"None of These Candidates"

Townley v. Nevada
(Robert C. Jones, D. Nev. 3:12-cv-310)

A June 8 federal complaint sought to prohibit a state from including "none of these candidates" on the ballot, because state law prevented that choice from prevailing. On August 22, the judge granted the plaintiffs relief, but the court of appeals stayed the injunction. Later, the court of appeals determined that the plaintiffs did not have standing because the relief sought—elimination of the none-of-these choice—would not redress the alleged impropriety—not counting none-of-these votes when determining the winner.

Subject: Voting procedures. *Topics:* Intervention; recusal; case assignment; Electoral College.

On June 8, 2012, nine voters and two Electoral College candidates in Nevada filed a federal complaint seeking an order prohibiting Nevada from including "none of these candidates" on the 2012 general election ballot because Nevada law did not permit "none of these candidates" to win.[1]

On June 11, Judge Edward C. Reed, Jr., recused himself in light of his decision to cease presiding over cases as of September 30.[2] Chief Judge Robert C. Jones assigned the case to himself in light of the case's time pressures.[3]

The plaintiffs filed an amended complaint on June 20.[4] They moved for a preliminary injunction on June 28.[5]

On July 13, a voter moved to intervene in defense of Nevada's law and his opportunity to vote for "none of these candidates."[6] On August 22, Judge Jones granted intervention and granted the plaintiffs a preliminary injunction.[7] A preliminary question was whether Nevada's voting machines allowed voters to skip parts of the ballot rather than select "none of these candidates" based on an out-of-court representation by the judge's assistant.[8] Based in part on an out-of-court representation by his mother, the attorney for Neva-

1. Complaint, Townley v. Nevada, No. 3:12-cv-310 (D. Nev. June 8, 2012), D.E. 1; Townley v. Miller, 722 F.3d 1128, 1131–32 (9th Cir. 2013).

2. Notice, *id.* (June 11, 2012), D.E. 6; Order, *id.* (Sept. 5, 2012), D.E. 51 [hereinafter Sept. 5, 2012, Order].

3. Sept. 5, 2012, Order, *supra* note 2; Docket Sheet, *id.* (June 8, 2011) [hereinafter D. Nev. Docket Sheet] (D.E. 21).

4. Amended Complaint, *id.* (June 20, 2012), D.E. 10.

5. Preliminary Injunction Motion, *id.* (June 28, 2012), D.E. 15; *Townley*, 722 F.3d at 1132.

6. Intervention Motion, *id.* (July 13, 2012), D.E. 26.

7. Transcript at 2–3, 50, *id.* (Aug. 22, 2012, filed Aug. 29, 2012), D.E. 46; D. Nev. Docket Sheet, *supra* note 3 (D.E. 39); *Townley*, 722 F.3d at 1132; *see* Sarah Wheaton, *The Protest Vote: "None" Judged a Loser in Nevada*, N.Y. Times, Aug. 23, 2012, at A13.

8. Transcript, *supra* note 7, at 3.

da assured the court that the voting machines did warn voters if they skipped an item on the ballot but the machines did allow voters to skip items.[9]

Both Nevada and the intervenor appealed.[10] Relying on a docket entry reflecting Judge Jones's oral decision, the court of appeals, on September 4, stayed the injunction.[11] In concurrence, one circuit judge scolded Judge Jones for his delay in assigning the case, his delay in holding the hearing, and his not issuing an appealable written order.[12]

The appeal was heard on March 11, 2013.[13] While the appeal was pending, on July 9, Judge Jones allowed the plaintiffs to amend their complaint to add Nevada's Republican Party as a plaintiff.[14] On the following day, the court of appeals determined that the plaintiffs on appeal did not have standing because the relief sought—eliminating the none-of-these choice—would not redress the alleged impropriety—not counting none-of-these votes when determining the winner.[15] On August 14, Judge Jones ordered "that the mandate be spread upon the records of" the court.[16]

9. *Id.* at 4–6.

10. Docket Sheet, Townley v. Miller, No. 12-16882 (9th Cir. Aug. 27, 2012) [hereinafter Intervenor's 9th Cir. Docket Sheet] (intervenor's appeal); Docket Sheet, Townley v. Miller, No. 12-16881 (9th Cir. Aug. 27, 2012) [hereinafter Nevada's 9th Cir. Docket Sheet] (Nevada's appeal); *Townley*, 722 F.3d at 1132.

11. Townley v. Miller, 693 F.3d 1041, 1042 (9th Cir. 2012); *Townley*, 722 F.3d at 1132; *see* Sandra Chereb, *In Nevada, "None" Will Still be an Option in Nov.*, Wash. Post, Sept. 6, 2012, at A5.

12. *Townley*, 693 F.3d at 1042–45 (Reinhardt, concurring); *see* Chereb, *supra* note 11.

13. www.ca9.uscourts.gov/media/view.php?pk_id=0000010551 (audio recording of oral argument); Intervenor's 9th Cir. Docket Sheet, *supra* note 10; Nevada's 9th Cir. Docket Sheet, *supra* note 10.

14. Order, Townley v. Nevada, No. 3:12-cv-310 (D. Nev. July 9, 2013), D.E. 59.

15. *Townley*, 722 F.3d 1128, *cert. denied*, 571 U.S. 1127 (2014); *see* Sean Whaley, *Court Rules Silver State Voters Retain "None" Option*, Las Vegas Rev.-J., July 11, 2013, at 3B.

16. Order, *Townley*, No. 3:12-cv-310 (D. Nev. Aug. 14, 2013), D.E. 63; *see* Order, *id.* (Sept. 16, 2013), D.E. 64 (dismissing the action for lack of standing).