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.

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

APPELLANTS' OPENING BRIEF

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STATEMENT OF SUBJECT MATTER AND JURISDICTION

Plaintiffs-Appellants Craig and Robin Griswold (hereafter the Griswolds) brought this civil rights action in the United States District Court for the Southern District of California pursuant to 42 U.S.C. § 1983 to vindicate rights guaranteed by the Due Process and Equal Protection Clauses of the Fourteenth Amendment. In addition, they sought pendent jurisdiction to enforce their rights under Article XIIID of the California Constitution. The district court had jurisdiction over their federal claims pursuant to 28 U.S.C. §§ 2201, 1331, and 1343(a)(3), and their pendent state claim pursuant to 28 U.S.C. § 1367. The district court granted the Defendant's motion to dismiss on September 27, 2007. The Griswolds filed their notice of appeal on October 19, 2007. This Court has jurisdiction over that appeal pursuant to 28 U.S.C. § 1291.

ISSUES PRESENTED

1. The Griswolds allege that the City violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment by requiring as a condition of their building permit that they pay a $114,979 assessment fee, or sign a waiver giving up their constitutionally guaranteed right to vote on property assessments. Did the lower court err in concluding that the Griswolds' injury accrued when the City Engineering Department informed them that they "may defer" payment of the fee by signing the

waiver, as opposed to the moment when it became clear that they would be required to sign the waiver without further negotiations over its terms?

2. Although the California Constitution requires an election by affected property owners prior to the formation of an assessment district, the Neighborhood Improvement Agreement (NIA) waiver declares that the Griswolds "consent[] to and approve[] of" the formation of an assessment district and the assessment of their property, and permanently deprives them (and their successors in interest) of the right to vote against the formation of an assessment district. Therefore, the Griswolds have essentially been required to vote "yes." They allege that this violates their state and federal constitutional rights. Did the district court err in finding their claims unripe?

STATEMENT OF THE CASE

A. Legal Background

Article XIIID of the California Constitution requires that, before a homeowner's property may be assessed for the cost of public improvements, a municipality must hold an election to determine whether to form an assessment district. All property owners in a proposed district are entitled to vote in such an election. *See also* Cal. Gov't Code § 53753 (establishing procedure of Article XIIID elections). Property owners also have the right to vote on the amount of the assessment levied against their properties. When it forms an assessment district, a municipality must send ballots to those affected property owners who are entitled to

vote under the specifications of Article XIIID, which the property owners may cast by mail. This provision is the exclusive legal method of assessing property for improvements. *Barratt American, Inc. v. City of San Diego*, 117 Cal. App. 4th 809, 817-18 (2004).

The City of Carlsbad has a policy, set forth in City Ordinance NS-555 and City Resolution 2000-237, which requires all property owners who request a building permit, and whose construction costs are estimated by the City to exceed $75,000, to pay the cost of "public improvements" before receiving a permit. Complaint ¶ 1, ER 038. If a property owner cannot pay or is unwilling to pay this demand, he or she must sign a waiver, called a "Neighborhood Improvement Agreement" or "NIA," which declares that he or she "hereby consents to and approves of . . . the inclusion of the Property in an assessment district" and "the levy of an assessment against the property." *See* NIA at 2, ER 061.

The NIA also declares that the owner forever gives up his or her right to "object or protest" against the "imposition of the Assessment," as well as the right to "submit an assessment ballot in support of or in opposition to the imposition of the Assessment," and the right to "file or bring any protest, complaint, or legal action of any nature whatsoever" against "the validity of the proceedings to form the Assessment District." *Id.* at 6, ER 065. This waiver makes it absolutely clear that the owner is "grant[ing] to the City a proxy . . . for the limited purpose of completing and

submitting an assessment ballot in support of the levy of the Assessment in the proceedings to form the Assessment District." *Id.* at 3, ER 062. The NIA waiver also runs with the land, thereby precluding any future owner from participating in an assessment district election. *Id.* at 6, ER 065.

B. Statement of Facts

Craig and Robin Griswold live in a small home in an established neighborhood of Carlsbad, California. In 2004, they requested a building permit to add two bedrooms, a bathroom, and a family room to the house. In response, the City demanded that they pay a $114,979 assessment in exchange for a permit. Complaint ¶ 17, ER 041. The assessment was imposed by the City on the grounds that it would pay the cost of "improvements" that the City demanded the Griswolds provide, including "paving," "sidewalk," "curb and gutter," and "underground [and] overhead utilities." NIA at 11-12, ER 070-071. These improvements were not part of the Griswolds' construction plans, and the $114,979 amount was calculated by the City. *Id.* at 12, ER 071.

On June 16, 2004, the City Engineering Department gave the Griswolds an 11-page checklist of items to be completed before the City would grant them a

building permit. City Engineering Department Checklist, ER 022-032.[1] Among the many items on this checklist was the following:

> Construction of the public improvements may be deferred pursuant to Carlsbad Municipal Code Section 18.40. Please submit a recent property title report or current grant deed on the property and a processing fee of $340 so we may prepare the necessary Neighborhood Improvement Agreement. This agreement must be signed, notarized, and approved by the City prior to issuance of a building permit.

ER 026. In other words, if the Griswolds could not pay the $114,979 assessment, the payment "may be deferred" if they were to sign the NIA waiver.

The Griswolds signed the NIA in December of 2004, but they withheld it and did not turn it over to the City, because they hoped to negotiate the waiver's terms before finally agreeing to it. On March 31, 2005, the City did invite the Griswolds to negotiate. *See* Plaintiffs' Exhibit 4, Letter from City Attorney Ronald Ball to Craig Griswold, ER 083 ("If you would like to make suggestions for changes to the [NIA] I would be happy to consider them and discuss them with the City Attorney and the City Manager."). But on May 11, 2005, after an exchange of letters and

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[1] This document was not available to Plaintiffs when the City filed its motion to dismiss, because discovery has not occurred in this case. The City also did not include it as part of the Motion to Dismiss. Instead, City relied in its Motion on a January 10, 2005, letter which quoted from the June 16, 2004, checklist. *See* Letter from Deputy City Engineer to Craig Griswold, January 10, 2005, ER 075. At oral argument on the motion to dismiss on April 17, 2007, Judge Rhoades ordered the City to provide the original June 16, 2004, checklist to the court, which was done in a supplemental lodgment on May 18, 2007. *See* Defendant's Notice of Supplemental Lodgment, May 18, 2007, ER 034.

phone calls, the City indicated that it was no longer willing to negotiate and that the Griswolds must either pay the $114,979 assessment, or sign the NIA waiver without any changes. *See* Letter from Craig Griswold to Deputy City Attorney Kemp, May 11, 2005, ER 093. The Griswolds then delivered the signed document, and on May 24, 2005, the City granted them a building permit. *See* Building Permit, ER 096. The NIA waiver was recorded by the county recorder's office on June 2, 2005. ER 060.

C. Proceedings Below

On August 14, 2006, less than two years after negotiations over the NIA's terms broke down, and less than two years after the final decision granting their permit, the Griswolds filed the complaint in this case. They allege that, as applied, the NIA waiver requirement: (1) violates the Equal Protection Clause of the Fourteenth Amendment because the City arbitrarily requires one class of homeowners to pay assessments or to sign the NIA but not others, and this difference in treatment is not rationally related to a legitimate government interest, ER 042-043; (2) constitutes an unconstitutional poll tax in violation of the Fourteenth Amendment because it makes a property owner's right to vote contingent on the payment of a fee, ER 043-044; (3) violates the Due Process Clause of the Fourteenth Amendment under the unconstitutional conditions doctrine because it requires them to give up their constitutional right to vote in exchange for a building permit, ER 044-045; and

(4) violates Article XIIID of the California Constitution because it attempts to establish an illegal alternative to the exclusive constitutional method of imposing property assessments, ER 044-045.

The City filed a motion to dismiss on September 1, 2006. Oral argument was heard before Judge John Rhoades on April 17, 2007. After Judge Rhoades' death on September 3, 2007, the case was transferred to Judge Hayes, who granted the motion to dismiss on September 27, 2007. ER 004-014.

Judge Hayes dismissed the second and third causes of action (the Griswolds' due process and poll tax arguments) for exceeding the statute of limitations, and the first and fourth causes of action (their Equal Protection and Article XIIID arguments) for not being ripe. *See* Slip Opinion, ER 007-011. He found that the city's "operative decision to apply the Ordinance and require Plaintiffs to either pay the Assessment or sign the NIA" was "final prior to June 16, 2004," ER 007, when the City Engineering Department provided the Griswolds with the checklist. This was when the City made its "operative decision to apply the Ordinance and require [the Griswolds] to either pay the Assessment or sign the NIA." ER 010. The court rejected the Griswolds' argument that the operative decision was the City's decision in May, 2005, to refuse any further negotiations on the terms of the NIA, and concluded that the Griswolds had therefore filed their complaint too late.

In addition, the court concluded that the Griswolds' arguments that the NIA waiver is an unconstitutional poll tax, or deprives them of their right to vote as protected by Article XIIID of the California Constitution, were not ripe because the City had not yet held an assessment election, and was not planning on doing so in the immediate future. ER 013. Thus "[a]ny allegation that Plaintiffs have been denied the right to vote is speculative." *Id.* The Griswolds contended that they had already been injured because they had been required to give up their constitutional right to oppose the assessment of their property, and because that deprivation was made to run with the land to any subsequent owner. But the district court found that their injuries were "contingent on the occurrence" of other events and thus unripe. *Id.*

This appeal was filed on October 16, 2007. ER 001.

STANDARD OF REVIEW

Orders granting motions to dismiss are subject to *de novo* review. *Ellis v. City of San Diego*, 176 F.3d 1183, 1188 (9th Cir. 1999); *Cabrera v. City of Huntington Park*, 159 F.3d 374, 378 (9th Cir. 1998). This Court must consider the facts in the light most favorable to the non-moving party—*i.e.*, the Griswolds. *Ventura Packers v. Jeanine Kathleen*, 305 F.3d 913, 916 (9th Cir. 2002), *cert. denied*, 538 U.S. 1000 (2003); *Valdez v. Rosenbaum*, 302 F.3d 1039, 1043 (9th Cir. 2002), *cert. denied*, 538 U.S. 1 (2003). This Court should therefore reverse the dismissal " 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his

claim which would entitle him to relief.'" *Usher v. City of L.A.*, 828 F.2d 556, 561 (9th Cir. 1987) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

SUMMARY OF ARGUMENT

The district court erred when it concluded that the Griswolds' claims were simultaneously beyond the statute of limitations and unripe.

1. With respect to the Griswolds' Due Process and Poll Tax arguments (*i.e.*, their second and third causes of action), their injury accrued in May of 2005, when the City announced that it would not permit negotiations as to the terms of the NIA waiver, and made it clear that the Griswolds would be required to sign the NIA waiver without any change in its terms. A cause of action accrues when a person knows or should know of the injury that gives rise to the cause of action. *R.K. Ventures v. City of Seattle*, 307 F.3d 1045, 1048 (9th Cir. 2002). This occurs when the government agency makes its final operative decision affecting the plaintiffs' rights. *Id.* To be final, such a decision must be "unequivocal, and communicated in a manner such that no reasonable person could think there might be a retreat or change in position." *Hoesterey v. City of Cathedral City*, 945 F.2d 317, 320 (9th Cir. 1991), *cert. denied*, 504 U.S. 910 (1992). Although the district court found that these causes of action accrued on June 16, 2004, when the Griswolds received the checklist from the City Engineering Department, that incident was not a final operative act for two reasons. First, that document merely indicated the possibility that payment of the

assessment "may be deferred" by signing the NIA, and the terms of the NIA were left unspecified. ER 026. This ambiguous language does not establish a final operative decision. Second, the City invited the Griswolds to negotiate the NIA's terms, which they attempted to do. ER 083. Only in May, 2005, did the City indicate that no further negotiations were allowed and that the Griswolds would have to sign the NIA waiver as-is. ER 093. It was *this* act that constituted a "*final* decision, not a tentative or preliminary one." *R.K. Ventures*, 307 F.3d at 1060 n.10. Since the Griswolds' claims accrued in May, 2005, the filing of their complaint was timely.

2. The Griswolds' claims are also ripe. First, they have *already* been deprived of their voting rights, meaning that their injury has already occurred. The NIA waiver essentially required them to cast their vote in favor of the formation of an assessment district and in favor of the assessment of their property, and deprived them and any person to whom they might bequeath, give, or sell the property of the right to oppose the formation of an assessment district or the assessment of the property. Their injury has therefore already occurred; it depends on no future act. The district court erred by mistaking the *present* deprivation of the Griswolds' right to oppose the assessment, which is ripe, with the effect of that deprivation at the time of a future assessment election. But "[w]here the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions

will come into effect." *The Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 143 (1974).

Requiring the Griswolds to await an assessment election would be improper, because it is absolutely certain that they are denied the right to participate in such an election. It makes no sense to require the Griswolds to wait, because unlike presidential or congressional elections, assessment elections are not normally conducted at polling places open to voters; instead, property owners are only sent ballots if they are deemed eligible to vote. *See* Cal. Gov't Code §§ 53750(g), 53753(c). When the City does seek to form an assessment district, or to levy assessments, it will not be required to mail notices and ballots to the Griswolds or to other signers of the NIA at all. The Griswolds' Equal Protection and Article XIIID claims are therefore ripe.

ARGUMENT

I

THE GRISWOLDS' DUE PROCESS AND POLL TAX ARGUMENTS WERE FILED WITHIN TWO YEARS OF THE ACCRUAL OF THEIR INJURIES

The statute of limitations for a section 1983 case in California is two years after the accrual of the injury. *Carpinteria Valley Farms, Ltd. v. County of Santa Barbara*, 344 F.3d 822, 828 (9th Cir. 2003); *Maldonado v. Harris*, 370 F.3d 945, 954 (9th Cir. 2004), *cert. denied sub nom., Kempton v. Maldonado*, 544 U.S. 968 (2005). In their

second and third causes of action, the Griswolds argue that the NIA requirement violates their Due Process rights by conditioning the granting of a building permit on the waiver of constitutional rights, *cf. Steffel v. Thompson*, 415 U.S. 452, 462 (1974); *Wooley v. Maynard*, 430 U.S. 705, 710 (1977), and that it is a poll tax in violation of the Fourteenth Amendment, because it conditions their right to vote on the payment of a fee. Complaint ¶ 28, ER 043. *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 666 (1966).

These causes of action accrued in May, 2005, when the City barred further negotiations over the terms of the NIA. ER 093. This was less than two years before the filing of the complaint on August 14, 2006. ER 037. The district court's conclusion that their complaint was filed too late was therefore in error.

A. The Griswolds' Case Accrued When the City Made Clear That the Terms of the NIA Waiver Were Non-Negotiable

In section 1983 cases challenging the denial of, or the conditions imposed on, land-use permits, a plaintiff's causes of action arising "from denial of equal protection or denial of due process . . . are not matured claims until planning authorities and state review entities make a final determination of the status of the property." *Norco Constr., Inc. v. King County*, 801 F.2d 1143, 1145 (9th Cir. 1986). But a final determination did not occur when the Griswolds were simply advised that certain conditions might be enforced with regard to their permit application. A final

determination is an unequivocal act by the governing entity which conclusively establishes the nature or status of the plaintiff's rights and obligations, *Hoesterey*, 945 F.2d at 320, and this occurred when the City required the Griswolds to make a choice between signing the proffered NIA, paying the assessment, or having their permit application denied.

In *McMillan v. Goleta Water Dist.*, 792 F.2d 1453 (9th Cir. 1986), *cert. denied*, 480 U.S. 906 (1987), the plaintiffs brought a 1983 claim against a water district that denied their applications for water service to their properties. The district court found that the plaintiffs filed their complaint too long after learning that the interruption of their water service would be permanent. *Id.* at 1455. But this Court reversed, explaining that the claim accrued when the government made its final determination with regard to their applications, and not when the plaintiffs became "subjectively convinced of the permanence" of the government action. *Id.* at 1455-57. The plaintiffs' claims were " 'not ripe until the government entity charged with implementing the regulations ha[d] reached a final decision regarding the application of the regulations to the property at issue.' " *Id.* (quoting *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186-87 (1985)). Their claims accrued when the water district "issued the final denial of appellants' application." *Id.* Here, too, the Griswolds' injury did not accrue when one department of the City government gave the Griswolds a checklist of requirements

routinely applied to building permit applications, even if the Griswolds had become subjectively convinced of the permanence of the NIA waiver requirement. Their injury ripened in May, 2004, when the City reached a final determination to stop negotiations over the terms of the NIA waiver and to require the Griswolds either to sign it or be denied a building permit.

The same rule about finality applies throughout the civil rights context. In *McCoy v. City & County of San Francisco*, 14 F.3d 28 (9th Cir. 1994), for example, a police officer sued the city for violating his rights in a disciplinary proceeding. The city argued that his case was time-barred because it was filed too long after he received oral notification of the Police Commission's disciplinary decision. But this Court found that "[a]lthough McCoy 'knew' of the Commission's decision at the conclusion of the August 29 hearing, he also knew that the Commission would issue a more detailed written decision. That written decision supplied the rationale of the Commission, and set the dates of the suspension." *Id.* at 30. Thus it was the written determination that "clearly was the 'final decision' that triggered the applicable statute of limitations," *id.*, even though the plaintiff had been informed of the possibility of disciplinary action before that.

A cause of action thus accrues only upon a final decision by the government. A final decision is not a tentative or preliminary one, *R.K. Ventures*, 307 F.3d at 1060 n.10; it must be "unequivocal," and clearly not subject to change. *Hoesterey*,

945 F.2d at 320. A claim accrues "when the plaintiff is aware of the wrong *and can successfully bring a cause of action*." *Acri v. Int'l Ass'n of Machinists & Aerospace Workers*, 781 F.2d 1393, 1396 (9th Cir.), *cert. denied*, 479 U.S. 816 (1986) (emphasis added).

Here, the City's Public Works and Engineering Department gave the Griswolds an 11-page checklist on June 16, 2004, which stated among other things that the payment of the $114,979 assessment "may be deferred" by the signing of an NIA waiver. ER 026. This equivocal notification is simply not the sort of unambiguous final determination by which a section 1983 action accrues. The fact that the Griswolds "may" have been—or may not have been—required to sign an NIA is not a final agency determination. Indeed, this notification requested that the Griswolds "[p]lease submit" certain information so that the City "may prepare the necessary Neighborhood Improvement Agreement." *Id.* This is not an unequivocal determination that constitutes a final agency action. The mere notification of the availability of the NIA option, like the oral notifications to the plaintiffs in *McCoy*, 14 F.3d 28, and *Hoesterey*, 945 F.2d at 320, is not enough to constitute a final operative decision by the City.

Even aside from the ambiguity of its wording, the June 16, 2004, document is inherently tentative. The first page of this document indicates that although officials in the Engineering department signed it under the "denial" box in June and December

of 2004, it was only on May 13, 2005, that a signature was added which granted "engineering authorization to issue building permit." ER 023. In other words, the June, 2004, checklist from the City's Public Works and Engineering Department was simply a list of guidelines provided by a City department to assist applicants in meeting the requirements for final approval by the City—it did not purport to be a final decision of any sort.

The fact that the June 16, 2004, checklist was merely a tentative and preliminary notification is buttressed by the subsequent acts of City officials. On February 14, 2005 (eight months later), Deputy City Attorney Ron Kemp claimed that "there are alternatives" to the NIA requirement, and referred to it as a "propos[al]" and an "offer." ER 077-079. Again, on March 31, 2005, City Attorney Ronald Ball invited Craig Griswold "to make suggestions for changes to the [NIA] . . . I would be happy to consider them and discuss them with the City Attorney and the City Manager." ER 083. Mr. Griswold did so. *See* ER 089 (Letter from Mr. Griswold: "You have invited my suggestions for changes to the NIA . . . ."); ER 091 ("The above would appear to be a reasonable compromise . . . ."). Thus, not only did the June, 2004, checklist lack any indication that it was a final operative determination, but the City also invited the Griswolds later to negotiate the terms of the NIA.

Simply put, the Griswolds were "entitled, indeed required, to await" the City's "final decision" as to the conditions that would be imposed on their building permit

application. *Norco Constr.*, 801 F.2d at 1146. That decision came, not when they were first notified of the possibility that they might be required to sign an NIA waiver, but when the City cut off negotiations over the terms of that waiver and demanded that they sign the NIA waiver as-is. ER 093 (Letter from Mr. Griswold: "I wish to herein confirm . . . that [the City] will not accept either of my proposed compromises . . . [and that] I am unable to participate in any fashion in the drafting of the [NIA].").

As this Court explained in *McMillan*, the law generally holds that the grant or denial of a permit is the final operative decision in land-use cases because until that moment, the government is free to change or negotiate the terms or conditions of the permit: "The rationale for this rule is that '[i]f [the property owners] were to seek administrative relief under these procedures, a mutually acceptable solution might well be reached with regard to individual properties, thereby obviating any need to address the constitutional questions.' " 792 F.2d at 1456-57 (quoting *Williamson County*, 473 U.S. at 186-87). In *Norco Constr.*, this Court repeated the point: "Even though the plaintiffs knew of the taking earlier, waiting for a final determination increased the possibility of finding a mutually acceptable solution." 801 F.2d at 1146. A final determination does not occur when a plaintiff is merely notified of the existence of a law or permit requirement. Instead, it occurs when the government makes a final determination to accept no alternatives or substitutes and to finally

impose a particular demand on an applicant. *See also Eide v. Sarasota County*, 908 F.2d 716, 725 (11th Cir. 1990), *cert. denied*, 498 U.S. 1120 (1991) ("If the authority has not reached a final decision with regard to the application of the regulation to the landowner's property, the landowner cannot assert an as applied challenge to the decision because, in effect, a decision has not yet been made.").

Here, the checklist from the City Engineer was not a "formal notice" of any conclusive determination by the City; and no formal proceedings were instituted by that department. Instead, the final determinative act occurred in May, 2005, when the City stopped negotiations over the terms of the NIA waiver, foreclosing any of the "alternatives" which the City had held out to the Griswolds in its February letter, and required the Griswolds to sign. In short, the checklist from the Engineering Department was simply not a "decision to apply the Ordinance" to the Griswolds, ER 010, but was a preliminary notification that the Griswolds "may" be able to defer payment of the assessment by signing the NIA waiver. The checklist did not purport to decide anything; and City officials subsequently invited negotiations over the terms to be imposed in the NIA. It was when the City closed those negotiations and required the Griswolds to sign the NIA, pay the $114,979, or be denied a permit, that it made a final decision on their application.

B. Even if the Griswolds' Claim Accrued in June, 2004, Their Claims Are Subject to Equitable Tolling

The Griswolds argued in the court below that even if the June, 2004, Engineering Department checklist was a final operative decision, their case is subject to equitable tolling due to the fact that the City invited them to engage in negotiations over the terms of the NIA waiver and that they did so in good faith. ER 083-093. The district court, however, did not address this argument.

The equitable tolling doctrine—which is applicable to section 1983 claims, *Lucchesi v. Bar-O Boys Ranch*, 353 F.3d 691, 696 (9th Cir. 2003)—holds that a limitations period will not apply to a period of time during which a potential plaintiff seeks in good faith to negotiate with a potential defendant so as to lessen the extent of damages. *Mills v. Forestex Co.*, 108 Cal. App. 4th 625, 650 (2003). *See also Addison v. California*, 21 Cal. 3d 313, 317 (1978) (equitable tolling applies where plaintiff "possessing several legal remedies . . . reasonably and in good faith pursues one designed to lessen the extent of his injuries or damage, and when the defendant has had timely notice of the claim and is not prejudiced by application of the doctrine").

On March 31, 2005, City Attorney Ronald Ball wrote to the Griswolds inviting them to negotiate the terms of the NIA. ER 083-084 (Letter from City Attorney Ronald Ball: "If you would like to make suggestions for changes to the [NIA] I

would be happy to consider them and discuss them with the City Attorney and the City Manager."). Mr. Griswold did so, engaging in good faith in an exchange of telephone calls and letters with the City about the NIA waiver requirement. The district court should therefore have applied the doctrine of equitable tolling. *Retail Clerks Union Local 648, AFL-CIO v. Hub Pharmacy, Inc.*, 707 F.2d 1030, 1033 (9th Cir. 1983).

The equitable tolling doctrine provides that a limitations period will not apply during a period in which the parties are negotiating a dispute, so long as the defendant has timely notice of the grounds of a legal claim, there is no prejudice to the defendant, and the plaintiff's conduct is reasonable and in good faith. *Id.* All of these elements are present here. The City had notice of the grounds of the Griswolds' lawsuit, since Mr. Griswold objected to the NIA on December 29, 2004. *See* Letter from City Engineering Department, ER 075 ("in response to your letter dated December 29, 2004 regarding questions/issues about [NIA]s"). In subsequent letters and phone calls, he explained many constitutional grounds for his objections. ER 080-090. There was no prejudice to the City, since it received timely notice of the possible action and had sufficient opportunity to gather and preserve evidence in anticipation of a future lawsuit. *Hub Pharmacy*, 707 F.2d at 1033. The Griswolds' actions were reasonable and in good faith since the City itself invited negotiations

over the terms of the NIA and Mr. Griswold repeatedly sought explanations of the authority claimed by the City to support the NIA waiver requirement.

The district court erred in failing to address the Griswolds' equitable tolling argument. The limitations period ought to have been tolled, and the motion to dismiss denied.

II

THE GRISWOLDS' EQUAL PROTECTION AND CALIFORNIA STATE LAW CLAIMS ARE RIPE

In addition to their Due Process and Poll Tax arguments, the Griswolds contend that the City's NIA policy violates the Equal Protection Clause of the Fourteenth Amendment by treating them differently than other, similarly situated property owners. The City has deemed the Griswolds' building project to cost more than $75,000, and under City Ordinance NS-555 and City Resolution 2000-237, people whose projects are estimated to cost more than this amount are required to pay an assessment or sign an NIA waiver, while those whose projects are estimated by the City to cost less are not so required. Complaint ¶ 6, ER 039. The Griswolds contend that this difference in treatment lacks a rational connection to a legitimate state interest. *Id.* ¶ 23, ER 042. Also, the Griswolds argue that the NIA mechanism violates Article XIIID of the California Constitution by attempting to create a separate and illegal procedure for collecting assessments. *Id.* ¶¶ 46-48, ER 046.

The district court found that these claims (their first and fourth causes of action) were not ripe because the City has not yet sought to form an assessment district, and has no apparent plans to do so. ER 013. But this analysis was improper because the Griswolds have *already* suffered injuries, by being treated differently than similarly situated property owners, and because they have already been forced to cast their vote in favor of the assessment of their property. Complaint ¶ 12, ER 040. Moreover, they and their successors in interest have already been denied the right to oppose any such assessment. *Id.* ¶ 13, ER 041. Since the injury has already occurred, the Griswolds' injury is ripe.

A. The Griswolds Have Already Been Treated Differently for No Legitimate Reason

An equal protection violation occurs whenever a person is subjected to an unconstitutional difference in treatment by the government. *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 resulting from the imposition of [a] barrier, not the ultimate inability to obtain [a] benefit." (quoting *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993))). The Griswolds claim that the City's decision to require them to file a signed NIA waiver, but not requiring the same duty of a person whose project is deemed to cost less than $75,000, lacks any rational

relationship to a legitimate state interest. Complaint ¶ 25, ER 043. This injury occurred when the City treated the Griswolds differently in a final, operative decision—that is, when it required them to sign the NIA waiver or be denied a permit. No other act was necessary to complete their injury: the fact that they were subjected to an "objectively unequal . . . process" is sufficient. *Bras*, 39 F.3d at 873 (quoting *Coral Constr. v. King County*, 941 F.2d 910, 930 (9th Cir. 1991)). A case is ripe "when all the essential facts establishing the right to declaratory relief have already occurred." *Wickland Oil Terminals v. Asarco, Inc.*, 792 F.2d 887, 893 (9th Cir. 1986).

The district court erred by lumping the Griswolds' Equal Protection claim with their Article XIIID claim, concluding that the Equal Protection cause of action centered on the deprivation of their right to vote. But the Equal Protection cause of action is distinct; here the Griswolds' complain that they were subjected to a different legal requirement than were similarly situated others, regardless of the particular right at issue. *Cf. Tutor-Saliba Corp. v. City of Hailey*, 452 F.3d 1055, 1062 (9th Cir. 2006) (equal protection inquiry focuses on classifications rather than on substantive rights in cases like this). Unlike the second cause of action—which alleges that the NIA waiver constitutes a poll tax, also barred by the Equal Protection Clause—the Griswolds' first cause of action focuses on the fact that the City treated them differently than others without any reasonable connection to a legitimate state

interest. For purposes of this claim, it is irrelevant whether or not the City has actually held an assessment election. The relevant inquiry is whether the City has subjected the Griswolds to different permit conditions than those imposed on similarly situated others, and whether it had a rational basis for doing so. The Griswolds' claim was ripened the moment they were treated unequally by the City.

B. The Griswolds' Constitutionally Protected Voting Rights Have Already Been Violated Because They Were Forced to Vote "Yes"

The violation of the Griswolds' Article XIIID rights has already occurred because the NIA required them to vote in favor of the assessment of their property. There is no reason to await an election to ripen their case. The Griswolds were forced to sign and file a document declaring that they are deemed to "consent[] to and approve[] of" the "inclusion of [their] Property in an assessment district which may be formed," NIA at 2, ER 061, and "grant[ing] to the City a proxy to act for and on [their] behalf . . . for the limited purpose of completing and submitting an assessment ballot in support of the levy of the Assessment . . . ." *Id.* at 3, ER 062. The NIA also purports to "waive[]" the Griswolds' "rights under the Assessment Law" to "object or protest . . . the imposition of the Assessment," or to "submit an assessment ballot in support of or in opposition to the imposition of the Assessment." *Id.* at 5-6, ER 064-065. In reality, the Griswolds have *already* been forced to vote "aye."

The only case that appears to address the question of when an alleged deprivation of voting rights is ripe is *Lawson v. Shelby County, Tenn.*, 211 F.3d 331 (6th Cir. 2000). In that case, the plaintiffs were denied the opportunity to register to vote, because they refused to provide their Social Security numbers on the registration forms. The Sixth Circuit Court of Appeals found that their cause of action accrued on election day, because "the issue at hand in this case is the fundamental right to vote not the right to register to vote. The U.S. Constitution protects an individual's right to vote during an election, not the right to register to vote prior to an election." *Id.* at 336. Thus the constitutional rights of the *Lawson* plaintiffs had not yet been violated when they were barred from registering to vote. But here, by contrast, the Griswolds are *deemed to have voted already*. The NIA waiver declares that they have already "consent[ed]" to the formation of the assessment district and to the assessment of their property, that they have waived any right to "object or protest" to "the imposition of the Assessment," or to "protest" in any way "whatsoever" against "the validity of the proceedings to form the Assessment District." NIA at 6, ER 065. Signing the NIA immediately gave the City "a proxy" allowing the City to vote on the Griswolds' behalf "in support of" the formation of an assessment district and the assessment of their property. *Id.* at 3, ER 062. The Griswolds, therefore, have already been forced to vote in favor of the assessment. Their injury, unlike that of the *Lawson* plaintiffs, has already occurred.

Although it dealt with corporate law—the right of shareholders to vote for boards of directors—the Delaware Chancery Court's decision in *Carmody v. Toll Brothers, Inc.*, 723 A.2d 1180 (Del. Ch. 1998), is instructive here. The plaintiffs in that case challenged a corporate action that required them to vote for incumbent directors in the event of a takeover proposal. *Id.* at 1184 (Plaintiffs alleged that "the 'dead hand' provision disenfranchises, in a proxy contest, all shareholders that wish the company to be managed by a board empowered to [act in a certain way], by depriving those shareholders of any practical choice except to vote for the incumbent directors."). The defendant argued that the case was not ripe because no takeover proposal yet existed. *Id.* at 1187. But the court found that the case was ripe because the plaintiffs were suing over the way the corporation's rule "presently affects shareholders' fundamental rights"—namely the deprivation of their right "to vote for a board of directors capable of exercising the full array of powers provided by statute." *Id.* at 1188. The plaintiffs were therefore basing their case on the "alleged *current* adverse impact" of the corporate rule depriving them of their voting rights, *id.* at 1188, not on any contingent happenstance. Similarly, here, the Griswolds' complaint alleges that they have already been required to vote in favor of the assessment of their property, which has a current adverse impact on them. Complaint ¶ 12, ER 040. Their case is therefore ripe.

Moreover, requiring the Griswolds to wait for an assessment election would be a futile gesture, unlike in *Lawson*. In assessment district elections under Article XIIID of the California Constitution, there is no voter-registration process. Pursuant to Article XIIID and Cal. Gov't Code § 53750, *et seq.*, assessment ballots are mailed to those property owners that *the government identifies as being entitled to vote* on the formation of an assessment district or on the amount of an assessment. *See* Cal. Gov't Code §§ 53750(g), 53753(c). Thus, when the City does seek to form an assessment district, or to levy assessments, it will not be required to mail notices and ballots to the Griswolds or to other signers of the NIA. Because the NIA declares that the Griswolds already "approve" of the assessment of their property, the harm has occurred. Forcing the Griswolds to wait for an election (of which they may not even receive notice and will not be allowed to vote) would unnecessarily compound their injury. "Where the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect." *The Reg'l Rail Reorganization Act Cases*, 419 U.S. at 143 (quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923)). When the enforcement of a law is inevitable, it is not necessary for the plaintiff to incur penalties before challenging the constitutionality of that law. *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298-99 (1979); *see also Clements v. Fashing*, 457 U.S. 957, 962 (1982) (case

was ripe where plaintiffs alleged that, but for statutory sanctions, they would exercise their constitutional rights).

In support of its conclusion that the Griswolds' injury was contingent on future occurrences, the district court cited *Texas v. United States*, 523 U.S. 296, 300 (1998), but the distinctions between that case and this are stark. In *Texas*, the plaintiffs' injuries were entirely speculative because a series of contingent events would have had to occur before the plaintiffs would have been injured. As the Court explained, only *if* a school district had fallen below state standards, and only *if* the Commissioner tried sanctions and they failed, and only *if* the Commissioner decided it was necessary to do so, the Commissioner would appoint a management team, thus injuring the plaintiffs. *Id.* at 300. Here, by contrast, the City has already required the Griswolds to grant their approval to the formation of an assessment district, and to waive their right to object or to vote no. That waiver is also made to run with the land to any subsequent owner, reducing the rights that the Griswolds and their successors in interest may convey by sale, bequest, or gift. Thus even though the City has not yet formed an assessment district, the Griswolds have already been deprived of their rights. As the Tenth Circuit noted in distinguishing *Texas*, "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). The district court's ripeness decision was therefore in error.

CONCLUSION

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

DATED: February 28, 2008.

Respectfully submitted,

MERIEM L. HUBBARD
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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))

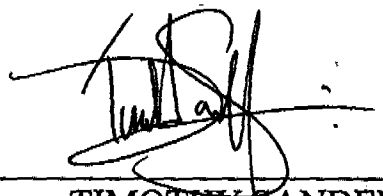
✓ 1. Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32.1, the attached opening/answering/reply/cross-appeal brief is

☑ Proportionately spaced, has a typeface of 14 points or more and contains 7,096 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: February 28, 2008.



TIMOTHY SANDEFUR

CERTIFICATE OF SERVICE

I hereby certify that the foregoing APPELLANTS' OPENING BRIEF was filed with the Clerk this 28th day of February, 2008, via Federal Express. I further certify that two copies of the foregoing APPELLANTS' OPENING BRIEF were served this day via first-class mail, postage prepaid, upon the following:

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