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 REPLY BRIEF

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TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 2

I. PLAINTIFFS' CHALLENGE TO THE FELONY PROVISION IS NOT JUSTICIABLE 2

A. Plaintiffs Lack Article III Standing And Ripeness 2

B. Plaintiffs Have Not Established Article III Redressability 4

II. THE DISTRICT COURT ABUSED ITS DISCRETION IN ISSUING A PRELIMINARY INJUNCTION 6

A. The District Court's Injunction Violates The *Purcell* Doctrine 6

B. The District Court's Refusal To Account For Plaintiffs' Unexplained Delay Was An Abuse Of Discretion 8

CONCLUSION 10

TABLE OF AUTHORITIES

Page(s)

CASES

Arizona Democratic Party v. Hobbs,
18 F.4th 1179 (9th Cir. 2021) 7

Clapper v. Amnesty Int'l USA,
568 U.S. 398 (2013) 4

Feldman v. Arizona Sec'y of State's Off.,
843 F.3d 366 (9th Cir. Nov. 4, 2016) 7

Lujan v. Defs. of Wildlife,
504 U.S. 555 (1992) 1

New Hampshire v. Maine,
532 U.S. 742 (2001) 3

Summers v. Earth Island Inst.,
555 U.S. 488 (2009) 2

Thomas v. Anchorage Equal Rights Comm'n,
220 F.3d 1134 (9th Cir. 2000) 1

INTRODUCTION

Plaintiffs' challenge to the Felony Provision is a paradigmatic example of a non-justiciable controversy. Of the 16 authorities that could enforce the provision against Plaintiffs, Plaintiffs only named one—who disavowed enforcement for *all* relevant activities. As a result, Plaintiffs cannot establish (1) 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); (2) any non-speculative injury; or (3) redressability, as required for Article III standing, *see*, *e.g.*, *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992).

The district court also abused its discretion in issuing its preliminary injunction contrary to the *Purcell* doctrine and without weighing Plaintiffs' needless and completely unexplained delay in filing suit. Although Plaintiffs quibble at the edges of the State's arguments, they never deny the two core facts that render the preliminary injunction an abuse of discretion: (1) the injunction was issued *after* the law had gone into effect, and was *already* regulating the conduct of election operations for a rapidly approaching election, and (2) that timing was

entirely caused by Plaintiffs' delay in bringing suit, which Plaintiffs have *never* justified and the district court did not meaningfully consider.

This Court should therefore reverse the district court's preliminary injunctions for all of those reasons, as well as those advanced by Intervenors.

ARGUMENT

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

A. Plaintiffs Lack Article III Standing And Ripeness

Article III ripeness requires a "genuine threat of imminent prosecution" to establish justiciability for a pre-enforcement challenge such as this one. *Thomas*, 220 F.3d at 1139. Similarly, to establish Article III standing, Plaintiffs must demonstrate that "the threat must be actual and imminent, not conjectural or hypothetical." *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009) (citation omitted).

Here, Plaintiffs have not established *either* such a "genuine threat of imminent prosecution" or that their asserted harms are anything other than conjectural—and indeed, the district court's justiciability reasoning *explicitly* relies on evidence-free, citation-less speculation.

Here, the *sole* prosecutorial authority that Plaintiffs named has explicitly disavowed enforcement for all of the activities that Plaintiffs seek to engage in. *See* 1-ER-6-7 & n.2; Opening Br.7-8. Plaintiffs never deny that the Attorney General's disavowal of enforcement covers *all* of their relevant activities.

Plaintiffs nevertheless fault the formality of that disavowal (at 13), claiming that it was only in "the context of this litigation." But that was *not* the basis on which the district court rested its decision. And if the district court had actually accepted that argument, the Attorney General could have readily supplied codification in whatever form Plaintiffs desired. Nor is there any reason to doubt that if he had prevailed on his justiciability arguments, judicial estoppel would have prevented the Attorney General from breaking his word as to his disavowal. *See*, *e.g.*, *See*, *e.g.*, *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001). Indeed, while the State specifically raised judicial estoppel in its Opening Brief (at 11-12 n.2), Plaintiffs make no attempt to answer that argument.

The district court nonetheless found that the Attorney General's disavowal did not defeat justiciability vis-à-vis his office because the next Attorney General "may have views that in no way reflect his own." 1-ER-

7. But that is, on its face, *explicit speculation*. Nor did the district court cite to *any* evidence supporting that speculation. And Plaintiffs do not point to *any such evidence* in their Answering Brief either.

The central premise of the district court's justiciability holding thus rests expressly on conjecture that is concededly unsupported by even a *scintilla* of record evidence. That cannot possibly 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)). And while Plaintiffs suggest that Article III is "relaxed" here, it cannot be so relaxed that evidence-free speculation suffices to satisfy its requirements.

B. Plaintiffs Have Not Established Article III Redressability

Because Plaintiffs have supplied no evidence that they face a genuine threat of prosecution by the Attorney General, an injunction against him provides no meaningful redress. Plaintiffs' response is little better than an *ipse dixit*: "Enjoining the Attorney General's enforcement of the Felony Provision against Plaintiffs and their protected activities would redress an injury Plaintiffs suffer—period." Answering Br.26

(offered without supporting citation). But any such putative "injury" is entirely conjectural and thus renders any redress conjectural too. Nor does declaring (at 26) that redress is established "period" substitute for offering any actual evidence of threatened prosecution, which is the only possible injury here.

Plaintiffs also resist (at 26-27) this conclusion by pointing to the effect of the injunction on the non-joined County Attorneys. But that merely digs Plaintiffs' justiciability hole even deeper.

Even in their own telling, Plaintiffs are explicitly relying upon the preliminary injunction against the Attorney General to act as an advisory opinion against non-parties: arguing to this Court expressly that Article III redressability was established because "as a practical matter, it is highly unlikely that a local prosecutor would choose to enforce statutory provisions that a federal court has enjoined on constitutional grounds." Answering Br.26. That is explicitly relying on the *advisory* effect of the preliminary injunction to provide redress, and precisely what Article III denies federal courts authority to do.

Plaintiffs' candid admission that they are relying on the advisory effect of the preliminary injunction notably mirrors the district court's

overt reasoning. As set forth in the State's Opening Brief (at 16-17), the district court was *explicitly* relying on its injunction to act as a "deterrent" on third parties. 2-ER-25. But although the State specifically flagged this language as demonstrating that the preliminary injunction acts as—and was intended to be—an impermissible advisory opinion, Plaintiffs make no attempt to reconcile that language with the limitations of Article III. Indeed, the word "deterrent" cannot be found anywhere its Answering Brief.

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

The district court's injunction was also an abuse of discretion because it violates the *Purcell* doctrine and fails to weigh meaningfully Plaintiffs' delay that needlessly created all of the *Purcell* problems presented here.

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

The district court's injunction violates the *Purcell* doctrine and thus constitutes an abuse of discretion. There is no dispute that the injunction was entered after the law had gone into effect and after it was regulating registration for a rapidly upcoming election.

Plaintiffs argue (at 64) that no *Purcell* violation exists here because "the District Court's order had the effect of preserving Arizona's preexisting election laws." That reasoning mirrors this Court's reasoning in *Feldman*, which explained that the *Purcell* doctrine did not apply because the injunction at issue merely "preserve[d] the status quo prior to the recent [challenged statute]." *Feldman v. Arizona Sec'y of State's Off.*, 843 F.3d 366, 369 (9th Cir. Nov. 4, 2016) (en banc).[1] And if that *Feldman* order were the end of that dispute, Plaintiffs would have a good case here.

But the Supreme Court disagreed: *rapidly and unanimously*. That court issued a stay the next day (a Saturday) without any noted dissent. 137 S. Ct. 446 (Nov. 5, 2016). Thus, *Purcell* cannot be disregarded by simply characterizing the injunction at issue as a preservation of the status quo. But remarkably that is Plaintiffs' principal argument here. It should fare no better here than in *Feldman*.

[1] Motion decisions by this Court are not binding precedent. *See Arizona Democratic Party v. Hobbs*, 18 F.4th 1179, 1186 n.3 (9th Cir. 2021).

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

The *Purcell* problems here were also completely avoidable and gratuitous given Plaintiffs' delay. Had Plaintiffs filed suit shortly after SB 1260 was signed into law on June 8, 2022, all or nearly all of the *Purcell* issues could have been avoided. But Plaintiffs refused to do so and have *never* provided any defensible explanation for their delay.

Plaintiffs point (at 67) to stray language at the hearing below that the district court said that Plaintiffs had not "'forfeited'" their challenge. Answering Br.67 (citing 4-ER-393:20–24). That contention is unavailing for three reasons.

First, the district court entirely failed to examine *why* Plaintiffs had delayed suit or to require them to provide *any* explanation. That abused its discretion. *See* Opening Br.24-25.

Second, the State's argument was not that Plaintiffs' claims were totally barred—or "forfeited" in the district court's language—as if Plaintiffs had run afoul of the statute of limitations. Instead, the State's contention was that Plaintiffs' delay needed to be *weighed* as part of the equitable balancing. Simply declaring that it does not rise to the level of

outright and complete forfeiture does not perform that requisite equitable balancing.

Moreover, the district court hardly absolved Plaintiffs from the charge of unreasonable delay, pointedly telling them that they "didn't do it [file suit and for a preliminary injunction] very quickly, [and they] could have done it quicker," thereby putting the district court in a tricky "position where [it] ha[d] to interpret some very complex laws" on a short timetable. 4-ER-398-98. But the district court nonetheless did not give that acknowledged delay weight.

Third, Plaintiffs' defense (at 68) that "all of Plaintiffs' actions occurred *before* the challenged provisions went into effect" hardly means that their delay was not a highly relevant consideration here.

As an initial matter, Plaintiffs' preliminary injunction barely satisfies their own articulation of what constitutes unreasonable delay: their preliminary injunction was filed a mere 16 days before SB 1260 went into effect on September 24. But even more relevant is that Plaintiffs could have filed suit *three months earlier*, when SB 1260 was signed into law on June 8. That Plaintiffs dithered away 92 of the 108 days between signed-into-law June 8 date and the September 24 effective

date should have militated strongly against granting Plaintiffs' eleventh-hour request for a preliminary injunction. Instead it was given no weight or consideration at all, which was an abuse of discretion.[2]

CONCLUSION

For all of the reasons explained above, previously, and in Intervenors' briefs the district court's order issuing a preliminary injunction should be reversed.

[2] Plaintiffs (at 66) fault the State for not seeking a stay pending appeal. But given the State's position that SB 1260 only codified existing law, there was no reason to seek such a stay once the district expressly made clear that its "injunction does not extend to the state's election procedures." 2-ER-28.

Respectfully submitted,

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Dated: December 30, 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 Reply 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 December 30, 2022, which will send notice of such filing to all registered CM/ECF users.

s/ Drew C. Ensign
Drew C. Ensign