No. 20-16890

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

DARLENE YAZZIE; CAROLINE BEGAY; LESLIE BEGAY; IRENE ROY; DONNA WILLIAMS; AND ALFRED MCROYE,

Plaintiffs-Appellants,

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

Defendant-Appellee.

Appeal from the United States District Court
District of Arizona
CV-20-08222-PCT-GMS

# DEFENDANT-APPELLEE'S RESPONSE TO AMICUS CURIAE LEAGUE OF WOMEN VOTERS OF ARIZONA

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Amicus curiae League of Women Voters of Arizona ("LWVAZ") equates difficulties in returning a ballot on the Navajo reservation with a demonstrated burden on the right to vote in violation of Section 2 of the Voting Rights Act ("VRA"). But those are two distinct concepts. With no evidentiary support—whether from testimony, statistics, expert opinion, or the like—for the idea that Navajo voters are unable to meet the longstanding Election Day deadline (let alone at disparate rates when compared to other racial or ethnic groups), the district court was left only with a supposition that having fewer days to cast a mail-in ballot necessarily leads to fewer Navajo ballots meeting the Election Day receipt deadline. LWVAZ cannot point to any decision finding a disparate burden under step one of the established test for Section 2 claims based on such unsupported speculation. For this reason, their arguments about why the district court's decision was an abuse of discretion are unavailing.

## I. Like Appellants, LWVAZ misinterprets the district court's order to claim that it incorrectly found there was no disparate burden on Navajo voters.

LWVAZ invokes some of the same caricatures of the district court order as Appellants do. It first claims that the lower court improperly restricted its analysis to a comparison of burdens between Navajo voters and rural voters in a "flawed like to like comparison." *See* LWVAZ Amicus Br. 5, 7–8; *see also* Open. Br. 13–15. It also contends that the district court improperly pointed to "alternatives to voting by

mail," like using ballot drop-off boxes, as a way to brush aside a genuine disparate burden. *See* LWVAZ Amicus Br. 8–11; *see also* Open. Br. 18.

As the Secretary explained in her answering brief, neither of these contentions is accurate. The district court referenced rural voters in passing, and only to illustrate that Appellants failed to introduce evidence of a disparate racial burden—rather than a geographic one. Answering Br. 21–22 (citing ER005–006). It did not determine that the relevant comparator under the Section 2 VRA analysis was rural Arizona voters.

Additionally, the district court only mentioned alternative ways to meet the Election Day deadline to identify a flaw in Appellants' argument—that slow or unreliable Postal Service operations necessarily means there is a disparate burden on Navajo voters' ability to cast a timely ballot under the Election Day deadline. Answering Br. 23–24 (citing ER006). As the Secretary noted, Appellants challenged the Election Day deadline itself as causing a disparate burden, so it was only logical for the district court to point to the various ways that any burden could be alleviated. Answering Br. 24. Nor does LWVAZ grapple with the logical consequence of its argument that any difficulties traveling to ballot drop-off locations can qualify as a disparate burden under Section 2 of the VRA even when, as here, Appellants failed to put forward any evidence proving that lengthy travel times caused any Navajo

votes being rejected as untimely in any prior election.[1] Ultimately, even Appellants' experts declined to conclude that fewer voting days and increased distances to ballot drop-off facilities during the month-long period for voting by mail in Arizona amounted to a disparate burden on Navajo voters. *See* Answering Br. 23 (quoting ER004) (noting that the district court found that Appellants' expert "offered no opinion testimony"). That LWVAZ might now believe otherwise does not render the district court's conclusion based on the evidence presented below an abuse of discretion. LWVAZ's attempts to identify error based on arguments that misinterpret the order below are thus unpersuasive.

## II. None of the cases LWVAZ cites find a Section 2 violation with the kind of paucity of evidence of a disparate impact present here.

LWVAZ cites several cases in its brief that it argues all-but-establish that Navajo voters experience a disparate impact under the first step of the test for Section 2 violations. These decisions, it claims, explain that Navajo voters have a "diminished opportunity" to meet the Election Day deadline because of the pace of mail delivery and the lack of accessible ballot drop-off locations. *See, e.g.*, LWVAZ Amicus Br. 6 (quoting *Democratic Nat'l Comm. v. Hobbs* ("*DNC v. Hobbs*"), 948 F.3d 989, 1005-06 (9th Cir. 2020), *cert. granted sub nom. Ariz. Republican Party v.*

[1] Perhaps LWVAZ is conflating the test for showing a burden on First and Fourteenth Amendment rights under the *Anderson-Burdick* framework with the test for showing a disparate burden on voting rights under Section 2 of the VRA. As explained further below, these are analytically distinct inquiries, although both examine "burdens" on voting rights.

*Democratic Nat'l Comm.*, No. 19-1258, 2020 WL 5847129 (U.S. Oct. 2, 2020), *and cert. granted sub nom. Brnovich v. Democratic Nat'l Comm.*, No. 19-1257, 2020 WL 5847130 (U.S. Oct. 2, 2020); *id.* at 11 (citing *League of Women Voters of N. Carolina v. N. Carolina*, 769 F.3d 224 (4th Cir. 2014) and *Ohio State Conference of the NAACP v. Husted*, 768 F.3d 524 (6th Cir. 2014)). None of these cases support a claim of error. Instead, they support the district court's decision. All relied on significant record evidence demonstrating a differential voting outcome between minority and non-minority groups. As noted in the Secretary's answering brief, the district court rested its decision on the fact that Appellants adduced no evidence establishing that the conditions on the reservation resulted or are likely to lead to any Navajo ballots being rejected as untimely. Answering Br. 19 (citing ER005–006).

This is in stark contrast to the showings made in *DNC v. Hobbs*, where the court marshaled "[e]xtensive" evidence that minority voters were over-represented among those voting out-of-precinct by a ratio of two to one and were therefore twice as likely to not have their votes counted. 948 F.3d at 1014; *see also* Answering Br. 19–20. The plaintiffs in *League of Women Voters* presented a statistical disparity between the rates at which African-Americans and white voters availed themselves of same-day registration voting, which had been eliminated. Answering Br. 20 (quoting 769 F.3d at 245). The same was also true in *Husted*. *See* 768 F.3d at 552–

553 (presenting statistical evidence that African-American voters were more likely to rely on in-person early voting, which had been reduced).

Appellants could have attempted to make a similar showing. After all, the Election Day deadline has been the law for over 20 years. But they didn't even try. They never claimed that even a single Navajo ballot arrived late in all the years the Election Day deadline has been in force, let alone that there is a disparity with the figures for other racial groups. Nor did Appellants' own experts conclude that having fewer days to mail ballots within the window for casting votes by mail in Arizona amounted to a burden on Navajo Nation members' right to vote. The district court thus did not abuse its discretion in finding that Appellants fell short of the showing required to meet the first step of the established test for Section 2 VRA claims—as shown by the very cases LWVAZ cites.

LWVAZ also argues that this case should be informed by the decision in *League of Women Voters of Florida, Inc. v. Detzner*, 314 F. Supp. 3d 1205 (N.D. Fla. 2018), in which the court found a burden from inaccessible voting locations. *See* LWVAZ Amicus Br. 12. But *Detzner* was not a Section 2 VRA case at all. Instead, the plaintiffs in *Detzner* alleged violations of their First and Fourteenth Amendment rights, claims analyzed under the distinct *Anderson-Burdick* framework. Although the *Anderson-Burdick* and Section 2 VRA tests appear in similar contexts and both reference "burdens" on the franchise, they are separate and non-interchangeable

inquiries. Demonstrating a "burden" under each test requires a different showing. Under the *Anderson-Burdick* framework, courts evaluate whether a policy frustrates the exercise of First Amendment rights and evaluates whether that burden is justified by the State's reasons for the policy. *See Democratic Nat'l Comm. v. Reagan*, 904 F.3d 686, 702–703 (9th Cir. 2018), *superseded en banc sub nom. Democratic Nat'l Comm. v. Hobbs,* 948 F.3d 989 (9th Cir. 2020), *cert. granted sub nom. Brnovich v. Democratic Nat'l Comm.*, No. 19-1257 (Oct. 2, 2020). Under the test for showing violations of Section 2 of the VRA, however, a plaintiff must demonstrate a racial disparity stemming from the denial or abridgment of the right to vote. *DNC v. Hobbs*, 948 F.3d at 1011. Accordingly, whether voters experience a burden from a particular practice under the *Anderson-Burdick* framework does not translate into—and says nothing about—whether there is a disparate burden on a protected group's right to vote under Section 2 of the VRA. *Detzner* thus has no relevance to this case.

## III. LWVAZ's discussion of the Senate Factors is incomplete and unnecessary.

As stated in the Secretary's answering brief, the district court properly denied relief because Appellants failed to meet the first of two required steps of the test to show a Section 2 VRA violation. There is thus no need, as LWVAZ does, to analyze the Senate Factors to determine whether the history and present conditions of discrimination bear on the disparate ability of Navajo Nation members to participate in the electoral process.

In any event, the Secretary does not contest the history or current effects of discrimination on the Navajo Nation. She does object, however, to LWVAZ's analysis of Senate Factor 8, which concerns the responsiveness of elected officials to minority groups. LWVAZ claims that the fact that the Secretary affords election officials 20 days to canvass the election—but does not extend a similar grace to Navajo voters—somehow shows her disregard for minority voters. This argument borders on the nonsensical. The post-election canvass is a sui generis statutorily-mandated governmental function designed to take place after Election Day, and must take place within a particular timeframe to comply with other mandates, including the meeting of the Electoral College. Comparing the statutory canvass deadline to the deadline to return ballots is an apples-to-oranges exercise.

That aside, LWVAZ's argument ignores that the Secretary has engaged in extensive outreach to the Navajo community, as detailed during the evidentiary hearing in district court. For example, the Secretary has engaged in a $1.5 million voter outreach education campaign where she has, among other things, produced radio advertisements in Navajo. ER029. She also secured another $1.5 million in funding to increase access to early voting and ballot drop-off options in tribal communities. ER030. Since taking office, she has met regularly with Navajo Nation members and leaders, working collaboratively to address barriers they may face in voting. ER030. And perhaps most significantly, to mitigate any potential mail

delays, the Secretary is working on an arrangement with the United States Postal Service and the county recorders of Navajo, Coconino, and Apache Counties to develop and implement a plan for USPS to hold ballots at designated facilities in those counties for regular pick-up by authorized county recorder staff for at least the seven days before Election Day. *See* ER030–31. This evidence undermines LWVAZ's accusation that the Secretary is unresponsive to the community's needs.

## IV. LWVAZ's arguments for why the *Purcell* principle is unimportant to this case are unpersuasive.

LWVAZ mentions the recent district court decision in *Mi Familia Vota v. Hobbs*, No. 2:20-cv-01901, 2020 WL 5904952 (D. Ariz. Oct. 5, 2020) and points to the Secretary's decisions not to appeal that case as an example of why the *Purcell* principle is inapplicable here. LWVAZ Amicus Br. 20–21. They argue that because the Secretary is apparently amenable to extending the voter-registration deadline as ordered by the court in *Mi Familia Vota*, she must also be able to extend the Election Day return deadline. Not so. As an initial matter, as the Secretary explained in her answering brief, the Secretary is unable to effectuate the relief Appellants seek. Answering Br. 10–12. The Secretary has no involvement at all with ballot processing and counting, which is solely a county function. On the other hand, the Secretary oversees the statewide voter registration database, and the order in *Mi Familia Vota* necessitated action by the Secretary with respect to voter registration even if an appeal was successful. There is no such court order here and requiring a change now, even closer to the election, only

further flouts the *Purcell* principle. And the relief Plaintiffs seek—extending the ballot-return deadline for only a subset of voters, who are not readily identifiable—is wholly distinguishable from *Mi Familia Vota* because it poses much greater risk of voter confusion that could lead to disenfranchisement, and affects the canvass and the ability of the Secretary and the counties to timely certify election results.

And as should be readily apparent, the Supreme Court, this Court, and this Court's sister circuits have taken a distinct view of *Purcell* from the one embraced by the district court in *Mi Familia Vota.* In particular, the Supreme Court has been wary of upholding remedies that affect ultimate election deadlines, create voter confusion, and require action by non-parties to the suit. As explained in the Secretary's answering brief, the Appellants' requested relief runs directly afoul of these principles. Answering Br. 13–16. *Mi Familia Vota* simply does not offer the support for Appellants that LWVAZ claims it does.

RESPECTFULLY SUBMITTED this 9th day of October, 2020.

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## Certificate of Compliance

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2,194 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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Respectfully submitted this 9th day of October, 2020.

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**Certificate of Service**

I hereby certify that on October 9, 2020, I electronically filed the foregoing **Defendant-Appellee's Response to Amicus Curiae League of Women Voters of Arizona** 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.

Respectfully submitted this 9th day of October, 2020.

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