Appeal No. 20-16301

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIAN MECINAS, ET AL.,

Plaintiffs-Appellants,

v.

KATIE HOBBS, THE ARIZONA SECRETARY OF STATE,

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Arizona
No. 2:19-cv-05547-DJH
Hon. Diane J. Humetewa

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TABLE OF CONTENTS

Page

INTRODUCTION 1

ARGUMENT 2

I. Plaintiffs have three independent bases for standing. 2

A. Competitive Standing 2

B. Associational Standing 10

C. Organizational Standing 12

II. The Secretary is the appropriate defendant. 14

A. The claims are traceable to and redressable by the Secretary. 14

B. The case fits within the well-established *Ex parte Young* exception to Eleventh Amendment immunity. 17

III. The claims are justiciable. 20

A. The district court's conflation of the merits with justiciability is legally unsupportable and would lead to absurd results. 20

B. The purported similarities between this case and *Rucho* do not hold water. 23

C. Plaintiffs' proposed remedy has no bearing on justiciability and is supported by precedent. 24

IV. The Complaint sufficiently states a claim for relief. 27

CONCLUSION 29

CERTIFICATE OF COMPLIANCE 31

CERTIFICATE OF SERVICE 32

TABLE OF AUTHORITIES

CASES

Anderson v. Celebrezze,
460 U.S. 780 (1983).....21

Ariz. Democratic Party v. Reagan,
No. CV-16-03618-PHX-SPL, 2016 WL 6523427 (D. Ariz. Nov. 3, 2016).....16, 17

Ariz. Libertarian Party, Inc. v. Bayless,
351 F.3d 1277 (9th Cir. 2003).....8, 15, 16

Burdick v. Takushi,
504 U.S. 428 (1992).....21, 27

Chaudhry v. City of L.A.,
751 F.3d 1096 (9th Cir. 2014).....7

Clough v. Guzzi,
416 F. Supp 1057 (D. Mass. 1976).....27, 28

Coal. to Defend Affirmative Action v. Brown,
674 F.3d 1128 (9th Cir. 2012).....18

Colwell v. Dep't of Health & Hum. Servs.,
558 F.3d 1112 (9th Cir. 2009).....29

Crawford v. Marion Cnty. Election Bd.,
553 U.S. 181 (2008).....23

Cressman v. Thompson,
719 F.3d 1139 (10th Cir. 2013).....18

Democratic Nat'l Comm. v. Ariz. Sec'y of State,
CV-16-01065-DLR, 2017 WL 840693 (D. Ariz., Mar. 3, 2017).....15, 16

Democratic Nat'l Comm. v. Reagan,
329 F. Supp. 3d 824 (D. Ariz. 2018), *vacated on other grounds*, *Democratic Nat'l Comm. v. Hobbs*, 948 F.3d 989 (9th Cir. 2020).....10

Diamond v. Charles,
476 U.S. 54 (1986).....18

Digit. Recognition Network, Inc. v. Hutchinson,
803 F.3d 952 (8th Cir. 2015).....18

Drake v. Obama,
664 F.3d 774 (9th Cir. 2011).....3, 5

Ex parte Young,
209 U.S. 123 (1908).....14, 18

Gill v. Whitford,
138 S. Ct. 1916 (2018).....7, 8

Graves v. McElderry,
946 F. Supp. 1569 (W.D. Okla. 1996).....9

Green Party of Tenn. v. Hargett,
767 F.3d 533 (6th Cir. 2014).....9

Huskey v. City of San Jose,
204 F.3d 893 (9th Cir. 2000).....6

Jacobson v. Fla. Sec'y of State,
974 F.3d 1236 (11th Cir. 2020).....12, 17

Kautenburger v. Jackson,
333 P.2d 293 (Ariz. 1958).....9

L.A. Haven Hospice, Inc. v. Sebelius,
638 F.3d 644 (9th Cir. 2011).....25

Lujan v. Defs. of Wildlife,
504 U.S. 555 (1992).....2, 13

Mann v. Powell,
314 F. Supp. 677 (N.D. Ill. 1969).....24

Mann v. Powell,
398 U.S. 955 (1970).....9, 24, 25

Maya v. Centex Corp.,
658 F.3d 1060 (9th Cir. 2011) 13

McLain v. Meier,
637 F.2d 1159 (8th Cir. 1980) 9, 28

MGIC Indem. Corp. v. Weisman,
803 F.2d 500 (9th Cir. 1986) 15

Mi Familia Vota v. Abbott,
977 F.3d 461 (5th Cir. 2020) 19

Nat'l Council of La Raza v. Cegavske,
800 F.3d 1032 (9th Cir. 2015) 7, 11, 13

Nelson v. Warner,
472 F. Supp. 3d 297 (S.D. W.Va. 2020).....9, 26

Nelson v. Warner,
477 F. Supp. 3d 486 (S.D. W.Va. 2020).....5, 6, 11

Owen v. Mulligan,
640 F.2d 1130 (9th Cir. 1981) 2, 3, 4, 8

Pavek v. Donald J. Trump for President, Inc.,
967 F.3d 905 (8th Cir. 2020).....9, 26

Pavek v. Simon,
467 F. Supp. 3d 718 (D. Minn. 2020).....3, 5, 13

Pub. Integrity All., Inc. v. City of Tucson,
836 F.3d 1019 (9th Cir. 2016) 26, 27

Renee v. Duncan,
686 F.3d 1002 (9th Cir. 2012) 16

Rucho v. Common Cause,
139 S. Ct. 2484 (2019).....passim

Russell v. Lundergan-Grimes,
784 F.3d 1037 (6th Cir. 2015) 18

Sangmeister v. Woodard,
565 F.2d 460 (7th Cir. 1977) 9, 25

Schulz v. Williams,
44 F.3d 48 (2d Cir. 1994) 5

Soltysik v. Padilla,
910 F.3d 438 (9th Cir. 2018) 22, 26, 28

Tex. Democratic Party v. Benkiser,
459 F.3d 582 (5th Cir. 2006) 4, 5, 11

Tex. Democratic Party v. Hughs,
997 F.3d 288 (5th Cir. 2021) 19

Tex. Democratic Party v. Hughs,
No. 20-50667, 2021 WL 2310010 (5th Cir. June 4, 2021) 19

The Wis. Assembly Democratic Campaign Comm. v. Gill,
No. 3:18-cv-763-JPD (W.D. Wis. Sept. 14, 2018).....7

Townley v. Miller,
722 F.3d 1128 (9th Cir. 2013) 3, 6

Va. Off. for Prot. & Advoc. v. Stewart,
563 U.S. 247 (2011).....19

Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.,
535 U.S. 635 (2002).....19

STATUTES

A.R.S. § 16-142(A)(1) 14

A.R.S. § 16-452(A).....14, 15

A.R.S. § 16-452(A)-(C) 16

A.R.S. § 16-452(C) 14

A.R.S. § 16-503.....15

OTHER AUTHORITIES

First Amendment.....8, 9

Eleventh Amendment.....9, 14, 17

Fed. R. Civ. P. 65(d)(2)(C) 16

John Harrison, *The Political Question Doctrines*, 67 Am. U. L. Rev. 457 (2017).....21

INTRODUCTION

The district court improperly conflated the pleading and merits stages of this case, ignoring the complaint's factual allegations and binding precedent. The Secretary doubles down on those errors.

The Secretary's argument that Plaintiffs' claims are beyond judicial review rests on four main contentions, none of which withstands scrutiny. First, her insistence that Plaintiffs—including the Democratic National Committee ("DNC") and DSCC—lack standing to challenge a law they allege systematically disadvantages them and their candidates fundamentally mischaracterizes the nature of those organizations, misunderstands their asserted injury, and misreads binding precedent. Second, her claim that she is not the appropriate defendant has been previously—and appropriately—rejected. Third, the Secretary's contention that *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019)—in which the Court concluded, after decades of trying, that *partisan gerrymandering* presented the "rare circumstance" of nonjusticiability—somehow rendered *ballot order* cases nonjusticiable disregards both *Rucho*'s fundamental rationale and the host of federal cases that have successfully adjudicated ballot order claims. The Secretary's *Rucho* argument would also require courts to become hopelessly entangled with the merits before determining whether a case is justiciable in the first place. That same rush to adjudicate the merits and disregard for precedent animates the Secretary's

unfounded contention that Plaintiffs failed to state a claim for relief.

None of the Secretary's arguments provides a sound basis for affirming the district court. This Court should reverse.

ARGUMENT

I. Plaintiffs have standing.

At the very least, both DNC and DSCC ("Plaintiffs") have standing. The Secretary's insistence that the Ballot Order Statute "has not injured them" (Defendant-Appellee's Answering Brief ("Resp.") 28) bypasses the actual allegations in the complaint and relies instead on evidence in the preliminary injunction record and caselaw resolved on the merits. *See* Resp. 30. But it is well established that, at the pleading stage, "general factual allegations of injury resulting from the defendant's conduct may suffice." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). The complaint supports three independent bases for standing—competitive, associational, and organizational. The district court's conclusion to the contrary should be reversed.

A. Competitive Standing

The Secretary's and district court's erroneous contention that competitive standing only exists when a candidate challenges the inclusion of a rival on the ballot disregards binding precedent. In *Owen v. Mulligan*, this Court held that both "[a 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." 640 F.2d 1130, 1133 (9th Cir. 1981) (emphasis added). Both *Drake v. Obama*, 664 F.3d 774, 783 (9th Cir. 2011), and *Townley v. Miller*, 722 F.3d 1128, 1135-36 (9th Cir. 2013), reaffirmed that holding. Plaintiffs allege the same injury here. 2-ER-287-88 ¶¶ 24-25 (alleging Statute gives opponents "an unfair, arbitrary, and artificial electoral advantage").

The Secretary attempts to distinguish *Owen* in three ways, but none survives examination. Resp. 34-35. First, the Secretary observes that the *Owen* defendants "admitted they failed to follow their own procedures" in setting mailing rates, Resp. 34, but she does not explain why that matters. An admission of wrongdoing by a defendant does not create a cognizable injury, nor does *Owen* suggest as much.

Second, the Secretary notes that a candidate was among the plaintiffs in *Owen*, Resp. 34, but the Court held that *both* the candidate "and the Republic[an] Committee members" had standing based on their shared competitive injury. 640 F.2d at 1133.[1] This makes sense: political parties act in elections through candidates. A law that makes it harder for a candidate to get elected hurts the candidate *and* their party. *See Pavek v. Simon*, 467 F. Supp. 3d 718, 743 (D. Minn. 2020) (citing *Owen*

[1] Even the Secretary admits —as she must—that "the political committees also had standing" in *Owen.* Resp. 34. Though she attempts to explain away that holding, her focus on factual circumstances outside the Court's standing analysis skirts the Court's reasoning for finding political party standing.

for holding that the injury "that results from the purported illegal structuring of a competitive election" is inflicted on both candidates and "the political parties who seek to elect those candidates"). As *Owen* makes clear, there is no basis to find that this injury is the candidate's alone.

Third, the Secretary asserts that the competitive injuries alleged in *Owen* were "specific and measurable," Resp. 35, but she only gets there by obscuring the opinion. While the mailing rate discrepancy may have been measurable monetarily, the injury that this Court found conferred standing was the resulting *electoral disadvantage*. 640 F.2d at 1132. The plaintiffs did not offer evidence quantifying the likelihood of a lost election as a result of the rate differential, nor did the defendant define the injury in those terms. To the contrary: "The Postal Service assert[ed] that the *only* threatened injury to the plaintiffs *is 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*. (emphases added). *Owen*'s entire standing discussion concerned whether that type of injury was, as the Postal Service argued (and the Secretary argues here), "too remote, speculative and unredressable to confer standing." *Id.* This Court repudiated that argument, noting it "has been uniformly rejected." *Id.* at 1132-33 (collecting cases); *see also Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 587 (5th Cir. 2006) ("While power may be less tangible than money, threatened loss of that power is still a concrete and particularized injury

sufficient for standing purposes."). *Owen* affirms the broadly accepted proposition that where one political party is given preferential treatment, the resulting electoral disadvantage to the unfavored party confers competitive standing.

That conclusion is fortified by subsequent cases. In *Drake*, this Court reaffirmed that the "potential loss of an election' [is] an injury-in-fact." 664 F.3d at 783 (quoting *Owen*, 640 F.2d at 1132-33). The Secretary tries to distinguish *Drake* by focusing on the fact that there the Court found the candidate-plaintiffs lacked standing because they were no longer candidates. Resp. 33. But that has no bearing here, where political party Plaintiffs seek "to enjoin an ongoing practice" that they allege will "produce[] an unfair advantage in the next election." *Drake*, 664 F.3d at 783 n.3.

Multiple other courts have cited *Owen* to find that political parties have competitive standing to challenge election laws—including to challenge ballot order statutes. *See, e.g.*, *Benkiser*, 459 F.3d at 586-87 n.4 (citing *Owen* among "[v]oluminous persuasive authority" showing that a political party is injured when its "candidate's chances of victory" are reduced); *Pavek*, 467 F. Supp. at 743 (same, in ballot order challenge); *Nelson v. Warner*, 477 F. Supp. 3d 486, 495–97 (S.D. W.Va. 2020) (same); *see also Schulz v. Williams*, 44 F.3d 48, 53 (2d Cir. 1994) (holding political party had standing to challenge election law under "well-

established concept of competitors' standing").[2]

About *Townley*, 722 F.3d at 1135, which again cited to the expansive language in *Owen* to describe this Court's competitive standing doctrine, *id.* at 1136, the Secretary says very little. In response to Plaintiffs' extensive analysis of how the district court misconstrued that opinion, Appellants' Opening Brief ("Op. Br.") 22-25, the Secretary offers a block quote from the district court and states simply that it "correctly applied" the case. Resp. 32-33. In fact, the district court grossly misread *Townley*. Nothing in *Townley* indicates that this Court intended to limit the competitive standing doctrine to *only* instances involving the inclusion of a candidate on the ballot. *See* Op. Br. 23. By confusing the necessary and sufficient conditions of competitive standing, the district court "engage[d] in the logical fallacy of *post hoc,* literally, 'after this, therefore because of this.'" *Huskey v. City of San Jose*, 204 F.3d 893, 899 (9th Cir. 2000) (citing *Choe v. INS*, 11 F.3d 925, 938 (9th Cir. 1993)). And, of course, the district court's narrow reading is impossible to reconcile with *Owen*—a three-judge opinion *Townley* could not overrule.

Against the weight of this precedent, the Secretary prematurely pivots to the merits to try to distinguish this case. Based on her factual conclusion that the Statute

[2] The Secretary uses almost entirely merits-based arguments to attempt to distinguish these cases and other successful ballot order challenges. *See* Resp. 38-39 (attempting to distinguishing *Nelson* by discussing expert testimony rather than allegations of the complaint).

"does not 'discriminate based on partisan affiliation,'" Resp. 33, the Secretary contends Plaintiffs lack standing to challenge it in the first place. But Plaintiffs alleged that the Statute *does* discriminate against them to their disadvantage, 2-ER-284, 293 ¶¶ 15, 44-45, and those allegations must be taken as true, *Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1040 (9th Cir. 2015). As this Court has unequivocally held, Article III standing "in no way depends on the merits of the plaintiff's contention that particular conduct is illegal." *Chaudhry v. City of L.A.*, 751 F.3d 1096, 1109 (9th Cir. 2014) (collecting cases). Plaintiffs' allegations are sufficient to establish competitive standing.

The Secretary next argues that all of this precedent was rendered irrelevant by *Gill v. Whitford*, 138 S. Ct. 1916 (2018). Resp. 35. But *Gill* was a partisan gerrymandering case that reflects the unique challenges inherent in those cases. And the Secretary ignores its plaintiffs were individual voters, not political party entities. Indeed, the four justices who concurred in *Gill* recommended that the voter plaintiffs *cure* their standing defects by *adding a political party entity* as a plaintiff, *see* 138 S. Ct. at 1938-39 (Kagan, J., concurring)—which they did on remand. *See* Compl., *The Wis. Assembly Democratic Campaign Comm. v. Gill*, No. 3:18-cv-763-JPD (W.D. Wis. Sept. 14, 2018).

The Secretary also misses the mark when she contends that, because *Gill*'s voter plaintiffs had to prove a district-specific injury, Plaintiffs can only demonstrate

standing here by "show[ing] that the primacy effect has changed (or will imminently change) the actual outcome of a partisan election." Resp. 29. She does not explain this logical leap; nor does *Gill*. In her concurrence, Justice Kagan emphasized that the majority's standing analysis was specific to the voters' claims of vote dilution, while partisan gerrymanders "may infringe the First Amendment rights of association held by parties, other political organizations, and their members," which "would occasion a different standing inquiry. . . ." *Gill*, 138 S. Ct. at 1938 (Kagan, J., concurring). Notwithstanding the Secretary's repeated mischaracterization of Plaintiffs' claims, this appeal does not involve vote dilution. *See generally* 2-ER-278-300 (political party entities make no vote dilution claim); *see also* Op. Br. (making no mention of vote dilution). *Gill* thus has no application here. *See Gill*, 138 S. Ct. at 1939 (Kagan, J., concurring) ("[W]hen the harm alleged is not district specific, the proof needed for standing should not be district specific either.").

Notably, the Secretary does not point to any case in which a plaintiff challenging an election law had to establish that the outcome of an election would have been different but for the challenged law. *Accord Ariz. Libertarian Party, Inc. v. Bayless*, 351 F.3d 1277, 1280 (9th Cir. 2003) (holding plaintiff had standing to challenge primary procedures and emphasizing "[i]t is not necessary for the plaintiffs to show that the primary system affected the outcome of any contested races"). Neither *Owen*, 640 F.2d at 1132, nor any of the long string of ballot order

cases has imposed such a requirement. *See, e.g.*, *Mann v. Powell*, 398 U.S. 955 (1970) (affirming injunction of ballot order statute without imposing election outcomes requirement); *Kautenburger v. Jackson*, 333 P.2d 293, 294 (Ariz. 1958) (same); *Sangmeister v. Woodard*, 565 F.2d 460, 463 (7th Cir. 1977) (same); *McLain v. Meier*, 637 F.2d 1159, 1159 (8th Cir. 1980) (holding ordering system unconstitutional where plaintiff-candidate received only 1.5% of vote); *Green Party of Tenn. v. Hargett*, 767 F.3d 533, 544 (6th Cir. 2014) (holding political parties had standing to challenge ballot order statute where they supported candidates who were "affected by" and "subject to" the statute); *Pavek v. Donald J. Trump for President, Inc.*, 967 F.3d 905, 907 (8th Cir. 2020) (holding political committees (including DSCC) had standing to challenge ballot order statute "insofar as it unequally favors supporters of *other* political parties"); *Graves v. McElderry*, 946 F. Supp. 1569, 1579 (W.D. Okla. 1996) (finding that, "although the impact may be slight, citizens' [constitutional] rights under the First and Fourteenth Amendments are directly infringed" by ordering statute that favored similarly situated candidates over others); *Nelson v. Warner*, 472 F. Supp. 3d 297, 307 (S.D. W.Va. 2020) (holding Democratic Party had standing to challenge ballot order statute because it "will harm the electoral prospects" of its candidates).

Under the Secretary's logic, Arizona could give Republican candidates in Maricopa County five extra percentage points in an election, and the Democratic

Party would have no standing to sue if it could not show its candidates would come within five points. But the head start is the injury, and the disfavored party has to work harder to try to overcome the state-inflicted advantage. That is the injury alleged here, 2-ER-287-88 ¶¶ 24-25, and it is sufficient to establish standing without also needing to show that the Statute was outcome-determinative in an election.

Finally, the Secretary argues that Plaintiffs are not injured because sometimes, in some counties, Democrats are listed first. Resp. 36-37. But Plaintiffs do not allege they are disadvantaged in every single race; it is that they consistently and systematically receive a net disadvantage in elections across the state. 2-ER-282-83 ¶ 12. If anything, the Secretary's argument supports finding that a political party, rather than an individual candidate, has standing—because the party's harm across elections transcends any one candidate's harm in any one election.[3]

B. Associational Standing

The Secretary acknowledges the "long line of precedent finding candidates have standing" to challenge election laws that advantage their opponents, Resp. 34, but fails to recognize an equally long line establishing that political parties have associational standing via their candidates. *See, e.g.*, *Democratic Nat'l Comm. v.*

[3] Although the Secretary disputes that Democrats are systematically disadvantaged, Resp. 37 n.9, that merits-based argument is premature and premised on her misleading characterization of the preliminary injunction record. It is not the amount of the electoral advantage that determines the injury, but its unequal distribution in favor of Plaintiffs' opponents. 2-ER-82-83 ¶¶ 10-12.

Reagan, 329 F. Supp. 3d 824, 841-42 (D. Ariz. 2018), *vacated on other grounds*, *Democratic Nat'l Comm. v. Hobbs*, 948 F.3d 989 (9th Cir. 2020) (holding DNC and DSCC had associational standing based on harm to affiliated voters and candidates); *Nelson*, 477 F. Supp. 3d at 495–97 (holding Democratic Party had associational standing to challenge law allegedly harming candidates' electoral prospects); *Benkiser*, 459 F.3d at 586-88 (holding Texas Democratic Party "has associational standing on behalf of its candidate"). For good reason: political parties and candidates both are harmed when they must compete in elections that are structured to favor their opponents. *See* 2-ER-297 ¶ 61.

In contending that Plaintiffs lack standing because they failed to identify an injured member, the Secretary gets both the law and facts wrong. An organization need not identify members where the injury is clear and their identity is not relevant to understand or address the injury. *Nat'l Council of La Raza*, 800 F.3d at 1041. Nevertheless, these Plaintiffs *did* identify members who would be harmed. *See* 2-ER-282, 292 ¶¶ 13, 40 (identifying Democratic candidate for 2020 Senate race as injured member); 2-ER-292 ¶¶ 38-39 (alleging harm from Statute "will be particularly felt" in upcoming CD-1, CD-2, and CD-6 races).[4]

The remainder of the Secretary's arguments flow from her persistent belief in

[4] The candidates were described in generic terms because the complaint was filed nine months before the primary.

the district court's flatly erroneous contention that "the Democratic Party is not a Plaintiff in this case." Resp. 42 (citing 1-ER-16). *Yes it is*. 2-ER-283 ¶ 13 (stating Plaintiff DNC is "the official national party committee for the Democratic Party"); 2-ER-287-88 ¶ 24-25 (alleging DNC and DSCC are official committees of the Democratic Party and each has the mission of electing its candidates); 2-ER-287-88 ¶ 24 (referring to DNC's "candidate members" as "Democratic Party candidates"). The argument was not raised below, but the DNC is the operative arm of the Democratic Party, and state parties (such as the Arizona Democratic Party) are only considered part of the Party if and when recognized by the DNC. Op. Br. 28-29. The Secretary ignores Plaintiffs' *description of their own organizations* in favor of a citation to *Jacobson v. Florida Secretary of State*, 974 F.3d 1236 (11th Cir. 2020). *Jacobson*'s conclusion was not only erroneous, it was based on the particular evidence in the record after a trial on the merits, and thus has no bearing at the pleadings stage. *See* Op. Br. 28-29. Plaintiffs adequately pled associational standing.

C. Organizational Standing

The Statute frustrates Plaintiffs' mission "to elect local, state, and national candidates of the Democratic Party" and forces them to divert resources away from other mission-critical goals. 2-ER-287-88 ¶¶ 24-25; *see also* 2-ER-286-89, 291, 292 ¶¶ 23-25, 27, 31-33, 41. It systematically benefits Republicans and injures Democratic candidates and the Party's statewide prospects, 2-ER-284-88 ¶¶ 21-25,

42, requiring Plaintiffs "to expend and divert additional funds and resources on GOTV, voter persuasion efforts, and other activities in Arizona, at the expense of [their] efforts in other states, to combat the effects of the . . . Statute." 2-ER-287-88 ¶ 24 (DNC); *see also* 2-ER-88 ¶ 25 (DSCC). These allegations amply establish standing. *See Lujan*, 504 U.S. at 561; *Nat'l Council of La Raza*, 800 F.3d at 1040; *see also Pavek*, 467 F. Supp. 3d at 740 (finding injury where DSCC alleged ballot order statute "requires them to divert resources into Minnesota that would normally be spent in other states").

Instead of crediting these allegations as it should have on a motion to dismiss, the district court faulted Plaintiffs for not "put[ting] forth any evidence of resources being diverted from other states to Arizona." 1-ER-19. This was not required at this stage, but it also does not accurately describe the preliminary injunction record in which Plaintiffs did put forth this evidence. *See* 1-ER-52-57 (DNC declaration); 1-ER-60-63 (DSCC declaration). The Secretary does not dispute the district court's clear factual error in asserting that the evidence did not exist, but claims that the declarations "did not add" anything important, such as "what [Plaintiffs] would do differently in their day-to-day operations in counties" listing Republicans first. Resp. 45. The Secretary offers no citation for the proposition that this level of detail is necessary. *But see Maya v. Centex Corp.*, 658 F.3d 1060, 1068 (9th Cir. 2011) (stating "general factual allegations of injury resulting from the defendant's

conduct" are sufficient to establish standing at pleading stage). By disregarding the allegations of the complaint and instead demanding evidence—let alone certain types of evidence—the court below erred.

II. The Secretary is the appropriate defendant.

The Secretary next urges this Court to adopt new interpretations of Arizona law, the Eleventh Amendment, and *Ex parte Young*, 209 U.S. 123 (1908). These arguments have been correctly rejected in the past and should be again.

A. The claims are traceable to and redressable by the Secretary.

Plaintiffs' injuries are directly traceable to and redressable by the Secretary. As Arizona's "chief state election officer," A.R.S. § 16-142(A)(1), the Secretary oversees Arizona's elections and "prescribe[s] rules to achieve and maintain the maximum degree of correctness, impartiality, uniformity and efficiency on the procedures for early voting and voting, and of producing, distributing, collecting, counting, tabulating and storing ballots." A.R.S. § 16-452(A). She also promulgates regulations to county officials in the Election Procedures Manual, which carries the force of law. A.R.S. § 16-452(C) ("A person who violates any rule adopted [by the Secretary in the Manual] is guilty of a class 2 misdemeanor."). The Secretary's Manual contains detailed instructions on ballot design and expressly requires

counties to order candidates' names on ballots in accordance with the Statute.[5]

Although county officials *print* the ballots under A.R.S. § 16-503, they have no discretion in ordering candidate names. They are bound to follow the Statute and the Secretary's Manual enforcing the Statute. A.R.S. § 16-452. This Court has previously found that this makes claims traceable to the Secretary. *Bayless*, 351 F.3d at 1281 (holding challenge to Arizona election law was traceable to Secretary where Manual's provisions were "applicable to and mandatory for" challenged practice). The Secretary's emphasis on the fact that counties must "prepare and print" ballots under A.R.S. § 16-503 ignores that A.R.S. § 16-452(A) separately assigns her authority over promulgating rules for "producing [and] distributing . . . ballots," which implicates the Statute just as much as (if not more than) the ministerial act of pressing the print button. *Democratic Nat'l Comm. v. Ariz. Sec'y of State*, CV-16-01065-DLR, 2017 WL 840693, at *3 (D. Ariz. Mar. 3, 2017) (holding the Secretary was appropriate defendant in challenge to Arizona election laws and rejecting her argument to the contrary as reflecting "a misconception" of her role).

Redressability is likewise satisfied. A plaintiff's burden to demonstrate

[5] The Manual is housed on the Secretary's website. Ariz. Sec'y of State's Office, *2019 Elections Procedures Manual* (Dec. 2019), https://azsos.gov/sites/default/files/2019_ELECTIONS_PROCEDURES_MANUAL_APPROVED.pdf at 145-48. Plaintiffs cited to these portions of the Manual in the proceedings below, and the Manual is a matter of public record subject to judicial notice. *See, e.g., MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986).

redressability is "relatively modest." *Renee v. Duncan*, 686 F.3d 1002, 1013 (9th Cir. 2012). They need only show that their requested remedy "would amount to a significant increase in the likelihood that the plaintiff would obtain relief that directly redresses the injury suffered." *Id.* (citations omitted). The Secretary's contention that she cannot "control the order in which candidates appear on the ballot," Resp. 47 (quoting *Jacobson*, 974 F.3d at 1236), is belied by her express mandate to "prescribe rules" for "producing [and] distributing" ballots in accordance with the Statute, the violation of which carries a criminal penalty. A.R.S. § 16-452(A)-(C). Should the Secretary direct counties to order ballots pursuant to a court order, they would have no choice but to follow her instructions. The Secretary has not claimed to the contrary, nor identified any contrary precedent. *See Ariz. Democratic Party v. Reagan*, No. CV-16-03618-PHX-SPL, 2016 WL 6523427, at *7 (D. Ariz. Nov. 3, 2016) ("The mere possibility that a county might not follow the Secretary's directive is insufficient to show that an injunction against her would not accord the Committees the complete relief they seek."); *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). These principles are consistent with the analyses of multiple courts that have rejected similar arguments—including this Court. *E.g.*, *Bayless*, 351 F.3d at 1280-81 (affirming holding that Secretary's broad responsibility to oversee elections made her correct defendant in facial challenge to Arizona election law); *Democratic*

Nat'l Comm., 2017 WL 840693, at *4 (same); *Ariz. Democratic Party*, 2016 WL 6523427, at *6 (same).

The Secretary ignores these cases, leaning exclusively on the Eleventh Circuit's analysis about the duties of the *Florida* Secretary of State. Resp. 46-47 (citing *Jacobson*, 974 F.3d at 1253-54). The Secretary does not explain why this Court should disregard binding precedent regarding *her* roles and duties in favor of an out-of-circuit opinion about a different state's official in a different election regime. Moreover, *Jacobson*'s holding that Florida's ballot order statute was not traceable to or redressable by the Florida Secretary depended on the fact that the Florida Secretary is responsible *only* for certifying nominees, not overseeing ballots (in contrast to here), 974 F.3d at 1253, and evidentiary findings in that case after a trial, *see id.* (holding plaintiffs "offered no contrary evidence to establish that the Secretary plays any role" in ballot order). In short, *Jacobson* does not supersede the opinions of multiple in-circuit courts that have decided—in the specific context of *Arizona* law—that Arizona's Secretary of State is the correct defendant here.

B. The case fits within the *Ex parte Young* exception to Eleventh Amendment immunity.

This case is a textbook example of *Ex parte Young*'s exception to sovereign immunity. The Eleventh Amendment permits "actions for prospective declaratory or injunctive relief against state officers in their official capacities for their alleged violations of federal law" as long as the state officer has "some connection with the

enforcement of the act." *Coal. to Defend Affirmative Action v. Brown*, 674 F.3d 1128, 1134 (9th Cir. 2012) (citing *Ex parte Young*, 209 U.S. at 157). This rule is grounded in the principle that "[a] suit against a state officer in his official capacity is, of course, a suit against the State." *Diamond v. Charles*, 476 U.S. 54, 57 n.2 (1986).

That standard is satisfied here. Plaintiffs sued the Secretary in her official capacity seeking statewide relief from violations of the federal Constitution. 2-ER-283-84 ¶¶ 13-15. The Secretary's duties give her sufficient connection with the Statute to make her the proper defendant for Article III purposes. *Supra* at 14-17. That alone likely ends the inquiry. The Secretary acknowledges that this Court has held that the analyses for Article III and *Ex parte Young* are similar. *See* Resp. 62 (citing *Culinary Workers Union, Local 226 v. Del Papa*, 200 F.3d 614, 619 (9th Cir. 1999)). At least three sister Circuits have made clear that they are effectively the same. *See Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1047 (6th Cir. 2015); *Digit. Recognition Network, Inc. v. Hutchinson*, 803 F.3d 952, 960 (8th Cir. 2015); *Cressman v. Thompson*, 719 F.3d 1139, 1146 n.8 (10th Cir. 2013).

To counter this uncontroversial application of *Ex parte Young*, the Secretary points to recent Fifth Circuit case law about (yet again) a different official's connection to different laws in a different state. *See* Resp. 63 (citing *Mi Familia Vota v. Abbott*, 977 F.3d 461, 467-69 (5th Cir. 2020)). But the Fifth Circuit's conclusion

in *Mi Familia Vota* that the Texas Secretary of State could not afford relief from a Texas election law was based on the finding that an injunction against the secretary would still leave local officials with enough discretion to prevent meaningful relief. 977 F.3d at 467-69. In Arizona, in contrast, the Secretary has clear duties to oversee ballot production, her Manual enforces the Statute's order, and county officials have no discretion to impose some contrary order. *Supra* at 14-17.

Moreover, although the Supreme Court has repeatedly stated the *Ex parte Young* inquiry should be "straightforward," *see, e.g.*, *Va. Off. for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 255 (2011); *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002), *Mi Familia Vota* and two other recent Fifth Circuit cases have bent it beyond recognition. *See Tex. Democratic Party v. Hughs* ("*TDP II*"), No. 20-50667, 2021 WL 2310010 (5th Cir. June 4, 2021); *Tex. Democratic Party v. Hughs*, 997 F.3d 288 (5th Cir. 2021). In the last of these cases, *TDP II*, the Fifth Circuit noted the absurdity of its result, but concluded that was the corner its prior decisions had painted it into. 2021 WL 2310010 at *2, n.5 ("A reasonable person could argue that it makes little sense to be unable to sue the official who caused the problem in question, but we are bound to follow the relevant precedents and, therefore, do not address this point further."). This Court should not follow the Fifth Circuit down this absurd path. A straightforward application of *Ex parte Young*—conducted in accordance with the Supreme Court's instruction and this Court's

precedent—compels the holding that the Secretary is the appropriate defendant here.

III. The claims are justiciable.

The Secretary next doubles down on the district court's untenable assertion that the Supreme Court's decision in *Rucho* must be read to put ballot ordering claims—and, by the Secretary's logic, any *Anderson-Burdick* claim where a court finds no burden on voting rights—beyond the justiciable reach of the federal courts. But she fails to meaningfully grapple with over half a century of case law to the contrary, including a summary affirmance by the Supreme Court in a ballot order case where justiciability arguments were squarely presented and necessarily rejected. *See* Op. Br. 40-41. The Secretary's argument is also internally inconsistent: in attempting to distinguish *some* ballot order cases as justiciable, she only underscores both the injury imposed by systemically awarding first position on the ballot to certain types of candidates and the ability of courts to adjudicate such disputes. The Court should reverse.

A. The district court's conflation of the merits with justiciability leads to absurd results.

First, the Secretary contends that the district court's finding of nonjusticiability is supported by that court's determination that, *on the preliminary injunction record*, the Statute imposes no burden to weigh in the *Anderson-Burdick* analysis. Resp. 49-52. This contention presents significant legal problems. As an initial matter, the Supreme Court has unequivocally stated that *every* election law

imposes at least some burden. *See Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (noting all election laws "will invariably impose some burden" subject to weighing); *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983) (holding that "[e]ach provision" of an election code imposes "at least to some degree" a burden subject to weighing). The district court's conclusion is foreclosed by this precedent.

More importantly, nonjusticiability is a jurisdictional question raised on a motion to dismiss, where Plaintiffs' assertions in their complaint must be taken as true. That the district court decided the motion to dismiss after Plaintiffs presented a limited factual record in support of their preliminary injunction motion (without having sought or received any discovery from the Secretary) does not change this standard. By reaching the merits of Plaintiffs' claim to determine whether it was capable of adjudicating the merits, the district court engaged in circular reasoning and committed plain legal error.

The district court's decision also stands precedent on its head. While courts—including the Supreme Court—have long adjudicated *Anderson-Burdick* claims, the Supreme Court has found only a handful of issues nonjusticiable in its entire history. *See generally* John Harrison, *The Political Question Doctrines*, 67 Am. U. L. Rev. 457 (2017); *see also Rucho*, 139 S. Ct. at 2508 (recognizing it is a "rare circumstance" where no judicially manageable standard exists). Endorsing the district court's reasoning would lead to the opposite result: it would require that a

court declare a question nonjusticiable any time it determines that an election law imposes minimal burdens under *Anderson-Burdick*. Combined with this Court's other precedents, *see infra* at 28-29, it would also require that a court allow for full discovery in elections cases before deciding whether a case is justiciable at all, so that it could fairly evaluate the factual record—rather than the type of claim—to determine justiciability.

The Secretary encourages this result by suggesting that certain ballot order cases are justiciable, but this one—based on the limited factual record presented below—is not. Resp. 52 (noting that, while Plaintiffs point to other ballot order disputes adjudicated without incident, "[o]n this record, however, Plaintiffs failed to demonstrate that *their* partisan ballot-order vote dilution claim could be resolved by any judicially discoverable and manageable standards"). There are glaring problems with this conclusion. Read in concert with *Soltysik v. Padilla*, 910 F.3d 438, 450 (9th Cir. 2018)—where this Court correctly held that *Anderson-Burdick* is a fact-intensive inquiry inappropriate for resolution on a motion to dismiss—the Secretary's logic would require reversal and remand here so that all discovery be completed before justiciability could be determined. This would result in a tremendous waste of judicial resources. *Rucho* says nothing even hinting at such a profound change in basic civil procedure and does not compel this result.

B. The Secretary's argument misunderstands crucial differences between redistricting and other types of election laws.

When understood in its proper context, *Rucho* has no bearing here. The Secretary contends that *Rucho* broadly posed three questions the Court thought could not be adequately answered, rendering the case nonjusticiable: (1) whether federal courts are authorized to second-guess legislative determinations to ensure partisan fairness, (2) whether federal courts possess any adequate test for doing so, and (3) if they do, how much deviation is too much. Resp. 54-55. But what the Secretary misses is that these concerns make sense *in the redistricting context*, where some level of partisanship is not just inevitable but constitutional, and the central questions—how do you measure partisanship, and how much is too much?—had bedeviled the Supreme Court for generations. *See* Op. Br. 44-46.

Outside of the redistricting context, however, states are generally *forbidden* from discriminating between similarly situated parties based on partisanship. *See id.* at 45-46 (citing cases). In such cases, courts are undoubtedly entitled to consider whether partisan favoritism animates elections laws, and—if so—hold them unconstitutional. *See, e.g.*, *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 203 (2008) (noting voter identification law would be unconstitutional if justified by partisanship alone). Unlike in *Rucho*, then, there is a straightforward answer to the three questions the Secretary identifies in a ballot order case: (1) federal courts *can* intercede to ensure partisanship does not animate the decision of how to order

similarly situated candidates on a ballot, (2) *Anderson-Burdick* provides a meaningful test to gauge the constitutionality of these laws (which courts have used without incident), and (3) as to how much "deviation" is too much—i.e., how to apply the test to gauge constitutionality—ballot ordering laws that favor similarly situated parties over one another are unconstitutional unless the state offers sufficiently important interests other than partisanship.

Under this analysis, it is unsurprising that courts have successfully adjudicated ballot order cases for decades. *Rucho* does not compel a different result.

C. The court's ability to adjudicate this case is supported by precedent.

The Secretary concludes her *Rucho* analysis by attacking Plaintiffs' requested remedy and attempting to distinguish the raft of cases adjudicating ballot order disputes over the last half century, but neither approach explains why this matter is *nonjusticiable*. *See* Resp. 56-61.

Plaintiffs' requested remedy mimicked the injunctive relief that the Supreme Court approved of in *Mann*, *compare* 2-ER-298 (requesting injunction "requiring the Secretary of State to use a ballot order system that gives similarly situated major-party candidates an equal opportunity to be listed first on the ballot"), *with Mann v. Powell*, 314 F. Supp. 677, 679 (N.D. Ill. 1969) (requiring use of a "nondiscriminatory means by which each of such candidates shall have an equal opportunity to be placed first on the ballot"), where the Court declined (despite the

defendant's invitation) to find the case nonjusticiable. *Mann*, 398 U.S. 955 (summarily affirming injunction of ballot ordering scheme); Jurisdictional Statement, *Powell v. Mann*, No. 1359, 1970 WL 155703, at *21, 32 (U.S. Mar. 27, 1970) (arguing no "judicially manageable" standard exists to evaluate a ballot ordering claim because it turns on "subjective . . . notions of political fairness"). Clearly the Court did not view the form of the injunction to foreclose judicial review.

In any event, the district court here was free to construct any injunction it deemed appropriate, so long as it was "no more burdensome to the defendant than necessary" to provide relief to the Plaintiffs. *L.A. Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 664 (9th Cir. 2011). The Secretary never explains why the form of the remedy requested can or should bear on justiciability.

As to the Secretary's attempt to distinguish the long line of ballot order case law, it offers no distinction at all. The Secretary argues that at issue in those cases was "intentional political discrimination, explicit partisan favoritism, or attempts to entrench incumbents." Resp. 59. But Arizona's law is not meaningfully different. Here, the intent to discriminate based on partisan affiliation is baked into the Statute, which mandates favoring the party that won the most gubernatorial votes when assigning ballot order in each county. *Cf., e.g.*, *Sangmeister*, 565 F.2d at 467 (finding the "systematic and widespread exclusionary practice[]" of partisan favoritism in assigning ballot order to "satisfy even the strictest intent requirement"); *see also id.*

at 468 (enjoining use of any ballot ordering procedure that is not "neutral," including procedures that "invariably award[]" first position to "the County Clerk's party, the incumbent's party, or the 'majority party'" in each county).

Even if a lack of intentional discrimination were to doom Plaintiffs' claim (it would not, as *Anderson-Burdick* requires no showing of intent), that would once more go to the merits. The Secretary's argument betrays too much: by acknowledging that some ballot order schemes are not only justiciable but unconstitutional, she implicitly concedes that Plaintiffs have standing (based on the well-recognized benefit that accrues to first-listed candidates) and that this case is justiciable (because courts have tools to evaluate whether ballot ordering schemes favoring certain types of candidates are constitutional).

Plaintiffs do not ask for anything novel. They merely seek the application of a straightforward *Anderson-Burdick* analysis to a state election law—a task this Court has done repeatedly. *See, e.g.*, *Pub. Integrity All., Inc. v. City of Tucson*, 836 F.3d 1019, 1025 (9th Cir. 2016); *Soltysik*, 910 F.3d at 448–49. Federal courts "have competently adjudicated ballot order cases using equal protection principles for decades." *Nelson*, 472 F. Supp. 3d at 311; *see also Pavek*, 967 F.3d at 907 ("We have adjudicated the merits of such claims before and have comfortably employed judicially manageable standards in doing so."). *Rucho* cannot properly be read to have brought an abrupt (and silent) end to decades of jurisprudence.

IV. The complaint sufficiently states a claim for relief.

The Secretary concedes that, if the Court finds this case justiciable, *Anderson-Burdick* applies. Resp. 64. *Anderson-Burdick* is a "flexible" test, where the rigorousness of scrutiny depends upon the extent to which the challenged law burdens Plaintiffs' rights. *Pub. Integrity All.*, 836 F.3d at 1024. The court must weigh that burden against the state's interests, taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights." *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S.at 789).

Remarkably, in arguing that Plaintiffs fail to state a cognizable claim, the Secretary barely references the complaint or its allegations. A review of that document proves her folly: the complaint alleges facts that, if proven, would establish both that the Statute burdens Plaintiffs' rights and that the burden is not outweighed by the State's interests. 2-ER-292 ¶ 37 ("As a direct result of the . . . Statute, position bias has severely injured and, unless enjoined, will continue to injure Plaintiffs in Arizona elections."); 2-ER-295 ¶ 53 (alleging Statute "provides an unfair, arbitrary, and artificial advantage" that "burdens the right to vote"); 2-ER-294 ¶ 48 (alleging that any administrative burden on the State "cannot justify" burden on rights). These allegations are sufficient to state a claim.[6]

[6] Although the Secretary points to *Clough v. Guzzi*, 416 F. Supp 1057, 1067 (D. Mass. 1976), to argue that Plaintiffs' claim is about a "constitutional right to a wholly

The Secretary sidesteps these allegations entirely, instead assuring the Court that Plaintiffs' injury is "negligible" and justified by the state's interest—but that position cannot be reconciled with *Soltysik*. There, the Court reversed a district court's dismissal of an *Anderson-Burdick* claim where the lower court concluded on a motion to dismiss that the burdens were not severe and the state's interests justified the law. 910 F.3d at 449. In finding that was error, this Court emphasized that application of *Anderson-Burdick* "rests on the specific facts of a particular election system, not on strained analogies to past cases, as analogy and rhetoric are no substitute for evidence." *Id*. at 444 (citing *Ariz. Green Party v. Reagan*, 838 F.3d 983, 990 (9th Cir. 2016)). The district court's conclusion that the burdens were not "severe" and that the state's interests outweighed them was "premature" until "both sides ha[d] developed their evidence." *Id.* at 450.

The Secretary urges this Court to make that same error here. "A complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove

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rational election," Resp. 65, *Clough* is highly distinguishable. There, the court upheld an incumbent-first statute because the plaintiffs failed to adequately prove that ballot order *alone*—rather than the well-documented advantages of *incumbency*—caused a disadvantage. *Id*. at 1066. Plaintiffs here allege the opposite. *See* 2-ER-279 ¶ 1 (alleging "the candidate whose name appears first on a ballot in a contested race receives an electoral benefit *solely* due to her first position"); *cf. McLain*, 637 F.2d at 1167 (distinguishing *Clough* as "involv[ing] evidentiary considerations which do not apply here"). Also, *Clough* was decided following a merits hearing, 416 F. Supp at 1060; it does not support rejecting Plaintiffs' claims on a motion to dismiss.

no set of facts in support of the claim that would entitle it to relief." *Colwell v. Dep't of Health & Hum. Servs.*, 558 F.3d 1112, 1121 (9th Cir. 2009) (citing *Williamson v. Gen. Dynamics Corp.*, 208 F.3d 1144, 1149 (9th Cir. 2000). At this stage, the facts pled must be accepted as true, and they establish that the Statute burdens Plaintiffs and is not justified by Arizona's interests.

It bears repeating: this is an appeal from the grant of a motion to dismiss, not from the denial of a preliminary injunction. *See* 1-ER-26. Ultimately, the district court may deny the preliminary injunction motion, or eventually deny relief after discovery and trial or summary judgment, if it is not persuaded by the evidence. *Anderson-Burdick* is designed to give the trial court that precise ability to sift through competing evidence and come to its own conclusions. But it cannot conduct an early evaluation of the merits under the guise of a motion to dismiss—particularly when making sweeping jurisdictional rulings that will reverberate throughout an otherwise well-established body of law.

CONCLUSION

For reasons discussed above and in Appellants' Opening Brief, this Court should reverse.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,990 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Times New Roman 14-point font.

Dated: June 21, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on June 21, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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Date: June 21, 2021

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