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No 07-56592

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CRAIG R. GRISWOLD
and ROBIN GRISWOLD,
a husband and wife,

Plaintiffs - Appellants,

v.

CITY OF CARLSBAD,
CALIFORNIA,

Defendant - Appellee.

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U.S. COURT OF APPEALS

On Appeal from the United States District Court
for the Southern District of California
Honorable William Q. Hayes, District Judge

APPELLANTS' REPLY BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Craig R. Griswold and Robin Griswold, a husband and wife, hereby state that they have no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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INTRODUCTION

The City of Carlsbad has a general policy of depriving citizens of their constitutionally protected right to vote when they seek permits to renovate their homes. If a resident seeks a permit for a project that the City decides will cost more than $75,000, the City requires the person immediately to pay an assessment for local improvements—in violation of Article XIIID of the California Constitution, which requires cities to hold elections regarding such assessments. *See Barratt American, Inc. v. City of San Diego*, 117 Cal. App. 4th 809, 818 (2004). If the person cannot afford or is unwilling to pay this illegal assessment, the City requires him or her to sign a waiver (hereafter an NIA Waiver) which essentially casts a "yes" vote in any future Article XIIID election, and which gives up the person's right to vote "no." It also runs with the land, depriving any future owner of the right to vote against an assessment.

The Griswolds have challenged the constitutionality of the waiver they were required to sign, on the grounds that it deprives them of federal and state constitutional rights. The City argues that their case is both too early and too late: too late because the Griswolds were aware in June, 2004, that the waiver requirement would apply to them—and too early because there has not yet been an Article XIIID election, and therefore the Griswolds have not yet been deprived of their right to vote.

In addition, the City contends that the waiver they were required to sign also includes a provision waiving their right to sue the City for depriving them of their rights.

None of these arguments holds weight. The Griswolds' injuries accrued when they were informed that the City was closing the negotiations that it had opened on March 31, 2005, and that the Griswolds would be required to sign the proffered waiver as-is. This occurred in May, 2005. That same month, the Griswolds delivered the signed NIA waiver and the City issued its final determination to grant the Griswolds' permit application. (It is of course irrelevant that the Griswolds signed the NIA in December, 2004. Answer Brief ("Ans. Br.") at 8. A contract is not valid until it has been both signed *and delivered*. Cal. Civ. Code § 1565(3).).

This May, 2005, determination was the same moment that the Griswolds' case ripened, because it was at this point that the Griswolds were required to vote "yes," in favor of the assessment. Their injury was complete at that point, and no further actions were necessary. Although there is some case law holding that a claim for the deprivation of voting rights are only ripe when the election occurs, *see Lawson v. Shelby County, Tenn.*, 211 F.3d 331 (6th Cir. 2000). That case is inapplicable here for two reasons: first, because unlike in *Lawson*, the Griswolds have *already* lost their rights: they have been forced to vote in favor of the assessment. Second, the unique nature of Article XIIID elections means that there is no legal or prudential reason to require them to wait for such an election.

Finally, the provision in the waiver that deprives them of their right to sue is an unconstitutional condition, and in fact is precisely the injury complained of in this case. *Clark v. County of Placer*, 923 F. Supp. 1278, 1287-89 (E.D. Cal. 1996); *La. Pac. Corp. v. Beazer Materials & Services, Inc.*, 842 F. Supp. 1243, 1253 (E.D. Cal. 1994); *see also Parks v. Watson*, 716 F.2d 646, 650 (9th Cir. 1983). For the City to raise it as a bar to this challenge is therefore both illogical and unconstitutional.

The order granting the motion to dismiss should be reversed, and the Griswolds should have their day in court to vindicate their constitutionally protected right to vote.

ARGUMENT

I

THE OPERATIVE DECISION BY WHICH THE GRISWOLDS' CASE ACCRUED CAME IN MAY, 2005, WHEN THE CITY CUT OFF NEGOTIATIONS AND FORCED THE GRISWOLDS EITHER TO SIGN THE NIA OR HAVE THEIR BUILDING PERMIT DENIED

A. The Griswolds' Constitutional Rights Were Violated When the City Made Its Decision to Require Them to Sign the NIA Waiver As-Is

In a Section 1983 case like this one, a plaintiff's cause of action accrues when the plaintiff knows or should know of the "operative decision" that gives rise to the plaintiff's injury. *RK Ventures, Inc. v. City of Seattle*, 307 F.3d 1045, 1059 (9th Cir.

2002). An "operative decision" must be "a final one," and "not a tentative or preliminary one." *Id.* at 1060 n.10.

The Griswolds contend that the operative decision came in May, 2005, when they were notified that the City would not negotiate the terms of the NIA waiver and that the Griswolds were required to sign it as-is if they wanted a building permit. The City, on the other hand, claims it occurred in June, 2004, when the City Engineering Department gave the Griswolds an 11-page Checklist (a pre-printed, standardized form) which identified the many things required for any building permit application in Carlsbad. ER 2:023-032.

The City is wrong, however, because the Checklist was in no way an "operative decision" about the Griswolds' property. The language on this boilerplate document was decidedly preliminary and tentative. It declared that the property owner "may" defer the required assessment by signing an NIA waiver, ER 2:026, and that the owner would have to apply for a waiver, pay a fee, and wait for the City to "prepare" the waiver, which would then be signed by the owner and "approved by the City" in a later proceeding. *Id.* This language indicates that the City could consider—and negotiate—the terms to be included in the NIA waiver. And, indeed, the record reveals that the City invited the Griswolds to negotiate its terms on March 31, 2005. ER 2:083.

On that day, the Deputy City Attorney stated in an official letter to the Griswolds, "You have asked if the City will allow you to participate in jointly drafting the NIA. If you would like to make suggestions for changes to the agreement I would be happy to consider them and discuss them with the City Attorney and the City Manager." *Id.* The Griswolds took the City at its word, engaging in a correspondence, telephone calls, and a personal meeting, in which they sought to reach a mutually acceptable arrangement. ER 2:085-093. Two months later, the City cut off negotiations, and made it clear that the Griswolds were required to sign the NIA as-is, without any changes. ER 2:093. This occurred in May, 2005, well within the statute of limitations period. Thus the Griswolds' case is timely.

The City's brief plays down the importance of these negotiations. But it is clear from the correspondence between the Griswolds and the City that the City's attorney invited them to offer suggestions and changes to the waiver's terms, and then ultimately closed these negotiations in May, 2005. ER 2:083; 2:093. Any reasonable person in the Griswolds' position would rightly believe that the City had not made a final decision at that point, since the City's attorney had offered to change the terms of the NIA pursuant to the negotiations. *See Norco Constr., Inc. v. King County*, 801 F.2d 1143, 1146 (9th Cir. 1986) (property owner "was entitled, indeed required, to await the final decision of the county without commencement of the statute of limitations. To hold that a cause of action accrued before that date in effect would

bar Norco from relief."). Up to that date—or so at least it would appear to a reasonable person in the Griswolds' position—the City could have changed the specific demands that it would make, up to and including the provisions of the NIA regarding their right to vote. It was only when the final form of the NIA waiver was made clear to the Griswolds—when the opportunity to negotiate its terms was closed off—that the Griswolds' injury became final, and it was only at that point that their as-applied challenge could be brought. *Id.* ("[A] cause of action does not accrue until a party has a right to enforce the claim.").

In *McCoy v. S.F., City & County*, 14 F.3d 28 (9th Cir. 1994), the police officer plaintiff was notified several weeks before the commission issued a final written decision, that the police commission would be taking disciplinary action against him. *Id.* at 29. As the City acknowledges in its brief, this Court found that the officer's injury did not accrue until the written decision was issued. *Id.* at 30; Ans. Br. at 17. The Court noted that "McCoy 'knew' of the Commission's decision at the conclusion of the August 29 hearing," but he "also knew that the Commission would issue a more detailed written decision, "which" supplied the rationale of the Commission, addressed the defenses raised by McCoy, and set the dates of the suspension. The written decision clearly was the 'final decision' that triggered the applicable statute of limitations." *Id.* at 30. Likewise in this case, although the Griswolds may have known that some form of NIA waiver might be required of them, the final terms of

that waiver were not solidified until the City closed down the negotiations it had opened, and required them to sign in exchange for a building permit. That decision came after the City heard the Griswolds' objections, suggestions, and points of negotiation regarding the terms of the NIA. As in *McCoy*, their injury accrued upon the final, official determination.

The City seeks to distinguish *McCoy* on the grounds that the police officer in that case proposed factual findings and affirmative defenses which were "not considered and suspension not set until the Commission's written decision as issued." Ans. Br. at 17. But this fact reveals why the *McCoy* case *does* control here: the Checklist from the City's Engineering Department did not make any final decision, take into account any extenuating circumstances, or address the City's offer to negotiate with the Griswolds (which had not yet occurred). It was a form letter, sent to all applicants routinely, *see* ER 2:019 (Checklist addressed "to whom it may concern"), and thus not a decision regarding any particular project. Rather, it was a preliminary notification like the oral notice given to the officer in *McCoy*. The written, final determination by which the Section 1983 claim accrued came later, both in *McCoy* and in this case.

Likewise, in *Norco Constr.*, the property owner was aware of the objectionable provisions in the County ordinances governing building permit applications long before the final decision on the permit application was made. 801 F.2d at 1146. This

Court found that the final decision was the moment when the injury accrued, because the property owner could not have sued before then. *Id.* at 1146. Like the property owner in that case, the Griswolds could not have brought this as-applied challenge against the ordinance during the pendency of the negotiations, or prior to the City's final determination regarding the contents of the NIA. They were therefore "entitled, indeed required, to await the final decision" before filing this case. *Id.*

The City seems to believe that its practice of regularly requiring property owners to sign NIA waivers, and its ultimate refusal to make any changes to the waiver that it proffered to the Griswolds, make the negotiations irrelevant and mean that the Griswolds' case is time-barred. But as the City repeatedly acknowledges, this case is an *as-applied* challenge. The NIA was not *applied* to the Griswolds until they were required to hand over a signed NIA in exchange for a building permit. It was only at that point that the Griswolds were able to bring their as-applied challenge. *Cf. Acri v. Int'l Ass'n of Machinists & Aerospace Workers*, 781 F.2d 1393, 1396 (9th Cir.), *cert. denied*, 479 U.S. 816 (1986) (claim accrues "when the plaintiff is aware of the wrong and can successfully bring a cause of action").

B. Alternatively, the Good-Faith Formal Negotiations Should Toll the Statute of Limitations as a Matter of Equity

Even if the City were correct that the preliminary checklist provided by the City Engineering Department was a final decision applying the NIA requirement to

the Griswolds, this Court should nevertheless apply the equitable tolling doctrine, since the Griswolds were pursuing their other legal remedies in good faith. The Griswolds took the City's offer to negotiate at face value, only to discover that the City refused any attempt to change the terms of the NIA and that they would be required to sign the waiver as-is. Their attempt to negotiate with the government was an attempt to pursue an alternative legal remedy, to which the equitable tolling doctrine applies. *Jones v. Blanas*, 393 F.3d 918, 928 (9th Cir. 2004), *cert. denied sub nom. County of Sacramento, Cal. v. Jones*, 546 U.S. 820 (2005) (citation omitted) ("The purpose of California's equitable tolling doctrine 'is to soften the harsh impact of technical rules which might otherwise prevent a good faith litigant from having a day in court.' ").

The equitable tolling doctrine applies where a plaintiff has given the defendant timely notice of the claim, where the defendant is not prejudiced in gathering evidence, and where the plaintiff has acted in good faith. *Collier v. City of Pasadena*, 142 Cal. App. 3d 917, 924 (1983). These elements apply here: the City was put on timely notice of the Griswolds' objections to the NIA waiver; the City had enough time to gather any evidence it might need in its defense; and given that the City itself invited the negotiations, the Griswolds' actions were plainly in good faith. The policies behind the equitable tolling doctrine are applicable. As the *Collier* court explained, equitable tolling provides defendants with the benefits of the statutes of

limitations without imposing forfeitures on plaintiffs; avoids forcing plaintiffs to undergo the difficult prospect of pursuing more than one action simultaneously; and lessens the burden on courts by encouraging parties to negotiate to settlement. *Id.* at 926; *cf. Ashou v. Liberty Mut. Fire Ins. Co.*, 138 Cal. App. 4th 748, 757 (2006) ("[E]quitable tolling will further our policy of encouraging settlement.").

The City quotes out of context from *Retail Clerks Union Local 648, AFL-CIO v. Hub Pharmacy, Inc.*, 707 F.2d 1030, 1034 (9th Cir. 1983), to the effect that a "simple correspondence between the parties" does not suffice to implicate the equitable tolling doctrine. But the Griswolds were not engaged "simple correspondence" or informal negotiations. They were engaged in formal negotiations, at the City's invitation and with the City's attorney and deputy attorney, over the terms of their permit application. Such negotiations between a citizen and the City's legal representatives cannot be described as "simple" or informal correspondence. In *Hub*, the parties' attorneys exchanged letters regarding discovery requests, and in *Peles v. La Bounty*, 90 Cal. App. 3d 431 (1979), on which the *Hub* decision relied, one party simply sent a series of letters to the government over the course of three years asking that it reconsider a prior decision. *Id.* at 437. Neither of these cases is similar to this case, in which City officials invited the Griswolds to "make suggestions for changes to the agreement," ER 2:083, and the Griswolds, in

good faith, did so. They were pursuing the remedy to which the City invited them, and equitable tolling should apply.

II

THE GRISWOLDS WERE TREATED DIFFERENTLY FROM SIMILARLY SITUATED OTHERS WHEN THEY WERE FORCED TO SIGN THE NIA OR HAVE THEIR BUILDING PERMIT DENIED

The Griswolds are not, as the City would have it, trying to change their as-applied case in to a facial case, or change their equal protection arguments. Ans. Br. at 28. There are, and always have been, two equal protection causes of action in this case.

In their first cause of action, ER 2:042-43, the Griswolds allege that the City treats those whose construction projects it estimates as costing more than $75,000 differently from those whose projects it estimates to cost less. The City is correct that rational basis scrutiny applies to this non-suspect classification. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985); *Romer v. Evans*, 517 U.S. 620, 632-33 (1996); Ans. Br. at 31. But this classification is not rationally related to a legitimate state interest, because depriving citizens of their constitutionally guaranteed right to vote on property assessments is not a legitimate state interest. *Stewart v. Blackwell*, 444 F.3d 843, 872 (6th Cir. 2006), *vacated as moot*, 473 F.3d 692 (6th Cir. 2007) ("An individual's vote is the lifeblood of a democracy. To that

extent, we find it difficult to conjure up what the State's legitimate interest is by the use of technology that dilutes the right to vote.").

It is also not a legitimate state interest for the City to seek ways of avoiding the exclusive constitutional method of assessing property owners for local improvements, established in Article XIIID. *Cf. Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987) ("Whatever may be the outer limits of 'legitimate state interests' in the takings and land-use context [avoiding constitutional protections] is not one of them."); *Parks*, 716 F.2d at 652 ("[T]he City imposed the condition to avoid going through condemnation proceedings . . . . While governmental entities may negotiate agreements aggressively . . . they must stop short of imposing unconstitutional conditions."). If a government's action does not serve a legitimate state interest, its actions cannot withstand the rational basis test. *Cleburne*, 473 U.S. at 446-47; *Romer*, 517 U.S. at 635. Thus the Griswolds would prove, if given the opportunity, that the classification violates even the most lenient form of equal protection scrutiny.

In their second cause of action, ER 2:043-44, the Griswolds allege that the NIA waiver requirement is an illegal poll tax, also in violation of the Equal Protection Clause, because it conditions their right to vote on the payment of a fee. *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 666 (1966); *Harman v. Forssenius*, 380 U.S. 528, 540-41 (1965). This claim is subject to strict scrutiny, which the NIA

waiver requirement also must fail, since it is not narrowly tailored to advance a compelling government interest.

But arguments on the merits are premature here, since this case is an appeal of a dismissal, and the Griswolds have not had an opportunity to seek discovery or to prove their case. The question instead is at what point the Griswolds' equal protection rights were violated. The City has not answered or even addressed the Griswolds' contention that this came in May, 2005, when they were forced to vote "yes" on the assessment of their property, by signing the NIA waiver.

With regard to both of their as-applied equal protection claims, the Griswolds were injured when the City made its operative decision to apply the law to them, by requiring them to sign the NIA waiver. No other contingent event was necessary to complete their injuries. With regard to their first cause of action, they were injured in May, 2005, when the City made its operative decision to treat them differently than similarly situated homeowners contemplating a remodeling project by requiring them to sign the NIA. *See Bras v. Cal. Pub. Utilities Comm'n*, 59 F.3d 869, 873 (9th Cir. 1995), *cert. denied*, 516 U.S. 1084 (1996) ("The 'injury in fact' in an equal protection case . . . is the denial of equal treatment."). It was at that moment that the City chose to require of the Griswolds a waiver of rights that it does not require of others, with no rational basis for the difference in treatment. With regard to their second cause of action, the Griswolds were injured when they were finally put to the unconstitutional

choice of either signing the NIA or paying the fee. This also came in May, 2005. It was at that moment that the Griswolds were entitled to bring their lawsuit alleging that they had been treated differently than similarly situated others without any rational connection to a legitimate state interest. They did so within the two-year limitations period.

III

THE GRISWOLDS DO NOT HAVE TO WAIT FOR A PROP. 218 ELECTION BECAUSE THEIR RIGHT TO VOTE HAS ALREADY BEEN TAKEN FROM THEM

A. Article XIIID Elections *Are* Elections

This Court has determined that "once a state grants its citizens the right to vote on a particular matter . . . that right is protected by the Equal Protection Clause." *Green v. City of Tucson*, 340 F.3d 891, 897 (9th Cir. 2003). The City seeks to escape the burden of the Equal Protection Clause by arguing for the first time on appeal[1] that the Article XIIID election process is "not an election," because California Government Code section 53753(e)(4) declares that such elections "shall not constitute an election or voting for purposes of Article II of the California Constitution or of the California Elections Code." But this provision hardly

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[1] This Court should refuse to consider this argument, as the Appellants have had no prior opportunity to brief this issue and would therefore be prejudiced; there are no exceptional circumstances, and no change in law while the appeal was pending. *Manta v. Chertoff*, No. 07-55353, 2008 WL 638404, at *6 (9th Cir. Mar. 11, 2008).

transforms the Article XIIID election process into something other than an election. Instead, it points to the fact that Article XIIID elections are what the Supreme Court calls "special interest elections," *see, e.g., Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 69 (1978), or "limited purpose election[s]," *Cipriano v. City of Houma*, 395 U.S. 701, 704 (1969), and not the kind of general elections described in Article II of the California Constitution or the California Elections Code.

Special interest elections like those established in Article XIIID differ from general elections because only affected property owners are entitled to vote, meaning that the usual constitutional rules against property restrictions (Cal. Const. art. II, §§ 2-3) are inapplicable. *Holt*, 439 U.S. at 69. This is why the specific terminology regarding Article XIIID elections has been altered: to make clear that the rules for general elections do not apply. Section 4000(8)(A) of the Elections Code makes this more clear when it states that "[a]n *election* . . . required or authorized by Article . . . XIIID . . . conducted by mail . . . shall be denominated an 'assessment ballot proceeding' rather than an election." *Id.* (emphasis added). This section thus acknowledges that Article XIII proceedings are "elections," but of a special type, that should be described as an "assessment ballot proceeding," to avoid confusion.

These statutes do not mean that Article XIIID provisions are not *actually* elections,[2] and certainly do not mean that the standards of the Equal Protection Clause do not apply. *Cipriano*, 395 U.S. at 704 (applying equal protection analysis to special interest election). Thus although Article XIIID elections are "special interest elections," the procedures for which differ significantly from presidential or legislative elections, the right of otherwise qualified voters to vote on property assessments is still protected by the Equal Protection Clause, and the Griswolds are entitled to participate in such an election. *Id.* at 706. The City cannot require the Griswolds to waive that right in exchange for a building permit.

B. The Griswolds' Constitutional Right to Vote Has Already Been Taken Away Because They Have Already Been Forced to Vote "Yes"

The City contends that the Griswolds have not been deprived of their right to vote because the City has not yet held an assessment election. Ans. Br. at 24-28. In

[2] The ballot statement for Proposition 218, by which Article XIIID was added to the Constitution, described its proceedings as elections: "local governments must hold a mail-in election for each assessment. Only property owners and any renters responsible for paying assessments would be eligible to vote. Ballots cast in these elections would be weighted based on the amount of the assessment the property owner or renter would pay." *See* Hastings Law Library, research databases, CA ballot measures, California Ballot Propositions Database, Proposition No. 218, *available at* http://library.uchastings.edu/library/Research%20Databases/CA%20Ballot%20Measures/ca_ballot_measures_main.htm (last visited Apr. 10, 2008). *See also Coal. for Econ. Equity v. Wilson*, 122 F.3d 692, 696-97 (9th Cir. 1997) (relying on ballot pamphlet materials to interpret initiative).

particular, the City relies on *Lawson*, 211 F.3d 331, for the proposition that the Griswolds must await an election before asserting an injury on the grounds of being deprived of their voting rights.

First, the special interest election proceeding in this case differs from the general election proceeding involved in *Lawson*. The court in *Lawson* found that the plaintiffs had no constitutionally protected right to register to vote, but only a constitutional right to vote, so that they could state a claim only when they had actually been turned away from the polling place. 211 F.3d at 336. But here, there is no procedure analogous to registration—instead, the Griswolds will simply never receive a ballot, to which, unlike the *Lawson* plaintiffs, they *do* have a constitutionally protected right. *See* Cal. Const. art. XIIID, § 4(c)-(d) (guaranteeing that owners of affected parcels will receive ballots for assessment elections). In their opening brief (AOB at 25, 27), the Griswolds explained why the differences between general elections and the special assessment elections provided for in Article XIIID make *Lawson* an inappropriate precedent to follow; the City does not respond to this point in its Answer Brief.

Second, the Griswolds have *already* been injured, because they have already been required to vote in favor of an assessment. The terms of the NIA waiver specify that by signing, the Griswolds "consent" to the formation of the assessment district and the assessment of their property, and that they may not "object or protest" against

"the imposition of the Assessment" in any way "whatsoever." ER 2:065. Thus, unlike the *Lawson* plaintiffs, the Griswolds have already lost their constitutionally protected right to vote "no."[3] On this point also, the City's brief is silent.

The Griswolds' injuries are similar to the injury suffered by the plaintiffs in *Gonzalez-Alvarez v. Rivero-Cubano*, 426 F.3d 422 (1st Cir. 2005), a First Circuit case which distinguished *Lawson* for reasons that also apply here. In that case, milk producers complained that certain quotas allowing them to sell milk had been cancelled. The appellants cited *Lawson* for the proposition that, regardless of the date on which the quotas were cancelled, the case was not ripe until the producers actually lost milk sales. But the court rejected this argument because the producers "were already deprived of the property at issue," at the moment that their quotas were cancelled. *Id.* at 427. After that, the plaintiffs "were simply waiting for the decision to be enforced." *Id.* Likewise, here, the Griswolds' voting rights have already been cancelled, and they are merely waiting for that decision to be enforced.

The City's contentions that the Griswolds' injuries are contingent on future happenstance are erroneous. In *Texas v. United States*, 523 U.S. 296 (1998), and in *Socialist Labor Party v. Gilligan*, 406 U.S. 583 (1972), the plaintiffs' injuries were

[3] Moreover, this deprivation runs with the land to any future owner of the property, meaning that not only their right to vote, but the rights which they can convey on their heirs, purchasers, or assignees have also been obliterated. ER 2:067.

all contingent on future happenings. As the Griswolds explained in their opening brief, the plaintiffs' injuries in the *Texas* case were distinctly contingent upon several incidents which might never have occurred, whereas the Griswolds have already been compelled to vote in the affirmative on the question of the assessment of their property. The City fails to respond to this point in its answering brief. What the Tenth Circuit said in a case in which it distinguished *Texas* is equally true of this case: "the complained-of action here does not rest on contingent future events, but rather on . . . an event which has already occurred." *Sierra Club v. U.S. Dep't of Energy*, 287 F.3d 1256, 1264 (10th Cir. 2002).

In *Gilligan*, the socialist party challenged a law requiring its members to take an oath forswearing any attempt to overthrow the government by force. 406 U.S. at 585. The Supreme Court noted that the party did not allege that it "has ever refused in the past, or will now refuse, to sign the required oath," *id.* at 586, and that it had appeared on the ballot in previous elections even though the oath requirements were in place for over 25 years. *Id.* The Court therefore found no reason to believe the party had been injured. By contrast, in this case, the Griswolds specifically allege that they were required to sign a document by which they "consent[ed]" to the levy of a future assessment against their property and waived any right to "object or protest" against any such assessment. ER 2:065. They have *already* been deprived of their rights.

Instead of answering the Griswolds' allegation that their rights have already been lost, the City's argument confuses wholly speculative future happenstances with the future effects of an existing injury. But the latter kind of injury *can* serve as the basis of a lawsuit, and that is the case here. As the Second Circuit phrased the point,

> in the instant case . . . defendants have already injured the plaintiffs . . . . [There is a] difference between the type of wholly speculative injury that cannot serve as the basis for a . . . claim, on the one hand, and a claim based on [an already existing injury] . . . on the other hand. This case falls squarely in the second category.

Motorola Credit Corp. v. Uzan, 388 F.3d 39, 58-59 (2d Cir. 2004), *cert. denied*, 544 U.S. 1044 (2005). The City claims that because it has not undertaken the "specific procedural steps [that] must be taken before an assessment ballot proceeding may be initiated," the Griswolds have not yet been injured. Ans. Br. at 26. But the Griswolds allege that they are *already* compelled to accept any future illegal assessment up to $115,979, and that they are already deprived of their right to oppose such an assessment in the future. *Cf. James v. Cain*, 56 F.3d 662, 668 (5th Cir. 1995) ("James' claim . . . is ripe for determination because he is complaining of a present injury, not an injury that will occur in twenty years.").

In their opening brief, the Griswolds pointed to *Carmody v. Toll Brothers, Inc.*, 723 A.2d 1180 (Del. Ch. 1998), as instructive on the ripeness question.[4] There, corporate shareholders challenged a corporate action which deprived them of their right to vote against the incumbent board of directors in the event of a future takeover bid. As in this case, the defendant argued that the plaintiff's case was not ripe because at the time of the lawsuit there was no takeover bid on the immediate horizon. *Id.* at 1188. But the court found that the case was nevertheless ripe because the plaintiffs were complaining of the current deprivation of their voting rights, not of any future possible circumstance. *See id.* ("[T]he plaintiff complains of the Rights Plan's . . . *present* depressing and deterrent effect upon . . . [their] *present* entitlement to . . . vote . . . . Because of their alleged *current* adverse impact, the plaintiff's claims . . . are ripe.").

The City seeks to distinguish *Carmody* on the grounds that the Delaware court "based its decision that the claim was ripe on its determination that the shareholder rights plan was facially invalid," Ans. Br. at 27, but that is not true. Ripeness is a "threshold argument," 723 A.2d at 1187, and the court considered ripeness *before* proceeding to the merits. *Id.* at 1189 ("Having considered and rejected the threshold

[4] *Carmody* is, of course, not binding on this Court. But cases involving the compelled waiver of voting rights are rare, and *Carmody* provides a persuasive analysis of the ripeness issue involved.

defenses, the Court turns to the crux of this case."). The court's reference to facial invalidity was simply to demonstrate the absurdity of the corporation's argument in that case—and the City's in this case. Under such arguments, the court noted, a person deprived of the right to vote could "never be the subject of a legal challenge" so long as there is "no specific . . . proposal" on which to vote. *Id.* at 1188. This absurd consequence demonstrated the flaw in the ripeness argument.

More outlandish is the City's contention that the Griswolds should have simply acceded to the City's illegal imposition of an assessment: the Griswolds, it claims, could "take steps themselves—such as constructing the improvements—which would permit them to [vote]." Ans. Br. at 28. Of course, in every unconstitutional condition like this, the parties could "choose" to accept one or the other unconstitutional option. But the government may not require a citizen to make the "choice" of which constitutional right to forego. *See DKT Mem'l Fund Ltd. v. Agency for Int'l Dev.*, 887 F.2d 275, 303 (D.C. Cir. 1989) ("The label 'voluntary,' as unconstitutional condition doctrine makes plain, obscures or begs the question."). As the Supreme Court explained in *Union Pac. R.R. Co. v. Pub. Serv. Comm'n of Missouri*, 248 U.S. 67 (1918), the presence of some element of choice in the matter does not make this arrangement voluntary. "It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called." *Id.* at 70.

More recently, in *Parks*, 716 F.2d at 652, a property owner alleged that the government imposed a condition on its building permit that constituted a taking of its property. The government argued, as the City argues here, that the owner "was free to reject the terms" of the condition, 716 F.2d at 651, but this Court rejected this contention because the property owner should not have been put to the choice in the first place. The existence of some specious degree of choice "does not render the condition placed on [the permit] any less objectionable." *Id.*

Under the California Constitution, the City has no authority to impose the $115,979 assessment on the Griswolds in the first place without holding an election, and the City could not therefore require the Griswolds to waive their voting rights in order to avoid this illegal demand. *See Barratt American*, 117 Cal. App. 4th at 818 (Article XIIID "renders unconstitutional contradictory procedures or process leading to the *adoption* or *levy* of an assessment falling within its ambit."). Moreover, requiring the Griswolds to pay a fee for the right to vote is an unconstitutional poll tax. Yet the City demanded that they make just such a "choice": either to pay the illegal assessment or sign a waiver accepting a future assessment and giving up their constitutionally guaranteed right to vote against it.

C. There Is No Justification for Requiring the Griswolds to Wait for a Prop. 218 Election Before Bringing Their Lawsuit

Even if the Griswolds' injury could be characterized as a future injury, the district court should have proceeded to the merits, because the effect that the NIA waiver would have is "in no way hypothetical or speculative." *Pacific Legal Foundation v. State Energy Res. Conservation & Dev. Comm'n*, 659 F.2d 903, 917 (9th Cir. 1981), *aff'd*, 461 U.S. 190 (1983). Where the effect that an existing decision will have on a future event is clear and unavoidable, a court will consider the case ripe. The Supreme Court found the *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102 (1974), ripe despite the fact that a final disposition of the disputed property had not been made. The Court explained that the government was "mandated to order the conveyance" of the land at issue, and had "no discretion not to order the transfer." *Id.* at 141. Thus "while the exact terms of the conveyance" of the property in dispute "remain[ed] to be decided," the case was ripe. *Id.* at 142-43. Likewise, in this case, there is no question that the NIA waiver will deny the Griswolds the opportunity to participate in any assessment election. The case should therefore proceed.

Moreover, there is no policy reason to require the Griswolds to wait for an assessment election. Ripeness requirements exist to ensure that cases are not brought prematurely, before a record is developed, or before a government decision-maker has the opportunity to gather facts, hear evidence, and adopt a conclusion. *See, e.g.*,

Carson Harbor Vill., Ltd. v. City of Carson, 353 F.3d 824, 826-27 (9th Cir.), *cert. denied*, 543 U.S. 874 (2004). But there is no fact-finding to be done, and no decision for the City to make. Requiring the Griswolds to wait for the City to act again would unnecessarily delay resolution of their claims and waste judicial resources. The question of the validity of the NIA waiver is "'fit' for resolution, and delay means hardship." *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 13 (2000). This case is fit for resolution because it presents a purely legal question which cannot be refined by any further development of the facts; judicial resolution would not entangle the court in abstract disagreements over administrative policy; and the NIA waiver's elimination of the Griswolds' voting rights is "clearly definitive." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49, 151 (1967). Thus even if the Griswolds' injury is not yet complete, there is no reason to require them to wait for the City to hold an election.

IV

THE PURPORTED WAIVER PROVISION IN THE NIA IS UNENFORCEABLE

The City contends that the Griswolds waived their right to sue by signing the NIA. This, however, commits the fallacy of "begging the question," since the Griswolds allege that it was unconstitutional for the City to require them to sign the NIA in the first place. *See Biwot v. Gonzales*, 403 F.3d 1094, 1098 (9th Cir. 2005)

("[S]imply concluding that Biwot 'waived' his appeal begs the question whether the waiver was valid.").

The NIA—including its provision purporting to waive the right to sue—is an unconstitutional condition imposed on the granting of building permits, and the City cannot insulate itself from constitutional challenge by the terms of the very waiver that it forces citizens to sign. *Cf. Terral v. Burke Constr. Co.*, 257 U.S. 529, 532 (1922) (state may not exact waiver of the right of access to federal courts as a condition of doing business in the state); *Clark*, 923 F. Supp. at 1287-89 (government may not ordinarily require waiver of right to sue under Section 1983).

The Constitution "bars the government from attaching unconstitutional conditions even to benefits the government has no obligation to bestow . . . . The bar applies even more forcefully when the government attempts to attach unconstitutional conditions to a party's right of access to the ballot." *S.F. County Democratic Cent. Comm. v. Eu*, 826 F.2d 814, 823 (9th Cir. 1987), *aff'd*, 489 U.S. 214 (1989); *see also Clark*, 923 F. Supp. at 1287-89. Not only is the NIA provision purporting to waive the Griswolds' right to vote on assessments an unconstitutional condition, but the provision purporting to waive their right to sue is *also* an unconstitutional condition, and unenforceable for the same reasons.

In *Clark*, the district court found that the government failed to justify requiring citizens to waive their right to sue under Section 1983. The court explained that such

a waiver must satisfy a balancing test which weighed the government's legitimate interest and the benefit conferred on the adverse party. *Id.* at 1288. But the only justification provided by the government was to restrict its own tort liability. The court found this insufficient. *Id.* at 1289. Likewise, in *Beazer*, 842 F. Supp. 1243, the court explained that

> the doctrine of unconstitutional conditions . . . limit[s] . . . the government's power to exact a waiver of constitutional rights by, among other things, disallowing the making of an offer which "can't be refused." Put another way, the more an offer is "your money or your life," i.e., the presentation of two undesirable alternatives, the less it is likely to be a legitimate offer . . . and the more likely it is an attempt to unlawfully coerce the surrender of a constitutional right.

Id. at 1254. The NIA requirement is very much an offer that cannot be refused. The City made clear in May, 2005, that it was not willing to negotiate the terms of the NIA. Thus the provision purporting to waive the right to sue cannot be described as voluntary by any stretch of the imagination. The Constitution does not allow the government to force citizens to give up their constitutional rights in return for permits or for discretionary benefits. *See Speiser v. Randall*, 357 U.S. 513, 529 (1958); *United States v. Scott*, 450 F.3d 863, 866 (9th Cir. 2006); *Danskin v. San Diego Unified Sch. Dist.*, 28 Cal. 2d 536, 545-47 (1946).[5] The waiver provision in the NIA

[5] The unconstitutionality of the condition in this case is particularly egregious since a building permit "cannot remotely be described as a 'governmental benefit.' " *Nollan*, 483 U.S. at 833 n.2.

was therefore just as unenforceable as the other provisions of which the Griswolds complain. It, like the rest of the NIA waiver, is a void attempt to deprive the Griswolds of their constitutional rights.

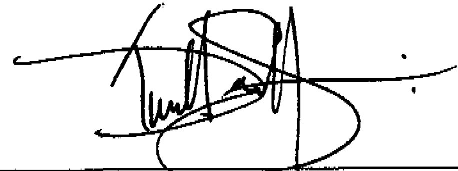
CONCLUSION

For the reasons set forth herein, the decision of the district court should be *reversed*.

DATED: April 11, 2008.

Respectfully submitted,

MERIEM L. HUBBARD
TIMOTHY SANDEFUR



By ______________________
TIMOTHY SANDEFUR

Counsel for Plaintiffs - Appellants

STATEMENT OF RELATED CASES

Plaintiffs - Appellants are aware of no related cases within the meaning of Circuit Rule 28-2.6.

FORM 8. CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NUMBER 07-56592

Form Must Be Signed By Attorney or Unrepresented Litigant *and Attached to the Back of Each Copy of the Brief*

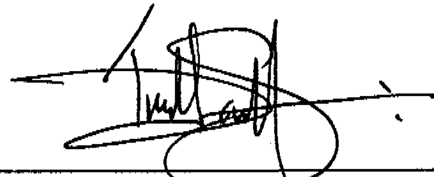
I certify that: (check appropriate option(s))

✓ 1. Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32.1, the attached opening/answering/reply/cross-appeal brief is

☐ Proportionately spaced, has a typeface of 14 points or more and contains 6,875 words (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words),

or is

☐ Monospaced, has 10.5 or fewer characters per inch and contains ______ words or ______ lines of text (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words or 1,300 lines of text; reply briefs must not exceed 7,000 words or 650 lines of text).



DATED: April 11, 2008.

TIMOTHY SANDEFUR

CERTIFICATE OF SERVICE

I hereby certify that the foregoing APPELLANTS' REPLY BRIEF was filed with the Clerk this 11th day of April, 2008, via Federal Express. I further certify that two copies of the foregoing APPELLANTS' REPLY BRIEF were served this day via first-class mail, postage prepaid, upon the following:

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