Docket No. 12-16881

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WENDY TOWNLEY, et al.,

Appellees,

v.

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

Appellants.

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

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

EMERGENCY MOTION UNDER CIRCUIT RULE 27-3

APPELLANT EDWARDS' MOTION FOR STAY PENDING APPEAL

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CIRCUIT RULE 27-3 CERTIFICATE

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

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

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

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

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

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

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

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

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

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

DATED: August 28, 2012.

Respectfully submitted,

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INTRODUCTION

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

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

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

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

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

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

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

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

STATEMENT OF FACTS

A. Factual Background

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

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

> Every ballot upon which appears the names of candidates for any statewide office or for President and Vice President of the United States shall contain for each office an additional line equivalent to the lines on which the candidates' names appear and placed at the end of the group of lines containing the names of the candidates for that office. Each additional line shall contain a square in which the voter may express a choice of that line in the same manner as the voter would express a choice of a candidate, and the line shall read "None of these candidates."

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

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

Id. N.R.S. 293.269(2). Finally, subsection 3 prescribes specific instructions that must be given the voter on each ballot: "Every sample ballot or other instruction to voters prescribed or approved by the Secretary of State shall clearly explain that the voter may mark the choice of the line 'None of these candidates' only if the voter has not voted for any candidate for the office." *Id.* N.R.S. 293.269(3).

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

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

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

B. Procedural History

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

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

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

ARGUMENT

I.

THE STANDARD FOR GRANTING A STAY PENDING APPEAL

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

II.

EDWARDS IS LIKELY TO SUCCEED ON THE MERITS

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

A. Each of the Plaintiffs Lacks Constitutional Standing

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

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

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

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

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

1. Each Plaintiff Lacks Constitutional Standing

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

statutory provision." As a threshold matter, four of these Plaintiffs (Wendy Townley, Whitlock, Gunson, and Thomas) do not even allege that much, but rather allege that they are registered members of political parties and they plan to vote in the November 2012 election; none alleges a single identifiable interest or injury. *See* Am. Compl. ¶¶ 3-6. And while three of the other non-NOTC Plaintiffs (Wood, Linford, and Wesley Townley) allege interests, each of those interests is nothing more than "a general interest common to all members of the public," *Lance*, 549 U.S. at 439. For example, these three non-NOTC Plaintiffs allege that they have an interest in "being able to cast [a] vote for any of the options listed for each race on the ballot, and having that vote be given full legal effect," Am. Compl. ¶¶ 7(b), 8(b), and 9(b), or, in other words, an "interest in proper application of the Constitution and laws," a quintessentially insufficient injury, *Lance*, 549 U.S. at 439.[1] Notably absent from these allegations is any claim that any of these non-NOTC Plaintiffs

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

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

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

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

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

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

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

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

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

treated. But this statute will never apply to the non-NOTC Plaintiffs, who do not intend to exercise that option. Accordingly, they cannot claim that *their* vote will ever be, in Plaintiffs' words, "disregard[ed]." Am. Compl. at 1; *see, e.g.*, Am. Compl. ¶ 9 (non-NOTC Plaintiff Wesley Townley alleging that he will vote for Mitt Romney). Rather, to the extent that any non-NOTC Plaintiff is "injured," that injury derives solely from their "interest in not having 'None of these candidates' appear as an option on the ballot for President of the United States in the November 6, 2012 general election." Am. Compl. ¶¶ 12(c), 13(c); *see also id.* at ¶ 8(a) (Plaintiff Linford alleging an interest in not voting on a ballot that includes NOTC as "one of the officially presented option in the races for President of the United States and U.S. Senator"). That injury is caused by Nev. Rev. Stat. § 293.269(1), not Nev. Rev. Stat. § 293.269(2). Indeed, Plaintiffs would be worse off if NOTC "votes" were given effect. In all events, Plaintiffs "cannot leverage [their] injuries under certain, specific provisions to state an injury under the [statute] generally," *Get Outdoors II*, 506 F.3d at 892.[2]

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

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

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

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

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

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

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

they claim.

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

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

B. Plaintiffs' Claims Have Little Chance Of Success

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

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

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

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

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

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

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

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

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

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

Due Process

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

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

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

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

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

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

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

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

Equal Protection

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

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

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

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

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

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

Voting Rights Act

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

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

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

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

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

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

III.

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

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

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

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

B. Granting A Stay Will Cause No Irreparable Injury

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

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

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

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

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

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

process.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

D. The Public Interest Favors A Stay

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

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CONCLUSION

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

DATED: August 28th, 2012.

Respectfully,

/s/ John P. Parris
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CERTIFICATE OF SERVICE

I certify that on the 28th day of August, 2012, the foregoing Emergency Motion to Stay Pending Appeal was served by submission to the Court's electronic filing system, and was also delivered to the following parties by separate electronic mail delivery and by placing same in U.S. Mail at the addresses below:

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