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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Brian Mecinas, *et al.*,

Plaintiffs,

v.

Katie Hobbs, in her official capacity as the Arizona Secretary of State,

Defendant.

No. 19-cv-05547-PHX-DJH

RESPONSE TO ARIZONA SECRETARY OF STATE'S NOTICE OF SUPPLEMENTAL AUTHORITY

On April 29, 2020, the Secretary submitted a Notice of Supplemental Authority alerting the Court to the opinion issued by the Eleventh Circuit Court of Appeals in *Jacobson, et al. v. Lee*, et al., No. 19–14552, on April 29, 2020. (Doc. 67). The Secretary's contention that the appellate decision in *Jacobson*—which notably rests only on questions of standing and does not reach the merits of the lower court's decision—should guide this Court in the instant case is foreclosed by numerous binding precedents in this Circuit.

First, the Eleventh Circuit's holding that the injury flowing from Florida's Ballot Order Statute is not traceable to or redressable by Florida's Secretary of State is based on specific features of Florida law, as well as contrary to binding precedent in *this* Circuit, *multiple* recent opinions by judges in this district where the Secretary has attempted to disclaim responsibility for Arizona's elections laws, and the holdings of multiple other courts nationwide when presented with similar questions. As Plaintiffs noted in their Response to the Secretary's Motion to Dismiss (Doc. 27), in *Arizona Libertarian Party, Inc. v. Bayless*, 351 F.3d 1277, 1280-81 (9th Cir. 2003), the Ninth Circuit affirmed the district court's holding that Secretary's broad responsibility to oversee the administration of elections made her the proper defendant in a challenge to an Arizona election law. *See* Doc. 27 at 11. This argument was recently rejected again by two courts in this district. *See* Order, *Dem. Nat'l Com. v. Reagan*, No. CV-16-01065-DLR, Doc. 267 at 6 (D. Ariz. March 3, 2017); *Ariz. Democratic Party v. Reagan*, No. CV-16-03618-PHX-SPL, 2016 WL 6523427, at *1, *6 (D. Ariz. Nov. 3, 2016); *see also* Doc 27. at 10-11. Multiple other decisions from federal courts in other jurisdictions similarly run contrary to *Jacobson's* analysis. *See, e.g.*, *OCA-Greater Houston v. Texas*, 867 F.3d 604, 613-14 (5th Cir. 2017) (injury stemming from election law redressable by state's Secretary of State); *United States v. Missouri*, 535 F.3d 844, 846 n.1 (8th Cir. 2008) (same); *Harkless v. Brunner*, 545 F.3d 445, 451-52 (6th Cir. 2008) (same); *McLain v. Meier*, 851 F.2d 1045, 1048 (8th Cir. 1988)

(finding voter plaintiff had standing to sue Secretary of State based on injury that was fairly traceable to ballot order law).[1]

Second, the Secretary's reliance on the Eleventh Circuit's conclusion that the plaintiffs in that case had not suffered an injury in fact is yet again foreclosed by binding precedent in this Circuit. Unlike the Eleventh Circuit, the Ninth Circuit has repeatedly recognized the concept of "competitive standing," holding that a political organization suffers a direct organizational injury when its "interest in having a fair competition" is compromised. *Drake v. Obama*, 664 F.3d 774, 782-83 (9th Cir. 2011); *see also id.* at 783 ("[T]he 'potential loss of an election' [is] injury-in-fact sufficient to give a local candidate and Republican party officials standing.") (quoting *Owen v. Mulligan*, 640 F.2d at 1130, 1132-33 (9th Cir. 1981)); *Owen*, 640 F.2d at 1133 (holding that political candidate and party had standing where they sought "to prevent their opponent from gaining an unfair advantage in the election process" which "arguably promote his electoral prospects") (quotation marks and citation omitted). This is precisely the injury Plaintiffs allege here. *See, e.g.*, Doc. 13 ¶¶ 49-63; Doc. 14 at 10-13; Hearing Tr. at 255:6-257:4, 258:9-262:7. Indeed, the Secretary herself has previously acknowledged in this litigation that in the Ninth Circuit "competitive standing has [] been recognized for candidates and political parties." Doc. 34 at 4 (citing *Drake*, 664 F.3d at 782-83).

[1] Even if the Eleventh Circuit's holding on this score were not an outlier (which it demonstrably is), as a pure factual matter the Arizona Secretary of State is more directly responsible for the enforcement of the ordering of Arizona's ballot than Florida's Secretary of State. The Arizona Secretary promulgates regulations to county officials in the Election Procedures Manual, which is issued every two years and carries *the force of law*. A.R.S. § 16-452(B), (C) (making it a class 2 misdemeanor to violate a rule promulgated by the secretary). In the 2019 Manual, the Secretary issued detailed instructions on ballot design and expressly required counties to order candidates' names on ballots according to the Ballot Order Statute. 2019 Elec. Proc. Manual, *available at* https://azsos.gov/sites/default/files/2019_ELECTIONS_PROCEDURES_MANUAL_APPROVED.pdf (last accessed Apr. 30, 2020). By contrast, the Eleventh Circuit noted that the *only* control Florida's Secretary of State has over Florida Supervisors of Elections as related to ballot order is by her power to seek a writ of mandamus to enforce the performance of any duties of a county supervisor of elections. *See Jacobson*, No. 19–14552, slip op. at 26 (citing Fla. Stat. § 97.012(14)).

Finally, Judge William Pryor's dicta in concurrence regarding the effect of *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), in addition to being entirely wrong on the law, is a single circuit judge's opinion and has no binding effect in even the Eleventh Circuit let alone this case. As Plaintiffs detailed in their response to the Secretary's Motion to Dismiss, *Rucho*'s plain terms limit it to the partisan gerrymandering context. (Doc. 27 at 15). Unlike that unique context, where federal courts were agonizing over the proper legal test to apply for decades, federal courts have been easily and ably deciding First and Fourteenth Amendment challenges similar to the ones Plaintiffs bring here for decades—including to ballot order statutes specifically—using the *Anderson-Burdick* balancing test. *See, e.g.*, *Mann v. Powell*, 314 F. Supp. 677, 678-79 (N.D. Ill. 1969), *aff'd* 398 U.S. 955 (1970); *see also* Doc. 27 at 2, 3, 15-17; Doc. 29 at 7 (Secretary acknowledging *Anderson-Burdick* "governs challenges to the voting process," including this one). As a majority of the Eleventh Circuit panel in *Jacobson* determined, *Rucho* has no applicability here.

In sum, the Eleventh Circuit decision cannot and does not upend or undo the governing standards in the Ninth Circuit. Based on binding, applicable Ninth Circuit precedent, Plaintiffs have established standing and the Secretary's motion to dismiss (Doc. 26) should be denied.

Respectfully submitted,

Dated: April 30, 2020

/s Sarah R. Gonski

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CERTIFICATE OF SERVICE

I hereby certify that on Thursday, April 30, 2020, I electronically transmitted the attached document to the Clerk's Office using the ECF System for filing and transmittal of a Notice of Electronic Filing to the ECF registrants.

/s Michelle DePass