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

APPELLANTS' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Corporate Plaintiffs-Appellants the Democratic National Committee, the DSCC, and Priorities USA, respectively, hereby certify that there is no parent corporation nor any publicly held corporation that owns 10% or more of the stock in any of the corporate Plaintiffs-Appellants. A supplemental disclosure statement will be filed upon any change in the information provided herein.

March 18, 2021

/s/ Sarah R. Gonski

Attorney for Plaintiffs-Appellants

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

OTHER AUTHORITIES

INTRODUCTION

This appeal presents two questions. *First*, do political parties have standing to challenge laws that threaten their candidates' electoral prospects? Forty years ago, this Court held in *Owen v. Mulligan*, 640 F.2d 1130, 1133 (9th Cir. 1981), that they do. *Second*, did the Supreme Court silently and suddenly declare that ballot order cases are nonjusticiable when it abandoned its decades-long unsuccessful effort to identify a judicially-manageable standard to evaluate *partisan gerrymandering* cases in *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019)? It did not.

In granting the motion to dismiss, the district court answered both questions incorrectly. Its decision should be reversed and the case remanded so the district court can evaluate the constitutionality of Arizona's ballot order statute, A.R.S. § 16-502(E) (the "Statute"). The Statute mandates that, on general election ballots, all candidates who share the same political party as the gubernatorial candidate who won the most votes in that county in the last election must be listed first. In other words, it sets a fixed ballot order based on political affiliation.

This is no inconsequential elections administration decision. It confers an electoral advantage to one political party and all of its candidates across each county for at least four years at a time. That advantage, moreover, makes it more likely that the first-listed party will maintain political dominance in the county and, given the lopsided distribution of voters across counties, statewide.

This is because of a well-documented phenomenon known as "primacy effect," or "position bias," whereby first-listed candidates obtain a boost to their electoral prospects merely from being listed first. The Arizona Supreme Court recognized the distortive impact this can have on elections over sixty years ago, when it found a ballot order system that mandated a fixed order on machine ballots violated the State Constitution's equal protection guarantee because of the advantage conferred on first-listed candidates. *Kautenberger v. Jackson*, 85 Ariz. 128, 130-31 (1958). Ever since, Arizona has required that in its *primary* elections candidate names are rotated across precincts, neutralizing the primacy effect.

But when Arizonans vote in *general* elections to elect public officers, the Statute mandates a fixed county-wide ballot order that favors certain candidates based on their political affiliation over others similarly situated. This advantage persists for at least four years, until the next gubernatorial election.

As a result, Arizona puts its thumb on the scale in favor of one political party in all partisan races in each county—including in Maricopa County, which is home to 60 percent of the state's voters. For the past 40 years, the result has been the systemic favoritism of Republicans on the vast majority of general election ballots. In 2020, a full *82 percent* of Arizona voters were presented with ballots that listed Republican candidates first in every partisan race. Unless enjoined, the Statute will result in the same arbitrary advantage to Republican candidates in 2022.

Plaintiffs include the Democratic National Committee ("DNC"), DSCC, Priorities USA (collectively, "Organizational Plaintiffs"), and individual Arizona Democratic voters, who sought to adjudicate the constitutionality of the Statute based on its continuing threat to Democratic electoral prospects in Arizona. Their claim was not novel; for decades, courts have routinely held that ballot order schemes that favor one type of candidate over others similarly situated are unconstitutional. This includes a case in which the U.S. Supreme Court affirmed a lower court order requiring elections officials to use "nondiscriminatory means by which each of such candidates shall have an equal opportunity to be placed first on the ballot." *Mann v. Powell*, 314 F. Supp. 677, 679 (N.D. Ill. 1969), *aff'd* 398 U.S. 955 (1970). Plaintiffs sought the same remedy here.

But the district court never reached the merits of Plaintiffs' claims. Instead, it dismissed them outright, finding first that Plaintiffs lacked standing and in the alternative that *Rucho* rendered the case nonjusticiable. Both decisions were in error. The notion that Democratic Party entities lack standing to challenge election laws that systematically favor Republican candidates contradicts well-established precedent. And at no point has the Supreme Court ever issued an opinion that declared previously justiciable claims suddenly nonjusticiable. There is no indication that the Court intended to do so implicitly for the first time with regard to ballot order in *Rucho*. This Court should reverse.

JURISDICTIONAL STATEMENT

Plaintiffs brought this lawsuit in the U.S. District Court for the District of Arizona under the First and Fourteenth Amendments and 42 U.S.C. § 1983. This appeal arises from the district court's order granting the State's motion to dismiss with prejudice. 1-ER-2-27. The district court entered its order on June 25, 2020, and Plaintiffs timely filed a notice of appeal on July 3, 2020.3-ER-302. Plaintiffs sought an injunction pending appeal, which was denied by a motions panel. Doc. 9. The district court possessed jurisdiction under 28 U.S.C. §§ 1331, 1343, and 1357, and this Court has appellate jurisdiction under 28 U.S.C. § 1291.

ADDENDUM OF AUTHORITIES

Under Circuit Rule 28-2.7, the primary statutory and constitutional authorities pertinent to this case are included in the Addendum.

ISSUES PRESENTED

1. Did the district court err by concluding that Plaintiffs, including the national Democratic Party, lack standing to challenge a law that systematically disadvantages statewide Democratic candidates in Arizona?
2. Did the district court err by holding that this case presented a nonjusticiable political question under *Rucho*, despite the fact that courts—including the U.S. Supreme Court itself—have adjudicated ballot order cases for more than 50 years?

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

It is well established that a person selecting an item from a written list is statistically more likely to select the first option. Known as "primacy effect" or "position bias," this phenomenon has been proven to strongly influence human decision-making in virtually all contexts, from consumer surveys to standardized tests.2-ER-70-71. Recent studies have confirmed what political actors long suspected: position bias also influences electoral performance, giving candidates listed first on the ballot a meaningful advantage over their rivals.2-ER-65-66, *see generally* 131. The impact is statistically significant, including for major party candidates running for national office.2-ER-152-153.

Both Arizona courts and Arizona law have long recognized the existence of position bias in Arizona elections. In *Kautenberger v. Jackson*, 85 Ariz. 128 (1958), the Arizona Supreme Court considered a challenge under the state constitution to a law that required rotation of candidates' names on paper ballots in primary elections but maintained a fixed ballot order on machine ballots. The court held that the Arizona Constitution required name rotation due to the "well-known fact" that "where there are a number of candidates for the same office, the names appearing at the head of the list have a distinct advantage." *Id.* at 131. As the court concluded,

"[n]o other reason exists for the statute [requiring rotation on paper ballots] except that otherwise there would result disadvantage to some candidates." *Id.*

Consistent with the decision in *Kautenberger*, Arizona still mandates ballot order rotation in its primary elections. *See* A.R.S. § 16-464(A) (requiring that "the name of each candidate shall appear substantially an equal number of times at the top" of primary ballots across the jurisdiction). It also mandates name rotation in general elections when candidates from the *same party* run for the same office; in that instance, each candidate's name is rotated within their partisan peer group so that each is listed first on a roughly equal number of ballots. A.R.S. § 16-502(H).

But Arizona takes a sharply different tack when it comes to general election ballots in races between candidates of competing political parties. In those elections, the Statute first separates partisan candidates into four tiers:[1]

[1] Courts have recognized that states have a legitimate interest in election administration schemes that make it easier for voters to locate major party candidates, including in ballot order cases evaluating tiered systems that group major parties first on the ballot. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 367 (1997); *see also Bd. of Election Comm'rs of Chi. v. Libertarian Party of Ill.*, 591 F.2d 22, 25 (7th Cir. 1979) (upholding two-tiered ballot ordering system that placed minor party candidates below major party candidates and collecting cases to support proposition that "distinctions between major and minor political parties do not necessarily violate the equal protection clause"). Consistent with these well-established principles, Plaintiffs do not challenge the method by which Arizona groups candidates into tiers, organizes those tiers on the ballot, or orders candidates within Tiers 2-4.

1	Candidates from parties that ran a gubernatorial candidate last election
2	Candidates from parties that did not run a gubernatorial candidate last election
3	Candidates not affiliated with any political party
4	Write-in candidates

Different ordering systems are applied to different tiers. At issue here is the system used to order candidates in the first tier. The Statute provides that, in that tier, candidates' names "shall be arranged with the names of the parties in descending order according to the votes cast for governor for that county in the most recent general election for the office of governor . . . ." A.R.S. § 16-502(E). Thus, rather than diffusing the primacy effect by rotation or randomization (e.g., by a lottery each election), the Statute reserves the first position for candidates based on their political party, skewing the impact of position bias in favor of the candidates of a single party. And by tying ballot order to the performance of the party in the last gubernatorial election, the Statute fixes that order for at least four years at a time.

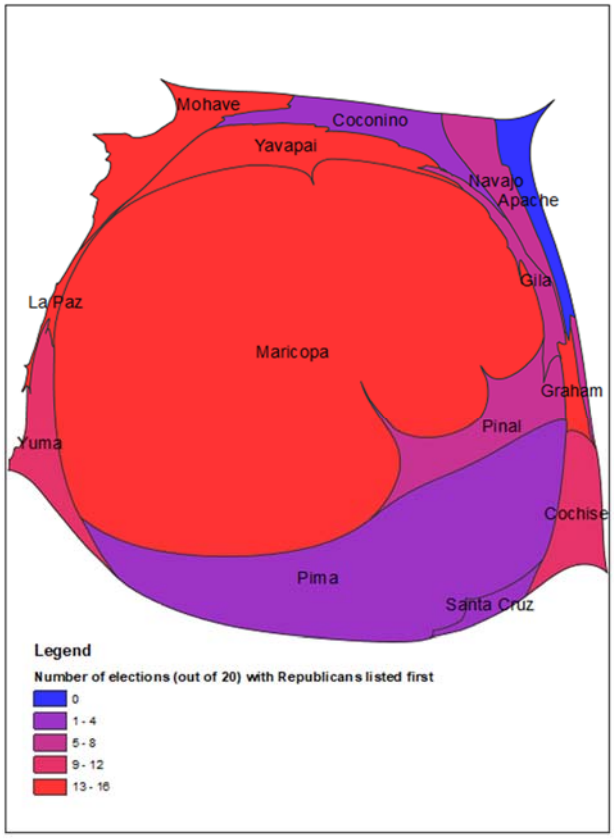
Although theoretically a county-specific application could allow for neutralization of the primacy effect by distributing the benefits of first position equitably among first-tier candidates, because Arizona's population is highly concentrated in only a handful of counties, the gubernatorial results of the most populous county determines ballot order for the vast majority of voters statewide. Maricopa County is home to over 2.6 million of Arizona's 4.3 million registered

voters. The next most populous counties are Pima and Pinal, which are home to a comparatively paltry roughly 630,000 (Pima) and 252,000 (Pinal) registered voters. None of the other counties have over 166,000 registered voters, and the smallest (Greenlee) has just under 5,000.[2]

Because a full 60 percent of Arizona's registered voters are in Maricopa County, the Statute dictates that the gubernatorial results in Maricopa County will result in a meaningful advantage to all candidates of a single party in every statewide race. The beneficiary of this state-mandated advantage has most commonly been the Republican Party: for 33 out of the 41 years since the Statute's enactment, anywhere from 61 to 99 percent of Arizona's voters have voted on general election ballots that have Republican candidates listed first for every single race. The sea of red in the figure below, which represents ballot order trends over the last 20 years (with county lines distorted to reflect the county's relative share of Arizona's voting population),

[2] The population information in this paragraph is taken from the voter registration data publicly available on the Secretary's website. See Arizona Sec'y of State, State Voter Registration, available at https://azsos.gov/sites/default/files/State_Voter_Registration_January_2021.pdf (last accessed Mar. 18, 2021). The Court may take judicial notice of the population distribution of voters because it "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2).

displays a stark visual representation of Republican dominance under the Ballot Order Statute:



2-ER-78. The most recent election was no exception: in 2020, the Statute required that 11 out of Arizona's 15 counties—which collectively contain 82 percent of Arizona's total population—list Republicans first in every partisan race. 2-ER-77-78. The same will be true in 2022.

Arizona's Ballot Order Statute has had a persistent, meaningful effect on Arizona's election outcomes. 2-ER-282-283 . Using data from 1980 to 2018, Plaintiffs' expert Dr. Jonathan Rodden estimated that first-listed candidates receive

up to a 5.6 percentage point bump from being listed first, with an average electoral advantage of 2.2 percentage points. 1-ER-96-97. This is consistent with studies done in other states calculating the impact of ballot order in elections. 1-ER-158-160; 172. In fact, in nearly every jurisdiction that has been studied (with Afghanistan being the sole exception), position bias has been found to have a meaningful statistical impact on election results. 1-ER-168.

II. PROCEDURAL HISTORY

Plaintiffs initiated this action in November 2019, alleging that the Statute violated the First and Fourteenth Amendments because it gives a state-sponsored electoral advantage to certain candidates based on their political affiliation. 1-ER-28. Shortly after filing the complaint, Plaintiffs moved for a preliminary injunction in advance of the November 2020 election. *Id.* The Secretary opposed that motion and filed a separate motion to dismiss.

In March 2020, the district court held an evidentiary hearing and heard oral argument on both the motion for a preliminary injunction and the motion to dismiss. *Id.* In June, the district court granted the motion to dismiss with prejudice, holding that Plaintiffs lack standing and that, in the alternative, this case presents a nonjusticiable political question under the Supreme Court's decision in *Rucho*. 1-ER-2-27. The court did not reach the merits of Plaintiffs' claims. 1-ER-26. Plaintiffs noticed an appeal and moved for an injunction pending appeal, which the district

court likewise denied. Dkt. 81. In light of the impeding election, Plaintiffs moved this Court for an emergency injunction pending appeal. The motions panel denied the motion in a short order that cited *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008), as the grounds for denial. *See* Doc. 9. This opening brief is filed in accordance with the briefing schedule that followed. Docs. 9, 18.

SUMMARY OF THE ARGUMENT

The district court's decision granting the motion to dismiss rested on two independent errors of law.

First, it incorrectly held that Plaintiffs lack standing. Under the proper application of this Court's and Supreme Court precedents, Plaintiffs have standing on at least three independent grounds: (1) competitive standing based on the ongoing harm the Statute does to the Democratic Party's electoral prospects in Arizona elections, (2) associational standing on behalf of Democratic Party candidates who are injured by the Statute's operation, and (3) organizational standing based on the diversion of resources required to help overcome the systematic inequity mandated by the Statute.

Second, the district court incorrectly held that, even if Plaintiffs had standing, the case presents a nonjusticiable political question under the Supreme Court's recent decision in *Rucho v. Common Cause*. This far overreads *Rucho*, which marked the end of a decades-long struggle in which the Supreme Court had tried

"without success" to identify a judicially-manageable standard by which to resolve partisan gerrymandering claims, leading it to ultimately conclude that they were among the exceedingly narrow category of claims that are nonjusticiable by federal courts. 139 S. Ct. at 2507.

This case does not present a partisan gerrymandering claim; it asks whether Arizona's ballot ordering scheme is constitutional. These types of claims have been successfully adjudicated by federal courts for over 50 years, applying familiar, judicially-manageable standards. While the Supreme Court emphasized in *Rucho* that it "had *never* struck down a partisan gerrymander as unconstitutional—despite various requests over the past 45 years," *id*. at 2507 (emphasis added), the same is not true of ballot order claims. The Supreme Court itself summarily affirmed an injunction of a ballot order statute on equal protection grounds, implicitly rejecting arguments made in briefing that the Court should find such challenges nonjusticiable. The district court erred in overlooking this precedent to conclude that this case was nonjusticiable.

STANDARD OF REVIEW

Both of the issues before this Court in this appeal are reviewed *de novo*. *See WildEarth Guardians v. U.S. Dep't of Agric.*, 795 F.3d 1148, 1154 (9th Cir. 2015) ("[A] motion to dismiss for lack of standing [is reviewed] de novo, construing the factual allegations in the complaint in favor of the plaintiffs."); *Arakaki v. Lingle*,

477 F.3d 1048, 1056 (9th Cir. 2007) (reviewing motion to dismiss granted on justiciability grounds *de novo*). Findings of fact are reviewed for clear error, *Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1286 (9th Cir. 2013), but the court nevertheless "retains the power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law." *Smith v. Salt River Project Agr. Imp. & Power Dist.*, 109 F.3d 586, 591 (9th Cir. 1997) (citation omitted).

ARGUMENT

I. Plaintiffs have standing on three independent grounds under well-established Ninth Circuit and Supreme Court precedent.

In a case involving multiple plaintiffs, only one must have standing for the case to proceed. *See, e.g.*, *Leonard v. Clark*, 12 F.3d 885, 888 (9th Cir. 1993). The "manner and degree of evidence required" to establish standing depends on the stage of the litigation; at the pleading stage, when a court is evaluating a motion to dismiss, "general factual allegations of injury resulting from the defendant's conduct may suffice." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). Here, the district court concluded that none of the Plaintiffs had established a cognizable injury-in-fact sufficient to proceed at the earliest stages of the litigation, despite the numerous factual allegations of injury in the complaint and the declarations and expert evidence Plaintiffs submitted in support. This Court should reverse.

As political organizations that expend resources to support candidates and—as to the DNC and DSCC (the "Democratic Party Plaintiffs")—count such candidates among their members and constituents, Plaintiffs established that they have standing based on, at a minimum, three independent grounds. *First*, the Democratic Party Plaintiffs have competitive standing based on this Court's well-developed precedent establishing that political parties suffer a cognizable injury when laws harm or threaten their electoral prospects. The district court misread and incorrectly limited this Court's precedent in deciding otherwise.

Second, the Democratic Party Plaintiffs have associational standing based on the harm to their candidates who are disadvantaged by the state-mandated thumb on the scale in favor of their opponents. Both the Secretary and the district court acknowledged below that candidates themselves would have standing to challenge the Statute. *See* ECF No. 26 at 7; 1-ER-12-13; 2-ER-293:9-21. But the district court erred—both as a legal and a factual matter—by deciding that the Democratic Party Plaintiffs could not rely on that harm under the doctrine of associational standing. The district court's conclusion was based on its opinion that the candidates are not among the Democratic Party Plaintiffs' membership. 1-ER-16-17. This ignored both the Plaintiffs' factual allegations to the contrary and governing Supreme Court precedent as to when an organization may assert associational standing. *See Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 344-45 (1977). The district

court's alternative holding that Plaintiffs had not specifically identified Democratic candidates who would be injured not only misapplies the relevant legal standard at this stage of the proceedings, but also overlooks that Plaintiffs in fact identified the Democratic candidate for Senate in Arizona as a candidate who will be harmed by the Statute.

Finally, all three Organizational Plaintiffs also have standing based on diversion of resources, as supported by allegations sufficient to establish standing at the motion to dismiss stage. This Court should reverse the district court's erroneous conclusion that Plaintiffs failed to establish standing at this stage in the proceedings.

A. The Democratic Party Plaintiffs have competitive standing based on the Statute's threatened harm to their electoral prospects.

Political parties exist to win elections, and laws that threaten their and their candidates' electoral prospects impose a direct injury-in-fact on the political parties themselves that is sufficient for Article III standing. This Court held as much forty years ago, when it found in *Owen v. Mulligan* that political parties have standing to challenge election laws "to prevent their opponent[s] from gaining an unfair advantage in the election process." 640 F.2d at 1133. This Court has since reaffirmed that principle in both *Drake v. Obama*, 664 F.3d 774, 783 (9th Cir. 2011), and *Townley v. Miller*, 722 F.3d 1128, 1135-36 (9th Cir. 2013). At least seven sister Circuits similarly recognize competitive standing on behalf of political parties and their candidates based on harm to their electoral prospects. *See Pavek v. Donald J.*

Trump for President, Inc., 967 F.3d 905, 907 (8th Cir. 2020); *Green Party of Tenn. v. Hargett*, 767 F.3d 533, 543-44 (6th Cir. 2014); *LaRoque v. Holder*, 650 F.3d 777, 786 (D.C. Cir. 2011); *Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 586 (5th Cir. 2006); *Smith v. Boyle*, 144 F.3d 1060, 1061–63 (7th Cir. 1998); *Schulz v. Williams*, 44 F.3d 48, 53 (2d Cir. 1994); *Schiaffo v. Helstoski*, 492 F.2d 413, 417 (3d Cir. 1974). The allegations in the complaint about the harm that the Statute threatens to the electoral prospects of Democrats in Arizona (to say nothing of the expert evidence before the district court at the time it ruled on the motion) was more than sufficient to establish standing at the motion to dismiss stage. The district court's conclusion to the contrary was in error, and should be reversed.

1. The Statute threatens the Democratic Party Plaintiffs' electoral prospects.

The DNC is the national Democratic Party's operative arm, given "general responsibility for the affairs of the Democratic Party" and for "carry[ing] out . . . the objectives of the Democratic Party." *The Charter & The Bylaws of the Democratic Party of the United States*, art. III, § 1(f) (as amended Aug. 25, 2018) ("Democratic Party Charter");[3] *see also* 1-ER-37 ¶ 24; 1-ER-53 ¶ 2. The state parties, such as the

[3] *Available at* https://democrats.org/wp-content/uploads/2018/10/DNC-Charter-Bylaws-8.25.18-with-Amendments.pdf. Plaintiffs did not cite to the Democratic Party Charter or the DNC Bylaws below until their emergency motion for injunction pending appeal because the issue of whether the DNC constituted the Democratic Party was never challenged or raised until the district court issued its order granting

Arizona Democratic Party, are part of the Democratic Party as a result of their recognition by the DNC, and the DNC's membership is composed of, *inter alia*, high ranking officers of each recognized state party organization as well as all voters and candidates who voluntarily affiliate with the Party. 1-ER-37 ¶ 24; Democratic Party Charter art. 3 § 2(a); *id*. art. 8 § 1.[4] The DSCC is the Democratic Party committee dedicated to the election of Democrats to U.S. Senate, including from Arizona. 1-ER-38 ¶ 25; 1-ER-60 ¶ 2. Both the DNC and the DSCC are officially recognized as national committees of the Democratic Party by federal law. *See* 52 U.S.C. § 30101(14).

As the complaint alleged, Arizona's Statute has harmed and continues to threaten significant and serious harm to the electoral prospects of the Democratic Party and its candidates up and down the ballot. 1-ER-77-142; 1-ER-144-290; 1-ER-28-51; *supra* at 7-10. Specifically, Plaintiffs alleged that the Statute has historically

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the Secretary's motion to dismiss in which it reached this conclusion. *See* 1-ER-16 ("[T]he Democratic Party is not a Plaintiff in this case."). This Court may consider the provisions of both documents in evaluating the district court's decision to grant the Secretary's motion to dismiss because both are matters of public record. *See, e.g.*, *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986) ("On a motion to dismiss, we may take judicial notice of matters of public record outside the pleadings.").

[4] *See also* DNC, *Regulations of the Rules and Bylaws Committee for the 2020 Democratic Nat'l Convention* (Dec. 1, 2018), Reg. 1.1 ("DNC Bylaws") ("State Party" or "State Party Committee" means the body recognized by the DNC as the State's Democratic Party organization), https://democrats.org/wp-content/uploads/sites/2/2019/07/Regulations-of-the-RBC-for-the-2020-Convention-12.17.18-FINAL.pdf.

operated and—unless enjoined—will continue to operate to give the Republican Party an electoral advantage (and the Democratic Party a disadvantage) in statewide elections by mandating that Republican candidates be listed first on the ballot in partisan races. 1-ER-39, 40 ¶ 28, ¶ 29; 42-43 ¶ 42. Plaintiffs further detailed the scope of their injury in the expert reports included with their preliminary injunction motion (which the district court considered at oral argument simultaneously with the motion to dismiss), which demonstrated that for 33 out of the 41 years since the Statute's enactment, anywhere from 61 to 99 percent of Arizona's voters have voted on general election ballots that have Republican candidates listed first for every single race, and that first-listed candidates in Arizona receive on average a 2.2 percentage point bump from being listed first. 1-ER-91; 1-ER-96-98; *see Table Bluff Rsrv. (Wiyot Tribe) v. Philip Morris, Inc.*, 256 F.3d 879, 882 (9th Cir. 2001) (holding that, in assessing standing, the court may consider "the complaint and any other particularized allegations of fact, in affidavits or in amendments to the complaint"). This is consistent with a raft of case law that has found an advantage from being listed first on the ballot. *See, e.g.*, *McLain v. Meier*, 637 F.2d 1159, 1166 (8th Cir. 1980) (affirming "finding of ballot advantage in the first position"); *Sangmeister v. Woodard*, 565 F.2d 460, 465 (7th Cir. 1977) ("[T]he trial court's conclusion that 'top placement on the ballot would be an advantage to the plaintiff' is supported by substantial evidence[.]"); *Nelson v. Warner*, 477 F. Supp. 3d 486, 508 (S.D. W. Va.

2020) (crediting evidence showing that "first-listed candidates in West Virginia are overwhelmingly likely to receive an approximately 2.94 percentage point advantage" from being listed first on the ballot); *Graves v. McElderry*, 946 F. Supp. 1569, 1576 (W.D. Okla. 1996) (finding "some measure of position bias exists in Oklahoma's" elections); *Kautenberger*, 85 Ariz. at 130-131 ("It is a commonly known and accepted fact that in an election, either primary or general, where a number of candidates for the same office are before the electorate, those whose names appear at the head of the list have a distinct advantage.") (quoting *Elliott v. Sec'y of State*, 294 N.W. 171, 173 (Mich. 1940)).

Indeed, there was little dispute below regarding the existence of position bias in elections. The Secretary's expert, while quibbling over the amount of position bias present in Arizona elections, conceded that one of Plaintiffs' expert report provided a "largely accurate" review of the literature on position bias since the 1950s. ECF No. 30-1 ¶ 102. That report noted that 84 percent of the tests documented in the literature demonstrate that a candidate performed better electorally when listed first on the ballot than when listed later on the ballot, and that a test of the statistical significance of that result showed more than a 99 percent chance that the electoral advantage from first-position is real and prevalent. *See* 1-ER-171. This is consistent with Arizona law itself, which requires rotation of candidate names in primaries and general elections among co-partisans precisely in order to neutralize the effects of

position bias. *See* A.R.S. § 16-464; A.R.S. § 16-502(H); *see also Kautenberger*, 85 Ariz. at 131 ("No other reason exists for the statute[s] [requiring ballot order rotation] except that otherwise there would result disadvantage to some candidates.").

In sum, both the allegations and evidence before the district court established that the Statute threatens the electoral prospects of the Democratic Party Plaintiffs and their candidates.

2. The district court's conclusion that Plaintiffs lacked competitive standing relied on a misreading of this Court's relevant precedents.

This Court's precedent compelled the finding that the Democratic Party Plaintiffs have competitive standing to challenge the Statute based on its threatened harm to their electoral prospects. *See Townley*, 722 F.3d at 1135-36; *Drake*, 664 F.3d at 783; *Owen* 640 F.2d at 1133. But the district court misread those precedents to limit competitive standing solely to the factual scenario in which a candidate from an opposing party has been mistakenly placed on the ballot. 1-ER-21-22. None of these precedents support that holding.

The district court's conclusion was based, first, on a misreading of *Owen*. In that case, this Court found that a candidate and Republican party officials had competitive standing in a factual scenario far outside the narrow lane that the district court identified as the sole scenario in which competitive standing is cognizable:

there, the plaintiffs' alleged injury was "the potential loss of an election caused by the Postal Service's alleged wrongful act in enabling their opponents to obtain an unfair advantage" through preferential mailing rates. *Owen*, 640 F.2d at 1132-33. This Court rejected the defendant's argument that "this injury is 'too remote, speculative and unredressable to confer standing,'" and held that the plaintiffs "have a continuing interest in preventing" their political opponent "from gaining an unfair advantage in the election process through abuses of mail preferences which arguably promote his electoral prospects," and "thus, have standing." *Id.* (quotation marks and citation omitted).

The district court recognized that "[i]n *Owen*, the Ninth Circuit held that the 'potential loss of an election' was an injury-in-fact sufficient to give a candidate and Republican party officials standing." 1-ER-21. That alone should have resolved the issue of the Democratic Party Plaintiffs' standing here. Nevertheless, it found *Owen* distinguishable based on the district court's erroneous understanding that "the injuries were found to be concrete as the Postal Service's violations were not limited to its own policies, but also related to a previous injunction." 1-ER-21. But *Owen* makes no mention of the previous injunction in holding that the plaintiffs have standing. *See* 640 F.2d at 1132-33. To the contrary, it expressly describes the plaintiffs' injury as the threatened "potential loss of an election" due to the postal service's actions. *Id.* at 1132. That is precisely the injury that the Democratic Party

Plaintiffs alleged (and then demonstrated through expert evidence) that the Statute causes them here, and *Owen* establishes it is sufficient to confer standing.

In *Drake v. Obama*, this Court reaffirmed *Owen*'s holding that "the 'potential loss of an election' [is] an injury-in-fact" sufficient to give candidates and political party officials standing, 664 F.3d at 783 (quoting *Owen*, 640 F.2d at 1132-33), emphasizing that competitive standing exists where "plaintiffs [are] seeking to enjoin an ongoing practice that would . . . produce[] an unfair advantage in the next election." 664 F.3d at 783 n.3. While the court in *Drake* found that the plaintiffs there could assert no competitive injury because the only election for which they sought a remedy was over, *see id.* at 784, the Democratic Party Plaintiffs here have alleged ongoing harm in *future* elections as a result of the Statute. *See* 1-ER-42 ¶ 37. In other words, they seek to enjoin the Statute because it is "an ongoing practice giving [Republican candidates] a competitive advantage in the next election." *Drake*, 664 F.3d at 783 n.3. *Drake* makes plain that this is exactly the type of injury that provides competitive standing.

Despite this clear precedent, the district court concluded that the Democratic Party Plaintiffs did not have competitive standing based on an improper reading of *Townley* to effectively overrule *Owen* and limit competitive standing to the sole factual instance in which "another candidate has been impermissibly placed on the ballot." 1-ER-21. *Townley* did no such thing. As a threshold matter, *Townley* cannot

properly be read to narrow the doctrine announced in *Owen* and reaffirmed in *Drake* because it is the subsequent decision of a three-judge panel. *See Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001) (explaining "the first panel to consider an issue sets the law not only for all the inferior courts in the circuit, but also future panels of the court of appeals" and "[o]nce a panel resolves an issue in a precedential opinion, the matter is deemed resolved, unless overruled by the court itself sitting en banc, or by the Supreme Court"). But, in any event, *Townley* neither limits *Owen*'s holding nor does anything to draw back the expansive understanding of the competitive standing doctrine affirmatively endorsed by the Court in *Drake*.[5]

To see why, it is helpful to understand what was at issue in *Townley*, and exactly what the plaintiffs there challenged. *Townley* involved a unique option that Nevada offered its voters "to register their disapproval of all of the named candidates running for a particular office" "by voting for 'None of these candidates,'" also referred to as the "NOTC" option. *Townley*, 722 F.3d at 1130-31. The Nevada Secretary of State counts and reports the number of voters who select the NOTC option, but (for obvious reasons) those votes are not counted in determining the winner among the named candidates. *Id*. at 1131. The plaintiffs were a group of

[5] Perplexingly, the district court dismissed *Drake* as irrelevant, 1-ER-20-21, never mind that *Townley* itself cited to and relied on *Drake*'s more expansive language in explaining the Court's recognized competitive standing doctrine. *See Townley*, 722 F.3d at 1136.

Republican, Democratic, and Independent voters (the Nevada Republican Party would later only join the case on appeal). *Id*. at 1132. In a key litigation decision that the Court emphasized was "[o]f critical importance," the plaintiffs chose *not* to challenge the inclusion of the NOTC option on the ballot. *Id*. Instead, they challenged "only" the portion of the statute that directed the Secretary to give no legal effect to NOTC votes, arguing that "the state's refusal to give legal effect" to those ballots "disenfranchised" the voters who selected the option. *Id*.

In the course of the appeal, three plaintiffs—including the Nevada Republican Party—purported to rely on the doctrine of competitive standing, arguing that the NOTC option "would potentially siphon votes from the Party's nominees running on its 'Republican' ballot line." *Id*. at 1135. The Court's opinion was clear that the reason it found they lacked standing was *not* because those allegations failed to establish a cognizable injury-in-fact, but because the plaintiffs failed to satisfy "the *other* standing requirements." *Id*. at 1135-36; *see also id*. at 1136 ("[P]laintiffs' failure to meet the causation and traceability requirement is their ultimate undoing."). The Court found that the plaintiffs lacked standing because they failed to "*connect*[]" their competitive injury (inclusion of the NOTC option) "to the conduct the complaint says violated their rights" (failure to give legal effect to NOTC votes). *Id*. at 1136. In so holding, the Court distinguished cases upon which the plaintiffs purported to rely in which a party or candidate asserted a challenge to

a candidate on the ballot, explaining that in those cases "the competitive injury was clearly traceable to the allegedly illegal action the lawsuit challenged." *Id*. Notably, the Court expressly reiterated that "the potential loss of an election can be sufficient *injury-in-fact* to support standing." *Id*. at 1135-36.

Thus, the district court's conclusion that *Townley* "narrowed the scope of competitive standing" is contradicted by *Townley* itself. *See* 1-ER-21. Not only does *Townley*'s discussion of causation and traceability have no bearing on the competitive standing analysis here, *Townley* reaffirmed *Owen*'s holding that "the potential loss of an election can be sufficient *injury-in-fact* to support standing . . . ." *Townley*, 722 F.3d at 1135; *see also id.* at 1136 (citing to *Drake* quoting *Owen* for the principle that "this circuit has held that the potential loss of an election was an injury-in-fact sufficient to give a local candidate and Republican party officials standing") (cleaned up). Far from limiting *Owen* and *Drake*, *Townley* expressly relies on both cases and reaffirms the basis for Democratic Party Plaintiffs' competitive standing here.

3. There is no logical basis for concluding that individual candidates would have standing but the Democratic Party Plaintiffs do not.

Both the district court and the Secretary appeared to agree that Democratic candidates have competitive standing to challenge ballot order statutes. The Secretary noted in her motion to dismiss that "candidates themselves may have

standing to bring the equal protection claim alleged in [Plaintiffs' complaint]," ECF No. 26 at 7, and the district court noted both at oral argument and in its opinion the wealth of case law holding that candidates have competitive standing to bring ballot order disputes. 1-ER-12-13; 2-ER-293:9-21. The conclusion that the district court came to, however—that candidates have competitive standing to challenge ballot order statutes, but the political party committees who support those candidates do not—has no basis in either this Court's precedents or in the structure and purpose of political parties.

As to precedent, both *Townley* and *Owen* involved the standing of political parties and refer to threatened harm to electoral prospects as an injury suffered by candidates and political parties alike. *Townley*, 722 F.3d at 1135 (noting, where plaintiffs included the Nevada Republican Party, that the court "[a]ssum[es] without deciding that the potential loss of an election . . . could fulfill standing's injury-in-fact requirement"); *Owen*, 640 F.3d at 1133 (holding that "Owen and the Republic [sic] Committee members" have standing based on their "continuing interest in preventing . . . their opponent from gaining an unfair advantage in the election process"); *see also* 2-ER-294:15-19.

This is logical. As a practical matter, political parties are nothing more than a community of people who band together to help elect political candidates who affiliate with their party. And political party candidates run on their party affiliation.

Structural mechanisms that hamper the success of a political party's candidates necessarily directly and concretely injure the party's core organizational mission. Courts that have applied the competitive standing doctrine have recognized this reality, finding that the interests of political parties "are identical" to the interests of the candidates they field in elections. *Benkiser*, 459 F.3d at 588; *see also Green Party of Tenn.*, 767 F.3d at 544 (holding minor party had standing to challenge ballot order statute where its candidates were "subject to the ballot-ordering rule"). In *Benkiser*, the Fifth Circuit expressly relied upon and found "persuasive" this Court's holding in *Owen* that "'potential loss of an election' was an injury in fact sufficient to give Republican party official[s] standing," and further explained that:

> [A] political party's interest in a candidate's success is not merely an ideological interest. Political victory accedes power to the winning party, enabling it to better direct the machinery of government toward the party's interests. While power may be less tangible than money, threatened loss of that power is still a concrete and particularized injury sufficient for standing purposes.

459 F.3d at 587 & n.4 (quoting *Owen*, 640 F.3d at 1132-33).[6]

[6] *Drake* illustrates why parties might even have a greater claim to competitive standing than their candidates. In *Drake* the court found that the candidate plaintiffs could assert no competitive injury because they were no longer "candidates" after the election they complained of was over. 664 F.3d at 784. This court noted, however, that competitive standing "continues beyond a given election" where plaintiffs "seek[] to enjoin an ongoing practice that would have produced an unfair advantage in the next election." *Id.* at 783 n.3. While many candidates will only run in one election, many political parties compete in every election, and thus will

Two courts that recently considered this exact issue in the ballot order context agreed. *Pavek*, 967 F.3d at 907 (holding political committees (including the DSCC) had standing to challenge Minnesota's ballot order statute "insofar as it unequally favors supporters of *other* political parties"); *Nelson v. Warner*, 472 F. Supp. 3d 297, 307 (S.D. W. Va. 2020) (holding Democratic Party had standing to challenge West Virginia's ballot order statute because it "will harm the electoral prospects" of Democratic candidates "running in the November election").

While *Pavek* and *Nelson* relied on sound logical and legal footing, the Eleventh Circuit's recent decision in *Jacobson v. Florida Secretary of State*, 974 F.3d 1236 (11th Cir. 2020), did not.[7] As an initial matter, unlike this Court, the Eleventh Circuit has never squarely held that harm to electoral prospects is an injury sufficient for political party or candidate standing. More importantly, both the *Jacobson* court and the district court here based their conclusions that the Democratic Party Plaintiffs failed to establish competitive standing on the incorrect

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continue to be disadvantaged by laws that systematically discriminate based on partisan affiliation.

[7] *Jacobson* is one of only two decisions Plaintiffs' counsel is aware of (outside of the district court here) to incorrectly conclude that political parties do not have standing to challenge ballot order statutes. The other, *Miller v. Hughs*, 471 F. Supp. 3d 768 (W.D. Tex. 2020), failed to address or consider competitive standing at all, *see* Order on Motion to Dismiss, *Miller v. Hughs*, No. 1:19-CV-1071-LY (W.D. Tex. July 10, 2020), ECF No. 76, notwithstanding binding Fifth Circuit precedent holding that a political party has standing based on "harm to its election prospects," *Benkiser*, 459 F.3d at 586.

assertion that the DNC and DSCC are not equivalent to the Democratic Party of the United States and so cannot bring claims for the national Democratic Party. *See* 1-ER-16; *Jacobson*, 974 F.3d at 1251. As set forth above, this assertion is contrary to the Democratic Party's charter, which makes clear that the DNC is the operative arm of the national Party. *See* Democratic Party Charter art. III, § 1 *supra* at 16-17. In other words, the DNC *is* the Democratic party, and the district court and the *Jacobson* court erred in concluding otherwise. *Jacobson* offers nothing to enhance the district court's erroneous conclusion here.[8]

The district court's conclusion that the Democratic Party Plaintiffs lack competitive standing to proceed here was in error. This Court should reverse.

[8] *Jacobson* relied upon additional factual errors to reach its conclusion that the DNC and DSCC lacked competitive standing, including assertions that these entities are only harmed by threats to candidates for national political office, 974 F.3d at 1251-52, and that major-party candidates for national office statewide are immune to ballot order effects, *id.* at 1252. Neither contention was correct based on the factual record before the *Jacobson* court, but notably they were also not determined at the motion to dismiss stage. The *Jacobson* plaintiffs survived a motion to dismiss, tried their case, and won before the district court before being reversed on appeal, at which point the full trial record was before the Court of Appeals. *Id.* at 1243-45. This Court cannot and should not presume that the record here, if Plaintiffs are given the opportunity to try their case, will be identical. *See, e.g.*, 1-ER-53 ¶¶ 4,5 (explaining the DNC provides resources to help elect Democratic candidates up and down the ballot in Arizona); 1-ER-165-166 (explaining that previous research has shown a statistically significant advantage for presidential candidates).

B. The Democratic Party Plaintiffs have associational standing based on harm to their candidate members.

It is well established that even if an organization has not directly suffered a cognizable injury, it may satisfy Article III under the doctrine of associational standing if (1) it has members who would have standing to sue in their own right, (2) the interest the lawsuit seeks to protect are germane to the organization's purpose, and (3) neither the claims asserted nor the relief requested require the participation of individual members. *Hunt*, 432 U.S. at 343. The Democratic Party Plaintiffs satisfy all three elements of associational standing. The district court's conclusion to the contrary was in error and should be reversed.

1. The Democratic Party Plaintiffs have members with standing to challenge the Statute.

The DNC and DSCC both include among their membership candidates who have standing to challenge the Ballot Order Statute, satisfying *Hunt*'s first prong. The Secretary and the district court acknowledged that candidates have standing to bring challenges to ballot order statutes, Dkt. 26 at 7; 1-ER-12-13; 2-ER-293:9-21; 1-ER-37-38 ¶ 24; 1-ER-38 ¶ 25, and the DNC and DSCC alleged that these candidates are among their members and constituents, 1-ER-37-38 ¶¶ 24, 25. This should have ended the inquiry and resulted in a holding that both organizations met the first requirement for associational standing. The district court only reached the opposite conclusion by determining that that the DSCC has no members, that the

DNC's membership for standing purposes is limited to the seven DNC national committee members in Arizona, and that in any event both organizations failed to identify a specific member who would be injured. 1-ER-16-17. These determinations suffer from multiple legal and factual errors requiring reversal.

As an initial matter, the district court's conclusion about the Democratic Party Plaintiffs' memberships contradicts the pleadings and declarations submitted by the DNC and DSCC, in violation of the applicable legal standard. In ruling on a motion to dismiss for lack of standing, "both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Tyler v. Cuomo*, 236 F.3d 1124, 1131 (9th Cir. 2000). The district court turned this standard on its head, finding the DNC and DSCC lacked standing due to factual determinations directly contradictory to the pleadings. *Compare* 1-ER-17 (limiting evaluation of DNC's membership for associational standing purposes to DNC's seven national committee members in Arizona), *with* 1-ER-37 ¶ 24 (alleging that "[t]he DNC has members and constituents across the United States, including in Arizona, where the DNC's members and constituents include Democratic Party candidates, elected officials, and voters"). This was legal error.

Second, the district court's subjective determination regarding the Democratic Party Plaintiffs' membership is constitutionally problematic under the First

Amendment. The Supreme Court has repeatedly made clear that the First Amendment's protections include "the freedom to join together in furtherance of common political beliefs," *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214–15 (1986), and that this right "necessarily presupposes the freedom to identify the people who constitute the association." *Democratic Party of U.S. v. Wis. ex rel. La Follette*, 450 U.S. 107, 122 (1981); *see also California Democratic Party v. Jones*, 530 U.S. 567, 574 (2000) (same). The district court's dismissal of a case brought by the DNC and DSCC due to the district court's own belief regarding who constitutes these political parties' members—in contradiction of the allegations and evidence advanced by the organizations themselves—treads upon the First Amendment-protected freedom of association.

Third, the district court's limited definition of who constitutes a "member" for the purposes of associational standing is contrary to Supreme Court precedent. In *Hunt v. Washington State Apple Advertising Commission*, the Supreme Court found that a Washington state agency statutorily charged with promoting and protecting the State's apple industry had standing to bring suit on behalf of the Washington State apple growers and dealers—despite the fact that such growers and dealers were not per se "members" of the Commission. 432 U.S. at 344-45. The Court cautioned that courts should not "exalt form over substance" in defining who is a member of an organization for the purposes of associational standing, and that where an

organization represents individuals "and provides the means by which they express their collective views and protect their collective interests," it has associational standing to bring claims for those supporters. *Id.* at 345. The DNC and DSCC, like all political parties, exist principally as vehicles for voters and candidates to "express their collective views and protect their collective interests." *Id.*; *see also Benkiser*, 459 F.3d at 587 (finding Texas Democratic Party has "associational standing on behalf of its candidate[s]"); *Democratic Nat'l Comm. v. Reagan*, 329 F. Supp. 3d 824, 841-42 (D. Ariz. 2018), *vacated on other grounds and remanded sub nom. Democratic Nat'l Comm. v. Hobbs*, 948 F.3d 989 (9th Cir. 2020), *cert. granted Ariz. Republican Party v. Democratic Nat'l Comm.*, 141 S. Ct. 221 (2020) (finding DNC and DSCC had associational standing to challenge law that harmed affiliated voters and candidates).

Finally, the district court's conclusion that in any event neither the DNC nor DSCC had established associational standing because they had not identified a specific member who would be injured, 1-ER-17, was both legally wrong—no such requirement exists—and factually baseless—Plaintiffs did identify such a member. Plaintiffs' allegations make plain that a substantial number of Democratic candidates who will run in Arizona's elections will be harmed by the Ballot Order Statute, so identification of a specific member by name is not required to demonstrate associational standing. *See Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032,

1041 (9th Cir. 2015) (holding organization need not identify injured members where injury is clear and their specific identity is not relevant to defendant's ability to understand or respond). The district court did not address or distinguish this binding precedent in ruling to the contrary. But even if there were such a requirement, Plaintiffs satisfied it when they specifically alleged that the "Democratic candidate for U.S. Senate"—a member of both DSCC and DNC for associational standing purposes—would be harmed by the Ballot Order Statute. *See* 1-ER-38 at ¶ 25. Identifying a candidate in generic terms rather than naming a specific individual is evidence of the practical realities of the election calendar, not a fatal defect in pleading: when the lawsuit was initiated in November 2019, the primary election to select the candidates was still nine months away. *See* Arizona Sec'y of State, 2020 Election Information, available at https://azsos.gov/2020-election-information (last accessed Mar. 18, 2021).[9] In short, the district court had no legal or factual basis to determine that the Democratic candidates it recognized would have standing in their own right were not members of the DNC and DSCC.

[9] Contrary to the district court's conclusion, 1-ER-16, the fact that this candidate (or any candidate for that matter) managed to overcome position bias to ultimately win his election does not mean that the Statute did not harm him by placing him at a competitive disadvantage. *See LaRoque*, 650 F.3d at 787 (noting fact that a particular candidate "might be able to overcome this disadvantage" "does not change the fact that" the challenged provision "tends to benefit [one party's] candidates and thus disadvantage their opponents").

2. This lawsuit seeks to vindicate the Democratic Party Plaintiffs' core interests and does not require individual members' participation.

The DNC and DSCC also readily satisfy the other two prongs for associational standing under *Hunt*. First, there is no question that the election of Democratic candidates is germane to the purpose of the DNC and DSCC, satisfying *Hunt*'s second prong. Neither the Secretary nor the district court appeared to dispute this, and for good reason. Simply put, these organizations' *raison d'être* is to elect Democratic candidates, and without the continued electoral success of Democratic candidates neither organization would exist.

Further, Plaintiffs seek declaratory and prospective relief, satisfying *Hunt*'s final prong. This Court has repeatedly made clear that prospective and declaratory relief does not require the participation of individual members for the purposes of associational standing. *Compare Alaska Fish & Wildlife Federation & Outdoor Council, Inc. v. Dunkle*, 829 F.2d 933, 938 (9th Cir. 1987) (granting associational standing because organization sought "declaratory and prospective relief rather than money damages, [and thus] its members need not participate directly in the litigation"), *with United Union of Roofers, Waterproofers, & Allied Trades No. 40 v. Insurance Corp. of America*, 919 F.2d 1398, 1400 (9th Cir. 1990) (holding organization could not rely on associational standing because it sought monetary relief "requiring the participation of individual members").

The Democratic Party Plaintiffs meet all the requirements for associational standing. The district court's conclusion otherwise was in error. This Court should reverse.

C. The Organizational Plaintiffs have standing based on their diversion of resources.

The DNC, DSCC, and Priorities USA are all national organizations that seek to support and help elect progressive candidates across the United States, and the fact that the Ballot Order Statute forces them to devote additional resources away from other states and to Arizona to achieve that goal is an independent basis to find they have standing to bring this challenge. *See Smith v. Pac. Props. & Dev. Corp.*, 358 F.3d 1097, 1105 (9th Cir. 2004) (holding an organization may have injury in fact if it can demonstrate frustration of its organizational mission and diversion of resources to combat the effects of a challenged law).

All three organizations alleged that the unfair advantage conferred by the Statute requires them "to expend and divert additional funds and resources on GOTV, voter persuasion efforts, and other activities in Arizona, at the expense of [their] efforts in other states, to combat the effects of" the Statute. 1-ER-36-38 ¶¶ 23-25. The Democratic Party Plaintiffs also put forth declarations to this effect. 1-ER-56 ¶ 17; 1-ER-62 ¶ 13; 2-ER-295:15-20. This was more than enough to establish standing at the motion to dismiss stage, where all material allegations must be

accepted as true and general factual allegations of injury are sufficient. *See Maya v. Centex Corp.*, 658 F.3d 1060, 1068 (9th Cir. 2011).

The district court's conclusion to the contrary was an error of both fact and law. Factually, the district court incorrectly found that the Organizational Plaintiffs did not "put forth any evidence of resources being diverted from other states to Arizona," and that accordingly their claims must be dismissed. 1-ER-19. The district court overlooked the declarations the Democratic Party Plaintiffs submitted in support of their preliminary injunction motion, which should have been considered in ruling on the motion to dismiss. *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988) ("[W]hen considering a motion to dismiss pursuant to Rule 12(b)(1) the district court . . . may review any evidence, such as affidavits [], to resolve factual disputes concerning the existence of jurisdiction."); s*ee also* 1-ER-52-57 (DNC affidavit); 1-ER-59-63 (DSCC affidavit). Both declarations detailed the resources the Democratic Party Plaintiffs must divert to combat the deleterious effects of the Statute on Democratic electoral prospects in Arizona. *See* 1-ER-62 ¶ 13; 1-ER-55-56 ¶¶ 14, 17.

As a legal matter, the district court was wrong to dismiss the case at this stage of the proceedings given the claims and evidence presented by the Organizational Plaintiffs. Standing requires a different "manner and degree of evidence" as the litigation progresses. *Maya*, 658 F.3d at 1068. When standing is at issue in a motion

to dismiss, "general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presum[e] that general allegations embrace those specific facts that are necessary to support the claim." *Id.* (quoting *Lujan*, 504 U.S. at 561) (quotation marks omitted). The cases that the district court relied on were applying evidentiary standards used in much more advanced stages of litigation than the pleading stage. *See Jacobson*, 974 F.3d at 1250 (holding plaintiffs did not produce sufficient evidence to demonstrate diversion of resources after full trial on the merits); *Ass'n of Cmty. Orgs. for Reform Now v. Fowler*, 178 F.3d 350, 359 (5th Cir. 1999) (affirming plaintiffs did not demonstrate standing based on diversion of resources at summary judgment stage). At the motion to dismiss stage, all three Organizational Plaintiffs provided sufficient factual allegations—taken as true—to show that they had standing to proceed in their challenge against the statute on a diversion of resources theory. The Democratic Party Plaintiffs even buttressed these allegations with declarations laying out further specifics. The district court erred in granting the motion to dismiss.

II. This case presents a justiciable controversy.

The district court also erred in holding that, even if Plaintiffs had standing, the Supreme Court's recent decision in *Rucho* renders ballot order cases like the one here nonjusticiable political questions. Federal courts—including the Supreme Court—have been utilizing broadly applicable and well-established judicial

standards to evaluate ballot order disputes for over half a century. This alone drastically distinguishes ballot order cases from the partisan gerrymandering cases that were the subject of *Rucho*. It also distinguishes ballot order disputes from the novel climate change claims that were at issue in *Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020). In fact, Plaintiffs are unaware of *any* case in which the U.S. Supreme Court has explicitly (much less implicitly) declared a category of cases that were formerly deemed justiciable (and had, in fact, been adjudicated to judgment by multiple federal courts over a span of decades) suddenly nonjusticiable. *Rucho* itself makes clear that nonjusticiability is the exception to the rule, reserved for truly "rare circumstance[s]." 139 S. Ct. at 2508. As the long history of successful adjudication of ballot order cases illustrate, this is not one of those rare circumstances.

A. Federal courts, including the Supreme Court, have been ably adjudicating ballot order disputes for over 50 years.

Courts have been adjudicating ballot order cases without incident for more than half a century. Nothing has changed that would suddenly put them outside the reach of federal courts.

In federal courts, ballot order disputes like this one were first analyzed under traditional equal protection principles. *See, e.g.*, *McLain*, 637 F.2d at 1167; *Sangmeister*, 565 F.2d at 465-67; *Weisberg v. Powell*, 417 F.2d 388, 392 (7th Cir. 1969); *Mann*, 314 F. Supp. at 679; *Netsch v. Lewis*, 344 F. Supp. 1280, 1280 (N.D. Ill. 1972). Since the Supreme Court articulated the now well-worn and familiar

Anderson-Burdick standard, federal courts have consistently analyzed ballot order cases using that test. *See, e.g.*, *Pavek*, 967 F.3d at 907; *Libertarian Party of Va. v. Alcorn*, 826 F.3d 708, 716-17 (4th Cir. 2016); *Green Party of Tenn.*, 767 F.3d at 551; *Nelson*, 472 F. Supp. 3d at 312; *Graves*, 946 F. Supp. at 1578; *New All. Party v. N.Y. State Bd. of Elections*, 861 F. Supp. 282, 294-95 (S.D.N.Y. 1994); *see also Akins v. Sec'y of State*, 904 A.2d 702, 706-07 (N.H. 2006) (noting that *Anderson-Burdick* is the federal standard for ballot order claims and applying it to state constitutional claim as well). But while the standards have changed with the times, the one constant has been that federal courts have ably applied widely utilized and easily manageable judicial standards to evaluate and decide ballot order disputes without any difficulties.[10]

Included among this raft of precedent is *Mann*, a case where the U.S. Supreme Court considered the constitutionality of a ballot ordering scheme and rejected the

[10] State courts have analyzed ballot order challenges using similar standards, albeit often under the rubric of their own state constitutional law, for even longer. *See, e.g.*, *Akins*, 154 N.H. at 74 (holding statute granting first position to party receiving most votes in previous election violated New Hampshire's equal protection clause); *Gould v. Grubb*, 14 Cal. 3d 661, 674 (1975) (concluding provision providing priority ballot listing to incumbents failed strict scrutiny and violated the equal protection clauses of the federal and California Constitutions); *Holtzman v. Power*, 62 Misc. 2d 1020, 1024-25 (N.Y. Sup. Ct. 1970) (holding law reserving first position for incumbents in New York City elections violated state equal protection clause); *Kautenburger*, 85 Ariz. at 131 (discussed above); *Elliott*, 294 N.W. at 173 (requiring rotation of names of candidates for Michigan Supreme Court justice on ballot to ensure the "fairness or purity of [the] election[]" under Michigan law).

argument that such cases are nonjusticiable. In *Mann*, the Court considered an appeal from a preliminary injunction that required that similarly situated candidates have an equal opportunity to be placed first on the ballot. *See* 314 F. Supp. at 679. The question of justiciability was squarely presented by the Illinois Secretary of State, who argued that no "judicially manageable" standard existed to evaluate such a question as it turned on "subjective . . . notions of political fairness." Jurisdictional Statement, *Powell v. Mann*, No. 1359, 1970 WL 155703, at *21, 32 (U.S. Mar. 27, 1970); *see also id.* at *6 (asserting among "questions presented" whether "the 'political question doctrine' . . . permit[s] federal judicial cognizance of political cases, involving inter- or intra-party election disputes") (quoting *Baker v. Carr*, 369 U.S. 186, 211 (1962)). But the Supreme Court summarily affirmed the granting of the preliminary injunction on the merits, leaving no doubt that it found the case justiciable. 398 U.S. 955; *see also* 2-ER-296:14-2 - ER-297:6. Given that the issue of justiciability was squarely presented in the papers, *Mann* compels a holding that this case is justiciable. *See Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (holding that the Supreme Court's summary affirmances "prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions").

The district court's contention that these cases are nonjusticiable because it could not determine what a "fair" ballot ordering system looks like, 1-ER-24-25,

asked the wrong question. The question is not whether the system is "fair," but whether it violates constitutional protections. Courts across the country regularly adjudicate these types of disputes by applying traditional constitutional principles, which establish that statutes or practices that selectively grant preferential treatment among otherwise similarly-situated parties—like the Statute at issue here—violate the Equal Protection Clause. *See McLain*, 637 F.2d at 1166 (invalidating statute that reserved first position on ballot for candidates whose party received most votes in last congressional election); *Sangmeister*, 565 F.2d at 468 (requiring local officials to adopt a new ballot ordering procedure that does not "invariably award[]the first position on the ballot to the County Clerk's party, the incumbent's party . . . or the 'majority' party); *Graves*, 946 F. Supp. at 1569 (using *Anderson-Burdick* to strike down law that mandated Democrats be listed first on ballot); *Mann*, 314 F. Supp. at 679 (invalidating practice that reserved first position for incumbent candidates under certain circumstances). By contrast, those practices or laws that favor major party candidates over independent, write-in, or minor party candidates by placing them in different tiers generally pass constitutional muster. *See Alcorn*, 826 F.3d at 711-712 (dismissing challenge by Libertarian Party to system that put Democratic and Republican candidates in first tier); *New All. Party*, 861 F. Supp. at 298-99 (dismissing challenge by minor party to tiered ballot ordering system and noting "[c]ourts have consistently upheld two-tiered ballot placement schemes as

constitutionally valid under the Equal Protection Clause"). This makes sense, as the Supreme Court has held that states may constitutionally "enact reasonable election regulations that may, in practice, favor the traditional two-party system," *Timmons*, 520 U.S. at 367, but has never stated that they may enact regulations that favor one of those parties over the other. In sum, federal courts know what a constitutional ballot ordering system looks like, and have consistently and ably applied judicially manageable standards to evaluate these types of challenges for at least half a century.

B. The district court misapplied *Rucho*.

The district court rejected *Mann*'s binding precedent and cast aside half a century of ballot order jurisprudence to hold that *Rucho* has since rendered such cases nonjusticiable. *Rucho* relied on *Baker v. Carr*, 369 U.S. 186, 217 (1962), for the standard that thorny issues which lack "judicially discoverable and manageable standards for resolving [them]" are nonjusticiable. *Rucho*, 139 S. Ct. at 2494 (quoting *Baker*, 369 U.S. at 217) (quotation marks omitted). The *Rucho* court determined that partisan gerrymandering cases, where the Supreme Court had been unable to settle on a manageable standard for 45 years, fit within this rubric. *Id.* at 2507-08; *see also id.* at 2491 ("This Court has not previously struck down a districting plan as an unconstitutional partisan gerrymander, and has struggled without success over the past several decades to discern judicially manageable standards for deciding such claims.").

The district court's conclusion that *Rucho* also rendered courts powerless to adjudicate *ballot order* disputes overreads *Rucho*'s narrow holding and disregards the decades of caselaw saying otherwise. The district court did not address why so many courts before it had been able to adjudicate ballot order cases, nor did it explain why it could not utilize the same standards they had successfully put to work. It also did not address how its holding could be squared with *Mann*, where post-*Baker* the Supreme Court was presented with—and rejected—the very same argument that the district court found compelling in this case. Instead, the district court did little more than state that it found *Rucho* "instructive," before using it as a blunt instrument to close the courthouse doors to ballot order litigants. 1-ER-23-25. The district court's conclusion fails on multiple grounds.

First, not only is the district court's opinion directly contrary to *Mann's* binding holding, it relies on a fundamental misreading of *Rucho*. *Rucho* did not announce a new standard for nonjusticiable disputes, or direct lower courts to throw up their hands at classes of cases they had been successfully adjudicating for decades. Rather, it applied a standard first articulated by the Court in *Baker* in 1962—that one class of nonjusticiable political questions is those that lack "judicially discoverable and manageable standards for resolving [them]," *Baker*, 369 U.S. at 217—to partisan gerrymandering disputes. *See Rucho*, 139 S. Ct. at 2494 (citing *Baker*, 369 U.S. at 217). Since the Supreme Court first articulated that

standard in *Baker*, it has neither discovered nor consistently utilized a manageable standard to judge partisan gerrymandering disputes—and not for lack of trying. *See id.* at 2498 (noting that the Court's "considerable efforts" since 1973 had left "unresolved whether . . . claims [of legal right] may be brought in cases involving allegations of partisan gerrymandering") (quoting *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018)). In *Rucho*, it finally gave up, deciding after decades of tinkering that partisan gerrymandering is beyond the competence of federal courts. *Rucho*, 139 S. Ct. at 2507-08.

Second, *Rucho*'s reluctance to adjudicate issues of partisan "fairness" is unique to partisan gerrymandering claims—and wholly inapplicable to ballot order claims. While it has long been accepted that "[p]olitics and political considerations are inseparable from districting and apportionment," *Rucho*, 139 S. Ct. at 2497 (quoting *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973)), outside of the redistricting context states are generally forbidden from discriminating based on political views. *See, e.g.*, *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 203 (2008) (noting that, if voter identification law had been justified by partisanship alone, court would have found it unconstitutional); *Carrington v. Rash*, 380 U.S. 89, 94 (1965) ("'Fencing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible."). In other words, some level of partisanship is acceptable in drawing district lines, *see Rucho*, 139 S. Ct. at

2501 ("At what point does permissible partisanship become unconstitutional?"), but not when designing a ballot. *Cf. Timmons*, 520 U.S. at 363 ("Ballots serve primarily to elect candidates, not as forums for political expression."). Indeed, while in *Rucho* the Supreme Court held that "[a]ny judicial decision on what is 'fair' in th[e] [partisan gerrymandering] context would be an 'unmoored determination' of the sort characteristic of a political question beyond the competence of the federal courts," 139 S. Ct. at 2500 (quoting *Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012)), in *Mann* the Court *rejected* the argument that ballot order disputes are nonjusticiable political questions because they turn on "subjective . . . notions of political fairness." 398 U.S. 955; 1970 WL 155703, at *21; *supra* at 40-41. The district court's decision equating "fairness" in ballot ordering with the "precise ['fairness'] issue that *Rucho* declined to meddle in," 1-ER-24, thus fails to acknowledge this critical distinction between the two types of claims.

Third, although the district court pointed to this Court's decision in *Juliana* as a reason to expand *Rucho* beyond the partisan gerrymandering context, *Juliana* cannot support that expansive reading. *Juliana* merely stands for the principle that climate change disputes—like partisan gerrymandering disagreements—are nonjusticiable under the *Baker* standard. As in *Rucho*, the Court in *Juliana* applied the *Baker* standard to another realm of unsettled law where no legal standard had existed previously, holding there that evaluating sufficient compliance with a novel

injunction requiring the maintenance of a "climate system capable of sustaining human life," does not lend itself to judicially discoverable or manageable standards. *Juliana*, 947 F.3d at 1173. Crucially, the *Juliana* court was not using *Rucho* to erase decades of precedent, as the district court did here; instead, *Juliana* considered a newly-minted legal claim and determined, in the first instance, that it could not envision a set of judicially manageable standards that federal courts could use to evaluate that claim. By contrast, federal courts have already discovered standards for considering ballot order disputes, and have used them successfully for decades. *Id.*; *see also* 2-ER-298:22 - 2-ER-299:1.

Fourth, the district court misread Justice Scalia's concurrence in *Crawford v. Marion County Election Board* to conclude that this case cannot be adjudicated under the *Anderson-Burdick* test. In *Crawford*, Justice Scalia observed that *Anderson-Burdick* requires courts to "identify a burden before [they] can weigh it." 553 U.S. at 205 (Scalia, J., concurring). The district court places a lot of weight on this rather unremarkable statement, quoting the passage three times to conclude that "[b]ecause Plaintiffs have not established a 'burden' on their rights to vote, the court cannot 'weigh it.'" 1-ER-25 (quoting *Crawford*, 553 U.S. at 205). But Justice Scalia did not suggest that a plaintiff's failure to establish a burden renders a dispute nonjusticiable. To the contrary, Justice Scalia proceeded to apply the *Anderson-Burdick* standard by finding the voter-identification law at issue there "eminently

reasonable and "simply not severe" and concluding that "the State's interests are sufficient to sustain that minimal burden." *Crawford*, 553 U.S. at 209 (Scalia, J., concurring) (cleaned up). In other words, a court's attempt to identify the applicable burden is *itself* an adjudication of a claim under *Anderson-Burdick*. While a court may determine that a plaintiff's claim fails to establish a constitutional violation under the *Anderson-Burdick* test, that is a far cry from determining that the court is powerless to even hear the claim in the first place.[11]

Multiple courts have rejected arguments that *Rucho* renders ballot order disputes nonjusticiable precisely because *Anderson-Burdick* provides a feasible framework for evaluating such claims. For example, last July a court in the Southern District of West Virginia observed that "[t]he *Anderson/Burdick* test and decades of precedent addressing ballot order provide the Court with an adequate framework to adjudicate the plaintiffs' [ballot order] claims." *Nelson*, 472 F. Supp. 3d at 313. That same month the Eighth Circuit agreed, noting that "[w]e have adjudicated the merits

[11] The district court also appears to misread Justice Scalia's statement in his concurrence to conflate justiciability with both standing, 1-ER-25 ("As discussed above, these alleged injuries are not actual and concrete. Therefore, as there is no burden, the court is unable to weigh it."), and the merits, 1-ER-25 (finding that because the Statute "does not prevent candidates from appearing on the ballot or prevent anyone from voting," "Plaintiffs have not established a 'burden' on their rights to vote, [and] the court cannot 'weigh it'"). To the extent the district court's justiciability analysis is based on the same findings as its standing analysis or reflects a premature adjudication of the merits of Plaintiffs' claim, it is wholly unfounded.

of [ballot order] claims before and have comfortably employed judicially manageable standards in doing so," and that "we apply the so-called *Anderson/Burdick* standard when evaluating the statute's constitutionality." *Pavek*, 967 F.3d at 907. These courts properly looked to decades of precedent providing a roadmap for how to consider ballot order disputes in concluding that *Rucho* altered nothing in the ballot order context.[12]

Finally, *Rucho* itself explained that it is a "rare circumstance" where no judicially discoverable and manageable standard exists. *Rucho*, 139 S. Ct. at 2508. History bears this out; the Supreme Court has only found a handful of issues nonjusticiable in its over two hundred years of existence. *See generally* John Harrison, *The Political Question Doctrines*, 67 Am. U. L. Rev. 457 (2017). If the Court wanted to announce a sea change in political question jurisprudence and invite lower courts to stop using established standards they have successfully utilized for decades, it would have said so. *See, e.g.*, *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000) (The Supreme Court "does not normally overturn, or so

[12] Beyond ballot order disputes, multiple sister Circuits have similarly rejected the argument that *Rucho* renders other election law disputes nonjusticiable. *See, e.g.*, *Baten v. McMaster*, 967 F.3d 345, 351-52 (4th Cir. 2020) (rejecting argument that challenge to winner-take-all systems for appointing presidential electors was nonjusticiable post-*Rucho*); *Tex. Democratic Party v. Abbott*, 961 F.3d 389, 398 (5th Cir. 2020) (rejecting argument that challenge to Texas's absentee voting law presents a nonjusticiable political question as "federal courts routinely entertain suits to vindicate voting rights" and "[t]he standard for resolving such claims are familiar and manageable").

dramatically limit, earlier authority *sub silentio*."). But in *Rucho* it said nothing of the sort.

C. Recent decisions reaching the same conclusion as the district court further caution against this overreading of *Rucho*.

Since the district court's holding two other courts have relied on similar flawed reasoning to find ballot ordering disputes nonjusticiable, but their justifications hold up no better than the district court's opinion—and only further demonstrate why the district court's opinion must not be allowed to stand. First, in *Miller v. Hughs*, a court in the Western District of Texas largely echoes the analysis of the district court here, similarly holding that *Rucho* renders ballot order statutes nonjusticiable and pointing to *Juliana* as evidence that *Rucho* should reach outside of the partisan gerrymandering context. *Compare* 1-ER-23 (citing *Juliana* in rejecting the argument that *Rucho* is limited to partisan gerrymandering because "the Ninth Circuit recently extended the reasoning of *Rucho* to find that claims related to climate change are nonjusticiable"), *and* 1-ER-24 ("This idea of 'fairness' is the precise issue that *Rucho* declined to meddle in."), *with Miller*, 471 F. Supp. 3d at 778 (citing *Juliana* in rejecting the argument that *Rucho* is limited to partisan gerrymandering because "the Ninth Circuit recently extended the reasoning of *Rucho* to find that claims related to climate change are nonjusticiable"), *and id.* at 779 ("This request to determine what is 'fair' is the precise question that the Supreme Court in *Rucho* declined to address."). *Miller*'s holding is no more correct than the

district court's and suffers from the same fatal flaws. It adds nothing to justify the district court's flawed analysis.

Second, in *Jacobson*, a divided panel of the Eleventh Circuit doubled down on the district court's overreading of *Rucho*. Rather than taking *Rucho* at its word by narrowly construing the scope of issues that should be considered nonjusticiable political questions, the *Jacobson* court, like the district court here, broadly read *Rucho* to place ballot order disputes off limits to federal courts. *See* 967 F.3d at 1261 ("Under the reasoning of *Rucho*, complaints of partisan advantage based on ballot order are likewise nonjusticiable political questions."). But the *Jacobson* court went even further in expanding *Rucho*'s reach by using it to limit the scope of *Anderson-Burdick* as well. *See id.* at 1261-62. The *Jacobson* court determined that the *Anderson-Burdick* test should be confined to four narrow categories of laws, suggesting that all other electoral disputes are "political questions" beyond judicial competence. *Id.* at 1261. Not only is this contrary to the plain language of *Anderson*, *see Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983) ("Each provision of [an election code] . . . inevitably affects—at least to some degree—the individual's right to vote and his right to associate with others for political ends."), it disregards the numerous cases that have applied *Anderson-Burdick* to evaluate challenges to election laws outside the narrow contours the *Jacobson* court identified. *See, e.g.*, *Buckley v. Am. Const. Law Found., Inc.*, 525 U.S. 182, 200 (1999) (applying

Anderson-Burdick and holding unconstitutional statutes requiring initiative-petition circulators to wear badges and disclose names and wages); *Marcellus v. Va. State Bd. of Elections*, 849 F.3d 169, 175 (4th Cir. 2017) (applying *Anderson-Burdick* in challenge to law prohibiting candidates from having party identifier on ballot); *Libertarian Party v. D.C. Bd. of Elections & Ethics*, 682 F.3d 72, 74 (D.C. Cir. 2012) (applying *Anderson-Burdick* in challenge to regulation regarding public announcement of vote tally of write-in candidates). This includes ballot order cases. *See, e.g.*, *Pavek*, 967 F.3d at 907. Both *Jacobson* and the district court's ruling suffer from the same fundamental flaw—overreading *Rucho* to obliterate all that came before it.

If anything, *Miller* and *Jacobson* demonstrate why this Court should not allow the district court's holding to stand. *Rucho* is a limited holding, consistent with the Supreme Court's history of only rarely declaring certain narrow issues to be outside judicial competence. Letting it stand for something greater would be to substantially overreach. Where over half a century of consistent federal precedent provides a sufficient guidebook for courts, *Rucho* should be read in a manner that is faithful to the opinion's text and consistent with all that came before it. That reading requires reversal here.

CONCLUSION

Plaintiffs request that the Court reverse the district court's opinion dismissing the case and remand for consideration on the merits.

RESPECTFULLY SUBMITTED this 18th day of March, 2021.

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STATEMENT OF RELATED CASES

In accordance with Ninth Circuit Rule 28-2.6, Plaintiffs-Appellants hereby inform the Court that they are not aware of any related cases pending in this Court.

Dated: March 18, 2021

s/ *Sarah R. Gonski*

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the attached document 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 March 18, 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.

s/ Michelle DePass

CERTIFICATE OF COMPLIANCE

The undersigned, counsel for Plaintiffs-Appellants, certifies that this brief complies with the length limits permitted by Ninth Circuit Rule 32-1(a). The brief contains 12,764 words, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

s/ *Sarah R. Gonski*