

No. 13-442

In the Supreme Court of the United States

REPUBLICAN PARTY OF NEVADA,
Petitioner,

v.

ROSS MILLER, NEVADA SECRETARY OF STATE, et al.,
Respondents.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

- I. May a plaintiff seek to enjoin a statutory provision that allegedly injures it, by alleging that it is inseverable from a different provision that the plaintiff alleges is unconstitutional, but which does no harm to the plaintiff?
- II. Must a political party meet all three *Lujan* requirements for Article III standing when it challenges an allegedly invalid option on the ballot against which its candidates will run?

PARTIES TO THE PROCEEDING

Petitioner Republican Party of Nevada (“RPN”) was not a plaintiff in the district court. It intervened as a plaintiff/appellee during the pendency of the appeal.

Plaintiffs:

1. Voter plaintiffs who did not allege that they intended to vote for “None of These Candidates:” Wendy Townley, Amy Whitlock, Ashley Gunson, Heather Thomas, Dax Wood, Casja Linford, and Wesley Townley.
2. Voter plaintiffs who alleged that they intended to vote for “None of These Candidates:” Jenny Riedl and Todd Dougan.
3. Republican candidates for the office of presidential elector at the 2012 election: Bruce Woodbury and James W. DeGraffenreid.

Defendant:

Ross Miller, Nevada Secretary of State.

Intervenor:

Voter Kingsley Edwards intervened in the district court as a defendant. He alleged that he had voted for “None of These Candidates” in the past, intended to do so in the future, and therefore has an interest in it remaining as an option on Nevada’s ballots.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statute at issue is Nev. Rev. Stat. § 293.269. It is reproduced in full in Petitioner's Appendix beginning at page A-44.

STATEMENT OF THE CASE

A. The statute providing for None of These Candidates.

Nevada is the only state which provides for a "none of the above" option on its ballots. In 1975, the Nevada Legislature enacted the bill that became Nev. Rev. Stat. § 293.269. Subsection 1 of Nev. Rev. Stat. § 293.269 requires that all statewide races must have an option for voters to choose "None of these Candidates" (NOTC). Nev. Rev. Stat. § 293.269(1). Subsection 2 provides that election officials are to tabulate and report how many voters chose NOTC, but NOTC is not to be counted in determining the winner of an election. Nev. Rev. Stat. § 293.269(2). Therefore, "None of These Candidates" can never "win" an election, even if a plurality or majority of voters chooses it. Voters who choose NOTC are treated the same as voters who undervote, abstain, spoil their ballot, or otherwise decline to vote for a candidate.

B. The Role of None of These Candidates in Nevada Elections.

The election of 1976 was the first election held in which NOTC appeared as an option on the ballot. In that year, more voters chose NOTC than voted for either of the candidates in the Republican primary for U.S. House of Representatives. The same occurred in

the 1978 Republican primary for U.S. House of Representatives. These are the only two instances in Nevada history in which more ballots were cast for NOTC than for a named candidate.

In the 2012 presidential race, 5,770 voters selected NOTC, far fewer than the 67,806 vote difference between Barack Obama and Mitt Romney.¹ However, there have been several instances in which the difference in the number of votes between the top two candidates was smaller than the number of voters who chose NOTC. For example, in the 2012 U.S. Senate race, Republican Dean Heller beat Democrat Shelley Berkley by a margin of 11,576 votes. In that race, 45,277 voters chose NOTC. Another 48,792 voted for David Vanderbeek, the Independent American Party candidate.² Also in 2012, about a quarter of voters chose NOTC in each of the state supreme court races. However, the incumbent ran unopposed in all of those races.³

C. The Proceedings Below.

The plaintiffs below complained that Subsection 2 of Nev. Rev. Stat. § 293.269 is unconstitutional because

¹ 2012 Election Night Results, Presidential Race, available at: <http://www.silverstateelection.com/USPresidential/index.shtml> (last visited Nov. 25, 2013).

² 2012 Election Results, U.S. Senate Race, available at: <http://www.silverstateelection.com/USSenate/> (last visited Nov. 25, 2013).

³ 2010 Election Results, Statewide/Judicial, available at: <http://www.silverstateelection.com/Judicial/> (last visited Nov. 25, 2013).

it allegedly “disenfranchises” voters who choose NOTC by providing that NOTC is not counted in determining the winner of the election. The only relief (other than attorney’s fees and costs) that plaintiffs sought was an injunction prohibiting NOTC from appearing on the ballot as required by Subsection 1 of Nev. Rev. Stat. § 293.269, and a declaration that the refusal to count NOTC as a vote is unconstitutional. *See* Amended Complaint, district court docket entry #10, pp. 16-17; *see also* Pet. at 9 (discussing original complaint).

Intervenor Kingsley Edwards intervened as a defendant in the district court to keep NOTC on the ballot. He alleged that he had voted for NOTC in the past and intends to do so in the future, and therefore his rights would be infringed if it were removed from the ballot.

The plaintiffs moved for a preliminary injunction to prevent NOTC from appearing on the ballot. Both the Nevada Secretary of State and Mr. Edwards opposed the plaintiffs’ motion both on its merits and on the basis that plaintiffs all lacked standing. On August 22, 2012, after full briefing and a hearing, the district court granted the preliminary injunction and ordered that NOTC must not appear on any ballot. Pet. App. A-20. Counsel for both the Secretary and Mr. Edwards requested the district court to stay its order pending appeal, but both requests were denied. D.E. #46, Pet. App. A-21; A-41-42, n. 3. The district court’s decision was reflected in the minutes of the proceeding. Pet. App. A-21

The Secretary and Mr. Edwards appealed. Due to the short time before the election, both the Secretary and Mr. Edwards also filed emergency motions to stay

the district court's preliminary injunction. The Ninth Circuit granted the emergency motions to stay. As a result, NOTC appeared on the 2012 ballot in accordance with Nev. Rev. Stat. § 293.269.

Because the 2012 election occurred while the appeal was still pending, the Petitioner Republican Party of Nevada (hereinafter "RPN") intervened to avoid dismissal based on mootness. Intervention was granted by both the Ninth Circuit and the district court.

After full briefing and oral argument, the Ninth Circuit reversed and vacated the preliminary injunction, finding that none of the plaintiffs had shown that they had Article III standing to challenge the placement of None of These Candidates on the ballot. Pet. App. A-1-19. The decision is published at *Townley v. Miller*, 722 F.3d 1128 (9th Cir. 2013). Pet. App. A-19. The Ninth Circuit remanded the case with instructions to dismiss without prejudice.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I. This case is not a proper vehicle for addressing "standing through inseverability," because that issue was waived and there is no circuit split.

A. The theory of standing through inseverability was waived and the Ninth Circuit never ruled on it.

This Court should deny the petition because RPN waived the issue of "standing through inseverability" by failing to address it in the courts below. *See United States v. United Foods, Inc.*, 533 U.S. 405, 417 (2001)

(declining to address arguments or theories not passed upon by the court whose decision is under review); *cf.* *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (addressing an argument that, although disavowed by the petitioner below, was actually addressed and passed upon by the circuit court).

Both the Nevada Secretary of State and the Intervenor, Kingsley Edwards, challenged the plaintiffs' standing. In response, the plaintiffs argued that they had standing under the test in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992), but never argued any theory of “standing through inseverability.” The plaintiffs did not cite *Alaska Airlines Inc. v. Brock*, 480 U.S. 678 (1987), the case upon which the Petition primarily depends, nor otherwise asserted that the severability analysis had any bearing on standing. Instead, severability was discussed solely in the context of remedies.

The closest plaintiffs came to asserting this theory was in their Respondents' Brief to the Ninth Circuit, at page 73. Ninth Circuit Docket Entry #28. There, they argued that the fact that the entire statute should be invalidated because of inseverability does not *deprive* them of standing, citing *Orr v. Orr*, 440 U.S. 268, 292 (1979) and *Stanton v. Stanton*, 421 U.S. 7, 17 (1975).

But neither *Orr* nor *Stanton* involved plaintiffs who asserted standing to challenge one provision of a law *because* some other, inseverable provision that did *not* harm them was allegedly unconstitutional. Instead, both of those cases involved straightforward challenges to statutes that directly caused the plaintiffs' injuries, i.e., being treated differently from other, similarly situated people. Thus both cases are inapplicable here.

See Orr, 440 U.S. at 273 (husband had standing to challenge statute that disallowed alimony payments by a wife to a husband because, under that statute, he was directly burdened with a responsibility females did not share); *Stanton*, 421 U.S. at 12 (mother who was entitled to child support payments from father for son and daughter had standing to challenge statute that made 21 the age of majority for males, and 18 the age of majority for females, because she had a direct and personal interest in receiving child support payments until both children were 21).

Thus, instead of asserting that they had standing to challenge Subsection 1 of the statute *because* of the alleged inseverability of Subsection 2, the plaintiffs in this case only argued that they had standing under *Lujan* (for voter plaintiffs) and competitive standing (for RPN and candidate plaintiffs). Respondent's Brief, pp. 70-76, Ninth Circuit D.E. #28. Inseverability was only presented in the context of supporting their position that the only proper remedy was to strike NOTC from the ballot altogether. *See e.g., id.* at 57-60.

Furthermore, as in *United Foods, Inc.*, 533 U.S. at 417, the lower courts in this case did not address or pass upon the first question presented in the Petition. According to RPN, the Ninth Circuit erred by rejecting its theory of "standing through inseverability." In order for that to be true, the Ninth Circuit would have had to first conclude or assume that the statute was *not* severable, and then nevertheless deny standing. But in fact the Ninth Circuit never addressed severability at all, nor did its opinion either implicitly or explicitly reject Petitioner's theory of "standing through inseverability." The Ninth Circuit simply did not

address it, because it was never briefed by any party.

In short, this Court should deny the Petition because RPN waived the issue of standing through inseverability by failing to raise it in the courts below. Counsel did not develop, brief, or argue the issue, and the lower courts were not able to analyze the arguments or the law, and never addressed or ruled upon the issue in their decisions.

B. There is no circuit split regarding standing through inseverability.

No circuit split exists regarding the theory of standing through inseverability. RPN claims that several circuits have recognized this theory of standing, and that two circuits, the Fifth and now the Ninth, have “expressly reject[ed] it.” Pet. 21-22. However, that is not the case. As discussed above, the Ninth Circuit’s decision does not address severability at all, let alone in the context of standing. Under these circumstances, the Ninth Circuit’s decision cannot be fairly characterized as “expressly rejecting” “the doctrine of standing through inseverability.” *See id.* Nor can it be viewed as “deepening” any alleged circuit split. *See* Pet. at 23.

As for the Fifth Circuit case cited by RPN, *Nat’l Federation of the Blind of Texas v. Abbott*, 647 F.3d 202 (5th Cir. 2011), that court held that the plaintiffs lacked standing to challenge certain provisions of a law governing charitable solicitations. But it also expressly acknowledged that, in certain circumstances at least, the severability analysis may be bound up with the standing inquiry. *Id.* at 211.

Abbott involved a Texas statute which required

certain disclosures to be made by for-profit entities soliciting donations on behalf of charitable organizations. *Id.* at 206. The district court found that the plaintiff charities had standing to challenge the part of the statute requiring solicitors who paid the charities on a flat-fee basis to make certain disclosures because the charities had actually engaged such solicitors, and planned to continue to do so. *Id.* at 207. The district court also found that the charities could challenge the disclosures related to solicitors hired on a percentage basis, even though the charities did not hire such solicitors. *Id.* The district court reasoned that the charities nevertheless had standing to challenge the latter provisions, because severing only the flat-fee provisions “would create a large hole in the regulatory structure.” *Id.*

On appeal, the Fifth Circuit reversed this holding. First, the Fifth Circuit found that the charities’ statements that they were “seriously interested” in hiring solicitors on a percentage basis were insufficient to satisfy the injury-in-fact requirement of *Lujan*. *Id.* at 209. It based this holding on lack of evidence that the charities ever had engaged, or were likely to engage, solicitors on a percentage basis. *Id.*

As for the severability issue, the Fifth Circuit held that the district court erred in two ways. First, it noted that “the normal rule” is that severability only comes into play *after* a constitutional judgment on the merits has already proven unavoidable and has been rendered. *Id.* at 211. However, it did note that “[i]n unusual circumstances,” severability may be made a threshold question. *Id.* The Fifth Circuit noted *INS v. Chadha*, 462 U.S. 919, 929, 931 n. 7 (1983), in which

severability was addressed first because it was intertwined with standing. *Abbot*, 647 F.3d at 211. But in the particular case before it, the Fifth Circuit found nothing unusual which required putting severability at the forefront. *Id.*

In short, the Fifth Circuit's opinion in *Abbott* does not stand for the proposition that a plaintiff challenging one part of a statute always lacks standing to challenge another, inseverable part of the statute. To the contrary, the *Abbott* court expressly acknowledged that, in some cases at least, the severability analysis is appropriately considered as a threshold question. *Id.* at 211. As discussed further below, the approach in *Abbott* is consistent with clear precedents from this Court that generally require plaintiffs to satisfy all three standing requirements for *each* claim they present.⁴

In this case, the Ninth Circuit's opinion does not even address the issue of severability vis-à-vis standing, and unsurprisingly so, because it was never argued in the briefs. Accordingly, the decision for which RPN seeks review does not contribute to any supposed circuit split on this issue. The *Abbott* case, the only other case which RPN asserts is in conflict with other circuits, did not reject using the severability analysis in the standing determination. Rather, the Fifth Circuit only found it unnecessary in that particular case.

Finally, given the relative paucity of authorities on

⁴ The political party *amici* similarly incorrectly characterize the holding in *Abbott* in order to bolster the argument that a circuit split exists. See Brief of *Amici Curiae* Libertarian Party, Green Party, Independent American Party, and America's Party (hereinafter "*Amici Brief*"), p. 15.

the subject, it is apparent that there are no serious concerns or inter-circuit conflicts requiring this Court's intervention. If this standing issue were one of national importance giving rise to a "deep circuit split" as RPN asserts (Pet. at 23), one would expect to find numerous decisions articulating clear holdings (and clearly conflicting holdings) on the issue. Especially since the Ninth Circuit's opinion did not address the question, this case is a particularly poor vehicle to take up a larger standing issue on which there is no apparent circuit split and no urgent need for resolution.

C. The Ninth Circuit's opinion does not conflict with *Alaska Airlines v. Brock*

RPN's next argument urging this Court to grant certiorari is that the Ninth Circuit's decision directly conflicts with this Court's decision in *Alaska Airlines v. Brock*, 480 U.S. 678 (1987). However, *Brock* did not analyze standing and is readily distinguishable.

In *Alaska Airlines v. Brock*, the airlines challenged § 43 of the Airline Deregulation Act of 1978. 480 U.S. at 682-83. Section 43 of the Act created the "Employee Protection Program," which provided various benefits for employees displaced due to deregulation. *Id.* at 680-81. Part of § 43, specifically subsection 43(f)(3), provided for an unconstitutional legislative veto provision. *Id.* at 682. As the district court observed, the legislative veto provision applied *only* to the Employee Protection Program in § 43, and "the statutory language directly links the admittedly unconstitutional provision with the specific grant of rulemaking authority under attack." *Alaska Airlines, Inc. v. Donovan*, 594 F. Supp. 92, 95 (D.D.C. 1984).

In an attempt to analogize this case to *Brock*, RPN contends that the legislative veto provision did not harm, and in fact was helpful to, the airline plaintiffs. Pet. at 22-23. However, nothing in this Court's opinion in *Brock* or the lower courts' opinions in that case supports that contention. While the legislative veto might have given the airlines a "potential opportunity" to defeat regulations they disliked (*see* Pet. at 22), it cut the other way too: it also gave Congress the ability to strike down regulations favorable to the airlines which Congress felt did not sufficiently further its interest in protecting employees, therefore harming the airlines. Thus *Brock* is distinguishable because it is clear in this case that RPN is not harmed by Subsection 2 of Nev. Rev. Stat. § 293.269, which states that NOTC is not counted in determining who wins the election.

This Court's opinion in *Brock* did not address standing. Nor did the district court or circuit court. *Alaska Airlines, Inc. v. Donovan*, 766 F.2d 1550, 1556 (D.C. Cir. 1985).

RPN argues that, in *Brock*, this Court "*implicitly* endorsed the concept of standing through inseverability." Pet. at 21 (emphasis added). In *Brock*, the Court held that the legislative veto provision was severable from the rest of the statute, 480 U.S. at 697, standing was not discussed at all, and the legislative veto provision was patently unconstitutional. Thus the fact that the Court reached the merits of the severability argument is not a basis for relying on *Brock* as creating a special rule for standing. Instead, it appears that *Brock*, like the Fifth Circuit's decision in *Abbott*, was a straightforward and unremarkable case applying the usual severability analysis in

determining the proper remedy after a statute is found unconstitutional.

Furthermore, RPN's characterization of *Brock* conflicts with other controlling precedents. Particularly, it conflicts with the long-standing rule that plaintiffs generally must demonstrate standing separately for each claim and for each form of relief sought. See *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006); *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs., Inc.*, 528 U.S. 167, 185 (2000); *Lewis v. Casey*, 518 U.S. 343, 358, n. 6 (1996) (“[S]tanding is not dispensed in gross.”).

For example, in *DaimlerChrysler*, this Court rejected the plaintiffs' argument that their ability to satisfy standing requirements for one claim sufficed to provide them standing for *all* their claims. 547 U.S. at 352. Thus it held that, even though plaintiffs had standing to challenge their municipal taxes, they did not thereby also have standing to challenge their state taxes. *Id.* at 353.

This Court explained in *Allen v. Wright*, 468 U.S. 737, 752 (1984) that “the standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted.” One of the questions to be asked when examining the complaint is: “Is the line of causation between the illegal conduct and injury too attenuated?” *Id.*

The Court's opinion in *Allen* held that the plaintiffs lacked standing because they failed to show an adequate causal connection between the conduct they challenged – the granting of tax exemptions to racially

segregated private schools – and their alleged harm, “their children's diminished ability to receive an education in a racially integrated school.” *Id.* at 757-58. The Court observed that there would be a causal link between the denial of a tax exemption and desegregation of the schools only if there were enough racially discriminatory private schools in the plaintiffs’ communities such that withdrawal of the exemptions would make “an appreciable difference in public school integration.” *Id.* at 758. However, the plaintiffs had “made no such allegation.” *Id.*

In this case, the Ninth Circuit correctly followed this Court’s precedents by looking at the conduct that was challenged in the complaint: the failure to count NOTC in a way that would allow NOTC to win an election. It then correctly determined, in accordance with *Lujan* and *Allen*, that there was no causal connection between the challenged conduct and the injury to RPN, i.e., having to compete against NOTC.

In sum, the issue of “standing through inseverability” was never briefed and the Ninth Circuit never ruled on it. Moreover, there is no circuit split on this issue. Instead, the Ninth Circuit correctly applied this Court’s standing jurisprudence. For these reasons, this case is not a proper vehicle for granting certiorari.

II. The Ninth Circuit Applied the Correct Test for Standing and There is No Circuit Split on the Scope of Competitive Standing.

A. The Ninth Circuit correctly required RPN to meet all three elements of standing as stated by this Court in *Lujan*.

Petitioner argues that the doctrine of competitive standing bestows upon it a “*per se right*” to challenge any option on the ballot that it alleges is “invalid,” regardless of the reason or source of the alleged invalidity. *See* Pet. at 32, 33, 37 (emphasis added). This is incorrect. The doctrine of competitive standing is simply a particular application of the “irreducible constitutional minimum of standing” required by Article III. *See Lujan*, 504 U.S. at 560. It is not a special type of standing that dispenses with the usual *Lujan* requirements.

Each of the cases that Petitioner relies upon in its Petition applied the usual test for standing that this Court reiterated in *Lujan*. *See Shays v. Fed. Election Comm'n*, 414 F.3d 76, 83 (D.C. Cir. 2005); *Fulani v. Hogsett*, 917 F.2d 1028, 1030 (7th Cir. 1990) (predates *Lujan*, but applies the same three factors); *Texas Democratic Party v. Benkiser*, 459 F.3d 582, 586 (5th Cir. 2006); *Schulz v. Williams*, 44 F.3d 48, 52 (2d Cir. 1994); *Smith v. Boyle*, 144 F.3d 1060, 1063 (7th Cir. 1998) (applying usual standing rules, although not citing *Lujan*); *Hollander v. McCain*, 566 F. Supp. 2d 63, 67 (D.N.H. 2008).

These cases demonstrate that, contrary to Petitioner’s argument, candidates and political parties

do not have a “*per se* right” to challenge every option on the ballot, in every instance. Instead, the cases only stand for the basic notion that increased electoral competition *can* satisfy the *injury* requirement for Article III standing.

“Competitive standing” should more correctly be called “competitive *injury*,” because it is essentially short-hand for denoting that certain types of increased competition can constitute a legally cognizable injury-in-fact for purposes of Article III standing. *See e.g.*, *Shays*, 414 F.3d at 83; *Drake v. Obama*, 664 F.3d 774, 783 (9th Cir. 2011); *Owen v. Mulligan*, 640 F.2d 1130, 1132-33 (9th Cir. 1981). But that is not the *end* of the standing analysis. It is only the beginning.

For example, in *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 228 (2003)⁵, this Court noted that certain plaintiff-candidates alleged that they had suffered a “competitive injury” as a result of the increased contribution limits created by the Bipartisan Campaign Reform Act (“BCRA”). However, this Court held that they lacked standing because this injury was not “fairly traceable” to BCRA – instead, it was traceable to their personal choice not to accept large contributions. *Id.* As a result, the plaintiffs failed the test for Article III standing, even though they adequately alleged a competitive injury. *Id.*

In *Allen*, 468 U.S. at 752, this Court further expounded on the causation and redressability requirements for standing. It explained that, although

⁵ Overruled in part on other grounds by *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

the “fairly traceable” and “redressability” requirements of standing both address *causation*, they are different forms of causation, because it is possible that the relief requested may indeed *redress* the injury, while at the same time, the injury is not actually *caused* by the challenged conduct. *Id.* at 753, n. 19. If the plaintiffs cannot show causation between the challenged conduct and the injury, they lack standing, even if the requested relief would redress the injury.⁶ *Id.*

This Court’s precedents show that merely alleging a “competitive injury” is not sufficient for standing. Similarly, all the cases upon which RPN and *Amici* rely also employed the usual standing analysis. None of those cases stand for the novel proposition that Petitioner and *Amici* assert, i.e, that simply alleging a competitive injury relieves them of meeting each of the remaining standing requirements. *See* Pet. at 32, 33, 37; *Amici* Brief at 9.⁷

In any event, the question whether the RPN alleged a sufficient injury is not at issue in this case. The Ninth Circuit presumed that RPN had shown the requisite

⁶ For this reason, the Court should reject *amici* political parties’ assertions that the “fairly traceable” element of standing is met here, simply because an order removing NOTC from the ballot would redress the alleged competitive injury. *Amici* Brief at 9. As stated in *Allen*, this analysis improperly collapses two distinct elements of standing into one. 468 U.S. at 753, n. 19.

⁷ In fairness to *Amici*, it appears they only argue that they need not meet the causation prong, so long as they could meet the redressability prong. *Amici* Brief, p. 9. However, as just discussed, that is directly contrary to *Allen*, which explained that the two are separate and distinct concepts, and both are required for standing. 468 U.S. at 757.

injury under the theory of competitive standing.⁸ *Townley*, 722 F.3d at 1135. The Ninth Circuit acknowledged that a candidate or a political party may have competitive standing to challenge the inclusion of an ineligible rival on the ballot, because such a rival hurts the candidate's or party's chances of winning the election. *Townley*, 722 F.3d at 1135. The Ninth Circuit recognized that, under the doctrine of competitive standing, such increased competition, or decreased chance of winning, constitutes a sufficiently cognizable injury to satisfy the injury-in-fact requirement of Article III standing. *Id.* at 1135-36 (citing *Drake v. Obama*, 664 F.3d 774, 783-84 (9th Cir. 2011)).

However, as in *McConnell*, *Allen* and also like *Texas Democratic Party* and the other cases relied on by RPN, the Ninth Circuit also correctly recognized that the remaining *Lujan* factors must still be present, even when the injury prong is met. *Id.*

The Ninth Circuit correctly identified the defect in RPN's competitive standing argument when it observed: "[plaintiffs] do not at all address the second and third prongs of standing, apparently believing that a plaintiff who experiences competitive injury has competitive standing." *Id.* at 1135-36. In other words, the Ninth Circuit applied the correct test, as required by *Lujan* and *McConnell*, and the other cases relied upon by RPN.

⁸ It also observed that the RPN and the candidate plaintiffs likely met the redressability requirement. *Id.* at 1136, n. 8. The Petition erroneously asserts that the Ninth Circuit found that the candidate plaintiffs and RPN failed to meet the redressability prong. Pet. at 32, 36.

Therefore it is RPN that is mistaken when it characterizes “competitive standing” as giving it a “*per se* right” to challenge any option on any ballot that it alleges is invalid “without regard to the source of the alleged illegality or invalidity.” *See* Pet. at 33. What RPN is actually asserting is that, in cases of competitive injury, it *need not show causation* between its alleged injury and the challenged conduct or statute. But as discussed above, that is plainly not the case. As this Court made abundantly clear in *Lujan*, causation is one element of the “irreducible constitutional minimum of standing.” 504 U.S. at 560.

B. The Circuit Court’s ruling does not create a circuit split with regard to causation.

RPN relies heavily on *Shays v. Federal Election Comm.*, 414 F.3d 76 (D.C. Cir. 2005) for its proposition that the Ninth Circuit created a circuit split on the application of competitive standing. Again, that is not the case.

Shays involved a challenge to a Federal Election Commission regulation which the plaintiffs asserted was in direct conflict with the BCRA, and which they claimed permitted certain campaign practices which BCRA prohibited. *Id.* at 79. Analyzing the standing issue, the D.C. Circuit first referred to the three *Lujan* requirements. *Id.* at 83.

Most of the standing analysis centered on the “injury” requirement. *Id.* at 84-87. Specifically, the court concluded that the “illegal structuring of a competitive environment” could be sufficient to produce the injury-in-fact required for standing. *Id.* at 86-87. It

therefore held that the plaintiffs – candidates who would have to respond to additional campaign practices, even though the FEC’s rules did not create any new *rivals*—had alleged sufficient injury for standing purposes. *Id.* at 87.

But again, the injury-in-fact requirement is not at issue in this case. Even if *Shays* adopted a broad concept of what constitutes a competitive *injury*, that is not the issue here. Despite what Petitioner implies, *Shays* did not hold that a plaintiff *always* has standing simply because the plaintiff may have to respond to new campaign practices or because the plaintiff alleges an “illegal structuring of a competitive environment.”

Indeed, *Shays* turned to the causation part of the standing analysis after determining that a sufficient injury-in-fact was alleged. The court recognized that the rights the plaintiffs were attempting to enforce were created by BCRA. 414 F.3d at 88-89. Because the FEC’s regulations permitted what BCRA disallowed, the court found that the plaintiffs’ injuries were “fairly traceable” to the operation of the FEC’s regulations. *Id.* at 89.

The D.C. Circuit rejected the FEC’s argument that the plaintiffs’ injury was a result of their own personal choice *not* to take advantage of the permissiveness of the regulations. *Id.* The court reasoned that this amounted to a choice to violate the law, in order to be on the same footing as competitors, and it was exactly that predicament which BCRA was meant to spare them. *Id.*

There is no conflict between *Shays* and the Ninth Circuit’s decision in this case because both decisions

apply the same legal standard. Although the court in *Shays* found standing existed, and the Ninth Circuit in this case did not, that is because *Shays* is easily distinguishable on the facts. There, the plaintiffs directly challenged the regulation which harmed them. *Id.* at 82. Here, they did not. In this case, RPN did not challenge Subsection 1 of Nev. Rev. Stat. § 293.269, which requires NOTC to be on the ballot, but instead challenged Subsection 2, which states that NOTC is not counted in a way that would allow it to win an election.

The Petition states that the plaintiffs challenged NOTC “on the grounds that it would siphon votes from people who, like Plaintiff Dougan, otherwise would vote for Republican candidates.” Pet. at 31. However, the operative complaint did not actually allege that and did not challenge NOTC on that basis. *See* Amended Complaint, D.E. #10. As the Ninth Circuit correctly observed, the operative complaint only challenged NOTC on the grounds that it is not counted as a vote and therefore allegedly “disenfranchises” voters. 722 F.3d at 1132. *See also* Pet. at 36-37 (acknowledging that the Ninth Circuit found causation lacking “[b]ecause the Party challenged that ballot option [NOTC] on the basis that state law prohibited Secretary Miller from according any legal effect to ballots cast for it”).

Thus there is no conflict on the causation element of standing and no circuit split. The Ninth Circuit simply reached a different conclusion on different facts.

C. This case does not present any issue of national importance warranting this Court's review.

As discussed above, there is nothing about the Ninth Circuit's decision in this case that creates any conflict with this Court's precedents, or those of other circuits. It applied the usual *Lujan* factors for Article III standing. The facts of this case are that RPN never challenged the statutory provision that it alleges caused its injury. Instead, RPN challenged a different provision which does not cause it harm, regardless of whether or not that provision is valid. Thus the Ninth Circuit's decision that RPN lacked standing was both correct and conventional.

Additionally, the Court should reject RPN's argument, made without any citation to authority, that it is necessary to ease the usual standing rules to support their "broad conception of competitive standing" simply because officials who oversee elections themselves may be elected to office or belong to political parties. *See* Pet. at 37. Nevada's NOTC law is more than 37 years old. In that time, it had never before been challenged and it has endured through many changes in the political affiliation of Nevada's Secretaries of State and local elections officials. Nevada's statute giving voters the option to choose "None of These Candidates" is plainly not a product of partisan skullduggery, as RPN seems to suggest. Nor does the Ninth Circuit's decision in any way impair a political party's access to the federal courts. It only holds political parties to the same requirements of standing that all parties must meet to invoke federal jurisdiction in any case.

Finally, no other state has a law like Nevada's NOTC statute. RPN and *Amici* are attempting to characterize this case as raising weighty questions of standing, when in fact both the analysis and the conclusion of the Court of Appeals are quite ordinary. Nothing in the Ninth Circuit's opinion in this case – a case involving a flawed challenge to a unique Nevada law – can be fairly characterized as “curtailing” competitive standing generally, or otherwise creating any issue of national importance. Thus RPN's and *Amici*'s dire warnings that the decision will somehow make it impossible to challenge election laws in the federal courts ring hollow. *See Amici* Brief, at 11; Pet. at 37.

In short, there is no conflict among the circuits on any of the issues presented in the Petition, and because of the unique law and circumstances of this case, it has no nationwide importance that warrants the use of this Court's resources.

CONCLUSION

For these reasons, the Respondent respectfully requests that the Petition for Certiorari be DENIED.

Respectfully Submitted,

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