No. 20-16890

In the United States Court of Appeals for the Ninth Circuit

DARLENE YAZZIE, ET AL.,
Plaintiffs—Appellants,

v.

KATIE HOBBS, IN HER OFFICIAL CAPACITY AS SECRETARY OF STATE FOR THE STATE OF ARIZONA
Defendant—Appellee.

On Appeal from the U.S. District Court for the District of Arizona
No. 3:20-cv-0822-GMS | Hon. G. Murray Snow

BRIEF FOR LEAGUE OF WOMEN VOTERS OF ARIZONA AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT AND REQUESTING REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A), the League of Women Voters of Arizona certifies that it is not a publicly held corporation, does not have any parent corporations, and has not issued any shares of stock.

Dated: October 6, 2020

Respectfully submitted,

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STATEMENT OF AMICUS CURIAE[1]

Amicus Curiae The League of Women Voters of Arizona ("LWVAZ" or "the League") is an affiliate of The League of Women Voters of the United States, a nonpartisan community-based organization that was formed in 1920, immediately after the enactment of the Nineteenth Amendment granting women's suffrage. LWVAZ is dedicated to encouraging its members and individuals to exercise their right to vote as protected by the Constitution and the Voting Rights Act of 1965. LWVAZ's mission is to promote political responsibility through informed and active participation in government and to act on selected governmental issues. LWVAZ works to impact public policies, promote citizen education, and support democracy by, among other things, removing unnecessary barriers to full participation in the electoral process. LWVAZ began as an organization focused on the needs of women and empowering women voters, but it has evolved into an organization concerned with educating, advocating for, and empowering all Arizonans. LWVAZ works with and through its 6 local Leagues and approximately 870 members throughout Arizona. With members across the State, the LWVAZ's local Leagues

[1] No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or any person other than *amicus curiae* and its counsel made a monetary contribution to the preparation or submission of this brief.

are engaged in numerous activities, including hosting public forums and open discussions on issues of importance to the community. Individual League members invest substantial time and effort in voter training and civic engagement activities, including voter registration and get-out-the-vote ("GOTV") efforts.

Finally, in fulfilling its mission to foster civic engagement and encourage voter participation, LWVAZ has made substantial investments in voter registration and voter protection activities statewide, including incurred expenses for the 2020 election cycle. Given the extensive experience and efforts of LWVAZ to ensure that the interests of all Americans are fully and fairly represented in the democratic process, LWVAZ is well-positioned to provide a useful perspective to the Court.

SUMMARY OF ARGUMENT

This case presents a critical issue about protecting voting rights for groups long recognized as having been subject to disparate burdens in having their votes counted. Most Arizonans take access to mail receipt and delivery as a given. By contrast, the District Court recognized the painful reality that "several variables make voting by mail difficult" for Native American voters. *Yazzie v. Hobbs*, No. 20-cv-08222, 2020 WL 5834757, at *1 (D. Ariz. Sept. 25, 2020). More specifically, "[m]ost Navajo Nation residents do not have access to standard mail service," including home delivery, and must travel "lengthy distance[s]" to access postal services—a burden compounded by "socioeconomic factors." *Id.*

Meanwhile, Arizona law requires that ballots "must be received by the county recorder or other officer in charge of elections or deposited at any polling place in the county no later than 7:00 p.m. on election day." Ariz. Rev. Stat. § 16-548(A) (2019) ("Receipt Deadline"). In light of the unique and longstanding burdens Appellants and thousands of their fellow Native American voters have endured and continue to face in accessing mail services and physical ballot-delivery sites, the Receipt Deadline violates Section 2 of the Voting Rights Act 52 U.S.C. § 10301(a).

Like Appellants' claims here, vote-denial claims under Section 2 of the Voting Rights Act "implicate the value of participation" in the political process. *Farrakhan v. Gregoire*, 590 F.3d 989, 1005-1006 (9th Cir.), *on reh'g en banc*, 623 F.3d 990 (9th Cir. 2010). Section 2 is a "permanent, nationwide ban on racial discrimination," animated by the principle that "any racial discrimination in voting is too much." *Shelby Cty., Ala. v. Holder*, 570 U.S. 529, 557 (2013). It therefore "'prohibits all forms of voting discrimination' that lessen opportunity for minority voters." *League of Women Voters of N. Carolina v. North Carolina*, 769 F.3d 224, 237-238 (4th Cir. 2014) (quoting *Thornburg v. Gingles*, 478 U.S. 30, 45 n.10 (1986)). Courts effectuate that prohibition by asking two questions: (1) whether the "challenged standard, practice or procedure results in a disparate burden on members of the protected class"; and, if so (2) whether "there is a relationship between the challenged standard, practice, or procedure, on the one hand, and social and historical conditions

on the other." *Democratic Nat. Comm. v. Hobbs*, 948 F.3d 989, 1012 (9th Cir. 2020), *cert. granted sub nom. Ariz. Republican Party v. Democratic Nat. Comm.*, No. 19-1258, 2020 WL 5847129 (U.S. Oct. 2, 2020), *and cert. granted sub nom. Brnovich v. Democratic Nat. Comm.*, No. 19-1257, 2020 WL 5847130 (U.S. Oct. 2, 2020) (quotations omitted).

Appellants' challenge to the Receipt Deadline satisfies both steps, and the District Court erred in holding otherwise. First, the District Court misapplied the disparate burden analysis by assuming that the impact of the Receipt Deadline on Appellants, as Native Americans, must be compared to a narrowed group of rural voters, rather than the general electorate. That view finds no support in the law. Nor does the Court's characterization of the burden as a mere "inconvenience," as illustrated by *League of Women Voters of Fla. Inc. v. Detzner*, 314 F. Supp. 3d 1205 (N.D. Fla. 2018) which invalidated a prohibition against early voting sites on college campuses.

Second, after misapplying the first step, the District Court erroneously skipped the second. As explained below, the "Senate Factors" courts look to in assessing the relationship between the burdensome practice and the relevant social and historical context weigh heavily in Appellants' favor.

For these reasons, this Court should reverse the District Court's conclusion that Appellants are not likely to succeed on the merits of their claim that the Receipt Deadline violates Section 2 of the VRA.

ARGUMENT

I. THE RECEIPT DEADLINE PLACES A DISPARATE BURDEN ON APPELLANTS' RIGHT TO VOTE ON ACCOUNT OF THEIR RACE.

Simply because they are Native Americans who live on the Navajo Nation Reservation, Appellants face greater challenges in meeting the Receipt Deadline than other Arizona voters. The District Court's attempts to reason around that fact cannot be squared with Section 2 of the Voting Rights Act, as applied by this Court and others.

A. The Disparate Burden Analysis Turns On A Comparison Between Appellants And Voters In General.

As this Court recognizes, a disparate burden under Section 2 of the VRA exists when, "'as a result of the challenged practice or structure[,] plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice.'" *Hobbs*, 948 F.3d at 1012 (quoting *Gingles*, 478 U.S. at 44). The District Court misapplied this principle in holding that Appellants had to compare the obstacles they face, as Native Americans living on Tribal lands who may not speak or read English, with those faced by other *rural* voters, rather than the general electorate, in order to show a disparate burden. And whereas most Arizona voters

(even those in rural places) can count on timely and reliable mail service, Native American voters on Tribal lands cannot.

Earlier this year, this Court recognized that in Arizona, "[r]eady access to reliable and secure mail service is nonexistent in some minority communities." *Hobbs*, 948 F.3d at 1034 (quotations and citations omitted). Indeed, "[o]nly 18 percent of American Indian registered voters have home mail service. White registered voters have home mail service at a rate over 350 percent higher than their American Indian counterparts." *Id.* at 1005-1006 (citations omitted). The *Hobbs* court specifically noted that "[o]n the Navajo Reservation, most people live in remote communities, many communities have little to no vehicle access, and there is no home incoming or outgoing mail, only post office boxes, sometimes shared by multiple families." *Id.* (quotations and citations omitted).

Here, Appellants presented compelling evidence, consistent with *Hobbs*, highlighting the particular difficulties they face, as Tribal members, in trying to meet the Receipt Deadline. For example, as the District Court noted, Certified First-Class mail sent from the reservation took, on average, four to ten days to reach the sender's county recorder's office; that time period shrinks to only one to two days for similar mail traveling from off-reservation cities. *Yazzie*, 2020 WL 5834757, at *2. That means Appellants and their fellow Tribal members must mail their ballots earlier than most Arizonans in order to make the Receipt Deadline, which in turn reduces

the time they have to translate and consider their ballots, as compared to most Arizonans.

In addition, the court noted the "great discrepancies" in the number of ballot drop-off locations on Tribal lands as compared to several other locations. *Id.* at *3. Further, the court recognized that "it is difficult for many Navajo Nation members to access the postal service because of lack of home mail delivery, the lengthy distance it takes to get to the post office on-reservation, and the fact that many Navajo Nation members have insufficient funds to travel to a post office." *Id.*

Despite acknowledging all that evidence, the District Court nevertheless found these facts insufficient to show a disparate burden, primarily because Appellants ran comparisons between the reservation and "cities, not to other rural areas of Arizona." *Yazzie*, 2020 WL 5834757, at *3. That was error. First, at least two points of comparison were themselves small, rural municipalities in Arizona—Holbrook, with a population just over 5,000, and St. John's, at just under 3,500, according to the 2010 Census.[2]

More importantly, the District Court impermissibly narrowed the disparate-burden analysis by requiring a flawed like-to-like comparison. "Section 2 of the

[2] *See* http://bit.ly/holbrook2010; http://bit.ly/StJohns2010.

VRA 'prohibits all forms of voting discrimination that lessen opportunity for minority voters.'" *Hobbs*, 948 F.3d at 1011 (quoting *League of Women Voters of N. Carolina*, 769 F.3d, at 238 (internal quotes omitted)). The outcome does not turn on whether minority voters enjoy less opportunity than similarly situated non-minority voters or some other subset of the electorate. The correct points of comparison are the affected minority group and non-minority voters. And here, as discussed above, the evidence was perfectly clear that Native Americans face different and greater challenges than the vast majority of Arizonan voters who do not live on-reservations and the many voters whose primary language is English. In other words, as Tribal members, Appellants '"do not have an equal opportunity to participate in the political processes and to elect candidates of their choice.'" *Hobbs*, 948 F.3d at 1011-1012 (quoting *Gingles*, 478 U.S. at 44). That is precisely the disparate burden barred by Section 2 of the VRA.

B. The Receipt Deadline Results In A Disparate Burden, Not A Mere Inconvenience.

The District Court also brushed aside Appellants' evidence as showing a mere inconvenience, rather than a disparate burden, because in theory there are means other than mail by which Native Americans can return their ballots. *Yazzie*, 2020 WL 5834757, at *4. That reasoning turns Section 2 on its head. According to the court, Section 2 would effectively shift the burden to minority voters to avoid disenfranchisement by any means necessary, rather than "prohibit[ing] all forms of voting

discrimination that lessen opportunity for minority voters." *League of Women Voters of N. Carolina*, 769 F.3d at 238 (quotations omitted). To the contrary, Section 2 requires relief when "a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Id.* at 239 (quoting *Gingles*, 478 U.S. at 47).

The Receipt Deadline creates just such an inequality between the voting opportunities available to Native American voters and non-minority voters in Arizona. As the District Court recognized, "[m]ost Navajo Nation residents do not have access to standard mail services," *Yazzie*, 2020 WL 5834757, at *1; many face "lengthy distance[s] to get to the post office on-reservation" (and, presumably, the county recorders and other ballot drop-off locations), *id.* at *3; and many "have insufficient funds to travel," *id.* Complicating matters, over 70% of households in tribal reservations in Arizona speak a language other than English.[3]

Paradoxically, the court then reasoned that Native American voters have alternatives to voting by mail—traveling to the county recorder's office, using a ballot drop-box, or voting in person—that suffer from the same race-based disparities at

[3] Ariz. Rural Policy Institute, *Demographic Analysis of the Navajo Nation Using 2010 Census and 2010 American Community Survey Estimates*, at 59, available at http://bit.ly/Analysis2010.

the heart of Appellants' claims. As discussed above, this Court catalogued in *Hobbs* the many ways in which Native Americans living on-reservation are disadvantaged above and beyond mail delivery issues: huge distances from their homes to ballot-collection and voting locations; financial hardships that make such travel difficult; and lack of public transportation and access to vehicles. The mere existence of means other than the mail to deliver a ballot does not reduce the disparate burden the Receipt Deadline causes for Native American voters to a simple inconvenience, particularly when those alternative means also impose race-based burdens. *See League of Women Voters of N. Carolina*, 769 F.3d at 243 ("In waiving off disproportionately high African American use of certain curtailed registration and voting mechanisms as mere 'preferences' that do not absolutely preclude participation, the district court abused its discretion.").

Appellants are not advancing the extreme claim that "every polling place 'would need to be precisely located such that no group had to spend more time traveling to vote than did any other.'" *Yazzie*, 2020 WL 5834757, at *4 (quoting *Lee v. Virginia State Bd. of Elections*, 843 F.3d 592, 601 (4th Cir. 2016)).The court's reliance on *Lee* is thus misplaced, and fails to justify its flawed characterization of Appellants' disparate burden as an inconvenience. *Lee* involved a Section 2 challenge to Virginia's voter ID requirement. The crux of the Fourth Circuit's decision was the fact that "every registered voter who shows up to his or her local polling place on

the day of the election has the ability to cast a ballot and to have the vote counted, even if the voter has no identification." *Lee*, 843 F.3d at 600. As a result, the plaintiffs could not show that, as a result of the voter ID provision, "members of the protected class have less of an opportunity than others to participate in the political process." *Id*.

Here, by contrast, Appellants suffer from a diminished opportunity to meet the Receipt Deadline as compared to most Arizonans, simply because they are Native Americans residing on Tribal lands. That is the essence of a Section 2 violation; it "invite[s] comparison by using the term 'abridge[].'" *League of Women Voters of N Carolina*, 769 F.3d at 241 (quoting 52 U.S.C. § 10301(a); *see also Ohio State Conference of N.A.A.C.P. v. Husted*,, 768 F.3d 524, 558 (6th Cir. 2014) (holding that, under Section 2, "the focus is whether minorities enjoy less opportunity to vote as compared to other voters"). The Supreme Court has observed that assessing voting-rights abridgement claims "necessarily entails a comparison." *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 333-34 (2000). The District Court missed this critical component of the Section 2 analysis. *See League of Women Voters of N. Carolina*, 769 F.3d at 242 (holding that district court erred, in part, by refusing to compare past and current minority "voting opportunities" in assessing claim that challenged legislation abridged minority voting rights).

Appellants face similar, if not more severe, impediments than the successful plaintiffs in *League of Women Voters of Fla., Inc., v. Detzner*, 314 F. Supp. 3d 1205 (N.D. Fla. 2018), an instructive example of the comparative analysis required to evaluate a Section 2 claim. There, the plaintiffs challenged an opinion of the Florida Secretary of State that barred early voting locations at colleges and universities. The court held that the opinion "lopsidedly impacts Florida's youngest voters," thereby "creating a secondary class of voters who Defendant prohibits from even seeking early voting sites in dense, centralized locations where they work, study, and, in many cases, live." *Id*. at 1216-17. Even though early voting was enacted in Florida as "a convenience to the voter," Fla. Stat. § 101.657, the court recognized that "[c]onstitutional problems emerge . . . when conveniences are available for some people but affirmatively blocked for others." *Id.* at 1217. The court struck down the opinion based on evidence that it burdened a "discrete class of individuals . . . who live and work on public college and university communities, i.e. overwhelmingly young voters," by requiring them to travel "significantly longer" than other voters to early-voting sites. *Id.*

Appellants face significantly higher hurdles than the individual plaintiffs in *Detzner*. The *Detzner* plaintiffs were students living in relatively dense, compact areas—their travel burdens ranged between 1 and 5 miles to get from their dorms or residences to the closest early voting site allowed by the Secretary of State's opinion.

Id. at 1219 n.14. By contrast, Tribal lands in Arizona are vast, with residents facing far longer commutes to county recorders or ballot drop sites, compounded by the financial and logistical challenges in finding the time, money, and transport needed to cover those distances. Requiring Native American voters to comply with the Receipt Deadline hampers their "constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction," *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972), to a far great degree than the challenged measure in *Detzner*.

The District Court also missed the mark in suggesting that the Appellants' showing in this case is weaker than those in *Hobbs*, *League of Women Voters of North Carolina*, and *Gonzalez v. Arizona*, 677 F.3d 383, 405-06 (9th Cir. 2012), and therefore unworthy as a basis for the requested relief. First, *Hobbs supports* Appellants' position. There, *Hobbs*, this Court made it clear that distance to polling places and access to those polling places are relevant factors to consider when evaluating disproportionate impact on voters in a protected class:

> American Indian and Hispanic voters live farther from their assigned polling places than white voters. American Indian voters are particularly disadvantaged. The district court found: 'Navajo voters in Northern Apache County lack standard addresses, and their precinct assignments for state and county elections are based upon guesswork, leading to confusion about the voter's correct polling place.'

948 F.3d at 1003 (citations omitted).

In fact, this Court's analysis in *Hobbs* is premised on comparing the impact of ballot accessibility for whites and Native Americans over a defined geographic area in order to determine whether a disparate impact on a protected class exists. *Id.* at 1002-05 (reviewing county-wide data in Maricopa and Pima counties to conclude disparate impact exists). That is precisely the comparison Appellants made but the District Court missed. The District Court's conclusion that the record in this case is inadequate to show a disparate burden simply ignores the critical question *Hobbs* (and *League of Women Voters of North Carolina*) considered and answered, and Section 2 of the VRA requires: whether the Appellants, as Native Americans and members of a protected class, have a lesser opportunity to vote than non-minority voters because of the Receipt Deadline.

Finally, *Gonzalez* is a helpful point of contrast that also strengthens Appellants' position. There, this Court rejected a Section 2 challenge to an Arizona voter ID requirement because the plaintiff alleged that "'Latinos, among other ethnic groups, are less likely to possess the forms of identification required under Proposition 200 to ... cast a ballot,' but produced no evidence" in support. 677 F.3d at 407. In other words, the plaintiff failed to link the ID requirement to the prohibited outcome of "Latinos having less opportunity to participate in the political process and to elect representatives of their choice." *Id.* By contrast, Appellants established that,

due to the conditions faced by Native American voters on Tribal lands like the Navajo Nation that limit access to mail service and in-person voting places, they have "less opportunity" than non-minority voters to comply with the Receipt Deadline. Moreover, the absence of expert evidence cited in *Gonzalez* is beside the point here; the delays in mail delivery *on Tribal lands*, the limited access to transportation *on Tribal lands*, the outsized impact of Covid-19 *on Tribal lands*, and the excessive rates of poverty *on Tribal lands* by definition and logic disproportionately impact the residents on Tribal lands: Native Americans. Expert evidence is unnecessary to establish that connection.

II. THERE IS AN INSEPARABLE RELATIONSHIP BETWEEN THE RECEIPT DEADLINE AND THE RELEVANT SOCIAL AND HISTORICAL CONDITIONS.

In light of its incorrect conclusion that the Receipt Deadline does not work a disparate burden, the District Court did not consider whether "there is a relationship between the challenged standard, practice or procedure, on the one hand, and social and historical conditions on the other." *Hobbs*, 948 F.3d at 1012 (quotations omitted); *accord League of Women Voters of N. Carolina*, 769 F.3d at 240 (disparate "burden 'must in part be caused by or linked to social and historical conditions that have or currently produce discrimination against members of the protected class'" (quoting *Conference of NAACP v. Husted*, 768 F.3d 524, 553 (6th Cir. 2014)). If it

had, it could have reached only one conclusion: The Receipt Deadline burdens Native American voters precisely because of the social and historical conditions that inform their ability to exercise the franchise.

Courts assess the nexus between the burden of a challenged voting practice and the relevant social and historical conditions in light of the totality of the circumstances. *Gonzalez*, 677 F.3d at 405; *Husted*, 768 F.3d at 553. Courts look to the factors set out in the Senate Judiciary Committee report accompanying the 1982 VRA amendment that established Section 2 in its current form. *Gonzalez*, 677 F.3d at 405 (citing *Gingles*, 478 U.S. at 44-45). The so-called "Senate Factors" comprise a non-exhaustive framework for the analysis, although "'there is no requirement that any particular number of factors be proved, or [even] that a majority of them point one way or the other.'" *Gingles*, 478 U.S. at 45 (quoting S. Rep. No. 97-417, 97th Cong., 2d Sess. 29 (1982)). The result is "'an intensely local appraisal of the design and impact of' electoral administration 'in light of past and present reality.'" *League of Women Voters of N Carolina*, 769 F.3d at 241 (quoting *Gingles*, 478 U.S. at 78). Viewed through that lens, three of the applicable Senate Factors vividly depict how

tightly the Receipt Deadline interweaves with the relevant social-historical context to burden Native American voters.[4]

Senate Factor 1: The Receipt Deadline, as applied to Native Americans living on Tribal lands, invokes the historical discrimination they have suffered for centuries. Native Americans, whose forebears lived in what became the continental United States long before this country was formed, have been denied the unfettered right to vote in Arizona since its statehood in 1912. *See Hobbs*, 948 F.3d at 1019-21. Initially, Native Americans were denied citizenship and with it the right to vote until 1924, when Congress filled the void and passed the Indian Citizenship Act. *Id.* at 1019. Recognizing that "Indian voting had the potential to change the existing white political power structure of Arizona," Arizona's governor and other officials "sought to prevent Indians from voting" in the 1928 election. *Id.* at 1019-20. County officials challenged Native American voter registrations, and the Arizona Supreme Court held that Native Americans "were 'wards of the nation,' and were therefore 'under guardianship' and not eligible to vote." *Id.* at 1020 (quoting *Porter v. Hall*,

[4] Naturally, not all of the Senate Factors will apply in all cases, as this Court has repeatedly recognized. *See, e.g.*, *Gonzalez v. Arizona*, 677 F.3d 383, 405-06 (9th Cir. 2012) (focusing on Senate Factors 1, 2, and 5); *Farrakhan*, 590 F.3d at 1004-1005 (observing that "not all of the Senate Factors were equally relevant, or even necessary," to the analysis); *Gomez v. City of Watsonville*, 863 F.2d 1407, 1412 (9th Cir. 1988) ("[T]he range of factors that [are] relevant in any given case will vary depending upon the nature of the claim and the facts of the case.").

34 Ariz. 308, 271 P. 411, 417, 419 (1928)). For twenty years *Porter* remained the law of the land, and, although it was overturned in 1948, the use of literacy tests and voter intimidation continued the sad tradition of Native American (and general minority) disenfranchisement. *Id.* at 1020-21. There can be no dispute that Arizona has engaged in a pattern and practice of actions since 1912 that have been designed to prevent Native Americans from casting ballots that are counted. The Receipt Deadline must be considered in light of that history and its lingering effects.

Senate Factor 5. The Receipt Deadline also amplifies "the extent to which [Native Americans] . . . bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process." Senate Report 28-29. As this Court observed in *Hobbs*, "Arizona has a long history of race-based discrimination against its American Indian [and] Hispanic [] citizens. Much of that discrimination is directly relevant to those citizens' ability to register, to vote, or otherwise to participate in the democratic process." *Hobbs*, 948 F.3d at 1017 (quotations omitted). Sadly, that history remains part of Native Americans' everyday existence, reflected in the poverty and employment challenges its people still face and the severely underdeveloped infrastructure that in turn under-serves its vast geography and widely dispersed population. In the voting realm, it manifests in slow, unreliable mail delivery and hours-long travel, often on dirt roads, to county recorders and voting locations.

Of particular relevance here, this Court noted in *Hobbs* that "[d]ue to their lower levels of literacy and education, minority voters are more likely to be unaware of certain technical rules, such as the requirement that early ballots be received by the county recorder, rather than merely postmarked, by 7:00 p.m. on Election Day." *Id.* at 1028 (cleaned up). That gap widens due to Arizonans' lived experience with other common mail-related deadlines—which rely on the postmark, not the actual delivery. Critically, voter registration applications are timely if postmarked by the registration deadline and received within five days of that postmark deadline. Ariz. Rev. Stat. § 16-134(C)(2) (2019). The same holds for other familiar processes. *See* Ariz. Rev. Stat. § 1-218(A) (2019) (tax documents); Ariz. Rev. Stat. § 20-191 (2019) (insurance premium payments); Ariz. Admin. Code 17-4-304 (vehicle registrations). The Receipt Deadline is an outlier, and one that unfortunately dovetails with the effects of the past (and ongoing) discrimination borne by Native Americans.

Senate Factor 8. The Receipt Deadline also evinces "a significant lack of responsiveness on the part of elected officials to the particularized needs" of Native American voters on Tribal lands." Senate Report at 29. The disconnect between the Deadline and Appellants' "particularized needs" comes into graphic relief against the backdrop of other Arizona laws that contemplate counting votes past the deadline. For instance, Arizona law gives county election officials 20 days after Election Day to count votes and certify election results. Ariz. Rev. Stat. § 16-642(A) (2019).

In addition, election officials have up to ten days after Election Day to process provisional ballots. *Id.* § 16-135(D). Further, voters have up to five business days to cure incomplete ballots. *Id.* § 16-550.

In other words, Arizona law (1) gives election officials the latitude of a twenty-day period to certify results and (2) recognizes that allowing voters to cure incomplete ballots up to five business days after Election Day does not undermine the certification deadline. The same logic applies to Appellants' requested relief: Requiring election officials to count ballots postmarked by Election Day and received within a reasonable period (at a minimum, five business days) thereafter would no more jeopardize the twenty-day certification deadline than the existing five-day cure period. Therefore, maintaining the Receipt Deadline in the face of the particularized needs of Native American voters like Appellants demonstrates "a significant lack of responsiveness" to those needs. Senate Factor 8 leans heavily in Appellants' favor.

In addition, Arizona's existing statutory timeline undermines the District Court's application of the *Purcell* principle. *Yazzie*, 2020 WL 5834757, at *4, n.2. In a decision issued yesterday, Arizona was enjoined from enforcing its statutory October 5 voter registration cut-off, which was extended the registration deadline to October 23. *Mi Familia Vota v. Hobbs*, No. 2:20-cv-01901-SPL (slip op.) at 10 (D.

Ariz. Oct. 5, 2020). Judge Logan dispensed with defendants' argument that the impending election precluded relief under *Purcell v. Gonzales*, 549 U.S. 1 (2006): "This Court has previously held that the *Purcell* doctrine does not apply to the extension of election deadlines because the requested remedy is 'asking [election] officials to continue applying the same procedures they have in place now, but for a little longer.' The Court finds the current case no different." *Mi Familia Vota v. Hobbs*, at 4-5 (quoting *Arizona Democratic Party v. Hobbs*, No. 2:20-cv-01143-PHX-DLR, 2020 WL 5423898, at *13 (D. Ariz. Sept. 10, 2020)).

The same logic applies here, only with more force. Unlike the voter registration deadline, the Receipt Deadline applies to the "back end" of the voting process, after each voter has submitted their ballot, whether in-person or by mail. Election officials use it after the fact to determine whether a ballot should be counted. The extension sought by Appellants is the paradigmatic case of an election official "applying the same procedures they have in place now, but for a little longer." *Id.*

Tellingly, Secretary of State Hobbs has stated publicly that her office will not appeal the ruling (although defendant-intervenors The National Republican Senatorial Committee and the Republican National Committee have filed a notice of appeal with this Court). The State's decision to accept the *Mia Familia Vota* ruling indicates that Arizona election officials are capable of managing a last-minute, 18-day exten-

sion of the voter registration deadline. It stands to reason that Arizona's voting infrastructure and elections officials can readily accommodate the more measured relief sought by Appellants in this case.

CONCLUSION

For all of the foregoing reasons, amicus curiae LWVAZ urges this Court to reverse the District Court's order denying Appellants' motion for preliminary injunction, find that Appellants are likely to succeed on the merits, clarify the correct legal standard of review applicable to § 2 vote denial claims, and remand for further proceedings.

Respectfully submitted.

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October 6, 2020

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5).

1. Exclusive of the exempted portions of the motion, as provided in Fed. R. App. P. 32(f), the brief contains 5025 words.

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/s/ Michael Donofrio
Michael Donofrio

October 6, 2020

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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I hereby certify that on October 6, 2020, an electronic copy of the foregoing brief was filed with the Clerk of Court for the U.S. Court of Appeals for the Ninth Circuit, using the appellate CM/ECF system. I further certify that all parties in the case are represented by lead counsel who are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ *Michael Donofrio*
Michael Donofrio

October 6, 2020