No. 22-16490

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARIZONA ALLIANCE FOR RETIRED AMERICANS, et al.,
Plaintiff-Appellees,
v.
MARK BRNOVICH, in his official capacity as Arizona Attorney General,
Defendant-Appellants,
and
YUMA COUNTY REPUBLICAN COMMITTEE,
Intervenor-Defendant-Appellants,
and
KATIE HOBBS, in her official capacity as Arizona Secretary of State; et al.
Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
Case No. 2:22-CV-01374-GMS

ATTORNEY GENERAL'S OPENING BRIEF

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Dated: November 18, 2022

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

INTRODUCTION

The preliminary injunction issued by the district court should be reversed for all of the reasons explained by Intervenor-Defendant-Appellants' ("Intervenors'") Opening Brief. Mark Brnovich, in his official capacity as Arizona Attorney General (the "State" or "Attorney General") therefore incorporates those arguments by reference.

The district court's injunction suffers from two other fatal infirmities as well: (1) it exceeded the lower court's authority under Article III, as the dispute over the Felony Provision was not ripe and Plaintiffs could not satisfy Article III's injury or redressability requirements for standing and (2) the district court abused its discretion by violating the doctrine of *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006), and by failing to account for Plaintiffs' delay in bringing suit and seeking an injunction. In doing so, the court accepted the complete absence of any explanation for the delay as sufficient despite the election-eve nature of the injunction issued necessarily being occasioned by that unexplained delay.

The district court's preliminary injunction should be reversed.

JURISDICTION

The district court had jurisdiction under 28 U.S.C. §1331, and entered a preliminary injunction on September 26, 2022. The State and Intervenor-Defendants filed a timely notice of appeal the next day. 5-ER-401-02.[1]

This Court has jurisdiction under 1292(a).

STATEMENT OF ISSUES

This appeal presents the following issues:

(1) Whether Plaintiffs' challenge to the Felony Provision is a justiciable "case or controversy" under Article III.

(2) Whether the district court abused its discretion in issuing a preliminary injunction where it (a) violated *Purcell* doctrine and (b) failed to account for Plaintiffs' unexplained delay in bringing suit.

(3) Whether the district court erred in holding that the Cancellation Provision violated the National Voter Registration Act ("NVRA").

[1] All ER citations are to the Excerpts of Record filed by Intervenors.

(4) Whether the district court erred in holding that the Felony Provision was unconstitutional under the Due Process Clause on vagueness grounds.

STATUTORY ADDENDUM

Intervenor-Defendants' statutory addendum includes the relevant statutory provisions.

STATEMENT OF THE CASE

The State incorporates by reference the Statement of the Case of Intervenors.

SUMMARY OF THE ARGUMENT

The district court's injunction fails on the merits because the Cancellation Provision does not violate the NVRA and the Felony Provision does not violate the Due Process Clause for all of the reasons that Intervenors have explained in their Opening Brief, which the State incorporates by reference.

In addition, the district court's preliminary injunction against the Felony Provision violates Article III for two reasons. *First*, Plaintiffs' challenge to the Felony Provision is not ripe because the Attorney General—the *sole* prosecutor named as a defendant here—has disavowed

any enforcement for the activities at issue. Plaintiffs thus do not face any "genuine threat of imminent prosecution" that could establish Article III ripeness. *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (en banc) (citation omitted).

Second, Plaintiffs lack standing to challenge the Felony Provision. Plaintiffs lack non-speculative injury-in-fact because the threat of injury (here prosecution) rests on pure evidence-free conjecture. That does not suffice under Article III.

In addition, Plaintiffs failed to establish redressability. The Attorney General has already disavowed enforcement against Plaintiffs, so the injunction against him provides little (if any) redress. Plaintiffs also did not join *any* of the 15 County Attorneys. So of the sixteen authorities that could enforce the Felony Provision against Plaintiffs, fully *fifteen* of them are completely unenjoined. Such hollow relief does not satisfy Article III's redressability requirement.

The district court's injunction was also an abuse of discretion because it squarely violates *Purcell* doctrine. This Court previously stayed an injunction issued on September 10 of an election year that had been sought on June 10, concluding it ran afoul of *Purcell* doctrine.

Arizona Democratic Party v. Hobbs ("Hobbs I"), 976 F.3d 1081, 1086 (9th Cir. 2020). But this suit—in which the preliminary injunction was sought nearly three months later, and the injunction was granted 16 days later (and much closer to election day and the start of mail-in voting) violates *Purcell* doctrine even more clearly.

In addition, the district court abused its discretion by failing to give any weight—or indeed analyze *at all*—Plaintiffs' delay in filing suit and seeking a preliminary injunction. SB 1260 was signed into law on June 8. But this suit was not filed until August 15, and a preliminary injunction was not sought until September 8. That delay is wholly unexplained and unjustified, and yet the district court refused to analyze it. That refusal was also an abuse of discretion.

STANDARDS OF REVIEW

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). "[P]laintiff[s] seeking a preliminary injunction must establish that [(1) they are] likely to succeed on the merits, that [(2) they are] likely to suffer irreparable harm in the absence of preliminary relief, that [(3)]

the balance of equities tips in [their] favor, and that [(4)] an injunction is in the public interest." *Id.* at 20.

This Court "review[s] the district court's decision to grant or deny a preliminary injunction for abuse of discretion." *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) (en banc) (per curiam).

"A district court's decision to grant a[n] injunction involves factual, legal, and discretionary components. Therefore, [this Court] evaluate[s] a decision to grant such relief under several different standards of review." *Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998). This Court "review[s] the district court's legal conclusions *de novo*." *Scott v. Pasadena Unified Sch. Dist.*, 306 F.3d 646, 653 (9th Cir. 2002). "Any factual findings supporting the decision to grant the injunction [are] reviewed for clear error." *Id.*

ARGUMENT

I. PLAINTIFFS' CHALLENGE TO THE FELONY PROVISION IS NOT JUSTICIABLE

The district court's injunction against the Attorney General (and no one else) enforcing the Felony Provision exceeded that court's authority under Article III because (1) Plaintiffs' challenge to that provision was

not ripe and (2) Plaintiffs' lacked standing to challenge it, as they both (a) lacked non-conjectural injury-in-fact and (b) failed to establish redressability, particularly where the injunction sought left 15 of 16 relevant prosecutorial authorities free to enforce the Felony Provision against them.

A. Plaintiffs' Challenge Is Not Ripe

To establish an Article III "case-or-controversy," a "case must be 'ripe.'" *Trump v. New York*, 141 S. Ct. 530, 535 (2020) (citation omitted). Ripeness doctrine is particularly important in the context of criminal statutes where "neither the mere existence of a proscriptive statute nor a generalized threat of prosecution satisfies the 'case or controversy' requirement.'" *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (en banc) (citation omitted). Instead, "there must be a 'genuine threat of imminent prosecution.'" *Id.* (citation omitted). Plaintiffs thus typically must articulate "a 'concrete plan' to violate the law in question[.]" *Id.* (citation omitted).

Here, the Attorney General has disavowed any interpretation of the Felony Provision that criminalizes ordinary voter outreach. *See* 1-ER-7-8. Specifically, the Attorney General "interprets 'mechanism for voting'

to mean a ballot and a ballot affidavit envelope and nothing else," and further that "'knowingly' in SB 1260 modif[ies] the entire provision—*i.e.*, the person must have knowledge that they are both 'providing a mechanism for voting to another person' and that person is 'registered in another state.'" 1-ER-7-8 & n.2.

Plaintiffs notably do not even *allege* that they intend to engage in *any* conduct that falls with the Attorney General's construction of the Felony Provision. And the Attorney General is the *sole* prosecutorial authority that is a named defendant here. Accordingly, Plaintiffs are completely without *any* conceivable "'genuine threat of imminent prosecution.'" *Thomas*, 220 F.3d at 1139 (citation omitted).

Plaintiffs' challenge to the Felony Provision is thus unripe. *Id.* Alternatively, if the challenge was ever ripe, the Attorney General's disavowal of enforcement renders the controversy moot. *See*, *e.g.*, *Winsness v. Yocom*, 433 F.3d 727, 736 (10th Cir. 2006) ("Even if we assume that a credible threat of prosecution existed before this lawsuit was filed, the prosecutors' affidavits have rendered the controversy moot.").

Nor have Plaintiffs joined any of the County Attorneys, and thus cannot rely on potential enforcement by *non-parties* to create a justiciable controversy against the Attorney General. *See*, *e.g.*, *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976) ("[A] federal court act only to redress injury … traced to the challenged action of the defendant, and not injury that results from … some third party not before the court.").

In any event, the district court did not cite *any* evidence that any county prosecutor intended to enforce the Felony Provision against Plaintiffs. Thus, even if a ripe controversy could be established by evidence that a *non*-party might enforce a statute against Plaintiffs, *there is no such evidence here*.

The district court attempted to sidestep these insurmountable ripeness problems by the bare claim that "the Attorney General cannot disavow enforcement because he cannot bind County Attorneys or future Attorneys General to his interpretation of the statute." 1-ER-7 n.1. That does not suffice for three reasons.

First, the district court's injunction also "cannot bind County Attorneys," 1-ER-7 n.1, because they are non-parties to this case. Under the district court's rationale, plaintiffs could manufacture ripe

controversies in the absence of any genuine threat of enforcement by the expedient of refusing to join some potential prosecutorial agencies and then pointing to the inability of the named parties to disavow enforcement by those intentionally non-joined third parties. That cannot be the law (and is not). Either Plaintiffs must create a justiciable controversy against the parties they actually named or Article III demands dismissal. *See*, *e.g.*, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) ("'Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.'" (citation omitted)).

Second, even if potential enforcement by non-parties could create a justiciable controversy against the named parties (who disavow enforcement), Plaintiffs did not submit any evidence that the non-party County Attorneys were likely to prosecute them under the Felony Provision—and the district court certainly did not cite any such evidence. *See* 1-ER-7 n.1. Plaintiffs' reliance on the conjectural, evidence-free speculation about enforcement by non-parties thus fails as a matter of both law and fact.

Third, the district court's reliance on the prospect of enforcement by a future Attorney General is insufficient as well. The district court did not dispute that the disavowal was effective for the existing administration. And the prospect that a future Attorney General would interpret the Felony Provision in a different manner is entirely conjectural and not premised on even a scintilla of evidence (and certainly none was cited, 1-ER-7-8 & n.1). Indeed, the district court engaged in *explicit* reasoning-out-loud speculation, postulating that a future Attorney General "may have views that in no way reflect" the current Attorney General's. 1-ER-8. That might be conceivable possible, but that conjecture was offered without citation to any actual evidence. It is nothing more than evidence-free speculation.

Such speculative future enforcement is precisely the sort of "'contingent future events that may not occur as anticipated, or indeed may not occur at all,'" which does not suffice under ripeness doctrine. *Trump*, 141 S. Ct. at 535 (quoting *Texas v. United States*, 523 U.S. 296, 300 (1998)).[2]

[2] In addition, it is likely that principles of judicial estoppel would prevent any prosecution by a future Attorney General where the Plaintiffs relied upon the interpretation of his or her predecessor, which was advanced to

B. Plaintiffs Have Not Established Article III Redressability

For similar reasons, Plaintiffs lacked Article III standing to obtain injunctive relief here and the district court erred in holding otherwise.

To establish Article III standing, plaintiffs "must show [(1)] that [they are] under threat of suffering 'injury in fact' that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; [(2)] it must be fairly traceable to the challenged action of the defendant; and [(3)] it must be likely that a favorable judicial decision will prevent or redress the injury." *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009) (citation omitted). Here Plaintiffs failed to establish either (1) non-conjectural injury-in-fact or (2) redressability.

Non-Speculative Injury-in-Fact. Plaintiffs' injury-in-fact—*i.e.*, potential prosecution—is purely "conjectural or hypothetical." *Id.* As discussed above, the only defendant that could enforce the Felony Provision against Plaintiffs is the Attorney General—who has disavowed enforcement for *all* activities in which Plaintiffs seek to engage. While the district court reasoned a future Attorney General might seek to

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defeat a preliminary injunction. *See*, *e.g.*, *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001).

enforce, that was pure speculation did not rest on *any* actual evidence and instead was the sort of "conjectural or hypothetical" injury-in-fact that does not suffice. *See*, *e.g.*, *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 401 (2013) (Plaintiffs lacked Article III standing where their "theory of *future* injury [wa]s too speculative to satisfy the well-established requirement that threatened injury must be 'certainly impending.'" (citation omitted)).

Redressability. Plaintiffs also failed to establish Article III redressability. The redressability requirement demands that "it must be '*likely*,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (emphasis added). But it is entirely speculative that the injunction sought and obtained here will remedy *any* injury at all.

It is undisputed that the Attorney General disavowed enforcement against Plaintiffs for all activities they said they wished to engage in. Any injunction against unequivocally disclaimed enforcement provides no redress. And "'[r]elief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court.'" *Yazzie v. Hobbs*, 977 F.3d 964, 967 (9th Cir. 2020) (quoting *Steel Co.*, 523 U.S. at 107 (alteration

omitted)). And to the extent that the district court was relying on potential future enforcement by a future Attorney General, such "threat of future harm to [plaintiffs] [wa]s based upon an extended chain of highly speculative contingencies" that does not establish standing. *Nelsen v. King County*, 895 F.2d 1248, 1252 (9th Cir. 1990).

Moreover, because Plaintiffs did not join *any* of the 15 County Attorneys—who bring the *vast* majority of criminal charges within the State[3]—it remains "'speculative,'" rather than "likely … that the injury will be 'redressed by a favorable decision.'" *Lujan*, 504 U.S. at 561. Any enforcement was always more likely to come from County Attorneys anyway, and an injunction against the Attorney General alone (even absent the complete disavowal here for all relevant conduct) provides only speculative relief.

Put simply, assuming that Plaintiffs actually face a realistic, imminent threat of prosecution—as would be required to satisfy Article III—an injunction purely against the Attorney General is not likely to remedy it. By leaving Plaintiffs exposed to potential prosecution by all 15

[3] *See*, *e.g.*, 2020 Superior Court filings by agency, https://www.azcourts.gov/Portals/39/2020DR/SuperiorCourtFY20.pdf?ver=2021-08-16-181754-943.

County Attorneys, the relief sought and obtained here is of speculative value at best for redressability purposes.

Ultimately, the district court's redressability reasoning is self-defeating. The district court's injunction is explicitly premised on the proposition that "[i]f the Felony Provision is not enjoined, Plaintiffs will need to self-censor their voter registration efforts." 1-ER-8 n.3. But the Felony Provision is *overwhelmingly "not enjoined." Fifteen* out of sixteen authorities that could prosecute violations of it are under no injunction at all, and remain perfectly free to enforce the Felony Provision against Plaintiffs. Under the district court's reasoning, Plaintiffs will therefore need to continue to "self-censor their voter registration efforts"—which, by definition, means their alleged injury will remain unredressed.

The district court's injunction thus fails even under its own internal logic.

C. The District Court's Injunction Is An Impermissible Advisory Opinion

The district court's transgressions of Article III are made all the more apparent because that court seemingly *sought* for its injunction to function as an advisory opinion—precisely what Article III denies it authority to do. *See*, *e.g.*, *Steel Co.*, 523 U.S. at 101 (issuance of "advisory

opinion[s]" has been "disapproved by this Court from the beginning" of its jurisprudence). The explicitly advisory nature of the district court's injunction is apparent for two reasons.

First, the district court expressly announced that its injunction against the Attorney General was intended to act as a "deterrent" against the non-party County Attorneys from enforcing the Felony Provision; it thus explained that "enjoining all law enforcement parties in this case from enforcing it is certainly a *more effective deterrent* of overall potential harm than not doing so." 2-ER-27 (emphasis added). But a preliminary injunction is an "extraordinary remedy never awarded as of right," that may only appropriately be issued where Plaintiffs "demonstrate that irreparable injury is *likely* in the absence of an injunction." *Winter*, 555 U.S. at 22, 24. An injunction issued to "send a message" to non-parties, rather than remedy *likely* irreparable harm from existing parties, both violates Article III and is an abuse of the district court's equitable discretion.

The district court's "deterrent" language makes plain the advisory nature of the injunction here: that court did not seek to remedy a dispute between the parties before it—there effectively was none given the

Attorney General's disavowal. Instead, the district court sought to issue a universal decision against all relevant parties not before it as a "deterrent." But Article III denied it power to do so.

Second, the advisory nature of the district court's injunction is shown by its assumption that it would effectively bind everyone. As explained above, the district court reasoned that "[i]f the Felony Provision is not enjoined, Plaintiffs will need to self-censor their voter registration efforts." 1-ER-8 n.1. But, as explained above (at 15), for the vast majority of enforcement agencies, the Felony Provision is *not enjoined*—unless the preliminary injunction is taken as an advisory opinion against them. That the district court believed its injunction to operate *de facto* against non-parties underscores its advisory nature.

II. THE DISTRICT COURT ABUSED ITS DISCRETION IN ISSUING A PRELIMINARY INJUNCTION

The district court also abused its discretion by issuing an injunction so close to the November 2022 election—particularly where that timing was occasioned purely by Plaintiffs' unexplained delay.

The challenged statute was signed into law on June 8—but Plaintiffs did not file this suit until August 15, and did not seek a preliminary injunction until September 8. 1-ER-7 n.1, 5-ER-416. Yet the

district court did not demand any explanation for that delay, or indeed account for it at all. Indeed, its order does not even *mention* those dates. 1-ER-2-23. And the injunction was only issued on September 26—a mere 16 days before most mail-in ballots were sent out and 2 days *after* military and overseas ballots had already been mailed.[4]

Given the timing of Plaintiffs' actions and the district court's injunction, the resulting injunction was a clear abuse of discretion under *Purcell* doctrine.

A. The District Court's Injunction Violates *Purcell* Doctrine

Enjoining a reasonable voter administration law like SB 1260 during the critical weeks before a voter's registration is solidified and early ballots are distributed is a quintessential violation of the *Purcell* doctrine. "[F]ederal district courts ordinarily should not enjoin state election laws in the period close to an election." *Merrill v. Milligan*, 142 S. Ct. 879, 879 (2022) (Kavanaugh, J., concurring) (citing *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam)); *Moore v. Harper*, 142 S. Ct.

[4] *See* Maricopa County Elections Department (Sept. 23, 2022), *available at* https://elections.maricopa.gov/news-and-information/elections-news/the-general-election-has-begun-ballots-sent-to-military-and-overseas-voters.html.

1089, 1089 (2022) (Mem.) (Kavanaugh, J., concurring); *Republican Nat'l Comm. v. DNC*, 140 S. Ct. 1205, 1206-77 (2020) (per curiam); *Yazzie*, 977 F.3d at 968-69 (dismissing "last-minute challenge to decades-old rule" under the *Purcell* doctrine); *Mi Familia Vota v. Hobbs*, 977 F.3d 948, 953 (9th Cir. 2020) (relying on *Purcell* doctrine as a "factor supporting the government's likelihood of success on the merits").

Purcell doctrine strongly "discourages last-minute litigation and instead encourages litigants to bring any substantial challenges to election rules ahead of time, in the ordinary litigation process." *DNC v. Wis. State Leg.*, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurring). Plaintiffs' artificial "emergency" action is a perfect example of this type of case.

Plaintiffs' delay had several consequences. To start, the district court (and Defendants) were forced to wade through novel, difficult legal questions in the span of a week. 4-ER-397-98 (noting that Plaintiffs' late filing has "put [the court] in a position where [it has] to interpret some very complex laws" in an expedited time frame). Moreover, SB 1260 *did* go into effect on September 24, 2022 (the same day that the 2022 General

Election commenced), confirming to election officials that they were free to carry on with the same procedures for maintaining accurate voter rolls.

Two days later, however, the district court enjoined parts of SB 1260, but not the similar procedures or related statutes that set forth the same process concerning the elimination of duplicate registrations. 1-ER-23. This inconsistency caused undue confusion regarding how county recorders may maintain accurate voter rolls. Moreover, counties may differ in how they interpret the district court's injunction. *DNC*, 141 S. Ct. at 31 (Kavanaugh, J., concurring) ("Even seemingly innocuous late-in-the-day judicial alterations to state election laws can interfere with administration of an election and cause unanticipated consequences."). The Arizona "legislature[may] alter [its] own election rules in the late innings and [] bear the responsibility for any unintended consequences. It is quite another thing for a federal district court to swoop in and alter carefully considered and democratically enacted state election rules when an election is imminent." *Id.*

Injecting confusion into election administrators' already complex job *during* an election is untenable and constitutes an abuse of discretion under *Purcell* doctrine. *See Mi Familia Vota*, 977 F.3d at 953 (reasoning

that an injunction of an election law so close to an election would cause irreparable harm because it "makes it considerably more difficult for [the Secretary] and other election officials to fulfill their statutory obligations in administering the election").

A quick comparison to this Court's decision in *Arizona Democratic Party v. Hobbs ("Hobbs I")*, 976 F.3d 1081 (9th Cir. 2020) makes obvious the district court's abuse of discretion here. Notably, that suit was filed on *June 10*, and a motion for a preliminary injunction was filed the same day—*i.e.*, that suit was filed *two months* earlier and the preliminary injunction nearly *three months* earlier.

This difference is material: it more than *doubled* the amount of time from suit/preliminary injunction filing to the election. Indeed, the true difference is even greater than that: because about 80% of Arizona voters vote by mail-in ballots, which are sent out 27 days before election day, elections in Arizona effectively begin in early October rather than November. (For the 2022 election, that date was October 12, 2022.) And the district court's injunction in *Hobbs I* issued on September 10—*i.e.*, *substantially* further away from the general election date (and several times more removed from the *de facto* early-October start of Arizona

election). But the district court's September 26 injunction here came *substantially* later than that in *Hobbs I*.

Despite the greater diligence by plaintiffs in *Hobbs I*, this Court still had no difficulty in concluding that the district court's September 10 injunction was a clear abuse of discretion under *Purcell* doctrine. As this Court explained in issuing a stay pending appeal, "the public interest is well served by preserving Arizona's existing election laws, rather than by sending the State scrambling to implement and to administer a new procedure for curing unsigned ballots at the eleventh hour." *Hobbs I*, 976 F.3d at 1086. But the injunction issued here comes even later: issued essentially at the eleventh-and-a-half hour and (unlike *Hobbs I*) after overseas votes had already gone out. The district court's injunction here violates *Purcell* doctrine here *a fortiori* under *Hobbs I*.

Ignoring this Court's decision in *Hobbs I*, the district court instead cited the injunction pending appeal decision in *Feldman v. Arizona Sec'y of State's Off.*, 843 F.3d 366, 370 (9th Cir. Nov. 4, 2016) (en banc). 1-ER-22. But the district court failed to account for (or even note) that decision's subsequent history: It was *unanimously stayed* by the Supreme Court. 137 S. Ct. 446 (Nov. 5, 2016). The very next day—a Saturday. *Id.*

That is no ordinary action by the Supreme Court, but that 24-hour/Saturday-turnaround was a clear indication that this Court had profoundly abused its discretion, particularly given the absence of a single noted dissent.

This Court subsequently dismissed the entire appeal as moot on June 1, 2018, and the stayed injunction (and whatever precedential value it still carried) with it. And while this Court subsequently adopted much of the reasoning of *Feldman* in *DNC v. Hobbs*, 948 F.3d 989 (9th Cir. 2020) (en banc), the Supreme Court decisively reversed that decision in *Brnovich v. DNC*, 141 S. Ct. 2321 (2021).

Feldman is thus of extremely doubtful precedential status, particularly given the *two* Supreme Court decisions rejecting this Court's analysis—first as a nearly-unprecedented unanimous 24-hour Saturday stay and second as an outright reversal of the underlying decision. And that precedential status is further eliminated as this Court has since made clear that motions decisions, such as those resolving requests for stays or injunctions pending appeal, are only "'persuasive'" authority and "'not binding.'" *Arizona Democratic Party v. Hobbs ("Hobbs II")*, 18 F.4th 1179, 1186 n.3 (9th Cir. 2021) (citations omitted).

B. The District Court's Refusal To Account For Plaintiffs' Unexplained Delay Was An Abuse Of Discretion

Plaintiffs' delay is problematic not only quantitatively, but also qualitatively. Specifically, Plaintiffs did not even *attempt* to explain why they delayed bringing this case and seeking a preliminary injunction, and the district court did not inquire into the subject at all. The *Purcell* violation here was thus wholly preventable and, even worse, completely without any proffered rationale, defensible or otherwise.

As this Court has repeatedly recognized, "delay" in bringing suit against an election law properly "implies a lack of urgency and irreparable harm.'" *Miracle v. Hobbs*, 808 F. App'x 470, 473 (9th Cir. 2020) (quoting *Oakland Tribune, Inc. v. Chronicle Publ'g Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985).

Plaintiffs here engaged in substantial—and completely unjustified—delay. As noted above, Plaintiffs did not file this suit until August 15, more than *two months* after SB 1260 was signed into law. *Supra* at 17. Even after filing suit, Plaintiffs waited an additional three weeks—and more than three months *after* SB 1260 was signed into law—to move for a preliminary injunction and demand emergency briefing.

Supra at 17. Neither did Plaintiffs offer—nor the district court demand—any rationale for the delay.

Just as in *Miracle* and *Oakland Tribune*, "[t]his delay 'implies a lack of urgency and irreparable harm.'" *Miracle*, 808 F. App'x at 473 (quoting *Oakland Tribune*, 762 F.2d 1374, 1377 (9th Cir. 1985).

The district court, however, failed to account for this delay. Indeed, its order does not even *mention* these relevant dates, let alone attempt to weigh Plaintiffs' unexcused (and inexcusable) delay here. In doing so, the district court abused its discretion by failing to account for this critical consideration, which significantly exacerbated the *Purcell* violation here by making it entirely gratuitous and preventable.

CONCLUSION

For all of the reasons explained in Intervenors' Opening Brief, along with those provided above, the district court's order issuing a preliminary injunction should be reversed.

Respectfully submitted,

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Dated: November 18, 2022

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, the State states that it is not aware of any related cases.

CERTIFICATE OF COMPLIANCE

Form 8. Certificate of Compliance for Briefs

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CERTIFICATE OF SERVICE

I, Drew C. Ensign, hereby certify that I electronically filed the foregoing State'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 on November 18, 2022, which will send notice of such filing to all registered CM/ECF users.

s/ Drew C. Ensign
Drew C. Ensign