No. ______

In the Supreme Court of the United States

REPUBLICAN PARTY OF NEVADA,
Petitioner,

v.

ROSS MILLER, NEVADA SECRETARY OF STATE,
IN HIS OFFICIAL CAPACITY; KINGSLEY EDWARDS,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. May a plaintiff seek to enjoin a statutory provision that injures it, on the grounds that the provision is inseverable from another, allegedly unconstitutional or otherwise invalid provision?

II. Does a political party have Article III standing to challenge the inclusion of an allegedly unconstitutional or illegal option on a ballot, against which its candidates will run?

PARTIES TO THE PROCEEDING

Petitioner Republican Party of Nevada was a Plaintiff-Appellee below. Other Plaintiffs-Appellees included:

(i) Democrat, Republican, and Independent registered voters (Wendy Townley, Amy Whitlock, Ashley Gunson, Heather Thomas, Dax Wood, Casja Linford, and Wesley Townley);

(ii) registered voters who alleged that they intended to vote for "None of These Candidates" and would be disenfranchised as a result (Jenny Riedl and Todd Dougan); and

(iii) Republican candidates for the office of presidential elector, who would face "None of These Candidates" as a ballot option in the 2012 election (Bruce Woodbury and James W. DeGraffenreid).

Respondent Ross Miller, Nevada Secretary of State, was a Defendant-Appellant below. Respondent Kingsley Edwards, a registered voter who supports the current statutory scheme, was an Intervenor Defendant-Appellant below.

CORPORATE DISCLOSURE STATEMENT

Petitioner Republican Party of Nevada has no parent corporation or stock.

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PETITION FOR WRIT OF CERTIORARI

The U.S. Court of Appeals for the Ninth Circuit held that Petitioner Republican Party of Nevada ("the Party") lacks standing to challenge a Nevada law that requires the Secretary of State to include "None of these candidates" as a ballot option in presidential and statewide elections, and then ignore any ballots validly cast for that option when determining the outcomes of those races. This ruling dramatically curtails the doctrine of "competitive standing," under which several other circuits have held that political parties and their nominees may challenge allegedly illegal or invalid ballot options against which their candidates must run. *See Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 587 (5th Cir. 2006); *Schulz v. Williams*, 44 F.3d 48, 53 (2d Cir. 1994); *Fulani v. Hogsett*, 917 F.2d 1028, 1030 (7th Cir. 1990); *cf. Shays v. FEC*, 414 F.3d 76, 85 (D.C. Cir. 2005) (adopting an even broader notion of competitive standing, under which a candidate may challenge "illegal structuring of a competitive environment").

More broadly, this ruling cements the Ninth Circuit's rejection of the theory of "standing through inseverability." The Party argued that the statutory provision requiring Respondent Secretary of State Ross Miller to include "None of these candidates" as an option in presidential and statewide races, Nev. Rev. Stat. § 293.269(1), is unenforceable because it is inseverable from another provision that prohibits Secretary Miller from counting ballots cast for that option in determining an election's outcome, *id.* § 293.269(2), which the Party alleged is

unconstitutional and violates federal law. This Court implicitly approved the doctrine of standing through inseverability in *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 683 & n.5 (1987), in which it adjudicated an airline's claim that a statutory provision governing its hiring practices was unenforceable because it was allegedly inseverable from a unconstitutional legislative veto provision. *Id*. The panel below barred the Party from maintaining identically structured claims.

In the decades since *Brock*, circuits have split over whether a plaintiff may challenge a statutory provision that harms it, on the grounds that it is inseverable from another, allegedly unconstitutional or otherwise invalid provision. The Tenth Circuit and D.C. Circuits have allowed claims to proceed based on standing through inseverability. *Local 514 Transp. Workers Union of Am. v. Keating*, 358 F.3d 743, 746 (10th Cir. 2004); *Catholic Soc. Serv. v. Shalala*, 12 F.3d 1123, 1126 (D.C. Cir. 1994). Other jurisdictions also have endorsed this approach, but held that the plaintiffs before them lacked standing because the underlying statutes were, in fact, severable. *See, e.g.*, *Advantage Media, L.L.C. v. City of Eden Prairie*, 456 F.3d 793, 801 (8th Cir. 2006); *Contractors Ass'n of E. Pa. v. City of Phila.*, 6 F.3d 990, 996 (3d Cir. 1993).

In contrast, the Fifth Circuit, like the Ninth Circuit, has held that plaintiffs may not attempt to invoke standing on such grounds. *National Federation of the Blind of Texas, Inc. v. Abbott*, 647 F.3d 202, 210-11 (5th Cir. 2011). This issue has a broad, trans-substantive impact on the ability of plaintiffs to bring claims in federal court under

complex statutory schemes in almost any area of law, including not only election law, but labor law, *Keating*, 358 F.3d at 746; Medicare, *Catholic Soc. Serv.*, 12 F.3d at 1126; employment law, *Brock*, 480 U.S. at 683 & n.5; and charitable solicitations, *Abbott*, 647 F.3d at 210.

Thus, this case warrants certiorari at every level of analysis. Most basically, the Ninth Circuit improperly barred the Party from even attempting to vindicate the fundamental right to vote by challenging an inseverable statutory scheme that the Party contends requires *de jure* voter disenfranchisement. More generally, the Ninth Circuit curtailed the doctrine of competitive standing and the ability of political parties to challenge allegedly illegal or invalid ballot options against which their candidates must run. Broader still, the Ninth Circuit's ruling is contrary to *Brock*, 480 U.S. at 683, and confirms the Ninth Circuit's place in the two-circuit minority which has limited plaintiffs' ability to challenge invalid laws by establishing standing through inseverability. This Court should grant certiorari.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Ninth Circuit is published at 722 F.3d 1128 and reproduced at A-1 to A-19. On September 4, 2012, a motions panel of the Ninth Circuit stayed the district court's preliminary injunction. Its opinion is not available online, but is reproduced at A-23 to A-32. On September 5, 2012, the motions panel issued an

amended opinion, which is published at 693 F.3d 1041 and reproduced at A-33 to A-43.

The district court verbally granted Petitioners' motion for a preliminary injunction on August 22, 2012, but did not issue a written opinion or order. Its oral ruling is reproduced at A-20, and the docket entry reflecting that ruling (which the Ninth Circuit treated as a written preliminary injunction) is reproduced at A-21 to A-22.

JURISDICTIONAL STATEMENT

The Ninth Circuit issued its opinion on July 10, 2013. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reproduced in the appendix.

STATEMENT OF THE CASE

This case is about whether the Republican Party of Nevada has standing to challenge a Nevada law that requires the Secretary of State to include "None of these candidates" as an option in all presidential and statewide elections, and then ignore ballots cast for that option in determining the election's outcome. *See* Nev. Rev. Stat. § 293.269. More broadly, this case concerns whether a political party may challenge an allegedly illegal or invalid ballot option against which its candidates must run and, broader still, whether a plaintiff may challenge a statutory

provision on the grounds that it is inseverable from another, allegedly unconstitutional or otherwise invalid provision.

A. Nevada's "None of These Candidates" Law

1. Nevada law requires every ballot in a presidential or other statewide race to include, after the names of the candidates running for that office, an "additional line" that reads "None of these candidates." Nev. Rev. Stat. § 293.269(1) ("Subsection 1"). This line must be "*equivalent* to the lines on which the candidates' names appear" and "contain a square in which the voter may express a choice of that line *in the same manner* as the voter would express a choice of a candidate." *Id.* (emphases added). A voter may select "None of these candidates" only "if the voter has not voted for any candidate for the office." *Id.* § 293.269(3).

Nevada law prohibits the Secretary of State from considering ballots cast for "None of these candidates" in determining the outcome of an election. *Id.* § 293.269(2) ("Subsection 2"). Subsection 2 provides that "[o]nly votes cast for the named candidates shall be counted in determining nomination or election" to any office. *Id.* Thus, even if a plurality or majority of voters selects "None of these candidates" for a particular office, the Secretary is required to ignore those ballots and declare one of the candidates who lost to that option as the winner.

2. "None of these candidates" has played a major role in many Nevada elections. In the 1976

Republican primary for the U.S. House of Representatives, "None of these candidates" received 14,499 votes (47.2%), while the leading candidate, Walden Earhart, received only 8,992 votes (29.3%). During the following election cycle, "None of these candidates" received 1,784 more votes than the leading candidate, Earhart.

Even when it has not received the most votes, "None of these candidates" still has attracted enough votes to potentially influence the outcomes of races for U.S. Senate, Nevada Supreme Court Justice, and other statewide offices. In the 1998 general election for U.S. Senate, for example, Democratic candidate Harry Reid received 208,650 votes (47.88%) and Republican candidate John Ensign received 208,222 votes (47.78%). The margin between the two candidates was 428 votes (0.1%), far less than the 8,125 votes (1.86%) that "None of these candidates" received. Likewise in the 2008 general election for Nevada Supreme Court Justice, the margin between prevailing candidate Mary "Kris" Pickering and challenger Deborah Schumacher was 24,815 votes (2.94%), a small fraction of the 159,736 votes (18.96%) that "None of these candidates" received. "None of these candidates" also received many times more votes than the prevailing candidate's margin of victory in the 2012 U.S. Senate race, 2006 state controller race, and 2004 Nevada Supreme Court race.[1]

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[1] *See generally* Secretary of State Ross Miller, *Election Results*, *available at*http://nvsos.gov/index.aspx?page=93 (last referenced Oct. 6, 2013).

3. Nevada ballots expressly invite voters to "vote" for "None of these candidates." For each presidential and statewide race, every ballot contains the heading "VOTE FOR ONE," lists the named candidates running for that office, and then includes "None of these candidates" as an "equivalent" alternative that a voter may select "in the same manner" as he would any of the named candidates. Nev. Rev. Stat. § 293.269(1). The directive "VOTE FOR ONE" appears to apply equally to both named candidates and "None of these candidates":

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

PRESIDENTE / VICEPRESIDENTE MANDATO DE 4 AÑOS VOTE POR UNO	
Baldwin, Chuck / Castle, Darrell L.	IAP ○
Barr, Bob / Root, Wayne A.	LIB ○
McCain, John / Palin, Sarah	REP ○
McKinney, Cynthia / Clemente, Rosa	GRN ○
Nader, Ralph / Gonzalez, Matt	IND ○
Obama, Barack / Biden, Joe	DEM ○
Ninguno de Estos Candidatos	○

2008 General Election Ballots, *reprinted in* Appellees' Br. at 15.

State law likewise refers to ballots cast for "None of these candidates" as "votes." It provides, "A

mechanical voting system must permit the voter to vote for any office for which he or she has the right to vote, but none other, or indicate ***a vote against all candidates***." Nev. Rev. Stat. § 293B.075 (emphasis added). The term "mechanical voting system" includes paper, mechanical, and electronic balloting systems—in other words, all methods of voting under Nevada law. *Id.* § 293B.033. Respondent Miller's own regulations expressly require county clerks to test voting machines to ensure they will record "a ***vote*** for 'None of these candidates' for all statewide contests." Nev. Admin. Code § 293B.090(3)(a)(2) (emphasis added). And his official election reports specify the number of "votes" that "None of these candidates" receives in each election. *See infra* note 7.

Nevada Supreme Court precedent confirms that a ballot cast for "None of these candidates" is a vote that must be given legal effect. That court has held that, under Nev. Const. art. V, § 4,[2] a ballot which is validly cast by a qualified and properly registered voter must be counted and given legal effect in determining an election's outcome, even if the selected option does not refer to someone who is legally eligible to assume office. *Ingersoll v. Lamb*, 333 P.2d 982, 983-84 (Nev. 1959). The court emphasized that a candidate may not be declared the winner of an election if one of the ballot options against which she ran received a greater number of votes, even if that other ballot option does not refer to

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[2] "The persons having the highest number of votes for the respective offices shall be declared elected." Nev. Const. art. V, § 4.

someone who can assume office. *Id.* (holding that, even though ballots cast for a deceased candidate are "ineffective to elect him to office," they may not be "treated as void" or "thrown away," but rather are "legal votes" that must be counted in determining whether another candidate may be declared the winner). The legislature subsequently codified this ruling, providing that votes cast for a deceased candidate must be counted in determining the outcome of an election; should a deceased candidate receive a plurality of votes, the office must be declared vacant at the commencement of the term. Nev. Rev. Stat. §§ 293.165(4), 293.368.

B. Lower Court Proceedings

1. On June 8, 2012, Plaintiffs filed this lawsuit in the U.S. District Court for the District of Nevada against Respondent Ross Miller, Nevada Secretary of State, seeking injunctive and declaratory relief against Nevada's "None of these candidates" statute. D.E. #1. Plaintiffs sought to bar Secretary Miller from including "None of these candidates" as a ballot option in any future state or federal elections, because an inseverable provision of state law prohibited him from giving such ballots legal effect, in violation of the U.S. Constitution and federal law.

The Plaintiff group included Democrat, Republican, and Independent Nevada voters. Two Plaintiffs alleged that they intended to vote for "None of these candidates," which would result in their "effective disenfranchise[ment]," because Nevada law required Secretary Miller to treat such votes as "legal nullit[ies]." *Id.* ¶ 10; *see also id.* ¶ 11. Plaintiff Todd

Dougan alleged in particular that he intended to vote for "None of these candidates" in the presidential race if it appeared on the ballot, and for Mitt Romney if it did not appear on the ballot. *Id.* ¶ 11.

The Plaintiff group also included Republican nominees for the office of presidential elector Bruce Woodbury and James DeGraffenreid. *Id.* ¶¶ 12-13. Under Nevada law, a vote for Mitt Romney for President was deemed a vote for the Republican slate of nominees for presidential elector, including Woodbury and DeGraffenreid. *Id.* Woodbury and DeGraffenreid alleged that they stood to lose the votes of people such as Plaintiff Dougan who, if "None of these candidates" were omitted from the ballot, would vote for them.

In mid-June, Plaintiffs filed a five-count Amended Complaint, D.E. #10, and Motion for Preliminary Injunction, D.E. #15. The Amended Complaint alleged that Nevada's "None of these candidates" law violates the Fourteenth Amendment's Due Process Clause (Count I) and the Voting Rights Act (Count IV), 42 U.S.C. § 1973i,[3] by requiring Secretary Miller to treat votes for "None of these candidates" as legal nullities and ignore them in determining the outcomes of elections. D.E. #10, ¶¶ 40, 59.

The Amended Complaint further alleged that the law also violates the Equal Protection Clause (Count II) and the Help America Vote Act ("HAVA")

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[3] The Voting Rights Act provides, in relevant part, "No person acting under color of law shall fail or refuse to permit any person to vote who . . . is otherwise qualified to vote, or *willfully fail or refuse to tabulate, count, and report such person's vote*." 42 U.S.C. § 1973i (emphasis added).

(Count V), 42 U.S.C. § 15481,[4] because it requires Secretary Miller to give legal effect to votes cast for named candidates—and even deceased candidates, who obviously cannot assume office, Nev. Rev. Stat. §§ 293.165(4), 293.368—but not to votes properly cast for the "'equivalent'" ballot option for "None of these candidates." D.E. #10, ¶¶ 46-47, 63-65 (quoting Nev. Rev. Stat. § 293.269(1)). Finally, the Amended Complaint alleged that, as applied to federal elections, the law effectively "'dictat[ed] electoral outcomes'" in violation of the Elections Clause, U.S. Const., art. I, § 4, cl. 1, by allowing a candidate to be declared the winner, even if "None of these candidates" receives a greater number of votes. D.E. #10, ¶¶ 54-55 (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 833-34 (1995)).[5] Secretary Miller moved to dismiss for failure to state a claim and lack of standing. D.E. #19.[6]

2. Chief Judge Robert C. Jones held a hearing on August 22 at which he granted Plaintiffs' motion for

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[4] HAVA provides in relevant part, "Each state shall adopt uniform and nondiscriminatory standards that define what constitutes a vote and what will be counted as a vote for each category of voting system used in the State." 42 U.S.C. § 15481(a)(6). Plaintiffs argued that, even if HAVA does not create a private cause of action, it preempts Nevada's "None of these candidates" law. *See* Appellees' Br. at 44-45.

[5] Plaintiffs' briefing demonstrates that nearly all of their causes of action remain valid, albeit under different legal theories, even if a court concludes that ballots cast for "None of these candidates" should not be considered votes. Appellees' Br. at 47-54.

[6] The district court granted Nevada voter Kingsley Edwards' motion to intervene in the case as a Defendant to help the State defend the statute. D.E. #33, at 2-3.

a preliminary injunction and denied the State's motion to dismiss. D.E. #33. The court began by holding that ballots cast for "None of these candidates" should be considered votes. It explained, "It is a vote. It's a mark in a box. It's a specific vote against either one of the two above persons. It's an expression of intent regarding the election. It seems to me it meets all the tests for a vote." *Id*. at 8; *see also id*. at 9-10. The State had argued that ballots cast for "None of these candidates" are not votes because they cannot determine the outcome of an election. Recognizing the circularity of that claim, the court pointed out that the "only reason" such ballots cannot determine the outcome of elections "is because the statute says don't count it." *Id*. at 8; *see also id*. ("You're saying it's not a vote because the statute says don't count it.").

The State also maintained that it had a compelling interest in allowing voters to cast their ballots for "None of these candidates" in order "to give voters a chance to directly and unambiguously express their discontent for all candidates." *Id*. at 18, 20-21. The court rejected that argument, explaining:

> A person may have a multitude of reasons for casting such a vote. They may—for example, they may say I don't like either of these candidates. Number two, they may be saying I don't like this one candidate at all, I don't know the other candidate, I'm not willing to vote for either one. They may be saying I don't know either candidate, therefore

> my conscience won't let me vote for either one.

Id. at 14; *see also id.* at 18 (suggesting that voters may select "None of these candidates" if they are simply disinterested in an election). The State admitted, "That's true, your Honor," *id.* at 14, and conceded that voters were not limited to selecting "None of these candidates" only for certain reasons or to send a particular message. *Id.* at 19.

The court further held that, if it enjoined "None of these candidates" from appearing on the ballot, voters would retain "the ability to express [that] I don't like either of these candidates" by "voting all the other races but . . . not voting in this one." *Id.* at 53. It explained that the number of people who declined to vote in a particular race was readily ascertainable by comparing the number of ballots cast in that race to the number of ballots cast in other races, the total number of ballots cast in the election, or total voter turnout. *Id.* at 53-55.

The court concluded that Nevada's "None of these candidates" law was "violative . . . on all of the grounds suggested by the plaintiffs," and announced its intention to enter a preliminary injunction barring the State from including that option on ballots. *Id.* at 50. The court noted that it would be drafting an opinion and invited the parties to submit proposed language for its order. *Id.* at 50-51.

3. Both the State and Edwards asked the district court to stay its ruling, but it declined. *Id.* at 51, 57. On Tuesday, August 28, Edwards filed a 51-page motion asking the Ninth Circuit to stay any preliminary injunction from the district court, even

though that court had not yet issued a written order. *See* 9th Cir. D.E. #4. The Ninth Circuit Clerk's Office orally informed counsel for Plaintiffs that their opposition was due on Wednesday, September 5.

The State filed its own 47-page motion for emergency relief with the Ninth Circuit on August 30, raising many distinct arguments. *See* 9th Cir. D.E. #6. The motions panel then issued an order directing Plaintiffs' counsel to file their opposition to *both* motions—over 90 pages of briefing—by *the next day*, Friday, August 31, at 5:00 P.M. 9th Cir. D.E. #9.

The motions panel granted the State's and Edwards' stay requests the following Tuesday, September 4, in a three-page order that did not explain its reasoning. A-23. The panel noted only that it was treating the entry from the district court's PACER docket summarizing the hearing on Plaintiff's preliminary injunction motion as the court's written injunction. A-24 to A-25.

Judge Reinhardt issued an 8-page concurrence in the stay, in which he declared:

> [T]he panel is in agreement that the basis for our grant of the stay of the district court's order pursuant to *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008), is that the likelihood of success on the merits *overwhelmingly favors* the state. Plaintiffs' arguments offer *no colorable basis* for this court to conclude that Nevada's 37-year-old statute providing for "None of these candidates" ballots is contrary to the Constitution or to any federal statute.

A-26 (emphasis added). Later that day, an amended version of this opinion was issued, in which the term "overwhelmingly" was omitted, and the phrase "no colorable basis" was changed to "inadequate basis," substantially toning down Judge Reinhardt's characterization of the panel's assessment of plaintiffs' claims. A-37.

Both the original and amended versions of Judge Reinhardt's concurrence went on to accuse the district court of "deliberately attempt[ing] to avoid entering any order that would allow an appeal" before ballots for the 2012 election had to be printed. A-26, A-37. Judge Reinhardt claimed that Judge Jones' "dilatory tactics appear to serve no purpose other than to seek to prevent the state from taking an appeal." A-37 to A-38; *see also* A-38 ("The district judge's intent to evade appellate review is plain from the record."). Judge Reinhardt further accused Judge Jones of engaging in "egregious" behavior, A-41, including "numerous and substantial delays . . . which . . . can only be explained as a deliberate attempt to evade review by higher courts," A-39. Judge Reinhardt's concurrence concluded by declaring, "Such arrogance and assumption of power by one individual is not acceptable in our judicial system." A-43.

Shortly thereafter, Judge Jones issued an order on a motion for clarification that the State had filed with the district court, in which he responded to Judge Reinhardt's decision "to impugn [his] personal integrity and motivation." D.E. #51, at 1; *see also id.* at 2. Judge Jones stated:

> The undersigned was quite surprised when Judge Reinhardt contacted my Chambers through the Ninth Circuit Clerks [sic] Office and requested early entry of the order granting preliminary injunction, in light of a preliminary hearing date set by himself on the Defendants [sic] Emergency Motion to the Ninth Circuit for Stay Pending Appeal. I am not even sure if Judge Reinhardt was on the motions panel for the month of August, 2012 . . . . Such contact for the purpose of influencing the lower court's decision and earlier entry of its order in order to establish appellate jurisdiction is an inappropriate judicial activity.

Id. at 3; *see also* D.E. #59, at 2. The order concluded, "Judge Reinhardt's separate decision to impugn the integrity and motivation of the undersigned judge, together with his contact to Chambers through the Ninth Circuit Clerks's [sic] Office, was an example of assumption of power by one individual which is not acceptable in our judicial system." D.E. #51, at 4.

4. "None of these candidates" appeared as an option on the ballot in the 2012 election. In the U.S. Senate race, Republican Dean Heller beat Democrat Shelley Berkeley by 11,576 votes, while "None of these candidates" received 45,277 votes.[7] It also

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[7] Secretary of State Ross Miller, *Silver State Election Night Results 2012*, *available at* http://www.silverstateelection.com/USSenate. The official election results on the Nevada Secretary of State's website refer to ballots cast for "None of these candidates" as "votes." *Id*.

received over a quarter of the vote in all three elections for the state supreme court.

After the election, out of an abundance of caution, the Republican Party of Nevada moved to join the case as a Plaintiff-Appellee in both the district and circuit courts, to preclude any argument that the passage of the election mooted the voter and candidate plaintiffs' claims. Both courts granted its motions. D.E. #59 at 3; 9th Cir. D.E. #28, at 1.

5. On July 10, 2013, a merits panel of the Ninth Circuit reversed the preliminary injunction on the grounds that none of the Plaintiffs had standing to seek it. It began by holding that the Plaintiff voters who had not alleged they intended to vote for "None of these candidates" could not establish standing based on the possibility that "at some point . . . in a future election," they may choose that option. A-11 to A-12.

The court then went on to hold that the Plaintiff voters who *had* alleged that they intended to vote for "None of these candidates" *also* lacked standing to enjoin the State from including that option on the ballot. A-15. The court held that the relief those Plaintiffs sought—excluding "None of these candidates" from the ballot—was an invalid remedy for the harm they allegedly would suffer from the State's refusal to accord their ballots legal effect. A-13.

Finally, the court held that the candidate plaintiffs and Republican Party of Nevada lacked standing to maintain this lawsuit. A-16. It acknowledged that the candidates and Party alleged that they were harmed by the State's inclusion of "None of these candidates" as a ballot option, because

it could siphon votes from people (such as Plaintiff Dougan) that Republican candidates otherwise would receive. *Id.* Curiously, the court then went on to contend that the "complaint does not challenge the inclusion of NOTC as a voting option on the ballot. Rather it challenges only the subsection prohibiting ballots cast for NOTC from being given legal effect." A-17. The court concluded that the Party and candidates "failed to establish that the injury alleged by the competitive injury [to] plaintiffs is fairly traceable to the conduct being challenged." A-18. Having rejected the claims of general Nevada voters, voters who specifically intended to vote for "None of these candidates," candidates running against that ballot option, *and* a state political party, the Ninth Circuit effectively held that it is constitutionally impossible to attempt to challenge the appearance of "None of these candidates" on Nevada ballots.

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT IGNORED THIS COURT'S RULING IN *ALASKA AIRLINES, INC. v. BROCK* AND DEEPENED A CIRCUIT SPLIT BY REJECTING THE DOCTRINE OF STANDING THROUGH INSEVERABILITY.

This Court should grant certiorari to resolve the circuit split and correct the Ninth Circuit's grievous error concerning whether plaintiffs may satisfy Article III's requirements based on the doctrine of standing through inseverability.

Under *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992), a plaintiff must establish three elements to have standing to challenge a statute's constitutionality: (i) the plaintiff has suffered an "injury in fact", (ii) the injury is fairly traceable to the challenged provision ("causation"), and (iii) a favorable decision likely will redress the plaintiff's injury ("redressability"). In general, a plaintiff must establish all three of these elements with regard to *each* statutory provision it wishes to challenge. *See FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 230-31 (1990) (holding that plaintiffs had standing to challenge some provisions in an ordinance regulating sexually oriented businesses, but not others); *see also DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006).

The various provisions of an inseverable statutory scheme, however, "are inextricably bound together" and must be treated as a "unit." *Planned Parenthood v. Danforth*, 428 U.S. 52, 83 (1976). This Court

should reaffirm that Article III permits plaintiffs to rely on a theory of standing through inseverability, under which they may establish each of *Lujan*'s elements by pointing to a different provision of an inseverable law. That is, a plaintiff may enjoin a provision that is causing it to suffer an injury-in-fact on the grounds that the provision is inseverable from another, allegedly unconstitutional or otherwise invalid provision. *See infra* p. 23-28. Invalidation of the allegedly unconstitutional provision would require concomitant invalidation of the inseverable provision causing the plaintiff's injury, thereby establishing redressability.

The Ninth Circuit assumed that Subsection 1 of Nevada's "None of these candidates" law, which requires the Secretary of State to include that option on ballots, *see* Nev. Rev. Stat. § 293.269(1), inflicts injury-in-fact on the Party, by creating an additional ballot option against which the Party's candidates must run, A-16. The court then held that Subsection 2, which prevents the State from according ballots cast for "None of these candidates" any legal effect, *see* Nev. Rev. Stat. § 293.269(2), was the allegedly invalid provision of the law, and that enjoining Subsection 2 would redress the alleged constitutional and statutory infirmities, A-16 to A-18.

Ignoring the Party's repeated insistence that § 293.269 must be treated as an inseverable whole, the court concluded that the Party could not satisfy *Lujan*'s causation and redressability prongs by pointing to a different statutory provision (Subsection 2) from the one that was injuring it (Subsection 1). A-17 to A-18. It explained that the Party:

> ha[s] not connected [its] injury to the conduct [the Party] says violated [its] rights. . . . Rather it challenges only the subsection prohibiting ballots cast for NOTC from being given legal effect. . . . [T]he state's failure to give legal effect to ballots cast for NOTC is immaterial to [the Party's] alleged competitive injury. Therefore, [the Party] ha[s] failed to establish that [its] injury . . . is fairly traceable to the conduct being challenged.

Id. Thus, the panel flatly rejected the doctrine of standing through inseverability animating the Party's claims—the theory that the court must invalidate Subsection 1, which requires the inclusion of "None of these candidates" on the ballot, because it is inseverable from Subsection 2, which violates the U.S. Constitution and federal law by prohibiting the State from counting ballots cast for that option in determining the outcome of an election.

This Court implicitly endorsed the concept of standing through inseverability in *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678 (1987). The concept nevertheless remains the subject of a circuit split, with two circuits expressly applying it, *see Local 514 Transportation Workers Union of America v. Keating*, 358 F.3d 743, 746 (10th Cir. 2004); *Catholic Social Serv. v. Shalala*, 12 F.3d 1123, 1126 (D.C. Cir. 1994), other circuits issuing opinions suggesting the doctrine's validity, *see, e.g.*, *Advantage Media, L.L.C. v. City of Eden Prairie*, 456 F.3d 793, 801 (8th Cir. 2006); *Contractors Ass'n of E. Pa. v. City of Phila.*, 6 F.3d 990, 996 (3d Cir. 1993), and two circuits expressly rejecting it, *National Federation of the*

Blind of Texas, Inc. v. Abbott, 647 F.3d 202 (5th Cir. 2011); A-18. This critical Article III issue has broad applicability to nearly any complex, allegedly inseverable statutory scheme, directly impacting a plaintiff's ability to enforce her fundamental rights in a wide range of substantive legal areas. This Court should grant certiorari.

A. The Panel's Ruling is Contrary to *Alaska Airlines, Inc. v. Brock.*

This Court adjudicated the merits of a case based on standing through inseverability in *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 683 & n.5 (1987). The plaintiff airlines in *Brock* sought an injunction against provisions of the Airline Deregulation Act of 1978 that injured them by restricting their employment practices. *Id*. at 682-83. The airlines did not contend that those restrictions were inherently objectionable, however. Rather, they argued that the provisions were inseverable from § 43(f)(3) of the Act, which imposed a one-house legislative veto on Department of Labor regulations implementing the employment restrictions. *Id*. at 682. The Secretary promulgated such regulations in 1982, and Congress did not veto them. *Id*. at 682 n.3.

The legislative veto provision the airlines sought to challenge had not harmed them in any way; to the contrary, the legislative veto affirmatively benefited the airlines by giving them a potential opportunity to defeat regulations implementing the statutory program they opposed. Moreover, invalidating the legislative veto, on its own, would not redress the harm the airlines allegedly suffered from the

statute's substantive provisions. Thus, the plaintiffs in *Brock* sought to challenge statutory provisions that injured them (regarding re-employment of former employees) based on the fact that they were inseverable from an allegedly unconstitutional legislative veto provision that did not injure them. Rather than suggesting that the airlines might lack standing to raise such a challenge, this Court adjudicated the merits of their severability claim. *Cf. Adarand Constr., Inc. v. Mineta*, 534 U.S. 103, 110 (2001) (per curiam) ("We are obliged to examine standing *sua sponte* where standing has erroneously been assumed below").

Likewise here, the Party sought to challenge Subsection 1, which injured it by requiring the State to include "None of these candidates" as a ballot option, on the grounds that the provision is inseverable from Subsection 2, which prohibits the Secretary of State from giving legal effect to ballots cast for that option. The Ninth Circuit's failure to adjudicate the merits of the Party's claim directly conflicts with the *Brock* Court's treatment of such claims.

B. The Panel Ruling Exacerbates a Circuit Split Concerning the Doctrine of Standing Through Inseverability.

Despite *Brock*, a deep circuit split exists over whether a plaintiff has standing to challenge a statutory section that directly injures it, on the grounds that it is inseverable from another, allegedly unconstitutional section that does not directly injure it.

1. Several circuits either have applied the doctrine of standing through inseverability to exercise Article III jurisdiction over plaintiffs' claims, or otherwise endorsed such an approach. *See Advantage Media,* 456 F.3d at 801 (approving the "incorporat[ion] [of] severability analysis into standing determinations"); *Ala. Power Co. v. U.S. Doe*, 307 F.3d 1300, 1316 (11th Cir. 2002) (recognizing that "the severability question . . . was an integral part of the standing and ripeness issues"); *Contractors Ass'n*, 6 F.3d at 996 ("Courts considering constitutional challenges often analyze standing problems in terms of the severability doctrine.").

In *Local 514 Transportation Workers Union of America v. Keating*, 358 F.3d 743 (10th Cir. 2004), for example, the plaintiff labor unions sought to enjoin Article XXIII, § 1A of the Oklahoma Constitution, in its entirety. Subsections 1A(B)(2)-(4), which protected employees from being compelled to join a union or pay union dues or fees, harmed the plaintiff unions, but the unions had no grounds for directly challenging those provisions' validity. Rather, the unions alleged that those subsections were inseverable from Subsection 1A(B)(1), which provided that a person could not be required to resign from a union as a condition of employment, and was allegedly preempted by the National Labor Relations Act ("NLRA"). *Id*. at 750.

The State argued that the lawsuit should be dismissed, since the union's attack on Subsections 1A(B)(2)-(4) hinged on the alleged invalidity of Subsection 1A(B)(1), which did not harm the unions. *Keating*, 358 F.3d at 748-49. The Tenth Circuit held that, since the union alleged that § 1A was

inseverable, the union could rely on the invalidity of any of § 1A's provisions to seek to enjoin § 1A as a whole, including the specific provisions that allegedly injured it.

The court explained:

> Plaintiffs' assertion that § 1A(B)(1) is preempted by the NLRA is but a step in its argument that § 1A in its totality, specifically including § 1A(B)(2)-(4), is invalid. . . . Plaintiffs have demonstrated that they have an injury in fact attributable to § 1A(B)(2)-(4) and that a favorable decision that § 1A is non-severable and void will redress that injury. Thus, plaintiffs' claims regarding § 1A(B)(1) are justiciable even if plaintiffs could not bring a distinct claim seeking relief only in relation to that provision.

Id. at 750.

Similarly, in *Catholic Social Serv. v. Shalala*, 12 F.3d 1123, 1124 (D.C. Cir. 1994), the Department of Health and Human Services ("HHS") issued regulations changing the rules for reimbursing home health service providers. The issuance also contained a separate provision specifying that the new rules would apply retroactively to certain services provided before their promulgation. Home health service providers who had not worked before the rules' effective date, and thus were not personally affected by the retroactivity provision, sued to enjoin the new regulations as a whole. *Id*. at 1124-25. They alleged that, even though the new rules were not intrinsically invalid, they nevertheless should be

enjoined because they were inseverable from the retroactivity provision, which was invalid. *Id.* at 1125.

The district court dismissed those plaintiffs' claims for lack of standing, but the D.C. Circuit rejected that conclusion, noting that the plaintiffs "have been quite deft in fashioning their claim so as to establish standing and to avoid pitfalls that would jeopardize their footing." *Id.* The court explained that the plaintiffs were alleging that, due to the retroactivity provision, the issuance as a whole was *ultra vires* and *void ab initio*. *Id.* If the plaintiffs' challenge to the retroactivity provision were successful, then the regulations—including the new reimbursement restrictions—"would not be in effect for anyone and [the plaintiffs] would be entitled to greater reimbursement ($5 million more) from the government." *Id.* The D.C. Circuit concluded that the plaintiffs had standing to challenge the retroactivity provision, even though it did not directly injure them, as a basis for seeking to enjoin the new, allegedly inseverable reimbursement provisions, which did injure them.[8]

Thus, the Tenth and D.C. Circuits have embraced the standing through inseverability doctrine that the Ninth Circuit rejected below. Plaintiffs in those jurisdictions may challenge a statutory provision that injures them, but is not inherently unconstitutional

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[8] *See also EEOC v. CBS, Inc.*, 743 F.2d 969, 973 (2d Cir. 1984) (adjudicating merits of plaintiffs' challenge to a provision of the Reorganization Act which allegedly harmed it by transferring jurisdiction over age discrimination claims from the Department of Labor to the EEOC, because it was inseverable from an unconstitutional legislative veto provision).

or invalid, on the grounds that it is inseverable from another provision that *is* allegedly unconstitutional or invalid, even though that other provision does not directly injure them.

2. The Fifth and Ninth Circuits, in contrast, have rejected the doctrine of standing through inseverability. Those courts require a plaintiff to demonstrate that each provision of an allegedly inseverable statute that she wishes to challenge separately satisfies all three *Lujan* requirements: injury, causation, and redressability.

In *National Federation of the Blind of Texas, Inc. v. Abbott*, 647 F.3d 202, 210-11 (5th Cir. 2011), the Fifth Circuit overturned the district court's injunction against allegedly unconstitutional statutory provisions that did not directly injure the plaintiffs, but were inseverable from other provisions that did injure them. The so-called "percentage provisions" or "(c) provisions" of Texas' charitable solicitation law imposed restrictions on for-profit entities that solicited people to donate goods that those entities would resell, in order to donate a percentage of the proceeds to a charity. *Id.* at 206. The "flat fee provisions" or "(d) provisions" applied to for-profit entities that engaged in such solicitations and sales, but paid the charity a flat fee for the use of its name that was not contingent on the proceeds of the sales. *Id.*

The plaintiffs, which sought to challenge both sets of provisions, were charities that allowed resellers to use their names when soliciting donations in exchange for flat fees. The district court held that the plaintiffs had standing to challenge the (d) provisions, because of their flat-fee arrangements

with resellers. *Id.* It further held that, even though the (c) provisions did not directly injure the plaintiffs, they had to be invalidated as well, because they were inseverable from the (d) provisions. *Id.*

The Fifth Circuit vacated the lower court's ruling on this issue. Acknowledging that the plaintiffs had standing to challenge the (d) provisions, it held that the district court erred in enjoining the (c) provisions because the plaintiffs "demonstrated no injury-in-fact" with respect to them. *Id.* at 209. It expressly rejected the district court's theory of standing through inseverability:

> [A] severability analysis should almost always be deferred until after the determination that the portion of a statute that a litigant has standing to challenge is unconstitutional. Consistent with this rule, we shall defer further discussion of the severability of the (d) provisions until first addressing their constitutionality. We will not address the constitutionality of the . . . (c) provisions because the Charities lack standing to challenge them. Accordingly, we VACATE the portion of the district court's opinion addressing the (c) provisions.

Id. at 211. The Fifth Circuit's reluctance to consider severability at the standing stage, along with its refusal to review the constitutionality of a statutory provision that was allegedly inseverable from one that unquestionably harmed the plaintiffs,

demonstrates its rejection of the standing through inseverability doctrine.

Thus, the Fifth and Ninth Circuits have held that a plaintiff must establish injury, causation, and redressability for each provision in an allegedly inseverable statutory scheme that it wishes to challenge. *See Nat'l Federation of the Blind*, 647 F.3d at 210-11; A-18 to A-19. This Court should grant certiorari to resolve this circuit split over the breadth of Article III.

C. This is an Important Issue That Warrants Certiorari.

This Court should grant certiorari to directly address standing through inseverability and reverse the Ninth Circuit's erroneous ruling because this issue is of widespread importance. Standing is not only "a matter of . . . importance to the proper functioning of the judicial process," *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 121 (1998), but "is perhaps the *most* important of [the jurisdictional] doctrines," *United States v. Hays*, 515 U.S. 737, 742 (1995) (emphasis added and quotation marks omitted); *accord Allen v. Wright*, 468 U.S. 737, 750 (1984). The circuit split over standing through inseverability creates unacceptable disparities in people's ability to vindicate their fundamental constitutional rights in federal court.

Moreover, as the discussion above demonstrates, the question of standing through inseverability can arise under complex statutory schemes in almost any substantive area of law, such as election law, A-16 to A-18; labor law, *Keating*, 358 F.3d at 746; Medicare,

Catholic Soc. Serv., 12 F.3d at 1136; employment law, *Brock*, 480 U.S. at 683 & n.5; and charitable solicitations, *Abbott*, 647 F.3d at 210.

It is especially important to address this issue in the context of the instant case, because Nevada's "None of these candidates" law both impacts the course of federal elections and implicates the fundamental right to vote. *Cf. Foster v. Love*, 520 U.S. 1114 (1997) (granting certiorari to determine the legality of Louisiana's *sui generis* voting system that allowed members of Congress to be elected before the federally mandated Election Day). Most basically, requiring candidates to run against that ballot option necessarily impacts their campaign strategies. *Cf. Shays v. FEC*, 414 F.3d 76, 86-87 (D.C. Cir. 2005) (holding that plaintiff Members of Congress had standing to challenge election rules that required them to "adjust their campaign strategy" by "respond[ing] to a broader range of competitive tactics").

Moreover, past election results demonstrates the impact this option can have on federal elections. "None of these candidates" received the most votes in two congressional primaries. Moreover, in 1998, it received 8,125 votes (1.86%), while Senator Harry Reid won by only 428 votes (0.1%). During the past election cycle, it received more than four times as many votes as Senator Dean Heller's margin of victory.

Thus, the Ninth Circuit has prevented the Party from litigating the constitutionality and legality of a ballot option that impacts federal elections, and allegedly causes *de jure* voter disenfranchisement. It has limited the ability of all plaintiffs to challenge

legal provisions in any substantive area of law under a theory of standing through inseverability. Its ruling is contrary to *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 683 & n.5 (1987), and contributes to a deep circuit split. This Court should grant certiorari.

II. THE NINTH CIRCUIT ERRED AND CREATED A CIRCUIT SPLIT BY CURTAILING "COMPETITIVE STANDING."

This Court also should grant certiorari to resolve the circuit split and reverse the Ninth Circuit's error concerning the permissibility of "competitive standing," particularly in election cases. Depending on the jurisdiction, a political party (or candidate) may rely on competitive standing to challenge either the allegedly illegal or unconstitutional inclusion of additional options on the ballot against which that party's candidates must compete or, more broadly, election rules or practices that will affect its campaign strategy or likelihood of prevailing.

Here, the Party sought an injunction barring Secretary Miller from including "None of these candidates" as a ballot option in future presidential and statewide races, on the grounds that it would siphon votes from people who, like Plaintiff Dougan, otherwise would vote for Republican candidates. The Party alleged that this ballot option was unconstitutional and contrary to federal law because an inseverable provision of state law prohibited Secretary Miller from giving legal effect to votes cast for that option in determining an election's outcome. Enjoining the entire statute and barring the State

from including "None of these candidates" as an option on future ballots would both prevent the alleged constitutional and federal-law problems from occurring and redress the Party's injury from increased competition.

Earlier Ninth Circuit precedents had established that a political party or candidate may rely on competitive standing to satisfy *Lujan*'s first requirement, injury-in-fact. *See Drake v. Obama*, 664 F.3d 774, 783 (9th Cir. 2011) (recognizing that "'potential loss of an election' was an injury-in-fact sufficient to give a local candidate and Republican party officials standing") (quoting *Owen v. Mulligan*, 640 F.2d 1130, 1132-33 (9th Cir. 1981)). The panel below erroneously rejected the Party's assertion of competitive standing, however, finding it insufficient to satisfy *Lujan*'s causation and redressability requirements. A-16. It observed that the Party did not contend that it was *inherently* unconstitutional to include "None of these candidates" as a ballot option, but rather that this particular law was unconstitutional because it barred Secretary Miller from giving legal effect to ballots cast for that option. A-17 to A-18. The panel concluded that the Party "failed to establish" that its competitive injury is "fairly traceable" to "the state's failure to give legal effect to the ballots cast for NOTC." A-18.

The panel's reasoning is not only incorrect, but contrary to holdings in numerous other circuits, which have ruled that the doctrine of competitive standing gives political parties and candidates the *per se* right to challenge the inclusion of allegedly invalid ballot options against which they must run. It especially deviates from the approach taken by the

D.C. Circuit, which has adopted the broadest conception of competitive standing. That court recognizes candidates' competitive standing to challenge any election-related rules that may require them to "adjust their campaign strategy" by "respond[ing] to a broader range of competitive tactics." *Shays*, 414 F.3d at 86-87. This Court should grant certiorari to resolve this important issue over the scope of competitive standing that directly impacts the ability of candidates to ensure that elections are conducted fairly and with integrity.

A. The Ninth Circuit's Erroneous Ruling Has Created a Circuit Split Over the Scope of Competitive Standing

1. Numerous other jurisdictions have upheld political parties' "competitive standing" in cases structurally identical to this one. The majority of jurisdictions allow political parties and candidates to challenge allegedly illegal or invalid ballot options against which they must compete, without regard to the source of the alleged illegality or invalidity.

In *Fulani v. Hogsett*, 917 F.2d 1028, 1029-30 (7th Cir. 1990), for example, the Indiana Secretary of State had certified the New Alliance Party's candidates for presidential elector by the statutory deadline, but did not certify the Democrat and Republican candidates until after the deadline elapsed. New Alliance claimed that the Secretary's decision to certify the major parties' candidates after the deadline violated the Equal Protection Clause, because he would not have done the same for the New Alliance candidates, had such a need arisen.

New Alliance sought an injunction barring the Secretary from including the Democrat and Republican presidential candidates on the general election ballot. *Id*. at 1030.

The Seventh Circuit held that New Alliance had standing to maintain its claims. It recognized that New Alliance had suffered injury-in-fact by the "increased competition" that resulted from having the Democrat and Republican candidates on the ballot. *Id*. The court continued, "We believe that New Alliance's injury is fairly traceable to the action of the Indiana officials who allowed the Democrats and Republicans on the ballot. . . . [D]eclaratory relief would prevent future violations of the Indiana certification law." *Id*. It concluded that New Alliance "ha[d] standing to bring this suit." *Id*.; *see also Smith v. Boyle*, 144 F.3d 1060, 1063 (7th Cir. 1998) (holding that state party has standing to challenge election districts that disadvantage its candidates).

The Fifth Circuit adopted the same reasoning in *Texas Democratic Party v. Benkiser*, 459 F.3d 582, 587 (5th Cir. 2006). One month after the Texas Republican Party had nominated Tom DeLay for Congress, he resigned his seat and moved to Virginia. *Id*. at 585. The party chairwoman declared him ineligible to run and intended to name a replacement candidate pursuant to state law. *Id*. The Texas Democratic Party sought an injunction against the chairwoman, arguing that the U.S. Constitution's Qualifications Clause barred her from declaring DeLay ineligible to run for Congress. *Id*.

On appeal, the Fifth Circuit affirmed that the Texas Democratic Party had standing to attempt to

prevent the chairwoman from replacing DeLay's name on the ballot with another, "more viable" candidate. *Id.* at 586. The court held that the Republicans' attempted substitution of a new congressional candidate would injure the Democratic Party by reducing "its congressional candidate's chances of victory." *Id.* It explained, "Political victory accedes power to the winning party, enabling it to better direct the machinery of government toward the party's interests. . . . [T]hreatened loss of that power is . . . a concrete and particularized injury sufficient for standing." *Id.* at 587 (citation omitted).

The court went on to find that the Democratic Party also had established causation and redressability. *Id.* "The injury threatened to the [Democratic Party's] electoral prospects is fairly traceable to Delay's replacement and likely would be redressed by a favorable decision, which would preclude a Republican replacement candidate." *Id.* The court added that the Democratic Party also had associational standing to maintain its claims on behalf of its candidates. *Id.* at 587-88.

Other courts have reached identical conclusions. *See, e.g.*, *Schulz v. Williams*, 44 F.3d 48, 53 (2d Cir. 1994) (holding that the Conservative Party had standing to challenge the inclusion of the Libertarian Party on the ballot, to prevent it from "siphon[ing] votes from the Conservative Party line and therefore adversely affecting the interests of the Conservative Party"); *see also Hollander v. McCain*, 566 F. Supp. 2d 63, 68 (D.N.H. 2008) ("[A] candidate or his political party has standing to challenge the inclusion of an allegedly ineligible rival on the ballot, on the

theory that doing so hurts the candidate's or party's own chances of prevailing in the election.").

2. The D.C. Circuit has adopted the broadest, most permissive conception of competitive standing. In *Shays v. FEC*, 414 F.3d 76, 85 (D.C. Cir. 2005), the court allowed members of Congress running for re-election to challenge FEC regulations implementing BCRA on the grounds that they were too *lenient* and gave their opponents and others too much flexibility to raise and spend money. The court held that allegedly "illegal structuring of a competitive environment" is "sufficient to support Article III standing." *Id.*

The court recognized that while "the challenged rules create[d] neither more nor different rival candidates," they required the plaintiffs to "anticipate and respond to a broader range of competitive tactics than federal law would otherwise allow." *Id.* at 86. It explained that such "additional competitors and additional tactics . . . fundamentally alter the environment" in which candidates must compete. *Id.* Thus, the court concluded that candidates had standing to challenge "FEC rules structuring reelection contests" that allegedly violated federal law. *Id.* at 94.

3. The Ninth Circuit dramatically narrowed the scope of competitive standing within its jurisdiction by distinguishing away most of these other cases. A-17. The fact that the Party sought an injunction against the inclusion of "None of these candidates" on future ballots was not sufficient, in the panel's view, to satisfy *Lujan*'s causation and redressability requirements. A-17 to A-18. Because the Party challenged that ballot option on the

grounds that state law prohibited Secretary Miller from according any legal effect to ballots cast for it, the panel concluded that Party lacked competitive standing to maintain its suit. *Id.* No other circuit has adopted such a cramped conception of *Lujan*'s causation and redressability requirements, particularly in competitive standing cases where a plaintiff expressly seeks to enjoin the inclusion of an allegedly invalid or illegal alternative on the ballot—whatever the source of that alleged invalidity or illegality. *Fulani*, 917 F.2d at 1029-30; *Benkiser*, 459 F.3d at 587; *Schulz*, 44 F.3d at 53; *Shays*, 414 F.3d at 85; *see also Hollander*, 566 F. Supp. 2d at 68.

B. This is an Important Issue That Warrants Certiorari.

A broad conception of competitive standing is essential to maintaining the integrity of the electoral process. The officials who oversee most elections belong to political parties, are active in partisan politics, and have strong incentives to tilt decisions in favor of their respective parties and candidates. Competitive standing is a crucial doctrine that allows candidates to seek judicial relief in federal court (rather than from state judges who themselves may be politically active and even running for re-election) when necessary to preserve the integrity of an election and prevent allegedly unfair, illegal, or even unconstitutional decisionmaking that can affect the election's outcome. Particularly given the doctrine's salience for federal elections, this Court should overturn the Ninth Circuit's unduly narrow conception of competitive standing and establish a

single, uniform national standard upon which all candidates for federal office may rely.

CONCLUSION

For these reasons, this Court should grant the petition and issue a writ of certiorari in this case.

Respectfully submitted,

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APPENDIX A
Opinion of the U.S. Court of Appeals for the Ninth Circuit Reversing Grant of Preliminary Injunction (July 10, 2013)

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WENDY TOWNLEY; AMY WHITLOCK; ASHLEY GUNSON; HEATHER THOMAS; DAX WOOD; CASJA LINFORD; WESLEY TOWNLEY; JENNY RIEDL; TODD DOUGAN; BRUCE WOODBURY; JAMES W. DEGRAFFENREID; REPUBLICAN PARTY OF NEVADA, *Plaintiffs-Appellees*, v. ROSS MILLER, Secretary of State of Nevada, *Defendant-Appellant*, and KINGSLEY EDWARDS, *Intervenor-Defendant*.	No. 12-16881 D.C. No. 3:12-cv-00310-RCJ-WGC

WENDY TOWNLEY; AMY WHITLOCK; ASHLEY GUNSON; HEATHER THOMAS; DAX WOOD; CASJA LINFORD; WESLEY TOWNLEY; JENNY RIEDL; TODD DOUGAN; BRUCE WOODBURY; JAMES W. DEGRAFFENREID; REPUBLICAN PARTY OF NEVADA, *Plaintiffs-Appellees*, v. ROSS MILLER, Secretary of State of Nevada, *Defendant-Appellant*, and KINGSLEY EDWARDS, *Intervenor-Defendant*.	No. 12-16882 D.C. No. 3:12-cv-00310-RCJ-WGC OPINION

Appeal from the United States District Court
for the District of Nevada
Robert Clive Jones, Chief District Judge, Presiding

Argued and Submitted
March 11, 2013—San Francisco, California

Filed July 10, 2013

Before: John T. Noonan, Jr., Raymond C. Fisher and Jacqueline H. Nguyen, Circuit Judges.

Opinion by Judge Fisher

SUMMARY*

Civil Rights

The panel vacated the district court's preliminary injunction and remanded with instructions to dismiss for lack of standing an action challenging Nevada election law, Nev. Rev. Stat. § 293.269, which allows voters the ability to register their disapproval of all the named candidates running for a particular office in statewide and presidential elections by voting for "None of these candidates," commonly referred to as NOTC.

Pursuant to the law, the Secretary of State must count and report to the public the number of NOTC ballots cast for each office, but they cannot be counted in determining the winner among the named candidates in those races. Plaintiffs alleged that the law disenfranchises voters by disregarding ballots cast for NOTC in determining the winner of elections. Plaintiff moved for a preliminary

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

injunction prohibiting the state from allowing the NOTC option to appear on any ballot.

The panel held that seven of the plaintiffs, who expressed an intent to vote but did not assert an intent to cast a ballot for NOTC in the November 2012 election or any subsequent election, lacked standing because they had not suffered an injury-in-fact that was actual or imminent. The panel held that the two plaintiffs who asserted a concrete intent to cast ballots for NOTC, nevertheless failed to establish that the relief they sought, removing the NOTC option from the ballot, would redress their injury. Finally, the panel held that the remaining plaintiffs, two Republican presidential elector designees and the Nevada Republican Party, lacked competitive standing because they failed to establish that their alleged injury, that NOTC would potentially siphon votes from the Republican Party's nominee, was fairly traceable to the conduct being challenged.

COUNSEL

Catherine Cortez Masto, Attorney General, and Kevin Benson (argued), Senior Deputy Attorney General, Carson City, Nevada, for Defendant-Appellant Ross Miller, Secretary of State of Nevada.

Paul Swen Prior, Snell & Wilmer LLP, Las Vegas, Nevada, and Michael T. Morley (argued), Law Offices of Michael T. Morley, Washington, DC, for Plaintiffs-Appellees.

John P. Parris (argued), Law Offices of John P. Parris, Las Vegas, Nevada, for Intervenor-Defendant-Appellant Kingsley Edwards.

OPINION

FISHER, Circuit Judge:

Since 1975, Nevada has given its voters the ability to register their disapproval of all the named candidates running for a particular office in statewide and presidential elections by voting for "None of these candidates," commonly referred to as NOTC. The Secretary of State must count and report to the public the number of NOTC ballots cast for each office, but they cannot be counted in determining the winner among the named candidates in those races. They do, of course, provide a way for disaffected voters to express themselves other than by simply not voting. In June 2012, plaintiffs challenged this 37-year-old state election law by suing in the United States District Court for the District of Nevada to prohibit the NOTC option from appearing on the November 2012 ballot and any others thereafter. Their contention is that unless NOTC votes are given "legal effect" in some manner, those voters are "disenfranchised" and so the NOTC option cannot appear on the ballot at all. Although the merits of their arguments are questionable,[1] we

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[1] See, e.g., Townley v. Miller, 693 F.3d 1041, 1042 (9th Cir. 2012) (Reinhardt, J. concurring).

do not resolve them because we hold that none of these plaintiffs has standing to assert the claims made in this lawsuit.

BACKGROUND

In 1975, the Nevada legislature passed a law permitting voters to register their opposition to all candidates running in statewide or presidential races by casting a ballot for "None of these candidates" instead of one of the named candidates. *See* Nev. Rev. Stat. § 293.269. The statute has three subsections. Section 293.269(1) mandates the inclusion of a "None of these candidates" option on every ballot for any statewide office or for President and Vice President of the United States. Section 293.269(2) provides that only votes cast for named candidates shall be counted in determining the winner of those elections. Section 293.269(3) provides that voters shall be instructed that they may select "None of these candidates" only if they have not voted for any named candidate in a particular race.[2]

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[2] The full text of § 293.269 is as follows:

> 1. Every ballot upon which appears the names of candidates for any statewide office or for President and Vice President of the United States shall contain for each office an additional line equivalent to the lines on which the candidates' names appear and placed at the end of the group of lines containing the names of the candidates for that office. Each additional line shall contain a square in which the voter may express a choice of that line in the same manner as the voter

As plaintiffs themselves argue, § 293.269 was enacted with the sole intent of providing voters the opportunity to express their lack of confidence in all of the candidates for elected office — to send a message to candidates that they need to "'clean up [their] act' if [they] get into office." Minutes, Assembly Election Committee, Nevada State Assembly (Mar. 18, 1975); *see also None of the Above*, Wall St. J., Dec. 22, 1975 ("A heavy vote in [the NOTC] space would, of course, be a strong expression of displeasure with available choices."); Tom Gardner, *Candidate 'None' didn't do as well in the general*, Reno Evening Gazette, Nov. 11, 1978 (noting that the bill's "original intent was to give voters an opportunity to express lack of confidence in a candidate").

In presidential, senatorial and gubernatorial general elections, NOTC has typically garnered only

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would express a choice of a candidate, and the line shall read "None of these candidates."

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

3. Every sample ballot or other instruction to voters prescribed or approved by the Secretary of State shall clearly explain that the voter may mark the choice of the line "None of these candidates" only if the voter has not voted for any candidate for the office.

a few percent of the vote. *See* Nate Silver, *In Nevada, No One is Someone to Watch*, FiveThirtyEight, N.Y. Times, Aug. 27, 2010, http://fivethirtyeight.blogs.nytimes.com/2010/08/27/innevada-no-one-is-someone-to-watch/. In primary elections, however, the ballots cast for NOTC have at times exceeded those cast for one or more named candidates. For example, in the 1980 presidential primaries, more voters cast ballots for NOTC than for Ted Kennedy, and primary winner Jimmy Carter only narrowly "beat" NOTC. *See* Chris Black, *The Political Revolution: How to Throw the Bums Out*, Boston Globe, Oct. 28, 1990, at A29, 1990 WLNR 1100058; *see also* Christopher W. Carmichael, *Proposals for Reforming the American Electoral System After the 2000 Presidential Election: Universal Voter Registration, Mandatory Voting, and Negative Balloting*, 23 Hamline J. Pub. L. & Pol'y 255, 299-300 (2002) (identifying several occasions on which NOTC garnered more ballots than votes received by named candidates).

In June 2012, eleven plaintiffs filed suit against the Nevada Secretary of State, alleging that § 293.269(2) disenfranchises voters by disregarding ballots cast for NOTC in determining the winner of elections. Seven plaintiffs are Democratic, Republican or Independent registered voters who "intend to vote" but have not expressed an intent to cast a ballot for NOTC in any election. Two plaintiffs expressed an intent to cast a ballot for NOTC. The final two plaintiffs were Republican designees for presidential electors for the November 2012 general election. The Nevada Republican Party, which expressed its "strong interest in ensuring that 'None

of These Candidates' does not appear as a ballot option," joined this appeal in support of the plaintiffs.

Of critical importance, the operative complaint does not challenge subsection 1 of the NOTC statute — that is, plaintiffs do not assert that the requirement that NOTC appear on the ballot violates federal constitutional or statutory provisions. Plaintiffs challenge only subsection 2 of the NOTC statute. They argue that the state's refusal to give legal effect to ballots cast for NOTC disenfranchises voters who cast such ballots. Although plaintiffs challenge only subsection 2, the remedy they seek is not that the state be ordered to give legal effect to ballots cast for NOTC. Rather, they ask that the state be enjoined from allowing NOTC to appear on the ballot altogether.

Plaintiffs moved for a preliminary injunction prohibiting the state from allowing NOTC to appear on any ballot, including the ballot for the November 2012 election. The district court granted plaintiffs' motion and stated that it would bar the state from allowing NOTC to appear on the ballot.

The Nevada Secretary of State and intervenor Kingsley Edwards immediately appealed and filed emergency motions to stay the district court's order.[3] A motions panel of this court granted a stay of the injunction pending appeal. *See Townley v. Miller*, 693 F.3d 1041, 1042 (9th Cir. 2012). NOTC consequently appeared on the November 2012 ballot.

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[3] Kingsley Edwards intervened in support of the Secretary of State because he previously cast a ballot for NOTC and has an interest in ensuring that it continues to be a ballot option.

JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction over the district court's entry of a preliminary injunction under 28 U.S.C. § 1292(a)(1). We review de novo questions of Article III justiciability, including standing. *See Porter v. Jones*, 319 F.3d 483, 489 (9th Cir. 2003).

DISCUSSION

To establish standing, a plaintiff must demonstrate (1) that he suffered an injury in fact, i.e., an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) that there is a causal connection between the injury and the conduct complained of, such that the injury is fairly traceable to the challenged action of the defendant; and (3) that the injury will likely be redressed by a favorable decision. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). At the preliminary injunction stage, plaintiffs must make a clear showing of each element of standing. *See id.* at 561 ("[E]ach element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation."); *Lopez v. Candaele*, 630 F.3d 775, 785 (9th Cir. 2010) (articulating "clear showing" as the burden of proving standing at the preliminary injunction stage).

Plaintiffs seek injunctive relief, not damages, and "[a]s a general rule, in an injunctive case this court

need not address standing of each plaintiff if it concludes that one plaintiff has standing." *Nat'l Ass'n of Optometrists & Opticians LensCrafters, Inc. v. Brown*, 567 F.3d 521, 522 (9th Cir. 2009).[4] We therefore examine whether at least one plaintiff has standing in this case.

1. Non-NOTC Voter Plaintiffs

According to the First Amended Complaint, seven plaintiffs expressed an intent to vote but did not assert an intent to cast a ballot for NOTC in the November 2012 election or any subsequent election. Plaintiffs argue that these individuals "are harmed by the prospect of their ballots not being counted or given legal effect, depending on whether they cast their ballots for 'None of These Candidates.'"

The non-NOTC voter plaintiffs have not suffered an injury-in-fact that is "actual or imminent, not 'conjectural' or 'hypothetical.'" *Lujan*, 504 U.S. at 560. The proposition that these plaintiffs have standing because they may, at some point, depending on which candidates decide to run in a future

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[4] Plaintiffs also seek declaratory relief, as well as attorney's fees and costs. We need not examine standing as to these requests for relief, however, as neither provides a basis for plaintiffs' standing to sue. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998) ("[A] plaintiff cannot achieve standing to litigate a substantive issue by bringing suit for the cost of bringing suit."); *Mayfield v. United States*, 599 F.3d 964, 971 (9th Cir. 2010) (holding, in a lawsuit challenging the legality of government action, that because a declaratory judgment would not require the government to take or abstain from taking action, it did not redress the plaintiff's injury).

election, choose to cast a ballot for NOTC and therefore be denied a right that they assert exists epitomizes speculative injury. This category of plaintiffs therefore lacks standing.

2. NOTC Voter Plaintiffs

Two plaintiffs, Jenny Riedl and Todd Dougan, have asserted a concrete intent to cast ballots for NOTC. Plaintiffs argue that Riedl and Dougan have standing because "[c]learly, a person who intends to cast his ballot of 'None of These Candidates' is a 'proper party' to litigate whether it is proper for Secretary Miller to present 'None of These Candidates' as a ballot alternative, and then disregard ballots cast for it."

We agree with plaintiffs that the first two standing requirements are met. In light of their stated intent to cast ballots for NOTC, the injury Riedl and Dougan assert — the harm caused by the Secretary refusing to give legal effect to their ballots — is sufficiently concrete and imminent, not conjectural or hypothetical.[5] This injury is also causally related to the challenged conduct — the

[5] Although the complaint asserts Riedl and Dougan's intent to cast ballots for NOTC only in the 2012 presidential election, we assume without deciding that these plaintiffs' standing is not lost because the 2012 election has already occurred. *See Moore v. Ogilvie*, 394 U.S. 814, 815-16, 89 S. Ct. 1493, 23 L. Ed. 2d 1 (1969) (discussing the "capable of repetition, yet evading review" doctrine in the election challenge context); *Nelson v. King Cnty.*, 895 F.2d 1248, 1254 (9th Cir. 1990) ("Th[e 'capable of repetition, yet evading review'] exception governs cases in which the plaintiff possesses standing, but then loses it due to an intervening event.").

Secretary of State's failure to give legal effect to ballots cast for NOTC.

Riedl and Dougan fall short, however, in establishing that the relief they seek would redress the injury they argue is caused by § 293.269(2). Plaintiffs say they are harmed because the ballots cast for NOTC are not given legal effect, yet they do not actually ask that, as the remedy for this injury, the Secretary of State be ordered to give legal effect to such ballots. Rather, they demand that the option of casting a ballot for NOTC be entirely removed from the Nevada election system. As a result, if plaintiffs were to prevail in this lawsuit, voters' opposition to named candidates would not be given legal effect, but instead voters would no longer have the opportunity to affirmatively express their opposition at the ballot box at all. The relief plaintiffs seek will therefore decrease their (and other voters') expression of political speech rather than increase it, worsening plaintiffs' injury rather than redressing it.

The proposition that plaintiffs must seek relief that actually improves their position is a well-established principle. As then-Judge Kennedy noted more than three decades ago, "[t]he court's inability to redress the claimed injury may be manifest" where "the requested relief will actually worsen the plaintiff's position." *Gonzales v. Gorsuch*, 688 F.2d 1263, 1267 (9th Cir. 1982); *see also id.* ("[I]f the requested relief would worsen the plaintiff's position . . ., the plaintiff lacks standing."); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 188 n. 4, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000) (characterizing *Linda R.S. v. Richard D.*,

410 U.S. 614, 93 S. Ct. 1146, 35 L. Ed. 2d 536 (1973), as a case in which redressability was lacking because "the relief sought in Linda R.S. — a prosecution which, if successful would automatically land the delinquent father in jail for a fixed term with predictably negative effects on his earning power — would scarcely remedy the plaintiff's lack of child support payments" (internal citation omitted)). This case presents precisely such a scenario.[6]

Allowing standing here, where granting plaintiffs' requested relief would decrease — indeed, eliminate — an important benefit state law grants to Nevada voters, would undermine the purpose of Article III standing. Standing focuses on whether a plaintiff has a "personal stake" in the action such that she will be an effective litigant to assert the legal challenge at issue. *See Baker v. Carr*, 369 U.S. 186, 204, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962); *FDIC v. Bachman*, 894 F.2d 1233, 1236 n. 1 (10th Cir. 1990). Nonparties to litigation may suffer directly from poorly considered decisions reached in actions brought by parties who

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[6] The cases plaintiffs cite do little to support their position. Unlike here, the plaintiff in *Orr v. Orr*, 440 U.S. 268, 99 S. Ct. 1102, 59 L. Ed. 2d 306 (1979), did not seek relief that would necessarily worsen his position. Rather, he argued that he should not be required to pay alimony to his ex-wife because similarly situated wives would not be required to pay under state law. *See id*. at 271. *Stanton v. Stanton*, 421 U.S. 7, 95 S. Ct. 1373, 43 L. Ed. 2d 688 (1975), is irrelevant because it did not involve the redressability question presented here. The only standing issue discussed was whether a mother seeking child support for the care of her 18-year-old daughter was the proper party to challenge a child support statute, rather than the daughter having to assert the legal challenge herself. *See id*. at 11-12.

may not have adequate incentives or motives to effectively present a legal challenge, particularly in a case such as this that involves important public rights. *See* 13A Charles Alan Wright et al., Federal Practice and Procedure § 3531.1 (3d ed. 2008); *see also id.* § 3531 (noting that the Article III standing requirement helps to ensure that courts will not make "[a]n improvident decision" that "may harm . . . individuals who are not before the court"). A plaintiff who seeks relief that advances, rather than undermines, her position is the party best suited to litigate her case zealously and present the best arguments for the court's consideration. *See Baker*, 369 U.S. at 204 (explaining that "[t]he gist of the question of standing" is whether the plaintiff has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions").

"Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998). Because the relief plaintiffs seek would worsen the position of voters who intend to cast ballots for NOTC, rather than redress the injury they assert, this category of plaintiffs lacks standing.

3. Competitive Standing Plaintiffs

The remaining plaintiffs — two Republican presidential elector designees and the Nevada

Republican Party — rely on the doctrine of competitive standing. Competitive standing is the notion that "a candidate or his political party has standing to challenge the inclusion of an allegedly ineligible rival on the ballot, on the theory that doing so hurts the candidate's or party's own chances of prevailing in the election." *Drake v. Obama*, 664 F.3d 774, 782 (9th Cir. 2011) (quoting *Hollander v. McCain*, 566 F. Supp. 2d 63, 68 (D.N.H. 2008)). Plaintiffs argue that they have competitive standing because NOTC constitutes "an unconstitutional and illegal ballot alternative that would potentially siphon votes from the Party's nominees running on its 'Republican' ballot line."

Assuming without deciding that the potential loss of an election due to the appearance of NOTC on the ballot could fulfill standing's injury-in-fact requirement, plaintiffs nonetheless have not established that the other standing requirements are met as to the competitive standing plaintiffs. Specifically, they do not at all address the second and third prongs of standing, apparently believing that a plaintiff who experiences competitive injury has competitive standing. As we made clear in Drake, however, the potential loss of an election can be sufficient injury-in-fact to support standing, but the causation/traceability and redressability requirements still must be met for standing to exist. *See Drake*, 664 F.3d at 783, 784 (noting that this circuit has "held that the 'potential loss of an election' was an injury-in-fact sufficient to give a local candidate and Republican party officials standing," but concluding that the political candidates challenging President Obama's eligibility for

presidency "failed to establish redressability sufficient to establish standing" (quoting *Owen v. Mulligan*, 640 F.2d 1130, 1132-33 (9th Cir. 1981))).

Here, plaintiffs' failure to meet the causation and traceability requirement is their ultimate undoing. This case is distinguishable from the competitive standing cases plaintiffs cite, each of which asserted a constitutional or statutory challenge to the inclusion of a candidate on the ballot. *See Fulani v. Hogsett*, 917 F.2d 1028, 1029 (7th Cir. 1990) (challenging Indiana electoral officials' decision to allow presidential candidates on the ballot even though those candidates were not certified by the Indiana Secretary of State by the statutory deadline); *Schulz v. Williams*, 44 F.3d 48, 52-53 (2d Cir. 1994) (concluding that an intervenor had standing to appeal an injunction by the district court that required the inclusion of Libertarian candidates on the ballot even though the state Board of Elections had concluded that the petition to include those candidates was invalid); *Texas Democratic Party v. Benkiser*, 459 F.3d 582, 586 (5th Cir. 2006) (challenging an official's decision to declare one candidate ineligible and replace him with a viable candidate). In each of these cases, the competitive injury was clearly traceable to the allegedly illegal action the lawsuit challenged.

In contrast, plaintiffs have not connected the competitive standing plaintiffs' injury to the conduct the complaint says violated their rights. *See Lujan*, 504 U.S. at 560. Plaintiffs' complaint does not challenge the inclusion of NOTC as a voting option on the ballot. Rather it challenges only the subsection prohibiting ballots cast for NOTC from

being given legal effect. Plaintiffs having conceded the legality of the NOTC option being on the ballot — the voter option that would have a siphoning effect — the state's failure to give legal effect to the ballots cast for NOTC is immaterial to plaintiffs' alleged competitive injury. Therefore, plaintiffs have failed to establish that the injury alleged by the competitive injury plaintiffs is fairly traceable to the conduct being challenged, so they too lack standing.[7]

CONCLUSION

In sum, plaintiffs do not articulate a way in which any category of plaintiffs fulfills all three standing requirements. Instead, plaintiffs attempt to cobble together the three standing prongs from different groups — injury from the NOTC voter plaintiffs and competitive standing plaintiffs, traceability from the NOTC voter plaintiffs and redressability from the competitive standing plaintiffs.[8] Manufacturing standing in this way is impermissible.

"However desirable prompt resolution of the merits . . . may be, it is not as important as observing the constitutional limits set upon courts in our system of separated powers." *Steel Co.*, 523 U.S. at 110. Because plaintiffs lack standing, we vacate the

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[7] Because plaintiffs' argument that the Republican Party has associational standing to assert the interests of its future nominees is premised on the competitive standing of those nominees, it fails for the same reason.

[8] Notwithstanding plaintiffs' failure to address redressability, it appears that the competitive injury plaintiffs would satisfy this prong if NOTC were removed from the ballot.

preliminary injunction and remand with instructions that the district court dismiss this action without prejudice for lack of standing.

REVERSED AND REMANDED.

APPENDIX B
Verbal Ruling of the U.S. District Court for the District of Nevada Granting Preliminary Injunction (Aug. 22, 2012)

I am going to enter an injunction that bars you from having that on the ballot. I think it would be inappropriate to just narrow it to the federal elections.

I will enjoin you from having none of the above on the ballot. This is the only state that has that. It is violative, I think, on all of the grounds suggested by the plaintiffs and therefore I'm going to order you to strike it from the ballot on all races.

I'll prepare the order, of course. I'll ask you for any proposed ultimate language of the order, the injunctive order. You may, of course, suggest that language. I'll prepare the analysis and the order on the decision.

* * *

I am going to study it out, I'm going to make the order consistent with an analysis that I buy into, but what I'm doing is I'm forewarning them that that's probably where I'm going because they do have a printing problem, a deadline.

D.E. #46, at 50-52.

APPENDIX C
Docket Entry #39—Memorializing Verbal Grant of Preliminary Injunction by the U.S. District Court for the District of Nevada (Aug. 22, 2012)

MINUTES OF PROCEEDINGS—Motion Hearing RE: 15 Motion for Preliminary Injunction, 19 Motion to Dismiss, 26 Motion to Intervene held on 8/22/2012 before Chief Judge Robert C. Jones. Crtm Administrator: *Lesa Ettinger*; Pla Counsel: *Michael Morley*, *Paul Prior*; Def. Counsel: *K. Benson*; Intervener [sic]: *John Parris* Court Reporter/FTR #: *Margaret Griener*; Time of Hearing: *9:53 – 11:02 a.m.*; Courtroom: *6*;

Court convenes. Appearances are noted on the record. The Court makes preliminary remarks. The 26 Motion to Intervene is granted. The Court then hears arguments of counsel in support of and opposition to the 15 Motion for Preliminary Injunction, respectively. Following arguments, the Court gives analysis and finds that plaintiffs have satisfied the requirements for preliminary injunction relief. Accordingly, the Court grants 15 Motion for Preliminary Injunction. Defendant Secretary of State Ross Miller, his agents, employees, affiliates, and all those acting in concert with him, are enjoined from allowing "None of these candidates" to appear on voting ballots. Mr. Benson's oral motion to stay pending appeal is denied. ***Written ruling of the court will issue.*** Court adjourns.

(no image attached) (Copies have been distributed pursuant to the NEF – LE) (Entered: 08/24/2012).

APPENDIX D
Opinion of the U.S. Court of Appeals for the Ninth Circuit Staying Preliminary Injunction, with Concurrence by Judge Reinhardt (Sept. 4, 2012)

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WENDY TOWNLEY; et al., *Plaintiffs - Appellees*, v. ROSS MILLER, Secretary of State of Nevada, *Defendant - Appellant*, and KINGSLEY EDWARDS, *Intervenor-Defendant-Appellant*.	Nos. 12-16881, 12-16882 D.C. No. 2:12-cv-00310-RCJ-WGC District of Nevada, Reno ORDER

Before: REINHARDT, WARDLAW, and BEA, Circuit Judges.

Appellants Ross Miller, Nevada Secretary of State, and Kingsley Edwards, a Nevada voter, appeal from the district court's preliminary injunction order enjoining Nevada's nearly 37-year-old statute that requires a "None of These Candidates" option on the ballot in statewide elections for state or federal office.

The district court entered its preliminary injunction order, dated August 22, 2012, on August 24, 2012. The preliminary injunction order reads in part:

> [T]he Court grants [Docket Number] 15 Motion for Preliminary [I]njunction. Defendant Secretary of State Ross Miller, his agents, employees, affiliates, and all those acting in concert with him, are enjoined from allowing "None of these candidates" to appear on voting ballots. [Defendant's counsel]'s oral motion to stay pending appeal is denied. Written ruling of the Court will issue. Court adjourns.

(emphasis omitted).

The notices of appeal of the grant of the preliminary injunction were filed immediately thereafter, on August 24 and 25, 2012. The filing of these notices of appeal, consolidated by this court on August 28, 2012, divested the district court of jurisdiction over the preliminary injunction. *See Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 103 S. Ct. 400, 74 L. Ed. 2d 225 (1982); *Davis v. United States*, 667 F.2d 822 (9th Cir. 1982) (filing of a notice of appeal generally divests the district court of

jurisdiction over the matters appealed, although the district court may act to assist the court of appeals in the exercise of its judgment). We therefore have jurisdiction over these appeals from the district court's August 22, 2012 and August 24, 2012 orders granting appellees' motion for preliminary injunction pursuant to 28 U.S.C. § 1292(a)(1).

Appellants' emergency motions to stay the district court's August 22, 2012 order pending appeal are granted. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008).

Appellant Ross Miller's motion for leave to file an oversized emergency motion to stay the district court's August 22, 2012 order is granted.

Appellees' motion for leave to file an oversized opposition to appellants' emergency motions to stay the district court's August 22, 2012 order is granted.

The briefing schedule established previously shall remain in effect.

JUDGE REINHARDT, Concurring:

I concur fully in this court's order, including its determination that this court has jurisdiction over the appeals from the district court's preliminary injunction. I write separately only to add that there is an alternative basis for our jurisdiction over the appeals—a basis that would exist even if the district

judge had not entered his minute order issuing the preliminary injunction.

Before doing so, however, I wish to make clear that the panel is in agreement that the basis for our grant of the stay of the district court's order pursuant to *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008), is that the likelihood of success on the merits overwhelmingly favors the state. Plaintiffs' arguments offer no colorable basis for this court to conclude that Nevada's 37-year-old statute providing for "None of these candidates" ballots is contrary to the Constitution or to any federal statute. A failure to stay forthwith any injunction issued by the district court would accordingly result in irreparable injury to the State of Nevada and its citizens, and would be directly contrary to the public interest.

The parties have advised both this court and the district court that, in order for Nevadans in the military to cast their ballots in the forthcoming Presidential election, the complex process of printing the statewide ballots must be completed no later than September 22, 2012, and that the printing of all such ballots must begin by September 7, 2012. Although the district judge acknowledged his awareness of these facts, he has deliberately attempted to avoid entering any order that would allow an appeal before that date. His dilatory tactics appear to serve no purpose other than to seek to prevent the state from taking an appeal of his decision before it must print the ballots. As set forth below, these attempts to frustrate the jurisdiction of

the appellate court, and, necessarily, the Supreme Court—at least until the issue in this case is mooted—itself constitutes a sufficient basis for our exercise of jurisdiction.

The district judge's intent to evade appellate review is plain from the record. Indeed, the district judge essentially admitted as much, as evidenced by the transcript of the hearing held August 22, 2012, regarding the motion for preliminary injunction. At that hearing, counsel for the state requested that the district judge rule in time to permit an appeal to the Ninth Circuit before the ballot deadline; the district judge, however, displayed no interest in Defendants' ability to appeal:

> MR. BENSON: Well, we have a problem in the procedural sense in that if we—in order to get to the Ninth Circuit between now and September 7th—
>
> THE COURT: Well, that's your problem. I'm just trying to accommodate your problem with regard to notifying the printer.

Although the district judge's response was entirely out of keeping with the importance and time sensitiveness of this case, it, alone, would not suffice to evidence deliberate delay.

The court's comment, however, followed numerous and substantial delays caused by the district judge, which, in the face of efforts by both

parties to expedite consideration of the matter,[1] can only be explained as a deliberate attempt to evade review by higher courts. For example, when the district judge who had originally been assigned to this case withdrew from the case on June 11, 2012, the current district judge as Chief Judge took until July 3, 2012, to reassign the case—and, when he did so, he reassigned it to himself. The resultant delay had the prejudicial effect of rendering moot the parties' request for expedited briefing. Further, the district judge then waited almost three weeks, until July 20, 2012, to even schedule a hearing on the preliminary injunction. The date he eventually chose—August 22, 2012—resulted in another month-long delay in the resolution of this proceeding.

At the August 22, 2012, hearing, the parties once again urged the court to issue its ruling as soon as possible; in response, the district judge assured the parties that he would rule quickly:

> MR. BENSON: With regard to preparing the order and all of that, we have a ballot deadline, printing deadline coming up very quickly.

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[1] Plaintiffs specifically requested expedited treatment of the preliminary injunction, marking their motion "EXPEDITED TREATMENT REQUESTED." The parties also filed a request for an expedited briefing schedule. They further explained the importance of an expeditious ruling during the oral hearing on the preliminary injunction motion.

THE COURT: That's why I'm announcing this orally now.

MR. BENSON: I appreciate that, your Honor.

THE COURT: Even though I would like more time to study it, but—

MR. BENSON: And with regard to the written order, my understanding is that an appeal cannot be taken until a written order is put in the record so—

THE COURT: Right. I'll try to do that as quickly as I can.

As set forth in the district judge's recent order in response to the notices of appeal, however, the district judge has so far refused to issue a fully-reasoned explanation for his preliminary injunction (a precondition, under his view, for appellate review). Despite his promise to rule 'quickly,' more than a month has passed since the completion of briefing on that issue—and 13 days have passed since the August 22 hearing—without such a reasoned ruling. It is now three work days before the printing of ballots must commence, and the district judge has exhibited no signs of issuing the written explanation that he believes is essential for appellate review.

The district judge was fully aware that his efforts might affect this court's jurisdiction and that Defendants were seeking appellate review of

his decision. Indeed, his recent post-appeal order notes the notices of appeal filed by the parties, and describes them as "premature." In any event, his awareness did not put an end to his attempts to evade appellate review. When the appeals were filed, he immediately sought to frustrate our ability to entertain a stay pending appeal, denying that he had issued an order but scheduling a hearing on whether he should grant a stay of that order for September 14, 2012—fully a week after the state's deadline for printing the ballots—a hearing that he deemed a precondition to this court's "entertainment" of a stay motion.[2] This last action by the district judge is particularly egregious in light of the fact that he swiftly denied oral motions for the precise same stay (made by both sets of Defendants) during the August 22, 2012, hearing.[3]

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[2] Before requesting a stay from this court, the parties are required either to request one from the district court or demonstrate why seeking such a stay would be impracticable. *See* Fed. R. App. P. 8(a). Here, both apply.

[3] The district judge was presented with two such motions for a stay during the August 22, 2012, hearing, and denied them both times without equivocation. The first time was upon motion of the state:

> THE COURT: But the reason I'm announcing this orally is so that you're forewarned with regard to the printing problem.
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> MR. BENSON: And, finally, with regard to that, I must take an oral motion that the Court stay its order pending appeal. We do intend to take an appeal.

In circumstances such as these, when a district judge's actions might serve to deprive the appellate court of meaningful judicial review, an appellate court has the authority to exercise jurisdiction in aid of its own appellate jurisdiction. This is so even if an appeal has not yet been properly perfected. In *FTC v. Dean Foods, Co.*, for example, the Supreme Court upheld the court of appeals's authority to grant a preliminary injunction preventing a merger that would moot any subsequent appeal. 384 U.S. 597, 603-05, 86 S. Ct. 1738, 16 L. Ed. 2d 802 (1966). The Court noted that, "where an appeal is not then pending but may be later perfected," an appellate court may exercise jurisdiction when doing so would be necessary to preserve its later appellate jurisdiction. *Id.* at 603. The ability of appellate tribunals to act to preserve their jurisdiction is a necessary element of appellate review; "[o]therwise the appellate jurisdiction could be defeated . . . by unauthorized action of the district court obstructing the appeal." *Roche v.*

THE COURT:	I'll deny that.
MR. BENSON:	Thank you, your Honor.
THE COURT:	So you have it for the record.

Later, in response to a motion by Defendant-Intervenor, the court again denied the stay, stating, "I'll deny that for the record so that you can ask the appellate court for a stay" (emphasis added). Indeed, the district court's orders on this point are so contradictory that the state today filed a motion with the district court to clarify the precise state of the record regarding both the preliminary injunction and the stay.

Evaporated Milk Ass'n, 319 U.S. 21, 25, 63 S. Ct. 938, 87 L. Ed. 1185 (1943) (emphasis added); *see also California Energy Comm'n v. Johnson*, 767 F.2d 631, 634 (9th Cir. 1985) (reiterating this principle but declining to exercise such jurisdiction).

When a decision on our part is necessary in order to permit the losing party below to obtain review by our court and the Supreme Court, we have the ability to act in order to preserve the jurisdiction of the appellate courts. In this case, that authority would permit us to decide the stay motion before us, even if the district court had not issued the injunction on August 24. Refusal to exercise our jurisdiction would frustrate not only our appellate authority, but also that of the Supreme Court, and would allow the district court to erroneously invalidate Nevada's long-standing election process and to deprive its citizens of their right to participate in Presidential elections in the manner that the law prescribes. Such arrogance and assumption of power by one individual is not acceptable in our judicial system.

I therefore wholeheartedly concur in the panel's decision to grant the stay.[4]

---

[4] In any event, if the district court were to succeed temporarily in blocking appellate jurisdiction as a result of its contention that it has not issued an injunction, the state would be free to commence printing the ballots immediately. Any subsequent attempt to disrupt that printing would be subject to an immediate stay as the weighing of the *Winter* factors would favor the state even more strongly.

APPENDIX E
Amended Opinion of the U.S. Court of Appeals for the Ninth Circuit Staying Preliminary Injunction with Concurrence by Judge Reinhardt (Sept. 5, 2012)

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WENDY TOWNLEY; AMY WHITLOCK; ASHLEY GUNSON; HEATHER THOMAS; DAX WOOD; CASJA LINFORD; WESLEY TOWNLEY; JENNY RIEDL; TODD DOUGAN; BRUCE WOODBURY; JAMES W. DEGRAFFENREID, *Plaintiffs-Appellees*, v. ROSS MILLER, Secretary of State of Nevada, *Defendant-Appellant*, and	Nos. 12-16881, 12-16882 D.C. No. 2:12-cv-00310-RCJ-WGC District of Nevada, Reno AMENDED ORDER

KINGSLEY EDWARDS,
Intervenor-Defendant.

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

Plaintiffs-Appellees,

v.

ROSS MILLER, Secretary of State of Nevada,

Defendant,

and

KINGSLEY EDWARDS,
Intervenor-Defendant-Appellant.

Submitted to Motions Panel September 5, 2012

Before: REINHARDT, WARDLAW, and BEA, Circuit Judges.

The order issued September 4, 2012 is hereby amended and this amended order is designated for publication.

Appellants Ross Miller, Nevada Secretary of State, and Kingsley Edwards, a Nevada voter, appeal from the district court's preliminary injunction order enjoining Nevada's nearly 37-year-old statute that requires a "None of These Candidates" option on the ballot in statewide elections for state or federal office.

The district court entered its preliminary injunction order, dated August 22, 2012, on August 24, 2012. The preliminary injunction order reads in part:

> [T]he Court grants [Docket Number] 15 Motion for Preliminary [I]njunction. Defendant Secretary of State Ross Miller, his agents, employees, affiliates, and all those acting in concert with him, are enjoined from allowing "None of these candidates" to appear on voting ballots. [Defendant's counsel]'s oral motion to stay pending appeal is denied. Written ruling of the Court will issue. Court adjourns.

(emphasis omitted).

The notices of appeal of the grant of the preliminary injunction were filed immediately thereafter, on August 24 and 25, 2012. The filing of these notices of appeal, consolidated by this court on August 28, 2012, divested the district court of jurisdiction over the preliminary injunction. *See*

Griggs v. Provident Consumer Disc. Co., 459 U.S. 56, 103 S. Ct. 400, 74 L. Ed. 2d 225 (1982); *Davis v. United States*, 667 F.2d 822 (9th Cir. 1982) (filing of a notice of appeal generally divests the district court of jurisdiction over the matters appealed, although the district court may act to assist the court of appeals in the exercise of its judgment). We therefore have jurisdiction over these appeals from the district court's August 22, 2012 and August 24, 2012 orders granting appellees' motion for preliminary injunction pursuant to 28 U.S.C. § 1292(a)(1).

Appellants' emergency motions to stay the district court's August 22, 2012 order pending appeal are granted. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008).

Appellant Ross Miller's motion for leave to file an oversized emergency motion to stay the district court's August 22, 2012 order is granted.

Appellees' motion for leave to file an oversized opposition to appellants' emergency motions to stay the district court's August 22, 2012 order is granted.

The briefing schedule established previously shall remain in effect.

JUDGE REINHARDT, Concurring:

I concur fully in this court's order, including its determination that this court has jurisdiction over the appeals from the district court's preliminary

injunction. I write separately only to add that there is an alternative basis for our jurisdiction over the appeals—a basis that would exist even if the district judge had not entered his minute order issuing the preliminary injunction.

Before doing so, however, I wish to make clear that the panel is in agreement that the basis for our grant of the stay of the district court's order pursuant to *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008), is that the likelihood of success on the merits favors the state. Plaintiffs' arguments offer an inadequate basis for this court to conclude that Nevada's 37-year-old statute providing for "None of these candidates" ballots is contrary to the Constitution or to any federal statute. A failure to stay forthwith any injunction issued by the district court would accordingly result in irreparable injury to the State of Nevada and its citizens, and would be directly contrary to the public interest.

The parties have advised both this court and the district court that, in order for Nevadans in the military to cast their ballots in the forthcoming Presidential election, the complex process of printing the statewide ballots must be completed no later than September 22, 2012, and that the printing of all such ballots must begin by September 7, 2012. Although the district judge acknowledged his awareness of these facts, he has deliberately attempted to avoid entering any order that would allow an appeal before that date. His dilatory tactics appear to serve no purpose other than to seek to

prevent the state from taking an appeal of his decision before it must print the ballots. As set forth below, these attempts to frustrate the jurisdiction of the appellate court, and, necessarily, the Supreme Court—at least until the issue in this case is mooted—itself constitutes a sufficient basis for our exercise of jurisdiction.

The district judge's intent to evade appellate review is plain from the record. Indeed, the district judge essentially admitted as much, as evidenced by the transcript of the hearing held August 22, 2012, regarding the motion for preliminary injunction. At that hearing, counsel for the state requested that the district judge rule in time to permit an appeal to the Ninth Circuit before the ballot deadline; the district judge, however, displayed no interest in Defendants' ability to appeal:

> MR. BENSON: Well, we have a problem in the procedural sense in that if we—in order to get to the Ninth Circuit between now and September 7th—
>
> THE COURT: Well, that's your problem. I'm just trying to accommodate your problem with regard to notifying the printer.

Although the district judge's response was entirely out of keeping with the importance and time sensitiveness of this case, it, alone, would not suffice to evidence deliberate delay.

The court's comment, however, followed numerous and substantial delays caused by the district judge, which, in the face of efforts by both parties to expedite consideration of the matter,[1] can only be explained as a deliberate attempt to evade review by higher courts. For example, when the district judge who had originally been assigned to this case withdrew from the case on June 11, 2012, the current district judge as Chief Judge took until July 3, 2012, to reassign the case—and, when he did so, he reassigned it to himself. The resultant delay had the prejudicial effect of rendering moot the parties' request for expedited briefing. Further, the district judge then waited almost three weeks, until July 20, 2012, to even schedule a hearing on the preliminary injunction. The date he eventually chose—August 22, 2012—resulted in another month-long delay in the resolution of this proceeding.

At the August 22, 2012, hearing, the parties once again urged the court to issue its ruling as soon as possible; in response, the district judge assured the parties that he would rule quickly:

> MR. BENSON: With regard to preparing the order and all of that, we have a ballot deadline, printing deadline coming up very quickly.

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[1] Plaintiffs specifically requested expedited treatment of the preliminary injunction, marking their motion "EXPEDITED TREATMENT REQUESTED." The parties also filed a request for an expedited briefing schedule. They further explained the importance of an expeditious ruling during the oral hearing on the preliminary injunction motion.

> THE COURT: That's why I'm announcing this orally now.
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> MR. BENSON: I appreciate that, your Honor.
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> THE COURT: Even though I would like more time to study it, but—
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> MR. BENSON: And with regard to the written order, my understanding is that an appeal cannot be taken until a written order is put in the record so—
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> THE COURT: Right. I'll try to do that as quickly as I can.

As set forth in the district judge's recent order in response to the notices of appeal, however, the district judge has so far refused to issue a fully-reasoned explanation for his preliminary injunction (a precondition, under his view, for appellate review). Despite his promise to rule 'quickly,' more than a month has passed since the completion of briefing on that issue—and 13 days have passed since the August 22 hearing—without such a reasoned ruling. It is now three work days before the printing of ballots must commence, and the district judge has exhibited no signs of issuing the written explanation that he believes is essential for appellate review.

The district judge was fully aware that his efforts might affect this court's jurisdiction and that Defendants were seeking appellate review of his decision. Indeed, his recent post-appeal order notes

the notices of appeal filed by the parties, and describes them as "premature." In any event, his awareness did not put an end to his attempts to evade appellate review. When the appeals were filed, he immediately sought to frustrate our ability to entertain a stay pending appeal, denying that he had issued an order but scheduling a hearing on whether he should grant a stay of that order for September 14, 2012—fully a week after the state's deadline for printing the ballots—a hearing that he deemed a precondition to this court's "entertainment" of a stay motion.[2] This last action by the district judge is particularly egregious in light of the fact that he swiftly denied oral motions for the precise same stay (made by both sets of Defendants) during the August 22, 2012, hearing.[3]

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> THE COURT: I'll deny that.

In circumstances such as these, when a district judge's actions might serve to deprive the appellate court of meaningful judicial review, an appellate court has the authority to exercise jurisdiction in aid of its own appellate jurisdiction. This is so even if an appeal has not yet been properly perfected. In *FTC v. Dean Foods, Co.*, for example, the Supreme Court upheld the court of appeals's authority to grant a preliminary injunction preventing a merger that would moot any subsequent appeal. 384 U.S. 597, 603-05, 86 S. Ct. 1738, 16 L. Ed. 2d 802 (1966). The Court noted that, "where an appeal is not then pending but may be later perfected," an appellate court may exercise jurisdiction when doing so would be necessary to preserve its later appellate jurisdiction. *Id.* at 603. The ability of appellate tribunals to act to preserve their jurisdiction is a necessary element of appellate review; "[o]therwise the appellate jurisdiction could be defeated . . . by unauthorized action of the district court obstructing the appeal." *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 25, 63 S. Ct. 938, 87 L. Ed. 1185 (1943) (emphasis added); *see also California Energy Comm'n v. Johnson*, 767 F.2d 631, 634 (9th Cir.

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Later, in response to a motion by Defendant-Intervenor, the court again denied the stay, stating, "I'll deny that for the record so that you can ask the appellate court for a stay" (emphasis added). Indeed, the district court's orders on this point are so contradictory that the state today filed a motion with the district court to clarify the precise state of the record regarding both the preliminary injunction and the stay.

1985) (reiterating this principle but declining to exercise such jurisdiction).

When a decision on our part is necessary in order to permit the losing party below to obtain review by our court and the Supreme Court, we have the ability to act in order to preserve the jurisdiction of the appellate courts. In this case, that authority would permit us to decide the stay motion before us, even if the district court had not issued the injunction on August 24. Refusal to exercise our jurisdiction would frustrate not only our appellate authority, but also that of the Supreme Court, and would allow the district court to erroneously invalidate Nevada's long-standing election process and to deprive its citizens of their right to participate in Presidential elections in the manner that the law prescribes. Such arrogance and assumption of power by one individual is not acceptable in our judicial system.

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APPENDIX F
Constitutional and Statutory Provisions Involved

Nev. Rev. Stat. § 293.165(4). Procedure for filing vacancy in major or minor political party nomination or nonpartisan nomination.

* * *

4. No change may be made on the ballot for the general election after 5 p.m. on the fourth Friday in June of the year in which the general election is held. If a nominee dies after that time and date, the nominee's name must remain on the ballot for the general election and, if elected, a vacancy exists.

Nev. Rev. Stat. § 293.269. Ballots for statewide offices or President and Vice President must permit voter to register opposition to all candidates.

1. Every ballot upon which appears the names of candidates for any statewide office or for President and Vice President of the United States shall contain for each office an additional line equivalent to the lines on which the candidates' names appear and placed at the end of the group of lines containing the names of the candidates for that office. Each additional line shall contain a square in which the voter may express a choice of that line in the same manner as the voter would express a choice of a

candidate, and the line shall read "None of these candidates."

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

3. Every sample ballot or other instruction to voters prescribed or approved by the Secretary of State shall clearly explain that the voter may mark the choice of the line "None of these candidates" only if the voter has not voted for any candidate for the office.

Nev. Rev. Stat. § 293.368. Counting of votes cast for deceased candidate.

1. Except as otherwise provided in subsection 3 of NRS 293.165, if a candidate on the ballot at a primary election dies after 5 p.m. of the second Tuesday in April, the deceased candidate's name must remain on the ballot and the votes cast for the deceased candidate must be counted in determining the nomination for the office for which the decedent was a candidate.

2. If the deceased candidate on the ballot at the primary election receives the number of votes required to receive the nomination to the office for which he or she was a candidate, except as otherwise provided in subsection 2 of NRS 293.165, the deceased candidate shall be deemed nominated and the vacancy in the nomination must be filled as provided in NRS 293.165 or 293.166. If the deceased person was a candidate for a nonpartisan office, the nomination must be filled pursuant to subsection 2 of NRS 293.165.

3. Whenever a candidate whose name appears upon the ballot at a general election dies after 5 p.m. on the fourth Friday in June of the year in which the general election is held, the votes cast for the deceased candidate must be counted in determining the results of the election for the office for which the decedent was a candidate.

4. If the deceased candidate on the ballot at the general election receives the majority of the votes cast for the office, the deceased candidate shall be deemed elected and the office to which he or she was elected shall be deemed vacant at the beginning of the term for which he or she was elected. The vacancy thus created must be filled in the same manner as if the candidate had died after taking office for that term.

Nev. Rev. Stat. § 293B.075. Full choice of candidates for offices; vote against all candidates.

A mechanical voting system must permit the voter to vote for any person for any office for which he or she has the right to vote, but none other, or indicate a vote against all candidates.

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

* * *

3. A county clerk shall conduct the test required pursuant to subsection 2 by:

(a) Processing on a mechanical recording device, during the periods prescribed in NRS 293B.150 and 293B.165, a group of logic and accuracy test ballots voted so as to record:

(1) A vote for each candidate and a vote for and against each measure on the ballot.

(2) A vote for "none of these candidates" for all statewide contests;

(3) "No selection made" for each contest and ballot measure;

(4) In all contests in which a voter may vote for more than one candidate, each option available to the voter, from "No selection made" to the total number of candidates a voter may select.

Due Process Clause
U.S. Const., amend. XIV, § 1

> . . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .

Equal Protection Clause
U.S. Const., amend. XIV, § 1

> . . . [N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.

Elections Clause
U.S. Const., art. I, § 4, cl. 1

> The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.

Civil Rights Act
42 U.S.C. § 1973i(a)

(a) Failure or refusal to permit casting or tabulation of vote

No person acting under color of law shall fail or refuse to permit any person to vote who is entitled to vote under any provision of subchapters I–A to I–C of this chapter or is otherwise qualified to vote, or willfully fail or refuse to tabulate, count, and report such person's vote.

Help America Vote Act ("HAVA")
42 U.S.C. § 15481(a)(6)

(6) Uniform definition of what constitutes a vote

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.

2 U.S.C. § 1 – Time for election of Senators

At the regular election held in any State next preceding the expiration of the term for which any Senator was elected to represent such State in Congress, at which election a

Representative to Congress is regularly by law to be chosen, a United States Senator from said State shall be elected by the people thereof for the term commencing on the 3d day of January next thereafter.

3 U.S.C. § 1 – Time of appointing electors

The electors of President and Vice President shall be appointed, in each State, on the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President.

Nev. Const., art. V, § 4

Section 4. Returns of general election transmitted to secretary of state; canvass by supreme court; declaration of election.

* * * The persons having the highest number of votes for the respective offices shall be declared elected, but in case any two or more have an equal and the highest number of votes for the same office, the legislature shall, by joint vote of both houses, elect one of said persons to fill said office.