

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA
3

4 Michael Schaefer,

5 Plaintiff

6 v.

7 Barbara Cegavsky, Secretary of State,

8 Defendant

2:16-cv-00004-JAD-VCF

**Order Denying Motion for Preliminary
Injunction; Denying Request for
Preliminary Injunction Hearing as Moot;
and Ordering Schaefer to Show Cause
Why this Case Should Not Be Dismissed
Under the Doctrine of Res Judicata**

[ECF 22]

9
10 Michael Schaefer sues the Nevada Secretary State for declaratory and injunctive relief,
11 challenging NRS 293.263's requirement that candidates be listed alphabetically on primary
12 ballots for major political parties as a violation of his due-process and equal-protection rights.¹ I
13 recently dismissed Schaefer's complaint for failure to state a claim and gave him until April 15,
14 2016, to file an amended complaint if he could state a plausible claim for relief.²

15 Schaefer timely filed an amended complaint³ and now moves to enjoin the Nevada
16 Secretary of State from approving an NRS 293.623-compliant ballot, insisting that the candidates
17 appear in a randomly selected order, not alphabetically.⁴ Schaefer also requests a hearing on his
18 motion and to combine that hearing with a trial on the merits.⁵

19 But this is not Schaefer's first case challenging this Nevada statute as a due-process and
20 equal-protection violation. He litigated a nearly identical case that he lost on summary judgment
21 in 1998.⁶ Conveniently, Schaefer makes no mention of his prior, unsuccessful bid to challenge
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23 ¹ ECF No. 21.

24 ² ECF No. 19.

25 ³ ECF No. 21.

26 ⁴ ECF No. 22.

27 ⁵ *Id.*

28 ⁶ *Mike Schaefer v. Dean Heller, et al.*, CV-S-96-492 (RJJ) (D. Nev. 1998).

1 this Nevada law. I find that Schaefer has not established that he is likely to succeed on the
2 merits—or even that there are serious questions going to the merits—of his claim because it
3 appears that his claim is barred by the doctrine of res judicata. I also find that Schaefer merely
4 restates in his first amended complaint the same allegations that I previously found insufficient to
5 state a plausible claim for relief. Accordingly, I deny Schaefer’s motion for an injunction, I deny
6 his request for a hearing on that motion and to combine it with a trial on the merits as moot, and I
7 order Schaefer to show cause why this case should not be dismissed under the doctrine of res
8 judicata.

9 **Background**

10 **A. Schaefer’s prior case challenging the constitutionality of Nevada’s law requiring**
11 **alphabetically listed primary ballots was summarily adjudicated in the state’s favor.**

12 Schaefer intended to seek the 1996 Republican nomination to the U.S. House of
13 Representatives for the 2nd Congressional District of Nevada.⁷ In June of that year, Schaefer
14 sued the Nevada Secretary of State (Dean Heller) and the State of Nevada in the U.S. District
15 Court in the District of Nevada asking the court to declare that “Nevada statutes mandating
16 alphabetical listing of candidates [are] unconstitutional, and to order that the Secretary of State
17 determine some procedure to determine ballot listing that affords plaintiff, and other candidates
18 for the Republican Nomination to Congress, District 2, with the same opportunity to enjoy First
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27 ⁷ Appendix A at 2, ¶ 2 (Complaint for Declaratory Relief (Election Ballot Listing)
28 (Constitutionality of the Alphabet), ECF 1 in *Mike Schaefer v. Dean Heller, et al.*, CV-S-96-492
(RJJ) (D. Nev.) (“*Schafer v. Heller*”).

1 Position on the September 3, 1996 ballot.”⁸ That case was stayed⁹ but eventually proceeded to
2 the dispositive-motion stage with both sides filing competing motions for summary judgment.¹⁰
3 Then U.S. District Judge Johnnie Rawlinson heard oral argument on the motions on June 9,
4 1998.¹¹

5 In ruling on the motions, Judge Rawlinson considered the evidence offered by the parties
6 and analyzed Schaefer’s challenge to Nevada’s alphabetically listed-ballot law under the standard
7 announced by the U.S. Supreme Court in *Burdick v. Takushi*, 504 U.S. 428 (1992).¹² Judge
8 Rawlinson found that Schaefer had “not provided any evidence that the alphabetical ballots place
9 a severe restriction on candidates. . . .”¹³ She also found that “the State nevertheless provided a
10 rational reason for requiring an alphabetical ballot.”¹⁴ Judge Rawlinson therefore concluded that
11 the State of Nevada and the Nevada Secretary of State were entitled to summary judgment in
12 _____

13 ⁸ Appendix A at 5:12-20. Although the only statute mentioned by number in Schaefer’s
14 complaint in *Schaefer v. Heller* is NRS 293.265—mentioned once and in parenthetical, *see*
15 Appendix A at 3:3—it appears to be a typo because that statute concerns nonpartisan primary
16 ballots and Schaefer was “seeking the Republican nomination in [the] primary election set for
17 9/3/96[.]” Appendix A at 2:2–3, which would have, even in 1996, been governed by NRS
18 293.263.

19 ⁹ Apparently, Schaefer had unsuccessfully challenged this Nevada statute in a Nevada state court
20 and a stay was imposed while Schaefer appealed that decision to the Nevada Supreme Court.
21 Appendix B at 1:24–2:14 (Order, ECF 33 in *Schaefer v. Heller*). Judge Rawlinson recounted that
22 the Nevada Supreme Court dismissed Schaefer’s appeal because he failed to show in the trial
23 court that alphabetical listing of candidates provided any with a statistical advantage, and thus
24 could not show that he was denied due process or equal protection of the laws. Appendix B at
25 2:9–14. The state moved to stay the case again when Schaefer brought another state-court
26 proceeding challenging the issue, but because a decision had been issued against him and he was
27 waiving his right to appeal, the state withdrew its motion to stay. Appendix B at 3:6–12.

28 ¹⁰ *See* Appendix B at 1–3.

¹¹ Appendix C (Minutes of Court, ECF 32 in *Schaefer v. Heller*).

¹² Appendix B at 4:9–7:15.

¹³ Appendix B at 6:19-20.

¹⁴ Appendix B at 7:7–15.

1 their favor, and thus granted those defendants’ motion for summary judgment and denied
2 Schaefer’s competing motion for summary judgment.¹⁵ The Clerk of Court then entered
3 judgment in favor of the Nevada Secretary of State and the State of Nevada and against Schaefer
4 and closed the case.¹⁶

5 **B. Schaefer’s current case likewise challenges the constitutionality of Nevada’s**
6 **alphabetically listed primary ballots.**

7 Schaefer currently intends to seek the 2016 Democratic nomination to the U.S. House of
8 Representatives for the 4th Congressional District of Nevada.¹⁷ Donning a familiar mantle,
9 Schaefer sues the Nevada Secretary of State for an order declaring that NRS 293.263’s
10 requirement that candidates be listed alphabetically on ballots for major political parties violates
11 his due process and equal protection rights. He also seeks an injunction requiring the Nevada
12 Secretary of State to list the candidates on the ballot “in a randomized alphabetical order. . . .”¹⁸

13 Upon adopting the report and recommendation of U.S. Magistrate Judge Cam Ferenbach,
14 I recently dismissed Schaefer’s complaint with leave to amend.¹⁹ Schaefer timely amended²⁰ and
15 now moves for a preliminary injunction and requests a hearing on that motion to be combined
16 with a trial on the merits of his due-process and equal-protection challenge to Nevada’s
17 alphabetical-ballot requirement.²¹

21 ¹⁵ Appendix B at 7:16–19.

22 ¹⁶ Appendix D (Judgment in a Civil Case, ECF 34 in *Schaefer v. Heller*).

23 ¹⁷ *See* ECF No. 21.

24 ¹⁸ *See id.* at 5.

25 ¹⁹ ECF No. 19.

26 ²⁰ ECF No. 21.

27 ²¹ ECF No. 22.

1 **Discussion**

2 The U.S. Supreme Court instructed in *Winter v. Natural Resources Defense Council, Inc.*
3 that a plaintiff seeking injunctive relief “must establish that he is likely to succeed on the merits,
4 that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of
5 equities tips in his favor, and that an injunction is in the public interest.”²² The Ninth Circuit
6 subsequently recognized in *Stormans, Inc. v. Selecky* that the Supreme Court had “definitively
7 refuted” the circuit’s possibility-of-irreparable-harm test.²³ However, several panels of the Ninth
8 Circuit have since instructed that “if a plaintiff can only show that there are ‘serious questions
9 going to the merits’—a lesser showing than likelihood of success on the merits—then a
10 preliminary injunction may still issue if the ‘balance of hardships tips *sharply* in the plaintiff’s
11 favor,’ and the other two *Winter* factors are satisfied.”²⁴

12 To obtain injunctive relief, Schaefer must therefore show either that he is likely to
13 succeed on the merits of his claim that NRS 293.263 violates his due-process and equal-
14 protection rights or that there are serious questions going to the merits of his claim. Schaefer’s
15 prior, summarily adjudicated case that unsuccessfully challenged the constitutionality of this
16 same Nevada statute appears to pose an insurmountable obstacle for him to make the showing
17 required under either test.

18 The basis of the U.S. District Court for the District of Nevada’s subject-matter
19 jurisdiction in Schaefer’s prior case of *Mike Schaefer v. Dean Heller, et al.*, CV-S-96-492 (RJJ)
20 (D. Nev.) (“*Schaefer v. Heller*”), was federal-question jurisdiction.²⁵ After trial by the court on the
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22 ²² *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008).

23 ²³ *Stormans v. Selecky*, 586 F.3d 1109, 1127 (9th Cir. 2009) (citing *Winter*, 555 U.S. at 22).

24 ²⁴ *Shell Offshore v. Greenpeace*, 709 F.3d 1281, 1291 (9th Cir. 2013) (quoting with emphasis
25 *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011)); *accord Towerly v.*
26 *Brewer*, 672 F.3d 650, 657 (9th Cir. 2012) (quoting *Cottrell*, 632 F.3d at 1135)).

27 ²⁵ See Appendix A at 1:18–22 (“This case involves a federal question, jurisdiction existing
28 pursuant to Constitution, Art. III, sec. 2, and Title 28, U.S. Code, sec. 1331[], providing for
original jurisdiction inactions [sic] ‘arising under the Constitution, laws or treaties of the United

1 parties' competing motions for summary judgment, the court in *Schafer v. Heller* entered
2 judgment in favor of the State of Nevada and Nevada Secretary of State and against Schaefer on
3 his claim challenging the constitutionality of Nevada's law requiring candidates be listed
4 alphabetically on primary ballots.²⁶

5 "The preclusive effect of a federal-court judgment is determined by federal common
6 law."²⁷ "For judgments in federal-question cases[,] . . . federal courts participate in developing
7 'uniform federal rule[s]' of res judicata, which [the U.S. Supreme] Court has ultimate authority
8 to determine and declare."²⁸ "The preclusive effect of a judgment is defined by claim preclusion
9 and issue preclusion, which are collectively referred to as 'res judicata.'"²⁹ "Under the doctrine
10 of claim preclusion, a final judgment forecloses 'successive litigation on the very same claim,
11 whether or not relitigation of the claim raises the same issues as the earlier suit.'"³⁰ "Issue
12 preclusion, in contrast, bars 'successive litigation of an issue of fact or law actually litigated and
13 resolved in a valid court determination essential to the prior judgment,' even if the issue recurs in
14 the context of a different claim."³¹ "By 'preclud[ing] parties from contesting matters that they
15 have had a full and fair opportunity to litigate,' these two doctrines protect against 'the expense
16 and vexation attending multiple lawsuits, conserv[e] judicial resources, and foste[r] reliance on
17 judicial action by minimizing the possibility of inconsistent decisions.'"³²

18 _____
19 States.'").

20 ²⁶ See Appendix D; Appendix B at 7:16–21.

21 ²⁷ *Taylor v. Sturgell*, 553 U.S. 880, 891 (2008) (citing *Semtek Int'l v. Lockheed Martin*, 531 U.S.
22 497, 507–08 (2001)).

23 ²⁸ *Id.* (citing *Taylor*, 553 U.S. at 508).

24 ²⁹ *Id.* at 892.

25 ³⁰ *Id.* (quoting *New Hampshire v. Maine*, 532 U.S. 742, 748 (2001)).

26 ³¹ *Id.* (quoting *New Hampshire*, 532 U.S. at 748–49).

27 ³² *Id.* (quoting *Montana v. U.S.*, 440 U.S. 147, 153–54 (1979)).

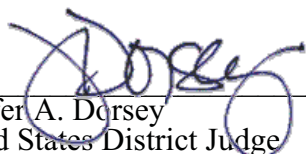
1 Schaefer previously litigated and lost on summary judgment his claim that NRS 293.263
2 violates his due-process and equal-protection rights by requiring that candidates be listed
3 alphabetically on primary ballots for major political parties. Schaefer's current lawsuit seeks to
4 litigate the same claim and issues of fact and law that were actually litigated and resolved in a
5 valid court determination that was essential to Judge Rawlinson's prior judgment. Schaefer does
6 not address his prior, unsuccessful challenge of this Nevada statute, and the allegations in his
7 first amended complaint merely restate what I previously found to be insufficient to state a
8 plausible claim for relief.³³ Because it appears that his claim in this case is barred by the doctrine
9 of res judicata, I find that Schaefer has not shown that he is likely to succeed on the merits of his
10 claim or that there are serious questions going to its merits.

11 **Conclusion**

12 Accordingly, IT IS HEREBY ORDERED that **Schaefer's motion for preliminary**
13 **injunction [ECF 22] is DENIED** and **Schaefer's request for a hearing on that motion**
14 **combined with a trial on the merits [ECF 22] is DENIED** as moot.

15 IT IS FURTHER ORDERED that **Schaefer has until Tuesday, April 26, 2016, to show**
16 **cause** why this case should not be dismissed under the doctrine of res judicata. **Any reply by**
17 **the Nevada Secretary of State to Schaefer's response to the order to show cause must be**
18 **filed within seven days of service of Schaefer's response. No further briefing will be**
19 **permitted. If Schaefer does not file a document showing good cause by April 26, 2016, this**
20 **case will be dismissed in its entirety without further notice and with prejudice.**

21 DATED: April 12, 2016

22 
23 Jennifer A. Dorsey
24 United States District Judge

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28 ³³ See ECF No. 22.

Appendix A

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Attorney for Plaintiff

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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

MIKE SCHAEFER)
)
Plaintiff)
)
v.)
)
DEAN HELLER,)
SECRETARY OF STATE)
STATE OF NEVADA)
Defendants)

CV-S-96-00492-LDG (RJJ)

COMPLAINT FOR
DECLARATORY RELIEF
(ELECTION BALLOT LISTING)
(CONSTITUTIONALITY OF THE ALPHABET)

JURISDICTION

This case involves a federal question, jurisdiction existing pursuant to Constitution, Art. III, sec. 2, and Title 28, U.S. Code, sec. 1331., providing for original jurisdiction in actions "arising under the Constitution, laws or treaties of the United States".

CAUSE OF ACTION: DECLARATORY RELIEF

1. Pursuant to FRCP Rule 57, the Court may grant a declaratory judgment determining the rights of the parties, and may order a speedy hearing of such an action and may advance it on the calendar.

1 2. Plaintiff is a candidate for election to U.S. Congress,
2 District 2, State of Nevada, as one of many candidates seeking
3 the Republican nomination in primary election set for 9/3/96.

4 3. The other candidates for said nomination may be
5 affected by, or interested in this proceeding, but are not
6 named as parties therein, but are being served with a copy
7 of this pleading so that they may consider their rights to
8 intervene pursuant to Rule 24, FRCP, if they are of the opinion
9 that their interest is not adequately represented by existing
10 parties. Such other candidates are:

11	PATTY CAFFERATA	BOB SEALE
	ROBERT J. EDWARDS, SR.	HILARY MICHAEL MILKO
12	JIM GIBBONS	CHERYL LAU
	PAT McMILLAN	

13
14 The reasons such other candidates are not joined is fact
15 that most of them live in the Reno/Carson City area, some
16 distance from this Court, and if such candidates have no
17 interest or concern in this action, to mandate service upon
18 them giving time constraints involving with early or priority
19 hearings herein, would burden existing parties and the Court;
20 all of such other candidates being invited by service of a copy
21 of this pleading to intervene and express their interest,
22 concern or opinion, in assistance to the Court.

23 4. Defendant DEAN HELLER, SECRETARY OF STATE is the
24 officer entrusted with administering of the elections for
25 United States Congress pursuant to the laws of the State of
26 Nevada and of the United States. Defendant State wrote the law.

27 5. Pursuant to Nevada law, said defendant intends to
28 list the names of candidates for the Republican Nomination

1 in alphabetical order, with the result being that the ballot
2 in each of Nevada's 17 counties will disclose the candidate's
3 names thusly: (per NRS 293.265)

4 PATTY CAFFERATA
5 ROBERT J. EDWARDS, JR.
6 JIM GIBBONS
7 CHERLY LAU
8 PAT McMILLAN
9 HILARY MICHAEL MIKKO
10 MIKE SCHAEFER
11 BOB SEALE

12 6. There exists an advantage to being first on a listing
13 of so many candidates, numerous voters having the inclination
14 to vote for the first name they see, or the last name they
15 notice, resulting in an advantage of 5% to 15% of the vote
16 in favor of those candidates who appear First or Last on any
17 such ballot listing, as found in numerous trials and reported cases.

18 7. To permit such candidates, by accident of birth and
19 family name, to receive such artificial advantage by operation
20 of laws of the State of Nevada, in the election of a resident
21 to serve in the United States Congress, results in a denial
22 of equal protection of laws to all other candidates, and
23 violates the due process of law guarantees of fundamental
24 fairness in the conduct of elections for such federal office.

25 8. Other jurisdictions, having recognized this phenomenon,
26 have acted to bring Constitutional due process and equal
27 protection of the law to candidates in their jurisdiction by
28 providing non-alphabetical procedures for determining ballot
order, such as Calif. Elections Code sec. 13112, which provides
for a randomized alphabet to be drawn annually by the Secretary
of State, with countywide candidates furthermore having their
names rotated within an Assembly District, to further minimize

1 what the legislature in California obviously found was a
2 system resulting in prejudice to some candidates, the new
3 legislation being directed at a 'level playing field' for all.

4 Only Alabama, Colorado, Connecticut, Delaware, Florida,
5 Georgia, Hawaii, Louisiana, Main, Maryland, Mississippi, Nevada,
6 Rode Island and Tennessee, of our 50 jurisdictions, list
7 candidates by alphabet; rotation of candidate names exists in
8 Alaska, Arizona, Idaho, Indiana, Iowa, Kansis, Kentucky, Michigan,
9 Minnesota, Montana, North Carolina, North Dakota, Ohio,
10 Oklahoma, Oregon, Vermont and Wyoming. A lottery is used in
11 Arkansas, District of Columbia, New York, Pennsylvania, South
12 Dakota, Texas, Utah and Wisconsin. Filing date determines ballot
13 order in Illinois, Missouri, Nebraska, New Jersey and Virginia,
14 and a combination of methods is used in New Hampshire, California
15 and West Virginia, and still other procedures obtain in
16 Massachusetts, New Mexico, South Carolina and Washington.

17 9. The alphabetical listing procedure that defendant
18 SECRETARY OF STATE intends to follow in scheduling ballot
19 listings in Congressional District 2 violates plaintiff's
20 rights pursuant to the Fourteenth and First Amendments of
21 the United States Constitution, necessitating this action
22 seeking to declare the rights of respective parties herein.

23 10. It is plaintiff's position that he is entitled to have
24 his ballot position be determine by any method that will give
25 him the same opportunity as PATTY CAFFERATA to be first on
26 the list of candidates, be it lottery, or rotation among counties,
27 or some other procedure; in several California trial cases
28 where plaintiff has raised these issues as an attorney for


1 candidates, the court has ordered names tossed into a 'hat'
2 and drawn at random, with all candidates invited to witness
3 the event; these cases leading to the legislative changes that
4 have brought fundamental fairness and a level playing field
5 to the issue of ballot listing.

6 11. It is defendant SECRETARY OF STATE'S position that
7 he is mandated by the law of the jurisdiction to list candidates
8 for Congressional District 2 by alphabet, even though such
9 listing will artificially assist the candidates of those
10 candidates appearing First(Cafferata) and Last(Seale).

11
12 WHEREFORE, plaintiff prays for an Order of this Court
13 declaring Nevada statutes mandating alphabetical listing of
14 candidates to be unconstitutional, and to order that the
15 Secretary of State determine some procedure to determine ballot
16 listing that affords plaintiff, and other candidates for the
17 Republican Nomination to Congress, District 2, with the
18 same opportunity to enjoy First Position on the September 3, 1996
19 ballot. And for costs incurred herein and such further
20 relief as appears just in the premises.

21 Date: June 5, 1996

Respectfully submitted,

22 
23 MICHAEL SCHAEFER
24 State Bar No. 2089
Attorney for Plaintiff

25 The Nevada Attorney General is also served
26 in this matter as validity of a statute
27 of the jurisdiction is at issue, by service of
28 a 2nd copy upon Secretary of State, per instruction
of Assistant Attorney General Haight.

1 MEMORANDUM IN SUPPORT OF COMPLAINT

2 I. CONSTITUTION VIOLATED

3 "No state shall enforce any law which shall abridge
4 privileges or immunities of citizens of the United
5 States..nor deny to any person..the equal protection
6 of the law".

7 Fourteenth Amendment, U.S. Constitution.

8 "Congress shall make no law..abridging the right of
9 the people..to petition the Government for a redress
10 of grievances".

11 First Amendment, U.S.Constitution

12 The State of Nevada by virtue of its alphabetical listing
13 law is denying candidates for public office the equal protection
14 of the law, favoring the Aaron Aardvarks and Zzeek Zzzyo's* of
15 politics with favored ballot positions (* Las Vegas Residential
16 directory p.574).

17 And one way citizens petition their Government is by
18 sending someone to Washington, D.C. to cut the red-tape and
19 correct the wrongs of society, and the people are prejudiced in
20 their quest if the most able candidates are forced to lose-out
21 to those with more-favored family names, alphabetical-wise.

22 II. STRICT SCRUTINY REQUIRED BY
23 THE COURTS, AS TO SUCH PREJUDICE

24 In Gould v. Grubb, 1975, 14 Cal 3d 661, 536 P2d 1337,
25 122 Cal. Rptr. 377, the California Supreme Court affirmed a
26 trial court ordering listing of names be determined by lot.
27 "The state's current practice of listing incumbents first on a
28 lists of candidates", and the others then follow alphabetically,
"substantially diluted the weight of votes of those supporting
other candidates and would be subject to strict judicial scrutiny".
The State's asserted interest in "making it easier for voters to
locate names of candidates of their choice" was "not a compelling
interest and did not justify alphabetical order ballot-listing".

1 In Illinois, the court in Culliton v. Board of Election
2 Commissioners, USDC Ill. 1976, 419 F Aupp.126 found that:

3 "evidence indicated it would be a denial of equal
4 protection to arbitrarily give candidates such a
head start toward victory,"

5 specifically finding that: "a 3% advantage existing and would
6 create a 6% 'hurdle' which other
candidates must overcome".

7 In Reynolds v. Sims, 1964, 377 US 533, the Supreme Court
8 stated that: "the concept of equal protection of the laws has
9 been traditionally viewed as requiring the
10 uniform treatment of persons standing in the
11 same relation to governemtn action questioned
or challenged; that a denial of constitutionally
protected rights demands judicial protection".

12 Alphabetical placement of names on ballots was also found
13 to provide "an unfair and unlawful advantage" in Sangmeister v.
14 Woodard, CA7, 1977, 565 F2d 460.

15 California's Supreme Court, in a case filed by plaintiff
16 herein, Canaan v. Abdelnour, City Clerk, 1985, 40 C3d 703, 221
17 Cal.Rptr. 468, 710 P2d 268, suggested an analysis for election
18 litigation:

- 19 1. First the Court must consider the magnitude and
20 character of the asserted injury to the rights protected
by First and Fourteenth Amendements that plaintiff
seeks to vindicate;
- 21 2. Then the Court must identify and evaluate the precise
22 interests put forward by the State as justification
of the burden imposed by its rule.

23 The Court in Canaan found there must be a determination of
24 the legitimacy and strength of each of those interests, and there
25 must also be consideration of the extent to which these interests
26 make it necessary to burden plaintiff's rights. (The issue
27 there was write-in voting prohibition, the issue here is
28 burden on candidates who are not named A or Z).

1 In Sumner v. Sexton, an unreported Superior Court case
2 in San Diego, Cal., also filed by plaintiff, and being the
3 first successful challenge to a 99-year old alphabetical listing
4 law, the Court ordered a lottery system to be utilized.
5 In a state with keno, roulette, and other chance-games involving
6 numbers, in most every community, it should be an easy task
7 for defendant SECRETARY OF STATE to devise a procedure that
8 treats all candidates fairly, and consistent with the Constitution.

9 Arizona, in the 1958 case of Kautenburger v. Jackson,
10 85 Az. 128, 333 P2d 293, found that: as follows

11 "it was proper to interfere in the the event the method
12 prescribed by statute unconstitutionally discriminates
13 in favor of one candidate against another;
14 a listing in alphabetical order deprives candidates of
a fundamental right which was entitled to protection
under the privileges and immunities article of the
Constitution".

15 III. VOTERS ARE PREJUDICED TOO

16 It's not just the candidates that are affected. The
17 rights of candidates and rights of voters do not lend themselves
18 to neat separation; laws that affect candidates always have at
19 least some theoretical correlative effect on voters.

20 Anderson v. Celebrezze, 1983, 460 U.S. 780, 789.

21 IV. CONCLUSION

22 This is a very important election, involving the election
23 of a new Congressman or Congresswoman by those of 384,516 voters
24 who trek to the polls or vote by mail. The District includes
25 all or part of each of Nevada's 17 counties. It is vital that
26 the playing field be level, and that the rights of the candidates
27 and the voters be protected. The Nevada alphabetical listing
28 law must yield to Constitutional analysis and protection.

1 SPECIAL SERVICE LIST

2 Michael Schaefer certifies that on 6/5/96 copies of complaint or
3 petition and application herein were sent by first class mail,
4 postpaid, addressed as follows, to other candidates having
5 an interest in this matter, but not being parties thereto:

6 1. Patty Cafferata
7 PO Box 20357
8 RENO, NV. 89515

9 2. Robert J. Edwards, Sr.
10 P.O.Box 1567
11 Carson City, NV. 89702

12 3. Jim Gibbons
13 2535 Kinney Lane
14 RENO, NV. 89511

15 4. Pat McMillan
16 P.O.Box 96162
17 Las Vegas, NV. 89193

18 5. Bob Seale
19 P.O.Box 71120
20 RENO, NV. 89570

21 6. Cheryl Lau
22 1721 Andorra Dr.
23 Carson City, NV. 89703

24 7. Hilary Michael Milko
25 P.O. 72344
26 Las Vegas, NV. 89170

27 Executed 6/5/96 at Las Vegas, NV. *Mich of Schaefer*
28 MICHAEL SCHAEFER

Appendix B

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JUN 19 10 11 AM '98

LANCE S. WILSON
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DEPUTY

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2 ENTERED AND
3 SERVED
4 JUN 19 1998
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6 CLERK, U.S. DISTRICT COURT
DISTRICT OF NEVADA
7 BY blj DEPUTY

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

8 MIKE SCHAEFER,
9 Plaintiff,
10 v.
11 DEAN HELLER, Secretary of the State of
12 Nevada, and STATE OF NEVADA,
13 Defendants.

CV-S-96-492-JBR (RJJ)

ORDER

14 On June 5, 1996, Plaintiff Mike Schaefer filed a complaint (#1) against Defendants
15 State of Nevada, and Dean Heller, Secretary of State for the State of Nevada (sometimes jointly
16 referred to as the "State"). Schaefer was a candidate for the September 3, 1996, Republican
17 primary election to the United States Second Congressional District in the State of Nevada. In his
18 Complaint, Schaefer seeks a declaratory judgment that Nevada's present method of listing
19 candidates alphabetically on the ballot is an unconstitutional violation of the First and Fourteenth
20 Amendments to the United States Constitution. Schaefer argues that Nevada's alphabetical listing
21 of candidates provides the candidate listed at top and the one listed on the bottom with an unfair
22 statistical advantage. Schaefer requests this Court to order the Secretary of State to use a method
23 of listing candidates that provides an equal chance to each candidate of being listed first.

24 On June 13, 1996, the State moved (#6) for summary judgment. In its motion, the
25 State argues that this Court lacks jurisdiction because Plaintiff had a pending law suit in the Nevada
26 Supreme Court involving the same issue. The State also argues that Nevada's election law requiring

1 alphabetical ballots is constitutional because it places a minimum burden on voters and candidates
2 while serving a valid interest of preventing voter confusion and creating a manageable ballot by
3 providing a reasonable way to find the name of a candidate on the ballot. In response, Schaefer
4 moved (#6A) that the question of constitutionality be certified to the Nevada Supreme Court.

5 The Court, in an Order (#8) entered on June 17, 1996, declined to certify the
6 constitutionality question to the Nevada Supreme Court. The Court did, however, stay its ruling
7 pending a decision on the issue of the constitutionality of alphabetical ballots in the case already
8 before the Nevada Supreme Court.

9 On January 23, 1998, the Nevada Supreme Court entered an order dismissing
10 Schaefer's appeal. The Nevada Court found that Schaefer, in the lower court, failed to show that
11 alphabetical listing of candidates provided any candidate with a statistical advantage. The Nevada
12 Court ruled that without a sufficient showing that certain candidates were advantaged by the
13 alphabetical listing of candidates on ballots, Schaefer could not show that he was denied due process
14 or equal protection of the laws.

15 After the Nevada Supreme Court issued a decision, Schaefer moved for summary
16 judgment (#23). He again argued that the alphabetical listing of candidates denied him equal
17 protection under the law. The only evidence of discrimination offered by Schaefer is the following:
18 1) an affidavit by Schaefer (sometimes referred to as the "Schaefer Affidavit") that he has evaluated
19 election results in San Diego and has perceived that candidates whose surnames were lower in the
20 alphabet received more votes than those higher in the alphabet, with the exception that those at the
21 bottom of a given list on a ballot receive more votes than candidates in the middle of the list; 2)
22 yellow page ads and phone book entries offered to show people write their ads and names for the
23 phone book so that they will be listed first; 3) a declaration by Schaefer (sometimes referred to as
24 the "Schaefer Declaration") purportedly quoting Judge Bonaventure wherein the judge recused
25 himself from deciding a state case involving an alphabetical ballot because he is elected to office and
26 likes to be listed first on the ballot because of his name; 4) an article describing a case where the

1 California Supreme Court declared that alphabetical ballots violated the California constitution's
2 guarantee of equal protection; 5) a California statute requiring names on the ballot to be listed
3 randomly; and 6) an article that describes the aforementioned phonebook phenomenon in San Diego.
4 The State opposed (#23) Schaefer's motion and again renewed its motion for summary judgment
5 to which Schaefer replied (#25).

6 On June 8, 1998, the State moved (#31) that the case again be stayed pending the
7 resolution of another Nevada state court case recently filed by Schaefer regarding the
8 constitutionality of alphabetical ballots. On June 9, 1998, this Court held a hearing on the State and
9 Schaefer's motions. At the hearing, Schaefer represented that a decision had been issued against
10 Schaefer in this recent case and that he was waiving any right to an appeal. The State then
11 withdrew its motion to stay. The Court heard arguments from all parties. At the hearing, Schaefer
12 offered no additional evidence that alphabetical ballots are discriminatory.

13 **STANDARD FOR SUMMARY JUDGMENT**

14 Pursuant to Rule 56(c) of the Federal Rules of Civil Procedures, summary judgment
15 shall be granted when, viewing the facts in the light most favorable to the non-moving party, (1)
16 there is no genuine issue of material fact, and (2) the moving party is entitled to summary judgment
17 as a matter of law. The plain language of Rule 56(c) "mandates the entry of summary judgment,
18 after adequate time for discovery and upon motion, against a party who fails to make a showing
19 sufficient to establish the existence of an element essential to that party's case, and on which that
20 party will bear the burden of proof at trial." *Triton Energy Corp. v. Square D Co.*, 68 F.3d 1216,
21 1221 (9th Cir. 1995) *citing Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The burden of the
22 moving party may be discharged by pointing out to the district court an absence of evidence
23 necessary to support the nonmoving party's case. *Celotex*, 477 U.S. at 325. Once the moving
24 party has satisfied his burden, he is entitled to summary judgment if the non-moving party fails to
25 designate, by affidavits, depositions, answers to interrogatories, or admissions on file, "specific
26 facts showing that there is a genuine issue for trial." *Celotex*, 477 U.S. at 324-25. "The mere

1 existence of a scintilla of evidence in support of the non-moving party's position is not sufficient."
2 *Triton Energy*, 68 F.3d at 1212. In other words, "summary judgment should be granted where the
3 non-moving party fails to offer evidence from which a reasonable jury could return a verdict in its
4 favor." *Id.*

5 Additionally, though the election in question has ended, the controversy has not
6 become moot because challenges to election ballot requirements "are worthy of resolution as capable
7 of repetition yet evading review." *Norman v. Reed*, 502 U.S. 279, 288 (1992)(citation omitted).

8 **STATE'S MOTION FOR SUMMARY JUDGMENT**

9 In *Burdick v. Takushi*, 504 U.S. 428, 434 (1992), the United States Supreme Court
10 held that "a court considering a challenge to a state election law must weigh the character and
11 magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments
12 that the plaintiff seeks to vindicate against the precise interests put forward by the State as
13 justification for the burden imposed by its rule, taking into consideration the extent which those
14 interests make it necessary to burden the plaintiff's rights." The Court explained that when
15 plaintiff's rights are subjected to "severe restrictions," the state regulation "must be narrowly drawn
16 to advance a state interest of compelling importance" but "when a state election law provision
17 imposes only a reasonable nondiscriminatory restriction" upon plaintiff's and/or voters' rights, "the
18 State's important regulatory interests are generally sufficient to justify the restriction." *Id.* (holding
19 that Hawaii's prohibition on write-in voting does not unreasonably infringe upon First and
20 Fourteenth Amendments rights); *see also Libertarian Party of Washington v. Munro*, 31 F.3d 759
21 (9th Cir. 1994) (using the *Burdick* standard in holding that a Washington law which required minor
22 parties to obtain signatures of voters before being placed on the primary ballot while major parties
23 had no such requirement did not significantly burden minor party's rights and the state has a
24 legitimate interest in insuring that minor party candidates have adequate support).

25 In other words, Schaefer, as the party challenging Nevada's election laws, has the
26 initial burden of showing that Nevada's alphabetical ballot severely restricts the available political

1 opportunity to those candidates who are not positioned first or last in a list of candidates on the
2 ballot. *Munro*, 31 F.3d at 762 (party challenging State's election law has the burden of showing
3 the law seriously restricts political opportunity). If he succeeds in showing a "severe restriction"
4 on political opportunity, the State has the burden of proving that the regulation is "narrowly drawn
5 to advance a state interest of compelling importance." *Burdick*, 504 U.S. at 434. If he is unable
6 to show a severe restriction but merely shows a "*de minimis*" burden on his constitutional rights,
7 Schaefer bears the burden of proving that the regulation he attacks has "no legitimate rational
8 basis." *Munro*, 31 F.3d at 763.

9 The evidence offered by Schaefer, at best, shows the State's requirement that
10 candidates be listed alphabetically on the ballot imposes a *de minimis* burden on any candidate's
11 constitutional rights. Schaefer's affidavit, claiming that he has reviewed San Diego election results
12 and determined that candidates whose names are located first or last in a list of candidates on a
13 ballot have a greater likelihood of winning an election, is too conclusory to meet his burden.
14 *Hansen v. U.S.*, 7 F.3d, 137, 138 (9th Cir. 1992)(non-moving party's affidavit that is unsupported
15 by factual data cannot create an issue of material fact). Although Schaefer claims to be an expert
16 in his affidavit, the Schaefer Affidavit is insufficient to create a genuine issue of material fact that
17 would preclude summary judgment because Schaefer did not provide the scientific methodology or
18 procedures underlying the conclusions found in his affidavit. *Claar v. Burlington Northern R. Co.*,
19 29 F.3d 499, 503 (9th Cir. 1994). Schaefer's conclusions in his affidavit are either a subjective
20 belief or speculation unsupported by substantive evidence, neither of which is admissible to oppose
21 a motion for summary judgment. *Id.*

22 The article describing a case where a California court found an alphabetical ballot
23 to violate the equal protection clause of the California Constitution is likewise inadmissible. The
24 article is inadmissible hearsay which cannot be the basis for denying summary judgment. *School*
25 *Dist. No. 1J, Multnomah County v. ACandS, Inc.*, 5 F.3d 1255, 1261 (9th Cir.
26 1993)(unauthenticated documents are inadmissible hearsay that may not be relied upon to defeat a

1 motion for summary judgment); *Horta v. Sullivan*, 4 F.3d 2, 8 (1st Cir. 1993)(news articles used
2 to prove the truth of statements made by a third party are inadmissible hearsay and should not be
3 considered for summary judgment purposes). Even if the article were not hearsay, the article, like
4 the Schaefer Affidavit, does not provide any of the underlying facts or methodology upon which the
5 expert in that case relied to form his opinion, or the court relied upon in making its decision.

6 The remaining evidence offered by Schaefer is likewise inadmissible or irrelevant.
7 The Schaefer Declaration, purportedly quoting the comments of Judge Bonaventure, indicates that
8 it is not being offered for the truth of the judge's supposed belief that he benefitted because of where
9 he was placed on the Nevada ballot. The Schaefer Declaration therefore is not competent evidence
10 that ballot placement affects a candidate's chances for election. The yellow page ads and the article
11 about people who change their names to be positioned first in a yellow page ad are not credible
12 evidence that voters choose candidates based upon their position on the ballot. Additionally, a
13 California statute that provides for a random method of listing candidates is not evidence that the
14 Nevada statute providing for an alphabetical ballot is unconstitutional. *See Burdick*, 504 U.S. at
15 433 (under Art. 1, §4, cl. 1 of the United States Constitution, States retain the power to regulate
16 the time, place, and manner of holding their own elections). None of the evidence submitted by
17 Schaefer creates a genuine issue of material fact on the issue that alphabetical ballots place a severe
18 restriction on a candidate's political opportunity that would preclude summary judgment.

19 Because Schaefer has not provided any evidence that alphabetical ballots place a
20 severe restriction on candidates, Schaefer also bears the burden of proving that the State's statute
21 requiring an alphabetical ballot "has no legitimate rational basis." *Munro*, 31 F.3d at 763; *see also*
22 *Roley v. Pierce County Fire Protection Dist. No. 4*, 869 F.2d 491, 493 (9th Cir. 1989)(state statute
23 presumed to be constitutional, although it discriminates, unless there is a showing of a suspect
24 classification or the infringement of a fundamental right). Schaefer did not expressly argue that the
25 State statute is irrational. Rather, he asserted that any election law which burdens a candidate's
26 political opportunity would require a compelling reason. The Supreme Court, however, rejected

1 such arguments and declared that even though "[e]lection laws will invariably impose some burden
2 . . . to subject every voting regulation to strict scrutiny and to require that the regulation be
3 narrowly tailored to advance a compelling state interest . . . would tie the hands of States seeking
4 to assure that elections are operated equitably and efficiently." *Burdick*, 504 U.S. at 433. As set
5 forth above, only when the party challenging the election law proves a severe restriction on political
6 opportunity, is the state required to provide a compelling reason for its legislation.


7 Even though not required, the State nevertheless provided a rational reason for
8 requiring an alphabetical ballot. The State has a legitimate interest in organizing a comprehensible
9 and manageable ballot. *Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96 (1986) (preventing
10 voter confusion by creating a manageable ballot is a valid state interest that need not be proven by
11 the State provided that the response is reasonable and does not significantly impinge on
12 constitutionally protected rights). The State can require that candidates are presented in a logical
13 and orderly arrangement that prevents voter confusion and allows voters to quickly find the
14 candidate for whom they wish to vote. Listing candidates alphabetically on the ballot is rationally
15 related to that ended. Accordingly,

16 IT IS ORDERED that Defendants State of Nevada and Dean Heller's motion for
17 summary judgment (#6) is GRANTED.

18 IT IS FURTHER ORDERED that Plaintiff Mike Schaefer's motion for summary
19 judgment (#20) is DENIED.

20 IT IS ALSO ORDERED that Defendants State of Nevada and Dean Heller's motion
21 for stay (#31) is WITHDRAWN.

22
23 DATED this 18th day of June, 1998.

24
25 
26 Johnnie B. Rawlinson
United States District Judge

Appendix C

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

MICHAEL SCHAEFER,)
)
 Plaintiff,)
)
 vs.)
)
 DEAN HELLER, et al.,)
)
 Defendant(s).)
)
 _____)

CV-S-96-492 JBR(RJJ)
MINUTES OF COURT
June 9, 1998

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AND FILED
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LANCER S. WILSON
CLERK
BY John X
DEPUTY

PRESENT:
THE HONORABLE JOHNNIE RAWLINSON, UNITED STATES DISTRICT JUDGE

DEPUTY CLERK: B. J. PRICE **RECORDER:** VERONICA HAYES

COUNSEL FOR PLAINTIFF(S): MICHAEL SCHAEFER, ESQUIRE (PRO SE)

COUNSEL FOR DEFENDANT(S): KATERI CAVIN, DEPUTY A.G.
DONALD REIS, CHIEF DEPUTY, SECRETARY OF STATE

PROCEEDINGS: ORAL ARGUMENT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENTS (#6), PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT (#20),

9:02 a.m. COURT CONVENES

The Court advises Counsel she was Assistant District Attorney in the Civil Division.

Counsel has no objection to Judge Rawlinson continuing on the case.

Ms. Cavin withdraws "Defendant's Motion for Stay of Proceedings" (#31).

Mr. Schaefer advises the Court his petition for mandamus was denied in State Court and he accepts that ruling.

The Court hears the arguments of Counsel.

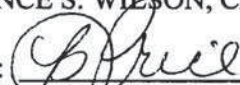
CV-S-96-492 JBR(RJJ)
June 9, 1998
Page 2

IT IS HEREBY ORDERED that the motions for summary judgment are taken under submission. The Court will issue a ruling within the next two weeks.

9:30 a.m. ADJOURNMENT.

LANCE S. WILSON, CLERK

BY:


Deputy Clerk

OFF RECORD: IT IS FURTHER ORDERED THAT THE MOTION FOR EXPEDITED HEARING (#26) IS GRANTED.

Appendix D

UNITED STATES DISTRICT COURT

***** DISTRICT OF NEVADA

MIKE SCHAEFER,

JUDGMENT IN A CIVIL CASE

Plaintiff,

V.

CV-S-96-492-JBR (RJJ)

DEAN HELLER, Secretary of the State of Nevada, and STATE OF NEVADA,

Defendant. /

— Jury Verdict. This action came before the jury for a trial by the Court. The issues have been tried and the jury has rendered it's verdict.

Decision by Court. This action came to trial before the Court. The issues have been tried and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Summary Judgment is entered for Defendants State of Nevada and Dean Heller and against Plaintiff Mike Schaefer.

June 19, 1998 Date

LANCE S. WILSON Clerk

Katyn Gargich (By) Deputy Clerk,

ENTERED AND SERVED JUN 19 1998 CLERK, U.S. DISTRICT COURT DISTRICT OF NEVADA BY [Signature] DEPUTY

FILED JUN 19 1998 CLERK, U.S. DISTRICT COURT DISTRICT OF NEVADA BY [Signature] DEPUTY