th day of August, 2012, the foregoing Supplemental Exhibit to Motion to Stay Pending Appeal was served by submission to the Court's electronic filing system, and was also delivered to the following parties by separate electronic mail delivery and by placing same in U.S. Mail at the addresses below:

Paul Swenson Prior
Snell & Wilmer
3883 Howard Hughes Pkwy
Suite 1100
Las Vegas, NV 89169
702-784-5200
Fax: 702-784-5252
Email: sprior@swlaw.com
Attorneys for Plaintiffs

Michael T. Morley
616 E Street, N.W. #254
Washington DC 20004
860-778-3883
Email: michaelmorleyesq@hotmail.com
Attorney for Plaintiffs

K. Kevin Benson
Office of the Attorney General
100 N. Carson Street
Carson City, NV 89701
775-684-1114
Fax: 775-684-1108
Email: kbenson@ag.nv.gov
Attorneys for Defendant Secretary of State

/s/ John P. Parris

John P. Parris, Esq.

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA
3 BEFORE THE HONORABLE ROBERT C. JONES, CHIEF DISTRICT JUDGE
4 ---o0o---

4 WENDY TOWNLEY, et al., :
5 :
6 Plaintiffs, : No. 3:12-CV-310-RCJ-WGC
7 :
8 -vs- : August 22, 2012
9 :
10 ROSS MILLER, in his : Reno, Nevada
11 official capacity as :
12 Secretary of State for the :
13 State of Nevada, :
14 Defendant. :
15 _____ :

16 TRANSCRIPT OF MOTION HEARING

17 APPEARANCES:

18 FOR THE PLAINTIFF: MICHAEL T. MORLEY
19 Attorney at Law
20 Washington, D.C.

21 PAUL SWENSON PRIOR
22 Attorney at Law
23 Las Vegas, Nevada

24 FOR THE DEFENDANT: K. KEVIN BENSON
25 Deputy Attorney General
Carson City, Nevada

FOR THE INTERVENOR
DEFENDANT: JOHN P. PARRIS
Attorney at Law
Las Vegas, Nevada

Reported by: Margaret E. Griener, CCR #3, RDR
Official Reporter
400 South Virginia Street
Reno, Nevada 89501
(775) 329-9980

1 RENO, NEVADA, WEDNESDAY, AUGUST 22, 2012, 9:53 A.M.

2 ---o0o---

3
4 THE COURT: Let's see. Townley versus State of
5 Nevada, please.

6 MR. MORLEY: Yes, your Honor. Michael Morley
7 and Swen Prior for the plaintiffs.

8 THE COURT: Thank you.

9 MR. BENSON: Kevin Benson, Deputy Attorney
10 General, for the defendant, Secretary of State Ross Miller.

11 MR. PARRIS: Your Honor, John Parris on behalf
12 of Mr. Kingsley Edwards, the intervenor in particular this
13 matter.

14 THE COURT: Thank you so much.

15 I do have some special questions. I've read your
16 briefs. Please don't be redundant. You'll want to emphasize
17 the most important points, of course, but not every detail of
18 the briefs, please. I do have some factual questions, and
19 then I'll ask you to go ahead.

20 This is the motion to intervene and the motion to
21 dismiss. I do think I should entertain the motion to
22 intervene first and get your objections.

23 Well, let's do that. The motion to intervene, I've
24 got your objection. My inclination is to grant it. I see no
25 reason why I shouldn't. So -- and it may portend, too, what I

1 have to say or to rule regarding standing. So my inclination
2 is unless there's more strenuous objection or something else
3 to add, to grant the motion to intervene.

4 MR. MORLEY: No, your Honor, no objection.

5 THE COURT: Okay. I'll do so. Then the motion
6 to dismiss.

7 Now, this is your turn, so I have a couple of
8 initial questions. In Nevada, you know, one question I have,
9 factual question, is -- to the other side, is what's the
10 difference. A person can just choose not to vote in that
11 particular election, they can vote the rest of the ballot.

12 But my administrative assistant tells me she's tried
13 to do that before, and she can't do it with our present
14 machines. She's gone down through the ballot having not voted
15 in a particular election, and then the ballot kicks her back
16 up to the top, won't let her cast the entire ballot.

17 So that's the first question, what's the status,
18 mechanical status of our machines. Will it not let you simply
19 skip that race even if you want to vote, because that's the
20 first obvious question to the other side is what's the
21 difference.

22 I realize that they have an answer for me, and we'll
23 hear that, but -- so that's the first factual question.

24 The other question is -- well, let me get into the
25 other questions as you proceed with your argument. Go ahead.

1 MR. BENSON: To address the factual issue, my
2 understanding -- as to the question of whether or not the
3 machines will let you vote that way, my understanding is you
4 are correct in the sense that if you under vote a race,
5 meaning you skip that race, the machine will give an alert
6 that says you skipped this race, is that really what you want
7 to do, and that if you continue to hit next on the machine,
8 that it will go ahead and skip that race, but it does give
9 you an alert.

10 THE COURT: This report, off the record,
11 out-of-court report to me, was that that's what she tried to
12 do, she skipped it. She went right down to the end of the
13 ballot where you get to the question do you want to cast your
14 ballot, when she tried to do that, it kicked her back up to
15 the top saying you have not voted in this race.

16 MR. BENSON: And my understanding is that it's a
17 requirement under the Help America Vote Act that the machines
18 alert a voter if they have left a race blank. However, that
19 voters are able to, by continuing to hit next on the machine,
20 go forward and --

21 THE COURT: Okay. So your representation to me
22 factually is, a member of the bar of the court, your
23 representation to me is that the machine will let you vote
24 without having voted in one of the races.

25 MR. BENSON: That is correct. And if I had been

1 prepared, your Honor, I would have brought my mother as
2 witness today because I was just discussing this very issue in
3 this case.

4 THE COURT: Okay. There you go.

5 MR. BENSON: You can obtain -- a voter can, of
6 course, ask, as she told me she did, assistance from the
7 clerks, the poll workers and so forth, on how to cast that
8 ballot without casting a race.

9 THE COURT: Okay.

10 MR. BENSON: So it certainly can be done in
11 Nevada, and that is, as I mention, I believe it's a
12 requirement of the Help America Vote Act that the machine at
13 least alert a voter that they have not filled a choice in each
14 of the races.

15 THE COURT: You'll agree with me it certainly
16 doesn't, however, require that the state of Nevada not let you
17 cast your entire ballot if you insist on not voting in a
18 particular race. That certainly isn't required by the Voter
19 Act.

20 MR. BENSON: If I understand your question
21 correctly, we are not required to make people vote, if that's
22 what you're getting at. People are free under the federal
23 law --

24 THE COURT: I don't understand your answer,
25 but -- and it wasn't responsive, but the point is you're

1 making a representation, a factual representation to me as a
2 member of the bar of the court that the machine will let you
3 vote without going through onerous hurdles, without jumping
4 over onerous hurdles, other than just simply the reminder that
5 you haven't voted in a single race, it does let you vote the
6 entire ballot.

7 MR. BENSON: That is my understanding, yes,
8 your Honor.

9 THE COURT: Okay. Go ahead with your motion,
10 please.

11 MR. BENSON: With regard to the motion to
12 dismiss, basically it's motion to dismiss for failure to state
13 a claim, and essentially what that comes down to is the choice
14 of none of these candidates is not a vote.

15 You have a federal constitutional right to vote for
16 a candidate for US Senate, for president and so forth and so
17 on, but that's not what we're talking about in this case.

18 What we're talking about is a choice none of these
19 candidates which is exactly the opposite of voting for a
20 candidate.

21 THE COURT: You know, if it quacks like --
22 you're marking the box, right?

23 MR. BENSON: Correct.

24 THE COURT: It's actually reported in the
25 newspapers how many votes were for none of the above, right?

1 MR. BENSON: That is correct.

2 THE COURT: The statute just forbids you from
3 counting it. Of course, it doesn't -- counting it in the
4 election. They do count it, of course.

5 MR. BENSON: We do count it. Indeed, we count
6 it and tabulate it and report it.

7 THE COURT: So I just -- I mean, I get the
8 argument. I've read it back and forth that it's not a vote,
9 but I just simply don't get it.

10 MR. BENSON: Well, under the Ninth Circuit's
11 case law under the *Green versus City of Tucson* and *Hussey*
12 *versus City of Portland* cases, the Ninth Circuit in those
13 cases take a functional approach to what constitutes a vote,
14 and under that functional approach it has to meet all three
15 criteria.

16 It has to, one, be an official expression of the
17 voter's will, it has to be necessary to resolve a political
18 question, and it has to have some threshold at which something
19 happens at which it becomes effective or fails to become
20 effective.

21 In this case, it doesn't meet any of those three
22 criteria. It doesn't answer the question of who ought to be
23 U.S. Senator or who ought to be president.

24 THE COURT: Sure, it does. It's saying these
25 two better not be.

1 MR. BENSON: But it doesn't fulfill the ultimate
2 question of who should be --

3 THE COURT: Sure, it does.

4 MR. BENSON: -- which is the whole purpose --

5 THE COURT: The only reason it doesn't is
6 because the state statute says don't count it.

7 MR. BENSON: And there's no difference between
8 that and under voting a race as we talked about before.
9 Voters are, of course, free to do that, and obviously we don't
10 count that as a vote.

11 THE COURT: You're right, they are, and there's
12 no problem with the state saying don't count any votes in a
13 race where there was no vote.

14 MR. BENSON: That's correct, and that's
15 essentially what this --

16 THE COURT: But that's what they charge you
17 with. They say you're using -- what is it, suspenders and --
18 you've got a circular argument. You're saying it's not a vote
19 because the state statute says don't count it.

20 It is a vote. It's a mark in a box. It's a
21 specific vote against either one of the two above persons.
22 It's an expression of intent regarding the election. It seems
23 to me it meets all the tests for a vote.

24 MR. BENSON: Even if we accept that it's an
25 expression of an intent, that's only the first of the three

1 prongs that it has to meet in order to be a vote.

2 The second is it has to answer a political question.
3 The political question in an election is who should be
4 elected.

5 The purpose of an election is to fill an office,
6 it's not to create a vacancy, it's to fill an office which
7 this does not and cannot do and was never intended to do. So
8 it cannot meet that second criteria.

9 THE COURT: Again, I don't follow you on that
10 one. It seems to me it's clearly -- the purpose of the
11 election is to select a candidate.

12 MR. BENSON: That is the political question at
13 issue.

14 THE COURT: Selecting none of the above is a
15 definite vote for neither one of the two above to fill the
16 office.

17 MR. BENSON: But it doesn't select a candidate,
18 and that is the problem why it doesn't answer the political
19 question at issue, your Honor, in an election.

20 THE COURT: That's because you phrased the
21 question that way.

22 MR. BENSON: And, well, let's put it this way,
23 your Honor. If we -- the plaintiffs' theory in this case on
24 why none of the above or none of these candidates violates due
25 process and equal protection, et cetera, is because we don't

1 count it as a vote. Assuming --

2 THE COURT: That's the tougher question, and
3 there, of course, you have a leg up, a very weak leg, and you
4 can obviously see where I'm going is this is a vote, and I
5 just don't see your arguments, nor do I buy it that it is not
6 a vote. It is a vote.

7 MR. BENSON: So let's say -- so if it is a
8 vote --

9 THE COURT: Yeah. Now get to the more important
10 question.

11 MR. BENSON: Okay. If it is a vote --

12 THE COURT: Does it violate any of these
13 statutes or the voting clauses, et cetera.

14 MR. BENSON: It does not because even assuming
15 it's a vote and even assuming it therefore implicates equal
16 protection, due process and so forth, under the *Anderson*
17 *versus Celebrezze* test, all of those are only subject to
18 strict scrutiny if the plaintiffs bear the burden of showing
19 that it is severely burdened.

20 The Supreme Court has applied strict scrutiny in
21 only two types of cases on voting rights. Those are the
22 reapportionment cases where people's votes are diluted based
23 on geography because of how the districts are apportioned, and
24 the other are in the poll tax cases and similar cases such as
25 requiring people to own land and property, things like that

1 that have no rational relationship to their ability to vote --

2 THE COURT: Now, I might buy that argument, but
3 I guess my question really ultimately will be do we have two
4 different standards depending on whether it's a federal or
5 state race.

6 I might buy that argument if we were only talking
7 about a state race. You know, I have no business as a federal
8 judge being involved in that question at all except for the
9 raised issues of due process and equal protection. Those are
10 violations of the U.S. Constitution. But I think I have every
11 business being involved in a federal election handled at the
12 state level.

13 And is the standard different, in other words, is it
14 different depending on whether I'm just simply handling a
15 question for state elections, or whether I'm operating under
16 the additional impositions upon me by the U.S. Constitution
17 granting limited authority to the state to conduct federal
18 elections, and clearly subject to oversight by the federal
19 courts, federal Congress, and, in addition, federal policy
20 with regard to those federal elections as expressed in current
21 legislation, for example, the Voting Act and the two acts that
22 we're dealing with here.

23 So is the standard different?

24 MR. BENSON: No, your Honor, is the short
25 answer.

1 The *Anderson versus Celebrezze* balancing test
2 applies specifically to federal rights, whether it's First
3 Amendment, due process, equal protection, right of
4 association, so forth and so on.

5 That test applies to all of those federal rights in
6 federal elections because really the only elections at issue
7 in this particular case are the US Senate elections, president
8 and vice-president elections which, obviously, are federal
9 races.

10 So this is not the type of case where --

11 THE COURT: So let's phrase the question this
12 way. In a federal election, let's limit it to that, where the
13 state is mandating we will not count what I consider to be a
14 vote, which probably I'm going to rule is a vote, is that not
15 a violation -- does that not, number one, require something
16 more than simply a rational basis, but, more importantly, in
17 light of federal policy and the fact that it's a federal
18 election, should not I find that there's not even a rational
19 basis, number one, number two, that it should pass a higher
20 test, and, number three, it's also a violation of equal
21 protection as it pertains to citizens?

22 The Fourteenth Amendment says, states, you can no
23 longer impair the privileges of United States citizens. So
24 whatever rights you had to do before to impair their rights,
25 henceforth you no longer have a right to impair privileges of

1 U.S. citizens.

2 So both due process and equal protection which are
3 invoked under that Fourteenth Amendment against the states,
4 seems to me you have to answer that question it's a violation.

5 MR. BENSON: Let me address it, if I can, in
6 steps.

7 THE COURT: That's a multiple question.

8 MR. BENSON: First of all, it's the same test,
9 it's a balancing test.

10 As I mentioned earlier, the plaintiffs bear the
11 burden of showing what burden it imposes on their rights.
12 Only if they show that it -- bear the burden of showing that
13 it imposes a severe burden do you even get to strict scrutiny.

14 THE COURT: I agree. They have the burden.
15 They must show me that there's some injury. But if the injury
16 is it impairs the right to have your vote counted, it seems to
17 me they've answered the burden.

18 MR. BENSON: And in that case --

19 THE COURT: In a federal election.

20 MR. BENSON: There really is no severe burden on
21 their rights in this case because what we're talking about
22 here is --

23 THE COURT: Why is it any different from South
24 Carolina telling an African-American you can't vote unless you
25 wear -- unless you pay a hundred bucks or you -- everybody has

1 to pay a hundred bucks, or you have to wear a particular color
2 on your lapel? How is it any different?

3 MR. BENSON: It's fundamentally different,
4 your Honor, because those are classifications that are
5 completely arbitrary and have no rational connection to an
6 election whatsoever.

7 THE COURT: Well, isn't this arbitrary --

8 MR. BENSON: It's not arbitrary.

9 THE COURT: -- by putting yourself into the
10 classification of none of the above, we will not count your
11 vote?

12 MR. BENSON: It's not arbitrary in this case
13 because this option by --

14 THE COURT: A person may have a multitude of
15 reasons for casting such a vote. They may -- for example,
16 they may want to say I don't like either of these candidates.

17 Number two, they may be saying I don't like this one
18 candidate at all, I don't know the other candidate, I'm not
19 willing to vote for either one.

20 They may be saying I don't know either candidate,
21 therefore my conscience won't let me vote for either one.

22 MR. BENSON: That's true, your Honor.

23 THE COURT: They may be saying any one of those
24 things.

25 But the reason -- the fact they have voted none of

1 the above means automatically for you we're not going to count
2 that vote.

3 MR. BENSON: And like I said before, that is not
4 an arbitrary distinction because none of these candidates
5 means exactly that, none of these candidates. It is directly
6 related to the question of who is to be elected to office.
7 It's not an arbitrary --

8 THE COURT: Again, it seems to me that it's
9 arbitrary. None of the above starts with an alphabetical
10 letter, N. John Doe, D, starts with an alphabetical letter D.
11 Why are you disparaging the vote, my vote, if I select none of
12 the above by refusing to count it?

13 MR. BENSON: Because it doesn't answer the
14 ultimate question of an election which is who should fill the
15 office, and that's why it's not an arbitrary --

16 THE COURT: That's your decision. That's your
17 moral imposition.

18 I may be saying I am definitely interjecting myself
19 on the ability to vote for a candidate, namely, I don't want
20 either one of these two. I want you to count my vote against
21 both of them, none of the above, N. So why isn't your refusal
22 to count arbitrary?

23 MR. BENSON: As I said before, and your Honor
24 obviously disagrees, it's not arbitrary because it's not
25 related to race, to the color of your hair, the color of your

1 clothing, to where you live, to the amount of money you have,
2 or factors that for some reason personal to the voter have no
3 bearing --

4 THE COURT: What if the state statute said you
5 can fill in the line, put anybody you want, but we're not
6 going to count the vote. Wouldn't that be arbitrary?

7 MR. BENSON: This would be a different case. If
8 we had a statute that said --

9 THE COURT: Undoubtedly it's a different case.
10 That's why I'm exploring the analogies.

11 MR. BENSON: Sure. If we had --

12 THE COURT: Would that be arbitrary?

13 MR. BENSON: If we had a statute that said --

14 THE COURT: Would that be arbitrary?

15 MR. BENSON: I'm sorry, could you reask the
16 question?

17 THE COURT: Would that be arbitrary?

18 If the state statute allowed to you fill in your
19 name, somebody else's name on a line, and the state statute
20 said you can do it, we're not going to count it, would that be
21 arbitrary?

22 MR. BENSON: No, I don't think so.

23 THE COURT: Okay. Another example. If the
24 state statute said we will have a representative on the ballot
25 mandatorily from Colombia, that representative of Colombia,

1 that name must be on the ballot but we are not going to count
2 it, would that be arbitrary?

3 MR. BENSON: That's an interesting question,
4 your Honor, and I don't know why -- I think it would depend on
5 what the legislative history and purpose is behind that --

6 THE COURT: Okay. One last example just so that
7 you can see the fine lines that I'm drawing here.

8 If the ballot said -- no, I'm not going to ask that
9 question. Go ahead. I'll let you complete the analysis.

10 MR. BENSON: So going back to the steps of the
11 test, the -- whether something is subject to strict scrutiny
12 or not, they bear the burden of showing there is no, in this
13 case, severe burden on those rights because choosing none of
14 these candidates, you're free to under vote as well, you're
15 free to stay home on the couch, and whatever reasons voters
16 have for doing that, those are their own reasons, and we don't
17 get into their head about that.

18 THE COURT: So you're just saying it's their
19 burden, and there is, in fact, no injury because the other
20 choice is just not to vote in that race.

21 MR. BENSON: And that's something they will
22 always be free to do as well.

23 THE COURT: That's right, and they've got to
24 answer that question. That's a big question in my mind.

25 The counter question to it, of course, is why

1 doesn't the state statute just allow people not to vote in a
2 particular race, along with casting their ballot, and it will
3 be reported? Obviously there's nothing to count, but we
4 will -- it will be reported.

5 Out of a hundred thousand voters, actual voters who
6 cast ballots, 5,000 did not cast a ballot in this race. Why
7 doesn't the state statute do that?

8 MR. BENSON: In this case, the purpose of the
9 statute is to give voters a chance to directly and
10 unambiguously express their discontent for all candidates, and
11 that's done by choosing none of these candidates.

12 When you just under vote a race, it's much more
13 ambiguous. We don't know why voters do that. We don't know
14 if it's because they just don't care, they don't know the
15 candidates.

16 The purpose of that option is to send a clear
17 message so that we know that the reason that the voters did
18 not vote in that race, did not pick a candidate, is they
19 disapprove.

20 THE COURT: Does the voter know that?

21 Is the voter clearly instructed if you just don't
22 know these people, just don't vote in this race? If you just
23 oppose one of these candidates, just don't vote in the race if
24 you don't want to vote for either one. Only if you oppose
25 both of these candidates should you choose none of the above.

1 Are the voters instructed as to that method of expressing
2 their intent.

3 MR. BENSON: There is no explicit directions to
4 that extent on the ballot itself. However, the law -- voters
5 are, of course -- there's an un rebuttable assumption that they
6 know what the law is. This has been on the books for
7 35 years, it's very well known in Nevada. I don't think
8 anybody has been misled. There's been no evidence or even
9 allegation that voters are coerced or misled or mistaken in
10 choosing this option.

11 THE COURT: I think there's such an allegation
12 having read the complaint.

13 On the question of other states, how long this has
14 been on the books, are there other states that have this --

15 MR. BENSON: We are the only state, I
16 understand, that has this --

17 THE COURT: In the entire Union?

18 MR. BENSON: In the United States. There are,
19 of course, other countries that allow this, but it's of
20 limited relevance here.

21 THE COURT: Have other states ever adopted it
22 even if it's no longer effective?

23 MR. BENSON: To my knowledge, I don't believe
24 other states have adopted it. I know there was a lot of
25 debate about it in California about the same time we adopted

1 it, but I believe their legislature ultimately rejected the
2 idea. So to my knowledge there is no case law if that's what
3 you're asking where it's been rejected.

4 THE COURT: All right. Proceed, please, from
5 due process and equal protection, unless you haven't finished
6 there, and give me your analysis on the other statutes.

7 MR. BENSON: With regard to the balancing test,
8 because that applies to all of the constitutional -- whether
9 it's due process or equal protection and so forth and so on,
10 that's the *Dudum versus Arizona* case, is that that balancing
11 test applies to all of those.

12 And so what this Court's duty is, is to weigh the
13 severity of the burden on the right, and according to that
14 severity, it's a scale from rational basis to strict scrutiny,
15 and there's an intermediate scrutiny applied in there as well.

16 Even if we were to get to strict scrutiny in this
17 case, the state has a compelling interest in not counting
18 these as votes.

19 THE COURT: Saving lives, putting out fires --

20 MR. BENSON: Holding an effective election,
21 your Honor, meaning that the election results --

22 THE COURT: What's the compelling interest in
23 allowing people to vote for none of the above even though
24 their vote doesn't count? What's the compelling interest?

25 MR. BENSON: The interest there is in allowing

1 voters to communicate with their politicians, with their
2 government, to express their disapproval for all of those
3 candidates so that the candidates will be more responsive to
4 the voters.

5 I can't think of a more compelling government
6 interest than to have public officials that are responsive to
7 their constituency.

8 THE COURT: Okay.

9 MR. BENSON: And with regard to -- so there's
10 actually -- and let me parse this out a little bit because
11 there are two separate issues here.

12 THE COURT: I think you are parsing.

13 MR. BENSON: One issue is -- well, one issue is
14 not counting the vote, if you're going to call it a vote.
15 Another is having it appear on the ballot because those are
16 two completely different things.

17 We don't count it because of our state interest in
18 holding an effective election. Effective means it actually
19 elects somebody to office. We fill the office as opposed to
20 creating a vacancy. That's the whole reason we have elections
21 in the first place.

22 THE COURT: So you feel a compelling need to let
23 people interrupt that process to express their feelings. Why
24 don't you allow them to have a write-in section on the ballot,
25 I hate the present government, or I don't like the -- even

1 though they're not on the ballot, I don't like the current
2 senator, I don't like the current law regarding the speed
3 limit? Why don't you permit them to interrupt the process
4 there to express their same feelings?

5 MR. BENSON: Well, the point is that under our
6 current statutory code is it does not interrupt the process.
7 Voters have the ability to express themselves to make that
8 statement without interrupting the process under the current
9 law.

10 THE COURT: So if there's such a compelling -- I
11 don't need to pursue this. You get the point.

12 If there's such a compelling need to all the
13 communications to their elected officials, you've selected a
14 very narrow way to meet the need and only one small portion of
15 the need. So I just don't buy the argument there's any
16 compelling need.

17 MR. BENSON: That balances the state interest
18 and holding an effective --

19 THE COURT: Forty-nine other states haven't felt
20 the need.

21 MR. BENSON: Like I said, those are two
22 different -- there are two different issues is the problem
23 here, is -- let's assume we count the vote. Let's assume that
24 our statute says or this Court orders us, okay, the reason
25 this is unconstitutional is because it's not counted. Okay,

1 the obvious remedy seems to be to order us to count it.

2 THE COURT: You bet. That's one of the remedies
3 here is to strike just -- not the whole statute, but just that
4 portion that says you will not count it.

5 MR. BENSON: That's correct.

6 THE COURT: I could mandate that you count it.

7 MR. BENSON: You could, and if that was --

8 THE COURT: What impact would that have on the
9 election?

10 MR. BENSON: Well, first of all, obviously, it
11 would have to obtain a plurality for it to make any difference
12 at all, and it's rather doubtful that that would happen,
13 especially in presidential races.

14 THE COURT: So out of a hundred votes, one
15 candidate gets -- and we're talking about the federal
16 elections now, I don't care what happens in the state
17 elections, and I shouldn't care.

18 If 49 votes are -- 48 are for one and 47 for the
19 other one, and four votes for none of the above, what's the
20 effect on the election?

21 MR. BENSON: There is no effect from whether
22 it's counted or not. The person who gets 48 percent would win
23 in that case.

24 THE COURT: Okay.

25 MR. BENSON: And so it will only have any

1 potential effect if none of these candidates obtained the
2 plurality, it gets the 48 percent, and in that case --

3 THE COURT: Okay. That's an obvious question
4 for the other side.

5 If I have to strike something down, I'm supposed to
6 strike it down as narrowly as possible. Why shouldn't -- if I
7 do think there's violation here in not counting the vote, why
8 can't I just strike that portion of the statute that says you
9 will not count it?

10 MR. BENSON: With regard to that, if that were
11 this Court's ruling, or that's what the law already said, then
12 now we have a situation where the voters are still able to
13 express themselves, there's no problem with that being on the
14 ballot, so obviously there's no burden on anybody's rights in
15 that sense, and voters are still able to do that.

16 Only in the very unusual circumstances in which that
17 actually obtains a plurality of the votes would it have any
18 effect, and that effect is --

19 THE COURT: Okay. I have to ask you to wind up.
20 I'm sitting here on a trial that lawyers are waiting to
21 proceed in the middle of a trial.

22 MR. BENSON: Sure. And let me mention briefly
23 then that in that effect there would be no issue with having
24 to rewrite Nevada law, there would be no vacuum in the law.
25 The law adequately provides for filling vacancies in that

1 unusual circumstance that that should occur.

2 And so, as you noted yourself, your Honor, if you
3 are to strike any part of a law, it should be done on the
4 narrowest possible grounds in order to preserve the
5 legislature's interest, the voters' interest, the interests
6 such as the intervenors who wish this to remain on the ballot.

7 And with regard to the balancing test on the
8 preliminary injunction, if that is the constitutional
9 impediment in this case is that it's not counted, that's the
10 remedy, is to order that it be counted rather than to take it
11 off the ballot altogether.

12 And that makes it a valid choice where there's no
13 burden on anyone's rights unquestionably at that point, and it
14 still preserves the rights of those voters who do wish to have
15 this as an option and to exercise it in the future.

16 If your Honor has no further -- I can -- I know you
17 want me to wrap up.

18 I think that the overall questions with regard to
19 each of the statutory requirements I'll just touch on briefly.

20 The -- whether -- depending on whether you rule one
21 way or the other on due process and equal protection grounds,
22 let me say briefly equal protection, this is not similarly
23 situated as voting for a named candidate because it cannot
24 take office, but with regard to the -- and therefore the equal
25 protection claim itself should fail *ab initio*.

1 With regard to the Voter Rights Act only applies
2 when voters are discriminated against based on their race,
3 there's no such allegation in this case and therefore that
4 claim fails as a matter of law.

5 The Help America Vote Act, the particular section
6 that they're suing under in this case does not provide a
7 private cause of action, nor does section 1983 provide private
8 cause of action in that case, and if there's no private cause
9 of action, they cannot sue under a preemption theory either.
10 That would be up to the U.S. Attorney General to do so, and
11 obviously that has not happened in this case.

12 With regard to the election clauses, under the case
13 law, it's -- the states have broad powers to administer
14 elections, and they cite repeatedly to the *Cook versus Gralike*
15 case, and that's the case where the ballots had something on
16 them to the effect that, in giant, bold letters it said "This
17 candidate ignored voter instructions on term limits," and in
18 that case the court said, you know what, you're dictating
19 electoral outcomes because you're really putting your thumb on
20 the scale against those particular candidates based on one
21 very narrow issue.

22 That case is not remotely like this case. In this
23 case, we have one option that is politically neutral, and it
24 doesn't address any particular issue in this case. All it
25 does is give the voters a chance to explicitly say I don't

1 like any of you candidates, therefore it doesn't put the thumb
2 on any --

3 THE COURT: That's one answer to the question
4 can we not just strike down the portion that it won't be
5 counted. You say -- because they are, in fact, expressing an
6 interest in the election.

7 They want their -- they want -- that's the reason
8 they're voting for none of the above is so that they can
9 express their disfavor with both candidates. They expressly
10 are voting in the election, and to simply say therefore we'll
11 count it doesn't quite answer the problem of the statute.

12 MR. BENSON: Well, that -- I think it does
13 answer the problem there because that gives them the chance to
14 express themselves. Contrary to what the plaintiffs argue,
15 it's not illegal to let people express themselves on the
16 ballot.

17 All of those cases --

18 THE COURT: And it's not a disparagement by
19 analogy to those ballots that say the above -- this candidate
20 disapproved extension of the environmental protection
21 application in the Elko area, this candidate equally
22 disparaged voting rights in Pershing County.

23 MR. BENSON: And those types of things --

24 THE COURT: It's not -- it's dislike that case.

25 MR. BENSON: It's unlike that case because those

1 obviously put a scarlet letter on particular named candidates.
2 This does nothing of the sort.

3 THE COURT: Why isn't it Ross's suggestion to
4 the voter neither one of these candidates are worthy of your
5 vote?

6 MR. BENSON: Well, first of all, it's not the
7 Secretary's suggestion. This was -- the Nevada legislature
8 enacted this through the people's representatives, because the
9 people wanted this choice.

10 THE COURT: No, it's Ross's imposition. It's
11 his statement on the ballot. He's mandated to do it, of
12 course, we're not going to hold him for damages, of course.
13 We understand he's operating under people of the state of
14 Nevada telling him we want that choice.

15 Nevertheless, isn't it just -- the placement of none
16 of the above an imposition of Ross's statement on the voter,
17 neither one of these candidates are worthy of your vote?

18 MR. BENSON: No, its not.

19 THE COURT: So it's not like the case where
20 there's a third block, and he has the arbitrary right to say
21 neither of these candidates is worthy of your choice, not like
22 that case.

23 MR. BENSON: I'm not sure which -- are you
24 referring to a particular case, or are you making a
25 hypothetical?

1 THE COURT: Hypothetical.

2 MR. BENSON: I'm not sure which case.

3 I don't believe it's like that because the voter
4 always has the ability to not vote in a race. If the voter
5 doesn't think they're worthy of the vote, then they can not
6 vote and under vote it, and that's perfectly legitimate. That
7 is a legitimate choice of the voter.

8 THE COURT: Of course, the voter, in response to
9 a comment on the ballot this person wears pink clothes, the
10 voter also has the choice, I can ignore that, I don't believe
11 it anyway.

12 MR. BENSON: But that's the thing about this
13 option is because it's completely neutral. It doesn't say
14 anything about any particular candidate, whereas in the *Cook*
15 case, it was only certain candidates.

16 Kevin Benson appears on the ballot with a statement
17 that says he ignores how you feel about term limits, my
18 opponent does not. Guess who has the advantage. It's very
19 clear in that case.

20 In this case, it's neutral as to each of the
21 candidates, it doesn't single any of them out. It's neutral
22 as to all issues, really, it doesn't single out any particular
23 issue.

24 And, as I mentioned before, the voters are always
25 free, if they don't think any of those candidates merit their

1 vote, they don't have to give it, and that's a perfectly
2 legitimate choice of the voter. If they want to make that
3 voice heard and make it unambiguous and do so by choosing none
4 of these candidates --

5 THE COURT: Okay. You have a final right of
6 reply. I'll give you equal time and no more, please, because
7 we are sitting on a trial.

8 MR. MORLEY: Your Honor, may it please the
9 Court, based on the Court's comments I'll move past the
10 threshold issue of whether or not none of these candidates
11 should count as a vote.

12 I would preliminarily emphasize as laid out in our
13 briefs that regardless of where this Court comes down on that
14 question, we have stated valid causes of action under all --

15 THE COURT: Well, two initial questions.

16 MR. MORLEY: Yes, your Honor.

17 THE COURT: One, can you cast your ballot
18 without voting in a particular race?

19 MR. MORLEY: My understanding, your Honor, is
20 yes, that if you do not vote for any of the candidates in a
21 particular race, you are --

22 THE COURT: Okay. So save that question for a
23 minute.

24 When we get to the merits, the core merits, is there
25 any injury then to you? Is there any difference from someone

1 who just simply doesn't vote in this race?

2 Next predicate question is, is this a vote. Is it a
3 vote.

4 MR. MORLEY: Thank you, your Honor.

5 Addressing your first question first, what is the
6 difference between under voting versus voting for none of
7 these candidates.

8 Under voting is making the deliberate decision to
9 effectively waive your right to vote in a particular case.
10 Rather than affirmatively casting a ballot in that race, the
11 voter is choosing not to do so.

12 Selecting none of these candidates is a legally
13 valid, legally permissible selection from among the legally
14 presented ballot options. It is a vote. It is an affirmative
15 act of expression by the voter that, according to us, is
16 analytically like a vote.

17 As the statute itself lays out, in order to choose
18 none of these candidates, a person must select that option in
19 the same manner, that's a quote from the statute, as he or she
20 would select any of the other candidates.

21 So everything that the person has to do is select
22 none of these candidates is the act of voting, is an
23 affirmative expression of intent as opposed to a waiver or
24 decision not to participate in that election.

25 So, yes, both from a formalist, as well as from a

1 functionalist perspective, affirmatively casting a ballot for
2 none of these candidates is different from just choosing not
3 to cast a ballot at all in a particular race.

4 And more to the point, having options like none of
5 these candidates on the ballot can affect the outcomes of
6 races in ways that simply the theoretical possibility of under
7 voting would not.

8 At the very least, as your Honor pointed to, it
9 could potentially be a gentle nudge in favor of selecting that
10 option.

11 But as the state itself recognized, under the
12 state's theory it need not stop at none of these candidates.
13 The opportunity to participate in nonvote expressive choices
14 could extend to none of these candidates want to lower taxes
15 enough, none of these candidates respect the original intent
16 of the constitution enough, that once you open the door to
17 that type of manipulation, it could have a dramatic impact on
18 the outcome of elections in a way that the simple theoretical
19 possibility that a person might choose to skip a particular
20 race would not.

21 And so, for those reasons, I would argue that there
22 is a substantial difference between skipping a race versus
23 affirmatively casting a legally valid and legally permissible
24 ballot in that election.

25 THE COURT: So start first with -- let's assume

1 I agree with you it's a vote. I need more answers to that
2 last question, what is your injury, than what you've just
3 given, but do it in the context of the argument, please.

4 Start first with equal protection and due process.
5 Why isn't it a violation of equal protection and due process,
6 what standard should I use, and is it different if it's a
7 state race versus a federal election race.

8 MR. MORLEY: With regard to your Honor's last
9 question, the election clause analysis is entirely different.

10 You're absolutely right, your Honor, that under the
11 elections clause of the constitution, that only regulates
12 federal races, and so our election clause challenge is an
13 as-applied challenge to the federal races.

14 So if your Honor were to base this Court's ruling
15 under the elections clause, then that would only extend to
16 federal races.

17 With regard to due process and equal protection,
18 however, the underlying constitutional violation is the same.
19 Under the due process clause --

20 THE COURT: Because that first option is very
21 tempting. Even if I agree with you, you know, I'm a federal
22 judge, I really don't want to be injecting myself into state
23 elections or how they're run. So that's a very tempting
24 alternative, even if I agree with you, and that is to go off
25 on that leg only, with respect to the federal elections on

1 this ballot, you may not have a none-of-the-above choice.

2 Tell me please, now, on equal protection and due
3 process why I should go more broadly.

4 MR. MORLEY: With regard to due process, there
5 are three different approaches this Court could take. The
6 first is to simply follow the line of Supreme Court cases
7 cited throughout our briefs that simply declare repeatedly,
8 clearly, expressly, that the right to vote not only includes
9 the right to cast a ballot, but to have that ballot counted
10 and be given full effect.

11 It is simply a *per se* denial of the right to vote,
12 to acknowledge that something is a vote and yet for the state
13 to intentionally and deliberately not to count it.

14 *Reynolds v Sims, Gray v Sanders, United States*
15 *versus Classic*, this would be a *per se* violation of that rule.

16 THE COURT: You're going to have to respond to
17 that because, unfortunately, I think I'm agreeing with him.
18 It is very tempting to just narrow this decision to the
19 federal election part of the ballot. But I think I agree with
20 his argument on that one. So that one you do have to reply
21 to.

22 MR. MORLEY: I'd also like to suggest a second
23 possible approach this Court could take potentially as an
24 alternative approach under the due process clause, that even
25 if the Court did not want to take the *per se* approach, under

1 the Ninth Circuit's ruling in *Hussey versus City of Portland*,
2 the court in that case held that a rule --

3 THE COURT: Although the answer to your argument
4 there, both present argument and the just prior, is to simply
5 strike that portion of the statute that says don't count it.

6 MR. MORLEY: Your Honor, that goes to the
7 question of severability. Severability, as the Court is
8 aware, is a matter of state law. The Nevada Supreme Court
9 case of --

10 THE COURT: But that's your very complaint under
11 due process and equal protection is they're not counting it.

12 MR. MORLEY: Yes, your Honor.

13 THE COURT: It's not that they're including it
14 on the ballot.

15 MR. MORLEY: Yes, your Honor.

16 THE COURT: Under the other statutes your
17 complaint is it has a subtle effect, an influence, and
18 therefore it violates the federal statute.

19 But your argument under equal protection is -- is
20 more broad than that, it's that you're not counting it. It's
21 not because you include it on the ballot.

22 So the result under that analysis is it's severable,
23 and it should be severable. I can just strike down the part
24 of the statute that says don't count it, and that answers the
25 equal protection and due process complaint.

1 MR. MORLEY: Your Honor, I would respectfully
2 suggest that Nevada state law might push toward a different
3 approach on the severability analysis.

4 The Nevada Supreme Court has held that -- and this
5 is in the case of *Flamingo Paradise Gaming versus Chanos*, we
6 cite it in the brief, that once a provision of a statute is
7 found to be unconstitutional, in deciding whether it's
8 severable, the question becomes can the remaining provisions
9 be given legal effect and did the legislature intend for the
10 remaining provisions to be given legal effect.

11 THE COURT: And he tells me it can.

12 There's absolutely no influence or effect on --
13 we're talking now about a state race. There's no effect on
14 the state race if you tell us we have to count it, it doesn't
15 matter.

16 There will be the rare circumstance, of course,
17 where it has a plurality of votes, but exclusive of that
18 single event, it will have no effect on the state race.

19 MR. MORLEY: But that's entirely the problem,
20 your Honor.

21 The Nevada Supreme Court has said that in looking at
22 the severability question, you have to look at the intent of
23 the legislature, and the undisputed legislative history that
24 both parties have quoted from and relied on --

25 THE COURT: Of course, but that doesn't answer

1 your complaint about severability. In every case the state
2 legislature includes both the ultimately offensive clause as
3 well as the innocuous clause.

4 MR. MORLEY: But --

5 THE COURT: And so arguing that the state
6 legislature expressed their intent by putting in the offensive
7 clause doesn't answer the question on severability.

8 MR. MORLEY: But, your Honor, in this case the
9 portions of the legislative history from which both of us have
10 quoted show that the legislature went forward with this
11 precisely because it was something that wouldn't be counted,
12 that there's not even a shred of evidence in the legislative
13 histories to suggest that if a federal court were to tell them
14 no, this has to be counted as a vote, this has to be given a
15 legal effect if it --

16 THE COURT: And what are you relying on, one
17 senator who stood up and said, gee, I don't want to vote for
18 this if it's -- or a committee report that said it was phrased
19 differently and we added the clause to satisfy that one
20 senator that it wouldn't be counted?

21 MR. MORLEY: It was simply the explanation of
22 the bill's sponsor in the committee from which this emerged.

23 The key point here which your Honor alluded to --

24 THE COURT: I don't think I can take that on the
25 severability question, with all due respect.

1 MR. MORLEY: The key point to which this Court
2 alluded, though, is if this Court decides that it is a vote,
3 and it must be counted as a vote, that means it has to be
4 given legal effect if it were to obtain a plurality or a
5 majority in the election.

6 THE COURT: And it will be given -- well, that's
7 true, and that's obvious, and he even conceded that. He just
8 said that's a very rare event, and otherwise there's no
9 influence on the election.

10 MR. MORLEY: If this Court simply strikes out
11 section 2 which requires the state not to count the vote --

12 THE COURT: The result is, if we do have a
13 plurality, there will be no candidate selected, that means
14 it's a vacant office, just like the prior Nevada Supreme Court
15 case where the gentleman died, and basically the governor
16 appoints the person who fills the office because it's vacant
17 on the first day.

18 MR. MORLEY: But, your Honor, there's nothing in
19 the statute to say that or suggest that.

20 In the case of *County of Clark versus Las Vegas* from
21 the Nevada Supreme Court, in a similar situation where the
22 heart of a statute was taken out, the court said that it
23 should not engage in what it termed procrustean restructuring
24 the law in order to allow it to survive.

25 Here, this Court would be taking out a pen --

1 THE COURT: I'm chuckling because that's part of
2 the recent Obamacare decision in the Supreme Court.

3 I just think you lose on that point. You ought to
4 move on to a different one.

5 But I am tempted to go along with your analysis on
6 due process and equal protection. But I think a very good
7 out, at least with respect to the legislative races is -- I'm
8 sorry, the state of Nevada races is just simply to say you can
9 still include none of the above but you must count it.

10 MR. MORLEY: If I can speak for briefly one more
11 moment on that point, your Honor, in order for a -- a vote for
12 none of the above to create a vacancy, the statute would have
13 to say that.

14 If this Court strikes down section 2, there's
15 nothing in the law that says what happens or how it's treated
16 if a plurality or a majority of people in an election vote for
17 none of these candidates.

18 To just say that a vacancy would be created would be
19 blue-lining the statute, would be --

20 THE COURT: They're treated like any other
21 candidate. They're treated like a deceased candidate.

22 MR. MORLEY: Which again -- and those are
23 entirely possible outcomes that the legislature could choose,
24 but it would take this Court to take out --

25 THE COURT: No, it would be the resulting effect

1 right now if I were to say you must count it. They don't have
2 to take any additional action. They could if they wanted to,
3 but they don't have to. You'll just count none of the above
4 like any other candidate. If no one shows up on the first day
5 to be sworn in, the governor appoints it, it's a vacant
6 office.

7 MR. MORLEY: Well, I would suggest, your Honor,
8 that in looking to the legislative history, there is nothing
9 to suggest the legislature ever would have wanted this to have
10 any legal effect whatsoever.

11 THE COURT: Okay. You're using up your time and
12 you're losing on that point.

13 And I want the record to note that with regard to
14 equal protection, I'm being equally nasty to both sides so --

15 MR. MORLEY: Moving on then, your Honor.

16 With regard to due process, a *per se* rule should
17 apply. With regard to equal protection, the issue seems even
18 clearer.

19 If this Court decides that a vote for none of these
20 candidates is a vote, then it would clearly violate the equal
21 protection clause for the state to decide whether or not a
22 vote should be counted in a particular election based on which
23 of the legally presented and legally valid ballot options a
24 voter selects.

25 THE COURT: I got that argument. It's in your

1 brief. How about the statutes?

2 MR. MORLEY: The Voting Rights Act, your Honor,
3 there is just a plain text interpretation. The Voting Rights
4 Act makes it a federal -- provides no person under color of
5 law shall willfully fail or refuse to count a person's vote.
6 That is exactly what the statute here calls for.

7 THE COURT: That's the statute he says only
8 applies in the case of racial discrimination?

9 MR. MORLEY: That is the state's argument,
10 your Honor. There is nothing in the plain text of
11 section 1973 IA which is the section I'm relying on, to
12 suggest that, and the only --

13 THE COURT: There's nothing in the statute that
14 limits it to racial discrimination only?

15 MR. MORLEY: Not this provision, your Honor.
16 Certainly there are several other provisions of the Voting
17 Rights Act that are limited there. There are, I believe, two
18 district courts from other circuits --

19 THE COURT: Okay.

20 MR. MORLEY: -- that have held there is an
21 implied requirement, but there is not, and the Ninth Circuit
22 has never said that there is.

23 And, finally, with regard to the HAVA claim,
24 your Honor, the notion that only the Attorney General can make
25 a preemption argument is simply false. The Ninth Circuit,

1 sitting a *en banc*, in the recent immigration ruling case
2 applied the preemption analysis.

3 THE COURT: So there are some portion of the
4 statute that allow for private right of action, but you have
5 to admit and concede there are some portions that don't.

6 MR. MORLEY: Absolutely, your Honor.

7 THE COURT: So by analogy which one is this?

8 MR. MORLEY: I would argue that it does create a
9 private right of action, but in the event this Court concluded
10 that it did not, we still can rely on that provision in terms
11 of our preemption analysis which is exactly what the Ninth
12 Circuit sitting *en banc* just did in the recent immigration
13 case.

14 Finally, your Honor, I would like to briefly touch
15 on the elections clause which, as I --

16 THE COURT: I think the last one was a very good
17 point, and you do need to reply to that one.

18 Go ahead.

19 MR. MORLEY: I would like to turn to the
20 elections clause. That is something that is limited to just
21 the federal races.

22 The Supreme Court has held that it is
23 unconstitutional -- this is the *Term Limits versus Thornton*
24 case, this is the *Cook versus Gralike* case, that it is
25 unconstitutional -- under the elections clause, it exceeds the

1 scope of a state's authority to regulate federal elections to
2 either dictate an electoral outcome, or to put certain ballot
3 choices at a disadvantage, and this law, of course, does both
4 by directing the state to ignore votes from none of these
5 candidates even if they are a plurality or --

6 THE COURT: You do need to rely to that one
7 because I'm inclined to agree with it.

8 MR. MORLEY: -- even if they are a plurality or
9 majority, that is dictating an electoral outcome, it is saying
10 a loser should be the winner, and, secondly, it is doing
11 exactly what the court struck down in *Cook*.

12 In *Cook* the Court said you can't take one ballot
13 option and put some derogatory language next to it. Here the
14 state is picking a ballot option and saying the votes aren't
15 going to count for that at all.

16 THE COURT: Well, he draws a subtle point. He
17 says this is disparagement, if at all, against both
18 candidates. It's not disparagement against just one in favor
19 of the other, it's disparagement, if anything, against both,
20 and that the prior precedents don't cover, they're talking
21 about cases where there was disparagement, subtle or
22 otherwise, against one or the other.

23 MR. MORLEY: Oh, you're right, your Honor, and
24 I'm not arguing that this is disparaging one of the other
25 candidates.

1 I do agree that it is an unconstitutional nudge
2 against voting for them, but my main point here is that if you
3 can't put -- if you can't put negative language next to one of
4 the ballot options, surely you cannot go a step further and
5 say we are just not going to count votes cast for one of the
6 those ballot options.

7 So basically the disadvantaged ballot option under
8 this argument is not the named candidate, it's the
9 disadvantaged ballot option is the one that doesn't get
10 counted, none of these candidates.

11 THE COURT: Okay. Anything else?

12 MR. MORLEY: No, your Honor. Thank you very
13 much for your time.

14 THE COURT: Thank you.

15 And I'm going to let you go unmolested. You can
16 respond to those critical points.

17 MR. BENSON: Thank you, your Honor. I think
18 I'll go in reverse order since those are fresher in everyone's
19 minds I think.

20 With regard to the *Cook* case and putting disparaging
21 things on the ballot, in the Ninth Circuit case, in the *Caruso*
22 case I believe it was, that involved a ballot question that
23 the state law required there to be a statement on the ballot
24 that approval of this question will -- may result in property
25 taxes rising by more than three percent. Now, that's a

1 scarlet letter if I've ever heard of one, but yet the Ninth
2 Circuit upheld that.

3 Again, this is the sort of case where a voter is not
4 obligated to vote for a candidate. They have no requirement
5 to do so, and if they don't think either of these candidates
6 merit their vote, they're not obligated to give it.

7 In this case, the option of none of these candidates
8 does not in any way unconstitutionally nudge them to vote for
9 a candidate who they really don't want to. All it does is
10 give them an option, to remind them, as it were, that they
11 don't have to do that.

12 That's neutral on the issues, it's neutral on the
13 candidates, and therefore this entirely unlike *Cook* and that
14 line of cases.

15 With regard to the preemption under HAVA issue, I
16 was somewhat baffled by this idea that if there's no private
17 cause of action, you can, nevertheless, get there by arguing a
18 preemption which is that's their whole argument under HAVA, is
19 that it preempts Nevada law because it requires us to have
20 nondiscriminatory, uniform rules on what constitutes a vote.

21 And if you can bring a preemption argument, even if
22 you have no private cause of action, then you can always
23 bootstrap a private cause of action into a preemption
24 argument. They're essentially one in the same.

25 THE COURT: At least in those areas where

1 Congress has said we preempt this entire field, or we preempt
2 this specific question, clearly you could.

3 Even if there's not a private cause of action, if a
4 person at least has -- I was going to tie it to standing but
5 that's not proper.

6 MR. BENSON: In this case, Congress has only
7 explicitly given standing to the U.S. Attorney General to
8 enforce that provision. At best they would have to show an
9 implicit private --

10 THE COURT: But you have to concede, just like
11 they conceded, that there are portions of this statute that
12 the courts have implied a private right of action.

13 MR. BENSON: Different sections, not the section
14 that they rely on in this case.

15 THE COURT: That's true, but different sections
16 that do not contain any express grant of a private right of
17 action.

18 MR. BENSON: Correct, and in those sections,
19 those sections, this is --

20 THE COURT: Why is this section any different
21 from those?

22 MR. BENSON: This section is very different
23 because the text of those sections provided for an individual
24 vested right that it said if an individual is prevented from
25 casting a provisional ballot, this is who you complain to,

1 this is what you do, this is how you go about --

2 THE COURT: Sounds to me like this is a pretty
3 individual particular right, my vote is not being counted.

4 MR. BENSON: That's not what HAVA says in this
5 case. The section --

6 THE COURT: It's my vote, not yours, not anybody
7 else's, my vote for none of the above will not be counted.

8 MR. BENSON: Well, the section of HAVA that they
9 rely on, all it says is that states have to have uniform and
10 nondiscriminatory rules on what constitutes --

11 THE COURT: And their complaint it's not -- it's
12 between you who voted for one candidate and me who voted for
13 none of the above, it's nonstandard, it's certainly different,
14 and it affects me individually because this is the choice I'm
15 making.

16 MR. BENSON: And that may -- that works in their
17 equal protection argument. However, under HAVA, all this HAVA
18 requirement does, it says the state must have uniform,
19 nondiscriminatory rules.

20 The rule in this state is uniform and
21 nondiscriminatory. It treats everybody the same.

22 It says this is -- as I discuss in the brief, HAVA
23 was put in place to react to the Haney chads debacle in
24 Florida where you had some counties that counted a chad that
25 was hanging by two corners as a vote, and some counties that

1 counted a chad hanging by two corners as not a vote.

2 You had different election boards in the same county
3 counting them differently. If it had a dimple in it, they
4 might count it, other boards would not. Those are the sorts
5 of issues that HAVA was enacted to address, uniform meaning
6 all the election boards throughout the county treats this the
7 same way. That is the case in this case.

8 Even if this Court were to decide that this is a
9 equal protection or due process issue, it's not a HAVA issue
10 because the rule is uniform and nondiscriminatory. Every
11 county clerk counts it the same way or not as the case may be.
12 It's not arbitrary as to one voter or another.

13 THE COURT: So the statute doesn't apply if
14 the -- as long as the counties are operating the same way, if
15 the Secretary of State tells them you will give only a
16 75 percent credit for a vote for this candidate as compared to
17 a hundred percent credit for a vote for the above, as long as
18 the counties are operating the same way and have the same
19 standard, it doesn't violate the statute.

20 MR. BENSON: That meets requirements of HAVA.
21 It might be unconstitutional, obviously, but it meets HAVA.

22 THE COURT: I sure disagree with you on that
23 one.

24 MR. BENSON: Because all of that, as I discuss
25 in the brief, that is the purpose of that statute, and there

1 is no explicit private cause of action for that section of
2 HAVA, and so the Court has to go through this --

3 THE COURT: Why don't you go to more critical
4 questions.

5 MR. BENSON: Certainly.

6 THE COURT: Go to the last question because I do
7 have to cut you off, and that is, if the Court agrees with
8 plaintiffs here, should I narrow the rule with respect to the
9 state races.

10 In other words, on the federal races I think I'm
11 going to have to order you to strike none of the above, but on
12 the state races should I narrow my ruling to just mandating
13 that you count the vote?

14 MR. BENSON: Well, I think that, your Honor -- I
15 think the correct remedy, if the Court were to find that it
16 violates due process or equal protection or any of these other
17 claims, is that for both the federal races and the state races
18 the Court should order us to count it only, not strike it from
19 the ballot altogether.

20 Because that is -- according to plaintiffs, the only
21 real harm here is that it's not counted which that goes to
22 whether it's a state or federal race, and so the remedy for
23 that in a state or federal race is simply to count it.

24 The countervailing interest of being able to express
25 one's dissatisfaction with any of the candidates equally

1 applies whether it's a state or federal race, and, as your
2 Honor knows, a preliminary injunction should be as narrow as
3 possible to achieve the purpose.

4 If we remedy any constitutional defects by counting
5 it, then it should stay on the ballot even for the federal
6 races so that intervenors and other voters who wish to have
7 that --

8 THE COURT: Okay. I do have to cut you off. I
9 apologize.

10 I do take this question very seriously. I've tried
11 to inject a little humor into it, and I apologize if it's
12 offended either side, I've tried to be equally tough on both
13 of you in exploring your analysis, but I do take it seriously,
14 it is a serious question.

15 I am going to enter an injunction that bars you from
16 having that on the ballot. I think it would be inappropriate
17 to just narrow it to the federal elections.

18 I will enjoin you from having none of the above on
19 the ballot. This is the only state that has that. It is
20 violative, I think, on all of the grounds suggested by the
21 plaintiffs and therefore I'm going to order you to strike it
22 from the ballot on all races.

23 I'll prepare the order, of course. I'll ask you for
24 any proposed ultimate language of the order, the injunctive
25 order. You may, of course, suggest that language. I'll

1 prepare the analysis and the order on the decision.

2 MR. BENSON: May I address a quick procedural
3 issue, your Honor?

4 THE COURT: Yes, please.

5 MR. BENSON: With regard to preparing the order
6 and all of that, we have a ballot deadline, printing deadline
7 coming up very quickly.

8 THE COURT: That's why I'm announcing this
9 orally now.

10 MR. BENSON: I appreciate that, your Honor.

11 THE COURT: Even though I would like more time
12 to study it, but --

13 MR. BENSON: And with regard to the written
14 order, my understanding is that an appeal cannot be taken
15 until a written order is put in the record so --

16 THE COURT: Right. I'll try to do that as
17 quickly as I can.

18 MR. BENSON: Okay. Thank you, your Honor.

19 THE COURT: But the reason I'm announcing this
20 orally is so that you're forewarned with regard to the
21 printing problem.

22 MR. BENSON: And, finally, with regard to that,
23 I must take an oral motion that the Court stay its order
24 pending appeal. We do intend to take an appeal.

25 THE COURT: I'll deny that.

1 MR. BENSON: Thank you, your Honor.

2 THE COURT: So you have it for the record.

3 MR. PARRIS: And, your Honor, John Parris,
4 again. On behalf of the intervenor, I realize I did not file
5 any briefs regarding the motion to dismiss, that's why I did
6 not participate.

7 THE COURT: You've got a right to be heard, sir.

8 MR. PARRIS: Correct, but it seems like the
9 Court has already made its decision with respect to the
10 injunction.

11 THE COURT: No, I am going to study it out, I'm
12 going to make the order consistent with an analysis that I buy
13 into, but what I'm doing is I'm forewarning them that that's
14 probably where I'm going because they do have a printing
15 problem, a deadline.

16 MR. PARRIS: Certainly, your Honor. And there
17 were just several issues that were brought up in the
18 intervenor's brief that were -- well, in their briefing
19 regarding the preliminary injunction that have not been
20 discussed so I just wanted to put those on the record as well.

21 THE COURT: Why don't you.

22 MR. PARRIS: One thing that the Court had
23 indicated earlier was, in its earlier arguments, it dealt with
24 the issue of when a person selects none of the above, or none
25 of these candidates, it could be because they don't like

1 person A or either person, or they have their own reasons
2 which would be arbitrary to the voter themselves, and that was
3 almost a basis for there being some injury to that particular
4 individual, to that voter, because that particular selection
5 was not being counted.

6 THE COURT: Well, you know, they have the
7 choice. The same question I posed to them could certainly be
8 posed to the intervenor. You want the ability to express I
9 don't like either of these candidates, but you do that when
10 you say -- according to counsel you can say I'm voting all the
11 other races but I'm not voting in this one, and that's an
12 expression.

13 And, as we know, they report it. They report total
14 votes counted, and they also report the votes for each of the
15 candidates, total votes in that race, so in essence your vote
16 to not vote in the race has been recorded.

17 MR. PARRIS: That's correct, your Honor. But
18 the harm that's being -- that is occurring is not due to
19 anything by the state, the harm is being incurred by the
20 voter's own individual actions, and as we have referenced in
21 our brief --

22 THE COURT: What do you mean?

23 MR. PARRIS: The harm could be -- the harm
24 catalyzes when that particular voter selects none of the above
25 versus voting for person A or person B.

1 If they wanted their vote to count, they could
2 certainly vote for person A or person B, or any of the other
3 candidates, but instead they've chosen to vote for none of the
4 above.

5 But courts have held --

6 THE COURT: My question was so what. They've
7 got their issues expressed, and we're counting their
8 expression.

9 MR. PARRIS: And if it's a situation where the
10 Court narrowly construes its ruling and strikes only the
11 portion of the statute that precludes the Nevada state
12 electors from counting those actual votes, that would not be
13 offensive to the intervenors at this point in time.

14 It's the striking of the actual selection of none of
15 the above or none of these candidates that's offensive. But
16 the problem is this --

17 THE COURT: So what? Why is it offensive? How
18 does it hurt you other than your feelings?

19 MR. PARRIS: Because this is a right that was
20 conferred to us by the state legislature 35 years ago, and I'm
21 happy to get into the equities defense regarding laches since
22 we've been dealing with this issue for almost four decades
23 now, and only now has it --

24 THE COURT: You don't have a property right or a
25 liberty right in having this on the ballot, do you?

1 MR. PARRIS: I'm sorry, your Honor?

2 THE COURT: You don't have a property interest
3 or a liberty interest in having this on the ballot, do you,
4 because it's been on the ballot for 35 years?

5 MR. PARRIS: No, I do not, your Honor, or my
6 clients do not.

7 THE COURT: Right.

8 MR. PARRIS: However, this is a situation where
9 the harms of which these plaintiffs are complaining --

10 THE COURT: Again, answer my question, please.
11 Where's the harm?

12 We already count -- we count the expression of those
13 that don't vote altogether, we show this particular election
14 that included this race came in at a 15 percent turnout. This
15 election that includes these ballot questions came in at a
16 45 percent turnout.

17 So we're already recording the general populous
18 feelings I don't like this race or the questions, but
19 expressly in regard to this race and these candidates, if you
20 cast a vote, but you don't cast a vote in this race, we're
21 also recording that expression.

22 So as far as answering an overriding, overcompelling
23 interest of the state to allow you to express your interest,
24 we're doing that. You just -- where's the difference?

25 MR. PARRIS: We agree, there is no harm to the

1 voter who selects none of these candidates or none of the
2 above.

3 THE COURT: If we just simply let them not vote
4 in that particular race.

5 MR. PARRIS: We agree there's no harm to those
6 candidates -- excuse me, to those voters. However, if there's
7 no harm to the voters, that's one of the three tenants that's
8 required in order to have a preliminary injunction. If
9 there's no harm, there's no need for an injunction.

10 THE COURT: They've argued that there may be a
11 number of different reasons for the vote. I don't know them,
12 I dislike this one, I dislike both of them. And to the extent
13 you're denying the counting of all of those, there's injury to
14 at least one or two of those intentions.

15 MR. PARRIS: And then the remedy would be to
16 force the state to count them, both in state -- well, in
17 federal races. That's the remedy, not striking the whole
18 provision.

19 Because here's what they're arguing. They're
20 arguing there's a speculative right, perhaps there may be some
21 injury because the reason I'm voting none of the above or none
22 of these candidates is because of reasons X or Y or Z or
23 something arbitrary, or whatever reasons I may have.

24 However, you have to balance that with the right of
25 the individuals, of whom I represent, the intervenor, whose

1 right in order to vote none of the above is being taken away.
2 That's a cognizable, tangible right that Nevada gave us
3 35 years ago.

4 THE COURT: I've got that. Any other critical
5 points that you wanted to make?

6 MR. PARRIS: Your Honor, no. I just wanted to
7 be heard regarding those issues and the lack of harm,
8 therefore undercutting the need for the preliminary
9 injunction.

10 THE COURT: Thank you so much.

11 I'll recess just briefly. Counsel can come forward
12 and get yourselves into position.

13 I do appreciate the argument. It was very ably
14 presented.

15 MR. PARRIS: And for the record, it sounds like
16 we know where the Court is heading, we would request the stay
17 as well on behalf of the intervenors.

18 THE COURT: I'll deny that for the record so
19 that you can ask the appellate court for a stay.

20 MR. PARRIS: And, your Honor, do we have a
21 timetable regarding when that order will be provided?

22 THE COURT: When do you have to know before
23 final publication, not date of publication, but the date you
24 have to send it to the printer?

25 MR. BENSON: I believe that --

1 THE COURT: What's that deadline date?

2 MR. BENSON: I don't know the exact deadline,
3 but I think that it is going to be somewhere around
4 September 7th.

5 THE COURT: Around September 7th.

6 MR. BENSON: Because we have to --

7 THE COURT: So until then you don't have a
8 problem.

9 MR. BENSON: Well, we have a problem in the
10 procedural sense in that if we -- in order to get to the Ninth
11 Circuit between now and September 7th --

12 THE COURT: Well, that's your problem. I'm just
13 trying to accommodate your problem with regard to notifying
14 the printer. September 7th is the last day which you can
15 notify the printer how the thing should look?

16 MR. BENSON: I believe that's the deadline, and
17 I don't know that for 100 percent certainty.

18 THE COURT: Okay. Thank you very much.

19 MR. PARRIS: Thank you, your Honor.

20 -o0o-

21

22 I certify that the foregoing is a correct
23 transcript from the record of proceedings
in the above-entitled matter.

24 /s/Margaret E. Griener 08/29/2012
25 Margaret E. Griener, CCR #3, RDR
Official Reporter

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