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Yazzie v. Hobbs—Ninth Circuit affirms district court denial of preliminary injunction in suit by Navajo Nation members to require Arizona election officials to count mail-in ballots postmarked but not received by November 3, 2020

Six members of the Navajo Nation filed a non-class action suit against Arizona election officials in late August 2020 alleging violation of the Voting Rights Act of 1967 over burdens experienced by on-reservation members in voting by mail. The complaint alleged, in part, that “[m]any on-reservation members do not have home mail service; to receive or send mail, they must travel to a post office. This trip is often long and requires traversing rough terrain and stretches of unpaved roads. Added to this challenge are the socioeconomic factors, educational disadvantages, and language barriers that make both the travel to the post office—which requires access to a car—and the completion of mail ballots difficult.” The plaintiffs sought a mandatory injunction shortly after filing to require the defendants “to count mail ballots from on-reservation Navajo Nation tribal members that are postmarked—rather than received—by election day, November 3, 2020, and received on or before November 13, 2020.” Arizona law has required since 1997 actual receipt of mail-in ballots by 7 pm on election day. The district court denied the motion, concluding that the plaintiffs failed to establish a likelihood of success on the merits. *Yazzie v. Hobbs*, No. CV-20-08222-PCT-GMS, 2020 WL 5834757 (D. Ariz. Sept. 25, 2020). On appeal, the Ninth Circuit affirmed the motion’s denial but did so on Article III standing grounds. *Yazzie v. Hobbs*, No. 20-16890, 2020 WL 6072861 (9th Cir. Oct. 15, 2020).

The panel first held that the plaintiffs “fail to make a clear showing of a concrete and particularized injury” as to themselves. It continued:

What is missing for Yazzie is any allegation or showing as to, at a bare minimum, whether any of the plaintiffs intend to vote in this general election, and if so, whether they intend to vote by mail. Nor does Yazzie allege whether the plaintiffs are on the rolls for automatic receipt of an early ballot or whether they face the challenges in terms of location or other claimed disabling factors, such as “the COVID-19 pandemic and the United States Postal Service . . . reorganizational issues” with respect to the Receipt Deadline. While the Complaint is replete with general allegations concerning the various hardships the Navajo Nation members who live on the reservation generally face with respect to mail voting, nothing in the record says whether Yazzie and her fellow plaintiffs have experienced “lack of home mail delivery, the need for language translation, lack of access to public transportation and lack of access to any vehicle” such that the Receipt Deadline will harm their ability to vote in this election.

The panel next found the complaint’s allegations concerning the ability of a federal court to redress the alleged injury in fact inadequate. “Crucially,” it reasoned, the requested November 13

postmark deadline “cannot be implemented because the mail ballots received and logged by the county recorder do not indicate—and Yazzie provides no way to otherwise discern—whether those ballots were cast by on-reservation Navajo Nation members.” On this score, the panel pointed to the testimony of the state Elections Director for the fact that “county recorders cannot ‘effectively differentiate between the ballots from Navajo voters who live on the reservation versus everyone else’s ballots.’” Moreover, “[a] voter’s ethnic identity or tribal membership is not on the face of the ballot or readily available from the voter’s registration record.” An additional difficulty with regard to redressability was “that ‘mail is not always date-stamped with the day and time that it is actually posted.’” The latter difficulty proved even more fatal because, “even if the mandatory injunction will prompt the Postal Service to attempt to postmark all mail ballots for this election, Yazzie’s relief will still depend on the act of a third party who is not controlled or bound by a favorable ruling of this court.”

The panel observed in closing that “[a]lthough we do not discourage challenges to voting laws that may be discriminatory or otherwise invalid, whenever they may arise, we are mindful that the Supreme Court ‘has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election.’” Here, “[d]ismissal of this last-minute challenge to a decades-old rule should be fair notice to plaintiffs who want to tackle the deadline in the future.”

Decision link: <https://cdn.ca9.uscourts.gov/datastore/opinions/2020/10/15/20-16890.pdf>