No. 16-4551

In The United States Court of Appeals For The Eighth Circuit

MUHAMMAD ABDURRAHMAN,

Appellant,

v.

MARK DAYTON, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF MINNESOTA, LORI SWANSON, IN HER OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF MINNESOTA, AND STEVE SIMON, IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE FOR THE STATE OF MINNESOTA,

Appellees.

Appeal from the United States Court District Court
for the District of Minnesota

CORRECTED REPLY BRIEF FOR APPELLANT

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I. APPELLENT'S DECLARATORY RELIEF CLAIM REMAINS CAPABLE OF REPETITION, YET EVADING REVIEW.

Appellees hope to persuade this Court that Dr. Abdurrahman's lawsuit is unlike every other election case with respect to the issue of mootness. They argue that this is the *one* election case that is not capable of repetition, yet evading review. But in making their argument, Appellees do not distinguish the facts in this case from the dozens of cases cited by Dr. Abdurrahman—including one involving presidential electors. They do not address those cases whatsoever. Instead, Appellees introduce a new theory for interpreting mootness, which has roots in laches, but does not adopt the full doctrine—a quasi-laches theory.

Under Appellees' theory, this Court should analyze Dr. Abdurrahman's litigation strategy to determine whether it would have been *possible* to fully litigate his case—under an extremely expedited schedule—if he had only filed at the earliest possible opportunity. A schedule determined, of course, by Appellees' framing of the controversy, not Dr. Abdurrahman's. And if it would have been possible, the theory goes, this Court should punish him for "inexcusable delay." But Appellees do not provide any authority for this quasi-laches theory to mootness. There is none. Appellees argument is wrong as a matter of law and logic.

A. Appellant's Lawsuit is Like Every Other Election Case that Meets the "Evading Review" Requirement.

The issue in this case remains whether the "capable of repetition, yet evading review" exception to mootness applies. Again, this "exception applies where (1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Fed. Election Comm'n v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 462 (2007). The district court acknowledged that Dr. Abdurrahman meets the first prong. (*See* Appx004 ("Abdurrahman meets the exception's first requirement, but not the second.").) While the court did not elaborate, it likely acknowledged this point because of the overwhelming—and perhaps unanimous—authority from the Supreme Court, this Court, and other circuit courts confirming that cases involving election issues are inherently too short in duration to be fully litigated.[1] *See, e.g.*, *Van Bergen v. State of Minn.*, 59 F.3d 1541, 1547 (8th Cir. 1995) ("The [election law] issue ... will never be fully litigated if, at each election, the case becomes moot before appeals can be completed.").

[1] Dr. Abdurrahman will not recite the approximately forty cases he provided in his brief showing that lawsuits involving election issues are rarely, if *ever*, found to not meet the "evading review" requirement. But those cases remain the authority on this issue. (*See* Appellant's Br. at 19-28.) And it is telling that Appellees did not cite one election case that failed to meet this requirement. (*See* Appellees' Br. at 5-17.)

But Appellees do not concede this first prong. (Appellees' Br. at 6 ("Abdurrahman's claims fail to meet either prong of the exception.").) Instead, Appellees argue that Dr. Abdurrahman's "Suit Only Evaded Review as the Result of His Own Laches," because of his "extreme delay," and/or because of his "inexcusable delay." (*Id.* at 7, 12-13.) This argument is problematic for at least two reasons. First, Appellees do not provide any justification for their quasi-laches theory under the mootness doctrine, and the cases they cite that might *suggest* such a rule are inapposite. Second, as importantly, Appellees fail to analyze their theory within the overwhelming authority from the Supreme Court, this Court, and other circuit courts addressing mootness in election cases.

1. The Cases Supporting Appellees' Quasi-Laches Theory to Mootness are Inapposite.

Appellees' theory seems to rest on one case from this Court unrelated to elections. (*See* Appellees' Br. at 7 (citing *South Dakota v. Hazen*, 914 F.2d 147, 150-51 (8th Cir. 1990).) Appellees implicitly argue that *Hazen* stands for the proposition that, when applying the "evading review" requirement, this Court should assess whether a plaintiff dutifully and efficiently litigated his case. (*See id.*) In turn, under Appellees' theory, if a court finds that a plaintiff "failed to diligently pursue his legal

rights in court," the case is moot. (*Id.* at 15.) This is like applying the doctrine of laches—but not exactly.[2]

In *Hazen*, South Dakota received an injunction against the Army Corps of Engineers preventing discharge between two interstate bodies of water. 914 F.2d at 149-50. Because the injunction's deadline passed, this Court found the dispute factually moot. *Id.* This Court also found that the capable of repetition, yet evading review exception did not apply because (1) the case already *had* been fully litigated, showing that time was not an issue; and (2) South Dakota would have had ample time to fully litigate the case if had been filed sooner, which also showed that time was not an issue. *Id.*

Appellees find this second aspect of *Hazen* compelling—but with an unsupported twist. They suggest that *Hazen* stands for the proposition that courts look *backwards* at the plaintiff's actions, and punish that plaintiff if the suit was not

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[2] This Court recognizes laches as an equitable defense when a party engages "in unreasonable and inexcusable delay which results in undue prejudice to the other party." *Citizens & Landowners Against the Miles City/New Underwood Powerline v. Sec'y, U.S. Dep't of Energy*, 683 F.2d 1171, 1175 (8th Cir. 1982). Appellees seek to adopt this standard—with the same "inexcusable delay" language—when analyzing mootness. (*See* Appellees' Br. at 13.) But they provide no authority linking the two legal doctrines. Appellees also only half-heartedly make this argument because, if they applied the full standard, they would have to address prejudice. And Appellees cannot reasonably argue that they are prejudiced in having to defend Dr. Abdurrahman's declaratory relief claim after the election within an ordinary briefing schedule.

filed as soon as possible—like with laches. But that is not correct. The "evading review" requirement is forward looking. The objective is to determine whether *next time* the case can be fully litigated, or whether the same time constraints will present themselves. *See Van Bergen*, 59 F.3d at 1547 (reasoning that the election season itself is always invariably too short of duration). The *Hazen* court analyzed present facts to help it determine whether there are inherent time constraints in a future case under similar facts. *See Hazen*, 914 F.2d at 150 ("There is no apparent reason why a similar future action by the Corps could not be fully litigated before its cessation or expiration.") Thus, contrary to Appellees' quasi-laches theory, this Court was not using the mootness doctrine to punish South Dakota for inexcusable delay.

Additionally, *Hazen* cannot be understood without addressing this Court's follow-on opinion in *S. Dakota v. Ubbelohde*, 330 F.3d 1014, 1023 (8th Cir. 2003). Under similar facts and parties, this Court held:

> A preliminary injunction that bars the Corps from releasing water from the reservoirs during spawning will never last long enough to allow for full litigation because of the brevity of spawning season. Thus, if these actions were to recur, they would continually evade review. Moreover, we have every reason to suspect that these events will recur. On previous occasions, we were inclined to think this type of litigation would not repeat itself. (citing *Hazen*, 914 F.2d at 147; *Missouri ex rel. Nixon v. Craig*, 163 F.3d 482 (8th Cir.1998)). But repetition now seems quite likely.

Id. at 1023. This Court thus had a second opportunity to address the facts and reasoning in *Hazel* and found that perhaps timing *is* an issue. More importantly for

this case, in its review, this Court did not read *Hazel* as holding that, when applying the "evading review" requirement, a Court should analyze whether a plaintiff filed as soon as possible—whether it somehow created its own mootness issue. But that is the rule Appellees want this Court to adopt now.

Appellees cite three other cases ostensibly intended to bolster their quasi-laches theory. (*See* Appellees' Br. at 7 (citing *Iowa Prot. & Advocacy Servs. v. Tanager, Inc.*, 427 F.3d 541, 544 (8th Cir. 2005); *Minn. Humane Soc'y v. Clark*, 184 F.3d 795, 797 (8th Cir. 1999); *Craig*, 163 F.3d at 485).) Appellees argue that these cases stand for the proposition that, to avoid mootness, a plaintiff must utilize certain "procedural options," such as filing a "preliminary injunction," or otherwise seeking an "expedited appeal." (*See id.*)

Even accepting Appellees' interpretation of these cases, their argument has an exposed flaw: Dr. Abdurrahman *did* utilize these procedural options. The same day he filed his complaint, Dr. Abdurrahman moved for an injunction, a shortened briefing schedule, and summary judgment. (Appx005-15.) And after the district court denied all three motions, Dr. Abdurrahman almost immediately moved for an emergency injunction in this Court, and then applied for an emergency injunction in the Supreme Court. Both were denied. In summary, considering Dr. Abdurrahman's

attempt to expedite his case, even assuming Appellees' interpretation is correct, none of these cases apply.[3]

This brings us to *Roy v. Blair*. Appellees spend an inordinate amount of time addressing this case to support their quasi-laches theory to mootness. (*See* Appellees' Br. at 8-14 (citing *Roy v. Blair*, 343 U.S. 214 (1952).) In doing so, Appellees introduce something called the "*Blair* standard." (*See id.* at 11-13.) This standard seems to be: (1) a plaintiff can have standing to sue upon nomination as a presidential elector, and (2) the Supreme Court may expedite that litigation to completion before it becomes factually moot. (*See id.*) Appellees' reliance on this so-called standard misunderstands or misconstrues Dr. Abdurrahman's lawsuit.

In *Blair*, the plaintiff challenged the constitutionally of a statute requiring presidential-elector candidates to pledge their vote for their party's nominee. *See Blair*, 343 U.S. at 216. The plaintiff in *Blair* sought and received a writ of mandamus on that issue. *Id.* Dr. Abdurrahman, however, is not challenging the provision of Minnesota's law requiring the pledge, nor does he challenge the *Blair* decision holding that the requirement is constitutional. (*See* Appx018-31.) Instead, Dr.

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[3] Additionally, even assuming (1) Appellees' interpretation of these cases is correct, and (2) Dr. Abdurrahman failed to attempt to expedite his case, these cases would *still* not apply because the facts in this case involve an election issue. This Court has held that a plaintiff does not have to attempt to expedite his case to defeat mootness in an election case. *Nat'l Right to Life Political Action Comm. v. Connor*, 323 F.3d 684, 692 (8th Cir. 2003).

Abdurrahman challenges Appellees' refusal to acknowledge and transmit his *votes* to Congress *after he voted*.[4] (*See id*.) These are not "nearly identical claims" to *Blair*. (Appellees' Br. at 13.) Thus, contrary to Appellees' assertion, it does not matter that our case contains a "comparable pledge requirement," or that Dr. Abdurrahman was "required to sign a pledge" as soon as he was nominated. (*Id*. at 12.)

The purpose of Appellees' manufactured link is ostensibly to invoke judicial standing principles. Appellees argue that *Blair* shows that Dr. Abdurrahman could have sued months earlier. (*See id.* at 11.) Appellees then implicitly argue that, consequently, Dr. Abdurrahman *had* to sue earlier or he would lose his rights—their quasi-laches theory. (*See id*.) This again misstates relevant law. Standing is founded on the existence of an "injury in fact." *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). A plaintiff must show that he "suffered an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical." *Id.* at 1458 (internal quotations omitted). And a party of course cannot be "forced to sue before [he] was injured, and could not even sue for injunctive relief without demonstrating that the injury was imminent." *Webb v. Indiana Nat. Bank*, 931 F.2d 434, 436 (7th Cir. 1991) (Posner, J.).

[4] This could also be framed as whether the *enforcement* of the pledge is constitutional, which is an issue the Supreme Court explicitly left open. *See Blair*, 343 U.S. at 229.

Appellees argue that Dr. Abdurrahman suffered an injury in fact by at least August 11, 2016, the day the DFL nominated him as a presidential elector and he took the pledge. (*See* Appellees' Br. at 8, 12.) If that were true, however, then Dr. Abdurrahman must have intended to violate his pledge—vote his conscience for Bernie Sanders—on that date but for Minnesota law.[5] But Appellees have provided no evidence that Dr. Abdurrahman took his pledge intending to break it. They have provided no evidence that, before December 19, 2016, Dr. Abdurrahman had any grievance, let alone an injury in fact, with the Minnesota law now under dispute—a justiciable controversy.[6] In fact, Dr. Abdurrahman did not know he would be voting for President and Vice-President until the election results arrived on November 8, 2016. So how could Dr. Abdurrahman have suffered an "actual or imminent" injury,

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[5] Appellees also argue that Dr. Abdurrahman could have had standing before August 11, 2016. (Appellees Br. at 8, 12.) But Hillary Clinton was not officially the Democratic Party nominee until July 28, 2016. So even if Dr. Abdurrahman had decided, from the start, that he was only going to vote for Bernie Sanders, and Appellees have no evidence of that original intent, he still could not have suffered an injury in fact before that date because there was no Democratic Party nominee.

[6] Assuming this Court grants Appellant's motion to supplement the record, the only evidence available regarding *when* Dr. Abdurrahman decided to vote for Bernie Sanders over Hillary Clinton is upon reflecting on events he learned after being elected a presidential elector. (*See* Appx034.) That could have happened any time between November 8, 2016, when he knew he would be voting, and December 19, 2016, the day he finally reflected on all events and voted.

rather than one that is merely "conjectural or hypothetical," before that date?[7] *See Robins*, 136 S. Ct. at 1548.

2. Appellees Fail to Address Any Relevant Election Case Authority on the "Evading Review" Requirement.

The most glaring error in Appellees' analysis of the "evading review" requirement is that they fail to analyze even *one* relevant election-law case and apply it to the present facts. (*See* Appellees' Br. at 7-15.) Instead, after accurately citing relevant law, (*see id.* at 14 (citing *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 735-36 (2008); *Wisconsin Right to Life, Inc.*, 551 U.S. at 462-64,) they revert to *Blair*, a case unrelated to mootness:

> *Blair*, proves, however, that lawsuits challenging constitutionality of state procedures *pertaining to presidential electors* are fundamentally different, because such lawsuits, if they are timely filed, provide courts with ample time to decide them.

(*Id*. at 14 (citing *Blair*, 343 U.S. at 216) (emphasis in original).) Appellees provide no authority for this categorical distinction between presidential-elector election

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[7] A related problem with Appellees' theory is that it requires action that initiates a different case altogether. As Dr. Abdurrahman hopes to later argue, a state has plenary power to "appoint" presidential electors. *See McPherson v. Blacker*, 146 U.S. 1, 35 (1892) (citing U.S. Const. art. II, § 2, cl. 2). Thus, even assuming Appellees' factual assertions are correct, if Dr. Abdurrahman had filed suit months before the election, Appellees arguably could have removed him as an elector *before* he votes. The facts in our case occur *after* Dr. Abdurrahman has already voted as a duly-appointed elector. This invokes the Twelfth Amendment of the U.S. Constitution. *See* U.S. Const. amend. XII. The Tenth Circuit acknowledged this important constitutional distinction and its ramifications. *See infra* note 8.

cases and other election cases when analyzing mootness. (*See id.*) They also do not explain why this distinction should matter. (*See id.*) And perhaps most egregiously, they fail to acknowledge that the Supreme Court has *already* held that a presidential-elector election case meets the "evading review" requirement. *See Moore v. Ogilvie*, 394 U.S. 814, 816 (1969). ("But while the 1968 election is over … as long as Illinois maintains her present system as she has done since 1935[, t]he problem is … capable of repetition, yet evading review[.]").

Additionally, based on the district court's reasoning, Dr. Abdurrahman's motion for an injunction would have *still* been denied irrespective of mootness or laches. (*See* Appx007-10 (holding that Dr. Abdurrahman has not shown a likelihood of success on the merits).) How would filing two months earlier change that result? Appellees do not answer this question.[8] And without an opinion from this Court or

[8] Appellees also fail to acknowledge that plaintiffs in three other states were denied injunctions after filing suit within Appellees' preferred timeline. (*See* Appx006 (internal citations omitted).) The Ninth and Tenth Circuits also denied motions for emergency injunctions. (*Id.*) But as the Tenth Circuit acknowledged, this case is much different:

> "While we question whether [the challenged Colorado law] provides [the Colorado Secretary of State removal and replacement] authority *after voting has commenced*, that precise question is not before us."

Baca v. Hickenlooper, No. 16-1482, at *13 (10th Cir. Dec. 16, 2016) (emphasis added); *see also id.* at *12 n.10 (stating that such action would be inconsistent with the text of the Twelfth Amendment).

the Supreme Court, any argument that this holding would be overturned in an expedited proceeding is mere conjecture.

Regardless, relevant authority for election cases shows that two months *is* too short a duration to be full litigated. Every election case cited by Dr. Abdurrahman involved a two- or four-year election cycle. (*See* Appellant's Br. at 19-28.) Courts understand that legal disputes involving elections routinely come up in the weeks and months immediately before the election—like this case—and there is no way to know when the issue will return. *See Wisconsin Right To Life, Inc.*, 551 U.S. at 462-63. This includes disputes involving presidential electors. *See Moore*, 394 U.S. at 816. This rationale is likely why this Court recognizes that "election issues are among those most frequently saved from mootness by [the capable of repetition, yet evading review] exception." *Missourians for Fiscal Accountability v. Klahr*, 830 F.3d 789, 796 (8th Cir. 2016). And also why, for example, the Sixth Circuit announced that the capable of repetition, yet evading review exception becomes "somewhat relaxed in election cases." *Lawrence v. Blackwell*, 430 F.3d 368, 372 (6th Cir. 2005).

B. Appellant's Lawsuit is Like Every Other Election Case that Meets the "Capable of Repetition" Requirement.

Appellees' argument regarding the second "capable of repetition" requirement is equally unavailing. The applicable legal standard remains whether there is a "reasonable expectation" or a "demonstrated probability" that the "same

controversy will recur involving the same complaining party." *See Wisconsin Right To Life, Inc.*, 551 U.S. at 463 (internal quotations omitted). A controversy is sufficiently likely to recur when there is a reasonable expectation that the claimant "will again be subjected to the alleged illegality," or "will [again] be subject to the threat of prosecution" under the challenged law. *Id.* Finally, with election cases, to be *capable* of repetition, the "recurrence of the dispute" does not even have to be "more probably than not." *Klahr*, 830 F.3d at 795 (quoting *Honig v. Doe*, 484 U.S. 305, 318 n.6 (1988)).

Dr. Abdurrahman further explained this standard in the context of the *Connor* decision where this Court rejected drawing "a narrow scope of probability" based on the "uniqueness" of past events. (Appellant's Br. at 33 (citing *Connor*, 323 F.3d at 691).) This case is instructive considering Appellees' argument that it is unlikely Dr. Abdurrahman will be able to replicate the same sequence of events in 2020 or beyond. (*See* Appellees' Br. at 16-17 (arguing that Ms. Hooper must first become a delegate before *she* can nominate him as a presidential elector, but failing to acknowledge that *any other* delegate could also nominate him).)

Appellees ignore the applicable standard altogether. In its place, Appellees erect an evidentiary barrier not found in mootness jurisprudence. (*See* Appellee Br. at 16 ("Abdurrahman presented the district court with no evidence that he is likely to be subjected to the Minnesota statutes pertaining to presidential electors in the

future.").) In turn, Appellees implicitly argue that, absent this evidence, any "assertions" by Dr. Abdurrahman are merely "speculative," which does not meet the "capable of review" requirement. (*See id*.)

Appellees' proposed rule requiring a heightened evidentiary basis to prove "capable of review" finds no support in the opinions of the Supreme Court, this Court, or any circuit court. Dr. Abdurrahman provided numerous election cases applying the standard set forth in *Honig* and *Wisconsin Right To Life, Inc.* (*See* Appellant's Br. at 19-28.) This Court even decided one of these cases just last year. *See Klahr*, 830 F.3d at 795. It is incumbent upon Appellees to address this authority and, if possible, distinguish the facts in this case under the appropriate standard. Appellees do not even try.

Instead, Appellees cite two cases for the proposition that Dr. Abdurrahman cannot defeat mootness "by citing speculative contingencies." (Appellees' Br. at 15 (citing *Bishop v. Comm. on Prof'l Ethics & Conduct of Iowa State Bar Ass'n*, 686 F.2d 1278, 1285 (8th Cir. 1982); *McFarlin v. Newport Special Sch. Dist.*, 980 F.2d 1208, 1211 (8th Cir. 1992).) But neither of these cases are on point. First, *Bishop* does not involve an election issue, and it was decided well before this Court's four major election cases addressing mootness. *See Klahr*, 830 F.3d at 795; *Connor*, 323 F.3d at 691; *Van Bergen*, 59 F.3d at 1547; *Arkansas AFL-CIO*, 11 F.3d 1430, 1436 (8th Cir. 1993). Second, with *McFarlin*, in addition to not being an election case,

and being decided before this Court's four major election cases, the plaintiff conceded the case was *incapable* of review with the *same complaining party*. *See McFarlin*, 980 F.2d at 1211. Appellees decision to cite these two cases and ignore all election cases on point—from this Court or any other—confirms that their "capable of repetition" argument rests on a shaky legal foundation.

C. Appellees Misstate or Misunderstand Appellant's Pleading and Evidentiary Obligations Related to the District Court's Premature Dismissal.

There are three points on the premature dismissal issue that undermine Appellees' argument. First, there are the facts. Appellees assert the following:

> [T]he district court dismissed the action on the grounds of mootness only after a hearing at which the court and parties extensively discussed whether the suit was moot. Appellees also briefed the mootness issue before the district court, providing Abdurrahman with additional notice that the mootness of his action was at issue.

(Appellees' Br. at 17-18.) This incomplete and one-sided recitation of the relevant timeline also happens to be false. Dr. Abdurrahman moved for an injunction to enjoin Appellees from submitting Minnesota's electoral votes to Congress without including Dr. Abdurrahman's votes for Bernie Sanders and Tulsi Gabbard. (*See* Appx003.) In their response to this motion, Appellees argued that Dr. Abdurrahman's case is moot because, since he filed his claim, "the Secretary's staff [had] already [transmitted the electoral votes cast to Congress.]" (SuppAppx001.) The next morning, at the hearing, the district court asked a question specific to this

argument. (SuppAppx004.) Counsel for Dr. Abdurrahman correctly responded that the case is not moot because the court can still render injunctive relief before Congress *counts* the vote submitted by Appellees. (*See* SuppAppx004; SuppAppx010; SuppAppx014.) And the applicable deadline is January 6, 2017, the day Congress will count those votes. (*See* SuppAppx010; SuppAppx014.)

The issue argued by Appellees and discussed before the district court was thus whether Dr. Abdurrahman's motion for *injunctive relief* is moot. That was, after all, the purpose for the expedited hearing.[9] Whether Dr. Abdurrahman's declaratory relief claim is moot—as distinct from his injunctive relief claim—was *not* discussed, let alone "extensively discussed." Yet the district court summarily dismissed that claim without any analysis distinguishing it from his motion for an injunction.

Second, Appellees argument is based on the flawed premise that Dr. Abdurrahman had to allege or even prove facts to preemptively defend against Appellees' subsequent mootness argument. Appellees argue the following:

> It was entirely foreseeable that Abdurrahman, like every other plaintiff in federal court, would be required to allege and prove facts demonstrating that his claims were not moot at any stage of the litigation, including on appeal.

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[9] The capable of repetition, yet evading review exception did come up in a roundabout way during the hearing. (*See* SuppAppx007.) But the discussion was not "extensive," and certainly did not provide Dr. Abdurrahman the opportunity to adequately brief the court with the extensive case authority it provided this Court confirming that he meets the applicable standard.

(Appellees' Br. at 19.)[10] Dr. Abdurrahman has already shown that a plaintiff does not have to specifically allege that his claim is capable of repetition, yet evading review in his complaint. (Appellant's Br. at 28 (citing *Merle v. United States*, 351 F.3d 92, 95 (3d Cir. 2003); *N. Carolina Right To Life Comm. Fund For Indep. Political Expenditures v. Leake*, 524 F.3d 427, 435–36 (4th Cir. 2008); *Schaefer v. Townsend*, 215 F.3d 1031, 1033 (9th Cir. 2000).) And regarding "prov[ing] facts," Appellees want it both ways. The district court's summary dismissal without notice precluded any development of facts related to mootness. Dr. Abdurrahman thus moved this Court to supplement the record. But Appellees have contested that motion.

Finally, Appellees misconstrue the authority Dr. Abdurrahman cited to support his argument that the district court prematurely dismissed his lawsuit. Dr. Abdurrahman established that it is a "fundamental requirement of due process" that courts provide litigants notice and a reasonable opportunity to be heard before dismissing a lawsuit. (Appellant's Br. at 39-40 (quoting *California Diversified*

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[10] Appellees further argue that it "was equally foreseeable" that Dr. Abdurrahman lawsuit would become moot in three weeks. (Appellees Br. at 19-20.) Dr. Abdurrahman of course understood this. That is why he immediately moved for a temporary injunction and sought expedited appellate review. It is noteworthy, however, that Appellees finally concede that Dr. Abdurrahman had until January 6, 2016 before his injunctive relief claim became factually moot. They previously argued that it became moot when Appellees delivered the electoral votes to Congress to be counted. (*See* SuppAppx001.)

Promotions v. Musick, 505 F.2d 278, 280 (9th Cir. 1974).) Appellees argue that these cases are inapposite because they do not address mootness, which is a jurisdictional issue. (Appellees' Br. at 19.) But because Dr. Abdurrahman did not have to allege facts in his complaint to preemptively defend against mootness—instead, like he did, just establish the existence of an Article III case or controversy—Appellees jurisdictional distinction falls flat. Prevailing authority remains that a court must provide parties "notice of the proposed [dismissal] and [afford] them an opportunity to address the issues." *Literature, Inc. v. Quinn*, 482 F.2d 372, 374 (1st Cir. 1973). The district court did not meet this standard.

II. THE ELEVENTH AMENDMENT DOES NOT BAR APPELLANT'S CLAIM FOR PROSPECTIVE RELIEF.

Appellees argument regarding the Eleventh Amendment is frankly difficult to understand. Their headnote suggests they are arguing that the Eleventh Amendment bars Dr. Abdurrahman's claim for declaratory relief because he allegedly failed to plead one for injunctive relief. (Appellees' Br. at 21.) This becomes more apparent when they attempt to establish relevant law. (*See id.* at 22. ("[T]he Supreme Court has held that lawsuits that seek only a declaratory judgment [are barred by the Eleventh Amendment].) But they also acknowledge that Dr. Abdurrahman's "lawsuit sought an injunction." (*Id.* at 6 (citing Appx031-32).) And Appellees' conclusion suggests their real argument is that Dr. Abdurrahman sought retrospective relief in *both* claims:

> In the instant case, both (1) Abdurrahman's assertions regarding the alleged injury to his constitutional rights and (2) his claim for injunctive relief are retrospective[.]

(*Id*. at 22.) But this is the extent of Appellees' reasoning on retrospective versus prospective claims. They provide no analysis on how a declaratory judgment striking down an ongoing violation of the constitution is anything but prospective. Their failure to analyze this issue betrays the lack of merit in their argument.

A. The *Ex Parte Young* Exception Applies to Appellant's Declaratory Relief Claim.

Appellees correctly note that the Eleventh Amendment is construed as providing a state immunity from a lawsuit in federal court by its own citizens. (Appellees' Br. at 21 (citing *Skelton v. Henry*, 390 F.3d 614, 617 (8th Cir. 2004).) The exception to this rule is found in *Ex Parte Young*, 209 U.S. 123 (1908), which "rests on the premise—less delicately called a 'fiction'—that when a federal court commands a state official to do nothing more than refrain from violating federal law, he is not the State for sovereign-immunity purposes." *Virginia Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 255 (2011) (internal citation omitted). It applies to claims for both prospective injunctive relief and declaratory relief. *See Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 269-70 (1997) ("[T]his Court has recognized [an exception] for certain suits seeking declaratory and injunctive relief against state officers in their individual capacities.").

Claims for prospective relief include allegations of ongoing violations of federal law—future conduct. *See id.* at 281 ("An allegation of an ongoing violation of federal law where the requested relief is prospective is ordinarily sufficient to invoke the *Young* fiction.")[11] Claims for retrospective relief include, for example, requests for money damages or for specific performance of a government contract—past conduct. *See Stewart*, 563 U.S. 247 at 256-57. A claim that conduct is both unconstitutional in the past *and* future, but does not seek money damages for the past conduct, falls within the *Ex Parte Young* exception. *Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Maryland*, 535 U.S. 635, 646 (2002).

Appellees seek to add an additional rule to the *Ex Parte Young* exception unsupported by law. They cite *Green v. Mansour*, 474 U.S. 64, 73 (1985) for the proposition that "the Supreme Court has held that lawsuits that seek only a declaratory judgment and not prospective injunctive relief cannot make use of the *Ex Parte Young* exception." (Appellees' Br. at 22.) This rule is not found in that case. In *Green*, the district court issued a preliminary injunction. *Green*, 474 U.S. at 66. While the appeal was pending, however, Congress changed the law, so the parties stipulated to terminate the injunction. *Id.* The plaintiffs subsequently argued that

[11] An exception is if the allegedly prospective claim is the "functional equivalent" of retrospective claim, such as a quiet title action. *Coeur d'Alene Tribe of Idaho*, 521 U.S. at 269-70. This holding confirms that a proper *Ex Parte Young* exception analysis addresses the claim's substance rather than its form.

they are entitled to "notice relief and a declaration that respondent's prior conduct violated federal law." *Id.* at 65. The Supreme Court framed the issue as follows:

> We granted certiorari to resolve a conflict in the Circuits over whether federal courts may order the giving of notice of the sort approved in *Quern v. Jordan*, [440 U.S. 332 (1979)], or issue a declaratory judgment that state officials violated federal law in the past *when there is no ongoing violation of federal law*.

Id. at 67 (emphasis added).

Thus, contrary to Appellees assertion, the facts in *Green* have nothing to do with seeking "only a declaratory judgment and not prospective injunctive relief." (Appellees Br. at 22.) The parties in that case *did* seek injunctive relief, but that relief was rendered moot by a change in law. *Green*, 474 U.S. at 67-68. As to what remained, the Court reasoned:

> There is no claimed continuing violation of federal law, and therefore no occasion to issue an injunction. Nor can there be any threat of state officials violating the repealed law in the future.

Id. at 73. In summary, *Green* merely upheld the rule in *Ex Parte Young* that it must be a prospective claim seeking a remedy for a continuing violation of federal law as opposed to a retrospective claim for past conduct.

Notably, the Supreme Court *could* have decided *Green* based on the putative rule Appellees now assert. The Court could have held that, because the *Ex Parte Young* exception requires prospective *injunctive* relief, and only a claim for *declaratory* relief remains, the Eleventh Amendment bars any relief. But the Court

did not decide *Green* that way. Instead, far from relying on mere labels, it analyzed the relief *actually* sought, and reasoned that "notice relief is not the type of remedy designed to prevent ongoing violations of federal law." *See id.* at 71; *see also id.* at 73 ("But the issuance of a declaratory judgment in these circumstances would have much the same effect as a full-fledged award of damages or restitution by the federal court[.]") In summary, *Green* does not support the rule Appellees ask this Court to now adopt.[12]

B. Appellant has Sufficiently Pleaded a Prospective Claim for Relief that Precludes Immunity Under the Eleventh Amendment.

By its plain terms, Dr. Abdurrahman's declaratory relief claim sought prospective relief for an ongoing and continuing violation of law:

> 5. A declaration that the "[challenged law] is repugnant to the United States Constitution and of no force and effect."

(Appx031.) Appellees do dispute that the challenged law remains in effect. In turn, Appellees cannot argue, like in *Green*, that Dr. Abdurrahman's remaining

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[12] Appellees also imply that this Court's *281 Care Comm. v. Arneson*, 638 F.3d 621 (8th Cir. 2011) decision stands for the same proposition. (*See* Appellees Br. at 22 ("Under *221* and *Green*, a litigant cannot maintain a declaratory action … unless he or she also alleges a continuing violation of federal law and seeks a prospective injunction.").) But there is nothing in that decision even suggesting such a holding. Instead, this Court framed the issue as follows: "The only issue is whether [the appellants] have alleged that [the Minnesota Attorney General] is, herself, engaged in an ongoing violation of federal law." *See id.* at 632. This Court found that she had and thus the *Ex Parte Young* exception applies. *Id.*

declaratory relief claim does not challenge an ongoing and continuing violation of law. So they instead try to make a categorical distinction based on form. They direct this Court to ask whether Dr. Abdurrahman seeks "injunctive relief or declaratory relief," rather than whether he seeks "retrospective relief or prospective relief." (*See* Appellees' Br. at 22.) But the latter question, not the former, is exactly what the Supreme Court instructs this Court to ask. *See Papasan v. Allain*, 478 U.S. 265, 278 (1986) ("Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law. But compensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment.") (quoting *Green*, 474 U.S. at 68)).

In the end, like with mootness, Appellees ask this Court to adopt a new rule without any case authority supporting that rule. Moreover, they ask this Court to adopt this rule without recognizing the cases that challenge the very proposition. Indeed, several cases address claims for declaratory relief within the context of the Eleventh Amendment. *See, e.g., Lynch v. Pub. Sch. Ret. Sys. of Missouri, Bd. of Trustees*, 27 F.3d 336, 338-39 (8th Cir. 1994) (holding that a declaratory action is within the *Ex Parte Young* exception); *Melo v. Hafer*, 912 F.2d 628, 635 (3d Cir. 1990), *aff'd*, 502 U.S. 21 (1991) ("In suits for injunctive or declaratory relief, however, the Eleventh Amendment does not bar an action in which a state official is the named party."); *TTEA v. Ysleta del Sur Pueblo*, 181 F.3d 676, 680 (5th Cir. 1999)

("State sovereign immunity does not preclude declaratory or injunctive relief against state officials."); *Austin v. State Indus. Ins. Sys.*, 939 F.2d 676, 680 n.2 (9th Cir. 1991) ("We note that the eleventh amendment does not bar actions for declaratory or injunctive relief brought against state officials in their official capacity."). Dr. Abdurrahman's lawsuit thus falls within the *Ex Parte Young* exception.

III. ALL THREE APPELLEES WERE PROPERLY NAMED AS PARTIES.

Appellees' argument regarding the proper parties is inappropriate for this appeal. A district court is the proper forum for dismissing claims against parties when there is allegedly no legal relief. *See* Fed. R. Civ. P. 12(b)(6). And although the district court's summary dismissal compromised Appellees ability to move for partial dismissal—much like it compromised Dr. Abdurrahman's ability to address mootness—they will still have an opportunity to move if this Court remands. In summary, this Court "generally [does] not consider issues not raised below," and because Appellees will have an opportunity to move for dismissal, if necessary, "injustice [will not] otherwise result" if this Court refuses to address the issue now. *See Haury v. C.I.R.*, 751 F.3d 867, 870 (8th Cir. 2014).

Appellees argument is nonetheless misplaced on the merits. The Supreme Court held that, to make a state officer a proper defendant, "[t]he fact that the state officer, by virtue of his office, has some connection with the enforcement of the act, is the important and material fact[.]" *Ex parte Young*, 209 U.S. at 157. And that case

coincidently involved the Supreme Court holding that the Minnesota Attorney General is a proper party. *Id.* at 149. Appellees have not provided this Court any analysis distinguishing this case from *Ex Parte Young* or any other. *See, e.g., 281 Care Comm. v. Arneson*, 638 F.3d 621, 632-33 (8th Cir. 2011) (holding that Attorney General Swanson is the proper party in a constitutional challenge to state law)

The rule in *Ex Parte Young* also applies to Appellee Governor Dayton. Under the law being challenged, Governor Dayton signed and delivered the amended certificate of ascertainment to Congress that failed to include Dr. Abdurrahman's name and votes. *See* Minn. Stat. § 208.47. This is also well documented in the record. (*See* SuppAppx016 (the final signature page of the Appellees' Certificate of Ascertainment sent to Congress on January 20, 2016 that does not contain Dr. Abdurrahman's votes).) This action is at the heart of this dispute. It also surely constitutes "some connection with the enforcement of the act." *Ex parte Young*, 209 U.S. at 157.

CONCLUSION

Dr. Abdurrahman presented this Court with overwhelming citation to authority showing that election cases are almost always found to meet the capable of repetition, yet evading review exception. In response, Appellees fail to distinguish the facts in this case from even *one* of those election cases. Their conspicuous decision to ignore relevant authority suggests this case is no different. Moreover,

regarding the Eleventh Amendment, their conclusory assertion that Dr. Abdurrahman's declaratory relief claim is not prospective and thus not subject to the *Ex Parte Young* doctrine has no basis in law.

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CERTIFICATE OF COMPLIANCE

1. The Corrected Reply Brief for Appellant complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(ii) because it contains **6,419** words, excluding the parts of the brief excluded by Federal Rule of Appellate Procedure 32(f).

2. The Corrected Reply Brief for Appellant complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it is prepared in proportional spaced 14-point font typeface using plain, roman style font.

3. The Reply Brief for Appellant complies with this Court's Rule 28A(h) because it has been scanned for viruses and it is virus-free.

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I hereby certify that on April 27, 2017, I served a copy of the foregoing CORRECTED REPLY BRIEF FOR APPELLANT by electronic means on the following principal counsel:

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