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,

KATIE HOBBS, in her official capacity as Arizona Secretary of State, et al.,

Defendant-Appellee.

Appeal from the United States District Court
District of Arizona
CV-20-08222-PCT-GMS
The Honorable G. Murray Snow

DEFENDANT-APPELLEE'S ANSWERING BRIEF

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Table of Contents

Table of Authorities

Page(s)

Cases

Statutes

Introduction

Plaintiffs-Appellants, individual members of the Navajo Nation seeking to alter Arizona's longstanding Election Day early ballot receipt deadline for a subset of the state's voters, present a case that is fundamentally flawed: Appellants lack Article III standing. Nowhere do Appellants allege that they intend to vote in the upcoming election, let alone that they plan to vote *by mail*. Nor do they allege that they would personally face difficulty in timely returning their ballots, or that they have previously voted by mail, or that their ballots have been rejected for arriving past the deadline. Their alleged harms fall far short of constituting an imminent, concrete, and particularized injury. Rather, this Court would be required to manufacture a theoretical plaintiff to find an injury. Moreover, Appellants' harms are neither fairly traceable to the Secretary nor redressable by this Court. Appellants have failed to name the government officials with the sole ability to count Appellants' ballots and apply the requested deadline, and Appellants' requested relief would likely disenfranchise more Navajo Nation voters than it helps. This Court should dismiss the appeal.

If this Court does not dismiss for lack of jurisdiction, it should affirm the district court's denial under the *Purcell* principle. The Supreme Court has repeatedly admonished lower courts not to alter election rules on the eve of an election when such changes would cause voter confusion and upend longstanding procedures, and

the district court wisely heeded this guidance. Appellants' requested relief would cause significant voter confusion and change the election rules after early voting has begun, and thus runs directly afoul of the *Purcell* principle.

If the Court reaches the merits, it should affirm the district court's findings that Appellants are unlikely to succeed on the merits of any of their claims. Appellants failed to present evidence of a racial disparity sufficient to meet the first step of the two-part test under Section 2 of the Voting Rights Act, and presented no meaningful evidence in support of their state and federal constitutional claims.

Issues Presented for Review

1. Because Appellants fail to meet the irreducible constitutional minimum of standing, must this case be dismissed for lack of jurisdiction?
2. Because Appellants' requested relief would cause substantial voter confusion and alter Arizona's election rules with voting for 2020 General Election already underway, does the *Purcell* principle bar Appellants' requested relief?
3. Did the district court correctly hold that Appellants were unlikely to succeed on their claim under Section 2 of the Voting Rights Act because they failed to present evidence at step one of the two-step test?

4. As Appellants did not present any meaningful evidence in support of their federal or state constitutional claims, did the district court correctly find that they were unlikely to succeed on the merits of those claims?

Summary of the Argument

1. Appellants cannot prevail because their case suffers from a fatal defect: lack of standing. Nowhere do Appellants allege that they intend to vote in the upcoming election, let alone that they plan to vote *by mail*. Nor do they allege that they would personally face difficulty in timely returning their ballots, that they have previously voted by mail, or that their ballots have been rejected for arriving past the deadline. Their alleged harms fall far short of constituting an imminent, concrete, and particularized injury. Rather, this Court would be required to manufacture a theoretical plaintiff to find an injury. And Appellants' harms are neither fairly traceable to the Secretary nor redressable by this Court. Appellants have failed to name indispensable parties: the government officials responsible for counting ballots and applying the deadline. As a result, this Court must dismiss the case for lack of jurisdiction.

2. Appellants' case suffers from another unavoidable flaw: the *Purcell* principle precludes their requested relief. At bottom, courts should not alter election rules on the eve of the election when such changes would cause voter confusion.

That is exactly what Appellants requested here, and the district court wisely denied the preliminary injunction.

3. Although this Court need not reach the merits because Appellants lack standing and their claims are barred by *Purcell*, the district court also correctly held that Appellants are unlikely to succeed on the merits of any of their claims. It applied the proper test under Section 2 of the Voting Rights Act, and correctly found that Appellants failed to present evidence of a racial disparity. Similarly, the district court correctly determined that Appellants presented no meaningful evidence to support their state and federal constitutional claims. Alternatively, in light of the Supreme Court's recent grant of certiorari in *Brnovich v. Democratic National Committee*, this Court may hold the disposition of this appeal pending the outcome of that case.

Argument

I. This Court should dismiss the appeal because Appellants fail to meet the irreducible constitutional minimum of standing.

"Standing is a threshold requirement, without which neither the district court nor this Court has jurisdiction." *Arakaki v. Hawaii*, 314 F.3d 1091, 1097 (9th Cir. 2002) (cleaned up). A district court errs when it fails to assess standing prior to reaching the merits, and standing may be addressed for the first time on appeal. *Id.* A plaintiff seeking a preliminary injunction must make a "clear showing" of each element of standing to sue in federal court. *Townley v. Miller*, 722 F.3d 1128, 1133 (9th Cir. 2013). To satisfy Article III's standing requirements, then, Appellants here

were required to clearly show that they have "suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC) Inc.*, 528 U.S. 167, 180–81 (2000).

If the district court had jurisdiction, its decision to deny Appellants' requested preliminary injunction would be correct. But there is a more fundamental problem with Appellants' case. The record is entirely devoid of the baseline facts required to establish injury in fact, causation, or redressability—the minimum prerequisites to jurisdiction in federal court.[1] Because Appellants lack standing, this Court lacks jurisdiction and must dismiss the appeal.

A. Appellants have not alleged an injury in fact, as they do not allege an intent to vote in the 2020 General Election, let alone an intent to vote by mail.

The record is notable for what it does not contain. Not once do Appellants express their intent to vote in the 2020 General Election—a simple allegation, but a necessary one. They certainly do not allege that they intend to vote in the 2020 General Election *by mail*. Similarly, they do not allege that they plan to vote by mail

[1] Although the Secretary squarely raised these issues below, *see* SER 18-25, the district court erred by deferring a decision on standing.

but would face difficulty in returning their mail ballot by some means other than the USPS if necessary, such as dropping it off at a ballot drop-box, an early voting location, or any polling place in their county on Election Day. They also do not allege that they have voted by mail in any past election, let alone that they voted by mail in a past election and had their ballot rejected because it arrived past the Election Day deadline. *See generally* SER 126-53.

Without these basic yet essential facts, the Court is forced to guess whether Appellants would even vote in this election at all, to say nothing of whether they would do so by mail. Any speculation to that effect is decidedly not the kind of "concrete" and "imminent" injury that can form the basis of a federal action—instead, it is impermissible "'conjectural or hypothetical'" harm. *Spokeo v. Robbins*, 136 S. Ct. 1530, 1548 (2016).

A plaintiff cannot gain standing merely by alleging an intent to vote and a *possibility* that they may vote in a way that would cause their ballot to be rejected. *Townley*, 722 F.3d at 1133. Allegations of that nature "epitomize speculative injury." *Id.* Rather, a plaintiff must specifically allege they intend to vote in a way that would lead to the rejection of their ballot. *Id.* at 1133–34. Similarly, allegations of "'some day' intentions—without any description of concrete plans—do not support a finding of the actual or imminent injury that our cases require." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 564 (1992) (cleaned up). Appellants offered far less than even that here.

Appellants allege that various geographic, demographic, and socioeconomic statistics make it more likely that the "typical" Navajo Nation member living on-reservation will have fewer days to complete and return a ballot by the Election Day deadline. SER 130-31, 135-40. But Appellants cannot satisfy the injury-in-fact requirement simply by alleging that "there is a statistical probability that some [Navajo Nation] members are threatened with concrete injury." *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009). Appellants are all individual plaintiffs, they must allege an imminent, particularized injury to *themselves*, and they failed to do so here.

None of the Appellants testified at the preliminary injunction hearing, and they presented no evidence about their personal circumstances. Even in their complaint, they failed to allege that *they* are isolated from post offices, lack reliable transportation, or face other challenges that impact their ability to vote by mail. *See* SER 135-40. Nor do they contend that other unavoidable circumstances or personal characteristics (like a disability, limited English proficiency, poverty, or other limitations) will prevent them from returning a mail ballot in time to meet the current deadline.[2] Without any explanation of impediments specific to *Appellants'* ability to return mail ballots by the deadline, their complaint collapses into a collection of

[2] Appellants attempted to admit hearsay testimony from Mr. Bret Healy about an "interview" he conducted with one of the Appellants, Darlene Yazzie, *see* SER 43–46, but the district court did not admit the evidence. *See* SER 3–4.

generalized grievances about the difficulties of ensuring regular mail delivery and collection on the Navajo reservation. A generalized grievance, however, is an inappropriate injury on which to base a federal claim. *Carroll v. Nakatani*, 342 F.3d 934, 940–41 (9th Cir. 2003).

In sum, it is unclear whether Appellants will suffer any cognizable, redressable harms on November 3, 2020, no matter what the deadline is. To rule in Appellants' favor, this Court would be forced to manufacture a theoretical plaintiff from whole cloth. This exercise would require the Court to imagine contingency upon contingency—that the theoretical plaintiff will want to vote by mail, that they will request a mail ballot in a timely fashion, but that they will not be able to complete and return their ballot by Election Day due to circumstances outside their control, or that they lack access to a mailbox or adequate transportation to a post office to be able to return their ballot with a sufficient cushion to meet the deadline. An injury resting on such a "highly attenuated chain of possibilities" is unduly speculative. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410 (2013). What's more, this kind of conjectural dispute is exactly antithetical to Article III's "limitation of federal-court jurisdiction to actual cases or controversies." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006). Because Appellants have not demonstrated they will suffer a concrete and imminent injury, they lack standing.

B. The harms Appellants complain of are not fairly traceable to the Secretary and the Election Day deadline.

Appellants fail to satisfy the second element of standing—causation—because the face of their complaint attributes their alleged injuries to factors outside the Secretary's control. The Supreme Court has been averse to embracing causation "theories that rest on speculation about the decisions of independent actors." *Clapper*, 568 U.S. at 414. Appellants thus cannot establish that their injuries are "fairly traceable" to the Secretary, which is required to meet the "irreducible constitutional minimum" of standing to proceed in this forum. *Spokeo*, 136 S. Ct. at 1547.

Appellants trace the difficulty of timely ballot return to various circumstances other than those the Secretary has the power to change—the hardship of traveling on the Navajo reservation, the Covid-19 pandemic, and recent policy changes to USPS operations, among others. *See, e.g.*, SER 132-33, 137; *see also* SER 54, 63–65. None of these issues is "fairly traceable" to the Secretary or her duty to uphold the Election Day receipt deadline.[3]

A simple hypothetical illustrates this point: suppose the Secretary were to change the deadline to, as Appellants request, SER 151, a deadline that requires a

[3] Appellants' arguments on appeal only reinforce the lack of causation. They incorrectly contend, Opening Br. 21, that the "challenged voting practice" in this case is "slower mail delivery." Not so. Appellants are challenging the ballot receipt deadline in A.R.S. § 16-548(A), not mail delivery practices.

postmark by Election Day and receipt within 10 days of Election Day. This would have no impact on the ability of Navajo Nation members to access a mailbox or post office, or on the ease or frequency with which mail can be delivered and collected. And Appellants do not explain why they cannot comply with the current deadline, but would be able to meet a deadline requiring both a postmark by Election Day *and* receipt by November 13, 2020.[4] Thus, Appellants' harms are not fairly traceable to the Secretary's actions.

C. Appellants' alleged harms are not redressable by this Court because Appellants failed to join necessary defendants and because their requested relief would not ameliorate—and instead might exacerbate—the alleged harms.

Appellants' alleged injuries are not redressable for two reasons. For one, they have not named indispensable defendants—Arizona's 15 county recorders, who have sole responsibility for counting ballots—so the Court cannot grant the relief they seek. More fundamentally, Appellants' requested relief will not eliminate their claimed underlying hardship in their efforts to vote and may very well result in *fewer* tribal members' votes being tallied, thus defeating redressability.

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[4] Under Arizona law, voters have many options for returning their early ballots. They can drop their ballots off at any polling place in their county on Election Day without having to wait in line or show ID. *See* Arizona Elections Procedures Manual ("EPM") at 60; *see also Gonzalez v. Arizona*, 677 F.3d 383, 397 (9th Cir. 2012) (the EPM has the force and effect of law) (citing A.R.S. § 16-452). Voters may also return their mail ballot by placing it in a ballot drop-box, returning it to any early voting location in their county, or mailing it. EPM at 60.

First, issuing an injunction against the Secretary, as Appellants request, will not result in Appellants' ballots being counted if they are received by the requested deadline. The county recorders—not the Secretary—are the relevant government officials responsible for accepting and counting ballots under Arizona law. A.R.S. §§ 16-548; 16-550. Although the Secretary (with the approval of the Governor and Attorney General) can create binding rules through the EPM, A.R.S. § 16-452, the Secretary has no power to order the county recorders to institute a different ballot-return deadline for *this* election. The EPM has already been finalized for the 2020 General Election, cannot be unilaterally amended by the Secretary, and cannot contain provisions that conflict with state law. *See* SER 5-6 (testimony of State Elections Director Sambo Dul). Appellants' failure to name the county recorders—or at least those in Apache, Navajo, and Coconino Counties (the counties in which the Navajo Nation reservation is located)—is fatal to their claims. *See Carroll*, 342 F.3d at 945 (holding that injury was not redressable where plaintiffs failed to name the United States as a party despite knowing at the outset of the litigation that the federal government's participation was required to effectuate plaintiffs' requested relief); *Rubin v. City of Santa Monica*, 308 F.3d 1008, 1019–20 (9th Cir. 2002) (because enjoining the California Secretary of State would not force the city to change their election regulations, injury was not redressable); *Gonzales v. Gorsuch*,

688 F.2d 1263, 1267 (9th Cir. 1982) ("[I]f the wrong parties are before the court . . . the plaintiff lacks standing.").

More fundamentally, Appellants' alleged injuries are not redressable because—as detailed above—their requested relief would not eliminate the hardships Navajo Nation members face, such as poverty, isolation, and unreliable mail service.

Worse yet, Appellants' requested relief might *increase* the risk that their ballots are rejected. For one, voters who might otherwise make efforts to mail back their ballots well in advance of Election Day may be swayed by a postmark deadline into delaying the planned return of their ballots. *See* SER 7–8, 10 (testimony of State Elections Director Sambo Dul). Any interruptions or delays in mail collection in the few days before November 3, 2020 could thus affect a larger share of Navajo voters than under the current deadline. Also, in every election, thousands of Arizona voters either fail to sign their mail ballot affidavits or sign using a signature that does not match the signature elections officials have on file for that voter. Voters who forget to sign their mail ballot affidavits may only "cure" the missing signature until 7 p.m. on Election Day. *See* EPM at 68–69. Voters with a mismatched signature have only until 5 p.m. on the fifth business day after Election Day to cure their ballots. *See id.*; A.R.S. § 16-550(A). If Appellants' requested postmark deadline were in place, Navajo Nation voters who wait to mail their ballots until on or just before Election

Day would likely have no chance to cure any issues with their signatures. *See* SER 9–10 (testimony of State Elections Director Sambo Dul). Because Appellants' requested remedy would "decrease [or] eliminate an important benefit state law grants to Arizona voters"—namely, the ability to cure missing or mismatched signatures—Appellants lack redressability. *Townley*, 722 F.3d at 1135 (cleaned up); *see also Gonzales*, 688 F.2d at 1267 (holding that where the requested relief may "actually worsen the plaintiff's position," redressability is lacking).

II. Appellants' requested relief would lead to voter confusion and upend orderly election administration in violation of the *Purcell* principle.

Federal courts ordinarily should not alter election rules on the eve of an election. *See, e.g.*, *Purcell v. Gonzalez*, 549 U.S. 1, 5 (2006) (per curiam). This is because "court orders affecting elections can themselves result in voter confusion and consequent incentive to remain away from the polls," a risk that only increases "as an election draws closer." *Id.* at 4–5 (cleaned up). The Supreme Court has repeatedly reaffirmed the *Purcell* doctrine, including multiple times this year. *See, e.g.*, *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (staying district court injunction extending absentee ballot deadline); *Little v. Reclaim Idaho*, No. 20A18, 2020 WL 4360897, at *2 (U.S. July 30, 2020); *Raysor v. DeSantis*, No. 19A1071, 2020 WL 4006868, at *4 (U.S. July 16, 2020). And this Court reaffirmed *Purcell* just this week, staying a district court's injunction that

altered Arizona's rules for curing unsigned mail ballots. *See Arizona Democratic Party v. Hobbs*, No. 20-16759, 2020 WL 5903488, at *2 (9th Cir. Oct. 6, 2020).

Heeding the Supreme Court's guidance, the district court correctly found that Appellants' requested relief would likely run afoul of *Purcell*. ER007-08. As the district court noted, the Secretary presented evidence that changing the ballot deadline for a subset of voters would cause voter confusion, complicate ballot processing, clash with the mandated timelines for other election laws, and pose feasibility concerns. *Id*. As the record reveals, the risk of voter confusion is even more acute here because Appellants seek a change in the deadline for just a *subset* of Arizona voters: Navajo Nation members who reside on the Navajo reservation. This could lead to members of other tribes living on their respective reservations—after all, Arizona has over 20 tribal communities—erroneously believing that the postmark deadline applies to them. *See* SER 13 (testimony of State Elections Director Sambo Dul). Likewise, Navajo Nation members who do not reside on the reservation may wrongly believe that the new deadline applies to them, and have their ballots rejected as a result. *Id.*

Appellants disregard these factual findings, claiming that "the Appellee can just implement the requested remedy and permit ballots mailed from the Navajo Nation Reservation to continue to be counted until November 13, 2020 without any effective need to communicate same to the public. Instead, just do it." Opening

Br. 23. That is wishful thinking. As explained, Appellants' requested remedy cannot be implemented without a court order compelling county recorders—the officials responsible for accepting ballots under state law, who are not parties to this case—to take additional action. Indeed, the Secretary cannot grant any of Appellants' desired relief.

Appellants brush aside these concerns, arguing that other courts have granted injunctions implementing postmark deadlines. Opening Br. 24–25. In support of their argument, Appellants cite the Seventh Circuit's recent denial of a stay in *Democratic National Committee v. Bostlemann*, No. 20-2835, 2020 WL 5796311, at *1 (7th Cir. Sept. 29, 2020). This ignores important differences between this case and *Bostlemann*—most critically, that the Seventh Circuit dismissed the appeal and denied a stay because none of the appellants had standing. *Id.* at *1–2. Because the court in *Bostlemann* lacked jurisdiction, it could not have reached the *Purcell* principle. Appellants also ignore that early voting for the General Election is already underway. Overseas and military voters have received and started returning their early ballots,[5] and early voting begins for all other voters today. It is too late to reprint mail ballots and their instructions, or any of the statutorily-mandated voter

[5] Counties mailed ballots to overseas and military voters by September 19, 2020 pursuant to the Uniformed and Overseas Citizens Absentee Voting Act.

education guides that have already been printed and disseminated to voters. *See, e.g.*, ER 28–29, 31.

Voter confusion is at the heart of the *Purcell* principle. As the Secretary argued and as the district court correctly found, ER007-08, Appellants' requested remedy would lead to substantial voter confusion in ways likely to disenfranchise other voters, particularly other Native American voters. That risk of confusion, combined with the eleventh-hour nature of Appellants' request, means that Appellants' requested relief is foreclosed by *Purcell*.

III. The district court did not abuse its discretion in denying Appellants' requested preliminary injunction because they did not present sufficient facts to warrant relief under Section 2 of the Voting Rights Act.

Despite introducing reports and presenting testimony at a hearing, Appellants failed to set forth key evidence necessary to prevail on their substantive claim under Section 2 of the Voting Rights Act. Applying established Ninth Circuit law, the district court found that Appellants' evidentiary showing did not satisfy the first step for obtaining relief under the statute. The court therefore did not abuse its discretion in denying Appellants' requested preliminary injunction. *See, e.g.*, *Sanai v. McDonnell*, 809 F. App'x 353, 354 (9th Cir. 2020) (concluding that district court did not abuse its discretion in denying preliminary injunction where appellant "presented no basis for such relief").

Appellants cannot overcome this finding on appeal. They fail to show—and hardly allege—that the court below applied an incorrect legal standard. Nor do they contest the district court's core factual findings. Rather, Appellants selectively quote out-of-context portions of the district court's order and ask this Court to draw conclusions that the district court found factually unsupported. This falls far short of what is required to overturn the denial of preliminary injunctive relief.

A. The district court faithfully applied the established test for evaluating Section 2 Voting Rights Act claims.

Initially, the district court properly invoked and applied the two-step test governing Voting Rights Act claims articulated in *Democratic National Committee v. Hobbs*, 948 F.3d 989 (9th Cir. 2020) [hereinafter *DNC v. Hobbs*]. *See* ER3–7. As the lower court recognized, the first step of that test requires a plaintiff to demonstrate that a "challenged standard, practice or procedure results in a disparate burden on members of the protected class." *Id.* at 1012.

Appellants do not contend that the two-step test outlined in *DNC v. Hobbs* does not apply. Rather, they spill much ink summarizing a position paper the Civil Rights Division of the United States Department of Justice submitted in another voting rights case. Opening Br. 9–13. But Appellants fail to show how the DOJ's position differs in any meaningful way from the two-step test articulated in *DNC v. Hobbs*. Indeed, the DOJ policy paper reiterates that the fundamental aim of the first step of the test for showing a Section 2 Voting Rights Act violation requires

establishing a disparity between protected minority citizens and non-minority citizens. *See* Opening Br. 9 (citing ER 13) (noting that step one requires assessing whether material limitations "bear more heavily on minority citizens than nonminority citizens"); *see also id.* (describing the analysis as evaluating the "likelihood" that minority voters will face a burden and their "relative ability" to overcome it); *id.* at 13 (citing ER 22) ("Section 2 contains a comparative standard").

Appellants argue that they need not "show that they have no opportunity to vote"—only that they have "less opportunities" to vote as compared to other voters. Opening Br. 11-12. But neither the Secretary nor the district court demanded such a showing below. The district court correctly concluded that Appellants failed to satisfy the very standard they parrot in their briefs—that material limitations result in "less opportunities" to vote, resulting in a "disparate burden" on members of the Navajo Nation. Opening Br. 9.

B. Appellants failed to present evidence to establish a likelihood of success on their Section 2 claim.

Appellants produced no evidence that the Election Day deadline results in a disparity between Navajo voters and others, as they acknowledge is required under *DNC v. Hobbs* and the DOJ guidance they cite. Despite chronicling various hardships that Navajo Nation members face when it comes to accessing mail, Appellants never demonstrate that these hardships have resulted, or are likely to result, in a disparate burden on Navajo voters when it comes to meeting the Election

Day deadline. The district court rested its decision on the absence of this critical showing of proof. ER005. Its fact-specific determination, based on the record assembled by Appellants in this case, is wholly unlike the kind of "clearly erroneous factual finding" that amounts to an abuse of discretion. *Nader v. Brewer*, 386 F.3d 1168, 1169 (9th Cir. 2004).

After examining all of Appellants' pleadings and considering the live testimony presented during a preliminary injunction hearing, the court determined that Appellants "fail[] to demonstrate that the Receipt Deadline results in a disparate burden on Navajo Nation members living on-reservation." ER004. Specifically, the district court noted that "Plaintiffs present no evidence that Navajo voters' ballots are disproportionately thrown out because of the Receipt Deadline." ER005. Thus, the district court determined that despite cataloguing the hardships that Navajo Nation members face, Appellants did not show that these conditions translated into a disparate burden on their right to vote by the Election-Day return deadline. ER006 ("To the extent Plaintiffs' evidence can be construed as showing disparities faced by Navajo voters, Plaintiffs still have not shown that the Receipt Deadline results in a disparate burden.").

This failure of proof dooms Appellants' case. As the district court acknowledged, Section 2 Voting Rights Act cases uniformly require the plaintiff to show a disparity between a minority group of voters and others. ER006. In *DNC v.*

Hobbs, for example, this Court concluded that plaintiff satisfied their step one obligation by marshaling "[e]xtensive and uncontracted evidence in the district court establish[ing] that American Indian, Hispanic, and African American voters are over-represent[ed] among [out-of-precinct] voters by a ratio of two to one" and that in the preceding election, these minority voters "were twice as likely as white voters to . . . not have their votes counted." 948 F.3d at 1014. Similarly, in *League of Women Voters of North Carolina v. North Carolina*, 769 F.3d 224, 245 (4th Cir. 2014), the court found that plaintiffs met their step one burden where they presented evidence that "13.4% of African American voters who voted early [in the most recent election] used same-day registration, as compared to 7.2% of white voters," and comparable disparities in prior elections, such that "elimination of same-day registration would 'bear more heavily on African-Americans than whites.'" *Id.* at 233; *see also Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016) (en banc) (finding a disparity where expert's regression analysis, corroborated by a survey of 2300 voters, revealed that Hispanic and Black registered voters were respectively 195% and 305% more likely than their white peers to lack the kind of identification required by a new law).

The Ninth Circuit has repeatedly noted that a statistical disparity is insufficient to meet a party's burden of proof. *See DNC v. Hobbs*, 948 F.3d at 1012 (citing *Smith v. Salt River Project Agric. Improvement and Power Dist.*, 109 F.3d 586 (9th Cir.

1997)). But what Appellants introduced in the record below does not even approach that minimum requirement. On the contrary, Appellants never demonstrated that a single Navajo voter's ballot has ever been rejected as untimely, let alone at a higher rate than other voters' ballots have been rejected. They have thus set forth no demonstrable burden, let alone a disparate one. And without a concrete showing that a disparity exists, the district court was correct to find that Appellants failed to satisfy step one of the two-part test. Because the district court did not clearly err in its interpretation of the law, it did not abuse its discretion by denying relief. *Cf. United States v. Arpaio,* 951 F.3d 1001, 1005 (9th Cir. 2020) ("A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law.").

C. Appellants' arguments for why the district court abused its discretion mischaracterize the lower court's holding and rehash evidence rejected below.

None of Appellants' arguments for why the district court abused its discretion are persuasive.

Appellants first contend that the district court erred by comparing their burden to those of "rural voters" instead of all Arizona voters outside their protected class. Opening Br. 6, 7-8; *see also id.* at 13-14. This undue focus on the district court's passing reference to rural voters mischaracterizes its holding.

As noted above, the district court found that Appellants failed to show any disparity between Navajo voters and *any* other racial or ethnic group with respect to their votes being counted. Appellants are thus wrong when they argue that the district court restricted its step-one analysis to a comparison of Navajo and rural Arizona voters. The district court merely referenced rural voters to illustrate that Appellants failed to show a disparate burden based on a particular protected racial or ethnic group—as opposed to a geographic group—as required to state a Section 2 claim. *See, e.g.*, ER005. In evaluating Appellants' evidence, the district court observed that they only set forth mail-delivery times and distances to ballot drop-off locations on the reservation. The district court criticized this evidence as insufficiently probative of any burden on Navajo voters, as opposed to the burdens shouldered by rural and remote voters generally. ER006.

Next, Appellants reprise a catalogue of observations about the pace and ease of mail delivery and the concentration of post offices and ballot drop-off locations on the reservation—information that their experts included in their reports and testimony below. Opening Br. 15-17. This attempt to recast the factual record has no persuasive force on appeal. Appellants' expert evidence about mail delivery speeds and the relative prevalence of post offices on the reservation, even accepted as true, falls far short of establishing that the Election Day deadline violates Appellants' rights. Appellants fail to acknowledge that their experts declined to

opine that these conditions resulted in a disparate burden on Navajo voters' ability to meet the Election Day deadline. The district court found this omission significant, noting that Appellants acknowledged that their principal expert "offered no opinion testimony." ER004.

Fundamentally, Appellants cannot belatedly draw conclusions based on their own assessment of the evidence presented below, especially where neither their experts nor the district court did so. Neither should this Court. Whether a disparate burden exists is a fact-intensive inquiry, and this Court is not in a position to find these facts on its own. *Miss Universe, Inc. v. Flesher*, 605 F.2d 1130, 1133 (9th Cir. 1979) ("The Court of Appeals does review factual findings; however, we do not generally serve as fact-finders of first instance."). That is particularly so where the district court found that the evidence showed, at most, that Navajo voters had fewer days to cast their votes. Without statistical, expert, or survey evidence establishing that having fewer days for casting a mail-in ballot resulted in Navajo ballots being rejected at higher rates than other demographic groups, the district court did not clearly err in concluding that the record did not show any burden on the voting rights of Navajo Nation members. Accordingly, the district court did not abuse its discretion in determining that mere differences in mail-delivery speeds—without more—cannot satisfy step one of Appellants' VRA claim.

Finally, Appellants claim that the district court "improperly accepted and relied upon [the] argument that as long as Appellants had some other option for voting, it was acceptable to ignore the statutory requirement that all voters have 'equal opportunities' to vote as mandated under the VRA." Opening Br. 8, 18. Not so. The district court merely referenced alternative ways to meet the Election-Day deadline to explain how faulty Postal Service operations could be mitigated by employing other ways to return a vote-by-mail ballot. *See* ER006.

Appellants' claim that the district court pointed to other means of voting—as opposed to various ways to satisfy the same manner of voting—is thus untrue. After all, Appellants challenge the Election-Day deadline itself as causing a disparate burden. It is only logical for the district court to look to the various ways the burden can be mitigated. This does not amount to an unlawful conclusion that Appellants suffer no burden simply because they have more than one means of voting.

In sum, the district court did not abuse its discretion in finding that Appellants are unlikely to succeed on their VRA claim.

D. Appellants' shifting theory of the case further justifies the district court's decision to deny relief.

Given the lack of evidence in the record to satisfy the first of two prongs of Appellants' VRA claims, the district court did not abuse its discretion in declining to address the remaining analysis, namely causation under the totality of the circumstances. That inquiry is irrelevant where a plaintiff fails to set forth the

showing at step one of a disparate burden on a protected class. *DNC v. Hobbs,* 948 F.3d at 1012 (explaining that "*if* we find at the first step that the challenge imposes a disparate burden, we ask whether, under the totality of the circumstances . . . there is a legally significant relationship between the disparate burden on minority voters and the social and historical conditions affecting them") (emphasis added); *cf. Gonzalez*, 677 F.3d at 405-06 (finding no causation despite a showing of a disparate burden); *see also Ohio Democratic Party v. Husted*, 834 F.3d 620, 638 (6th Cir. 2016).

That is all the more true where, as here, Appellants change the nature of their argument on appeal. They contend that their challenged practice is "slower mail delivery resulting in less days to cast their [vote-by-mail ballot]." ER021. But Appellants claimed below that the Election-Day receipt deadline—not Postal Service operations—had a discriminatory impact on Navajo Nation voters. *See* SER 127 (alleging that "Arizona's requirement that Vote By Mail . . . ballots be received . . . before 7:00 p.m. on November 3, 2020 . . . to be counted is an unconstitutional burden[] on [Appellants'] right to vote"); SER 133 ("Defendant's requirement that VBM ballots are to be received—rather than postmarked—on or before Election Day, leads to the disenfranchisement of Navajo Nation Tribal Members"). For this reason, the argument and factfinding below focused on whether there were adequate ways to mitigate interruptions in Postal Service operations to allow Navajo voters to

timely return their mail-in ballots under the deadline. *See* ER006 (concluding that Appellants' showing does not "take into consideration that mailing a ballot is not the only way to submit a vote by mail ballot"); ER030 (declaration of State Elections Director Sambo Dul stating that the Secretary of State's Office has sought to increase access to ballot drop-off locations in tribal communities).

Appellants' new and exclusive focus on the effect of Postal Service operations on the ability of Navajo Nation members to cast a timely ballot entirely changes the gravamen of their case. No longer is this a lawsuit about "whether a deadline for receiving ballots is unlawful." ER007. Rather, it has become primarily about mail accessibility on the Navajo Reservation and the potential implications of service interruptions and delays on the ability of Navajo Nation members to vote. But that is not a policy or practice within the Secretary's power to control.

This Court has repeatedly held that, absent exceptional circumstances, it will not consider arguments raised for the first time on appeal. *See El Paso City v. Am. W. Airlines, Inc.*, 217 F.3d 1161, 1165 (9th Cir. 2000). And it has noted that a party's failure to raise an argument that was indisputably available below is "perhaps the least exceptional circumstance warranting . . . exercise of . . . discretion." *G&G Prods. LLC v. Rusic*, 902 F.3d 940, 950 (9th Cir. 2018). That is equally true for novel theories of a case. *Sateriale v. R.J. Reynolds Tobacco Co.*, 697 F.3d 777, 793 n.10 (9th Cir. 2012). The district court properly analyzed the factual record in light of the

arguments that Appellants made below. Framed in context of the theory of liability that Appellants pursued, the lower court did not abuse its discretion in denying preliminary injunctive relief.

E. The district court rightfully dismissed Appellants' remaining substantive claims, which they fail to challenge on appeal.

The district court acknowledged that in order to prevail on an equal protection theory under 42 U.S.C. 1983, a plaintiff must plead intentional or purposeful unlawful discrimination. ER008; *see also Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). The court concluded that Appellants provided no evidence "on the reasons why Arizona enacted the Receipt Deadline," and "no evidence that ballots from Navajo voters living on-reservation are disproportionately rejected or otherwise disproportionately impacted by the deadline." ER008. The lower court thus did not abuse its discretion in denying relief on Appellants' equal protection claim where they "fall far below the showing of discriminatory intent required by *Arlington Heights*." *Id.*

Similarly, the district court did not abuse its discretion in denying a preliminary injunction on Appellants' claim under the Free and Equal Elections Clause of the Arizona Constitution. It found that "Plaintiffs have provided no evidence that, because of the Receipt Deadline, Navajo voters are unable to cast a vote because of intimidation or lack of free will. Furthermore, Plaintiffs have

provided no evidence that Defendant selectively enforces the Receipt Deadline." ER009 (citing *Chavez v. Brewer*, 222 Ariz. 309, 319 (App. 2009)).

Appellants do not challenge either of these conclusions as clearly erroneous applications or interpretations of law—nor can they. The district court's decision on these substantive grounds for relief should be affirmed.

IV. If this Court wishes to reach the merits of this appeal, it should hold the case pending the Supreme Court's disposition of *Brnovich v. Democratic National Committee*.

The Supreme Court recently granted certiorari to evaluate the legality of two Arizona election laws under Section 2 of the Voting Rights Act. *Brnovich v. Democratic Nat'l Comm.*, No. 19-1257 (cert. granted Oct. 2, 2020). But the petition for certiorari indicates that the scope of the issues presented span the entirety of the "discriminatory burden" test itself. *See* Pet. for Certiorari at 26, *Brnovich*, No. 19-1257 (cert. granted Oct. 2, 2020). The petition argues that without the Supreme Court's guidance, the circuits are "deeply divided over how to determine if laws impose a 'discriminatory burden' under Section 2." *Id.* It also claims that the "two-step framework" employed by circuit courts "frankly is difficult to square with the compromise that Congress struck in Section 2's text." *Id.*

The Supreme Court did not limit its grant of certiorari to any specific questions presented. Its disposition of the case will undoubtedly involve a discussion of the proper test for finding a violation under Section 2, which in turn

will bear on this appeal. Because Appellants' request for relief includes a permanent injunction, this Court should consider holding the appeal pending resolution of the *Brnovich* proceedings in the Supreme Court.

Conclusion

For the above reasons, the Secretary respectfully requests that this Court dismiss the appeal, or, in the alternative, affirm the district court's denial of the preliminary injunction.

Statement of Related Cases

The Secretary is unaware of any related cases currently pending in this Court.

Respectfully submitted this 7th day of October, 2020.

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Certificate of Compliance

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,877 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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Certificate of Service

I hereby certify that on October 7, 2020, I electronically filed the foregoing **Defendant-Appellee's Answering Brief** 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.

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