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; and 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' REPLY IN SUPPORT OF EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 FOR INJUNCTION PENDING APPEAL

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I. INTRODUCTION

The Secretary rehashes the same errors made by the district court, neglecting binding precedent to argue Plaintiffs lack standing and that this case is nonjusticiable. She also revives an oft-rejected argument that, as the State's chief elections official, she is powerless to remedy injuries that flow from an Arizona election law. The Secretary's arguments are without merit. If Plaintiffs' motion is not granted, Arizona will persist in putting its thumb on the scale in favor of Plaintiffs' political opponents on the vast majority of ballots this November. Every court to have reached the merits in an analogous challenge has found that the Constitution does not permit such a result. Granting Plaintiffs' motion will not only be consistent with this extensive body of case law, it will avoid irreparable harm, serve the public interest, and is strongly favored by the equities. The Court should grant Plaintiffs' motion.

II. ARGUMENT

A. Plaintiffs are highly likely to succeed on the merits of this appeal.

1. Plaintiffs have standing.

Plaintiffs established three independent bases for standing—competitive, direct, and associational. The Secretary's arguments to the contrary rest on the same misapprehensions that rendered the district court's conclusion erroneous.

Competitive Standing. The Secretary asserts that competitive standing only exists when a candidate challenges the inclusion of another on the ballot—but that cramped view finds no support in case law, not in this Circuit or any other.

The Secretary's argument cannot be reconciled with *Owen v. Mulligan*, 640 F.2d 1130 (9th Cir. 1981), which held that both "[the candidate] *and* the Republic[an] Committee members" had standing based on their "continuing interest in preventing" their opponent from "gaining an unfair advantage in the election process," *id.* at 1133 (emphasis added); *see also Drake v. Obama*, 664 F.3d 774, 783 (9th Cir. 2011) ("In *Owen v. Mulligan*, we held that the 'potential loss of an election' was an injury-in-fact sufficient to give a local candidate *and Republican party officials* standing.") (emphasis added); *Crawford v. Marion Cty. Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007) (citing *Owen* in support of holding that "the Democratic Party has standing"), *aff'd*, 553 U.S. 181 (2008); *Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 586-87 n.4 (5th Cir. 2006) (citing *Owen*'s holding on "Republican party official standing" in support of holding that TDP had "direct standing" based on "harm to its election prospects"). Every circuit to consider this question agrees that political parties and their candidates alike have competitive standing to challenge election laws, including ballot order statutes. *See* Pls.-Appellants' Emergency Mot. for Prelim. Inj., Doc. 2-1 at 6-7 ("Mot.") (listing cases).[1] Since Plaintiffs filed their motion with this Court, yet another federal court rejected the conclusion the Secretary urges here, finding the Democratic Party had standing to challenge a ballot order statute because it "will harm the electoral

[1] Neither *Jacobson v. Fla. Sec'y of State*, 957 F.3d 1193 (11th Cir. 2020), nor *Miller v. Hughs*, No. 1:19-CV-1071-LY (W.D. Tex. July 10, 2020), reached the question of competitive standing. *See* Mot. at 7.

prospects" of Democratic candidates "running in the November election." *Nelson v. Warner*, No. CV 3:19-0898, 2020 WL 4004224, at *4 (S.D. W. Va. July 15, 2020).

Contrary to the Secretary's contention, *Townley v. Miller* did not cast aside nearly forty years of precedent in a single sentence. *Townley* merely states that the inclusion of a candidate on the ballot is one instance where there may be competitive standing, not that that is the *only* instance. *See* 722 F.3d 1128, 1135 (9th Cir. 2013). In fact, that single sentence from *Townley* is plucked from *Drake*, 664 F.3d at 782, in which the Ninth Circuit expressly recognized that its doctrine of "competitive standing" is anchored in *Owen*, which had nothing to do with the inclusion of another candidate on the ballot. *Id.* at 783. Simply put, "the direct injury that results from [Arizona's] 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," *Pavek v. Simon*, No. 19-CV-3000 (SRN/DTS), 2020 WL 3183249, at *13 (D. Minn. June 15, 2020) (citing *Owen*, 640 F.2d at 1133).

Direct Organizational Standing. The Secretary's suggestion that Plaintiffs offered little more than "general allegations" in support of diversion of resources—an independent basis for Plaintiffs' standing—is plain false; like the district court, the Secretary wholly ignores 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* Mot. at 10; *see also* Hr'g Tr. (Ex. F) 16:11-16; ECF No. 47 at 2 n.1 ("The parties have agreed that the Court may rely on and consider all documents filed on the docket in support of and in opposition to Plaintiffs' motion for a preliminary injunction, including the affidavits filed [by

DSCC and DNC]."); ECF No. 46 at 2 (explaining "the Secretary reserves the right to use or refer to any exhibits or filings from either party" at the preliminary injunction hearing). "The Supreme Court has made clear that injuries of the sort that Plaintiffs allege"—and substantiated with sworn declarations—"are concrete and particular for purposes of Article III." *Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1040 (9th Cir. 2015) (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)); *see also Pavek,* 2020 WL 3183249, at *10-11 (finding injury based on diversion of resources where DSCC alleged ballot order statute "requires them to divert resources into Minnesota that would normally be spent in other states around the country"). The Secretary does not dispute, meanwhile, that the district court applied the wrong standard in determining whether Plaintiffs had met their burden to prove standing on this ground. *See* Mot. at 10-12.

Associational Standing. Although conceding that Democratic candidates would have standing, the Secretary fails to rebut Plaintiffs' arguments that DNC and DSCC constitute the Democratic Party and thus may sue on behalf of their affiliated candidates. *See* Mot. at 12-15; *see also Nelson*, 2020 WL 4004224, at *6 (holding Democratic Party had standing to challenge ballot order statute based on harm to candidate). Further, the Secretary's argument that Plaintiffs failed to identify an injured member is wrong on both the facts and the law. *See* Mot. at 14 (identifying Democratic candidate for Senate as injured member); *see also Nat'l Council of La Raza,* 800 F.3d at 1041 (holding organization need not identify members where injury is clear and their specific identity is not relevant to defendant's ability to understand or address injury).

2. This case presents a justiciable question.

The Secretary dangerously overreads *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), which held that, where the Court had tried (and failed) for nearly half a century to formulate a way to adjudicate partisan gerrymandering cases, it could identify no judicially manageable standard. That *Rucho* was applied in the climate change case of *Juliana v. United States*, 947 F. 3d 1159, 1173 (9th Cir. 2020), is logical: courts have likewise been unable to formulate a standard for evaluating whether the government has done enough to ensure a livable climate. *Id.*

But courts have been successfully adjudicating ballot order challenges for decades, including in the post-*Rucho* era. Mot. at 16; *see also Nelson*, 2020 WL 4004224, at *8 (holding *Rucho* does not render challenge to ballot order statute nonjusticiable as "courts have competently adjudicated ballot order cases using equal protection principles for decades"). The Supreme Court has only found a handful of issues nonjusticiable in its 225-year existence, and research has not revealed a single instance in which it suddenly declared an entire category of litigation non-justiciable without expressly saying so. *See generally* John Harrison, *The Political Question Doctrines*, 67 Am. U. L. Rev. 457 (2017). There is no basis for finding it did so here.

3. The Secretary is the appropriate defendant to afford relief.

The Secretary also dusts off two arguments that even the district court did not find persuasive: she claims she is not the proper defendant and that the Eleventh Amendment bars this lawsuit, but neither argument has merit.

First, the Secretary's refrain that she is not the proper defendant in a challenge to an Arizona election law has been repeatedly rejected, including by this Court. *E.g.*, *Ariz. Libertarian Party, Inc. v. Bayless*, 351 F.3d 1277, 1280-81 (9th Cir. 2003) (affirming holding that Secretary's broad responsibility to oversee elections administration made her correct defendant in facial challenge to Arizona election law); Order, *Democratic Nat'l Com. v. Reagan*, CV-16-01065-DLR, ECF No. 267 at 6 (Mar. 3, 2017) (rejecting identical argument made here and holding that Secretary, not individual counties, was appropriate defendant); *Ariz. Democratic Party v. Reagan*, No. CV-16-03618-PHX-SPL, 2016 WL 6523427, at *1, *6 (D. Ariz. Nov. 3, 2016) (same). Although the Secretary asserts that counties print the ballots, she ignores that the *design* of the ballots is prescribed by the Ballot Order Statute, A.R.S. § 16-502, which the Secretary has a duty to implement and enforce in her capacity as Arizona's chief elections officer. *See* A.R.S. §§ 16-142(A), 16-452. There is no credible reason to believe that the supervisors would break rank should the Secretary direct them to order ballots in another way pursuant to a court order. *See id.*; *see also* Fed. R. Civ. P. 65(d)(2)(c) (binding to an injunction all "persons who are in active concert or participation" with defendant).

Second, Plaintiffs' suit against the Secretary in her official capacity for prospective relief fits perfectly within *Ex Parte Young*'s exception to sovereign immunity. *See Coal. to Defend Affirmative Action v. Brown*, 674 F.3d 1128, 1134 (9th Cir. 2012). Her argument that the counties are the proper defendants "reflects both a misconception of [her] role in overseeing and administering elections and an overly mechanical interpretation of Plaintiffs' requested relief." *DNC*, ECF No. 267

at 6. Because she oversees ballot preparation, and has a duty to implement the Ballot Order Statute in performing that duty, the Eleventh Amendment does not bar this claim against her. *See* A.R.S. § 16-452.

4. The Ballot Order Statute violates the Constitution.

This case presents two simple questions: (1) do first-listed candidates obtain an advantage merely as the result of being listed first, and (2) does Arizona arbitrarily award that advantage to one similarly situated party over another? The answer to both is yes, and the Statute is unconstitutional.

The Secretary's attempt to cast doubt on the impact of ballot order in Arizona elections not only defies the evidence in this case but also the Arizona Supreme Court, who held decades ago that ballot order impacts Arizona's elections and ordered name rotation in the state's primary elections. *See Kautenberger v. Jackson*, 85 Ariz. 128, 131 (1958); A.R.S. § 16-464 (requiring rotation on primary ballots); A.R.S. § 16-502(H) (requiring rotation in general elections among candidates from the same party). The Secretary never explains why constitutional principles can simultaneously require Arizona to rotate names on primary ballots but allow it to cement ballot order's advantage in general elections.

As for her assertions that the evidence in this case is fairly disputed, it is simply not credible. The Secretary builds this argument on minor purported coding errors her proffered expert, Sean Trende, identified in the work of Dr. Jonathan Rodden, Plaintiffs' expert who analyzed the magnitude of primacy effects in Arizona. Doc. 7-1 at 4-5. Dr. Rodden is a Stanford professor of political science whose analysis of the impacts of election laws—including ballot order specifically—

have been previously credited by federal courts.[2] Mr. Trende is a Ph.D. student who received his Masters in applied statistics just months before he testified, has never written a peer reviewed article, admitted that he is not an expert on ballot order effect, and has been discredited by almost every court in which he has testified (the others have largely ignored him). Ex. G 213: 21-25; 214:1-7, 12-14; 215:3-7.[3]

The Secretary's critiques of Plaintiffs' expert Dr. Krosnick, a professor at Stanford who has made a career of studying ballot order effects, Ex. G 152:21-23, are similarly baseless. As Dr. Krosnick testified, the ballot order effect has been observed in elections in every jurisdiction where it has been studied over the last 70 years except Afghanistan. Ex. G 156:13-158:14; Doc. 2-3 at 23-25. The scientific consensus is that first-listed candidates obtain an electoral advantage, often by several points. ECF No. 15-2 at 41; Ex. G 185:21-25.[4]

The question then becomes whether Arizona apportions the ballot order advantage constitutionally. Parties agree that the Court must apply *Anderson-Burdick*. *See* Doc. 7-1 at 16. The Secretary repeatedly claims that Arizona's Ballot Order Statute is "neutral," *id.* at 3, 17, but every court to have considered an analogous challenge has held that the systemic favoritism of one party over another other *is not neutral*—it is partisan discrimination, in violation of equal protection

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[2] *Democratic Nat'l Comm. v. Hobbs*, 948 F.3d 989 (9th Cir. 2020) (en banc) (relying heavily on Dr. Rodden's testimony in challenge to Arizona election law); *see also Jacobson*, 411 F. Supp. 3d at 1273.

[3] Mr. Trende admitted if the district court were to rely upon his regression analysis, it would be the very first to do so. Ex. G 235:19-22.

[4] Mr. Trende conceded that Dr. Krosnick's review of the literature regarding primacy effects was "largely accurate." Sec'y Ex. 3 at 0077.

guarantees. Mot. at 18 (citing cases); *Sangmeister v. Woodard*, 565 F.2d 460, 468 (7th Cir. 1977) (noting that any procedure that "invariably awards the first position on the ballot to the County Clerk's party, the incumbent's party, or the "majority" party" is not "neutral in character"). Unless enjoined, the Statute will mandate that 82 percent of Arizona's voters will be given ballots that list Republican candidates first in each race, giving the Republican Party a significant advantage in the coming general election. To justify this head start for one major party over the other, the Secretary only offers an interest in "logical, efficient, and manageable rules," Doc. 7-1 at 17, but any number of alternative schemes could fulfill these goals without the current system's favoritism. *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."); *see also* Mot. at 19.

B. Plaintiffs will be irreparably harmed absent an injunction.

The Secretary's fundamental misunderstanding of Plaintiffs' claim is never more on display than when she claims that Plaintiffs will experience no imminent irreparable harm because, even if she were to implement a lottery system, some candidate would be disadvantaged by not being listed first. Doc. 7-1 at 19. Plaintiffs have never claimed that the Secretary must conjure a ballot design free of position bias. But here, Plaintiffs are deprived of their right to a ballot design that gives them the same opportunity as similarly situated candidates to be listed first. *See, e.g.*, *Mann v. Powell*, 314 F. Supp. 677, 679 (N.D. Ill. 1969). "It is well established that the deprivation of constitutional rights unquestionably constitutes irreparable

injury." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (citation omitted). Rotation of all candidates (a remedy easily implemented with Arizona's existing system) would diffuse that effect, *see Jacobson*, 411 F. Supp. 3d at 1284 (noting "rotational ballot order schemes satisfy the requirements of the First and Fourteenth Amendment by equalizing the burden on voting rights"), while a lottery scheme would randomize it, *see id.* (lottery "alleviate[s] the burden on First and Fourteenth Amendment rights by cleansing the partisan taint from the process"). [5]

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

The Secretary's argument on the equities once again rests on her mistaken assertion that the Ballot Order Statute places no burden on Plaintiffs, and fails for the same reasons discussed above. Her invocation of the *Purcell* principle, moreover, is a poor fit here. The Secretary does not dispute that the state already uses a fair ballot ordering system in other contexts; implementing that very same system here would require little effort and involve none of the concerns which animate *Purcell*.

III. CONCLUSION

The constitutional harm that will befall Plaintiffs absent an emergency injunction will be severe and irreparable. Plaintiffs respectfully request that the Court grant their motion.

[5] The Secretary contends Plaintiffs requested one specific form of relief—rotation of major party candidates—but the record repeatedly refutes that. *See* Mot. at iv n.1.

RESPECTFULLY SUBMITTED this 21st day of July, 2020.

/s Sarah 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 21, 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