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12
13 **UNITED STATES DISTRICT COURT**
14 **DISTRICT OF ARIZONA**

15 Darlene Yazzie; Caroline Begay; Leslie
Begay; Irene Roy; Donna Williams; and
16 Alfred McRoye,

17 Plaintiffs,

18 v.

19 Katie Hobbs, in her official capacity as
20 Arizona Secretary of State,

21 Defendant.

) No. CV-20-08222-PCT-GMS
)
)

) **DEFENDANT ARIZONA**
) **SECRETARY OF STATE’S**
) **CONSOLIDATED MOTION TO**
) **DISMISS**

) **-AND-**
)

) **RESPONSE TO PLAINTIFFS’**
) **EMERGENCY MOTION FOR**
) **PRELIMINARY INJUNCTIVE AND**
) **DECLARATORY RELIEF**
)

22
23 **INTRODUCTION**

24 Mere weeks before the November 3, 2020 General Election, Plaintiffs—six
25 members of the Navajo Nation¹—seek the extraordinary remedy of a federal injunction

26 ¹ The Navajo Nation is not a party to this lawsuit. In fact, the Navajo Nation has demanded
27 that Plaintiffs’ supporters cease and desist from making any statements to suggest that the
28 Navajo Nation is in any way involved in this action. *See* Apr. 28, 2020 letter from the
Navajo Nation to Four Directions, Inc., attached as **Exhibit A**.

1 to alter Arizona’s Election Day ballot-return deadline, as applied to them and other
2 similarly-situated Navajo individuals. The relief sought is nearly identical to the relief
3 sought in late 2019 in *Voto Latino Foundation v. Hobbs*, 2:19-cv-05685-DWL, which
4 resulted in a settlement agreement affirming the Election Day ballot-return deadline and
5 requiring extensive education and outreach to Arizona voters regarding the same.
6 Plaintiffs’ lawsuit undermines the work of that settlement, but in any event fails under
7 Federal Rule of Civil Procedure 12(b) and, for largely the same reasons, Plaintiffs also do
8 not make the required showing to warrant injunctive relief.²

9 As a threshold matter, Plaintiffs’ complaint should be dismissed under Rules
10 12(b)(1), (b)(6), and (b)(7) of the Federal Rules of Civil Procedure. Primarily, Plaintiffs
11 do not have standing to sue in federal court. Moreover, Plaintiffs’ eleventh-hour request
12 to alter the ballot-return deadline flouts the principles outlined in *Purcell v. Gonzalez*, 549
13 U. S. 1 (2006) (per curiam). Along the same lines, their last-minute request for relief is
14 barred by the doctrine of laches.

15 More fundamentally, though, Plaintiffs fail to state a claim for relief on each of their
16 constitutional and statutory causes of action. Plaintiffs fail to muster competent support for
17 their claim that the Election Day deadline results in a discriminatory burden on Navajo
18 Nation voters in violation of Section 2 of the Voting Rights Act. Nor do they set forth a
19 legally significant relationship between the Election Day deadline and the social and
20 historical conditions of Navajo Nation members as required to state a claim for relief.
21 Plaintiffs’ federal civil rights and state constitutional claims also fail to state a claim. The
22 Court should thus dismiss Plaintiffs’ action under Rule 12 based on any of these grounds.

23 The Court should also deny Plaintiffs’ motion for a preliminary injunction because
24 Plaintiffs fail to show that they are entitled to preliminary injunctive relief. *First*,
25 Plaintiffs cannot establish a likelihood of success on any of their claims for the same
26 reasons that their claims warrant dismissal outright.

27
28 ² A certificate of consultation required by Local Rule 12.1(c) is attached as **Exhibit B**.

1 1131 (9th Cir. 2011). Rather, “a plaintiff seeking a preliminary injunction must establish
2 that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the
3 absence of preliminary relief, that the balance of equities tips in his favor, and that an
4 injunction is in the public interest.” *Winter*, 555 U.S. at 20.

5 A federal court should be particularly wary of harnessing its injunctive powers to
6 enjoin a sovereign state’s enforcement of its election deadlines on the eve of a general
7 election. The Supreme Court has reminded lower courts of this rule several times this
8 very year. *See, e.g., Republican Nat’l Comm. v. Democratic Nat’l Comm.*, 140 S. Ct.
9 1205, 1207 (2020) (“This Court has repeatedly emphasized that lower federal courts
10 should ordinarily not alter the election rules on the eve of an election.”) (citing cases).
11 Plaintiffs’ request to alter Arizona’s statutory Election-Day ballot-return deadline runs
12 afoul of these recent rulings.

13 ANALYSIS

14 **I. Plaintiffs’ Complaint Should Be Dismissed Under Rule 12(b).**

15 **A. Plaintiffs lack standing because their alleged injuries are speculative, 16 and are not caused by, and cannot be redressed by, the Secretary.**

17 At the preliminary injunction stage, plaintiffs must make a clear showing of each
18 element of standing to sue in federal court under Article III of the Constitution. *Townley*
19 *v. Miller*, 722 F.3d 1128, 1133 (9th Cir. 2013). A plaintiff seeking to establish standing
20 must demonstrate, in turn, that (1) it has suffered an ‘injury in fact’ that is (a) concrete
21 and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the
22 injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as
23 opposed to merely speculative, that the injury will be redressed by a favorable decision.”
24 *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC) Inc.*, 528 U.S. 167, 180–81,
25 (2000) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)). Plaintiffs
26 cannot satisfy any of these three prerequisites for federal court jurisdiction.

1 **1. Plaintiffs merely speculate that their votes will not be counted**
2 **under the election-day return deadline.**

3 Nowhere in their complaint do Plaintiffs explain why they are likely to suffer the
4 injury of their votes not being counted. Instead, they catalogue a variety of circumstances
5 that they argue make it statistically more difficult for Navajo Nation members, in general,
6 to return their ballots by mail. But absent specific allegations about why they *themselves*
7 will not be able to obtain and return a mail-in ballot by the election-day deadline, Plaintiffs
8 offer only hypothetical, generalized grievances—not the kind of concrete, particularized,
9 and imminent harms required to show injury-in-fact under Article III.

10 All that Plaintiffs tell us about themselves in their complaint and motion for a
11 preliminary injunction is that they are enrolled members of the Navajo Nation who live
12 on the reservation, and who are registered voters who “desire to participate in the electoral
13 and political processes of Arizona on an equal basis with non-Indian voters.” [Doc. 1
14 ¶¶ 2–7; *see also* Doc. 9 at 1]. Right away, these allegations (even taken to be true)³ are
15 facially insufficient to establish any cognizable injury-in-fact. Plaintiffs do not once
16 express their intent to vote in the 2020 General Election, let alone to do so by mail, nor
17 do they allege they have submitted a request to receive a ballot by mail. Without knowing
18 these basic details, the Court is forced to guess whether Plaintiffs would even actually
19 vote, setting aside the separate, critical question of whether they will experience any
20 cognizable injuries from not having their votes counted due to the Election Day ballot-
21 return deadline. This kind of speculation is decidedly not the kind of “concrete” and
22 “imminent” injury that can form the basis of a federal action—it amounts instead to
23 impermissible “‘conjectural or hypothetical’” harm. *Spokeo v. Robbins*, — U.S. at —,
24 136 S. Ct. 1530, 1548 (2016) (quoting *Lujan*, 504 U.S. at 560). Indeed, the Supreme
25 Court has explained that even mere allegations of “‘some day’ intentions—without any
26 description of concrete plans, ...—do not support a finding of the ‘actual or imminent’

27 _____
28 ³ The Secretary has been unable to confirm, among other facts, that Alfred McRoye is a
registered Arizona voter.

1 injury that our cases require.” *Lujan*, 504 U.S. at 564. Plaintiffs have offered far less
2 than even that here.

3 Plaintiffs attempt to paper over the glaring deficiencies in their complaint by
4 spending the bulk of their pleadings cataloguing various geographic, demographic, and
5 socio-economic characteristics of the Navajo Reservation that they imply make it
6 generally more difficult for Navajo Nation members to return their ballot by mail. [*See*,
7 *e.g.*, Doc. 1 ¶ 68 (explaining that isolation on the reservation due to physical features such
8 as mountains, canyons, rivers and vast expenses of unoccupied land is compounded by
9 the lack of paved roads); *id.* ¶ 55 (contending that the poverty rate on the reservation is
10 38%, twice the poverty rate in the State of Arizona); *id.* ¶ 26 (alleging that there is only
11 one Post Office for every 707 square miles on the reservation); *id.* ¶ 63 (explaining that
12 Navajo members on the reservation often lack reliable transportation to travel the vast
13 distances to election offices and post offices); *id.* ¶¶ 71 (claiming that voting by mail
14 breaks down in Indian Country because of housing instability/homelessness and lack of
15 physical address where election materials may be mailed)] They repeat many of these
16 contentions in their motion for a preliminary injunction. [*See, e.g.*, Doc. 9 at 3, 11, 13]

17 To be sure, Plaintiffs never claim that *they* are isolated from Post Offices, lack
18 reliable transportation, or are homeless. Nor do they contend that other unavoidable
19 circumstances or personal characteristics (like a disability, limited English proficiency,
20 poverty, or other limitations) will prevent them from returning a mail-in ballot well in
21 time to meet the current deadline. Rather, they imply that the particular geographic,
22 socio-economic, and demographic features of the Arizona Navajo Reservation make it
23 more likely that the “typical” tribal member will have fewer days to complete and return
24 a ballot to arrive by the Election Day deadline, Doc. 9 at 2, implying that there is a greater
25 likelihood that Navajo voters’ ballots in general will not be counted. But Plaintiffs cannot
26 satisfy the injury-in-fact requirement simply by alleging that “there is a statistical
27 probability that some of [their] members are threatened with concrete injury.” *Summers*
28 *v. Earth Island Institute*, 555 U.S. 488, 497 (2009). Without any explanation of the

1 specific impediments to Plaintiffs’ ability to timely obtain and return mail-in ballots by
2 the deadline, their complaint collapses into a collection of generalized grievances about
3 the difficulties of ensuring regular mail delivery and collection on the Navajo reservation.
4 A generalized grievance, however, is an inappropriate injury on which to base a federal
5 claim. *See Planned Parenthood of Greater Wash. & N. Idaho v. U.S. Dep’t of Health &*
6 *Human Servs.*, 946 F.3d 1100, 1108 (9th Cir. 2020).

7 In sum, it is unclear whether Plaintiffs will suffer any cognizable, redressable
8 harms on November 3, 2020, regardless of which ballot-return deadline is in effect.
9 Because Plaintiffs fail to present more than generalized circumstances, as legitimate as
10 those circumstances may be, the Court would be forced to manufacture a theoretical
11 plaintiff from whole cloth to rule in their favor. This exercise would require it to imagine
12 contingency upon contingency—that the plaintiff will want to vote by mail, that they will
13 register to receive their mail-in ballot in a timely fashion, but that they will not be able to
14 complete and return their ballot in advance of Election Day due to circumstances outside
15 their control, or that they lack access to a mailbox or adequate transportation to a Post
16 Office to be able to return their ballots with a sufficient cushion to meet the deadline, or
17 that the Postal Service will be so unreliable as to likely frustrate their best efforts to vote
18 by mail. But such an injury resting “on a highly attenuated chain of possibilities” is
19 unduly speculative. *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 410 (2013). What’s
20 more, this kind of conjectural dispute is exactly antithetical to Article III’s “limitation of
21 federal-court jurisdiction to actual cases or controversies.” *DaimlerChrysler Corp. v.*
22 *Cuno*, 547 U.S. 332, 341 (2006). Plaintiffs have not demonstrated they will suffer a
23 concrete and imminent injury; they have no standing.

24 **2. Any injuries that plaintiffs may experience are a consequence**
25 **of Postal Service operations in a pandemic, or other exogenous**
26 **circumstances over which the Secretary has no control.**

26 Plaintiffs fail to satisfy the second element of standing—causation—because the
27 face of their complaint attributes their injuries to factors outside the Secretary’s control.
28 The Supreme Court has been averse to embracing causation “theories that rest on

1 speculation about the decisions of independent actors.” *Clapper*, 568 U.S. at 414.
2 Plaintiffs thus cannot establish that their injuries are “fairly traceable” to the Secretary,
3 which is required to meet the “irreducible constitutional minimum” of standing to proceed
4 in this forum. *Spokeo*, 136 S. Ct. at 1547.

5 Plaintiffs trace the difficulty of timely ballot return to various circumstances other
6 than those the Secretary has the power to change—the hardship of travelling on the
7 Navajo reservation, the Covid-19 pandemic, and recent policy changes to Post Office
8 operations to name a few examples. *See, e.g.*, Complaint ¶¶ 33, 37, 39-40, 61-62; *see*
9 *also* Doc. 9 at 2, 11, 13. None of these issues is “fairly traceable” to the Secretary or her
10 duty to uphold the Election Day ballot-return deadline.

11 A simple hypothetical illustrates this point: Suppose the Secretary were to change
12 the deadline to a postmark deadline. This would have no impact on the ability of Navajo
13 Nation members to access a mailbox or Post Office, or on the ease or frequency with
14 which mail can be delivered and collected. A voter on the Navajo reservation could face
15 the same risk that their ballot would not be counted because of Post Office delays in
16 collection schedules if they were to place their ballots in a mailbox, and the same
17 difficulties in traveling to a Post Office, were they able to travel. And the Plaintiffs do
18 not explain how many of them would only be able to return their mail-in-ballots during a
19 window that will prevent them from complying with the current deadline, but allow them
20 to meet a postmark deadline. Thus, the Plaintiffs’ harms are not fairly traceable to the
21 Secretary’s actions.

22 **3. Plaintiffs’ requested relief will not eliminate—and may even**
23 **exacerbate—the hardship experienced in their voting efforts.**

24 Plaintiffs’ injuries are not redressable for two reasons. For one, they have not
25 named indispensable defendants, so the relief they seek cannot be effectuated in any
26 meaningful way. More problematic for them is that their requested relief will not
27 eliminate their claimed underlying hardship in their efforts to vote, which is the gravamen
28

1 of their complaint; indeed, a postmark deadline may very well result in fewer Navajo
2 votes being tallied.

3 As a preliminary matter, issuing an injunction against the Secretary, as Plaintiffs
4 request, is insufficient. [*See* Doc. 1 at 26 (asking the Court to order the Secretary “to
5 count [vote-by-mail] ballots cast by Tribal Members living on the reservation”); Doc. 9,
6 at 1 (same)] The County Recorder—not the Secretary—is the relevant government
7 official responsible for accepting and counting mail-in ballots. A.R.S. §§ 16-548; 16-
8 550. Plaintiffs’ failure to name as defendants all county recorders, or at least the Apache,
9 Navajo, and Coconino County Recorders (because Plaintiffs only seek a change in the
10 law for some voters in some counties) renders their claims non-redressable. *Carroll v.*
11 *Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003) (holding that injury was not redressable
12 where plaintiffs failed to name the United States as a party despite knowing at the outset
13 of the litigation that the government’s participation was required). It also provides
14 grounds to dismiss Plaintiffs’ claims under Federal Rule of Civil Procedure 12(b)(7) for
15 failure to join indispensable parties. *Schnabel v. Lui*, 302 F.3d 1023, 1029 (9th Cir. 2002).

16 Plaintiffs’ requested relief suffers from more fundamental flaws. Merely changing
17 the mail-in ballot deadline to a postmark deadline will not eliminate the risk that Navajo
18 ballots will not be accepted and counted in a timely manner. For one, the Post Office
19 does not habitually postmark mail-in ballots. [Declaration of Patty Hansen (“Hansen
20 Decl.”) ¶ 4, attached as **Exhibit C**] As pre-paid mail, mail-in ballots are not required to
21 be postmarked, and many of them are not. [*Id.*] Indeed, the Post Office often expressly
22 forgoes procedures such as postmarking in order to expedite ballot delivery. [*Id.*] Nor
23 do the Plaintiffs explain how many of them (or how many other Navajo Nation members)
24 will likely only be able to return their mail-in-ballots during a window that will prevent
25 them from meeting the current deadline, but allow them to satisfy a hypothetical postmark
26 deadline. The risk that Navajo mail-in ballots will not arrive in time to be counted is
27 fundamentally a consequence of irregular Postal Service operations on the Navajo
28 reservation and the difficulties of managing a vote-by-mail program during a global

1 pandemic. Accordingly, shifting the ballot deadline to give Plaintiffs additional days to
2 return their ballots will not remedy the underlying circumstances that will affect mail-in
3 voters on the Navajo reservation no matter what the deadline is. Thus, Plaintiffs’
4 proposed remedy will not result in a “‘substantial likelihood’ that the requested relief will
5 remedy the alleged injury.” *Vermont Agency of Nat. Res. v. United States ex rel. Stevens*,
6 529 U.S. 765, 771 (2000).

7 Worse still, the Plaintiffs’ requested remedy may very well *reduce* the number of
8 Navajo ballots that will be counted. Individuals who might otherwise have made efforts
9 to mail back their ballots well in advance of Election Day might be swayed by a postmark
10 deadline into delaying the planned return of their ballots. Any interruptions or delays in
11 mail collection in the few days before November 3, 2020 could thus affect a larger share
12 of Navajo ballots than would otherwise have returned their ballots in time.

13 Moreover, Plaintiffs do not explain how their proposed deadline would interact
14 with the statutory signature cure period. *See* Ariz. Rev. Stat. § 16-550(A). Under this
15 procedure, county recorders verify voters’ signatures, which may change over time due
16 to age or illness. [Hansen Decl. ¶ 6] Where a signature discrepancy is identified, county
17 recorders contact voters and, for a general election, provide them with a five-day period
18 in which to correct or confirm their signature. [*Id.*] Were a postmark deadline to be
19 enforced, ballots that would have otherwise been allowed a five-day cure period may be
20 rejected out of hand.

21 Finally, there is no established procedure for how ballots received after Election
22 Day should be processed. Currently, counties employ Early Boards to process mail-in
23 ballots, but those boards are typically discharged two days before the election. [*Id.* ¶ 7]
24 Plaintiffs do not ask that early board service be extended past Election Day, but even if
25 they did, it is not clear that remedy is feasible, where it would consume resources that
26 would otherwise be devoted to canvassing duties. [*Id.* ¶¶ 7, 9]

27 For these reasons, any injuries that Plaintiffs may suffer under the current Election
28 Day ballot-return deadline would not be redressed by an injunction against the Secretary

1 or the imposition of a postmark deadline. Because Plaintiffs fail to bring suit against the
2 proper officials and request a remedy that would likely exacerbate—not ameliorate—their
3 injuries, they cannot establish the third element of Article III standing.

4 **B. The *Purcell doctrine* warrants dismissal.**

5 In *Purcell v. Gonzalez*, the Supreme Court affirmed the cardinal rule that lower
6 federal courts should not alter election rules on the eve of an election. 549 U. S. 1, 5
7 (2006). As justification, the Court explained that lower “[c]ourt orders affecting
8 elections, ... can themselves result in voter confusion and consequent incentive to remain
9 away from the polls.” *Purcell*, 549 U.S. at 4–5. The Court observed the reality that such
10 a risk of voter confusion will only increase “[a]s an election draws closer.” *Id.*

11 The Supreme Court has repeatedly reaffirmed the *Purcell* doctrine, including
12 multiple times this year, particularly by way of staying lower-court injunctions. *See, e.g.*,
13 *Little*, No. 20A18, 2020 WL 4360897, at *2; *Raysor v. DeSantis*, No. 19A1071, 2020 WL
14 4006868, at *4 (U.S. July 16, 2020); *Republican National Committee*, 140 S. Ct. at 1207;
15 *Frank v. Walker*, 574 U.S. 929 (2014); *Veasey v. Perry*, 574 U. S. __ (2014). These cases
16 make clear that Plaintiffs’ requested injunction, issued mere weeks before an impending
17 General Election, would flout binding Supreme Court law.

18 In *Republican National Committee v. Democratic National Committee*, for
19 example, the Court granted a stay of a district court injunction changing absentee ballot
20 deadlines to “allow[] ballots to be mailed ... after Election Day.” 140 S. Ct. 1207. The
21 Court noted that by extending the absentee-ballot deadline and consequently prolonging
22 the public release of election results, the injunction changed the election rules “close to
23 the election date” and “in essence enjoined nonparties to this lawsuit.” *Id.* By doing so,
24 the Court concluded, the district court “contravened [the Supreme Court’s] precedents ...
25 repeatedly emphasiz[ing] that lower federal courts should ordinarily not alter the election
26 rules on the eve of an election.” *Id.*; *see also Little v. Reclaim Idaho*, No. 20A18, 2020
27 WL 4360897, at *2 (U.S. July 30, 2020) (Roberts, C.J., concurring in the grant of a stay)

28

1 (a district court’s injunction was “all the more extraordinary” for having “disable[d] [a
2 state] from vindicating its sovereign interest” in the enforcement of election laws).

3 Plaintiffs ask for relief that would have near-identical consequences to the orders
4 that the Supreme Court recently invalidated; an injunction in this case would extend
5 ballot-return deadlines “close to the election date” and possibly require nonparties to this
6 suit to take action. It would also prevent the State from enforcing its statutory ballot-
7 return deadline and will require election officials to scramble to adopt new signature-
8 verification procedures.

9 In sum, Plaintiffs’ requested injunction is all but expressly foreclosed by *Purcell*.
10 Dismissal under Rule 12(b)(6) is thus appropriate. *See, Godecke v. Kinetic Concepts,*
11 *Inc.*, 937 F.3d 1201, 1208 (9th Cir. 2019) (dismissal under Rule 12(b)(6) is appropriate
12 where plaintiffs fail to plead a viable cause of action); *UMG Recordings, Inc. v. Shelter*
13 *Capital Mgmt. Partners*, 718 F.3d 1006, 1014 (9th Cir. 2013) (“[d]ismissal can be based
14 on the lack of a cognizable legal theory”) (quoting *Balistreri v. Pacifica Police Dep’t,*
15 901 F.2d 696, 699 (9th Cir. 1988)).

16 **C. Plaintiffs’ claims are barred by the doctrine of laches.**

17 A federal court may dismiss a complaint based on laches where a plaintiff has
18 unreasonably delayed in bringing suit, and where continuing with the action would
19 prejudice a defendant. *Jarrow Formulas, Inc. v. Nutrition Now, Inc.*, 304 F.3d 829, 838
20 (9th Cir. 2002); *see also Sams v. Yahoo! Inc.*, 713 F.3d 1175, 1179 (9th Cir. 2013)
21 (explaining that a court may properly consider the assertion of an affirmative defense on
22 a motion to dismiss where the “allegations in the complaint suffice to establish”
23 entitlement to the defense).

24 Both elements of laches are satisfied here. To evaluate whether Plaintiffs have
25 unreasonably delayed in bringing suit, the Court must look to “the length of delay, which
26 is measured from the time the plaintiff knew or should have known about its potential
27 cause of action,” and assess the reasonableness of the period of inaction. *Jarrow*, 304
28 F.3d at 838 (citing *Portland Audubon Soc’y v. Lujan*, 884 F.2d 1233, 1241 (9th Cir.

1 1989)). The current Election-Day ballot-return deadline has been the existing, governing
2 law in Arizona for 23 years and, in fact, was challenged in the *Voto Latino* case filed in
3 November 2019 and settled in June 2020. The geographic, demographic, and socio-
4 economic conditions of the Navajo reservation have not changed recently. And Plaintiffs
5 have known about the Covid-19 pandemic and its potential effects on election
6 administration for months. Yet they filed their complaint and moved for injunctive relief
7 weeks before the General Election. The unreasonable delay from this conduct is self-
8 evident.

9 The Secretary will undoubtedly be prejudiced if this suit were to continue. The
10 Secretary is currently preparing for the rapidly-approaching General Election, and is
11 immersed in the work of coordinating statewide election preparations in the midst of a
12 global pandemic. This litigation will distract from her efforts to conduct an orderly
13 election, and may frustrate her efforts if the mail-in ballot-return deadline is changed to a
14 postmark deadline. This is not to say that the Secretary has not devoted time or attention
15 to assist Navajo voters. In fact, the Secretary of State's Office has engaged in targeted
16 outreach to assist Native voters. [Declaration of Sambo Dul ("Dul Decl.") ¶ 6, attached
17 as **Exhibit D**] Specifically, the Office has published and will be distributing an
18 AZVoteSafe Guide for Native American Voters, which highlights the Election Day
19 receipt deadline and encourages voters to drop-off their ballots at any voting location in
20 their county if they still have it on Election Day. [*Id.*] The Secretary of State's office also
21 secured \$1.5 million in funding to increase access to early voting and ballot drop-off
22 options in tribal and rural communities. [*Id.* ¶ 10] Those funds have been used to, among
23 other things, purchase close over 80 secure ballot drop boxes, 38 of which will be installed
24 in Coconino, Navajo, and Apache Counties, and rent mobile voter outreach and early
25 voting trailers/vehicles for use in tribal and rural communities, at the request of County
26 Recorders. [*Id.*] Litigating this case will only burden the Secretary and take away from
27 the considerable time and energy she has already expended to accommodate Plaintiffs.

28

1 **II. Plaintiffs fail to state any plausible claims.**

2 **A. Plaintiffs have failed to state a claim under Section 2 of the VRA.**

3 The “results test”⁴ of Section 2 of the Voting Rights Act involves a two-step
4 process. *Democratic Nat’l Comm. v. Hobbs (DNC)*, 948 F.3d 989, 1012 (9th Cir. 2020)
5 (en banc). The first step asks whether, as a result of a challenged practice, a protected
6 group lacks “equal opportunity to participate in the political processes and to elect
7 candidates of their choice.” *Id.* (cleaned up). “[T]he mere existence—or bare statistical
8 showing—of a disparate impact on a racial minority, in and of itself, is not sufficient.”
9 *DNC*, 948 F.3d at 1012 (cleaned up). Rather, step one requires “proof of a causal
10 connection between the challenged voting practice and a prohibited discriminatory
11 result.” *Gonzalez v. Arizona*, 677 F.3d 383, 405 (9th Cir. 2012) (en banc) (citation
12 omitted).

13 Plaintiffs allege that the “requirement that VBM ballots are to be received—rather
14 than postmarked—on or before Election Day, leads to the disenfranchisement of Navajo
15 Nation Tribal Members living On-Reservation when their overdue ballots are rejected,”
16 [Doc. 1 ¶ 42], but they fail to allege any facts in support of that conclusion. *Dean v. Allred*,
17 No. CV 13-1202-PHX-GMS, 2014 WL 231992, at *1 (D. Ariz. Jan. 22, 2014) (“The
18 principle that a court accepts as true all of the allegations in a complaint does not apply
19 to legal conclusions or conclusory factual allegations.”). While the complaint generally
20 alleges that mail service is slower on the reservation [Doc. 1 ¶¶ 21-31, 36, 40-41],
21 Plaintiffs do not allege that tribal voters’ ballots have been rejected for arriving past the
22 Election Day deadline at a higher rate than any other class of voters.⁵ In fact, they do not
23 allege that in *any* prior election—including the recent 2020 Presidential Preference and
24

25 ⁴ Plaintiffs do not allege that the Election Day deadline violates Section 2 under the
“intent test,” nor could they.

26 ⁵ The Ninth Circuit has declined to conclusively decide whether a facially-neutral policy
27 must affect more than a certain number of voters to violate step one of the results test, but
28 has assumed that “more than a de minimis number of minority voters” must be affected.
See DNC, 948 F.3d at 1015.

1 Primary Elections—even a *single* mail ballot cast by an on-reservation Navajo Nation
2 voter was rejected because it arrived past the deadline. Without these factual allegations,
3 Plaintiffs fail to state a claim that the Election Day deadline denies Navajo Nation voters
4 an equal opportunity to vote. Plaintiffs’ VRA claim should be dismissed.

5 **B. Plaintiffs fail to state an Equal Protection claim.**

6 Where, as here, a challenged election law is facially neutral, plaintiffs must prove
7 that a “racially discriminatory intent or purpose” was a “substantial or motivating factor”
8 behind the law. *Hunter v. Underwood*, 471 U.S. 222, 227–28 (1985). If plaintiffs do so,
9 then “the burden shifts to the law’s defenders to demonstrate that the law would have
10 been enacted without this factor.” *Id.* at 228; *Arlington Heights v. Metro. Hous. Dev.*
11 *Corp.*, 429 U.S. 252, 264–65 (1977).

12 “Proof of racially discriminatory intent or purpose is required to show a violation
13 of the Equal Protection Clause.” *Arlington Heights*, 429 U.S. at 265. The requisite
14 racially invidious intent may only be inferred from disproportionate impact and
15 disproportionate impact alone in the “rare” case where the pattern of disproportionate
16 impact is “stark,” “clear,” and “unexplainable on grounds other than race.” *Id.* at 266.

17 Plaintiffs’ undeveloped and conclusory allegations fall far short of meeting this
18 standard. Again, Plaintiffs have not alleged any facts to show that the Election Day
19 deadline results in a legally-significant discriminatory impact on Navajo Nation voters.
20 Plaintiffs’ speculative and conclusory allegation that the deadline “will have a significant
21 disparate impact on Tribal members’ voting power,” [Doc. 1 ¶ 45], is not sufficient. And
22 their failure to sufficiently plead a discriminatory impact by definition means that they
23 have also failed to allege that this is the “rare” case where this Court may infer the
24 required racially invidious intent from impact alone because the pattern of
25 disproportionate impact is *so* stark, clear, and “unexplainable on grounds other than race.”
26 *Arlington Heights*, 429 U.S. at 266.

27 Plaintiffs’ conclusory allegation [Doc. 1 ¶ 114] that the State has “no legitimate,
28 non-racial reason” for imposing the deadline need not be accepted as true, and is not

1 sufficient to save the Complaint. Plaintiffs’ generalized history of discrimination against
 2 Native Americans [¶¶ 57-97] likewise does not suffice; instead, Plaintiffs must show that
 3 *this* law was enacted with a racially discriminatory purpose or intent. *See, e.g., Hunter*,
 4 471 U.S. at 230–33 (examining the legislative history of particular disenfranchisement
 5 provision to conclude that the intent, at least in part, was to disenfranchise Black
 6 residents); *Arlington Heights*, 429 U.S. at 268 (explaining that the legislative or
 7 administrative history of the particular challenged law or decision “may be highly
 8 relevant,” especially contemporary statements by members, minutes, or reports).⁶

9 **C. Plaintiffs fail to state a claim under the Arizona Constitution.**

10 Plaintiffs allege that the Defendants “deprive Tribal Members equal elections by
 11 arbitrarily refusing to count VBM ballots from Tribal Members postmarked on or before
 12 Election Day.” [Doc. 1 ¶ 118] But they allege no facts to support that vague conclusion.
 13 *Iqbal*, 556 U.S. at 678 (“Threadbare recitals” of a claim, “supported by mere conclusory
 14 statements, do not suffice.”).

15 Plaintiffs do not allege any facts to suggest that the Election Day deadline is
 16 selectively enforced or that it has a discriminatory purpose. As detailed above, Plaintiffs’
 17 state constitutional claim fails for the same reasons as their federal constitutional claim.
 18 *Pub. Integrity All. Inc. v. City of Tucson*, No. CV 15-138-TUC-CKJ, 2015 WL 10791892,
 19 at *7 (D. Ariz. May 20, 2015) (“The Court declines to find that the Free and Equal
 20 Elections Clause of the Arizona Constitution affords any greater protections than either
 21 the Due Process Clause of the U.S. Constitution or the Privileges and Immunities Clause
 22 of the Arizona Constitution.”).

23 * * *

24 _____
 25 ⁶ Race-based Equal Protection Clause voting rights challenges are evaluated under the
 26 *Arlington Heights* standard, but even if this claim were evaluated under the *Anderson-*
 27 *Burdick* framework, the State’s significant interests in promoting voter confidence,
 28 orderly election administration, and “protecting the integrity, fairness, and efficiency of
 [] ballots and election processes” would justify any incidental burden caused by the
 neutral, non-discriminatory Election Day deadline. *E.g., Timmons v. Twin Cities Area*
New Party, 520 U.S. 351, 364 (1997).

1 For the foregoing reasons, the Secretary respectfully requests that the Court grant
2 her motion to dismiss Plaintiffs' complaint under Rule 12(b) of the Federal Rules of Civil
3 Procedure for lack of jurisdiction, failure to state viable claims for relief, and failure to
4 join an indispensable party. Doing so will obviate the need to consider Plaintiffs' motion
5 for preliminary injunctive relief, which, for the reasons below, is not warranted in any
6 event.

7 **III. Plaintiffs Are Not Entitled To A Preliminary Injunction**

8 **A. Plaintiffs are not likely to succeed on any of their claims.**

9 In order to prevail on the merits-success prong at the preliminary-injunction
10 stage, Plaintiffs' "burdens ... track the burdens at trial." *Gonzales v. O Centro Espirita*
11 *Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006). Plaintiffs cannot carry their
12 burden at this stage for the same reasons that they could never do so at a trial. As
13 discussed above, Plaintiffs lack standing and have failed to state a claim. And even if
14 Plaintiffs' Complaint could survive dismissal, Plaintiffs' Motion for Preliminary
15 Injunction fails to establish a likelihood of success on the merits.

16 **1. Plaintiffs are unlikely to prevail under Section 2 of the VRA.**

17 As detailed above, the first step of the "results test" asks whether the challenged
18 practice causes a discriminatory result. *Gonzalez*, 677 F.3d at 405. It is not enough to
19 make a "bare statistical showing." *DNC*, 948 F.3d at 1012.

20 If a plaintiff establishes the first step, they also must show that under the "totality
21 of the circumstances," there is a "legally significant relationship" between the challenged
22 practice and social and historical conditions, and that this relationship "causes an
23 inequality in the opportunities" of a protected group to participate in the political process.
24 *DNC*, 948 F.3d at 1012 (citing *Gingles*, 478 U.S. at 43, 47). Put differently, step two asks
25 how the challenged policy interacts with social and historical circumstances to cause the
26 disparate burden identified in step one. *Id.*

27 The step two assessment requires "a searching practical evaluation of the past and
28 present reality." *Id.* at 1013 (citation omitted). It involves considering a number of

1 factors, most commonly the list of nine factors known as the “Senate factors”—although
 2 the Senate list “is neither comprehensive nor exclusive.” *Id.* Plaintiffs argue that the
 3 relevant Senate factors here are the first, fifth, and eighth Senate factors:

- 4 1. the extent of any history of official discrimination in the state or political
 5 subdivision that touched the right of the members of the minority group to
 6 register, to vote, or otherwise to participate in the democratic process;
- 7 5. the extent to which members of the minority group in the state or political
 8 subdivision bear the effects of discrimination in such areas as education,
 9 employment and health, which hinder their ability to participate effectively in
 10 the political process;
- 11 8. whether there is a significant lack of responsiveness on the part of elected
 12 officials to the particularized needs of the members of the minority group.

13 *Id.* (citing S. Rep. No. 97-417 at 28–29 (1982)); [see Doc. 9 at 9–13]. “Thus, the second
 14 step asks not just whether social and historical conditions ‘result in’ a disparate impact,
 15 but whether the challenged *voting standard or practice* causes the discriminatory impact
 16 as it interacts with social and historical conditions.” *Ohio Democratic Party v. Husted*,
 17 834 F.3d 620, 638 (6th Cir. 2016) (emphasis added).

18 Plaintiffs have failed to show a likelihood of success on step one or step two.

19 **a. Plaintiffs have not shown that the Election Day Deadline**
 20 **causes a disparate burden on Navajo Nation voters.**

21 Plaintiffs’ undeveloped step one argument falls short of making the requisite
 22 showing that the Election Day deadline causes a disparate burden on Navajo Nation
 23 members living on-reservation. Indeed, Plaintiffs inexplicably skip directly to step two
 24 of the results test. [See Doc. 9 at 9–15] The Court should deny their motion for this
 25 reason alone. *See, e.g., Madison v. First Magnus Fin. Corp.*, No. CV-08-1562-PHX-
 26 GMS, 2009 WL 2783098, at *1 (D. Ariz. Aug. 31, 2009) (“If an argument is not properly
 27 argued and explained, the argument is waived.”).

28 But even construing the Motion as generously as possible, at *best* their step one
 argument rests on a series of geographic and socioeconomic statistics about Navajo
 Nation members living on the reservation, combined with an irrelevant anecdotal “study”

1 of mail times. [*See id.* at 13–14] Courts require much more than this. In *DNC*, for
2 example, the plaintiffs submitted expert evidence demonstrating that Native American,
3 Latino, and Black voters were twice as likely as white voters to have their votes thrown
4 out entirely under Arizona’s policy of discarding out-of-precinct votes. 948 F.3d at 1014.
5 Likewise, in *Veasey v. Abbott*, one plaintiffs’ expert reported that Latino and Black voters
6 were respectively 195% and 305% more likely than white voters to lack voter ID that
7 complied with a Texas law, and another plaintiffs’ expert similarly showed that Black
8 and Latino voters were respectively 1.78 times and 2.24 times more likely to lack
9 sufficient ID than their white peers. 830 F.3d 216, 250–51 (5th Cir. 2016). And in *League*
10 *of Women Voters of N. Carolina v. North Carolina*, the plaintiffs showed that Black voters
11 had used the since-eliminated same-day registration option at nearly twice the rate of
12 white voters during recent elections. *See* 769 F.3d 224, 245 (4th Cir. 2014) (citing *N.*
13 *Carolina State Conference of NAACP v. McCrory*, 997 F.Supp.2d 322, 349 & n.28
14 (M.D.N.C. 2014)). Each of these cases involved extensive evidence that examined the
15 impact of challenged practices on thousands of voters and demonstrated stark racial
16 disparities—directly tied to the challenged practices at issue—in protected groups’ ability
17 to vote.

18 No such evidence exists here. Plaintiffs’ experts state that Plaintiffs’ attorney
19 asked them to research whether “requiring mail-in ballots to be returned—rather than
20 postmarked—on or by Election Day lead[s] to the disenfranchisement of Tribal Member
21 voters when their overdue ballots are rejected.” [Doc. 9-3 at 5] Yet the report is
22 conspicuously absent of an answer to this question⁷ [*see id.* at 5, 26–29], and it provides
23 no evidence that any tribal voters have been impacted by the Election Day deadline.

24

25

26 ⁷ Plaintiffs’ motion falsely claims that the report *did* conclude that “requiring mail-in
27 ballots to be returned—rather than postmarked—on or by 7:00 pm on Election Day leads
28 to disenfranchisement of Tribal Member voters when their overdue ballots are rejected.”
[Doc. 9 at 14] No surprise, then, that the Motion provides no citation to the report for this
alleged “conclusion,” unlike the surrounding sentences.

1 Courts have found much more evidence insufficient to establish step one. In
2 *Gonzalez*, for example, the plaintiffs’ expert had presented evidence that in the first
3 general election after the challenged voter ID law went into effect, Latino voters
4 comprised between 2.6% and 4.2% of voters, but represented 10.3% of the ballots that
5 went uncounted because of inadequate identification. 677 F.3d at 442–43 (Pregerson, J.,
6 dissenting). But the Ninth Circuit found that the plaintiffs still had not shown the requisite
7 “causal connection between the challenged voting practice and a prohibited
8 discriminatory result.” *Id.* at 405 (citation omitted). This was in part because no expert
9 “testified to a causal connection between [the challenged voter ID requirement] and the
10 observed difference in voting rates of Latinos,” nor did the plaintiffs produce evidence
11 supporting their allegation that Latinos “are less likely to possess the forms of
12 identification required.” *Id.* at 406–07; *see also Ohio Democratic Party v. Husted*, 834
13 F.3d at 639–40 (finding that evidence of disparate effect did not outweigh contrary
14 evidence of the political process being equally open to African Americans, such as
15 statistically indistinguishable registration rates and similar turnout rates between African
16 Americans and whites); *Ortiz v. City of Philadelphia Office of City Comm’r Voter*
17 *Registration Div.*, 28 F.3d 306, 308–14 & n.2 (3d Cir. 1994) (that Pennsylvania’s “voter
18 purge” law did not disproportionately burden Black and Latino voters, despite expert
19 evidence showing that Black and Latino voters were both slated for purging and actually
20 purged at higher rates than white voters).

21 Plaintiffs’ lack of evidence of any discriminatory impact is fatal to their claim.
22 And even if Plaintiffs could show a disparate impact based on slower mail service, they
23 still fail to show a likelihood of success that the disparity in mail times results in a
24 disparate *burden*, and not a mere disparate *effect*. *See DNC*, 948 F.3d at 1012; *Gonzalez*,
25 677 F.3d at 383. Even accepting as true Plaintiffs’ assertion that Navajo Nation members
26 who reside on-reservation and are mailed a ballot on the first day of the early voting
27 period have as few as 15 days in which to consider and cast that ballot, versus the up to
28 25 days white voters in Scottsdale have to do the same, *see Mot.* at 13–14, Plaintiffs have

1 not shown why this constitutes a disparate *burden*. After all, voters who vote early in
 2 person or vote on Election Day have at most a number of hours in which to consider and
 3 cast their ballot—far less time than the (low-end) estimate of 15 days for tribal member
 4 voters who vote by mail *and* plan to return their ballot via mail. Further, Arizona law
 5 requires that both a Citizens Clean Elections Commission (CCEC) voter education guide
 6 and a Secretary of State voter education pamphlet be *delivered* to every registered voter
 7 prior to the start of early voting on October 7. [See Dul Decl. ¶ 3; Declaration of Thomas
 8 Collins (“Collins Decl.”) ¶ 8, attached as **Exhibit E**] Thus, even if a voter lacks internet
 9 service or other resources to research the candidates and races on the ballot, they may still
 10 begin to consider their votes even in advance of receiving their mail ballot because of the
 11 CCEC guide and the Secretary’s pamphlet. [See *id.*]

12 Further, returning a ballot by mail is just one of five ways that voters may return
 13 their ballots. If a voter lacks sufficient time to mail their ballot back, they can also drop
 14 it off at a drop-box, drop it off at any early voting site, drop it off at the county recorder’s
 15 office, or drop it off at any polling place in their county on Election Day. [See Dul Decl.
 16 ¶ 14; EPM Ch.2 §§ H, I] Moreover, Apache, Coconino, and Navajo Counties have
 17 multiple in-person Election Day and in-person early voting locations; thus, Navajo Nation
 18 voters registered in those counties have considerably more options for returning their mail
 19 ballots than, say, a white voter residing in similarly-rural Graham County,⁸ whose lone
 20 in-person early voting location is at the Graham County Recorder’s office. [See Dul Decl.
 21 ¶ 14] Because Plaintiffs have not demonstrated why having at worst 15 days (rather than,
 22 at best, 25 days) to consider and cast their mail ballot constitutes a disparate *burden* and
 23 not a mere disparate *effect*, see *DNC*, 948 F.3d at 1012, Plaintiffs cannot show a likelihood
 24 of success on their VRA claim.

25
 26 ⁸ According to Census data, Graham County is 81.7% white. U.S. Census Bureau,
 27 *QuickFacts: Graham County, Arizona* (2019),
 28 <https://www.census.gov/quickfacts/fact/table/grahamcountyarizona/RHI125219#RHI125219>.

1 **b. Plaintiffs cannot succeed at step two of their Section 2**
2 **claim.**

3 Plaintiffs’ failure to plead sufficient facts to satisfy step one dooms their Section 2
4 claim. *See, e.g., Husted*, 834 F.3d at 640 (“Plaintiffs have failed to meet the first step in
5 establishing a vote denial or abridgement claim. . . . Consequently, the second step inquiry
6 regarding the causal interaction of [the challenged law] with social and historical
7 conditions that have produced discrimination is immaterial.”). Nonetheless, the Secretary
8 will briefly address why Plaintiffs fall short of establishing step two.

9 As applied here, step two requires Plaintiffs to show two things. First, Plaintiffs
10 must show that under the totality of the circumstances, there is a legally significant
11 relationship between the Election Day deadline on one hand, and, on the other hand, social
12 and historical conditions of Navajo Nation members. *See DNC*, 948 F.3d at 1012. If
13 there is such a legally significant relationship, step two further requires demonstrating
14 that this relationship “causes an inequality in the opportunities” of on-reservation Navajo
15 Nation members to participate in the political process. *See id.* Put differently, “the second
16 step asks not just whether social and historical conditions ‘result in’ a disparate impact,”
17 but whether the Election Day deadline “causes the discriminatory impact as *it* interacts
18 with social and historical conditions.” *Husted*, 834 F.3d at 638.

19 The Secretary does not discount Arizona’s history of discrimination against
20 members of the Navajo Nation. The Secretary also does not dispute that members of the
21 Navajo Nation living on-reservation bear the effects of discrimination in areas like
22 education, employment, and health. But the Secretary’s awareness of these racial
23 disparities has led her to actively work to combat them, and thus the Secretary objects to
24 Plaintiffs’ unsupported assertion that, under the eighth Senate factor, “there is a
25 significant lack of responsiveness on the part of [the Secretary] to the particularized needs
26 of the members of the [Navajo Nation].” *See DNC*, 948 F.3d at 1013; Mot. at 13. To the
27 contrary, since the Secretary took office in January 2019, she has diligently and creatively
28 worked to ensure that Native American voters are able to vote without undue barriers.

1 The current Secretary ran for office in 2018 on a platform designed to combat
2 Arizona’s long history of disenfranchising minority voters. *See* Hobbs Brief in Opp. to
3 Cert. at 5, *Brnovich v. DNC*, No. 19-1257. Thus, since the Secretary took office in
4 January 2019, she has worked diligently to ensure that all Arizonans have adequate
5 opportunity to exercise their right to vote, and especially Arizona voters who have
6 historically encountered unique burdens in exercising the franchise. For example, the
7 Secretary actively campaigned on her opposition to H.B. 2023, the law criminalizing
8 ballot collection efforts, in large part because she recognized how it disproportionately
9 harmed voters of color, including Native American voters. *See id.* Likewise, in part
10 because of the evidence demonstrating that Arizona’s out-of-precinct policy
11 disproportionately burdened voters of color—including Native American voters—the
12 Secretary opposed the Arizona Attorney General’s decision to appeal the en banc decision
13 in *DNC v. Hobbs*. *See id.*; Press Release, Ariz. Sec’y of State, *Hobbs Opposes AG’s*
14 *Appeal of DNC v. Hobbs* (Jan. 29, 2020). And when the Navajo Nation sued to challenge
15 Arizona’s missing-signature policy as imposing a disproportionate burden on Navajo
16 Nation voters, the Secretary reached a settlement with the Plaintiffs and agreed to propose
17 language in the EPM that would allow curing of unsigned ballots to alleviate this burden.
18 *See Navajo Nation v. Hobbs*, 3:18-cv-08329-DWL (D. Ariz.) (Doc. 44-2).

19 The Secretary has also undertaken a statewide voter outreach and education
20 campaign, with special efforts targeted toward Navajo Nation voters (including radio ads
21 in Navajo). [Dul Decl. at 9] She also secured \$1.5 million in funding to increase access
22 to early voting and ballot drop-off options in tribal and rural communities. [*Id.*] Further,
23 she has developed relationships with key Navajo Nation stakeholders to work
24 cooperatively with them to address barriers their voters may face. [*Id.* ¶¶ 11-12] The
25 Secretary also created an AZVoteSafe Guide for Native American Voters to help those
26 voters safely vote during the Covid-19 pandemic. [*Id.* ¶ 6] And perhaps most
27 significantly, in order to mitigate any rural mail disparities and help ensure that as many
28 mail ballots are received by the Election Day deadline as possible, the Secretary has been

1 actively coordinating with the USPS and the County Recorders of Coconino, Navajo, and
2 Apache Counties to develop and implement a plan for USPS to hold ballots at designated
3 USPS facilities in Coconino, Navajo, and Apache Counties for regular pick-up by
4 authorized County Recorder staff beginning at least seven days before the General
5 Election. [*Id.* ¶ 12] Given the Secretary’s diligent efforts, Plaintiffs cannot plausibly
6 argue that “there is a significant lack of responsiveness” to the “particularized needs” of
7 Navajo Nation members by the Secretary—and indeed, their only support for this
8 allegation is that the Secretary has publicly stated her intent to enforce the statutorily-
9 required Election Day deadline. [*See* Doc. 9 at 13]

10 Finally, although the Secretary agrees that Navajo Nation members have
11 historically been subjected to voting-related discrimination and that they bear the effects
12 of discrimination in many areas, courts have consistently held that these factors alone are
13 insufficient to demonstrate a violation of Section 2. In *Gonzalez*, for example, the en
14 banc court affirmed the district court’s finding that while “Latinos had suffered a history
15 of discrimination in Arizona that hindered their ability to participate in the political
16 process fully [and] that there were socioeconomic disparities between Latinos and whites
17 in Arizona,” the plaintiffs had not adequately connected those factors to the challenged
18 law nor explained the causal connection Section 2 requires. 677 F.3d at 406. Similarly,
19 in a case involving a Section 2 challenge to Virginia’s voter ID law, the court observed
20 that “there is no serious dispute in this case that the Commonwealth of Virginia, like many
21 states, has a regrettable history of discriminatory policies and practices designed to
22 suppress voting within the black community.” *Lee v. Virginia State Bd. of Elections*, 188
23 F.Supp.3d 577, 603 (E.D. Va.), *aff’d*, 843 F.3d 592 (4th Cir. 2016). But because there
24 was a “progressive pattern of . . . remediation,” the plaintiffs could not successfully
25 demonstrate a Section 2 violation. *Id.* at 603–04. Here, because Plaintiffs have not tied
26 the challenged law to any historical discrimination Navajo Nation members have
27 experienced, they cannot succeed on a Section 2 claim.

28

1 **2. Plaintiffs are not likely to succeed on their claims under the**
2 **Equal Protection Clause of the federal Constitution or the Free**
3 **and Equal Elections Clause of the Arizona Constitution.**

4 For the same reasons that Plaintiffs' Complaint fails to state a claim, Plaintiffs'
5 vague, unsupported arguments in their Motion [at 13, 16] are not sufficient to demonstrate
6 a likelihood of success on these claims.

7 In sum, the Court should deny Plaintiffs' motion for a preliminary injunction, as a
8 failure to satisfy even one of the necessary elements is fatal to the overall claim for
9 equitable relief. *Cottrell*, 632 F.3d at 1135 (explaining that *Winter* requires a plaintiff to
10 make a showing on all four prongs of the test for a preliminary injunction).

11 **B. Plaintiffs have not established the kind of irreparable harm that**
12 **merits the solemn power of a federal injunction.**

13 Plaintiffs must also establish that irreparable harm is likely, not merely possible.
14 See *Cottrell*, 632 F.3d at 1131 (citing *Winter*, 555 U.S. 21–22). This they cannot do,
15 where they have not shown why any of their injuries are particularly likely to occur, or
16 why Plaintiffs could not avoid harm simply by availing themselves of basic self-help
17 measures. After all, “[s]elf-inflicted wounds are not irreparable injuries.” *Al Otro Lado*
18 *v. Wolf*, 952 F.3d 999, 1008 (9th Cir. 2020).

19 As discussed above, Plaintiffs point to a host of factors that they claim generally
20 make it more difficult for Navajo Nation members residing on the reservation to cast mail-
21 in ballots. See, e.g., Complaint ¶¶ 26, 55, 63 68, 71; Doc. 9 at 12. Plaintiffs, however,
22 never claim that *they* are isolated from Post Offices, lack reliable transportation, or are
23 homeless. Nor do they contend that any other circumstances or personal characteristics
24 will prevent them from returning a mail-in ballot well in time to meet the current deadline.
25 In sum, Plaintiffs decidedly never allege that they will be unable (or likely unable) to
26 obtain and return a mail-in ballot in time to arrive at a county recorder's office by 7:00
27 p.m. on Election Day with sufficient cushion to accommodate mail-travel delays. By
28 their own contentions, the risk that they will suffer irreparable injury thus appears to be
 non-existent.

1 Further, it appears that Plaintiffs possess the very tools required to avoid the
2 possibility that their votes will not be counted. Specifically, they give no reason why they
3 cannot complete and mail their ballots with enough lead time to account for any mail
4 travel time or utilize the multiple other ballot drop-off options available to voters.
5 Plaintiffs are entitled to request mail-in ballots from their County Recorder at any point
6 between now and October 23, 2020. They may thus conceivably have as many as several
7 weeks to receive, complete, and return their ballots before November 3, 2020. Where, as
8 here, “the purported harm could ... [be] avoided through [a plaintiff’s] own conduct,”
9 there is an insufficient showing of irreparable harm. *Wham-O, Inc. v. Manley Toys, Ltd.*,
10 No. 08-56188, 2009 WL 1353752, at *1 (9th Cir. May 15, 2009); *see also Al Otro Lado*,
11 952 F.3d at 1008 (concluding that alleged injuries were not irreparable where they were
12 avoidable and thus self-inflicted). And where a comparatively simple mechanism exists
13 to avoid the harm resulting from late mail-in ballots, it is unnecessary for a federal court
14 to harness its extraordinary equitable powers to reset a state’s preferred election deadline.

15 Because Plaintiffs cannot show that they are likely to suffer the kind of irreparable,
16 unavoidable injury that will result from their mail-in vote not being counted, they are not
17 entitled to injunctive relief. *Cottrell*, 632 F.3d at 1135.

18 **C. The balance of equities and the public interest tip sharply against the**
19 **plaintiffs.**

20 The final requirements for obtaining an injunction are that the balance of equities
21 tips in favor of awarding relief and that an injunction is in the public interest. *Cottrell*,
22 632 F.3d at 1131 (citing *Winter*, 555 U.S. at 20). Plaintiffs do not—and cannot—come
23 close to making either showing.

24 First, the balance of equities tip sharply against Plaintiffs. As previously
25 explained, their requested remedy will not even necessarily help guarantee that more
26 Navajo ballots will be counted in the upcoming election. Individuals who might
27 otherwise have made efforts to return their ballots well in advance of Election Day might
28 be swayed by a postmark deadline into delaying the planned return of their ballots. This

1 may result in more ballots arriving late and may deprive Navajo voters of the statutory
2 signature-cure period that would otherwise have been afforded to them under Arizona
3 law. *See* A.R.S. § 16-550(A); [Hansen Decl. ¶¶ 5-6].

4 Additionally, an injunction would uniquely burden the Secretary. Arizona's
5 election officials are working around the clock to implement a successful General
6 Election with anticipated record turnout in the midst of a global pandemic. Issuing an
7 injunction to alter the ballot-return deadline so soon before the election will be sure to
8 frustrate those efforts, requiring a diversion of resources to development procedures for
9 and training elections on how to implement a new postmark rule. The election is now 50
10 days away and voting starts in just 23 days.

11 Changing the rules this late in the process would also sow confusion in the
12 electorate generally as well as among Navajo voters. An injunction changing the ballot
13 deadline will conflict with the extensive and consistent voter education efforts that the
14 Secretary is engaged in, [Dul Decl. ¶¶ 9-10], including the Secretary's statewide publicity
15 pamphlet and the Citizens Clean Elections Commission's voter education guide, both of
16 which will be mailed to every household with a registered voter. [*Id.* ¶¶ 3-4; Collins Decl.
17 ¶¶ 8-9]

18 For these reasons, the Court should deny Plaintiffs' motion for a preliminary
19 injunction.

20 **CONCLUSION**

21 For the above reasons, the Secretary respectfully requests that the Court dismiss
22 Plaintiffs' Complaint in its entirety or, in the alternative, deny the motion for preliminary
23 injunction and declaratory relief.

24 Respectfully submitted this 14th day of September, 2020.

25 **COPPERSMITH BROCKELMAN PLC**

26 By s/ Roopali H. Desai
27 Roopali H. Desai
28 D. Andrew Gaona
Kristen Yost

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