Nos. 12-16881, 12-16882

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WENDY TOWNLEY, AMY WHITLOCK, ASHLEY GUNSON, HEATHER THOMAS, DAX WOOD, CASJA LINFORD, WESLEY TOWNLEY, JENNY RIEDL, TODD DOUGAN, BRUCE WOODBURY, and JAMES DEGRAFFENREID,

Plaintiff-Appellees,

v.

ROSS MILLER, Secretary of State of Nevada, in his official capacity,

Defendant-Appellant,

and

KINGSLEY EDWARDS,

Intervenor Defendant-Appellant.

On appeal from the U.S. District Court for the District of Nevada

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JURISDICTIONAL STATEMENT

Plaintiffs concur in the State's jurisdictional statement.

STATEMENT OF ISSUES

Did the district court properly issue a preliminary injunction against a Nevada law that presents voters with a ballot option in statewide races labeled "None of These Candidates," allows voters to cast their ballots for that option "in the same manner" as they would vote for a named candidate, and then requires the Secretary of State to ignore such votes in determining the election's outcome?

STATEMENT OF THE CASE

Plaintiffs concur in the State's Statement of the Case.

On October 24, 2012, the Nevada Republican Party moved to join this appeal as a Plaintiff-Appellee, and Plaintiffs concurrently sought leave in the District Court to file a Second Amended Complaint adding the Nevada Republican Party as a Plaintiff. In the event this Court grants the Nevada Republican Party's motion, it wishes to adopt and join in this brief.

STATEMENT OF FACTS

The Nevada law governing "None of These Candidates," 1975 Nev. Stat. 475, *codified at* Nev. Rev. Stat. §§ 293.269, 293B.075, is comprised of two main subsections. Subsection 1 requires the State to include a line on the ballot reading

"None of These Candidates" for each race for statewide office, including President of the United States. Nev. Rev. Stat. § 293.269(1); *see also id*. § 293B.075 (requiring mechanical voting systems to allow voters to "indicate a vote against all candidates").[1]

Subsection 1 specifies that the line for "None of These Candidates" must be "equivalent to the lines on which the candidates' names appear," and be printed immediately after them. *Id*. § 293.269(1). It further requires that the line for "None of These Candidates" must "contain a square in which the voter may express a choice of that line in the same manner as the voter would express a choice of a candidate." *Id*. Thus, "None of These Candidates" appears on the ballot as an "equivalent" choice to each of the named candidates, and a person may cast his vote for it "in the same manner" as he would vote for any of those candidates. *Id*.; *see also id*. § 293.269(3) (explaining that voters may not vote for both "None of these candidates" and one of the named candidates).

Subsection 2 provides that "[o]nly votes cast for the named candidates shall be counted in determining nomination or election to any statewide office . . . or the selection of presidential electors," although the Secretary of State must report the

[1] Under Nevada law, a vote for a candidate for President of the United States counts as a vote for the slate of presidential electors (*i.e.*, members of the electoral college) that the candidate's party filed with the Secretary of State. Nev. Rev. Stat. § 298.025. Thus, a vote for Governor Mitt Romney for President in the 2012 general election, for example, is actually a vote for Plaintiffs Woodbury and DeGraffenreid to become Nevada's presidential electors. EOR 117.

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

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

Alternatively, the legislature could have required that a follow-up election be held for that office, similar to run-off elections that sometimes must be held shortly after Election Day in states that require candidates to receive an absolute majority, rather than simple plurality, of votes in order to prevail, *see, e.g.*, Ga. Code § 21-2-501(a); Tex. Elec. Code § 2.021. The legislature could have decided whether to

allow a candidate who lost to "None of These Candidates" to participate in any such follow-up election. Instead, the State chose to formally offer voters the chance to validly cast their ballots for "None of These Candidates," in "the same manner" as they would vote for a named candidate, Nev. Stat. § 293.269(1), and then treat those votes as legal nullities, *id*. § 293.269(2).

INTRODUCTION AND SUMMARY OF ARGUMENT

This case concerns the constitutionality and legality under federal law of a Nevada statute directing Defendant Secretary of State Ross Miller to include "None of These Candidates" as a ballot option in statewide races, Nev. Rev. Stat. § 293.269(1), while prohibiting him from counting any votes cast for that ballot option in determining the outcomes of those races, *id*. § 293.269(2). Under Nevada law, "None of These Candidates" is presented on the ballot in statewide races as an "equivalent" choice to the named candidates, and a voter may select it "in the same manner" as he would a named candidate. *Id*. § 293.269(1). Even if "None of These Candidates" receives a plurality or majority of votes cast, however, the Secretary of State must ignore those votes and declare one of the losing candidates—the one with the next-highest number of votes—to be the winner. *Id*. § 293.269(2). The district court properly entered a preliminary injunction barring enforcement of this statute. *See* EOR 143 (Minutes of Proceedings).

Under the district court's preliminary injunction, a voter remains free, in each statewide race, either to cast his vote for one of the named candidates, or to refrain from voting for any of those candidates by simply skipping that race on the ballot. This is the same range of alternatives that Nevada voters enjoy in all other races, such as for U.S. House of Representatives, the Nevada legislature, and countywide offices; and from which voters in ***every other state*** in the nation may choose in statewide races.

Furthermore, the preliminary injunction does not prevent voters from "sending a message" to government officials. A voter who is dissatisfied with the entire slate of candidates running for a statewide office may convey that displeasure by refraining from casting a vote in that race. Conversely, under the enjoined statute, a person may vote for "None of These Candidates" for any reason, such as his lack of knowledge about any of the candidates in a particular race, lack of interest in that race, inability to choose among several desirable candidates, or even a misconception that such a vote could have a legal effect. Thus, a vote for "None of These Candidates" does not send a clearer, more coherent, or different message than simply refraining from voting in a race.

The district court properly concluded that Nevada's "None of These Candidates" law, Nev. Rev. Stat. § 293.269, violates numerous provisions of the U.S. Constitution and federal law. A ballot cast for "None of These Candidates" is

a "vote" as a matter of Nevada statutory law, Nev. Rev. Stat. § 293B.075; Nevada administrative law, Nev. Admin. Code § 293B.090(2); state constitutional law, *see Ingersoll v. Lamb*, 333 P.2d 982 (Nev. 1959); and historical practice, *see infra* p. 15. Regardless of whether this Court agrees that a ballot cast for "None of These Candidates" constitutes a vote, however, § 293.269 violates both the U.S. Constitution and federal law.

On the one hand, if this Court agrees with the district court's finding that a ballot cast for "None of These Candidates" is a vote, EOR 14, then the State's refusal to count it is a direct violation of: (i) the Due Process Clause, U.S. Const., amend. XIV, § 1, which gives voters the right to "have their votes counted," *Reynolds v. Sims*, 377 U.S. 533, 554 (1964); (ii) the Elections Clauses, U.S. Const., art. I, § 4, cl. 1; *id*. art. II, § 1, cl. 2, which prevent states from dictating electoral outcomes by 66ignoring votes, *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 832-34 (1995); and (iii) the Voting Rights Act, which provides that a state official may not "willfully fail or refuse to . . . count . . . [a] person's vote," 42 U.S.C. § 1973i(a).

Likewise, the State's decision to treat votes for "None of These Candidates" differently than votes for named candidates violates: (i) the Equal Protection Clause, U.S. Const., amend. XIV, § 1, which prevents a State from "valu[ing] one person's vote over that of another," *Bush v. Gore*, 531 U.S. 98, 104-05 (2000) (*per*

curiam); (ii) the Elections Clauses (again), which prohibit a State from putting one valid and officially presented ballot alternative at a disadvantage relative to the others, *see Cook v. Gralike*, 531 U.S. 510, 525-26 (2001); and (iii) the Help America Vote Act ("HAVA"), which requires States to have "uniform and nondiscriminatory standards that define . . . what will be counted as a vote," 42 U.S.C. § 15481(a)(6). Even if HAVA does not create a private right of action, it preempts Nevada's inconsistent state law. *Gonzalez v. Arizona*, 677 F.3d 383, 390 (9th Cir. 2012) (*en banc*).

On the other hand, even if this Court concludes that a ballot cast for "None of These Candidates" is ***not*** a vote, § 293.269 still is unconstitutional, on four different grounds. ***First***, it establishes an unconstitutional condition, because a voter is offered the allegedly valuable opportunity to send a purportedly unique message to the politicians running for a particular office to "clean up their acts" only if he refrains from exercising his fundamental constitutional right to vote in that race. Nev. Rev. Stat. § 293.269(3). ***Second***, the Equal Protection Clause bars the state from treating ballots for named candidates—including deceased candidates, Nev. Rev. Stat. § 293.368(4)—as votes, while treating ballots for "None of These Candidates" as legal nullities. ***Third***, the Elections Clauses prohibit States from littering ballots in federal elections with "non-vote expressive choices" that can distort the elections' outcomes. ***Finally***, HAVA requires States

to have "uniform and nondiscriminatory standards that define what constitutes a vote." 42 U.S.C. § 15481(a)(6).

The district court's decision to enjoin the entire statute was proper, because it is inseverable. Federal law barred the district court from allowing "None of These Candidates" to remain on the ballot in federal races, with a vacancy being declared if that option receives a plurality of the votes. *See* 2 U.S.C. § 1 (providing that "a United States Senator from said State ***shall be elected*** by the people thereof" at "the regular election") (emphasis added); 3 U.S.C. § 1 (providing that "[t]he electors of President and Vice President ***shall be appointed***, in each State, on the Tuesday next after the first Monday in November") (emphasis added); *see also Voting Integrity Proj., Inc. v. Kiesling*, 259 F.3d 1169, 1175 (9th Cir. 2001).

More broadly, nothing in the legislative history suggests the legislature would have wanted "None of These Candidates" to be made a legally effective ballot option in either state or federal races. *See* EOR 91-99. Turning "None of These Candidates" from a way of "sending a message" into a legally effective vote is not merely allowing other provisions of the "None of These Candidates" statute to remain in effect, but rather fundamentally changing those other provisions' nature and effect. *Cf. County of Clark v. Las Vegas*, 550 P.2d 779, 788 (Nev. 1976). Thus, the district court properly enjoined the entire statute. *See Flamingo Paradise Gaming, LLC v. Chanos*, 217 P.3d 546, 555 (Nev. 2009).

ARGUMENT

The district court properly enjoined Nev. Rev. Stat. § 293.269. Subsection (2) requires Secretary Miller to ignore ballots cast for "None of These Candidates" in determining the outcome of statewide elections, and that provision is inseverable from the rest of the statute.

A court should issue a preliminary injunction if a plaintiff can demonstrate: "[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*, 555 U.S. 7, 20 (2008). "A stronger showing of one element may offset a weaker showing of another. For example, a stronger showing of irreparable harm to plaintiff might offset a lesser showing of likelihood of success on the merits." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). Even in cases where a court cannot say that a plaintiff is "likely to succeed on the merits," he is entitled to injunctive relief if he has raised "serious questions" as to the merits of the case, and the "balance of hardships tips sharply in [his] favor." *Id*. at 1131-32. The district court properly granted a preliminary injunction under either standard.

I. SECRETARY MILLER IS VIOLATING THE U.S. CONSTITUTION AND FEDERAL LAW BY REFUSING TO COUNT VOTES CAST FOR "NONE OF THESE CANDIDATES"

The district court properly found that Plaintiffs are likely to succeed on the merits of their claim, because Secretary Miller's refusal to count votes cast for "None of These Candidates" violates both the U.S. Constitution and federal law.[2] At the very least, Plaintiffs have raised a substantial question as to the merits. Section A establishes that ballots cast for "None of These Candidates" qualify as votes entitled to full legal and constitutional protection. Section B shows that Secretary Miller's refusal to count such votes violates numerous constitutional and federal statutory provisions.

A. Ballots Cast for "None of These Candidates" Are Votes

As the district court correctly found, ballots cast for "None of These Candidates" are votes. The district court explained, "It is a vote. It's a mark in a box. It's a specific vote against either one of the two above persons. It's an

[2] Intervenor Edwards attempts to preclude this Court from considering on this issue, since it held, in the context of ruling on Secretary Miller's and Edwards' stay motions, that Plaintiffs lacked a likelihood of success on the merits. Edwards Br. at 34-37. The "decision of a motions panel," however, "is not binding for purposes of law of the case." *Crystal Clear Commc'ns, Inc. v. Southwestern Bell Tel. Co.*, 415 F.3d 1171, 1176 n.3 (10th Cir. 2005) (internal citation omitted); *accord, Sammie Bonner Constr. Co. v. W. Star Trucks Sales, Inc.*, 330 F.3d 1308, 1311 (11th Cir. 2003); *see also Lambert v. Blackwell*, 134 F.3d 506, 512 n.17 (3d Cir. 1997) (holding that the conclusion of a motions panel "is not binding" on a merits panel because it typically lacks "the opportunity for the intensive study available to a merits panel").

expression of intent regarding the election. It seems to me it meets all the tests for a vote." EOR 14. Intervenor Edwards' brief repeatedly recognizes such ballots as votes. *See, e.g.*, Edwards Br. at 6-7 ("[M]ore than 10 percent of the Nevada electorate has voted NOTC."); *id*. at 7 ("[I]n two races in 1976 and 1978 NOTC did win the most votes of any option presented to the voters."). Section 1 demonstrates that Nevada state law recognizes such ballots as votes. Section 2 shows that, even if this Court concludes that Nevada law does not formally recognize such ballots as votes, they still must be considered votes for purposes of the U.S. Constitution and federal law.

1. Ballots cast for "None of These Candidates" are votes under Nevada law

Ballots cast for "None of These Candidates" are votes under Nevada law as a matter of statutory text, administrative regulation, state constitutional law, judicial precedent, and past practice.

a. State statute

First, Nevada law expressly provides that ballots cast for "None of These Candidates" are votes, stating:

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

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

As the Secretary emphasizes, § 293.269(1) does not expressly use the term "vote" in connection with "None of These Candidates." Miller Br. at 14 n.2. Instead, that section provides that a "voter may express a choice of ['None of these candidates'] ***in the same manner*** as the voter would express a choice of a candidate." Nev. Rev. Stat. § 293.269(1) (emphasis added). Because there is no dispute that "express[ing] a choice" for a named candidate constitutes voting under Nevada law, "express[ing] a choice" for the ballot line for "None of These Candidates" likewise must qualify as voting.

b. Administrative regulation

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

> § 293B.090. *Testing of equipment and programs; reporting and correction of certain errors; use of mechanical recording devices which directly record votes electronically.*

> A county clerk shall conduct the test [of voting machines] . . . by [p]rocessing on a mechanical recording device . . . a group of logic and accuracy test ballots voted so as to record:
>
> (1) A vote for each candidate and a vote for and against each measure on the ballot;
>
> (2) ***A vote for "None of these candidates" for all statewide contests;***
>
> (3) "No selection made" for each contest and ballot measure . . . .

Nev. Admin. Code § 293B.090(2)-(3)(a)(1)-(4) (emphasis added). These regulations expressly distinguish between a "vote" for "None of These Candidates" and ballots on which "No selection" is made. *Id*.

c. State constitutional law and judicial precedent

The Nevada Supreme Court has recognized that, under the Nevada Constitution, when an eligible and registered voter validly selects from among the officially presented ballot options for a particular office, that selection is a "vote" which must be given legal effect, even if the selected option does not contain the name of a qualified, eligible candidate. In *Ingersoll v. Lamb*, 333 P.2d 982 (Nev. 1959), the court construed a provision of the Nevada Constitution that provides, "The persons having the ***highest number of votes*** for the respective offices shall be elected." *Id*. at 983 (quoting Nev. Const., art. V, § 4) (emphasis added).

The *Ingersoll* Court had to determine whether ballots cast for a deceased candidate whose name appeared on the ballot (who obviously was ineligible to

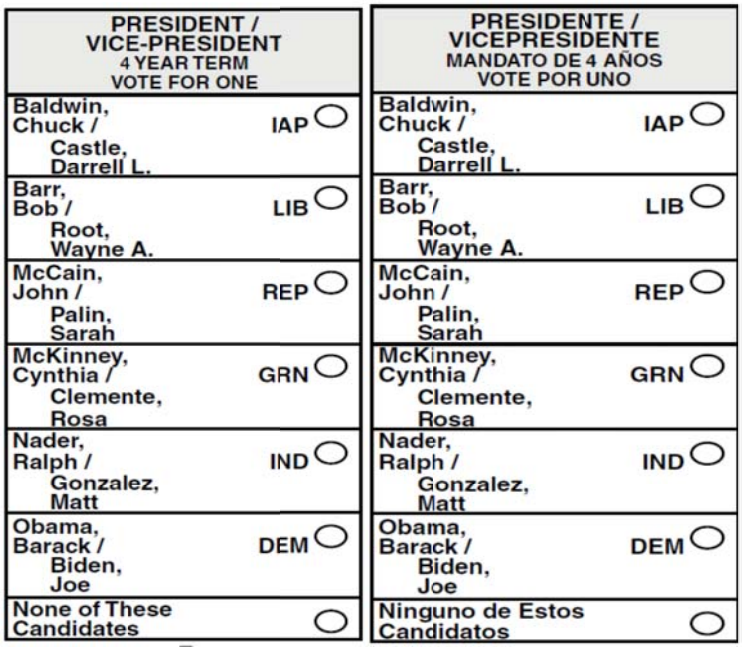
assume office) qualified as "votes" under this provision, or if those ballots instead should be disregarded, which would make the candidate with the next-highest number of votes the winner. At the time, Nevada did not have a statute addressing the issue.

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

d. Past practice

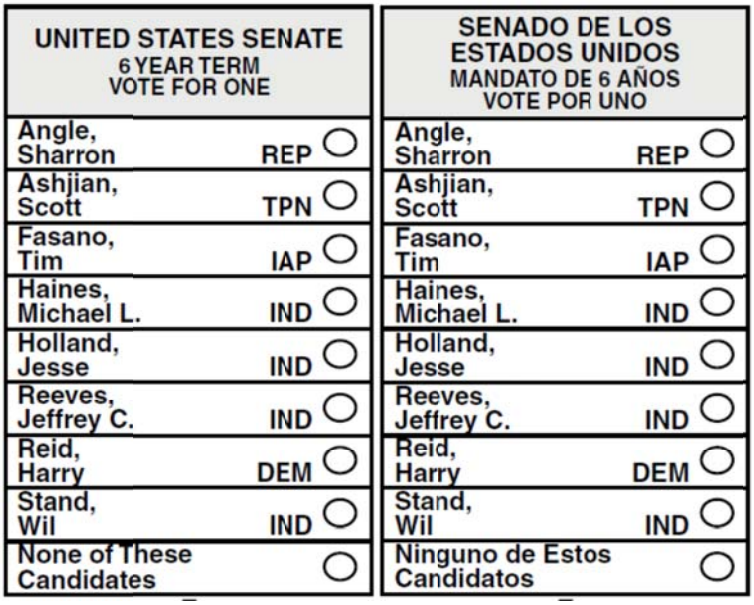
Finally, as a matter of past practice, "None of These Candidates" historically has been presented to voters as a valid way to vote:

2008 general election:



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

2010 general election:



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

Whether in English or Spanish—"VOTE FOR ONE" or "VOTE POR UNO"—the ballot itself has made clear that a ballot cast for "None of these candidates" (or "Ninguno de Estos Candidatos") is a "vote." Tellingly, the ballot

does ***not*** say "VOTE FOR A NAMED CANDIDATE OR INSTEAD SEND A NON-VOTE EXPRESSIVE MESSAGE."

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

2. Alternatively, ballots cast for "None of These Candidates" should be treated as votes under the U.S. Constitution and federal law

Even if this Court concluded that ballots cast for "None of These Candidates" are not votes under Nevada state law, they still are entitled to be recognized and protected as votes under federal law and the U.S. Constitution. When a plaintiff alleges that state officials are violating his right to vote, but the act at issue does not constitute "voting" under state law, the court has an independent obligation to consider whether it nevertheless constitutes "voting" under federal law and the U.S. Constitution. *See Green v. City of Tucson*, 340 F.3d 891, 897 (9th Cir. 2003) (holding that signatures on a petition to incorporate a municipality "are the constitutional equivalent of votes"); *Hussey v. City of Portland*, 64 F.3d 1260, 1265 (9th Cir. 1995) (holding that written "consents" to annexation "legally . . . must be treated as votes"). "Labelling [sic] cannot be dispositive," this Court explained, "otherwise a state could escape the laws protecting voters." *Hussey*, 64 F.3d at 1263.

a. Ballots for "None of These Candidates" are "votes" under the U.S. Constitution and federal law because they are official expressions of voters' will and otherwise are presented as votes

Ballots cast for "None of These Candidates" must be considered votes under federal law. In determining whether something "must be treated as [a] vote" for federal constitutional or statutory purposes, the court must consider whether it is "analytically like," *Hussey*, 64 F.3d at 1265, or "sufficiently similar to," *Green*, 340 F.3d at 897, a vote.

Federal courts have recognized, "In common parlance 'vote' is defined as 'the expression of one's will, preference, or choice,' or 'to express the will or a preference in a matter by ballot, voice, etc.'" *United States v. Cole*, 41 F.3d 303, 308 (7th Cir. 1994) (citing Black's Law Dictionary 1576 (6th ed. 1990); Webster's New World Dictionary 1593 (2d College ed. 1984)); *Montero v. Moyer*, 861 F.2d 603, 607 (10th Cir. 1988) ("The word 'vote' involves actions pertinent to registering one's choice at a special, primary, or general election. . . . [It is] '[the] formal expression of opinion or will in response to a proposed decision.'") (*citing* Webster's Third New International Dictionary 2565 (3rd ed. 1981)); *see also Green*, 340 F.3d at 897 (holding that "a vote . . . is an expression of a registered voter's will"). A ballot cast for "None of These Candidates" easily falls within these definitions, because it reflects the voter's will, preference, and choice.

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

b. The Secretary's proposed standard for determining whether a ballot qualifies as a vote under federal law is erroneous

Secretary Miller argues that this Court's rulings in *Green*, 340 F.3d at 897-98, and *Hussey*, 64 F.3d at 1264-65, establish a "three-prong" test for determining whether something qualifies as a "vote." *See* Miller Br. at 10-11. The Secretary maintains: "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." *Id*. at 11. A ballot cast for "None of These Candidates," Secretary Miller argues, cannot be a vote because it does not and cannot determine "who should represent the people." *Id*. at 13.

This argument fails for three reasons. First, Secretary Miller's position is flatly inconsistent with the Supreme Court's ruling in *United States v. Classic*, 313 U.S. 299 (1941), *cited by* Miller Br. at 11-12. Second, the Secretary's reasoning is tautological, and would effectively bar many indisputably valid types of "vote denial" claims. Third, his argument is based on an inaccurate and incomplete reading of *Green*, 340 F.3d at 897-98, and *Hussey*, 64 F.3d at 1264-65, themselves.

First, this argument is inconsistent with the Supreme Court's ruling in *United States v. Classic*, 313 U.S. 299 (1941), upon which Secretary Miller heavily relies, *see* Miller Br. at 11-12. The *Classic* Court held that, when a State chooses to make primary elections "an integral part of [its] election machinery," ballots cast in those primaries must be counted as votes and receive full constitutional protection, even though a primary does not and cannot result in the election of a public official. *Id*. at 317-18, *citing* U.S. Const., art. I, §§ 2, 4.

The Court emphasized that the right to vote extends to all validly cast ballots in a primary, regardless of whether the primary "invariably, sometimes ***or never*** determines the ultimate choice of the representative." *Id*. at 318 (emphasis added);

see also Hussey, 64 F.3d at 1264 (holding that an act may count as a vote even if it "has no direct, dispositive effect"). The Court further elaborated that the Constitution protects "the right to cast a ballot and to have it counted . . . whether for the successful candidate or not." *Classic*, 313 U.S. at 318; *id*. at 314 (recognizing the right of voters "to have their ballots counted"); *id*. at 315 (reaffirming the constitutional right of voters "to cast their ballots and have them counted").

Voters who cast their ballots for "None of These Candidates" are participating in an "integral" stage of Nevada's electoral process, *id*. at 318, and therefore are entitled "to have their ballots counted," *id*. at 314. The fact that such ballots can "never determine[] the ultimate choice of the representative," *id*. at 318, and "has no direct, dispositive effect," *Hussey*, 64 F.3d at 1264, does not exclude them from constitutional protection. Such ballots are just as constitutionally protected as votes in primary elections, which also do not definitively determine the identity of the person who will assume public office, but may help to narrow or change the field. *Classic*, 313 U.S. at 317-18.

Second, the Secretary's reasoning is tautological. Plaintiffs contend that Secretary Miller's refusal to count ballots cast for "None of These Candidates" is unconstitutional and violates federal law. Secretary Miller argues in response that such ballots do not qualify as votes and need not be counted, because state law

prevents them from being counted. *See* Miller Br. at 10-11 (arguing that Secretary Miller is not required to give legal effect to votes for "None of These Candidates" because "there is no threshold at which [they] become [legally] effective").

The district court properly rejected this circular reasoning, stating to Secretary Miller's counsel, "[Y]ou've got a circular argument. You're saying it's not a vote because the state statute says you don't count it." EOR 14. Secretary Miller cannot rely on his own allegedly improper refusal to count ballots cast for "None of These Candidates" as evidence that such ballots are not "votes" that are entitled to be counted. The ***descriptive*** fact that State law prohibits Secretary Miller from giving legal effect to ballots validly cast for "None of These Candidates" cannot resolve the ***normative*** issue of whether such ballots ***should*** be given legal effect under the U.S. Constitution and federal law.

"Labelling [sic] cannot be dispositive; otherwise a state could escape the laws protecting voters." *Hussey*, 64 F.3d at 1263. Under Secretary Miller's reasoning, when Secretary Miller runs for re-election, he constitutionally could declare that he will not count ballots cast for his opponent, because, as a result of such refusal, such ballots would neither "resolve a political issue" nor "become[] effective" at any "threshold." Miller Br. at 12, 14. The Secretary's refusal to count ballots validly cast for "None of These Candidates" is what gives rise to the constitutional violation here; that act does not and cannot serve as its own

constitutional justification. Statutory and constitutional protections may not be evaded so easily.

Finally, the Secretary's argument is based on a misreading of *Green*, 340 F.3d 891, and *Hussey*, 64 F.3d 1260. This Court did not purport to establish a multi-factor test to be inflexibly applied to all future cases, but rather was describing the material facts of those particular cases. *See Green*, 340 F.3d at 897-98 (9th Cir. 2003) (discussing characteristics of petitions to incorporate a municipality that made signatures on them equivalent to votes); *Hussey*, 64 F.3d at 1263 (discussing characteristics of consent forms that made them equivalent to votes). In any event, Secretary Miller presented an incomplete and misleading view of the factors discussed in those cases.

In *Hussey*, 64 F.3d at 1262-63, the court held that residents' written "consents" to have their territory annexed by an adjacent municipality qualified as constitutionally protected votes. It first pointed out that such consents could be executed only "by registered voters," *id*. at 1263; *accord Green*, 340 F.3d at 897, exactly like ballots cast for "None of These Candidates." Next, it noted that the consents were "official expressions of an elector's will," *Hussey*, 64 F.3d at 1263; *accord Green*, 340 F.3d at 897, precisely like ballots cast for "None of These Candidates." Secretary Miller complains that such ballots "do[] not indicate the

voter's will on who *should* be elected," Miller Br. at 13 (emphasis in original), but that is not a requirement set forth in either *Hussey* or *Green*.

The *Hussey* Court also pointed out that consents were "required to resolve political issues" and "require a majority for success." *Hussey*, 64 F.3d at 1263; *accord Green*, 340 F.3d at 897. Ballots cast for "None of These Candidates," by comparison, resolve the political issue of whether any of the individuals running should assume the office at issue. The Secretary's allegedly unlawful and unconstitutional refusal to count such ballots is the only reason that a plurality or majority of them do not cause the "None of These Candidates" ballot option to prevail in the election. As discussed above, it is tautological for the Secretary to rely on the fact that he refuses to treat such ballots as votes as the normative constitutional jurisdiction for that very refusal to treat them as votes.

Although this Court has held that a state has discretion in choosing how to deal with blank ballots, on which a voter does not select any of the options presented, *see Bennett v. Yoshina*, 140 F.3d 1218 (9th Cir. 1998), *as amended* No. 97-16408, 1998 U.S. App. LEXIS 13350 (9th Cir. June 23, 1998), *cited by* Edwards Br. at 38-39, that case is easily distinguishable from the present situation. In *Bennett*, the plaintiffs challenged a state supreme court ruling that a state constitutional convention could not be held unless an absolute majority of voters in a referendum on that issue voted in favor of it. *Id*. at 1223. The plaintiffs argued

that this violated the Due Process Clause, because this effectively treated blank ballots, on which the voters did not cast any votes, as "no" votes. *Id*. at 1222-23. This Court rejected that argument, stating, "Voters who didn't care simply left the question blank. . . . They did not vote because they did not care or did not care enough to do so." *Id*. at 1227.

In this case, in contrast, voters are not waiving, or declining to exercise, their right to vote by leaving the ballot blank. Rather, Secretary Miller presents "None of These Candidates" as a ballot choice "equivalent" to named candidates, Nev. Rev. Stat. § 293.269(1), and voters may cast their votes for that option in "the same manner" as they would vote for one of the named candidates, *id*. Where properly registered and duly qualified voters affirmatively exercise their right to vote by validly selecting from among the officially presented alternatives on the ballot, Secretary Miller may not ignore those votes and treat them as legal nullities. *Reynolds v. Sims*, 377 U.S. 533, 554 (1964); *Classic*, 313 U.S. at 315; *Gray v. Sanders*, 372 U.S. 368, 380 (1963).

Thus, ballots cast for "None of These Candidates" are votes under both the dispositive standard that the Supreme Court established in *Classic*, 313 U.S. at 318 (holding that a person has "the right to cast a ballot and to have it counted," even if that ballot does not "determine[] the ultimate choice of the representative"), as well as this Court's rulings in *Green*, 340 F.3d 891, and *Hussey*, 64 F.3d at 1264

(holding that an act can be considered a vote and subject to constitutional protection, even if it "has no direct, dispositive effect").

B. Secretary Miller's Refusal to Count Votes Cast for "None of These Candidates" Violates the U.S. Constitution and Federal Law

Plaintiffs are likely to succeed on the merits of their claims because, as the district court correctly concluded, EOR 14, 56, Secretary Miller's refusal to count votes cast for "None of These Candidates" is both unconstitutional and illegal under federal law. Critically, Plaintiffs must show a likelihood of success (or even a "substantial question" as to the merits) concerning only one of these claims to support the district court's preliminary injunction. *See N.Y. Pathological & X-Ray Labs., Inc. v. INS*, 523 F.2d 79, 82 (2d Cir. 1975); *Choppers, Inc. v. Passaro*, 159 F. App'x 74, 75 (11th Cir. 2005) (*per curiam*); *United Healthcare Ins. Co. v. AdvancePCS*, 316 F.3d 737, 743 (8th Cir. 2002) (holding that a demonstration of likelihood of success on the merits of one claim "obviates the need for any further inquiry" as to the others).

1. Due Process (Count I)

Most basically, a State's intentional refusal to count votes that were properly cast by registered and duly qualified voters for an officially present ballot option violates the fundamental right to vote protected by the Due Process Clause, U.S. Const., amend. XIV, § 1. This Court "vehemently protect[s] every citizen's right

to vote, carefully and meticulously scrutinizing any alleged infringement." *Charfauros v. Bd. of Elections*, No. 99-15789, 2001 U.S. App. LEXIS 15083, at *23 (9th Cir. 2001). Regardless of the standard of review this Court chooses to use, Secretary Miller's refusal to count votes cast for "None of These Candidates" is a due process violation.

Supreme Court precedent requires this Court to treat § 293.269(2)'s prohibition on counting votes for "None of These Candidates" as a *per se* due process violation. Alternatively, this Court should apply strict scrutiny and invalidate the statute. At the very least, even if this Court holds that Nevada's "None of These Candidates" statute should be subjected to a lower level of scrutiny, it still should be invalidated because it substantially burdens the right to vote while not materially advancing important government interests.

a. *Per se* Due Process violation

Section 293.269(2) is a *per se* violation of the Due Process Clause because it prohibits Secretary Miller from counting votes cast for "None of These Candidates." The Supreme Court has declared, "It has been repeatedly recognized that all qualified voters have a constitutionally protected right to vote, and to ***have their votes counted***." *Reynolds*, 377 U.S. at 554 (emphasis added); *see also Classic*, 313 U.S. at 315 ("Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their

ballots and have them counted."); *United States v. Mosley*, 238 U.S. 383, 386 (1915) (equating "the right to have one's vote counted" with "the right to put a ballot in a box").

Under these cases, "[e]very voter's vote is entitled to be counted once. It must be correctly counted and reported." *Gray*, 372 U.S. at 380. This Court never has upheld a statute that allows election officials to intentionally disregard legally cast votes by properly registered and duly qualified voters in determining the outcome of an election. *Cf. Dudum v. Arntz*, 640 F.3d 1098, 1111 (9th Cir. 2011) (cited by Edwards Br. at 38) (rejecting due process challenge to a city's instant-runoff voting system because no one's votes were "disregarded in tabulating election results," and the plaintiff's claim that "the City's system discards votes is incorrect"); *Bennett*, 140 F.3d at 1227 (cited by Edwards Br. at 38-39) (rejecting due process challenge to State's method of treating blank ballots because "there was no disenfranchisement" and "[e]very ballot submitted was counted"). As the district court concluded, EOR 40 ("I think I agree with his argument on this one."), where properly registered and duly qualified voters affirmatively have exercised their right to vote by selecting from among the alternatives on the ballot, Secretary Miller is not free to ignore those votes and treat them as legal nullities. *Reynolds*, 377 U.S. at 554; *Classic*, 313 U.S. at 315; *Gray*, 372 U.S. at 380; *Mosley*, 238 U.S. at 386.

The Secretary argues that § 293.269(2) does not violate the Due Process Clause, because his refusal to count votes cast for "None of These Candidates" does not infringe "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." Miller Br. at 16 (*quoting Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997)). This standard is inapplicable, however, because Plaintiffs are not asking this Court to "expand the concept of substantive due process" to a new area, *Washington*, 521 U.S. at 720 (quotation marks omitted), but rather simply enforce the well-established right to have one's vote counted, *Reynolds*, 377 U.S. at 554; *Classic*, 313 U.S. at 315; *Gray*, 372 U.S. at 380. The Due Process Clause protects the right to vote, even when the vote at issue is unconventional or assumes a form that the Framers "did not have specifically in mind." *Classic*, 313 U.S. at 316; *see, e.g.*, *Hussey*, 64 F.3d at 1266 (holding that an ordinance interfering with a landowner's decision regarding whether to execute a "consent" to annexation "severely and unreasonably interfere[d] with the right to vote").

Secretary Miller further argues that, "[o]rdinarily, to succeed on a due process claim in the elections context, plaintiffs must demonstrate that the election was conducted in a fundamentally unfair manner." Miller Br. at 16, *citing Bennett*, 140 F.3d at 1226-27. That standard applies only in the context of post-election challenges, however, where the plaintiff is seeking to undo a completed election.

See, e.g., *Bennett*, 140 F.3d at 1221 ("Plaintiffs ask us to invalidate the vote on the ground that . . . the voters' substantive due process and free speech rights were violated."). This case, in contrast, presents a general challenge to Nevada's decision to intentionally decline to accord any legal effect to votes for "None of These Candidates." The statute is *per se* unconstitutional under binding Supreme Court precedent that recognizes voters' Due Process right to have their validly cast votes counted. *Reynolds*, 377 U.S. at 554; *Classic*, 313 U.S. at 315; *Gray*, 372 U.S. at 380; *Mosley*, 238 U.S. at 386.

b. Strict scrutiny

Even if this Court declines to apply a *per se* rule to § 293.269(2), it should apply strict scrutiny to the statute and invalidate it. When a law, such as Nevada's "None of These Candidates" statute, imposes "severe restrictions" on a person's right to vote, it is subject to strict scrutiny. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). Section 293.269(2) substantially burdens the right to vote because it provides that votes for "None of These Candidates" may not be counted or given legal effect in determining the outcome of an election. Nev. Rev. Stat. § 293.269(2).

This is similar to *Hussey*, 64 F.3d at 1262, in which this Court invalidated a state law that allowed a city to annex an adjacent area if it received written consent from a majority of the residents there. One city enacted an ordinance providing "a

subsidy, or reduction in hook-up costs, for mandated sewer connections" to people from a particular area who submitted written consents to annexation. *Id*. This Court held that this consent process was "the constitutional equivalent of 'voting,'" with the submission of a written consent constituting a "yes" vote, and the refusal to provide consent constituting a "no" vote. *Id*. at 1263. It went on to rule that the ordinance, which conditioned a subsidy "on how an elector votes," was subject to strict scrutiny because it "severely and unreasonably interferes with the right to vote." *Id*. at 1266-67.

If conditioning a subsidy on whether a person votes a certain way qualifies as a "severe" burden on the right to vote that warrants strict scrutiny, then wholly disregarding a person's vote based on which of the legally permissible ballot options she selects likewise must be considered a severe restriction. The Secretary's intentional refusal to count or accord any legal effect to votes cast for "None of These Candidates" thus should be subject to strict scrutiny.

To survive strict scrutiny, an election law must be "'narrowly drawn to advance a state interest of compelling importance.'" *Burdick*, 504 U.S. at 434 (*quoting Norman v. Reed*, 502 U.S. 279, 289 (1992)). Nevada's "None of These Candidates" provision satisfies neither prong of this test. Even assuming that the Secretary has a valid interest in allowing voters to express disdain at the entire field of candidates running for a particular office, *see* Miller Br. at 36; Edwards Br.

at 6, that interest hardly rises to the level of "compelling." *See* EOR 28 (Jones, C.J.) ("I just don't buy the argument that there's any compelling need."). Nor does the State have a "compelling" interest in refusing to count votes for "None of These Candidates." Miller Br. at 35; *cf.* EOR 26-27 (Jones, C.J.) (listing, as examples of compelling interests, "[s]aving lives, putting out fires").

Additionally, § 293.269 is not narrowly drawn, because Secretary Miller need not disenfranchise anyone to allow voters to cast their ballots for "None of These Candidates." As discussed earlier, there are several ways in which the legislature could have given legal effect to votes cast for "None of These Candidates" if they constitute a plurality or majority of the vote, such as by treating the office at issue as being vacant when its term commences, or requiring that a follow-up election be held, perhaps with different candidates. This would be similar to run-off elections in states that require candidates for statewide offices such as U.S. Senate to receive absolute majorities to win. *See, e.g.*, Ga. Code § 21-2-501(a); Tex. Elec. Code § 2.021.

Thus, Nevada's "None of These Candidates" statute fails strict scrutiny and violates the Due Process Clause.

c. Balancing test

Even if this Court determines that Nevada's "None of These Candidates" statute does not impose a "severe" restriction on the right to vote and applies a

more lenient standard of review, *cf*. Miller Br. at 32-33, that law still violates the Due Process Clause. To adjudicate a Due Process challenge to an election statute that does not trigger strict scrutiny, the court "must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule," determine "the legitimacy and strength of each of those interests," and "consider the extent to which those interests make it necessary to burden the plaintiff's rights." *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1992); *see also Burdick*, 504 U.S. at 434; *Weber v. Shelley*, 347 F.3d 1101, 1106 (9th Cir. 2003).

The only state interest that Nevada's "None of These Candidates" law serves is to allow voters to use their votes to "express [their] nonconfidence" in the entire field of candidates running for a particular office, and to tell each candidate "to 'clean up your act' if you get into office." EOR 91-92 (Nevada Assembly, Election Committee minutes). The strength of this interest is minimal. The U.S. Supreme Court has held that "ballots serve primarily to elect candidates, not as fora for political expression," *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363 (1997), or as "a means of giving vent to . . . pique," *Burdick*, 504 U.S. at 438 (quotation marks omitted).

Moreover, voters have a virtually limitless range of alternate ways of either expressing their overall dissatisfaction with the candidates running for a particular office, or attempting to persuade government officials to perform better. Thus, the

State's interest in placing "an unnecessary stigma upon the winning candidate, who may prove himself to be a very valuable and worthy public official," if any, is insubstantial. EOR 96-97 (letter from Clark County Registrar of Voters Stanton B. Colton to Assemblyman David Demers (Mar. 7, 1975)). It certainly is not sufficient to warrant the total disregard of legally cast votes by properly registered and duly qualified voters.

Thus, no matter what standard of scrutiny this Court imposes, Nevada's "None of These Candidates" law violates the Due Process Clause.

2. Equal Protection (Count II)

Nevada's "None of These Candidates" law also violates the Equal Protection Clause, U.S. Const., amend. XIV, § 1. The U.S. Supreme Court has held:

> The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another.

Bush v. Gore, 531 U.S. 98, 104-05 (2000) (*per curiam*); *accord S.W. Voter Regis. Educ. Proj. v. Shelley*, 344 F.3d 882, 894 (9th Cir. 2003), *overruled in part on other grounds*, 344 F.3d 914 (9th Cir. 2003) (*en banc*). Under this time-honored concept of one person, one vote, "all who participate in the election are to have an equal vote," *Gray v. Sanders*, 372 U.S. 368, 379 (1963), meaning that "each

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

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

Secretary Miller and Intervenor Edwards argue, however, that Plaintiffs cannot prevail on their Equal Protection claim, because "voters who choose 'None of these candidates' are not similarly situated to those who choose a candidate." Miller Br. at 19; Edwards Br. at 39. In statewide races, however, Secretary Miller includes the option for "None of These Candidates" on the ballot on "an additional line ***equivalent*** to the lines" for the named candidates. Nev. Rev. Stat. § 293.269(1) (emphasis added). A voter must be able to select "None of These

Candidates" by checking a box "***in the same manner***" as he or she "would express a choice of a candidate." *Id*. (emphasis added). Thus, the "None of These Candidates" option is presented to voters in the same way as the named candidates, and voters may select that option in the same way as they would select a named candidate. A person who selects that option therefore is similarly situated as a person who selects a named candidate.

The Secretary responds that "If 'None of these candidates' were counted in a way that permitted it to win, a vacancy in the office would result, whereas that is obviously not the case with votes for candidates. Also, NOTC is not a candidate that could hold office." Miller Br. at 19. Even if those considerations were enough to allow the Secretary Miller to distinguish between identically presented ballot alternatives from which voters could select in the same way, there still would be no basis for treating "None of These Candidates" differently from a deceased candidate.

A deceased candidate, like "None of These Candidates," obviously cannot "hold office," Miller Br. at 19, and an election in which a deceased candidate won would have to result in a vacancy, *id*.; *see also* Nev. Rev. Stat. § 293.368(4) Nevada law nevertheless requires that votes for deceased candidates be "counted in determining the results of the election." Nev. Rev. Stat. § 293.368(3). At a minimum, Nevada's "None of These Candidates" statute violates the Equal

Protection Clause by requiring Secretary Miller to count some ballots cast for ballot options other than eligible candidates (i.e., votes for deceased candidates), but not others (i.e., votes for "None of These Candidates").

The Secretary responds that "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." Miller Br. at 19; *see also* Edwards Br. at 40. That does not appear to be a meaningful basis, however, for distinguishing votes for deceased candidates from votes for "None of These Candidates." A voter's subjective beliefs about a ballot alternative have no bearing on whether his vote is valid or entitled to be counted. Nor does this consideration explain why votes for a candidate whose death was widely publicized and well known among the electorate (*i.e.*, Sen. Mel Carnahan of Missouri), and perhaps even conspicuously noted at polling locations, are counted, *see* Nev. Rev. Stat. § 293.368(4), while votes for "None of These Candidates" are ignored, *id.* § 293.269(2). Thus, at the very least, a person who selects a deceased candidate is similarly situated in all relevant respects to a person who selects "None of These Candidates," and the Equal Protection Clause prohibits Secretary Miller from treating his vote differently.

The Secretary further argues that "a voter who chooses 'None of these candidates' is similarly situated to voters who abstain from voting altogether, who

undervote a particular race, [or] who deface their ballots." Miller Br. at 19. These arguments are incorrect. Voting for "None of These Candidates" is not comparable to "abstain[ing] from voting altogether . . . [or] undervot[ing] a particular race." *Id*. A person who abstains from voting, by definition, refrains from acting, does not engage in any affirmative expression, and thereby waives his right to vote for that office. A person who selects "None of These Candidates," in contrast, does so "in the same manner as [he] would express a choice of a candidate." Nev. Rev. Stat. § 293.269(1). Making a valid selection from among the officially presented ballot options is not the same thing as altogether declining to make such a choice.

Likewise, a person who votes for "None of These Candidates" is not comparable to someone who defaces his ballot. Miller Br. at 19. Under Nevada law, a "deface[d]" ballot is deemed to be "spoiled," and the voter may exchange it for a new one. Nev. Rev. Stat. § 293.107. Choosing "None of These Candidates," however, does not "deface" a ballot, but rather is a valid selection from among the officially presented alternatives. *Id*. § 293.269(1). Thus, the Secretary's arguments simply underscore the fact that his selective refusal to count votes cast for "None of These Candidates" violates the Equal Protection Clause.

3. Elections Clauses (Count III)

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

The Elections Clauses give states broad "authority to provide a complete code for congressional elections," *Smiley v. Holm*, 285 U.S. 355, 366 (1932), as well as elections for presidential electors, *Oregon v. Mitchell*, 400 U.S. 112, 124 (1970), including matters such as "counting of votes," *Smiley*, 285 U.S. at 366. When a state enacts a law that applies to elections for presidential electors or the U.S. Senate, it is acting "only within the exclusive delegation of power under the Elections Clause[s]," and not any inherent authority. *Cook v. Gralike*, 531 U.S. 510, 523 (2001); *see also Bush v. Palm Beach Cnty. Canvassing Bd.*, 531 U.S. 70, 76 (2000).

The U.S. Supreme Court has emphasized that, although these provisions grant states "authority to issue procedural regulations," they are "not a source of

power to dictate electoral outcomes." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 832-34 (1995). Nevada's "None of These Candidates" statute exceeds the scope of the State's power under these provisions in two ways. First, it improperly treats the "None of These Candidates" ballot option less favorably than the other ballot options in the race, by prohibiting votes for that option from being counted. Second, the statute dictates electoral outcomes by prohibiting votes from "None of These Candidates" from being counted, even if they constitute a plurality or majority in the election.

a. Disadvantageous treatment

First, the Supreme Court has held that the Elections Clauses do not permit states to put derogatory labels next to certain lines on the ballot for federal office, such as "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" or "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" *Cook*, 531 U.S. at 514-15, 525-26; *see also* Miller Br. at 21-22. If the Election Clauses do not "authorize[]" a state to place a disadvantageous label next to a particular ballot choice in federal races, *Cook*, 531 U.S. at 525-26, they certainly cannot allow a state to go even further and wholly disregard votes cast for a particular ballot choice.

Secretary Miller argues that the "None of These Candidates" ballot option is "neutral since it is not juxtaposed against any particular candidate" and does not

"discourage voters from voting for any candidate." Miller Br. at 22. These responses misapprehend the thrust of this argument. Plaintiffs do not contend that "None of These Candidates" unfairly places any one of the named candidates at a disadvantage. Rather, § 293.269(2) exceeds the State's power under the Elections Clauses precisely because it subjects the "None of These Candidates" ballot option itself to a unique disability—failure to be given legal effect—that no other ballot option faces.

b. Dictating electoral outcomes

Second, as mentioned above, the Court has explained that the Elections Clauses grant states "authority to issue procedural regulations" concerning federal elections, but are "not a source of power to dictate electoral outcomes." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 832-34 (1995). Nevada's "None of These Candidates" statute, however, effectively "dictate[s] electoral outcomes" by requiring Secretary Miller to ignore votes cast for "None of These Candidates," even if they constitute a plurality or majority in an election. Nev. Rev. Stat. § 293.269(2). The district court expressly stated that it was "inclined to agree with" this argument, EOR 49, and the Secretary does not even address it. For these reasons, Plaintiffs properly prevailed under the Elections Clauses.

4. Voting Rights Act (Count IV)

Plaintiffs are likely to succeed on their Voting Rights Act ("VRA") claim. That statute provides, in relevant part, "No person acting under color of law shall fail or refuse to permit any person to vote who is entitled to vote under any provision of this Act or is otherwise qualified to vote, or ***willfully fail or refuse to*** tabulate, ***count***, and report ***such person's vote***." 42 U.S.C. § 1973i(a) (emphasis added). Section 293.269(2) expressly requires Secretary Miller to refuse to count votes cast for "None of These Candidates." Thus, it flatly violates the VRA.

Plaintiffs' only response is that "the VRA applies only when there is interference with the right to vote that is based on racial discrimination." Miller Br. at 23 (citing *Powell v. Power*, 436 F.2d 84, 87 (2d Cir. 1970)). As demonstrated above, however, the plain text of § 1973i(a) does not require a plaintiff to prove that the defendant's willful refusal to count his vote was motivated by racial discrimination. Many other provisions of the VRA, in contrast, expressly prohibit certain voting-related misconduct only if they are based on a voter's "race or color." 42 U.S.C. § 1973(a); *see also id*. § 1973b(a)(1)(A) (prohibiting the use of "test[s] or device[s]" that have "the effect of denying or abridging the right to vote on account of race or color"). When Congress "includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely

in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (quotation marks omitted). Thus, the exclusion of any reference to race or color in § 1973i(a) confirms that racial discrimination is not a required element under that provision.

This conclusion is confirmed by the fact that none of the other causes of action set forth in §1973i either expressly contain, or reasonably can be understood as implying, a requirement that the defendant's conduct be based on the voter's race or color. For example, that section also prohibits intimidating, threatening, or coercing voters, 42 U.S.C. § 1973i(b); fraudulently registering to vote, *id*. § 1973i(c); and voting multiple times, *id*. § 1973i(e). The various provisions of § 1973i should be read *in pari materia* with each other. *See, e.g.*, *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 711 (1996) (reading various subsections of 28 U.S.C. § 1447 *in pari materia* with each other); *Montana Wilderness Ass'n v. U.S. Forest Serv.*, 655 F.2d 951, 954 (9th Cir. 1981) (reading subsections of § 1323 of the Alaska Lands Act *in pari materia*). Because the other provisions of § 1973i clearly lack implied race-related elements, this Court should not infer that § 1973i(a) contains any such unwritten requirement, either.

The Second Circuit noted that the VRA's main purpose was "to eliminate racial discrimination in the conduct of public elections." *Powell*, 436 F.2d at 86. This Court has held, however, that "[W]e cannot ignore the statute's plain meaning

in the name of upholding its purpose." *Danielson v. Flores*, 692 F.3d 1021, 1033 n.8 (9th Cir. 2012). Furthermore, "a court should not add language to an unambiguous statute." *Aronsen v. Crown Zellerbach*, 662 F.2d 584, 590 (9th Cir. 1981). Thus, § 1973i(a) cannot be read to require a plaintiff to show that the defendant's willful failure to count his vote was due to his race or color.

Although the Second Circuit expressed concern about involving courts in "the details of virtually every election," *Powell*, 436 F.2d at 86, *quoted in* Miller Br. at 23, this case arises from Secretary Miller's willful refusal to count certain votes, Nev. Rev. Stat. § 293.269(2). Applying § 1973i(a) here would not require federal courts to entertain the wide range of election-related claims involving "all manner of error and insufficiency" about which the Second Circuit was warning. *Powell*, 436 F.2d at 86, *quoted in* Miller Br. at 23.[3] Thus, Plaintiffs are likely to succeed on their VRA claim.

5. Help America Vote Act (Count V)

Finally, Plaintiffs are likely to succeed on their claim under the Help America Vote Act ("HAVA"), 42 U.S.C. § 15481(a)(6). HAVA provides, in

[3] Intervenor Edwards argues that the State does not violate the VRA because it ***does*** calculate the number of votes cast for "None of These Candidates." Edwards Br. at 44. It is undisputed, however, that votes for "None of These Candidates" are ignored in determining the outcome of an election. *See* Nev. Rev. Stat. § 293.269(2). The VRA's requirement that public officials "count" votes reasonably must be understood as requiring them to give those votes legal effect; merely tabulating certain votes, and then ignoring them, does not satisfy § 1973i(a).

relevant part, "Each State shall adopt uniform and nondiscriminatory standards that define what constitutes a vote and what will be counted as a vote for each category of voting system used in the State." 42 U.S.C. § 15481(a)(6). This provision's legislative history explains, "Because every vote properly cast must be counted . . . uniform standards for what constitutes a vote must be adopted by all states. The definition of a vote shall be as objective as possible." H.R. Rep. No. 107-329 (2001).

Nevada law permits people to vote for "None of These Candidates" in "the same manner" as they would vote for a named candidate, Nev. Rev. Stat. § 293.269(1), but does not allow such votes to be "counted in determining nomination or election to any . . . office," *id*. § 293.269(2). Thus, Nevada lacks a uniform standard for "what will be counted as a vote" in violation of HAVA, § 15481(a)(6).

Defendant's only response is that this provision of HAVA neither "explicitly creates a private right of action" nor "create[s] any private rights that could be enforceable by an action under 42 U.S.C. § 1983." Miller Br. at 24-25. Even assuming these claims were accurate, this Court's recent *en banc* ruling in *Gonzalez v. Arizona*, 677 F.3d 383, 390 (9th Cir. 2012) (*en banc*), allows Plaintiffs to enjoin § 293.269(2) on the grounds that HAVA preempts it under the U.S. Constitution's Elections Clauses.

This Court has held that, although "state governments are given the initial responsibility for regulating the mechanics of federal elections, . . . Congress is given the authority to 'make or alter' the states' regulations." *Gonzalez*, 677 F.3d at 390. A federal law, "so far as it extends and conflicts with the regulations of the State, necessarily supersedes them." *Ex Parte Siebold*, 100 U.S. 371, 384 (1879).

Congress' power to preempt state election laws under the Elections Clauses is even broader than its ability to do so under the Supremacy Clause, U.S. Const., art. VI, § 2. "Because states have no reserved authority over the domain of federal elections, courts deciding issues raised under the Elections Clause[s] need not be concerned with preserving a 'delicate balance' between competing sovereigns." *Gonzalez*, 377 F.3d at 392. Congress has "plenary authority" to "supplant state rules," and neither the presumption against preemption nor any "plain statement" rule applies in determining whether a federal election law preempts a state law, *id.* at 393-94; *see also Foster v. Love*, 522 U.S. 67, 69 (1997) (holding that a federal statute establishing "Election Day" preempted a state law that allowed the outcome of federal elections to be determined a month before).

To determine whether a federal election law preempts a state law under the Elections Clauses, a court need only consider whether, "under a natural reading, the state and federal enactments address[] the same procedures and [a]re in conflict." *Gonzalez*, 677 F.3d at 394. "If the two statutes do not operate

harmoniously in a single procedural scheme . . . then Congress has exercised its power to 'alter' the state's regulation, and that regulation is superseded." *Id.*; *see, e.g.*, *Wash. Ass'n of Churches v. Reed*, 492 F. Supp. 2d 1264, 1269-70 (W.D. Wash. 2006) ("[P]laintiffs have demonstrated a strong likelihood of success on the merits of their argument that [a state election law] stands as an obstacle to achieving the purposes and objectives of HAVA, and is therefore preempted by federal law.").

Here, HAVA conflicts with Nevada's "None of These Candidates" law. HAVA requires states to apply "uniform and nondiscriminatory standards" in "defin[ing] what constitutes a vote and what will be counted as a vote." 42 U.S.C. § 15481(a)(6). Nevada law provides that "darkening a designated space on the ballot," or making a "writing" such as "a cross or check" in that space constitutes a vote, Nev. Rev. Stat. § 293.3677(2)(a), but then purports to either disregard certain such votes, or refuse to recognize such ballots as constituting votes, because the voter selected "None of These Candidates." Thus, the district court properly concluded that Nevada's "None of These Candidates" statute is preempted by HAVA under the Elections Clauses, and therefore unenforceable. *See* EOR 48 (noting that Plaintiffs' preemption argument raised "a very good point").

For these reasons, Plaintiffs have a substantial likelihood of success—or, at the very least, have raised a substantial question going to the merits, *Alliance for*

the Wild Rockies v. Cottrell, 632 F.3d 1127, 1131-32 (9th Cir. 2011)—on at least one of their claims.

II. EVEN IF BALLOTS CAST FOR "NONE OF THESE CANDIDATES" DO NOT QUALIFY AS "VOTES," THE NEVADA STATUTE STILL VIOLATES THE U.S. CONSTITUTION AND FEDERAL LAW

Even if this Court concludes that ballots cast for "None of These Candidates" do not qualify as votes under Nevada law, and are not otherwise entitled to be protected as votes under the U.S. Constitution and federal law, Plaintiffs still are likely to succeed on most of their claims. Secretary Miller has not even attempted to address these arguments, instead declaring that, if ballots cast for "None of These Candidates" are not votes, "all of Plaintiffs' claims fail from the outset." Miller Br. at 10.

Section A explains that, even if ballots cast for "None of These Candidates" do not constitute votes, the underlying statute still violates the Due Process Clause because it creates an unconstitutional condition. The law requires voters to forego their fundamental right to cast a vote in a particular race in order to take advantage of the purportedly "unique and powerful" opportunity to tell the candidates in that race to "clean up [their] act." Miller Br. at 30, 36 (brackets in original). *See* Nev. Rev. Stat. § 293.269(3).

Section B shows that the statute also violates the Equal Protection Clause by treating some ballot alternatives as legally effective votes, and other "equivalent"

ballot alternatives, *see id*. § 293.269(1), as mere non-vote "choices," *see id*. § 293.269(2). Section C demonstrates that the law, at least as applied to federal elections, exceeds the scope of the State's power under the Elections Clauses, which does not permit States to litter ballots for federal office with various non-vote "choices" to purportedly allow voters to communicate more effectively with their elected officials. Finally, Section D explains that the law violates HAVA, 42 U.S.C. § 15481(a)(6), by establishing non-uniform standards for whether particular markings on ballots constitute legally valid votes.

A. Nevada's "None of These Candidates" Statute Violates Due Process, Because It Requires Voters to Forego Their Right to Vote To Take Advantage of an Allegedly Special Opportunity to "Send a Message" To Public Officials

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

Secretary Miller argues that the ability to select "None of These Candidates" is a "unique and powerful" means of expressing displeasure with all of the candidates running in a particular race. Miller Br. at 30, 36-37. A person is not permitted to take advantage of this purportedly valuable opportunity to "send a message" and convey his disappointment with those candidates, however, unless he sacrifices his right to vote for any of the named candidates running for that office. Nev. Rev. Stat. § 293.269(3) ("[T]he voter may mark the choice of the line 'None of these candidates' only if the voter has not voted for any candidate for the office.").

This is an unconstitutional condition. A person reasonably could wish to convey his disappointment with the entire field of candidates running for an office, yet also exercise his fundamental constitutional right to vote by selecting what he perceives to be the least distasteful choice. Nevada law deprives him of that alternative. *Id*. It requires a person to forego his right to cast a vote in order to take advantage of the supposed opportunity to express displeasure with all the candidates by selecting "None of These Candidates," *See* Miller Br. at 37. Thus, Nevada's "None of These Candidates" statute violates the Due Process Clause, U.S. Const., amend. XIV, § 1.

B. The Equal Protection Clause Prohibits Secretary Miller From Treating Some Ballot Alternatives as Votes, and Other Equivalently Presented Ballot Alternatives That Voters May Validly Select As Non-Vote "Choices"

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

The Secretary argues that the State is justified in distinguishing between those types of ballots, because a named candidate who receives a plurality of votes may assume office, whereas some further action—such as an interim appointment or a follow-up election—would be required if "None of These Candidates" were to receive a plurality of votes (or "choices," in the Secretary's parlance). Miller Br. 19-20, 35. As noted earlier, however, a deceased candidate obviously may not assume office, yet Nevada law treats a person's selection of a deceased candidate whose name appears on the ballot as a "vote" that must be counted and given legal effect in determining the outcome of an election. Nev. Rev. Stat. § 293.368.

Secretary Miller's refusal to afford similar treatment to ballots cast for "None of These Candidates" therefore violates the Equal Protection Clause.

C. The Elections Clauses Do Not Permit States to Present Non-Vote Expressive "Choices" As Alternatives on Ballots in Federal Elections.

If ballots cast for "None of These Candidates" do not qualify as votes, then the State's decision to include that alternative as a ballot choice in federal elections also exceeds the scope of its authority under the U.S. Constitution's Elections Clauses, U.S. Const., art. I, § 4, cl. 1; *id*. art. II, § 1, cl. 2. Secretary Miller has not offered any evidence to suggest that the Constitution's Framers intended to allow States to litter ballots in federal elections with non-vote expressive alternatives such as "None of These Candidates."

Secretary Miller argues that "Nevada's option for 'None of these candidates' is well within the broad powers of the State to prescribe the 'manner' of holding elections." Miller Br. at 21. To the contrary, the inclusion of a purportedly "non-vote" choice such as "None of These Candidates" is "not among 'the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right'" of voting, *Cook v. Gralike*, 531 U.S. 510, 524 (2001) (*quoting Smiley v. Holm*, 285 U.S. 355, 366 (1932)), and therefore "bears no relation to the 'manner' of elections" under the Constitution's Elections Clauses, *id*. at 523.

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

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

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

D. HAVA Preempts Nevada's "None of These Candidates" Law Because That Law Imposes Non-Uniform Standards for Determining Whether Validly Completed Ballots Are Counted as Votes

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

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

Plaintiffs do not dispute that HAVA allows each state to decide for itself "what constitutes a vote"; the gravamen of their complaint is that HAVA requires

these standards to be "uniform." 42 U.S.C. § 15481(a)(6). Nevada law specifies that an individual casts a vote by "darkening a designated space on the ballot," or making a "writing" such as "a cross or check" in that space. Nev. Rev. Stat. §§ 293.3677(2)(a) (rules for paper ballots), 293B.180 (same for ballots on mechanical voting systems, including electronic voting machines). Having established the standard that darkening, checking, or otherwise indicating a selection of a "designated space" on the ballot constitutes a vote, Nev. Rev. Stat. §§ 293.3677(2)(a), 293B.180, the State may not declare that certain ballots properly marked in that manner do not "constitute . . . vote[s]" on the grounds that the voter selected "None of These Candidates," 42 U.S.C. § 15481(a)(6). Plaintiffs therefore are likely to prevail on their HAVA claim.

Thus, Plaintiffs have a substantial likelihood of success—or, at the very least, have raised a substantial question going to the merits, *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131-32 (9th Cir. 2011)—on at least one of their claims, regardless of whether this Court recognizes ballots cast for "None of These Candidates" as votes.

III. THIS COURT MUST INVALIDATE NEVADA'S "NONE OF THESE CANDIDATES" STATUTE, BECAUSE ITS UNCONSTITUTIONAL AND ILLEGAL PROVISIONS ARE NOT SEVERABLE FROM THE REST OF THE STATUTE

Nevada's "None of These Candidates" law must be enjoined because it violates both federal law and the U.S. Constitution. *See supra* Parts I & II. Secretary Miller argues that the district court's injunction is "overbroad" because it enjoins the statute as a whole , *see* 1975 Nev. Stat. 475, *codified at* Nev. Rev. Stat. §§ 293.269, 293B.075, rather than just the provision that prohibits him from counting votes for "None of These Candidates." *See* Miller Br. at 38 (citing Nev. Rev. Stat. § 293.269(2)). The Secretary maintains that "the appropriate remedy" is to count ballots cast for "None of These Candidates" as votes, and declare a vacancy if that option receives a plurality of votes. Miller Br. at 39, 41.

The district court's injunction was not overbroad, but rather was the appropriate remedy, for two reasons. ***First***, federal law does not allow states to establish election procedures that allow races for U.S. President and U.S. Senate to result in vacancies. ***Second***, Nevada's "None of These Candidates" statute is not severable because it does not appear that the legislature would have wanted "None of These Candidates" to remain as a ballot option if votes for that option had to be given legal effect, and it could cause elections to end in vacancies.

A. Federal Law Prohibits the State From Allowing General Elections for President and U.S. Senate to Result in Vacancies.

Federal law prohibited the district court from allowing "None of These Candidates" to remain on the ballot as an option in statewide races for federal office and ordering that, if that option prevails, a vacancy will result. 2 U.S.C. § 1 (emphasis added) provides that "a United States Senator from said State ***shall be elected*** by the people thereof" at "the regular election" in any year in which a sitting Senator's term expires. This statute not only requires states to hold Senate elections, but also to ensure that a new Senator is actually elected. Under this law, the State may not give legal effect to votes cast for "None of These Candidates," and simply declare a vacancy if that ballot option prevails in the U.S. Senate race.

A similar statute applies to presidential electors. In presidential election years, "[t]he electors of President and Vice President ***shall be appointed***, in each State, on the Tuesday next after the first Monday in November." 3 U.S.C. § 1 (emphasis added). Although federal law appears to contemplate the possibility of electors not being selected on Election Day, *id*. § 2, this Court has held that § 1 requires the "'consummation' of the process of selecting an official," and the "'final selection of an officeholder," to occur in presidential elections on Election Day. *Voting Integrity Proj., Inc. v. Kiesling*, 259 F.3d 1169, 1175 (9th Cir. 2001), *quoting Foster v. Love*, 522 U.S. 67, 71 (1997). Thus, allowing "None of These

Candidates" to prevail in the Nevada presidential election likely would violate 3 U.S.C. § 1.

B. Nevada's "None of These Candidates" Statute is Not Severable Because There Is No Evidence That the Legislature Would Have Created That Ballot Option If Votes for It Had to Be Counted and Given Legal Effect

Even apart from these federal statutory restrictions, the district court properly enjoined the entire "None of These Candidates" statute because it is not severable. Severability is governed exclusively by state law. *Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996). Nevada law provides that, if a statutory provision "is held invalid, such invalidity shall not affect the provisions or application of [state law] which can be given effect without the invalid provision." Nev. Rev. Stat. § 0.020.

The Nevada Supreme Court has held, however, that "[d]espite the wording of [§] 0.020, which is the general severability clause, it is a function of th[e] court to consider whether the remainder of the statute can stand independently and whether the Legislature would have intended it to do so." *Desert Chrysler-Plymouth v. Chrysler Corp.*, 600 P.2d 1189, 1192 (Nev. 1979); *see also Flamingo Paradise Gaming, LLC v. Chanos*, 217 P.3d 546, 555 (Nev. 2009) (holding that a statute is severable only if "the remaining portion of the statute, standing alone, can be given legal effect, and if the Legislature intended for the remainder of the statute to stay in effect when part of the statute is severed").

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

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

More broadly, nothing in the law's admittedly limited legislative history suggests that the legislature would have intended "None of These Candidates" to be made a legally effective ballot option in either state or federal races. The purpose of the statute was merely to "provide for voters[']expression of nonconfidence in candidates for any elected office." EOR 91 (Nevada Assembly, Election Committee Minutes). The Chair of the Assembly Elections Committee, who co-sponsored the legislation, stated that it was simply "a way to tell [a candidate] to 'clean up your act,' if you get in office." EOR 92. The testimony of numerous witnesses confirms that the only intent was to allow for a non-binding expression of "nonconfidence." *Id*.; *see also* EOR 99 ("If a person does not wish to vote for either or any candidate the spaces may be left blank. This certainly indicates nonconfidence."); EOR 97 ("[W]e already have an adequate expression of no-confidence that is readily visible.").

Turning "None of These Candidates" from a way of "sending a message" into a legally effective vote is not merely allowing other provisions of the "None of These Candidates" statute to remain in effect, but rather fundamentally changing those other provisions' nature and effect. Although superficially an act of judicial restraint, it actually is a "Procrustean restructuring of the law." *County of Clark v. Las Vegas*, 550 P.2d 779, 788 (Nev. 1976). This court should not "presume" the legislature would have intended for "None of These Candidates" to be given such

legal effect. *Jiminez v. State*, 644 P.2d 1023, 1024-25 (Nev. 1982); *see also Brewery Arts Ctr. v. State Bd. of Examiners*, 843 P.2d 369, 373 (Nev. 1992) ("[B]ecause it does not appear the Legislature intended A.B. 590 to stand alone without subsection 5 of section 5, we decline to sever it."). Defendants have no basis for attempting to disturb the district court's determination that the statute was not severable.

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

IV. PLAINTIFFS SATISFY THE REMAINING REQUIREMNETS FOR OBTAINING A PRELIMINARY INJUNCTION

This court should affirm the district court's preliminary injunction, because in addition to either demonstrating a likelihood of success on the merits or raising a substantial question as to the merits, Plaintiffs also satisfy the other requirements for an injunction. *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008); *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011).

A. A Preliminary Injunction Is Necessary to Prevent Irreparable Injury

Plaintiffs will suffer irreparable injury if this Court permits "None of These Candidates" to remain on ballots in statewide races in future elections. ***First***, "[i]t is well established that the deprivation of constitutional rights 'unquestionably

constitutes irreparable injury.'" *De Jesus Ortega Melendres v. Arpaio*, No. 12-15098, 2012 U.S. App. LEXIS 20120, at *25 (9th Cir. Sept. 25, 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *see also Nelson v. NASA*, 568 F.3d 1028, 1030 n.5 (9th Cir. 2009) ("Constitutional violations . . . generally constitute irreparable harm.") (quotation marks omitted). In particular, infringement or denial of the right to vote in violation of the U.S. Constitution or federal law inflicts irreparable injury on voters. *Cardona v. Oakland Unified Sch. Dist.*, 785 F. Supp. 837, 840 (N.D. Cal. 1992) ("Abridgement or dilution of a right so fundamental as the right to vote constitutes irreparable injury.").

Second, voters—including but not limited to the voter Plaintiffs—will suffer irreparable harm if Secretary Miller continues to offer "None of These Candidates" as an official ballot alternative in statewide races, and then ignore ballots cast for that alternative in determining the outcomes of those races. *See* Nev. Rev. Stat. § 293.269(2). Voters suffer irreparable injury if a state "certifies the election results without counting their . . . ballots." *Hoblock v. Albany Cnty. Bd. of Elections*, 422 F.3d 77, 97 (2d Cir. 2005). Having one's vote disregarded, or being presented with a ballot in which validly selecting a certain choice will result in one's vote being ignored, is not the type of "monetary injur[y]" that may be "adequately remedied through damages." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1138 (9th Cir. 2009) (quotation marks omitted).

Third, candidates—including but not limited to the Plaintiff candidates—suffer irreparable injury when invalid or unconstitutional alternatives appear on the ballot, because "the individual's right to seek public office is inextricably intertwined with the public's fundamental right to vote." *Davies v. Grossmont Union High Sch. Dist.*, 930 F.2d 1390, 1397 (9th Cir. 1991). Additionally, the presence of an unconstitutional or illegal ballot option irreparably harms candidates because it "hurts the candidate's . . . own chances of prevailing in the election." *Drake v. Obama*, 664 F.3d 774, 782 (9th Cir. 2011) (quotation marks omitted); *see also Fulani v. Hogsett*, 917 F.2d 1028, 1030 (7th Cir. 1990) (holding that "the increased competition" that a candidate faces from allegedly illegal alternatives on the ballot "is an injury" to the candidate); *see, e.g.*, EOR 114 (declaration of Plaintiff Dougan). Loss of an election, of course, is "an irreparable and substantial harm." *Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219, 244 (6th Cir. 2011); *see also Owen v. Mulligan*, 640 F.2d 1130, 1132-33 (9th Cir. 1981) (holding that "potential loss of an election" constitutes an injury-in-fact). The fact that "voters always have the ability and the right to withhold their vote," Miller Br. at 28, does not undermine this point, because there are voters who will vote for "None of These Candidates" if it is included on the ballot, but vote for a named candidate—rather than abstaining and waiving their right to vote—if that alternative is not available. *See, e.g.*, EOR 114.

Fourth, an unconstitutional or illegal ballot option causes irreparable injury to the political parties—such as putative Plaintiff Nevada Republican Party (whose motion to join this appeal presently is pending)—whose ballot lines compete against it. The parties suffer direct harm because "[p]olitical victory accedes power to the winning party, enabling it to better direct the machinery of government toward the party's interests." *Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 587 (5th Cir. 2006); *see, e.g.*, *Drake*, 664 F.3d at 782 (agreeing that an "ineligible rival on the ballot" harms a political party's "chances of prevailing in the election"); *see also Schulz v. Williams*, 44 F.3d 48, 53 (2d Cir. 1994) (holding that a political party is harmed by "the improper placing" of an improper alternative on a statewide ballot because it could "siphon votes" from the plaintiff political party's candidates "and therefore adversely affect [its] interests").

A political party also has organizational standing to assert the irreparable injury of its voter and candidate members. *See, e.g.*, *Benkiser*, 459 F.3d at 587 (holding that a state party "has associational standing on behalf of its candidate" to challenge state action that "threaten[s] [the candidate's] election prospects"); *Sandusky Cnty. Democratic Party v. Blackwell*, 387 F.3d 565, 573-74 (6th Cir. 2004) (holding that political parties have standing to assert the rights of their member voters in election-related litigation).

Thus, Secretary Miller's continued inclusion of "None of These Candidates" as a ballot option in statewide races will cause irreparable injury.

B. The Balance of Hardships Tilts Sharply in Favor of Plaintiffs

The balance of hardships tips sharply in favor of granting an injunction. Indeed, the balance tips so sharply in favor of Plaintiffs that they need only demonstrate a "serious question" as to the merits in order to obtain an injunction. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011).

If "None of These Candidates" appears on the ballot, many thousands of voters who select that option will be disenfranchised because those votes will be ignored in determining the outcome of the election. There also are voters who, if "None of These Candidates" did not appear on the ballot, would vote for a named candidate instead of abstaining and waiving their right to vote in the race. EOR 114. The improper inclusion of "None of These Candidates" as a ballot option thereby harms candidates by depriving them of potentially dispositive votes they otherwise would receive. *See Drake*, 664 F.3d 783 (holding that a candidate is harmed by "the inclusion of an allegedly ineligible rival on the ballot, on the theory that [the invalid option] hurts the candidate's or party's own chances of prevailing in the election"). The unconstitutional and illegal inclusion of "None of These Candidates" on ballots likewise harms political parties, which face increased

competition against their ballot lines and a reduced likelihood of prevailing and being able to implement their agenda. *Benkiser*, 459 F.3d at 587 n.4.

Conversely, neither Defendants nor other voters will suffer any hardship if "None of These Candidates" is removed from the ballot. *Regents of Univ. of Cal. v. ABC*, 747 F.2d 511, 520 (9th Cir. 1984) (holding that the balance of hardships tilted sharply toward the plaintiffs where "[t]he record fails to reveal any significant injury to the defendants stemming from the issuance of the preliminary injunction"). Even without "None of These Candidates" as a ballot option, a voter remains free to express his disdain for the entire field of candidates running for a particular office simply by declining to cast a vote in that race. *See* EOR 10-11, 59, 61 (Jones, C.J.); *see also* EOR 92 (Nevada Assembly, Election Committee Minutes); EOR 96-97 (letter from Clark County Registrar of Voters Stanton B. Colton); EOR 99 (letter from Norma Joyce Scott); Miller Br. at 28 ("[V]oters can always withhold their vote, even if NOTC does not appear on the ballot."). As the district court stated, eliminating the "None of These Candidates" ballot option will not cause harm because the State "record[s]" the number of people who show up to vote without "cast[ing] a vote in [a particular] race." EOR 61.

It is specious to contend that "None of These Candidates" offers voters a "unique and powerful opportunity" to convey a unique or "meaningful" message, Miller Br. at 29-30; Edwards Br. at 6—much less a message that is different from,

or less ambiguous than simply undervoting that race, Miller Br. at 36; Edwards Br. at 6. As the district court itself correctly found, a person might have "a multitude of reasons for casting . . . a vote" for "None of These Candidates"—for example, because he was not interested in a particular race, did not "know either candidate," or even for the sheer novelty of it. EOR 20-21. Thus, because a vote for "None of These Candidates" does not send any coherent, discernible message, removing that alternative will not interfere with voters' ability to "send a message" to public officials.

The State's argument that voters have a First Amendment right to engage in "political speech" by voting for "None of These Candidates" is incorrect. State Br. at 29. The U.S. Supreme Court repeatedly has held that "ballots serve to elect candidates, not as forums for political expression," *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363 (1997), or as "a means of giving vent to . . . pique," *Burdick v. Takushi*, 504 U.S. 428, 438 (1992). More importantly, voters have a nearly limitless range of alternative methods of expressing distaste with candidates running for particular office: undervoting that race, letters to public officials, phone calls to public officials, office visits, participating in public opinion polls, publicly distributing flyers or handbills, holding protests, submitting letters to the editor or op-eds, internet postings, creating websites, making calls to radio talk shows, interviews with reporters, or donating money for adverse mailers or

negative advertisements. *Cf. ABC v. Heller*, No. 2:06-CV-01268-PMP-RJJ, 2006 U.S. Dist. LEXIS 80030, at *39 (D. Nev. Nov. 1, 2006) (holding that the balance of harms from enjoining a statute "clearly tips" in favor of the plaintiffs when "the State has at its disposal a variety of" other means of furthering the purpose of the challenged law).

It also is worth noting that state law does not permit Nevada voters to vote for "None of These Candidates" in elections for the U.S. House of Representatives, state senate, state assembly, countywide offices, or local offices. Nev. Rev. Stat. § 293.269(1). And Nevada is the only state in the nation to allow voters to select that option in statewide races. EOR 28 (Jones, C.J.) (noting that "[f]orty-nine other states haven't felt the need" to include "None of these candidates" on their ballots). Far from imposing any cognizable harm on voters, the injunction simply gives Nevada voters the same range of options in statewide races as they have in all other races, and brings Nevada's ballots for statewide offices in line with those of every other state in the nation.

For these reasons, removing "None of These Candidates" from the ballot in statewide races will not impose any hardship on voters. Thus, the balance of hardships tips sharply in Plaintiffs' favor.

C. A Preliminary Injunction Is In the Public Interest

Finally, the preliminary injunction is in the public interest. Preserving the right to vote is a "public interest . . . of the highest order." *Davies v. Grossmont Union High Sch. Dist.*, 930 F.2d 1390, 1397 (9th Cir. 1991). Conversely, as noted above, the Supreme Court has held that the public lacks any real interest in using the ballot as a "forum[] for political expression" beyond the pure election of candidates, *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363 (1997), or as "a means of giving vent to . . . pique," *Burdick v. Takushi*, 504 U.S. 428, 438 (1992) (quotation marks omitted). Thus, an injunction is in the public interest.

V. PLAINTIFFS HAVE STANDING TO PURSUE THESE CLAIMS

Intervenor Edwards argues that Plaintiffs lack standing to maintain these claims. Edwards' argument fails for two reasons. First, the original Plaintiffs to this lawsuit have standing to pursue it. Second, the joinder of the Nevada Republican Party will cure any potential jurisdictional or justiciability problems that may exist.

"[W]hen standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue." *Flast v. Cohen*, 392 U.S. 83, 99 (1968). The parties seeking to defend the preliminary injunction include: (i) the Nevada Republican Party, whose nominees for statewide office are forced to run against an unconstitutional and

illegal ballot alternative, and whose members face the prospect of having their votes ignored if they select that alternative; (ii) candidates who would be facing "None of These Candidates" on the ballot; (iii) eligible and registered voters who intend to vote for "None of These Candidates" and will have their votes ignored; (iv) eligible and registered who intend to vote for some other candidate; and (v) eligible and registered voters who do not yet know how they will vote in the presidential race, but wish to be able to have their vote counted, regardless of which of the officially presented ballot options they ultimately decide to select.

Despite his vitriol, Edwards does not suggest who would have been a more appropriate plaintiff to maintain this challenge. If this Court agrees with Intervenor Edwards' argument, and holds that this case must be dismissed for lack of standing, it effectively is ruling that Nev. Rev. Stat. § 293.269 is immune from legal scrutiny, and that it is impossible for a federal court to determine whether states may litter their ballots with purported "non-vote expressive choice" alternatives.

A. Plaintiffs Have Standing to Maintain This Suit.

The district court properly exercised subject-matter jurisdiction over this case because Plaintiffs have standing to bring this suit. Because Plaintiffs seek injunctive and declaratory relief, only one of them must establish standing to pursue these claims. *Leonard v. Clark*, 12 F.3d 885, 888 (9th Cir. 1993); *Nat'l*

Ass'n of Optometrists & Opticians Lenscrafters, Inc. v. Brown, 567 F.3d 521, 522 (9th Cir. 2009). It is helpful to distinguish among three different groups of Plaintiffs who have standing: (i) candidate Plaintiffs; (ii) individuals voting for "None of These Candidates"; and (iii) individuals unsure of how they will vote.

1. Candidate Plaintiffs

At a minimum, candidates forced to run against "None of These Candidates" are harmed by having to compete against an allegedly illegal and unconstitutional ballot option. *See* EOR 126-27 (Plaintiffs Woodbury and Degraffenreid; collectively, the "Candidate Plaintiffs"). This Court has adopted the doctrine of "competitive standing," under which a candidate has standing to "challenge the inclusion of an allegedly ineligible rival on the ballot, on the theory that doing so hurts the candidate's or party's own chances of prevailing in the election." *Drake v. Obama*, 664 F.3d 774, 782-83 (9th Cir. 2011) (quotation marks omitted); *see also Fulani v. Hogsett*, 917 F.2d 1028, 1030 (7th Cir. 1990) (holding that "the increased competition" that a candidate faces from allegedly illegal alternatives on the ballot "is an injury which gives [him] sufficient standing to bring" a challenge); *Schulz v. Williams*, 44 F.3d 48, 53 (2d Cir. 1994) (holding that a political party and its candidates would suffer "a concrete, particularized, actual injury" from "competition on the ballot from candidates" who did not comply with the law); *Owen v. Mulligan*, 640 F.2d 1130, 1132-33 (9th Cir. 1981) (holding that "potential

loss of an election" constitutes an injury-in-fact). Thus, the Candidate Plaintiffs have standing to seek to have "None of These Candidates" removed from the ballot.

Defendant Edwards argues that Plaintiffs Woodbury and Degraffenreid have nothing more than a "generalized grievance shared by the public," because their only interest is making it more likely that other people vote for their "desired candidate." Edwards Br. at 28. To the contrary, Plaintiffs Woodbury and Degraffenreid are the Nevada Republican Party's nominees for the state office of Nevada presidential elector (*i.e.*, member of the electoral college). As a matter of law, a vote for Mitt Romney is a vote for Plaintiffs Woodbury and Degraffenreid for that office. Nev. Rev. Stat. § 298.025. Thus, they have a substantial, direct, and personal interest in whether other, invalid ballot alternatives, such as "None of These Candidates" appear on the presidential election ballot; such invalid alternatives would improperly injure them by impeding their efforts to prevail and become presidential electors. Contrary to Intervenor Edwards assertions, the Candidate Plaintiffs are seeking to prevent competitive injury to themselves, and are neither "suing to vindicate someone else's rights" nor invoking "third party standing." Edwards Br. at 29.

Furthermore, the Candidate Plaintiffs have alleged (and produced evidence) that at least one person who otherwise would vote for "None of These Candidates"

will instead vote for them if "None of These Candidates" is removed from the ballot. *See* EOR 125-26; *see also* EOR 114. Thus, the harm they suffer from having "None of These Candidates" appear on the ballot is real and concrete, rather than hypothetical and speculative, and is sufficient to allow this case to proceed.

2. Individuals voting for "None of These Candidates"

Voters who intend to cast their ballots for "None of These Candidates" also will be harmed by not having their ballots treated as votes and counted. *See* EOR 125-26 (Plaintiffs Riedl and Dougan). Clearly, a person who intends to cast his ballot for "None of These Candidates" is a "proper party" to litigate whether it is proper for Secretary Miller to present "None of These Candidates" as a ballot alternative, and then disregard ballots cast for it.

Intervenor Edwards argues that these Plaintiffs lack standing because "they are in complete control of whether they will suffer any alleged 'injury.'" Edwards Br. at 21. This argument is palpably false. Under this reasoning, if Secretary Miller announces during his next re-election campaign that he will not count any votes cast for his opponent, voters would lack standing to challenge that disenfranchisement because they would remain in "complete control" of whether their votes get counted. *Id*. A voter cannot lack standing to challenge the State's

refusal to count his vote on the grounds that he could have cast his ballot differently.

The fact that, as a matter of state law, the proper remedy is to invalidate the statute as a whole, does ***not*** deprive these Plaintiffs of standing. *See Orr v. Orr*, 440 U.S. 268, 292 (1979) (holding that a plaintiff in an Equal Protection lawsuit who claims he has been unconstitutionally deprived of a particular benefit does not lack standing, simply because his lawsuit may lead to the elimination of the challenged benefit for everyone, rather than extension of the benefit to him); *see, e.g.*, *Stanton v. Stanton*, 421 U.S. 7, 17 (1975) (holding that an 18-year-old male could bring an Equal Protection challenge to a state law declaring that males become legal adults at age 18, and females become legal adults at age 21, even if, as a matter of state law, the proper remedy was to reduce the age of adulthood for females).

3. Individuals unsure how they will vote

Finally, the voter Plaintiffs who have not yet settled on a particular presidential candidate are harmed by the prospect of their ballots not being counted or given legal effect, depending on whether they cast their ballots for "None of These Candidates." The inclusion of a choice on the ballot that, if chosen, would result in the voter Plaintiffs being disenfranchised constitutes injury-in-fact; they

therefore have standing to seek the elimination of ballot alternatives that the State refuses to count as valid votes.

Intervenor Edwards argues that such Plaintiffs lack standing because they do not know for sure whether they will select "None of These Candidates,"[4] Edwards Br. at 24-25, 31, and that any injury they allege is a generalized grievance shared by the entire voting public, *id*. at 25, 27. The right to vote, however, belongs to each individual citizen. *Badham v. U.S. Dist. Ct. for N. Dist. of Cal.*, 721 F.2d 1170, 1173 (9th Cir. 1983) (discussing "each citizen's federal right to vote"); *Charfauros v. Bd. of Elections*, No. 99-15789, 2001 U.S. App. LEXIS 15083, at *23 (9th Cir. 2001) (noting that this Court "vehemently protect[s] every citizen's right to vote"). Consequently, in cases such as this, "where large numbers of voters suffer interference with voting rights conferred by law," each of them has standing to bring suit. *FEC v. Akins*, 524 U.S. 11, 24 (1998). The fact that the alleged injury to voting rights "is widely shared" does not preclude the injury from being "sufficiently concrete and specific" to be "vindicat[ed] in the federal courts." *Id*. at 24-25. Thus, Edwards' challenge to Plaintiffs' standing fails.

[4] This argument is puzzling because Intervenor Edwards further contends that voters who vote for "None of These Candidates" also lack standing because, in effect, they have chosen to disenfranchise themselves. Edwards Br. at 21-23.

B. The Nevada Republican Party Has Standing to Maintain This Suit

As this Court is aware, the Nevada Republican Party has moved for leave to join this appeal as a Plaintiff-Appellee to defend the court's preliminary injunction. To the extent this Court finds that the individual plaintiffs lack standing, or that the passage of the November 6, 2012 general election moots their claims (which it does not, since this situation is capable of repetition, yet will evade review, in future statewide elections[5]), the Nevada Republican Party clearly has standing to litigate this issue with regard to future elections, and its joinder cures any potential justiciability-related deficiencies. *Mullaney v. Anderson*, 342 U.S. 415, 417 (1952); *Cal. Credit Union League v. City of Anaheim*, 190 F.3d 997, 998 (9th Cir. 1999) ("We conclude that the United States can join this action [on appeal] as a co-

[5] Plaintiffs sought a preliminary injunction barring Defendant Miller from including "None of These Candidates" as an option on any ballots "in ***any*** future elections, including but not limited to the November 6, 2012 general election." EOR 84; EOR 120. The minutes of the district court's August 22, 2012 hearing, which this Court has chosen to treat as its written order, *see* Amended Order, DE #15, at 2-3 (Sept. 5, 2012), state broadly that Secretary Miller is "enjoined from allowing 'None of these candidates' to appear on voting ballots," EOR 143. This Court repeatedly has recognized that challenges regarding election-related laws fall within the "capable of repetition, yet evading review" exception to the mootness doctrine. *See, e.g.*, *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1002 (9th Cir. 2010) (noting that "most election cases" fall within this exception); *Citizens for Clean Gov't v. City of San Diego*, 474 F.3d 647, 650 (9th Cir. 2007) ("[E]lection cases tend to fall within this exception."); *Aguon-Schulte v. Guam Election Comm'n*, 469 F.3d 1236, 1239 n.2 (9th Cir. 2006) ("[B]ecause Plaintiffs challenge the Legislature's authority to alter election law, the underlying case presents an issue that is capable of repetition yet will evade review.").

plaintiff and that the United States[']s belated joinder retroactively cures any jurisdictional defect that previously existed.").

The Party has direct standing to prevent the inclusion of an unconstitutional and illegal ballot alternative that would potentially siphon votes from the Party's nominees running on its "Republican" ballot line. *See Drake v. Obama*, 664 F.3d 774, 782 (9th Cir. 2011).[6] A political party has standing to challenge the inclusion of an allegedly ineligible rival on the ballot, on the theory that doing so hurts the . . . party's own chances of prevailing in the election." *Id*. at 782-83.

The Party also has associational standing to assert the interests of its future nominees in avoiding competition from an unconstitutional and illegal ballot alternative, *Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 587 (5th Cir. 2006), as well as the interest of its members in not having their votes ignored, based on the ballot option they select. *See Sandusky Cnty. Democratic Party v. Blackwell*, 387 F.3d 565, 573 (6th Cir. 2004) (holding that political parties have standing to

[6] *See also Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 587 n.4 (5th Cir. 2006) (holding that a political party has standing to challenge decisions regarding ballots that may reduce its candidates' chances for success, because "[p]olitical victory accedes power to the winning party, enabling it to better direct the machinery of government toward the party's interests"); *Schulz v. Williams*, 44 F.3d 48, 53 (2d Cir. 1994) (holding that a plaintiff political party has standing to challenge "the improper placing of an additional party . . . on the state-wide ballot" because it could "siphon votes" from the plaintiff political party's candidates "and therefore adversely affect [its] interests"); *Fulani v. Hogsett*, 917 F.2d 1028, 1030 (7th Cir. 1990) (holding that a political party has standing to challenge "increased competition" on the ballot from allegedly invalidly added rivals).

assert the rights of their member voters in election-related litigation); *cf. Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007) ("The Democratic Party also has standing to assert the rights of those of its members who will be prevented by voting by the new law."), *aff'd*, 553 U.S. 181 (2008). Thus, this case is justiciable.

VI. LACHES DOES NOT BAR PLAINTIFFS CLAIMS

Finally, Intervenor Edwards argues that Plaintiffs' claims are barred by laches. Edwards Br. at 49. The fact that § 293.269 was enacted 35 years ago, *id.* at 51, does not render the statute forevermore immune from judicial review. Nor have Plaintiffs somehow "waive[d]" their right to challenge the law under the U.S. Constitution or federal law. *Cf. id.* at 52. This Court already chose to stay the district court's preliminary injunction as it applied to the November 6, 2012 general election. Enough time exists before the next statewide election to allow this Court to adjudicate the constitutionality and legality of § 293.269 without concerns about undue rush or alleged prejudice to Secretary Miller. Thus, Intervenor Edwards' laches defense lacks merit.

CONCLUSION

For these reasons, Plaintiffs-Appellees (and the Nevada Republican Party, if this Court grants its Motion for Joinder) respectfully request that this Court affirm the district court's preliminary injunction.

Respectfully submitted,

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REQUEST FOR ORAL ARGUMENT

Appellees respectfully request that this Court grant oral argument in this case.

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, the undersigned asserts that, to the best of his knowledge, there are no other related cases pending in this Court.

Respectfully dated this 5th day of November, 2012.

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CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rule 32(a)(7), I certify that the attached Appellees' Brief is proportionately spaced, has a typeface of 14 points or more, and contains 18,577 words. Appellees have concurrently filed a Motion for Enlargement of Words.

Respectfully dated this 5th day of November, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court of the U.S. Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 5, 2012.

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

/s/ Paul S. Prior

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