No. 20-16890

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DARLENE YAZZIE, CAROLINE BEGAY, LESLIE BEGAY, IRENE ROY, DONNA WILLIAMS and ALFRED MCROYE,

Plaintiffs-Appellants,

v.

KATIE HOBBS, in her official capacity as Secretary of State for the State of Arizona

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Arizona
No. CV-20-08222-PCT-GMS
Hon. G. Murray Snow

APPELLANTS' REPLY BRIEF

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INTRODUCTION

Time is of the essence. Appellants are seeking protection for one of the most fundamental rights afforded to a citizen in our society. When you are part of a class of citizens that have long been deprived of this right, discriminated against, and challenged at every step, the right to vote becomes a badge of honor. Appellee fails to provide this Court with any legal or other basis for continuing to deny Native Americans what they have been fighting to receive for 100 years: an equal opportunity to cast a ballot that is counted. Appellants, by this appeal, are seeking redress from the failings of the State of Arizona which have occurred year after year. The time is now. There is no good reason to delay. There is no justification for the failure of the district court to properly apply the Voting Rights Act of 1965 (VRA), 42 U.S.C. § 1973, Section 2 abridgement test, and Appellants are entitled to a reversal of denial of preliminary injunction.

ARGUMENT

Appellees have presented four reasons for this Court to affirm the denial of preliminary injunction, most of which were presented to the district court but did not form the basis of the decision. The arguments fall short. Appellants have standing; the District Court rejected Appellee's Standing argument by addressing

the merits. There is no holding in *Purcell v. Gonzalez*, 549 US 1 (2006) (*per curiam)* which would preclude this Appeal. Further, Appellee's Section 2 arguments understate the importance of the right to vote and overlook the likelihood that Native American voters will be disenfranchised by the receipt deadline and must be rejected. Appellees are trying, in vain, to buttress a district court decision based on a confused and erroneous application of the legal standard for a Section 2 claim. By misapplying the Section 2 standard, the district court effectively ignored the ongoing impact of the historical oppression of the Native Americans in Arizona, reflected in the very real challenges Appellants and their fellow on-reservation voters face in meeting the Vote By Mail receipt deadline. In sum, the history and the present circumstances—all of which this Court accurately and cogently laid out in *Democratic Nat. Comm. v. Hobbs*, 948 F.3d 989 (9th Cir. 2020)—illustrate that the receipt deadline is a disparate burden on Appellants' right to vote, and thus cannot stand under Section 2.

I. APPELLANTS HAVE STANDING

A. Appellants Have Presented a Distinct and Redressable Injury in Fact.

The Standing challenge did not fly in the district court and has no legs here. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The Supreme Court addressed standing in voting rights cases by asking whether plaintiffs have

alleged a personal stake in the outcome. *Baker v. Carr*, 369 U.S. 186, 204 (1962). Notably, "voters who allege facts showing disadvantage to themselves as individuals have standing to sue." *Id.* 205-06. Appellants have more than met this burden. As detailed below, Appellee remains confused as to Appellants' standing because she misapprehends the test for a Section 2 violation. Since Appellee does not understand the legal basis for a Section 2 injury, she similarly cannot comprehend when an injury has occurred.

Voting harms hold a special importance in the American democratic tradition and alleged infringement of the fundamental right to vote must be meticulously scrutinized. *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964); *accord Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). In this case, Appellants have specifically alleged an "abridgement" under Section 2 of the Voting Rights Act. An "abridgement" violation of Section 2 requires only a showing that Appellants have less opportunities to vote compared to other non-minority voters; not just other rural voters, but all other non-minority voters in their state. The injury is "less opportunity". *See Democratic Nat. Comm. v. Hobbs*, 948 F.3d 989, 1011 (9th Cir. 2020) ("Section 2 of the VRA 'prohibits all forms of voting discrimination that lessen opportunity for minority voters.'" (quoting *League of Women Voters of N. Carolina v. North Carolina*, 769 F.3d 1205 (4th Cir. 2014))].

Appellants alleged they are residents on, and enrolled members of, the Navajo Nation, in Apache County in the State of Arizona, and that they desire to participate in the general election. (SER53). Appellants provided the district court with compelling evidence of the existing difficulties that they and all the Navajo voters residing on the Navajo Nation Reservation encountered and will encounter with the mail system and the discriminatory tactics employed by the State of Arizona in an attempt to limit the votes of Native Americans. (ER094-096). Mail delivery takes longer at Navajo Nation postal locations than off-Reservation postal locations. (ER033-034) Navajo Nation postal locations cover 681 square miles while postal locations in Scottsdale, for example, cover 15.33 square miles, with the Navajo Nation postal locations covering 4,440% more area than those in Scottsdale. (ER035). The district court recognized that Appellants "showed that a Scottsdale voter that requests a ballot on October 23 has nine days to consider their ballot, while a Dennehotso voter does not have enough time to mail their ballot at all." (ER005). In light of these realities—which the district court did not dispute or reject—Appellants have alleged facts illustrating why the receipt deadline lessens their opportunity to vote as compared with non-minority voters, a classic injury-in-fact under Section 2.

Furthermore, the Appellants clearly have standing to have their votes counted. Appellee may not like Appellants' requested remedy, however, the remedy

specifically redresses harm to Appellants. Whether or not additional Members of the Navajo Nation are able to obtain redress through the requested remedy as well, is irrelevant. That question does not impact Standing. Last, Appellants have a right to vote in this election, and under the law, they do not have to prove that they have been denied a right to vote in the past. Appellants have shown that, without a change in the receipt deadline, they may be denied their right to vote in this election.

B. Appellants' Injury is Fairly Traceable to Appellee's Decision to Apply the Vote By Mail Receipt Deadline.

As Appellee acknowledges, "the difficulty of timely ballot return" under the Vote By Mail deadline follows from factors including "the hardship of traveling on the Navajo reservation, the Covid-19 pandemic, and recent policy changes to USPS operations." Opp. at 9. As discussed above, those realities also include the long history of active discrimination as well as ongoing conditions like generally slower mail receipt and delivery, limited access to mail services, fewer in-person polling places serving geographically enormous areas, and poor transportation infrastructure. While Appellee cannot singlehandedly fix the roads and supply more mailboxes, Appellee can implement and enforce an extension of the Vote By Mail receipt deadline, which would narrow the voting-opportunity gap faced by Appellants. Appellants' injury is directly traceable to Appellee's adherence to the existing Deadline.

C. Appellants' Injury Can Be Corrected by Extension of the Deadline.

The last factor of the *Lujan* analysis requires that Appellant demonstrate that the injury can be redressed. In this case, Appellants have asserted that the Vote By Mail receipt deadline creates a disparate burden on Native Voters because they have diminished opportunity to meet that deadline as compared to other non-minority voters in Arizona. Appellants seek to extend the receipt deadline for ballots, mailed on the Navajo Nation Reservation so that all such ballots post marked by Election Day and received by November 13, 2020 must be counted. This date is based squarely on the Appellants' evidence that delivery times for mail from the Navajo Nation Reservation can take up to 10 days to be processed and arrive at the county recorder's office. This requested relief being sought herein is therefore tailored to specifically redress Appellants injury. Appellants have satisfied the *Lujan* standard, and Appellee's standing arguments should be rejected.

II. APPELLANTS DID NOT UNREASONABLY DELAY

A. There is no *Purcell* Violation

Appellants take issue with Appellee's attempt to resolve an outstanding Motion to Dismiss, within the framework of this Appeal. This includes her assertion that this Appeal and the underlying Complaint, is barred by the holding in *Purcell v.*

Gonzalez, 549 US 1 (2006) (*per curiam)*. The *Purcell* case does not bar this action. The U.S. Supreme Court in *Purcell* indicated that it clearly disfavored last-minute election Complaints and cautioned against changing the outcome of an election. *Purcell*, 549 US at 4-5. However, the *Purcell* holding in no way precludes the instant action from proceeding. *Purcell's* fundamental goal is to prevent late-breaking court decisions from causing "voter confusion and consequent incentive to remain away from the polls." *Id*.

Specifically, this Court held that the *Purcell* doctrine does not apply to cases seeking an extension of election deadlines because the Appellants remedy is simply "asking [election] officials to continue applying the same procedures they have in place now, but for a little longer." *Arizona Democratic Party v. Hobbs*, No. CV-20-01143-PHX-DLR, 2020 WL 5433898, at *13 (D. Ariz. Sept 10, 2020). That logic applies with force here; affected voters will be empowered, not confused.

In footnote 2 of its Order, the district court took issue with the fact that Arizona's Vote By Mail system has been in place for 23 years, however this does not create a laches bar. The laches doctrine bars claims when there is "unreasonable delay" in bringing the suit that "prejudices the opposing party or the administration of justice." *Arizona Libertarian Party v. Reagan*, 189 F. Supp. 3d 920, 922 (D. Ariz. 2016) (internal citations omitted). "To determine whether delay was unreasonable, a court considers the justification for the delay, the extent of the plaintiff's advance

knowledge of the basis for the challenge, and whether the plaintiff exercised diligence in preparing and advancing his case." *Id*. at 923. Indeed, despite the district court's commentary, it did not rule that there was any laches on the part of Appellant. Frankly, it is the Appellants' position that all forms of voting in Arizona violate Section 2 of the VRA for Native Americans on the Navajo Nation Reservation. Specifically, the State of Arizona offers three ballot systems to be utilized in the general election: Election Day In-Person Polling Place, In-Person Early Voting Polling Place and Vote By Mail. Appellants believe that none of these voting systems are equal for Navajo Nation Members. However, the State of Arizona and its counties are *still* in the process of determining polling locations, polling box locations and other critical election system decisions. (ER028-032). Appellants can hardly be barred from asserting their Section 2 claim based on laches, when Appellee has still not yet finalized or made available to the voters, such vital information on polling accessibility. Appellants' filing, while clearly time sensitive, was necessitated by Appellee's own failure to adequately prepare for the general election. But for the fact that so much necessary and vital information has yet to be made public, Appellants' complaint would have included more than the Vote By Mail challenge. To wait any longer would have truly required the filing of a (disfavored) eleventh-hour Complaint. There was no unreasonable delay on the part of Appellants.

B. The County Recorders are Not Necessary Parties

Appellee's assertion that Appellants' suit fails without the inclusion of the County Recorder as party is patently false. As Secretary of State for the State of Arizona, Appellee is the chief elections officer and in that capacity, she is responsible for supervising and issuing directives concerning the conduct of all elections in the state. A.R.S. § 16-142. Challenging Appellants Appeal on the basis that the County Recorders should have been included as parties misrepresents the Office of the Secretary of State.

III. APPELLANTS ARE LIKELY TO SUCCEED ON THEIR CLAIM THAT THE RECEIPT DEADLINE IS A DISPARATE BURDEN ON THEIR RIGHT TO VOTE.

A. Native Americans Face Greater Challenges Based on their Race.

Appellants, being Members of the Navajo Nation residing on the Reservation, face greater challenges in exercising their right to vote compared to other non-minority voters in Arizona. The district court premised its decision on the mistaken view that the burdens faced by Appellants because of the receipt deadline should be compared to the burdens faced by rural non-minority voters, which is inapposite. However, the proper analysis under Section 2 of the Voting Rights Act entails comparing the burdens faced by Appellants with those experienced by other non-minority voters in the State of Arizona generally, not just a specific sub-group.

The only viable conclusion of that comparison is that Native American voters face greater challenges purely because of their race.

The first step in the analysis evaluates whether a disparate burden exists under Section 2 when "'as a result of the challenged practice or structure[,] plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice.'" *Hobbs*, 948 F.3d at 1012 (*quoting Thornburg v. Gingles*, 478 U.S. 30, 44 (1986)).

The evidence presented by Appellants was consistent with the evidence presented in *Hobbs*. This evidence included specifics on the difficulties faced as Members of the Navajo Nation living on the Reservation, and the difficulties experienced when trying to Vote By Mail under the Arizona election system which imposes an election day ballot receipt deadline. (ER094-096). The district court recognized these difficulties and noted in its order that certified first-class mail sent from the reservation took, on average, between four to ten days to reach the county recorder's office when compared to only one to two days for similar mail traveling from off-reservation cities (ER004). Additionally, the district court recognized that "it is difficult for many Navajo Nation members to access the postal service because of lack of home mail delivery, the lengthy distance it takes to get to the post office on-reservation, and the fact that many Navajo Nation members have insufficient funds to travel to a post office." (ER005). However, despite its acknowledgment of

these peculiar difficulties, the district court nonetheless determined that such facts and evidence were insufficient to show that the Appellants faced a disparate burden. (ER005). The district court reasoned that that Appellants should have compared mailing experiences between the Navajo Reservation and other rural areas of Arizona.

In requiring this comparison of the Members of the Navajo Nation living on the Reservation to other non-minority rural voters, the district court impermissibly narrowed the disparate burden analysis, This flawed like-to-like comparison conducted by the district court ignored not only the test, but the purpose underlying it. "Section 2 of the VRA 'prohibits all forms of voting discrimination that lessen opportunity for minority voters.'" *Hobbs*, 948 F.3d at 1011 (*quoting League of Women Voters of N. Carolina*, 769 F.3d, at 238 (internal quotes omitted)). The outcome does not turn on whether minority voters enjoy less opportunity than similarly situated non-minority voters or some other subset of the electorate. The correct points of comparison are the affected minority group and non-minority voters. The evidence presented by Appellants showed the greater challenges faced by Native American voters in comparison to the majority of non-minority voters in Arizona who do not live on reservations. Section 2 of the VRA requires that the protected voters have the same "opportunities" as all other non-minority voters in their county and state. This requirement cannot be defeated by comparing the Tribal

Member voters to other non-minority rural voters, that comparison is barred by Section 2 of the VRA.

B. The Vote By Mail Receipt Deadline is Discriminatory

Once a disparate burden has been found, the next step is to determine whether the practices that result in the Section 2 violation create liability. *See Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 595 (9th Cir. 1997). A violation exists if, based on the totality of the circumstances, there is a causal connection between the challenged voting practice and a prohibited discriminatory result. *See Gonzalez v. Arizona*, 677 F.3d 383, 405-06 (9th Cir. 2012) (totality of circumstances standard used to determine whether unequal access interacts with "past and present reality" to depress political participation); *Smith*, 109 F.3d at 595-96 (reviewing the district court's findings in light of the totality of circumstances). The election day receipt deadline creates an unequal voting opportunity between the Appellant Navajo Nation residents and non-minority voters in Arizona for all of the reasons evidenced by Appellants.

While the district court's order recognized the problems Navajo Nation Members face when utilizing the mail system, it did not find such evidence persuasive. To the contrary, the district court reasoned that there remained the potential for the Appellants to utilize other methods of voting and so there was no violation of Section 2. This analysis should not have impacted the district court's

decision and does not preclude a finding of a Section 2 violation under the controlling caselaw. Moreover, the district court's analysis puts the onus on the minority voter to take any step available rather that to have the equal opportunities as described under Section 2, thus perpetuating the discriminatory result.

C. When the Senate Factors Are Analyzed Properly, the Result Substantiates A Violation of Section 2 and Preliminary Injunction is Appropriate.

Had the district court properly determined that the minority Appellants faced a disparate burden in that they had less opportunities to vote under the Arizona Vote By Mail System, *and* that its stated receipt deadline created the unequal voting opportunities, the next step should have been an analysis of the totality of the circumstances to determine whether the challenged voting practice caused a prohibited discriminatory result. *Gonzalez*, 677 F.3d at 405-406. At this point the district court should have evaluated the discriminatory practice in light of the "Senate Factors" to determine whether these circumstances supported Appellants' allegation and which resulted in Native-American voters living on the Navajo Reservation having less opportunity than non-minority voters to participate in the political process. *Gonzalez*, 677 F.3d at 405-406 (identifying Senate Factors 1 and 5 as relevant circumstances to consider in a vote denial case). The Senate Factors are guidelines to be utilized when evaluating the second prong of the Section 2 test.

These factors can be applied not only in the consideration of the relevant jurisdiction's conduct but also that of other governmental entities as well as private individuals. *See, e.g., Gingles*, 478 U.S. at 80; *cf. White v. Regester*, 412 U.S. 755, 765-70 (1973). These Senate Factors should have been used by the district court in its evaluation of whether the challenged practice, in light of current social and political conditions in the jurisdiction, result in a discriminatory denial or abridgement of the right to vote by creating a reduced opportunity for the allegedly affected group to participate in the political process relative to other voters.

Of the various factors, Senate Factors One (history of official discrimination), Five (the effects of discrimination in other areas on minorities access to voting) and Eight (lack of responsiveness to the minority group) are particularly important. These factors combine to evidence the discriminatory result, rooted in historic restrictions and discriminations against the Native Americans living in Arizona. Though "not essential," *Gingles*, 478 U.S. at 48 n. 15, the other factors provide "helpful background context." *Ohio State Conf. of the NAACP v. Husted*, 768 F.3d 524, 555 (6th Cir. 2014).

The *Amicus Curiae* brief filed herein by the League of Women Voters of Arizona sets forth a detailed analysis of the applicable Senate Factors on pages 15-21 of its Brief in Support of Appellants. Without duplicating the majority of the

arguments contained therein, Appellants directs the Court's attention to the salient arguments directed to the Senate Factors.

Senate Factor One or history of official discrimination, is particularly strong in the State of Arizona. Arizona officials have a long history of restricting the rights of Tribal Members, denying citizenship, restricting the ability to register to vote, vote or otherwise participate in the democratic process. Notwithstanding the passage of the Indian Citizenship Act in 1924, 8 U.S.C. § 1401(b), states including Arizona continued to discriminate against Indians by denying them the right to vote in state and federal elections through the use of poll taxes, literacy tests, and intimidation. The Arizona Supreme Court upheld vote prohibitions finding that Indians living on reservations could not vote because they were wards of the federal government and, as such were "persons under guardianship" and thereby prohibited from voting in Arizona. *Porter v. Hall*, 34 Ariz. 308, 331-332, 271 P. 411, 419 (Ariz. 1928).

Senate Factor Five evaluates the effects of discrimination in other areas on minorities access to voting. Arizona first implemented its Vote By Mail system in 1998 and currently, approximately 80 percent of all Arizonans receive their ballot and vote by mail. However, the Vote by Mail system breaks down in Indian Country because of poverty, housing instability/homelessness, poor accessibility to mail services in addition to the lack of physical address for election materials to be mailed.

Other barriers including language limitations exist as well. Obtaining Vote By Mail ballots is a significant problem for Native American voters. Similar problems were well documented and evidenced in the *Hobbs* case. Hobbs, at 24.

Finally, the Eighth Senate Factor, or lack of responsiveness to the minority group, is of particular interest in the case of Appellee. Appellee has asserted that past practices should not be held against her and that Arizona no longer conducts itself in that manner. However, it is also instructive that as recently as 2018, the Navajo Nation was forced to file a lawsuit against the State when Arizona refused its request for In-Person voter registration site and In-Person early voting sites. It is therefore disingenuous for the Defendant to claim that Arizona's discriminatory tactics are no longer in practice. The evidence is strong that current and past voting practices utilized in Arizona discriminate against Tribal Members.

Therefore, when evaluating the impact of the Vote By Mail ballot receipt deadline on Appellant minority voters, the totality of the circumstances tips heavily in favor of the Appellants. Appellants met their burden and were entitled to preliminary injunction.

IV. THE COURT SHOULD NOT WAIT BASED ON SPECULATION.

After strenuously arguing that Appellants' claim should be barred because they unnecessarily delayed, Appellee, only a few pages later, suggests that

this Court further delay this process to wait for the U.S. Supreme Court to proceed with its calendar. That is not reasonable.

Specifically, Appellee argues "[t]his Court should consider holding the appeal pending resolution of the *Brnovich* proceedings in the Supreme Court." Opp. Pages 33-34. The *Brnovich* proceedings will not be heard until well after the election and Appellee is aware of that. There is legal precedent that guides this Court right now. This Court clearly delineated the Section 2 test for vote denial claims in *Democratic Nat. Comm. v. Hobbs*, 948 F.3d 989, 1012 (9th Cir. 2020), *cert. granted sub nom*; *Ariz. Republican Party v. Democratic Nat. Comm.*, No. 19- 1258, 2020 WL 5847129 (U.S. Oct. 2, 2020), *cert. granted sub nom*. *Brnovich v. Democratic Nat. Comm.*, No. 19-1257, 2020 WL 5847130 (U.S. Oct. 2, 2020) (*quotations omitted*). This Court has historically applied the Section 2 abridgement test in a manner that is consistent with the United States Department of Justice's own enforcement actions and policies. (ER011-027). Thus, it is proper for this Court to follow its well-established precedent rather than holding the instant appeal. Furthermore, to hold this action in abeyance, based on speculative changes to the law, ignores the urgency of Appellants' case.

CONCLUSION

The Appellants have detailed the errors made by the district court in denial of preliminary injunction, the foundation of which is its failure to properly apply the legal test for a Section 2 abridgment claim under the Voting Rights Act. Based on these errors, this Court should reverse the district court's order denying preliminary injunction, find that Appellants are likely to succeed on the merits of their action based on the correct legal standard applicable to Section 2 claims, and remand for further proceedings.

Date: October 8, 2020

Respectfully Submitted

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Attorney for Appellants Darlene Yazzie, Caroline Begay, Leslie Begay, Irene Roy, Donna Williams and Alfred McRoye

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,021 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word Times New Roman 14-point font.

Date: October 8, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on October 8, 2020 I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: October 8, 2020

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