UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

MADELINE PAVEK, ETHAN SYKES, DSCC, and DCCC, *Plaintiffs*, v. STEVEN SIMON, in his official capacity as the Minnesota Secretary of State, *Defendant*.	Case No. 0:19-cv-03000-SRN-DTS

AMICUS BRIEF OF HONEST ELECTIONS PROJECT IN SUPPORT OF DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

INTEREST OF AMICUS CURIAE[1]

The Honest Elections Project is a nonpartisan organization devoted to supporting the right of every lawful voter to participate in free and honest elections. Through public engagement, advocacy, and public-interest litigation, the Project defends the fair, reasonable measures that voters put in place to protect the integrity of the voting process. The Project supports commonsense voting rules and opposes efforts to reshape elections for partisan gain. It thus has a significant interest in this important case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Defendant, Minnesota's Secretary of State, is right about the merits of this case: Minnesota's ballot-order statute, which lists candidates in reverse order based on how well their party performed in the last election, does not violate the Equal Protection Clause. Under circuit precedent, Minnesota's statute must survive only rational-basis review. A notoriously low bar, Minnesota's statute easily clears it. By listing candidates from the incumbent party last, Minnesota prevents incumbents from getting yet another artificial advantage in its elections, while also maintaining an organized ballot for voters. Laws that temper the advantages of incumbency, like Minnesota's, are not motivated by irrational prejudice. They are sensical ways to make elections more competitive and to ensure that elected officials are more responsive to their constituencies.

[1] No party's counsel authored this brief in whole or in part, and no one besides amicus and its counsel contributed money to fund the brief's preparation or submission.

Although the Secretary gets the merits right, he misses the most glaring problem with Plaintiffs' case: Plaintiffs have not established Article III standing with enough specificity to obtain a preliminary injunction (much less a *permanent* injunction). Standing is a jurisdictional question that this Court must examine on its own, even though Plaintiffs don't raise it. *See Michel v. Anderson*, 14 F.3d 623, 625 (D.C. Cir. 1994) ("Ordinarily, we would not entertain an *amicus*' argument if not presented by a party, but as [standing] questions go to our jurisdiction, we are obliged to consider them on our own and therefore welcome *amici*'s presentation."). The vague, conclusory declarations that Plaintiffs submitted to support their standing are a far cry from the specific facts they must provide at this stage of the litigation.

Plaintiffs' declarations flatly assert that Minnesota's statute, by giving non-Democratic candidates the artificial boost of being listed first on the ballot, forces Plaintiffs to spend more resources to elect Democrats in Minnesota. Yet Plaintiffs make zero effort to quantify those resources, describe those resources, or disentangle those resources from what they already plan to spend in Minnesota. Plaintiffs also do not explain (because they did not know when they sued) how many races in 2020 will both be close and list a Republican first on the ballot—the only races where it possibly makes sense for Plaintiffs to spend resources to counteract Minnesota's statute. Without these missing facts, "[i]t is pure conjecture to assume that [Minnesota's statute] caused [Plaintiffs] to drain their resources." *Colo. Taxpayers Union, Inc. v. Romer*, 963 F.2d 1394, 1397 (10th Cir. 1992).

Nor does Minnesota's statute "dilute" anyone's vote. Voters who want to support a Democratic candidate can simply vote for that candidate, wherever she appears on the ballot. If others want to vote for the first-listed candidate, that is their prerogative; their voluntary *exercise* of the right to vote does not *dilute* anyone's vote. The right to be free from "vote dilution," as that term is used in the caselaw, is the right to have an equally weighted vote. It is not the right to elect a particular candidate.

Because Plaintiffs have not established Article III standing, this Court should dismiss their case. *See* Fed. R. Civ. P. 12(h)(3). At the very least, this Court should deny Plaintiffs' motion for a preliminary and permanent injunction.

ARGUMENT

A preliminary injunction is "never awarded as of right," but only on "a clear showing" that the plaintiff is entitled to this "extraordinary remedy." *Winter v. NRDC*, 555 U.S. 7, 24, 22 (2008). The "'most significant'" showing that the plaintiff must make is "'a likelihood of success on the merits.'" *Barrett v. Claycomb*, 705 F.3d 315, 320 (8th Cir. 2013). "'[S]howing a likelihood of success on the merits ... necessarily includes a likelihood of the court's *reaching* the merits, which in turn depends on a likelihood that plaintiff has standing.'" *Waskul v. Washtenaw Cty. Cmty. Mental Health*, 900 F.3d 250, 256 n.4 (6th Cir. 2018); *accord Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 913 (D.C. Cir. 2015) ("A party who fails to show a 'substantial likelihood' of standing is not entitled to a preliminary injunction.").

Plaintiffs are unlikely to succeed on the merits for two main reasons. They have not established Article III standing, and Minnesota's ballot-order statute does not violate the Equal Protection Clause.

I. Plaintiffs lack Article III standing.

Although the Secretary does not challenge Plaintiffs' standing, this Court has an "independent obligation" to make sure it exists. *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009). "If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." Fed. R. Civ. P. 12(h)(3). This Court must ensure that Plaintiffs have established the three elements of standing—injury, causation, and redressability—with "the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992).

Because Plaintiffs seek a preliminary injunction, they must prove standing under "the heightened standard for evaluating a motion for summary judgment." *Food & Water Watch*, 808 F.3d at 912. That standard requires them to submit "specific facts establishing distinct and palpable injuries fairly traceable to [Minnesota's statute]." *Nat'l Fed'n of Blind of Mo. v. Cross*, 184 F.3d 973, 979-80 (8th Cir. 1999). Plaintiffs cannot carry this burden by "replac[ing] conclusory allegations of the complaint …. with conclusory allegations of an affidavit." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888 (1990).

Yet conclusory affidavits are all that Plaintiffs provide. Notably, unlike prior challenges to ballot-order laws in this Court and the Supreme Court, no Plaintiff is a *candidate* for public office. *See McLain v. Meier*, 637 F.2d 1159, 1160 (8th Cir. 1980)

(plaintiff was "independent candidate for the United States Congress"); *Mann v. Powell* (*Mann I*), 314 F. Supp. 677, 678 (N.D. Ill. 1969) (plaintiffs included incumbent candidate for "the Illinois House of Representatives"), *aff'd*, 398 U.S. 955 (1970). Plaintiffs are political organizations and individual voters who worry that Minnesota's statute might disadvantage some Democratic candidates in some future races. Their abstract injuries—and the vague, conclusory declarations that Plaintiffs use to support them—come nowhere close to satisfying Article III.

A. The organizational plaintiffs lack standing.

Plaintiffs mainly rely on two organizations, the DCCC and DSCC, for Article III standing. Organizations can assert standing on their own behalf or on behalf of their members. *ASPCA v. Feld Entm't, Inc.*, 659 F.3d 13, 24 (D.C. Cir. 2011). The latter kind of standing (known as associational standing) is not implicated here. The DCCC and DSCC are political committees, not membership associations; they do not claim to have members, let alone "make specific allegations establishing that at least one identified member" was injured by Minnesota's statute. *Summers*, 555 U.S. at 498. Plaintiffs' declarations instead claim injuries to the organizations *themselves*. Specifically, the DCCC and DSCC claim that Minnesota's statute will make them "commit even more resources

to support" Democratic candidates for the U.S. House and Senate "in order to combat the ballot order effect." Guinn Decl. ¶21; Schaumburg Decl. ¶12.[2]

While an organization can base its standing on "a concrete and demonstrable injury to [its] activities which drains its resources," *Nat'l Fed'n of Blind*, 184 F.3d at 979, this theory of standing is hard to prove. Courts know that "[a]n organization's expenses … are self-effectuating" and that "claiming them as injury-in-fact would allow any advocacy group to manufacture standing." *Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 288 (3d Cir. 2014). To prove standing under a diversion-of-resources theory, then, an organization must "quantify the resources … expended to counteract" the defendant's conduct "in particular." *Ark. ACORN Fair Hous., Inc. v. Greystone Dev. Co.*, 160 F.3d 433, 434-35 (8th Cir. 1998). Resources that are consistent with the organization's mission, that the organization would have spent anyway, or that were spent based on the organization's speculative fears do not count. *Fair Employment Council of Greater Wash.,*

[2] The declarations immediately backtrack, however, and confess that Plaintiffs may never divert additional resources to Minnesota. *See* Schaumburg Decl. ¶12 ("*If* the DSCC diverts those additional resources"; "No matter what *choice* the DSCC makes" (emphases added)); Guinn Decl. ¶21 (same). Plaintiffs insist that, even if they never divert resources to Minnesota, they still have standing because their missions are "compromised and severely injured" by Minnesota's statute. Schaumburg Decl. ¶12; Guinn Decl. ¶21. Not so. An organization must ground its standing in "more than simply a setback to its abstract social interests." *Nat'l Fed'n of Blind*, 184 F.3d at 979. "Frustration of an organization's objectives" without injury to its "'activities'" is "'the type of abstract concern that does not impart standing.'" *NTEU v. United States*, 101 F.3d 1423, 1429 (D.C. Cir. 1996).

Inc. v. BMC Mktg. Corp., 28 F.3d 1268, 1276-77 (D.C. Cir. 1994); *Shelby Advocates for Valid Elections v. Hargett*, 947 F.3d 977, 982 (6th Cir. 2020).

The organizational plaintiffs "present[] no facts to quantify the resources" they will divert to counteract Minnesota's ballot-order statute. *Ark. ACORN*, 160 F.3d at 434. Their declarations state, in the most conclusory terms possible, that Minnesota's statute might require them to spend "more resources." Schaumburg Decl. ¶12; Guinn Decl. ¶21. They do not say what resources will be diverted, how much will be spent, where the resources will come from, when they will be spent, or who will receive them. This silence is telling because, if this information exists, these sophisticated organizations surely have it and could give it to the Court. But they will not even tell the Court what they spent to counteract Minnesota's statute *in 2018*, when Democrats were placed in the same ballot position that they will face in 2020. *See* Schaumburg Decl. ¶¶4, 8; Guinn Decl. ¶¶5, 11-13. Plaintiffs instead flatly insist that they will spend "more resources"—conclusory allegations that might survive a motion to dismiss but that are woefully inadequate at this stage. *See, e.g.*, *Fair Hous. Council of Suburban Phil. v. Montgomery Newspapers*, 141 F.3d 71, 76-78 & n.2 (3d Cir. 1998) ("naked assertions" that organization was "forced to divert funds" and "launch further efforts" were insufficient at summary judgment); *Fair Elections Ohio v. Husted*, 770 F.3d 456, 460 (6th Cir. 2014) (allegations that "the law compelled [the organization] to divert limited resources" were insufficient at summary judgment).

There is a reason why the organizational plaintiffs do not quantify how Minnesota's statute will affect their resources: doing so would be "a futile act of speculation." *Colo. Taxpayers*, 963 F.2d at 1397; *accord EPIC v. PACEI*, 878 F.3d 371, 379 (D.C. Cir. 2017). Consider the math. Most of the money that the DCCC and DSCC have budgeted to support Democratic candidates in Minnesota will be spent irrespective of the ballot-order statute. *See* Schaumburg Decl. ¶¶4, 11; Guinn Decl. ¶¶4-5, 17-18, 20. That baseline money doesn't count for purposes of standing. *Fair Hous. Council*, 141 F.3d at 78.

Plaintiffs also get no credit for resources that are not "fairly traceable" to Minnesota's ballot-order statute. *Ark. ACORN*, 160 F.3d at 435; *see EPIC*, 878 F.3d at 379 n.7 (organization must provide specific facts establishing a "direct causal link between the [challenged conduct] and [its] own expenditures"). For example, Plaintiffs will not spend money to counteract Minnesota's statute in races where a third-party candidate is listed first, since the statute's "primacy effect" benefits a candidate who has no chance of winning anyway. Rodden Report 22. In races where a Republican is listed first, Plaintiffs will spend money to counteract the statute only if the race is reasonably close. Plaintiffs are "national" organizations that are careful about where they focus their limited resources. Schaumburg Decl. ¶¶2, 10; Guinn Decl. ¶¶2, 19. The DCCC

and DSCC would not waste money counteracting a small primacy effect[3] in races where their candidate is ahead or behind by a comfortable margin. If they did, such irrational expenditures would be "unnecessary alarmism constituting a self-inflicted injury." *NTEU*, 101 F.3d at 1430; *accord Shelby Advocates*, 947 F.3d at 982 ("an organization [cannot] spend its way into standing based on speculative fears of future harm" (citing *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013)).

Because Minnesota's statute affects Plaintiffs only in close races that feature no major third parties, Plaintiffs' theory of standing is fatally "conjectural, hypothetical and speculative." *La. ACORN Fair Hous. v. LeBlanc*, 211 F.3d 298, 306 (5th Cir. 2000). Plaintiffs filed their complaint in November 2019—well before they even knew which candidates and parties were running in which races. Their declarations do not fill in these crucial gaps. "[N]either document sets forth specific facts demonstrating [Plaintiffs] suffered an injury in fact that was actual or imminent at the time [they] filed suit." *Equal Rights Ctr. v. Post Properties, Inc.*, 633 F.3d 1136, 1141-42 (D.C. Cir. 2011); *accord Fair Hous. Council*, 141 F.3d at 77-78. While the DCCC identifies two House races

[3] Plaintiffs estimate that the primacy effect for Minnesota Republicans is "2.6 percentage points." Rodden Report 19. Not exactly a large number to begin with, that figure is overstated because it includes election data for "all offices" in Minnesota. *Id.* Yet the DSCC and DCCC fund campaigns for the U.S. House and Senate—races that have diminished primacy effects because they are more visible, more likely to attract major third parties, and more likely to feature well-known incumbents. *Id.* at 2-3, Krosnick Report 28-29; *see Ulland v. Growe*, 262 N.W.2d 412, 415 (Minn. 1978) ("The magnitude of positional bias [in Minnesota] tends to vary in inverse proportion to the visibility of a particular election.").

that might be close in 2020, the DCCC *already* plans to spend substantial resources to support the Democrats in those races. Guinn Decl. ¶¶16-18. Plaintiffs do not disentangle the money they will spend on those races via their "normal, day-to-day operations" from the money they will spend to counteract Minnesota's statute. *ACORN v. Fowler*, 178 F.3d 350, 359 (5th Cir. 1999). They *cannot* disentangle those expenditures, since Plaintiffs admit that the "primacy effect" shrinks when races are close. Krosnick Report 33.

Even if Plaintiffs had identified the resources they will shift to Minnesota to counteract the ballot-order statute, such expenditures would not constitute an Article III injury. The mission of the DCCC and DSCC is "to elect candidates of the Democratic Party." Schaumburg Decl. ¶2; Guinn Decl. ¶2. So the "alleged diversionary actions" they complain about—spending time and money to elect Democrats in Minnesota—"do not divert resources from [their] mission. That is [their] mission." *Shelby Advocates*, 947 F.3d at 982. While money spent in Minnesota might mean money not spent in other States, organizations' "budgetary choices" to prioritize one aspect of their mission over another do not create organizational standing. *Fair Employment Council*, 28 F.3d at 1276-77; *accord NAACP v. City of Kyle*, 626 F.3d 233, 238-39 (5th Cir. 2010) (no standing where organization had "not identified any specific projects that [it] had to put on hold or otherwise curtail" and "only conjectured that the resources [it] had devoted … could have been spent on other unspecified [organizational] activities"); *Nat'l Ass'n of Home Builders v. EPA*, 667 F.3d 6, 12 (D.C. Cir. 2011) (no standing where

plaintiff had "not shown [its expenditures] were for 'operational costs beyond those normally expended' to carry out its advocacy mission"). The law does not recognize organizational standing based on "the diversion of resources from one program to another, but rather on the alleged injury that the defendants' actions themselves had inflicted upon the organization's programs." *Fair Employment Council*, 28 F.3d at 1277.

B. The individual plaintiffs lack standing.

Beyond the DCCC and DSCC, Plaintiffs claim standing based on two individual voters: Ethan Sykes and Madeline Pavek. Having "recently" learned about Minnesota's ballot-order statute, Sykes and Pavek are now "concerned" they "will have to work harder and expend more resources" in order to "overcome the built-in advantage [for] Republicans." Sykes Decl. ¶¶3, 8; Pavek Decl. ¶¶5, 7. Sykes and Pavek also contend that Minnesota's statute "dilutes" their votes by "making it relatively harder … to elect [Democratic] candidates" for federal, state, and local office. Sykes Decl. ¶7; Pavek Decl. ¶7.

Plaintiffs' "resources" theory fares no better for the individual plaintiffs than it does for the organizational plaintiffs—far worse, actually. Like the organizational plaintiffs, the individual plaintiffs do not quantify the resources they will spend counteracting Minnesota's statute, or draw a nonspeculative connection between those resources and the resources they would spend anyway. It is even less possible for these two individuals—Minnesotans with limited time and money to spend on politics—to disentangle their activism for Democrats generally from their activism caused by

Minnesota's statute. Nor does it make sense to say that Minnesota's statute "directly conflict[s]" with these individual plaintiffs' "mission" (what mission?). *NTEU*, 101 F.3d at 1430. Their alleged injury is instead "one that is shared by a large class of citizens" (*i.e.*, every person who advocates for Democratic candidates in Minnesota) and "is thus insufficient to establish injury in fact." *Id.*[4]

The individual plaintiffs have not suffered any "vote dilution" either. Vote dilution "refers to the idea that each vote must carry equal weight"—that "each representative must be accountable to (approximately) the same number of constituents." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2501 (2019). The individual plaintiffs do not argue that their votes will weigh less than anyone else's; they do not allege "placement in a 'cracked' or 'packed' district," or say anything about their districts at all. *Gill v. Whitford*, 138 S. Ct. 1916, 1931 (2018). Nor do the individual plaintiffs claim an inability to vote for the candidate of their choice. They can and will vote for Democratic candidates, even if those candidates are listed last among the major parties on the ballot. Sykes Decl. ¶¶2-3; Pavek Decl. ¶¶3-5. The fact that "some citizens may choose to vote irrationally [for the first-listed candidate], as is their right, does not mean that the votes of better-informed voters are arithmetically 'diluted.'" *Ulland*, 262 N.W.2d at 416.

[4] In passing, the individual plaintiffs also mention injuries to their "peers." Sykes Decl. ¶8; Pavek Decl. ¶7. But Plaintiffs cannot claim standing based on the rights of third parties who are not before the Court. *Fair Elections Ohio*, 770 F.3d at 461.

Instead of true vote dilution, the individual plaintiffs allege an abstract diminution in the odds that their preferred candidates will get elected. Sykes Decl. ¶7; Pavek Decl. ¶7. They claim that some portion of the electorate will always vote for the first-listed candidate, and they find it "upsetting" and "frustrating" that Democrats might receive less than an equal share of those voters in 2020. Sykes Decl. ¶7; Pavek Decl. ¶6.

Needless to say, this is not "an individual and personal injury of the kind required for Article III standing." *Gill*, 138 S. Ct. at 1931. "[T]he right to vote does not entail the right to have a [particular] candidate elected." *Smith v. Winter*, 717 F.2d 191, 198 (5th Cir. 1983) (citing *City of Mobile v. Bolden*, 446 U.S. 55, 65 (1980)). Courts cannot vindicate "generalized partisan preferences" or "group political interests," only "individual legal rights." *Gill*, 138 S. Ct. at 1933. While a voter might passionately want to see "his political party achieve representation in some way commensurate to its share of statewide support," that "nonjusticiable general interest" cannot be vindicated in federal court. *Rucho*, 139 S. Ct. at 2501; *Gill*, 138 S. Ct. at 1931. The argument that an individual's "right to vote will be … diluted because [the statutory ballot order] will benefit candidates whom he opposes … is an insufficient personal interest" to support standing. *Mann v. Powell* (*Mann II*), 333 F. Supp. 1261, 1265 (N.D. Ill. 1969).

II. Minnesota's ballot-order statute does not violate equal protection.

Even if Plaintiffs' had standing and this Court had jurisdiction, Plaintiffs' constitutional claim would fail on the merits. The "Framers of the Constitution

intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections." *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973). States employ many different methods for ordering ballots, serving their intended "'role'" in our federalist system "'as laboratories for experimentation.'" *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2673 (2015). "This Court should not diminish that role absent impelling reason to do so." *Oregon v. Ice*, 555 U.S. 160, 171 (2009). No impelling reason exists to invalidate Minnesota's perfectly rational statute.

Plaintiffs' equal-protection challenge fails if Minnesota's ballot-order statute survives rational-basis review. While Plaintiffs ask this Court to subject the statute to "heightened scrutiny" under the *Anderson-Burdick* balancing test, they admit that the Eighth Circuit's decision in *McLain* "controls" this case. PI Memo. 22, 19. The *McClain* Court applied "the rational basis test" to North Dakota's ballot-order statute. 637 F.2d at 1167. It used that test because "the effect" of ballot order on the right to vote "is somewhat attenuated"; "the placement of candidates on a ballot," after all, "does not involve absolute exclusion." *Id.* Any argument that Minnesota's ballot-order statute imposes "substantial" burdens on voting rights directly contradicts *McClain*.

Because *McClain* predates *Anderson* and *Burdick*, perhaps Plaintiffs believe that *McClain* has been supplanted by those decisions. *But see Taylor v. Grubbs*, 930 F.3d 611, 619 (4th Cir. 2019) ("'We do not lightly presume that the law of the circuit has been overturned,' especially 'where, as here, the Supreme Court opinion and our precedent can be read harmoniously.'").

But if this Court is going to evaluate Plaintiffs' equal-protection challenge on a clean slate, then it should not apply the *Anderson-Burdick* test at all. As the Sixth Circuit recently explained, the Supreme Court has never applied *Anderson-Burdick* "to Equal Protection claims." *Mays v. LaRose*, ___ F.3d ___, 2020 WL 1023039, at *3 n.4 (6th Cir. 2020). And "[o]ther courts that have considered Equal Protection claims in the voting context don't apply *Anderson-Burdick*" either. *Id.* The Equal Protection Clause asks *why* a State treats groups of individuals differently, not *how much* a group's rights are burdened in a vacuum. *Id.* "The traditional Equal Protection tiers of scrutiny"—heightened scrutiny for suspect classifications, rational-basis scrutiny for everything else—"are thus better suited for analyzing disparate treatment claims … in the voting context." *Id.* Because Minnesota's statute draws no suspect classifications, this Court should review it under rational-basis scrutiny. *See Pagan v. Calderon*, 448 F.3d 16, 36 (1st Cir. 2006) ("The universe of suspect or quasi-suspect classifications does not encompass … political affiliation."); *Rucho*, 139 S. Ct. at 2502-03 (same).

Rational-basis scrutiny is "a paradigm of judicial restraint." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314 (1993). Courts "hardly ever strike[] down a policy as illegitimate under rational basis scrutiny." *Trump v. Hawaii*, 138 S. Ct. 2392, 2420 (2018). Challenged laws bear "a strong presumption of validity" and must be upheld if there is "'a plausible policy reason for the classification'" and "the 'relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.'" *Heller v. Doe by Doe*, 509 U.S. 312, 319 (1993); *Fitzgerald v. Racing Ass'n of Cent.*

Iowa, 539 U.S. 103, 110 (2003). Rational-basis review "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *Beach Commc'ns*, 508 U.S. at 313. "[T]hose attacking the rationality of the legislative classification have the burden 'to negative every conceivable basis which might support it,'" and "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." *Id.* at 315.

Under rational-basis scrutiny, Minnesota's statute easily passes muster. One well-known phenomenon in contested elections is the "incumbency effect," where some voters will choose the incumbent for no reason other than familiarity with her name. *See* Rodden Report 18; Tushnet, *Judicial Review and Congressional Tenure: An Observation*, 66 Tex. L. Rev. 967, 974 (1988). If the incumbent is listed first on the ballot, this artificial incumbency advantage could be supercharged by another artificial advantage: positional bias. Minnesota's statute prevents this double boost for incumbents by listing candidates from the incumbent party last on the ballot. True, the statute does not work perfectly in every race; sometimes the incumbent will be listed first because she does not belong to the incumbent party (and no major third parties are running). *See* PI Memo. 1. But the fix for this issue—listing every incumbent last on the ballot, irrespective of their party—would create a new problem. From race to race, candidates from the same party would appear in different positions on the ballot, confusing voters and making it harder to engage in straight-ticket voting. *See New All. Party v. N.Y.S. Bd. of Elections*, 861 F. Supp. 282, 298 (S.D.N.Y. 1994); *Graves v. McElderry*, 946 F. Supp.

1569, 1581 (W.D. Okla. 1996). Rational-basis review allows Minnesota to balance these competing goals and make "'rough accommodations'" to address them. *Heller*, 509 U.S. at 321; *accord Beach Commc'ns*, 508 U.S. at 316.

Plaintiffs nevertheless believe that Minnesota's statute is irrational. But the Secretary is right: "Plaintiffs have not cited a single decision in which a court has ever held that a ballot-order provision that disfavors incumbent candidates or parties is constitutionally suspect." PI Opp. 12. While courts have held that other types of ballot-order statutes fail rational-basis review, Minnesota's statute shares none of the identified defects in those statutes.

Minnesota's statute does not select "one *particular* party's candidates for priority position on every … ballot." *Graves*, 946 F. Supp. at 1580 (emphasis added); *see id.* at 1580-81 (statute required "Democratic Party candidates" to be listed first); *Sangmeister v. Woodard*, 565 F.2d 460, 462 (7th Cir. 1977) ("practice by Illinois County Clerks of placing their own political party … first"). Minnesota's statute is neutral with respect to particular parties; *any* party can be listed first, depending on how they performed in the last election. The notion that Minnesota's statute, which was enacted by a "DFL majority in the legislature," was enacted to *discriminate against Democrats* is absurd. *Ulland*, 262 N.W.2d at 415 n.6. Even if the legislature had this self-defeating purpose, courts applying rational-basis review "will not 'inquire into the subjective motives of the decisionmakers.'" *Barket, Levy & Fine, Inc. v. St. Louis Thermal Energy Corp.*, 21 F.3d 237, 241 (8th Cir. 1994).

Minnesota's statute is also unlike the "'incumbent first' statute" that the Eighth Circuit deemed unconstitutional in *McLain*. 637 F.2d at 1167. Incumbent-first statutes are irrational, according to cases like *McClain*, because they can be explained only in terms of "favoritism" for incumbents. *Id.*; *see Holtzman v. Power*, 313 N.Y.S.2d 904, 908 (Sup. Ct. 1970) ("The Court finds no rational basis for affording such favoritism to a candidate merely on the basis of his having been successful at a prior election."). "[I]ncumbent first statutes," these courts reason, do nothing but "suppress opposition by freezing the status quo." *New All. Party*, 861 F. Supp. at 298.

Minnesota's statute does the opposite: it is an incumbent-*last* statute that works to *un*freeze the status quo by making elections *more* competitive. Laws aimed at reducing the advantages of incumbency do not "discriminate" against any particular party. *Clements v. Fashing*, 457 U.S. 957, 967 (1982); *Bates v. Jones*, 131 F.3d 843, 847 (9th Cir. 1997) (en banc). And they do not "lack any purpose other than a bare desire to harm a politically unpopular group." *Trump*, 138 S. Ct. at 2420 (cleaned up); *see Citizens for Legislative Choice v. Miller*, 144 F.3d 916, 922 (6th Cir. 1998) ("[W]e are aware of no historical bias against incumbent politicians or their supporters."). Reducing the advantages of incumbency serves many legitimate goals, including "provid[ing] for the infusion of fresh ideas and new perspectives," "decreas[ing] the likelihood that representatives will lose touch with their constituents," and preventing the accumulation of "excessive power." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 837 (1995); *Bates*, 131 F.3d at 847. If Plaintiffs are right that any law with the purpose of

"disadvantaging incumbents" is unconstitutional, PI Memo. 23, then laws that impose term limits on state legislators or provide public funding for elections are unconstitutional. No one thinks that. *See Citizens for Legislative Choice*, 144 F.3d at 921-22.

In short, Minnesota's statute is one rational way, among many, to order candidates on a ballot. What the Minnesota Supreme Court said about this law forty years ago is still true today: "The method selected by the legislature … cannot be overturned by this court merely because we think a rotation system would be marginally more fair. We are mindful of the proper role of an appellate court conducting a 'rational basis' review of a legislative enactment. It is the function of the legislature to make classifications," and "the legislature is not required to adopt the means which this court thinks best for furthering the state's interests." *Ulland*, 262 N.W.2d at 418.

CONCLUSION

The Court should deny Plaintiffs' motion for a preliminary and permanent injunction. The Court could also dismiss this case for lack of subject-matter jurisdiction. *See* Fed. R. Civ. P. 12(h)(3).

Respectfully submitted,

Dated: March 26, 2020

s/ Cameron T. Norris

Thomas H. Boyd, #0200517
WINTHROP & WEINSTINE, P.A.
225 South Sixth Street, Suite 3500
Minneapolis, MN 55402
(612) 604-6400
tboyd@winthrop.com

William S. Consovoy (pro hac vice)
Jeffrey M. Harris (pro hac vice)
Cameron T. Norris (pro hac vice)
CONSOVOY MCCARTHY PLLC
1600 Wilson Boulevard, Suite 700
Arlington, VA 22209
(703) 243-9423
cam@consovoymccarthy.com

CERTIFICATE OF COMPLIANCE

Per Local Rule 7.1(f)(2) and this Court's order, this brief contains 4,908 words, including headings, footnotes, and quotations but excluding the caption, signature block, and certificate of compliance. That word count was generated by Microsoft Word 2016. This brief also complies with Local Rule 7.1(h) because it is prepared in 14-point Garamond font and satisfies all other requirements of that rule.

Dated: March 26, 2020

s/ Cameron T. Norris
Counsel for Honest Elections Project

CERTIFICATE OF SERVICE

This brief was filed via this Court's ECF system, which will electronically notify all counsel of record. The parties also received a copy of this brief via email on March 13, 2020.

Dated: March 26, 2020

s/ Cameron T. Norris
Counsel for Honest Elections Project