No. 20-16301

In the United States Court of Appeals
for the Ninth Circuit

BRIAN MECINAS; CAROLYN VASKO *EX REL* C.V.; DNC SERVICES CORPORATION D/B/A DEMOCRATIC NATIONAL COMMITTEE; DSCC; PRIORITIES USA; PATTI SERRANO;
Plaintiffs - Appellants,

v.

KATIE HOBBS, in her official capacity as Secretary of State of Arizona,
Defendant - Appellee.

On Appeal from the United States District Court
for the District of Arizona
Case No. CV-19-05547-DJH

PLAINTIFFS-APPELLANTS' EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 FOR INJUNCTION PENDING APPEAL

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CIRCUIT RULE 27-3 CERTIFICATE

Pursuant to Circuit Rule 27-3, Plaintiffs-Appellants (hereinafter, "Plaintiffs") provide the following information:

(i) ***The names, telephone numbers, e-mail addresses, and office addresses of the attorneys for all of the parties.***

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(ii) ***The facts showing the existence and nature of the emergency.***

Plaintiffs challenge the constitutionality of A.R.S. § 16-502(E) (2018) (the "Ballot Order Statute"), which violates the federal constitution by (1) arbitrarily treating similarly situated political parties in Arizona differently, giving all of the candidates associated with one party (the "favored" party) an electorally significant and arbitrary electoral advantage on the vast majority of ballots presented to the

electorate in general elections; and (2) burdening the right to vote of the candidates and supporters of the similarly situated, but statutorily disfavored party. It does this by mandating that all of the candidates who are associated with the political party of the candidate who won the most votes in the last race for governor in a given county must be listed first in all of the partisan races listed on the general election ballot in that county. *See id*. As a result of the Ballot Order Statute, over 80 percent of the state's general election ballots in the upcoming November election will list Republican Party candidates first in all partisan elections.

The Arizona Supreme Court recognized decades ago that the candidate listed first on the ballot enjoys a meaningful electoral advantage merely because they are listed first. *Kautenburger v. Jackson*, 85 Ariz. 128, 131 (1958). Consistent with that precedent, Arizona law has long required that in its *primary* elections all candidate names must be rotated on a precinct-by-precinct basis, ensuring none is consistently advantaged by being placed in the first position on all or a majority of ballots, thereby neutralizing the so called "primacy effect." *See* A.R.S. § 16-464 (2018); *see also Kautenburger*, 85 Ariz. at 131 (holding randomization necessary because "where there are a number of candidates for the same office, the names appearing at the head of the list have a distinct advantage," and without rotation, candidates whose names are never listed first are "disadvantage[d]"). Since then, political scientists who study the primacy effect in the context of elections (sometimes referred to as the "ballot order effect") have confirmed what the Arizona Supreme Court intuited: ballot order matters, and Arizona is no exception.

Plaintiffs brought this case last November and have diligently prosecuted it, repeatedly making clear their need for relief sufficiently in advance of the coming general election—now four months away—to implement an alternative means of ballot order that would not systemically favor one of the major political parties over the other when voters go to cast their ballots. Counsel for Defendant Arizona Secretary of State Katie Hobbs (the "Secretary") has represented that Arizona could implement a new ballot order system if so ordered as late as the end of July. In the interim, the Secretary has conceded that the current voting system is capable of rotating all candidates on the general election ballot on a precinct-by-precinct basis (as is currently done in the primary), confirming that that remedy would be easy to implement should the Court grant Plaintiffs' motion.[1] Nevertheless, Plaintiffs are

[1] Although in denying Plaintiffs' motion for an injunction pending appeal which, in accordance with Federal Rule of Appellate Procedure 8(a)(1), Plaintiffs sought in the first instance from the district court, the district court stated that this is "different" relief than what Plaintiffs sought in the proceedings below, this is not accurate. In fact, Plaintiffs repeatedly made clear that they were not asking the Court to order any specific remedy, only one that gave their candidates an equal opportunity to be listed first on the ballot, and explicitly stated that appropriate remedies would include full-scale rotation or a lottery system. ECF No. 14 at 2 (seeking "a non-discriminatory system that gives similarly-situated major-party candidates an equal opportunity to be listed first on the ballot"); ECF No. 13 at 21 (advocating for "a ballot order system that gives similarly situated major-party candidates an equal opportunity to be listed first on the ballot"); ECF No. 27 at 15 (explaining that adopting "the exact same precinct-by-precinct rotational system [Arizona] already uses in primary systems or in general elections under certain circumstances" would be one acceptable remedy); ECF No. 35 at 11 (explaining that "top-tier rotation is only one of a host of constitutional remedies this Court could order" and "Plaintiffs' preliminary injunction motion is not predicated on a specific remedy"); ECF No. 64 at 276:10-277:18 (Plaintiff's counsel noting at oral argument that, while top candidate rotation is the most equitable remedy, rotation of all candidates or a lottery

quickly running out of time to obtain relief before the November election, due to no fault of their own.

In granting the motion to dismiss and denying the motion for a preliminary injunction, the district court declined to reach the merits; instead, it found—contrary to long-standing and governing Ninth Circuit precedent—that Plaintiffs lacked standing. This was legal error and should be reversed. Once that error is corrected, Plaintiffs are highly likely to succeed on their claims. In fact, every court to have considered whether states may favor one major political party over another similarly situated by systematically awarding first position on the ballot on the basis of party affiliation (or past electoral success or failure) has found such practices unconstitutional—including a federal district court which enjoined such a statute in Minnesota just three weeks ago. *See Pavek v. Simon*, No. 19-CV-3000, 2020 WL 3183249, at *29-30 (D. Minn. June 15, 2020) (preliminarily enjoining ballot order statute that awarded first position to the major political party with the least electoral support in the previous gubernatorial election); *see also McLain v. Meier*, 637 F.2d 1159, 1159 (8th Cir. 1980) (holding unconstitutional statute reserving first position for candidates whose party received most votes in last congressional election); *Sangmeister v. Woodard*, 565 F.2d 460, 468 (7th Cir. 1977) (enjoining award of first position on the ballot to "the incumbent's party or the majority party") (citation omitted); *Jacobson v. Lee*, 411 F. Supp. 3d 1249, 1268 (N.D. Fla. 2019) (finding ballot order statute that listed candidates of the party of last-elected Governor first

"addresses Your Honor's question about what the options are here for a remedy"). Plaintiffs reiterate that position again today.

unconstitutional), *rev'd on other grounds by* 957 F.3d 1193 (11th Cir. 2020); *Graves v. McElderry*, 946 F. Supp. 1569, 1580 (W.D. Okla. 1996) (finding ballot order statute that listed Democratic Party candidates first unconstitutional); *Akins v. Sec'y of State*, 904 A.2d 702, 708 (N.H. 2006) (holding unconstitutional statute reserving first position on the ballot for candidates whose party received most votes in last general election). Multiple others have similarly found that, when the advantage of first position is unfairly or arbitrarily assigned, it raises concerns of constitutional magnitude. *See, e.g.*, *Netsch v. Lewis*, 344 F. Supp. 1280, 1281 (N.D. Ill. 1972) (holding statute prescribing ballot order by past electoral success violated equal protection); *Kautenberger*, 85 Ariz. at 131 (finding system that did not rotate candidate names in primary elections violated state constitution); *Gould v. Grubb*, 14 Cal. 3d 661, 665 (1975) (holding statute requiring incumbents be listed first unconstitutional); *Holtzman v. Power*, 313 N.Y.S.2d 904, 908 (N.Y. Sup. Ct. 1970) (holding system requiring incumbents be listed first unconstitutional), *aff'd*, 311 N.Y.S.2d 824 (1970). Even the U.S. Supreme Court has weighed in, affirming a case that found the systematic favoritism of incumbents in determining ballot order to be an "unlawful invasion" of the "Fourteenth Amendment right to fair and evenhanded treatment" and required implementation of a preliminary injunction that ordered the use of "nondiscriminatory means by which [similarly-situated] candidates shall have an equal opportunity to be placed first on the ballot." *Mann v. Powell*, 314 F. Supp. 677, 679 (N.D. Ill. 1969), *aff'd* 398 U.S. 955 (1970).

Emergency relief is necessary to safeguard Plaintiffs' fundamental rights. Given the timing of the district court's order, an injunction pending appeal is likely

to be the only means of protecting those rights against further serious and irreparable injury in the coming November 2020 election.

(iii) *Why the motion could not have been filed earlier.*

Plaintiffs have diligently pursued relief. They initiated this action on November 1, 2019, over a year before the November 2020 election. ECF No. 1. They amended their complaint on November 15, 2019, ECF No. 13, and filed their motion for a preliminary injunction just three days later on November 18. ECF. No. 14. The Secretary initially sought a 90-day extension of her deadline to respond to Plaintiffs' motion for a preliminary injunction, ECF No. 18, to which Plaintiffs objected due to the need to obtain relief sufficiently in advance of the coming election (and out of a concern that, in prior litigation with Arizona's Secretaries of State, the Secretary had sought broad extensions that had ultimately led in plaintiffs obtaining relief too close to the election at issue for it to be implemented, ECF No. 19 at 4 (discussing *DNC v. Hobbs*, in which the *en banc* Ninth Circuit held that an Arizona election law was unconstitutional on the Friday before the election, but the Supreme Court vacated the decision one day later in a decision consistent with the *Purcell* doctrine). Upon consideration of the parties' positions on scheduling, including the Secretary's representation that a remedial scheme needed to be in place by July for implementation in time for the November 2020 election, ECF No. 22 at 2, the district court issued an order setting a hearing on Plaintiffs' preliminary injunction motion on March 5, 2020. ECF No. 24. The Secretary filed her response in opposition on January 20, ECF No. 29, and Plaintiffs filed their reply on February 3, ECF No. 35. The Secretary also filed a motion to dismiss on January 2, ECF No. 26. Plaintiffs

responded on January 16, ECF No. 27, and the Secretary filed her reply on January 31, ECF No. 34. The district court held an evidentiary hearing on the motion for a preliminary injunction on March 4 and 5, and heard oral argument on both motions on March 10.

Over three months after that hearing and seven months after Plaintiffs filed their motion for a preliminary injunction, the district court issued its order on June 25 granting the motion to dismiss and denying the motion for a preliminary injunction. ECF No. 73. Plaintiffs filed a notice of appeal five business days later and moved for an injunction pending appeal before the district court the next day. As discussed *supra* at viii, the district court denied that motion earlier today. ECF No. 81.

Thus, despite having sought preliminary injunctive relief nearly a year before the November 2020 election, Plaintiffs now find themselves at a point in the cycle when the need for injunctive relief has become a true emergency. This matter presents an urgent need for emergency injunctive relief, without which Plaintiffs will be once more irreparably harmed by the Ballot Order Statute's operation in the coming election. For all these reasons, Plaintiffs certify that an injunction pending appeal is immediately necessary to prevent irreparable harm.

(iv) ***Notice and service of motion to counsel for other parties and Clerk's Office.***

In their motion seeking an injunction pending appeal in the first instance from the district court, Plaintiffs gave notice that they intended to file an emergency motion for injunction pending appeal with this Court today. This morning at 9:00

a.m., Sarah Gonski, counsel for Plaintiffs, telephoned Kara Karlson, counsel for Defendant Arizona Secretary of State Katie Hobbs (the "Secretary"), advising her of Plaintiffs' continued intent to file the emergency motion today. The Secretary's counsel advised that the Secretary intends to oppose the motion.

At around 9:15 a.m., Plaintiffs' counsel Sarah Gonski also contacted the Ninth Circuit Motions Unit and left a voicemail advising the unit of the nature of the emergency and that Plaintiffs intended to file an emergency motion by the end of the day.

(v) ***Whether the relief sought in the motion was sought in the district court.***

As required by Federal Rule of Appellate Procedure 8, Plaintiffs first sought an injunction pending appeal from the district court. ECF No. 77. Due to the rapidly approaching deadlines explained above, Plaintiffs advised the district court that it would plan to seek emergency relief from this Court by the end of the business day today even if the district court had not yet ruled. Recognizing that the district court just issued an order denying Plaintiffs' motion for a preliminary injunction under a substantially similar legal standard, and in an attempt to avoid further delay, Plaintiffs requested that, if the district court was inclined to deny the motion it do so immediately, without further briefing or argument or, alternatively, that it expedite consideration of the motion to permit a decision by the end of the week. *Id.* The district court issued an order directing the Secretary to file a response to Plaintiffs' motion for an injunction pending appeal by 12 p.m. yesterday, July 9. The Secretary

did so, and earlier today the district court issued an order denying Plaintiffs' motion for injunction pending appeal. ECF No. 81.

I declare under penalty of perjury that the foregoing is true and correct and based upon my personal knowledge. Executed in Phoenix, Arizona.

DATED: July 10, 2020.

Respectfully submitted,

By: *s/ Sarah R. Gonski*

Counsel for Plaintiffs-Appellants

FEDERAL RULE OF APPELLATE PROCEDURE 26.1 CORPORATE DISCLOSURE STATEMENT

Corporate Plaintiffs-Appellants DNC Services Corporation d/b/a Democratic National Committee, DSCC, and Priorities USA, respectively, hereby certify that there is no parent corporation nor any publicly held corporation that owns 10% or more of the stock in any of the above-mentioned corporations. A supplemental disclosure statement will be filed upon any change in the information provided herein.

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I. INTRODUCTION

Emergency relief is necessary because Plaintiffs will suffer severe irreparable harm to their most fundamental rights if Arizona's Ballot Order Statute, A.R.S § 16-502(E), is not enjoined in time for the rapidly approaching November election. The Statute mandates Arizona ballots must list first, in every partisan election, the candidates who share their political party with the gubernatorial candidate who won the most votes in that county in the last election. *Id*. Federal and state courts have repeatedly found that the first-listed candidate obtains an electoral advantage merely as a result of being first, a conclusion broadly shared by political scientists. When the first-position advantage is aggregated in favor of one party, it can make an enormous difference in that party's electoral prospects.

Arizona has long recognized the need to neutralize ballot order effect in its elections. In *Kautenburger v. Jackson*, 85 Ariz. 128, 131 (1958), the Arizona Supreme Court struck down a law requiring alphabetical name rotation under certain circumstances, declaring it a "well-known fact" that "where there are a number of candidates for the same office, the names appearing at the head of the list have a distinct advantage." *Id*. The Court concluded "[n]o other reason exists for the statute … except that otherwise there would result disadvantage to some candidates." *Id*. Ever since, Arizona has rotated candidate names on primary ballots across precincts, equalizing the advantage conferred by first position on the ballot when partisanship is not an issue. A.R.S. § 16-464. Even in general elections, when candidates from the same party run for the same office, Arizona requires that their names be rotated so that each occupies the top position on a roughly equal number of ballots. A.R.S.

§ 16-502(H). Only in general election races among candidates of competing political parties does the Ballot Order Statute irrationally favor one major political party over the other, based on past electoral performance in unrelated elections.

Every court that has reached the merits in challenges analogous to this one has found such statutes unconstitutional. Perhaps recognizing this, the Secretary attempted to argue that the fact that the Statute orders based on county-level election results effectively equates to "rotation" of candidate names, thereby alleviating constitutional harm. But the lopsided distribution of Arizona's population—where *two-thirds* of the state's voters live in Maricopa County—has repeatedly proved this wrong. The vast majority of Arizonans have seen *only* Republicans first on their general election ballots for 31 of the past 39 years. Unless enjoined, the Statute will list Republicans first on over *80 percent* of ballots in the coming November election.

The district court's conclusions that Plaintiffs lacked standing or that this case presents a nonjusticiable political question were legal error and should be reversed. Once those errors of law are cured, Plaintiffs are highly likely to succeed on the merits of their claims. However, if an injunction does not enter immediately, any relief is likely to come too late to avoid serious, irreparable harm. This is precisely the type of case for which the interim remedy of an injunction pending appeal is necessary and appropriate. The Secretary has conceded that Arizona's voting system has the ability to rotate all candidates, and thus the record is clear that a remedy is immediately available and would alleviate certain irreparable harm.

II. PROCEDURAL BACKGROUND

The procedural background of this litigation is set forth above at ii-iii.

III. FACTUAL BACKGROUND

A. Position Bias

It is a well-understood phenomenon that there is a bias toward selecting the first in a set of visually-presented options, such as with candidate names on election ballots. *See generally* Expert Rep. of Jon Krosnick, ECF No. 15-2 (Ex. A). Studies have consistently demonstrated that first-listed candidates have a meaningful advantage simply due to their position on the ballot. Expert Rep. of Jonathan Rodden, ECF No. 15-1 (Ex. B) at 1-2; *see also* Ex. A at 28 (presenting unrefuted evidence that across 1,086 elections, 84 percent displayed position bias and finding likelihood that this result would appear by chance is just .0000001 percent).

Consistent with the academic research, courts have repeatedly found that first-listed candidates enjoy an electoral advantage simply because they are listed first. *See, e.g.*, *McLain v. Meier*, 637 F.2d 1159, 1166 (8th Cir. 1980) (affirming "finding of ballot advantage in the first position"); *Sangmeister v. Woodard*, 565 F.2d 460, 465 (7th Cir. 1977) (affirming district court's holding "top placement on the ballot [confers] an advantage"); *Jacobson v. Lee*, 411 F. Supp. 3d 1249, 1275-76 (N.D. Fla. 2019) (finding candidate listed first on receives statistically significant advantage), *rev'd on other grounds* 957 F.3d 1193 (11th Cir. 2020); *Graves v. McElderry*, 946 F. Supp. 1569, 1576 (W.D. Okla. 1996) (finding "position bias is present in partisan elections"); *Akins v. Sec'y of State*, 154 N.H. 67, 71 (N.H. 2006) (affirming finding that "primacy effect confers an advantage in elections"); *Gould v. Grubb*, 14 Cal. 3d 661, 664 (1975) (describing finding of position bias as "consistent with parallel findings rendered in similar litigation throughout the

country"); *Holtzman v. Power*, 62 Misc. 2d 1020, 1023 (N.Y. Sup. Ct. 1970) (finding position bias "appears to be so widespread and so universally accepted as to make it almost a matter of public knowledge"), *aff'd*, 311 N.Y.S.2d 824 (1970).

This extensive precedent includes a decision issued just a few weeks ago by a Minnesota federal district court, who found that the DSCC (also a Plaintiff here) had standing to challenge a ballot order statute and was likely to succeed on the merits of the claim. *See Pavek v. Simon*, No. 19-CV-3000, 2020 WL 3183249, at *13 (D. Minn. June 15, 2020) (recognizing "party candidates listed first on a ballot can expect a 'clear and discernable' advantage in the form of higher vote share than if they were listed lower on the ballot"). It also includes a summary affirmance from the U.S. Supreme Court, *Mann v. Powell*, 314 F. Supp. 677, 679 (N.D. Ill. 1969), *aff'd* 398 U.S. 955 (1970), and a decision from the Arizona Supreme Court that declared it a "well-known fact" that "where there are a number of candidates for the same office, the names appearing at the head of the list have a distinct advantage." *Kautenberger v. Jackson*, 85 Ariz. 128, 131 (1958).

B. Arizona's Ballot Order Statute

Arizona mandates ballot order rotation in primary elections. *See* A.R.S. § 16-464. It also mandates rotation in general elections when candidates from the same party run for the same office, such that each appears first among their partisan fellows a roughly equal number of times. A.R.S. § 16-502(H). But on general election ballots in races between candidates of different political parties, the Ballot Order Statute mandates that candidates of parties who previously fielded gubernatorial candidates "shall be arranged with the names of the parties in

descending order according to the votes cast for governor for that county in the most recent general election for the office of governor." A.R.S. § 16-502(E).

This November, the Ballot Order Statute will mandate that, in 11 out of 15 counties, Republican candidates will be listed first in all partisan races. This accounts for 82 percent of Arizona's population. For 31 of the last 39 years, anywhere from 61% to 99% of Arizona's voters have voted general election ballots that listed Republican candidates first. *See* ECF No. 15-1 at 15. Plaintiffs are the Democratic National Committee ("DNC"), DSCC, and Priorities USA ("Priorities") (collectively, the "Organizational Plaintiffs"), and individual Democratic Arizona voters, who have been and will be harmed—in their own right, and in the case of the DNC and the DSCC, also based on the injury to their candidates and their voters—as a result of the Ballot Order Statute.

IV. STANDARD FOR INTERIM RELIEF

To obtain an injunction pending appeal, Plaintiffs must demonstrate either (1) "a probability of success on the merits and the possibility of irreparable injury," or (2) "that serious legal questions are raised and that the balance of hardships tips sharply in [their] favor." *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983); *see also Se. Alaska Conservation Council v. U.S. Army Corps of Eng'rs*, 472 F.3d 1097, 1100 (9th Cir. 2006). Here, Plaintiffs meet these requirements.

V. ARGUMENT

The district court's holding that Plaintiffs lack standing, as well as its independent (and dangerous) conclusion that this case presents a nonjusticiable political question, constitutes legal error contrary to Ninth Circuit and Supreme

Court precedent. Once those errors are corrected, Plaintiffs are highly likely to succeed on their claims. Plaintiffs filed this case over a year before the coming election and have made every effort to obtain timely relief. But based on the district court's order issued just two weeks ago, as well as the Secretary's prior assertions that a ruling is needed by the end of July to institute a remedy, Plaintiffs now must seek emergency injunctive relief pending appeal. For the reasons that follow, this is precisely the type of case in which the Court should use its express authority, pursuant to Federal Rule of Appellate Procedure 8 (a)(2), to grant such relief.

A. Plaintiffs have standing.

Only one plaintiff needs standing for a case to proceed. *See, e.g.*, *Leonard v. Clark*, 12 F.3d 885, 888 (9th Cir. 1993). Here, however, the district court concluded *none* of the Plaintiffs could satisfy Article III's injury-in-fact requirement. This was legal error, contrary to both binding precedent and the practical reality of how political parties operate.

1. Harm to electoral prospects

Nearly 40 years ago, this Court held political parties have standing to challenge election laws that harm their political prospects, including "to prevent their opponent from gaining an unfair advantage in the election process." *Owen v. Mulligan*, 640 F.2d 1130, 1133 (9th Cir. 1981). The Ninth Circuit is not alone. Six other circuits recognize political parties and candidates have standing under this theory, including in ballot order challenges brought by political party committees. *See Green Party of Tenn. v. Hargett*, 767 F.3d 533, 544 (6th Cir. 2014) (concluding

political parties "subject to" state's ballot-ordering provision had standing to challenge it); *LaRoque v. Holder*, 650 F.3d 777, 786-87 (D.C. Cir. 2011) (holding candidate had standing to challenge election law that "provid[es] a competitive advantage to his . . . opponents"); *Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 586-87 (5th Cir. 2006) (holding party had "direct standing" based on "harm to its election prospects"); *Smith v. Boyle*, 144 F.3d 1060, 1062 (7th Cir. 1998) (holding Republican Party had standing to challenge at-large method of electing judges that disadvantaged Republicans); *Schulz v. Williams*, 44 F.3d 48, 53 (2d Cir. 1994) (holding Conservative Party had standing to challenge opposing candidate's position on the ballot where opponent "could siphon votes from the Conservative Party line"); *Schiaffo v. Helstoski*, 492 F.2d 413, 422 (3d Cir. 1974) (holding candidate had standing to challenge opponent's right to send constituent mail postage-free as damage to his "electoral prospects constitutes a noneconomic harm"). Just over the past four months, two other federal courts have found political party committees have standing to challenge ballot order statutes under this theory, including one in which DSCC—also a plaintiff here—was held to have standing based on factually indistinguishable allegations. *See Pavek*, 2020 WL 3183249, at *12-14; *Nelson v. Warner*, No. 3:19-0898, 2020 WL 1312882, at *3 (S.D. W. Va. Mar. 17, 2020).[2]

[2] *Jacobson v. Fla. Sec'y of State*, 957 F.3d 1193, 1206 (11th Cir. 2020), and *Miller v. Hughs*, Order on Motion to Dismiss, No. 1:19-CV-1071-LY (W.D. Tex. July 10, 2020), ECF No. 76, are the only cases Plaintiffs' counsel is aware of, outside of the district court here, to dismiss an analogous case based on standing. *Jacobson* and *Miller* are wrong. Plaintiffs in *Jacobson* have already sought *en banc* review. But these cases are also distinguishable, as neither addressed the question of whether competitive standing was applicable. *See Pavek*, 2020 WL 3183249, at *14 n.13 (observing *Jacobson* declined to address this form of injury).

Consistent with the above, Plaintiffs have standing to challenge the Ballot Order Statute because it directly injures the Democratic Party's electoral prospects in Arizona. ECF No. 13 ¶¶ 23-25. The district court rejected that argument, erroneously finding *Owen* distinguishable and concluding that *Townley v. Miller*, 722 F.3d 1128 (9th Cir. 2013), limited competitive standing to the sole factual instance in which "another candidate has been impermissibly placed on the ballot." ECF No. 73 at 20. In *Owen*, a candidate and Republican party officials sued the Postal Service for giving an opponent a cheaper mailing rate. *Id.* at 1132. The plaintiffs characterized their injury as "the potential loss of an election caused by the Postal Service's alleged wrongful act in enabling their opponents to obtain an unfair advantage." *Id.* at 1132-33. Contrary to the district court's reading of the case, *see* ECF No. 73 at 20, the injury in *Owen* had nothing to do with postal regulations or the terms of a prior injunction: it was that the postal service's actions threatened plaintiffs with "the potential loss of an election." That is precisely the injury that the Ballot Order Statute causes the Organizational Plaintiffs here.

Townley did not (and as the decision of a three-judge panel, cannot fairly be read to) narrow the doctrine announced in *Owen*. *See Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001). In *Townley*, the Republican Party alleged that a "[n]one of these candidates" ("NOTC") option on the ballot would cause its candidates to receive fewer votes and potentially lose the election. *Id.* at 1131. The *Townley* decision was clear that the potential loss of an election *would* constitute an injury-in-fact, *id.* at 1135, but concluded the plaintiff failed the separate *traceability and redressability* requirements. *Id.*; *see also id.* at 1136 ("Here, plaintiffs' failure to

meet the causation and traceability requirement is their ultimate undoing."). This was because the *Townley* plaintiffs had "conceded the legality of the NOTC option being on the ballot—the voter option that would have a siphoning effect," and challenged "only the subsection prohibiting ballots cast for NOTC from being given legal effect." *Id.* at 1136. Because "the state's failure to give legal effect to the ballots cast for NOTC [was] immaterial to plaintiffs' alleged *competitive* injury," the Townley plaintiffs failed to allege their injury was traceable to the "conduct being challenged." *Id.* In contrast, Plaintiffs here assert a competitive injury—that the Ballot Order Statute *itself* has a "siphoning effect" on votes for the candidates they support— directly traceable to the Statute and redressable by its injunction.

Notably, the Secretary and the district court appear to agree that Democratic *candidates* have competitive standing to challenge ballot order statutes. *See* ECF No. 26 (Ex. C) at 3-4; ECF No. 73 (Ex. D) at 12. The district court's conclusion that the party Plaintiffs here lack competitive standing has no basis in *Owen* or *Townley* (both of which involved the standing of political parties) or in the party committee structure, *see infra* V.A.3. Because the interests of political parties "are identical" to the interests of the candidates they field in elections, *Benkiser*, 459 F.3d at 587-88, when a law puts a party's candidate at a disadvantage (much less systemically disadvantages *all* of its candidates in the State's largest county), it harms not just the candidates but the party committees. *See Pavek*, 2020 WL 3183249, at *13 ("[T]he direct injury that results from the purported illegal structuring of a competitive election is inflicted not only on candidates who are at a disadvantage, but also on the

political parties who seek to elect those candidates to office.") (citing *Owen*, 640 F.2d at 1133).

2. Diversion of resources

The district court's separate conclusion that Plaintiffs could not establish standing based on diversion of resources was also error and provides an independent basis for reversal. In so holding, moreover, the district court held Plaintiffs to a far greater burden of proof than was appropriate on a motion to dismiss.

First, Organizational Plaintiffs adequately alleged direct standing based on their diversion of resources from other states into Arizona as a result of the Ballot Order Statute. Each alleged that the unfair advantage conferred by the Ballot Order Statute requires them "to expend and divert additional funds and resources on GOTV, voter persuasion efforts, and other activities in Arizona, at the expense of its efforts in other states, to combat the effects of the Ballot Order Statute." ECF No. 13 ¶ 24 (DSCC); *id.* ¶ 23 (DNC), ¶ 25 (Priorities USA).

Second, in concluding Plaintiffs did not "put forth any evidence of resources being diverted from other states to Arizona," ECF No. 73 at 18, the court ignored the DSCC and DNC's declarations in support of their preliminary injunction motion, which should have been considered in ruling on the motion to dismiss. *See, e.g.*, *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988) ("[W]hen considering a motion to dismiss pursuant to Rule 12(b)(1) the district court . . . may review any evidence, such as affidavits [], to resolve factual disputes concerning the existence of jurisdiction."). DSCC's declaration explained it "will have to commit even more resources to support the Democratic U.S. Senate candidate in Arizona" due to the

Ballot Order Statute and that because it will have to "divert[] those additional resources to Arizona, it will have less resources to support other Democratic U.S. Senate candidates across the country." ECF No. 14-5 ¶ 13. Similarly, the DNC described that, as a direct result of the Ballot Order Statute, it would be forced to "commit even more resources to supporting the State Democratic Party and the election of Democrats in Arizona than it would otherwise have to," ECF No. 14-6 ¶ 17, and that it only "has a certain amount of money to spend to support Democrats and state parties across the country." *Id.* at ¶ 14. Weeks before the district court issued its Order, the *Pavek* court found virtually the same allegations sufficient for standing. 2020 WL 3183249, at *10-12; *see also E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 766 (9th Cir. 2018) (finding standing where organization had to spend more "to pursue [asylum] relief for" certain clients as result of rule, causing it to "divert resources away from providing aid to other clients").

The allegations and evidence produced by Plaintiffs were more than sufficient to support their standing on a diversion-of-resources theory at this stage.[3] When standing is at issue in a motion to dismiss, "general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presum[e] that general allegations embrace those specific facts that are necessary to

[3] The stage of the litigation distinguishes this case from the two that the district court relied on to support its conclusion that Plaintiffs failed to support a diversion of resources theory, *see* ECF No. 73 at 18, which were both at significantly more advanced stages of litigation. *See ACORN v. Fowler*, 178 F.3d 350, 359 (5th Cir. 1999) (affirming plaintiffs did not demonstrate standing at summary judgment stage); *Jacobson*, 957 F.3d at 1206 (holding plaintiffs did not produce sufficient evidence to demonstrate diversion of resources after full trial on the merits).

support the claim." *Maya v. Centex Corp.*, 658 F.3d 1060, 1068 (9th Cir. 2011) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)) (quotation marks omitted). The same standard applies on a preliminary injunction. *See, e.g.*, *City & Cty. of S. F. v. U.S. Dep't of Homeland Sec.*, 944 F.3d 773, 787 (9th Cir. 2019) ("[P]laintiffs may rely on the allegations in their Complaint and whatever other evidence they submitted in support of their preliminary-injunction motion to meet their burden").

3. Associational standing

The district court also erred in holding that the Democratic Party committees lacked *associational* standing to bring claims on behalf of their candidates and voters, providing yet another independent basis for reversal.

As an initial matter, the district court's conclusion that "the Democratic Party is not a Plaintiff in this case," ECF No. 73 at 15, is clear error. The DNC is "the official national party committee for the Democratic Party," as designated and defined by federal law. ECF No. 13, at ¶¶ 13, 24 (citing 52 U.S.C. § 30101(14)). DSCC is the national senatorial committee of the Party, also as designated and defined by federal law. *Id.* ¶ 25 (citing 52 U.S.C. § 30101(14)). The state parties, such as the Arizona Democratic Party, are part of the Democratic Party only as a result of their recognition by the DNC, and the DNC's membership is composed of, *inter alia*, high ranking officers of each recognized state party organization as well as all voters who voluntarily affiliate with the Party.[4] This necessarily includes the

[4] Democratic Party of the U.S., The Charter & The Bylaws of the Democratic Party of the U.S., art. 2 § 2; *id.* art. 3 § 2(a), *available at* https://democrats.org/wp-

Democratic candidates who the Party runs in elections. *See, e.g.*, *Dem. Nat'l Committee v. Reagan*, 329 F. Supp. 3d 824, 841-42 (D. Ariz. 2018) (vacated on other grounds) (DNC and DSCC had standing to challenge law that harmed affiliated voters and candidates); *Benkiser*, 459 F.3d at 587 (Texas Democratic Party has "associational standing on behalf of its candidate[s]"). Simply put, the DNC *is* the Democratic Party.

Indeed, the Supreme Court has long recognized that among the First Amendment's most vital and core protections is "the freedom to join together in furtherance of common political beliefs." *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214–15 (1986). This right "necessarily presupposes the freedom to *identify the people who constitute the association*." *Democratic Party of U.S. v. Wisconsin ex rel. LaFollette*, 450 U.S. 107, 122 (1981) (emphasis added). The district court erred by dismissing a complaint brought by the DNC and DSCC, both official national committees of the Democratic Party, based on the court's conclusion that Democratic candidates and voters who will run and participate in coming Arizona elections are not included within their membership.

In any event, the Supreme Court has held that an organization need not be a "traditional membership organization" with card-carrying "members" to establish associational standing, and consideration of the relevant factors demonstrates DNC

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content/uploads/2018/10/DNC-Charter-Bylaws-8.25.18-with-Amendments.pdf.; *id.* art. 8 § 1; *see also* Democratic National Committee, Regulations of the Rules and Bylaws Committee Reg. 1.1 ("State Party" or "State Party Committee" means the body recognized by the DNC as the State's Democratic Party organization), https://democrats.org/wp-content/uploads/sites/2/2019/07/Regulations-of-the-RBC-for-the-2020-Convention-12.17.18-FINAL.pdf.

and DSCC have associational standing for Democratic candidates. *See Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 344-45 (1977) (finding apple growers association bore "all of the indicia of membership in an organization," including (1) power to elect members, (2) power to serve, and (3) financing of Commission's activities). Where an organization represents individuals "and provides the means by which they express their collective views and protect their collective interests," *id.*, "it would exalt form over substance" to deny that organization representational standing. *Id.* Finding a political party cannot represent the interests of its candidates under a theory of associational standing does exactly that.

The district court's alternative holding that Plaintiffs failed to show associational standing because they did not identify a specific member who would be harmed is wrong on both the law and the facts. Because it is plain that a substantial number of Democratic candidates who will run in Arizona's elections will be harmed by the Ballot Order Statute, identification of a specific member by name is not required. *See Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1041 (9th Cir. 2015) (holding organization need not identify injured members where injury is clear and their specific identity is not relevant to defendant's ability to understand or respond). Nonetheless, the DSCC *did* identify a specific candidate—the Democratic candidate for Senate in the 2020 election—who will be harmed by the Ballot Order Statute. *See* ECF No. 13 at ¶ 25. The fact that the Senate candidate's name, along with other Democratic nominees' names, is not yet known with certainty because Arizona's primary election occurs on August 4, 2020, can hardly be the basis for finding Plaintiffs lack associational standing here.

Finally, that Democratic candidates sometimes win in Arizona does not render the Ballot Order Statute constitutional. *See LaRoque v. Holder*, 650 F.3d 777, 787 (D.C. Cir. 2011) (noting fact that a particular candidate "might be able to overcome this disadvantage" "does not change the fact that" the challenged provision "tends to benefit [one party's] candidates and thus disadvantage their opponents"). Indeed, Plaintiffs need not show that position bias has been outcome determinative in any particular election to establish a constitutional violation. *See McLain*, 637 F.2d at 1162 (holding ballot order system unconstitutional where plaintiff candidate received only 1.5% of the vote); *Jacobson*, 411 F. Supp. 3d at 1276 (finding ballot order statute unconstitutional because it was a contributing—although not necessarily determinative—factor); *Graves*, 946 F. Supp. at 1579 (finding that ballot order law infringed First and Fourteenth Amendments even where effect was "slight"); *Akins*, 154 N.H. at 72 (striking down statute on finding "that the primacy effect influences, even to a small degree, the outcome of New Hampshire elections").

B. This case presents a justiciable question.

After erroneously concluding Plaintiffs lacked standing, the district court committed another legal error by concluding that the case must be dismissed because it presents a nonjusticiable political question under *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019). This far overreads *Rucho* and runs directly contrary to the expansive precedent in which federal courts have repeatedly not only considered analogous ballot order challenges, but struck down similar laws as unconstitutional.

In *Rucho*, the Supreme Court concluded partisan gerrymandering claims present political questions beyond the reach of federal courts because of its inability to identify a judicially manageable standard for resolving those types of claims. *Id.* at 2494. The Court had been in search of a standard for decades, "struggl[ing] without success" to identify one. *Id.* at 2491. In deciding *Rucho*, the Court emphasized it "had *never* struck down a partisan gerrymander as unconstitutional—despite various requests over the past 45 years." *Id.* at 2507 (emphasis added).

The history of ballot order challenges tells a very different story. While the Supreme Court was debating whether there even was a manageable test for partisan gerrymandering, federal courts were ably deciding challenges indistinguishable from the ones Plaintiffs bring here. *See, e.g.*, *McLain*, 637 F.2d at 1166; *Sangmeister*, 565 F.2d at 468; *Pavek*, 2020 WL 3183249, at *22-28; *Nelson*, 2020 WL 1312882, at *2; *Jacobson*, 411 F. Supp. 3d at 1282; *Graves*, 946 F. Supp. at 1582; *Netsch*, 344 F. Supp. at 1280.

Even the Supreme Court has considered a ballot order challenge—and *declined* to find it non-justiciable. *Mann v. Powell*, 333 F. Supp. 1261 (N.D. Ill. 1969), *aff'd* 398 U.S. 955 (1970). There, the district court preliminarily enjoined a law that ordered candidates' names by when their nominating petitions were received and awarded ties to incumbents. 314 F. Supp. at 679. The court found the systemic favoring of incumbents unconstitutional (even when just resolving "ties") and ordered that ballot order in the coming election be determined by "nondiscriminatory means by which each" similarly-situated candidate must "have an equal opportunity to be placed first on the ballot." *Id.* The Supreme Court

summarily affirmed, and that decision binds this Court. *See United States v. Blaine Cty.*, 363 F.3d 897, 904 (9th Cir. 2004) (describing "the well-established rule that the Supreme Court's summary affirmances bind lower courts") (citing *Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975)). Notably, in seeking Supreme Court review, the appellants in *Mann* expressly argued that the case raised a non-justiciable political question. *See Powell v. Mann*, Appellants' Jurisdictional Statement, No. 1359, 1970 WL 155703, at *5-6 (U.S., Mar. 27, 1970) (asserting among "questions presented" for Court's review: "(1) Does the complaint state a claim within the judicial Power of United States; or, the judicial power generally? . . . (5) Does the 'political question doctrine' . . . permit federal judicial cognizance of political cases, involving inter- or intra-party election disputes?"); *see also id*. at *21 (arguing Court should find lower court lacked jurisdiction due to "[t]he lack of predeterminable federal standards, based on some neutral principle [which are] too subjective to allow federal courts in the antagonistic climate of pre-election politics"). In summarily affirming the matter on the merits, the Supreme Court clearly found the issue justiciable. *See Mann*, 398 U.S. 955.

This Court's recent decision in *Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020), does not alter this analysis. There, this Court was asked to invent a standard for a "climate system capable of sustaining human life"—a question for which there was *no* previous guidance. 947 F.3d at 1173. In contrast, Plaintiffs request the Court answer a straightforward question that courts have ably resolved for decades, both pre- and post- *Anderson-Burdick*. *Juliana* and *Rucho* cannot reasonably be read to suddenly render those claims suddenly nonjusticiable.

C. The Ballot Order Statute is unconstitutional.

Once the district court's errors are corrected, this case presents a simple question, and Plaintiffs are highly likely to succeed on the merits of their claims.

Every court considering the merits of a ballot order statute that favors one major party over another similarly situated party has found them unconstitutional—including a Minnesota court just three weeks ago. *See Pavek*, 2020 WL 3183249, at *29-30; *see also McLain*, 637 F.2d at 1159; *Sangmeister*, 565 F.2d at 468; *Jacobson*, 411 F. Supp. 3d at 1282; *Graves*, 946 F. Supp. at 1580. Multiple others have similarly found that, when the advantage of first position is unfairly or arbitrarily assigned, the law cannot survive. *See, e.g.*, *Netsch*, 344 F. Supp. at 1281; *Gould*, 14 Cal. 3d at 665; *Holtzman v. Power*, 313 N.Y.S.2d 904, 908 (N.Y. Sup. Ct. 1970), *aff'd*, 311 N.Y.S.2d 824 (1970). The U.S. Supreme Court and Arizona Supreme Court are no exception. *See Mann v. Powell*, 398 U.S. 955; *Kautenburger*, 85 Ariz. at 131.

On its face, the Ballot Order Statute treats similarly situated major parties differently by giving preferential treatment to candidates of the favored party. But "treating voters differently based on their political party would violate the Equal Protection Clause." *Charfauros v. Bd. of Elections*, 249 F.3d 941, 954 (9th Cir. 2001); *accord Jacobson*, 411 F. Supp. 3d 1277 (holding unconstitutional a "politically discriminatory" statute that "systematically award[ed] a statistically significant advantage to the candidates of the party in power"). The Ballot Order Statute places a meaningful state-mandated thumb on the scale which makes it more difficult for Plaintiffs "to associate in the electoral arena to enhance their political

effectiveness as a group." *Anderson v. Celebrezze*, 460 U.S. 780, 794 (1983).

The interests proffered by the state are insufficient to justify the Statute. Below, the Secretary claimed Arizona had an interest in a "facially-neutral, manageable, and cost-efficient" ballot that "list[s] the parties in the same order throughout their ballot," ECF No. 29 at 12-13 (Ex. E), but that only justifies the idea of *some* method of ordering the ballot, not *this* Ballot Order Statute. Many alternative ordering systems (including rotation of major parties across precincts, or even a county-based lottery among major parties for first position) could avoid unconstitutional favoritism while still fulfilling those interests. *See Soltysik v. Padilla*, 910 F.3d 438, 448 (9th Cir. 2018) (where burden is more than de minimis, *Anderson-Burdick* requires "an assessment of whether alternative methods would advance the proffered governmental interests."). Because the favoritism itself is what the State must justify, and is not a necessary component of a system that would meet the State's interests, Plaintiffs are highly likely to succeed on their claims.

D. Plaintiffs will suffer irreparable harm absent an injunction.

If the Ballot Order Statute is in effect in November, it will disadvantage Democratic candidates on over 80 percent of ballots statewide. Below, the Secretary asserted that any relief must be issued by the end of July to be in place for the November election, a representation that guided the district court's scheduling orders. The Secretary has admitted that a remedy could be implemented quickly. *See* ECF No. 30-2 ¶ 5. With the election fast approaching, time is of the essence to avoid irreparable harm.

E. The balance of the equities and public interest support an injunction.

The remaining balance of the equities also favors Plaintiffs. If the 2020 general election is conducted under the Ballot Order Statute, Plaintiffs' fundamental rights will be severely burdened and the Arizona electorate will once again be casting their ballots in an unfair system. "It is always in the public interest to prevent the violation of a party's constitutional rights." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012). In contrast, little harm will come to the Secretary if the Court enjoins the Statute pending appeal; the worst thing that happens is that the State employs an easily administrable ballot order (the same system it already uses in other elections) for a single election. The balance of the equities and the public interest thus tip sharply in favor of issuing an injunction.

VI. CONCLUSION

For all of these reasons, the Court should grant this Motion and enjoin the Ballot Order Statute pending the resolution of this appeal.

RESPECTFULLY SUBMITTED this 10th day of July, 2020.

/s Sarah R. Gonski

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the attached document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 10, 2020. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Sarah R. Gonski