No._____

In the Supreme Court of the United States

STATE OF ARIZONA,

Petitioner,

v.

BRIAN MECINAS; ET AL. AND KATIE HOBBS, THE ARIZONA SECRETARY OF STATE,

Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Democratic National Committee (the "DNC") sued Katie Hobbs, the Arizona Secretary of State, asserting that Arizona's ballot order statute was unconstitutional. Finding that the DNC lacked Article III standing and that the claim raised a nonjusticiable political question, the district court dismissed the action. In a published opinion, the Ninth Circuit Court of Appeals reversed the district court and remanded. By then, Secretary Hobbs had announced she was running as a Democratic candidate for Governor, and she would not commit to seeking further appellate review of the case. Within the 14-day period to seek rehearing, the State of Arizona thus moved to intervene and also moved for rehearing en banc.

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The DNC and Secretary Hobbs then filed a stipulated dismissal of the district court action. On the same day, they also filed oppositions to the State's motion to intervene, arguing that the court should deny the State's motion as both untimely and moot. The State then filed an alternative motion to vacate the Ninth Circuit's opinion under *U.S. v. Munsingwear, Inc.*, 340 U.S. 36 (1950). By a 2-1 vote, the Ninth Circuit denied the State's motion for intervention as untimely. The court also denied the alternative motion for vacatur.

The questions presented are:

1. Whether the motion to intervene was timely.

2. Whether the opinion below should be vacated as moot under *Munsingwear*.

PARTIES TO THE PROCEEDINGS

Petitioner is the State of Arizona.

Respondents are both the plaintiffs/ appellants below (Brian Mecinas, Carolyn Vasko, DNC Services Corporation, DBA Democratic National Committee, DSCC, Priorities USA, and Patti Serrano), and the defendant/appellee below (Katie Hobbs, the Arizona Secretary of State).

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STATEMENT OF RELATED PROCEEDINGS

United States District Court (D. Arizona):

Mecinas, et al. v. Hobbs, No. 19-cv-05547 (Jun 26, 2020)

United States Court of Appeals (9th Cir.):

Mecinas et al. v. Hobbs, No. 20-16301 (Apr 8, 2022).

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On May 11, 2022, the Ninth Circuit issued its order (1) denying the State's motion to intervene; (2) denying the State's motion for rehearing en banc; and (3) denying the State's alternative motion to vacate the circuit court's April 8, 2022 opinion. App. 1.

On May 24, 2022, the Ninth Circuit issued its order (1) denying the State's motion for reconsideration; and (2) denying the State's request to have its motion for reconsideration circulated to and heard by the en banc court. App. 71.

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JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Arizona's Ballot Order Statute, A.R.S. § 16-502(E). A copy is attached at App. 77.

INTRODUCTION

This case involves a sovereign state's right to intervene in a case to protect its voting laws. More particularly now, the case involves a state's right to obtain vacatur of what this Court has called a "preliminary" adjudication, in order "to prevent an unreviewable decision from spawning any legal consequences." *Camreta v. Greene,* 563 U.S. 692, 713 (2011).

When the DNC sued Arizona Secretary of State Katie Hobbs over the State's ballot order statute, she successfully defended the suit and the district court granted her motion to dismiss. But two years later, when the Ninth Circuit Court of Appeals reversed the district court, Hobbs was running for Governor as a Democrat and elected not to pursue further appellate review.

At that point, the State of Arizona moved to intervene and simultaneously moved for en banc review of the Ninth Circuit's published opinion. Both the DNC and Hobbs not only filed memoranda opposing the State's intervention, but on the same day they also filed a stipulated motion in the district court to dismiss the underlying action. Upon learning of this, the State promptly filed an alternative motion to vacate the Ninth Circuit opinion under *Munsingwear*.

By a 2-1 vote, the Ninth Circuit, in a one-sentence order, denied the State's motion to intervene "as untimely made." The Ninth Circuit also denied the State's motion for rehearing en banc and its alternative motion to vacate the Ninth Circuit's opinion.

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The Ninth Circuit's denial of intervention on these facts conflicts with the Court's intervention jurisprudence, including the Court's recent decisions in *Berger v. North Carolina State Conf. of the NAACP,* ___S. Ct. ___, 2022 WL 2251306, and *Cameron v. EMW Women's Surgical Center, P.S.C.,* 142 S. Ct. 1002 (2022). The Ninth Circuit's denial of vacatur also conflicts with the Court's announced practice when a case becomes moot: the Court will "normally…vacate the lower court judgment in a moot case because doing so 'clears the path for future relitigation of the issues between the parties,' preserving 'the rights of all parties,' while prejudicing none 'by a decision which…was only preliminary.'" *Alvarez v. Smith,* 558 U.S. 87, 94 (2009), quoting *United States v. Munsingwear*, 340 U.S 36, 40.

The Court should thus permit the State to intervene and grant the State's request for vacatur.

STATEMENT OF THE CASE

The State of Arizona seeks to intervene in a lawsuit challenging the constitutionality of the State's ballot order statute.

1. Arizona's ballot order statute, A.R.S. § 16-502(E), ties the order of candidate names to the results of the most recent gubernatorial election, on a county-by-county basis. The statute says that the "candidates of the several parties shall be arranged with the names of the parties in descending order according to the votes cast for governor for that county in the most recent general election for the office of governor…." App. 77.

2. In 2019, a group of three Democratic voters and three Democratic associations, including the DNC,

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sued Arizona Secretary of State Katie Hobbs in Arizona federal district court, asserting that the State's ballot order statute conferred "an unfair political advantage on candidates solely because of their partisan affiliation…." *See* 11/15/19 First Amended Cmpl. for Declaratory and Injunctive Relief, Doc. 13, at p. 7 ¶ 15, in Case No. 19-cv-05547 (D. Ariz.). For simplicity, we refer to the plaintiffs in that suit, collectively, as the "DNC." Hobbs—represented by the State's chief legal officer, the Attorney General, as well as attorneys from the Office of the Attorney General (the "AGO")—defended the statute. *See* 5/9/22 Reply in Support of Mot. to Intervene on Behalf of the State of Ariz., p. 5, Case No. 20-16301, U.S. Court of Appeals for the Ninth Cir., Doc. 63. The State saw no need to separately intervene at that point. In defending against the suit, Hobbs, through the Attorney General and the AGO, argued that the DNC lacked Article III standing to bring the suit, and that the suit in any event involved a nonjusticiable political question.

3. The district court (Humatewa, J.) agreed, and on June 25, 2020, dismissed the lawsuit on both grounds. App. 32. *See* 468 F. Supp.3d 1186 (2020). In doing so, the district court relied in part on a recent opinion of the Eleventh Circuit, *Jacobson v. Florida Secretary of State,* 974 F.3d 1236 (11th Cir. 2020). Like this case, *Jacobson* also involved the DNC and other Democratic organizations, and some Democratic voters, who were challenging a Florida ballot order statute similar to that of Arizona. The Eleventh Circuit found that the Democratic voters and political organizations lacked standing to challenge the statute, and that the lawsuit's claims in any event raised a nonjusticiable

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political question.[1] The DNC did not petition this Court to review the *Jacobson* decision.

4. In this case, the DNC appealed the district court's decision to the Ninth Circuit Court of Appeals. 7/6/20 Notice of Appeal, No. 19-cv-05547, Doc. 76. Secretary Hobbs continued to defend the case, still represented by the Attorney General and lawyers from the AGO, and the State again saw no need to separately intervene. On May 27, 2021, lawyers from the AGO filed Secretary Hobbs's Answering Brief in the appeal. 5/27/21 Answering Brief, No. 20-16302, Doc. 30. (Copy of brief available at 2021 WL 2302779.)

5. As required by a then newly enacted statute, in September 2021 Secretary Hobbs retained new, outside counsel for the appeal. *See* 5/9/22 Reply in Support of Motion to Intervene, No. 20-16301, Doc. 63, p. 6. At that point, however, essentially all that remained to be done was oral argument, and the Secretary's new counsel appeared at oral argument and argued in support of the district court's decision. *See* video recording of 1/14/22 argument at ca9.uscourts.gov/media/video/?202202114/20-16301.

6. On April 8, 2022, however, the situation abruptly changed when the Ninth Circuit issued its published opinion reversing the district court. *See* 30 F.4th 890 (9th Cir. 2022). App. 3. Contrary to the Eleventh Circuit's *Jacobson* opinion, the Ninth Circuit found that the DNC *did* have standing to

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[1] The district court here relied on that version of the *Jacobson* opinion issued at 957 F.3d 1193 (11th Cir. 2020). After the district court issued its decision, the *Jacobson* court later issued a revised opinion at 974 F.3d 1236, though the outcome was the same.

challenge the ballot order statute, and that the relief sought was *not* a nonjusticiable political question.[2] The Ninth Circuit therefore remanded the matter to the district court for further proceedings on the merits. *Id.*

7. Unfortunately, by April 8, 2022 when the Ninth Circuit issued its opinion in *Mecinas,* real-world facts had put Secretary Hobbs's objectives in conflict with those of Arizona Attorney General Brnovich. The Attorney General wanted to seek further review of the Ninth Circuit's opinion, but Secretary Hobbs—in the midst of a very public dispute with the Attorney General—had decided not to further pursue the case. 5/9/22 Reply in Support of Motion to Intervene, pp. 6-7. No. 20-16301, Doc. 63. Some history is helpful to appreciate the situation.

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8. In January 2020, the Ninth Circuit, en banc, had issued its opinion in *Brnovich v. Democratic Nat'l Comm.*, 948 F.3d 989 (9th Cir. 2020), invalidating certain parts of Arizona's election law and procedures. Attorney General Brnovich filed a petition for certiorari, asking this Court to review the matter. On July 1, 2020, Secretary Hobbs took the unusual step of filing a brief *opposing* the Attorney General's petition. *See* 7/1/20 Brief of Ariz. Secretary of State Katie Hobbs in Opp. to Certiorari., Nos. 19-1257, 19-1258. Hobbs argued that Arizona's Attorney General lacked Article III standing to file his petition because the Arizona constitution reserved to the Secretary of

[2] Finding that at least the DNC had Article III standing, the Ninth Circuit didn't address standing as to the other plaintiffs. 30 F.4th at 894.

State "authority over conducting elections and canvasing votes." *Id.* p. 31.

9. Then on June 2, 2021, Secretary Hobbs announced that she was running as a Democratic candidate for governor in the 2022 election. 5/9/22 Reply in Support of Mot. to Intervene, p. 6, No. 20-16301, Doc. 63.

10. Despite the Secretary's opposition to Attorney General Brnovich's petition for certiorari in *Brnovich v. Democratic Nat'l Comm.*, on July 1, 2021, this Court issued its decision reversing the Ninth Circuit's en banc opinion in that case. *See Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021). In doing so, the Court expressly rejected Secretary Hobbs's jurisdictional challenge, finding that Attorney General Brnovich was "authorized to represent the State in any action in federal court," and that he "fits the bill" for Article III standing. *Id.* 141 S. Ct. 2336.

11. After the Ninth Circuit issued its April 8, 2022 opinion in *Mecinas*, Secretary Hobbs advised the AGO that she would oppose the State's intervention in this case, although the Secretary declined to say whether she intended to seek further review of the Ninth Circuit's opinion. *See* 4/22/22 Mot. to Intervene, p. 2, 5 No. 20-16301, Doc. 58.

12. At the direction of Attorney General Brnovich, *Id.* p. 4, to ensure that the Ninth Circuit's April 8, 2022 opinion received further review, the State on April 22, 2022—within the 14-day FRAP Rule 40 period for filing a petition for rehearing—filed its Motion to Intervene on Behalf of the State of Arizona, and concurrently filed a Petition for Rehearing En Banc. No. 20-16301, Doc. 60. And as the State

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expected, Secretary Hobbs did *not* seek further review of the Ninth Circuit opinion.

13. On May 2, 2022, in response to the State's intervention motion, Secretary Hobbs and the DNC filed:

(1) in the district court, No. 2:19-cv-05547, a "Notice of Stipulated Dismissal" (Doc. 87), and

(2) in the Ninth Circuit, separate responses opposing the State's intervention motion. No. 20-16301, Docs 61 (DNC) and 62 (Secretary Hobbs).[3]

14. The separate responses to the State's Motion to Intervene both argued that, in light of the stipulated dismissal, the case was now moot. Secretary Hobbs's response also argued that her decision not to seek en banc review was an "appropriate strategic decision," and that in any event the State's request to intervene was untimely and prejudicial because it would "delay the proceedings." Secretary Hobbs's Resp. at p. 10 (Doc. 62). However, any arguable "delay" in the proceedings, due to the State's desire to pursue further review of the Ninth Circuit's opinion, would have occurred even if the State had intervened earlier in the case.

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15. Upon learning that Secretary Hobbs and the DNC were trying to dismiss the district court case, the

[3] At the time the DNC and Secretary Hobbs filed their Notice of Stipulated Dismissal in the district court, the appeal to the Ninth Circuit was still pending, so the district court Notice was at best premature; the district court lacked jurisdiction to dismiss the case. However, once the Ninth Circuit issued its mandate, App. 73, and returned jurisdiction to the district court, that court dismissed the case pursuant to the stipulation. App. 75.

State filed an alternative motion to vacate the Ninth Circuit's April 8, 2022 opinion under *U.S. v. Munsingwear, Inc.,* 340 U.S. 36, 39 *See* 5/9/22 Alternative Mot. to Vacate the Court's April 8, 2022 Opinion, No. 20-16301, Doc. 64.

16. On May 11, 2022, the Ninth Circuit panel, by a 2-1 vote, denied the State's motion for intervention, based on a single issue: the court found the motion was "untimely made." App. 1. The order stated that "Judge Watford would grant the State's motion to intervene." *Id.* The order also said that, because the motion to intervene was denied, the State's motions for rehearing en banc and to vacate the April 8, 2022 opinion were also denied. *Id.*

17. The State then moved for reconsideration, and reconsideration en banc, of that order. On May 24, 2022, the Ninth Circuit panel denied those requests as well. App. 71. The May 24 order also stated that Judge Watford would grant the State's motion for reconsideration. *Id.*

18. On June 1, 2022, the Ninth Circuit issued its Mandate returning the case to the District Court. App. 73. One June 2, 2022, the District Court dismissed the case without prejudice based on the stipulated dismissal filed jointly by the DNC and Secretary Hobbs. App. 75.

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REASONS FOR GRANTING THE PETITION

This case concerns the State's attempt to intervene in a federal appellate proceeding to seek further review of a published Ninth Circuit opinion on important issues of constitutional standing and justiciability, stemming from a challenge to the

State's ballot order statute. The issue arose after a panel of the Ninth Circuit Court of Appeals reversed a decision holding that the DNC lacked Article III standing to challenge the statute, and that the issue was in any event a non-justiciable political question.

By the time the Ninth Circuit issued that opinion, the Arizona Secretary of State—who was the sole defendant in the action and who had successfully defended the action before the district court and had continued to defend it on appeal—had declared herself a Democratic candidate for Governor. She then (1) declined to tell the Arizona Attorney General whether she would seek further appellate review of the case, but (2) did say she would oppose the State's intervention in the matter. At that point, the State—reasonably (and correctly) assuming that the Secretary would *not* seek further review—moved to intervene, and within the 14-day FRAP deadline for filing a petition for rehearing or rehearing en banc, simultaneously filed a Petition for Rehearing En Banc of the panel's published opinion.

By a 2-1 vote, the Ninth Circuit panel subsequently denied the State's motion to intervene as "untimely," denied the State's petition for rehearing and rehearing en banc of that order, and refused to even circulate the petition for rehearing en banc of the order denying intervention to the en banc court.

The Court should grant certiorari because on the facts here the Ninth Circuit order denying the State's motion to intervene, on the sole ground that it was "untimely," conflicts with the Supreme Court's decisions in *Cameron v. EMW Women's Surgical Center, P.S.C.*, 142 S. Ct. 1002 (2022), and *Berger v.*

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North Carolina State Conf. of the NAACP, ___ S. Ct.___ (Jun 23, 2022). The order also conflicts with Ninth Circuit precedent, including *Day v. Apoliona* 505 F.3d 963 (9th Cir. 2007), and *Peruta v. County of San Diego,* 824 F.3d 919 (9th Cir. 2016) (en banc).

Moreover, by denying intervention, the Ninth Circuit was able to keep its published opinion in place and unilaterally prevent further review of that opinion. And that was so even though (1) the opinion addressed significant voting law issues not yet addressed by this Court, (2) the opinion directly conflicted with the 2020 opinion of the Eleventh Circuit in *Jacobson*, and (3) the opinion was not now tied to an active dispute.

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I. The State's Motion to Intervene Was Timely Under Both Supreme Court and Ninth Circuit Precedent.

The State plainly has a substantial legal interest in defending its laws in federal court, and that interest "sounds in deeper, constitutional considerations." *Cameron*, 142 S. Ct. at 1010. And despite denying the State's motion to intervene, the Ninth Circuit did not question that interest. Rather, the Ninth Circuit rejected the intervention motion only as "untimely"—a ruling that has no support in the law or the facts that are present here.

A. The State's motion to intervene was timely under *Cameron* and *Berger*.

To begin with, because the State filed its motion to intervene "as soon as it became clear" that the State's interest may no longer be protected by Secretary

Hobbs, the State's motion was timely under *Cameron*. *See Cameron,* 142 S. Ct. at 1012.

In *Cameron*, the Sixth Circuit denied intervention by Kentucky's attorney general as untimely, but the Supreme Court reversed by a lopsided 8-1 majority. There, as here, "the attorney general sought to intervene [as the State] 'as soon as it became clear' that the [State's] interests 'would no longer be protected' by the parties in the case." 142 S. Ct. at 1012. There, as here, the motion to intervene was filed "within the 14-day time limit for petitioning for rehearing en banc." *Id.* And there, as here, "The attorney general's need to seek intervention did not arise until the secretary ceased defending the state law, and the timeliness of his motion should be assessed in relation to that point in time." *Id.* *Cameron* compels a conclusion that the State's motion to intervene here was timely.

The principles articulated by the Court in *Berger* are also instructive. The Court there discussed how, within a State, there may emerge "different officials who do not answer to one another," with "different interests and perspectives," though "all important to the administration of state government…." The Court then cited *Brnovich v. Democratic National Committee,* 594 U.S. ___ (2021), as an example of such, where "Arizona's secretary of state and attorney general took opposite sides."

The Court then concluded that "[a]ppropriate respect for these realities" suggests "that federal courts should rarely question that a State's interests will be practically impaired or impeded if its duly authorized representatives are excluded from participating in federal litigation challenging state

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law." *Id.* To "hold otherwise," the Court emphasized, would "not only risk turning a deaf federal ear to voices the State has deemed crucial to understanding the full range of its interests," but "would encourage plaintiffs to make strategic choices" to control which state agents they will sue.

Similarly, the State's intervention motion was timely under *United Airlines, Inc. v. McDonald,* 432 U.S. 385, 394 (1977), which makes plain that when a party "filed [its] motion within the time period in which the named plaintiffs could have taken an appeal … the [party's] motion to intervene was timely filed[.]" *United Airlines,* 432 U.S. at 396. It is undisputed that the State did so here—filing its motion to intervene within the 14-day deadline for seeking rehearing or rehearing en banc, and even attaching (as in *Cameron*) a proposed petition for rehearing en banc. The State's motion to intervene was thus timely under *United Airlines*.

Furthermore, as Justice Kagan emphasized in *Cameron,* a court considering a government official's motion to intervene should take account of "real-world" facts, including the shifting sands of politics. *Cameron,* 142 S. Ct. at 1018 (concurring opinion by Kagan, J.). Here, as in *Cameron,* the State's motion to intervene was in "response to a major shift in the litigation," *Cameron,* 142 S. Ct. at 1018 (concurring opinion by Kagan, J.): the Ninth Circuit panel's reversal of the district court's favorable ruling, coupled with Secretary Hobbs's refusal to say whether she would seek further review.

In light of those real-world facts, the State has a strong reason for intervening; to paraphrase Justice

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Kagan in *Cameron,* the State "belong[s] in the suit, absent some good cause to exclude [it]." *Id.*

In addition, as the Court recently emphasized in *Cameron,* the circuit court panel's refusal to allow the State to intervene to pursue further appellate review of the panel's published opinion ignores important issues of State sovereignty. A "State's opportunity to defend its laws in federal court should not be lightly cut off." 142 S. Ct. at 1011. Under the United States Constitution, the states retained "a residuary and inviolable sovereignty" that included the "power to enact and enforce any laws that do not conflict with federal law." *Id.* (internal quotation marks omitted). Hence, a federal court "must respect" the "place of the States in our federal system." *Id.* (internal quotation marks omitted). This should apply with special force to a state's election laws, since Art. I, § 4, cl. 1 of the Constitution commits to state legislatures the right to determine the "Times, Places and Manners" of holding congressional elections.

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In addition, "[r]espect for state sovereignty must also take into account the authority of a State to structure its executive branch in a way that empowers multiple officials to defend its sovereign interests in federal court." *Id.* Arizona law empowers the Attorney General to seek intervention in federal court on behalf of the State. *See* A.R.S. § 41-193(A)(3) (empowering Department of Law to represent the State in federal courts). Moreover, since an Arizona statute vests the Attorney General with direction and control of the Department of Law, A.R.S. § 41-192(A), Attorney General Brnovich has the right to retain counsel to pursue intervention on behalf of the State to ensure the laws are carried out. Arizona law also expressly

authorizes the attorney general to enforce, "through civil and criminal actions," the provisions of Arizona elections law set forth in Arizona Revised Statutes Title 16. *See* A.R.S. § 16-1021.

B. The State's motion to intervene was timely under Ninth Circuit precedent.

The State's motion to intervene was also timely under the Ninth Circuit's own precedent, including *Day v. Apoliona,* 505 F.3d 963. In *Day*, Hawaii participated as an amicus curiae before the district court and on appeal. The district court, consistent with Hawaii's amicus argument, dismissed the case, but—just as occurred here—the Ninth Circuit reversed in a published decision. Not until that point—just as happened here—did the state (Hawaii) move to intervene, and Hawaii did so "in order to petition for panel rehearing and petition for panel rehearing en banc." 505 F.3d at 964. In *Day,* just as here, none of the then-current parties were going to file a petition for en banc review. On those facts, the Ninth Circuit allowed Hawaii's motion to intervene.

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In doing so, the Ninth Circuit explained that unless the State of Hawaii were "made a party to these proceedings, no petition for rehearing can be filed in this Court," so allowing intervention "will ensure that our determination of an already existing issue is not insulated from review simply due to the posture of the parties." *Day,* 505 F.3d. at 965-966. In arriving at this conclusion, the Ninth Circuit noted that allowing Hawaii to intervene at that late stage of the proceedings didn't prejudice the parties, because "the practical result of its intervention—the filing of a

petition for rehearing—would have occurred whenever the state joined the proceeding." 505 F.3d at 965. The Court also observed that the fact that no other party had petitioned for rehearing "means that the State of Hawaii's interest is not adequately protected at this stage of the litigation." *Id.*

Each of these statements applies directly to the present facts. In sum:

- Allowing intervention would ensure that "determination of an already existing issue is not insulated from review simply due to the posture of the parties."
- No one would be prejudiced by allowing the State's late intervention, because "the practical result of its intervention—the filing of a petition for rehearing—would have occurred whenever the state joined the proceeding."
- The fact that no other party petitioned for rehearing en banc meant that the State's "interest was not adequately protected at [that] stage of the litigation."

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Similarly, in *Peruta,* 824 F.3d 919, the Ninth Circuit, sitting en banc, reversed a panel decision that had denied the State of California's motion to intervene which was—just as here—not filed until the panel had issued its published opinion in the case and the losing party declined to petition for rehearing en banc. As the en banc Court explained, although California "sought to intervene at a relatively late stage in the proceeding," the state had a "significant interest" in the case, there was no prejudice, and the state "had no strong incentive to seek intervention . . . at an earlier stage." 824 F.3d at 940. As the Court

explained: "If we do not permit California to intervene as a party . . . there is no party in that case that can fully represent its interests." *Id.* at 941.

As the Ninth Circuit has also explained, "the 'general rule is that a post-judgment motion to intervene is timely if filed within the time allowed for the filing of an appeal.'" *U.S. ex rel McGough v. Covington Technologies Co.*, 967 F.2d 1391, 1394 (9th Cir. 1992) (quoting *Yniguez v. Arizona*, 939 F.2d 727, 734 (9th Cir. 1991) (alteration omitted)).

The Ninth Circuit, sitting en banc, also granted the State of Arizona's motion to intervene for purpose of seeking certiorari in *Democratic National Committee v. Hobbs*, 948 F.3d 989 (9th Cir. 2020). The court did so by a 10-1 vote, even though the State's motion to intervene in that case was not filed until five weeks *after* the Ninth Circuit's en banc decision was issued, though within the time period to seek certiorari. *See id.*, Doc. 128 (9th Cir. Apr. 9, 2020). The State's motion to intervene is thus timely under *DNC v. Hobbs* as well.

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Indeed, except for the now-reversed Sixth Circuit decision in *Cameron,* the State is not aware of any other precedent holding as untimely a motion to intervene for purposes of seeking rehearing, when that motion was filed within the rehearing deadline.

C. Respondents suffered no legal prejudice caused by the State's April 22, 2022 motion to intervene.

A key fact showing that the State's motion to intervene was timely is Respondents' inability to show any prejudice caused by the timing of the State's

motion. As stated in Federal Practice and Procedure: "The most important consideration in deciding whether a motion for intervention is untimely is whether the delay in moving for intervention will prejudice the existing parties to the case." 7C Wright, Miller and Kane, Fed'l Practice and Proc., Civ. 3d § 1916, p. 541. Indeed, in the words of the Fifth Circuit, prejudice "may well be the *only* significant consideration when the proposed intervenor seeks intervention of right." *McDonald v. E.J. Lavino Co.,* 430 F.2d 1065, 1073 (5th Cir. 1970).

The sole prejudice Respondents can claim, and have claimed, is the supposed delay in finally resolving the case—due to the time needed to pursue further appellate review. But surely that is not a cognizable prejudice. To the contrary, the Ninth Circuit has granted motions for late interventions precisely to *enable* a full appellate review. *See Day,* 505 F.3d at 965-966 (noting that allowing intervention "will ensure that our determination of an already existing issue is not insulated from review simply due to the posture of the parties.").

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Finally, if the State had moved to intervene at any earlier time, the State would still have wanted to seek full appellate review of an adverse decision. So in no sense did the *timing* of the State's intervention motion unfairly prejudice Respondents.

II. Under *Munsingwear,* The Court Should Grant Vacatur Of The Ninth Circuit Opinion.

If the Court allows the State to intervene in this matter, the Court should vacate the Ninth Circuit panel opinion (the "Opinion") under *Munsingwear.*

When a case becomes moot while on appeal, the Court "normally" vacates the lower court judgment, "because doing so 'clears the path for future relitigation of the issues between the parties,' preserving 'the rights of all parties,' while prejudicing none 'by a decision which … was only preliminary.'" *Alvarez,* 558 U.S. at 94, quoting *Munsingwear,* 340 U.S. at 40.

The Opinion was "only preliminary" because it was subject to further appellate review that it will now not receive. Moreover, since the DNC and Secretary Hobbs—notably *after* the State filed its motion to intervene—agreed to dismiss the district court case, there is no longer a live controversy. Yet the unreviewed and unreviewable Opinion remains in force. And as the Court has explained, the "point of vacatur is to prevent an unreviewable decision 'from spawning any legal consequences….'" *Camreta,* 563 U.S. at 713.

Vacatur is an equitable remedy based on fairness. Although this case became moot after the DNC and Secretary Hobbs agreed to settle the matter by dismissing the case, those facts don't trigger the *U.S. Bancorp* exception to vacatur. The Court's "established" practice of vacating a lower court judgment when a suit becomes moot on appeal is subject to one principal exception: where a party seeks vacatur, but that party was *itself* responsible for the mootness, then the "party has voluntarily forfeited his legal remedy … and thereby surrender[ed] his claim to the equitable remedy of vacatur." *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership,* 513 U.S. 18, 25 (1994). Here, the party seeking vacatur—the State—was not in any respect responsible for the

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mootness. To the contrary, the State intervened in order to ensure that the Ninth Circuit opinion received the full appellate review process. And it was only *after* the State moved to intervene that Respondents DNC and Secretary Hobbs took steps to moot the case by agreeing to dismiss it.

Given those facts, the mootness at issue here is best viewed as having occurred by "happenstance." And '[w]hen happenstance prevents that review from occurring, the normal rule should apply: Vacatur then rightly 'strips the decision below of its binding effect,' … and 'clears the path for future relitigation.'" *Camreta,* 563 U.S. at 713, quoting *Deakins v. Monaghan,* 484 U.S. 193, 200 (1988) and *Munsingwear*, 340 U.S. at 40.

Unless the Court vacates the Opinion, it will surely spawn many legal consequences. The Ninth Circuit is by far the largest federal circuit, covering nine different states and two federal territories—and the Opinion will be binding law throughout all of those states and territories.[4] This, despite the fact that the Opinion directly conflicts with the *Jacobson* case from the Eleventh Circuit on important constitutional questions of Article III standing and justiciability in voting rights cases. *See, id.* 974 F.3d 1236.

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[4] The Ninth Circuit includes Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington, along with Guam and Northern Mariana Islands. According to data found on United States Courts website, uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2020-tables, about 10,000 new cases are filed in the Ninth Circuit every year, roughly one-fifth of the nation's total.

One "public interest" rationale for leaving moot judicial opinions in place is the notion that "[j]udicial precedents are presumptively correct and valuable to the legal community as a whole." *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.,* 510 U.S. 27, 40 (1993) (Stevens, J., dissenting). But given the split of the circuits here, there is a substantial likelihood that the Court would find the Opinion *not* correct. And that outcome is all the more likely given the DNC's acts in, first, not seeking this Court's review of the *Jacobson* decision, and, second, avoiding any further review in *this* case by agreeing to dismiss it.

Correctly concluding that Secretary Hobbs would not seek further review of the Opinion, the State intervened precisely to ensure that the en banc Ninth Circuit—and if necessary, this Court—had the chance to review the merits of the Opinion. But the DNC and Secretary Hobbs prevented that by agreeing to dismiss the case. In such circumstances, as the Court explained in *U.S. Bancorp*:

"A party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment." 513 U.S. at 25.

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CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted, the State should be allowed to intervene as a party, and the Court should vacate the Opinion.

July 7, 2022

Respectfully submitted,

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APPENDIX

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APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20-16301

[Filed: May 11, 2022]

BRIAN MECINAS; et al.,

Plaintiffs-Appellants,

v.

KATIE HOBBS, the Arizona Secretary of State,

Defendant-Appellee,

STATE OF ARIZONA,

Intervenor-Pending.

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D.C. No. 2:19-cv-05547-DJH
District of Arizona,
Phoenix

ORDER

Before: RAWLINSON and WATFORD, Circuit Judges, and RAKOFF,* District Judge.

The motion for intervention of the State of Arizona (docket entry no. 58), whether permissive or as of right, is denied as untimely made. *See* Fed. R. Civ. P. 24(a) & (b). Because the motion to intervene is denied, the State's motions for rehearing en banc (docket entry no. 60) and to vacate the April 8, 2022 opinion (docket entry no. 64) are also denied.

Judge Watford would grant the State of Arizona's motion to intervene.

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* The Honorable Jed S. Rakoff, United States District Judge for the Southern District of New York, sitting by designation.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20-16301

[Filed: April 8, 2022]

BRIAN MECINAS; CAROLYN VASKO; DNC SERVICES CORPORATION, DBA Democratic National Committee; DSCC; PRIORITIES USA; PATTI SERRANO,

Plaintiffs-Appellants,

v.

KATIE HOBBS, the Arizona Secretary of State,

Defendant-Appellee.

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D.C. No.
2:19-cv-05547-DJH

OPINION

Appeal from the United States District Court
for the District of Arizona
Diane J. Humetewa, District Judge, Presiding

Argued and Submitted January 14, 2022
Pasadena, California

Filed April 8, 2022

Before: Johnnie B. Rawlinson and Paul J. Watford, Circuit Judges, and Jed S. Rakoff,[*] District Judge.

Opinion by Judge Rakoff

SUMMARY[**]

Civil Rights

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The panel reversed the district court's dismissal of a complaint challenging Arizona's Ballot Order Statute, A.R.S. § 16-502, which requires that, in each county, candidates affiliated with the political party of the person who received the most votes in that county in the last gubernatorial race be listed first on the general election ballot.

Plaintiffs, three Arizona voters and three organizations, including the Democratic National Committee, brought this action against the Arizona Secretary of State alleging that the Ballot Order Statute violates the First and Fourteenth Amendments because it gives candidates the benefit of appearing first on the ballot, not on the basis of some politically neutral ordering (such as alphabetically or by lot), but

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[*] The Honorable Jed S. Rakoff, United States District Judge for the Southern District of New York, sitting by designation.

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

on the basis of political affiliation. Plaintiffs allege that, for most of the elections that have occurred in Arizona since the Ballot Order Statute was enacted, the Republican Party's candidates have appeared in the top position in the great majority of Arizona's general election ballots solely as a result of their political affiliation. Plaintiffs allege that the candidate whose name appears first on a ballot in a contested race receives the benefit resulting from a recognized psychological phenomenon known as "position bias" or the "primacy effect."

The district court dismissed the complaint on the basis that plaintiffs lack standing and that the complaint presented a nonjusticiable political question. The panel held that the district court erred in dismissing the suit on these grounds. Specifically, the panel held at least one of the plaintiffs—the DNC—had standing to bring this suit. The panel held that: (1) the DNC satisfied the injury in fact requirement on the basis of its competitive standing; (2) the challenged law was traceable to the Secretary; and (3) having shown that an injunction against the Secretary would significantly increase the likelihood of relief, plaintiffs met their burden as to redressability.

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The panel held that plaintiffs' claims did not present a nonjusticiable political question and that the district court overlooked the narrow scope of the Supreme Court's decision in *Rucho v. Common Cause*, 139 S. Ct. 2484, 2491 (2019). Adjudicating a challenge to a ballot order statute did not present the sort of intractable issues that arise in partisan gerrymandering cases.

The panel rejected the Secretary's argument that the district court's dismissal could be affirmed on the alternative ground that she was not the proper defendant under Article III or the Eleventh Amendment. Finally, the panel held that plaintiffs had stated a claim sufficient to survive a motion to dismiss. The magnitude of the asserted injury was a function of the "primacy effect," presenting factual questions that could not be resolved on a motion to dismiss.

COUNSEL

Abha Khanna (argued) , Elias Law Group LLP, Seattle, Washington; Marc Elias, Elisabeth C. Frost, and John M. Geise, Elias Law Group LLP, Washington, D.C.; for Plaintiffs-Appellants.

Kristen Michelle Yost (argued), Coppersmith Brockelman LLP, Phoenix, Arizona; Kara M. Karlson, Assistant Attorney General; Linley Wilson, Deputy Solicitor General; Office of the Attorney General, Phoenix, Arizona; for Defendant-Appellee.

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OPINION

RAKOFF, District Judge:

In Arizona the state's Ballot Order Statute, A.R.S. § 16-502, requires that, in each county, candidates affiliated with the political party of the person who received the most votes in that county in the last gubernatorial race be listed first on the general election ballot. In 2019, three Arizona voters, Brian Mecinas, Carolyn Vasko, and Patti Serrano, and three organizations, the Democratic National Committee (the "DNC"), the Democratic Senatorial Campaign

Committee (the "DSCC"), and Priorities USA ("Priorities"), a political action committee (collectively, the "Plaintiffs"), brought this action against Katie Hobbs, in her official capacity as the Arizona Secretary of State (the "Secretary"), claiming that the Ballot Order Statute violates the First and Fourteenth Amendments because it gives candidates the benefit of appearing first on the ballot, not on the basis of some politically neutral ordering (such as alphabetically or by lot), but on the basis of political affiliation. Specifically, Plaintiffs allege that, for most of the elections that have occurred in Arizona since the Ballot Order Statute was enacted, the Republican Party's candidates have appeared in the top position in the great majority of Arizona's general election ballots solely as a result of their political affiliation.

Without addressing the merits of Plaintiffs' argument, the district court dismissed their complaint at the pleading stage based on jurisdictional challenges raised by the Secretary, *viz.*, that Plaintiffs lack standing and that the complaint presents a nonjusticiable political question. Plaintiffs now appeal, arguing that the district court erred in dismissing their suit on these grounds. We agree. Specifically, we hold that at least one of the plaintiffs—the DNC—has standing to bring this suit and that Plaintiffs' claims do not present a nonjusticiable political question. We also reject the Secretary's argument that the district court's dismissal can be affirmed on the alternative ground that she is not the proper defendant under Article III or the Eleventh Amendment. Finally, we hold that Plaintiffs have stated a claim sufficient to survive a

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motion to dismiss. We therefore reverse the dismissal of the complaint and remand for further proceedings.

BACKGROUND

In 1979, the Arizona legislature enacted A.R.S. § 16-502, the Ballot Order Statute. The Ballot Order Statute establishes the order in which candidates appear on the ballot in general elections in each of Arizona's fifteen counties. The statute mandates a tiered system of organizing the names on the ballot. First, names of candidates are listed according to their political party, "in descending order according to the votes cast for governor for that county in the most recent general election for the office of governor." *Id.* § 16-502(E). Next, candidates affiliated with political parties that did not have candidates on the ballot in the last general election are "listed in alphabetical order below the parties that did have candidates on the ballot in the last general election." *Id.* Third are the names of candidates who were nominated but are not registered with a recognized political party. *Id.* A space for write-in candidates is listed last. *Id* § 16-502(G).

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Under this statutory organization scheme, the candidates of the political party that received the most votes in the most recent gubernatorial election in that county appear first in all races and on all ballots in that county. According to Plaintiffs' complaint, the result of these rules has been that in all but a handful of general elections since the statute was enacted the vast majority of Arizona's voting population received a ballot with the Republican Party's candidates in the top position. The complaint further alleges that a candidate whose name appears first on a ballot in a

contested race receives an unfair electoral advantage based on political affiliation—specifically, the benefit resulting from a recognized psychological phenomenon known as "position bias" or the "primacy effect."

Plaintiffs filed this action on November 1, 2019. Shortly thereafter, Plaintiffs amended their complaint and moved for a preliminary injunction in advance of the November 2020 election in Arizona. The Secretary opposed the preliminary injunction motion and filed a separate motion to dismiss.

In March 2020, the district court held a two-day evidentiary hearing on Plaintiffs' preliminary injunction motion—at which Plaintiffs' two experts, Dr. Jonathan Rodden and Dr. Jon Krosnick, and the Secretary's expert, Mr. Sean Trende, testified regarding the statistical modeling of the "primacy effect"—and heard oral argument on both the motion for preliminary injunction and the motion to dismiss. While both motions were still pending, the district court, on June 2, 2020, ordered the parties to submit a joint letter as to whether they would agree to deem the preliminary injunction hearing to also constitute a trial on the merits. Shortly thereafter, on June 8, 2020, the parties submitted a responsive letter stating that they would not so agree.

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On June 25, 2020, the district court granted the motion to dismiss with prejudice, holding that Plaintiffs lack standing and, independently, that their claims present nonjusticiable political questions. The court did not reach the merits of Plaintiffs' claims.

Plaintiffs timely noticed an appeal and moved for an injunction pending appeal, which the district court denied. With the 2020 election approaching, Plaintiffs moved this Court for an emergency injunction pending appeal. That motion was denied by the motions Panel in a brief order. Briefing and oral argument on Plaintiffs' appeal followed.

STANDARD OF REVIEW

"We review *de novo* dismissal for lack of subject matter jurisdiction and may affirm on any basis supported by the record." *Zuress v. Donley*, 606 F.3d 1249, 1252 (9th Cir. 2010).[1] When "deciding standing at the pleading stage, and for purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Desert Citizens Against Pollution v. Bisson*, 231 F.3d 1172, 1178 (9th Cir. 2000).

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It is true that there is an exception to this general rule where the defendant brings a motion under Rule 12(b)(1) challenging subject matter jurisdiction as a factual—rather than facial—matter. *See White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). "Once the moving party has converted the motion to dismiss into a factual motion by presenting affidavits or other evidence properly brought before the court, the party opposing the motion must furnish affidavits or other evidence

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[1] Unless otherwise specified, all internal quotation marks, citations, omissions, emphases, and alterations are omitted from all sources cited herein.

necessary to satisfy its burden of establishing subject matter jurisdiction." *Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1039 n.2 (9th Cir. 2003). At that point, the court may resolve any factual disputes concerning the existence of jurisdiction. *See Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983). "However, where the jurisdictional issue and substantive issues are so intertwined that the question of jurisdiction is dependent on the resolution of factual issues going to the merits, the jurisdictional determination should await a determination of the relevant facts on either a motion going to the merits or at trial." *Id.*

Here, the Secretary's motion was based solely on the allegations in Plaintiffs' amended complaint. It thus did not convert the motion to dismiss into a factual motion. And while the district court held an evidentiary hearing on the Plaintiff's preliminary injunction, there is nothing in the record to indicate that the court, *sua sponte*, converted it into a hearing on standing. As such, we properly consider this motion based solely on the allegations in the complaint.[2]

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[2] In its answering brief, the Secretary asserts that the district court properly resolved any necessary factual disputes and that it was "Plaintiffs' burden below 'to furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction.'" This misstates the law. To the extent the district court purported to resolve factual disputes relating to subject matter jurisdiction on the basis of the preliminary injunction hearing, this would be error, particularly insofar as those evidentiary issues are intertwined with the merits.

DISCUSSION

A. *Standing*

Article III of the U.S. Constitution limits federal court jurisdiction to "Cases" and "Controversies." U.S. Const. art. III, § 2, cl. 1. As the Supreme Court has explained, "the 'case or controversy' requirement defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded." *Allen v. Wright*, 468 U.S. 737, 750 (1984). "[S]everal doctrines [] have grown up to elaborate that requirement," including "mootness, ripeness, political question, and the like," but "standing . . . is perhaps the most important of these doctrines." *Id.*

To have standing, plaintiffs must establish (1) that they have suffered an injury in fact, (2) that their injury is fairly traceable to a defendant's conduct, and (3) that their injury would likely be redressed by a favorable decision. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). Each of these elements must be supported "with the manner and degree of evidence required at the successive stages of the litigation." *Id.* at 561. At the pleading stage, "general factual allegations of injury resulting from the defendant's conduct may suffice." *Id.*

The district court held that none of Plaintiffs has standing to mount a facial attack on the Ballot Order Statute. Plaintiffs do not appeal the district court's holding that the individual voters lack standing, arguing only that the organizational plaintiffs—that is, the DNC, the DSCC, and Priorities—have standing. In a suit with multiple plaintiffs, generally only one

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plaintiff need have standing for the suit to proceed. *See Leonard v. Clark*, 12 F.3d 885, 888 (9th Cir. 1993). We find that the DNC has sufficiently established standing to proceed beyond the pleading stage. We do not address the standing of the other plaintiffs.

1. *Injury in Fact*

To meet the first element of standing, a plaintiff's "injury in fact" must be "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560. Of particular relevance here is the requirement that the injury be "particularized," rather than a "generalized grievance." *Id.* at 560, 575. "The fact that a harm is widely shared does not necessarily render it a generalized grievance." *Sisley v. U.S. Drug Enf't Admin.*, 11 F.4th 1029, 1034 (9th Cir. 2021). "Rather, a grievance too 'generalized' for standing purposes is one characterized by its abstract and indefinite nature—for example, harm to the common concern for obedience to law." *Id.*

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Plaintiffs argue that the DNC has satisfied injury in fact on the basis of its "competitive standing," explaining that the Ballot Order Statute "frustrat[es] its mission and efforts to elect Democratic Party candidates" by allegedly diverting more votes to Republicans than Democrats, thereupon giving the Republican Party an unfair advantage.

We first recognized the doctrine of competitive standing in *Owen v. Mulligan*, 640 F.2d 1130 (9th Cir. 1981). In that case, a candidate and "Republic[an] Committee members" sued the U.S. Postal Service for giving an opponent a cheaper mailing rate, in violation

of its own regulations and a previous injunction. *Id.* at 1132–33. The Postal Service argued that the "potential loss of an election" was "too remote, speculative, and unredressable to confer standing." *Id.* at 1132. Rejecting that argument, we recognized both the candidate's and the party officials' standing to sue "to prevent their opponent from gaining an unfair advantage in the election process through abuses of mail preferences which arguably promote his electoral prospects." *Id.* at 1133.

We next addressed competitive standing in *Drake v. Obama*, 664 F.3d 774, 778 (9th Cir. 2011), a case involving a challenge to President Obama's eligibility to serve as President brought by a group of plaintiffs that included Presidential candidates. There, we reaffirmed *Owen*'s holding that, as relevant to this case, the "potential loss of an election [is] an injury-in-fact sufficient to give . . . party officials standing" to challenge an offending election regulation. *Id.* at 783. Ultimately, we held that the candidate-plaintiffs lacked standing because, by the time they had filed their suit, the election had already passed and they were thus no longer candidates. *Id.* at 783–84. However, we distinguished the facts of that case from one in which a plaintiff—like Plaintiffs here—challenged "an ongoing practice that would have produced an unfair advantage in the next election." *Id.* at 783 n.3.

Citing *Owen* and *Drake*, Plaintiffs argue that, like the party committee members in *Owen*, the DNC, as the operational arm of the Democratic Party, *see* 52 U.S.C. § 30101(14), has standing to sue based on the ongoing, unfair advantage conferred to their rival

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candidates by the Ballot Order Statute. We agree. If an allegedly unlawful election regulation makes the competitive landscape worse for a candidate or that candidate's party than it would otherwise be if the regulation were declared unlawful, those injured parties have the requisite concrete, non-generalized harm to confer standing.[3]

This principle is neither novel nor unique to the realm of the electoral. Competitive standing recognizes the injury that results from being forced to participate in an "illegally structure[d] competitive environment," *Shays v. Fed. Election Comm'n*, 414 F.3d 76, 87 (D.C. Cir. 2005), a type of harm that we have identified in a variety of different contexts, *see, e.g.*, *City of Los Angeles v. Barr*, 929 F.3d 1163, 1173 (9th Cir. 2019) ("[The] inability to compete on an even playing field constitutes a concrete and particularized injury."); *Preston v. Heckler*, 734 F.2d 1359, 1365 (9th Cir. 1984) ("[W]hen challenged agency conduct allegedly renders a person unable to fairly compete for some benefit, that person has suffered a sufficient 'injury in fact' and has standing . . . ."). Accordingly, a number of our sister Circuits have come to the same conclusion as we do here in similar cases involving ballot order statutes. *See Pavek v. Donald J. Trump for President, Inc.*, 967

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[3] That both a candidate and a candidate's political party can assert standing based on their shared interest in "fair competition," *see Drake*, 664 F.3d at 782, follows not only from our decision in *Owen*, which held as much, *see* 640 F.2d at 1132, but also from the fact that typically, and as Plaintiffs alleged here, "after the primary election, a candidate steps into the shoes of his party, and their interests are identical," *Texas Democratic Party v. Benkiser*, 459 F.3d 582, 588 (5th Cir. 2006).

F.3d 905, 907 (8th Cir. 2020) (per curiam) (political committees, including the DSCC, had standing to challenge Minnesota's ballot order statute "insofar as it unequally favors supporters of other political parties"); *Green Party of Tenn. v. Hargett*, 767 F.3d 533, 544 (6th Cir. 2014) (political parties had standing to challenge ballot order statute because they were "subject to the ballot-ordering rule" and supported candidates "affected by" the law); *see also Nelson v. Warner*, 12 F.4th 376, 384 (4th Cir. 2021) (candidate had standing to challenge ballot order statute that "allegedly injure[d] his chances of being elected").

Contrary to these established principles, the district court rejected the DNC's competitive-standing theory, relying principally on our decision in *Townley v. Miller*, 722 F.3d 1128 (9th Cir. 2013). In that case, the Nevada Republican Party, along with other plaintiffs, challenged a statute mandating the appearance of a "none of these candidates" ("NOTC") option on the ballot, which the Party alleged would cause its candidates to receive fewer votes and thus harm its chances in an election. *Id.* at 1135. "Assuming without deciding" that the Republican Party had satisfied "standing's injury-in-fact requirement" on the basis of its alleged competitive harm, we held that standing failed for the separate reason that the "causation/traceability and redressability requirements" were not met. *Id.* at 1135–36. The reason was simple: The Party did not challenge the appearance of the NOTC option on the ballot (which it conceded was legal) but only that votes for that option were given no legal effect. *Id.* at 1136. Because the alleged siphoning effect would give rise to injury regardless of whether

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the option was given legal effect or not, the challenged aspect of the statute was "immaterial to plaintiffs' alleged *competitive* injury." *Id.*

The district court characterized the *Townley* decision as "narrow[ing] the scope of competitive standing," stating that this Court "declined to find competitive standing" on the ground that the "inclusion of an 'NOTC' was not the [impermissible] *inclusion of a candidate* on the ballot." This was in error. Rather than narrowing competitive standing as a basis for injury in fact, *Townley* reasserted this Court's long-held position that the "potential loss of an election" may give rise to standing. 722 F.3d at 1135–36 (quoting *Drake*, 664 F.3d at 783–84).[4]

Further, because the injury is the burden of being forced to compete under the weight of a state-imposed disadvantage, we reject the Secretary's argument that "Plaintiffs must show"—or rather, allege, given the current procedural posture—"that the primacy effect has changed (or will imminently change) the actual outcome of a partisan election." The Secretary suggests that, absent the allegation of a changed outcome, "Plaintiffs' purported injury remains 'conjectural' or 'hypothetical,'" citing in support the Supreme Court's decision in *Gill v. Whitford*, 138 S. Ct. 1916 (2018). But

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[4] In any case, *Townley* could not have narrowed the doctrine adopted in *Owen* (and reaffirmed in *Drake*) because it was the decision of a three-judge panel. *See Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001) ("Once a panel resolves an issue in a precedential opinion, the matter is deemed resolved, unless overruled by the court itself sitting en banc, or by the Supreme Court.").

Gill offers no support for that position. In that case, the Supreme Court held that, in order to establish standing to challenge an allegedly unconstitutional gerrymander on the basis of a voter-dilution theory, a voter-plaintiff must show that he or she resides in a gerrymandered district, explaining that absent such a showing the voter lacks a sufficiently "particularized" injury. *Id.* at 1926, 1934. It thus left undisturbed the distinct and established competitive standing doctrine. *See id.* at 1937–38 (Kagan, J., concurring) ("Everything said so far relates only to suits alleging that a partisan gerrymander dilutes individual votes. That is the way the Court sees this litigation.").

We thus conclude that the DNC has sufficiently pled an injury in fact.

2. *Traceability and Redressability*

The Secretary also argues that even if Plaintiffs could demonstrate an injury in fact, they cannot meet the two elements of standing not addressed by the district court—traceability and redressability. *See Lujan*, 504 U.S. at 560–61. "[T]he 'fairly traceable' and 'redressability' components for standing overlap and are 'two facets of a single causation requirement.'" *Washington Env't Council v. Bellon*, 732 F.3d 1131, 1146 (9th Cir. 2013) (quoting *Allen*, 468 U.S. at 753 n.19). However, they are distinct in that traceability "examines the connection between the alleged misconduct and injury, whereas redressability analyzes the connection between the alleged injury and requested relief." *Id.*

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To establish traceability, "there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Lujan*, 504 U.S. at 560. The Secretary argues that Plaintiffs cannot establish traceability because neither the challenged section of the Ballot Order Statute, A.R.S. § 16-502(E), nor the provision that directs the board of supervisors in Arizona's counties to prepare and print ballots, A.R.S. § 16- 503, mentions the Secretary. *See Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1253–54 (11th Cir. 2020) (plaintiff failed to plead an injury traceable to the Florida Secretary of State where the challenged ballot order statute "tasks the Supervisors, independently of the Secretary, with printing the names of candidates on ballots in the order prescribed by the ballot statute"). Similarly, the Secretary argues that Plaintiffs' claims and relief sought fail for lack of redressability because "[a]n injunction ordering the Secretary not to follow the ballot statute's instructions for ordering candidates cannot provide redress, for neither she nor her agents control the order in which candidates appear on the ballot." *Id.* at 1254.

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However, while the county supervisors print the ballots under A.R.S. § 16-503, they have no discretion in ordering candidate names. Rather they are bound to follow the Statute and the Election Procedures Manual, which is promulgated by the Secretary as a matter of Arizona law. *See* 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

Manual, which contains detailed instruction on ballot design and expressly requires counties to order candidates' names on ballots in accordance with the Statute, is promulgated by the Secretary in the context of her role as Arizona's "chief state election officer," A.R.S. § 16-142(A)(1), who is tasked with "prescrib[ing] 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).[5] Indeed, relying on the Secretary's role in "promulgat[ing] rules . . . applicable to and mandatory for the statewide . . . elections," we have previously held that a challenged Arizona election law was traceable to the Secretary. *Arizona Libertarian Party, Inc. v. Bayless*, 351 F.3d 1277, 1281 (9th Cir. 2003). The same holds true here.

Redressability is satisfied so long as the requested remedy "would amount to a significant increase in the likelihood that the plaintiff would obtain relief that directly redresses the injury suffered." *Renee v. Duncan*, 686 F.3d 1002, 1013 (9th Cir. 2012). Because, as noted above, the Secretary is statutorily delegated the authority to "prescribe rules" for "producing [and] distributing" ballots in accordance with the Statute, A.R.S. § 16-452(A), the counties would have no choice but to follow a mandate from her directing them to

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[5] Because the Secretary has a role in overseeing the ballots, in contrast to the Florida Secretary of State, who "is responsible only for certifying" the nominees, the Eleventh Circuit's *Jacobson* decision is inapposite. 974 F.3d at 1253.

order the ballots pursuant to a court's injunction. The Secretary does not dispute this point. Instead, she argues that her ability to adhere to a court's injunction may be stymied by the governor or the attorney general, both of whom must approve the Manual before it can go into effect. *See id.* § 16-452(B). But this is of no moment. "Plaintiffs need not demonstrate that there is a 'guarantee' that their injuries will be redressed by a favorable decision." *Renee*, 686 F.3d at 1013. Having shown that an injunction against the Secretary would "significant[ly] increase" the likelihood of relief, Plaintiffs have met their burden as to redressability. *Id*.

Thus, at least with regard to the DNC, Plaintiffs have satisfied all three elements of standing.

B. *Political Question*

In addition to dismissing for lack of standing, the district court held that Plaintiffs' suit was nonjusticiable under the political question doctrine. In general, a federal court "has a responsibility to decide cases properly before it, even those it 'would gladly avoid.'" *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 194 (2012) (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821)). To this rule, the political question doctrine operates as only a "narrow exception." *Id.* Accordingly, the Supreme Court has limited its application to those few cases where there is either "a textually demonstrable constitutional commitment of the issue to a coordinate political department" or "a lack of judicially discoverable and manageable standards for resolving it." *Nixon v. United States*, 506 U.S. 224, 228, (1993) (quoting *Baker v.*

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Carr, 369 U.S. 186, 217 (1962)). As we have explained, "courts should undertake a discriminating case-by-case analysis to determine whether [a] question posed lies beyond judicial cognizance" under this doctrine. *Alperin v. Vatican Bank* , 410 F.3d 532, 545 (9th Cir. 2005).

In finding Plaintiffs' challenge to the Ballot Order Statute nonjusticiable for lack of manageable standards, the district court—adopting the Eleventh Circuit's reasoning in *Jacobson*, 974 F.3d at 1260–63—invoked the Supreme Court's recent decision in *Rucho v. Common Cause*, 139 S. Ct. 2484, 2491 (2019), a case involving challenges to two states' congressional districting maps as unconstitutional partisan gerrymanders. There, the Court concluded that, given its precedent allowing legislatures "to take partisan interests into account when drawing district lines," adjudicating just "how much" partisan gerrymandering "is too much" presents questions of "fairness" not suitable for judicial resolution. *Id.* at 2497, 2500–01. Relying on this language, the district court held that the present case was similarly nonjusticiable, characterizing Plaintiffs' complaint as calling on the court to decide what constitutes a "fair" ballot ordering system.

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But, in so holding, the district court overlooked the narrow scope of the *Rucho* decision, which the Supreme Court explicitly linked to its "struggle[] without success over the past several decades to discern judicially manageable standards for deciding" partisan gerrymandering claims. *Id.* at 2491. The Court explicitly distinguished partisan gerrymandering claims as "more difficult to adjudicate" than other

election-related challenges, namely districting challenges grounded in "one-person, one-vote" violations and racial discrimination. *Id.* at 2497. As such, "[n]othing about the Court's language . . . suggests that the holding in *Rucho* is applicable outside the context of partisan gerrymandering claims." *Nelson*, 12 F.4th at 387.[6]

Indeed, adjudicating a challenge to a ballot order statute does not present the sort of intractable issues that arise in partisan gerrymandering cases. While cases like *Rucho* require "reallocating power and influence between political parties" through complicated exercises in (literal) line-drawing, 139 S. Ct. at 2502, there is no comparable difficulty in constructing a ballot ordering scheme that lists candidates on a basis other than political party affiliation. Whether it be at random, through the sort of rotation system required in Arizona's primary election, *see* A.R.S. § 16-502(H), or by some other

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[6] Contrary to the suggestion of the district court, our decision in *Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020), did not extend *Rucho*'s reasoning to find claims related to climate change nonjusticiable under the political question doctrine. *See id.* at 1174 n.9 ("we do not find this to be a political question"). Rather, in that case, we found that the plaintiffs could not satisfy the redressability element of standing because the relief sought—"a comprehensive scheme to decrease fossil fuel emissions and combat climate change"—was inconsistent with the limited remedial authority of federal courts siting in equity. *Id.* at 1171–73; see also *Guar. Tr. Co. of N.Y. v. York*, 326 U.S. 99, 105 (1945) ("Equitable relief in a federal court is of course subject to restrictions," including that "the suit must be within the traditional scope of equity as historically evolved in the English Court of Chancery[.]"). That issue is not present here.

method, "[a]ny system that orders candidates on a basis other than party affiliation remedies the constitutional concern," *Jacobson*, 974 F.3d at 1301 (Pryor, Jill, J., dissenting). It is thus no surprise that, in contrast to the Court's persistent struggle to address partisan gerrymandering claims, federal courts—as well as state courts[7]—have adjudicated the merits of ballot order disputes for decades. *See Nelson*, 12 F.4th at 387 (collecting cases). Notably, this includes the U.S. Supreme Court, which, in a summary affirmance over an objection premised on the political question doctrine, upheld a district court's finding that an incumbent-favoring ballot order policy was a "purposeful and unlawful invasion of [the] plaintiffs' Fourteenth Amendment right to fair and evenhanded treatment." *Mann v. Powell*, 314 F. Supp. 677, 679 (N.D. Ill. 1969), *aff'd*, 398 U.S. 955 (1970).

More particularly, there is no reason to conclude that the Supreme Court's *Rucho* opinion "call[s] into question the use of the *Anderson*[-]*Burdick* framework," the constitutional test that "[c]ourts regularly [use to] evaluate and adjudicate disputes regarding the lawfulness of state [election] statutes, including ballot-order statutes." *Nelson*, 12 F.4th at

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[7] For example, in *Kautenberger v. Jackson*, 85 Ariz. 128, 129 (1958), the Arizona Supreme Court considered a challenge under the state constitution to a law that required rotating candidates' names on paper ballots in primary elections but maintained a fixed ballot order on machine ballots. The court held that Arizona's constitution required name rotation due to the "well-known fact" that "where there are a number of candidates for the same office, the names appearing at the head of the list have a distinct advantage." *Id.* at 131.

387; *Soltysik v. Padilla*, 910 F.3d 438, 444 (9th Cir. 2018) ("Our court has applied [the *Anderson-Burdick*] test to a wide variety of challenges to ballot regulations and other state-enacted election procedures."). Under the *Anderson-Burdick* test, a court identifies the "character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" and then weighs the injury "against the precise interests put forward by the State as justifications for the burden imposed by its rule." *Burdick v. Takushi* , 504 U.S. 428, 434 (1992); *see Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).

As reflected in the Supreme Court's use of *Anderson-Burdick* to adjudicate claims that state election laws unconstitutionally burden political parties' rights, the test provides precisely the sort of judicially manageable standard that renders a case such as the instant one amenable to adjudication. *See, e.g.*, *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 357–64 (1997) (applying test to Minnesota law prohibiting candidates from appearing on ballot as candidate of more than one political party). Because the *Anderson-Burdick* test is available to review Plaintiffs' constitutional challenges, we conclude that we can "comfortably employ[] judicially manageable standards" in adjudicating the merits of the claims at issue here. *Pavek*, 967 F.3d at 907.

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We therefore hold that the political question doctrine does not render the merits of this case nonjusticiable.[8]

C. *Eleventh Amendment*

The Secretary further argues that even if we disagree with both of the district court's jurisdictional holdings, we can nevertheless affirm the dismissal on the ground that Plaintiffs' suit is barred by Eleventh Amendment immunity. The Eleventh Amendment has been "construed to prohibit federal courts from entertaining suits brought by a state citizen against the state or its instrumentality in the absence of consent." *Culinary Workers Union, Loc. 226 v. Del Papa*, 200 F.3d 614, 619 (9th Cir. 1999). However, under *Ex parte Young*, 209 U.S. 123 (1908), this immunity is subject to an exception for "actions for prospective declaratory or injunctive relief against state officers in their official capacities for their alleged violations of federal law" so long as the state officer has "some connection with enforcement of the act." *Coal. To Defend Affirmative Action v. Brown*, 674 F.3d 1128, 1134 (9th Cir. 2012) (quoting *Ex parte Young*, 209 U.S. at 157).

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[8] The district court further erred insofar as it based its finding of nonjusticiability on its determination that, as a factual matter, Plaintiffs "did not meet their burden" of establishing "the existence of any ballot order effect in Arizona." Because the existence of such an effect is unquestionably an issue intertwined with the merits, the district court was not permitted to resolve this question of fact on a motion to dismiss. *See Augustine*, 704 F.2d at 1077.

The question of whether there is the requisite "connection" between the sued official and the challenged law implicates an analysis that is "closely related—indeed overlapping"—with the traceability and redressability inquiry already discussed. *Culinary Workers*, 200 F.3d at 619 (quoting *Okpalobi v. Foster*, 190 F.3d 337, 347 (5th Cir. 1999)); *see also Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 919 (9th Cir. 2004) (noting that the two inquiries share a "common denominator"). Accordingly, the Secretary argues, as she did in connection to standing, that she lacks sufficient connection to the Ballot Order Statute because she is merely the chief state election officer, not the one who prints the ballots. In support of this position, the Secretary cites the Fifth Circuit's decision in *Mi Familia Vota v. Abbott*, 977 F.3d 461, 468–69 (5th Cir. 2020), in which the court held that a claim challenging a prohibition against the use of paper ballots did not fall within the *Ex parte Young* exception as applied to the Texas Secretary of State because county officials, and not the Secretary of State, were statutorily responsible for printing ballots.

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The decision in *Mi Familia Vota*, however, was premised on a finding that an injunction against the Texas Secretary of State would still leave local officials with enough discretion to prevent meaningful relief, *see id.* at 467–68, whereas in Arizona, in contrast, the Secretary has clear duties to oversee ballot production, including, as already discussed, through the promulgation of the Manual, which the county officials have no discretion to disregard, A.R.S. §§ 16-452(A), (C). The "connection" required under *Ex parte Young* demands merely that the implicated state official have

a relevant role that goes beyond "a generalized duty to enforce state law or general supervisory power over the persons responsible for enforcing the challenged provision." *Planned Parenthood*, 376 F.3d at 919. Here, given the Secretary's role in promulgating the Election Procedures Manual, that modest requirement is far exceeded. The Secretary is thus properly named as a defendant under *Ex parte Young*.

Having decided that Plaintiffs' suit against the Secretary presents a justiciable case or controversy, we now turn to the merits.

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D. *The Merits*

The right to vote is "preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). As such, voting is accorded "the most fundamental significance under our constitutional structure." *Burdick*, 504 U.S. at 433. But, "[o]n the other hand, the Constitution assigns to the States the duty to regulate elections, and election laws 'invariably impose some burden upon individual voters.'" *Arizona Democratic Party v. Hobbs*, 18 F.4th 1179, 1186 (9th Cir. 2021) (quoting *Burdick*, 504 U.S. at 433). Moreover, "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Id.* at 1186–87 (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)).

To balance these competing concerns, the Supreme Court "devised [the *Anderson-Burdick* test as] a 'flexible standard' for assessing laws that regulate elections." *Id.* at 1187 (quoting *Burdick*, 504 U.S. at

434). "This is a sliding scale test, where the more severe the burden, the more compelling the state's interest must be." *Soltysik*, 910 F.3d at 444. "A law that imposes a 'severe' burden on voting rights must meet strict scrutiny." *Hobbs*, 18 F.4th at 1187 (quoting *Burdick*, 504 U.S. at 434). "Lesser burdens, however, trigger less exacting review, and a State's 'important regulatory interests' will usually be enough to justify 'reasonable, nondiscriminatory restrictions.'" *Timmons*, 520 U.S. at 358 (quoting *Burdick*, 504 U.S. at 434).

In assessing Plaintiffs' challenge to the Ballot Order Statute, the first step, as already noted, is to consider "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate." *Anderson*, 460 U.S. at 789. Here, Plaintiffs assert a cognizable injury resulting from the "primacy effect," which Plaintiffs allege is so substantial so as to give "Republican candidates . . . a significant, state-mandated advantage, up and down the slate of partisan races," violating the First and Fourteenth Amendments by diluting votes for candidates whose party the Statute disfavors and conferring an unfair political advantage on certain candidates solely because of their partisan affiliation. *See, e.g.*, *McLain v. Meier*, 637 F.2d 1159, 1165–67 (8th Cir. 1980) (incumbent-first statute "burden[ed] the fundamental right to vote possessed by supporters of the last-listed candidates" and violated equal protection); *Sangmeister v. Woodard*, 565 F.2d 460, 467 (7th Cir. 1977) (policy of awarding first position on the ballot to the incumbent party violated equal protection); *Mann*, 314 F. Supp. at 679 (favoring incumbents when breaking ballot order

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ties violated "Fourteenth Amendment right to fair and evenhanded treatment"), *aff'd*, 398 U.S. 955.

The Secretary urges us to deem "any burden" imposed by the Statute as "negligible" and thus justified by the state's interest in "establish[ing] a manageable ballot layout." But the magnitude of the asserted injury is a function of the "primacy effect," presenting factual questions that cannot be resolved on a motion to dismiss. *See Soltysik*, 910 F.3d at 449. For example, the complaint alleged that in the 2020 election cycle, more than "80% of Arizona's voters [would] be presented with ballots in which the names of Republican candidates [were] listed first for every single partisan race." And, as noted, the Arizona Supreme Court has characterized the "distinct advantage" arising from a candidate's name appearing at the head of a ballot as a "well-known fact." *Kautenberger*, 85 Ariz. at 131. Moreover, even if the burden imposed is, as the Secretary contends, "not severe," that is not the end of our inquiry. *Soltysik*, 910 F.3d at 445. Even a ballot measure "not severe enough to warrant strict scrutiny" may well be "serious enough to require an assessment of whether alternative methods would advance the proffered governmental interests." *Id.* at 450. And given that Arizona's asserted interest in a manageable ballot could seemingly be effectuated through a nondiscriminatory ordering system, "judgment in the Secretary's favor is premature" at this juncture. *Id.*

Accordingly, we reverse the district court's order and judgment dismissing Plaintiffs' claims with

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prejudice and remand for further proceedings consistent with this Opinion.

REVERSED AND REMANDED.

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APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV-19-05547-PHX-DJH

[Filed: June 25, 2020]

Brian Mecinas, et al.,

Plaintiffs,

v.

Katie Hobbs,

Defendant.

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ORDER

This matter is before the Court on Plaintiffs' Motion for Preliminary Injunction (Doc. 14) and Defendant's Motion to Dismiss the First Amended Complaint (Doc. 26). Plaintiffs seek declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201 and 2202. (Doc. 13). The Court held oral argument on the Motion to Dismiss and an evidentiary hearing on the Motion for Preliminary Injunction on March 4, 5, and 10, 2020 ("Hearing"), and took both Motions under advisement. (Docs. 49, 52, and 55).

I. Background

This case involves the constitutionality of Arizona's general election ballot ordering statute, A.R.S. § 16-502(E) (the "Ballot Order Statute"). The Ballot Order Statute, enacted in 1979, will be utilized for the twentieth time in the November 2020 general election. The Ballot Order Statute establishes the order in which candidates appear on the ballot in each of Arizona's fifteen counties.[1] Names of candidates are listed according to their political party, "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). Therefore, candidates of the political party that received the most votes in the most recent gubernatorial election in that county appear first in all races and on all ballots in that county. *Id*. This has generally led to Republican candidates being listed first in some counties, and Democratic candidates being listed first in other counties in any given general election.[2] A three-letter

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[1] The Statue was enacted in 1979 as a part of a comprehensive elections code agreed to by the Arizona Democratic and Republican parties and the County Recorders Association. The Statute, which has periodically been modified over time with participation of the 15 County Recorders, aims to "help the County Recorders and Election Directors do a better job and save public money." Ariz. H.R. Comm. Min., S.B. 1372 (Mar. 1, 2000).

[2] In four general elections since the Statute's enactment, 1984, 1986, 2008 and 2010, Democratic candidates appeared first on the ballots in every race in all 15 counties statewide. These four elections are the only instances where a single party's candidates were listed first on all ballots statewide since the Statute was enacted. (Doc. 15-1 at 11).

political party identification—DEM for Democrat and REP for Republican—is listed next to each candidate's name regardless of the candidate's position on the ballot. A.R.S. § 16-502(C). This identification provides voters with visual cues when searching for their preferred party on the ballot.

A. The Parties

Plaintiffs in this matter include three Arizona voters, Brian Mecinas, Carolyn Vasko, and Patti Serrano (collectively the "Voter Plaintiffs"), and three organizations, the Democratic National Committee ("DNC"), the Democratic Senatorial Campaign Committee ("DSCC"), and PRIORITIES USA ("Priorities"), a political action committee (collectively the "Organizational Plaintiffs"). (Doc. 13). Plaintiffs contend that a "well-documented phenomena" known as "position bias" or "primacy effect" exists in elections of all kinds throughout the country. Plaintiffs define position bias as the "significant electoral advantage" gained by the first-listed candidate "merely from being listed first." (Doc. 14 at 5). They allege that candidates in Arizona who are listed first on the ballot obtain "several percentage points" more than those candidates not listed first. *Id.* While Plaintiffs acknowledge that the Ballot Order Statute could theoretically equally distribute the number of times a candidate from each party appears first, they argue that this could never happen in Arizona because the population is not equally divided between counties.

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The Voter Plaintiffs allege that the Ballot Order Statute injures them, other Arizona voters, and the candidates they support, by diluting their votes and

creating an "artificial" advantage to Republicans. (Doc. 13 at 9). They explain that this "dilution" results from their votes needing to "compete with the overwhelming majority of Arizonans who vote in counties where the favored party is the Republican Party." (Doc. 13 at 6). Moreover, they allege that the "weight and impact" of their votes are "consistently decreased by the votes accruing to the first-listed candidates." (Doc. 13 at 18). The Voter Plaintiffs further allege that because they live in Maricopa County, where Republicans will be listed first on the ballot, they will personally suffer irreparable injury due to the burden on their ability to "engage in effective efforts to elect" Democrats. (Doc. 13 at 8). Plaintiff Mecinas specifically alleges that the Ballot Order Statues impedes his work of supporting and interning for a congressional campaign. (*Id.*) Plaintiff Vasko, who was 17 years old when this case was filed, alleges that the impact of her efforts to elect Democratic candidates, including during her mother's 2014 candidacy for the state legislature, have been negatively impacted. (*Id.* at 9). Plaintiff Serrano alleges that she participates in "advocacy efforts for progressive causes" that are negatively impacted by the Ballot Order Statute. (*Id.* at 10).

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Plaintiff DNC is the national committee of the Democratic Party. It alleges that the Ballot Order Statute frustrates its mission to elect Democratic candidates and to actively support the development of programs that benefit its candidates. (Doc. 13 at 10-11). The DNC alleges that it has "seven members in Arizona and millions of constituents who affiliate with and consider themselves to be members of the Democratic Party." (Doc. 14-6 at 4). The DNC alleges

that it has expended extra resources and diverted funding to Arizona in order to combat the effects of the Ballot Order Statute. (Doc. 13 at 10). It further alleges that its members are harmed when Republican candidates are listed first "in the vast majority of Arizona's counties" because its members' votes are diluted. (Doc. 13 at 10).

Plaintiff DSCC is the national senatorial committee of the Democratic Party with a mission of electing Democrats to the United States Senate. (Doc. 13 at 11). The DSCC alleges that it spent millions of dollars in Arizona in 2018 to "persuade and mobilize voters to support Democratic Senate candidates" and that it "again intends to make substantial contributions and expenditures to support the Democratic candidate for U.S. Senate in Arizona in 2020." (*Id.*) The DSCC alleges that the Ballot Order Statute frustrates its mission by giving an arbitrary and artificial electoral advantage to Republicans, including in Arizona Senate races.[3] The DSCC states that, "[o]f particular concern to the DSCC is that the Ballot Order Statute will give the Republican candidate a meaningful advantage in what is expected to be a highly competitive race for U.S. Senate, as Republican Senator Martha McSally will be defending the seat to which she was appointed earlier this year." (Doc. 14-5 at 4). It further alleges

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[3] Democratic candidate, Kyrsten Sinema, won the U.S. Senate race in 2018, becoming the first Democrat elected to the Senate from Arizona in nearly three decades. Simon Romero, *Kyrsten Sinema Declared Winner in Arizona Senate Race*, THE NEW YORK TIMES, Nov. 12, 2018, https://www.nytimes.com/2018/11/12.us/kyrsten-sinema-arizona-senator.html.

that the Ballot Order Statute will significantly impact DSCC's resources, "in a severe and irreparable way," by diverting money away from other unspecified states to combat the "arbitrary advantage" Republicans enjoy in Arizona. (*Id.*)

Plaintiff Priorities is an advocacy organization with a mission to "engage Americans in the progressive movement by running a permanent digital campaign" to mobilize citizens around issues. (Doc. 13 at 11). Priorities spent money in Arizona in the 2018 election to advance this mission. (*Id.* at 12). Priorities alleges that the Ballot Order Statute frustrates its mission by giving an arbitrary and artificial electoral advantage to Republicans, which causes it to spend more money in Arizona and divert money away from other unspecified states. (*Id.*)

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B. Relief Requested

Plaintiffs request that the Court issue an order (1) declaring that the Ballot Order Statute is unconstitutional pursuant to the First and Fourteenth Amendments, (2) preliminarily and permanently enjoining the Secretary from utilizing the Ballot Order Statute, (3) directing the Secretary to comply with a new scheme they wish the Court to develop, and (4) awarding costs, disbursements and attorneys' fees incurred in bringing this action. (Doc. 13). Specifically, Plaintiffs request a system by which major party candidates have an equal opportunity to be listed first on the ballot by either requiring the rotation of major party candidates by precinct or county, or by a lottery to determine which candidate will be listed first in each

precinct or county.[4] (Doc. 64 at 24-26). At the hearing, Plaintiffs stressed that they are not requesting that Independent Party candidates or write-in candidates be included in the new rotation scheme. (*Id.*)

C. Defendant's Position

Defendant argues that the Court must not reach the merits of Plaintiffs' arguments, as they have not alleged a concrete injury sufficient to satisfy the requirements of Article III standing, that the relief sought is barred by the Eleventh Amendment, and that the claims are non-justiciable political questions. (Doc. 26). Alternatively, Defendant argues that Plaintiffs failed to establish that the primacy effect exists in Arizona, and thus, that their claims fail as a matter of law. The Court must first address Defendant's Motion to Dismiss and the jurisdictional arguments Defendant makes therein. (Doc. 26).

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II. Legal Standards

"To ensure that the Federal Judiciary respects the proper—and properly limited—role of the courts in a democratic society, a plaintiff may not invoke federal-court jurisdiction unless he can show a personal stake in the outcome of the controversy." *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018) (internal citations omitted). Article III provides that federal courts may only exercise judicial power in the context

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[4] Arizona recognizes three political parties: the Democratic Party, the Republican Party and the Libertarian Party. *See* https://azsos.gov/elections/information-about-recognized-political-parties. (last visited June 25, 2020).

of "cases" and "controversies." U.S. CONST. art. III, § 2, cl. 1; *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 559 (1992). For there to be a case or controversy, the plaintiff must have standing to sue. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) ("*Spokeo II*"). Whether a plaintiff has standing presents a "threshold question in every federal case [because it determines] the power of the court to entertain the suit." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *DaimlerChrysler Corp. v. Cuno,* 547 U.S. 332, 341 (2006). A suit brought by a plaintiff without Article III standing is not a "case or controversy," and an Article III federal court therefore lacks subject matter jurisdiction. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 101 (1998).

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"[A] plaintiff seeking relief in federal court must first demonstrate . . . a personal stake in the outcome," *Baker v. Carr*, 369 U.S. 186, 204 (1962), distinct from a "generally available grievance about government," *Lance v. Coffman*, 549 U.S. 437, 439 (2007) (per curiam). That threshold requirement "ensures that we act as judges, and do not engage in policymaking properly left to elected representatives." *Gill*, 138 S. Ct. at 1923. To establish standing, a plaintiff has the burden of clearly demonstrating that she has: "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo II,* 136 S. Ct. at 1547 (quoting *Warth*, 422 U.S., at 518); accord *Kokkonen v. Guardian Life*

Ins. Co. of Am., 511 U.S. 375, 377 (1994) (noting the party asserting jurisdiction bears the burden of establishing subject matter jurisdiction on a Rule 12(b)(1) motion to dismiss).

To establish an injury in fact, "a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo,* 136 S. Ct. at 1548 (quoting *Lujan,* 504 U.S., at 560). "When we have used the adjective 'concrete,' we have meant to convey the usual meaning of the term—'real,' and not 'abstract.'" *Id*. The plaintiff must establish a "particularized" injury, which means that "the injury must affect the plaintiff in a personal and individual way." *Raines v. Byrd*, 521 U.S. 811, 819 (1997). Moreover, "[a]lthough imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is certainly impending." *Clapper v. Amnesty Int'l USA,* 568 U.S. 398, 409 (2013). Where a plaintiff has not established the elements of standing, the case must be dismissed pursuant to Federal Rule of Civil Procedure ("Rule") 12(b)(1).

Rule 12(b)(1) authorizes a court to dismiss claims over which it lacks subject-matter jurisdiction. A Rule 12(b)(1) challenge may be either facial or factual. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). In a facial attack, the court may dismiss a complaint when the allegations of and documents attached to the complaint are insufficient to confer subject-matter jurisdiction. *See Savage v. Glendale*

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Union High Sch. Dist. No. 205, 343 F.3d 1036, 1039 n.2 (9th Cir. 2003). In this context, all allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. *Fed'n of African Am. Contractors v. City of Oakland*, 96 F.3d 1204, 1207 (9th Cir. 1996). In contrast, when a court evaluates a factual challenge to jurisdiction, a court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. *Safe Air for Everyone*, 373 F.3d at 1039 ("In resolving a factual attack on jurisdiction, the district court may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment.").

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Under Rule 12(b)(6), a district court must dismiss a complaint if it fails to state a claim upon which relief can be granted. To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556, (2007). A claim is facially plausible when the plaintiff pleads facts that "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). There must be "more than a sheer possibility that a defendant has acted unlawfully." *Id*. In other words, while courts do not require "heightened fact pleading of specifics," a plaintiff must allege facts sufficient to "raise a right to relief above the speculative level." *See Twombly*, 550 U.S. at 570.

Establishing the plausibility of a complaint's allegations is "context-specific" and "requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679. In that regard, and important here, this Court acknowledges that federal courts cannot lightly interfere with a state election. *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) (en banc). Although election cases are not exempt from traditional stay standards, courts must nonetheless take careful account of considerations specific to state election cases. *Feldman v. Arizona Secretary of State's Office*, 843 F.3d 366, 368 (9th Cir. 2016) (citing *Veasey v. Perry*, 135 S.Ct. 9, 10 (2014)) (Ginsburg, J., dissenting); *see also Purcell v. Gonzales*, 549 U.S. 1 (2006).

The Court will first address Defendant's Motion to Dismiss and examine whether Plaintiffs have alleged sufficient facts to establish standing.

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III. Analysis

Defendant argues that neither the Voter Plaintiffs nor the Organizational Plaintiffs have alleged an injury sufficient to establish Article III Standing. Defendant also argues that Plaintiffs' alleged injuries are not redressable by this Court. They argue that the lack of either of these elements requires dismissal. (Doc. 26).

A. Injury in fact

Plaintiffs allege that, absent an Order from this Court, they will be "severely injured" because of the Ballot Order Statute and its history of "overwhelmingly favor[ing] the Republican Party." (Doc. 13 at 6). To determine whether Plaintiffs have

adequately alleged an injury in fact to establish standing, the Court must look to the Amended Complaint. (Doc. 13).

As an initial matter, Plaintiffs heavily rely on a recent decision arising in Florida, where a district court enjoined Florida's state ballot order statute, which is similar to Arizona's Ballot Order Statute. *See Jacobson v. Lee*, 411 F. Supp. 3d 1249 (N.D. Fla. 2019), vacated and remanded sub nom. *Jacobson v. Fla. Sec'y of State*, 957 F.3d 1193 (11th Cir. 2020). There, the secretary of state argued that the plaintiffs lacked standing, however, the district court found that those "hodgepodge" arguments were designed to prevent the court from reaching the merits of the case. *Id.* at *2. Plaintiffs argue that Defendant here is also attempting to mislead the Court into dismissing the case on standing grounds. *See* (Doc. 14 at 9; *see also* Doc. 27 at 7) ("Instead of grappling head-on with the serious constitutional claims . . . Defendant . . . moves to dismiss the Complaint in its entirety." "The remainder of [Defendant's] motion is spent conjuring doubt as to whether this case is justiciable at all."). What Plaintiffs fail to fully appreciate, however, is that this Court ***must*** analyze the elements of standing thoroughly. This is a fundamental principal of Article III. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101–02 (1998) ("For a court to pronounce . . . the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act *ultra vires*.").

The district court decision in *Jacobson* has no bearing on this Court, especially in light of the Eleventh Circuit's decision reversing that order in its

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entirety and finding that the plaintiffs did not have standing. *See Jacobson v. Fla. Sec'y of State*, 957 F.3d 1193, 1201 (11th Cir. 2020) ("Unfortunately, the district court took its obligation to ensure its jurisdiction far too lightly. It dismissed weighty challenges to the voters' and organizations' standing under Article III as a 'hodgepodge' of '[p]reliminary [m]iscellanea' and proceeded to declare Florida's ballot statute unconstitutional and enter an injunction against both the Secretary and the nonparty Supervisors. In doing so, the district court acted *ultra vires* by ordering relief that the voters and organizations had no standing to seek.").

This Court is obligated to address standing and determine whether Plaintiffs have adequately alleged an injury in fact. In doing so, the Court will first address standing as to the Voter Plaintiffs, followed by the Organizational Plaintiffs.

1. Voter Plaintiffs

The Voter Plaintiffs allege that the Ballot Order Statute impermissibly infringes on their right to vote when Republican candidates appear first on the majority of ballots in the state. (Doc. 13). The Amended Complaint alleges that "ballot order matters, and when it is unfairly or arbitrarily assigned, it can raise concerns of constitutional magnitude." (Doc. 13 at 2). Plaintiffs allege that in the upcoming 2020 general election, the Ballot Order Statute will cause "severe and irreparable harm to the Plaintiffs, the candidates they support, and the voters who support them." (Doc. 13 at 16). They allege that the candidates they support "may well be unable to overcome the advantage the

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Ballot Order Statute gives to their Republican opponents." (Doc. 14-2 at 3). They allege that these are all examples of a state-sanctioned burden on their right to vote. The Voter Plaintiffs also allege that the Ballot Order Statute "dilutes" their votes in relation to votes cast for Republicans who are listed first on the ballot. (Doc. 13).

a. Right to Vote

Individuals have an interest in being able to vote under the First and Fourteenth Amendments to the Constitution. Indeed, "voting is of the most fundamental significance under our constitutional structure." *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979). All voters have a legal interest in their ability to vote, in not being prevented from voting because of state-imposed obstacles, and in their vote being weighed the same as all others. *See, e.g., Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) ("No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live"); *Reynolds v. Sims*, 377 U.S. 533, 544 (1964) ("It has been repeatedly recognized that all qualified voters have a constitutionally protected right to vote . . . " and that right cannot not be "diluted by ballot-box stuffing"); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966) (declaring poll taxes as unconstitutional infringement on the right to vote); *United States v. Mosley,* 238 U.S. 383, 386 (1915) ("the right to have one's vote counted is as open to protection by Congress as the right to put a ballot in a box."). "These associational rights, however, are not absolute and are

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necessarily subject to qualification if elections are to be run fairly and effectively." *Munro v. Socialist Workers Party*, 479 U.S. 189, 193 (1986). As to the "right" to vote, the Supreme Court has noted that the Constitution "does not confer the right of suffrage upon any one," *Minor v. Happersett*, 88 U.S. 162, 178 (1874), and that "the right to vote, *per se*, is not a constitutionally protected right." *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 35, n.78 (1973). And "absent any burden [on the franchise], there is no reason to call on the State to justify its practice." *Ariz. Libertarian Party v. Reagan*, 798 F.3d 723, 732 n.12 (9th Cir. 2015).

The Voter Plaintiffs allege that they intend to cast ballots in the November 2020 election.[5] However, the harm that Plaintiffs allege is not a harm to themselves, but rather an alleged harm to the Democratic candidates whom they intend, at this juncture, to support. As explained recently by the Eleventh Circuit Court of Appeals, "[a] candidate's electoral loss does not, by itself, injure those who voted for the 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)). Additionally, as the Supreme Court determined in *Raines*, a group of legislators had not suffered a concrete injury when a piece of legislation they voted for was not enacted. *Raines*, 521 U.S. 811 at 814. The Supreme Court determined that the legislators' votes were counted and given full effect, and the legislators

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[5] Plaintiff Vasko states that she "plans to" register to vote in time to vote in the November 2020 election. (Doc. 13 at 8).

"simply lost that vote." *Id.* at 824. To be sure, the voting rights of elected legislators and of a citizen are not the same. *See Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 126 (2011). However, multiple circuit courts have held that an individual voter is not harmed by a candidate losing an election, or where the harm alleged to the voter is abstract or widely shared. *See Jacobson*, 957 F.3d at 1202–03; *see also Berg v. Obama*, 586 F.3d 234, 240 (3d Cir. 2009) (dismissing for lack of standing where voter's "wish that the Democratic primary voters had chosen a different presidential candidate . . . do[es] not state a legal harm"); *Crist v. Comm'n on Presidential Debates*, 262 F.3d 193, 195 (2d Cir. 2001) ("a voter fails to present an injury-in-fact when the alleged harm is abstract and widely shared or is only derivative of a harm experienced by a candidate"); *Becker v. Fed. Election Comm'n*, 230 F.3d 381, 390 (1st Cir. 2000) (dismissing for lack of standing where a candidate's alleged decreased "chance of being elected" was "hardly a restriction on voters' rights and by itself [was] not a legally cognizable injury sufficient for standing").

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Moreover, although the Voter Plaintiffs attempt to frame their injury as personal to them, the Plaintiffs do not argue that they, personally, are at greater risk of losing an election due to the alleged effects of Arizona's Ballot Order Statute. Nor could they, as none of the Voter Plaintiffs allege that they are, or intend to be, candidates on the ballot. Although they allege that "the Ballot Order Statute offends the First and Fourteenth Amendments to the U.S. Constitution because it confers an unfair political advantage on ***candidates*** solely because of their partisan affiliation and the fact

that a different ***candidate***, also affiliated with their party, won the majority of votes in a specific county in an unrelated, previous election," no candidates, either former or present, are named plaintiffs in this suit. (Doc. 13 at 7) (emphasis added). Moreover, while Plaintiffs argue that they are not aware of "a single challenge brought by similarly-situated parties against a ballot order statute that was dismissed," they 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. (Doc. 14 at 7-9). *See McLain v. Meier*, 637 F.2d 1159 (8th Cir. 1980) (plaintiff, a candidate in upcoming election, challenged an incumbent first ballot statute); *Sangmeister v. Wodard*, 565 F.2d 460, 463, 463 (7th Cir. 1977) (consolidated appeal brought by multiple plaintiffs who were all candidates for office); *Kautenburger v. Jackson*, 333 P.2d 293, 294-95 (Ariz. 1958) (constitutional challenge by a primary candidate who sought to enjoin the board of supervisors from using voting machines unless fellow candidates' names were rotated); *Akins v. Sec. of State*, 904 A.2d 702, 703 (N.H. 2006) (Democratic, Republican, and Libertarian Party candidates challenging organization of the general election ballot); *Gould v. Grubb*, 14 Cal. 3d 661, 664-65 (Cal. 1975) (nonincumbent candidates had standing to bring action challenging constitutionality of incumbent first ballot procedure); *Mann v. Powell*, 333 F. Supp. 1261, 1264–65 (N.D. Ill. 1969) (finding that candidate had alleged an injury in fact to maintain the suit challenging ballot order, while dismissing individual voter for lack of standing, reasoning that a voter cannot "maintain this action on behalf of candidates in the primary election"). These cases do not

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persuade this Court that the Voter Plaintiffs have standing.

Voter Plaintiffs have not established a meaningful infringement on their right to vote caused by the Ballot Order Statute. They do not argue that the Ballot Order Statute prevents them from casting a ballot for their intended candidate, nor do they argue that their lawfully cast votes will not be counted. Rather, the Voter Plaintiffs allege that the Statute places a burden on 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. In short, they do not allege that the Ballot Order Statute imposes a burden on them personally that is not common to all voters.[6] *See Gill*, 138 S. Ct. at 1933 (Article III courts are unable to redress a "generalized partisan preference").

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b. Dilution of Votes

Voter Plaintiffs have also not established a concrete injury based on an alleged dilution of their votes. The Voter Plaintiffs allege that the Ballot Order Statute causes a "reduction in the value of their votes," by providing an "artificial" advantage for first-listed Republican candidates. (Doc. 27 at 15).

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[6] Likewise, Plaintiffs argue that the Ballot Order Statute "treats similarly-situated major parties differently," in violation of the Equal Protection Clause. (Doc. 14 at 14). Plaintiffs cannot sustain this Equal Protection claim on behalf of unnamed candidates. Moreover, the Voter Plaintiffs do not allege that the Ballot Order Statute treats similarly situated ***voters*** differently, as all voters in a given county receive the same ballot.

In *Gill*, a political gerrymandering case, the Supreme Court addressed the voter plaintiffs' claim that they had standing based on the dilution of their votes. The plaintiffs there presented a similar theory of the case as here, that the weight of their votes were decreased based on the makeup of the voting districts. *Gill*, 138 S. Ct. at 1929-31. The Supreme Court concluded that the injury alleged did not impact the individual voter, but rather the "fortunes of political parties," throughout the entire state. *Gill*, 138 S. Ct. at 1922. In finding that the voter plaintiffs had not proven "concrete and particularized injuries," the Supreme Court concluded that the issue was one of "political interests, not individual legal rights," and that it did not infringe on the plaintiffs' right to vote. *Id.*

Similarly, while Plaintiffs rely heavily on the Supreme Court's summary affirmance in *Mann*, they fail to explain that the three-judge panel of the district court dismissed the voter plaintiff for lack of standing. 333 F. Supp. at 1264–65.[7] The district court reasoned

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[7] Moreover, *Mann* was a summary affirmance by the Supreme Court of a district court decision, which contains all of four words, "[t]he judgment is affirmed." *Mann*, 398 U.S. at 955. That holding carries little weight in this case. *See Mandel v. Bradley*, 432 U.S. 173, 176 (1977). ("When we summarily affirm, without opinion, . . . we affirm the judgment but not necessarily the reasoning by which it was reached. An unexplicated summary affirmace settles the issues for the parties, and is not to be read as a renunciation by this Court of doctrines previously announced in our opinions after full argument.") (internal citations omitted); *See also Teddards v. Ducey*, 951 F.3d 1041, 1048 (9th Cir. 2009) (noting that "[n]ormally, a summary affirmance binds us to the precise result affirmed, yet it remains incumbent upon us to give full consideration to the issues and articulate our own independent

that plaintiff's allegation that "his right to vote will be burdened or the strength of his vote diluted because unconstitutional action by the defendants will benefit candidates whom he opposes" is "an insufficient personal interest to state a cause of action." *Id.*

Here, the Voter Plaintiffs will not be injured simply because other voters may act "irrationally" in the ballot box by exercising their right to choose the first-listed candidate. *See Alcorn*, 826 F.3d at 718 (rejecting the notion that "some voters' choices are less constitutionally meaningful than the choices of other supposedly more informed or committed voters"). The Court finds that 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.[8] Therefore, the Court must dismiss this action, unless it finds that the Organizational Plaintiffs have standing. *See Leonard v. Clark*, 12 F.3d 885, 888 (9th Cir. 1993), as amended (Mar. 8, 1994) ("The general rule applicable to federal court suits with multiple plaintiffs is that once the court determines that one of the plaintiffs has standing, it need not decide the standing of the others.").

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analysis." (citations omitted).

[8] And while Plaintiffs are correct that the presence of a "widely shared grievance" does not necessarily mean that it is a "generalized grievance," the case they cite for that proposition does not support their argument. (Doc. 27 at 15); *See Fed. Election Comm'n v. Akins*, 524 U.S. 11, 12 (1998) (finding voter plaintiffs had pleaded an injury in fact where a federal statute explicitly allowed them to file a complaint, and if their complaint was dismissed, to seek district court review of the dismissal).

2. Organizational Plaintiffs

The Organizational Plaintiffs allege that the Secretary has no constitutionally justifiable reason to enforce the Ballot Order Statute, and argue that it violates the Equal Protection Clause as it treats similarly situated political parties differently. The Organizational Plaintiffs argue that they have alleged sufficient facts to establish associational, organizational, or competitive standing regardless of whether the Voter Plaintiffs have standing. The Court will address each standing theory in turn.

a. **Associational Standing**

"Even in the absence of injury to itself, an association may have standing solely as the representative of its members." *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 342–43 (1977). "The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit." *Id.* An association has standing to bring suit on behalf of its members when "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Id*. at 343. Organizations seeking to establish standing on behalf of members must "identify members who have suffered the requisite harm." *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009).

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As an initial matter, Plaintiffs DSCC and Priorities do not allege that they are membership organizations or that they have any members. (Doc. 13, ¶¶ 25–26). This glaring omission is fatal to associational standing for these two Plaintiffs. *See Hunt*, 432 U.S. at 343 ("The association must allege that its ***members***, or any one of them, are suffering immediate or threatened injury. . . .") (emphasis added). Notably, when presented with this argument in the Motion to Dismiss, Plaintiffs' respond that the Voter Plaintiffs are "members" of the Democratic Party. (Doc. 27 at 12). While the "Democratic Party" may have "members," it does not follow that the DSCC or Priorities do. Moreover, the Democratic Party is not a Plaintiff in this case. (Doc. 13). As having members is crucial to asserting jurisdiction under associational standing, the DSCC and Priorities have not established standing under this theory.

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Even had the DSCC established that it were a membership organization, the mission of the DSCC to elect Democrats to the U.S. Senate was not apparently frustrated. For example, in the 2018 election, a Democratic candidate was indeed elected to the Senate under the state's current ballot system. Moreover, whether Priorities' mission is frustrated is highly speculative. Priorities alleges that its mission is to build a permanent digital campaign and engage Americans in the democratic process, something it has already spent considerable time and money on in Arizona, specifically in 2018. (Doc. 13 at 11). Priorities has not established how the current ballot order system frustrates its mission to build a permanent digital

campaign or engage Arizonans in the democratic process.

Plaintiff DNC does allege that it has members, stating that is has "seven members in Arizona and millions of constituents who affiliate with and consider themselves to be members of the Democratic Party." (Doc. 14-6 at 4). The DNC does not name any of these individuals, does not allege how any of them were specifically harmed, and does not allege that any of those seven members are candidates who will appear on the general election ballot. The allegations generally are that Plaintiff DNC provides support to its candidate "members." (Doc. 13 at 10-11). These allegations are not specific to what it is doing in Arizona, however. Moreover, the Court will not assume, based on a single affidavit, that "millions" of Arizonans who vote for Democratic candidates "consider themselves" to be "members" of the Democratic Party. (Doc. 14-6). This assumption is not relevant to the Court's determination of whether the ***DNC*** has established standing as a result of having "seven members" in Arizona. For purposes of associational standing, the Court will look to the allegations with respect to the "seven members" of the DNC alleged to be located in Arizona.

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Plaintiff DNC alleges that the Ballot Order Statute "gives Republican voters more voting power and dilutes the relative strength of Democratic voters, because of the built-in advantage to the first-listed party." (Doc. 14-6 at 6). This is the same type of harm alleged by the Voter Plaintiffs discussed above. 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. *See Hunt*, 432 U.S. at 343. Even accepting as true that the DNC's seven Arizona members are Arizona voters who will be voting in the 2020 Election, 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. Based on the information pleaded in the Amended Complaint, the Court cannot discern the alleged injuries of Plaintiff DNC's members. *See Summers*, 555 U.S. at 497 (holding that an organization could not meet the injury in fact requirement simply by alleging that "there is a statistical probability that some of those members are threatened with concrete injury"). Therefore, the DNC has not established standing under associational standing.

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b. Organizational Standing

The Organizational Plaintiffs alternatively allege they have suffered their own injuries sufficient to establish organizational standing. (Doc. 27 at 13-14). To establish organizational standing, a plaintiff must allege an injury-in-fact to include: "(1) frustration of its organizational mission; and (2) diversion of its resources" to mitigate the effects of the challenged action. *Smith v. Pac. Props. and Dev. Corp.*, 358 F.3d 1097, 1105 (9th Cir. 2004). An organizational plaintiff must allege "more than simply a setback to the organization's abstract social interests." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). Allegations of "*concrete* and *demonstrable* injury to the

organization's activities—with the consequent drain on the organization's resources—constitutes far more than simply a setback to the organization's abstract social interests." *Id.* (emphasis added). However, an organization "cannot manufacture the injury by incurring litigation costs or simply choosing to spend money fixing a problem that otherwise would not affect the organization at all." *La Asociacion de Trabajadores de Lake Forest v. Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010). "It must instead show that it would have suffered some other injury if it had not diverted resources to counteracting the problem." *Id.*

As to the first element, the Organizational Plaintiffs allege that the Ballot Order Statute frustrates the missions of electing Democrats in Arizona by giving an "unfair, arbitrary, and artificial" advantage to Republicans. (Doc. 13 at 25). As discussed above, this is not a concrete injury to establish standing, but rather a generalized grievance with the political process that this court "is not responsible for vindicating." *Gill*, 138 S. Ct. at 1933; *see also id.* at 1932 (dismissing voters' "hope of achieving a Democratic majority in the legislature" as "a collective political interest" that cannot establish standing). Their dissatisfaction with the Ballot Order Statute is nothing more than "a setback to the organization's abstract social interests." *See Havens Realty Corp*, 455 U.S. at 379. Plaintiff's described injury can fairly be described as abstract. *See Spokeo*, 136 S.Ct. at 1548 (citation omitted). Therefore, the argument that the Ballot Order Statute frustrates their mission of electing Democrats is not a cognizable injury.

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As to the second element, the Organizational Plaintiffs allege that the Ballot Order Statute has required them to expend resources on "Get Out the Vote ("GOTV") assistance," "voter persuasion efforts," and making contributions and expenditures to persuade voters to support Democratic Senate candidates. (Doc. 13, ¶¶ 24–26). The DSCC alleges that it "will have to expend and divert additional funds and resources . . . in Arizona." (Doc. 13 at 13). Additionally, the DSCC states that it "again intends to make substantial contributions and expenditures to support the Democratic candidate for U.S. Senate," in Arizona. (Doc. 13 at 11). Therefore, the Organizational Plaintiffs acknowledge that despite the Ballot Order Statute, they plan to expend significant time and resources in Arizona this election cycle on a Senate race they describe as one of the seats "most likely to flip" the U.S. Senate this year. (Doc. 13 at 15). Moreover, and despite the operation of the Statute, the Organizational Plaintiffs' efforts were rewarded in the much-publicized U.S. Senate race in 2018, which was won by their Democratic candidate.

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Perhaps most importantly, the Organizational Plaintiffs do not put forth any evidence of resources being diverted from other states to Arizona. Nor did they offer witness testimony on this element at the hearing on the Motion to Dismiss. Their allegations, without more, do not establish the very specific requirements for organizational standing. *See ACORN v. Fowler*, 178 F.3d 350, 359 (5th Cir. 1999) (expenditures must be "caused by an[] action by" the defendant that the organization "claims is illegal, as opposed to part of the normal, day-to-day operations of

the group" to confer standing); *see also Jacobson*, 957 F.3d at 1206 (finding the testimony of the representatives of the organizations did not explain "what activities the Committee or Priorities USA would divert resources away from in order to spend additional resources on combatting the primacy effect, as precedent requires").

The Organizational Plaintiffs have not established that they would spend additional funds because of the Ballot Order Statute, nor have they established that they are diverting those funds from other places. In short, they have not established that they "would have suffered some other injury if [they] had not diverted resources to counteracting the problem." *La Asociacion de Trabajadores*, 624 F.3d at 1088. Therefore, this theory of standing also fails.

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c. Competitive Standing

The Organizational Plaintiffs also argue that they have alleged facts sufficient to establish competitive standing. Competitive standing is recognized in the Ninth Circuit. Generally, the doctrine provides that "a candidate or his political party has standing to challenge the inclusion of an allegedly ineligible rival on the ballot, on the theory that doing so hurts the candidate's or party's own chances of prevailing in the election." *Townley v. Miller*, 722 F.3d 1128, 1135 (9th Cir. 2013) (quoting *Drake v. Obama*, 664 F.3d 774, 782 (9th Cir. 2011)).

The theory put forward by the Organizational Plaintiffs is that the Ballot Order Statute "frustrat[es] its mission and efforts to elect Democratic Party

candidates" by allegedly diverting more votes to Republicans than Democrats. (Doc. 13, ¶ 24). Therefore, they allege that the ability of their candidates to be competitive in the election is compromised. However, the injuries alleged by the Organizational Plaintiffs are dissimilar to the injuries required by the line of competitive standing cases. The Organizational Plaintiffs rely on the holding of *Drake*, that a political organization suffers an injury where its "interest in having a fair competition" is compromised. *Drake v. Obama*, 664 F.3d 774, 782-83 (9th Cir. 2011). The court in *Drake*, however, did not find that the plaintiffs had a redressable injury; instead, the court held that the plaintiffs did not have a live claim or controversy because the election was over.[9] Therefore, *Drake* does not support the Organizational Plaintiffs' contention.

Plaintiffs also cite to the nearly 40-year-old decision in *Owen v. Mulligan* to support their theory of competitive standing. 640 F.2d 1130, 1132–33 (9th Cir. 1981). In *Owen*, the Ninth Circuit held that the "potential loss of an election" was an injury-in-fact sufficient to give a ***candidate*** and Republican party officials standing. *Id.* In that case, the candidate plaintiff sued the Postal Service for giving his opponent a cheaper mailing rate, in violation of its own

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[9] Moreover, Plaintiffs cited quote comes from the "Synopsis" and "Holdings" section of the case, a section which generally is not part of the opinion. *See United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337 (noting that the syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader).

regulations and of its representations to the court regarding procedures implemented in response to a previous injunction. *Id.* at 1132. The candidate and party officials sought "to prevent their opponent from gaining an unfair advantage in the election process through abuses of mail preferences which arguably promote his electoral prospects." *Id.* While the court in *Owen* recognized that candidate's right to competitive standing on those facts, the injuries were found to be concrete as the Postal Service's violations were not limited to its own policies, but also related to a previous injunction. *Id.* Therefore, *Owen* is also distinguishable.

Moreover, Plaintiffs gloss over the holding of a recent Ninth Circuit decision that narrowed the scope of competitive standing. *See Townley v. Miller*, 722 F.3d 1128, 1131 (9th Cir. 2013). In *Townley*, the Republican Party plaintiff alleged that the appearance of a "none of these candidates" ("NOTC") option on the ballot would cause their candidates to receive fewer votes and potentially lose the election. *Id.* at 1131. The plaintiffs in *Townley* argued that they had established competitive standing based on the inclusion of the NOTC option on all ballots. *Id.* The Ninth Circuit, however, declined to find competitive standing, reasoning that the inclusion of an "NOTC" was not the *inclusion of a candidate* on the ballot necessary to advance a competitive standing theory. Moreover, garnering support from other circuit court opinions that recognize competitive standing, the Ninth Circuit in *Townley* held that for competitive standing to apply, a plaintiff must allege that another candidate has been impermissibly placed on the ballot. *See Townley*, 722

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F.3d at 1136; *see also Texas Democratic Party v. Benkiser*, 459 F.3d 582, 586 (5th Cir. 2006) (allowing competitive standing where Democratic Party challenged decision to declare one candidate ineligible and replace him with a different candidate on the ballot); *Schulz v. Williams*, 44 F.3d 48, 52–53 (2d Cir. 1994) (finding competitive standing based on the inclusion of Libertarian candidates on the ballot after State had concluded the petition to include those candidates was statutorily invalid); *Fulani v. Hogsett*, 917 F.2d 1028, 1029 (7th Cir. 1990) (challenging decision to allow candidates on the ballot who were not certified by the Indiana Secretary of State by the statutory deadline).

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There are no allegations of candidates being impermissibly placed on the ballot in this case. The Court finds, in line with Ninth Circuit precedent, that the Organizational Plaintiffs have not alleged facts sufficient to confer standing under this very limited theory.[10] Therefore, the Court finds that none of the Organizational Plaintiffs have established standing under any of these theories.

As neither the Voter Plaintiffs nor the Organizational Plaintiffs have established standing, the Court must dismiss them all from the case and grant the Secretary's Motion to Dismiss.

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[10] To the extent that the Voter Plaintiffs also argue they have competitive standing based on the "competitive interest of [their] preferred candidate," there are no candidates named in this case and the Court cannot find competitive standing for the Voter Plaintiffs on these allegations. *See Drake*, 664 F.3d at 784.

III. Justiciability

Generally, a court must give plaintiffs at least one chance to amend a deficient complaint, absent a clear showing that amendment would be futile. *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003). However, the Secretary argues that even if a single Plaintiff had established standing, the Court should decline to reach the merits of the case because no judicially discernable standard exists to determine what constitutes a fair ballot ordering scheme. (Doc. 26 at 18-21). In other words, the Secretary argues that this case, in the way that Plaintiffs frame it, involves a nonjusticiable political question and, therefore, any amendment to the Complaint would be futile.

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The standard of review for laws regulating a person's First and Fourteenth Amendment rights to vote was analyzed by the Supreme Court in *Burdick v. Takushi*, 504 U.S. 428 (1992). There, the Supreme Court held that states "must play an active role in structuring elections," and that "[e]lection laws will invariably impose some burden upon individual voters." *Id.* at 433. "Consequently, not every voting regulation is subject to strict scrutiny." *Pub. Integrity All., Inc. v. City of Tucson*, 836 F.3d 1019, 1024 (9th Cir. 2016). Importantly, courts "have to identify a burden before [they] can weigh it." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 205 (2008) (Scalia, J., concurring in the judgment).

The Supreme Court's recent decision in *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), is relevant to this inquiry. While *Rucho* involved political gerrymandering, it is nonetheless instructive. The

Supreme Court explained that some cases, by their very nature, are not redressable by the judicial branch because "the question is entrusted to one of the political branches or involves no judicially enforceable rights." *Id.* (quoting *Vieth v. Jubelirer,* 541 U.S. 267, 277 (2004) (plurality opinion)). "In such a case the claim is said to present a 'political question' and to be nonjusticiable—outside the courts' competence and therefore beyond the courts' jurisdiction." *Baker*, 369 U.S. at 217. "Among the political question cases the Court has identified are those that lack judicially discoverable and manageable standards for resolving [them]." *Rucho*, 139 S. Ct. at 2494. The Supreme Court in *Rucho* 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. *Id.* at 2500. These questions of fairness are best left to the legislatures and not the courts. *Id.*

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Plaintiffs argue that *Rucho* has no bearing on this case at all as it is "unambiguously limited to partisan gerrymandering cases." (Doc. 27 at 21). However, the Ninth Circuit recently extended the reasoning of *Rucho* to find that claims related to climate change are nonjusticiable. *Juliana v. United States*, 947 F.3d 1159, 1173 (9th Cir. 2020) (holding that, absent a judicially manageable standard, "federal judicial power could be unlimited in scope and duration, and would inject the unelected and politically unaccountable branch of the Federal Government [into] assuming such an extraordinary and unprecedented role"). To be sure, *Juliana* was a case brought by climate change activists

attempting to limit the Government's emission of carbon dioxide into the atmosphere, which has nothing to do with Arizona's Ballot Order Statute. Yet climate change also has little in common with political gerrymandering. Thus, Plaintiffs' contention that the holding in *Rucho* cannot be extended past political gerrymandering cases is unpersuasive. *See Juliana*, 947 F.3d at 1173 ("The Court found in *Rucho* that a proposed standard involving a mathematical comparison to a baseline election map is too difficult for the judiciary to manage. It is impossible to reach a different conclusion here.").

The crux of Plaintiffs' case is for the Court to determine what is "fair" with respect to ballot rotation. (Doc. 13). 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. *Rucho*, 139 S. Ct. at 2494; *see also 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.") (internal citations omitted). Determining what is "fair" for purposes of ballot order rotation has a number of complications. Fairness, as Plaintiffs define it, requires rotation of all "similarly-situated major-party" candidates on the general election ballot. (Doc. 14 at 21). While Plaintiffs argue that their case is "not predicated on a specific remedy," their definition of "fairness" does not require rotation of Independent Party candidates, write-in-candidates from the primary election, or other

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third-party candidates in their ballot scheme, meaning that those candidates would never be listed first on the ballot. (Doc. 14 at 10; Doc. 35 at 16). In fact, Plaintiffs' counsel explicitly stated at the hearing that their proposal need not disrupt the status of those candidates in terms of ballot order. (Doc. 64 at 24).

Most importantly, for the Court to examine the alleged burden on Plaintiffs, it necessarily would have to accept their version of what is "fair," in this case, by making it more "fair" for Democratic candidates in the upcoming election only, by rotating Democratic and Republican candidates, or having a lottery to determine which party's candidates would be listed first. The Court cannot do so. The allegations in the Amended Complaint are simply not based upon Plaintiffs being prevented from exercising their right to vote or being burdened in any meaningful way. Plaintiffs theories are that their votes for Democratic candidates are diluted whenever Republican candidates are listed first on the ballot. (Doc. 13). As discussed above, these alleged injuries are not actual and concrete. Therefore, as there is no burden, the court is unable to weigh it. *See Crawford*, 553 U.S. at 205 (2008) (Courts must "identify a burden before [they] can weigh it") (Scalia, J., concurring in the judgment).

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While Plaintiffs argue that there is a judicially manageable test for examining challenges to election-related issues, Plaintiffs fail to establish that the Ballot Order Statute meaningfully burdens them in the ways in which the Supreme Court has recognized as being appropriate for examination under the *Anderson-Burdick* framework. *See Crawford*, 553 U.S.

at 181 (analyzing constitutionality of photo-identification law); *Clingman v. Beaver*, 544 U.S. 581, 584 (2005) (challenging Oklahoma's semi-closed primary system); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 353–54 (1997) (analyzing law that forbade candidates from appearing on the ballot for more than one party); *Burdick*, 504 U.S. 428 (examining complete prohibition on write-in voting); *Norman v. Reed*, 502 U.S. 279, 288–89 (1992) (overturning law limiting the access of new political parties on the ballot); *Munro v. Socialist Workers Party*, 479 U.S. 189, 190 (1986) (challenging statute that restricted minor-party candidates from appearing on the ballot unless they met specific criteria).

The Ballot Order Statute here does not prevent candidates from appearing on the ballot or prevent anyone from voting. The Ballot Order Statute merely establishes the order by which candidates appear on the ballot in each of Arizona's fifteen counties. Because Plaintiffs have not established a "burden" on their rights to vote, the court cannot "weigh it."[11] *See Crawford*, 553 U.S. at 205 (2008). The Court finds that the relief sought amounts to a nonjusticiable political question that the Court is unable to redress. This serves as an independent ground to grant the

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[11] For instance, Dr. Krosnick acknowledged on cross-examination that none of the studies he reviewed analyzed the existence of any ballot order effect in Arizona. (Doc. 58 at 51). He also testified that "listing the party affiliation of the candidates on the ballot, all other things equal, reduces the size of the primacy effects." (Doc. 58 at 62). The Court acknowledges the difficulty Plaintiffs face in presenting evidence in this fashion to establish an injury. But they simply did not meet their burden in so showing.

Secretary's Motion to Dismiss. Thus, it would be futile to grant Plaintiffs leave to amend their Amended Complaint.

IV. Conclusion

It is fundamental that plaintiffs establish the elements of standing before a court exercises jurisdiction. The Supreme Court has insisted on strict compliance with this jurisdictional standing requirement. *See Chicago & Grand Trunk R. Co. v. Wellman,* 143 U.S. 339, 345 (1892) (federal courts may exercise power "only in the last resort, and as a necessity"); *Muskrat v. United States,* 219 U.S. 346, 356 (1911) ("[F]rom its earliest history this [C]ourt has consistently declined to exercise any powers other than those which are strictly judicial in their nature"). This requirement assures that "there is a real need to exercise the power of judicial review in order to protect the interests of the complaining party." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221 (1974). For a court to step in where plaintiffs have not established that a need to do so exists, "would significantly alter the allocation of power . . . away from a democratic form of government." *Summers*, 555 U.S. at 493 (quoting *Richardson*, 418 U.S. at 188).

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Although Plaintiffs frame this case as a "straightforward" matter, the Court finds that they cannot satisfy the requirements of Article III Standing. Thus, any order issued by this Court would be an unlawful advisory opinion. Therefore, the Court cannot reach the merits of this matter and Defendant's Motion to Dismiss will be granted. Moreover, even if Plaintiffs had standing, the Court is prevented from rendering an

opinion on the merits because Plaintiffs have not established that the Statute burdens them, and the relief sought amounts to a nonjusticiable political question. Thus, the Court will not grant Plaintiffs leave to amend their Amended Complaint.

. . .

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Accordingly,

IT IS HEREBY ORDERED that the Motion to Dismiss (Doc. 26) is **granted with prejudice**. The Clerk of Court shall kindly enter judgment and terminate this matter.

Dated this 25th day of June, 2020.

/s/ Diane J. Humetewa
Honorable Diane J. Humetewa
United States District Judge

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APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV-19-05547-PHX-DJH

[Filed: June 25, 2020]

Brian Mecinas, et al.,

Plaintiffs,

v.

Katie Hobbs,

Defendant.

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JUDGMENT IN A CIVIL CASE

Decision by Court. This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that pursuant to the Court's Order filed June 25, 2020, judgment of dismissal is entered. Plaintiffs to take nothing and this action is hereby dismissed with prejudice.

Debra D. Lucas
Acting District Court Executive/Clerk of Court

June 25, 2020

s/ L. Figueroa
By: Deputy Clerk

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APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20-16301

[Filed: May 24, 2022]

BRIAN MECINAS; et al.,

Plaintiffs-Appellants,

v.

KATIE HOBBS, the Arizona Secretary of State,

Defendant-Appellee.

D.C. No. 2:19-cv-05547-DJH
District of Arizona,
Phoenix

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ORDER

Before: RAWLINSON and WATFORD, Circuit Judges, and RAKOFF,* District Judge.

The panel has voted to deny the State of Arizona's motion for reconsideration of the Court's May 11, 2022

* The Honorable Jed S. Rakoff, United States District Judge for the Southern District of New York, sitting by designation.

order denying the State's motion to intervene, styled as a petition for rehearing and for rehearing en banc (docket entry no. 69). Judge Watford would grant the State of Arizona's motion for reconsideration.

The panel further denies the State's request to have its motion for reconsideration circulated to and be heard by an en banc court (docket entry no. 70).

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APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20-16301

[Filed: June 1, 2022]

BRIAN MECINAS; et al.,

Plaintiffs - Appellants,

v.

KATIE HOBBS, the Arizona Secretary of State,

Defendant - Appellee.

D.C. No. 2:19-cv-05547-DJH
U.S. District Court for Arizona,
Phoenix

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MANDATE

The judgment of this Court, entered April 08, 2022, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: David J. Vignol
Deputy Clerk
Ninth Circuit Rule 27-7

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APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV-19-05547-PHX-DJH

[Filed: June 2, 2022]

Brian Mecinas, et al.,

Plaintiffs,

v.

Katie Hobbs,

Defendant.

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ORDER

This matter is before the Court on the Plaintiffs' Notice of Stipulated Dismissal pursuant to Fed. R. Civ. 41(a)(1)(A)(ii) (Doc. 87), filed on May 2, 2022. Rule 41(a)(1)(A)(ii) authorizes a plaintiff to dismiss an action without a court order by filing "a stipulation of dismissal signed by all parties who have appeared." Fed. R. Civ. 41(a)(1)(A)(ii). The voluntary dismissal meets these requirements. Therefore, despite the Ninth Circuit's June 1, 2022, Mandate (Doc. 91) reversing and remanding the case to this Court, and a proposed amicus brief filed by non-party State of Arizona (Doc.

89), the Court will order the case be administratively dismissed and closed.

IT IS ORDERED approving Plaintiffs' Notice of Stipulated Dismissal (Doc. 87). This action is **dismissed, without prejudice,** and the Clerk of Court is kindly directed to terminate this action in its entirety.

Dated this 2nd day of June, 2022.

/s/ Diane J. Humetewa
Honorable Diane J. Humetewa
United States District Judge

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APPENDIX H

A.R.S. § 16-502(E)

16-502. Form and contents of ballot

* * *

E. The lists of the candidates of the several parties shall be arranged with the names of the parties in descending order according to the votes cast for governor for that county in the most recent general election for the office of governor, commencing with the left-hand column. In the case of political parties that did not have candidates on the ballot in the last general election, such parties shall be listed in alphabetical order below the parties that did have candidates on the ballot in the last general election. The names of all candidates nominated under section 16-341 shall be placed in a single column below that of the recognized parties. Next to the name of each candidate, in parentheses, shall be printed a three-letter abbreviation that is taken from the three words prescribed in the candidate's certificate of nomination.

* * *

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