Nos. 12-16881, 12-16882

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WENDY TOWNLEY, ET AL.

Plaintiffs-Appellees,

v.

ROSS MILLER, Secretary of State of Nevada,

Defendant-Appellant,

and

KINGSLEY EDWARDS,

Intervenor-Defendant-Appellant.

On Appeal From The United States District Court
For The District of Nevada

OPENING BRIEF OF INTERVENOR-DEFENDANT-APPELLANT

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September 24, 2012

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Rules / Statutes

Other Authorities

PRELIMINARY STATEMENT

This is a frivolous and incoherent suit, filed for cynical reasons at the 13th hour. There is no reason for federal courts to entertain "stop me before I vote again" claims, claims which purport to object to "disenfranchisement" resulting from a ballot option but then ask that the choice be eliminated altogether. It is equally improper for federal courts to entertain suits by partisans who are in fact *advantaged* by a provision that purportedly does not count votes *against* their preferred candidate but bring suit based solely on the belief they would be even better off if the whole law were struck down. Indeed, the entire suit rests on a distortion and trivialization of important legal safeguards, as demonstrated by the fact that it took Appellees—a collection of largely Republican voters and state officials ("Plaintiffs")—decades to finally "realize" that there was "actual voter disenfranchisement." No one whose voting rights are genuinely at stake—or who is genuinely concerned about others' voting rights—would file a suit remotely like this. Lest others be encouraged in the future, it warrants firm rejection from this Court and award of attorney fees to Defendant-Appellant Ross Miller and Defendant-Intervenor-Appellant Kingsley Edwards.

STATEMENT OF JURISDICTION

As discussed in more detail *infra*, the district court does not have jurisdiction over this case because no party can properly allege standing. Nonetheless, this

Court has "jurisdiction to determine [its] own jurisdiction." *Figueroa v. Mukasey*, 543 F.3d 487, 490 (9th Cir. 2008).

The district court entered its preliminary injunction order on August 24, 2012. Excerpts of Record ("ER") 81. Both Miller and Edwards timely filed notices of appeal on August 24 and 25, 2012, respectively. ER 75, 78. This court consolidated these appeals on August 28, 2012. This court has jurisdiction over interlocutory orders granting injunctions under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES

Whether the district court erred in granting Plaintiffs' motion for a preliminary injunction that would strike the ballot option provided by N.R.S. § 293.269 (the "NOTC statute"), which creates a mechanism for Nevada electors to vote for "None of these Candidates," ("NOTC"), an option that has been available to all Nevada voters for over thirty-five years , where:

1. None of the Plaintiffs can allege standing, because none of the Plaintiffs suffer a particularized injury that is caused by the NOTC option or would be redressed by the NOTC option being struck from the ballot; and

2. None of the Plaintiffs can demonstrate a likelihood of success on the merits, as a panel of this Court previously determined.

STATEMENT OF THE CASE

On June 11, 2012, Plaintiffs filed a complaint against Defendant Miller, in his official capacity as Secretary of State of Nevada, as well as against the State of Nevada itself, bringing a host of federal claims relating to Nevada's 1975 decision to put a "None of These Candidates" option on all of its ballots for both statewide office and for those electing President and Vice President. Doc. 1, *see* N.R.S. § 293.269. On June 20, 2012, Plaintiffs filed an amended complaint, dropping the State of Nevada as a defendant and adding additional federal claims. Doc. 10. On June 28, 2012, Plaintiffs moved for a preliminary injunction to enjoin Miller from printing any ballots with NOTC as an option. Doc. 15.

Though the case was originally assigned to the Honorable Judge Edward C. Reed, on June 11, 2012, the case was referred to the Honorable Chief Judge Robert C. Jones for reassignment, and on July 3, 2012, Chief Judge Jones ordered that he would hear all further proceedings. Doc. 21. On July 13, 2012, Edwards moved to intervene in support of Miller. Doc. 26.

On August 22, 2012, the district court held a hearing with all parties. At the hearing, the district court granted Edwards's motion to intervene (ER 7, and Doc. 39), and then granted Plaintiffs' motion for a preliminary injunction (Id.). The district court also denied Edwards's motion to stay the district court's ruling pending appeal. Id.

Miller filed his notice of appeal on August 24, 2012, and Edwards filed his on August 25. ER 75, 77. On August 28, Edwards filed a motion with this Court to stay the district court's order pending appeal. Dkt. 4. On August 30, Miller filed a similar motion with this Court. Dkt. 6. That same day, the district court purported to order the parties to file briefs regarding a motion for stay pending appeal, with briefing due on September 7, 2012, and with a hearing set for September 14. ER 5, Doc. 47. However, on September 4, 2012, a three-judge motions panel of this Court (Reinhardt, Wardlaw, and Bea, JJ.) issued an order pointing out that the notices of appeal "divested the district court of jurisdiction over the preliminary injunction." Order, *Townley v. Miller*, No. 12-16881, Dkt. 14 at 2 (Sept. 4, 2012).[1] This Court also granted Miller's motion to stay the lower court's order pending appeal. Id.

STATEMENT OF FACTS

A. Nevada's Voting Laws

1. The "None Of These Candidates" Option

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

[1] On September 5, this Court issued an amended order, designating its September 4, 2012 order for publication. Order (the "Stay Order"), *Townley v. Miller*, No. 12-16881, ECF No. 15 (Sept. 5, 2012). Unless otherwise noted, all quotations from the Stay Order are from the amended order.

of the other names on the ballot. N.R.S. § 293.269. The NOTC statute contains three relevant subsections. Subsection 1 creates the actual NOTC option:

> 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.

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." N.R.S. § 293.269(3).

The Nevada Legislature designed the NOTC statute "as a panacea to low voter [interest] in light of voter apathy and decreasing turnout in the post-Watergate era." Damore, Waters, & Bowler, *Unhappy, Uniformed, or*

Uninterested?: Understanding "None of the Above" Voting, XX(X) POL. RES. QUARTERLY 1, 9 (forthcoming). Nevada recognized that some voters may wish to express their dissatisfaction with all candidates, and created NOTC to "provide[s] voters with an unambiguous means to signal dissatisfaction with the status quo." *Id.* NOTC therefore both encourages voter participation and allows voters to express their true preferences in a more accurate fashion.

NOTC allows voters to send a message to candidates, to distinguish between those who are genuinely popular versus those who are simply seen as the "lesser of two evils." For example, a recent study showed that "NOT[C] voting increases when voters have fewer candidates from which to choose and in partisan general election races that attract the most voter interest." *Id.* at 9. In such cases, where voters are faced with two unpalatable choices, a voter may choose the NOTC option to make clear his or her discontent to all candidates. Such a message of voter discontent can be quite powerful, because officials whose vote-totals end up below 50 percent due to NOTC ballots 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.

Finally, NOTC has been widely used since its inception: on average from 1976 until 2012, slightly more than 10 percent of the Nevada electorate has voted

NOTC, "and, if anything, that percentage has increased slightly over time." *Id.* at 5. As Plaintiffs' amended complaint lays out, between 1998 and 2008, anywhere from approximately 8,000 to 126,000 Nevada voters have chosen the NOTC option. Doc. 10 (Am. Comp. ¶¶ 29-32). The amended complaint also makes clear that while NOTC has never taken a majority of votes, in two races in 1976 and 1978 NOTC did win the most votes of any option presented to the voters. *Id.* (Am. Comp. ¶¶ 33-34).

2. Other Nevada Voting Laws

Nevada has enacted several other voting laws that, while unchallenged by Plaintiffs, are relevant here. For example, Nevada prohibits voters from marking more than one choice on a ballot, requiring 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). Similarly, Nevada allows ballot counters to reject a "soiled or defaced ballot" where the defacing is intentional. N.R.S. § 293C.367(2)(b). Nevada voters are not allowed to "write in the name of an additional candidate for office." N.R.S. § 293.270(2). Defendant Miller has also represented that Nevada will count a ballot with the vote for one specific race left blank. ER 7 (Tr. 4-5).

B. The Instant Suit

The Plaintiffs brought suit on June 11, 2012, alleging that the NOTC statute creates a "case of actual voter disenfranchisement." Doc. 10 (Am. Comp. 1). The eleven Plaintiffs allege a variety of interests at issue. *Id.* (Am. Comp. ¶¶ 3-13). Four of the Plaintiffs (Wendy Townley, Amy Whitlock, Ashley Gunson, and Heather Thomas) allege solely that each is a "properly registered and duly qualified elector" and that each "intends to vote in the November 6, 2012 general election." *Id* (Am. Comp. ¶¶ 3-6).[2] Two Plaintiffs (Dax Wood and Cajsa Linford) allege that they have a purported interest in having all votes treated equally and to vote on a ballot where an allegedly "invalid" option will not appear. *Id* (Am. Comp. ¶¶ 7-8).[3] And another Plaintiff (Wesley Townley) alleges that he will vote for Mitt Romney in the November 6, 2012 general election, but that he "reasonably believes" that "if 'None of these candidates' did not appear as a choice on the

[2] Under Nevada law, an "elector" is "a person who is eligible to vote under the provisions of Section 1 of Article 2 of the Constitution of the State of Nevada." N.R.S. § 293.055.

[3] Specifically, these two Plaintiffs allege a purported interest in "not being 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," as well as "being able to cast his vote for any of the options listed for each race on the ballot, and having that vote be given full legal effect" and "having his properly cast vote be given equal legal effect to the properly cast votes of every other registered and duly qualified elector, regardless of which ballot options he, and those other electors, choose." Doc. 10 (Am. Comp. ¶¶ 7-8).

ballot … a substantial number of people … who otherwise would have selected 'None of these candidates' would instead cast their votes for one of the candidates running for those offices, including Governor Romney." *Id* (Am. Comp. ¶ 9). None of these Plaintiffs allege that they will choose the NOTC option (and indeed Plaintiff Wesley Townley affirmatively alleges that he not vote for NOTC).

Two other Plaintiffs—Bruce Woodbury and James DeGraffenreid—also allege that they will not vote for NOTC. *Id* (Am. Comp. ¶¶ 12-13). These so-called "Candidate Plaintiffs" (*id* (Am. Comp. 6)) allege instead that each is a "legally registered member of the Nevada Republican Party" and that each has been nominated "to serve as one of the [Republican] Party's presidential electors in the November 6, 2012 general election." *Id* (Am. Comp. ¶¶ 12(a), 13(a)). As alleged in the amended complaint, "[a] vote for Mitt Romney for the office of President of the United States in the November 6, 2012 general election is, by virtue of Nevada law, effectively a vote for [the Candidate Plaintiffs] for the office of presidential elector." *Id* (Am. Comp. ¶¶ 12(b), 13(b)). Without further elaboration, these two Plaintiffs nonetheless assert that each has 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." *Id* (Am. Comp. ¶¶ 12(c), 13(c)).

Only two of the Plaintiffs (Jenny Riedl and Todd Dougan) actually intend to vote for NOTC. The entirety of Ms. Riedl's alleged interest in this suit is that she is a "properly registered and duly qualified elector" unaffiliated with either major political party, that she "wishes to exercise her fundamental constitutional right to vote in the November 6, 2012 general election for President of the United States and U.S. Senate," and that "[s]he intends to vote for 'None of these candidates' in the race for President of the United States." *Id* (Am. Comp. ¶ 10). Mr. Dougan, on the other hand, is a registered Republican (*Id* (Am. Comp. ¶ 11)), who will, "[i]f 'None of these candidates' appears as a ballot option in the race for President of the United States, … select that choice" (*Id* (Am. Comp. ¶ 11(a)), but if NOTC is not an option, then he will "cast his vote in that election for Mitt Romney" (*Id* (Am. Comp. ¶ 11(b)).

Despite their alleged interest in voting using ballots that do not include "NOTC" as an option, Plaintiffs do not challenge subsection (1) of the NOTC statute, which is the subsection that actually places that option on the ballot. *See* N.R.S. § 293.269(1) (requiring "[e]very ballot" to "contain for each office an additional line equivalent to the lines on which the candidates' names appear" and reading "'None of these candidates'"). Instead, Plaintiffs observe that "Subsection (2) requires election officials to ignore such votes in determining the outcomes of those elections, thereby disenfranchising the voters who cast them," and allege that

"Subsection (2) therefore is unconstitutional, both facially, and specifically as applied to federal general election." *Id* (Am. Comp. 2). Plaintiffs' only challenge to Subsection (1) comes incidentally, in their assertion that "[b]ecause Subsection (2) is not severable from the rest of the statutory scheme for including 'None of these candidates' as a ballot choice in statewide and presidential races, the entire statute must be invalidated." *Id* (Am. Comp. 2-3); *see also* Am. Comp. ¶ 27) ("Subsection (2), the disenfranchisement provision of the statute, is not severable from the other provisions in the act—particularly Subsection (l)—that require 'None of these candidates' to be included as a ballot option in certain races."). The Plaintiffs likewise offer no challenge to subsection (3) of the NOTC statute, which requires every sample ballot and other voter instructions to inform voters that they may vote NOTC "only if the voter has not voted for any candidate for the office." N.R.S. § 293.269(3).

In contrast to the vast majority of the Plaintiffs, Edwards has voted NOTC repeatedly in the past, "and desires to retain that option to cast votes for that alternative in the November 6, 2012 general election." Edwards Mot. for Intervention Pursuant to F.R.C.P. 24 at 3, Doc. 26.

C. The Proceedings Below

Plaintiffs filed their suit on June 8, 2012 (Doc. 1), and filed their motion for a preliminary injunction shortly thereafter, on June 28, 2012, for which they

requested expedited treatment (Doc. 15). Edwards filed his motion to intervene on July 13, 2012. Though the case was originally assigned to the Judge Reed, it was reassigned to Chief Judge Jones, who accepted the reassignment on July 3, 2012 (Doc. 21). The district court then waited 16 days, until July 19, to deny the Plaintiffs' motion for expedited treatment "as moot" (Doc. 30), and the next day set a hearing date of August 22 to consider both Plaintiffs' motion for a preliminary injunction and Edwards's motion to intervene (Doc. 33).[4]

At the August 22 hearing, the district court orally granted Edwards's motion to intervene. ER 7 (Tr. 3). It then heard argument from Miller and Townley (*id* (Tr. 3-50)), without ever discussing standing or its own jurisdiction. The district court then stated on the record that it was "going to enter an injunction that bars [Miller] from having [NOTC] on the ballot. … I will enjoin [Miller] from having none of the above on the ballot." *Id* (Tr. 50). In entering this injunction, the district court found NOTC to be "violative, I think, on all the grounds suggested by plaintiffs and therefore I'm going to order [Miller] to strike [NOTC] from the ballot on all races." *Id* (Tr. 50). The district court also orally denied Miller's motion for a stay pending appeal. *Id* (Tr. 51).

[4] Miller also filed a motion to dismiss (Doc. 19), which the district court also considered (and denied) at the August 22 hearing (ER 7).

After deciding to enter the preliminary injunction, the district court then heard from Edwards. *Id* (Tr. 52). While the district court again did not ask any questions about whether it had jurisdiction over the case, its primary question to Edwards was "Where's the harm?" *Id* (Tr. 55). As the district court reasoned:

> We already count—we count the expression of those that don't vote altogether, we show this particular election that included this race came in at a 15 percent turnout. … So we're already recording the general populous feelings I don't like this race or the questions, but expressly in regard to this race and these candidates, if you cast a vote, but you don't case a vote in this race, we're also recording that expression. So as far as answering an overriding, overcompelling interest of the state to allow you to express your interest, we're doing that. You just—where's the difference?

Id (Tr. 55). Edwards agreed that there was no harm to voters for having NOTC on the ballot (the district court did not ask about harm to Miller or Nevada), and noted that a lack of irreparable harm was a strong reason to deny the preliminary injunction under the governing test. *Id* (Tr. 56); *see Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) ("A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is *likely to suffer irreparable harm in the absence of preliminary relief*, that the balance of equities tips in his favor, and that an injunction is in the public interest.") (emphasis added). The district court nonetheless reaffirmed its ruling, and denied Edwards's motion for a stay "for the record so that you can ask the appellate court for a stay." *Id* (Tr. 57). Only then did the district court ask when ballots would need to be printed,

and when informed that printing would need to begin on September 7, informed Miller that that was "your problem." *Id* (Tr. 58).

Immediately after the hearing, on August 24, 2012 Miller filed his notice of appeal and moved for a stay pending appeal. ER 78, Doc. 40. The next day, Edwards filed his notice of appeal and similarly moved for a stay. ER 75, Doc. 41. In response, on August 30 the district court purported to require the parties to file briefs by September 7 "regarding a motion for stay pending appeal," with the parties to appear before the district court on Friday, September 14. Doc. 47.

In a published order issued on September 4 (and amended on September 5), a three-judge panel of this Court recognized that the district court had issued a "preliminary injunction order enjoining Nevada's nearly 37-year-old statute that requires a 'None of These Candidates' option on the ballot in statewide elections for state or federal office." Stay Order 2. This Court first held that "[t]he filing of these notices of appeal, consolidated by this court on August 28, 2012, divested the district court of jurisdiction over the preliminary injunction." Stay Order 3 (citing *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56 (1982) and *Davis v. United States*, 667 F.2d 822 (9th Cir. 1982)). This Court then held that "Appellants' emergency motions to stay the district court's August 22, 2012 order pending appeal are granted." Stay Order 3 (citing *Winter*, 555 U.S. 7).

Concurring fully in the order, Judge Reinhardt wrote separately to discuss "alternative basis for our jurisdiction over the appeals." Stay Order 5 (Reinhardt, J., concurring). Prior to this discussion, however, Judge Reinhardt wrote to "make clear that the panel is in agreement that the basis for our grant of the stay of the district court's order pursuant to *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008), is that the likelihood of success on the merits favors the state." Stay Order 5 (Reinhardt, J., concurring). Specifically, Judge Reinhardt wrote that the panel agreed that "Plaintiffs' arguments offer an inadequate basis for this court to conclude that Nevada's 37-year-old statute providing for 'None of these candidates' ballots is contrary to the Constitution or to any federal statute." Stay Order 5 (Reinhardt, J., concurring). The panel therefore agreed, Judge Reinhardt wrote, that "[a] failure to stay forthwith any injunction issued by the district court would accordingly result in irreparable injury to the State of Nevada and its citizens, and would be directly contrary to the public interest." Stay Order 5 (Reinhardt, J., concurring).

In addition, Judge Reinhardt wrote that "The parties have advised both this court and the district court that, in order for Nevadans in the military to cast their ballots in the forthcoming Presidential election, the complex process of printing the statewide ballots must be completed no later than September 22, 2012, and that the printing of all such ballots must begin by September 7, 2012." Stay Order 5-6

(Reinhardt, J., concurring). Although the district court was aware of these deadlines, the "dilatory tactics," as described above, "appear to serve no purpose other than to seek to prevent the state from taking an appeal of his decision before it must print the ballots." Stay Order 6 (Reinhardt, J., concurring).

SUMMARY OF ARGUMENT

This Court has disapproved of the district court's procedural machinations, but the substance of the district court's ruling (most particularly its willingness to exercise subject matter jurisdiction based purely on Plaintiffs' say-so) is every bit as extraordinary. Now that this Court has a chance to turn to the merits of Plaintiffs' claims, however, the exact same conclusion is inexorable: Plaintiffs are not entitled to a preliminary injunction.

First, none of the Plaintiffs have standing to bring suit. The two plaintiffs who actually allege that they will take advantage of the challenged voting option, because they suffer no injury: if they are concerned about their votes not being formally "counted" (in their subjective view), then they have every right, freedom, and privilege to vote for a candidate of their choosing. They are only injured by their own freely chosen political choice, a choice from which, as the Supreme Court recently reminded us, federal courts are not required to protect. As for the nine other Plaintiffs, who allege they will not vote for NOTC, they suffer only as much injury as any other individual who is indirectly affected by another's vote:

that is to say, not at all. Abjuring the option of actually persuading voters to vote for their desired candidate, any injury these nine plaintiffs may suffer is simply not a cognizable one, either because it does not exist or because it is shared by the rest of the populace. Nor is any such hypothetical injury caused by the challenged subsection of the NOTC statute, and, as Plaintiffs themselves have admitted to this Court before the motions panel, nothing a federal court can do can alleviate their injury. There is simply no jurisdiction here for any federal court.

Second, even if there were jurisdiction, the Plaintiffs have still failed to satisfy the *Winter* test, as a prior three-judge panel of this Court concluded in a published order. That decision is binding on this Court as a matter of law of the case—at a minimum, it presents a highly persuasive reading of the case. The host of federal claims Plaintiffs bring are only superficially similar to the federal claims that previous courts have found to be sufficient. In fact, Plaintiffs are challenging a politically neutral law that openly and publicly proclaims that it will treat differently situated individuals differently. That is not a violation of the Constitution, but rather normal legislation that inevitably imposes at least a mild burden on voters. Plaintiffs' statutory claims are equally frivolous, as each depends on language from statutes that does not confer an individual right on any of the Plaintiffs.

Third, even if Plaintiffs were not bringing wholly unmeritorious claims and had standing to invoke a federal court's jurisdiction, they would still not be entitled to an injunction because the other *Winter* factors cut strongly against them. Both Plaintiffs and the district court have recognized that Plaintiffs will suffer no injury at all if the NOTC option is struck from the ballot, because people who wish to express their preferences will simply undervote or refuse to vote. In contrast, both Edwards and Miller will suffer drastic harms if any preliminary injunction were to be granted: Edwards would lose his desired ballot option, while Miller would be forced to recall thousands of absentee ballots from voters such as overseas military servicemembers, in addition to being required to reprint millions of ballots that include the NOTC option. Furthermore, this is a dilemma entirely of Plaintiffs' own making: despite NOTC being on the books for over 35 years, they waited until 5 months before election day (and 3 months before ballots would begin to be printed) to bring suit. This decades-long delay not only provides an independent ground to dismiss the suit in its entirety, but also provides a strong equitable reason to deny a preliminary injunction that would wreak havoc on Nevada's voting process.

For all of these reasons, the preliminary stay should be dissolved and Nevada's election should be allowed to proceed in the same manner it has in the last three decades.

STANDARD OF REVIEW

The Court "review[s] de novo the district court's determination that [a plaintiff] has standing." *Lopez v. Candaele*, 630 F.3d 775, 784-85 (9th Cir. 2010) (quotation marks omitted). A plaintiff "bears the burden of establishing standing because he is the party invoking federal jurisdiction." *Id.* at 785. The Court "review[s] the district court's grant of a preliminary injunction for abuse of discretion." *Id.* "A district court abuses its discretion when it makes an error of law …." *United States v. 4.85 Acres of Land*, 546 F.3d 613, 617 (9th Cir. 2008).

ARGUMENT

In order to obtain a preliminary injunction, at least one of the Plaintiffs "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 20. Plaintiffs fail to meet any of these standards.

I. THE DISTRICT COURT WAS WITHOUT SUBJECT MATTER JURISDICTION TO AWARD MANDATORY PRELIMINARY INJUNCTIVE RELIEF

"In order to invoke the jurisdiction of the federal courts, a plaintiff must establish 'the irreducible constitutional minimum of standing,'" *Lopez*, 630 F.3d at 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).

Plaintiffs break down into two groups. Two plaintiffs, Riedl and Dougan (the "NOTC Plaintiffs"), allege that they would vote NOTC in November's election. Doc. 10 (Am. Comp. ¶¶ 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. *Id* (Am. Comp. ¶¶ 3-9, 12-13). Because each group of plaintiffs suffers from distinct defects in its standing allegations, their claims are addressed separately.

A. The NOTC Plaintiffs Lack Standing

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). In *Drake*, several active-duty military personnel sought to challenge President Obama's fitness for office; they claimed that 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." *Id.* 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. 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). 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, namely, voting for a candidate of their choosing. 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." ER XX (AC 2). The NOTC Plaintiffs do not ask the courts to direct 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 Edwards and other voters throughout Nevada—of an available, desired choice: even though they wish to vote for NOTC, they have brought suit to have that statute declared unconstitutional. Doc. 10 (Am. Comp. ¶¶ 10-11). In short, the "injury" that 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).

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 in "[e]very sample ballot or other instruction to voters," N.R.S. § 293.269(3). 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 counted for a candidate, 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. The Non-NOTC Plaintiffs Lack Standing

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

1. The Non-NOTC Plaintiffs Have Not Suffered An Injury

Initially, none of the non-NOTC Plaintiffs have suffered an "injury" that is cognizable by this Court, because they have no been denied any right or privilege. The Supreme Court made this principle clear in *United States v. Hays*: there, a group of plaintiffs challenged an allegedly racially gerrymandered district, without living in the district that was ostensibly redrawn on race-based motives. *See* 515 U.S. 737, 741-42 (1995) (O'Connor, J. 1995). The Supreme Court rejected the argument that "anybody in the State has a claim," *id.* at 744, based on the well-established proposition that any alleged "injury 'accords a basis for standing only to those persons who are personally denied equal treatment by the challenged discriminatory conduct," *id.* at 743-44 (some quotation marks omitted) (quoting *Allen v. Wright*, 468 U.S. 737, 755 (1984)). *Hays* also made clear that the mere fact that other citizens may be affected in some manner cannot confer standing on plaintiffs who are not so affected: "Of course, it may be true that the racial composition of [one district] would have been different if the legislature had drawn [another district] in another way. But an allegation to that effect does not allege a cognizable injury." *Id.* at 746.

As in *Hays*, the non-NOTC Plaintiffs cannot allege an injury because they have not been "personally denied equal treatment." Rather, their complaint is that since *other* individuals might vote for the NOTC option, the non-NOTC Plaintiffs

will somehow experience an injury. But this is no injury at all: simply because other voters may vote for a different option on the ballot does not impact the non-NOTC Plaintiffs' ability to vote in any manner or form. Whether or not NOTC is on the ballot, the non-NOTC Plaintiffs will still vote the same way and have their vote counted in exactly the same manner.[5] Because the non-NOTC Plaintiffs will not experience an injury, they do not have standing to sue.

2. Any Injury The Non-NOTC Plaintiffs May Experience Is One Shared By All Voters

Even if the Non-NOTC Plaintiffs experienced an injury, it would be nothing more than the same injury that every member of the public experiences, which is by definition insufficient to establish standing. 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

[5] Indeed, as described *infra*, the presence of NOTC on the ballot almost certainly *helps* the non-NOTC Plaintiffs since votes against their candidate will not, in the Plaintiffs' parlance, be "counted."

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 a core tenet of standing by alleging only 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. Doc. 10 (Am. Comp. ¶¶ 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" (Doc. 10 (Am. Comp. ¶¶ 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. Notably absent from these allegations is any claim that any of these non-NOTC Plaintiffs 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." Doc. 10 (Am. Comp. ¶¶ 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, *i.e.*, Woodbury and DeGraffenreid evidently believe that the availability of NOTC makes voters less likely to vote for Mitt Romney. Missing from the Complaint, however, is any explanation as to why an interest to have others vote for their desired candidate is anything more than a generalized grievance shared by the public. Indeed, it is precisely because every citizen shares this interest that we have elections.

In their Opposition to Miller and Edwards' motions for a stay of the district court's decision pending appeal before this Court (Dkt. 12) (the "Stay Opp."), Plaintiffs argued that the "Candidate Plaintiffs" suffered a "competitive injury" sufficient to confer standing. Stay Opp. 51 (citing *Drake*, 664 F.3d at 782 (dismissing candidate plaintiffs for lack of standing due to failure to allege sufficient injury)). But this case is nothing like the "competitive standing"

discussed in *Drake* and recognized in other decisions. In those cases, when a candidate who has satisfied a state's eligibility requirement seeks to have a rival who failed to comply with those requirements removed from the ballot, there is no question that the plaintiff is *harmed* by the violation he alleges. Here, in contrast, Romney electors are, on their own theory, *helped* by the provision they claim violates the law—the subsection that directs the Secretary of State to "disregard" NOTC "votes." These Plaintiffs do not actually challenge the "eligibility" of NOTC or claim there is a basis in law for declaring it an invalid ballot choice (their only ground for striking subsection (1) is their doubtful "severability" claim, discussed *infra*). Indeed, the only thing these plaintiffs share with candidates in those cases is a *desire* to have competitors thrown off the ballot, but that is not an actionable *injury* absent an invasion of some legal *right* belonging to *these Plaintiffs*.

And unlike in genuine "competitive injury" cases, where opposing candidates and their electors are the logical ones to enforce rules designed to prevent opponents from taking shortcuts around state requirements, here there is no practical barrier preventing one of the alleged "disenfranchised" voters from vindicating his rights directly. Indeed, the candidate Plaintiffs' efforts are foreclosed by basic rules limiting "third party standing," *i.e.*, suing to vindicate someone else's rights. *See Lopez*, 630 F.3d at 792 ("Plaintiffs who have suffered

no injury themselves cannot invoke federal jurisdiction by pointing to an injury incurred only by third parties."). It is plainly obvious that the candidate Plaintiffs *do not* have interests that are identical to or even loosely aligned with those whose rights they claim are being violated, *i.e.*, NOTC voters. The candidate Plaintiffs do not want subsection (1) upheld—they want it invalidated—and they if anything benefit from the provision they claim is illegal. Whatever latitude "competitive standing" might afford candidates to advance the legal rights of their supporters (and enforce laws designed to keep opponents from gaining unfair advantage), it does not permit them to represent others, NOTC voters like Edwards, to whose interests they are inimical.

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.

3. The Non-NOTC Plaintiffs' Injury, If Any, Is Not Caused By The Challenged Subsection Of The NOTC Statute

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. This portion of the statute, however, will never apply to the non-NOTC Plaintiffs, since they do not intend to exercise that option. Accordingly, they cannot claim that their vote will ever be, in Plaintiffs' words, "disregard[ed]." Doc. 10 (Am. Comp. 1); *see, e.g.*, *id* (Am. Comp. ¶ 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." *Id* (Am. Comp. ¶¶ 12(c), 13(c)); *see also id* (Am. Comp. ¶ 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 njury is caused by N.R.S. § 293.269(1), not N.R.S. § 293.269(2). Indeed, Plaintiffs would be worse off if NOTC "votes" were given effect, since Nevada would then be counting votes *against* their desired candidates. 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.

In addition, 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." *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 due not to Miller, but to those individual voters who independently choose NOTC and who are not before this court. That is yet another reason why Plaintiffs are unlikely to succeed on the merits.

4. 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 N.R.S. § 293.269) is not the "predicate" for the claimed injury. *Bronson*, 500 F.3d at 1113; *see* Part I.B.3, *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 before a motion panel of this Court, even without NOTC "voters retain the ability to refuse to vote for any of the named candidates in a particular statewide race." Stay Opp. 14. The district court likewise recognized that there is no harm caused by NOTC, since individuals can always leave a specific race blank. ER 7 (Tr. 55). As the district court asked, "Where's the harm?" (ER 7 Tr. 55)—Edwards agrees that there is none to voters from the presence of the option on the ballot—though Miller and absentee voters such as military servicemembers will suffers very real harm if NOTC is struck from the ballot, as described *infra*—and since there is nothing that the district court could have done to alleviated such speculative harm, the Candidate Plaintiffs cannot allege redressability.

This conclusion is one that courts have repeatedly reached. When redressability is "speculative" where an alleged injury "involves numerous third parties … whose independent decisions may not collectively have a significant effect" on the challenged outcome, a court is without standing. *Allen*, 468 U.S. at 759. 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.

II. THE DISTRICT COURT'S INJUNCTION WAS WITHOUT ANY BASIS IN LAW

In addition to the district court lacking jurisdiction to hear the claims of any of the Plaintiffs, its decision to impose a far-reaching injunction on Miller was fatally flawed because even if a court could hear Plaintiffs' claims, those claims are without merit.

A. Plaintiffs Failed To State A Valid Cause Of Action, Let Alone A Likelihood Of Success

As a three-judge panel of this Court previously recognized, Plaintiffs here are not entitled to equitable relief because they fail to meet the *Winter* factors. Because that three-judge panel considered and decided the identical factors at issue on the merits of this appeal, that ruling is binding on future panels as law of the case.[6] And even if not law of the case, the motions panel's ruling is entirely correct for the reasons given by Judge Reinhardt in his explanation for the motions panel's ruling.

[6] The motions panel did not rule on the jurisdictional arguments discussed *supra*.

Due to the district court's machinations, the motions panel entered a published order granting Miller and Edwards' emergency motions to stay pending appeal, and cited *Winter*, 555 U.S. 7. Stay Order 3. As Judge Reinhardt explained, the panel granted the emergency motion to stay because "the likelihood of success on the merits favors the state," especially since "Plaintiffs' arguments offer an inadequate basis for this court to conclude that Nevada's 37-year-old statute providing for 'None of these Candidates' ballots is contrary to the Constitution or to any federal statute." Stay Order 5 (Reinhardt, J. concurring) (citing *Winter*, 555 U.S. 7). Furthermore, as Judge Reinhardt reasoned, "[a] failure to stay forthwith any injunction issued by the district court would accordingly result in irreparable injury to the State of Nevada and its citizens, and would be directly contrary to the public interest." Stay Order 5 (Reinhardt, J. concurring).

That published ruling issued by a three-judge panel is binding on future panels as law of the case. Under that doctrine, "The law of the case applies to issues decided explicitly or by necessary implication in this court's previous disposition." *Hanna Boys Ctr. v. Miller*, 853 F.2d 682, 686 (9th Cir. 1988) (quotation marks omitted); *see also Disimone v. Browner*, 121 F.3d 1262, 1266 & n.1 (9th Cir. 1997) (applying law of the case to one-line summary order issued by prior panel). Following the sensible rule that "[w]here litigants have once battled for the court's decision, they should neither be required, nor without good reason

permitted, to battle for it again," *id.* at 1266-67 (quoting *Zdanok v. Glidden Co., Durkee Famous Foods Div.*, 327 F.2d 944, 953 (2nd Cir. 1964) (Friendly, J.)), prior motions panel determinations are binding where the record before the motions panel is nearly identical to the one before the merits panel and the "entire focus" of the motions panel's decision is the same as the merits panel's, *Hanna Boys Ctr.*, 853 F.2d at 685.

Here, the very issue (as well as the identical record) that was before the motions panel is now the issue pending appeal before the merits panel. The entirety of the motions panel's decision was that Plaintiffs failed to meet the *Winter* factors. Stay Order 3. It is undisputed (nor could it be disputed) that *Winter* states the relevant test for both a preliminary injunction and a motion to stay a case pending appeal. *Golden Gate Rest. Ass'n v. City & Cnty. of San Francisco*, 512 F.3d 1112, 1116 (9th Cir. 2008) (noting that the test for a motion for a stay pending appeal comes from " a test originally formulated for granting a preliminary injunction"); *see also* Stay Opp. 1 (citing "standard for a stay of a preliminary injunction" for the test for a motion for a stay pending appeal). As Judge Reinhardt elaborated, the panel granted the motion for the stay pending appeal based on the identical *Winter* factors this Court is now called upon to consider: "the likelihood of success on the merits favors the state," the injunction will "accordingly result in irreparable injury to the State of Nevada and its

citizens," and a preliminary injunction "would be directly contrary to the public interest." Stay Order 5 (Reinhardt, J. concurring); *see also* Stay Order 3. The motions panel further recognized that the equities tip against the Plaintiffs, who waited decades to seek a "preliminary injunction order enjoining Nevada's nearly 37-year-old statute." Stay Order 3. Because the motions panel previously considered and decided the very question at issue now before this Court, there is no good reason to permit Plaintiffs to relitigate it again.[7]

1. Plaintiffs Raised No Plausible Claim Under The Fourteenth Amendment

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.

[7] Even if this panel declines to be bound by a prior, published decision of a three-judge panel, that decision is nonetheless a highly persuasive reading of the case.

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 Edwards and Miller's favor here, because NOTC has been a part of Nevada law for some 35 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.

As for the Plaintiffs that will actually vote NOTC, 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. That argument fails as a matter of law, because "[e]vidence of different treatment of unlike groups does not support an equal protection claim." *Wright v. Incline Village Gen. Improvement Dist.*, 665 F.3d 1128, 1140 (9th Cir. 2011) (internal quotation marks omitted). Voters who choose to vote for no candidate are simply not identically situated to voters who choose to vote for a candidate (no matter which one). Just as there is no constitutional violation suffered by every voter in a state when a single voter decides to not vote a specific race, there is no

constitutional violation for Nevada to treat those who vote for NOTC differently than those who vote for a candidate.

The fact that Nevada provides for further elections when a candidate whose name appears on the ballot dies before election day, N.R.S. §§ 293.165, 293.368, 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, Edwards, and other Nevada voters well know the consequences of voting NOTC. *See* N.R.S. §§ 293.269(3) (requiring all "instructions to voters" to "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.").[8]

Finally, if there were any legally cognizable burden imposed by NOTC, it is outweighed by the State's interests. *See Dudum*, 640 F.3d at 1115-17. Plaintiffs repeatedly quote the Supreme Court's statement that "ballots serve to elect candidates, not as forums for political expression" (Stay Opp. 3) (quotation marks omitted), but while States are not required to provide maximal expression through

[8] 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).

the ballot, 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).

2. Plaintiffs' Late-Arriving "Unconstitutional Conditions" Claim Is Devoid Of Merit

In their Stay Opposition, 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* Stay Opp. 41-42. But they are unlikely to succeed on this late-breaking theory, either.

The focus of the unconstitutional conditions doctrine is inappropriate pressure or 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. All 50 States provide an available way to express dissatisfaction on election day that 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.

Plaintiffs argue that the law is nonetheless unconstitutional because (1) it would be "reasonably 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 (*e.g.*, Doc. 10 (Am. Comp. ¶ 24); and (2) that a voter could "reasonably" want that "alternative" (Stay Opp. 42). 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.

3. Plaintiffs' Statutory Claims Are Without Merit

Plaintiffs have no likelihood of succeeding on their Voting Rights 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 it 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.

Plaintiffs' HAVA claims are similarly without merit. At least two courts have already considered whether HAVA § 301, 42 U.S.C. § 15481 creates an individually enforceable right of action, and have 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, and Plaintiffs' HAVA claims must fail.

III. THE OTHER EQUITABLE FACTORS ALSO COMPEL REJECTION OF PLAINTIFFS' CLAIM

The district court also erred in granting a preliminary injunction because the remaining equitable factors under the *Winter* test—that the plaintiff is likely to suffer irreparable harm in the absence of preliminary relief, the balance of equities tips in his favor, and that an injunction is in the public interest—all weigh against an injunction.

A. Plaintiffs Cannot Demonstrate A Likelihood Of Irreparable Injury

Plaintiffs' claims of injury, even if sufficient to give them Article III standing, would not come close to satisfying the heavy burden necessary to obtain a mandatory preliminary injunction. "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 35 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.

Plaintiffs cannot meet this heavy burden. As discussed above, none of the Plaintiffs can show that their constitutional or statutory rights are violated if a voter selects NOTC. Indeed, as Plaintiffs conceded in their Stay Opposition, they will suffer no injury at all whether or not NOTC remains on the ballot, since "[a]lthough the injunction will prevent voters from selecting 'None of these candidates' in statewide races, voters still may refrain from voting for the entire slate of candidates running in a particular election by simply undervoting—*i.e.*, skipping—that race and moving on to the next race on the ballot." Stay Opp. 13. Accordingly, any injury that they claim will be caused by a stay is far outweighed by the injury that denying a stay will cause Edwards.

Plaintiffs' own allegations make this point clear. 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." Doc. 10 (Am. Comp. ¶¶ 11). However,

the autonomous choices of voters such as Plaintiff Dougan do not violate their own constitutional or statutory rights, or those of other electors. 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.

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. 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 v. Bradbury*, Plaintiffs argued that the appearance of allegedly misleading language on the ballot would violate their constitutional rights and "render the election fundamentally unfair." 2007 WL 2733826, at *1 (D. Or. Sept. 12, 2007). 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 makes clear that "speculative 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 35 years, and the chance of this occurring in a Presidential election is infinitesimal. In contrast, the injury to Edwards without a stay is certain.

B. The Balance Of Equities Tips Sharply Against Plaintiffs, Whose Claims Are Barred By Laches

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 waited literally 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 "[a]s 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 Stay Opp. 6).

Thus, for example, in a recent case on which Plaintiffs themselves rely (Stay Opp. 32), 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 (Stay Opp. 51), 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. Doc. 10 (Am. Comp. ¶¶ 29-34). Moreover, at least one of the Plaintiffs, Bruce Woodbury, ran for public office in 1982, 1984, 1988, 1992, 1996, 2000, and 2004, yet he has only now, in 2012, decided that NOTC "violates the U.S. Constitution and federal law" (*Id*

(Am. Comp. ¶ 1)).[9] 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, participated in past elections (see *id* (Am. Comp. ¶¶ 3, 4, 6, 7) (Plaintiffs Townley, Whitlock, Thomas, and Wood all registered members of political parties)), their delay in bringing suit is an "an 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 Miller, on Edwards, and on the electorate at large. Ballots have already been printed and distributed to absentee voters, including military voters. Stay Order 5-6 (Reinhardt, J., concurring); ER 7 (Tr. 58). Any injunction will thus require the Miller to recall the ballots that have been distributed, reprint ballots, and redistribute them to absentee voters, who may have already voted on their absentee ballots. 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

[9] *See* http://www.clarkcountynv.gov/Depts/parks/Documents/centennial/commissioners/commissioner-b-woodbury.pdf.

voters." *Id.*; *see also Fulani*, 917 F.2d at 1031 (relying on same reasoning from *Williams* to deny plaintiffs' claim based on laches). Moreover, this situation is entirely one of Plaintiffs' own making: though NOTC has gone unchallenged over the last 35 years, Plaintiffs waited to file suit on June 11, 2012—less than three months before the Secretary of State was required to begin printing ballots. 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.

CONCLUSION

For the foregoing reasons, the district court's grant of a preliminary injunction should be reversed.

Respectfully submitted,

Dated: September 24, 2012

By: s/_____

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REQUEST FOR ORAL ARGUMENT

Intervenor-Defendant-Appellant Edwards respectfully requests that this Court hear oral argument in this case.

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Intervenor-Defendant-Appellant states that it is not aware of any related cases pending in this Court.

CERTIFICATE OF COMPLIANCE WITH FRAP 32(A)(7)(C) & CIRCUIT RULE 32-1

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32-1, the attached opening brief is proportionately spaced, has a typeface of 14 points or more and contains 12,634 words.

_____
Attorney for Intervenor-Defendant-Appellant

September 24, 2012
Date

CERTIFICATE OF SERVICE

I, John P. Parris, hereby certify that on September 24, 2012, I electronically filed the foregoing "Opening Brief of Intervenor-Defendant-Appellant" with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Respectfully submitted,

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