No. 20-16301

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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.

Appeal from the United States District Court for the District of Arizona
No. 2:19-cv-05547-DJH

PETITION FOR REHEARING AND REHEARING EN BANC OF ORDER DENYING THE STATE OF ARIZONA'S MOTION TO INTERVENE

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The State of Arizona hereby moves for rehearing and rehearing en banc of the Court's May 11, 2022 order denying the State's motion to intervene. Rehearing is warranted because the order conflicts with two controlling Supreme Court precedents: *Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 142 S. Ct. 1002 (2022) and *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977). The order also conflicts with precedents of this Court, 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).

The Court's denial of intervention also blesses an agreement between Plaintiffs (collectively, "the DNC") and Defendant Secretary of State Hobbs to dismiss the district court case, but leave the Court's published opinion in place—which would thus insulate that opinion from further review.

The panel's denial of intervention, and resulting refusal to consider vacatur under *United States v. Munsingwear*, Inc., 340 U.S. 36, 39 (1950), was based on the panel's determination (over Judge Watford's dissent) that the motion to intervene was "untimely made." But under controlling precedents of this Court and the Supreme Court, the State's motion was timely.

I. Procedural Background.

Until the panel's published decision on the merits reversed the district court, the State had little or no reason to intervene in this case. While the case was before the district court, part of the Attorney General's Office successfully represented Secretary Hobbs in obtaining a ruling favorable to the State. The district court's ruling found that

(1) the DNC lacked standing to challenge Arizona's ballot order statute, and that (2) the relief the DNC sought in any event raised a non-justiciable political question.

After the panel issued its opinion reversing the district court, however, Secretary Hobbs—herself a Democrat and an announced Democratic candidate for Governor—decided she would not petition for rehearing, and the State filed its motion to intervene. Secretary Hobbs then reached agreement with the DNC to dismiss the favorable-to-the-State district court decision, but to keep in place—without possibility of further review—the panel's published decision that was adverse to the State. The State seeks to intervene to allow the State to further challenge the merits decision or to vacate that decision as moot.

II. The State's Motion To Intervene Was Timely Under Supreme Court Precedent.

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 further 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.

Similarly, the panel's timeliness holding conflicts with *United Airlines*, 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 by that deadline and even attaching (as in *Cameron*) a proposed rehearing petition. The State's motion to intervene was thus timely under *United Airlines*.

III. The State's Motion To Intervene Was Timely Under Ninth Circuit Precedent.

The panel's decision also conflicts with decisions of this Court, including *Day v. Apoliona,* noted above. 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 Court 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 Court allowed Hawaii's motion to intervene.

In doing so, the Court 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 F3d. at 965-966. In arriving at this conclusion, the Court 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.*

Similarly, in *Peruta v. County of San Diego,* this Court, 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 this Court 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)).

This Court, 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 en banc decision was issued (though within the time period to seek certiorari). *See id.*, Dkt. 128 (9th Cir. Apr. 9, 2020). The State's motion to intervene is thus timely under *DNC v. Hobbs* as well.

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.

IV. The Court Can End The Litigation By Granting The State's Alternative Motion For Vacatur.

One fair way of ending this litigation now is for the Court to grant the State's motion to intervene, and then, under *U.S. v. Munsingwear,* 340 U.S. 36, 39 (1950), grant the State's motion for vacatur of the Court's opinion. Because the current parties, the DNC and Secretary Hobbs, have agreed to dismiss the case, the case will become moot if the Court denies the State's motion to intervene, yet the panel opinion will remain as the unreviewable law of the circuit. Vacatur resolves that inequity.

As the Supreme Court explained in *Munsingwear*, "[t]he established practice of the Court in dealing with a civil case from a court in the federal system which has become

moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." *Munsingwear*, 340 U.S. at 39. "That procedure clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance. When that procedure is followed, the rights of all parties are preserved; none is prejudiced by a decision which in the statutory scheme was only preliminary." *Id.* at 40.

Moreover, because the *Munsingwear* inquiry is part of the Court's jurisdictional analysis, the Court has an obligation to consider *Munsingwear* vacatur even if the State's intervention was untimely. The panel declined to do so, treating vacatur as a forfeitable argument because the State's motion to intervene was purportedly untimely. But nothing about mootness, or the consequences flowing from it, is subject to forfeiture, and the panel's refusal to consider *Munsingwear* independently warrants rehearing.

For all the above reasons, the State seeks rehearing and rehearing en banc of the panel's order denying the State's motion to intervene and the related motion for vacatur. Moreover, the arguments raised in the original proposed petition for rehearing en banc raise substantial issues that also warrant rehearing en banc. *See* attached Exhibit 1 (originally filed as Docket 60).

RESPECTFULLY SUBMITTED this 17th day of May, 2022.

GALLAGHER & KENNEDY, P.A.

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CERTIFICATE OF SERVICE

I certify that on May 17, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in this case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ Gloria Kannberg

9118379v1/568-0206

EXHIBIT 1

No. 20-16301

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Proposed Intervenor State of Arizona petitions the Court for rehearing of this matter en banc. The panel decision conflicts with the 2020 decision of the Eleventh Circuit in *Jacobson v. Fla. Sec'y of State,* 974 F.3d 1236 (11th Cir. 2020) on both important aspects of legal standing and on whether a challenge to a ballot order statute such as Arizona's is justiciable. On these questions, there should be national uniformity. Moreover, the panel decision fails to note that Arizona's politically neutral Ballot Order Statute drew widespread bipartisan support both when it was first passed in 1979, under a Democratic administration, and when it was modified more than twenty years later, in 2000, under a Republican administration.

I. Arizona's Neutral Ballot Order Statute Enjoys Bipartisan Support.

Over four decades ago, in 1979—while Bruce Babbitt, a Democrat, was Arizona's governor—a bipartisan super-majority of Arizona legislators enacted A.R.S. § 16-502, Arizona's Ballot Order Statute. See Ariz. H.R. Comm. Min., H.B. 2028 (Mar. 5, 1979); Ariz. House J., 591, 641, 644-45 (Apr. 20, 1979) (H.B. 2028 passed 28-2 in the Senate and 40-11-9 in the House); *see also* Supplemental Excerpts of Record ("SER") 1-SER-2-37 (legislative history materials). The Arizona Legislature enacted the Ballot Order Statute as part of a comprehensive new elections code, achieving "agreement between both major political parties and the County Recorders Association." 1-SER-9 (Ariz. H.R. Comm. Min., H.B. 2028 (Mar. 5, 1979)).

The Ballot Order Statute directed the boards of supervisors in Arizona's fifteen counties to organize candidates' names by party affiliation "in descending order

according to the votes cast for governor for that county in the most recent general election for the office of governor [.]" A.R.S. § 16-502(E); see also A.R.S. § 16-503(A) (requiring the board of supervisors to "prepare and provide ballots").

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." A.R.S. § 16-502(E). The names of other candidates who were nominated but are not registered with a recognized political party appear below the names of the recognized parties. *Id.*

Next to each candidate's name, "regardless of the candidate's position on the ballot," is a three-letter abbreviation that identifies the candidate's party affiliation, *id.*, for example, "DEM for Democrat and REP for Republication [,]" 1-ER-3 (citing A.R.S. § 16-502(E)). This abbreviation "provides voters with visual cues when searching for their preferred party on the ballot." 1-ER-3.

Democratic Governor Babbitt was reelected in 1982. But in 1986, a Republican, Evan Mecham, was elected as Arizona's governor—despite the Democratic candidate having been listed first on the ballot as required by the Ballot Order Statute.

The 1979 statute originally required candidates' names to be organized in two columns. 1-SER-6 (Ariz. Sess. Laws 1979, Ch. 209, § 3; A.R.S. § 16-502(H) (1980)).1 In 2000—while a Republican, Jane Hull was governor—the Legislature amended the Ballot Order Statute to list the candidates' names in one column. 1-SER-25 (Ariz. Laws 2000, Ch. 249, § 25). The Senate Bill that prompted this change, among many revisions

to Arizona's election laws, came "from all 15 County Recorders and all 15 Election Directors." *13 1-SER-29 (Ariz. H.R. Comm. Min., S.B. 1372 (Mar. 1, 2000)); see also 1-SER-32 (Ariz. Senate Fact Sheet, S.B. 1372, 44th Leg., 2nd Reg. Sess. (May 12, 2000) ("State and county election officials regularly identify areas of election law to be modified to promote efficiency...")). Again, this Senate Bill passed with broad, bipartisan support in both chambers. 1-SER-36-37 (Final Reading Votes, S.B. 1372, 44th Leg., 2nd Reg. Sess. (April 10, 2000) (showing the bill passed the Senate 27-2-1 and the House 43-15-2)).

In the next election in 2002, however—again despite the Ballot Order Statute that listed the Republican candidate first—Democratic Governor Janet Napolitano was elected, and she was reelected in 2006. Following Governor Napolitano's resignation in January 2009 to become Secretary of Homeland Security, Republican Jan Brewer, then the Arizona Secretary of State, became governor by operation of law. She faced a regular election, however, in 2010 and—again despite the Ballot Order Statute which listed her Democratic opponent first—Brewer was elected governor in her own right.

We note three distinctive aspects of Arizona's Ballot Order Statute:

First, the ballot order is automatic and neutral based on whichever political party received the most votes in the most recent election for governor. In each election, no individual or political party has the ability to arbitrarily determine or manipulate the candidates' order on the ballot.

Second, regardless of position on the ballot, the political party of each candidate

is prominently identified by a three-letter abbreviation next to their name: "DEM" for Democrat, "REP" for Republican. No one can be fooled as to which party they are voting for.

Third, the ballot order is county-specific. If, in Pima County, the Democratic candidate for governor received the most votes in the last election, then on Pima County ballots, every Democratic candidate would be listed first. The political parties in each county throughout the state thus have the opportunity to get their candidates listed first.

This logical, efficient, and neutral method of organizing candidates' names on general election ballots in Arizona has been the law in Arizona for over 40 years, in 21 election cycles (including the recent 2020 general election). Over time in Arizona, the political winds have often shifted. Since 1978, when Democrat Bruce Babbitt became governor, through 2022, the parties have see-sawed back and forth, with Democrats having held the governorship for about 18 years, while Republicans have held the office for about 25 years. For example, it is undisputed that "Democrats were listed first [on all general election ballots] in all counties" in 1984, 1986, 2008, and 2010. 1-ER-3; see also 1-ER-87. "Those four elections are the only instances where a single party's candidates were listed first on all ballots statewide since the Statute was enacted." 1-ER-3.

With that background, we now turn to the issue of standing.

II. The DNC Lacks Article III Standing To Challenge The Ballot Order Statute.

The panel erred in finding that the DNC had "competitive" standing to challenge the Ballot Order Statute. To have standing, a plaintiff must show it 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, Inc. v. Robins,* 136 S. Ct. 1540 (2016). Plaintiffs failed to show these elements.

A. Plaintiffs failed to plausibly plead that the DNC had suffered a cognizable injury in fact.

The DNC failed to plausibly plead that it has suffered a cognizable injury in fact. To demonstrate an injury in fact, a plaintiff must show an "invasion of a legally protected interest" that is both "(a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical…." *Townley v. Miller,* 722 F.3d 1128, 1133 (9th Cir. 2013). The panel incorrectly found that the DNC had satisfied the "injury in fact" requirement on the basis of "competitive standing," because the Ballot Order Statute allegedly "frustrat[es]" the DNC's efforts to elect Democratic Party candidates by "diverting more votes to Republicans than Democrats, thereupon giving the Republican Party an unfair advantage." Opinion at 10-11.

On the undisputed facts of which the Court can take judicial notice, however, the claim that the Ballot Order Statute has significantly disadvantaged the Democrats doesn't meet *Twombly* and *Iqbal's* "facially plausible" pleading standard. *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 556 (2007); *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009). To wit:

despite the Ballot Order Statute, *both* Arizona's senators are Democrats, as are five of the state's nine congressional representatives. And that's despite the fact that Arizona has 137,124 more registered Republican voters than Democrats.[1] Republicans can only wish they were similarly disadvantaged.

In addition, a claim of mere "competitive disadvantage" is a slender reed on which to build a serious argument that a plaintiff suffered the required "concrete," "particularized, and "actual or imminent, not conjectural or hypothetical" injury, particularly when the actual evidence Plaintiffs offered failed to show any injury. As the district court held, the Plaintiffs "fail[ed] to establish that the Ballot Order Statute meaningfully burden[ed] them in the ways in which the Supreme Court has recognized as being appropriate for examination under the *Anderson-Burdick* framework." 468 F. Supp.3d 1186, 1208-09 (D. Ariz. 2020). As the district court observed, Plaintiffs' expert Dr. Krosnick "acknowledged on cross-examination that none of the studies he reviewed analyzed the existence of any ballot order effect in Arizona." 468 F. Supp. 3d at 1209, n. 11. And he also testified that "listing the party affiliation of the candidates on the ballot"—as Arizona's Ballot Order Statute requires—"all things being equal reduces the size of the primacy effects." *Id.*

The panel's decision on standing also conflicts with the Eleventh Circuit's

[1] Data as of January 2022 from the Arizona Secretary of State's website, https://azsos.gov/elections/voter-registration-historical-election-data. As of that date, there were 1,501,302 registered Republicans, 1,364,178 Democrats, 1,449,717 "Other," and 36,249 Libertarians.

analysis in *Jacobson*. That case involved a Florida ballot order statute which, similar to Arizona, required candidates of the party that won the last gubernatorial election to appear first for each office on the ballot, and candidates of the second-place party would appear second.[2] As here, the DNC and other groups and individuals sued to enjoin enforcement of the law, alleging that it violated their rights under the First and Fourteenth Amendments. As here, the DNC argued that it suffered an injury in its own right because the ballot order statute was "harming their mission of electing Democrats…." 974 F.3d at 1250.

Contrary to the panel decision here, which held that such an alleged harm sufficed to give the DNC "competitive standing," the Eleventh Circuit found that such harm was "not a cognizable injury." 974 F.3d at 1250. Rather, an "organization's general interest in its preferred candidates winning as many elections as possible" was just a "generalized partisan preference" that "federal courts are not responsible for vindicating…." "Harm to an organization's generalized partisan preferences," the Eleventh Circuit said, was only a setback to its "abstract social interests," which is "insufficient to establish a concrete injury in fact." *Id.*

The Eleventh Circuit also noted that—as here—the claims of the DNC tell us "nothing about whether ballot order has affected or will *affect any particular candidate in any particular election*"; instead, the plaintiffs only contend they have standing based on

[2] Unlike in Arizona, however, the Florida statute looked at the last election's vote for the entire state, rather than county by county as in Arizona.

"systemic disadvantage" to the Democratic party relative to other parties. 974 F.3d at 1251 (emphasis added). But that kind of harm from ballot order, the *Jacobson* court observed, is "based on nothing more than generalized partisan preferences"; it is "insufficient to establish standing." *Id.* Furthermore, as discussed earlier, the actual results of recent Arizona elections refute any supposed "systemic disadvantage" to the Democratic party.

As the Eleventh Circuit also emphasized, the DNC's "expansive theory of standing" would "allow *any* organization that favors the election of certain candidates to claim an injury based on harm to those candidates' electoral prospects." 974 F.3d at 1252. Such a holding would eviscerate the accepted need to show, in order for standing to exist, concrete, particularized, actual, not conjectural harm.

B. Plaintiffs failed to plausibly plead that any alleged harm would be redressable through this lawsuit.

Contrary to the panel opinion, Plaintiffs' claims about the Ballot Order Statute could not be redressed by a court decision against the Secretary. Although the Secretary is required to prepare an election manual that prescribes rules for producing and distributing ballots, by the terms of A.R.S § 16-452(B) that manual must be approved in advance by both the governor and attorney general. And since neither of them are parties to this lawsuit, they would not be bound by a decision in this matter.

III. Determining A Mechanism For Establishing a "Fair" Ballot Order Requires Non-Justiciable Political Decisions, Not Legal Decisions.

The panel also erred in holding that the question of ballot order presents a

justiciable issue, and the opinion on that point again directly conflicts with the Eleventh Circuit's thorough discussion of the matter in *Jacobson,* 974 F3d at 1258-1269.

A. Courts diverge widely on what they consider a fair or proper ballot order.

The panel Opinion implies that determining ballot order is easy, because all one need do is construct a "ballot ordering scheme that lists candidates on a basis other than political party affiliation." Opin. at 20. According to the panel—quoting the *dissent* in *Jacobson*—"any system" that orders candidates "on a basis other than party affiliation remedies the constitutional concern." That view, however, is doubly defective, because courts sometimes approve ballot order systems based on party affiliation and sometimes disapprove systems that are not based on party affiliation. The panel is far too sanguine about the supposed ease of determining a fair ballot order.

In *Nelson v. Warner,* 12 F. 4th 376 (4th Cir. 2021), for example, the court found constitutional a ballot order statute that placed candidates on the ballot on the basis of political party affiliation. Specifically, the Fourth Circuit approved a West Virginia ballot ordering scheme which listed first those candidates affiliated with the political party whose candidate for President of the United States received the most votes in the state's most recent presidential election. The Fourth Circuit found that such a statute imposed at most a "modest" burden on the plaintiffs' rights, and that the burden was "justified by the state's important regulatory interests." 12 F. 4th at 390.

Similarly, in *Pavek v. Donald J. Trump for President, Inc.,* 967 F. 3d 905, 908 (8th Cir.

2020), the Eighth Circuit held that a Minnesota ballot ordering scheme passed constitutional muster when it required major party candidates be listed on the ballot in reverse order of the parties' electoral showing in the last general election. The Eighth Circuit found that the "burdens imposed" by the ballot order statute "do not unconstitutionally violate the rights asserted." *Id.* The court went out of its way to note that the law did not require the state to "eliminate *any* law-based favoritism" that a "blind ballot-ordering process" might accomplish, because the "Constitution does not forbid all forms of political-party favoritism." *Id,* 967 F3d at 908-909.

On the other side of the equation, in *Katuenberger v. Jackson,* 85 Ariz. 128 (1958), Arizona's own Supreme Court affirmed the invalidation of part of an earlier ballot order statute that required candidates' names to be listed in alphabetical order on voting machines—an ordering scheme that had nothing to do with party affiliation. Then-candidate L. Tipton Jackson sued because under that system, his name would never be listed first on the machine ballot, which he felt was unfair to him. The trial court agreed, found the statute unconstitutional, and directed that the "names of candidates be rotated on the voting machines in the most practicable and fair way possible." 85 Ariz. at 130. The *Katuenberger* court affirmed.

As the panel opinion notes, the political question doctrine comes into play 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." Panel Opinion at 18, citing *Nixon v. United States,* 506 U.S.

224, 228 (1993). Both features are present here. We've already noted the Constitution commits to the states the "Times, Places and Manners" of holding congressional elections. We now address the lack of judicially discoverable and manageable standards.

B. There is a lack of judicially discoverable and manageable standards for determining whether Arizona's Ballot Order Statute is fair.

While a number of courts have ventured to resolve ballot order disputes, they haven't been able to agree on what standards to employ in deciding such, or what type of ballot order is either best or fair. Hence, courts have cited various inconsistent standards or rationales for upholding or rejecting ballot order statutes, leading to unanswered questions, such as:

- Is a ballot order statute unconstitutional per se if it is based in any way on political affiliation (as the panel opinion seems to say)?

- Is a ballot order statute constitutional per se if it is neutral in its application, as the Fourth Circuit seems to say in *Nelson v. Warner*, 12 F. 4th 376, 389 (4th Cir. 2021)?

- To pass constitutional muster, must a ballot order statute give every candidate and party—including minor parties—an equal opportunity to be listed first on the ballot?

Part of the problem in agreeing on standards for evaluating ballot order statutes stems from the odd nature of the alleged "primacy effect." Proponents of the primacy effect allege that many indifferent or unprepared voters will simply vote for the first

candidate listed on the ballot for a given contest—regardless of that candidate's party or political views—and that phenomenon thus gives additional "windfall" votes to the first candidate. Assuming that's true, though, does that raise a constitutional issue requiring the courts to fairly apportion such "windfall" votes among all candidates? Put differently, does a candidate for office have some constitutional right to get a fair share of the votes of voters who, according to a statistical analysis, are likely indifferent to the issues? Wouldn't a better approach be to expect the candidates and the political parties to better educate prospective voters?

Moreover, the Amended Complaint at issue here ignores a key feature of Arizona voting: 75% or more of Arizona voters vote via mail in ballots.[3] Yet Plaintiffs experts cited only one of 1,061 studies that even deals with "absentee" ballots, and that did not involve Arizona. Indeed, since mail in ballots have to be specifically requested by a voter, and he or she then has the time, at the voter's leisure, to peruse the ballot and decide for whom to vote, it's seems likely the analysis would be different.

Moreover, if the primacy effect raises constitutional issues, suppose someone

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[3] According to information on the Secretary of State's website, 3,420,565 ballots were cast in the 2020 general election, including all the ballots of any type from all of Arizona's 15 counties. *See* https://azsos.gov/elections/voter-registration-historical-election-data And looking at just the election returns for Arizona's three most populous counties, Maricopa, Pima, and Pinal, 2,523,929 of those votes were by mail in ballots. *See* https://azsos.gov/2020-general-election-county-canvass-returns, showing 2020 General Election County Canvass Returns. That's 74% of the 3,420,567 total ballots cast in Arizona. The percentage would obviously go up if one included the other 12 counties.

could prove that, statistically, candidates having, say, shorter names tended to receive more votes than candidates with longer names, all other factors being equal. Would that also raise a constitutional issue? If so, how would it be resolved?

As the Supreme Court recognized in *Rucho,* determining "fairness" in political matters is inherently political. And "laws that govern ballot order plainly regulate the manner of elections and are within the power of States to enact." *Jacobson,* 974 F.3d at 1266.

The Ballot Order Statute at issue does not make it more difficult for Democrats to vote for the candidate of their choice, nor limit any political party's or candidate's access to the ballot, nor burden the associational rights of political parties or create the risk that some votes will go uncounted or will be improperly counted. If the statute had any of those effects, it might raise justiciable issues. But all the Ballot Order Statute does is determine the order in which candidates appear on the ballot. Asking a court to fairly apportion the "windfall votes" of indifferent or unprepared voters among the political parties "falls squarely within *Rucho's* definition of a political question." *Id.*

CONCLUSION

The Court should reconsider this matter en banc and find both that Plaintiffs lack Article III standing and that the ballot order issue is in any event nonjusticiable as a political question. The Court should affirm the district court's order granting the Secretary's motion to dismiss.

RESPECTFULLY SUBMITTED this 22nd day of April, 2022.

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CERTIFICATE OF SERVICE

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/s/ Rona L. Miller

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