9TH Circuit Docket No. 12-16881, 12-16882

USDC Case No. 3:12-cv-00310-RCJ-WGC
Nevada (Reno)

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WENDY TOWNLEY, et al.,
Plaintiff-Appellee,
v.
ROSS MILLER, Secretary of State of Nevada,
Defendant-Appellant,
and
KINGSLEY EDWARDS,
Intervenor-Defendant-Appellant.

On Appeal From the United States District Court

For the District of Nevada

DEFENDANT-APPELLANT'S OPENING BRIEF

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The Defendant-Appellant, Ross Miller, Nevada Secretary of State, by and through his counsel, Catherine Cortez Masto, Attorney General, and Kevin Benson, Senior Deputy Attorney General, hereby submits his Opening Brief.

I.

STATEMENT OF JURISDICTION

The district court had federal question jurisdiction of this case pursuant to 28 U.S.C. § 1331.

This appeal is from an order granting a preliminary injunction, and therefore this Court has jurisdiction pursuant to 28 U.S.C. § 1292(a)(1), which provides for jurisdiction over "[i]nterlocutory orders of the district courts of the United States, …, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions…."

The order granting the preliminary injunction was announced on August 22, 2012. The order was entered in the minutes of the district court on August 24, 2012. The Secretary's notice of appeal was filed on August 24, 2012, after the preliminary injunction was entered. Therefore this appeal is timely.

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II.

STATEMENT OF ISSUES PRESENTED FOR APPEAL

Did the district court err in finding that placing the option of "None of these candidates" on the ballot, but not allowing it to "win" an election, implicates the federal right to vote?

Did the district court err in striking the entire statute as unconstitutional, and therefore enjoining the Secretary from placing "None of these candidates" on the November 2012 general election ballot, instead of entering a narrower injunction requiring only that "None of these candidates" be counted in the same manner as votes for a named candidate?

The relevant statute, NRS 293.269, is set out in full in Addendum 1.

III.

STATEMENT OF THE CASE

This case arises from the Amended Complaint (#10) ("Complaint") filed on June 20, 2012 by Plaintiffs Wendy Townley, Bruce Woodbury, and others (collectively "Townley"), against Defendant Ross Miller, Nevada's Secretary of State. EOR 121-137. The Plaintiffs are certain voters ("Voter Plaintiffs") and two Republican nominees for the office of presidential elector ("Candidate Plaintiffs"). EOR 123-127. The Complaint requests an injunction prohibiting the Secretary

from allowing the option of "None of these candidates" to appear on any ballot for the November 2012 general election. EOR 136-37.

The Complaint alleges five principal causes of action: (1) violation of due process; (2) violation of equal protection; (3) violations of the Elections Clauses (U.S. Const., art.I, s. 4, cl. 1; art. II, s. 1, cl.2); (4) violation of the Voting Rights Act (42 U.S.C. § 1973i); and, (5) violation of the Help America Vote Act ("HAVA"), 42 U.S.C. S 15481. EOR 131-35. It also asserts a sixth cause of action under 42 U.S.C. § 1983 for a violation of those constitutional or statutory provisions. EOR 135-36.

A motion for preliminary injunction (#15, 16) was filed on June 28, 2012. EOR 83-120. Briefing on all the motions was completed, and oral argument was held August 22, 2012. EOR 81-82. After hearing argument, the district court found that "None of these candidates" violated all of the grounds argued by Townley and therefore issued an oral order granting the preliminary injunction and enjoining the Secretary of State and all his employees, agents, affiliates, or anyone acting in concert with him from placing "None of these candidates" on any ballot to be used in the November 2012 general election. EOR 56, ll. 19-22; EOR 81-82.

On August 24, 2012, the clerk entered on the district court docket the "Minutes of the Proceeding," #39, which provides in relevant part:

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> Following arguments, the Court gives analysis and finds that plaintiffs have satisfied the requirements for preliminary injunction relief. Accordingly, the Court grants [15] Motion for Preliminary Injunction. Defendant Secretary of State Ross Miller, his agents, employees, affiliates, and all those acting in concert with him, are enjoined from allowing "None of these candidates" to appear on voting ballots.

Minutes of Proceedings (#39), EOR 81-82.

Later that day, August 24, 2012, both the Secretary and Intervenor Edwards filed Notices of Appeal (#40, #41). EOR 75-80. On August 28, 2012 and August 30, 2012, Edwards and the Secretary filed their respective Emergency Motions to Stay the district court's ruling. See 9th Cir. Dkt. Nos. 4, 6-1. On September 4, 2012, this Court entered an order staying the district court's preliminary injunction. See 9th Cir. Dkt. #14.

IV.

STATEMENT OF FACTS

Nevada Revised Statute 293.269 was enacted in 1975. NRS 293.269(1) requires that every ballot for any statewide office or for President and Vice President of the United States must contain an additional line after the list of candidates' names that must read: "None of these candidates." This option must be presented in the same manner that candidates' names are presented, and voters must be allowed to choose this option just as they would choose a candidate. *Id.*

However, Subsection 2 of NRS 293.269 provides:

> *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.

NRS 293.269(2) (emphasis added).

According to this subsection, although "None of these candidates" is tabulated and reported in all election results, it is not counted in determining who is nominated or elected to any statewide office or for the selection of presidential electors. Only votes for a named candidate are counted in determining who wins the election, therefore NOTC can never "win" an election, even if it receives a plurality or majority.

Plaintiff Wesley Townley asserts that he intends to vote for Dean Heller for Senate and for Mitt Romney for President and, in the latter case, to essentially cast his vote for Plaintiffs Woodbury and DeGraffenreid for the office of presidential elector. Amended Complaint, 9; EOR 124-25. Plaintiff Townley alleges that some electors – such as Plaintiff Dougan – will select "None of these candidates" if that option appears on the ballot, and that if it did not appear, they would select Dean Heller and Mitt Romney instead, and therefore if "None of these candidates" did

not appear on the ballot, it would increase the chance that Plaintiff Townley's preferred candidates would win. *Id.*

Plaintiffs Woodbury and DeGraffenreid allege that they are Republican nominees for the office of presidential elector. Amended Complaint, ¶¶ 12, 13; EOR 126-27. They allege that if Mitt Romney receives the highest number of votes in the general election, that they will be elected to the position of presidential elector, and therefore they have a direct personal interest in not having "None of these candidates" appear on the ballot. *Id.* Although not explicitly stated, this is presumably because Plaintiffs fear that the presence NOTC will siphon votes from Romney because, if given the option, some voters, like Plaintiff Dougan, will choose "None of these candidates" instead of voting for Mitt Romney.

V.

SUMMARY OF THE ARGUMENT

Putting an option of "None of these candidates" ("NOTC") on the ballot does not implicate the federal right to vote for U.S. Senator or President and Vice President, because it is logically and legally equivalent to withholding one's vote. For this reason, it is not a "vote" as contemplated in any of the constitutional or statutory provisions Plaintiffs rely on; therefore all of their claims fail at the outset.

Additionally, the Secretary is likely to prevail on the merits of each of Plaintiffs' claims. Substantive due process does not require "None of these

candidates" to be allowed to win an election. Choosing NOTC is substantially different than voting for a named candidate, therefore there is no equal protection problem. Placing NOTC on the ballot is well within the States' broad powers granted under the Elections Clauses of the U.S. Constitution. The Voting Rights Act is not applicable to this case, because there are no allegations of discrimination based on race. The Help America Vote Act does not provide a private cause of action, nor may the action be brought under § 1983.

Finally, even if NOTC implicates the federal right to vote, the State's compelling interest in holding elections that produce an office holder justifies not counting it in a way that would allow it to "win" the election.

VI.

ARGUMENT

I. Standard of Review for Preliminary Injunctions.

To obtain a preliminary injunction, a plaintiff must show all four of the following: (1) that he is likely to succeed on the merits; (2) that he is likely to suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in his favor; and, (4) that an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

Generally, a court of appeals reviews a district court's issuance of a preliminary injunction for abuse of discretion. *Associated Press v. Otter*, 682 F.3d

821, 824 (9th Cir. 2012). "The district court's interpretation of the underlying legal principles, however, is subject to *de novo* review." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1119 (9th Cir. 2009). Application of an erroneous legal standard amounts to an abuse of discretion. *Otter*, 682 F.3d at 824 (*citing Pimentel v. Dreyfus*, 670 F.3d 1096, 1105 (9th Cir. 2012)).

A district court also commits reversible error in issuing a preliminary injunction if it fails to identify, evaluate and weigh the specific countervailing injuries that the injunction may cause to the defendants and the public interest. *Caribbean Marine Services Co., Inc. v. Baldrige*, 844 F.2d 668, 677 (9th Cir. 1988).

Finally, preliminary injunctive relief must be tailored to remedy only the specific harm alleged. *Stormans*, 586 F.3d at 1140. An overbroad preliminary injunction is an abuse of discretion. *Id.* (citing *Lamb–Weston, Inc. v. McCain Foods, Ltd.*, 941 F.2d 970, 974 (9th Cir. 1991)).

II. Background on Nevada's "None of these candidates" option.

Nevada Revised Statute 293.269(1) requires that every ballot for any statewide office[1] or for President and Vice President of the United States must contain an additional line after the list of candidates' names that must read: "None

[1] "Statewide office" includes federal offices, such as U.S. Senator, as well as state offices such as governor, attorney general, and justice of the Nevada Supreme Court.

of these candidates." This option must be presented in the same manner that candidates' names are presented, and voters must be allowed to choose this option just as they would choose a candidate. *Id.*

However, Subsection 2 of NRS 293.269 provides:

> *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.

NRS 293.269(2) (emphasis added).

According to this subsection, although "None of these candidates" is tabulated and reported in all election results, it is not counted in determining who is nominated or elected to any statewide office or for the selection of presidential electors. Only votes for a named candidate are counted in determining who wins the election, therefore NOTC can never "win" an election, even if it receives a plurality or majority. A copy of the entire statute is attached for the Court's convenience as "Addendum 1."

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III. The Secretary of State has a strong chance of success on the merits of all of Plaintiffs' claims.

A. The district court abused its discretion in finding that choosing "None of these candidates" implicates any federal right to vote.

Citizens have a federal right to vote *for* U.S. Senators and *for* the President and Vice President. This case does not implicate those rights, because the fact that "None of these candidates" appears on the ballot does not deprive anyone of the right to vote for any candidate for U.S. Senate or President and Vice President. The Secretary is likely to succeed on the merits because choosing "None of these candidates" is fundamentally different from voting for a named candidate for any of these federal offices. It therefore is not a "vote" that must be counted and allowed to "win" the election. Since it is not a vote, all of Plaintiffs' claims fail from the outset, and the Secretary is likely to succeed on the merits.

Plaintiffs argued, and the district court agreed, that "None of these candidates" is a vote just like a vote for a named candidate, because it appears on the ballot and can be chosen just like a candidate. EOR 14. However, this applies the incorrect legal standard and therefore constitutes an abuse of discretion. *See Otter*, 682 F.3d at 824 (on review of a preliminary injunction, use of an erroneous legal standard amounts to an abuse of discretion and is reversible error).

The correct legal standard is the functional approach and three-prong test formulated by this Court in *Green v. City of Tucson*, 340 F.3d 891, 897-98 (9th

Cir. 2003) and *Hussey v. City of Portland*, 64 F.3d 1260, 1264-65 (9th Cir. 1995). A "vote" is an act that, at a minimum: (1) is an official expression of the voter's will; (2) is required to resolve some political issue; and, (3) which requires a majority (or some other threshold) to be effective. *Green*, 340 F.3d at 897-98. How the act is labeled is not dispositive; courts should look to the function of the act. *Hussey*, 64 F.3d at 1263-64.

This district court erred by failing to apply this three-prong test to determine whether NOTC is a "vote." Instead, it simply concluded that NOTC must be counted as a vote, because it appears on the ballot.

The court in *Green* found that signatures on a municipal incorporation petition must be treated as votes because: (1) a signature on the petition is, under state law, an official expression of the voter's will; (2) the petition required two-thirds majority to be successful; and (3) the petition itself served as a substitute for an election. 340 F.3d at 897-98. Similarly, in *Hussey*, the court found that "consents" to annexation were the functional equivalent of votes, because the annexation could not legally occur without them, and the consents were a substitute for a vote in a formal election. 64 F.3d at 1265.

This functional approach is consistent with Supreme Court precedent. *U.S. v. Classic*, 313 U.S. 299, 307 (1941) involved the sufficiency of a criminal indictment charging the defendants with depriving voters of their rights secured by

the U.S. Constitution by falsifying ballots and falsely certifying the results in a Louisiana partisan primary election for House of Representatives. The main question in that case was whether a closed partisan primary election held for the purpose of selecting party nominees to appear as candidates for federal office on the general election involved the federal right to vote. *Id.* at 310-11. In determining this question, the Court stated: "We look then to the statutes of Louisiana here involved to ascertain the nature of the right which under the constitutional mandate they define and confer on the voter…" *Id.* at 310.

The Court concluded that Louisiana's primaries *did* create a right to vote protected by the U.S. Constitution, because the election was conducted by the state at taxpayer expense, the state greatly restricted access to the general election ballot for candidates who did not appear on the primary ballot, and a choice of a nominee at the primary election was a critical step toward ultimately electing a congressman of the voter's choice. *Id.* at 311-14. The Court engaged in an extensive functional analysis of Louisiana's primary election system. It did not simply conclude, as district court did in this case, that because people had marked ballots and turned them in, that this *ipso facto* was voting that was entitled to the protections of the U.S. Constitution. Instead, it took a *functional* approach, based on a review of the entire relevant state statutory scheme.

In this case, selecting NOTC is not a vote because: (1) it is not an official expression of a voter's will of who should be elected; (2) it is not required to resolve any political issue; and, (3) there is no threshold at which it is effective.

Selecting "None of these candidates" is, by definition, an expression only that *none* of the candidates on the ballot should be elected. It does not indicate the voter's will on who *should* be elected. Although it is certainly an expression of an idea, it is not reflective of the voter's will on the ultimate question in the election, which is who should represent the people.

Second, the option of NOTC is not required to resolve any political issue. Here, the relevant political issue is who will be elected to office. That is the purpose of holding an election. Choosing "None of these candidates" is not necessary to resolving this issue, since the only data relevant in answering that question is which *candidate* received the most votes, data that NOTC does not provide. Therefore not only is it not *necessary* to resolve a political issue, it *cannot* resolve the issue.

By contrast, the "consents" in *Hussey* were necessary for the annexation to occur, even though the final boundaries were set by a local board, not the voters. 64 F.3d at 1265. In *Green*, the court found that signatures on a petition for municipal incorporation were the equivalent of voting because the petition process itself was a substitute for the election, and incorporation could not occur without a

successful petition. 340 F.3d at 897-98. In each of these cases, the entire statutory scheme contemplated that some official action would be triggered when enough consents or signatures were obtained, but not unless or until then. Thus it is the gathering of sufficient consents or signatures that resolves the political questions of whether annexation or incorporation should occur. Here, choosing "None of these candidates" does not solve the question of who should be elected to office.

Finally, there is no threshold at which choosing NOTC triggers any official act or legal result, in contrast to *Hussey*, *Green*, and similar cases. In *Green* for example, the petitioners had to get signatures of a two-thirds super majority in order to incorporate a municipality. 340 F.3d at 897. Here, there is no threshold at which NOTC becomes effective.

By definition, "None of these candidates" is the opposite of voting for any candidate, and therefore does not carry the function or essence of a vote[2]. Accordingly, having NOTC appear on the ballot does not impede or impair the right to vote in federal elections, because it does not result in any votes for a candidate for federal office not being counted. It neither expands nor restricts the right to vote in a federal election because it only reflects an ability votes always

[2] Throughout NRS 293.269, the Legislature never refers to the act of choosing "None of these candidates" as a vote. Instead, it appears to have gone out of its way to avoid doing so.

possess: to *withhold* their vote. For these reasons, NOTC simply does not implicate any federal right to vote.

The district court abused its discretion in granting the preliminary injunction because it applied an incorrect rule of law when it determined that NOTC is a "vote" without employing the functional test of *Green*, *Hussey*, and *Classic*. Therefore this Court should reverse the grant of the preliminary injunction.

B. Substantive Due Process does not require that "None of these candidates" be counted as a vote.

Substantive due process protects against certain governmental actions that deprive a person of a fundamental liberty interest. *Washington v. Glucksberg*, 521 U.S. 702, 719-20 (1997). The liberty interest in question must be both "carefully described" and so "'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'" *Id.* at 720-21 (*quoting Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

The Court in *Glucksberg* noted that it has been reluctant to expand what liberty interests implicate substantive due process "because guideposts for responsible decision-making in this unchartered area are scarce and open-ended." *Id.* at 720. The consequences of recognizing a liberty interest as being protected by substantive due process cannot be understated. As the Court explained: "By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative

action." *Id.* (emphasis added). Thus, the Court cautioned that it must "exercise the utmost care whenever we are asked to break new ground in this field…." *Id.*

Certainly, the right to vote is one of the most fundamental of rights. *Weber v. Shelley*, 347 F.3d 1101, 1105 (9th Cir. 2003). But this case raises a much more basic question: is the option to select "None of these candidates," by the mere fact that it *is* an option on the ballot, mean that the due process clause requires that it be counted as a "vote" and that it be permitted to win the election?

The answer is no. Choosing NOTC is not a "vote" because, functionally and logically, it is the opposite of voting for a candidate. No legal authority supports the notion that just because an option appears on the ballot, that it necessarily represents a fundamental liberty interest that is so "implicit in the concept of ordered liberty" that "neither liberty nor justice would exist" if it was not counted as a vote.[3] *Washington*, 521 U.S. at 720-21. Indeed, as demonstrated in the *Classic* case, the fact that people cast ballots is not determinative of whether the federal right to vote is even implicated. 313 U.S. at 311-14.

Ordinarily, to succeed on a due process claim in the elections context, plaintiffs must demonstrate that the election was conducted in a fundamentally unfair manner. *Bennett v. Yoshina*, 140 F.3d 1218, 1226-27 (9th Cir. 1998).

[3] If that were the law, it would be categorically unconstitutional for states and local governments to use advisory-only ballot questions, since voters "vote" on such questions, but they have no legal effect. *See e.g.*, NRS 293.482.

Plaintiffs argued that NRS 293.269 constitutes a "per se" violation of due process because it is an "officially-sponsored election procedure" that requires elections officials to ignore valid votes. However, all of those cases involved situations where the "officially-sponsored election procedure" in question unexpectedly changed, and it was the *change* in procedure, and the fact that it occurred without notice, that caused voters to be disenfranchised. *See e.g., Bennett*, 140 F.3d at 1226-27; *Griffin v. Burns*, 570 F.2d 1065, 1078 (1st Cir. 1978); *Hoblock v. Albany Cnty. Bd. of Elections*, 422 F .3d 77, 98 (2d Cir. 2005).

Here, the State is following a law that has been in operation for more than thirty five years. Unlike in *Griffin* or *Hoblock*, there is nothing fundamentally unfair because there has been no change in procedure, and no "inducement" to voters that they vote a certain way, only to later, completely unexpectedly, refuse to count those votes. *See Griffin*, 570 F.2d at 1074 (the state's action essentially worked a fraud upon the voters who reasonably relied on the procedures implemented by the state).

Since "None of these candidates" – as a matter of logic, not just law - is not a vote for any candidate, there is nothing fundamentally unfair about not counting it when determining which candidate won the election. Nor is there any fundamental right that "None of these candidates" must be permitted to win an election, since it is not a candidate. Finally, the State has not misinformed or

induced voters to choose it in a manner that would unfairly strip them of their franchise, like in the cases Plaintiffs rely upon. Thus NRS 293.269 does not disenfranchise anyone in violation of the Due Process clause.

C. Equal Protection is not implicated because voters who choose "None of these candidates" are not similarly situated to those who vote for a named candidate.

"Voting is a fundamental right subject to equal protection guarantees under the Fourteenth Amendment." *Idaho Coal. United for Bears v. Cenarrusa*, 342 F.3d 1073, 1076 (9th Cir.2003). Thus a state's election procedures "must pass muster against the charges of discrimination or of abridgment of the right to vote." *Moore v. Ogilvie*, 394 U.S. 814, 818 (1969).

However, a basic ingredient of any equal protection claim is that the parties who are being treated differently must be similarly situated. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439-42 (1985); *see also Wright v. Incline Village General Improvement Dist.*, 665 F.3d 1128, 1140 (9th Cir. 2011) ("Because Wright has no evidence that similarly situated persons are treated differently, his equal protection claim fails *ab initio*."); *Thornton v. City of St. Helens*, 425 F.3d 1158, 1168 (9th Cir. 2005) ("Evidence of different treatment of unlike groups does not support an equal protection claim.").

Thus if persons are not similarly situated, there is no equal protection violation and no need to justify different treatment, under any level of judicial

scrutiny, even if the issue involves elections and voting. Thus courts have held, for example, that states are not required to have identical ballot access procedures for independent candidates and partisan candidates because the two types of candidates are not similarly situated. *Van Susteren v. Jones*, 331 F.3d 1024, 1027 (9th Cir. 2003). Likewise, candidates trying to get on a primary election ballot are not similarly situated to candidates trying get on the general election ballot. *Anderson v. Mills*, 664 F.2d 600, 607 (6th Cir. 1981).

The Secretary has a strong chance of success on the merits of the equal protection claim because voters who choose "None of these candidates" are not similarly situated to those who choose a candidate. If "None of these candidates" were counted in a way that permitted it to win, a vacancy in the office could result, whereas that is obviously not the case with votes for candidates. Also, NOTC is not a candidate that could hold office. Nor is NOTC similar to a deceased candidate, since it is possible for voters to be factually mistaken about whether a candidate has died before the election, whereas it is not reasonably possible to believe that NOTC could take office. Thus choosing "None of these candidates" is fundamentally different from voting for a named candidate.

Furthermore, a voter who chooses "None of these candidates" is similarly situated to voters who abstain from voting altogether, who undervote a particular race, who deface their ballots, or who otherwise do not cast a vote for a particular

candidate. All of these voters are treated the same: their "vote" is not counted in determining which candidate won the election.

Voters who choose "None of these candidates" are not similarly situated to voters who vote for a named candidate because NOTC can never hold office and if this choice was counted, a vacancy could result. NOTC does not represent the voter's will of who should be elected. Thus there is no equal protection violation by treating NOTC differently than a vote for a named candidate.

D. The "None of these candidates" option is within the State's broad powers under the Elections Clauses.

The U.S. Constitution, Art. 1, § 4, cl. 1, provides in relevant part: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof…."

Under this clause, the states have "broad powers" to prescribe the mechanisms for holding elections. *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986). Regulating the "manner" of elections includes providing for "matters like 'notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns.'" *Cook v. Gralike*, 531 U.S. 510, 523-24 (2001) (*quoting Smiley v. Holm*, 285 U.S. 355, 366 (1932)). However, it is not "a source of power to dictate electoral outcomes, to favor or

disfavor a class of candidates, or to evade important constitutional restraints." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 833-34 (1995).

Nevada's option for "None of these candidates" is well within the broad powers of the State to prescribe the "manner" of holding elections because it does not favor or disfavor any candidate, nor does it dictate electoral outcomes.

In *Cook*, the Court held that states could not print statements next to candidates' names on the ballot such as: "DISREGARDED VOTERS' INSTRUCTIONS ON TERM LIMITS," and attempt thereby to control the outcome of the election. 531 U.S. at 524. The Court agreed that the labels were "a Scarlet Letter," "derogatory," "intentionally intimidating," "particularly harmful," "politically damaging," "a serious sanction," "a penalty," and "official denunciation." *Id.* at 524-25. The law "is plainly designed to *favor candidates* who are willing to support the particular form of a term limits amendment set forth in its text and *to disfavor those* who either oppose term limits entirely or would prefer a different proposal." 531 U.S. at 524 (emphasis added).

The Court found that such labels exceed the states' authority to regulate the manner of elections because "the labels surely place their targets at a political disadvantage to unmarked candidates for congressional office." *Id.* at 525. Thus, the Court reasoned, the labels went beyond regulating election procedures and

methods, and attempted to "dictate electoral outcomes," i.e., that candidates who did not support term limits would lose. *Id.* at 525-26.

This case is easily distinguishable from *Cook*. The "electoral outcomes" the Court was concerned with in *Cook* was the basic question of which candidate would win. In that case, *certain candidates* were clearly being targeted for unfavorable treatment that was specifically designed to induce voters to vote against those candidates and therefore cause them to lose the election. *Id.* at 525-26.

Here, in contrast to the labels in *Cook*, "None of these candidates" appears at the bottom of the list, after all of the candidates' names. NRS 293.269(1). It is neutral since it is not juxtaposed against any particular candidate. Nor does it demean, denounce, or in any way discourage voters for voting for any candidate or a candidate. Thus it does not attempt to determine the outcome of an election by disfavoring some candidates and favoring others, or by marking certain candidates with a "Scarlet Letter" that serves as an "intentionally intimidating" "derogatory" "official denunciation." *Cf. Cook*, 531 U.S. at 524.

Just having the option of "None of these candidates" does not unlawfully induce voters to choose that option. Voters are always free to undervote in a race, whether or not "None of these candidates" appears as an option. Unlike in *Cook*, there is nothing about the language of the option that is designed to steer voters one

way or another. Therefore allowing the option of "None of these candidates" is comfortably within the State's "broad powers" to regulate the manner of elections under the elections clauses. *See Tashjian*, 479 U.S. at 217.

E. The Voting Rights Act provides no cause of action because NRS 293.269 is not racially discriminatory.

The Secretary has a strong chance of success on the merits of Plaintiffs' Voting Rights Act ("VRA") claim, because the VRA applies only when there is interference with the right to vote that is based on racial discrimination.

In *Powell v. Power*, 436 F.2d 84, 87 (2nd Cir. 1970), the Second Circuit Court of Appeals recognized that the purpose of the Voting Rights Act is to ensure that states do not enact processes that impose racially discriminatory burdens on the right to vote. *Id.* at 86-87. Since the plaintiffs in that case disavowed any allegation that they were discriminated against based on race, the court found that the VRA provided no remedy. *Id.* at 87.

Additionally, the Second Circuit further reasoned that holding otherwise would "thrust [courts] into the details of virtually every election, tinkering with the state's election machinery, reviewing petitions, registration cards, vote tallies, and certificates of election for all manner of error and insufficiency under state and federal law." *Id.* at 86. The court refused to do so. It stated: "Absent a clear and unambiguous mandate from Congress, we are not inclined to undertake such a wholesale expansion of our jurisdiction into an area which, with certain narrow and

well defined exceptions, has been in the exclusive cognizance of the state courts." *Id.* (footnotes omitted).

Accordingly, it rejected the theory that the VRA itself gives federal courts jurisdiction to hear any allegation of election deficiencies; rather, the VRA only pertains to discrimination in voting that is based on race. *Id.* at 87.

Similarly, in this case there are no allegations that NRS 293.269 is racially discriminatory, or that any of the Plaintiffs are being discriminated against based on their race. Absent such allegations, the VRA provides no remedy. As the Second Circuit held, the VRA was never designed or intended to give federal courts jurisdiction over garden variety election disputes. For this reason, the Secretary has a strong likelihood of success on the merits of the VRA claim.

F. There is no private action under § 15481 of the Help America Vote Act.

Plaintiffs' claim is based on part of Section 301 of the Help America Vote Act, codified at 42 U.S.C. § 15481(a)(6), which states: "Each State shall adopt uniform and nondiscriminatory standards that define what constitutes a vote and what will be counted as a vote for each category of voting system used in the State." *Id.*; Pub. L. 107-252 § 301(a)(6).

Nothing in Section 301 explicitly creates a private right of action. Therefore, in order to have a claim, Plaintiffs must establish that Congress implicitly created a private cause of action. In *Alexander v. Sandoval*, the U.S.

Supreme Court held that in order to have an implied cause of action derived from a federal statute, a plaintiff must show that Congress intended to create both a private *right* and a private *remedy*. 532 U.S. 275, 286 (2001).

In this case, Congress distinctly defined the remedies available for enforcement of HAVA, and did not include suits by private individuals among them. *See* 42 U.S.C. § 15512 (requiring states to establish administrative complaint procedures for private individuals); and 42 U.S.C. § 15511 (authorizing civil suit against states by the U.S. Attorney General in case of violation). For these reasons, the court in *Taylor v. Onorato*, 428 F.Supp.2d 384, 386-87 (W.D.Pa. 2006) held that Section 301 of HAVA does not create any private cause of action.

Also, the legislative history of the act shows a deliberate intent on the part of Congress to leave out the availability of a private cause of action. Senator Christopher Dodd, who worked on the HAVA legislation, stated: "While I would have preferred that we extend [a] private right of action…, the House [of Representatives] simply would not entertain such an enforcement provision." Cong. Rec. 510504 (daily ed. Oct. 16, 2000) (Statement of Senator Dodd).

Furthermore, Section 301 of HAVA does not create any private rights that could be enforceable by an action under 42 U.S.C. § 1983. *Taylor*, 428 F.Supp.2d at 387. As the court in *Taylor* discussed at length, in *Blessing v. Freestone*, the U.S. Supreme Court held that a plaintiff must assert the violation of a federal *right*,

not merely a violation of federal law, when filing an action under § 1983. 520 U.S. 329, 340-41 (1997). The plaintiff must show that: (1) Congress clearly intended to benefit the plaintiff; (2) "the right assertedly protected by the statute is not so 'vague and amorphous' that its enforcement would strain judicial competence," and (3) the statute unambiguously imposes a binding obligation on the states. *Id.*

In *Gonzaga v. Doe*, 536 U.S. 273, 283 (2002) the Court held that nothing short of an "unambiguously conferred right" is permissible to support a cause of action under § 1983. Also, private rights are not created unless the statutory text is phrased in terms of the persons benefited. *Id.* at 286. The question becomes whether specific individuals have been granted explicit rights, not just benefits or interests. *Id.* at 283.

Many sections of HAVA merely direct the actions of state officials, rather than create rights for specific individuals. For example, in *Brunner v. Ohio Republican Party*, the U.S. Supreme Court relied on *Gonzaga* to hold that a section of HAVA generally requiring states to match their voter registration database with the database of the state department of motor vehicles was not sufficiently likely to create a cause of action so as to justify the issuance of a TRO. *Brunner v. Ohio Republican Party*, 555 U.S. 5, 6 (2008).

In this case, the Plaintiffs are invoking 42 U.S.C. § 15481(a)(6), which reads: "Each State shall adopt uniform and nondiscriminatory standards that define

what constitutes a vote and what will be counted as a vote for each category of voting system used in the State." 42 U.S.C. § 15481(a)(6). The statute creates directives for state officials without identifying any particular classes of individuals who are to receive new rights. Just as in *Gonzaga* and *Brunner*, the provision is not phrased in terms of the persons benefitted, and does not "unambiguously" create new rights for the plaintiffs or for any other particular individuals, nor does it provide a remedy for a violation.

The statute at issue in this case, 42 U.S.C. § 15481(a)(6), does not contain any language that speaks of any individual right to do anything in particular. It is not phrased in terms of persons who are benefited by the statute. Nor does it prescribe exactly what the standards must entail, or what happens if the state fails to comply with the statute. This is far short of the "unambiguously conferred right" required by the Court in *Gonzaga,* 536 U.S. at 283. Therefore the Secretary has a strong chance of success on Plaintiffs' HAVA claim because 42 U.S.C. § 15481(a)(1) does not confer any individual, privately enforceable right.

IV. Plaintiffs failed to show irreparable harm.

The Plaintiffs argued, and the district court held, that the reason NOTC is unconstitutional is because it is not counted as a vote. In other words, the harm they complain about is the "disenfranchisement" that occurs from *not counting* it. The Voter Plaintiffs have not offered any evidence that simply having NOTC on

the ballot harms them in any concrete way, let alone that they will suffer irreparable harm unless it is removed from the ballot.

Nor is there any harm to the Candidate Plaintiffs because NOTC is not like an ineligible candidate who can steal votes from legitimate candidates. This is not a "competitive standing" case where the plaintiffs are candidates competing against an unqualified candidate. It is true this court has recognized standing in such cases. *See e.g., Owen v. Mulligan*, 640 F.2d 1130 (9th Cir. 1981). Here, Plaintiffs must demonstrate not only sufficient injury for standing purposes, but also must demonstrate irreparable harm if "None of these candidates" is not removed from the ballot. But they cannot do so in this case, because voters always have the ability and the right to withhold their vote.

In competitive standing cases by contrast, removing the unqualified candidate from the ballot likewise removes the voters' ability to vote for that unqualified candidate. *See e.g., Schulz v. Williams,* 44 F.3d 48, 53 (2nd Cir. 1994). Thus removal from the ballot in those case remedies any possibility of harm caused by the ineligible candidate "siphoning" votes from the legitimate candidates. In this case, voters can always withhold their vote, even if NOTC does not appear on the ballot. The fact that NOTC might, at most, remind voters of a right they always possess in no way causes irreparable harm to any candidate, since withholding one's vote is a perfectly legitimate choice.

Even assuming that appearance of NOTC on the ballot would tend to increase the number of voters who select NOTC instead of Mitt Romney, this is a *political* injury, not a legal one. *See Cecelia Packing Corp. v. U.S. Dept. of Agriculture,* 10 F.3d 616, 623 (9th Cir. 1993) ("The First Amendment guarantees the right to participate in the political process; it does not guarantee political success."). Voters are never compelled to vote for any named candidate, nor to vote for Plaintiffs' preferred candidate. There is no cognizable legal harm to the Plaintiffs, let alone irreparable injury, if NOTC appears on the ballot.

V. The balance of the hardships tips against Plaintiffs.

Since 1975, Nevada voters have had the option to choose "None of these candidates" in all statewide races, including races for U.S. Senator and President and Vice President of the United States. *See* NRS 293.269. The district court's order enjoins the Secretary of State from placing "None of these candidates" as an option on the ballot. This irreparably harms Nevada voters by taking away a legitimate and meaningful ballot choice.

The loss of First Amendment rights of political speech, even for a short amount of time, constitutes irreparable harm. *Farris v. Seabrook*, 677 F.3d 858, 868 (9th Cir. 2012). Although Nevada is not constitutionally required to have "None of these candidates" as a ballot option, it has offered its voters this option for over 35 years. To now deprive voters of that option altogether harms Nevada

voters by preventing them from clearly expressing their dissatisfaction with the candidates.

One of the purposes of the "None of these candidates" (NOTC) option is to give voters a unique and powerful opportunity to communicate their dissatisfaction with the entire slate of candidates in a direct and unambiguous manner. When a voter abstains (does not go to the polls at all) or undervotes (casts a ballot, but skips one or more races by not voting for any candidate in those races), the reasons for this action are ambiguous. It may be due to apathy, the costs of voting, not being familiar with the candidates, dissatisfaction with the candidates, or any number of other reasons.

These reasons cannot be discerned from abstention or undervoting. But NOTC, by contrast, gives a clear message: the voter directly expresses dissatisfaction with all of the candidates. The intent is that if a large number of voters choose NOTC, it will send a message of disapproval to the candidates and the parties, so that they will become more responsive to their constituencies. Additionally, NOTC is designed to improve voter turnout by giving a meaningful option to those voters who would otherwise choose to abstain because they are dissatisfied with all of the candidates.

The injunction issued by the district court required that "None of these candidates" not appear as an option in any race on the November 2012 general

election ballot. Thus voters such as Intervenor Edwards, who intended to exercise that option in the upcoming election, are irreparably harmed by losing the longstanding ability to send a clear message of disapproval to the candidates and the parties. They injunction would deprive them of that option, and leave them only with the options of either abstaining completely, or undervoting, neither of which adequately expresses the voters' intent. This greatly outweighs any harm alleged by the Plaintiffs.

VI. The injunction is against the public interest.

The injunction is contrary to the public interest for the reasons discussed above – that it deprives voters of a legitimate choice and an opportunity to express their disapproval of the all of the candidate. A corollary to the voters' ability to send an unambiguous message to their politicians is the State's receipt of that message. NOTC is designed to make elected officials more responsive to their constituencies. The state itself, and the public interest especially, is harmed by losing this communication with voters. Obviously, there is a powerful public interest in making elected officials responsive to citizens, and NOTC directly furthers that interest by communicating to officials when voters disapprove of them. That communication will be entirely lost if NOTC is not placed on the ballot.

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VII. Even if NOTC implicates federal voting rights, the State is justified in both not counting it in determining who wins an election and in placing it on the ballot.

It is now well-settled that elections regulations are reviewed according to a "flexible standard" of judicial scrutiny, depending on the extent to which they burden the right to vote. *Dudum v. Arntz*, 640 F.3d 1098, 1106 (9th Cir. 2011). This flexible standard recognizes the reality that virtually every election regulation "whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual's right to vote." *Id.* (*quoting Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)). This flexible standard is not specific to First Amendment claims. *Dudum*, 640 F.3d at 1106, n. 15. Instead, whether plaintiffs assert First Amendment, due process, or equal protection claims, courts use "a single basic mode of analysis" to address them all. *Id.* (quoting *LaRouche v. Fowler*, 152 F.3d 974, 987–88 (D.C.Cir.1998)).

Thus, if the burden is "severe," then strict scrutiny applies, and the regulation can only be upheld if it is narrowly tailored to serve a compelling state interest. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). "But voting regulations are rarely subjected to strict scrutiny." *Dudum*, 640 F.3d at 1106 (citing *Lemons v. Bradbury*, 538 F.3d 1098, 1104 (9th Cir.2008)). Instead, regulations that are generally applicable, even-handed, and politically neutral are often upheld because

they impose non-severe burdens that are justified by important state interests. *Id.* Where the burden imposed by the regulation is slight, a state's rational basis is sufficient to uphold the regulation. *Libertarian Party of Washington v. Munro*, 31 F.3d 759, 761 (9th Cir. 1994).

The plaintiffs initially bear the burden of demonstrating that the burden on their rights is "severe." *Angle v. Miller*, 673 F.3d 1122, 1132 (9th Cir. 2012). Only if the plaintiff demonstrates that the burden is severe must the state demonstrate that the regulation is the least restrictive means to achieve to achieve a compelling interest. *Dudum*, 540 F.3d at 1114.

First, even assuming that NOTC implicates any federal rights at all, placing it on the ballot but not counting it in determining which candidate wins imposes only a *de minimus* burden on Plaintiffs' rights, and therefore it is subject only to rational basis review.

Voters are informed upfront that NOTC is not counted. NOTC is only one choice among many on the ballot, and it is solely up to the voter whether to choose it or not. Therefore, it is not the unexpected or arbitrary act of the State that determines whether the voter's choice will count or not. It is the voter's decision. When NOTC appears on the ballot, that option does not prevent a voter from casting a vote that will be counted by voting for a named candidate.

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Additionally, the fact that "None of these candidates" is not a candidate that can hold office in any event means that not counting it imposes little or no burden, since even if it was counted, it would not serve to elect an office holder who is favored by the people. NOTC imposes no burden on the right to vote because voters are never *mandated* to vote for a candidate in the first place; they are always free to withhold their vote.

Finally, there is no evidence that NOTC in any way "distorts" elections. Asserting "distortion" presumes that choosing NOTC is somehow an invalid choice. That is not the case, regardless of whether NOTC is counted as a vote or not. Choosing "None of these candidates" is a legitimate option, just as choosing not to vote at all, or voting for a minor party, or skipping the race, are all a legitimate voter choices. So if a substantial number of voters choose NOTC, that no more "distorts" the results of an election than if a substantial number of voters do not turn out at all, or choose a minor party, etc. Thus there is no evidence that just having NOTC appear on the ballot in any way severely burdens the rights of any candidates or voters.

For all these reasons, not counting NOTC is at most a *de minimus* burden on Plaintiffs' rights. Since only a minimal burden is at issue, the State's rational basis in not counting it is sufficient to uphold the statute. *Munro*, 31 F.3d at 761. Here,

the State has compelling reasons for not counting NOTC, therefore regardless of the level of scrutiny that applies, NRS 293.269 is constitutional.

The State has a compelling reason in not counting "None of these candidates" because it is not a candidate. As a result, if NOTC were permitted to win, each time it won, a vacancy would result. As a result, the fundamental purpose of holding an election in the first place would be defeated: no candidate would be selected to take on the official duties of the office in question. A state has a compelling interest in holding *effective* elections, that is, elections that produce an office-holder.

Furthermore, if NOTC were permitted to win the election, the resulting vacancy would have to be filled either by appointment or by a special election. Special elections are not only expensive, but also often result in low turnout because of limited interest and unusual scheduling. Also, the state of course has no control over who decides to run for office. Thus it is entirely possible that a series of elections could be held that do not produce any winning candidates. Appointments may be even less reflective of voter preferences since they will be made usually by an individual or small board, and could result in the appointment of one of the "rejected" candidates.

Avoiding these inefficiencies, confusion, and expense are compelling state interests to justify not counting votes unless they are cast for a named candidate.

See Clements v. Fashing, 457 U.S. 957, 965 (1982) (noting states' interests in creating efficient elections, limiting voter confusion, and avoiding the expense of special elections are important interests); *Libertarian Party of North Dakota v. Jaeger*, 659 F.3d 687, 697 (8th Cir. 2011) (characterizing these interests as compelling); *Geary v. Renne*, 880 F.2d 1062, 1071 (9th Cir. 1989) (California had compelling government interest in "having its officers discharge with fidelity to the public interest the duties for which they are responsible.").

Second, the State has a compelling, or at least important, interest in giving voters a method to communicate their dissatisfaction with candidates. This serves to send a message to politicians that voters expect them to "clean up [their] act." *See* Minutes of the Assembly Committee on Election, p. 2 (March 18, 1975) (testimony of Mr. Demers, one of the co-sponsors of AB 336, which enacted NRS 293.269). It also removes ambiguity that otherwise results from abstention and undervoting. Voters may stay home from the polls, or undervote a particular race, for many reasons, including not being familiar with any of the candidates, simple apathy, or as a protest. Some voters may also select minor party candidates as a form of protest, rather than because they necessarily support the tenets of that party. This can skew results that impact whether the minor party retains its ballot access. See NRS 293.1715(2)(a) (minor party receiving 1% or more of the votes cast for Representative in Congress retains ballot access automatically).

The option of NOTC clarifies the voter's intent. The State has an interest in making this clear, so that candidates will be more responsive to their constituents. If a candidate is elected with a large number of NOTC votes, he or she knows that the electorate is not happy with the candidate, and wants some change. In such cases, candidates cannot claim the same sort of "mandate" from the people. The idea is the candidates would be induced to find out why the voters are displeased, and work harder to respond to voters' needs. NOTC therefore encourages candidates to be more responsive by letting them know when the electorate is displeased, even though it nevertheless puts them in office so that the business of government may continue. Overall, this leads to more responsible, responsive government, a goal which is at very least an important state interest.

In sum, the Plaintiffs' rights are only minimally burdened, if all. Therefore the State need only put forth a rational basis to support NRS 293.269. However, the State has much more than that: it has a compelling interest in running orderly, effective elections and avoiding the expense and inefficiency of special elections. It also has a compelling interest in allowing voters to communicate with their candidates and parties, to make them more responsive to citizens. Therefore the statute would be constitutional even if strict scrutiny applies, and the Secretary has a strong chance of success on the merits.

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VIII. The preliminary injunction is overbroad and therefore an abuse of discretion.

The district court ruled that the option of NOTC is unconstitutional because it constitutes a vote, yet NRS 293.269(2) prohibits it from being counted as a vote in determining who wins. This, the district court ruled, disenfranchises voters who choose NOTC. According to the Plaintiffs, and the district court agreed, the constitutional infirmity of Nevada's NOTC option is *not* that it appears on the ballot; rather, the constitutional problem is that it is not counted as vote, like votes for named candidates are counted. EOR 41, ll. 10-15.

However, rather than strike only the first clause of NRS 293.269(2), which would have the effect of requiring the State to count NOTC as a vote in determining the winner of the election, the district court struck NRS 293.269 in its entirety. The district court therefore enjoined the Secretary from placing the option of "None of these candidates" on the ballot for any race.

This is the broadest possible injunction the district court could have issued. Although it cures any perceived constitutional problems with not counting NOTC as a vote, it does so at the expense of all the voters who would use that option to communicate with their politicians. It silences those voters, instead of balancing the relative interests and harms in having "None of these candidates" remain as a ballot option.

Such an overbroad injunction constitutes an abuse of discretion. *Stormans*, 586 F.3d at 1140. "[I]njunctive relief should be narrowly tailored to remedy the specific harms shown by plaintiffs, rather than to enjoin all possible breaches of the law." *Zepeda v. U.S. I.N.S.*, 753 F.2d 719, 728, n.1 (9th Cir. 1984) (internal quotations omitted). "This is particularly true when, as here, a preliminary injunction is involved. A preliminary injunction can only be employed for the 'limited purpose' of maintaining the status quo." *Id.*

In this case, the specific harm cited by the Plaintiffs was that voters who chose "None of these candidates" did not have that choice counted as a vote in determining who wins the election, and therefore those voters are being "disenfranchised." Therefore even if this Court were to agree that NOTC must be counted as a vote, the appropriate remedy would be to count it– not to strike it entirely from the ballot. This would be a narrower injunction that would cure any constitutional problem, while also preserving the choice of NOTC for those voters who wish to use it to communicate with their politicians and parties.

Nevada has a general policy that all statutes are severable. NRS 0.020. "A ruling of unconstitutionality frustrates the intent of the elected representatives of the people. Therefore, a court should refrain from invalidating more of the statute than is necessary." *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984). Thus, if part of a statute is unconstitutional, the remainder should stand, "unless the whole scope

and object of the law is defeated by rejecting the objectionable features." *Binegar v. Eighth Judicial Dist. Court In and For County of Clark*, 112 Nev. 544, 551, 915 P.2d 889, 894 (1996). A court should therefore sever the offending provision unless the remaining provisions would no longer have legal force or effect and the legislature did not intend them to stand alone. *Brewery Arts Center v. State Bd. of Examiners*, 108 Nev. 1050, 1056, 843 P.2d 369, 373 (1992).

The district court determined that NOTC is unconstitutional because it is not counted in determining who wins the election. Even if this Court were to agree, the only offending part of the statute is the first clause of Subsection 2, which reads: "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…" NRS 293.269(2). The remainder of Subsection 2 requires that NOTC must be tabulated and reported in all election results.

Obviously, the remainder of NRS 296.269 can stand alone and have legal force and effect if the first clause of subsection 2 is severed. NRS 296.269(1) describes in detail how NOTC should be placed on the ballot. NRS 296.269(3) requires instructions to appear on the sample ballots informing voters that they may only choose NOTC if they do not also vote for a named candidate. Severing

the relevant portion of Subsection 2 in no way would impair the operation of the remaining parts of the statute.

No judicial intervention would be required to determine the outcome if NOTC won the election, nor would it be necessary to "rewrite the statute" to make it effective. Other Nevada law adequately covers what would happen in the extremely unlikely event NOTC received a plurality of the votes. When no successor is validly elected, a vacancy results upon the expiration of the current incumbent's term. *Lueck v. Teuton*, 125 Nev. 674, 684; 685, 219 P.3d 895, 902; 902, n. 2 (2009). NRS 304.030 states that the Governor may appoint someone whenever the office of U.S. Senator becomes vacant. NRS 298.040 provides for filling vacancies in the office of presidential elector.

Accordingly, the preliminary injunction is overbroad, and therefore an abuse of discretion. This Court should reverse order granting the preliminary injunction and allow NOTC to appear on the ballot. This will prevent the injunction from causing irreparable harm to the voters who intended to choose NOTC, while still allowing this Court to review on the merits whether NOTC must be counted as a vote.

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VII.

CONCLUSION

For the foregoing reasons, the Appellant Secretary of State respectfully requests that this Court REVERSE the district court's order granting a preliminary injunction requiring that "None of these candidates" must not appear on any ballot.

Respectfully submitted this 24th day of September, 2012.

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STATEMENT OF RELATED CASES

The undersigned asserts that to the best of his knowledge, there are no other related cases pending in the Ninth Circuit Court of Appeals.

Respectfully submitted this 24th day of September, 2012.

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CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rule 32(a)(7), I certify that the attached Appellant's Opening Brief is proportionately spaced, has a typeface of 14 points or more and contains 11,226 words.

Respectfully submitted this 24th day of September, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on September 24, 2012.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Michael T. Morley
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/s/ Linda Deming
An employee of the State of Nevada
Office of the Attorney General

ADDENDUM 1

ADDENDUM 1

NRS 293.269 Ballots for statewide offices or President and Vice President must permit voter to register opposition to all candidates.

1. 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."

2. 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.

3. 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.

(Added to NRS by 1975, 475)