

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

WENDY TOWNLEY, et al.,)	9th Circuit Docket No. 12-16881
Plaintiffs-Appellees,)	
vs.)	USDC Case No. 3:12-cv-00310-RCJ- WGC
ROSS MILLER, Secretary State of Nevada,)	Nevada (Reno)
Defendant-Appellant,)	
and)	
KINGSLEY EDWARDS,)	
Intervenor-Defendant.)	

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KINGSLEY EDWARDS,)	
Intervenor-Defendant- Appellant)	

EMERGENCY MOTION UNDER CIRCUIT RULE 27-3

**APPELLANT / DEFENDANT ROSS MILLER'S EMERGENCY MOTION
FOR STAY OF ORDER GRANTING PRELIMINARY INJUNCTION**

CIRCUIT RULE 27-3 CERTIFICATE

I. CONTACT INFORMATION FOR ATTORNEYS OF THE PARTIES

The telephone numbers, e-mail addresses, and office addresses of the attorneys for the parties is set forth as follows:

Attorneys for Appellant / Defendant

Catherine Cortez Masto
Attorney General
Kevin Benson
Deputy Attorney General
100 N. Carson Street
Carson City, Nevada 89701
Ph: 775-684-1114
Fax: 775-684-1108
kbenson@ag.nv.gov

Attorneys for Appellees / Plaintiffs

Paul Swenson Prior
Nevada Bar No. 9324
3883 Howard Hughes Parkway, Suite
1100
Las Vegas, Nevada 89169
Telephone: (702) 784-5200
Facsimile: (702) 784-5252
Email: sprior@swlaw.com

Michael T. Morley (*Pro Hac Vice*)
616 E. Street, N.W. #254
Washington, D.C. 20004
Telephone (860) 778-3883
Email: michaeltmorleyesq@hotmail.com

Attorneys for Appellant / Intervenor

JOHN P. PARRIS, ESQ.
Nevada Bar No. 7479
Law Offices of John P. Parris
324 South Third Street, Suite 1
Las Vegas, Nevada 89101
Telephone: (702)-382-0905
Facsimile: (702)-382-6903
jparris@johnparrislaw.com

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II. FACTS SHOWING THE EXISTENCE AND NATURE OF CLAIMED EMERGENCY

Nevada law requires that the ballots for all statewide races, including races for President and Vice President and U.S. Senator, to include an option labeled “None of these candidates.” NRS 293.269(1). This option must appear at the end of the list of candidates, and must be presented so that it can be selected in the same manner as a candidate. *Id.* However, “None of these candidates” is not counted in determining which candidate won the election. NRS 293.269(2). In other words, “None of these candidates” cannot win the election, even if it receives a plurality or majority. NRS 293.269(2). The named candidate with the highest number of votes wins. *See id.*

Plaintiffs in this case sued, arguing “None of these candidates” is a vote just like voting for a candidate and that failure to count votes for NOTC in determining who wins the election is a violation of Due Process, Equal Protection, the Voting Rights Act, the Help America Vote Act, and the Elections Clauses of the U.S. Constitution.

The district court agreed. *See* District Court Docket #39, Minutes of Proceedings. However, instead of requiring that ballots cast for NOTC must be counted in determining who won the election, the Plaintiffs requested, and the district court ordered, that NOTC not appear on the ballot at all. *Id.* It therefore

issued a preliminary injunction enjoining and prohibiting the Secretary of State from placing “None of these candidates” on any ballot. *Id.*

Pursuant to the Uniformed and Overseas Citizens Absent Voting Act (UOCAVA), 42 U.S.C. § 1973ff, our military and overseas voters must be sent absentee ballots 45 days before the election. That deadline is September 22, 2012. However, it takes time to prepare the ballots. *See* Affidavit of Harvard L. Lomax, attached hereto as “Exhibit 1.” All materials on the ballot must be proofed and organized, before it can be sent to the printer. Ex. 1, ¶ 4. It may take the printer two weeks or longer to print the ballots. Ex. 1, ¶¶ 6-8. Therefore to have adequate time to prepare the ballots, the final content of the ballot must be known and disseminated to the clerks by September 7, 2012. Ex. 1, ¶ 9.

If the District Court’s order enjoining “None of these candidates” is not stayed before September 7, 2012, that option cannot appear on the November 2012 UOCAVA ballots, since there will be no time to obtain a ruling on appeal before ballots must be printed. As a result, Nevada voters will suffer irreparable harm because they will be deprived of one of their options on the ballot.

III. NOTIFICATION REGARDING SERVICE OF MOTION

Counsel for Appellant Secretary Miller notified counsel for Plaintiffs/Appellees Townley and Intervenor/Appellant Edwards of the filing of this emergency motion, on August 30, 2012 via email sent approximately

10:45 a.m. Counsel for Plaintiffs and Intervenor will be served with this emergency motion by email prior to filing, and also via ECF when the motion is filed. Counsel for Appellant Miller has also notified the Clerk of the Ninth Circuit via telephone at approximately 8:35 a.m. on August 30, 2012.

Respectfully submitted this 30th day of August, 2012.

CATHERINE CORTEZ MASTO
Attorney General

By: /s/ Kevin Benson
KEVIN BENSON
Senior Deputy Attorney General
100 North Carson Street
Carson City, Nevada 89701
(774) 684-1114
Attorney for Plaintiff-Appellant,
ROSS MILLER, Nevada Secretary
of State

Appellant/Defendant Nevada Secretary of State Ross Miller, by and through counsel, Catherine Cortez Masto, Attorney General, and Kevin Benson, Deputy Attorney General, moves this Court to Stay the order of the district court granting a preliminary injunction directing that the option of “None of these candidates” shall not appear on any ballots for the November, 2012 general election.

Due to rapidly approaching deadlines for printing ballots, Appellant Secretary Miller respectfully requests action by this Court no later than September 7, 2012.

I. Relief Sought in the District Court

Circuit Rule 27-3(a)(4) governs emergency and urgent motions and provides, in relevant part, “[i]f the relief sought in the motion was available in the district court...the motion shall state whether all grounds advanced in support thereof in this Court were submitted to the district court...and, if not, why the motion should not be remanded or denied.” Additionally, FRAP 8(a)(1) requires that a request for a stay of an injunction pending appeal should be made first to the District Court.

Counsel for Defendant-Appellant Secretary of State Ross Miller requested a stay of the District Court’s Order by oral motion made after the District Court announced its ruling following argument on the preliminary injunction motion on August 22, 2012. *See* District Court Docket #39 (Minutes of proceeding). The

District Court denied the motion. Counsel for Intervenor also orally requested a stay of the decision pending the appeal at the same hearing, which the District Court also denied. The District Court did not state its reasons in denying the stay. Therefore, consistent with FRAP 8(a)(2), the stay was first requested to the District Court, but the relief was denied.

The grounds for the motion were the same as the grounds advanced in this motion: that absent a stay, it is unlikely the matter could be resolved on appeal prior to September 7, 2012, which is the practical deadline by which the contents of the ballot must be known in order to print and disseminate ballots for military and overseas voters in accordance with federal law. Absent a stay, voters who wish to choose “None of these candidates” will be completely deprived of that ability, whereas leaving that option on the ballot poses no harm to the Appellees/Plaintiffs.

II. Standards of Review

A. Standard for Granting a stay pending appeal.

In deciding whether to grant a stay of an order pending appeal, the courts of appeal consider the following factors:

(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Hilton v. Braunskill, 481 U.S. 770, 776 (1987).

Although some threshold level showing is necessary for each factor, the courts take a flexible balancing approach to evaluating these factors, similar to that used for preliminary injunctions. *Leiva-Perez v. Holder*, 640 F.3d 962, 966 (9th Cir. 2011). There is some functional overlap between the two tests. *Id.* However, stays are generally less coercive than preliminary injunctions, since they operate only on the judicial process itself and are less disruptive than injunctions. *Id.*

The Ninth Circuit applies the same “sliding scale” for the success prong as for preliminary injunctions: that an applicant need only show “serious questions” on the merits, if it makes a stronger showing on the other factors. *Id.* at 967-68.

Accordingly, to obtain a stay, the applicant must show:

[T]hat irreparable harm is probable and either: (a) a strong likelihood of success on the merits and that the public interest does not weigh heavily against a stay; or (b) a substantial case on the merits and that the balance of hardships tips sharply in the petitioner's favor.

Id. at 970.

B. Standard of Review for Preliminary Injunctions.

Because this motion requests a stay pending appeal of an order granting a preliminary injunction, the standard for issuing preliminary injunction is also relevant, since there is significant overlap between the two tests. *Leiva-Perez*, 640 F.3d at 966.

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

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

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

Finally, preliminary injunctive relief must be tailored to remedy only the specific harm alleged. *Stormans*, 586 F.3d at 1140. An overbroad preliminary

injunction is an abuse of discretion. *Id.* (citing *Lamb–Weston, Inc. v. McCain Foods, Ltd.*, 941 F.2d 970, 974 (9th Cir. 1991)).

Because of the significant overlap between these two standards, each of the four factors will be discussed together, for purposes of both showing that a stay should issue and that the district court abused its discretion in granting the preliminary injunction.

III. The Secretary of State has a strong likelihood of success on the merits.

The first factor for obtaining a stay pending appeal requires that the applicant for the stay must show, at a minimum, “a substantial case for relief on the merits.” *Leiva-Perez*, 640 F.3d at 968. This does *not* mean that it must be more likely than not that the applicant will prevail. *Id.* at 967. It only requires that there be a non-negligible chance of success. *Id.* The whole point of a stay pending appeal is to hold the matter in abeyance until the appellate court and counsel can have time to thoroughly brief and review the matter on its merits. *Id.* at 966-67. This purpose is defeated if the required showing of success is too high. *Id.* at 968. Accordingly, the Secretary need only demonstrate “serious questions” on the merits. *Id.* at 966-67. However, for the reasons discussed below, the Secretary has shown a very strong likelihood of success.

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A. Background on Nevada’s “None of these candidates” option.

Nevada Revised Statute 293.269(1) requires that every ballot for any statewide office¹ or for President and Vice President of the United States must contain an additional line after the list of candidates’ names that must read: “None of these candidates.” This option must be presented in the same manner that candidates’ names are presented, and voters must be allowed to choose this option just as they would choose a candidate. *Id.*

However, Subsection 2 of NRS 293.269 provides:

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

NRS 293.269(2) (emphasis added).

According to this subsection, although “None of these candidates” is tabulated and reported in all election results, it is not counted in determining who is nominated or elected to any statewide office or for the selection of presidential electors. Only votes for a named candidate are counted in determining who wins

¹ “Statewide office” includes federal offices, such as U.S. Senator, as well as state offices such as governor, attorney general, justice of the Nevada Supreme Court, etc.

the election, therefore NOTC can never “win” an election, even if it receives a plurality or majority.

B. The district court erred in finding that choosing “None of these candidates” is a “vote” that implicates any federal right to vote.

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

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

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

Cir. 2003) and *Hussey v. City of Portland*, 64 F.3d 1260, 1264-65 (9th Cir. 1995).

A “vote” is an act that, at a minimum: (1) is an official expression of the voter’s will; (2) is required to resolve some political issue; and, (3) which requires a majority (or some other threshold) to be effective. *Green*, 340 F.3d at 897-98. How the act is labeled is not dispositive; courts should look to the function of the act. *Hussey*, 64 F.3d at 1263-64.

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

This functional approach is consistent with Supreme Court precedent. *U.S. v. Classic*, 313 U.S. 299, 307 (1941) involved the sufficiency of a criminal indictment charging the defendants with depriving voters of their rights secured by the U.S. Constitution by falsifying ballots and falsely certifying the results in a Louisiana partisan primary election for House of Representatives. The main question in that case was whether a closed partisan primary election held for the

purpose of selecting party nominees to appear as candidates for federal office on the general election involved the federal right to vote. *Id.* at 310-11. In determining this question, the Court stated: “We look then to the statutes of Louisiana here involved to ascertain the nature of the right which under the constitutional mandate they define and confer on the voter...” *Id.* at 310.

The Court concluded that Louisiana’s primaries did create a right to vote, because the election was conducted by the state at taxpayer expense, the state greatly restricted access to the general election ballot for candidates who did not appear on the primary ballot, and a choice of a nominee at the primary election was a critical step toward ultimately electing a congressman of the voter’s choice. *Id.* at 311-14.

The Court engaged in an extensive functional analysis of Louisiana’s primary election system. It did not simply conclude, as district court did in this case, that because people had marked ballots and turned them in, that this *ipso facto* was voting that was entitled to the protections of the U.S. Constitution. Instead, it took a *functional* approach, based on a review of the entire relevant state statutory scheme.

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

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

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

By contrast, the “consents” in *Hussey* were necessary for the annexation to occur, even though the final boundaries were set by a local board, not the voters. 64 F.3d at 1265. In *Green*, the court found that signatures on a petition for municipal incorporation were the equivalent of voting because the petition process itself was a substitute for the election, and incorporation could not occur without a successful petition. 340 F.3d at 897-98. In each of these cases, the entire statutory scheme contemplated that some official action would be triggered when enough consents or signatures were obtained, but not unless or until then. Thus it is the

gathering of sufficient consents or signatures that resolves the political questions of whether annexation or incorporation should occur. Here, choosing “None of these candidates” does not solve the question of who should be elected to office.

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

The essence of a “vote” is a choice that has some legally significant impact. Therefore examining whether the law assigns the act such characteristics is a critical part of determining whether something is a vote. See *Green*, 340 F.3d at 897-98 (to be a “vote,” the act must be necessary to resolving a political issue). As explained by *Green* and *Hussey*, and demonstrated in the decision in *Classic*, the court looks to what *function* the act in question serves in the state statutory scheme, not merely its form or label. Here, since NOTC is not a person that can take office, Nevada law sensibly provides that it is not counted in determining which person wins.² By definition, “None of these candidates” is the opposite of voting for any candidate, and therefore does not carry the function or essence of a vote.

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

Accordingly, having NOTC appear on the ballot does not impede or impair the right to vote in federal elections, because it does not result in any votes for a candidate for federal office not being counted. It neither expands nor restricts the right to vote in a federal election because it only reflects an ability votes always possess: to *not* vote for a named candidate. For these reasons, NOTC simply does not implicate any federal right to vote.

The district court abused its discretion in granting the preliminary injunction because it applied an incorrect rule of law when it determined that NOTC is a “vote” without employing the functional test of *Green*, *Hussey*, and *Classic*. Therefore it is appropriate to stay the order granting the preliminary injunction pending the appeal.

C. Substantive Due Process does not Require that “None of these candidates” be counted as a vote.

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

The Court in *Glucksberg* noted that it has been reluctant to expand what liberty interests implicate substantive due process “because guideposts for

responsible decision-making in this uncharted area are scarce and open-ended.” *Id.* at 720. The consequences of recognizing a liberty interest as being protected by substantive due process cannot be understated. As the Court explained: “By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action.” *Id.* (emphasis added). Thus, the Court cautioned that it must “exercise the utmost care whenever we are asked to break new ground in this field....” *Id.*

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

The answer is no. As discussed above, choosing NOTC is not a “vote” because, functionally and logically, it is the opposite of voting for a candidate. No legal authority supports the notion that just because an option appears on the ballot, that it necessarily represents a fundamental liberty interest that is so “implicit in the concept of ordered liberty” that “neither liberty nor justice would exist” if it was

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not counted as a vote.³ *Washington*, 521 U.S. at 720-21. Indeed, as demonstrated in the *Classic* case, the fact that people cast ballots is not determinative of whether the federal right to vote is even implicated. 313 U.S. at 311-14.

Ordinarily, to succeed on a due process claim in the elections context, plaintiffs must demonstrate that the election was conducted in a fundamentally unfair manner. *Bennett v. Yoshina*, 140 F.3d 1218, 1226-27 (9th Cir. 1998). Plaintiffs argued that NRS 293.269 constitutes a “per se” violation of due process because it is an “officially-sponsored election procedure” that requires elections officials to ignore valid votes. However, all of those cases involved situations where the “officially-sponsored election procedure” in question unexpectedly changed, and it was the *change* in procedure, and the fact that it occurred without notice, that caused voters to be disenfranchised. *See e.g., Bennett*, 140 F.3d at 1226-27; *Griffin v. Burns*, 570 F.2d 1065, 1078 (1st Cir. 1978); *Hoblock v. Albany Cnty. Bd. of Elections*, 422 F.3d 77, 98 (2d Cir. 2005).

Here, the State is following a law that has been in operation for more than thirty five years. Unlike in *Griffin* or *Hoblock*, there is nothing fundamentally unfair because there has been no change in procedure, and no “inducement” to

³ If that were the law, it would be categorically unconstitutional for states and local governments to place advisory-only ballot questions to the voters, since voters “vote” on such questions, but they have no legal effect. *See e.g., NRS 293.482*. Like “None of these candidates,” such questions are designed to poll the electorate’s sentiments.

voters that they vote a certain way, only to later, completely unexpectedly, refuse to count those votes. *See Griffin*, 570 F.2d at 1074 (the state’s action essentially worked a fraud upon the voters who reasonably relied on the procedures implemented by the state).

As discussed above, since “None of these candidates” – as a matter of logic, not just law - is not a vote for any candidate, there is nothing fundamentally unfair about not counting it when determining which candidate won the election. Nor has anyone misrepresented that NOTC can win an election, or otherwise misinformed or induced voters to choose it in a manner that would unfairly strip them of their franchise. Finally, the State is not refusing to count the votes for candidates that are cast by any voter. Thus no one is being disenfranchised in violation of the Due Process clause.⁴

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

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

⁴ The Secretary joins the Intervenor’s Emergency Motion to Stay regarding Plaintiffs’ lack of standing and laches.

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

Thus if persons are not similarly situated, there is no equal protection violation and no need to justify different treatment, under any level of judicial scrutiny, even if the issue involves elections and voting. Thus courts have held, for example, that states are not required to have identical ballot access procedures for independent candidates and partisan candidates because the two types of candidates are not similarly situated. *Van Susteren v. Jones*, 331 F.3d 1024, 1027 (9th Cir. 2003). Likewise, candidates trying to get on a primary election ballot are not similarly situated to candidates trying get on the general election ballot. *Anderson v. Mills*, 664 F.2d 600, 607 (6th Cir. 1981).

The Secretary has a strong chance of success on the merits of the equal protection claim because voters who choose “None of these candidates” are not similarly situated to those who choose a candidate. If “None of these candidates”

were counted in a way that permitted it to win, a vacancy in the office could result, whereas that is obviously not the case with votes for candidates. Also, NOTC is not a candidate that could hold office. Thus choosing “None of these candidates” is fundamentally different from voting for a named candidate. Therefore the Equal Protection clause does not require the State to treat them the same.

Furthermore, a voter who chooses “None of these candidates” is similarly situated to voters who abstain from voting altogether, who undervote a particular race, who deface their ballots, or who otherwise do not cast a vote for a particular candidate. All of these voters are treated the same: their “vote” is not counted in determining which candidate won the election.

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

E. The “None of these candidates” option is within the State’s broad powers under the Elections Clauses.

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

Under this clause, the states have “broad powers” to prescribe the mechanisms for holding elections. *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986). Regulating the “manner” of elections includes providing for “matters like ‘notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns.’” *Cook v. Gralike*, 531 U.S. 510, 523-24 (2001) (*quoting Smiley v. Holm*, 285 U.S. 355, 366 (1932)). However, it is not “a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints.” *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 833-34 (1995).

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

In *Cook*, the Court held that states could not print statements next to candidates’ names on the ballot such as: “DISREGARDED VOTERS’ INSTRUCTIONS ON TERM LIMITS,” and attempt thereby to control the outcome of the election. 531 U.S. at 524. The Court agreed that the labels were “a Scarlet Letter,” “derogatory,” “intentionally intimidating,” “particularly harmful,” “politically damaging,” “a serious sanction,” “a penalty,” and “official denunciation.” *Id.* at 524-25. The law “is plainly designed to *favor candidates* who

are willing to support the particular form of a term limits amendment set forth in its text and *to disfavor those* who either oppose term limits entirely or would prefer a different proposal.” 531 U.S. at 524 (emphasis added).

The Court found that such labels exceed the states’ authority to regulate the manner of elections because “the labels surely place their targets at a political disadvantage to unmarked candidates for congressional office.” *Id.* at 525. Thus, the Court reasoned, the labels went beyond regulating election procedures and methods, and attempted to “dictate electoral outcomes,” i.e., that candidates who did not support term limits would lose. *Id.* at 525-26.

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

Just having the option of “None of these candidates” does not unlawfully induce voters to choose that option. Voters are always free to undervote in a race, whether or not “None of these candidates” appears as an option. Unlike in *Cook*,

there is nothing about the language of the option that is designed to steer voters one way or another. Therefore allowing the option of “None of these candidates” is comfortably within the State’s “broad powers” to regulate the manner of elections under the elections clauses. *See Tashjian*, 479 U.S. at 217.

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

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

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

Similarly, in this case there are no allegations that NRS 293.269 is racially discriminatory, or that any of the Plaintiffs are being discriminated against based on their race. Therefore, the VRA provides no remedy.

Additionally, the Second Circuit further reasoned that holding otherwise would “thrust [courts] into the details of virtually every election, tinkering with the state's election machinery, reviewing petitions, registration cards, vote tallies, and

certificates of election for all manner of error and insufficiency under state and federal law.” *Id.* at 86. The court refused to do so. It stated: “Absent a clear and unambiguous mandate from Congress, we are not inclined to undertake such a wholesale expansion of our jurisdiction into an area which, with certain narrow and well defined exceptions, has been in the exclusive cognizance of the state courts.” *Id.* (footnotes omitted).

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

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

Plaintiffs’ claim is based on part of Section 301 of the Help America Vote Act, codified at 42 U.S.C. § 15481(a)(6), which states: “Each State shall adopt uniform and nondiscriminatory standards that define what constitutes a vote and what will be counted as a vote for each category of voting system used in the State.” *Id.*; Pub. L. 107-252 § 301(a)(6). Nothing in Section 301 explicitly creates a private right of action.

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

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

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

Furthermore, Section 301 of HAVA does not create any private rights that could be enforceable by an action under 42 U.S.C. § 1983. *Taylor*, 428 F.Supp.2d at 387. As the court in *Taylor* discussed at length, in *Blessing v. Freestone*, the U.S. Supreme Court held that a plaintiff must assert the violation of a federal *right*, not merely a violation of federal law, when filing an action under § 1983. 520 U.S. 329, 340-41 (1997). The plaintiff must show that: (1) Congress clearly intended to benefit the plaintiff; (2) “the right assertedly protected by the statute is not so

‘vague and amorphous’ that its enforcement would strain judicial competence,” and (3) the statute unambiguously imposes a binding obligation on the states. *Id.*

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

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

In this case, the Plaintiffs are invoking 42 U.S.C. § 15481. The relevant part reads: “Each State shall adopt uniform and nondiscriminatory standards that define what constitutes a vote and what will be counted as a vote for each category of voting system used in the State.” 42 U.S.C. § 15481(a)(6). The statute creates directives for state officials without identifying any particular classes of

individuals who are to receive new rights. Just as in *Gonzaga* and *Brunner*, the provision is not phrased in terms of the persons benefitted, and does not “unambiguously” create new rights for the plaintiffs or for any other particular individuals. The statute may benefit the voting public as a whole, but all federal statutes are generally intended to benefit the public, and a stricter standard must be used. The U.S. Supreme Court has required, in *Gonzaga*, a clear intent on the part of Congress to create individual rights before a § 1983 action becomes appropriate. That intent is absent from 42 U.S.C. § 15481.

The statute at issue in this case, 42 U.S.C. § 15481(a)(6), does not contain any language that speaks of any individual right to do anything in particular. It is not phrased in terms of persons who are benefitted by the statute. Nor does it prescribe exactly what the standards must entail, or what happens if the state fails to comply with the statute.

This is far short of the “unambiguously conferred right” required by the Court in *Gonzaga*, 536 U.S. at 283. Therefore the Secretary has a strong chance of success on Plaintiffs’ HAVA claim because 42 U.S.C. § 15481(a)(1) does not confer any individual, privately enforceable right.

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

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

Thus, if the burden is “severe,” then strict scrutiny applies, and the regulation can only be upheld if it is narrowly tailored to serve a compelling state interest. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). Regulations that are generally applicable, even-handed, and politically neutral are often upheld because they impose non-severe burdens that are justified by important state interests. *Id.* Where the burden imposed by the regulation is slight, a state’s rational basis is

sufficient to uphold the regulation. *Libertarian Party of Washington v. Munro*, 31 F.3d 759, 761 (9th Cir. 1994).

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

First, even assuming *arguendo* that choosing NOTC is a “vote” that is entitled to constitutional protection, placing it on the ballot but not counting it in determining which candidate wins imposes only a *de minimus* burden on Plaintiffs’ rights, and therefore it is subject only to rational basis review.

The Secretary joins the Intervenor’s Emergency Motion to Stay on the issue of standing. As argued there, Plaintiffs have not even shown a concrete, particularized injury sufficient for standing purposes. *A fortiori*, they have not established a severe burden on their rights under the *Anderson* balancing test.

Second, voters are informed upfront that NOTC is not counted. NOTC is only one choice among many on the ballot, and it is solely up to the voter whether to choose it or not. Therefore, it is not the unexpected or arbitrary act of the State that determines whether the voter’s choice will count or not. It is the voter’s

decision. When NOTC appears on the ballot, that option does not prevent a voter from casting a vote that will be counted by voting for a named candidate.

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

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

For all these reasons, not counting NOTC is at most a *de minimus* burden on Plaintiffs’ rights. Since only a minimal burden is at issue, the State’s rational basis

in not counting it is sufficient to uphold the statute. *Munro*, 31 F.3d at 761. Here, the State has compelling reasons for not counting NOTC, therefore regardless of the level of scrutiny that applies, NRS 293.269 is constitutional.

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

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

Avoiding these inefficiencies, confusion, and expense are compelling state interests to justify not counting votes unless they are cast for a named candidate. *See Clements v. Fashing*, 457 U.S. 957, 965 (1982) (noting states' interests in creating efficient elections, limiting voter confusion, and avoiding the expense of special elections are important interests); *Libertarian Party of North Dakota v. Jaeger*, 659 F.3d 687, 697 (8th Cir. 2011) (characterizing these interests as compelling); *Geary v. Renne*, 880 F.2d 1062, 1071 (9th Cir. 1989) (California had compelling government interest in "having its officers discharge with fidelity to the public interest the duties for which they are responsible.").

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

access. See NRS 293.1715(2)(a) (minor party receiving 1% or more of the votes cast for Representative in Congress retains ballot access automatically).

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

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

statute would be constitutional even if strict scrutiny applies, and the Secretary as a strong chance of success on the merits.

V. Irreparable Harm Will Result If the Injunction is Not Stayed

The second factor of the stay analysis requires the applicant to show that it is probable that it will suffer irreparable harm if the stay does not issue. *Leiva-Perez*, 640 F.3d at 968.

The U.S. Supreme Court has held that the third and fourth factors of the stay analysis – the injury to the *opposing* party and the public interest – “merge when the Government is the opposing party.” *Nken v. Holder*, 556 U.S. 418, 435 (2009).

This case, of course, is the opposite: the State of Nevada, through its duly elected Secretary of State, is the *applicant*, rather than the opposing party. Since the Secretary is acting in his official capacity on behalf of the public, the fourth factor – the public interest – should merge in this case with the second factor – the harm to the applicant.

A. Nevada voters will be irreparably harmed if the stay does not issue.

Since 1975, Nevada voters have had the option to choose “None of these candidates” in all statewide races, including races for U.S. Senator and President and Vice President of the United States. *See* NRS 293.269. The district court’s order enjoins the Secretary of State from placing “None of these candidates” as an

option on the ballot. This irreparably harms Nevada voters by taking away a legitimate and meaningful ballot choice.

Irreparable harm is generally harm that cannot be adequately compensated by money damages. *Colorado River Indian Tribes v. Town of Parker*, 776 F.2d 846, 850 (9th Cir. 1985). The loss of First Amendment rights of political speech, even for a short amount of time, constitutes irreparable harm. *Farris v. Seabrook*, 677 F.3d 858, 868 (9th Cir. 2012). Although Nevada is not constitutionally required to have “None of these candidates” as a ballot option,⁵ it has offered its voters this option for over 35 years. To now deprive voters of that option altogether harms Nevada voters by preventing them from clearly expressing their dissatisfaction with the candidates.

As discussed in the previous section, the purpose of the “None of these candidates” (NOTC) option is to give voters a unique and powerful opportunity to communicate their dissatisfaction with the entire slate of candidates in a direct and unambiguous manner. When a voter abstains (does not go to the polls at all) or undervotes (casts a ballot, but skips one or more races by not voting for any candidate in those races), the reasons for this action are ambiguous. It may be due

⁵ See *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363 (1997) (restrictions on what appears on the ballot may impose significant burdens on First Amendment rights, but these burdens are often outweighed by countervailing state interests in running efficient elections, avoiding voter confusion, etc.).

to apathy, the costs of voting, not being familiar with the candidates, dissatisfaction with the candidates, or any number of other reasons.

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

The injunction issued by the district court requires that “None of these candidates” shall not appear as an option in any race on the November 2012 general election ballot. Thus voters such as Intervenor Edwards, who intended to exercise that option in the upcoming election, are irreparably harmed by losing the longstanding ability to send a clear message of disapproval to the candidates and the parties.

B. The State and the public interest will be irreparably harmed if the stay does not issue.

A corollary to the voters’ ability to send an unambiguous message to their politicians is the State’s receipt of that message. As discussed above, NOTC is designed to make elected officials more responsive to their constituencies. The

state itself, and the public interest especially, is harmed by losing this communication with voters. Obviously, there is a powerful public interest in making elected officials responsive to citizens, and NOTC directly furthers that interest by communicating to officials when voters disapprove of them.

That communication will be lost if NOTC is not placed on the ballot. Thus, even if the second and fourth factors (the harm to the applicant and the public interest) are not merged, the State itself will be irreparably harmed by losing the communication that NOTC provides.

VI. No Harm to the Opposing Party Will Occur is the Stay is Issued

Staying the district court's order in this case will not cause any harm to the Plaintiffs-Appellees, because the presence of NOTC on the ballot itself does not harm anyone. The Plaintiffs-Appellees have argued, and the district court held, that the reason NOTC is unconstitutional is because it is not counted as a vote. In other words, the harm they complain about is the "disenfranchisement" that occurs from *not counting* it. The Plaintiffs-Appellants have not offered any evidence that simply having NOTC on the ballot harms them in any concrete way, let alone that they will suffer irreparable harm.

Plaintiffs Woodbury and DeGraffenreid allege that they are Republican nominees for the office of presidential elector. Amended Complaint, ¶¶ 12, 13. They allege that if Mitt Romney receives the highest number of votes in the

general election, that they will be elected to the position of presidential elector, and therefore they have a direct personal interest in not having “None of these candidates” appear on the ballot. *Id.* This is presumably because the presence NOTC will siphon votes from Romney because, if given the option, some voters will choose “None of these candidates” instead of voting for Mitt Romney. Therefore, presumably, removing this option would give the Candidate Plaintiffs a better chance of being elected to the office of presidential elector, and the Voter Plaintiffs a better chance of having their preferred candidate win.

However, this “injury” is merely conjectural and speculative. There was no evidence introduced that this is likely to occur. Even assuming that appearance of NOTC on the ballot would tend to increase the number of voters who select NOTC instead of Mitt Romney, and therefore reduce the chance of Romney winning, this does not implicate any legally protected interest, because voters are always free to undervote that race, whether NOTC appears on the ballot or not. They are certainly never compelled to vote for any named candidate, or to vote for Plaintiffs’ preferred candidate. There is no cognizable legal harm to the Plaintiffs, let alone irreparable injury.

VII. Granting a Stay is In the Public Interest

The public interest in this case would be greatly promoted by granting a stay. As discussed above, because the applicant in this case is the Secretary of

State acting in his official capacity, the interests of the applicant and the public interest should be merged. For the reasons stated earlier, the public interest is in granting a stay so that “None of these candidates” may proceed to the November 2012 ballot.

Many voters, such as Intervenor Edwards, intended to exercise the option of “None of these candidates” in the upcoming election. They are now being deprived of that option, and left only with the options of either abstaining completely, or undervoting, neither of which adequately expresses the voters’ intent. This greatly outweighs the speculative harm alleged by the Plaintiffs.

VIII. The District Court’s decision must be stayed because the preliminary injunction in this case is overbroad and therefore an abuse of discretion.

The district court ruled that the option of NOTC is unconstitutional because it constitutes a vote, yet NRS 293.269(2) prohibits it from being counted as a vote in determining who wins. This, the district court ruled, disenfranchises voters who choose NOTC. According to the Plaintiffs, and apparently the district court agreed, the constitutional infirmity of Nevada’s NOTC option is *not* that it appears on the ballot; rather, the constitutional problem is that it is not counted as vote, like votes for named candidates are counted. *See* Transcript of August 22, 2012 hearing, p. 35.

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

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

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

In this case, the specific harm cited by the Plaintiffs was that voters who chose “None of these candidates” did not have that choice counted as a vote in

determining who wins the election, and therefore those voters are being “disenfranchised.” Therefore even if this Court were to agree that NOTC must be counted as a vote, the appropriate remedy would be to count it– not to strike it entirely from the ballot. This would be a narrower injunction that would cure any constitutional problem, while also preserving the choice of NOTC for those voters who wish to use it to communicate with their politicians and parties.

Nevada has a general policy that all statutes are severable. NRS 0.020. “A ruling of unconstitutionality frustrates the intent of the elected representatives of the people. Therefore, a court should refrain from invalidating more of the statute than is necessary.” *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984). Thus, if part of a statute is unconstitutional, the remainder should stand, “unless the whole scope and object of the law is defeated by rejecting the objectionable features.” *Binegar v. Eighth Judicial Dist. Court In and For County of Clark*, 112 Nev. 544, 551, 915 P.2d 889, 894 (1996). A court should therefore sever the offending provision unless the remaining provisions would no longer have legal force or effect and the legislature did not intend them to stand alone. *Brewery Arts Center v. State Bd. of Examiners*, 108 Nev. 1050, 1056, 843 P.2d 369, 373 (1992).

The district court determined that NOTC is unconstitutional because it is not counted in determining who wins the election. Thus the only offending part of the statute is the first clause of Subsection 2, which reads: “Only votes cast for the

named candidates shall be counted in determining nomination or election to any statewide office or presidential nominations or the selection of presidential electors...” NRS 293.269(2). The remainder of Subsection 2 requires that NOTC must be tabulated and reported in all election results.

Obviously, the remainder of NRS 296.269 can stand alone and have legal force and effect if the first clause of subsection 2 is severed. NRS 296.269(1) describes in detail how NOTC should be placed on the ballot. NRS 296.269(3) requires instructions to appear on the sample ballots informing voters that they may only choose NOTC if they do not also vote for a named candidate. Severing the relevant portion of Subsection 2 in no way would impair the operation of the remaining parts of the statute.

No judicial intervention would be required to determine the outcome if NOTC won the election. Other Nevada law adequately covers what would happen in the extremely unlikely event NOTC received a plurality of the votes. NRS 304.030 states that the Governor may appoint someone whenever the office of U.S. Senator becomes vacant. NRS 298.040 provides for filling vacancies in the office of presidential elector.

Accordingly, this Court should stay the operation of the overbroad preliminary injunction and allow NOTC to appear on the ballot. This will prevent the injunction from causing irreparable harm to the voters who intended to choose

NOTC, while still allowing this Court to review the issue of whether NOTC must be counted as a vote.

If the preliminary injunction is not stayed, then voters who intended to choose NOTC will be effectively deprived of that option in the upcoming election, since there would likely not be time to put it back on the ballot if this Court were to decide that Nevada's scheme for NOTC is fully constitutional.

CONCLUSION

For the foregoing reasons, Appellant Secretary of State respectfully requests this Court to issue a STAY of the district court's order granting a preliminary injunction. Due to the fast-approaching deadlines for printing ballots, Appellant Secretary requests action before September 7, 2012.

Respectfully submitted this 30th day of August, 2012.

CATHERINE CORTEZ MASTO
Attorney General

By: /s/ Kevin Benson
KEVIN BENSON
Senior Deputy Attorney General
100 North Carson Street
Carson City, Nevada 89701
(774) 684-1114
Attorney for Plaintiff-Appellant,
ROSS MILLER, Nevada Secretary
of State

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 30, 2012.

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

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

Michael T. Morley, Esq.**
616 E Street, NW #254
Washington, D.C. 20004
Tel: (202) 434-5247
Fax: (202) 434-5029
Email: michaelmorleyesq@hotmail.com
Attorney for Plaintiffs-Appellees
TOWNLEY, et al.

*** pro hac vice admission forthcoming*

/s/ Linda Deming
Employee of the State of Nevada
Office of the Attorney General

EXHIBIT A

AFFIDAVIT OF HARVARD L. LOMAX

STATE OF NEVADA }
COUNTY OF CLARK } ss.

HARVARD L. LOMAX, having been duly sworn states as follows:

1. That I am the duly appointed Registrar of Voters of Clark County, Nevada and I make this affidavit in that capacity.
2. That the Clark County Registrar of Voters is responsible for the printing and mailing of the absentee ballots and sample ballots, and preparation of all voting equipment used by the voters in Clark County.
3. That in the 2012 general election, we will have 169 ballot styles in Clark County. A "ballot style" is a unique combination of contests for which voters in specific precincts are eligible to vote. The 169 ballot styles are spread among the 1067 voting precincts in which the voters in Clark County reside.
4. That printing, proofing and preparing absentee ballots requires a substantial amount of time. Because Nevada statutes require we report election results by precinct. The printing tolerances for the paper absentee ballots are 15/1,000 of an inch and the density of the ink requires that once one side of the ballot is printed, it must be allowed to dry for 24 hours (preferably 48) before the second side can be printed. After the ballots are printed and have dried, they are then cut (again, to tolerances of 15/1000 of an inch). They are then run through an automated folding machine. Next, they must be run through an ink jet printer that prints a unique identifying number, the precinct number and a processing barcode on each ballot or ballot stub. Finally, the ballots are run through an insertion machine that inserts each ballot and accompanying instructions into an envelope.
5. That when the ballots are delivered to the Clark County Election Center, they must be sorted into one of 1,067 trays, inventoried and proofed to ensure the appropriate ballot styles are in the proper envelopes. This process is normally completed three days after the last ballots are delivered.
6. That our printer is Nevada Color Litho, the only printer in the state of Nevada certified to print these ballots. Nevada Color Litho's normal production mode is 12-18 hours per day, five to six days per week. If we require them to go into what they call "rush" mode, they work 24/7, including holidays. In "rush" mode, an increasing percentage of their non-election work (other customers) becomes displaced until eventually the entire plant is devoted exclusively to election-related printing. When this happens, internal overtime increases, outsourcing (and all of its associated costs) increase, and additional temporary staff must be hired. They estimate the cost per day in "rush" mode would increase cost of the job from 2% to 10% per day of the total cost of the printing. Depending upon how compressed the schedule became and how many additional resources they would be required to devote to printing our material.

7. That Federal law and NRS 293D.320(1) mandate that ballots must be mailed to military and overseas voters not later than 45 days before the date of the General Election and, for the upcoming November General Election, that date is September 22, 2012. To allow Election Department personnel adequate time to inventory, sort and quality control the absentee ballots we receive from the printer, the ballots must be delivered no later than September 14.

8. That the last date we can provide the mail ballot files to the printer so that the printer can work in normal production mode and deliver all mail ballots to the Election Center by September 14 is today, August 24. After August 24 as previously stated, costs begin to increase. Based upon the fact that it is clear we will not have a decision on this issue until early September, we have revised our printing plans. The printer will only print the requested UOCAVA and out-of-state ballots and supporting test and blank ballots prior to September 22 (approximately 4,500 ballots). This will allow us to meet the federal 45-day deadline. The remaining estimated 80,000-90,000 ballots will be printed thereafter. Printing and issuing them will involve substantial overtime, but that is inevitable at this point.

9. That with our revised schedule, we require a decision on the "None of These Candidates" issue no later than September 7, 2012 if we are to meet the September 22 deadline without incurring overtime additional to that already compelled by the revised printing schedule.

10. That in addition to the printing and mailing of absentee ballots, the Clark County Election Department is responsible for support of the entire election process with over 800,000 active registered voters. Every day we are delayed, the preparation schedule becomes more compressed and the potential for an error that could impact the outcome of the election increases. An error-free election is our goal and we do everything we can to achieve that goal. Nevertheless, the reality of a 24-hour schedule and the corresponding reduction in time available for quality control efforts is that it increases the potential for error. Conducting a successful election has become incredibly complex in a county the size of Clark County. Adequate preparation time is essential to our ability to provide this county's residents the professionally conducted election they deserve and expect.

FURTHER AFFIANT SAYETH NAUGHT.


HARVARD L. LOMAX

SUBSCRIBED and SWORN to me before me

this 24 day of August, 2012.


NOTARY PUBLIC

