No. 20-16301

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 Arizona Secretary of State,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
Case No. CV-19-05547-PHX-DJH

DEFENDANT-APPELLEE'S RESPONSE TO PLAINTIFFS' EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL

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CIRCUIT RULE 27-3 COUNTER-STATEMENT[1]

In response to Plaintiffs-Appellants' ("Plaintiffs") Circuit Rule 27-3 Certificate, the Arizona Secretary of State ("Secretary") provides the following information.

(i) Attorney Information

On July 13, 2020, the district court granted the motion to withdraw filed by attorneys Mary R. O'Grady, Kimberly I. Friday, and Emma J. Cone-Roddy of Osborn Maledon, P.A., as co-counsel for the Secretary. ECF No. 83.

(ii) The Facts Do Not Support Plaintiffs' Assertion that an Emergency Exists

The district court denied Plaintiffs' request for "the Court to issue an emergency injunction that bars [the Secretary] from utilizing the forty-year-old Ballot Order Statute[,]" A.R.S. § 16-502(E), pending their appeal. Exhibit ("Ex.")

[1] Circuit Rule 27-3 requires the movant to make certain statements regarding the "existence and nature of the claimed emergency" and an explanation of why the movant failed to file the motion earlier. Plaintiffs essentially argue their case in their nine-page Certificate, which is replete with case law and alleged facts that the Secretary contested in the district court. *See* Doc. 2-1 at i-iv. The Secretary includes this counter-statement to respond to the assertions in Plaintiffs' Rule 27-3 Certificate in defending the constitutionality of Arizona's Ballot Order Statute. To avoid repeating information that the Secretary does not dispute, she includes only sections in which the Plaintiffs included significant argument or an incomplete citation to the record below.

1 at 0001; *see also* Ex. 2 (legislative history of Ballot Order Statute).[2] Plaintiffs will not suffer irreparable harm if the injunction pending appeal is not granted and there is not an "emergency" that entitles Plaintiffs to a mandatory injunction "to alter the status quo." Ex. 1 at 0003-0004.

Critically, none of the Plaintiffs in this lawsuit are candidates. They are various groups and individuals who support Democratic candidates and lack Article III standing to sue, let alone obtain injunctive relief. Plaintiffs claim that Arizona's Ballot Order Statute enacted in 1979—which provides county election officials with a neutral, efficient, and logical manner to determine the order of candidates' names on a general election ballot—is unconstitutional because it allegedly favors Republicans. *See* Doc. 2-1 at 4-5. The district court held that this is a nonjusticiable political claim because it is premised on a psychological phenomenon that occurs in some contexts ("primacy effect"). Plaintiffs claim the primacy effect gives the first-listed candidate "a meaningful electoral advantage merely because they are listed first."[3] Doc. 2-1 at 5.

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[2] The Secretary's attached Exhibits 1-5 are part of the record below. For ease of reference, citations herein correspond to the bates stamp numbers on the bottom right corner of the exhibits. When citing to Plaintiffs' motion and exhibits, the Secretary cites to the ECF page numbers on the top right corner.

[3] Plaintiffs interchangeably refer to "primacy effect," "position bias," or "primacy effect." For consistency, the Secretary uses the term "primacy effect."

Plaintiffs did not produce any reliable evidence in the district court to support their claim that a primacy effect exists, much less has a meaningful impact, on general elections in Arizona. Plaintiffs' emergency motion broadly alleges that "political scientists who study the primacy effect in the context of elections … have confirmed [that] ballot order matters, and Arizona is no exception." Doc. 2-1 at 5. But, Plaintiffs' "evidence" consisted of opportunistically-designed statistical models, and analysis that Plaintiffs' own experts admitted was unreliable and incomplete.

For example, Plaintiffs' primary expert, Dr. Jonathan Rodden conducted a statistical analysis to determine whether a primacy effect exists in Arizona's general elections. *See* Ex. B at 0194. He testified that:

- his use of county-level data to determine existence of primacy effect for district-level races "definitely introduces measurement error[,]" explaining, "[i]f I try to measure something and I measure it in completely the wrong way, then the coefficient on that variable *will not be reliable*" (emphasis added), Ex. 4 at 0172;

- "there is measurement error" in Dr. Rodden's regression analysis, which Dr. Rodden created by inputting inaccurate data for demographic and party registration control variables, *id.* at 0183-0189;

- he made a separate coding error "mistake", *id.* at 0197-98;

- he is aware that the percentage of voters in Arizona registered as Independent or third-party voters "is a substantial share[,]" yet he "did not enter that into the regression" because he "wouldn't have a hypothesis about how that would help [him] explain Republican or Democratic vote share", *id.* at 0175; and

- he understands that a "substantial" portion of voters in Arizona vote by mail, but he did not examine whether primacy effect exists or is smaller when mail-in ballots are used, and could not opine one way or another, *id.* at 0204-0205.

Plaintiffs' other expert, Dr. Jon Krosnick, did not study Arizona elections, and none of the studies he reviewed have ever analyzed whether a primacy effect occurs in Arizona's elections. Ex. 5 at 0271, 0281. Some studies of other states' elections actually found no primacy effect exists. *Id*. at 0276-0278. And Dr. Krosnick testified that "all other things held constant across races, … adding the partisan affiliations of the candidates next to their names on the ballot does weaken the size of primacy effects." *Id*. at 0282.

Moreover, the Secretary's expert Sean Trende, who reviewed Dr. Rodden's analysis and data, opined that the data "do not suggest a strong relationship between ballot order and vote share" in Arizona's general elections. Ex. 3 at 0047. Mr. Trende wrote in his report, and later testified at the evidentiary hearing, about numerous flaws in Dr. Rodden's methodology. *See id*. at 0047-0078; Ex. 5 at 0287-0343. Mr. Trende further opined:

> Dr. Krosnick's literature review is largely accurate, but it lumps diverse studies together, including studies using methods he has previously discounted; studies focusing on down-ballot races; and studies of states with an election framework different from Arizona's. … Even when I incorporate a strong prior belief of a large effect into my analysis of the Arizona data, I conclude that the effect is much smaller than the Rodden Report claims and that we are not justified in claiming that it is greater than zero.

Ex. 3 at 0077.[4]

Accordingly, the record does not support Plaintiffs' allegation that a primacy effect exists in Arizona's general elections and that this warrants a court order to enjoin enforcement of the Ballot Order Statute pending appeal. What Plaintiffs describe as an emergency is simply the operation of a forty-year-old law, implemented as a neutral, bipartisan reform to create a logical ballot order framework. *See* Ex. D at 288 n.1 (explaining that the Ballot Order Statute "was enacted in 1979 as part of a comprehensive elections code agreed to by the Arizona Democratic and Republican parties and the County Recorders Association" and that the law has been modified with the help of all of Arizona's county recorders) (citing legislative history). As the district court noted, "Democratic candidates appeared first on the ballots in every race in all 15 counties statewide" in 1984, 1986, 2008, and 2010 due to the Ballot Order Statute. *Id*. at 288 n.2. "These four elections are the only instances where a single party's candidates were listed first

[4] *See* Ex. 3 at 0042-0047 (summarizing Mr. Trende's expert credentials). To the extent Plaintiffs may challenge Mr. Trende's qualifications in their reply (as they did in the district court), such arguments would be misplaced for two reasons. First, Mr. Trende has an advanced degree in applied statistics and every court to have considered the issue has found Mr. Trende to be qualified to testify on the statistical analysis of elections. *See* ECF No. 40 (discussing Mr. Trende's extensive qualifications and collecting cases). Second, it is well-established that the standards by which a court examines evidence are relaxed at the preliminary injunction stage. *See Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981) (noting preliminary injunction proceedings involve "procedures that are less formal and evidence that is less complete than in a trial on the merits").

on all ballots statewide since the Statute was enacted." *Id.*; *see also* Ex. B at 202 (Figure 1 of Dr. Rodden's report showing cross-county and time-series variation in ballot order in Arizona's general elections from 1980 to 2018).

Presumably, Plaintiffs believe there to be an emergency now because in *this* upcoming election, "over 80 percent of the state's general election ballots" will list candidates from the Republican Party rather than Plaintiffs' party first. Doc. 2-1 at 5. The nature of the professed emergency underscores the political—not constitutional—core of this grievance. Indeed, the district court dismissed this lawsuit on two "independent ground[s,]" holding that (1) all Plaintiffs lack Article III standing; and (2) "even if a single Plaintiff had established standing … the relief sought amounts to a nonjusticiable political question that the Court is unable to redress" under the Supreme Court's reasoning in *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019). Ex. D at 307–11.

Plaintiffs nonetheless urge that the Ballot Order Statute is unconstitutional and presents an emergency because of the Arizona Supreme Court's holding regarding ballot order in primary elections based on the state constitution in *Kautenburger v. Jackson*, 85 Ariz. 128, 131 (1958). Doc. 2-1 at 5. But *Kautenburger* undermines Plaintiffs' assertion that there is an emergency and is ultimately inapplicable for several reasons. First, *Kautenburger* was decided in 1958, more than *half a century ago*. If *Kautenburger* has the effect that Plaintiffs

claim—establishing that there is a "meaningful electoral advantage [for candidates] merely because they are listed first," Doc. 2-1 at 5—then Plaintiffs' urgency comes *sixty years* too late. Second, *Kautenburger* involved a low-level office, in a primary election, where paper ballots used name-rotation but voting machines did not. 85 Ariz. at 129-30. Instead of rotation, voting machines listed candidates by alphabetical order. *Id.* The Arizona Supreme Court held that using rotation on one type of ballot and not another in the same election violated the equal protection provisions of the Arizona Constitution by treating similarly-situated candidates differently, depending on the manner used to vote. *Id*. at 131. It is no surprise that in that situation, and where voters are deprived of other visual cues like party affiliation to guide their behavior (which *are* present here, *see* Ex. D at 288), that the Arizona Supreme Court affirmed the trial court's order overturning the ballot order employed on voting machines.

Third, the ballot order statute struck by the *Kautenburger* court as unconstitutional is akin to the lottery name-ordering remedy that Plaintiffs request here. *See* Doc. 2-1 at 6 n.1. Plaintiffs' request for a lottery method to choose the candidate who is entitled to first position on a ballot across an entire county (or the entire state) is reminiscent of the "disadvantage" faced by the *Kautenburger* plaintiff who prevailed because his name "would never appear first on the machine ballot." *See id.* at 130. *Kautenburger* does not help Plaintiffs demonstrate that

continued operation of the Ballot Order Statute—which already achieves rotation of candidates' names within each political party, *see* A.R.S. § 16–502(H)—presents any emergency to justify enjoining enforcement of the Ballot Order Statute.

The district court correctly granted the Secretary's Motion to Dismiss without reaching any decision on Plaintiffs' motion for preliminary injunction. Ex. D at 311; Ex. 1 at 0003. The court considered the record, including testimony spanning two days and hours of oral argument. Ex. D at 287; *see also* Ex. 4 and 5. As discussed below, the district court applied the correct legal standard to the question of Article III standing, and then grappled directly with each Plaintiff's theory of standing. Ultimately, however—like the Eleventh Circuit in *Jacobson v. Fla. Sec'y of State*, 957 F.3d 1193 (11th Cir. 2020) and the district court in *Miller v. Hughs*, No. 1:19-CV-1071-LY (W.D. Tex. July 10, 2020)—the court below held that Plaintiffs failed to adequately allege an injury in fact. *See* Ex. D at 298–99, 303 (reasoning, *inter alia*, that Plaintiffs' allegation that the Ballot Order Statute burdens them "because a number of other voters' choices in the ballot box are irrational because they select the first name listed regardless of who it is" is not "a burden on them personally that is not common to all voters") (citing *Gill v. Whitford*, 138 S. Ct. 1916 (2018)); *Jacobson*, 957 F.3d at 1206 (holding organizational plaintiffs' "interest in [their] preferred candidates winning as many

elections as possible" is a "'generalized partisan preference[]' that federal courts are 'not responsible for vindicating,' no less than when individual voters assert an interest in their preferred candidates winning elections") [5] (quoting *Gill*, 138 S. Ct. at 1933); *Miller*, No. 1:19-CV-1071-LY, at 9 ("Miller's allegation of dilution of votes likewise fails to establish an injury-in-fact because it is based upon 'group political interests, not individual legal rights'") (quoting *Gill*, 138 S. Ct. at 1933).

The district court's well-reasoned order granting the Secretary's Motion to Dismiss, Ex. D, and subsequent order denying Plaintiffs' Emergency Motion for Injunction Pending Appeal, Ex. 1, are entitled to deference. An injunction should not enter here unless it is clear that the district court abused its discretion because the trial court is "best and most conveniently able to exercise the nice discretion needed" to decide whether to grant a request for an injunction pending appeal. *Cumberland Tel. Co. v. Pub. Serv. Comm.*, 260 U.S. 212, 219 (1922); *see also Rhoades v. Reinke*, 671 F.3d 856, 859 (9th Cir. 2011) ("We review the district court's denial of Rhoades's emergency motion for preliminary injunction … for

[5] Plaintiffs inaccurately assert in *Jacobson* that the Eleventh Circuit reversed the district court's decision "on other grounds." Doc. 2-1 at 7–8. In *Jacobson*, the district court granted injunctive relief to voters and organizational plaintiffs that challenged Florida's ballot order statute. *See Jacobson*, 957 F.3d at 1197–98. But the Eleventh Circuit held, "[b]ecause the voters and organizations lack standing, we vacate and remand with instructions to dismiss for lack of justiciability." *Id*. at 1198. And if that holding were not clear enough, the Eleventh Circuit stated that the district court "erred by reaching the merits and entering an injunction against nonparties whom it had no authority to enjoin." *Id*. at 1212.

abuse of discretion."); *S.W. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) (en banc) ("We review the district court's decision to grant or deny a preliminary injunction for abuse of discretion … "[o]ur review is limited and deferential."). Here, the district court acted well within its discretion when it denied Plaintiffs the extraordinary and disfavored relief of a mandatory injunction pending appeal.

(iii) Had the Case Been Filed Earlier, the Parties and the Court Would Not Be Confronted with the Need to "Steamroll Through Delicate Legal Issues"

Litigation delay in election cases prejudices the administration of justice by "compelling the court to steamroll through … delicate legal issues," *Lubin v. Thomas*, 213 Ariz. 496, 497–98 ¶ 10 (2006) (quotation marks and citations omitted), to the prejudice of the courts, candidates, election officials, and voters. *Sotomayor v. Burns*, 199 Ariz. 81, 83 ¶ 9 (2000). Plaintiffs claim that they diligently pursued their claims because they filed "over a year before the November 2020 election," amending their complaint two weeks after their initial filing and waiting a total of 17 days after filing the first complaint to seek a preliminary injunction, which included hundreds of pages of expert reports. Doc. 2-1 at 9. The Secretary had approximately forty-five days to secure an expert witness, provide him Plaintiffs' data, and craft a response to Plaintiffs' expansive production on the eve of Thanksgiving. Briefing on Plaintiffs' preliminary

injunction motion and the Secretary's Motion to Dismiss was completed in February 2020, evidence taken on March 4 and 5, and the oral argument concluded by March 10. *Id.* at 10. The court's order dismissing Plaintiffs' case was entered on June 25, 2020. Ex. D.

Simply put, Plaintiffs could have appealed sooner. Plaintiffs waited eight calendar days to file their Notice of Appeal, ECF No. 75, and another three calendar days to file their Emergency Motion for an Injunction Pending Appeal, ECF No. 77. In their Emergency Motion, Plaintiffs argued that a response from the Secretary was unnecessary because "the questions at issue are effectively the same as what the parties have briefed and argued before in the preliminary injunction proceedings." ECF No. 77 at 2 n.1. If Plaintiffs believed that the issues were so similar that a response from the Secretary was not necessary, then Plaintiffs should have been able to file their emergency motion more quickly, or at least file a Notice of Appeal within a day or two of the district court's order. Instead, Plaintiffs waited 11 calendar days to request an injunction pending appeal from the district court, then sought an order summarily denying their request to jump directly to this Court. Indeed, Plaintiffs warned that they would seek relief from this Court "by 4 p.m. on Friday, July 10," ECF No. 77 at 2 n.1, presumably whether the district court had ruled or not.

The district court called Plaintiffs' demand for a summary denial, without providing the Secretary any opportunity to respond, "unreasonabl[e]." Ex. 1 at 0001. Not only could Plaintiffs have filed sooner based on their own admission that their emergency motion for an injunction pending appeal was largely based on the same arguments that had already been fully briefed, they delayed seeking the injunction pending appeal. For this reason alone, Plaintiffs' motion should be denied. *See Earth Island Inst. v. Carlton*, 626 F.3d 462, 475 (9th Cir. 2010) ("An injunction is a matter of equitable discretion. The assignment of weight to particular harms is a matter for district courts to decide. The record here shows that the district court balanced all of the competing interests at stake.").

(v) Although Plaintiffs Sought an Injunction Pending Appeal in the District Court, It Was a Perfunctory Request

Despite their 11-day delay, Plaintiffs demanded in the district court that "the Court summarily deny the motion without awaiting a response from [the Secretary] or other further briefing or argument, so that Plaintiffs may seek the same relief from the Court of Appeals." ECF No. 77 at 1. Plaintiffs then contended that the Secretary's reasonable request for a mere seven days to respond (but not Plaintiffs' 11-day delay in filing) would prejudice their ability to obtain relief. *Id.* at 1 n.1.

Furthermore, "Plaintiffs' [Emergency] Motion seeks different relief than was formerly sought." Ex. 1 at 0004. Plaintiffs initially, clearly sought "a non-discriminatory **name rotation system** that **gives similarly-situated major-party**

candidates an equal opportunity to be placed first on the ballot." *Id.* (citing ECF No. 14 at 21) (emphasis added). Plaintiffs now seek a lottery system or rotation of all candidates' names instead of the longstanding name-ordering procedure that will be used "for the twentieth time this year." Ex. 1 at 0004. The district court denied Plaintiffs' attempt to obtain "the extraordinary relief of halting the operation of a forty-year-old state voting statute through improper procedural means, all while requesting different relief than previously sought." *Id.* Thus, while Plaintiffs did seek an injunction pending appeal in the district court, the relief they requested in their emergency motion for an injunction pending appeal was a very different injunction than the injunction on which the district court took briefing, evidence, and oral argument in March.[6]

I declare under penalty of perjury that the foregoing is true and correct and based upon my personal knowledge.

Executed in Phoenix, Arizona on July 17, 2020.

By: *s/ Kara Karlson*
Counsel for Arizona Secretary of State Katie Hobbs

[6] Plaintiffs insist that the district court's order noting that Plaintiffs are requesting "different relief than was formerly sought" is "not accurate." Doc. 2-1 at 6 n.1. But the record speaks for itself. Even at the conclusion of the preliminary injunction hearing, Plaintiffs' counsel maintained that the "permanent remedy" Plaintiffs sought was for the names of only "major-party candidates" to be rotated, stating that a lottery system or rotation of all candidates' names would only be an "interim remedy." *See* ECF No. 64 at 275–77.

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I. Introduction

Plaintiffs are not entitled to the extraordinary relief they seek here: a mandatory injunction to enjoin enforcement of Arizona's Ballot Order Statute, within months of the 2020 general election. As Plaintiffs recognize, Doc. 2-1 at 22, they must overcome *both* of the district court's jurisdictional holdings that Plaintiffs lack Article III standing and their claims are not justiciable. Then Plaintiffs must demonstrate that they are likely to succeed on their claims that the Ballot Order Statute is unconstitutional because of an alleged, but unsubstantiated, "primacy effect.". Plaintiffs request a judicial determination (based on flawed and incomplete statistical evidence) that some "voters' choices are less constitutionally meaningful than the choices of other[s]." *See Libertarian Party of Va. v. Alcorn*, 826 F.3d 708, 718 (4th Cir. 2016) (affirming district court's grant of motion to dismiss challenge to ballot-order law for failure to state a claim). Finally, Plaintiffs must show that the remaining injunction-pending-appeal factors favor them.

Plaintiffs cannot satisfy their heavy burden. They contend that "[e]very court that has reached the merits in challenges analogous to this one has found such statutes unconstitutional." Doc. 2-1 at 22. But this ignores several courts that have correctly declined to reach the merits of ballot-order statutes because such complaints are merely general political grievances. *See Jacobson v. Fla. Sec'y of State*, 957 F.3d 1193, 1206 (11th Cir. 2020) (holding organizational plaintiffs'

"interest in [their] preferred candidates winning as many elections as possible" is a "'generalized partisan preference[]' that federal courts are 'not responsible for vindicating'") (quoting *Gill v. Whitford*, 138 S. Ct. 1916, 1933 (2018)); *Miller v. Hughs*, No. 1:19-CV-1071-LY, at 9 (W.D. Tex. July 10, 2020) (holding voter plaintiff "fail[ed] to establish an injury-in-fact because it is based upon 'group political interests, not individual legal rights'") (citations omitted); *see also Alcorn*, 826 F.3d at 717 ("[M]ere ballot order denies neither the right to vote, nor the right to appear on the ballot, nor the right to form or associate in a political organization.").

If Plaintiffs could show that any one of them have Article III standing, *and* that their claims are constitutional and not political, Plaintiffs' claims still depend entirely on their ability to show that the primacy effect plays a meaningful role in Arizona's general elections. But Plaintiffs' own experts' testimony does not support such a conclusion. And Plaintiffs cannot rely on general social science in other contexts or cases from other jurisdictions to enjoin Arizona's Ballot Order Statute because "there is a factual dispute as to whether ballot position sways voters, and if so, how much." *Green Party of Tenn. v. Hargett*, 767 F.3d 533, 551 (6th Cir. 2014). Accordingly, this Court should deny Plaintiffs' emergency motion for injunction pending appeal.

II. Background

A. Arizona's Ballot Order Statute

Forty years ago, a bipartisan super-majority of Arizona legislators, in agreement with the County Recorders Association, enacted the Ballot Order Statute. *See* Ex. 2 at 0012 (Ariz. H.R. Comm. Min., H.B. 2028 (Mar. 5, 1979)) & 0017-0019 (Ariz. House J., 591, 641, 644–45 (Apr. 20, 1979) (H.B. 2028 passed 28-2 in the Senate and 40-11-9 in the House)). The statute provides that in each general election, candidates' names are organized by party affiliation "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). The Ballot Order Statute also requires rotation of candidates' names within each political party. *See* A.R.S. § 16-502(H).

The Ballot Order Statute provides a neutral process that has remained unchallenged for forty years. In 12 out of the 20 general elections since the Ballot Order Statute was enacted, Democratic candidates have been listed first in the majority of Arizona's counties. *See* Ex. B at 202. Twice in the 1980's and twice in the 2000's, Democratic candidates were listed first on ballots in all of Arizona's 15 counties. *Id.* Republican candidates have never been listed first statewide. *Id.*

B. The Present Litigation

Now that it appears Arizona is a politically-competitive state in a presidential election year, Plaintiffs seek "emergency" relief to enjoin Arizona's 40-year-old Ballot Order Statute. Plaintiffs filed their Complaint initiating this action on November 1, 2019, and filed an Amended Complaint two weeks later. ECF No. 1 & 15. Three days later, Plaintiffs filed a Motion for Preliminary Injunction. ECF No. 14. The Secretary filed a Motion to Dismiss and a response to the Motion for Preliminary Injunction in January 2020. ECF No. 26 & 29. The matter was fully briefed by February 3, 2020. ECF No. 35. The district court held a two-day evidentiary hearing and oral argument in early March. *See* Exs. 4 & 5.

Plaintiffs submitted expert reports from Dr. Jon Krosnick, Ex. A, and Dr. Jonathan Rodden, Ex. B. The Secretary submitted an expert report from Sean Trende, who explained that Dr. Rodden's data "do not suggest a strong relationship between ballot order and vote share" in Arizona's general elections. Ex. 3 at 0047. Dr. Rodden's report contained material errors that undermine the validity of his findings. *See id*. at 0047-0078 (discussing more appropriate variables for voter behavior in a regression analysis, demonstrating no statistically significant primacy effect in Arizona, and identifying other methodology errors); Ex. 5 at 0287-0343 (Mr. Trende's testimony about numerous flaws in Dr. Rodden's methodology).

Indeed, Dr. Rodden conceded at the evidentiary hearing that his analysis: (1) contained "measurement error," which renders his results "unreliable"; (2) cannot account for nearly one-third of Arizona's electorate—i.e., over one million Arizona voters who are registered as Independent or third-party;[7] (3) cannot account for approximately 80% of Arizonans who cast early ballots, *see Democratic Nat'l Comm. v. Reagan*, 329 F. Supp. 3d 824, 825 (D. Ariz. 2018); and (4) can only estimate an average primacy effect over the 40-year span of time that the statute has been in existence. Ex. 4 at 0170, 0172, 0175, 0180, 0200, 0204-0205.

Primacy effect does not exist in every race for public office and can be mitigated by certain factors such as greater voter awareness. Ex. A. Dr. Krosnick conceded in his testimony that "*none of the studies* he reviewed analyzed the existence of any primacy effect in Arizona" and that "listing the party affiliation of the candidates on the ballot [which *are* included on Arizona's ballots in general elections, *see* A.R.S. § 16-502(E)], . . . reduces the size of the primacy effects." Ex. D at 310-11 n. 11 (quoting ECF No. 58 at 51, 62) (emphasis added); *see also* Ex. 5 at 0247-0287 (Dr. Krosnick's testimony). Mr. Trende opined, *inter alia*, that

[7] *See* Arizona Voter Registration Statistics https://azsos.gov/elections/voter-registration-historical-election-data (April 1, 2020) (last accessed on July 8, 2020). This Court should take judicial notice of these statistics because they are publicly available and not subject to reasonable dispute. *See* Fed. R. Evid. 201(b); *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998-99 (9th Cir. 2010) (taking judicial notice of official information posted on governmental website, the accuracy of which was not factually challenged).

"[i]n a state such as Arizona where at least 75% of votes are consistently cast as early ballots, we might expect that effect to be even smaller to the point of being negligible." Ex. 3 at 0077.[8]

C. District Court's Decision

In an order issued on June 25, 2020, the district court granted the Secretary's Motion to Dismiss Plaintiffs' First Amended Complaint with prejudice. Ex. D. Specifically, the district court held that (1) all Plaintiffs lack Article III standing to challenge the Ballot Order Statute (*id*. at 294-307); and (2) even if the Plaintiffs had established standing, Plaintiffs' claims alleging that the Ballot Order Statute operates unfairly to major-party candidates amount to a nonjusticiable political question under *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019). Ex. D at 307-11. Either of these "independent ground[s]," *id.* at 311, provided the district court sufficient basis to grant the Secretary's Motion to Dismiss. The district court also concluded the Ballot Order Statute does not present any meaningful burden on Plaintiffs' rights. *Id*. at 310.

[8] This figure is likely to increase given the current pandemic. Under Arizona law, Arizonans who elect to vote by mail have up to twenty-seven days to return their ballots. A.R.S. §§ 16-541 -542(A), (C).

As noted above, Plaintiffs first sought an emergency injunction pending appeal in the district court, albeit in a perfunctory and unreasonable fashion. The district court denied Plaintiffs' emergency motion. Ex. 1.

III. Plaintiffs Have Failed to Satisfy Their Heavy Burden that the Law and the Facts Clearly Favor Them to Warrant a Mandatory Injunction

An injunction "is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1977) (quotation omitted). To obtain an injunction pending appeal, Plaintiffs must demonstrate "that they are likely to succeed on the merits, that they are likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in their favor, and that an injunction is in the public interest." *South Bay United Pentecostal Church v. Newsom*, 959 F.3d 938, 939 (9th Cir. 2020) (citations omitted).

Moreover, because Plaintiffs seek a mandatory injunction to up-end a ballot order process that has been used by elections officials for decades in exchange for a ballot order that Plaintiffs believe would be more "fair," Plaintiffs must meet a higher standard. *See Am. Freedom Defense Initiative v. King Cnty.*, 796 F.3d 1165, 1173 (9th Cir. 2015) ("Mandatory injunctions are particularly disfavored" and will only be entered if "extreme or very serious damage will result") (quotation marks and citation omitted). Plaintiffs now ask this Court, without the benefit of the full record and time for thoughtful consideration, for the "extraordinary relief

of halting the operation of a forty-year-old state voting statute through improper procedural means, all while requesting different relief than previously sought." Ex. 1 at 0004. Plaintiffs' shifting positions weigh against granting their request. *See Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) ("By changing the election rules so close to the election date and by affording relief that the plaintiffs themselves did not ask for in their preliminary injunction motions, the District Court contravened this Court's precedents and erred by ordering such relief."). They have failed to meet their heavy burden.

A. As the District Court Correctly Held, All Plaintiffs Lack Article III Standing to Challenge the Ballot Order Statute, And Therefore Lack Standing to Seek an Injunction

In a reasoned analysis, the district court correctly held that all the Plaintiffs lack Article III standing. Ex. D at 294-307. Specifically, "the Voter Plaintiffs have not alleged a concrete injury in fact, but rather a generalized political grievance with the Ballot Order Statute and its alleged effects." *Id*. at 300. And the district court properly rejected Plaintiffs' arguments that the Organizational Plaintiffs "alleged sufficient facts to establish associational, organizational, or competitive standing . . . ." *Id*. This ruling is consistent with this Court's precedent and the Eleventh Circuit's opinion in *Jacobson*, which held that individual voters and the same Democratic organizations that are the Plaintiffs here

lack standing to challenge Florida's ballot order law because "none of them proved an injury in fact." *See* 957 F.3d at 1198.

Plaintiffs unpersuasively argue the district court's standing analysis was in error. The Organizational Plaintiffs first argue that they have standing under a "competitive standing" theory because the statute allegedly harms their "electoral prospects." Doc. 2-1 at 26-30. But in *Townley v. Miller*, 722 F.3d 1128, 1135 (9th Cir. 2013), this Court described "[c]ompetitive standing [a]s the notion that 'a candidate or his political party has standing to challenge *the inclusion* of an allegedly ineligible rival on the ballot . . .'" *Id.* (citation omitted) (emphasis added). That is *not* the type of claim that Plaintiffs raised here. The district court correctly read *Townley* and declined to find that the Organizational Plaintiffs satisfy competitive standing. Ex. D at 306-07 (discussing *Townley*, emphasizing that "for competitive standing to apply, a plaintiff must allege that another candidate has been impermissibly placed on the ballot," and collecting cases).

Plaintiffs' reliance on *Owen v. Mulligan*, 640 F.2d 1130, 1133 (9th Cir 1981), is also misplaced. *See* Doc. 2-1 at 26-29. The district court correctly reasoned that *Owen* is distinguishable because "the 'potential loss of an election' was an injury-in-fact sufficient to give a ***candidate*** and Republican party officials standing." Ex. D at 306. As the district court aptly put it, Plaintiffs "fail to recognize that the majority of the cases they cite to support their theories of injury

involve ***candidates*** as plaintiffs who were alleging the personal harm of not getting elected." *Id*. at 298 (collecting cases).

Plaintiffs also rely on the recent federal district court decision *Pavek v. Simon*, No. 19-cv-3000, 2020 WL 3183249 (D. Minn. June 15, 2020). Doc. 2-1 at 26-29. *Pavek* appears to have sided with the now-vacated decision of a Florida district court, *Jacobson v. Lee*, 411 F. Supp. 3d 1249 (N.D. Fla. 2019). *See Pavek* at **26–27. The *Pavek* court erred when it attempted to distinguish the Eleventh Circuit's standing analysis discussing organizational standing and associational standing in *Jacobson*, 957 F.3d at 1204–07, from the case before it. *See Pavek* at *12. Regarding the "competitive standing" discussion, the *Pavek* court noted that "[t]he Eighth Circuit does not yet appear to have addressed this theory of standing[,]" *id.* at*12, n.12, and although it cited several cases, *Townley* was not among them. *See id*. at *12. The district court's erroneous decision in *Pavek* does not undermine the Eleventh Circuit's sound reasoning in *Jacobson* or the district court's standing analysis.

Organizational Plaintiffs further argue that the Ballot Order Statute results in a diversion of resources for purposes of an organizational standing theory. Doc. 2-1 at 30-32. Not so. Their general allegations of expending resources on "Get Out the Vote" assistance and voter persuasion efforts are insufficient to confer organizational standing on the Organizational Plaintiffs. *See* Ex. D at 304

(emphasizing Organizational Plaintiffs "do not put forth any evidence of resources being diverted from other states to Arizona" and did not "offer witness testimony on this element at the hearing"). *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) ("[A] setback to the organization's abstract social interests" is insufficient basis to find standing).

Next, Plaintiffs contend the district court erred in holding that DNC failed to establish associational standing. Doc. 2-1 at 32-35. But the district court correctly reasoned that "Plaintiff DNC has failed to identify its members and their specific alleged injuries; thus, the Court is unable to determine whether 'its members would otherwise have standing to sue in their own right,' which is required for associational standing." Ex. D at 302 (quoting *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)). The district court explained that "the DNC does not allege any specific harm as to those alleged seven unnamed members, nor does it allege that any of the seven are candidates." Ex. D at 302.

An organization's failure to prove that its members "would otherwise have standing to sue in their own right" is fatal to associational standing. *See Jacobson*, 957 F.3d at 1204 (rejecting associational standing for DNC where "it failed to identify any of its members, much less one who will be injured by the ballot statute" and even accepting as true that the Committee's members "include Democratic voters and candidates in Florida, the Committee still has not proved

that one of those unidentified members will suffer an injury"). Given the district court's correct holding that all Plaintiffs failed to establish Article III standing, Plaintiffs are not entitled to an injunction pending appeal. *See Townley*, 722 F.3d at 1133 (movant must make "a clear showing of each element of standing").

B. As the District Court Correctly Held, Plaintiffs' Claims Are Not Justiciable

Plaintiffs also cannot overcome the district court's correct holding that Plaintiffs' claims, and the relief sought, amount to a nonjusticiable political question under the Supreme Court's analysis in *Rucho*, 139 S. Ct. at 2484-2500. Ex. D at 307-11. Plaintiffs' claims here hinge on notions of "fairness" to political parties; in *Rucho*, the Supreme Court "concluded that partisan gerrymandering claims are nonjusticiable political questions because they rest on an initial determination of what is 'fair,' and a secondary determination of how much deviation from what is 'fair' is permissible." Ex. D at 308 (quoting *Rucho*, 139 S. Ct. at 2500). The district court elaborated:

> The crux of Plaintiffs' case is for the Court to determine what is 'fair' with respect to ballot rotation. Indeed, the specific relief requested involves this Court developing a new ballot system for Arizona's state elections. This idea of "fairness" is the precise issue that *Rucho* declined to meddle in.

Ex. D at 309 (internal citations omitted). And as the district court noted, this Court extended *Rucho*'s reasoning "to find that claims related to climate change are

nonjusticiable." *Id*. at 308 (citing *Juliana v. United States*, 947 F.3d 1159, 1173 (9th Cir. 2020)).

Plaintiffs' reliance on pre-*Rucho* case law, Doc. 2-1 at 36-37, does not show that the district court's justiciability analysis was wrong. Indeed, two other courts agree with the district court that *Rucho*'s reasoning logically extends to legal challenges to ballot-ordering laws that seek to vindicate political notions of fairness. *See Jacobson*, 957 F.3d at 1213 ("No judicially discernable and manageable standards exist to determine what constitutes a 'fair' allocation of the top ballot position, and picking among the competing visions of fairness poses basic questions that are political, not legal") (Pryor, J., concurring) (internal citations omitted); *Miller*, No. 1:19-CV-1071-LY at 13 ("Plaintiffs ask this court to determine what is 'fair' with respect to ballot order. This request to determine what is 'fair' is the precise question that the Supreme Court in *Rucho* declined to address . . . to examine the alleged burden on Plaintiffs in this case, the court would have to accept Plaintiffs' version of what is fair, which this court cannot do.").

Plaintiffs want the courts to determine what is a "fair" way of ordering candidates' names on ballots. Decades ago, however, both major political parties and Arizona's Legislature reasonably concluded that relying on the votes cast in each county in the previous gubernatorial election, and providing rotation of names

within each political party, was a fair and non-partisan manner of ordering names on a general election ballot. "These questions of fairness are best left to the legislatures and not the courts." Ex. D at 308 (citing *Rucho*, 139 S. Ct. at 2500). Plaintiffs' failure to show that the district court's justiciability holding was in error renders them unable to show a likelihood of success on the merits of their nonjusticiable claims.

C. Plaintiffs' Amended Complaint Suffers From Other Jurisdictional Defects that Preclude Relief

Additionally, Plaintiffs' claims are not redressable through this lawsuit and the Secretary has Eleventh Amendment immunity. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (determining plaintiffs lack standing where their alleged injury is not "fairly traceable to the challenged conduct" of the defendant); *Culinary Workers Union, Local 226 v. Del Papa*, 200 F.3d 614, 619 (9th Cir. 1999) (noting that the "case and controversy" analysis is similar to the Eleventh Amendment inquiry); ECF No. 26 at 15-18. Under Arizona law, the boards of supervisors of Arizona's 15 counties are responsible for preparing and printing general election ballots. *See* A.R.S. § 16-503. Plaintiffs are not entitled to injunctive relief because the "line of causation" between the Secretary's actions and Plaintiffs' alleged harm must be more than "attenuated." *See Allen v. Wright*, 468 U.S. 737, 757 (1984), *overruled in part on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014); *Jacobson*, 957 F.3d

at 1207-12 (holding that "any injury [plaintiffs] might suffer" from Florida's ballot order statute "is neither fairly traceable to the Secretary nor redressable by a judgment against her because she does not enforce the challenged law" and county boards of supervisors "are responsible for placing candidates on the ballot in the order the law prescribes").

And the Secretary is entitled to Eleventh Amendment immunity because her only connection to the Ballot Order Statute is an indirect one. Plaintiffs' request for an injunction pending appeal implicates the State's "special sovereignty interests" and seeks to impermissibly interfere with Arizona's elections. *See Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 281–82 (1997) (reasoning the "far-reaching and invasive relief" sought weighed in favor of finding that sovereign immunity controlled).

D. Jurisdictional Defects Aside, the Injunction-Pending-Appeal Factors Support Denial of Plaintiffs' Motion

1. Plaintiffs Are Unlikely to Succeed on the Merits

Plaintiffs cannot prevail on their claims because they have not shown they are "prevented from exercising their right to vote or being burdened in any meaningful way." Ex. D at 310. This is true even assuming *arguendo* that Plaintiffs can demonstrate standing *and* overcome the justiciability issues inherent in their claim for "fairness."

The *Anderson/Burdick* framework governs Plaintiffs' challenge to the Ballot Order Statute, and the level of scrutiny depends on the severity of the burden. *Burdick v. Takushi*, 504 U.S. 428, 433-34 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). Courts must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights." *Burdick*, 504 U.S. at 434 (citations omitted). Restrictions that are "generally applicable, evenhanded, politically neutral, and [that] protect the reliability and integrity of the election process" have repeatedly been upheld as constitutional. *Pub. Integrity All., Inc. v. City of Tucson*, 836 F.3d 1019, 1024-25 (9th Cir. 2016) (citation and alterations omitted)). If there is no burden, the State will not be called upon to justify it. *Ariz. Libertarian Party v. Reagan*, 798 F.3d 723, 736 n. 12 (9th Cir. 2015).

As a threshold matter, the record below does not support Plaintiffs' allegation that there is, in fact, a primacy effect in Arizona's general elections. *See supra*, Section II(B); *Hargett*, 767 F.3d at 551 ("[T]here is a factual dispute as to whether ballot position sways voters, and if so, how much"); *New Alliance Party v. N.Y. State Bd. of Elections*, 861 F. Supp. 282, 290 (S.D.N.Y. 1994) ("Position bias

is a disputable fact because its existence is dependent upon the circumstances in which it operates."). Putting aside that contested fact—which is critical to Plaintiffs' claims—the *Anderson/Burdick* framework requires only a showing that the law serves a legitimate state interest because the burden here is minimal, at best. *See Burdick*, 504 U.S. at 434.

The Ballot Order Statute easily satisfies this test. It is a politically-neutral statute that was enacted with broad, bipartisan support, and applies equally to all voters. *See* Ex. 2. Throughout its 40-year history, the statute has protected the reliability and integrity of the election process by establishing logical, efficient, and manageable rules to determine the order in which candidates' names appear on a general election ballot, at times resulting in Democratic candidates being listed first, and at other times Republican candidates. *See* Ex. B at 202. Plaintiffs cannot establish a meaningful—let alone severe—burden under the Equal Protection Clause or on Plaintiffs' right to vote, and Arizona's interest in enforcing the Ballot Order Statute outweighs any burden on Plaintiffs. *See Alcorn*, 826 F.3d at 716–19 (applying *Anderson/Burdick* to ballot order statute and concluding mere ballot order "does not restrict candidate access to the ballot or deny voters the right to vote for the candidate of their choice" and that the law "serves the important state interest of reducing voter confusion and speeding the voting process").

2. Plaintiffs Have Not Established Irreparable Harm

Arizona's Ballot Order Statute will not irreparably harm Plaintiffs. It is well-established that a mere "possibility of irreparable harm" does not justify enjoining enforcement of a statute. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). As the district court reasoned, Plaintiffs' alleged injuries "that their votes for Democratic candidates are diluted whenever Republican candidates are listed first . . . are not actual and concrete." Ex. D at 310. A "candidate's electoral loss does not, by itself, injure those who voted for a candidate. Voters have no judicially enforceable interest in the outcome of an election." *Jacobson*, 957 F.3d at 1202 (citing *Raines v. Byrd*, 521 U.S. 811, 819 (1997)).

The Organizational Plaintiffs allege they would suffer irreparable harm, speculating that a second-place ballot position on some ballots would decrease their ability to elect Democratic candidates, including "the Democratic candidate for Senate in the 2020 election" Mark Kelly. Doc. 2-1 at 14.[9] This also is not a judicially cognizable harm, much less an irreparable one.

The district court's determination that Plaintiffs did not show they suffered a judicially-cognizable harm is entitled to deference, particularly given the rushed review the Plaintiffs are requesting. *See Sw. Voter Registration Educ. Project v.*

[9] While Plaintiffs assert that candidate Mark Kelly's electoral chances are reduced by the Ballot Order Statute, the candidate is not a party to this lawsuit, and Plaintiffs' assertion is nothing more than speculation.

Shelley, 344 F.3d 914, 918 (9th Cir. 2003) (stating this Court's review of a ruling on request for injunction "is limited and deferential"). And as discussed above, Plaintiffs' allegation of a primacy effect is fact-intensive and was rigorously contested in the evidentiary hearing before the district court.

It is undisputed that *one* candidate must be listed first on the ballot. Plaintiffs' complaint is with how that order is determined. However, the process Plaintiffs requested in their preliminary injunction motion before the district court is impossible for the machines currently in use in Arizona.[10] *See* Doc. 30-2 at ¶ 4. Thus, Plaintiffs have altered the nature of their requested relief. Ex. 1 at 0001-0004. But it is far from clear that random selection of a candidate to receive the first position on the ballot by lottery—which could still result in Republican candidates being listed first on the majority of ballots in Arizona—would *still* not create the alleged harm of giving an "advantage" to the first-listed candidate. Plaintiffs have not shown the concrete, particularized harm required to warrant a court order enjoining the Ballot Order Statute and implementing an entirely new and untested method of listing candidates on Arizona's ballots. The Ballot Order Statute has allowed Democratic and Republican candidates to obtain the first

[10] This is one of the reasons that working in conjunction with county election officials, as the legislature did when drafting the Ballot Order Statute, is so important. County elections officials, not the Secretary, are directly responsible for printing and counting ballots, and understand the technical and logistical requirements and capabilities of the different machines in use in each county.

position on the ballot in various counties for 40 years. It is the quintessential "neutral, even-handed regulation" regularly upheld by courts, *see Pub. Integrity All., Inc.*, 836 F.3d at 1024-25, not an irreparable harm to Plaintiffs.

3. The Balance of Equities and Public Interest Do Not Support an Injunction Pending Appeal

The balance of equities weigh strongly in favor of maintaining the Ballot Order Statute, rather than overriding the legislature's measured judgment crafted in conjunction with a bi-partisan group of election administrators to ensure the orderly administration of elections in Arizona. Concern with modifying election laws are heightened as the election draws near, *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006). "Confidence in the integrity of our electoral processes is essential to the function of our participatory democracy." *Id.* at 4.

This is particularly true when, as here, the law imposes no burden on Plaintiffs. Unlike the cases cited by Plaintiffs that guaranteed a specific party or the incumbent a top slot on the ballot, Arizona's neutral Ballot Order Statute allows either party to obtain the first position in any county. Indeed, only Democratic candidates have ever enjoyed the first position on all ballots in the state in the last thirty years. Ex. D at 202. And even in counties where the Republican candidate appears first, the Democratic candidate appears directly below that candidate. Moreover, in partisan races (the only races in which the Ballot Order Statute applies), it is clearly marked on the ballot which candidate

belongs to which party. A.R.S. § 16-502(C). Voters who prefer to vote for Democratic candidates can easily vote for a Democratic candidate if they wish, whether that candidate appears first or second on the ballot. That a small number of voters *may* choose to vote for the first candidate is not a constitutionally cognizable burden any more than voters who may choose to vote for only one party, non-incumbents, or by flipping a coin. *See Alcorn*, 826 F.3d at 719 ("[A]ccess to a preferred position on the ballot . . . is not a constitutional concern.").

The Secretary undeniably has an interest in ensuring that all ballots are "comprehensible and manageable" with rules that were decided in a non-partisan manner before the election. *See New Alliance Party,* 861 F. Supp. at 296. The Ballot Order Statute provides a method for ordering candidates on general election ballots that is facially-neutral, manageable, and cost-efficient. *See Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 191 (1999) ("States … have considerable leeway to protect the integrity and reliability of … election processes generally"). Random ordering would force voters to spend more time to "decipher lengthy, multi-office, multi-candidate ballots to find their preferred candidates." *See Alcorn*, 825 F.3d at 719-720 (noting that election officials have a good reason for designing ballots that minimize confusion).

And contrary to Plaintiffs' contention, there is harm to the State whenever it "is enjoined by a court from effectuating statutes enacted by representatives of its people[.]" *Coal. for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997) ("[A] state suffers irreparable injury whenever an enactment of its people or their representatives is enjoined."). Allowing the Ballot Order Statute to stay in effect while this lawsuit is pending is thus in the public interest. *See Virginian Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515, 552 (1937) (observing that legislation "is in itself a declaration of the public interest."). The equities and public interest favor the Secretary.

IV. Conclusion

For the foregoing reasons, Plaintiffs' emergency motion for injunction pending appeal should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This Response contains 5,095 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6). I certify that this Response complies with the word limit in Fed. R. App. P. 27(d)(2)(A), and this certificate is filed pursuant to Fed. R. App. P. 32(g)(1).

/s/ *Kara Karlson*

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 17, 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/ *Kara Karlson*