No. 20-16301

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIAN MECINAS; CAROLYN VASKO EX REL C.V.; DNC SERVICES CORPORATION D/B/A DEMOCRATIC NATIONAL COMMITTEE; DSCC; PRIORITIES USA; AND PATTI SERRANO,

Plaintiffs-Appellants,

v.

KATIE HOBBS, THE ARIZONA SECRETARY OF STATE,

Defendant-Appellee.

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

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS 2

TABLE OF AUTHORITIES 4

INTRODUCTION 7

STATEMENT OF JURISDICTION 10

ISSUE PRESENTED FOR REVIEW 11

STATEMENT OF THE CASE 12

I. Arizona's Ballot Order Statute 12

II. Plaintiffs Challenge the Ballot Order Statute, Alleging Ballot Order Produces a "Primacy Effect" and Vote Dilution 15

III. After a Full Evidentiary Hearing, Plaintiffs Fail to Substantiate Their Allegation of a "Primacy Effect" in Arizona's General Elections 17

A. Dr. Rodden's Testimony 18

B. Dr. Krosnick's Testimony 22

IV. The District Court Grants the Secretary's Motion to Dismiss 23

V. Plaintiffs Unsuccessfully Move for Injunctions Pending Appeal 24

SUMMARY OF THE ARGUMENT 25

STANDARD OF REVIEW 26

ARGUMENT 27

I. The District Court Correctly Granted the Secretary's Motion to Dismiss Because Plaintiffs Lack Article III Standing 27

A. Ballot-Order Vote-Dilution Is Not a Cognizable Injury.....28

B. Plaintiffs Do Not Have Standing under the Narrow Competitive Standing Doctrine.....32

C. Plaintiffs Do Not Have Associational Standing 39

D. Plaintiffs Do Not Have Organizational Standing 43

E. Plaintiffs' Claims Also Are Neither Traceable to the Secretary Nor Redressable Through This Lawsuit.....45

II. Standing Aside, the District Court Also Correctly Held Plaintiffs' Partisan Vote Dilution Claims Are Not Justiciable Under *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019) 48

A. Plaintiffs Fail to Show the District Court Clearly Erred When It Found, as a Factual Matter, That the Ballot Order Statute Imposes No Burden for Courts to Weigh.....49

B. *Rucho* Warns Courts to Be Wary of Cases Seeking to Adjudicate Partisan "Fairness" Using Advanced Statistical Modeling 52

C. Plaintiffs' Relief Requires the Court to Accept Plaintiffs' Version of Fairness and Determine What Amount of Deviation from the "Fair" Standard Is Allowable Based on Statistics 56

D. Plaintiffs' Cited Cases That Found Ballot Order Disputes Justiciable Are Significantly Different Than This Case.....58

III. The Eleventh Amendment Bars Plaintiffs' Requested Relief.....62

IV. Plaintiffs Also Fail to State a Claim Upon Which Relief Can Be Granted 64

CONCLUSION.....67

STATEMENT OF RELATED CASES.....68

TABLE OF AUTHORITIES

Cases **Page(s)**

ACORN v. Fowler, 178 F.3d 350 (5th Cir. 1999) 45
Allen v. Wright, 468 U.S. 737 (1984) 46
Anderson v. Celebrezze, 460 U.S. 780 (1983) 64
Baker v. Carr, 369 U.S. 186 (1962) 48, 49, 52
Bd. of Election Comm'rs of Chi. v. Libertarian Party of Ill., 591 F.2d 22 (7th Cir. 1979) 58
Becker v. FEC, 230 F.3d 381 (1st Cir. 2000) 31
Burdick v. Takushi, 504 U.S. 428 (1992) 64
Chicago & Grand Trunk R. Co. v. Wellman, 143 U.S. 339 (1892) 35
Clough v. Guzzi, 416 F. Supp. 1057 (D. Mass. 1976) 65
Coal. to Def. Affirmative Action v. Brown, 674 F.3d 1128 (9th Cir. 2012) 63
Corrie v. Caterpillar, Inc., 503 F.3d 974 (9th Cir. 2007) 26, 48, 49
Culinary Workers Union, Local 226 v. Del Papa, 200 F.3d 614 (9th Cir. 1999) 62
Daniels-Hall v. Nat. Educ. Ass'n, 629 F.3d 993 (9th Cir. 2010) 14, 21
Drake v. Obama, 664 F.3d 774 (9th Cir. 2011) 33
Ex Parte Young, 209 U.S. 123 (1908) 62, 63
Fed. Election Comm'n v. Nat'l Conservative Political Pol. Action Comm., 470 U.S. 480 (1985) 42
Flinn v. Gordon, 775 F.2d 1551 (11th Cir. 1985) 35
Gill v. Whitford, 138 S. Ct. 1916 (2018) 29, 31, 42, 43
Gould v. Grubb, 536 P.2d 1337 (Cal. 1975) 59
Graves v. McElderry, 946 F. Supp. 1569 (W.D. Okla. 1996) 59
Green Party of Tenn. v. Hargett, 767 F.3d 533 (6th Cir. 2014) 16, 49
Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982) 43
Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333 (1977) 40
Jacobson v. Fla. Sec'y of State, 974 F.3d 1236 (11th Cir. 2020) ..... *passim*
Juliana v. United States, 947 F.3d 1159 (9th Cir. 2020) 54
Kautenberger v. Jackson, 85 Ariz. 128 (1958) 60
Lexmark Int'l v. Static Control Components, Inc., 572 U.S. 118 (2014) 46
Libertarian Party of Va. v. Alcorn, 826 F.3d 708 (4th Cir. 2016) 9, 65, 66, 67
Lujan v. Defs. of Wildlife, 504 U.S. 555 (1991) 28, 46
Mandel v. Bradley, 432 U.S. 173 (1977) 60
Mann v. Powell, 314 F. Supp. 677 (N.D. Ill. 1969) 59, 60
Mann v. Powell, 333 F. Supp. 1261 (N.D. Ill. 1969) 31
Mann. v. Powell, 398 U.S. 955 (1970) 31, 59

Maya v. Centex Corp., 658 F.3d 1060 (9th Cir. 2011) 27
McLain v. Meier, 637 F.2d 1159 (8th Cir. 1980) 59
Mi Familia Vota v. Abbott, 977 F.3d 461 (5th Cir. 2020) 63
Micomonaco v. Washington., 45 F.3d 316 (9th Cir. 1995) 62
Miller v. Hughs, 471 F. Supp. 3d 768 (D. Tex. 2020) ..... *passim*
Mitchell v. L.A. Cmty. Coll. Dist., 861 F.2d 198 (9th Cir. 1988) 62
Ne. Ohio Coal. for Homeless and Serv. Emps. Int'l Union, Local 1199 v. Blackwell, 467 F.3d 999 (6th Cir. 2006) 40
Nelson v. Warner, 472 F. Supp. 3d 297 (S.D. W. Va. 2020) 38, 39
Netsch v. Lewis, 344 F. Supp. 1280 (N.D. Ill. 1972) 59
New All. Party v. N.Y. State Bd. of Elections, 861 F. Supp. 282 (D. S.D.N.Y. 1994) 49, 59, 65
Orion Wine Imps., LLC v. Applesmith, 440 F. Supp. 3d 1139 (9th Cir. 2020) 50
Owen v. Mulligan, 640 F.2d 1130 (9th Cir. 1981) 34
Pavek v. Donald J. Trump for President, Inc., 967 F.3d (8th Cir. 2020) 37
Pers. Adm. of Mass. v. Feeney, 442 U.S. 256 (1979) 58
Pub. Integrity All., Inc. v. City of Tucson, 836 F.3d 1019 (9th Cir. 2016) 64
Rucho v. Common Cause, 139 S. Ct. 2484 (2019) ..... *passim*
Sangmeister v. Woodard, 565 F.2d 460 (7th Cir. 1977) 59
Sec. & Exch. Comm'n v. World Cap. Mkt., Inc., 864 F.3d 996 (9th Cir. 2017) 26, 50
Smith v. Pac. Props. and Dev. Corp., 358 F.3d 1097 (9th Cir. 2004) 43
Sonner v. Premier Nutrition Corp., 971 F.3d 834 (9th Cir. 2020) 26, 62
Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2016) 27, 46
Summers v. Earth Island Inst., 555 U.S. 488 (2000) 30, 35, 40
Texas Democratic Party v. Benkiser, 459 F.3d 582 (5th Cir. 2006) 38
Thornhill Pub. Co., Inc. v. Gen. Tel. & Elecs. Corp., 594 F.2d 730 (9th Cir. 1979) 16, 50
Townley v. Miller, 722 F.3d 1128 (9th Cir. 2013) 32, 33
Ulland v. Growe, 262 N.W.2d 412 (Minn. 1978) 65
United States v. Bentson, 947 F.2d 1353 (9th Cir. 1991) 27
United States v. Hays, 515 U.S. 737 (1995) 29
United States v. Palmer, 16 U.S. 610 (1818) 48
Va. Off. for Prot. & Advoc. v. Stewart, 563 U.S. 247 (2011) 62
Vieth v. Jubelirer, 541 U.S. 267 (2004) 53, 54
Warth v. Seldin, 422 U.S. 490 (1975) 27
Washington v. Davis, 426 U.S. 229 (1976) 58
Weisberg v. Powell, 417 F.2d 388 (7th Cir. 1969) 59
Zivotofsky v. Clinton, 566 U.S. 189 (2012) 55

Constitutional Provisions

Ariz. Const. art. II, § 13 60
U.S. Const. art. I, § 4, cl. 1.....53

Statutes

28 U.S.C. § 1291.....10
28 U.S.C. § 1331.....10
A.R.S. § 16-502..... *passim*
A.R.S. § 16-503..... 13, 46
Minn. Stat. § 204D.13(2) 37

Rules

Fed. R. App. P. 4(a) 10
Fed. R. App. P. 32.....69
Fed. R. Civ. P. 12(b)(1).....27
Fed. R. Civ. P. 54(a).....10
Fed. R. Civ. P. 58 10
Fed. R. Evid. 201(b)..... 14, 21

Other Authorities

Ariz. H.R. Comm. Min., H.B. 2028 (Mar. 5, 1979) 12
Ariz. H.R. Comm. Min., S.B. 1372 (Mar. 1, 2000).....13
Ariz. House J. (Apr. 20, 1979).....12
Ariz. Senate Fact Sheet, S.B. 1372, 44th Leg., 2nd Reg. Sess. (May 12, 2000).....13
Final Reading Votes, S.B. 1372, 44th Leg., 2nd Reg. Sess. (April 10, 2000) 13

INTRODUCTION

This case is about political questions raised by political groups seeking extraordinary relief: a permanent injunction of Arizona's 42-year-old ballot order law, A.R.S. § 16-502(E) ("Ballot Order Statute"), and an order requiring Arizona's Secretary of State ("Secretary") to replace the statute with a "system that gives similarly situated major-party candidates an equal opportunity to be listed first on the ballot." ER-48. The Plaintiffs here are various groups and individuals—the Democratic National Committee ("DNC"), DSCC, and Priorities USA ("Committee Plaintiffs"), and three Arizona voters, Brian Mecinas, Carolyn Vasko, and Patti Serrano ("Voter Plaintiffs")—who support Democratic candidates. Plaintiffs argue the Ballot Order Statute, which directs county officials to rely on votes cast for governor in the previous election to determine the ballot order of candidates' names, is unconstitutional because it allegedly favors Republicans.

As the district court emphasized, the Ballot Order Statute "does not prevent candidates from appearing on the ballot or prevent anyone from voting." 1-ER-25. According to Plaintiffs, when people vote for the first-listed candidate solely because of the candidate's position, those votes dilute and decrease "[t]he weight and impact of the Voter Plaintiffs' votes (as well as the [Committee Plaintiffs]' membership and constituencies)." 1-ER-45. So Plaintiffs ask the federal courts to

allocate some share of the alleged windfall vote to their preferred party and its candidates.

The district court correctly refused to do so. The court considered Plaintiffs' ballot-order vote-dilution theory in a contested evidentiary hearing and rejected it, finding that the Ballot Order Statute does not burden Plaintiffs' voting rights. Accordingly, the district court granted the Secretary's motion to dismiss Plaintiffs' amended complaint on two independent, jurisdictional grounds. The court found—in line with decisions of the Eleventh Circuit Court of Appeals and the Western District of Texas in analogous ballot-order lawsuits—that (1) Plaintiffs lack Article III standing; and (2) Plaintiffs' grievance with the Ballot Order Statute, and the relief Plaintiffs seek, amounts to a nonjusticiable political question under *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019). 1-ER-26; *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1241-42 (11th Cir. 2020) (holding voters and organizations, including the DNC and DSCC, lack standing to sue Florida Secretary of State over ballot order law and "[c]omplaints of unfair partisan advantage based on the order in which candidates appear on the ballot bear all the hallmarks of a political question outside our competence to resolve"); *Miller v. Hughs*, 471 F. Supp. 3d 768, 777-79 (D. Tex. 2020) (holding neither the DNC nor DSCC proved an injury-in-fact for Article III standing and plaintiffs' ballot-order claim asking federal courts "to accept Plaintiffs' version of what is fair" to

determine ballot order is a nonjusticiable political question). Plaintiffs admit they must overcome both rulings to prevail on appeal. Opening Brief ("O.B.") at 3. They fail to do so.

Moreover, Plaintiffs' amended complaint suffers from two more defects, each of which alternatively justified dismissal. Plaintiffs' requested relief is barred by the Eleventh Amendment. And even assuming for the sake of argument that Plaintiffs' claims were justiciable, they still fail as a matter of law. Arizona's Ballot Order Statute easily passes constitutional muster under the *Anderson-Burdick* framework. In another analogous ballot-order case, the Fourth Circuit Court of Appeals rightfully rejected the proposition that federal courts "possess the power to rule that some voters' choices are less constitutionally meaningful than the choices of other[s.]" *See Libertarian Party of Va. v. Alcorn*, 826 F.3d 708, 718-21 (4th Cir. 2016) (affirming grant of motion to dismiss challenge to ballot-order law for failure to state a claim). Because Plaintiffs cannot show the district court committed any error, this Court should affirm the district court's order granting the Secretary's motion to dismiss.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331. On June 25, 2020, the district court entered its order granting the Secretary's motion to dismiss with prejudice, which was a final order under Rules 54(a) and 58 of the Federal Rules of Civil Procedure. 1-ER-2-27. On July 3, 2020, Plaintiffs filed a notice of appeal that was timely under Rule 4(a) of the Federal Rules of Appellate Procedure. 2-ER-301-303. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

ISSUE PRESENTED FOR REVIEW

Whether the district court correctly granted the Secretary's motion to dismiss, where Plaintiffs lack Article III standing, the political question doctrine and the Eleventh Amendment bar Plaintiffs' claims and their requested relief, and Plaintiffs' claims fail as a matter of law.

STATEMENT OF THE CASE

I. Arizona's Ballot Order Statute

Over four decades ago, in 1979, 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 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, 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."

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[1] In 1983, the name-ordering provision at issue in this lawsuit was relocated from subsection (H) to its current location in subsection (E). *See* 1-SER-21 (Ariz. Laws 1983, Ch. 33, § 1).

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)).

Ever since its passage, the Ballot Order Statute has 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"). The statute also requires rotation of candidates' names within each political party "[w]hen there are two or more candidates of the same political party for the same office" to ensure that "the name of each candidate shall appear substantially an equal number of times in each possible location." A.R.S. § 16-502(H).

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.*[2]

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.

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). 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.

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[2] This Court may take judicial notice that the recognized political parties in Arizona currently include the Democratic Party, Republican Party, and the Libertarian Party. *See* Ariz. Sec'y of State, Recognized Political Parties, *available at*: https://azsos.gov/elections/information-about-recognized-political-parties; Fed. R. Evid. 201(b); *Daniels-Hall v. Nat. Educ. Ass'n*, 629 F.3d 993, 999 (9th Cir. 2010) (taking judicial notice of information on government entities' websites); *see also* 1-ER-6, n.4 (district court's recognition of the same information).

II. Plaintiffs Challenge the Ballot Order Statute, Alleging Ballot Order Produces a "Primacy Effect" and Vote Dilution

In November 2019, Plaintiffs filed an amended complaint, challenging the constitutionality of Arizona's Ballot Order Statute under the First and Fourteenth Amendments. 1-ER-28-50. Plaintiffs argued that "ballot order matters" because of "a well-studied and proven phenomenon known as 'position bias'" (also referred to as a "primacy effect"), and asserted that when ballot order is "unfairly" assigned, "it can raise concerns of constitutional magnitude." 1-ER-29. Plaintiffs asked the district court to enjoin the Ballot Order Statute and "requir[e] the Secretary of State to use a ballot order system that gives similarly situated major-party candidates an equal opportunity to be listed first on the ballot." 1-ER-48.

A few days later, Plaintiffs filed a motion for preliminary injunction, again asking the district court to order the Secretary to use a different ballot order framework for "similarly-situated major party candidates" during the 2020 general election. As the district court later noted, "[w]hile Plaintiffs argue[d] 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 third-party candidates in their ballot scheme, meaning that those candidates would never be listed first on the ballot." 1-ER-24. Plaintiffs submitted reports from two experts, Dr. Jonathan Rodden and Dr. Jon Krosnick, to

support their assertion that statistical evidence shows the primacy effect plays a meaningful role in Arizona's general elections. 1-ER-76-290.

The Secretary filed a motion to dismiss, attacking Plaintiffs' allegations in the complaint as insufficient to confer upon the court subject matter jurisdiction and contesting the court's subject matter jurisdiction in fact. 1-SER-108-133. *See Thornhill Pub. Co., Inc. v. Gen. Tel. & Elecs. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979) (explaining a motion to dismiss under Rule 12(b)(1) "may either attack the allegations of the complaint" or attack "the existence of subject matter jurisdiction in fact");[3] *Green Party of Tenn. v. Hargett*, 767 F.3d 533, 551 (6th Cir. 2014) ("The effect of preferential ballot ordering on voter behavior involves questions of fact … [and] there is a factual dispute as to whether ballot position sways voters, and if so, how much"). Specifically, the Secretary argued that Plaintiffs lacked Article III standing to bring the claim, that Plaintiffs' attempt to litigate partisan fairness as to the Ballot Order Statute was nonjusticiable in light of the Supreme Court's recent decision in *Rucho*, 139 S. Ct. at 2500, that Plaintiffs' requested relief was barred by the Eleventh Amendment, and that Plaintiffs' claims failed as a matter of law. 1-SER-108-133.

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[3] The district court correctly recited these legal standards in its order granting the Secretary's motion to dismiss. 1-ER-8.

The Secretary also filed a response opposing Plaintiffs' motion for preliminary injunction, disputing the existence of any primacy effect in Arizona's general elections and submitting an expert report from Sean Trende. 1-SER-38-107. Mr. Trende explained, *inter alia*, that Dr. Rodden's data "do not suggest a strong relationship between ballot order and vote share" in Arizona's general elections. 1-SER-44. Mr. Trende identified material errors in Dr. Rodden's methodology and other variables that would have been more appropriate for a statistician to use "in understanding contemporary voting behavior" in a regression analysis. 1-SER-44-47. Mr. Trende opined that Dr. Rodden's findings were "sensitive to model selection" and that if Dr. Rodden had included common variables in his analysis, such as ethnicity, race, and age, Dr. Rodden's report "would not have returned a statistically significant result." 1-SER-46-47. Mr. Trende also opined that "when taking account of the clustering of the data," Dr. Rodden's results were not statistically significant. 1-SER-50.

III. After a Full Evidentiary Hearing, Plaintiffs Fail to Substantiate Their Allegation of a "Primacy Effect" in Arizona's General Elections

In March 2020, the district court held a two-day evidentiary hearing where the court heard live, in-person testimony from Dr. Rodden, Dr. Krosnick, and Mr. Trende. 1-ER-2; 2-SER-135-370. The district court then held a three-hour oral argument on both Plaintiffs' preliminary injunction motion and the Secretary's

motion to dismiss before taking the matter under advisement. 2-SER-371-408. The following evidence was presented at the hearing.

A. Dr. Rodden's Testimony

Plaintiffs' first expert, Dr. Rodden, testified that he had been asked in his report "to examine whether there is a discernable difference between the vote share of the candidate who is listed first on the ballot in Arizona compared with the candidates who are listed second on the ballot, holding other things constant." 2-SER-143. Dr. Rodden gathered county-level data of all of the general elections held in Arizona from 1980 to the present, and then analyzed that data "using three different techniques." *Id*. Dr. Rodden conducted a "regression analysis," "matching analysis," and an analysis examining "close elections." 2-SER-144. Dr. Rodden had reservations about his "close elections" analysis, stating the "effect size" he found "might be a little too large." 2-SER-166-168.[4]

Dr. Rodden's regression analysis was an "effort to establish the relationship between some variables." 2-SER-148. Dr. Rodden explained that he designated ballot order as the "independent variable," and then selected control variables

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[4] Dr. Rodden does not have a degree in statistics; he took one class, "sequence of quantitative methods," in his Ph.D. program. 2-SER-179. Dr. Rodden's expert report was not peer-reviewed. 2-SER-190-191. The Secretary's expert, Mr. Trende, has a master's degree in Applied Statistics and took numerous courses on statistics. 2-SER-311.

(such as incumbency, party registration, population density, and "percent of the population that rents versus owns") to determine the "impact" of ballot order. 2-SER-149-151. Dr. Rodden agreed there is no "right method" to use to examine ballot order effects because "there are multiple ways to approach this dataset." 2-SER-189-193.

Dr. Rodden ultimately opined that both Democrats and Republicans "enjoy a bit of an advantage when they are listed first" and that Republicans' advantage was "larger" when there was "an open seat" with "no incumbent running." 2-SER-134-135. Dr. Rodden also found "the effect was larger in down ballot elections than the top of the ballot elections." 2-SER-159.

Dr. Rodden's testimony crumbled on cross-examination. Most significantly, Dr. Rodden conceded that his regression analysis contained "measurement error," which rendered his results unreliable. 2-SER-202; *see also* 2-SER-194 ("If I try to measure something and I measure it in completely the wrong way, then the coefficient on that variable will not be reliable."). Dr. Rodden introduced measurement error into his analysis by deciding to use county-level data for control variables when conducting regressions for district-level races. 2-SER-198-202. In other words, Dr. Rodden used county demographics data for any portion of a district that appears in any given county, even if those demographics, in reality, are completely different from the district demographics. Because of this error, Dr.

Rodden admitted he was unable to disentangle the impact of ballot order from district level partisanship. 2-SER-203.

Of Dr. Rodden's 16 regression analyses total, 14 involved district-level races and therefore contained this measurement error. 2-SER-213-214 (Dr. Rodden agreeing that "all but two" of the analyses included district-level data).[5] And when Dr. Rodden "dropp[ed]" the districted races and restricted the analysis "to statewide races where the same candidates are competing in every county," Dr. Rodden concluded the estimated ballot order effect was ***exactly the same*** for Democratic and Republican candidates: "around 2.5 percentage points[.]" 1-ER-99.

Putting aside the measurement error, Dr. Rodden also agreed that his analysis could only estimate an average primacy effect over the 40-year span of time that the statute has been in existence. 2-SER-182-183; 2-SER-192. Dr. Rodden could not determine average ballot order effect in any particular county (for example, Maricopa County, which Plaintiffs have particularly emphasized in this lawsuit, *see* O.B. at 9). 2-SER-192.

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[5] Dr. Rodden noted in his report that "16 of 20 general elections" in Arizona provided "useful cross-county variation in ballot order." 1-ER-87. Dr. Rodden presumably did not examine the four elections in which Democratic candidates were listed across ballots statewide. *See id.* Mr. Trende analyzed Dr. Rodden's data associated with the 16 total analyses. 1-SER-61.

Moreover, Dr. Rodden admitted he did not examine whether ballot order effect exists in Arizona with mail-in ballots. 2-SER-226-227. This was another crucial flaw in his analysis, given that a vast majority of Arizonans cast early ballots. Indeed, the Secretary's expert opined, *inter alia*, that "[i]n a state such as Arizona where at least 75% of votes are consistently cast as early ballots, we might expect th[e] [ballot order] effect to be even smaller to the point of being negligible." 1-SER-74.

Finally, Dr. Rodden acknowledged that although he used party registration as a variable in his regression analysis, he "did not enter [Independent or third party registration] into the regression" because he "wouldn't have a hypothesis about how that would help [him] explain Republican or Democratic vote share." 2-SER-197-198. This means that Dr. Rodden was unable to account for nearly one-third of Arizona's electorate—over 1.3 million Arizona voters—who are registered as Independent or third-party.[6]

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[6] *See* Ariz. Sec'y of State, Arizona Voter Registration Statistics, https://azsos.gov/elections/voter-registration-historical-election-data (April 2021) (reflecting that nearly one-third of Arizona's currently-registered voters are not registered as Republican or Democratic). This Court may take judicial notice of these statistics. *See* Fed. R. Evid. 201(b); *Daniels-Hall*, 629 F.3d at 998-99.

B. Dr. Krosnick's Testimony

Plaintiffs' second expert, Dr. Krosnick, likewise failed to provide any testimony to support a finding that ballot order impacts Arizona's general elections. Dr. Krosnick testified that he had conducted a "meta-analysis" of studies that considered "the impact of name order on voting behavior," and analyzed those studies "as a group." 2-SER-281-282. Dr. Krosnick testified that the literature showed that primacy effects "have been documented in Ohio, California, North Dakota, Colorado, Michigan, and Florida, and maybe Illinois." 2-SER-287.

When asked whether he was "aware of any studies that have been published on name order effects in general elections in Arizona," Dr. Krosnick answered, "I am not." *Id*.; *see also* 2-SER-303. Dr. Krosnick speculated that it was "[e]xtremely likely" that primacy effect has impacted Arizona elections, stating, "it's a part of human nature, and so therefore it's extremely likely to be happening, has happened in the past, and will happen in Arizona elections in the future." 2-SER-292. On cross-examination, Dr. Krosnick reiterated that none of the studies examined Arizona elections, and only one study (of 1,061 studies) examined the impact of absentee ballots. 2-SER-302. Dr. Krosnick also conceded that "adding the partisan affiliations of the candidates next to their names on the ballot"—which

Arizona's Ballot Order Statute requires, *see* A.R.S. § 16-502(E)—"does weaken the size of primacy effects." 2-SER-304.[7]

IV. The District Court Grants the Secretary's Motion to Dismiss

On June 25, 2020, in a 26-page ruling, the district court granted the Secretary's motion to dismiss on two independent grounds. 1-ER-2-27. First, the district court found Plaintiffs "cannot satisfy the requirements of Article III Standing." 1-ER-26. Second, the district court found that "even if Plaintiffs had standing, … Plaintiffs have not established that the [Ballot Order] Statute burdens them, and the relief sought amounts to a nonjusticiable political question." 1-ER-26. The district court did not expressly rely on the Secretary's expert's report or his testimony when it found that "Plaintiffs have not established a 'burden' on their rights to vote." 1-ER-25. Instead, the district court cited portions of Dr. Krosnick's testimony as examples of Plaintiffs' failure to make this showing. *Id*., n.11.

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[7] It is unnecessary to summarize Mr. Trende's testimony because, as discussed above, the district court ultimately found that Plaintiffs' own experts failed to prove that ballot order plays a role in Arizona's general elections. Nonetheless, Mr. Trende's testimony is included in the supplemental excerpts of record for completeness and to show that even experts cannot agree on one statistical method to determine whether any ballot order effect is statistically significant. *A fortiori*, there is no judicially manageable standard that applies to Plaintiffs' partisan ballot-order vote-dilution claim, as the district court held. *See supra*, Argument § II.

V. Plaintiffs Unsuccessfully Move for Injunctions Pending Appeal

Plaintiffs filed a notice of appeal and an emergency motion for injunction of the Ballot Order Statute pending appeal on July 6, 2020. 1-ER-301-303; 1-ER-319. The district court denied the motion four days later. 1-ER-319.

Plaintiffs then filed an emergency motion in this Court under Circuit Rule 27-3 for an injunction of the Ballot Order Statute pending appeal. Doc. 2-1. The Secretary filed a response, and a motions panel of this Court unanimously denied Plaintiffs' request for an injunction. Docs. 7-1, 9.

SUMMARY OF THE ARGUMENT

The premise of Plaintiffs' amended complaint is that candidates who appear first on a ballot in Arizona unfairly enjoy a statistically significant advantage, caused by presumably disinterested voters who select the first-listed candidate only because of the candidate's top position on the ballot. The district court found otherwise, as a matter of fact and law, and correctly granted the Secretary's motion to dismiss for two distinct reasons. First, Plaintiffs failed to allege an injury sufficient to establish Article III standing. Second, Plaintiffs' claims and their requested relief amount to a nonjusticiable political question for the same reasons that the Supreme Court deemed partisan gerrymandering claims nonjusticiable in *Rucho*.

And even assuming Plaintiffs could overcome both of those jurisdictional rulings, which are intertwined with factual findings and legal conclusions, this Court should still affirm because Plaintiffs' requested relief is barred by the Eleventh Amendment and their claims fail as a matter of law. The Ballot Order Statute provides clear direction to Arizona's 15 counties about how to organize candidates' names so that all general election ballots are comprehensible and manageable. The statute subjects all political parties to the same rules and is constitutional under the *Anderson-Burdick* framework.

STANDARD OF REVIEW

This Court reviews the district court's grant of a motion to dismiss for lack of subject matter jurisdiction *de novo* and may affirm the district court's dismissal of the complaint on any basis supported by the record. *See Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 979 (9th Cir. 2007); *Sonner v. Premier Nutrition Corp.*, 971 F.3d 834, 839 (9th Cir. 2020).

A district court's "underlying factual findings on jurisdictional issues," however, are reviewed "for clear error." *Sec. & Exch. Comm'n v. World Cap. Mkt., Inc.*, 864 F.3d 996, 1003 (9th Cir. 2017) (citation omitted).

ARGUMENT

I. The District Court Correctly Granted the Secretary's Motion to Dismiss Because Plaintiffs Lack Article III Standing

The district court did not err when it found that Plaintiffs "cannot satisfy the requirements of Article III Standing." 1-ER-26. 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). Plaintiffs must show they have "(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). When a party lacks Article III standing, the court must dismiss the action "for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1)." *Maya v. Centex Corp.*, 658 F.3d 1060, 1067 (9th Cir. 2011).

As a preliminary matter, Plaintiffs do not even attempt to challenge the district court's conclusion that the individual Arizona voters (Mecinas, Vasko, and Serrano) lack standing. *Compare* 1-ER-9-15 (finding, *inter alia*, 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"), *with* O.B. at 13-38 (alleging only that the Committee Plaintiffs have standing). Plaintiffs have therefore abandoned and waived any such argument. *See United States v. Bentson*,

947 F.2d 1353, 1356 (9th Cir. 1991) ("Legal issues raised for the first time in reply briefs are waived.").

Contrary to Plaintiffs' arguments on appeal, the Committee Plaintiffs lack standing because the Ballot Order Statute has not injured them. And Plaintiffs cannot satisfy the other two elements of Article III standing because their claims are neither traceable to the Secretary nor redressable through this lawsuit. The district court's ruling is consistent with this Court's precedent and should be affirmed.

A. Ballot-Order Vote-Dilution Is Not a Cognizable Injury

Plaintiffs' alleged injury fails as a matter of law. The harm that Plaintiffs allege in this lawsuit is partisan vote dilution, caused by the order of candidates' names on a ballot, which they claim leads other disinterested voters to reflexively cast ballots for the first-listed candidate. This is not a cognizable injury. For purposes of Article III standing, an "injury in fact" requires showing that the plaintiff suffered "an invasion of a legally protected interest which is (a) concrete and particularized" and "(b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1991) (citations and quotation marks omitted).

In *Gill v. Whitford*, when the Supreme Court addressed a partisan vote dilution claim caused by gerrymandering, the Court emphasized that "federal

courts are 'not responsible for vindicating' generalized partisan preferences." 138 S. Ct. 1916, 1933 (2018). *Gill* reiterated that to meet Article III's injury-in-fact requirement, the injury must "affect[] the plaintiff in a personal and individual way." *Id*. at 1929. When a plaintiff's "alleged harm is the dilution of their votes" due to partisan gerrymandering, "that injury is district specific." 138 S. Ct. at 1930. However, "[a] plaintiff who complains of gerrymandering but does not live in a gerrymandered district 'assert[s] only a generalized grievance against governmental conduct of which he or she does not approve.'" *Id*. (quoting *United States v. Hays*, 515 U.S. 737, 745 (1995)).

Just as the harm from partisan vote dilution through gerrymandering in *Gill* had to be "district specific" to satisfy the "injury in fact" test for Article III standing, the harm here that Plaintiffs allege must be "election-specific." In other words, Plaintiffs must show that the primacy effect has changed (or will imminently change) the actual outcome of a partisan election. Otherwise, Plaintiffs' purported injury remains "conjectural" or "hypothetical," which is insufficient to show an injury-in-fact. *See Jacobson*, 974 F.3d at 1248 (reasoning that "[m]uch like the average measure of wasted votes in *Gill*, the average measure of the primacy effect treats all elections 'as indistinguishable, even though their individual situations are quite different," and holding that "partisan vote dilution" from ballot order is not "an injury in fact sufficient for Article III standing").

Plaintiffs' vague allegations of "vote dilution" across counties and decades, without accounting for the particularities of each election, are insufficient to show standing to seek relief in the federal courts.

The best conjecture Plaintiffs could muster in the district court is that Arizona's Ballot Order Statute has had an average effect over the course of its' 40-year operation. 2-SER-192. Plaintiffs failed to link the primacy effect to the outcome of any previous election in Arizona, or empirically show how the primacy effect would imminently change the outcome of a future election. In fact, Dr. Krosnick testified that *none* of the studies he reviewed analyzed the existence of any ballot order effect in Arizona, 2-SER-287, 2-SER-303, and that, all things being equal, "adding the partisan affiliations of the candidates next to their names on the ballot does weaken the size of primacy effects." 2-SER-304. The district court noted these failures, stating, "[t]he Court acknowledges the difficulty Plaintiffs face in presenting evidence in this fashion to establish an injury … [b]ut they simply did not meet their burden in so showing." 1-ER-25-26. The court's conclusion is supported by the record and is consistent with settled law. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2000) (rejecting the notion that "statistical probability" of being threatened with an injury is sufficient to show injury-in-fact).

Plaintiffs' alleged harm caused by ballot-order vote-dilution also fails because no matter how Plaintiffs formulate it, their alleged "injury" depends on this Court finding that some voters' votes are so irrational as to not be entitled to the same constitutional respect and deference as other voters' choices. This is insufficient for Article III standing. *See Becker v. FEC*, 230 F.3d 381, 390 (1st Cir. 2000) (when a "preferred candidate … has less chance of being elected," the "harm" is not "a restriction on voters' rights and by itself is not a legally cognizable injury sufficient for standing"); *Mann v. Powell*, 333 F. Supp. 1261, 1264-65 (N.D. Ill. 1969) (dismissing voter plaintiff for lack of standing, reasoning that plaintiff's allegation that the "state action may cause other voters to act irrationally" is "an insufficient personal interest to state a cause of action").[8]

Accordingly, Plaintiffs have not satisfied the injury-in-fact requirement for their ballot-order challenge. *See Gill*, 138 S. Ct. at 1930. And as discussed below, the Committee Plaintiffs' involvement in this lawsuit does not salvage the Court's federal court jurisdiction.

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[8] Plaintiffs allege that the Supreme Court, in *Mann v. Powell*, 398 U.S. 955 (1970), "considered the constitutionality of a ballot ordering scheme and rejected the argument that such cases are nonjusticiable." O.B. at 40-41. Not so. The district court properly noted that "*Mann* was a summary affirmance by the Supreme Court" and therefore "carries little weight in this case." 1-ER-14 n.7.

B. Plaintiffs Do Not Have Standing under the Narrow Competitive Standing Doctrine

Plaintiffs contend the district court's "competitive standing" analysis was erroneous. O.B. at 15-29. But their arguments fail. The district court's ruling is "in line with [this Court's] precedent" under "this very limited theory" of standing. 1-ER-22.

In this Court's most recent case rejecting a competitive standing theory, *Townley v. Miller*, this Court described the competitive standing doctrine "[a]s the notion that 'a candidate or his political party has standing to challenge *the inclusion* of an allegedly ineligible rival on the ballot.'" 722 F.3d 1128, 1135 (9th Cir. 2013) (citation omitted). The district court aptly summarized the facts and holding of *Townley* as follows:

> 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. The plaintiffs in *Townley* argued that they had established competitive standing based on the inclusion of the NOTC option on all ballots. 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.

1-ER-21 (internal citations omitted).

Despite Plaintiffs' contentions, O.B. at 20-25, the district court correctly applied *Townley* when it refused to allow the Committee Plaintiffs to latch on to competitive standing here, which has nothing to do with the placement of an allegedly ineligible rival on the ballot. 1-ER-21-22.

Likewise, *Drake v. Obama*, 664 F.3d 774 (9th Cir. 2011), does not suggest that political committees have standing to assert that a particular ballot structure will cause voters to vote for some other party's candidates. Importantly, neither *Townley* nor *Drake* found any plaintiffs had standing, despite the fact that the list of Plaintiffs in both those cases included voters, candidates, political parties, and state representatives, among others. *Townley*, 722 F.3d at 1132; *Drake*, 664 F.3d at 779-80. In *Drake*, this Court held that political candidates could not claim competitive standing "because they were no longer candidates when they filed their complaint." 664 F.3d at 784. Plaintiffs argue in a footnote that *Drake* somehow supports a conclusion that political parties actually have "a greater claim to competitive standing than their candidates" because the parties "will continue to be disadvantaged by laws that systematically discriminate based on partisan affiliation." O.B. at 27-28, n.6. But the Ballot Order Statute here does not "discriminate based on partisan affiliation." It is a neutral law that applies equally to all political parties. And since its enactment, the Democratic Party is the only party that has ever been listed first across all ballots statewide. 1-ER-87.

Plaintiffs' heavy reliance on the Court's 40-year-old decision in *Owen v. Mulligan*, 640 F.2d 1130, 1133 (9th Cir. 1981), is also misplaced. *See* O.B. at 20-25. The district court properly distinguished *Owen* because there, this Court held that "the 'potential loss of an election' was an injury-in-fact sufficient to give a ***candidate*** and Republican party officials standing." 1-ER-21 (emphasis in original). As the district court put it, Plaintiffs "fail to recognize that the majority of the cases they cite to support their theories of injury involve ***candidates*** as plaintiffs who were alleging the personal harm of not getting elected." *Id.* (collecting cases).

Although the Court found standing in *Owen*, that case is significantly different from the case here. First, *Owen* was a case affirming an injunction after the defendants admitted they failed to follow their own procedures, and allowed a non-profit organization to allow a candidate for political office send campaign mailers at the lower rate. 640 F.2d at 1131. Second, the candidate had standing to object to the lower mailing rate his political opponent had received, consistent with a long line of precedent finding candidates have standing. *Id.* at 1132-33. Finally, the political committees also had standing because the modified postal rates were expanded to apply to them, but they were strictly limited in how they could use those lower rates and what candidates they would be able to assist with mailing at the lower rate. *Id.* at 1133-34. In sum, the alleged injuries in *Owen* are direct,

concrete, and measurable. These specific and measurable harms are a far cry from the vague assertions of partisan harm and "fairness" in ballot ordering that Plaintiffs asked the district court to adjudicate, based on flawed and incomplete statistical evidence.

Moreover, *Townley*, *Owen*, and *Drake* all pre-date the Supreme Court's decision in *Gill*. As discussed above, Plaintiffs' showing of an average primacy effect across the Ballot Order Statute's 40-year history is insufficient to establish an injury under *Gill*. The Court's narrow competitive standing theory should not be expanded to this context because doing so would run afoul of *Gill*.

Finally, Plaintiffs argue that "[t]here is no logical basis for concluding that individual candidates would have standing" but the Committee Plaintiffs do not. O.B. at 25-29. Abundant reasons exist not to excuse Committee Plaintiffs from the injury-in-fact requirement. The Supreme Court requires strict compliance with the 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"). And there is no federally protected right to winning an election. *Flinn v. Gordon*, 775 F.2d 1551, 1554 (11th Cir. 1985). As noted above, the Supreme Court has also explained that mere "statistical probability" that some members "are threatened with concrete injury" does not suffice for standing purposes. *Summers*, 555 U.S. at 497. Candidates who face a

political disadvantage in a particular election demonstrate a concrete, personal injury, rather than the hypothetical, speculative one that Committee Plaintiffs allege here.

Additionally, Arizona's Ballot Order Statute operates as a county-by-county rule. Plaintiffs' alleged harm is not appearing first on some portion (or all of) the ballots. However, the candidates of Plaintiffs' political party have always appeared first on the ballots in Apache county, and have appeared first most of the time in at least seven other counties. *See* 1-ER-86. Under the Ballot Order Statute, any harm to a candidate for statewide office (appearing on ballots in both Maricopa and Apache counties, for example) will be different than the alleged harm to a congressional candidate in Yavapai and Mohave counties (where more Republican voters reside), which will be different than the alleged harm to a candidate appearing on ballots in Coconino or Pima counties (where more Democratic voters reside). Thus, a Democratic candidate running for statewide office may appear first on some ballots but not others, while a Democratic candidate in a district encompassing specific counties may be almost certain to appear in the second position or the first position on all ballots in their race, depending on the district. That Democratic candidates in Arizona do not share the same alleged harm from

the Ballot Order Statute is yet another reason to require the Committee Plaintiffs to satisfy the injury-in-fact requirement as Article III requires.[9]

This unique county-by-county feature of Arizona's Ballot Order Statute also demonstrates why Plaintiffs' reliance on *Pavek v. Donald J. Trump for President, Inc.*, 967 F.3d 907 (8th Cir. 2020), is misplaced. *See* O.B. at 28. In *Pavek*, the Minnesota law at issue imposed a statewide rule, giving the top ballot position to candidates of the "political party that received the smallest average number of votes at the last state general election." 967 F.3d at 906; Minn. Stat. § 204D.13(2). The Eighth Circuit's one-paragraph standing analysis did not examine *Gill* or other precedent describing the type of evidence needed to establish standing in this context. 967 F.3d at 907. And even this lone case finding standing emphasized that the rights of organizational plaintiffs "are only marginally affected by the statute." *Id*. at 909. Even assuming, *arguendo*, that *Pavek*'s conclusion that political committees had standing to challenge the ballot-order law is consistent

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[9] Notably, Plaintiffs' own expert opined that when he dropped district races and examined only "statewide races where the same candidates are competing in every county," the "estimated effect of being listed first on the ballot for both Democrats and Republicans is around 2.5 percentage points." 1-ER-99. In other words, Dr. Rodden's report does not find the Ballot Order Statute "unfairly" assigns the ballot order effect to more Republican candidates than Democratic candidates.

with *Gill*, *Pavek* is still distinguishable because the law here does not impose a statewide rule that harms all Democratic candidates on ballots in Arizona.

Grasping for precedent, Plaintiffs also cite *Texas Democratic Party v. Benkiser*, 459 F.3d 582 (5th Cir. 2006), for the proposition that "the interests of political parties 'are identical' to the interests of the candidates they field in elections." O.B. at 27. But *Benkiser* is readily distinguishable. In *Benkiser*, the Fifth Circuit Court of Appeals found standing where the Texas Democratic Party ("TDP") sought an injunction to prevent the removal of an ineligible candidate's name from the ballot and to prevent the Republican Party of Texas from replacing him with a new candidate. 459 F.3d at 585-86. Under those circumstances, the Fifth Circuit "found injury in fact in the TDP's threatened loss of political power" and also found that TDP "has associational standing on behalf of its candidate." *Id*. at 587. *Benkiser* is therefore analogous to *Owen*; in both cases, the claims raised by the political parties alleged a specific candidate would be harmed in a specific election. Plaintiffs did not make this showing.

For similar reasons, Plaintiffs' citation to *Nelson v. Warner*, 472 F. Supp. 3d 297 (S.D. W. Va. 2020), which is pending further review by the Fourth Circuit Court of Appeals, is also unpersuasive. *See* O.B. at 28. *Nelson* addressed the constitutionality of West Virginia's law, which "mandate[s] that ballots for partisan offices list first the party whose candidate for president received the most

votes in the last election." 472 F. Supp. 3d at 302. In holding a candidate and the West Virginia Democratic Party had standing, the district court reasoned that the Eleventh Circuit's holding that Democratic committees lacked standing in *Jacobson* was "inapplicable [] because the plaintiffs actually focus the Court's analysis on a particular candidate in a particular election." *Id*. at 305. Here, however, "[t]here are no allegations of candidates being impermissibly placed on the ballot" and no allegations that any particular candidate in Arizona would be harmed by the Ballot Order Statute. *See* 1-ER-22. The district court in *Nelson* also expressly relied on Dr. Krosnick's testimony given in that case. 472 F. Supp. 3d at 305 (finding, based on Dr. Krosnick's analysis, that the candidate "demonstrated a substantial risk that the primacy effect will harm his chances of winning in the upcoming election"). Here, however, the district court found the opposite: Dr. Krosnick's testimony did *not* help the Committee Plaintiffs establish any injury caused by Arizona's Ballot Order Statute. 1-ER-25, n.11.

In sum, the district court correctly found that the Committee Plaintiffs failed to "allege[] facts sufficient to confer standing under this very limited theory." 1-ER-22.

C. Plaintiffs Do Not Have Associational Standing

Plaintiffs' Article III standing fares no better under an associational standing theory. The Supreme Court has explained associational standing as follows:

> [A]n 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.

Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 343 (1977). The beneficiaries of a plaintiff's services do not qualify as members for purposes of associational standing. *See Ne. Ohio Coal. for Homeless and Serv. Emps. Int'l Union, Local 1199 v. Blackwell*, 467 F.3d 999, 1010 n.4 (6th Cir. 2006).

Committee Plaintiffs' standing fails at the first step under *Hunt*. The district court properly reasoned that "Plaintiff DNC has failed to identify its members and their specific alleged injuries; thus, the Court is unable to determine whether 'its members would otherwise have standing to sue in their own right,' which is required for associational standing." 1-ER-17 (citing *Hunt*, 432 U.S. at 343). Again, that some of the Committee Plaintiffs' members may have a statistical probability of an injury at some unidentified time is not sufficient to show an injury-in-fact. *See Summers*, 555 U.S. at 499. The district court also correctly observed that "Plaintiffs DSCC and Priorities do not allege that they are membership organizations or that they have any members," and that this "glaring omission is fatal to associational standing for these two Plaintiffs." 1-ER-16; *see also* 1-ER-38.

Plaintiffs do not challenge the district court's conclusion that Priorities lacks associational standing. *See* O.B. at 30-36. Instead, the DNC and DSCC Plaintiffs advocate for a more relaxed standard that would not require them to identify any members by name or show that those members would have standing to sue in their own right. *See* O.B. at 30 (arguing that Democratic candidates would generally have standing, and therefore, it was sufficient for the DNC and DSCC to allege that such candidates "are among their members and constituents"). However, the district court accepted "as true that the DNC's seven Arizona members are Arizona voters who will be voting in the 2020 election," but still found that "the DNC does not allege any specific harm as to those alleged seven unnamed members, nor does it allege that any of the seven are candidates." 1-ER-17.

Thus, the district court could not "discern the alleged injuries of Plaintiff DNC's members" based on Plaintiffs' allegations. *Id*.; *see also Jacobson*, 974 F.3d at 1249 (holding DNC failed to establish associational standing, where even "accept[ing] as true the allegation of the complaint that the Committee's members include Democratic voters and candidates in Florida, the Committee still has not proved that one of those unidentified members will suffer an injury" from ballot order statute); *Miller*, 471 F. Supp. 3d at 777 (rejecting associational standing theory for committees to challenge ballot-order law because committees "merely suggest, in the abstract, that some members may have been harmed by the statute

in previous elections and may be harmed in the 2020 general election" and this alleged injury "is neither concrete nor imminent").

Plaintiffs appear to argue that this Court should construe the DNC and/or the DSCC as the "Democratic Party" for purposes of standing. *See* O.B. at 30-36. But the district court correctly noted that "the Democratic Party is not a Plaintiff in this case." 1-ER-16; *see also Jacobson*, 974 F.3d at 1251 (observing "the Supreme Court has held that the [Democratic] Party and the Committee are distinct entities that are not interchangeable for all purposes") (citing *Fed. Election Comm'n v. Nat'l Conservative Pol. Action Comm.*, 470 U.S. 480, 486 (1985)). Nonetheless, as the Eleventh Circuit reasoned in *Jacobson*, "even if we assume that an injury to the Democratic Party is an injury to the [DNC], the Committee never proved that one of *its* candidates is likely to lose a future election because of ballot order." 974 F.3d at 1251. The same is true here. "The average measure of the primacy effect on which the [DNC] relies cannot tell us what impact, if any, ballot order might have on a future presidential election." *Id*. at 1252.

Finding an "expansive theory" of associational standing here would essentially "allow *any* organization that favors the election of certain candidates to claim an injury based on harm to those candidates' electoral prospects." *Id*. But this alleged injury is nothing more than an attempt to vindicate "group political interests, not individual legal rights." *Gill*, 138 S. Ct. at 1933. Accordingly, the

district court correctly found that Plaintiffs failed to establish associational standing.

D. Plaintiffs Do Not Have Organizational Standing

The district court also rejected Plaintiffs' organizational standing theory, which considers whether a plaintiff has alleged an injury-in-fact that includes: "'(1) frustration of its organizational mission; and (2) diversion of its resources' to mitigate the effects of the challenged action." 1-ER-18 (citing *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" to support standing. 1-ER-18 (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)).

Plaintiffs' amended complaint alleged that the Ballot Order Statute directly harmed the Committee Plaintiffs by frustrating its mission and efforts to elect Democratic Party candidates in Arizona. 1-ER-37-39. But any injury based on the Committee Plaintiffs' interest in electing Democratic candidates is insufficient to establish either prong of organizational standing. As *Gill* explained, the "hope of achieving a Democratic majority in the legislature" is "a collective political interest" that cannot support standing. 138 S. Ct. at 1932; *see also Jacobson*, 974 F.3d at 1250.

Aside from the inadequate argument concerning efforts to elect Democratic candidates, the Committee Plaintiffs also failed to show that the Ballot Order Statute frustrates their organizational missions and diverts resources to mitigate the effects of the Ballot Order Statute. As the district court emphasized, "[p]erhaps most importantly, the [Committee] 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." 1-ER-19. And the Committee Plaintiffs' general allegations of expending resources on "Get Out the Vote" ("GOTV") assistance, "voter persuasion efforts," and making "contributions and expenditures in the tens of millions of dollars to persuade and mobilize voters to support Democratic Senate Candidates" (1-ER-37-39) do not establish frustration of mission or resource-diversion. These activities are precisely what political committees do; Plaintiffs cannot relabel their normal activities as a "harm" to manufacture standing. *See Jacobson*, 974 F.3d at 1250 (finding that witnesses' testimony failed to demonstrate resource diversion because they failed to explain "what activities the [DNC] or Priorities USA would divert resources away from in order to spend additional resources on combatting the primacy effect, as precedent requires"); *Miller*, 471 F. Supp. 3d at 777 (holding committee plaintiffs failed to allege an injury-in-fact to establish organizational standing when they alleged "only that the resources diverted to combat the [Texas]

Ballot-Order Statute's effect would otherwise go to other projects generally identified in the complaint," such as GOTV programs); *ACORN v. Fowler*, 178 F.3d 350, 359 (5th Cir. 1999) (explaining organizational plaintiff lacked standing when it "failed to show that any of its purported injuries relating to monitoring costs were in any way caused by any action by [defendant] that [plaintiff] now claims is illegal, as opposed to part of the normal, day-to-day operations of the group") (citation omitted).

Plaintiffs argue the district court erred by "overlook[ing] the declarations" Plaintiffs submitted in support of their preliminary injunction motion, stating the declarations "detailed the resources" the Committee Plaintiffs diverted "to combat the deleterious effects" of the Ballot Order Statute. O.B. at 37. But Plaintiffs' declarations did not add any additional factual allegations to show frustration of mission or diversion of resources. For example, Plaintiffs did not explain what they would do differently in their day-to-day operations in counties where their candidate appeared in the second position, versus counties where their candidates appeared in the first position. 1-ER-19-20. The district court did not err.

E. Plaintiffs' Claims Also Are Neither Traceable to the Secretary Nor Redressable Through This Lawsuit

Even if Plaintiffs could demonstrate an injury in fact (they have not), they still lack standing because they failed to satisfy the other two elements of "the irreducible constitutional minimum of standing"—traceability and redressability.

See Lujan, 504 U.S. at 560. As the Supreme Court has explained, the traceability requirement means that "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 … th[e] result [of] the independent action of some third party not before the court." *Id.* (cleaned up); *see also Spokeo*, 136 S. Ct. 1540 (alleged injury must be "fairly traceable to the challenged conduct" of the defendant). And redressability requires that it is "likely," not merely "speculative," that the plaintiff's alleged injury will be 'redressed by a favorable decision.'" *Lujan*, 504 U.S. at 560 (citation omitted). The "line of causation" between a defendant's actions and a plaintiff's alleged harm must be more than "attenuated." *Allen v. Wright*, 468 U.S. 737, 757 (1984), *overruled in part on other grounds by Lexmark Int'l v. Static Control Components, Inc.*, 572 U.S. 118 (2014).

Here, the causation between the Secretary's actions and Plaintiffs' alleged harm is attenuated at best. Plaintiffs' lawsuit is a narrow challenge to the constitutionality of the Ballot Order Statute, which governs the ballot order of candidates' names. For Plaintiffs to have standing, "the order in which candidates appear on the ballot must be traceable to the Secretary—the only defendant in this action." *See Jacobson*, 974 F.3d at 1253. But Plaintiffs cannot make this showing. The Ballot Order Statute does not mention the Secretary. Nor does A.R.S. § 16-

503, which directs the boards of supervisors in Arizona's fifteen counties to prepare and print ballots. The Secretary did not create this law and does not enforce it. As in *Jacobson*, any injury from Arizona's Ballot Order Statute is not traceable to the Secretary. *See* 974 F.3d at 1253-54 (finding ballot order lawsuit against Florida Secretary of State not traceable to Secretary where Florida ballot order law likewise "tasks the Supervisors, independently of the Secretary, with printing the names of candidates on ballots in the order prescribed by the ballot statute").

Plaintiffs' claims and relief sought also fail under the redressability element of standing. "An 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 1236. Accordingly, "[a]ny persuasive effect a judicial order might have upon the Supervisors, as absent nonparties who are not under the Secretary's control, cannot suffice to establish redressability." *Id*. Because the Secretary has no more than an attenuated connection with the Ballot Order Statute, Plaintiffs lack standing to pursue their claims against her.

II. Standing Aside, the District Court Also Correctly Held Plaintiffs' Partisan Vote Dilution Claims Are Not Justiciable Under *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019)

The district court also correctly determined that Plaintiffs' claims, and the relief they seek, present a non-justiciable political question under the Supreme Court's decision in *Rucho*, 139 S. Ct. at 2484-2500. 1-ER-22-26. "[T]he presence of a political question deprives a court of subject matter jurisdiction." *Corrie*, 503 F.3d at 980. "Because the political question doctrine curbs a court's power under Article III to hear a case, the doctrine is inherently jurisdictional." *Id*. at 981. A political question is appropriately construed as a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, and courts may "look beyond the face of the complaint to determine whether the district court properly dismissed plaintiffs' action under the political question doctrine." *Id*. at 982.

Courts have long recognized that the judiciary's role is incompatible with deciding questions that are "political [rather] than legal," and consequently such questions "belong more properly" to the legislative branch. *United States v. Palmer*, 16 U.S. 610, 634 (1818). This is because courts must be able to answer the questions put to them with "finality," based on "clearly definable criteria." *Baker v. Carr*, 369 U.S. 186, 213-14 (1962). In *Baker*, the Supreme Court "outlined six independent tests for determining whether courts should defer to the political branches on an issue," which includes (as relevant here) a case that

presents "a lack of judicially discoverable and manageable standards for resolving it[.] *Corrie*, 503 F.3d at 980 (quoting *Baker*, 369 U.S. at 217).

A. Plaintiffs Fail to Show the District Court Clearly Erred When It Found, as a Factual Matter, That the Ballot Order Statute Imposes No Burden for Courts to Weigh

On its face, the Ballot Order Statute does not give preferential treatment to any political party. *See* A.R.S. § 16-502(E). Because the statute is politically neutral, Plaintiffs advanced a legal theory of the "burden" allegedly caused by operation of the statute: a primacy effect that exists in Arizona general elections, which allegedly renders the statute unconstitutional. *See* 1-ER-34 (Plaintiffs' allegation in their amended complaint that "[t]he advantage of appearing first on a ballot is statistically significant" and "the Court should accordingly declare the Statute invalid" because of the "unfair political advantage" the statute allegedly creates). Accordingly, absent a factual finding that the primacy effect impacts general elections in Arizona, the Ballot Order Statute does not harm Plaintiffs. *See Hargett*, 767 F.3d at 551 (observing "there is a factual dispute as to whether ballot position sways voters, and if so, how much"); *New All. Party v. N.Y. State Bd. of Elections*, 861 F. Supp. 282, 290 (D. S.D.N.Y. 1994) ("Position bias is a disputable fact because its existence is dependent upon the circumstances in which it operates.").

When a motion to dismiss attacks "the existence of subject matter jurisdiction in fact," a court "may consider the evidence presented" and rule on the jurisdictional issue, "resolving factual disputes if necessary." *Thornhill Pub. Co., Inc.*, 594 F.2d at 733; *see also Orion Wine Imps., LLC v. Applesmith*, 440 F. Supp. 3d 1139, 1144 (9th Cir. 2020) (when a factual attack challenges the court's jurisdiction, "the court may review evidence outside the pleadings to resolve factual disputes concerning the existence of jurisdiction"). It was Plaintiffs' burden below to "furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction." *Applesmith*, 440 F. Supp. 3d at 1144 (citation omitted).[10]

And because the district court resolved the issue against Plaintiffs, Plaintiffs must show on appeal that the district court committed clear error when it resolved the disputed jurisdictional fact by finding that the Ballot Order Statute does not actually impose a "burden" sufficient to give federal courts jurisdiction to hear Plaintiffs' claim. *See Sec. & Exchange Comm'n*, 864 F.3d at 1003.

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[10] Indeed, the Secretary's counsel emphasized at oral argument in the district court that it was "critical" for Plaintiffs to "demonstrate as a matter of fact that there is some measureable ballot order effect in Arizona's general elections" and that they "failed to present any evidence supporting such a conclusion." 2-SER-389; *see also* 2-SER-406 (arguing Plaintiffs "have failed to show that any ballot order effect exists in Arizona elections by any scientific measure").

The district court found as a factual matter that Plaintiffs had not established a burden at all, let alone one that would allow courts to adjudicate what a "fair" ballot order would be as required to avoid dismissal as a political question. 1-ER-25 ("Because Plaintiffs have not established a 'burden' on their rights to vote, the court cannot 'weigh' it."). The district court specifically cited Plaintiffs' expert's testimony in explaining how Plaintiffs failed to substantiate the alleged primacy effect. *Id*., n.11. The record supports the district court's ruling. Over hundreds of pages of expert reports, and two days of live testimony, were dedicated to establishing whether a primacy effect exists in Arizona general elections. Experts used different statistical models—or the same models with different variables—and reached different results. Tellingly, *no studies* identified by Dr. Krosnick included Arizona, and the evidentiary hearing testimony revealed significant flaws in Dr. Rodden's analysis. 2-SER-287; 2-SER-303; *supra*, Statement of the Case, § III. Dr. Krosnick assumed there was a primacy effect in Arizona because researchers in some other states—each with their own ballot layout and manner of voting—had found a primacy effect at some time. 2-SER-292. But Plaintiffs' expert's speculation about a potential burden caused by the Ballot Order Statute is not sufficient evidence to confer subject matter jurisdiction on the court.

On appeal, Plaintiffs do not argue that the court's jurisdictional factual finding was clearly erroneous. *See* O.B. at 38-52. Instead, Plaintiffs insist, despite

the district court's finding, that the Ballot Order Statute "has had a persistent, meaningful effect on Arizona's election outcomes." O.B. at 9. Plaintiffs do not cite to any evidence adduced at the evidentiary hearing to support this assertion. Instead, they cite two extraneous pages of Dr. Krosnick's C.V. *See id*. (citing ER-282-283).

Plaintiffs also point to cases from other jurisdictions, which addressed different ballot order statutes in different factual contexts, and argue the district court misapplied *Rucho*.[11] On this record, however, Plaintiffs failed to demonstrate that *their* partisan ballot-order vote-dilution claim could be resolved by any judicially discoverable and manageable standards. *See Baker*, 369 U.S. at 217. Plaintiffs' failure to make this showing below supports the district court's political question ruling.

B. *Rucho* Warns Courts to Be Wary of Cases Seeking to Adjudicate Partisan "Fairness" Using Advanced Statistical Modeling

Setting aside the district court's factual finding that the Ballot Order Statute does not burden Plaintiffs' rights, Plaintiffs' vote-dilution ballot-order claim also fails under the political question doctrine as a matter of law. The limits imposed on the federal judiciary by the political question doctrine take on special concern

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[11] The Secretary addresses these arguments *infra*.

when courts face questions "entrusted to one of the political branches." *Rucho*, 139 S. Ct. at 2494; *see* U.S. Const. art. I, § 4, cl. 1 (giving state legislatures the duty to institute "[t]he times, places and manner of holding elections for Senators and Representatives").

In *Rucho*, the Supreme Court addressed whether "partisan gerrymandering" claims are justiciable. 139 S. Ct. at 2484. In concluding they are not, the Court made clear that it is "vital" for litigants to identify clear legal standards to "meaningfully constrain the discretion of the courts" in this area, because without such limitations "intervening courts—even when proceeding with best intentions—would risk assuming political, not legal, responsibility" for a "process that is the very foundation of democratic decisionmaking." *Id*. at 2498, 2499-500 (citation omitted). To that end, the Court held that claims seeking to invalidate a State's legislative map are justiciable only if they are based on "judicially discernible and manageable" standards. *Id*. at 2498 (citation omitted). To satisfy that requirement, the standards "must be grounded in a 'limited and precise rationale' and be 'clear, manageable, and politically neutral.'" *Id*. (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 306-08 (2004) (opinion of Kennedy, J.)). The Supreme Court specifically distinguished constitutional claims that rely on complex statistical modeling, rather than those that were "relatively easy to administer as a matter of math." *Rucho*, 139 S. Ct. at 2501.

Applying that requirement to the partisan gerrymandering claims before it, the Supreme Court held that those claims were nonjusticiable because there are no judicially discernible and manageable legal standards for resolving them. The Court categorically rejected the challengers' argument that such claims could be resolved using a standard that asks whether people in the challenged district receive "fair" representation. The Court did so for three reasons, all of which are directly applicable here.

First, the Court held that there is "[no] basis for concluding" that federal courts are even "authorized" to second guess the legislature's redistricting decisions out of a desire to ensure "fair" representation. *Rucho*, 139 S. Ct. at 2499. Second, not only do federal courts lack constitutional authority to interfere with such legislative choices out of a concern for fairness, *Rucho* held that they also are not competent or "equipped" to do so. *Id*. This is because there is no "clear, manageable and politically neutral" test for determining what "fair" representation even means, and such a standard therefore does not "meaningfully constrain" the court's discretion in any way. *Id.* at 2499-500 (quoting *Veith*, 541 U.S. at 291); *see also Juliana v. United States*, 947 F.3d 1159, 1173 (9th Cir. 2020) (relying on *Rucho* for the proposition that "a constitutional directive or legal standards must guide the courts' exercise of equitable power") (internal quotation marks omitted). Indeed, the Court discussed at length how "fair" representation could mean

different things to different people, for any number of perfectly legitimate reasons. *Rucho*, 139 S. Ct. at 2500. There are no judicially manageable standards for choosing which of those "visions of fairness" should prevail, much less for clearly and precisely describing what the prevailing vision is and how compliance with it should be measured. *Id.* Rather, such judgments "pose[] basic questions that are political, not legal," and any judicial decision about them would be "an unmoored determination' of the sort characteristic of a political question beyond the competence of the federal courts." *Id.* (quoting *Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012)).

Third, even if courts could define "fair" representation and figure out how to measure it, the Court held that such claims would still be nonjusticiable because the "determinative question" is not what fair representation means, but rather, how much deviation from perfect fairness is constitutionally permissible. *Rucho*, 139 S. Ct. at 2501. But federal courts do not have any clear or precise standards for making that determination either. Having conjured up their own criteria for defining and measuring "fair" representation, courts would be left to arbitrarily weigh, in their own discretion, "how much deviation from each [of those criteria] to allow." *Id.* Such "questions are unguided and ill-suited to the development of judicial standards[.]" *Id.* (citation and quotation marks omitted).

C. Plaintiffs' Relief Requires the Court to Accept Plaintiffs' Version of Fairness and Determine What Amount of Deviation from the "Fair" Standard Is Allowable Based on Statistics

Here, Plaintiffs' proposed constitutional standard that requires a complex, statistics-based comparison to a baseline "fair" primacy effect is no different. First, there is no way to determine whether the primacy effect in any particular election was driven by disinterested voters blindly selecting the first-listed candidate, which is an implicit premise in Plaintiffs' claims. Voters cast ballots based "on the issues that matter to them," including "the quality of the candidates, the tone of the candidates' campaigns, the performance of an incumbent, national events or local issues that drive voter turnout, and other considerations." *Rucho*, 139 S. Ct. at 2504. "Many voters split their tickets," while others "vote for candidates from both major parties at different points during their lifetimes." *Id*. Accordingly, this is not a case "relatively easy to administer as a matter of math." *Id*. at 2501. Just as courts cannot enjoin a legislative map on the basis of a complex statistical modeling showing that it is supposedly unfair, they cannot enjoin a ballot ordering scheme on the basis of a complex statistical model supposedly showing it is unfair in the aggregate.

Plaintiffs' requested relief also complicates the analysis. Their amended complaint asked the district court to determine a "fair" way to allocate the top position on a ballot between "similarly situated major-party candidates." *See* 1-

ER-24 ("The crux of Plaintiffs' case is for the Court to determine what is 'fair' with respect to ballot rotation."). But Arizona law does not define "major-party candidates," and more importantly, granting Plaintiffs' requested relief would require the district court (and this Court) to accept Plaintiffs' version of fairness. As the district court emphasized, Plaintiffs' "definition of 'fairness' does not require rotation of Independent Party candidates, write-in candidates from the primary election, or other third-party candidates in their ballot scheme, meaning that those candidates would never be listed first on the ballot." 1-ER-24; *see also* 2-SER-385 (Secretary's counsel emphasizing that "identifying the claimed burden on the right to vote here requires courts to engage in a statistical analysis, and Plaintiffs want it measured only on their terms").

Notably, the district court's conclusion that "[t]his idea of 'fairness' is the precise issue that *Rucho* declined to meddle in" (1-ER-24) aligns with decisions of the Eleventh Circuit in *Jacobson* and a district court in Texas when confronted with similar partisan challenges to ballot order laws. *See Jacobson*, 974 F.3d at 1261 ("Under the reasoning of *Rucho*, complaints of partisan advantage based on ballot order are likewise nonjusticiable political questions."); *Miller*, 471 F. Supp. 3d at 779 (reasoning plaintiffs' request for the court to "determine what is 'fair' with respect to ballot order" is indistinguishable from the "question that the Supreme Court in *Rucho* declined to address").

In short, (1) there is no objective or rational way for the courts to define partisan fairness in the context of ballot-order placement; (2) even if "fairness" could be defined, there is no objective way for courts to determine what deviation from "fair" would be constitutional; and (3) even if courts could do either, there is no reliable way to quantify the primacy effect. Here, for example, Dr. Rodden used no less than *three* statistical methods, and Mr. Trende disagreed with Dr. Rodden's methodology and conclusions. For these reasons, the principles motivating the *Rucho* Court apply just as compellingly here. The district court properly found Plaintiffs' claims and relief sought a nonjusticiable political question. *Rucho* forbids Plaintiffs' claims, which seek to impose a vague and undefined notion of "fairness" and reallocate partisan power based on advanced statistical modeling.

D. Plaintiffs' Cited Cases That Found Ballot Order Disputes Justiciable Are Significantly Different Than This Case

Plaintiffs nonetheless argue that federal courts have been "ably adjudicating ballot order disputes for over 50 years," *see* O.B. at 39-40, but none of their cited authority demonstrates that their claims here are justiciable. An equal protection challenge, which is justiciable, requires proof of a discriminatory intent (rather than just disparate impact). *See Pers. Adm. of Mass. v. Feeney*, 442 U.S. 256, 272 (1979); *Washington v. Davis*, 426 U.S. 229, 239 (1976). This is also true for ballot-placement challenges. *See, e.g.*, *Bd. of Election Comm'rs of Chi. v.*

Libertarian Party of Ill., 591 F.2d 22, 24-25 (7th Cir. 1979) (ballot placement equal-protection claim requires showing of "an intentional or purposeful discrimination"). Indeed, each of Plaintiffs' cited cases involved an allegation of intentional political discrimination,[12] explicit partisan favoritism,[13] or attempts to entrench incumbents,[14] which are "*intended* to suppress opposition by freezing the status quo." *New Alliance Party*, 861 F. Supp. at 298 (emphasis added).

Similarly, *Mann v. Powell*, 314 F. Supp. 677, 679 (N.D. Ill. 1969), *aff'd without opinion*, 398 U.S. 955 (1970), does not alter the analysis. *Mann* stemmed from "purposeful" discrimination enabled by a wholly discretionary ballot-order

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[12] *See Sangmeister v. Woodard*, 565 F.2d 460, 467 (7th Cir. 1977) (declaring county clerk's intentional practice of placing candidates from his party first on the ballot unconstitutional); *Weisberg v. Powell*, 417 F.2d 388, 390, 393-94 (7th Cir. 1969) (finding "intentional and purposeful" discrimination when secretary "improperly arranged the order of filing so as to discriminate in favor of candidates endorsed by party organizations by giving them the best places on the ballot").

[13] *See Graves v. McElderry*, 946 F. Supp. 1569, 1580 (W.D. Okla. 1996) (analyzing Oklahoma statute that expressly placed Democratic candidates first).

[14] *See McLain v. Meier*, 637 F.2d 1159, 1167 (8th Cir. 1980) (addressing ballot order statute that granted incumbents first-listed position on the ballot); *Netsch v. Lewis*, 344 F. Supp. 1280, 1280 (N.D. Ill. 1972) ("[I]nsofar as [a bill] purports to grant priority in listing on the election ballot by reason of incumbency and seniority, [it] violates the Fourteenth Amendment."); *Gould v. Grubb*, 536 P.2d 1337, 1345 (Cal. 1975) ("[A]n election procedure which grants positional preference to incumbents violates the equal protection clause of [the] federal constitution.").

provision. 314 F. Supp. at 678-79. And the Supreme Court summarily affirmed *Mann*, which binds lower courts only "from coming to *opposite* conclusions on the *precise* issues presented and *necessarily* decided." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (emphasis added). *Mann* bears no resemblance to the issue raised by Plaintiffs here—purported vote dilution caused by Arizona's neutral, ballot-order provision that provides no room for discretion. Contrary to Plaintiffs' assertion, O.B. at 41, *Mann* does not compel a holding that this case is justiciable.

Plaintiffs also heavily rely on *Kautenberger v. Jackson*, 85 Ariz. 128 (1958), *see* O.B. at 2, 5, 6, 19-20, 40, a 63-year-old decision that pre-dates the Ballot Order Statute and *Rucho*, was decided on state constitutional grounds, and is factually distinguishable. In *Kautenberger*, a primary candidate challenged a law that required candidates' names to be listed alphabetically on ballots used in voting machines, although candidates' names would be rotated on paper ballots. 85 Ariz. at 130. The Arizona Supreme Court pontificated that when there are several candidates for the same office, "the names appearing at the head of the list have a distinct advantage." *Id*. at 130-31. The supreme court noted that the trial court had "accepted evidence pro and con upon the question [of discrimination]" and held the trial court was "fully justified in its conclusion that the failure to alternate names on the machine ballots would deprive [the candidate] of a fundamental right" under article II, § 13 of the Arizona Constitution. *Id*. at 131.

Unlike *Kautenberger*, Plaintiffs here do not have the benefit of a favorable factual record to support their allegation that a primacy effect exists in Arizona's general elections today to render the Ballot Order Statute unconstitutional. As discussed above, the district court found that the statute does not burden Plaintiffs' voting rights at all. 1-ER-25. To the extent *Kautenberger* is relevant, it serves to "strengthen the conclusion that there are no judicially discernable and manageable standards for adjudicating complaints of partisan advantage based on ballot order." *Jacobson*, 974 F.3d at 1267 (emphasizing that courts in various cases, including *Kautenberger* and others that Plaintiffs cite here, have "settled on different and sometimes contradictory standards" to assess claims of partisan advantage based on ballot order, and this inconsistency supports the legal conclusion that such claims are nonjusticiable).

Arizona's Ballot Order Statute favors no party and affords no discretion to any state official. The statute does no more than prescribe a county-by-county rule to determine who appears first on a ballot in a way that animates the will of Arizona voters in the most recent gubernatorial election. The district court correctly held that *Rucho* prevents the Court from resolving this partisan-fairness ballot-order dispute.

III. The Eleventh Amendment Bars Plaintiffs' Requested Relief

Even if Plaintiffs could overcome both of the district court's jurisdictional holdings, their amended complaint suffers from another jurisdictional defect. For reasons similar to Plaintiffs' inability to show redressability for standing purposes, they cannot overcome the Secretary's Eleventh Amendment immunity. *See Culinary Workers Union, Local 226 v. Del Papa*, 200 F.3d 614, 619 (9th Cir. 1999) (noting that the "case and controversy" standing analysis is similar to the Eleventh Amendment inquiry). Although the district court did not reach this affirmative defense, it is a sufficient alternative basis on which this Court may affirm the court's order granting the Secretary's motion to dismiss. *See Sonner*, 971 F.3d at 839. "Whether a state is immune from suit under the Eleventh Amendment is a question of law and is reviewed *de novo*." *Micomonaco v. Washington*, 45 F.3d 316, 319 (9th Cir. 1995).

State officials are entitled to Eleventh Amendment immunity from federal civil rights suits when sued in their official capacities. *Mitchell v. L.A. Cmty. Coll. Dist.*, 861 F.2d 198, 201 (9th Cir. 1988). In *Ex Parte Young*, the Supreme Court recognized that a suit for prospective injunctive relief provides a narrow but well-established exception to Eleventh Amendment immunity. 209 U.S. 123 (1908). The *Ex parte Young* exception is limited to prohibitory injunctions "prevent[ing] [a state official] from doing that which he has no legal right to do." *Id.* at 159; *Va.*

Off. for Prot. & Advoc. v. Stewart, 563 U.S. 247 (2011) (*Ex Parte Young* exception to sovereign immunity "is limited to [the] precise situation" in which "a federal court commands a state official to do nothing more than refrain from violating federal law"). The state official "must have some connection with the enforcement of the act" to avoid an Eleventh Amendment bar to suit. *Coal. to Def. Affirmative Action v. Brown*, 674 F.3d 1128, 1134 (9th Cir. 2012) (quoting *Ex Parte Young*, 209 U.S. at 157).

Here, Plaintiffs sought a court order "requiring the Secretary of State to use a ballot order system that gives similarly situated major-party candidates an equal opportunity to be listed first on the ballot." 1-ER-48. But the Secretary is entitled to Eleventh Amendment immunity because her only connection to the Ballot Order Statute is an indirect one—her role as Arizona's chief state election officer. Under these circumstances, the Eleventh Amendment bars Plaintiffs' relief. *See Mi Familia Vota v. Abbott*, 977 F.3d 461, 467-69 (5th Cir. 2020).[15]

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[15] Although a district court held in *Miller* that the Texas Secretary of State was not immune from a challenge to Texas's ballot-order law, which is "implemented and enforced by local officials," that court believed it was bound by "Fifth Circuit precedent instruct[ing] otherwise." 471 F. Supp. 3d at 775. But *Miller* pre-dates the Fifth Circuit's decision in *Mi Familia Vota*. In *Mi Familia Vota*, the Fifth Circuit held that a claim challenging a prohibition against use of paper ballots did not fall within the *Ex parte Young* exception as applied to the Texas Secretary of State because county officials were statutorily responsible for printing ballots.

IV. Plaintiffs Also Fail to State a Claim Upon Which Relief Can Be Granted

Finally, even assuming Plaintiffs could overcome all of the jurisdictional hurdles above (standing, political question doctrine, and the Eleventh Amendment), their claims still fail as a matter of law.

Assuming Plaintiffs' claim is justiciable after *Rucho*, and even taking Plaintiffs' allegations as true (despite the record developed in the district court), Arizona's Ballot Order Statute is constitutional. Under the Supreme Court's *Anderson-Burdick* test that applies here, the level of scrutiny depends on the severity of the burden. *Burdick v. Takushi*, 504 U.S. 428, 433-34 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). Courts must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights." *Burdick*, 504 U.S. at 434 (citations omitted). Restrictions that are "generally applicable, evenhanded, politically neutral, and [that] protect the reliability and integrity of the election process" have repeatedly been upheld as constitutional. *Pub. Integrity All., Inc. v. City of Tucson*, 836 F.3d 1019, 1024-25 (9th Cir. 2016) (citation and alterations omitted).

The *Anderson-Burdick* framework requires only a showing that the law serves a legitimate state interest because any burden here is negligible. Again, Plaintiffs allege a burden on their voting rights based on an unsustainable vote-dilution theory. "Voters have no constitutional right to a wholly rational election, based solely on reasoned consideration of the issues and the candidates' positions, and free from other 'irrational' considerations[.]" *Clough v. Guzzi*, 416 F. Supp. 1057, 1067 (D. Mass. 1976). Positional bias does not reduce the value of any individual vote because "the 'biased' votes themselves are cast by fully qualified voters," and therefore, courts should not "treat the votes of any voters, however ill-informed, as if they were somehow inferior thereby 'diluting' the effect of the more thoughtfully cast ballots." *Ulland v. Growe*, 262 N.W.2d 412, 416 (Minn. 1978). The Ballot Order Statute thus imposes "only a minimal burden on First and Fourteenth Amendment rights." *See Alcorn*, 826 F.3d at 717.

The Arizona Legislature enacted the politically-neutral Ballot Order Statute with broad, bipartisan support to establish a manageable ballot layout—a quintessential legitimate state interest. The statute provides clear direction to counties regarding ballot order to ensure that all ballots are "comprehensible and manageable." *New Alliance Party*, 861 F. Supp. at 296. Throughout its 42-year history, the statute has protected the reliability and integrity of the election process by establishing logical, efficient, and manageable rules to determine the order in

which candidates' names appear on a general election ballot—at times resulting in Democratic candidates being listed first, and at other times Republican candidates. *See* 1-ER-86. And the statute avoids voter confusion by having the parties listed in the same order throughout the ballot in each county; it is straightforward, in contrast to random ordering, which forces voters to spend more time to "decipher lengthy, multi-office, multi-candidate ballots to find their preferred candidates." *See Alcorn*, 826 F.3d at 719-20 (noting election officials have good reason for designing ballots that minimize confusion).

The Ballot Order Statute is not subject to any of the legitimate constitutional criticisms discussed in the intentional-discrimination or incumbent-entrenching cases on which Plaintiffs rely. The State's compelling interest in uniform and efficient election administration outweighs any negligible burden associated with the Ballot Order Statute in some close elections. *See id.* at 716–19 (applying *Anderson-Burdick* to ballot order statute and concluding mere ballot order "does not restrict candidate access to the ballot or deny voters the right to vote for the candidate of their choice" and that the law "serves the important state interest of reducing voter confusion and speeding the voting process").

Accordingly, if the Court reaches this issue (only after addressing the factual and legal flaws in Plaintiffs' amended complaint that concern the court's subject matter jurisdiction), it should follow the lead of the Fourth Circuit and find that

"access to a preferred position on the ballot so that one has an equal chance of attracting the windfall vote is not a constitutional concern." *Alcorn*, 826 F.3d at 719 (internal quotes omitted).

CONCLUSION

Plaintiffs have failed to show any error in the district court's well-reasoned order and are therefore not entitled to reversal on any basis. This Court should affirm the district court's order granting the Secretary's motion to dismiss.

RESPECTFULLY SUBMITTED this 27th day of May, 2021.

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STATEMENT OF RELATED CASES

In accordance with Ninth Circuit Rule 28-2.6, undersigned counsel states that Defendant-Appellee is unaware of any related cases currently pending in this Court.

Date: May 27, 2021 *s/ Linley Wilson*

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this Answering Brief complies with the length limits permitted by Ninth Circuit Rule 32-1. The Answering Brief contains 13,305 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P.32(a)(5) and (6).

Date: May 27, 2021 *s/ Linley Wilson*

CERTIFICATE OF SERVICE

I hereby certify that 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 on May 27, 2021.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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