No. 20-2410

In the United States Court of Appeals for the Eighth Circuit

MADELINE PAVEK, ET AL.,
Plaintiffs-Appellees,

v.

DONALD TRUMP FOR PRESIDENT, ET AL.,
Intervenor-Defendants-Appellants.

On Appeal from the United States District Court
for the District of Minnesota

BRIEF FOR AMICI CURIAE THE STATES OF TEXAS, GEORGIA, AND WEST VIRGINIA

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

RYAN L. BANGERT
Deputy First Assistant
Attorney General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

KYLE D. HAWKINS
Solicitor General

TODD LAWRENCE DISHER
Deputy Chief, Special Litigation Unit
Todd.Disher@oag.texas.gov

WILLIAM T. THOMPSON
Special Counsel
Will.Thompson@oag.texas.gov

Counsel for the States of Texas, Georgia, and West Virginia

Table of Contents

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Constitutions

Other Authorities

Interest of Amici Curiae

By enjoining enforcement of Minnesota's ballot order statute, the district court dove head-first into political waters that at least three other federal courts have refused to test. This Court should grant Appellants' emergency motion for a stay.

This Court's decision will have an impact far beyond the State of Minnesota. At least eighteen States have ballot order laws like the one challenged here. Many States key ballot order to which party won the previous election for Governor[1] or Secretary of State.[2] Some look to which party received the most votes for certain federal offices.[3] One State asks which party currently holds a majority in the state legislature.[4] Another permanently fixes the order—Democrats first, then Republicans.[5]

True, Minnesota's law is unique because the party with the *lowest* number of votes in the preceding election is listed first.[6] But Minnesota's law resembles the laws in these other States in an important sense: All of them order candidates on a general election ballot by reference to party affiliation.

---

[1] Ariz. Rev. Stat. § 16-502(E); Conn. Gen. Stat. § 9-249a(a)(1); Ga. Code § 21-2-285(c); Md. Code Elec. Law §§ 1-101(dd), 9-210(j)(2); Mo. Rev. Stat. § 115.239(1); Neb. Rev. Stat. § 32-815(1); N.Y. Elec. Law § 7-116(1); 25 Pa. Cons. Stat. § 2963(b); Tex. Elec. Code § 52.091(b).

[2] Ind. Code § 3-11-2-6(a)(1); Mich. Comp. Laws § 168.703.

[3] Wash. Rev. Code § 29A.36.161(4); W. Va. Code § 3-6-2(c)(3); Wis. Stat. § 5.64(1)(b); Wyo. Stat. § 22-6-121(a).

[4] Tenn. Code §§ 2-1-104(11)-(12), 2-5-208(d)(1).

[5] Del. Code tit. 15, § 4502(a)(5).

[6] Minn. Stat. § 204D.13.

For that reason, the district court's ruling casts doubt on the constitutionality of laws in at least eighteen States. Many of these laws—including those of the amici States—have been challenged in federal court, primarily by two of the plaintiffs here and their counsel. Most of those lawsuits have already been dismissed for lack of jurisdiction. *See Jacobson v. Fla. Sec'y of State*, 957 F.3d 1193, 1212 (11th Cir. 2020); *Miller v. Hughs*, No. 1:19-cv-1071, 2020 WL 4187911, at *7 (W.D. Tex. July 10, 2020); *Mecinas v. Hobbs*, No. 19-cv-5547, 2020 WL 3472552, at *14 (D. Ariz. June 25, 2020). But some remain pending. *See S.P.S. ex rel. Short v. Raffensperger*, No. 1:19-cv-4960 (N.D. Ga.); *Nelson v. Warner*, No. 3:19-cv-898 (S.D. W. Va.).

In our federal framework, States retain "broad power to prescribe the 'Times, Places and Manner of holding Elections for [federal offices],' which power is matched by state control over the election process for state offices." *Clingman v. Beaver*, 544 U.S. 581, 586 (2005) (quotation omitted). The States of Texas, Georgia, and West Virginia submit this brief to protect their sovereign "power to regulate their own elections." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (citing U.S. Const. art. I, § 4); *see* Fed. R. App. P. 29(a)(2).

Introduction

The DSCC, the DCCC, and their counsel have challenged ballot order statutes across the country. Three federal courts have found they lack standing, and three federal judges have concluded they present non-justiciable political questions. Except for the decision below, no court has granted them relief.

The district court's outlier opinion enjoining enforcement of Minnesota's ballot order statute should be reversed. In light of the impending election, the Court should first grant Appellants' emergency motion for a stay.

Argument

I. The Plaintiffs Do Not Have Standing.

The plaintiffs did not establish standing to support a preliminary injunction. Three federal courts have now dismissed similar claims from individual voters, the DSCC, and the DCCC because they lack standing to challenge ballot order statutes. *See Jacobson*, 857 F.3d at 1201–07; *Miller*, 2020 WL 4187911, at *4–5; *Mecinas*, 2020 WL 3472552, at *4–12. This Court should follow that precedent.

The district court found standing on two theories: "diversion of resources, and harm to electoral prospects." Order at 23 (Ex. A, Appellants' Mot.). Neither is correct.

1. A plaintiff "cannot manufacture standing by choosing to make expenditures based on" an alleged harm that is not itself an injury in fact. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 402 (2013). "[A] self-inflicted budgetary choice . . . cannot qualify as an injury in fact." *Elec. Privacy Info. Ctr. v. Presidential Advisory Comm'n on Election Integrity*, 878 F.3d 371, 379 (D.C. Cir. 2017).

"[W]hile changing one's campaign plans or strategies in response to an allegedly injurious law can itself be a sufficient injury to confer standing, the change in plans must still be in response to a reasonably certain injury imposed by the challenged law." *Zimmerman v. City of Austin*, 881 F.3d 378, 390 (5th Cir. 2018). A diversion of resources does not suffice unless the plaintiff "would have suffered some other injury if it had not diverted resources to counteracting the problem." *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010).

Here, the plaintiffs' supposed diversion of resources—additional money spent supporting Democratic candidates in Minnesota—does not satisfy that standard. The only injury the plaintiffs claim they would have suffered, if they had not diverted their resources, is the harm to Democratic electoral prospects, which is addressed below. The diversion theory adds nothing to the analysis.

2. The district court concluded that "the statute impedes the election prospects of the Democratic candidates that" the plaintiffs support. Order at 31. But that does not injure either the individual plaintiffs or the organizations. *See Jacobson*, 857 F.3d at 1201–07; *Miller*, 2020 WL 4187911, at *4–5; *Mecinas*, 2020 WL 3472552, at *4–12.

Federal courts are "not responsible for vindicating generalized partisan preferences," and they do not hear "case[s] about group political interests." *Gill v. Whitford*, 138 S. Ct. 1916, 1933 (2018).

As the Eleventh Circuit explained when analyzing Florida's ballot order statute, an individual voter "is not injured by the simple fact that a candidate for whom she votes loses or stands to lose an election." *Jacobson*, 957 F.3d at 1202. When a

"preferred candidate . . . has less chance of being elected," the "harm" is not "a restriction on voters' rights and by itself is not a legally cognizable injury sufficient for standing." *Becker v. FEC*, 230 F.3d 381, 390 (1st Cir. 2000); *see also Gottlieb v. FEC*, 143 F.3d 618, 622 (D.C. Cir. 1998). Even the loss of a preferred candidate is not "a legal harm." *Berg v. Obama*, 586 F.3d 234, 240 (3d Cir. 2009). Thus, "a voter fails to present an injury-in-fact when the alleged harm is abstract and widely shared or is only derivative of a harm experienced by a candidate." *Crist v. Comm'n on Presidential Debates*, 262 F.3d 193, 195 (2d Cir. 2001). That precludes the individual plaintiffs' claims.

This logic applies with equal force to the DSCC and DCCC. "An organization's general interest in its preferred candidates winning as many elections as possible is still a 'generalized partisan preference[]' that federal courts are 'not responsible for vindicating,' no less than when individual voters assert an interest in their preferred candidates winning elections." *Jacobson*, 957 F.3d at 1206 (quoting *Gill*, 138 S. Ct. at 1933).

The DSCC and DCCC do not have broader standing than Democratic voters. "Individual persons cannot obtain judicial review of otherwise non-justiciable claims simply by incorporating, drafting a mission statement, and then suing on behalf of the newly formed and extremely interested organization." *Nat'l Treasury Emps. Union v. United States*, 101 F.3d 1423, 1429 (D.C. Cir. 1996).

The district court adopted a theory of "competitive standing," Order at 29, but the cases it cited do not support the plaintiffs here. In *Drake v. Obama*, for example, the Ninth Circuit held that candidate plaintiffs *lacked* competitive standing and did

not apply the doctrine to other plaintiffs. 664 F.3d 774, 782–84 (9th Cir. 2011). *Smith v. Boyle* provides, at most, a drive-by jurisdictional ruling that *Gill* has since overruled. 144 F.3d 1060, 1063 (7th Cir. 1998); *see Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998) (holding "drive-by jurisdictional rulings . . . have no precedential effect"). Cases conferring standing on candidates (or even political parties) do not help mere campaign committees like the DSCC and DCCC, especially when they have not identified an affected candidate. *See Jacobson*, 957 F.3d at 1206. And neither the district court nor the cases it cited confronted *Gill*'s holding that "group political interests" do not support Article III standing. 138 S. Ct. at 1933.[7]

II. This Case Raises a Nonjusticiable Political Question.

Federal judges in three separate cases have already concluded that the DSCC and DCCC's challenges to ballot order statutes present nonjusticiable political questions. *See Jacobson*, 857 F.3d at 1212–23 (W. Pryor, J., concurring); *Miller*, 2020 WL 4187911, at *6–7; *Mecinas*, 2020 WL 3472552, at *12–14. This Court should do the same.

"[T]he judicial department has no business entertaining [a] claim of unlawfulness" when "the question is entrusted to one of the political branches or involves no judicially enforceable rights." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2494 (2019)

[7] The plaintiffs do not have associational standing. They have not proven they have members, *see Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 344 (1977) (listing "indicia of membership"), much less "identif[ied] members who have suffered the requisite harm," *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009).

(quotation omitted). Such claims present nonjusticiable "political questions" because they are "outside the courts' competence and therefore beyond the courts' jurisdiction." *Id.*

Rucho held that partisan gerrymandering presented a political question for three reasons. First, "the Framers' decision to entrust districting to political entities" precluded "hold[ing] that legislators cannot take partisan interests into account." *Id.* at 2497. Thus, the relevant question is whether political gerrymandering "has gone too far," not whether it is permissible at all. *Id.* (quotation omitted). Second, courts cannot "even begin to answer" whether gerrymandering "has gone too far" unless they know the "fair" baseline from which to measure departures. *Id.* at 2500–01. Third, in the gerrymandering context, "fairness" could be defined in different ways, and "[t]here are no legal standards discernible in the Constitution for making such judgments, let alone limited and precise standards that are clear, manageable, and politically neutral." *Id.* at 2500.

The same is true for challenges to ballot order statutes. First, the Framers entrusted political entities with control over ballots, so the question is whether partisan interests or partisan effects have gone "too far." *See Jacobson*, 957 F.3d at 1219–20 (W. Pryor, J., concurring).

Second, courts cannot determine whether a statute goes too far without defining a "fair" baseline. *Mecinas*, 2020 WL 3472552, at *14 ("The crux of Plaintiffs' case is for the Court to determine what is 'fair' with respect to ballot rotation."); *Miller*, 2020 WL 4187911, at *6 ("Plaintiffs' ask this court to determine what is 'fair' with respect to ballot order.").

Third, "it is not even clear what fairness looks like in this context." *Rucho*, 139 S. Ct. at 2500. There are many "ways to conceive of a 'fair' ballot order," including:

- "award[ing] the primacy effect entirely to . . . the party that received the fewest votes in the last election";
- "distributing the primacy vote . . . evenly between the major parties";
- "distributing the primacy vote . . . on some apolitical basis, like random lottery or alphabetically by candidate last name";
- "ensur[ing] that each political party on the ballot—including minor parties—has an equal number of its candidates listed first for office";
- "distribut[ing] the primacy effect proportionately based on the number of registered voters in each party"; and
- "giving all parties the chance to win the primacy effect at each gubernatorial election."

Jacobson, 957 F.3d at 1217 (W. Pryor, J., concurring).

"Determining what is 'fair' for purposes of ballot order rotation has a number of complications." *Mecinas*, 2020 WL 3472552, at *13. "[P]icking among these alternatives 'poses basic questions that are political, not legal.'" *Jacobson*, 957 F.3d at 1217 (W. Pryor, J., concurring) (quoting *Rucho*, 139 S. Ct. at 2500). But "[i]t is not the job of the court to determine best practices." *Miller*, 2020 WL 4187911, at *6.

That some courts, including this one, previously considered the merits of complaints about ballot order is immaterial because those cases both pre-dated *Rucho* and did not consider the political question doctrine. *Jacobson*, 957 F.3d at 1221 (W. Pryor, J., concurring) (citing *McLain v. Meier*, 637 F.2d 1159, 1167 (8th Cir. 1980)). "When a potential jurisdictional defect is neither noted nor discussed in a federal decision,

the decision does not stand for the proposition that no defect existed." *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 144 (2011).[8]

III. Ballot Order Statutes Do Not Burden the Right to Vote under *Anderson-Burdick*.

On the merits, the plaintiffs' *Anderson-Burdick* claim cannot succeed because they have not shown a burden on the right to vote. As multiple courts have recognized, the DSCC and DCCC's challenges to ballot order statutes do not implicate *Anderson-Burdick* because their claims are "not based on the right to vote *at all*." *Jacobson*, 957 F.3d at 1216 (W. Pryor, J., concurring).

The *Anderson-Burdick* test applies only when a court "evaluate[s] a law respecting the right to vote—whether it governs voter qualifications, candidate selection, or the voting process." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 204 (2008) (Scalia, J., concurring in the judgment). But ballot order statutes do "not prevent

---

[8] The district court also exceeded its jurisdiction by ordering the Secretary of State "to adopt a procedure" implementing a random ballot order. Order at 74. Sovereign immunity bars constitutional claims "if the relief requested cannot be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign," *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 691 n.11 (1949), including "cases where the [defendant] sued could satisfy the court decree only by acting in an official capacity." *Zapata v. Smith*, 437 F.2d 1024, 1026 (5th Cir. 1971); *see also United Tribe of Shawnee Indians v. United States*, 253 F.3d 543, 548 (10th Cir. 2001). This principle applies to ballot order: "[I]t is doubtful that a federal court would have authority to order" "the Secretary to promulgate a rule requiring [local election officials] to [perform their duties] contrary to the ballot statute." *Jacobson*, 957 F.3d at 1211–12. This argument is not forfeited. Sovereign immunity "sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court." *Edelman v. Jordan*, 415 U.S. 651, 678 (1974).

candidates from appearing on the ballot or prevent anyone from voting." *Mecinas*, 2020 WL 3472552, at *14; *accord Miller*, 2020 WL 4187911, at *7. They govern only the formatting of ballots. Regardless of that formatting, each voter remains equally able to vote for and associate with any candidate.

This Court should resist "[t]he temptation to overindulge in the *Anderson-Burdick* test." *Daunt v. Benson*, 956 F.3d 396, 423 (6th Cir. 2020) (Readler, J., concurring in the judgment).

Conclusion

The Court should grant the emergency motion for a stay pending appeal.

Respectfully submitted.

Christopher M. Carr
Attorney General of Georgia

Ken Paxton
Attorney General of Texas

Patrick Morrisey
Attorney General of West Virginia

Jeffrey C. Mateer
First Assistant Attorney General

Ryan L. Bangert
Deputy First Assistant
Attorney General

Kyle D. Hawkins
Solicitor General

Todd Lawrence Disher
Deputy Chief, Special Litigation Unit
Todd.Disher@oag.texas.gov

/s/ William T. Thompson
William T. Thompson
Special Counsel
Will.Thompson@oag.texas.gov

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

Counsel for the States of Texas, Georgia, and West Virginia

Certificate of Service

On July 22, 2020, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made; (2) the electronic submission is an exact copy of the paper document; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

/s/ William T. Thompson
William T. Thompson

Certificate of Compliance

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) and 29(a)(5) because it contains 2,503 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

/s/ William T. Thompson
William T. Thompson