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September 13, 2021

Via ECF

The Hon. Molly Dwyer, Clerk
United States Court of Appeals for the Ninth Circuit
P.O. Box. 193939
San Francisco, CA 94119-3939

Re: *Mecinas v. Hobbs*, No. 20-16301
Response to Defendant-Appellee's Notice of Supplemental Authority pursuant to Rule 28(j)

Dear Ms. Dwyer:

Appellants respond to Secretary of State Katie Hobbs' Notice of Supplementary Authority regarding *Nelson v. Warner*, No. 20-1860 (4th Cir. Sept. 1, 2021). The Secretary's reliance is misplaced. If anything, *Nelson* supports Appellants, providing further reason to reverse the District Court's rulings on standing and justiciability, which are the only questions at issue in this appeal.

First, *Nelson* found that a candidate had standing to challenge a ballot order statute based on threatened injury to his electoral prospects. Op. at 12-15. *Nelson* did not need to decide whether political parties also had standing, because there the plaintiffs included both the party and a candidate. *Id*. at n.9. *Nelson* also indicates that it was erroneous for the District Court to decide that Appellants definitively lacked standing on a motion to dismiss. *See id.* at 15 (relying on trial evidence establishing "it was extremely likely that the primacy effect would have a negative impact on" candidate's prospects to hold candidate "showed a substantial risk of injury that was particular and concrete").

Second, *Nelson* definitively rejected the argument that *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), rendered ballot order disputes nonjusticiable. In fact, the opinion operates as a point-by-point refutation of the District Court's erroneous application of *Rucho*, including by emphasizing that ballot order disputes have long been ably adjudicated by the federal courts using well-recognized manageable judicial standards – namely *Anderson-Burdick* – and that "nothing" in *Rucho* changes that. Op. at 16-20.

As for *Nelson*'s conclusion that the West Virginia district court was wrong on the merits, this Court may not properly adopt that finding to affirm here, because that decision was based both on the application of Fourth Circuit precedent and *the record that was presented to the district court* in *Nelson*. Op. at 24-26. Here, in contrast, the District Court expressly declined to reach the merits, 1-ER-26, resulting in no alternative merits holding, or even a final evidentiary record. Moreover, the Fourth Circuit case upon which *Nelson* relied is not binding in this Circuit, and there is ample alternative precedent finding that analogous statutes are not constitutional.

Respectfully Submitted,

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