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,

v.

KATIE HOBBS, in her official capacity as Secretary of State for the State of Arizona

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Arizona
No. CV-20-08222-PCT-GMS
Hon. G. Murray Snow

APPELLANTS' OPENING BRIEF

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INTRODUCTION

Appellants seek *de novo* review of the district court's denial of preliminary injunction, including review of its conclusions of law with regard to Section 2 of the Voting Rights Act of 1965 ("VRA"), including the district court's findings of law and fact. *Smith v. Salt River Project Improvement & Power Dist.*, 109 F.3d 586, 591 (9th Cir. 1997). In its analysis under Section 2 of the VRA, the district court utilized an incorrect legal standard and improperly rejected Appellant's (hereafter Appellants or Tribal Members) VRA Section 2 vote denial claims.

In contrast to the analysis by the district court, to succeed on a Section 2 abridgement claim, Tribal Members are not required to establish a difference between the Tribal Members who are part of a protected class of voters and other non-Indian yet also 'rural' voters. The district court erred by requiring that the Tribal Members plead and prove a disparate impact between themselves and "rural" non-Indians. The appropriate standard is: based on the totality of circumstances, can the Tribal Members evidence that they have 'less opportunities' to participate in the political process than other Arizona citizens, due to their race or color, and therefor 'less opportunities' to elect representatives of their choice. *See* 42 U.S.C. § 1973(a) and (b). Due to the application of an incorrect legal

standard governing Section 2 of the VRA, the district court denied Appellant's request for injunctive relief and this Court should reverse and remand.

STANDARD OF REVIEW

While the grant or denial of a motion for a preliminary injunction lies within the discretion of the district court, *Amylin Pharms., Inc. v. Eli Lilly & Co.*, 456 Fed. Appx. 676, 677 (9th Cir. 2011), an order denying injunctive relief will be reversed if the district court relied on an erroneous legal premise. *Sports Form, Inc. v. United Press International, Inc.,* 686 F.2d 750, 752 (9th Cir. 1982); *Wright v. Rushen*, 642 F.2d 1129, 1132 (9th Cir. 1981); *Los Angeles Memorial Coliseum Commission v. National Football League*, 634 F.2d 1197, 1200 (9th Cir. 1980). The district court's order is reversible for legal error if the court did not employ the appropriate legal standard for preliminary injunction. *Wright*, 642 at 1132; *See Benda v. Grand Lodge of International Association of Machinists & Aerospace Workers*, 584 F.2d 308, 314-15 (9th Cir. 1978), cert. dismissed, 441 U.S. 937, 99 S. Ct. 2065, 60 L. Ed. 2d 667 (1979); *Aguirre v. Chula Vista Sanitary Service & Sani-Tainer, Inc.*, 542 F.2d 779, 781 (9th Cir. 1976). Or the district court's order is reversible when, in applying the appropriate legal standards, the court misconstrues the law with respect to the underlying issues. *Wright*, 642 F.2d at

1132; *Los Angeles Memorial Coliseum*, 634 F.2d at 1200; *Kennecott Copper Corp., etc. v. Costle*, 572 F.2d 1349, 1357 n.3 (9th Cir. 1978).

On appeal, the determination as to whether there has been an abuse of discretion requires that the reviewing court consider the relevant factors and whether the district court's decision was based on these factors or whether there has been a clear error of judgment. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, 91 S. Ct. 814, 823, 28 L. Ed. 2d 136 (1971). In making its analysis, the appellate court is not empowered to substitute its own judgment for that of the district court. *Id.*

Appellate review of a grant or denial of preliminary judgment is restricted to the record available to the district court when it made its decision. *Sports Form*, 686 F.2d at 753. The legal standards governing the issuance of a preliminary injunction in this circuit are clear. The moving party will meet its burden by demonstrating either "a combination of probable success on the merits and the possibility of irreparable injury" or "that serious questions are raised and the balance of hardships tips sharply in its favor." *Sports Form*, 686 F.2d at 753; *Wright v. Rushen,* 642 F.2d at 1132; *Los Angeles Memorial Coliseum*, 634 F.2d at 1201. At a minimum, the moving party must demonstrate "a fair chance of success on the merits" or "questions…serious enough to require litigation." *Benda*, 584 F.2d at 315.

On September 25, 2020, the United States District Court for the District of Arizona entered an order denying Appellants' motion for preliminary injunction basing such decision on the application of an incorrect legal standard. The district court made a finding that Appellant Navajo Nation Members, faced the similar difficulties exercising their right to vote as compared to other non-Indian rural voters, and therefore there is no violation of Section 2 and therefore not entitled to preliminary injunction. The district court erred. There is no legal basis or precedent for comparing the Tribal Members to non-Indian rural voters. (ER005-006). The Court did not take into consideration that Native American voters are a protected class and non-Indian rural voters are not protected. *Id*. After conducting this incorrect comparison, the district court then declined to review and consider the "Senate Factors" or conduct the totality of the circumstances balance. (ER007). Therefore, the district court committed reversible error.

STATEMENT REGARDING ORAL ARGUMENT

Appellants respectfully request oral argument.

STATUTORY AUTHORITIES

Section 2 of the Voting Rights Act prohibits voting procedures that deny or abridge the right to vote on account of race. 42 U.S.C. 1973. Subsection (a) states, in pertinent part, that

> [n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.

42 U.S.C. 1973(a). Under Subsection (b), a plaintiff may establish a violation of this provision if

> based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

42 U.S.C. 1973(b). Subsection (b) continues stating "[t]he extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered," however, these statutory protections do not create "a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. 1973(b). Claims brought under Section 2 of the VRA are generally categorized as "vote denial" or "vote dilution" claims, however the text of Section 2 makes no

distinction between either claim. Appellants' action is a vote denial or vote abridgement claim.

ISSUES PRESENTED

1. Did the district court err in denying Appellants' request for preliminary injunctive relief?

The district court denied Appellants' request because there was not a likelihood of success on their Voting Rights Act claim.

2. Did the district court err by misapplying the legal requirement for establishment of a Vote Denial claim under 42 U.S.C. § 1973?

The district court required Appellants to compare their burden to "rural voters" outside their protected class instead of all Arizona voters outside their protected class.

STATEMENT OF THE CASE

Navajo Nation Tribal Member Appellants who live on the Navajo Reservation will not have equal opportunities to Vote By Mail (VBM) when compared with other Arizona voters at the November 3, 2020 general election because of disparate mail receipt and delivery times. For Tribal Members on Arizona's Permanent Early Voting List (PEVL), ballots will be mailed on October

7, 2020 along with a "Publicity Pamphlet" which states in part that "ballots must be received by 7:00 pm on Election Day to be Counted." (ER106). Further, the Appellee prepares and distributes "AZVoteSafe Guide for Native American Voters" (ER105) which specifically references the known factor that slower mail service is problematic in rural areas. On every measure, the mail service on the Navajo Nation Reservation is found to be inferior to what is typically provided in off-reservation communities. (ER042). Hence, there is uncertainty on the part of Tribal Members who under such circumstances cannot know the deadline for posting their VBM ballot in the mail or having confidence that their vote will be received and counted, without this Court clarifying same.

SUMMARY OF THE ARGUMENT

Appellate review is necessary herein because the district court misapplied the legal standard for a Section 2 abridgement claim under the Voting Rights Act of 1965 and in doing so, determined that Appellants had not met the standard for preliminary injunction in that they failed to show likely success on the merits. This is clear error. The district court not only ignored the fact that Appellants, as Native Americans living on a reservation, comprise a special protected class of voter under the VRA, and instead compared these Tribal

Member voters to other non-Indian "rural" voters who lack such protected status, which has no applicability to a Section 2 abridgement violation.

Moreover, the district court improperly accepted and relied upon Appellee's 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. This reasoning utterly failed to recognize the fact that Navajo Nation Residents have less opportunities to exercise their right to vote, and instead looked at the potential for at least one manner of voting that was available to the Tribal Members. Had the district court properly applied the test for a Section 2 Abridgement claim, this appeal would not be necessary so close to the general election.

When the district court evaluated the likelihood that Appellants would succeed on the merits, it incorrectly interpreted Section 2 of the Voting Rights Act, and thereafter did not conduct the proper analysis of the impact of the relevant Senate factors. Appellants are entitled to relief.

ARGUMENT

I. APPELLANTS DEMONSTRATED LIKELIHOOD OF SUCCESS ON THE MERITS – SECTION 2 VOTING RIGHTS ACT

A. The Section 2 Abridgement Analysis Has Not Changed.

In the case of *Sanchez, et al. v. Cegavske, et al.*, 214 F. Supp. 3d 361 (D.S.D. 2016), the Civil Rights Division of the United States Department of Justice filed a Statement of Interest (ER011-027) wherein the United States presented in detail how the United States Department of Justice interprets the requirements for finding a violation of VRA Section 2, vote denial/abridgement claim (hereafter "US Statement"). This US Statement specified the vote abridgment 'test' which has not been altered, over-ruled or otherwise amended since that time.

1. Step One is to Determine if Minority Citizens are More Burdened.

Courts are to utilize a two-step analysis to determine whether any limitation to Vote By Mail voting result in denial or abridgment of the right to vote under Section 2 of the VRA. *See* (ER013). Step one is to assess "whether the practices amount to material limitations that bear more heavily on minority citizens than nonminority citizens." *Id*. This analysis must evaluate the "likelihood that minority voters will face the burden and their relative ability to overcome that burden." *Id*.

2. Step 2 is to Conduct Appraisal of the Totality of the Circumstances.

Once there has been a finding that there is a disparity for minority voters, the court must engage in an "intensely local appraisal" of the "totality of the circumstances" in the relevant jurisdiction in order to determine whether the challenged practice "works in concert with historical, social, and political conditions to produce a discriminatory result." (ER014). This is where the court is to consider and evaluate a variety of typical factors to be considered and which were discussed as part of the Legislative history for Section 2; these are generally known as the 'Senate Factors'. (ER014-015). However, it is important to understand that there is no requirement that any specific number of the Senate Factors be proven, nor is the list exhaustive. (ER015).

3. Appellants Need Only Establish They Have Fewer Opportunities Compared to Other Voters.

Section 2 of the Voting Rights Act prohibits any state or political subdivision from imposing or applying a "voting qualification," "prerequisite to voting," or "*standard, practice, or procedure*" that "*results in a denial or abridgement* of the right of any citizen of the United States to vote on account of race or color" or membership in a language minority group. 52 U.S.C. § 10301(a) (*emphasis added*). On page 10, starting at line 5 of the US Statement, the Department of Justice states:

> Defendants several times suggest that Plaintiffs must show an outright denial of access to voting opportunities. (*citations to Sanchez et al. omitted*). This ignores the plain text of the Act. Section 2 prohibits the "abridgment" as well as the outright "denial" of the right to vote. 52 U.S.C. § 10301(a). This prohibition does not require that a challenged practice deprive minority voters *completely* of the ability to vote. *See, e.g., Veasey*, 2016 WL 3923868, at *29 [*Veasey v. Abbott*, 830 F.3d 216, 2016 WL 3923868 (5th Cir. 2016) (*en banc*)](quoting *Black's Law Dictionary* (10th ed. 2014) (defining "Abridgement" as the "reduction or diminution of something")) (emphasis added). ***It requires only that Plaintiffs establish they have "less opportunity" to participate relative to other voters***. 52 U.S.C. § 10301(b). All electoral practices with a material disparate "effect on a person's ability to exercise [the] franchise" implicate the Voting Rights Act. *Cf. Perkins [v. Matthews]*, 400 U.S. [379] at 387 [(1971)](addressing Section 5); *see also League of Women Voters*, 769 F.3d at 243 [*League of Women Voters*, 769 F.3d at 243 *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224 (4th Cir. 2014) *stay granted*, 135 S. Ct. 6 (2014), *cert. denied*, 135 S. Ct. 1735 (2015)] (holding that Section 2 is not limited to practices that render voting "completely foreclosed" to the minority community); *Poor Bear*, 2015 WL 1969760, at *7 [*Poor Bear v. Cnty. Of Jackson*, 2015 WL 1969760 (D.S.D. 2015)] (concluding that Section 2 protects equal opportunity to cast a ballot via in-person absentee voting); *Spirit Lake Tribe*, 2010 WL 4226614, at *3, *6 [*Spirit Lake Tribe v. Benson County*, (D.N.D. 2010)] (enjoining polling place closures under Section 2); *Chisom v. Roemer*, 501 U.S. 380, 408 (1991) (Scalia, J., dissenting) (explaining that Section 2 would be violated if a county limited voter registration hours to one day a week, and "that made it more difficult for blacks to register than whites").[1] (ER020) (*emphasis added*).

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[1] US DOJ's Amicus Brief to the Ninth Circuit, (ER115-116), in *Wandering*

This bears repeating. Appellants do not need to show that they have *no* opportunity to vote. Appellants must *only* show that they have "less opportunities" to vote as compared to other voters. In this case, the district court focused on an inapplicable comparison between the Appellants and other rural voters, however that analysis is incorrect. It is irrelevant whether the voter seeking to enforce his or her rights pursuant to Section 2, is a rural voter or an urban voter, what is required is a showing that the minority voter, or, in this case the Appellant Native American voters, have fewer opportunities to vote when compared to other voters in the State of Arizona. The US Statement continues stating that not all voting systems are equivalent "and a court must consider the circumstances of each case and the impact a challenged practice has on opportunity to vote." (citations omitted) (ER021). Furthermore, the US Statement clarifies the requirements for a complaint under Section 2 stating that "[t]he plain text of Section 2(b) requires Appellants to show only that the political process is not equally open to Native

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Medicine states "by adding the language 'in a manner which results' to Paragraph (a) and by adding Paragraph (b), ***Congress made it a violation to have a voting standard, practice, or procedure that results in the denial, on the basis of race, of equal access to any phase of the electoral process*** and deprives voters of an equal opportunity to elect a candidate of their choice, on the basis of race." (ER116); *see also Chisom v. Roemer*, 501 U.S. 380, 394 (1991) (*emphasis added*).

Americans because the practice at issue results in their having "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." (ER022) (citations omitted). Here, the "other members of the electorate" have been identified with specificity, but in error, the Court failed to consider this distinction when determining that Appellants failed to demonstrate a likelihood to succeed on the merits.

Furthermore, as included in the US Statement "Section 2 contains a comparative standard: minority voters cannot be given "less opportunity" than other voters to participate and elect their preferred candidates. It does not, in this context, require proof that minority voters lack an opportunity to elect." (ER022). Any Section 2 abridgement case must evaluate the totality of the circumstances when conducting its analysis of whether a violation has occurred. (ER023-025). As such, the Appellants have clearly met their requirements to prove a violation under Section 2 of the VRA.

B. The District Court Erred In Comparing Appellants To "Rural Voters" And Failing To Find A Disparate Burden On Appellants

1. Appellants' opportunity to Vote By Mail should be compared against all Arizona Voters

Although no party had addressed this issue, the district court, *sua sponte* conducted an analysis that the Tribal Members were similarly situated or had the same detriments that typical rural voters faced. (ER005-006). Upon

making this finding, the Court asserted since there were no disparities between the Navajo voters who are a protected class and the non-protected class rural voters there was no violation of Section 2. *Id*. This analysis flips the Section 2 test on its head. The district court is not to compare the protected class to a small subset of voters that may face similar challenges, but rather, the analysis is required to compare the protected class of voters to the entire group of voters. In this case, being a National election, the Tribal Members voters must be compared to the typical voter in Arizona, which includes those residing in Phoenix or Scottsdale. Section 2 of the VRA requires that the protected voters have the same "opportunities" as all other voters in their county and state. This requirement cannot be defeated by comparing the Tribal Member voters to other non-Indian rural voters. Especially other rural voters who have not been granted protected status.

While the district court's decision is replete with examples of this contorted anlaysis, some relevant passages are as follows:

> Plaintiffs only compare mail delivery times and distance to ballot drop-off locations on the reservation to cities, not to other rural areas of Arizona. Therefore, it is not clear whether Plaintiffs' evidence shows disparities as to Navajo voters, a protected class, versus rural voters, a non-protected class. (ER005-006).
>
> Again, Plaintiffs only compare Navajo nation, a rural area, to cities, making it unclear whether the distance Navajo voters must travel to

> access these alternative forms on the reservation is any more severe than other rural parts of Arizona. (ER007).

It is unprecedented to carve out "rural voters" from the rest of the non-minority voters in a statewide election when comparing the impact of a voting regulation on a protected class.

2. Appellants Demonstrated a Disparate Burden When Voting By Mail

The prohibited discriminatory result borne by Appellant is less opportunity to vote by mail when receiving a ballot by mail via Permanent Early Voting List (PEVL) or by making a request for a mail ballot up to 5:00 pm October 23, 2020 and returning same via mail delivery. Appellant provided detailed testimony via the Declaration of Jean Schroedel and Bret Healy (ER068-104) and again in a supplemental Declaration of same (ER036-067) in addition to witness testimony at the hearing on preliminary injunction. Appellants' testimony was clear, direct and irrefutable that Tribal Members living on the Reservation are subject to drastically disparate rates of mail service in addition to the paucity of mailboxes or mail service centers available to residents of the Navajo Nation. Appellants' witness estimated that a Scottsdale voter on the permanent early voting list will have 25 days to consider their ballot and meet the receipt deadline while a Dennehotso voter, where mail may take 10 days to deliver, only has seven days to consider their ballot (ER033-034). Appellant further showed at the preliminary

injunction hearing that a Scottsdale voter who requests a ballot on October 23 has nine days to consider their ballot, while a Dennehotso voter does not have enough time to mail their ballot at all. *Id*. A comparison was also made of the number of ballot drop-off locations per square mile in the Navajo Nation as compared to Scottsdale, Flagstaff, Holbrook, and St. John's. (ER035) There was strong evidence by Plaintiffs which showed significant discrepancies in this comparison. For instance, in Scottsdale there is one election day polling location per 13.14 square miles whereas in Navajo Nation there is only one location per 306 square miles. (ER035). Moreover, several other factors make it difficult for Navajo members living on-reservation to meet the Receipt Deadline. These factors include that it is difficult for many Navajo Nation members to obtain sufficient funds to travel to a post office. (ER083). Additionally, post officers are generally not open for as many hours on-reservation as they are off-reservation. (ER042). More evidence was produced that;

- A Scottsdale voter requesting a ballot on October 23 has nine days to consider and return their ballot via mail delivery while a Dennehotso voter does not have this same opportunity even if they returned their ballot immediately via mail service. (ER033-034)

- There is one postal location per 681 square miles on Navajo Nation, one postal location per 26.10 square miles per location in St. Johns - Apache County, one postal location per 21.29 square miles in Flagstaff - Coconino County, one postal location per 15.40 square miles in Holbrook - Navajo County, and one postal location per 15.33 square miles in Scottsdale - Maricopa County. (ER035).

- The square miles of area served by a postal location on the Navajo Nation is 4,440 % greater than the square miles of area served by a postal location in Scottsdale, Arizona. (ER035).

The evidence provided to the district court was astounding. The protected Tribal Member voters' opportunities are severely curtailed in comparison to other voters in Arizona. Additionally, the historic and current bias and prejudice inflicted on the Tribal Members' ability to participate in the electoral process is extensive and should have been considered. The district court erred.

II. APPELLANTS SHOULD HAVE EQUAL OPPORTUNITY FOR EACH OF THE THREE BALLOT SYSTEMS.

A. Appellants Should Have Equal Opportunity to Election Day In-Person Polling Place, In-Person Early Voting Polling Place And Voting By Mail.

The State of Arizona offers three ballot systems to be utilized in the general election: Election Day In-Person Polling Place, In-Person Early Voting Polling Place and Vote By Mail. The reality is that Appellants consider none of these voting systems equal pursuant to Section 2 of the VRA. However, given that polling locations and polling box locations have yet to be determined, set, or otherwise made public, it was only reasonable to assert injury based on the Arizona Vote By Mail system, short of filing an eleventh-hour Complaint, given the historical circumstances Native American voters face in Arizona.

The district court, without identifying statutory authority or legal precedent, suggests that there is no Section 2 violation as long as there is at least one way for a voter to be able to cast their November ballot, despite the fact that every other citizen of Arizona has three distinct options by which to exercise their right to vote.

> This showing, however, does not take into consideration that mailing a ballot is not the only way to submit a vote by mail ballots. Navajo voters may drop their ballot off at a county recorder's office, ballot drop-box, in-person early voting location on election day. Therefore, even if a Navajo voter waits until October 23 to request a ballot and does not have time to mail the ballot in, that Navajo voter still has several options to get their ballot in on time. In addition, Navajo voters do not necessarily have less time to consider their vote than other voters. Before ballots are sent out, Arizona sends a voter education guide to voters with statements from each candidate, which allows voters begin considering their vote early. *Id.* at 51. Navajo voters can also utilize the alternative options for returning ballots to optimize their time to consider their ballots. As Navajo voters have access to several voting options that allow them to turn their ballots in later than the return posting of their ballot allows, Plaintiffs have not shown a disparate burden. (ER006).

To the contrary, every means of voting offered to the one segment of the electorate must be fundamentally and equally available to the entire electorate as a whole. Anything less than that is a violation of Section 2 on its face. Appellants produced undisputed evidence that each of the ballot return options levied a disparate burden when compared to other Arizona voters.

A violation of Section 2 does not require that minority voters be *completely* deprived of the ability to vote. *See, e.g., Veasey*, 2016 WL 3923868, at *29 (*emphasis added*). Instead, a plaintiff must only establish it has *"less opportunity"* to participate in the electoral process relative to other voters. 52 U.S.C. § 10301(b). The existence of alternative voting means or accessibility does not otherwise absolve the Defendant of the requirement to make all "opportunities" available. The US Statement, the Department of Justice states that mail-in voting is not the equivalent of in-person voting. (ER021).

The mere fact that Tribal Members were able to vote at all or had options other than VBM does not defeat their claim or ameliorate the harm rendered by Arizona's VBM system. Nor should this or any other Court accept such a dangerous interpretation of Section 2, because to do so would be not unlike finding that a protected class member who pays a discriminatory poll tax in order to cast his ballot cannot challenge the practice because his vote still counts. The question in that circumstance, as here, is not whether the protected class member was able to vote; it is whether he has a lesser opportunity to participate in the political process on account of his race or color. Any alternative application of Section 2 would defang the legislative intent thereby rendering it impotent and significantly less likely to protect voting rights of protected classes.

To be sure, this argument was expressly rejected according to the legislative history of the VRA as explained in the Senate Judiciary Committee Report:

> [F]or purposes of Section 2, the conclusion in the *Mobile* plurality opinion that "There were no inhibitions against Negroes becoming candidates and that in fact negroes had registered and voted without hindrance," would not be dispositive. Section 2 adopts the functional view of "political process," used in *White* rather than the formalistic view espoused by the plurality in *Mobile*.

S. Rep. at n. 120. Under the Senate's "functional view," the VRA was plainly intended to protect minority voters in situations precisely like those here, where a government decision has the effect *in its application* of providing them with less opportunity to participate in the political process.

B. Appellants Established Causation.

"Congress intended that the Voting Rights Act eradicate inequalities in political opportunities that exist due to the vestigial effects of past purposeful discrimination." *Thornburg v. Gingles*, 478 U.S. 30, 69 (1986). Practices that cause or result in discrimination create § 2 liability. *See Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 595 (9th Cir. 1997). A violation exists if, based on the totality of the circumstances, there is a causal connection between the challenged voting practice and a prohibited discriminatory result. *See Gonzalez v. Arizona*, 677 F.3d 383, 405-06 (9th Cir. 2012) (totality of

circumstances standard used to determine whether unequal access interacts with "past and present reality" to depress political participation); *Smith*, 109 F.3d at 595-96 (reviewing the district court's findings in light of the totality of circumstances). In evaluating Tribal Members' claim, the district court evaluated:

> Taken together, Plaintiffs' showing fails to demonstrate that the Receipt Deadline results in a disparate burden on Navajo Nation members living on-reservation. Plaintiffs present no evidence that Navajo voters' ballots are disproportionately thrown out because of the Receipt Deadline. Ass Arizona's Receipt deadline has been in law for 23 years, the Court is entitled to expect such evidence. Ariz. Laws 1997, 2nd Spec. Sess. Ch. 5 (S.B. 1003). Additionally, the evidence Plaintiffs do present does not show whether the Receipt Deadline disproportionately impacts Navajo voters *as a protected class*. (ER005).

The United States District Court for the District of North Dakota has recognized that "…poverty and transience of the Reservation makes mail balloting more difficult for tribal members. The evidence suggests that Indians are more likely to have not received a ballot application, which when coupled with a decreased ability to vote in person, creates a disparate impact." *Spirit Lake Tribe v. Benson County*, CIV 2:10-cv-095 at 6 (D.N.D. 2010).

Appellants in a vote denial case like the one here, then, must show there is a causal connection between the challenged voting practice (*i.e.*, slower mail delivery resulting in less days to cast their VBM) and a prohibited discriminatory result (*i.e.*, unequal access to VBM on the basis of race). *Gonzalez*,

677 F.3d at 405-406. Here, the district court recognized that a Section 2 plaintiff must establish causation but failed to perform a causation analysis that was focused on appropriate and relevant factors. Appellants live on the largest land base Reservation in the United States. Appellants are located in an area with significantly slower mail delivery than urban areas in Arizona. (ER105-106). Many Native Americans lack the resources necessary to travel long distances, thus making it more difficult for Native-American voters to participate than non-minority voters. Here, the history of official discrimination against Native Americans in Arizona is well-established, as was the fact that poverty, unemployment, and limited access to vehicles render it difficult for residents of the Navajo reservations to travel to the county seats. The district court should have considered whether these circumstances supported Appellants' allegation that the challenged voting practice caused a prohibited discriminatory result, in that it resulted in Native-American voters living on the Navajo Reservation having less opportunity than white voters to participate in the political process. *Gonzalez*, 677 F.3d at 405-406 (identifying Senate Factors 1 and 5 as relevant circumstances to consider in a vote denial case). By instead focusing on whether other rural populations were subject to similar adverse impacts as it relates to VBM, the court erroneously perpetuates and increases the likelihood that the exact discriminatory

result that Section 2 is designed to eradicate will in fact occur to the detriment of Appellants.

III. APPELLEE HAS ALREADY MADE CHANGES TO THE VOTER RECOMMENDATIONS, ONE MORE CHANGE CREATES NO HARM TO THE ELECTION PROCESS.

Appellee has made several changes to the recommended ballot return schedule published by the State of Arizona. It would not create any harm to make one additional change which would extend the receipt date for ballots mailed by voters living on the Navajo Nation Reservation. Truthfully, the Appellee can post a notice on the Secretary of State's website, can utilize radio and other media to spread the word, can advertise the change at various locations throughout the Navajo Reservation and can easily communicate with the Navajo Nation Tribal Council to ensure that voters are informed of the change. Absent 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.

AZVoteSafe Guide for Native American Voters was prepared and made public after the imposition of this action. This voter guide provides in part:

> Tribal members historically participate in voting on Election Day as a civic and community event, and *many tribal members face challenges to voting by mail due to limited mail service* and language assistance needs. However, because of current public health concerns, it's more

> important than ever to plan ahead and have back-up options available. If you need to mail your voted ballot back, make sure you mail it early enough to arrive at the County Recorder's office by 7:00 p.m. on Election Day. The state's recommended last day to mail back a ballot is October 27, *but if you live in a rural area with slower mail service, you should build in more time.* (ER1105-106) (*Emphasis Added*).

Thus, Appellee has already recognized that certain voters are disadvantaged by the current vote by mail system, however fails to provide a remedy for effected voters. Consequently, a need exists to solve this problem.

IV. OTHER CIRCUITS HAVE GRANTED VOTE BY MAIL BALLOT RECEIPT EXTENSIONS MERELY ON THE BASIS OF COVID-19 WITHOUT THE PROTECTED VOTER CLASS AS IS PRESENT HERE.

Other Circuits are extending receipt deadline for Vote By Mail Ballots based on the COVID-19 pandemic alone, regardless of whether a such impacts a protected class. One example is the recent Seventh Circuit case, which relied heavily on Ninth Circuit legal precedent, and which ruled that vote by mail ballots must be counted as long as they are post marked by election day. *DNC et. al. v. Bostlemann*, Nos. 20-2835 & 20-2844, Submitted September 26, 2020, Decided September 29, 2020. In the instant matter, the Navajo Nation Residents are at higher risk for contracting the Corona virus and facing potentially life-threatening reactions due to the known health problems faced by Native Americans. There, however, are no other instances to point to which supports the district court's position intimated in issuing its denial that so long as alternative voting options are

available, any form of voting may be less available to a voter of a protected class, such as Appellants.

Moreover, in the *DNC v. Bostlemann* case, the order on preliminary injunction was issued on September 21, 2020. It bears notice that neither the district court or the Seventh Circuit, mentioned or otherwise indicated that the case of *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (*per curiam*) precluded or otherwise impacted the holding in that case. Similarly, the holding in *Purcell* does not bar Appellants' action.

CONCLUSION

For all of the foregoing reasons, and because the district court erred its interpretation of § 2 and applied the wrong legal standard to the undisputed facts, this Court should reverse the district court's order denying their motion for preliminary injunction, find that Appellants are likely to succeed on the merits, pronounce the correct legal standard of review applicable to § 2 vote denial claims, and remand for further proceedings.

Date: October 3, 2020.

STEVEN D. SANDVEN PC

/s/ Steven D. Sandven
Steven D. Sandven

Attorney for Appellants Darlene Yazzie, Caroline Begay, Leslie Begay, Irene Roy, Donna Williams and Alfred McRoye

STATEMENT OF RELATED CASES

Date: October 3, 2020.

STEVEN D. SANDVEN PC

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,842 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word Times New Roman 14-point font.

Date: October 3, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on October 3, 2020 I electronically filed the foregoing 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.

Date: October 3, 2020

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