AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

NATIVE AMERICAN VOTING RIGHTS: EXPLORING BARRIERS AND SOLUTIONS

HEARING

BEFORE THE

SUBCOMMITTEE ON ELECTIONS

OF THE

COMMITTEE ON HOUSE ADMINISTRATION
HOUSE OF REPRESENTATIVES

ONE HUNDRED SIXTEENTH CONGRESS

SECOND SESSION

FEBRUARY 11, 2020

Printed for the use of the Committee on House Administration

Available on the Internet:
http://www.govinfo.gov/committee/house-administration

U.S. GOVERNMENT PUBLISHING OFFICE
41–319 WASHINGTON : 2020

COMMITTEE ON HOUSE ADMINISTRATION

ZOE LOFGREN, California, *Chairperson*

JAMIE RASKIN, Maryland
SUSAN A. DAVIS, California
G. K. BUTTERFIELD, North Carolina
MARCIA L. FUDGE, Ohio
PETE AGUILAR, California

RODNEY DAVIS, Illinois,
Ranking Member
MARK WALKER, North Carolina
BARRY LOUDERMILK, Georgia

CONTENTS

FEBRUARY 11, 2020

	Page
Native American Voting Rights: Exploring Barriers and Solutions	1

OPENING STATEMENTS

Chairwoman Marcia L. Fudge	1
Prepared statement of Chairwoman Fudge	4
Hon. Rodney Davis, Ranking Member	7
Prepared statement of Ranking Member Davis	8

WITNESSES

Hon. Ben Ray Luján, Representative, Third District of New Mexico	10
Prepared statement of Hon. Luján	13
Mr. Leonard Forsman, Chairman, Suquamish Tribe	16
Prepared statement of Chairman Forsman	19
Ms. Amber Torres, Chairperson, Walker River Paiute Tribe	22
Prepared statement of Ms. Torres	24
Ms. Doreen McPaul, Attorney General, Navajo Nation	26
Prepared statement of Ms. McPaul	28
Ms. Patricia Ferguson-Bohnee, Director, Indian Legal Clinic, Sandra Day O'Connor College of Law	54
Prepared statement of Ms. Ferguson-Bohnee	57
Mr. Elvis Norquay, Member, Turtle Mountain Band of Chippewa Indians	70
Prepared statement of Mr. Norquay	71
Jacqueline De León, Staff Attorney, Native American Rights Fund	72
Prepared statement of Ms. De León	74

QUESTIONS FOR THE RECORD

Ms. Patricia Ferguson-Bohnee, Director, Indian Legal Clinic, Sandra Day O'Connor College of Law, answers to submitted questions	97
Jacqueline De León, Staff Attorney, Native American Rights Fund, answers to submitted questions	112
Ms. Doreen McPaul, Attorney General, Navajo Nation, answers to submitted questions	120
Mr. Leonard Forsman, Chairman, Suquamish Tribe, answers to submitted questions	124
Ms. Amber Torres, Chairperson, Walker River Paiute Tribe, answers to submitted questions	127

SUBMISSIONS FOR THE RECORD

Statement of the National Congress of American Indians, The Native American Rights Fund	130
Letter, American Bar Association	137
Report, The Comprehensive Field Hearing Report on Historical and Contemporary Barriers to Political Participation by Native American Voters	139

NATIVE AMERICAN VOTING RIGHTS: EXPLORING BARRIERS AND SOLUTIONS

TUESDAY, FEBRUARY 11, 2020

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON ELECTIONS,
COMMITTEE ON HOUSE ADMINISTRATION,
Washington, DC.

The Subcommittee met, pursuant to call, at 9:59 a.m., in Room 1310, Longworth House Office Building, Hon. Marcia L. Fudge [chair of the Subcommittee] presiding.

Present: Representatives Fudge, Butterfield, Aguilar, and Davis of Illinois.

Staff Present: Sean Jones, Legislative Clerk; Jamie Fleet, Staff Director; David Tucker, Senior Counsel and Parliamentarian; Mariam Malik, Staff Assistant; Sarah Nasta, Elections Counsel; Giancarlo Pellegrini, Professional Staff Member; Hannah Carr, Staff Assistant; Veleter Mazyck, Chief of Staff for Chairperson Fudge; Kyle Parker, Legislative Director for Representative Butterfield; Evan Dorner, Legislative Assistant for Representative Aguilar; Nick Crocker, Minority Director, Member Services; and Jesse Roberts, Minority Counsel.

Chairperson FUDGE. Good morning. The Subcommittee on Elections of the Committee on House Administration will come to order.

I ask unanimous consent that all Members have five legislative days in which to revise and extend their remarks and that any written statements be made part of record.

Hearing no objection, so ordered.

I would like to thank the Members of the Committee as well as our witnesses and those in the audience for being here today.

We are here today to examine barriers to Native American voting rights. This morning's hearing will shed light on the longstanding disenfranchisement faced by this Nation's first people and potential solutions to right this wrong.

The ongoing injustice of voter disenfranchisement in America is far too familiar. Throughout 2019, the Subcommittee on Elections held a series of field hearings across the country to examine the state of voting rights and election administration in America. What we found was an alarming array of hurdles and obstacles to voting that exists for citizens across the country, especially minority groups.

Suppressive tactics have existed in various forms since this Nation's founding, and they continue today. In 2013, the Supreme Court's decision in Shelby County gave jurisdictions with a provable legacy of discrimination, a green light to discriminate at will.

What was old is new again: polling place closures and movements, cutbacks and restrictions on early voting, discriminatory voter ID laws, removing otherwise eligible voters from the rolls, modern day poll taxes, and a failure to provide required language assistance and materials among other barriers all combine to continually disfranchise millions of otherwise eligible voters.

Last year, the House passed bills to strengthen voter protections and ballot access, including H.R. 1 and H.R. 4. Both these bills now sit on the Senate Majority Leader's desk waiting for action, but we cannot be still.

At our founding, America claimed the commitment to equality. This Nation has failed to live up to that claim at many turns, and it is time to fix it.

Protecting the rights of Native American voters is no exception. This is now the second Subcommittee hearing focused exclusively on Native American voting rights and our third examining the issue in detail. One might ask why we are spending so much time on this topic. Almost 7 million people identify as American Indian or Alaskan Native, millions of whom are eligible voters, including tens of thousands serving on active military duty and thousands more veterans who bravely serve this country.

Apart from the Subcommittee's North Dakota field hearing, neither this Committee nor, in fact, any other committee in either Chamber of Congress has held a single hearing dedicated to Native American voting rights in recent memory. It is not only appropriate but necessary to hold a few hearings and make up for lost time.

The Federal Government has consistently failed Native American communities by engaging in policies of forced removal and assimilation, failing to live up to its treaty promises and trust obligations and denying Native American citizenship until 1924. The States are far from blameless. Once Native Americans acquired citizenship and the legal right to vote, States immediately erected a series of Jim Crow style barriers to prevent Native Americans from casting a ballot.

By the time this discrimination began to fade in the 1960s, the damage was done. Native Americans experienced disproportionately low rates of voter participation and steep socioeconomic challenges. Both of these problems persist today.

The socioeconomic challenges experienced by many Native Americans are severe and unacceptable. More than a quarter of Native Americans live in poverty, and Native Americans are unemployed at almost twice the rate of other Americans. Tribal lands are often rural and isolated, and many members lack access to transportation, residential street addresses, and reliable mail service. All of this was underscored by witnesses at our field hearings in North Dakota and Arizona, but it is not limited to those two States.

These structural challenges mean that today's election laws are not necessarily working for Native American voters. Voter registration services are often scarce or unavailable on Tribal land, and the act of voting itself is difficult for many Tribal members. Polling sites are plagued by inadequate facilities, outdated equipment, and long wait lines. Tribal lands sometimes lack a polling site altogether, and access to proper language assistance remains a persistent issue.

As we constantly talk about greatness, America is great because of her ability to repair her faults. It is time for us to do right by the residents of Tribal nations and guarantee the right to vote that each member is owed. We look forward to our panels today offering their views and possible solutions, hopefully. There is much work to be done.

I yield now to the Ranking Member, Mr. Davis.

[The statement of Chairperson Fudge follows:]

ZOE LOFGREN, CALIFORNIA
CHAIRPERSON

JAMIE RASKIN, MARYLAND
VICE CHAIRPERSON

SUSAN DAVIS, CALIFORNIA
G.K. BUTTERFIELD, NORTH CAROLINA
MARCIA FUDGE, OHIO
PETE AGUILAR, CALIFORNIA

JAMIE FLEET, STAFF DIRECTOR

Congress of the United States
House of Representatives
COMMITTEE ON HOUSE ADMINISTRATION
1309 Longworth House Office Building
Washington, D.C. 20515–6157
(202) 225–2061
https://cha.house.gov

RODNEY DAVIS, ILLINOIS
RANKING MINORITY MEMBER

MARK WALKER, NORTH CAROLINA
BARRY LOUDERMILK, GEORGIA

ONE HUNDRED SIXTEENTH CONGRESS

JEN DAULBY, MINORITY STAFF DIRECTOR

Chairwoman Marcia L. Fudge
Native American Voting Rights Act Hearing
Opening Statement

Good morning. We are here today to examine barriers to Native American voting rights. This morning's hearing will shed light on the long-standing disenfranchisement faced by this Nation's first people, and potential solutions to right this wrong. The ongoing injustice of voter disenfranchisement in America is far too familiar. Throughout 2019, the Subcommittee on Elections held a series of field hearings across the country to examine the state of voting rights and election administration in America.

What we found was an alarming array of hurdles and obstacles to voting that exist for citizens across the country, especially minority groups. Suppressive tactics have existed in various forms since this Nation's founding. And they continue today. In 2013, the Supreme Court's decision in Shelby County gave jurisdictions with a provable legacy of discrimination a green light to discriminate at will.

What was old is new again—polling place closures and movements, cutbacks and restrictions on early voting, discriminatory voter ID laws, removing otherwise eligible voters from the rolls, modern-day poll taxes, and a failure to provide required language assistance and materials, among other barriers, all combine to continually disenfranchise millions of otherwise eligible voters.

Last year the House passed bills to strengthen voter protections and ballot access, including H.R. 1, the For the People Act, and H.R. 4, the Voting Rights Advancement Act. Both these bills now sit on the Senate Majority Leader's desk, waiting for action.

But we cannot stand still. At her founding, America claimed a commitment to equality. She has failed to live up to that claim at many turns and it is time to fix this. Protecting the rights of Native American voters is no exception. This is now the second Subcommittee hearing focusing exclusively on Native American voting rights, and our third examining the issue in detail.

One might ask why we are spending so much time on the topic. Almost 7 million people identify as American Indian or Alaska Native, millions of whom are

eligible voters, including tens of thousands serving on active military duty and thousands more veterans who bravely served this country. Apart from this Subcommittee's North Dakota field hearing, neither this Committee, nor in fact any other committee in either chamber of Congress, has held a single hearing dedicated to Native American voting rights in recent memory. It is not only appropriate but necessary to hold a few hearings and make up for lost time.

The Federal Government has consistently failed Native American communities by engaging in policies of forced removal and assimilation, failing to live up to its treaty promises and trust obligations, and denying Native Americas citizenship until 1924. The States are far from blameless. Once Native Americans acquired citizenship and the legal right to vote, States immediately erected a series of Jim Crow-style barriers to prevent Native Americans casting a ballot.

By the time this first generation of discrimination began to fade in the 1960s, the damage was done. Native Americans experienced disproportionately low rates of voter participation and steep socioeconomic challenges. Both these problems persist today. The socioeconomic challenges experienced by many Native Americans are severe and unacceptable. More than a quarter of Native Americans live in poverty, and Native Americans are unemployed at almost twice the rate of other Americans. Tribal lands are often rural and isolated, and many members lack access to transportation, residential street addresses, and reliable mail services.

All of this was underscored by witnesses at our field hearings in North Dakota and Arizona but is not limited to those two states. These structural challenges mean that today's election laws are not necessarily working for Native American voters.

Voter registration services are often scarce or unavailable on tribal lands, and the act of voting itself is difficult for many tribal members. Polling sites are plagued by inadequate facilities, outdated equipment, and long wait times. Tribal lands sometimes lack a polling site altogether. And access to proper language assistance remains a persistent issue.

Voter ID laws severely burden Native Americans, who often lack the necessary residential addresses to obtain valid forms of identification. We learned about an especially egregious example of targeted voter ID laws during our field hearing in North Dakota, and we look forward to hearing more about that issue today. As we constantly talk about greatness—America is great because of her ability to repair her faults. It is time for us to do right by the residents of tribal nations and guarantee the right to vote that each member is owed.

We look forward to our panelists today further educating us on these challenges and offering their views regarding possible solutions. There is much work to be done.

Mr. DAVIS of Illinois. Thank you, Madam Chair.

Welcome to my good friend and colleague, Mr. Luján. Can't wait to grill you with questions, my friend.

Since the creation of the Committee on House Administration, oversight of Federal elections quickly became one of its chief tasks. Throughout CHA's existence, the Committee has worked across the aisle to create significant and necessary election policy that is widely impacted this Nation, including legislation to eliminate the poll tax, legislation to create easier access to members of the military and their families when voting overseas, and the landmark Help America Vote Act, a piece of legislation that took significant steps to remedy the problems seen in the 2000 presidential election.

The Subcommittee on Elections is designed to serve as an extension of CHA to enhance oversight capabilities of Federal elections. While the Subcommittee has not always been a formal part of this Committee, the work on the election administration has always remained a top priority. Since the Subcommittee's recent reinstatement, its focus has been on examining the Voting Rights Act, which historically has been a bipartisan effort, first enacted in 1965 for the purpose of removing racial-based restrictions on voting. While this legislation has primarily remained under the jurisdiction of the House Judiciary Committee, our Committee has an obligation to review how elections are being administered and recognize problems that Congress can solve, which I hope we are able to do here.

The bill we are reviewing today, the Native American Voting Rights Bill, is specifically to address how Native Americans vote in our Nation's elections, and I hope to hear more about that today, especially starting with my friend and colleague, Mr. Luján. We previously held a field hearing in North Dakota on Standing Rock where we heard from many Tribal leaders about their work to help their populations vote, and we discussed ways that they can work with State administrators to better increase those efforts.

We also held a field hearing in Phoenix, Arizona, where the Subcommittee had the opportunity to again hear from Native American representatives on voting rights. In Arizona, we heard from State Senator Ugenta Rita on the State's ballot harvesting prohibition, which has recently been, in my view, wrongly invalidated by Ninth Circuit Court of Appeals. I hope we can hear testimony on the very important issue of ballot harvesting as well.

If there is evidence of intentional widespread voter discrimination, we should take steps to remedy that in a bipartisan manner. Additionally, we should do our due diligence to review all of the facts and the numbers carefully and hear from all of the relevant stakeholders. What are the voter registration trends? What are the voter turnout trends? It is essential that Congress make the most well-informed decisions possible.

Voting is a fundamental right to American citizens, and protecting that right is a responsibility that I as Ranking Member of this Subcommittee and of the full Committee take very seriously.

Today I am here to listen to all the witnesses who have graciously agreed to participate. I look forward to hearing what each of you have to share in front of the Subcommittee.

Thank you, Madam Chair, and I yield back.

[The statement of Mr. Davis of Illinois follows:]

ZOE LOFGREN, CALIFORNIA
CHAIRPERSON

JAMIE RASKIN, MARYLAND
VICE CHAIRPERSON

SUSAN DAVIS, CALIFORNIA
G.K. BUTTERFIELD, NORTH CAROLINA
MARCIA FUDGE, OHIO
PETE AGUILAR, CALIFORNIA

JAMIE FLEET, STAFF DIRECTOR

Congress of the United States
House of Representatives
COMMITTEE ON HOUSE ADMINISTRATION
1309 Longworth House Office Building
Washington, D.C. 20515–6157
(202) 225–2061
https://cha.house.gov

RODNEY DAVIS, ILLINOIS
RANKING MINORITY MEMBER

MARK WALKER, NORTH CAROLINA
BARRY LOUDERMILK, GEORGIA

ONE HUNDRED SIXTEENTH CONGRESS

JEN DAULBY, MINORITY STAFF DIRECTOR

Ranking Member Rodney Davis
Native American Voting Rights Act Hearing
Opening Statement

Since the creation of the Committee on House Administration, oversight of federal elections quickly became one of its chief tasks. Throughout CHA's existence, the Committee has worked across the aisle to create significant and necessary election policy that has widely impacted this Nation, including legislation to eliminate the poll tax, legislation to create easier access to members of the military and their families when voting overseas, and the Help America Vote Act, a landmark piece of legislation that took significant steps to remedy the problems seen in the 2000 Presidential election.

The Subcommittee on Elections is designed to serve as an extension of CHA to enhance oversight capabilities of federal elections. While the Subcommittee has not always been a formal part of this Committee, the work on election administration has always remained a top priority.

Since the Subcommittee's recent reinstatement, it's focus has been on examining the Voting Rights Act, which, historically has been a bipartisan effort, was enacted in 1965 for the purpose of removing racial-based restrictions on voting. While this legislation has primarily remained under the jurisdiction of the House Judiciary Committee, our Committee has an obligation to review how elections are being administered and recognize problems Congress can solve, which I hope we're able to do here.

The bill we are reviewing today, the Native American Voting Rights bill is specifically to address how Native Americans vote in our Nation's elections, and I hope to hear more about that today. We previously held a field hearing in North Dakota on Standing Rock, where we heard from many tribal leaders about their work to help their populations vote, and we discussed ways they can work with state administrations to better increase those efforts. We also held a field hearing in Phoenix, Arizona, where the Subcommittee had the opportunity to again hear from Native American representatives on voting rights. In Arizona, we heard from State Senator Ugenti-Rita on the State's ballot harvesting prohibition, which has recently

been, in my view, wrongly invalidated by the Ninth Circuit Court of Appeals. I hope we can hear testimony on the very important issue of ballot harvesting, as well.

If there is evidence of intentional, widespread voter discrimination, we should take steps to remedy that in a bipartisan manner. Additionally, we should do our due diligence to review all of the facts and the numbers carefully and hear from all relevant stakeholders. What are the voter registration trends? What are the voter turnout trends? It is essential that Congress make the most well-informed decisions possible.

Voting is a fundamental right to American citizens, and protecting that right is a responsibility I take very seriously as Ranking Member. Today, I'm here to listen to all of the witnesses who have graciously agreed to participate, and I look forward to hearing what you have to share with the Subcommittee. Thank you, and I yield back.

Chairperson FUDGE. Thank you, Mr. Davis.

Mr. Luján, I will spare you all of the instructions about the lighting system. I am sure you are quite aware.

So, on our first panel, we will hear from a sponsor of H.R. 1694, the Native American Voting Rights Act, my colleague and friend, Congressman Ben Ray Luján. Congressman Luján represents New Mexico's Third Congressional District and is serving his sixth term in Congress. He serves as the Assistant Speaker of the House and is the highest-ranking Hispanic in Congress. He is also a member of the Congressional Native American Caucus and the Congressional Hispanic Caucus.

Congressman Luján's district includes 15 Pueblos and Navajo Nation and the Jicarilla——

Mr. LUJÁN. Jicarilla.

Chairperson FUDGE [continuing]. Apache Nation, and Congressman Luján was born and raised in Nambé a small community in northern New Mexico, nestled between two Pueblos and the historic high road to Taos scenic byway.

You are recognized, my friend, for five minutes.

STATEMENT OF THE HON. BEN RAY LUJÁN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW MEXICO

Mr. LUJÁN. Thank you, Madam Chair.

And thank you to Chairperson Lofgren, and Ranking Member Davis, Chairperson Fudge, members of the Subcommittee and their efforts to uplift Native American voting rights. I am glad to see the Honorable Doreen McPaul representing the Navajo Nation and Isleta Pueblo Tribal member Jacqueline De León here to lend their voices to this critical discussion. I welcome them as well.

I am proud of what we have accomplished in the 116th Congress to build on the Voting Rights Act with House passage of H.R. 4, but our work is not finished. As a Nation, we have still not fulfilled commitments to Tribes to work with them on a government-to-government basis to protect Native voting rights. This is a great injustice and one that allows the longstanding disenfranchisement of Native voters to continue.

Throughout our country's history, Native voters have been subject to guardianship, literacy tests, polling taxes, and outright rejection from the ballot box in regions across the U.S. These barriers still exist. My home State of New Mexico is figured prominently in this history.

More than 50 years after the ratification of the 14th Amendment and 24 years after Native Americans were finally granted their innate right to citizenship and the vote, veteran Miguel Trujillo of Isleta Pueblo was denied his right to participate in our democracy by his county registrar. Their reason? Mr. Trujillo lived on Tribal land and was classified by the government as "Indians not taxed." Mr. Trujillo filed suit and won in 1948. The landmark case, *Trujillo* v. *Garley*, granted Native Americans the right to vote regardless of whether they lived on Tribal lands or not.

That same year, Frank Harrison of the Yavapai Nation challenged Arizona in *Harrison* v. *Laveen* for the State's claim that Indians were "mentally incompetent," in the words of the government, and therefore prohibited from voting. Mr. Harrison won,

again, confirming States cannot infringe on Native people's right to vote.

And yet today States continue to restrict Native voting rights. They print ballots near Native communities in English only, close or move polling places off Tribal lands, and require physical addresses on IDs from voters whose homes do not have physical addresses but rather rural box addresses, which are commonplace in many rural communities across America.

I thank the House Judiciary Committee for ensuring Native voices are a part of the efforts to strengthen the Voting Rights Act. Committee action proved that Native peoples, particularly those living on Tribal lands, continue to face linguistic, geographic, and legal barriers to voting. We know North Dakota Tribes are fighting State voter ID laws that Tribal members are unable to comply with because, as I stated earlier, they lack physical addresses where they live and rely on rural box addresses. Growing up, through my own childhood, it was Route 1, Box 102. The same mailbox that was Route 1, Box 102 that went to our house is the same mailbox at the top of that dirt road. Now it is just named after my grandparents with a physical address. But the local government went in to change those addresses. There are still many parts of America where rural communities are still operating under that addressing system that I grew up with.

Just last week, South Dakota legislators rejected a bill that would have allowed Tribal IDs to be used for voter registration. In 2020, this type of disenfranchisement is unacceptable. It is a stain on our Federal trust responsibility and our democracy.

The good news is that Tribes and lawmakers are taking action. Less than a year ago, Washington State and Colorado passed laws that allow Tribes to designate addresses for individuals who do not have physical addresses for voting purposes.

Congress has a unique responsibility to legislate here because of the government-to-government relationship the United States has with Tribal Nations. That is why I introduced the Native American Voting Rights Act with Senator Tom Udall, our colleagues Deb Haaland and Sharice Davis and Ranking Member Tom Cole.

The Native American Voting Rights Act allows Tribal governments to collaborate with their State counterparts to ensure Native peoples have access to the ballot box. It directs States to accept Tribal IDs for voter registration or identification purposes, requires precincts to honor requests to place polling locations on Tribal lands, and ensure precincts seek Tribal consent before changing polling locations.

In places that require Native language assistance under the Voting Rights Act, it allows Tribes to determine the forms of assistance. Tribal governments are empowered to request Federal observers when they believe Native voters might be disenfranchised at the polls. It would also create a grant program to build a stronger election infrastructure for communities.

Madam Chair, I would ask unanimous consent to enter into the record the many organizations that are supportive of this legislation. I urge my colleagues to support the Native American Voting Rights Act. And I thank the Committee and witnesses for being part of today's vital hearing. Thank you.

[The statement of Mr. Luján follows:]

Committee on House Administration – Subcommittee on Elections
Topic Hearing: "Native American Voting Rights: Exploring Barriers and Solutions"

Remarks for Congressman Ben Ray Luján

February 11, 2020
10:00 am
1310 Longworth House Office Building

Thank you to Chairwoman Lofgren and Ranking Member Davis, Chairwoman Fudge, and Members of the Subcommittee for their efforts to uplift Native voting rights.

I am glad to see the Honorable Doreen McPaul representing the Navajo Nation and Isleta Pueblo Tribal member, Jacqueline De León, here to lend their voices to this critical discussion.

Welcome.

I am proud of what we have accomplished in the 116th Congress to build on the Voting Rights Act with House passage of H.R. 4.

But our work is not finished.

As a nation, we have still not fulfilled commitments to Tribes to work with them on a government-to-government basis to protect Native voting rights.

This is a great injustice -- and one that allows the longstanding disenfranchisement of Native voters to continue.

Throughout our country's history, Native voters have been subject to guardianship, literacy tests, polling taxes, and outright rejection from the ballot box.

In regions across the U.S., these barriers still exist.

My home state of New Mexico has figured prominently in this history. More than 50 years after the ratification of the 14th amendment and 24 years after Native Americans were finally granted their innate right to citizenship and the vote, veteran Miguel Trujillo of Isleta Pueblo was denied his right to participate in our democracy by his county registrar.

Their reason - Mr. Trujillo lived on Tribal land and was classified by the government as an "Indian not taxed."

Mr. Trujillo filed suit and won.

The landmark case *Trujillo v. Garley* granted Native Americans the right to vote regardless of whether they lived on Tribal lands.

Committee on House Administration – Subcommittee on Elections
Topic Hearing: "Native American Voting Rights: Exploring Barriers and Solutions"

Remarks for Congressman Ben Ray Luján

February 11, 2020
10:00 am
1310 Longworth House Office Building

The same year Frank Harrison of the Yavapai Nation challenged Arizona in *Harrison v. Laveen* for the state's claim that Indians were "mentally incompetent" wards of the government and therefore prohibited from voting.

Mr. Harrison won, again confirming states cannot infringe on Native peoples' right to vote.

And yet today states continue to restrict Native voting rights.

They print ballots near Native communities in English only, close or move polling places off Tribal lands, and require addresses on I.D.s from voters whose homes do not have physical addresses.

I thank the U.S. House Judiciary Committee for ensuring Native voices were a part of efforts to strengthen the Voting Rights Act.

Committee action proved that Native peoples, particularly those living on Tribal lands, continue to face linguistic, geographic, and legal barriers to voting.

North Dakota Tribes are fighting state voter I.D. laws that Tribal members are unable to comply with because they do not have physical addresses where they live.

Just last week South Dakota legislators rejected a bill that would have allowed Tribal I.D.s to be used for voter registration.

In 2020, this type of disenfranchisement is unacceptable. It is a stain on our federal trust responsibility and our democracy.

The good news is that Tribes and lawmakers are taking action.

Less than a year ago, Washington state and Colorado passed laws that allow Tribes to designate addresses for individuals who do not have physical addresses for voter registration and I.D. purposes.

Committee on House Administration – Subcommittee on Elections
Topic Hearing: "Native American Voting Rights: Exploring Barriers and Solutions"

Remarks for Congressman Ben Ray Luján

February 11, 2020
10:00 am
1310 Longworth House Office Building

Congress has a unique responsibility to legislate here because of the government-to-government relationship the United States has with Tribal Nations.

That is why I introduced the Native American Voting Rights Act with Senator Udall.

The Native American Voting Rights Act allows Tribal governments to collaborate with their state counterparts to ensure Native peoples have access to the ballot box.

It directs states to accept Tribal I.D.s for voter registration or identification purposes, requires precincts to honor requests to place polling locations on Tribal lands, and ensures precincts seek Tribal consent before changing polling locations.

In places that require Native language assistance under the Voting Rights Act, it allows Tribes to determine the forms of assistance.

Tribal governments are empowered to request federal observers when they believe Native voters might be disenfranchised at the polls. It would also create a grant program to build stronger elections infrastructure for Native communities.

This Act is a national priority for Indian Country and has the support of the:

- Native American Voting Rights Coalition,
- Native American Rights Fund,
- National Congress of American Indians,
- Native American Voters Alliance,
- Lakota People's Law Project,
- Tanana Chiefs Conference, and
- More than 45 other national and regional organizations.

I urge my colleagues to support the Native American Voting Rights Act.

Thank you to the Committee and the witnesses for taking part in today's vital discussion.

Chairperson FUDGE. Thank you very much.

I appreciate it. We are not going to ask our colleague any questions, so we thank you so much for being here, and we would call our second panel.

Thank you so much. Our witnesses today will be recognized for five minutes. I will remind our witnesses that their entire written statements will be made part of the record and that the record will remain open for at least five days for additional materials to be submitted if you wish.

The lighting system will tell you how much time you have remaining. You will each have five minutes. Green light means begin. Yellow means you have one minute left. And red means please wrap up your statement.

On our second panel, I would like to welcome Leonard Forsman, Chairman of the Suquamish Tribe. He has held the position since 2005. Previously, he was a research archaeologist for Larson Anthropological and Archaeological—those are two words hard to say together—Services in Seattle, Washington, from 1992 through 2003. He is also the vice chair of the Advisory Council of Historic Preservation, a position he was appointed to by President Obama.

Amber Torres has served as Chairman of the Walker River Paiute Tribe in Schurz, Nevada, since 2016. She currently serves on the Intertribal Council of Nevada Executive Board Native Farm Bill Coalition and Tribal Leaders Consultation Work Group, the National Indian Health Board, the National Congress of American Indians, Vice President, Alternate Western Region, Tribal Interior Budget Council, and other boards that represent Nevada, Arizona, and Utah.

Welcome.

Doreen McPaul assumed her position as Attorney General of the Navajo Nation in April 2019. She has 18 years of legal experience, including 11 years working for the Pascua Yaqui Tribe and Tohono O'odham Tribe—I am close; I am trying really hard—Nation and the Salt River Pima-Maricopa Indian community. She received her law degree from Arizona State University and is licensed to practice law in Arizona and New Mexico and on the Navajo Nation.

Thank you all so much for being here. We will begin. You have five minutes.

STATEMENTS OF LEONARD FORSMAN, CHAIRMAN, SUQUAMISH TRIBE, SUQUAMISH, WASHINGTON; AMBER TORRES, CHAIRPERSON, WALKER RIVER PAIUTE TRIBE; AND DOREEN MCPAUL, ATTORNEY GENERAL, NAVAJO NATION

STATEMENT OF LEONARD FORSMAN

Mr. FORSMAN. Good morning, Chairperson Fudge, Ranking Member Davis, and all the Members of the Subcommittee. My name is Leonard Forsman. I am the chairman of the Suquamish Tribe, and I also serve as President of Affiliated Tribes of Northwest Indians. I thank you for the opportunity to testify today about removing legal barriers that prevent Native Americans from exercising our right to vote, and specifically how we accomplished this in the State of Washington.

The Suquamish Tribe is signatory to the 1855 Treaty of Point Elliott. In exchange for ceding most of our aboriginal homeland, the Tribe reserved the Port Madison Indian Reservation, home of Chief Seattle, on the Kitsap Peninsula as well fishing, hunting, and gathering rights. We have roughly 1,200 enrolled citizens, more than half of whom reside on a reservation or within Kitsap County, which is located west of Seattle across the Puget Sound.

As residents of the State of Washington, we have many options on how to register to vote. We can register by mail or online eight days prior to election day. We also have the ability to register in person and on election day itself.

Washington is a vote-by-mail state. Prior to election day, ballots are mailed to all registered voters. Voters may return their ballots via mail or by dropping the ballot off at a designated ballot box location. Postage is not required to mail the ballot. Voters also have the option to vote in person on election day.

Even with the seemingly voter-friendly Washington system, American Indians still face many obstacles to exercising our right to vote. The obstacles I will discuss are not particular to Suquamish or Washington State. They are common across Indian Country.

The first barrier was using Tribal IDs to register to vote. Tribal citizens that did not have State-issued licenses or IDs have a harder time registering to vote online. Many Tribal citizens' primary identification is their Tribal ID cards. These individuals often do not have State-issued driver's license or ID cards. In addition, some Tribal-issued IDs do not include residential addresses or signatures.

The second barrier was that many Tribal citizens do not have a typical residential address to use to register to vote. Many Suquamish homes have addresses that do not correlate with the State's address system. This creates issues for these Tribal citizens in ensuring that they are registered to vote in the right precinct. In addition, Tribal citizens rely heavily on PO boxes, which are strictly prohibited in establishing residence for voter registration.

A third barrier specific to Washington was the option for returning ballots. Too often designated ballot box locations were off reservation and operated with limited hours. This created a hardship for many Tribal citizens that do not have the means of transportation. Tribal citizens were also deterred by having to pay the postage of the ballot. That is no longer the case.

Washington State responded to these challenges by enacting the Native American Voting Rights Act, or NAVRA. NAVRA addresses many of the issues we face when trying to vote. First, a Tribe may now request that their county auditor establish at least one ballot box on their reservation. More importantly, the Tribe can choose a location. There is no cost to the Tribe. We have one right outside our Tribal office, fortunately.

NAVRA allows Tribal citizens residing on a reservation to use nontraditional residential addresses for voter registration. They may also use a location of the tribally designated ballot box as a residential and mailing address if they live in the same precinct.

Third, NAVRA allows Tribal citizens to use Tribal IDs to register to vote. The Tribal ID does not need to list the residential address.

However, if the ID does not have the Tribal citizen's signature, the secretary of state must be able to obtain a copy of the signature from the Tribe.

Finally, a Tribe may request that any State facility located on the Tribe's reservation provide voter registration services. NAVRA also provides enforcement mechanisms that allow a Tribal government, an individual, or a State attorney general to sue to enforce its provisions.

Since the passage of NAVRA, Tribes in Washington are now partnered with the State. The Suquamish Tribe is now able to have direct involvement with the State in planning and ensuring that our people do not face obstacles while exercising their right to vote.

The Tribe is now preparing for this year's 2020 elections. We have a ballot box located in front of our Tribal offices, and we have a central location to deliver the ballots, our ballots. This is important for homeless citizens and for those that may not have a stable residence. These individuals now have the ability to designate the Tribal ballot box location as their address. The Suquamish have been working with the State to provide voter registration services on our reservation.

In addition to my role as chairman of the Tribe, I am also on the NCAI Executive Board, and NCAI has established a nonpartisan Native voting initiative that provides staff coordinators to offer vital information throughout Indian Country. NCAI has provided testimony to the work that they do on the Get Out the Vote.

And, in conclusion, I urge this Committee to consider the measures taken by the State of Washington as Congress moves forward in addressing voter rights issues. Thank you for the opportunity to testify. I am happy to answer any questions. Thank you.

[The statement of Mr. Forsman follows:]

Testimony of Chairman Leonard Forsman
Suquamish Tribe
Before the U.S. House of Representatives
Committee on House Administration
Subcommittee on Elections
February 11, 2020

Introduction & Background

Good morning Chairwoman Fudge, Ranking Member Dave, and Honorable Members of the Subcommittee on Elections. My name is Leonard Forsman and I serve as the Chairman of the Suquamish Tribe. Thank you for the opportunity to testify about the Suquamish Tribe's views on access to voting. My testimony today will focus on the many barriers tribal citizens face in their attempts to exercise their right to vote and how the State of Washington provided solutions to remove these barriers.

The Suquamish name comes from the traditional Lushootseed phrase for "people of the clear salt water." The Tribe is a signatory to the 1855 Treaty of Point Elliot. In exchange for ceding most of its aboriginal homeland, the Suquamish Tribe reserved the Port Madison Indian Reservation on the Kitsap Peninsula, as well as fishing, hunting, and gathering rights. The Tribe has roughly 950 enrolled citizens, half of whom reside on our Reservation, which is located west of Seattle, WA, across the Puget Sound. The Reservation encompasses approximately 7,600 acres, including 12 miles of Puget Sound shoreline.

Voting Barriers on the Port Madison Indian Reservation

In the State of Washington, individuals have many options on how to register to vote. An applicant may register in-person on Election Day. The applicant may also register by mail or online eight days prior to Election Day. Washington is also a vote by mail state. Voters also have the option to vote in-person on the day of elections. Prior to Election Day, ballots are mailed to all registered voters. Voters may return their ballots via mail or by dropping the ballot off at a designated ballot box location. Voters bear the burden of paying postage to mail in their ballot.

Prior to the passage of the Washington State's Native American Voting Rights Act, tribal citizens faced many obstacles in exercising their right to vote. Most of these obstacles are common across Indian Country. The first barrier was the ability to use tribal identification cards when registering to vote. Tribal citizens that did not have state issued licenses had a harder time registering to vote online. Many tribal citizens primary identification is their tribal identification cards. These individuals often do not have state issued driver's licenses. In addition, some tribal issued identification cards do not include the tribal citizen's residential address or a signature.

The second barrier for tribal citizens was that many tribal members do not have a typical residential address to use when registering to vote. Many Suquamish homes have addresses that do not correlate with the State's address system. This creates issues for these tribal citizens in ensuring that they are registered to vote in the right precinct. In addition, tribal citizens rely heavily on P.O. boxes. The use of P.O. Boxes is strictly prohibited in establishing residence for voter registration.

A third barrier was the options for returning ballots. Too often, designated ballot box locations were off reservation and operated with limited hours. This created a hardship for many tribal citizens that do not have means of transportation. Tribal citizens were deterred by having to pay the postage of the ballot.

The Washington State Native American Voting Rights Act

On March 14, 2019, the State of Washington enacted the Native American Voting Rights Act ("NAVRA"). The bill addresses many of the issues that tribal citizens face when trying to vote. First, a tribe may now request that the county auditor establish at least one ballot box at a location on the tribe's reservation. More importantly, the tribe can choose the location and there is no cost to the tribe.

Secondly, the bill allows tribal citizens residing on a reservation to use nontraditional residential addresses for voter registration. Tribal citizens may also use the location the tribally designated ballot box location as their residential and mailing address if the tribal citizen lives in the same precinct. If the tribal citizen lives in a different precinct, the tribal citizen may still use the tribally designated ballot location as their mailing address.

Third, the Washington NAVRA allows tribal citizens to use tribal identification cards to register to vote. The tribal identification card does not need a residential address on the card. However, if the identification card does not have the tribal citizen's signature, the Secretary of State must be able to obtain a copy of the individual's signature from the tribe issuing the identification card.

Finally, a tribe may request that any state facility located on the tribe's reservation provide voter registration services. The bill also provides enforcement mechanisms that allow a tribal government, an individual, or the State Attorney General to sue a county auditor for failure to establish a tribally requested ballot box location. The Secretary of State may be sued for failure to allow a tribal citizen to use a nonresidential address while attempting to register to vote. The Governor may also be sued for failure to designate voter registration services in a state facility on the reservation.

Current Impacts of Washington State's Native American Voting Rights Act

With the passage of the Washington NAVRA, tribes in Washington are now partners with the State. The Suquamish Tribe is now able to have direct involvement with the State in planning and ensuring that our people do not face obstacles while exercising their right to vote. The Tribe is now avidly preparing for this year's 2020 Elections.

The Tribe is in the process of designating a ballot box location on our reservation. Suquamish tribal citizens will now have a known central location to deliver their ballots. This is also important for our homeless tribal members and for those that may not have a stable residence. These individuals will now have the ability to designate the tribally designated ballot box location as their residential and mailing address.

In addition, the Tribe will be working with the State to provide voter registration services on our reservation. The Tribe will also continue to work with the State to bring awareness to our tribal citizens of all the new laws impacting the ability to register to vote and the process of voting. The Tribe will also ensure that county officials and staff are appropriately applying these new laws and not turning away tribal citizens from the right to vote.

National Congress of American Indians' Efforts

In addition to my role as Chairman of the Suquamish Tribe, I am also a member of the Executive Board for the National Congress of American Indians ("NCAI"). NCAI established the nonpartisan Native Vote initiative that provides staff coordinators to offer vital voting information throughout Indian Country. The primary focus of Native Vote is to ensure all Native citizens participate civically in their communities. Native Vote administers a number of key programming including Get-Out-the-Vote and registration efforts, election and voter protection awareness and advocacy, and voter and candidate education.

NCAI has passed several resolutions addressing voting rights in Indian Country. NCAI strongly encourages Congress to pass legislations, such as H.R.1694 - Native American Voting Rights Act of 2019, that removes voting barriers for all of Indian Country. Specifically, NCAI supports the establishment of a Native American Voting Rights Task Force to focus on boosting Native voter registration, education, and election participation. NCAI also supports provisions that ensure equal treatment for tribal identification.

Conclusion

Even with the passage of the Washington NAVRA, issues still persist for tribal citizens across Indian Country. I urge this Committee to consider the measures taken by the State of Washington and NCAI as Congress moves forward in addressing voting rights issues. Tribes will continue to fight to tear down these barriers and obstacles to vote.

Thank you for the opportunity to testify before the Subcommittee. I am available to answer any questions that the Subcommittee may have regarding my testimony.

Chairperson FUDGE. Thank you, Mr. Chairman.

I now recognize Chairwoman Torres for five minutes.

STATEMENT OF AMBER TORRES

Ms. TORRES. Pesha Awamooa'a me Amber Torres me nane'a nu Agai Dicutta Poinabe nu Agai Gway. Good morning, everyone. My name is Amber Torres.

I am the Chairman for the Walker River Paiute Tribe in Schurz, Nevada. I want to thank Chairperson Marcia L. Fudge and Ranking Member Rodney Davis and members of the Committee on House Administration, Subcommittee on Elections, for the opportunity to testify about Native American voting rights, exploring barriers and solutions.

In 2016, the Walker River and Pyramid Lake Paiute Tribes worked in conjunction with Four Directions Incorporated to determine if Tribal members living on reservations had equal access to the ballot box. It was determined that the poverty rate, lack of transportation, and/or the age and condition of the vehicles placed Tribal members at a disadvantage in participating in early in-person voting.

On or about September 7, 2016, a complaint and an emergency motion for a preliminary injunction was filed in Federal court that the alleged abridgement of the fundamental right, the right to vote and, in particular, to have equal access to early in-person voting and election day in-person polling, protected under Section 2 of the Voting Rights Act, *Sanchez* v. *Barbara Cegavske*.

A hearing on this matter was held, and the Honorable Judge Du and the stance taken by the Tribal members was supported by a preliminary expert report from Professor Daniel Craig McCool of the University of Utah and a Statement of Interest filed by the Department of Justice.

On or about October 7, 2020, the Honorable Judge Du issued an order that plaintiffs' Motion for Preliminary Injunction, ECF No. 26, is granted in part and denied in part. The motion is granted with respect to plaintiffs' request for early in-person voting in Nixon, Nevada, and Schurz, Nevada. The motion is also granted with respect to plaintiffs' request for election day in-person voting in Nixon, Nevada. The motion is denied with respect to plaintiffs' request for in-person voter registration in Nixon, Nevada, and Schurz, Nevada.

Since that time, the Nevada State legislators created legislation that allows counties to work with other Nevada Tribes to establish satellite offices. We have also seen an increase of Tribal members voter turnout. Because of the absolute offices, there are new registered voters.

One issue that still creates problems to this day is the felony provision in the State of Nevada voter registration application. Line 15 on the form states: Important, if you are assisting a person to register to vote and you are not a field register appointment by a county clerk, register of voters, or an employee of a voter registration agency, you must complete the following. Your signature is required. Failure to do so is a felony.

This creates problems within our reservation in that our youth tend to help their grandparents in everyday activities, and this pro-

vision makes them hesitant and/or not wanting to assist the elders in voter registration in that if they forget to sign, they could be charged with a felony. It would only take Nevada legislation to remove this barrier, but until that time, the field register appointed by a county clerk register of voters or an employee of a voter registration agency should be assigned to our reservations to assist with voter registration.

We would also like the House and Senate to support H.R. 1694, Native American Voting Rights Act of 2019. Our people understand the importance of voting and how hard our ancestors fought to have that right. Please make sure our voices are heard now and for future generations.

Thank you for your time for allowing me to testify before this Committee on the issues of voter equality at the ballot box. Pesha U. Thank you.

[The statement of Ms. Torres follows:]

Pesha Awamooa'a me Amber Torres me nane'a nu Agai Dicutta Poinabe nu Agai Gway (Good morning, my name is Amber Torres, Chairman for the Walker River Paiute Tribe in Schurz, NV 89427)

I want to thank Chairwoman Marcia L. Fudge and Ranking Member Rodney Davis and members of the Committee on House Administration, Subcommittee on Elections for the opportunity to testify about Native American Voting Rights: Exploring Barriers and Solutions.

In 2016 the Walker River and Pyramid Lake Paiute Tribes working with Four Directions Inc. to determine if Tribal members living on the reservations had equal access to the ballot box. It was determined that the poverty rate, lack of transportation and/or the age and condition of the vehicles placed Tribal members at a disadvantage in participating in early in-person voting.

On or about September 7th, 2016 a complaints/an emergency Motion for Preliminary Injunction was filed in Federal Court that the alleged abridgment of a fundamental right—the right to vote and in particular, to have equal access to early in-person voting and election day in-person polling—protected under Section 2 of the Voting Rights Act, Sanchez, et al., Plaintiffs, v. Barbara K. Cegavske.

A hearing on this matter was held and the Honorable Judge Du, and the stance taken by the Tribal members was supported by a preliminary expert report from Professor Daniel Craig McCool of the University of Utah and a Statement of Interest filed by the Department of Justice. On or about October 7, 2020 the honorable Judge Du, issued an ordered that Plaintiffs' Motion for Preliminary Injunction (ECF No. 26) is granted in part and denied in part. The Motion is granted with respect to Plaintiffs' request for early in-person voting in Nixon and Schurz. The Motion is also granted with respect to Plaintiffs' request for election day in-person voting in Nixon. The Motion is denied with respect to Plaintiffs' request for in-person voter registration in Nixon and Schurz.

Since that time the Nevada State legislators created legislation that allows Counties to work with other Nevada Tribes to establish satellite offices. We have also seen an increase of Tribal members, voter turnout because of the satellite offices, these are new registered.

One problem that still creates problems to this day, is the felony provision in the State of Nevada Voter Registration Application. Line 15 on the form states: "Important! If you are assisting a person to register to vote and you are not a Field Registrar appointed by a County Clerk / Registrar of Voters or an employee of a voter registration agency, you MUST complete the following. Your signature is required. Failure to do so is a felony."

This creates problems within our reservations in that our youth tend to help their grandparents in everyday activities, and this provision make them hesitant and/or not wanting to assist the elders in voter registration, in that if they forget they could be charged with a felony. It would only take Nevada legislation to remove this barrier, but until such time the Field Registrar appointed by a County Clerk / Registrar of Voters or an employee of a voter registration agency should be assigned to our reservations to assist with voter registration.

We also would like the House and Senate to support the H.R.1694 - Native American Voting Rights Act of 2019.

Thank you for your time for allowing me to testify before this committee on issues of voter equality at the Ballot Box.

Pesha U (Thank you)

Chairwoman Amber Torres
Walker River Paiute Tribe

Chairperson FUDGE. Thank you.

Attorney General McPaul, you are recognized for five minutes.

STATEMENT OF DOREEN MCPAUL

Ms. MCPAUL. Good morning. Thank you, Madam Chair, and honorable Members of the Subcommittee. I appreciate the opportunity to address the Subcommittee today.

My name is Doreen McPaul. I am an enrolled member of the Navajo Nation, and I serve as the Attorney General, and I oversee the Nation's Department of Justice.

I am here today to discuss three recent voting rights cases that greatly impact Navajo voters. Each of these decisions highlights adversities faced by Navajos when they are casting their ballots.

The first case is *Navajo Nation* v. *San Juan County*. San Juan County is in Utah. It is the largest county in the United States that has a majority Native American population. This case challenged the county's failure to redistrict its commission and school board for more than 20 years. The county is made up of three commission districts, two of which have a majority non-Native population, and the third had a 92 percent Navajo population in 2012 when this litigation was brought. As a result of this case, the Federal court found the county's district lines to be unconstitutional in violation of the Equal Protection Clause. The court appointed a special master to draft a redistricting plan. Under the new plan, two of the three county districts had, for the first time, a Native American majority population. The court ordered the county to adopt the plan and to hold a special election using the new redistricting plan. This election occurred in November of 2018, and as a result of the election, two Navajos for the first time in the county's history were elected to hold two of the three commissioner seats.

And despite the success, there is ongoing efforts to challenge the structure of this county and to undo these positive results.

The second case is *Navajo Nation* v. *Hobbs*. This is a Federal court case that challenged the early voting practices of three Arizona counties: Apache County, Navajo County, and Coconino County.

In 2018, these counties did not count the early ballots submitted by Navajo voters that failed to have a signature nor did the counties inform the voter that the ballot was defective.

The Nation filed a suit against the Arizona Secretary of State as well as the three counties. This particular case recently settled in a way which allows the voter who failed to sign their ballot two things. First, they have notice of the deficiency, and they also have the opportunity to cure that defect. These two remedies are also already afforded to voters who have mismatched signatures on their early voting ballots as well as to voters on election day who failed to present their identification.

We are having some post-settlement challenges with the State's election manual as well as some current legislation proposed by one Senator that would specifically prohibit curing and undo our settlement in this case.

The last case I want to mention is the very recent *Democratic National Committee* v. *Hobbs*. In this particular decision, the Ninth

Circuit overturned two laws that had significant hardship—created significant hardship for voters. The first law prohibited ballot collecting by third parties, and the second law prohibited out-of-precinct ballots.

It is very common for Navajos who share the burden of having a distant post office box to have relatives pick up or drop off the mail. This is true whether they share a box or they share a residence. And out-of-precinct voting is also very common on the Navajo Nation, especially where Tribal and State elections are happening on the same day. If a voter's precinct doesn't align with the Navajo Nation's 110 political subdivisions, it results in out-of-precinct voting, and so we are very pleased with this Ninth Circuit decision.

And just to conclude my comments, I want to emphasize that the Navajo Nation supports the efforts of Congress to address Native voting issues in the Native American Voting Rights Act. Litigation is expensive. It is time consuming, and there is really no end in sight. Both the Navajo Nation President as well as the Navajo Council have expressed support for the act. And for the Nation, this law recognizes the unique challenges faced by Native voters and attempts to remedy those issues, and the Nation would very much like Congress to pass that act. Thank you.

[The statement of McPaul follows:]

Written Testimony of Navajo Nation Attorney General Doreen McPaul

I. Introduction

The Navajo Nation is one of the largest Indian Nations in the country with a population of over 300,000 citizens. It is incredibly vast, extending over 27,000 square miles and across three states: Arizona, New Mexico, and Utah. While the Navajo Nation's capital is located in Window Rock, Arizona, there are 110 subunits of government, called Chapters, located throughout the Nation. The Navajo language is widely spoken by Navajo voters and enjoys coverage under Section 203 of the Voting Rights Act. The poverty rate on the Navajo Nation (38%) is more than twice as high as the poverty rate in the State of Arizona (15%). The physical vastness of the Navajo Nation, and its rural nature, create unique challenges for Navajo citizens in casting their ballots in state and federal elections. When this physical isolation is coupled with extreme poverty and language barriers, it can result in voting being an arduous task for many Navajo citizens. Since the 1970s the Navajo Nation has been forced to bring lawsuits, in multiple states, to protect the rights of its citizens to cast ballots in state in federal elections. When viewed together, these lawsuits illustrate the issues many Navajo citizens face when voting in state and federal elections on the Nation.

II. Legal Background

The U.S. Supreme Court has recognized that "voting is of the most fundamental significance under our constitutional structure" and the right to an effective vote is protected by the Equal Protection Clause of the Fourteenth Amendment.[1] Indeed, the right to vote is the

[1] *See Burdick v. Takushi*, 504 U.S. 428, 433-44 (1992).

"fundamental political right . . . preservative of all rights."[2] The Navajo Nation has relied heavily on several key legal theories to protect the voting rights of its citizens.

First, the Equal Protection Clause of the United States Constitution provides that "[n]o...State shall...deny to any person within its jurisdiction the equal protection of the law."[3] The Supreme Court has held that "[h]aving once granted the right to vote on equal terms, the State may not, by later arbitrary and separate treatment, value one person's vote over that of another."[4] Second, the Due Process Clause of the United States Constitution prohibits states from depriving "any person of...liberty...without due process of law."[5] Procedural due process includes "the right to notice and right to be heard...at a meaningful time and in a meaningful manner."[6] Thrid, Section 2 of the VRA "prohibits all forms of voting discrimination' that lessen opportunity for minority voters."[7] As amended in 1982, Section 2 of the VRA provides:

> (a) No voting qualifications 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, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b).[8]

A violation of subsection (a) is established when the political process in a State or political subdivision are not equally open to participation, by members of a class of citizens, resulting in these members having less of an opportunity to participate in the political process and to elect

---

[2] *Reynolds v. Sims*, 377 U.S. 533, 562 (1964).
[3] U.S. Const., 14th Amend., Sec. 1.
[4] *Bush v. Gore*, 531 U.S. 98, 105 (2000).
[5] U.S. Const., 14th Amend. Sec. 1.
[6] *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972).
[7] *League of Women Voters of N.C. v. North Carolina*, 769 F. 3d 224, 238 (4th Cir. 2014).
[8] 52 U.S.C. § 10301(a).

representatives of their choice.[9] This is called the results test, and it applies to both vote dilution and vote denial claims.

Lastly, Section 203 of the Voting Rights Act requires that covered jurisdictions must provide language assistance to all aspects of the voting process to limited English proficient voters. The entire Navajo Nation is a covered jurisdiction under Section 203. Section 203's coverage of all aspects of the voting process include voter registration and early voting.

Over the years the Navajo Nation has fought efforts by the states, and their political subdivisions, to dilute and deny the votes of its citizens residing on the Navajo Nation. The Nation has alleged violations of the Fourteenth Amendment of the Constitution, as well as Sections 2 and 203 of the VRA. Despite some progress, recent examples illustrate ongoing barriers that limit participation of Navajo voters in state and federal elections.

III. Recent Navajo Voting Cases

1) Navajo Nation v. San Juan County

The portion of the Navajo Nation located in Utah, 1.3 million acres, is entirely within Utah's San Juan County. Over 7,000 Navajo citizens reside in San Juan County, and approximately 52% of the county's population is Native American. Even though Native Americans make up a majority of the County's population, before 2018 Native Americans never held a majority of the seats on the county commission or school board. This is because most of the Navajo voters were packed into a single district of three to prevent them from electing two candidates of choice.[10]

---

[9] 52 USC 10301(b).

[10] This is not the first time the Navajo Nation has challenged malapportioned districts. In the early 1970s in an effort to prevent Navajo candidates from being elected to the Board of Supervisor, Apache County restructured the districts into three unequal districts. *Goodluck v. Apache Cty.*, 417 F. Supp. 13, 14 (D. Ariz. 1975), aff'd, 429 U.S. 876 (1976). District 1 had a

Utah, and San Juan County in particular, has a long history of violating Native American's right to vote. Utah was the last state in the Union, in 1957, to recognize the right of Native Americans to vote. In 1983, the United States Department of Justice filed a case against San Juan County alleging its' County Commission at-large elections violated the Constitution and Section 2 of the VRA because it denied Native American residents an equal opportunity to participate in the county's political process and to elect candidates of their choice. The county entered into a consent decree with the United States. The district court's settlement order acknowledged that the county's at-large system failed to comply fully with the requirements of Section 2 of the VRA. As part of the consent decree, the county agreed to adopt single-member districts.

The county established three single-member county-commission districts, Districts 1, 2, and 3. When District 3 was established, it was intentionally heavily packed with Navajo voters. Appeals Court Decision at 4. After the districts were established, the county never redrew them. By 2011, District 3, which was over 92% Native American, had an inordinately large population of Native Americans. Court of Appeals Decision. Based on this disproportionate amount of Native Americans in District 3, the Navajo Nation asked the county to redraw the county commission districts in response to the 2010 census. The county declined to change District 3's boundaries, and made only a few small changes to District 1 and 2 to equalize the population of those districts.

---

population of 1,700, of whom 70 were Indian; District 2 had a population of 3,900, of whom 300 were Indian; and District 3 had a population of 26,700, of whom 23,600 were Indian. Indian voters challenged the revised districts for violating the one-person, one-vote principle, the Fourteenth Amendment, the Voting Rights Act, and the Civil Rights Act. Apache County claimed that the Indians are not citizens of the United States and that the Indian Citizenship Act granting Indians citizenship was unconstitutional. A three-judge federal court found that the districts were malapportioned and rejected Apache County's arguments regarding the right of Native Americans to vote.

In 2012 the Navajo Nation and several of its individual tribal members brought suit against San Juan County in federal district court alleging voting-related violations of the Equal Protection Clause of the Fourteenth Amendment, Fifteenth Amendment, and Section 2 of the VRA.[11] Specifically, that the boundaries of District 3, were unconstitutional based on race in violation of the Equal Protection Clause, and that the high population deviations in the school board districts resulted in vote dilution of the Equal Protection Clause's guarantee of one person, one vote.[12] The Navajo Nation further alleged that the county-commission and school board districts diluted the voting power of Native Americans in violation of § 2 of the VRA.

The district court found that both the school board and the county commission districts violated the Equal Protection Clause and were therefore unconstitutional. The district court then ordered the county to develop a remedial redistricting plan. It stated that it would adopt the county's proposed remedial plan if the plan cured the identified violations and was otherwise legally sound. After the county submitted its proposed remedial redistricting plan, the district court found that the remedial plan was also unconstitutional. Specifically, it found that some districts in the remedial plan were based on race and did not survive strict scrutiny. So the district court rejected the county's plan and appointed a special master. After the special master created several proposed redistricting plans, the district court conducted two public hearings and accepted input from the parties. The special master then drafted a final plan, and the district court ordered the county to adopt it. The district court further ordered the county to hold special elections utilizing the new districts in November 2018. The county appealed the district court's

[11] *Navajo Nation v. San Juan Cty.*, 162 F. Supp. 3d 1162, 1165 (D. Utah 2016), *aff'd*, 929 F.3d 1270 (10th Cir. 2019).
[12] *See Avery v. Midland Cty.*, 390 U.S. 474, 478 (1968) (explaining that right to vote "is infringed when legislators are elected from districts of substantially unequal population")

decision and in July 2019, the 10th Circuit upheld the district court's ruling. The 2018 elections were the first elections in San Juan County under the newly established districts. As a result of the new districts, two Navajo individuals were elected to the county commission. For the first time in San Juan County's history, Native Americans make up a majority of the county commissioners.

2) Navajo Nation Human Rights Commission v. San Juan County

In 2014, San Juan County, Utah closed all of its polling locations and switched to an all vote by mail system. If a voter wanted to vote in-person, she would have to go to the county seat in Blanding, Utah to cast her ballot. Although San Juan County is a covered jurisdiction under Section 203 of the VRA and must provide all election materials in Navajo and English, no provisions were made to comply with the law. The Navajo Nation Human Rights Commission sued the County for violations of the Voting Rights Act and the Fourteenth Amendment.

Because Navajo is an oral language, switching to vote-by-mail effectively denies Navajo language speakers an opportunity to vote. Navajo voters who do not speak English are forced to find an individual who will assist them in translating the ballot and explain what the different provisions mean. This is a violation of Section 203 of the VRA.

It is also difficult for most Navajo voters to vote by mail because most Navajo voters lack access to mail or have unreliable mail service. At the time of this case, most Navajos residing on the Utah portion of the Nation did not have addresses. Instead, voters relied on P.O. Boxes to receive mail, including their ballots. Depending on the location of their residence, some Navajo voters who reside in Utah actually receive their mail at their P.O. Box in Arizona. Members of the communities of Navajo Mountain Chapter and Red Mesa Chapter in Utah may have their

residence in the state of Utah but their physical P.O. Boxes are located in Arizona. If a P.O. Box is located in Arizona, it can result in the mailing being routed to Phoenix before it is delivered. This results in an individual having less time to fill out their ballot than individuals with physical mailing addresses, as it takes their ballot longer to travel each way.

Because of the uncertainty about whether a mailed ballots will be received in time, many individuals prefer to vote in person. This ensures that their vote is timely and counted. However, after San Juan County closed all its polling locations, the ability of Navajos in the southern part of the county to cast their ballots in-person became extremely difficult. Blanding is located in the northern part of the county, close to the non-Native population. Due to the size of the county, and lack of roads connecting all parts of the county to each other, some Navajo voters have to drive into Arizona and then back to Utah in order to get to Blanding. This trip is approximately 180 miles one way, and up to nine hours round trip.

The Human Rights Commission was able to settle the case with the county, ensuring in the settlement agreement that physical polling locations were reopened on the Nation, and that Navajo speakers would be present at the locations to assist voters in explaining the ballot. Although the County had one in-person polling location, it was located in the county seat. Some Navajo voters have to travel 9 hours round trip in order to vote in person.

3) Navajo Nation v. Hobbs

For the 2018 general election, most early voting locations in Apache, Coconino, and Navajo County were located off-Nation, requiring Navajo voters to travel a great distance if they wanted to cast their early vote ballot in-person. Polling locations and voter registration sites on the Nation are often located at substantially greater distances from voters, than sites located

off-Nation. Further distances means a greater cost incurred to exercise one's vote. Making early voting available at the county seat, while not providing Navajo voters living on the Nation with the same access to early voting sites, has the practical effect of providing more voting resources to one community than another. Non-Indian voters have a greater opportunity to avail themselves of the less burdensome early voting process. Prior to the 2018 Election, the Navajo Nation asked Apache, Coconino, and Navajo Counties for additional voter registration and early voting locations on the Navajo Reservation. The Counties denied these requests. This resulted in Navajo voters having unequal access to voter registration and early opportunities as compared to off-reservation voters. Some voters, for example, had to travel over 100 miles roundtrip to participate in early voting.

In the November 2018 General Election, over 100 votes cast by citizens of the Navajo Nation residing in Arizona's Apache, Navajo, and Coconino counties were not counted, because the voter either did not sign the envelope containing their early ballot, or because the signature on the envelope did not match the voter's signature stored by the county.

Arizona requires a voter to provide identification when voting in-person.[13] When a voter votes via an early ballot, her signature on the ballot affidavit is considered her identification. If an early voter fails to sign the ballot affidavit she does not have the ability to cure the defect, unless the county which she votes in provides her that opportunity. The Arizona Election Manual in effect during the 2018 election was silent on how a county should handle an unsigned ballot affidavit. Apache, Navajo, and Coconino county did not allow voters to cure their unsigned ballot affidavit.

---

[13] A.R.S. § 16-579(A).

This lack of ability to cure a ballot identification defect is unique to early ballots missing affidavit signatures. The Arizona Election Manual in effect during the 2018 election specifically gave county officials discretion to allow curing of mismatched signatures on a ballot. For mismatched ballots, a county official could contact the voter and verify the signature. Both Apache and Coconino county allowed voters with mismatched signatures an opportunity to cure their ballots. Additionally, if a voter fails to present identification when voting in-person on election day, she has five business days, after the election, to return with her identification and have her ballot counted.

Voters who participate in early voting, and fail to sign their ballot affidavit, do not have the same opportunity to cure their identification deficiencies as those vote early but have mismatched signatures, or as those who vote in-person on election day but forget their identification.

This disparate treatment between voters led the Navajo Nation to file suit against the counties and the Secretary of State of Arizona in 2018.[14] The Navajo Nation filed suit in federal district court claiming that these inconsistencies in treatment impacted Navajo citizen's right to vote in the 2018 General Election. The Nation alleged that Navajo early voters who failed to sign their ballot affidavit were denied equal protection under the Equal Protection and Due Process Clause of the Constitution, since they were not provided notice of the defect nor were they provided the opportunity to cure the defect.

[14] *The Navajo Nation v. Reagan*, 2018 WL 9392919 (D.Ariz.).

The Navajo Nation was able to settle its case against the counties and the state by entering into settlement agreement with all the defendants. Under the terms of the agreement, the Secretary of State would propose the following language for inclusion in the Elections Manual:

> If a voter fails to sign an early ballot affidavit, the County Recorder or other officer in charge of elections shall make reasonable efforts to contact the voter, advise the voter of the missing signature, and allow the voter to cure the deficiency. The County Recorder or other officer in charge of elections shall allow signatures to be corrected not later than the fifth business day after a primary, general, or special election that includes a federal office or the third business day after any other election.

The counties agreed to provide curing if the state included the provision in the Elections Manual. The Attorney General objected to the language. The Secretary of State and the Attorney General reached a compromise to allow curing until 7 pm on Election Day. Limiting curing to 7 pm on election day fails to afford due process to those voters who turn in their ballots at a polling location on election day. It also fails to afford these voters equal protection because early voters with mismatched signatures, and voters who fail to provide identification on election day are both afforded five days post-election to cure the deficiencies. Attorney General McPaul informed Attorney General Brnovich, that excluding this agreed upon language from the Election Manual would be teeing up additional litigation, creating a situation in which some counties would allow voters to "cure" their votes and some would not.

Despite the limits in the Election Manual, during the 2020 Arizona Legislative Session State Senator Ugenti-Rita proposed bill SB 1032 to eliminate any opportunity to cure unsigned early ballots by including in law that a ballot shall not be counted if it is not signed by 7 pm on election day. However, there are no provisions in the bill to provide due process to the voter. This legislation seeks to undermine the settlement negotiated in good faith between the parties.

The litigation also addressed language assistance, voter registration, and early voting. To resolve the litigation, the counties also agreed to (1) open additional in-person early voting polling places, (2) develop a voter registration plan to maximize voter registration, (3) provide timely radio advertisements and election information in the Navajo language, and (4) provide Navajo translators at each polling place. The Department of Justice has also brought cases to enforce voting rights of Navajo citizens, specifically to enforce the language minority provisions of Section 203.

4) *Democratic Nat'l Comm. (DNC) v. Hobbs*

While the Navajo Nation did not participate directly in *DNC v. Hobbs,*[15] a number of its citizens were involved in the case and the decision has a direct impact on Navajo citizens being able to exercise their right to vote. As opposed to the San Juan County and Reagan case, the decision by the 9th Circuit in *Hobbs* focused exclusively on the application of Section 2 of VRA to laws passed by the Arizona legislature.

a. Out of Precinct Voting

Arizona allows its counties to choose a vote-center or a precinct-based system for in-person voting.[16] In counties that use vote-center system, registered voters may vote at any polling location in the county.[17] In counties using the precinct-based system, registered voters may vote only at the designated polling place in their precinct. Approximately 90 percent of Arizona's population lives in counties using the precinct-based system.[18]

---

[15] No. 18-15845, 2020 WL 414448 (9th Cir. Jan. 27, 2020).
[16] *Democratic Nat'l Comm. v. Reagan*, 329 F. Supp. 3d 824, 840 (D. Ariz. 2018)
[17] Id.
[18] *DNC* at 10.

On the Navajo Nation, Apache and Coconino county use a precinct-based system and Navajo county uses a vote-center system. If a Navajo voter tries to vote in Apache or Coconino county, she must vote at her precinct voting location in order for her vote to be counted. If she attempts to vote at a polling location outside of her precinct on election day, she can only cast a provisional ballot.[19] After election day, if election officials determine the voter voted outside of her precinct, prior to the Hobbs decision, they would discard the provisional ballot in its entirety.

Provisional ballots are commonly used by voters in Arizona. In the 2012 general election, more than 22 percent of all in-person ballots cast were provisional ballots.[20] Arizona is at the top of the list of States that cast provisional ballots.[21] Arizona is also the State that rejects the highest percentage of provisional ballots.[22] One of the most frequent reasons for rejecting provisional ballots in Arizona is that they are cast out-of-precinct.[23]

Native Americans are over-represented among out–of-precinct voters by a ratio of 2 to 1, with 1 in every 100 Native American casting a provisional ballot.[24] During the 2014 and 2016 general elections in Apache, Navajo, and Coconino counties, the vast majority of out-of-precinct ballots were in areas that were almost entirely Native American.[25]

Minority voters often vote out-of-precinct ballots due to their high mobility, fluidity in residential locations, and frequent changes to the precinct and polling place schemes.[26] In addition, a majority of Navajo citizens residing on the reservation do not have traditional street

---

[19] Ariz. Rev. Stat. §§16-122, -135, -584.
[20] *DNC* at 12.
[21] Id.
[22] Id.
[23] Id.
[24] *DNC* at 20 and 42.
[25] *DNC* at 19.
[26] *DNC* at 14.

addresses. Of the Navajo Nation's 110 chapters, about 70 of them do not have street names or numbered addresses, which adds up to at least 50,000 unmarked properties. Navajo voters' lack of standard addresses can cause their precinct assignment to be based on guesswork.[27] While state registration forms allow a space for an individual to draw a map location of their resident, these maps often do not allow for sufficient detail to properly locate the residence. In 2012, Apache County, Arizona purged 500 Navajo voters because their addresses were deemed "too obscure."

If the location of a voter's residence is unclear, it can result in counties assigning voters to the wrong precincts. If a voter is placed in the wrong precinct, it can lead to confusion about the voter's correct polling place, longer travel times for the voter to find her correct polling place, and to the county ultimately rejecting the ballot if it determines the voter cast her ballot in the wrong precinct.

Another reason Navajo voters may vote out of precinct is that their precinct polling location is different than their Navajo elections polling location for. For Navajo elections, Navajo voters must vote at the chapter house where they are registered. For example, if a Navajo voter is registered with Fort Defiance Chapter her polling location for all Navajo elections will be at the Fort Defiance chapter house. However, even though the Fort Defiance chapter house is a precinct polling location for Apache County, the individual may actually have to go to another precinct polling location because her residence is not in Apache County's Fort Defiance precinct.

---

[27] *DNC* at 18.

In the 2018 general election, a voter casted her ballot at the Fort Defiance Chapter House for the Navajo elections. She then attempted to cast her ballot in the state elections but was told by the poll workers that she was not registered to vote at that precinct. The poll worker did not inform the voter of her correct precinct polling location. Instead, the voter had to retrieve the information from a volunteer outside of the polling location. The volunteer informed the voter that her precinct polling location was at the Navajo Nation Museum in Window Rock, 6.3 miles away. If the volunteer had not been present it is unclear how the voter would have learned about her polling location.

The difference in tribal and state polling locations causes confusion, and results in voters casting ballots in the wrong precinct. It also results in voters having to drive to multiple locations to vote in tribal and state elections. Another example is the Coal Mine Mesa Chapter in Coconino County. Coal Mine Mesa Chapter is divided among several county voting precincts. A member of the Coal Mine Mesa Chapter may reside in the Cameron precinct or the Coal Mine Mesa precinct depending on the location of their residence. If this individual wants to vote in both the tribal and state election on election day, she would first have to cast her ballot at the Coal Mine Mesa Chapter house. She would then have to drive 43 miles one way to the Cameron Chapter house to vote in the state election.

For all of these reasons, Navajo voters are more likely than their white counterparts to vote out-of-precinct and cast a provisional ballot. Arizona's policy of rejecting a provisional ballot, cast out of precinct, in its entirety has a disparate impact on Navajo voters. The 9th Circuit's decision found that Arizona's policy of entirely discarding out-of-precinct ballots

results in disparate burden on minority voters causing in a substantially higher percentage of minority votes than white voters being discarded.[28]

b. Criminalization of Ballot Collection Assistance

Prior to Arizona's criminalization of ballot collection, it was common for Navajo voters to provide their ballots to third parties. As the 9th Circuit stated, the criminalization of ballot collection has a pronounced effect in rural counties with significant Native American populations who disproportionately lack reliable mail and transportation services.[29]

Many Navajo individuals live far off main roads, on dirt roads that are not easily accessible. There is no public transportation that allows for the pick-up of citizens at their place of residence.[30] Therefore, if an individual did want to take public transport, she would need to first get from her residence to a pick up site. This severely limits the transportation options for elderly and disabled citizens, who are reliant on relatives or friends for rides. In some parts of the Nation, only one in ten families own a vehicle which further limits transportation options.

In addition, Navajos do not have access to reliable mail service. Due to the remote location and lack of traditional addresses on the Nation, many Navajo citizens must utilize P.O. Boxes to receive their mail. Because the Nation spans three states, three counties in Arizona, one county in Utah, and four counties in New Mexico, an individual's P.O. Box location may be in a different state or county than the individual's residence. A person may reside in Arizona but their

---

[28] *DNC* at 47.
[29] *DNC* at 88.
[30] The census indicates that American Indians are twice as likely to have no vehicle available to them and there are not public transportation systems available to most Indians. Brief for Nat'l Cong. of Am. Indians as Amicus Curiae, *Wandering Medicine v. McCulloch*, 2013 WL 1452761, at *11 (9th Cir. 2013) (citing BUREAU OF INDIAN AFFAIRS, TRANSPORTATION SERVING NATIVE AMERICAN).

P.O. Box and Chapter House is in New Mexico (i.e. Red Lake Chapter and Crystal Chapter) or reside in Utah and their P.O. Box in Arizona (Navajo Mountain Chapter). Some individuals reside in Navajo County but their P.O. Box and local Chapter House is in Coconino County. (i.e. Birdsprings Chapter).

P.O. Boxes are usually shared by multiple family members. Multiple family members will utilize one box because some family members may not be able to afford their own P.O. Box. The sharing of P.O. Boxes by multiple individuals can lead to lost or delayed ballots and voter notifications, as one family may not provide the other individuals on the P.O. Box with their mail in a timely manner, if at all. Even with multiple family members on one P.O. Box, there are not enough P.O Boxes to serve the community; there are only a limited number of P.O. Boxes available at each location. The post office limits the number of people that can be listed on a P.O. Box, causing individuals who do share P.O. Boxes with their family to be removed from the box. If an individual is not able to secure a P.O. Box, or is removed from their family box, they may have to travel 30 to 40 miles to the next closest post office. At times this can be in addition to the 30 miles they traveled to reach their local post office. Long travel times to P.O. Boxes make checking the mail a hardship for individuals who are elderly or disabled. It also results in individuals checking their mail less frequently. Some citizens are only able to check their P.O. box once a week or even as little as once every three to four weeks.

For all these reasons many individuals rely on others to help them pick up and drop off mail. These individuals may be related by blood to the voter, or they may be a clan relation. They may also be a non-relation community member who happens to assist the individual at their house. The limitations placed on who can transport a ballot under Arizona law places the

burden on low-income, isolated, elderly voters, who may not speak English as a first language, to find a way to get their ballot to a mail-box possibly as far as 30 miles away, in a timely manner.

5) *Harris v. Arizona Independent Redistricting Commission*

In 2012, the Arizona Independent Redistricting Commission approved legislative and congressional maps that complied with the state constitutional requirements. The Commission hired an outside consultant to ensure that it followed the requirements of the Voting Rights Act in developing the maps. With this focus, the US Department of Justice precleared both maps on the first attempt—a first in Arizona's history. The Commission created one Native American majority minority district, LD7, comprising of nine tribes with a Native American voting age population of 63.7%. This district is the largest geographic district in the state, with the smallest population. It also has the smallest population density, with fewer than ten people per square mile throughout most of the district. The difference between the largest and smallest populated districts is 18,709, or an 8.8% maximum deviation.

In 2012, following the development of the congressional and legislative districts, there were numerous lawsuits challenging the maps drawn by the Arizona Independent Redistricting Commission. One of these challenges was *Harris v. Arizona Independent Redistricting Commission*[31]. In *Harris*, plaintiffs claimed that the Arizona legislative districts violated the one-person, one-vote principle of the Fourteenth Amendment and argued that the deviations were motivated by partisan influences. The Commission's rationale for under populating districts was to comply with the Voting Rights Act. The Navajo Nation participated as amicus curiae in a number of these challenges to protect the sole Native American majority-minority

[31] 136 S. Ct. 1301, 1304, 194 L. Ed. 2d 497 (2016).

district – LD 7. At trial, the challengers' own expert confirmed that there was no partisan motive in drawing. LD7 was developed to ensure that Native Americans could elect a candidate of their choice, but also considered and granted requests of Non-Indians who did not want to be in a Native American majority-minority district. Underpopulating a district also takes into account the extreme undercount in Native American communities, identified by the Census as hard-to-count populations.

A unanimous Supreme Court *in Harris v. Arizona Independent Redistricting Commission*, No. 14-232, upheld the deviations finding that deviations under 10% are generally acceptable, and will be only be overturned in rare cases. The Court said that factors other than partisanship explained the disparities, specifically the neutral redistricting criteria of compactness, contiguity, communities of interest, local boundaries, political competitiveness and compliance with the VRA.

A resolution has been introduced this legislative session to reduce the maximum deviation from the Supreme Court standard of 10% to 5,000 people. This would reduce the likelihood of maintaining a strong Native American majority-minority district. Arizona courts have recognized that Arizona's geography and demography create certain challenges in redistricting. Only 18.2% of the land in Arizona is held privately, and 27% of the land is located on Indian Reservations. Rural areas have remained sparsely populated while the urban areas continue to experience rapid growth. The majority of Arizona's Indian Country are located outside of urban areas. Five of the ten most populated reservations in the United States are located in Arizona, including the Navajo Nation, the largest reservation in both size and population. The Nation Nation is concerned that this is an ongoing effort that will result in the

inability of Navajo voters to elect candidates of choice in violation of Section 2 of the Voting Rights Act.

IV. Conclusion

Navajo voting rights are constantly under attack. Although positive strides have been made, more must be done to ensure that Navajos and other Native Americans have equal access to the ballot box. For this to occur, we must have voter registration and polling locations in our communities, voting districts should be created to ensure that we have an equal opportunity to elect candidates of choice, and our Navajo voters must be provided effective language assistance. For these reasons, the Navajo Nation supports the Native American Voting Rights Act.

Chairperson FUDGE. Thank you very much, and thank you all for your testimony. I congratulate you for the legal successes that you all have experienced and just note that it took more than 230 years to get two Native Americans elected to the House of Representatives.

Let me begin with this question for all of you, each of you, and we will just go down the line. Do you think that your surrounding non-Tribal communities face the same challenges with geography in voting?

Mr. FORSMAN. We have got 29 Tribes in Washington. It varies from the rural to the urban to the suburban. So I would guess it depend on the Tribe you are asking about. I would say generally that they don't face the same challenges that our people do within our reservations because of the past oppression that our people faced through the assimilation process the Federal Government imposed upon us.

And so most things that you mentioned earlier in your testimony about Indians not taxed and the tradition of our people not being allowed to go to public schools and then being sent to boarding schools, so this tradition of being excluded is something that—there is some distrust, but there are some challenges also around access.

Washington, of course, is a model for some of those things being eliminated, but I would just like to emphasize that not all States are like Washington in their relationship with Tribes in that we have a very positive relationship that took a lot of work. It didn't just come out of thin air, but it took a lot of work by my previous leadership that did a lot of those things. And so a lot of the political forces within Washington really respect the unique relationship that Tribes have with the Federal Government and the States.

Chairperson FUDGE. Is Washington the only State that has a Native American Voting Rights Act?

Mr. FORSMAN. As far as I know, but I may be—I had heard earlier that Colorado has something similar, but I am only familiar with Washington's.

Chairperson FUDGE. Thank you.

Ms. Torres.

Ms. TORRES. Thank you for the question. I want to say, frankly, that I don't believe that non-Indians have the same barriers to access as Native Americans do. As you know, reservations are located in rural and desolate areas where I would say that non-Indians have access because they are in urban settings.

Again, we deal with the barriers to access, transportation issues, high poverty rates, unemployment rates. And the biggest thing is, you know, if my people have to decide whether they are going to use that transportation to go to work versus, you know, going to vote 40 miles away, you know, it is a no-brainer.

We have historical trauma embedded within our people, and the biggest thing is we face challenges that no one else does. And, again, I feel it is a trust and treaty responsibility because our ancestors paid it due a long time ago, and it is time for the Federal Government to hold up their end of the bargain. Thank you for that question.

Chairperson FUDGE. Thank you.

Attorney General, can you just tell me what you think is the greatest hardship faced by Native Americans as it relates to voting? I mean, we have gone through the IDs and how costly they have been, how time consuming. What do you think is the biggest issue, and what should we be doing as a Nation to live up to our end of this bargain?

Ms. MCPAUL. I don't know if there is one single greatest challenge. I can tell you that I think for the Navajo Nation in particular because we cover such a large area of land, cover multiple States, cover multiple counties within those States, there is just a lot of challenges, you know. I moved back to Wind Rock from Tucson, Arizona, and for the first time in 20 years, I have a post office box. I have access to a vehicle. I have access to paved roads, and I only check my mail probably once every week or maybe two weeks. It is just an inconvenience to travel to the post office. And adding things like lack of transportation, having to traverse dirt roads, having to traverse those roads in bad weather, and then not having financial means to do just basic—you know, getting to the post office or getting to the polling location just are challenges upon challenges. So I don't know if there is a single fix, you know.

In my role having to bring constant litigation and the expense of litigation is a challenge to our budget, and you know, prioritizing this for our communities is—you know, I have to choose between, you know, a case like this or an Indian Child Welfare Act case or some other important case, you know, that goes to the root of Tribal sovereignty. And so, you know, I think that improving access, improving language, all of those things that help, you know, take down the barriers are of great need.

Chairperson FUDGE. Thank you.

Mr. Davis, you are recognized for five minutes.

Mr. DAVIS of Illinois. Thank you, Madam Chair.

Real quickly, I want to get from each of you, if we could—and we will start with Chairman FORSMAN—can you all speak a little bit about voter registration trends for each of your Tribes and overall voter participation in the last few election cycles?

Mr. FORSMAN. I don't have specific statistics to reference, but I know that, in Washington, the NAVRA, Voting Rights Act for Native Americans, and just the general trend within Washington to make voting easier through mail, through more less-stringent requirements for ID, for registration because you can actually use a Social Security number if you don't have a State-issued ID and the other alternatives for that. Just for example, my brother just moved back from being in San Francisco for 40 years, back to the reservation. And he only had a California ID and doesn't drive. So he had no need to get a State license. He was able to register fairly easily just through the mail.

The barriers have been dropping in Washington because there is a real conscious effort there to reduce the barriers to voting so that Washingtonians and their Tribal citizens can have that opportunity to vote. I feel that those efforts have increased our registration and our voter turnout.

Mr. DAVIS of Illinois. Great.

Ms. Torres. Chairwoman Torres.

Ms. TORRES. Thank you. Thank you for the question. So, with our litigation, we have had an early polling site on our reservation, which has offered us a number of new registered voters and also access for our people to be local there at home and make their vote count.

The other thing is we are getting our veterans out. We are getting our community members out. We are having voter drives where we are bringing in our people. We are hiring our own people, which I think is a huge success for us because of cultural competencies. People feel as if those people are trusted, and so I think it has been good for us.

I think one of the huge successes that we have had is with the early voting sites. We are getting our own people trained, and it allows more of our people to again feel comfortable coming in and giving their vote there.

The other thing is, this year, we are really concentrating on Census as well as voting, and we have new 18-year-olds. We are pushing that think get signed up, and, again, our older voters that haven't voting in quite some time, we are going out and educating them on that importance. We are really making the push to sign all of our people up. So it has been successful, and we have seen a huge voter turnout.

Mr. DAVIS of Illinois. All right.

Ms. McPaul, what are your thoughts?

Ms. MCPAUL. Thank you. With respect to voter registration trends, I can only speak to this in terms of our litigation with, for example, redistricting and a constitutional matter that affects voting turnout. And the results allowing for ballot collecting and out-of-precinct voting, you know, should be a trend if that is the way I can say that.

With respect to our Arizona settlement, adding additional in-person voting places as part of the settlement, developing a voter registration plan for the State to maximize voter registration as part of the settlement, adding timely radio advertisements. Election information in the Navajo language is important, providing Navajo translators at each polling place and also allowing voters an opportunity to cure their unsigned ballots.

Mr. DAVIS of Illinois. Okay. Thank you all for your thoughts on this.

Real quick, while I have a little bit of time left, Attorney General McPaul, I noticed in your testimony you mentioned the case that was discussed at the Arizona field hearing in regard to ballot harvesting in the Ninth Circuit Court of Appeals. On ballot harvesting, more generally, California, States like California, I have a concern with the chain of custody issues that I believe are ripe for fraud. As a matter of fact, we saw fraud in ballot harvesting in North Carolina where we had a special election. And one Member who won an election in November of 2018 was not seated in this institution because of ballot harvesting.

So, with the Ninth Circuit Court of Appeals ruling, do you think the gentleman who is probably going to be on—who is going to be on trial and likely to go to jail in North Carolina because ballot harvesting is illegal, do you think that gives him the ability to argue that his case should be thrown out of court?

Ms. MCPAUL. Thank you for the question. I am not familiar with the particular issue that you are talking about, so I don't feel competent to speak to it. I can tell you that, in my personal experience just growing up on the reservation and sharing a post office box, you know, my relatives all live in the same area, and it is not uncommon for everybody to have keys to the other people's post office boxes to collect the mail and to drop it off. And so, you know, I don't—I don't know. In that context, delivering the mail for my grandmother or my disabled relative, how that would constitute fraud for picking up the mail?

Mr. DAVIS of Illinois. Well, it is pretty well established now in most States that you can take the relatives' ballot, but we saw an instance of fraud in North Carolina where a Republican operative is likely to go to jail for doing what is completely legal in other States that the Ninth Circuit Court of Appeals addressed in their decision. I just find it interesting. I mean, I think if I was the one who was being charged, I would seriously look at that decision. So thank you all for your comments.

Chairperson FUDGE. Mr. Butterfield, you are recognized for five minutes.

Mr. BUTTERFIELD. Thank you very much, Madam Chair.

Let me join the Chair and Ranking Member in welcoming the three of you to this hearing today. Your testimony has been very valuable.

Many of my colleagues know that in my prior life, I was a trial judge in North Carolina, but many of my colleagues may not know that prior to that, I was a voting rights attorney for some six or seven years in my State. When I came out of law school, I did not recognize the full potential and power of the 1965 Voting Rights Act. But after I began to learn and to apply the Voting Rights Act, I began to appreciate the importance of the VRA. And so that is why I am an original cosponsor of H.R. 1694 that was offered by my good friend, Ben Ray Luján. I support it and will work very hard for its passage.

One thing that I learned during my voting rights years is that the Voting Rights Act is a statutory enactment whose basis is deeply rooted in the 15th Amendment, and I just happen to have a copy of the Constitution in my pocket today. I don't usually walk around with it, but for some reason, I picked it up this morning. And, last week, we observed the 150th anniversary of the ratification of the 15th Amendment. That is a very significant date in African American history and, indeed, in American history.

So I just want to read into the record—all of us have heard this over and over again, but I just want to do it for emphasis. Section 1 of the 15th Amendment. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Here is the key part that a lot of people don't really pay attention to: The Congress—the Congress—shall have power to enforce this article by appropriate legislation.

And that is what you are talking about, and that is what we are talking about, and that is why it is essential that we get H.R. 1694 enacted into law.

Chairperson Torres, your opening statement mentioned a 2016 case in which your Tribe successfully forced election authorities to include polling places on your land. How far would you say your members had to travel to vote before you brought that case? I think it may have come out earlier, but I need to get it into the record clearly. How far would your members have to drive?

Ms. TORRES. For the record, as far as Walker River Paiute Tribe, we have always had a polling site on our reservation. What we were battling for was access for early voting site, as well as traveling the distance for Pyramid Lake Paiute Tribe would be at least 40 minutes one way. Again, that would be from Pyramid Lake on their reservation up to the Reno, Sparks, or Washoe area. So, again, 40 miles one way.

Mr. BUTTERFIELD. Do you think the 2016 legislation changed the way the election officials engaged with your community? I know in the South after the passage of the 1965 Voting Rights Act, African American communities all of a sudden became important. But pre-Voting Rights Act, the African American communities were marginalized. Have you seen a difference?

Ms. TORRES. I can guarantee that we have seen a difference, again, just standing our ground and knowing what our rights were and fighting for them. Again, with our ancestors fighting so hard for our right to vote, we had to make sure to set that precedence. And, again, we have opened up the doors for all of Nevada Tribes now to have those satellite clinics or—I am sorry—those satellite options, offices, and then also so that they would have the ability to have polling sites on their reservation and early polling sites and then also have the ability to get their own people trained to work in those facilities. I think that is a huge success in Indian Country and Nevada specifically.

Mr. BUTTERFIELD. Thank you.

Let me now direct my final question to the Attorney General. Thank you for your service. How far do your members typically have to travel to apply for a driver's license or other government service? Does that affect your members' ability to obtain the IDs or other documents that they need to register and vote?

Ms. MCPAUL. Thank you for the question. It is not uncommon in our rural communities for folks to travel half an hour to an hour or more to get to the nearest city. That city might not have a place, a motor vehicle division to get a driver's license. So it kind of varies. I can tell you in San Juan County, folks in Navajo Mountain who travel to Blanding, which is where the county seat is, is four hours.

Chairperson FUDGE. How many?

Ms. MCPAUL. Four.

Mr. BUTTERFIELD. All right. I think I will stop right there, Madam Chair. Thank you. I yield back.

Chairperson FUDGE. Thank you.

Mr. Aguilar, you are recognized for five minutes.

Mr. AGUILAR. Thank you, Madam Chair. Thank you for the opportunity to have the panel, and thank you for our witnesses today.

Attorney General McPaul, as you know, Arizona recently moved to a vote center voting model. This means that voters no longer have a specific polling place in many locations but can vote any-

where they would like. While this model seems to offer more options for voters, it only works if there are an adequate number of polling places to choose from. Has the vote center model affected voters' access to the polls and their ability to vote in Indian Country?

Ms. MCPAUL. I am sorry. I don't know that I can speak intelligently to that question. I do know that Professor Patty Ferguson is on the next panel, and she would have the information to adequately address your question. I apologize.

Mr. AGUILAR. Can you talk to me a little bit about some of the barriers, then, to voting within the Navajo Nation that your community still faces? What are some of the largest barriers that exist?

Ms. MCPAUL. Thank you. Yeah, I can do that. You know, one of the things I mentioned is that, you know, my office represents all three branches of government, all of these executive branch divisions and programs, and we also represent the 110 local governing chapters. So the Nation is divided up into those 110 local community chapters where people vote, where people have community gatherings, and it is where local governance occurs.

Those boundaries are, you know, traditional boundaries. They predate statehood. They predate county lines. And so there are often issues with the way the polling precincts don't match with where people actually vote. And so it is entirely possible for people to have to go to two different places to vote on election day, and that creates confusion.

I think that the language barrier issue is also a prominent issue that was highlighted in one of the litigations where the instructions for signatures on the envelopes were not made available.

The other issue, as I think I mentioned before, is just having a rural community, no access to passable roads, particularly when there is bad weather and just the means to be able to do that and the convenience of having—you know, getting your mail at home and to return your early ballot by mail.

Mr. AGUILAR. Thank you.

Attorney General McPaul, just following up on the Ranking Member's question, you understand filling out someone else's ballot is fraud. It is fraud in Navajo Nation. I believe it is fraud in every State, correct?

Ms. MCPAUL. I believe so, yes.

Mr. AGUILAR. Is there a difference between filling out a ballot wrongfully for someone else and holding a ballot and physically just taking it for someone, a friend, a neighbor, a loved one? There would be a difference in those, right?

Ms. MCPAUL. Yes.

Mr. AGUILAR. Yes.

Chairman Forsman, in your testimony you talked—and specifically the relationship you have in Washington is a little different than our Washington, I suppose, among your policymakers. Can you talk to me a little bit about kind of, I guess, the atmospherics that exist between Indian Country and local elected officials and State elected officials and the lines of communication that are open so you can freely talk about the barriers that exist and how you seek to remedy those?

Mr. FORSMAN. Yeah. Well, one of the things that—I think that Tribal-State relations came to pretty much a bottom in the early 1970s over the fishing wars and the Boldt decision, which acknowledged the Tribes' treaty rights to half the harvestable salmon in Washington and also as co-managers, as governments, to help co-manage the fishing harvests and seasons. It was very empowering, and it took a little while for us all to get used to—I think for the State to get used to having the treaty rights and also the government-to-government relationship visible and implemented with the help of the United States Department of Justice and Congress itself and over time and the Supreme Court, of course.

So, over that time and during—in 1989, it was the 100th birthday of the State of Washington in 1989, the centennial. And the Centennial Accords were established—kind of the Governor's office with the help of Congressman Denny Heck, who was working for the State at the time, established this protocol for us to meet annually and work on our respective issues.

And through that, we worked with the legislature, and also getting Native Americans elected to our legislature has been helpful as well. We have taken a more—the State has embraced our Tribal-State relationship and tried to be respectful of each other. And part of that is, you know, working on natural resource issues, health, education, all these things because I think many of the legislators and leaders of the State see the Tribe as an asset to their community.

So, over time, that has, of course, made us responsive to current events, and one of those being some of the voter suppression we saw happening in other States. This legislation was in response to that to make sure that, although we do have—and things aren't perfect in Washington, but they are much better than many other States, but there are other States that also have good relationships and set good examples as well. There are others where there are challenges. Anyway, just to wrap up. I just think it is important to remember that we have worked really hard on that and look forward to more opportunities.

Mr. AGUILAR. Thank you. Thank you, Mr. Chairman. The State of Washington benefited from Mr. Heck's service for a number of years, and we all have here as well. Thank you so much.

Chairperson FUDGE. Thank you. Thank you all for your testimony today. We appreciate it. We will be sure to be in contact as we go further with this legislation. Thank you again. I would now ask for the third panel to please join us.

Thank you and welcome. As I explained to the previous panel, you will have five minutes to give your testimony. When the green light comes on, that means begin. When you see a yellow light, that means that you have one minute. And when you see a red light, that means please try to wrap up your testimony. Let me now introduce our panel.

Patty Ferguson-Bohnee is the director of the Indian Legal Clinic, faculty director of the Indian Legal Program and clinical professor of law at the Sandra Day O'Connor College of Law at Arizona State University. She has assisted in complex voting rights litigation on behalf of Tribes and has drafted amicus briefs to the United States Supreme Court for Tribal clients with respect to voting rights

issues. She serves as a Native Vote Election Protection Coordinator for the State of Arizona and has testified before Congress regarding Indian voting issues. Professor Ferguson-Bohnee received her bachelor's degree with honors in Native American studies with an emphasis in policy and law from the Stanford University and her Juris Doctorate from Columbia University School of Law with a certificate in foreign and comparative law.

Thank you and welcome.

Mr. Norquay is a member of the Turtle Mountain Band of Chippewa Indians in North Dakota, and he was denied the right to vote in 2014 due to his lack of an ID showing a residential address. Mr. Norquay was an individual plaintiff in the North Dakota voter ID litigation, and he is a veteran of the United States Marine Corps.

Thank you, sir, and thank you for your service.

Jacqueline De León is an attorney with the Native American Rights Fund, also known as NARF, and she is an enrolled member of the Isleta Pueblo. As an attorney at NARF, she helps lead field hearings across Indian Country on Native American voting rights, and she practices ongoing voter rights litigation. Prior to her work at NARF, Ms. De León was a senior associate at WilmerHale for 4 years focusing on international antitrust and litigation. She holds a J.D. from Stanford and a B.A. from Princeton University in philosophy. Ms. De León clerked for Judge William H. Walls of the United States District Court for the District of New Jersey and Chief Justice Dana Fabe of the Alaska Supreme Court.

Welcome all.

We will begin with you, and we will give you each five minutes. Remember, when the light comes on, begin. When you see yellow, you know you have one minute, and when you see red, please wrap up.

Ms. Ferguson-Bohnee, you are now recognized for five minutes.

STATEMENTS OF PATRICIA FERGUSON-BOHNEE, DIRECTOR, INDIAN LEGAL CLINIC, SANDRA DAY O'CONNOR COLLEGE OF LAW, PHOENIX, ARIZONA; ELVIS NORQUAY, MEMBER, TURTLE MOUNTAIN RESERVATION, ROLLA, NORTH DAKOTA; AND JACQUELINE DE LEÓN, STAFF ATTORNEY, NATIVE AMERICAN RIGHTS FUND, BOULDER, COLORADO

STATEMENT OF PATRICIA FERGUSON-BOHNEE

Ms. FERGUSON-BOHNEE. Thank you very much.

Chairperson Fudge, Ranking Member Davis, and Members of the Committee, thank you for inviting me to testify today. In my work, I have viewed firsthand the threats to Native American voting rights and the need for vigilant protection of the right to vote.

Congress has the duty to fulfill its unique trust obligation to Native Americans, including in matters of voting. The trust responsibility is a well-established legal obligation that originates from the historical relationship between the U.S. and Indian Tribes as set forth in Article I, section 8, of the U.S. Constitution. Under the trust responsibility, the U.S. must ensure the protection of Tribal and individual Indian lands, assets, resources, and treaty and similarly recognized rights.

While States have a duty to provide equal protection and ensure that Tribal citizens have equal access to voting, in many cases, they fail to do so. The Supreme Court has recognized that the States are the deadliest enemies of Tribes and that Congress has the responsibility to legislate with respect to Tribes when State governments cannot be trusted to do so.

So let's just look at a little bit of history. When Congress passed the Indian Citizenship Act in 1924, States prevented Indians from registering to vote and from voting. Representative Luján testified about ongoing barriers whenever Native people received that right to vote when they became citizens, but they were denied that right.

And while the Voting Rights Act improved voting for Indians, Native Americans continue to face obstacles. In recent years, States and counties have taken actions to reduce Native American voter participation by failing to comply with section 203 language requirements, packing Indians into districts to reduce voting strength, closing polling locations, and passing strict voter ID laws.

Further, many of the voting barriers faced by Tribal people result from systemic issues that Congress has failed to address. These include disproportionately poor levels of health, education, and employment. On many reservations, Indians lack access to basic services and modern-day conveniences. On-reservation voters have different experiences, opportunities, and realities than off-reservation voters. Isolating conditions, such as language, socioeconomic disparities, lack of transportation, lack of residential addresses, lack of access to mail, the digital divide, and distance are a few of the factors that impede Native American political participation. Today, States and counties either fail to consider these realities or intentionally exploit them in ways that give rise to modern forms of voter suppression we see in Indian Country.

Many of the methods to overcome these barriers are outside of the control of the individual Tribal voter. Let's take, for example, the issue of nontraditional addresses and lack of home mail delivery. Approximately 80 percent of the U.S. population lives in urban areas while many Native Americans and Alaskan Natives live in rural communities. These rural Indian communities lack residential street addresses, and locations for homes are usually described by landmarks, crossroads, and directions. It is important to recognize that, for reservation residents, at-home mail delivery is uncommon, residential addresses may not exist, and residents primarily rely on shared P.O. boxes for mail delivery. Unlike most post office locations, those located on reservations lack 24/7 access and have restricted hours. Distances can be great with some reservation residents traveling up to 70 miles in one direction to receive mail.

Across Indian Country, Native Americans have difficulty voting because of these residential addresses. It impacts all aspects of voting including getting mail, registering to vote, and complying with voter ID requirements. We have seen this in South Dakota, North Dakota, Washington, California, and Arizona.

Now, the lack of safe and reliable mail delivery was a factor in the Ninth's Circuit recent decision overturning Arizona's ballot collection law. Ballot collection is a method of increasing turnout utilized largely by Hispanic and Native American communities. In Ar-

izona, only 18 percent of Natives receive mail at home. This, coupled with lack of transportation, makes it difficult for Indians to vote by mail.

In overturning the law, the Ninth Circuit found that Arizona acted with racially discriminatory intent in violation of section 2 of the Voting Rights Act and the 15th Amendment when passing the ballot collection law. It is also important to note that Arizona tried to implement a ban on ballot collection in 2011 but withdrew it during the preclearance process.

This example illustrates the need for ongoing measures to protect Native American voters. U.S. Supreme Court Justice Hugo Black said great Nations, like great men, should keep their word. It has been 96 years since the Indian Citizenship Act, and the promise of the Native American franchise has yet to be kept. However, Congress has the power and the duty to keep that promise. Thank you for allowing me to testify today.

[The statement of Ms. Ferguson-Bohnee follows:]

TESTIMONY BEFORE THE HOUSE COMMITTEE ON ADMINISTRATION
SUBCOMMITTEE ON ELECTIONS
HEARING ON
NATIVE AMERICAN VOTING RIGHTS:
EXPLORING BARRIERS AND SOLUTIONS

PATTY FERGUSON-BOHNEE
DIRECTOR, INDIAN LEGAL CLINIC
CLINICAL PROFESSOR OF LAW
SANDRA DAY O'CONNOR COLLEGE OF LAW
FEBRUARY 11, 2020

Indian Legal Program
Beus Center for Law and Society
111 E. Taylor St., MC9520, Phoenix AZ 85004-4467
(480) 727-0420 | Fax: (480) 727-9270

I. Introduction and History of Native American Voting Rights

Chairwoman Fudge, Ranking Member Davis, and members of the committee, thank you for inviting me to testify today. My name is Patty Ferguson-Bohnee, and I am the Director of the Indian Legal Clinic at the Sandra Day O'Connor College of Law at Arizona State University. The Indian Legal Clinic coordinates the Native Vote – Election Protection Project in Arizona, a non-partisan effort to protect Native American voting rights founded in 2008 in response to disparities in voting as a result of Arizona's voter identification law.

Securing the right to vote has been an uphill battle for Native Americans. This is especially true for states with large Native American populations. Even after the passage of the Indian Citizenship Act in 1924, states and local jurisdictions prevented Native Americans from registering to vote and voting.[1] Montana excluded Native Americans for voting and holding office from its territorial establishment, and took measures to prevent Native Americans from voting.[2] South Dakota had a law in effect until 1939 that prevented Native Americans from holding public office.[3] Many states alleged that Native Americans living on reservations were not state citizens in an effort to prevent them from voting. In 1948, Native Americans in New Mexico and Arizona successfully litigated their right to vote.[4] Utah and North Dakota became the last states to afford on-reservation Native Americans the right to vote in 1957 and 1958, respectively.[5] When the right to vote was finally secured, steps were taken to prevent Native Americans from participating in elections and being elected to office.[6] A common and effective tool for Native American disenfranchisement were literacy tests because the lower rates of English literacy in Tribal communities. In Arizona, for example, Native Americans could not fully participate in voting until 1970 when the United States Supreme Court upheld the ban against using literacy tests as a voter qualification.[7]

Exercising the right to vote only came with protections afforded by the Voting Rights Act and enforcement of those rights through litigation. However, the Supreme Court invalidated the

---

[1] For a detailed history of voting rights of Native Americans, *see generally*, Daniel McCool *et al.*, Native Vote: American Indians, the Voting Rights Act, and the Right to Vote (2007).
[2] Kaitlyn Schaeffer, The Need for Federal Legislation to Address Native Voter Suppression, 43 N.Y.U. Rev. L. & Soc. Change 712 (2019).
[3] *Id.*
[4] *Montoya v. Bollack*, 372 P.2d 387 (N.M. 1962); *Harrison v. Laveen*, 196 P.2d 456 (Ariz. 1948).
[5] Jennifer L. Robinson & Stephen L. Nelson, The Small but Powerful Voice in American Elections: A Discussion of Voting Rights Litigation on Behalf of American Indians, 70 Baylor L. Rev. 91, 104 (2018); *Allan v. Merrell*, 305 P.2d 490 (Utah 1956), *vacated* 353 U.S. 932 (1957); Delilah Friedler, *The Rise of the Native American Electorate, Mother Jones* (Aug. 27, 2019), *available at* https://www.motherjones.com/politics/2019/08/the-rise-of-the-native-american-electorate/.
[6] *See generally*, Patty Ferguson-Bohnee, *The History of Indian Voting Rights in Arizona: Overcoming Decades of Voter Suppression*, 47 ARIZ. ST. L.J. 1099 (2015).
[7] The 1970 Amendments to the VRA suspended the use of literacy tests as a qualification for voting. Arizona had a literacy test for voter registration and unsuccessfully challenged the prohibition on using literacy tests. *Oregon v. Mitchell*, 400 U.S. 112 (1970).

preclearance formula in 2013, removing one of the most powerful tools to ensure equal access to the ballot for Native Americans, which included two jurisdictions in South Dakota, a jurisdiction in North Carolina, and the states of Alaska, and Arizona.[8] Since that time, efforts to suppress the vote have increased. For Native Americans, these voter suppression efforts can have devastating impacts.

In order to understand the challenges faced by Native American voters, one must recognize the vast differences in experiences, opportunities, and realities facing on-reservation voters as compared to off-reservation voters. Turnout for Native Americans is the lowest in the country, as compared to other groups.[9] While a number of issues contribute to the low voter turnout, a study conducted by the Native American Voting Rights Coalition found that low levels of trust in government, lack of information on how and where to register and to vote, long travel distances to register or to vote, low levels of access to the internet, hostility towards Native Americans, and intimidation are obstacles to Native American voter participation.[10] Further, access to the polls and participation in the political process are impacted by isolating conditions such as language barriers, socioeconomic disparities, lack of access to transportation, lack of residential addresses, lack of access to mail, and the digital divide. Changes to voting processes interact with these isolating conditions to limit Native American voter participation.

Today, the right to vote continues to be challenged through the passage of new laws and practices that either intentionally target or fail to consider the potential disparities the changes could have on Native American voters. It is Congress' duty to fulfill its trust obligation to Native American voters to assure that Indian Country has equal access to voting on federal lands.

II. The Federal Government's Trust Responsibility

The federal government has a trust responsibility to Tribes. The United States' trust responsibility is a well-established legal obligation that originates from the unique, historical relationship between the United States and Indian tribes. Article I, Section 8 of the Constitution states that "Congress shall have the power to regulate Commerce with foreign nations and among the several states, and with the Indian tribes," recognizing that Indian tribes are distinct from the federal government, the states, and foreign nations. Through the Indian Commerce Clause, the United States has authorized Congress to enact laws governing Indian affairs.[11]

---

[8] *Shelby County v. Holder*, 570 U.S. 529 (2013).
[9] Tova Wang, *Ensuring Access to the Ballot for American Indians & Alaska Natives: New Solutions to Strengthen American Democracy* at 3, 6, *available at* https://www.demos.org/sites/default/files/publications/IHS%20Report-Demos.pdf.
[10] NAVRC Study at 3, 5.
[11] Daniel Rey-Bear and Matthew Fletcher, *We Need Protection from our Protectors: The Nature, Issue, and Future of the Federal Trust Responsibility to Indians*, Mich. Journal of Envt'l and Admin. Law, Vol VI: 2, 401 (2017), *available at* https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1063&context=mjeal.

The Supreme Court recognized the trust relationship through the Marshall trilogy – three cases that still define federal Indian law and the relationship between tribes and federal government, while recognizing the inherent sovereignty of tribes.[12] The trust relationship has been defined as the highest moral obligations that the United States must meet to ensure the protection of tribal and individual Indian lands, assets, resources, and treaty and similarly recognized rights.[13]

Further, Congress has plenary power over Indian affairs.[14] Congress has exclusive authority when legislating matters involving Indian Tribes and may regulate pursuant to its Constitutional powers, which are recognized as plenary. Congress has exercised such plenary authority over matters implicating Indian Tribes since the founding of the United States, and is recognized as a political one, not subject even to judicial control.[15] Thus, Congress has the ultimate right to pass legislation governing Native Americans, even when that legislation conflicts with or abrogates Indian treaties. The Supreme Court examined the breadth and scope of Congress's plenary power over matters concerning the Indian Tribes in *United States v. Kagama*.[16] In upholding the power of the Congress to pass legislation governing relations with Indian tribes, the Court explained such authority is implied not only by the general principles of the Constitution, but also by the nature of the federal government's relationship with Indian tribes, with the federal government acting as a protectorate. The relationship between the Tribes and the federal government "is perhaps unlike that of any other two people in existence," with the federal government assuming the role of fulfilling unique, specific, and continuing obligations towards Indian Tribes.[17] By undertaking this responsibility, the federal government has charged itself with "obligations of the highest responsibility and trust".[18] Such obligations are moral, as well as legally enforceable fiduciary obligations that require the federal government to ensure mandates of federal law are properly executed with respect to Tribes. The need for this trust responsibility included the need to protect tribes from the states. The Supreme Court noted in *Kagama* "[b]ecause of the local ill feeling, the people of the states where they are found are often their deadliest enemies."[19]

As Indian law scholars and practitioners Dan Ray-Bear and Matthew Fletcher have observed, despite half a century of the Self-Determination era, Native Americans continue to have

---

[12] *Johnson v. McIntosh*, 21 U.S. 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. 1, 16 (1831); *Worcester v. Georgia*, 31 U.S. 515 (1832).
[13] *See generally* Cohen's Handbook of Federal Indian Law§ 5.04[3] (Nell Jessup Newton ed., 2012); *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942).
[14] *Lone Wolf v. Hitchcock*, 187 U.S. 553(1903); *see generally* Angela R. Riley, *The Apex of Congress' Plenary Power over Indian Affairs: The Story of* Lone Wolf v. Hitchcock, *in* Indian Law Stories 189 (Carole Goldberg et al. eds., 2011).
[15] *Lone Wolf v. Hitchcock*, 187 U.S. 553, 555 (1903).
[16] 118 U.S. 375 (1886).
[17] *Cherokee Nation v. Georgia*, 30 U.S. 1, 10 (1831).
[18] *Cherokee Nation v. Georgia*, 30 U.S. 1, 10 (1831).
[19] *Id.* at 384.

"disproportionately poor levels of health, education, and employment."[20] The trust responsibility requires a duty of good faith, loyalty, and protection.[21] To meet this obligation, they assert that

> Congress should reassert its authority to protect and empower Indians in order to better fulfill the federal trust responsibility and lay a foundation for future efforts to improve the status of Indians. This should be done through federal legislation that reaffirms the basic nature and scope of the trust responsibility; recognizes greater tribal sovereignty; integrates, elevates, and provides ongoing oversight for Indian affairs; and provides sufficient funding to accomplish those goals.[22]

This includes in the area of voting. Given the breadth and scope of Congress's plenary power to legislate on issues pertaining to Indian Tribes, the explicit and implicit powers under the Indian Commerce Clause and Elections Clause, and the duties imposed by the trust responsibility, Congress has the authority and the obligation to provide a legislative solution to the crisis continuously plaguing Native voters.

III. Voting Barriers

Barriers to voting include isolating conditions that reduce opportunities and participation, structural or institutional barriers that limit voter participation through the passage of laws or policies that reduce voter participation, and election administration issues.

Isolating conditions such as language barriers, socioeconomic disparities, lack of access to transportation, lack of residential addresses, lack of access to mail, and the digital divide limit Native American political participation. These isolating conditions limit the ability of Native Americans to participate in elections and run for office. Today, states and counties either fail to consider these realities or intentionally exploit them in ways that gives rise to the modern forms of voter suppression we see in Indian Country. These include closing and moving polling locations out of reservation communities where transportation is limited, limiting access to voting in Indian Country based on a lack of permanently Americans with Disabilities Act compliant buildings on Tribal lands, adopting strict voter ID laws, and the push towards vote by mail, among others.

Poverty

Native Americans face obstacles in voting as a part of their socioeconomic reality. The poverty rate for Native Americans in the US is 26.2%,[23] while the national poverty rate is 14.0%.[24] Native Americans are also more likely to be unemployed and have the highest unemployment rate of any

---

[20] Daniel Rey-Bear and Matthew Fletcher, *We Need Protection from our Protectors: The Nature, Issue, and Future of the Federal Trust Responsibility to Indians*, Mich. Journal of Envt'l and Admin. Law, Vol VI: 2, 398 (2017), *available at* https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1063&context=mjeal.
[21] *Id.* at 399.
[22] *Id.* at 400.
[23] U.S. CENSUS BUREAU, 2016 AMERICAN COMMUNITY SURVEY 1-YEAR ESTIMATES (2016), https://factfinder.census.gov/bkmk/table/1.0/en/ACS/16_1YR/S0201//popgroup~001|006
[24] *Id.*

race at 7.8%, compared to the national average of 4.4%.[25] Native Americans also have the lowest labor force participation rate.[26]

Language Barriers

Many Native Americans also face language barriers when it comes to voting. Some Native Americans have limited English proficiency and require language assistance. There are over 370,000 Native American language speakers.[27] Of these, about 84,000 Native Americans report speaking English "less than very well."[28] Only a handful of Native languages are written and not every speaker can read their native language. Without adequate translations, both oral and written, Native language speakers are at a disadvantage when trying to participate in the electoral process.

Section 203 of the Voting Rights Act requires language assistance to be effective. Specifically, Section 203 mandates "[w]henever any State or political subdivision [covered by the section] provides registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, it shall provide them in the language of the applicable minority group as well as in the English language."[29] As of 2016, jurisdictions in ten states must provide language assistance to Native American and Alaska Native voters under Section 203.[30]

However, not all jurisdictions provide adequate language assistance. Despite the lack of compliance, the Department of Justice has only brought one case to enforce Section 203 in the last ten years.[31] However, during the same period, several tribes brought litigation to enforce the provisions of Section 203, and several jurisdictions admitted to doing nothing to comply with Section 203.[32] In 2014, San Juan County, Utah, moved to an all vote-by-mail system that did not account for translations for Navajo language speakers. Navajo voters who needed language assistance were required to travel several hours round trip to the sole in-person voting location to obtain assistance. In Alaska, two separate lawsuits were filed to secure language assistance for

---

[25] U.S. BUREAU OF LABOR STATISTICS, *Labor force characteristics by race and ethnicity*, 2017 (2018), https://www.bls.gov/opub/reports/race-and-ethnicity/2017/home.htm
[26] *Id.*
[27] JULIE SIEBENS & TIFFANY JULIAN, NATIVE NORTH AMERICAN LANGUAGES SPOKEN AT HOME IN THE US AND IN PUERTO RICO: 2006-2010 1, 2 (2011).
[28] U.S. CENSUS BUREAU, 2013-2017 AMERICAN COMMUNITY SURVEY 5-YEAR ESTIMATES, https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_17_5YR_B16005C&prodType=table (last visited Feb. 6, 2020).
[29] 52 U.S.C. § 10503(c) (2012) (Westlaw through Pub. L. No. 115-90).
[30] Census Bureau, Determinations under Section 203 of the Voting Rights Act, 81 Fed. Reg. 87532 (Dec. 5, 2016).
[31] For a list of the Department of Justice's voting litigation, please visit their website at https://www.justice.gov/crt/voting-section-litigation; *U.S. v. Shannon County*, SD, MOA (April 23, 2010), *available at* https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/shannon_moa.pdf.
[32] ARIZONA STATE UNIVERSITY INDIAN LEGAL CLINIC, NATIVE VOTE – ELECTION PROTECTION PROJECT 2016 ELECTION REPORT 1, 34 (2016).

Yu'pik language speakers under Section 203.[33] After a lawsuit, the government the state of Alaska agreed via a settlement to comply with Section 203 for the purposes of providing language assistance to Native American language speakers. Even though Yu'pik is a written language, state officials were refusing to both written and oral materials in the Yu'pik language.

Infrastructure

As a part of their unique reality, many Tribal communities do not have the same infrastructure and access to information as other Americans. Some of these limitations in infrastructure include lack of paved roads and a digital divide, including the lack of broadband, telephone services, and electricity generally.

The lack of paved roads on reservation lands hinders access to voting locations, including early voting locations, polling locations and voter registration sites. During inclement weather, unpaved roads may become impassable and further impede voters. The Indian Reservation Roads (IRR) program has reported that they take care of more than 144,000 miles of roads and over 60% of those roads are unpaved.[34] According to the BIA, approximately 17,130 miles of existing roads in the National Tribal Transportation Facility Inventory are unimproved and earth surface roads.[35] When considering only BIA and tribal roads, the percent of unpaved roads increases to 80%.[36] In addition, 27% of all the bridges in the IRR system are deficient.[37]

Another unique barrier Native Americans face is the lack of broadband available on reservations. Only 58.3% of all Tribal lands have the option to connect to high-speed broadband, while 97.3% of urban areas have access to high speed broadband.[38] Without internet, Native Americans cannot easily access online voter registration or election polling locations, ballot or even candidate information. Many states mandate polling locations have electricity, which can be problematic for tribes because 14% of homes on reservations have no access to electricity, compared to the national

---

[33] *Nick v. Bethel*, No. 3:07-cv-00098, 2010 WL 11639983, at *1–2 (D. Alaska Jan. 20, 2010); Stipulated Judgment and Order, *Toyokak v. Mallott*, No. 3:13-cv-00137-SLG-LCL (D. Alaska 2014) *available at* https://www.narf.org/nill/documents/20150910_alaska_voting_settlement.pdf..

[34] TRIBAL TRANSPORTATION: PAVING THE WAY FOR JOBS, INFRASTRUCTURE AND SAFETY IN NATIVE COMMUNITIES: HEARING BEFORE THE S. COMM. ON INDIAN AFFAIRS, 112th Cong. 112-424 (2011) (statement of John R. Baxter, Assoc. Adm'r for Fed. Lands, Fed. Highway Adm'r).

[35] ENHANCING TRIBAL SELF-GOVERNANCE AND SAFETY OF INDIAN ROADS: HEARING BEFORE THE S. COMM. ON INDIAN AFFAIRS, (statement of Leroy Gishi, Chief of the Div. of Trans., BIA, DOI).

[36] TRIBAL TRANSPORTATION: PAVING THE WAY FOR JOBS, INFRASTRUCTURE AND SAFETY IN NATIVE COMMUNITIES: HEARING BEFORE THE S. COMM. ON INDIAN AFFAIRS, 112th Cong. 112-424 (2011) (statement of John R. Baxter, Assoc. Adm'r for Fed. Lands, Fed. Highway Adm'r).

[37] *Id.*

[38] FED. COMMC'N COMM'N, FCC RELEASES 2018 BROADBAND DEPLOYMENT REPORT CONCERNING 2018 BROADBAND DEVELOPMENT REPORT (2018), https://www.fcc.gov/document/fcc-releases-2018-broadband-deployment-report.

rate of 1.4%.[39] Accordingly, elections administrators may not provide a polling location on reservations in areas lacking electricity or be forced to rely on generators to sustain the polling location for long periods of time. This creates an added difficulty because the Help America Vote Act (HAVA) statutorily mandates accessible voting machines at every polling location.

Nontraditional Addresses and Home Mail Delivery

While 84% of the U.S. population lives in urban areas,[40] many Native Americans and Alaska Natives live in rural communities. These communities lack traditional street addresses,[41] and locations for homes are usually described in terms of landmarks, cross roads, and directions. Numerous roads on reservations are unimproved dirt or gravel roads, and "many miles of these roads are impassable after rain or snow. Because of the poor quality of the road systems on Indian reservations, many of the roads are unnamed and not serviced by the U.S. Postal Service. . . . A significant number of these reservation residents have no traditional street addresses."[42]

Due to the lack of traditional addresses, "[m]ost reservation residents do not receive mail at their homes and either pay to maintain a post office box in a nearby town or receive their mail by general delivery at a trading post or other location. Some reservation residents have to travel up to seventy miles in one direction to receive mail."[43] In Arizona, for example, only 18% of reservation voters outside of Maricopa and Pima Counties have physical addresses and receive mail at home.[44] The Navajo Nation, the largest reservation in the United States—the size of West Virginia, does not have an addressing program, and most people live in remote communities.[45] The Navajo Reservation has over 10,000 miles of road, 86% of which are unpaved.[46] Residents have "little to no vehicle access, only post office boxes, sometimes shared by multiple families."[47] Similarly, "[t]here is no home delivery in the Tohono O'odham Nation, where there are 1,900 post office boxes and some cluster mail boxes. . . . Residents come to the post office every two or three weeks

---

[39] Global Energy Network Institute, Renewable Energy on Tribal Lands 19, http://www.geni.org/globalenergy/research/renewable-energy-on-tribal-lands/Renewable-Energy-on-Tribal-Lands.pdf (last visited Feb. 6, 2020).
[40] University of Michigan Center for Sustainable Systems, US Cities Fact Sheet, *available at* http://css.umich.edu/factsheets/us-cities-factsheet.
[41] NAVRC Study at 3, 5.
[42] Brief for National Congress of American Indians et al. as Amici Curiae supporting Petitioners, *Crawford v. Marion County* at 11-12 (2008), *available at* https://sct.narf.org/documents/crawford/merits/amicus_ncai.pdf.
[43] Brief of Amici Curiae NCAI at 12, *Crawford v. Marion County* (2008).
[44] *DNC v. Reagan*, 329 F. Supp. 3d at 869-70.
[45] Carrie Jung, *Home Addresses on Navajo Nation are Rare* (Oct 8, 2015), *available at* https://kjzz.org/content/202564/home-addresses-navajo-nation-are-rare-officials-working-change.
[46] FY2019 Navajo Nation Tribal Transportation Plan at 1, *available at* http://navajodot.org/uploads/files/Draft%20FY2019%20NNTTIP_08-20-18.pdf.
[47] *Democratic Nat'l Comm. v. Reagan*, 329 F. Supp. 3d 824, 869 (D. Ariz.), *aff'd,* 904 F.3d 686 (9th Cir. 2018), *reh'g en banc granted,* 911 F.3d 942 (9th Cir. 2019).

to get their mail. Due to the lack of transportation, the condition of the roads, and health issues, some go to post office only once per month."[48]

The lack of traditional addresses can create barriers related to voter registration, voter ID requirements, and the implementation of voting by mail.[49] Native American voters should not face these barriers for the sole reasons of not having a traditional street address or not being able to receive home mail delivery. However, the lack of formal addresses in Indian Country makes it especially hard for voters to comply with address requirements to register to vote or to produce identification in order to vote on election day.[50] Voters may be placed in the wrong precinct, their ID address may not match the voter rolls, and voters may not receive their election mail timely, if at all. Further, they may not receive election mail because they may only check their mailbox once a month due to the distance they must travel to pick up their mail.

Housing

Intertwined with many aspects of the inherent barriers that Native Americans face in voting is the nationwide housing crisis affecting many tribal communities.[51] In a 2017 report, HUD notes that housing availability on reservations and in other tribal communities are considered "extreme by any standard."[52] Homelessness amongst Native Americans has largely taken the form of overcrowding. Homeless Native Americans living on Tribal lands depend upon couch surfing as their primary source of shelter. HUD found that between 42,000 and 85,000 people in Tribal areas are couch surfers, staying with friends or relatives only because they had no place of their own.[53] As a result, nearly 16% of Tribal households experience overcrowding compared to the national rate of 2%.[54]

The lack of housing in tribal communities directly affects the ability of Native Americans to register and to vote. In particular, state and local governments structure many of their voting procedures and policies around requirements of voters proving a physical address. This becomes problematic when registering to vote, complying with voter ID laws, receiving official election mail, and verifying your voter registration against the voter roll at the polls.

---

[48] *Democratic Nat'l Comm. v. Reagan*, 329 F. Supp. 3d at 869.
[49] NATIVE AMERICAN VOTING RIGHTS COALITION, VOTING BARRIERS ENCOUNTERED BY NATIVE AMERICANS IN ARIZONA, NEW MEXICO, NEVADA, AND SOUTH DAKOTA 6 (2018).
[50] Native American Voting Rights Coalition, Voting Barriers Encountered by Native Americans in Arizona, New Mexico, Nevada, and South Dakota at 5 (Jan. 2018).
[51] Les B. Whitbeck, et al., *Correlates of Homeless Episodes Among Indigenous People*, 49 AM. J. CMTY. PSYCHOLOGY 156 (2011).
[52] NANCY PINDUS, ET AL., HOUSING NEEDS OF AMERICAN INDIANS AND ALASKA NATIVES IN TRIBAL AREAS: A REPORT FROM THE ASSESSMENT OF AMERICAN INDIAN, ALASKA NATIVE AND NATIVE HAWAIIAN HOUSING NEEDS 1, 76, 82, 58 (Jan. 2017).
[53] NANCY PINDUS, ET AL., HOUSING NEEDS OF AMERICAN INDIANS AND ALASKA NATIVES IN TRIBAL AREAS: A REPORT FROM THE ASSESSMENT OF AMERICAN INDIAN, ALASKA NATIVE AND NATIVE HAWAIIAN HOUSING NEEDS 1, 76, 82, 58 (Jan. 2017).
[54] *Id.*

Access to Polling Locations

Increasing accessibility to voting locations, early voting and election day polling locations, is crucial to the protection of Native American voting rights.[55] In a 2018 survey conducted by the Native American Voting Rights Coalition, 10% of respondents in New Mexico, 15% in Arizona, 7% in Nevada, and 29% in South Dakota identified distance from polling locations as one of the many problems associated with in-person voting.[56] Early voting opportunities with polling locations hours away effectively amount to no access to in-person early voting in light of the practical effects of requiring voters to travel such distances. The federal district court in Nevada acknowledged the reality that these distances impede voting when it found that a polling location 16 miles away from the Pyramid Lake Paiute Reservation constituted an unburden on voters.[57] This undue burden is not unique to voters living on the Pyramid Lake Paiute Reservation. For example, in Mohave County, Arizona there were only three in-person early voting locations countywide. Most residents of the County lived near one of these locations, however, for the Kaibab-Paiute Tribe the closest of the three locations was located 285 miles away, and required on-reservation voters to travel for five to seven hours if they wanted to vote early in person.[58] These distances and compounded by the socioeconomic difficulties Native American voters face because of a decreased access to public transportation, personal transportation, or requisite funds to travel such distances simply to vote.

Vote by Mail

Vote by mail is not a simple or easy task for Native American voters. Native Americans are less likely to have mail delivered to their homes, especially when living on tribal lands.[59] Many on-reservation voters live in rural areas where it is common for mail to arrive late or not at all. Reservation residents often rely on post office boxes that may be 45 minutes to a 2-hour drive away.[60] The difficulties accessing mail make voting by mail difficult because traveling to the P.O. Box to pick up your ballot and then returning it can be an all-day task, without a car, it may be impossible. Voting early by mail on-reservation is largely unreliable. Thus, vote by mail is not as accessible for Native Americans living on reservation as it is for off-reservation voters.

Vote-by-mail can effectively eliminate voting opportunities for some Native American and Alaska Native Communities if no polling locations are available within the tribal communities. In 2008, the Alaskan government eliminated polling locations for Alaska Native villages as part of a "district realignment" that resulted in voters having to travel by plane in order to vote.[61] Alaska

---

[55] NAVRC Study at 41.
[56] *Id.*
[57] *Sanchez v. Cegavske*, 214 F. Supp. 3d 961, 976 (D. Nev. 2016).
[58] ARIZONA STATE UNIVERSITY INDIAN LEGAL CLINIC, NATIVE VOTE – ELECTION PROTECTION PROJECT 2016 ELECTION REPORT 1, 21 (2016).
[59] *Id.* at App. IV at 7.
[60] *Id.*
[61] Natalie Landreth, Why Should Some Native Americans Have to Drive 163 Miles to Vote?, The Guardian (June 10, 2015), *available at* https://www.theguardian.com/commentisfree/2015/jun/10/native-americans-voting-rights

contemplated moving to a vote-by-mail system and Alaskan Native voters responded with extreme concerns. Because mail is delivered via plane, Alaska Natives already have to wait two to three weeks to receive mail, and even longer if service is delayed by weather conditions. With federal elections taking place in October and November, delays caused by inclement weather render mail-in elections impracticable in Alaska. In 2016, the Pyramid Lake and Walker River Paiute Tribes in Nevada filed a lawsuit prior to the 2016 general election in order to get polling locations on the reservation.[62] In 2016, San Juan County, Utah switched a mail-only voting system and offered in-person early voting only in the majority white part of the County; the Navajo Nation sued to ensure in-person locations and compliance with the language assistance requirements under Section 203 of the Voting Rights Act. In North Dakota, closure of polling locations on the Mandan Hidatsa Reservation resulted in voters having to travel 80-100 miles in order to cast a ballot. For the Kaibab Paiute Tribe in Arizona, voters had to travel 280 miles one way in 2016 and 2018 in order to vote early in person. When Pima County closed early voting on the Pascua Yaqui Reservation in 2018, Pascua Yaqui voters reported that it took over two hours to participate in early voting using public transportation.

Moving to vote by mail will preclude Native Americans and Alaska Natives living in communities with unreliable mail delivery systems. Native Americans in many states, including Arizona, New Mexico, Nevada, and South Dakota, do not trust mail-in voting systems. Mail in tribal communities is untimely and inconsistent, creating a preference for Native American and Alaskan Native voters to vote in person.

Voter Identification Barriers

As a natural consequence of the socioeconomic conditions already mentioned, Native Americans are less likely to have the forms of identification that satisfy state law. Thirty-six states have laws requiring voters to show some form of identification at the polls.[63] Of these thirty-six states, only nine (Alabama, Arizona, Idaho, Michigan, North Carolina, South Dakota, Utah, Virginia and Washington) explicitly allow tribal identifications as a form of identification.[64] Of the nine states that allow tribal identifications, four explicitly require tribal identifications to have photos.[65]

Although many Tribes issue IDs, not all Tribes do, and even if they do, they may lack a residential address or a photo.

("[I]magine if you had to take a plane flight to the nearest polling place because you cannot get to it by road, which was the case for several Native communities in 2008, when the state of Alaska attempted a "district realignment" to eliminate polling places in their villages. And that's just half the trip").

[62] Jennifer Solis, *"Tribes get their own polling places, some for the first time,"* Nevada Current (Oct. 31, 2018).

[63] National Conference of State Legislatures, *Voter Identification Requirements: Voter ID Laws* (Jan. 1, 2020), https://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx

[64] *Id.*

[65] *Id.*

A voter ID law requiring a residential address went into effect in North Dakota right before the 2018 midterm elections.[66] This law expressly excluded the use of PO Boxes as residential addresses. Over 5,000 Native Americans lacked the requisite form of ID to participate in elections, and none of the six reservations has residential addresses.[67] While Tribes took actions to try to issue free Tribal IDs meeting the new requirements, they often expended resources they did not have.

During the 2006 election, 428 Navajos in Arizona voted provisional ballots that were never counted because they did not present identification at the polls. The Navajo Nation sued alleging that the voter ID law violated Section 2 of the Voting Rights Act; the parties settled expanding the acceptable forms of identification to include certain forms of tribal ID. Despite the settlement, valid forms of tribal identification poll workers continue to reject acceptable tribal IDs in each election due to insufficient poll worker training or because of problems arising with non-traditional reservation addresses.

Lack of Access to Voter Registration

Online voter registration is a tool that states continue to adopt and currently thirty-nine states and Washington D.C. employ this new technology.[68] If a Native American voter living on Tribal lands has access to the Internet, many states offering online registration require that a state-issued ID be utilized in the process thus excluding on-reservation voters who lack state identification.[69]

In several areas throughout the United States, Native Americans report lower awareness of how and where to register to vote and in general, report lower levels of activity by third party groups to conduct registration drives.[70] In a recent survey, ten percent of Native Americans cited long distance travel as a factor in their decisions to not register to vote.[71]

Discrimination

In some areas of the country, Native Americans face discrimination in voting. In San Juan County, nonIndians called Navajo voters "savage," and made other racist comments when they secured an additional representative on the county board of supervisors. In a recent survey conducted by NPR and the Robert Wood Johnson Foundation, they found that "[o]ne in ten Native Americans say they have been personally discriminated against because they are native when trying to vote or

---

[66] Maggie Astor, "A Look at Where North Dakota's Voter ID Controversy Stands," (Oct. 19, 2018), *available at* https://www.nytimes.com/2018/10/19/us/politics/north-dakota-voter-identification-registration.html?module=inline.
[67] Astor, "A Look at Where North Dakota's Voter ID Controversy Stands."
[68] National Conference of State Legislatures, *Online Voter Registration* (Feb. 3, 2020), https://www.ncsl.org/research/elections-and-campaigns/electronic-or-online-voter-registration.aspx
[69] *Id.*
[70] NATIVE AMERICAN VOTING RIGHTS COALITION Survey at 41.
[71] *Id.*

participate in politics."[72] In this survey, 15% of Native Americans reported that they observed discrimination when Native Americans tried vote.[73]

A recent decision by the Ninth Circuit Court of Appeals found that specific election laws, one discarding ballots cast out of precinct and one prohibiting ballot collection drives, had a discriminatory impact against Native Americans.[74] Furthermore, the court found that the ban on ballot collection was specifically passed with discriminatory intent to eliminate voting efforts utilized by minority communities, including Native Americans. The Ninth Circuit found that the ballot collection law disenfranchised Native Americans and held that it violated Section 2 of the Voting Rights Act and the 15th Amendment.

IV. Conclusion

More must be done to address the voting disparities in Indian Country. Although Native Americans have been citizens for almost a century, Native Americans still lack equal access to the ballot box. More should be done to ensure that Native Americans can exercise their right to register to vote, vote, and have access to language translations.

[72] Discrimination in America: Experiences and Views of Native Americans (Nov. 2017), *available at* https://www.rwjf.org/content/dam/farm/reports/surveys_and_polls/2017/rwjf441678/
[73] *Id*.
[74] *DNC v. Hobbs*, No. 18-15845 (9th Cir. Jan. 27, 2020).

Chairperson FUDGE. Thank you very much.

Mr. Norquay, you are recognized for five minutes, and again, I thank you for your service.

STATEMENT OF ELVIS NORQUAY

Mr. NORQUAY. Thank you, ma'am.

My name is Elvis A. Norquay, and I am from the Turtle Mountain band of Chippewa Indians. I am a veteran of the United States Marine Corps. I am a citizen of the United States. I have lived on and around the Turtle Mountain Reservation over the past 30 years.

In November 2014, I went to the KC hall to vote but was turned away. I have voted many times for years before being turned away. I was always happy to go vote. Being turned away knocked me down. It turned out North Dakota started requiring ID and addresses to vote. I didn't have an ID with an address on it. We are homegrown people. We don't need the residential ID. We know where everybody lives. Sometimes the homes on the reservation don't have addresses, and sometimes people don't have homes. I have been a homeless veteran. So sometimes I don't have an address. I don't have a car. I can't afford to get an ID. I still think I deserve to vote. Voting means to make our country better and see who can run it better. Thank you.

[The statement of Mr. Norquay follows:]

Written Statement of Elvis A. Norquay
Voter, Turtle Mountain Band of Chippewa Indians Member
Before the Subcommittee on Elections of the Committee on House Administration
United States House of Representatives
February 11, 2020

My name is Elvis A. Norquay, and I am from the Turtle Mountain Band of Chippewa Indians. I am a veteran of the U.S. Marine Corps. I am a citizen of the United States. I've lived on and around the Turtle Mountain reservation for the past 30 years. In November of 2014 I went to the KC hall to vote but was turned away. I voted many times for years before being turned away. I was always happy to go vote. Being turned away brought me down.

It turned out North Dakota started requiring ID and addresses to vote. I didn't have an ID with an address on it. We're homegrown people. We don't need the residential ID. We know where everybody lives. Sometimes the homes on the reservation don't have addresses. And sometimes people don't have homes. I've been a homeless veteran so sometimes I don't have an address. I don't have a car. I can't afford to get a new ID. I still think I deserve to vote. Voting means to make our country better and see who can run it better.

Chairperson FUDGE. Thank you. And yes, you do deserve to vote. Ms. De León, you are recognized for five minutes.

STATEMENT OF JACQUELINE DE LEÓN

Ms. DE LEÓN. Thank you, Chairman Lofgren and Ranking Member Davis, Chairperson Fudge, and Members of the Subcommittee for having me here today.

Thank you, Congressman Luján and Senator Udall, for introducing the Native American Voting Rights Act.

I am here to testify in support of this important bill. My name is Jacqueline De León. I am a member of the Isleta Pueblo and a staff attorney for the Native American Rights Fund, the Nation's oldest and largest nonprofit law firm dedicated to advancing the rights of Native Americans.

In 2015, NARF began the Native American Voting Rights Coalition focused on increasing Native American access to the political process. Over two years, the NAVRC completed a series of nine field hearings on the state of voting rights in Indian Country. I, along with NARF's pro bono counsel, Dr. James Tucker, had the honor of attending all of these hearings; 125 witnesses shared their experiences of voting. I am carrying their stories with me here today.

Unfortunately, I come with dire news. Native Americans are facing an onslaught of unjust barriers that keep them from voting. Today I am going to focus on conditions that would be improved by NAVRA: the unreasonable distance many Tribal members must travel to register and cast their votes, identification requirements, and the importance of flexible language provisions.

Finally, I will provide the Committee with a few instances of overt racism which highlight the need for Federal reform.

Native Americans have to travel, frankly, absurd distances to register. Voters from Nevada Tribes identified travel distance as the single biggest obstacle to registering. The closest elections office to the Duckwater Reservation is 140 miles each way. Pyramid Lake faces a 100-mile round trip, and the Walker River Reservation faces 70 miles.

NAVRA's extension of NVRA requirements to Federal programs servicing Native people increases registration opportunities if States are required to give registrations with SNAP applications. The Department of Agriculture should likewise be required to give out and collect registration forms for their commodity program.

Additionally, polling places are usually located in Non-Native communities. In Bighorn County, Montana, Native voters must travel twice as far to reach their polling elections as non-Natives. This is but one example of many. Long distances are costly because they take time to travel, require missed work, childcare, a vehicle, and gas money. What is more, this travel is on dirt roads which may be impassable in the winter month of November.

But even more damaging is the message that remote polling places convey to voting Tribal members. These distances communicate: Your vote doesn't matter. The system is not for you.

Mandating polling places on Tribal lands, as NAVRA does, will dramatically decrease travel time for thousands of Native Americans across the country, and this is much-needed reform.

Next, it is unreasonably difficult for many Native Americans to get State IDs. State-run DMVs are far. For example, in Keshena, Wisconsin, Tribal members must travel over an hour to get to the nearest DMV that is regularly open. Additionally, for impoverished Native Americans, even nominal fees can present a barrier, yet Tribal IDs are not automatically accepted. Just last week, South Dakota's House rejected allowing Tribal IDs to register to vote. NAVRA's provision mandating acceptance of Tribal IDs allows Tribes to provide IDs to their own members so they can vote.

Section 203 of the Voting Rights Act removes language barriers by requiring covered jurisdictions to provide language assistance. NAVRA would provide necessary relief by extending section 203 to Native voters whose languages are traditionally unwritten.

Finally, discrimination is not just a relic of the past or the effect of past wrongs. Native Americans continue to experience discrimination when they attempt to vote. In Arizona, racial tensions are so high between the Kaibab Band of Paiute Indians and the border town next to the reservation that border town residents regularly block the flow of water into the reservation. And for years, Tribal members were forced to vote in that same border town.

In South Dakota, voters were forced to vote in a repurposed chicken coop.

In Montana, the number of registration cards accepted by county officials from Native community organizations was arbitrarily limited to 70, creating an unnecessary barrier to registration.

In South Dakota, the Buffalo County seat located in Gann Valley has full early voting access. Gann Valley only has a population of 12 people. And yet 25 miles away on the Crow Creek Reservation, Fort Thompson's 1,200 residents had no early voting. Despite calls from activists to provide a polling location in Fort Thompson and despite HAVA funding being available, the county auditor refused and instead decided to forego the usage of the funds altogether. It is these local discriminatory actions that call out for Federal relief and oversight.

In sum, as one Tribal member explained, yes, I would like you, person at the poll, to respect me as a Native American, respect my culture. But if you can't do that, treat me as a human being and respect my elders and respect my children. Likewise, we ask for no more and no less than equal opportunity for all Native Americans to vote. Thank you for having me here today, and I am happy to answer any questions.

[The statement of Ms. De León follows:]

Written Statement of Jacqueline De León

Staff Attorney for the Native American Rights Fund

Before the Subcommittee on Elections Committee on Administration

United States House of Representatives

February 11, 2020

Thank you Chairwoman Lofgren and Ranking Member Davis, Chairwoman Fudge, and Members of the Subcommittee, for having me testify today. Thank you Congressman Luján for introducing the Native American Voting Rights Act. I'm here to testify in support of this important bill. My name is Jacqueline De León, I am a member of the Isleta Pueblo, and I am a staff attorney with the Native American Rights Fund ("NARF"). Since 1970, NARF has provided legal assistance to Indian tribes, organizations, and individuals nationwide who might otherwise have gone without adequate representation. NARF has successfully asserted and defended the most important rights of Indians and tribes in hundreds of major cases, and has achieved significant results in such critical areas as tribal sovereignty, treaty rights, natural resource protection, and Indian education. NARF is a non-profit 501(c)(3) organization that focuses on applying existing laws and treaties to guarantee that national and state governments live up to their legal obligations.

NARF is headquartered in Boulder, Colorado, with branch offices in Washington, D.C., and Anchorage, Alaska. NARF is governed by a volunteer board of directors composed of thirteen Native Americans from different tribes throughout the country with a variety of expertise in Indian matters. A staff of seventeen attorneys handles over fifty major cases at any given time, with most of the cases taking several years to resolve. Cases are accepted on the basis of their breadth and potential importance in setting precedents and establishing important principles of Indian law.

In 2015, NARF began the Native American Voting Rights Coalition, or NAVRC, a coalition of national and regional grassroots organizations, academics, and attorneys advocating

for the equal access of Native Americans to the political process.[1] It was founded to facilitate collaboration between its members on coordinated approaches to the many barriers that Native Americans face in registering to vote, casting their ballot, and having an equal voice in elections.

Led by NARF, in April 2018 the NAVRC completed a series of nine field hearings in seven states on the state of voting rights in Indian Country. I, along with my colleague, NARF's pro bono counsel, Dr. James Tucker, had the honor of attending all of these hearings. Approximately 125 witnesses from dozens of tribes in the Continental United States generated thousands of pages of transcripts with their testimony about the progress of the Native Americans in non-tribal elections, and the work that remains to be done.

The field hearings were conducted at the following locations: Bismarck, North Dakota on September 5, 2017; Milwaukee, Wisconsin on October 16, 2017; Phoenix, Arizona on January 11, 2018; Portland, Oregon, on January 23, 2018; on the tribal lands of the Rincon Band of Luiseño Indians north of San Diego, California, on February 5, 2018; Tulsa, Oklahoma on February 23, 2018; on the tribal lands of the Isleta Pueblo just outside of Albuquerque, New Mexico on March 8, 2018; Sacramento, California on April 5, 2018; and on the tribal lands of the Navajo Nation in Tuba City, Arizona on April 25, 2018. Field hearings were not conducted in Alaska because the Alaska Advisory Committee to the U.S. Commission on Civil Rights already had a similar effort underway. Coalition members also were familiar with Alaska's barriers after several years of voting rights litigation there.

Witnesses included tribal leaders, community organizers, academics, politicians, and Native voters. They shared their experiences in voter registration and voting in federal, state, and local (non-tribal) elections. I am carrying their stories with me here today. Unfortunately, I come with dire news. Native Americans are faced with unjust barriers that prevent their access to the ballot box.

We were able to identify common factors discouraging political participation, including: (1) geographical isolation; (2) physical and natural barriers; (3) poorly maintained or non-existent roads; (4) distance and limited hours of government offices; (5) technological barriers and the digital divide; (6) low levels of educational attainment; (7) depressed socio-economic conditions; (8) homelessness and housing insecurity; (9) non-traditional mailing addresses such as post office boxes; (10) lack of funding for elections; (11) and discrimination against Native Americans.

In addition to this daunting list of factors, language is "one of the closing gaps in the election process" for Native American voters. Under the 2011 determinations of jurisdictions that required language assistance, Native American languages were the second most common language group after Spanish. Section 203 language assistance protections were required in 33 political subdivisions in five states. This rose to 35 jurisdictions in nine states in the 2016 determinations.

---

[1] For more information about the NAVRC, *see About the Native American Voting Rights Coalition*, *available at* https://www.narf.org/native-american-voting-rights-coalition/.

Despite these broad protections, jurisdictions have often failed to provide the required translations, forcing Native American voters to file lawsuits in Alaska, Arizona, New Mexico, and Utah.

The field hearings revealed that Native American voters faced significant hurdles at the very first step to voting: registration. Despite the protections offered by the National Voter Registration Act (NVRA), the Help America Vote Act (HAVA), and the VRA, the field hearings revealed that there were many barriers to registration: (1) lack of traditional mailing addresses, (2) homeless and housing instability, (3) voter identification requirements (which can be hard for many Native Americans to obtain), (4) unequal access to online registration, (5) unequal access to in-person voter registration, (6) restrictions on access to voter registration forms, (7) denial of voter registration opportunities due to previous convictions, (8) rejection of voter registration applications, (9) voter purges, and (10) failure to offer registration opportunities at polling places on Election Day.

Even if Native Americans are able to register, the field hearings showed that they then face another set of barriers to actually casting a ballot. These include: (1) unequal funding for voting activities in Indian communities; (2) lack of pre-election information and outreach; (3) cultural and political isolation; (4) unequal access to in-person voting; (5) unequal access to early voting; (6) barriers *caused* by vote-by-mail, which are numerous; (6) barriers posed by state laws that create arbitrary population thresholds in order to establish polling places; (7) the use of the ADA to deny polling places on reservation lands; and (8) the lack of Native American election workers.

The field hearings revealed yet another set of hurdles in the form of barriers to having their ballots counted. Assuming a Native American can register and then vote, they then faced additional barriers including: (1) lack of ballot canvassing opportunities; (2) failure to count ballots cast out-of-precinct; (3) ballot harvesting bans and similar laws; and (4) lack of information about ballot status (whether it was counted) and the inability to correct errors.

A much more thorough review of these factors is found in our Field Hearing Report, which is in production and will be submitted to this committee in support of this hearing.

Today, I am going to focus on the unjust geographical distance many tribal members must travel to reach a registration site and/or polling place and the hardships that arise from that distance, identification requirements to vote and the unique problems that arise in Indian Country, and the importance of flexible language provisions. Finally, I will provide the Committee with a few instances of overt racism which highlight the need for federal reform.

The Tyranny of Distance

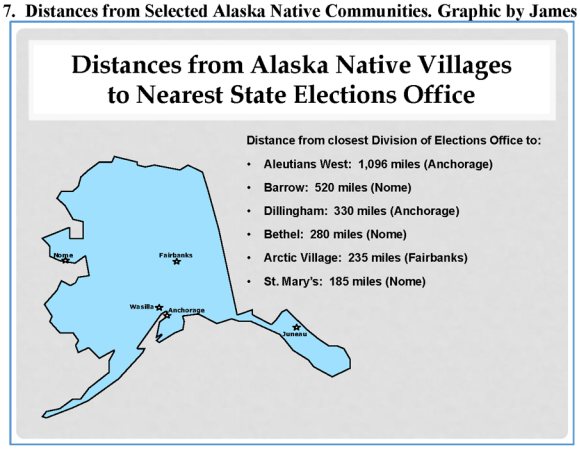
Distances to Register to Vote

Native Americans have to travel vast distances to get to the off-reservation communities that provide them with critical services such as driver's licenses their local election offices to register to vote. "Time is the principal cost of voting: Time to register; to discover what parties are running; to deliberate; to go to the polls; to mark the ballot. Since time is a scarce resource,

voting is inherently costly." That means that the greater the distance to register or to actually vote, the less likely someone is to cast a ballot," or what is referred to as "the tyranny of distance."[2]

Nowhere are distances and travel times greater than they are for Alaska Natives living in remote communities spread throughout Alaska and its Aleutian Islands chain. Those distances generally require using jet service that can cost hundreds, and in some cases even thousands, of dollars to some of the most economically disadvantaged populations in the United States.

Figure 7. Distances from Selected Alaska Native Communities. Graphic by James Tucker



Although the distances and travel times are less extreme than those faced by many Alaska Native villages, they can still prevent tribal members in other areas of the United States from accessing government services including voter registration.

Voters surveyed from the Duck Valley, Pyramid Lake, Walker River and Yerington Tribes in Nevada identified travel distance as "the single biggest obstacle to registering. Among those who were registered to vote, 10 percent stated that it was difficult for them to travel to register. Among [those] … not registered, a whopping 34 percent said that it would be difficult for them to travel to a place to register… But travel distance was also identified by the respondents as a major factor that inhibited voting…"[3]

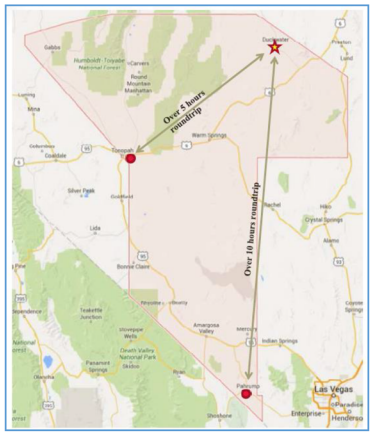
In Nye County, Nevada, the combined effect of geographical isolation and mountainous terrain results in lengthy travel times to get to either of the County's two election offices. The closest elections office is in Tonopah, 140 miles each way by road from the Duckwater Reservation. The Pahrump elections office is 303 miles each way by road. Travel time is at least five hours or ten hours, respectively, if the weather conditions permit.

---

[2] Bismarck Tr., Gerald Webster, 250-52.

[3] San Diego Tr., Jean Schroedel, 17-18.

Figure 8. Travel times from the Duckwater Reservation to Nye County, Nevada elections offices. Map by James Tucker



Travel time for many other Nevada tribes is several hours to reach county seats and non-tribal elections offices. Voters on the Pyramid Lake Reservation have as much as a 100-mile round-trip drive to get to the elections office in Reno. Voters on the Walker River Reservation have a 70-mile round-trip drive to get to the county office in Schurz.[4]

Southwestern tribes face similar barriers. Navajos in San Juan County, Utah living on tribal lands have to drive to Blanding or Monticello for any government services. From Navajo Mountain, Utah, which is near Lake Powell, it is about 200 miles (a four or five-hour drive) each way, weather conditions permitting. It requires driving south into northern Arizona on U.S. highway 98 to U.S. highway 160 in Navajo County, Arizona to U.S. highway 191 north back into Utah.[5]

Montezuma Creek is the closest Navajo community to Monticello, which is a 75 mile drive each way. "So in order for people to do business … like vehicle registration, any healthcare issues, as well as voting issues," it is necessary to travel great distances. "That's a burden to our people." It poses difficulties in giving Native voters "more say in the decision-making at the county level."[6]

---

[4] San Diego Tr., Jean Schroedel, 21-22; San Diego Tr., Amy Nantkes, 47-48, 50-51.

[5] Isleta Tr., Terry Whitehat, 11-18.

[6] Isleta Tr., Wilfred Jones, 16.

Northern Plains tribal members also have to travel great distances to reach their county government offices. In Montana, some members of the Northern Cheyenne Tribe have to drive as much as 120 miles roundtrip. Many tribal members of the Confederated Salish and Kootenai Tribes of the Flathead Nation have roundtrip drives of up to 140 miles, and those on the Crow Indian Reservation have as much as a 150-mile roundtrip drive.[7] For a potential Native voter on the Standing Rock Reservation, the mean distance to a driver's license site is nearly 61 miles. From the Fort Berthold Reservation to a driver's license office is nearly 50 miles.[8]

In Wisconsin, Native Americans face significant barriers registering to vote because the Department of Motor Vehicles is only open sometimes and in some places in Northern Wisconsin, where many tribal members live, only one day out of the month. Tribal members may have to drive up to 90 miles because of the limited locations where voter registration is available. Currently, the only in-person registration locations are through the township clerk, county clerk, and Department of Motor Vehicles.[9]

The provisions of the Native American Voting Rights Act extending National Voter Registration Act protections to federal programs servicing Native people is a practical way of increasing registration opportunities to Native communities.

Polling Place Distance

Additionally, Native voters generally must travel greater distances to get to their polling places than non-Native voters living in the same counties. Often, polling places are located in predominately non-Native county seats or non-Native communities. In Arizona, the nearest polling place for some tribes is off reservation.[10] The closest polling station to the Kaibab Paiute Tribe is about 30 miles away. One community is located on the east side of the reservation 15 miles farther away, which means they must travel about 90 miles roundtrip to vote at their polling place.[11]

Tribes in California face similar issues. Distance poses a barrier to getting to polling places for many members of the Karuk Tribe. People living in communities like Seiad or Horse Creek have to travel 40 to 50 miles roundtrip to a polling place in Happy Camp.[12] Prior to 2018, when the Thule River Reservation was finally able to get a polling place, voters had to drive about 50 miles roundtrip to vote, despite having 700 members of voting age.[13]

---

[7] Bismarck Tr., Stewart- Peregoy, 103 (Crow, Northern Cheyenne); Bismarck Tr., Erica Shelby, 140, 157 (Flathead).

[8] Bismarck Tr., Gerry Webster, 270 (Standing Rock).

[9] Milwaukee Tr., Paul Demain, 69-78, 79-86, 94, 96, 110-13.

[10] Phoenix Tr., Solveig Parson, 16.

[11] Phoenix Tr., Roland Maldonado, 120-21.

[12] Sacramento Tr., Buster Attebery, 66.

[13] Sacramento Tr., Thomas Eugene, 29.

In Minnesota, a member of the Mille Lacs Band of the Ojibwe explained that distances pose a significant barrier to many members of the state's eleven tribes. They commonly must travel 40 miles roundtrip to vote.[14] Similar barriers are present for tribes throughout Montana. On the Flathead Reservation, which comprises two-thirds of the land mass of Lake County and is about 1.2 million acres, tribal members requested that the County open two satellite voting offices. County officials chose to place them in two remote locations far from the larger tribal communities. The satellite offices are located just four miles apart, with one accessible to 200 Native voters and the other to 40 Native voters. Hundreds of other Native voters had to travel vast distances to reach those offices.[15]

In Blaine County, Montana, when the Lodge Pole precinct was merged with the Hays precinct, Native voters were forced to travel up to 114 miles roundtrip to their new polling location.[16] In Big Horn County, the distances are not as great, but Native voters nonetheless must travel twice as far to reach their polling places as non-Natives, 44 miles round-trip for Natives compared to 23.2 miles for non-Natives.[17] Native voters who live in Hot Springs, Montana, must drive 94 miles roundtrip to reach their polling place in Thompson Falls.[18]

Distance also is an issue for Native voters in Nevada because of the isolated location of several reservations, many of which lack polling places. Native voters often have to drive 80 to 100 miles roundtrip to cast a ballot.[19] On the Pyramid Lake Reservation in Nevada, 99-year old Flora Green, a tribal member, had never cast a ballot in a non-tribal election. She explained, "I have never had the opportunity to vote here on my reservation." When a polling place was opened on the reservation for the first time in 2016 as a result of the *Sanchez* decision, Ms. Green was able to vote for the first time.[20].[21]

The Goshute voters in Utah have to drive over an hour each way to get to their polling place. Citizens of the Ute Nation must drive about 45 minutes each way to their polling place. Many lack access to transportation, and no public transportation is available.[22]

These are just some examples of the distances that must be traversed in order for Native Americans to cast a ballot. But the distance is just part of the story. Travelling distance is costly because it takes a significant amount of time, missed work, and necessitates childcare, but also because it requires a vehicle and gas money, which many impoverished Native Americans simply

---

[14] Milwaukee Tr., Carolyn Beaulieu, 119-29.

[15] Bismarck Tr., Erica Shelby, 128; Bismarck Tr., Gerald Stiffarm, 128.

[16] Bismarck Tr., Gerald Stiffarm, 75.

[17] Bismarck Tr., Gerald Webster, 257.

[18] Bismarck Tr., Patrick Yawakie, 202.

[19] Sacramento Tr., Beverly Harry, 4-5.

[20] San Diego Tr, Amy Nantkes, 47-48.

[21] Isleta Tr., Terry Whitehat, 37; Tuba City Tr., James Attakai, 14.

[22] Tuba City Tr., Moroni Benally, 32, 37-38, 42.

lack. This is to say nothing of the fact that traversing these distances on dirt and gravel roads may be all but impossible in the winter month of November. But even more damaging, is the message that remote polling places convey to voting tribal members: your vote does not matter; this system is not for you. Mandating polling places on tribal lands, and allowing tribes to designate buildings for every precinct within their lands where tribal members can vote that makes sense to them, will dramatically decrease travel time for thousands of Native Americans across the country. This is a much needed reform.

Identification

> *[W]e were the first here, and we were the last to get the right to vote. We were here for thousands of years. My tribe never moved. . . . I live a stone's throw away from where my great grandfather was born in a wigwam. . . . this is my community. And to have these things thrown at us . . . nitpicking of these IDs and all this kind of thing, it's like we have to prove that we're able to vote in a system that's being pressed on us."*[23]

For most Americans, obtaining an identification is a rite of passage. Getting a driver's license is a simple act of going to the local Department of Motor Vehicles (DMV), the complicated part is passing the driver's test. But for many Native Americans, this rite of passage does not exist. There are numerous reasons why some Native Americans do not have or need identification. As states increasingly move toward requiring identification to register or vote, however, Native Americans are being excluded from accessing the ballot box. Following implementation of voter ID laws, heavily Native American areas have seen a "sharp decrease in voters"[24] and reports of hundreds of ballot rejections because of a lack of identification.[25]

Obtaining a state issued ID is unreasonably difficult for many Native American voters. State run DLS or DMVs are not present on reservation lands.[26] Consequently, Native Americans have to travel off the reservation in order to obtain a state issued ID. The distances to many of these DMVs is prohibitively far, with tribal members describing traveling over an hour to get a state issued ID.[27] For example, in Keshena, Wisconsin, tribal members describe having to drive an hour and 20 minutes to the nearest DMV.[28] In North Dakota, tribal members must travel an average

[23] Milwaukee Tr., Stephanie Thompson, 46-47.

[24] Phoenix Tr., Steve Titla, 245.

[25] Phoenix Tr., Solveig Parson, 19.

[26] Milwaukee Tr., Paul DeMain, 72-73.

[27] Milwaukee Tr., Stephanie Thompson, 23-24.

[28] Milwaukee Tr., Stephanie Thompson, 23.

of an hour to reach the nearest DLS, with the average Standing Rock Sioux member having to travel over an hour and a half to reach the nearest site.[29]

Even when a DMV may be located closer, tribal members describe having to make a "60 to 80, 90 mile drive" to access DMVs that are open on a consistent basis that provide full services.[30] One anecdote describes the burdens one voter had to face to try and get obtain an ID:

> … for four months she was taking a woman because there is a DMV that's in the next town over, it's open one day a week. And so you kind of – you have to make that one day trip over, about 20 miles away, in order for you to go there the one day a week, otherwise you miss your opportunity and then you have to drive a substantial amount away in order to get to the next DMV that's open more regularly. So she had been taking this woman for four months, taking this woman down to this DMV office [located in Minocqua, Wisconsin] that's open one day a week. They continuously were having computer issues. So after four months of trying to get this woman to get her ID so she was able to register early, she ended up kind of throwing her hands in the air and took this woman – like they had to take an entire day trip to get her to the nearest DMV which was open and available during the times that she had. There's a lot of stories like that that I keep running into.[31]

For impoverished Native Americans, the cost of an identification is often prohibitively expensive. Even nominal fees for an identification can present a barrier.[32] Moreover, drivers' licenses are not required for every day life, so expenditure on an identification is not a priority. One tribal leader described how their members "don't want to pay for an ID because a lot of them don't even have a bank account. We have our own bank system, so with their Tribal ID, they can cash any check that they're given through our social system with that. So why would they pay for other thing—the other ID if they don't have a reason for it."[33]

Obtaining a state ID usually requires underlying documentation. One advocate described how "we really oppose ID" because "[w]e see many elders struggling to get a birth certificate, to get a driver's license" She detailed how an elderly tribal member's birth certificate was not usable because it did not have her name on it since "her birth certificate was in the day when they named her 'Baby Girl"[34] Simply put, "the types of ID initially listed as accepted as terms of proof did not take into consideration the types off documents that are easily accessible to Native American

---

[29] Professor Gerald Webster, An Analysis of the Effects of North Dakota's Voter Identification Law on Potential white and Native American Voters, Appendix, 22

[30] Milwaukee Tr., Paul DeMain, 72-73.

[31] Milwauke Tr. Stephanie Thompson, 23-24.

[32] Sacramento Tr., Alex Padilla, 109.

[33] Portland Tr., Norma Sanchez, 157-158.

[34] Isleta Tr., Andrea Weahkee, 197.

voters."[35] As a consequence "Native American voters had a very difficult time obtaining a photo identification."[36]

Yet, despite how unreasonably difficult it is for Native American to get a state ID, tribal IDs are not automatically accepted for registration and voting purposes. Not all states include tribal IDs when crafting their ID laws. Just last week South Dakota's House rejected allowing tribal IDs to register to vote.[37] The Secretary Treasurer of the Mille Lacs Band of the Ojibwe explained how, even though tribal IDs were now accepted in Minnesota, "there was a period where tribes had to fight the Secretary of State for their tribal ID cards to be valid for voting."[38] At the time of the field hearings, Iowa was not accepting tribal IDs.[39] Following advocacy by tribal members, there was a legislative fix and Iowa began accepting tribal IDs.[40] Furthermore, previously having a tribal ID be recognized as an acceptable form of ID is no guarantee a state will continue to accept tribal IDs. For example, one witness described the uncertainty faced by tribes:

> so they weren't accepting tribal IDs or the enrollment paperwork up until two years ago, and then they began accepting them, but now they're going back to thinking they won't be accepting them because some of the ID requirements have changed on the federal level. So they're now telling the tribe that they need to update their ID equipment, and we need to purchase this like machine that costs thousands of dollars in order for our tribal IDs to be valid and be able to be used in that way.[41]

Even if a state accepts a tribal ID, states may also require the identification to contain certain information in order to be deemed valid. Some tribal IDs do not contain expiration dates since "we don't quit being Indian at some particular point" and laws that require an expiration date on an ID would exclude otherwise qualifying IDs.[42] Updating tribal IDs to contain specialized information or security features is expensive[43] and may be unattainable to impoverished tribes.

Finally, as one witness bluntly assessed, requiring an address on an identification "screws everything up."[44] As discussed by Professor Ferguson-Bohnee in her testimony before the committee today, Native Americans often lack an address for a variety of reasons such as homelessness, near homelessness, or an unaddressed home. Given the housing insecurity and lack

---

[35] Phoenix Tr., Steve Titla, 245.

[36] *Id.*

[37]

[38] Milwaukee, Caroline Beaulieu, 121.

[39] Tulsa Tr., Christina Blackcloud, 9.

[40] *See* State of Iowa, Iowa Secty. of State, Secretary Pate announces use of Tribal IDs as a valid form of identification for elections (Aug. 21, 2018), *available at* https://sos.iowa.gov/news/2018_08_21.html.

[41] Milwaukee Tr., Stephanie Thompson, 30-31.

[42] Milwaukee Tr., Paul DeMain, 78.

[43] Milwaukee Tr., Stephanie Thompson, 30-31; Tulsa Tr., Chuck Hoskin Jr., 128.

[44] Bismarck Tr., Donita Loudner, 32.

of regular postal service many Native Americans use PO Boxes to conduct their affairs and their tribal IDs will contain no address or PO Box instead of a residential address.[45] If a current residential address is required on the identification the ID may become quickly out of date since Native Americans "move around quite a bit and sometimes we'll forget to update our information they try to go vote and then they have those challenges."[46]

The Governor of the Gila River Indian Community located in Arizona described in detail how the lack of address on the reservation in concert with the requirement of an identification led to the disenfranchisement of his community:

> The first issue with the voter ID law that the community finds is that our Tribal IDs do not include an address. The second issue is that individuals living on the Pinal County portion of the reservation do not have standard street addresses as well. Tribal members do not receive mail at their homes, but must pay for and obtain a Post Office box. Tribal members can either use their Post Office box or non standard address on their Arizona Identification. The third issue is that individuals may change mailing addresses or move between elections, which can impact the addresses on a person's ID. In 2012 the voter ID law was strictly enforced on the Pinal County portion of the registration. Many Gila River voters were turned away from the polls when the voter's were turned away from the polls when the voter's address did not match the voter roles... The community subsequently learned that since our Tribal Citizens of Pinal County lacked traditional addresses, the addresses used by Tribal members are not compatible with the voter registration system used by the county. Thus, the County reassigned all our voter's physical addresses to be the service centers where they vote . . . and resulted in the voters again being denied a regular ballot.[47]

Not only were tribal members who did not have traditional addresses tasked with having IDs with addresses on them, the addresses that they did use were incompatible with the state's voter registration system. There was no conceivable way for these tribal members to comply with registration prior to the election.

Given the multitude of ways voter ID laws can lead to the disenfranchisement of Native Americans, it is no surprise that not one witness spoke in favor of voter identification laws. Rather, identification laws are seen as "a solution in search of a problem . . . imposed without a shred of real evidence that here has been voter fraud."[48] Identification laws pose a significant burden on

---

[45] Tulsa Tr., Chuck Hoskin Jr., 131.

[46] Phoenix Tr., Verlon Jose, 154; Phoenix Tr., Stephen Lewis, 130-31; Bismarck Tr., Donita Loudner, 32.

[47] Phoneix Tr., Stephen Lewis, 130-31.

[48] Tulsa Tr., Chuck Hoskin Jr., 128.

Native American voters, and are viewed as "hard and intimidating."[49] Mandating tribal IDs be accepted when a state requires IDs to vote makes tribal communities less dependant on state issued IDs that are difficult or impossible to obtain. Requiring acceptance of those IDs regardless of whether there is an address or expiration date likewise ensures that the tribal ID will be accepted.

Language

Language is "one of the closing gaps in the election process" for Native voters.[50] Over a quarter of all single-race American Indian and Alaska Natives speak a language other than English at home.[51] Two-thirds of all speakers of American Indian or Alaska Native languages reside on a reservation or in a Native village,[52] including many who are linguistically isolated, have limited English skills, or a high rate of illiteracy.[53]

The lack of assistance or complete and accurate translations of voting information and materials for Limited-English Proficient (LEP) American Indian and Alaska Native voters can be a substantial barrier. "If you require language assistance to register or cast a ballot, whether it's in English or another language, culturally competent and respectful assistance, for that matter, that too can be either a barrier or a discouragement from participating."[54]

Section 203 of the Voting Rights Act (VRA) helps LEP voting-age U.S. citizens overcome language barriers to political participation by requiring covered jurisdictions to provide bilingual written materials and oral language assistance.[55] The requirements apply to four language groups: Alaska Natives; American Indians; Asian-Americans; and persons of Spanish Heritage, as well as the distinct languages and dialects within those groups.[56]

Language assistance must be provided for voting activities in every type of public election conducted in a covered jurisdiction and its political subdivisions, including primary, general, and special elections.[57] Section 203 applies regardless of whether a public election is to fill an office,

---

[49] Bismarck Tr., Donita Loudner, 32.

[50] Isleta Tr., Martin Aguilar, 146.

[51] 2016 AIAN FFF, *supra* note 197 (27 percent).

[52] *See* U.S. Census Bureau, Native American Languages Spoken at Home in the United States and Puerto Rico: 2006-2010 at 2 (Dec. 2011).

[53] *See* U.S. Census Bureau, Public Use Data File for the 2016 Determinations under Section 203 of the Voting Rights Act, *available at* https://www.census.gov/rdo/data/voting_rights_determination_file.html (Dec. 5, 2016).

[54] Sacramento Tr., Alex Padilla, 108-09.

[55] *See* 52 U.S.C. § 10503. Other permanent provisions likewise can be used to ensure that LEP voters receive assistance. Section 2, the VRA's permanent non-discrimination provision, applies nationwide and has been used to secure language assistance for voters who are denied equal voting opportunities by English-only election procedures. *See* 52 U.S.C. 10301; TUCKER, *supra* note 72, at 43-45. Section 208 supplements the language assistance provisions by protecting the right of any voter, including language minority citizens, who needs assistance at the polls, to receive that assistance from the person of their choice. *See* 52 U.S.C. § 10508.

[56] *See* 52 U.S.C. § 10503(e).

[57] *See* 28 C.F.R. § 55.10.

to remove an elected official, or to vote on a bond issue, ballot question, or referendum.[58] Section 203 is a critical resource for Native American tribes but it also does not go far enough. Language relief must also include translations for Native languages that are unwritten. Section 203's protections are meaningless if the translations are not in a format – i.e. oral – that Native voters can understand. NAVRA would bridge this critical gap so that non-English speaking Natives of an unwritten language are not excluded from the ballot box.

Overt Discrimination

In the fall of 2016 and spring of 2017, NAVRC oversaw one of the most comprehensive in-person surveys ever conducted in Indian Country about barriers faced by Native voters. A total of 2,800 Native voters in four states completed the in-person survey.[59] In all four states, Native voters expressed the greatest trust in their tribal governments.

Although the federal government was identified by respondents as the most trusted of non-tribal governments (federal, state, local), the level of trust ranged from a high of just 28 percent in Nevada to a low of only 16.3 percent in South Dakota.[60] Trust of local government in South Dakota was notably bad with only 5.02% of respondents indicating they most trusted the local government, which is especially significant considering it is the local governments that are most often responsible for the administration of elections.

Native Americans have faced sustained assaults against their sovereignty and their right to vote. States ratified Constitutions that specifically excluded Native people from voting,[61] established cultural purity tests to determine if Native people had sufficiently assimilated before granting them the right to vote,[62] and argued Native self-governance was incompatible with participation in state run elections.[63] This legacy of equating voting with an abandonment of cultural and political sovereignty has resulted in a continued skepticism toward voting within Native communities.

Furthermore, states often made the experience of voting embarrassing for Native voters. Not only would states demand that Native vote disavow and prove they were no longer culturally

---

[58] *See id.*

[59] *See* NAVRC Report, *supra* note 5. The survey respondents included 644 Native voters in Arizona, 1,052 in Nevada, 602 in New Mexico, and 502 in South Dakota. NAVRC Report, *supra*, at 8, 38, 67.

[60] *See* NAVRC Report, *supra* note 5, at 15, 45, 77, 111. Respondents were asked, "Which government do you trust most to protect your rights?" *Id.* at 15, 45, 76-77. Among respondents in the other two states, 22.1 percent identified the federal government in Arizona and 27.4 percent identified the federal government in New Mexico. *See id.* at 77, 111.

[61] COHEN, *supra* note 45 at 157.

[62] 1858 MINN. CONST., Art. 7, § 1(4), *available at* http://www.mnhs.org/library/constitution/transcriptpages/dt.php.

[63] *Trujillo v. Garley,* Civ. No. 1353 (D.N.M. 1948); *Allen v. Merrell,* 305 P.2d 490, 6 Utah 32 (Utah 1956), *vacated as moot*, 353 U.S. 932 (1957).

Native American, states would also impose literacy tests that were impossible for Native voters to pass given their lack of fluency in English.[64]

Clerks also turned away Native voters alleging they were incompetent to vote because of the federal trust responsibility over tribes which was referred to in legalese as a "guardianship." The Arizona Supreme Court accepted this reasoning – that Native Americans were incompetent to vote – in a case that stood for twenty years.[65]

To this day, some elders that can recall humiliating voter experiences discourage younger generations from voting out of disregard for federal and state systems that were cruel to them and a lingering fear that participation in these systems will undermine tribal sovereignty. As one community member explained "People are still apprehensive because it's been taught we can participate in our elections but that's not our election. So if there is a county election or a state election or a federal election, elders tell their children and it's still true today they don't participate in voting because they feel it's an infringement on our sovereignty"[66]

Consequently, distrust between Native Americans and local, state, and federal governments abounds and was testified to throughout the field hearings. A sampling of these sentiments:

- *And I think in general, just a lack of, distrust, of government. Years of discrimination and injustice support that American Indians don't trust government and don't want to participate in this government process.*[67]
- *Why it's so hard for Native Americans to vote in local elections in Los Angeles is . . . just issues between the United States government and Native Americans and how every promise that was made to us has always been broken. So the amount of distrust among Native Americans and the government is not really good.*[68]
- *Isolating, keeping isolated, because a lot of it was no trust was really in between from the federal, the state, and county side.*[69]

Not only do many Native Americans not trust the local, state, and federal governments, they also do not feel supported by these institutions.

As one community member recounted, "[O]ur lives have been severely compromised by the racists and discriminatory impact of boarding schools, public education, and the harmful federal and state policies that go towards Indian families. Colonization for us meant the control of

---

[64] Harrison, *supra* note 64; Glenn Phelps, *Representation Without Taxation: Citizenship and Suffrage in Indian Country*, 9 AM. INDIAN Q. 136 (1985).

[65] *Porter v. Hall*, 34 Ariz. 308 (Ariz. 1928).

[66] Portland Tr., Matthew Tomaskin, 95-96.

[67] Phoenix Tr., Travis Lane, 94.

[68] San Diego Tr., Robin Thundershield, 98 (this is also the source of the quote for the title of this report).

[69] Isleta Tr., Shirlee Smith, 85.

tribal people by the appropriation of our lands. State and federal jurisdictions over our children and the suppression of our tribal traditions and culture."[70]

As these injustices continue to manifest themselves in present day inequities – poverty, lack of housing, inadequate roads and infrastructure, to name a few – voters disengage from the political process and become apathetic, firm in the belief that nothing will ever change. One witness described how his parents would tell him "We don't get no help from the county. Why should I vote? . . . Leave them alone. Don't bother. That's their system, don't bother."[71]

A tribal councilman explained how "we are from a very rural area, the poorest county in California. We, like most poor communities, have an issue with people wanting to vote. It's not the access to vote. It is the desire to vote. There's no passion their vote sometimes."[72] A tribal member reflected how "[y]ou know, alcoholism, high unemployment and things like that that just affect our ability to feel good about ourselves and really want to voice our opinions and vote."[73]

But discrimination is not just a relic of the past or the effects of past wrongs. Native Americans continue to experience overt discrimination in their everyday lives and when they attempt to vote. In Arizona, racial tensions are so fraught between the Kaibab Band of Paiute Indians and the border town that the pipes sending water to the reservation are regularly blocked by border town residents.[74] In Utah, a witness' Native grandson attempted to play baseball and was accosted by a non-Native woman who "started screaming at him, 'Who in the hell do you think you are? You think you're that good? You damn welfare people are starting to take over'"[75] Paternalistic racist attitudes are also prevalent. A Native high-schooler was denied a place on the school volleyball A team because, although she was better than girls on the A team, "the coach said he thought she would feel more comfortable on the B team. And she was so angry . . . she ended up quitting."[76]

These racist attitudes did not stop at residents. Voting officials also displayed racist attitudes, whether intentionally or not. In South Dakota, a poll worker described as a "[n]ice little old lady" was concerned about where she would be sitting while servicing a Native American community and asked field organizers where's a place "that's going to be safe? We don't want to be around people who are drinking. We don't want to be around, you know people who are going to harass us."[77]

---

[70] Portland Tr., Patricia Whitefoot, 70.

[71] Isleta Tr., Wilfred Jones, 28.

[72] Sacramento Tr., Carlos Negrete, 42.

[73] Portland Tr., Carol Evans, 193.

[74] Phoenix Tr., Roland Maldonado, 156.

[75] Isleta Tr., Wilfred Jones, 33-34.

[76] Portland Tr., Barbara Lewis, 42.

[77] Bismarck Tr., Donita Loudner, 51.

Racist attitudes tangibly effect the ability for Native Americans to vote, forcing voters to register and cast their ballots in substandard facilities and hostile conditions. For example:

- In South Dakota, voters were forced to vote in a repurposed chicken coop[78]
- In Montana, the number of registration cards accepted by county officials from Native community organizations was arbitrarily limited to 70 after community organizers were hassled and given "dirty looks" for bringing in too many at a time.[79]
- In South Dakota, the Buffalo County Seat was located Gann Valley which had a population of 12 and was the smallest county seat in the nation. As county seat, the residents of Gann Valley were provided a fully funded polling place that offers early voting and registration opportunities in line with the rest of the state. Twenty-five miles away on the Crow Creek reservation, however, Fort Thompson's 1,200 residents had no early voting location in 2014 and only one satellite voting site open on 2014 Election Day. Despite calls from activists to provide a polling location in Fort Thompson and despite HAVA funding being available to open a polling location in Fort Thompson, the county auditor refused to open a polling location and instead decided to forgo usage of the funds.[80]
- Voters are regularly forced to travel to border towns to cast a vote where there are "issues" and "hostile attitude[s]"[81] and "racist stereotypes"[82] where community members describe being "too intimidated to get the nearest polling" location[83] since the county seat "may or may not be welcoming to Native Americans coming from a reservation community."[84]

These negative experiences are exacerbated and reinforced today when Native Americans are denied equal opportunities to register to vote and to cast ballots that are counted. An on-reservation polling place would mean Native Americans would not need to interact with communities and county officials who are hostile toward them. It would also mean tribal officials would not need to rely on the goodwill of a county official in order to secure equal access to the ballot box for their tribal members. Indeed, it is these local discriminatory actions that call out for federal relief.

Not only would federal relief prevent some of the intentional and unintentional barriers to the ballot box facing Native Americans today, federal action would also result in significant savings. Today, discrimination is only addressed on an ad hoc basis, usually through litigation. Native activists have a stunning record of success. Indeed, this success is only partly attributable to the skill of their lawyers. Most often, however, it is the dismal facts and stark injustices – which

---

[78] Bismarck Tr., Donita Loudner, 33.

[79] Bismarck Tr., Erica Shelby, 140.

[80] Bismarck Tr., Donita Loudner, 23-24.

[81] Phoenix Tr., Lewis, 135.

[82] Portland Tr., Lewis, 139-41.

[83] San Diego, Nantkes, 51.

[84] Portland Tr., Miller, 175.

judges who hail from all geographic and political backgrounds – have been unable to ignore. In the past 12 years there have been 18 cases involving Indian voting rights. Of these eighteen cases, the Native plaintiffs either won or settled to their satisfaction all but one or two.[85] When combined with the cases prior to 2008, the total number of cases is 92 at the time of the printing of our Field Hearing Report, with victories or successful settlements in 85 cases and partial victories in two cases. That is a success rate of 92 percent. As a result, states and local budgets often face not only the cost of ensuring equal access to the ballot box for their Native constituents, but also hefty attorneys' fees when a case is proved. Federal action would clarify responsibilities toward Native constituents and save resources.

In sum, as one tribal member explained "[s]o, yes, I would like you, person at the poll, to respect me as a Native American, respect my culture. But if you can't do that, because if you're going to tell me, say: Well I'm going to have to learn about African-Americans, Hispanics, Mexicans, or whatever they're calling us, then do this. Treat me as a human being and be respectful to my elders, respectful to my children."[86] Likewise, we ask for no more, and no less, than an equal opportunity to vote for all Native Americans.

Thank you for having me today. I am happy to answer any questions you may have.

---

[85] Just last week there was an additional victory DNC v. Hobbs, No. 18-15845 (9th Cir. Jan. 27, 2019) where the Ninth Circuit en banc reversed the district court and held that Arizona's out of precinct policy that prevented even the partial counting of ballots filed out of precinct had a discriminatory impact on Native American, Hispanic, and African American Voters in violated of Section 2 of the Voting Rights Act. The Court also held that the criminalization of the collection of another person's ballot had a discriminatory impact on minority voters and violated the "intent" test of Section 2 of the Voting Rights Act and the Fifteenth Amendment. The Court did not rule on the First or Fourteenth Amendment claims. The State of Arizona has announced that it will file a petition for cert. http://cdn.ca9.uscourts.gov/datastore/opinions/2020/01/27/18-15845.pdf

[86] Phoenix Tr., Claude Jackson, 186.

Chairperson FUDGE. Thank you very, very much.

Mr. Aguilar, you are recognized for five minutes.

Mr. AGUILAR. Thank you, Madam Chair.

Mr. Norquay, thank you for sharing your story with us. In your testimony, you bring up that you believe you still have a right to vote. I share that belief. I hope everyone on this dais shares that belief. It must be difficult and confusing to comply with North Dakota's voter ID laws. From what I understand, voter ID laws in North Dakota have changed three times in the past five years. As Federal legislators, we want to make sure we develop and pass policies that make it easier for people to vote. It is disheartening to hear that you were turned away and not allowed to vote.

So my question is, what do you think can be done to ensure that you and friends aren't unfairly turned away from the voting polls? What more can we do to be helpful?

Mr. NORQUAY. Okay. The people of Turtle Mountain, they got free IDs, and a lot of those people, they don't know what that means because they—how do you say that? They don't know what it means.

Mr. AGUILAR. Yes.

Mr. NORQUAY. And a lot of them are older. Older. They don't have—they can't go far and stuff like that. I think just make it better for the people and transportation and, you know, closer voting. Closer voting because we have to go miles to vote around. Like I said, we know everybody around there, and some of us don't have vehicles, you know. And it costs us $20 to catch a ride to the voting booth, and, you know, that is $20 out of your pocket so you can't buy an ID card. What the Tribe did, they gave free IDs for a little while. Now we have to pay $15 for it. I don't think that is right for the people.

Mr. AGUILAR. Thank you for sharing your story.

Ms. Ferguson-Bohnee, good to see you again. You joined us in Arizona, I believe, as well. Can you talk a little bit about—I asked the previous panel about voting centers. Can you talk a little bit about how that is being implemented in Arizona, what barriers still exist with the voting center concept, and what more we could do to ensure that more individuals have access?

Ms. FERGUSON-BOHNEE. Sure. So, right now, the counties decide whether or not to implement voting centers. And if you have a vote center, then anyone within that county has an opportunity to vote at that vote center by ballot on demand. However, in places with large numbers of Native Americans, there are not vote centers, and you have to vote at your precinct. And if you don't vote at your precinct, then your ballot is not counted. And that was part of decision that the Ninth Circuit ruled I think on January 23rd, that out-of-precinct voting disproportionately impacted Native American voters, and so since they would discard the whole ballot, that now counties will have to count those parts of the ballot that are statewide or Federal, so they do not discard the whole ballot. But there was a finding by the court that it disproportionately affects Native American voters.

Mr. AGUILAR. Great. I appreciate it. I am sure the Ranking Member is going to talk a little bit about that Ninth Circuit decision in his line of questioning.

I did want to ask you, Ms. Ferguson-Bohnee. Have Arizona policymakers acted differently since preclearance is no longer required? What changes have you seen from a policymaking perspective since preclearance is no longer required?

Ms. FERGUSON-BOHNEE. There has definitely been a difference. The first election after preclearance was no longer the case of—that a lot of polling locations were closed. There was a lawsuit, and the county at the time, Maricopa County, said they did not consider the impact on minority communities. So, before, when a law was changed or a policy was made, there would have to be an assessment on, would this disparately impact Native American communities or Hispanics or African Americans? And they have not been doing that. They have actually been introducing laws such as the ballot collection law.

They have also introduced a law which requires individuals to show ID when you vote early in person. Well, who is going to be more likely to do that? That is going to be Native American voters because they don't have access to the mail. While other voters who vote early, most of the voters in the State of Arizona, the non-Native voters vote by mail, and their identification is verified through their signature.

And then we have a number of new laws that are introduced this session, and I think Attorney General McPaul stated that there is an effort to undermine the settlement that the Navajo Nation reached on ballot curing.

Mr. AGUILAR. Thank you. I appreciate it.

Thank you, Madam Chair. I yield back.

Chairperson FUDGE. Thank you.

Mr. Davis, you are recognized for five minutes.

Mr. DAVIS of Illinois. Thank you, Madam Chair.

Mr. Norquay, thank you for your service to the United States Marines. I am sorry to hear what happened in 2014. Were you able to vote in 2016?

Mr. NORQUAY. Yes. I got a new ID, a residential ID.

Mr. DAVIS of Illinois. And 2018?

Mr. NORQUAY. Yes.

Mr. DAVIS of Illinois. Okay. Thank you again for your testimony today here and for being here today too.

Ms. Ferguson-Bohnee, are you familiar with a gentleman who teaches at Arizona State University's law school, Chad Noreuil?

Ms. FERGUSON-BOHNEE. Yes, I am.

Mr. DAVIS of Illinois. What can you tell this Committee about Mr. Noreuil? Is he active in any of these issues that you are testifying on today?

Ms. FERGUSON-BOHNEE. Not to my knowledge.

Mr. DAVIS of Illinois. Is he actually competent in anything that he does?

Ms. FERGUSON-BOHNEE. Yes.

Mr. DAVIS of Illinois. Oh, good. He told me to tell you to stop by his office a little more. Chad was the best man in my wedding. I have known him for 40 years. Sorry I didn't get a chance to talk to you beforehand. I wanted to make sure that I made you feel a little uncomfortable here as a witness by talking about him, but——

Ms. FERGUSON-BOHNEE. Thank you. He is a nice guy.

Mr. DAVIS of Illinois. He said hello.

I welcome your testimony today. Some of the issues, especially the responses to Mr. Aguilar's questions I thought were very interesting, and we look forward to working with you on many of these issues.

But, again, make sure you stop by his office and say hello a little more, all right?

Ms. FERGUSON-BOHNEE. Thank you.

Mr. DAVIS of Illinois. Ms. De León, great to see you again. I enjoyed your testimony in North Dakota.

Ms. DE LEÓN. Thank you.

Mr. DAVIS of Illinois. In North Dakota, you said that Native American voter turnout for the 2018 midterm elections set an all-time high for a midterm election in North Dakota. That is great news, and as I said there, it should be celebrated. You know, be it your grassroots involvement of effort and especially getting the youth involved from Turtle Mountain Reservation who led the march to the polls, those are techniques that I think should be utilized everywhere. What can be done to continue this type of engagement?

Ms. DE LEÓN. Yes. So thank you so much for the question.

North Dakota is a perfect example of the type of litigation that is now necessary to be brought. It is incredibly costly. NARF brought a case over the course of almost four years and nearly a million dollars spent to articulate the injustice that was going on there, that the State of North Dakota was requiring an address on an ID in order to vote when the North Dakota Tribal members did not have addresses.

In response, the people were outraged and took that outrage, and they organized, and like you said, the highest turnout in record, which we are thrilled about.

But outrage will fade, but the law is going to remain. And so, in time, the barrier is going to remain erected, and people are still going to continue to have a problem voting, which is why, in North Dakota, like elsewhere, there shouldn't have to be that expenditure in order to get a just result—you know, of litigation in order to get a just result. I think, instead, Federal action like you can perform here would prevent the need for that type of litigation in the first place. And places like Washington State and, Nevada, where they brought a successful lawsuit, can then see that increase in voter registration and turnout.

Mr. DAVIS of Illinois. What is the process for one to register to vote in North Dakota?

Ms. DE LEÓN. There is no registration in North Dakota.

Mr. DAVIS of Illinois. So you have zero voter registration?

Ms. DE LEÓN. That is right.

Mr. DAVIS of Illinois. If you prove you live in the State, you can go vote that day?

Ms. DE LEÓN. Well, I don't think you have to prove that you live in a State. What you have to do is be a United States citizen and be a resident of North Dakota, and those are the qualifications to vote.

Mr. DAVIS of Illinois. Would you encourage a voter registration process like in my home State of Illinois or possibly Arizona or Ohio or California?

Ms. DE LEÓN. Registration is the province of the States, and I respect their authority on that.

Mr. DAVIS of Illinois. Okay. You don't have a preference.

Ms. DE LEÓN. I really don't have a preference as long as there is equal access for every individual.

Mr. DAVIS of Illinois. Okay. Do you foresee any issues where nongovernmental entities like NARF who apply and are granted funds to administer election functions on reservations instead of the Tribes—I mean, you mentioned funding was a big problem. Do you see—you know, my question is, you know—I would assume the Tribes would benefit from election security dollars and election administration dollars more so than the independent groups. What do you see?

Ms. DE LEÓN. I am not sure what you are referring to. I know that——

Mr. DAVIS of Illinois. Federal dollars are going to flow to increase the amount of turnout among Native Americans. Do you think the money should be sent directly to the Tribes, or do you think it should go to outside entities like NARF, for example?

Ms. DE LEÓN. It depends on what function is being performed. I think that NARF serves a critical function like you have seen, in North Dakota to highlight injustices across the country and to bring attention to places, and solutions, to places where people are denied the access to vote. But, of course, funding should also be provided directly to Tribes and State and county governments so that they can fulfill their polling location obligations.

Mr. DAVIS of Illinois. Thank you.

Ms. DE LEÓN. Thank you.

Chairperson FUDGE. Thank you, Mr. Davis.

Let me just ask both of the attorneys. Section 2 we know is a very time-consuming and expensive way to litigate the voting rights issue. Why do you think we are forced to do that? Help me understand why you feel that—as my colleagues would try to say, you know, "Voting was up, so what is your problem, you know, all good." Tell me why that is not true.

Ms. FERGUSON-BOHNEE. Well, I think one reason which has been highlighted through the work of the Native American Voting Rights Coalition is that there hasn't been a lot of attention paid to the issues faced by Native American voters, and the U.S. Department of Justice since 2000 has only brought one case on behalf of Native American voters, and that is a 2010 case. And Native Americans are dispersed across the country. So there hasn't been a lot of commitment to work with Native people. I think that is why Congress should use their function to investigate this issue and assist Tribes in the efforts to ensure that Native Americans are active participants in democracy.

Ms. DE LEÓN. Thank you so much for the question. I think that section 2 provides an opportunity for relief in areas that don't necessarily receive a lot of attention, and it can bring to light injustices that are taking place. But like you said, it is incredibly costly. You know, not just proving intentional discrimination, but just

proving discrimination itself costs a lot of money. So, for example, in North Dakota, we had to show that it was especially difficult for Native Americans to receive IDs. We had to employ an expert that had to map the average distance for a Native American versus a non-Native American to reach a driver's license site, for example, and in that case, there was a huge disparity. But that type of evidence and building that kind of evidence, it requires a lot of upfront cost. And so, you know, we have been able to identify some specific barriers, and we think that, with some congressional action, we can forego having to litigate over and over again.

Chairperson FUDGE. And still with you, Ms. De León. How did it make you feel to know that the authorities had the resources to put a polling place, to create a Tribal voting polling place, and refused to do it? How did that make you feel?

Ms. DE LEÓN. So, over the course of these field hearings, I had the honor of listening to testimony, heartbreaking testimony across the country of people and the injustices that they were facing, the lack of respect given to them, and hear how heartbroken they were when they tried to vote and it was just too hard or too far or they were stopped. And, you know, in the case of Buffalo County, I mean, it made me, frankly, infuriated. I think that it is wrong that, if there is funding available, that you are choosing to forego increasing the right or the opportunity for individuals to vote.

I will say that, through the activism of individuals in South Dakota, that county auditor was removed from office and was replaced by a Native American county auditor, which was a great success story. I will also say that I have talked to that county auditor, and she is facing severe discrimination right now by her coworkers and by the State government.

Chairperson FUDGE. Thank you.

Mr. Norquay, let me apologize on behalf of this Nation for your treatment, especially as one who has served this country. I apologize to you.

Now, let me just ask quickly. What is something that you think we can do right away to make the situation, especially on Tribal lands, better for this election this year? We will start with Ms. Ferguson-Bohnee, and we will just go right down the line.

Ms. FERGUSON-BOHNEE. I definitely think there needs to be more access to funding so that Tribes can have access to voter registration, polling locations, and language translations. We saw in the Navajo Nation litigation that one big obstacle faced by the Tribe where the county is saying that they don't have the resources to meet their obligations under Federal law. Do they have the resources? I don't know, but that is an excuse that has been used to not provide equal access to Navajo voters in Arizona and other voters in Arizona.

And I just want to mention that some voters in Arizona have to travel five hours, 280 miles, to participate in in-person early voting, and that should not be the case. If in-person early voting is offered, everyone should have access to in-person early voting.

Chairperson FUDGE. Thank you.

Mr. Norquay.

Mr. NORQUAY. I think they should have, like, the State and the Tribal government both together—they are separated you know,

like, one side, this side, that side, you know. And the people don't get to intertwine, you know, speak about their representatives. And, you know, they go their own way, and they don't go to the other side because, you know, they got different opinions about it. And like you said, the polling places, they have got to come together.

Chairperson FUDGE. Thank you.

Ms. DE LEÓN. So, first, I know it would be wonderful if you passed NAVRA and provide a polling place on every Tribal reservation. But absent that, I think that it would be helpful to issue Federal guidance to indicate that polling places are even allowed on reservations. I know that a lot of times, local county officials just may be unaware of that fact that polling places are allowed and it is encouraged. And, you know, the Federal Government can encourage or can bring litigation under section 2 as well. And given the well-documented discrimination facing Native Americans, we encourage them to do so.

Chairperson FUDGE. Thank you. And I thank you all so very much.

And in conclusion, I would just like to make a short statement for the record. Being an African American, I clearly understand discrimination. I know it when I see it, and I have seen it throughout this process as we have traveled this country. But those who have not faced discrimination tend to find ways to explain it away. They always want to make it that, you know, "Well, you overcame, so it is okay." It is not okay.

So I would say to you that it is going to continue to be difficult, but it is our responsibility as people who represent the Federal Government to protect protected classes of people, and we are going to do our very best to make it better. I don't know where we go from here, but I do know this: We are going to continue to expose the problem. We are going to continue to try to address the problem, and we thank you for every day for trying to make it better on your own.

And, with that, if there is nothing further, I would thank you again, and, without objection, this Subcommittee stands adjourned.

[Whereupon, at 11:28 a.m., the Subcommittee was adjourned.]

HEARING
COMMITTEE ON HOUSE ADMINISTRATION
SUBCOMMITTEE ON ELECTIONS
"NATIVE AMERICAN VOTING RIGHTS: EXPLORING BARRIERS AND SOLUTIONS"
FEBRUARY 11, 2020
MAJORITY QUESTIONS FOR THE RECORD
FOR
PATTY FERGUSON-BOHNEE
PROFESSOR OF LAW, SANDRA DAY O'CONNOR COLLEGE OF LAW

1. **H.R. 1694, the Native American Voting Rights Act, would give tribes a greater say in the placement of polling sites and voter registration centers on their own land. Do you think increased tribal participation in election administration decisions is an important part of a legislative solution to these issues? If so, why?**

Yes, increased Tribal participation in election administration decisions is important because Native American voter registration is deficient and voter turnout rates remain among the lowest in the United States. Meaningful participation by Tribal voters will only be achieved when there are increased opportunities to register to vote and to vote in state and federal elections. Although all Native Americans became United States citizens in 1924, the path to the ballot box continues to be blocked for many Tribal citizens. In 2015, after consultation with Tribes, the Department of Justice proposed legislation to improve voting access for Native Americans noting that "[i]n addition to suffering from a long history of discrimination, the distance many American Indian and Alaska Native citizens must travel to reach a polling place presents a substantial and ongoing barrier to full voter participation."[1]

Tribal governments are best suited to determine polling place locations on Tribal lands because of their knowledge of the community, accessible locations and those locations that are

[1] USDOJ, Proposed Legislation *Tribal Equal Access to Voting Act of 2015*, *available at* https://www.justice.gov/file/440986/download; USDOJ, Department of Justice Proposes Legislation to Improve Access to Voting for American Indians and Alaska Natives, Press Release (May 21, 2015), *available at* https://www.justice.gov/opa/pr/department-justice-proposes-legislation-improve-access-voting-american-indians-and-alaska.

frequently visited. Further, Tribal governments can facilitate the use of Tribally-owned buildings for voting purposes.

The Native American Voting Rights Act seeks to improve opportunities for Native Americans when registering to vote, accessing polling places, and casting a ballot. In order to properly assess how to improve election administration decisions for the benefit of Native Americans, a State or political subdivision needs to consider the realities of Native American voters on Tribal lands and recognize that for many Tribal communities, life on Tribal lands is different. Accordingly, ensuring equal access to voting requires consultation from tribal leaders because they best understand the issues specific to their communities and their members. For example, Tribal leaders can assess issues such as: (1) the number of additional polling places needed for a community; (2) strategic locations of new polling places; (3) the distances that voters will have to travel to reach polling places; and (4) ways to maximize voter registration and educational outreach.

After two Nevada Tribes sued for additional early voting and election day polling locations in their communities, the Reno-Sparks Indian Colony in Nevada requested a polling location on its reservation.[2] In 2018, the Reno-Sparks Indian Colony finally had a voting site on its reservation for the first time in its history. Prior to 2018, Tribal members had to travel about 70 miles roundtrip to cast a ballot. The Tribal leadership understood the importance of the election and encouraged voter participation. Almost half of the Tribe's membership registered to vote; this is an example of Tribal advocacy that led to a positive solution.

[2] Jennifer Solis, *Tribes get their own polling places, some for the first time*, Nevada Current (Oct. 31, 2018), *available at* https://www.nevadacurrent.com/2018/10/31/tribes-get-their-own-polling-places-some-for-the-first-time/.

Not every election administrator is responsive to Tribal requests. The Department of Justice has found that "some jurisdictions have been unresponsive to reasonable requests from federally recognized Indian Tribes for more accessible polling locations.[3]" In 2016 and 2018, for example, the Kaibab Paiute Tribe in Arizona requested a polling location from county election officials. These requests were denied, and Tribal members were required to travel over forty miles each way to an off-reservation polling location to cast a ballot on election day. Similarly, the Pascua Yaqui Tribe in Arizona has requested in-person early voting on its reservation. The county has denied the request, resulting in voters without cars to travel two hours roundtrip to participate in early voting.

2. **In a recent opinion, a recently appointed judge on the 11th Circuit Court of Appeals argued that private parties do not have the power to enforce Section 2 of the Voting Rights Act against states at all, and that only the Department of Justice may enforce Section 2 against states.[4]**

    a. **If the judicial branch were to remove the ability for private parties to enforce Section 2 against the states, what impact do you think that would have on Native American voting rights and the ability to combat suppressive voting laws?**

Congress passed the Voting Rights Act to secure a right already vested in American citizens—the right to vote. Should a court hold that private parties, including Tribes, lack standing to bring enforcement suits pursuant to Section 2 of the Voting Rights Act, Native American voting rights would be further threatened and likely result in no cases being filed that challenge suppressive voting laws. Between 1965 and 2020, approximately 92 private party suits were filed by Native American plaintiffs in reliance on various provisions of the Voting Rights Act, resulting in victories or successful settlements for Native American voters in 85 of these cases.

---

[3] USDOJ, Proposed Legislation *Tribal Equal Access to Voting Act of* 2015, *available at* https://www.justice.gov/file/440986/download.
[4] *Alabama NAACP v. Alabama*, No. 17-14443 (11th Cir. 2020), http://media.ca11.uscourts.gov/opinions/pub/files/201714443.pdf (Judge Branch, dissenting).

Notwithstanding the ongoing violations of voting rights in Indian Country, the Department of Justice has not vigorously sought to enforce Native American voting rights. Since 1988, the Department of Justice has brought only 10 actions on behalf of Native American voters alleging Section 2 violations. Since 2008, the Department of Justice has only filed one Voting Rights Act case on behalf of Native American voters. During the same period, private parties brought 18 claims under the Voting Rights Act.

Private suits are an effective and critical enforcement tool, as illustrated by plaintiffs' high success rate and the Department of Justice's failure to bring suits on behalf of Tribal citizens. Eliminating this tool would inevitably cause dozens of claims to go unaddressed, impacting thousands of Native American voters. States and counties would effectively be free to implement suppressive voting laws and policies with little to no accountability or repercussion.

b. Do you think that would increase the need for a legislative solution to address Native American voting rights issues?

Yes, because the Department of Justice has failed to bring enforcement actions on behalf of Native voters, eliminating private party suits would effectively leave no remedy for Section 2 violations. A prohibition on private party suits would certainly widen the current gap in Section 2 enforcement, rendering a legislative solution especially imperative to ensure the protection of Native American voting rights beyond the existing need for legislation. The Native American Voting Rights Act offers numerous solutions to effectively bridge the gap in Section 2 enforcement absent a private party's opportunity to file suit.

3. As was discussed at the hearing, lawsuits to enforce Section 2 are costly and time-consuming and are often unaffordable for individual tribes.

a. Could you describe the resources that are typically required in order to bring a Section 2 suit?

Section 2 cases involve significant time and resources to litigate. Section 2 litigation can cost millions of dollars in expert witness fees and attorney fees. Funding these costly suits also takes away from other Tribal resources, projects, and critical government services, and litigation can strain the relationship between Tribes and the state and local governments. Virginia Davis, Senior Advisor at the National Congress of American Indians stated that "We cannot litigate our way out of this problem. It's an important tool, but it's too expensive and not available to everyone. It doesn't build relationships on the ground. We need diplomacy."[5]

In general, Section 2 suits are expensive, complex, and can take years to resolve. Several Section 2 cases illustrate the expenses involved in this type of litigation. In *Navajo Nation v. San Juan County*, a Section 2 redistricting case, Plaintiffs' attorney fees were estimated at about $3.4 million dollars.[6] This case lasted over seven years; the judge ruled in favor of the Tribe and found multiple voting rights violations. In the final settlement agreement, San Juan County awarded the Navajo Nation $2.6 million in attorney fees.[7] Often Tribes must front litigation costs, which are diverted from other Tribal priorities.

In another Section 2 suit, Yakima County paid $3 million in legal costs after four years of litigation which found that its redistricting scheme violated Section 2 of the Voting Rights Act.[8] Not only are Plaintiffs' attorney fees costly, but defense costs are expensive. Defending suits can cost just as much as it does to bring suits and the burden of defending these lawsuits falls on the

---

[5] The Carter Center, *Breaking Down Barriers to Native American Voting* (Feb. 25, 2019), *available at* https://www.cartercenter.org/news/features/p/democracy/native-american-voting-breaking-down-barriers.html.
[6] San Juan County Commission Meeting, A Res. Approving A Settlement in the Case of *Navajo Nation et. al. v. San Juan County* with Regard to Attorney's Fees Owed to the Plaintiffs at 6:00 (Sep. 24. 2019), *available at* https://www.utah.gov/pmn/files/533287.wav.
[7] *Id.* at 6:30.
[8] Lex Talamo, *Charter Change proposal revives voting lawsuit history in Yakima*, Yakima Herald-Republic (Dec. 8, 2019), *available at* https://www.yakimaherald.com/news/local/charter-change-proposal-revives-voting-lawsuit-history-in-yakima/article_c20db1cd-d5f8-5ce5-9e6a-04b3a2dc36c5.html.

taxpayers of the state or political subdivision. For example, the state of Texas spent over $3.5 million dollars defending a Section 2 claim challenging the State's Voter ID law.[9]

b. In your opinion, do outside organizations such as the Native American Rights Fund have sufficient resources to bring Section 2 suits whenever there are alleged barriers to Native American voting rights?

In general, the Indian Legal Clinic cannot speak on behalf of other organizations, such as the Native American Rights Fund, as to whether they have sufficient resources to fund voting rights litigation. However, voting rights litigation is expensive. Lawsuits include not only time but also fees. Many Tribes also lack resources to fund voting litigation. Some Tribes lack funding to provide infrastructure for basic services such as running water and electricity and face great disparities because of failures of the federal government to meet its trust responsibility to Tribes.

4. **Recently, a federal court rejected the effort to dismiss a suit brought by tribes and voters in North Dakota in the Spirit Lake case.[10] The court specifically noted that the tribal plaintiffs allege they have been forced to divert resources to ensure their members have an ID which complies with the requirements of the state law.[11] The court said that it "is well-established that an organization has standing in its own right to challenge an election law when it expends or diverts resources to educate voters about the new law or assist them in complying with the new law."[12] Could you please discuss how tribes and voters may be negatively impacted by restrictive voting laws, even where turnout in those communities may be temporarily increased**?

According to the U.S. Commission on Civil Rights "the living conditions in Native communities remain unmatched by any other group in the United States, characterized by persistent poverty, poor health, and substandard housing and education."[13] The federal

[9] Jim Malewitz, State's Tab Defending Voter ID $3.5 Million So Far, June 17, 2016, http://www.gilmermirror.com/view/full_story/27211479/article-State-s-Tab-Defending-Voter-ID-$3-5-Million-So-Far?instance=home_news_bullets;
[10] Order Denying Defendant's Motion to Dismiss, *Spirit Lake v. Jaeger*, No. 1:18-cv-222, 2020 WL 625279 (D.N.D. Feb. 10, 2020).
[11] *Id.* at *3.
[12] *Id.* at *4.
[13] USCCR, A QUIET CRISIS FEDERAL FUNDING AND UNMET NEEDS IN INDIAN COUNTRY 117 (July 2003), *available at* https://www.usccr.gov/pubs/na0703/na0731.pdf.

government has failed to adequately address the social and economic wellbeing of Native Americans, resulting in chronically underfunded programs and unmet needs.[14] Tribal members, for example, experience the highest rates of poverty in the country at 26.6%.[15] Tribes have a limited and sometimes nonexistent tax base to fund their governments.[16] Any advancements in economic development for Tribes typically support government services that benefit Tribal members.[17] When Tribes divert resources to assist members who must comply with state voting laws, they do so at the expense of day care programs, medical services, elderly care and other important programs providing vital social services. Even though Tribal members are protected by Section 2 of the Voting Rights Act, a Tribe's ability to meet its citizens basic human needs is impaired when funds must be redirected to litigate state and local governments' restrictive voting laws.

The same holds true when Tribes must expend resources to overcome burdensome voting policies enacted by state governments, such as voter ID laws or bans on third party ballot collection. Many Tribal members lack residential mailing addresses and experience high rates of homelessness and near homelessness. This results in frequent changes in addresses, which means efforts to provide IDs to meet a State's strict ID law could mean that same ID needs to be updated in the next election in order for the Tribal member to cast a ballot. While a Tribe may invest in Get Out the Vote efforts in one election that increases voting turnout, the Tribe may lack the resources to educate Tribal members of the constant voting changes in the next election.

---

[14] USCCR, BROKEN PROMISES: CONTINUING FEDERAL FUNDING SHORTFALL FOR NATIVE AMERICANS , 1, 6 (Dec. 2018), *available at* https://www.usccr.gov/pubs/2018/12-20-Broken-Promises.pdf.
[15] U.S. Census Bureau, Profile America Facts for Features: CB16-FF.22, American Indian and Alaska Native statistics, *available at* https://www.census.gov/newsroom/facts-for-features/2016/cb16-ff22.html (Nov. 2, 2016).
[16] Matthew L.M. Fletcher, *In Pursuit of Tribal Economic Development as A Substitute for Reservation Tax Revenue*, 80 N.D. L. REV. 759, 771 (2004).
[17] *Id*. at 775.

In Arizona prior to the 2002 election, Tribes launched a significant Get Out the Vote campaign because there were several tribal initiatives on the ballot. Tribes engaged in voter registration drives and media campaigns to turn out the native vote. However, voter turnout decreased in the next election. Following 2002, Arizona passed new registration and voter ID laws making it difficult to conduct voter registration drives. Further, the voter ID law disproportionately impacted Native American voters. Thus, new restrictions on voting can decrease voter participation.

When tribal members must take time off from work and/or travel great distances to obtain valid ID, register to vote, or vote at polling locations, they bear additional financial burdens that reduce the likelihood that they will participate in elections. A recent five-state survey of Native Americans noted that between 10% and 30% of respondents who were unregistered to vote cited long-distances needed to travel as a reason not to register.[18] Similar numbers were noted when asked about difficulty in traveling to polling places for in-person voting.[19] Many tribal members are living in extreme poverty that leave them choosing between exercising the right to vote or having enough funds to provide for their families. Voting should not be this difficult, and voters should not have to make such choices.

5. **As we discussed at the hearing, the 9th Circuit Court of Appeals recently overturned Arizona's criminalization of ballot collection practices and held that Arizona's ballot collection ban intentionally discriminated against minority groups, including Native American voters.[20] How would you distinguish the election fraud that is alleged to have occurred in North Carolina in 2018[21] from the ballot collection practices occurring in Native American communities that were protected by the 9th Circuit?**

---

[18] Native American Voting Rights Coalition, Voting Barriers Encountered by Native Americans in Arizona, New Mexico, Nevada, and South Dakota at 6 (Jan. 2018), *available at* https://vote.narf.org/wp-content/uploads/2018/10/2017NAVRCsurvey-full.pdf.
[19] *Id*.
[20] *The Democratic Nat'l Comm. et al. v. Hobbs et al.*, No. 18-15845 (9th Cir. Jan. 27, 2020), http://cdn.ca9.uscourts.gov/datastore/opinions/2020/01/27/18-15845.pdf.
[21] *See* Indictment, *North Carolina v. Dowless*, No. 19CRS000489 at 1-3 (N.C. Super. Ct. Feb. 26, 2019), https://www.wfae.org/sites/wfae/files/dowless_indictments.pdf (describing alleged misconduct related to the 2016

Election security is important, and states have adopted laws to prevent and punish those who violate those laws. However, laws that seek to suppress voter participation under the guise of election security should be scrutinized and rejected. In *North Carolina v. Dowless*, Dowless was indicted for felonious obstruction of justice, conspiracy to obstruct justice, and illegal possession of absentee ballots after a North Carolina grand jury found probable cause to believe Dowless improperly collected and tampered with ballots.[22] During the state's general and primary elections, Dowless allegedly submitted improperly executed absentee ballots by mail in order to ensure the ballots were counted.[23] According to North Carolina law, an absentee ballot is properly executed when two qualified individuals witness the voter cast his/her vote upon the ballot.[24] Each witness must then sign a certification indicating s/he witnessed the voter cast his/her vote.[25] Finally, the absentee ballot must be returned by the voter him or herself, with an exception of near relatives and legal guardians.[26] After collecting absentee ballots, Dowless ordered individuals to sign ballot certifications indicating they witnessed voters execute their ballots when they in fact had not.[27] In addition, Dowless mailed in ballots on behalf of absentee voters even though he was not closely related to them, nor did he have legal authority as their legal guardian to return the ballots as required by North Carolina law.[28] This resulted in the counting of absentee ballots that would not have otherwise been counted due to their invalid execution.[29]

---

general and 2018 primary elections); Indictment, *North Carolina v. Dowless*, No. 19CRS001934 at 1-3 (N.C. Super. Ct. July 30, 2019), https://int.nyt.com/data/documenthelper/1529-mccrae-dowless-indictment/e3b692bb5c70ff25be23/optimized/full.pdf (describing alleged misconduct related to the 2018 general election).

[22] *Id.*

[23] *Id.*

[24] N.C. GEN. STAT. ANN. § 163-231(a)(5) (West 2019).

[25] *Id.*

[26] N.C. GEN. STAT. ANN. § 163-226.3(a)(5) (West 2019).

[27] *See* Indictment, *North Carolina v. Dowless*, No. 19CRS000489 at 1-3 (N.C. Super. Ct. Feb. 26, 2019); Indictment, *North Carolina v. Dowless*, No. 19CRS001934 at 1-3 (N.C. Super. Ct. July 30, 2019).

[28] *Id.*

[29] *Id.*

Arizona law criminalized the type of fraud committed in North Carolina before the legislature passed H.B. 2023, the ballot collection law overturned by the Ninth Circuit.[30] Under Arizona law, "any person who knowingly marks a voted or unvoted ballot or ballot envelope with the intent to fix an election for that person's own benefit or for that of another person is guilty of a class 5 felony."[31] Additionally, existing state law provided numerous safeguards to the third-party collection method, including tamper evident envelopes and stringent signature verification procedures. Quoting the district court, the Ninth Circuit explained:

> Ballot-collection-related fraud was already criminalized under Arizona law when H.B. 2023 was enacted. Collecting and failing to turn in someone else's ballot was already a class 5 felony. Ariz. Rev. Stat. § 16-1005(F). Marking someone else's ballot was already a class 5 felony. *Id.* § 16-1005(A). Selling one's own ballot, possessing someone else's ballot with the intent to sell it, knowingly soliciting the collection of ballots by misrepresenting one's self as an election official, and knowingly misrepresenting the location of a ballot drop-off site were already class 5 felonies. Id. § 16-1005(B)–(E). These criminal prohibitions are still in effect.[32]

The Ninth Circuit found that Arizona's ballot collection law violated Section 2 of the Voting Rights Act and disproportionately impacted Native Americans and other minorities. The Court also found that the law was passed with discriminatory intent in violation of the Fifteenth Amendment to the United States Constitution.

In *DNC v. Hobbs*, Plaintiffs challenged the validity of House Bill 2023, Arizona's ballot collection law, which criminalized the collection and delivery of another person's ballot.[33] Until the state legislature enacted H.B. 2023, Arizona did not restrict third parties from collecting or dropping-off completed early ballots. Due to various factors, such as lack of access to reliable mail and lack of transportation, minority voters relied heavily on third-party assistance to return their early ballots as compared to non-minority voters. A similar law failed to receive preclearance

---

[30] *See* ARIZ. REV. STAT. ANN. § 16-1005 (2016).
[31] *Id.*
[32] *DNC v. Hobbs*, No. 18-15845 (9th Cir. Jan. 27, 2020).
[33] *Id.*

approval from the Department of Justice when Arizona was covered under Section 5 of the Voting Rights Act.

The North Carolina case focuses on the illegal execution of another's ballot; the Arizona case focuses on voter suppression. The Court in *Hobbs* noted that you cannot manufacture race-based claims of voter fraud to facilitate the passage of a voter suppression law under the guise of voter protection. Unlike the third-party collection that occurred in North Carolina, third parties in Arizona have collected thousands of ballots with an exemplary record. There is no evidence of fraud in Arizona's long history of third-party ballot collection. If someone were to engage in actions similar to those of Dowless, these actions would also be illegal under Arizona law.

MINORITY QUESTIONS FOR THE RECORD

1. **Ms. Ferguson-Bohnee you discuss in your written testimony language barriers and note that some Native Americans have limited English proficiency, so language assistance is needed. You also mention that only few Native languages are written and not every speaker can read their native language. This understandably causes an issue when it comes to translation of balloting materials.**

    a. **With over 500 federally recognized Tribes, how many different languages are spoken among Tribes? Are there multiple languages used within a single Tribe?**

Each Tribe is unique, and many Tribes have their own distinct language. Some Tribes may have multiple dialects or languages. For example, the Colorado River Indian Tribes is comprised of four distinct tribes with four distinct languages: Hopi, Navajo, Mohave, and Chemehuevi. For purposes of Section 203 of the Voting Rights Act, the Census Bureau determines which political jurisdictions are covered by the language requirements of Section 203. The Census Bureau has indicated that only 55 counties in the country are required to provide language assistance in a

Native American language.[34] Of those 55 counties, Section 203 mandates counties to provide language assistance in 13 Native American languages. However, this should not limit jurisdictions from working with Tribes that are not covered by Section 203 to ensure that non-English speakers have assistance when casting a ballot on election day.

b. How can jurisdictions provide better language assistance to areas that might have multiple Tribes who speak a variety of languages?

Jurisdictions can work directly with individual Tribes to provide language assistance. For example, counties can work with individual Tribes to recruit translators or bilingual poll workers to provide language assistance for Native American speakers. Counties can also hire speakers of these Native languages as part of their election staff, convene a board of speakers certified by the Tribe to provide translations and involve the Tribe in planning the manner in which the translations can be accessible to voters. On the Navajo and San Carlos Apache Reservations, for example, counties use outreach workers to attend Tribal meetings and provide translations to Tribal members in advance of the elections. Counties could benefit from additional resources to hire dedicated outreach workers for each Tribe they serve.

2. We heard from Tribal leaders including Chairman Forsman of the Suquamish Tribe in Washington where the state just passed their own version of the Native American Voting Rights Act in March of 2019. The Act calls for many of the same things in this proposed version. There is a clear need for tribes and states to work together to improve access to the polls.

a. Assuming you are familiar with this legislation in Washington, do you think it provides a solid framework for other states to follow?

Yes, the Washington State legislation has several items that are beneficial to Tribal nations, including the use of tribal IDs to register electronically to vote, the ability to use nontraditional addresses on tribal land, and requiring at least one dedicated location on Tribal land to register to

[34] Voting Rights Act Amendments of 2006, Determinations Under Section 203, Notice of Determination, Fed. Reg. Vol. 18, No. 233 (Dec. 5. 2016), *available at* https://www.govinfo.gov/content/pkg/FR-2016-12-05/pdf/2016-28969.pdf.

vote and to collect ballots per Tribe. These items are critically important to increase access to the ballot box and are also included in the proposed Native American Voting Rights Act of 2019.

With 574 federally recognized Tribes located within the United States, each Tribe has different needs and each state has different processes that can affect how Tribal citizens in that state can vote. None of the Tribes in Washington are covered by Section 203 of the Voting Rights Act. For a small tribe in Washington State, one polling and voter registration location may be completely adequate, but for a very large tribe in northern Arizona that spans three counties and has a population of over 300,000, it is wholly inadequate.

Comprehensive legislation at the federal level would ensure a clear framework for states and tribes to use as a starting point. In fact, NAVRA goes further than Washington state's law by establishing a Native American Voting Rights Task Force, restoring review of voting changes that was lost in *Shelby County v. Holder*, requiring adequate language assistance, furnishing Federal election observers, and requiring the Department of Justice to conduct annual voting consultations with Indian Tribes.

If a state and Tribe can work together to secure the Native American right to vote, voter turnout would improve. Washington State passed its legislation with bipartisan support, and tribal leaders across the state supported the measure. This approach appears to be a winning combination for improving Native American voting rights.

Unfortunately, Washington State appears to be the only state taking a proactive approach to improve the voting rights of Native Americans within its state. Overall, the Washington State legislation provides a good model to secure Native American voting rights, but it seems unlikely that it could be passed on a state-by-state basis. Therefore, the federal government should exercise its trust responsibility to ensure sufficient access for Native American voters.

b. How can the federal government assist in improving the relationship between states and Tribes to improve election administration?

The relationship between the states and the Tribes could be improved if the federal government set ground rules for each side's responsibilities in election administration. In some instances, states and tribes work very well together to solve election issues, but in other instances the relationship is confrontational and has led to costly litigation that takes years to resolve. Federal legislation would assist in creating a baseline relationship of how states and tribes should interact and at a minimum what states should consider when administering federal and state elections in Tribal communities. Examples include requiring the acceptance of Tribal IDs as a form of voting ID, allowing alternatives to residential mailing addresses to include tribal government buildings or a description of the voter's address, consulting with Tribes on polling location placement including consultation prior to the closure of polling locations, consulting with Tribes on outreach plans, ensuring sufficient and effective language translations, and providing access to early voting.

In addition to creating a baseline relationship and clear direction of when states and local jurisdictions must consult with Tribes, resources are a key area of contention between states, counties, and tribes. Often states and counties must decide how to use their limited resources, sometimes choosing to spend those funds in more populated areas instead of within Indian Country. For example, funding for mobile voting units have been requested by counties in Arizona to provide more accessible in-person early voting opportunities. However, state HAVA funding has not been allocated for these purposes. Establishing that Tribes should not have to foot the bill to participate in elections that they have historically been excluded from would go a long way in securing Native American voting rights. Additional funding provided directly to the Tribes to improve voter registration and participation and retrofitting Tribal facilities to make them ADA

compliant would also be helpful. Further, annual consultation with the Federal government would keep an open dialogue with Tribes regarding ongoing concerns in protecting the Native American right to vote. Finally, the creation of a task force at the federal level to monitor Native American voting rights issues gives Tribes a way to voice ongoing concerns if jurisdictions pass restrictive voting laws that impair the ability of Tribal members to vote.

HEARING
COMMITTEE ON HOUSE ADMINISTRATION
SUBCOMMITTEE ON ELECTIONS
"NATIVE AMERICAN VOTING RIGHTS: EXPLORING BARRIERS AND SOLUTIONS"
FEBRUARY 11, 2020

MAJORITY QUESTIONS FOR THE RECORD
FOR
JACQUELINE DE LEÓN
STAFF ATTORNEY, NATIVE AMERICAN RIGHTS FUND

Thank you for the opportunity to testify on behalf of the Native American Voting Rights Act and for these questions. In addition, I have submitted "Every promise that was made to us has been broken": The Comprehensive Field Hearing Report on Historical and Contemporary Barriers to Political Participation by Native American Voters ("Field Hearing Report") which details the findings of the Native American Voting Rights Coalition's nine field hearings across Indian Country.

1. **H.R. 1694, the Native American Voting Rights Act, would give tribes a greater say in the placement of polling sites and voter registration centers on their own land. Do you think increased tribal participation in election administration decisions is an important part of a legislative solution to these issues? If so, why?**

Today, states and counties have total control of election administration decisions. These decisions are often made at a local level by county officials whose relationship with the tribes may be hostile, indifferent, or misinformed.

For example, Native Americans must often travel unreasonably far, upwards of fifty miles, to access voting registration and polling sites. Often, polling sites are located in border towns where tribal members feel unwelcome and intimidated. The polling sites chosen by county officials may be insensitive such as in Keshena, Wisconsin where the polling site was located inside of a sheriff's office which was intimidating and hampered voter turnout.

No voter should have to travel to an unfamiliar, degrading, or uncomfortable location to vote. Mandating on reservation polling sites ensures that tribal members are able to vote within their own communities, instead of being forced to go to a neighboring town. Voting within ones' own community fosters the idea that participation in the election affects that community. Voting outside of ones' community fosters the idea that the election will not impact every day life. Native Americans have felt disengaged from federal and state elections in part because these elections are not being held on their reservations. Native Americans are American citizens and are entitled to polling locations that are near them, in buildings they know, picked by their own tribal governments.

Tribes are best positioned to know which buildings are most utilized by their citizens and would best serve as polling and registration sites. It only makes sense that tribes should be the ones that decide where the voting services for their members should be located. Legislation that empowers tribes to be able to dictate the location of polling sites and voter registration centers lessons the opportunity for discrimination and encourages tribal and tribal member engagement with elections.

2. **In a recent opinion, a recently appointed judge on the 11th Circuit Court of Appeals argued that private parties do not have the power to enforce Section 2 of the Voting Rights Act against states at all, and that only the Department of Justice may enforce Section 2 against states.[1]**
    a. **If the judicial branch were to remove the ability for private parties to enforce Section 2 against the states, what impact do you think that would have on Native American voting rights and the ability to combat suppressive voting laws?**

Removal of a private right of action to enforce Section 2 protections would be devastating to Native Americans' access to the ballot box. Despite widespread voting rights abuses, including recent court findings of intentional discrimination[2], the Department of Justice under the Trump Administration has not brought any Section 2 cases, which indicates a low priority for this administration.[3] Meanwhile, Section 2 violations continue to abound in Indian Country.[4] These

[1] *Alabama NAACP v. Alabama*, No. 17-14443 (11th Cir. 2020), http://media.ca11.uscourts.gov/opinions/pub/files/201714443.pdf (Judge Branch, dissenting).
[2] *See e.g. Terrebonne Parish Branch Naacp v. Jindal*, 274 F. Supp. 3d 395 (M.D. La. 2017); *DNC v. Hobbs*, No. 18-15845 (9th Cir. Jan. 27, 2019)
[3] https://www.justice.gov/crt/voting-section-litigation (Note, *US v. City of Eastpoint MI*, was filed before the transition to the Trump administration).
[4] *Spirit Lake Tribe v. Benson Cty.*, No. 2:10-cv-95, (D.N.D. Oct. 6, 2011); *Brooks v. Gant*, No. Civ-12-5003-KES, 2012 WL 871262 (D.S.D. Mar. 14, 2012); *Wandering Medicine v. McCulloch*, No. 1:12-cv-135 (D. Mont. Oct. 10, 2012); *Poor Bear v. Jackson Cty.*, No. 5:14-cv-05059-KES, 2015 WL 1969760 (D.S.D. May 1, 2015); *Sanchez v. Cegavske*, 214 F. Supp. 3d 961 (D. Nev. 2016); *Brakebill v. Jaeger* ("Jaeger I"), No. 1:16-CV-008, 2016 WL 7118548, at *1 (D.N.D. Aug. 1, 2016); *Brakebill, et al. v. Jaeger II* (ND)**;** *Spirit Lake Tribe. v. Jaeger*, No. 1:18-cv-00222 (D.N.D.) (Complaint filed Oct. 30, 2018); *DNC v. Hobbs*, No. 18-15845 (9th Cir. Jan. 27, 2019)

cases demonstrate that time and time again, lawsuits brought under a private cause of action have resulted in recognition that discrimination faced by Native Americans is real and ongoing. Absent Section 2's protection through private action this discrimination would go unchecked in times where the DOJ was unable or unwilling to bring suit.

b. Do you think that would increase the need for a legislative solution to address Native American voting rights issues?

If private right of action to remedy Section 2 violations were removed, under Administrations that did not care to pursue voting rights violations, there would be no recourse for the discrimination preventing Native Americans from accessing the ballot box. Preventing Section 2 violations in the first place through NAVRA's provisions such as greater access to polling sites and increased acceptance of tribal IDs would alleviate some of the barriers faced by Native Americans and alleviate some of the need for Section 2 litigation.

3. As was discussed at the hearing, lawsuits to enforce Section 2 are costly and time-consuming and are often unaffordable for individual tribes.

a. Could you describe the resources that are typically required in order to bring a Section 2 suit?

Proving discrimination is a lengthy and costly process. In *Crawford v. Marion*, 553 U.S. 181, 189 (2008), the Supreme Court concluded a claim under Section 2 was unpersuasive because "the evidence in the record is not sufficient." Consequently, successful Section 2 claims require a thorough record.

In the recent litigation over North Dakota's requirement that Native Americans present ID containing a residential address despite knowing many Native Americans in North Dakota lack residential addresses, the cost of the first half of the litigation totaled $1,132,459.41.[5] The first phase of the litigation consisted of the investigation, expert reports, and attorney hours required to successfully obtain a preliminary injunction in advance of the 2016 election. The law was passed in 2013 and the investigation was started in 2014, with the preliminary injunction entered in 2016. The following year North Dakota made minor modifications to the law in an attempt to circumvent the preliminary injunction and suit was brought again. After two and a half years of additional litigation, litigation has been suspended pending finalization of an agreed upon consent decree. Again, substantial attorney hours and additional expert reports were required to pursue the second half of the litigation, which would result in another large fee claim should Plaintiffs pursue it.

---

[5] Plaintiffs' Motion for Attorneys' Fees and Costs, Brakebill v. Jaeger, No. 1:16-cv-8 (N.D. Apr. 17, 2018), ECF No. 107

The litigation in North Dakota was contentious and long-lasting. It is not until seven years after the first voter ID law was passed that Native Americans in North Dakota nearly have equitable access to the ballot box. This extended effort demonstrates how difficult it is to pursue Section 2 litigation. Many tribes lack the resources to cover upfront costs of such expensive litigation and lack the time to pursue such a protracted lawsuit.

In your opinion, do outside organizations such as the Native American Rights Fund have sufficient resources to bring Section 2 suits whenever there are alleged barriers to Native American voting rights?

NARF does not have enough resources to address every likely Section 2 violation. We are a staff of 17 full time lawyers, addressing issues spanning, to name a few, tribal water rights, intellectual property violations, natural resource and sacred site degradation, attacks on tribal sovereignty, along with voting rights work. As discussed, substantial upfront resources are required to develop a record sufficient to establish discrimination under Section 2. NARF does not have the upfront resources, or attorney time, to pursue every Section 2 violation.

4. **Recently, a federal court rejected the effort to dismiss a suit brought by tribes and voters in North Dakota in the Spirit Lake case.[6] The court specifically noted that the tribal plaintiffs allege they have been forced to divert resources to ensure their members have an ID which complies with the requirements of the state law.[7] The court said that it "is well-established that an organization has standing in its own right to challenge an election law when it expends or diverts resources to educate voters about the new law or assist them in complying with the new law."[8] Could you please discuss how tribes and voters may be negatively impacted by restrictive voting laws, even where turnout in those communities may be temporarily increased?**

When faced with discrimination, tribes and members are sometimes galvanized to try and defeat injustice. In North Dakota, when it became clear that the voter ID law would disenfranchise their community, the Turtle Mountain High School Youth Council organized a march in freezing temperatures to rally the vote. Additionally, the tribes expended considerable resources in order to get IDs in the hands of their members. Volunteers and organizers also supported get out the vote. Outside funds buoyed these efforts. As a consequence, despite being faced with discrimination, turnout in the 2018 election was a record high.

---

[6] Order Denying Defendant's Motion to Dismiss, *Spirit Lake v. Jaeger*, No. 1:18-cv-222, 2020 WL 625279 (D.N.D. Feb. 10, 2020).
[7] *Id.* at *3.
[8] *Id.* at *4.

In order to access the ballot box, however, teenagers should not have to march in the streets and tribes should not have to expend thousands of dollars to overcome obstacles. In time, when the sting of the injustice fades, if the barriers are not removed, it simply remains unreasonably difficult to vote. This difficulty, if it does not outright prevent a voter from casting a ballot, also breeds cynicism, feelings of powerlessness, and disengagement from civic duty.

At times, discrimination has the inverse of its intended effect and it increases turnout for a short period of time. All too often, however, discrimination simply makes it difficult to vote and turnout is suppressed. No American citizen should face discrimination when trying to exercise their fundamental right to vote. Furthermore, overcoming discrimination should never be used as an excuse to allow discrimination to reoccur.

5. **A settlement of the North Dakota voter ID litigation referenced above was announced shortly after the Subcommittee's hearing.[9] Is there any information related to the settlement that you believe would assist the Subcommittee as it continues to examine Native American voting rights?**

The final settlement consent decree has not yet been finalized and made public. Progress has been made as reported publicly through conferrals with the magistrate and the settlement will likely be announced in the coming weeks. If permitted, I will supplement the record with the final settlement order when it is made public.

MINORITY QUESTIONS FOR THE RECORD

1. **One of the main components of the proposed legislation is the establishment of the Native American Voting Task Force where applicants could apply for funds to assist in election administration. Eligible applicants for this program includes the Secretary of State or another official of a State entity responsible for overseeing elections, Indian Tribes, and nonprofit organizations that works, in whole or in part, on voting issues.**
    a. **Do you foresee issues where non-governmental entities, like NARF, who apply and are granted funds to administer election functions on reservations instead of the Tribes receiving the money directly?**

According to the Native American Voting Rights Act of 2019, H.R. 1694, 116th Cong. § 4(b) (2019):

[9] *Secretary of State Agrees to Settle Voter ID Lawsuits by Entering Into Consent Decree with North Dakota Tribes*, NARF.org (Feb. 13, 2020), https://www.narf.org/nd-voting-rights/, last accessed February 25, 2020.

The purpose of the Native American voting task force grant program is to—

(1) increase voter outreach, education, registration, and turnout in Native American communities;

(2) increase access to the ballot for Native American communities, including additional satellite, early voting, and absentee voting locations;

(3) streamline and reduce inconsistencies in the voting process for Native Americans;

(4) provide, in the community's dominant language, educational materials and classes on Indian lands about candidacy filing;

(5) train and educate State and local employees, including poll workers, about—

(A) the language assistance and voter assistance requirements under sections 203 and 208 of the Voting Rights Act of 1965 (52 U.S.C. 10503; 10508); and

(B) voter identification laws under section 8 of this Act;

(6) identify model programs and best practices for providing language assistance to Native American communities;

(7) provide non-partisan poll watchers on election day in Native American communities;

(8) participate in and evaluate future redistricting efforts;

(9) address issues of internet connectivity as it relates to voter registration and ballot access in Native American communities; and

(10) facilitate collaboration between local election officials, Native American communities, and Tribal elections offices.

The purposes of the NAVRA task forces include areas where tribes may need technical assistance. For example, "identify model programs and best practices for providing language assistance" and "train and educate State and local employees" would require less resources for nonprofits such as NARF or local organizations dedicated to get out the vote because these organizations are already well versed in these models and have the capacity to create training and education materials. Non-profit organizations committed to voting rights do not have to re-invent the wheel when it comes to many of the task force mandates.

Following the Native American Voting Rights Coalition's nine field hearings which consisted of testimony from 125 witnesses, a nearly two hundred page Field Hearing Report was produced. This report details extensive voting rights abuses, as well as identifies common voting difficulties that occur throughout Indian Country. Tribes, tasked with the everyday burdens of running a tribal government, may not have the capacity to keep up to date with these trends or be

able to identify potential solutions most efficiently. NARF, along with other organizations regularly engaged in voting rights work, can quickly identify areas of concern and offer suggestions that tribes can utilize.

Additionally, local nonprofit voting rights entities are familiar with local issues concerning election administration and can quickly solve practical problems such as the ideal location of a ballot drop box. Moreover, many local non-profits' mission statements are aligned with the task forces' first purpose to "increase voter outreach, education, registration, and turnout." This experience increasing voter turnout should be leveraged through participation in the NAVRA task forces.

In sum, depending on local tribal expertise and capacity, having the option to engage subject matter experts such as NARF and local non-profit organizations through the task force most efficiently utilizes resources.

2. **In your written testimony you mention that federal intervention would result in "significant savings" because discrimination is primarily addressed on an ad hoc basis through litigation. You also point out NARF's success rate in litigating Native American voting matters and how state and local governments are left to foot the bill for attorney fees when a case is proved.**
    a. **Under NAVRA, there is a private right of action allowing any individual or group to file a civil claim therefore tying up a state or locality in litigation. Groups like NARF can still litigate matters and collect attorney fees. How then is it that federal intervention would result in significant savings?**

In the last ten years, at least eight Section 2 cases would not have had to have been brought if the NAVRA was enacted.[10] Many more cases remain unfiled due to the lack of resources required to bring suit. I encourage the NAVRA's enactment so that Native Americans can participate in democracy on par with fellow Americans across the country without the necessity of litigation.

Upon the passage of the NAVRA, we do not anticipate states defying federal law. If states chose to defy federal law, then NARF or other organizations dedicated to protecting voting rights would alert states of their non-compliance and in some instances sue to enforce the NAVRA. Following a successful lawsuit Plaintiffs would likely pursue attorneys' fees and costs. However, a violation of the NAVRA would require a much smaller evidentiary record than a Section 2 case, which is

[10] *Spirit Lake Tribe v. Benson Cty.*, No. 2:10-cv-95, (D.N.D. Oct. 6, 2011); *Brooks v. Gant*, No. Civ-12-5003-KES, 2012 WL 871262 (D.S.D. Mar. 14, 2012); *Wandering Medicine v. McCulloch*, No. 1:12-cv-135 (D. Mont. Oct. 10, 2012); *Poor Bear v. Jackson Cty.*, No. 5:14-cv-05059-KES, 2015 WL 1969760 (D.S.D. May 1, 2015); *Sanchez v. Cegavske*, 214 F. Supp. 3d 961 (D. Nev. 2016); *Brakebill v. Jaeger* ("Jaeger I"), No. 1:16-CV-008, 2016 WL 7118548, at *1 (D.N.D. Aug. 1, 2016); *Brakebill, et al. v. Jaeger II* (ND); *Spirit Lake Tribe. v. Jaeger*, No. 1:18-cv-00222 (D.N.D.) (Complaint filed Oct. 30, 2018).

cumbersome and expensive, as described in my answer to the majority's question 3 discussed above. For example, establishing that a State refused to place a polling site on Indian land in violation of the NAVRA is a factual inquiry that can be readily established by the physical absence of a polling site on the land. A Section 2 case for the same scenario would require a record showing the lack of a polling site on Indian land discriminated against Native Americans. While such a claim may seem intuitively true, courts would still require the engagement of experts, such as a geographer and a sociologist, to validate the claim. This would undoubtedly result in higher costs to the state and local governments left to foot the bill.

Conclusion

Thank you for these questions. The NAVRA provides an opportunity for the federal government to provide Native Americans with more equitable access to the ballot box so they may exercise their rights as American citizens to participate in our democracy. I strongly support its passage and urge you to move this legislation forward.

I would also add that due to the covid-19 virus, states are increasingly moving toward vote by mail. As extensively detailed in the Field Hearing Report, vote by mail disenfranchises native communities. In part this is because many Native Americans do not receive residential mail delivery, live in homes that aren't addressed, and are dependent on P.O. Boxes to conduct their affairs. The NAVRA contains accommodations for vote by mail like those adopted in Washington State. These accommodations allow tribes to designate buildings that can be used to register, pick up, and drop off ballots. Passage of the NAVRA would provide protections for Native communities so they too can participate in elections conducted by vote by mail during this uncertain time and into the future.

HEARING
COMMITTEE ON HOUSE ADMINISTRATION
SUBCOMMITTEE ON ELECTIONS
"NATIVE AMERICAN VOTING RIGHTS: EXPLORING BARRIERS AND SOLUTIONS"
FEBRUARY 11, 2020
MINORITY QUESTIONS FOR THE RECORD
FOR
DOREEN MCPAUL
ATTORNEY GENERAL, NAVAJO NATION

1. Below are Attorney General McPaul's responses to Minority Questions for the Record.

a. What is the history of the Democratic National Committee's (DNC) involvement in *Democratic Nat'l Comm. (DNC) v. Hobbs*, 948 F.3d 989 (9th Cir. 2020)?

Based on the court documents, the DNC is one of the parties that brought the case.

b. In *DNC v. Hobbs* the 9th Circuit found that a discriminatory burden exists when any minority voter is being denied equal electoral opportunities. In your legal opinion, was the decision by the 9th Circuit consistent with the application by other courts?

The Navajo Nation ("Nation") is of the opinion that the 9th Circuit's decision in *DNC v. Hobbs* is correct and consistent with the decisions of other courts. In reviewing the 9th Circuit's decision, and the cases relied on by the 9th Circuit, the Nation believes the 9th Circuit's decision accurately states the relevant law and correctly applies it to the case at hand. The Nation also believes the 9th Circuit's decision is consistent with the decisions of other circuit courts and the United States Supreme Court.

The matters of contention in *DNC v. Hobbs* were 1) Arizona's policy of wholly discarding ballots cast in the wrong precinct ("out-of-precinct" or "OOP" policy) and 2) Arizona House Bill 2023 ("HB 2023"), criminalizing the collection and delivery of another person's ballot. Plaintiffs claim both of these practices violate Section 2 of the Voting Rights Act of 1965 ("VRA") because they adversely and disparately affect Arizona's minority populations.[1] The Plaintiffs also claim

[1] Section 2 of the VRA "'prohibits all forms of voting discrimination' that lessen opportunity for minority voters." *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 238 (4th Cir.

HB 2023 violates Section 2 of the VRA and the Fifteenth Amendment to the United States Constitution because it was enacted with discriminatory intent. The OOP claim and prohibition of ballot collection are considered vote denial claims under Section 2 of the VRA.

Section 2 of the VRA provides that "[n]o voting qualification or perquisite 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 its citizens to vote on account of race or color." 52 U.S.C. § 10301(a). A violation occurs if based on the totality of the circumstances, it is demonstrated that members of a protected class "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b).

In *DNC v. Hobbs*, the 9th Circuit correctly stated the law as it applies to vote denial claims and consistent with the decision of other circuit courts. A vote denial claim is understood to be "any claim that is not a vote dilution claim." *DNC*, 948 F.3d at 1011-1012 *citing Ohio State Conference of NAACP v. Husted*, 768 F.3d 524, 554 (6th Cir. 2014), *vacated on other grounds*, 2014 WL 10384647 (6th Cir. 2014). In evaluating a vote-denial challenge to a "standard, practice, or procedure" a court should utilize the "result test" contained in Section 2 of the VRA. *See* 52 U.S.C. § 10301 (b). Under the "results test" of Section 2, most courts engage in a two-step process. *DNC*, 948 F.3d at 1012 *citing Veasey v. Abbott*, 830 F.3d 216, 244–45 (5th Cir. 2016); *League of Women Voters*, 769 F.3d at 240 (4th Cir. 2014); *Ohio State Conference of NAACP v. Husted*, 768 F.3d 524, 554 (6th Cir. 2014); *Smith v. Salt River Project Agricultural Improvement & Power District*, 109 F.3d 586 (9th Cir. 1997).

2014) (quoting *Thornburg v. Gingles*, 478 U.S. 30, 45 n.10 (1986)). It prohibits the State from imposing a standard, practice, or procedure in a manner that results in the denial or abridgment of the right of any citizen to vote on account of race. *See* 52 U.S.C. § 10301 (a).

The two steps include first asking whether the challenged standard, practice or procedure results in a disparate burden on members of the protected class. *DNC*, 948 F.3d at 1012 *citing Gingles*, 478 U.S. at 44 ("…as a result of the challenged practice or structure[,] plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice."). Second, if a disparate burden is found, the court then asks whether, under the "totality of the circumstances," there is a relationship between the challenged "standard, practice, or procedure," on the one hand, and "social and historical conditions" on the other. *DNC*, 948 F.3d at 1012 *(quoting Gingles*, 478 U.S. at 47). The 9th Circuit found that the Plaintiffs satisfied both prongs based on evidence presented in the lower court.

The 9th Circuit applied the two steps of the results test to the OOP policy and HB 2023. In regards to the OOP policy the 9th Circuit found the district court had failed to find that step one of the results test was met, which was clearly erroneous. *DNC*, 948 F.3d at 1016. The district court failed to determine that step one was met even though "[t]he district court found that Arizona's policy of wholly discarding OOP ballots disproportionately affects minority voters." The district court incorrectly compared the amount of OOP ballots to the total number of all ballots cast. The 9th Circuit then conducted a step two analysis, applying the Senate factors as required by the Supreme Court in *Gingles*. *See Gingles*, 478 U.S. at 47. As a result of its analysis, the 9th Circuit found that the district court clearly erred in finding Plaintiffs had not carried their burden in step two and that Plaintiffs had successfully shown that all of the considered Senate factors weigh in their favor.

In applying the two-step analysis to HB 2023, the 9th Circuit found that the district court's finding for step one was clearly erroneous. *DNC*, 948 F.3d at 1033. Although the district court found that minorities were generally more likely to return their early ballots with the assistance of

third parties, it found that the law was not unduly burdensome because the number of minority ballots collected was de minimis compared to "the much greater number of all votes cast 'without the assistance of third parties." For both OOP and ballot collection, the 9th Circuit found that the formula to determine de minimis was wrong. "It goes on to incorporate much of the OOP step two analysis for the HB 2023, since many relevant facts under the Senate factors overlap, such as the factor one's "official history of discrimination."

For all of the above reasons stated above the Navajo Nation finds the legal basis and analysis of the 9th Circuit in *DNC v. Hobbs* so be consistent with application by other courts.

COMMITTEE ON HOUSE ADMINISTRATION
SUBCOMMITTEE ON ELECTIONS
"NATIVE AMERICAN VOTING RIGHTS: EXPLORING BARRIERS AND SOLUTIONS"
FEBRUARY 11, 2020
RESPONSES TO MINORITY QUESTIONS FOR THE HEARING RECORD
LEONARD FORSMAN
CHAIRMAN, SUQUAMISH TRIBE

1. Chairman Forsman, thank you for your testimony regarding Washington State's passage of the Native American Voting Rights Act. I am pleased to see that the tribes in Washington were able to work with their state legislature to pass a law that encourages native turnout across the State.

    a. You didn't require the federal government to intervene in your discussions with the State did you?

As a sovereign nation, the Suquamish Tribe is a signatory to the 1855 Treaty of Point Elliot, which was ratified by the U.S. Congress in 1859. The articles in this treaty are between the signatory tribes and the United States, not the State of Washington, which was only a territory at the signing of the treaty. As such, Congress has plenary duties that it must actively uphold to protect the sovereignty and rights our tribal nations.

Throughout the decades, tribes in Washington State have repeatedly demanded that Congress live up to its federal treaty and trust duties to protect and uphold our voting rights. During the Fish Wars of the 1960s and 1970s, the tribes in Washington State had a very tense relationship with the state and local communities. In 1974, U.S. District Court Judge George Boldt reaffirmed tribal reserved treaty rights (Boldt Decision). However, issues continued to persist. The federal government became so concerned that it dispatched the U.S. Commission on Civil Rights to investigate in 1977.

Tribes in Washington continued to struggle to work with the State. We repeatedly requested the aid of our Congressional members to protect our voting rights. We advocated for Congress to address our Native voting rights concerns through direct meetings, hearings, and our involvement with national organizations such as the National Congress of American Indians. Despite the introduction of much needed Native voting legislation throughout the years, Congress has yet to act.

In 2019, two tribal citizens that serve in the Washington State Legislator spearheaded the Native American Voting Rights Act. Without the dedication and leadership of Senator John McCoy and Representative Debra Lekanoff, Washington State may not have enacted strong statutory provisions to protect our tribal citizen's right to vote.

However, states across the U.S. are not willing to enact legislation to protect our Constitutional right to vote. Tribes should not be required to wait decades for a state legislator to address voting rights. Congress has that plenary power and treaty obligation to ensure that no one, including tribal citizens, is turned away from exercising their right to vote.

b. I'm of the opinion that the Washington state law is a good example of how some of these issues you discussed should be addressed. What advice would you give other tribes throughout the United States on working with their state legislatures to address needs on reservations?

After the issuance of the Boldt Decision, the State of Washington was required to work with the tribes in the state in co-managing the fishing resources. This court decision resulted in driving the State to the table. The relationship between the tribes and Washington State have come a long way and communications have greatly improved.

In addition, in 1989 the State of Washington signed the Centennial Accord with the tribes within the state. The Accord requires each cabinet member to consult with tribes. The only other state with a similar agreement is New Mexico. Most states and tribes do not have the flourishing relationship that is found here in Washington so the federal government must maintain its presence to uphold its trust responsibility and protect the right of individual tribal citizens to vote.

Across Indian Country, tribes should remain active in building relationship with their state governments. Tribal citizens should be supported and encouraged to run for local, county, and state elections. However, Congress has the sole plenary power over Indian Country, and Congress must continue to meet its treaty and trust responsibilities to meet our needs.

c. In regard to tribal identification cards, must tribal citizens attest to their United States citizenship

Much like states, tribes have the authority to administer tribal identification cards to its tribal citizens based on the tribe's own laws and codes. Currently fifteen states, including the state of Illinois, and the District of Columbia have enacted laws that provide legal avenues for unauthorized immigrants to obtain state driver's licenses. Similarly, some tribes have developed laws that provide tribal identification cards to non-U.S. citizens, and other tribes only provide identification cards to U.S. citizens.

It is also important to note that the U.S. Supreme Court in 2013 ruled that states may not require proof of U.S. citizenship from individuals seeking to register to vote in a federal election. The U.S. Supreme Court held that the form, as enacted by Congress, requiring individuals to check a box attesting to their U.S. citizenship status was acceptable. Thus, tribal citizens, like the rest of the country, are only required to attest to their U.S. citizenship when they register to vote in federal elections. It does not matter whether or not tribes require their citizens to attest to U.S. citizenship to obtain tribal identification cards.

d. What were the turnout numbers for the Suquamish Tribe in the 2018 elections?

The Tribe does not track individual voting turnout in federal elections. However, our tribal citizens are very civically engaged so I assume the overall turnout would be very high.

HEARING
COMMITTEE ON HOUSE ADMINISTRATION
SUBCOMMITTEE ON ELECTIONS
"NATIVE AMERICAN VOTING RIGHTS: EXPLORING BARRIERS AND SOLUTIONS"
FEBRUARY 11, 2020
MINORITY QUESTIONS FOR THE RECORD
FOR
AMBER TORRES
CHAIRPERSON, WALKER RIVER PAIUTE TRIBE

1. Please elaborate on your written testimony on the legislation that the Nevada State Legislature enacted?
    a. It is evident that administering elections in rural areas has its unique set of challenges. Could you discuss some of the problems you have seen in the more rural areas of your state?
    b. What did turnout look like for the Walker River Paiute Tribe in 2018?

2. In your testimony before the committee one of the things you said that was working was being able to hire your own people to work polling locations which helps because they are trusted and a familiar face. One of the main components of the proposed legislation is the establishment of the Native American Voting Task Force where applicants could apply for funds to assist in election administration. Eligible applicants for this program include the Secretary of State or another official of a State entity responsible for overseeing elections, Indian Tribes, and additionally a nonprofit organization that works, in whole or in part, on voting issues.
    a. Do you foresee issues where non-governmental entities, who apply and are granted funds to administer election functions on reservations instead of the Tribes receiving the money directly?

Response

Our Tribe won the right to have early voting on our reservation in 2016. We have been fortunate to have had our people vote here on our reservation for at least 40 years. During those years many tribal members have worked as poll workers and that continues today.

Our early voting numbers are increasing with each election. We have the second largest Precinct (#11) in Mineral County in Nevada, with 413 registered voters. We had 62.47% voter turnout (258); of those 66% (170) voted early in 2018.

We met with Nevada Senator Catherine Cortez-Masto in October of 2018, who was a co-sponsor for the Native American Voting Rights Act of 2018. We told her that work needs to be done in

Nevada, especially in rural areas. All Natives need to have the equal right to vote without suppression. We were the last people to earn that right. Voting needs to be made easier, not harder. We will continue to educate our people on the importance of voting. We expressed our thanks for her support of this bill.

It's great that we have many Tribal members here on our reservation that worked to get information out to our voters. The different types of social media have been used – Facebook, Snapchat and Instagram; text messaging was also used to a great extent.

We use "old school" methods as well – phone calls, posting fliers, going door-to-door to get voters interested. These methods still work, but what we realized was that the young 18-30 year olds communicate via of social media and their cell phones. This age group is also the group that is less likely to register to vote.

Here are some of comments that were received after the 2018 election; in order to do better with getting the Native Vote Out here on our reservation:

*We still need to go to door-to-door to inform people of the elections.
*We need to get out fliers to elders; some didn't want to vote because they were afraid to use the voting machines; they need help; some were very nervous to try and vote.
*Need to encourage elders to vote by absentee ballot.
*We need to have education sessions on the importance of voting or just on the voting process and how the machines work.
*Some elders felt that their vote wouldn't matter – need community education.
*We need to do training on voting and get out the historical perspective
*We need to have people register earlier before each election.
*Was good to see the young people get registered; need to identify more; maybe send information out to them.
*Elders were intimidated; need more interaction with them.
*Elders can't hear; need to take time with them to explain the voting process.
*We need to clean up our registered voters list; some of those on the list don't live here anymore.

Our Tribe has done better with having equal voting rights than many other tribes in Nevada and in the country. Mainly because we have had our people vote locally over the years.

In regards to the legislation that the Nevada State Legislature enacted where tribes can have a voting site on their reservations has not been pushed for implementation. I think that the only tribes that have requested a precinct site were Reno/Sparks for Hungry Valley and the Yerington Paiute Tribe for Campbell Ranch. There hasn't been a push to get other tribes to do this and no entity has taken on this role to educate tribes. This should have already been done as there is a timeframe for this to happen (I think it has already passed).

Tribes need to develop positive and good working relationships with their county clerks to discuss all voting issues. This year our County Clerk reached out to Elveda Martinez to discuss voting-by-mail due to the Covid-19 pandemic; in order to keep our people safe we agreed to this option for

the primary election. There was no early voting option for our people here on the reservation, but the safety of our people is more important.

There is a need for funding for tribes to work on elections. I think that working with non-governmental entities would be good to work with as long they are Native groups. Our people do need to see a familiar face when being educated about voting or having someone go to their homes.

House Committee on Administration Subcommittee on Elections
Hearing on Native American Voting Rights: Exploring Barriers and Solutions

Tuesday, February 11, 2020

Testimony of the National Congress of American Indians

On behalf of the National Congress of American Indians (NCAI), the oldest and largest organization of American Indian and Alaska Native tribal nations, we are pleased to submit this testimony on Native voting rights. We thank the Subcommittee for holding this hearing and for its recognition that Native voting rights are an issue that Congress must address. We further encourage the Subcommittee to take action on the Native American Voting Rights Act, H.R. 1694, which is currently pending before the House Committee on Administration. NCAI adopted Resolution ABQ-19-068 (attached) last October in support of the provisions of the Native American Voting Rights Act, which we believe would help address the challenges discussed in this hearing.

NCAI is an organization that was established 75 years ago by tribal leaders who recognized the need for a forum where they could join their voices together to advocate for Indian Country. One of the first resolutions considered by our Congress at its inaugural convening in 1944 was brought by a tribal delegate who was concerned that American Indians in New Mexico and Arizona were being denied the right to vote. The delegates debated the resolution, expanded its scope to address voting barriers experienced across the country, and unanimously adopted it. We have been working since that time to protect and promote voting rights for Native people. We understand that the right to vote is a fundamental issue that underpins all of the other issues that we work on as tribal nations and at NCAI. We know the importance of making our voices heard and exercising our right to vote.

Although American Indians and Alaska Natives have inhabited North America longer than any other segment of American society, they were the last group to receive the right to vote when the United States finally passed the Indian Citizenship Act in 1924. Even after 1924, certain states with large Native populations barred American Indians and Alaska Natives from voting by setting discriminatory voter registration requirements. For example, various states denied American Indians the right to vote because they were "under guardianship," or American Indians were denied the right to vote unless they could prove they were "civilized" by moving off of the reservation and renouncing their tribal ties. New Mexico was one of the last States to remove all express legal impediments to voting for American Indians in 1962, three years before the passage of the Voting Rights Act. American Indians and Alaska Natives also experienced many of the same tactics aimed at depriving African Americans of the franchise in the South, including poll taxes and literacy tests.

Today American Indian and Alaska Native people are U.S. citizens with the right to vote in all federal and state elections. Unfortunately, it is simply harder, in many cases, for tribal citizens to vote than it is for others. They often have to travel long distances both to register and to vote.

They often encounter intimidation or harassment at the polls. District lines are drawn to dilute their power. They may also encounter problems trying to vote in their indigenous languages or using their tribal identification cards. Discrimination is all too real for many American Indian and Alaska Native voters. As a result, turnout among American Indians and Alaska Natives nationwide is five to 14 percentage points below that of other racial and ethnic groups.[1]

As you will hear from witnesses at this hearing, and as were documented by the recent field hearings conducted by the Native American Voting Rights Coalition, there are a broad range of challenges that Native voters experience and there are structural issues at the root that need to be addressed legislatively. The Native American Voting Rights Act was drafted with the input of many tribal stakeholders and includes a number of important provisions that would address the most significant issues reported by tribal leaders and Native voters. We wholeheartedly support the Native American Voting Rights Act, and would like to focus our testimony for this hearing on one particular issue—the role of tribal nations as governments in election administration.

In general, tribal nations are excluded from the election administration system in this country. Of course, they administer their own tribal elections, but federal elections are generally the responsibility of state and local governments. The exclusion of tribal nations from election administration has had the predictable result of creating an uneven playing field and discouraging Native voters.

State and local election administrators often place voter registration locations and polling places outside of tribal communities—often requiring significant travel for Native voters. Whereas many Americans walk down the block to their local library or school to cast a ballot, residents on many Indian reservations have to travel long distances on bad roads in often high poverty areas. Residents on one reservation in South Dakota, for example, had to travel up to 150 miles roundtrip to vote until a federal court ordered the establishment of polling places on the reservation. Citizens of the Confederated Tribes of the Goshute Indian Reservation in Utah have to travel approximately 163 miles—over 5 and a half hours round trip to vote. In Alaska, Alaska Native voters may be assigned to polling places 75 miles away and accessible only by air or boat. In some instances, polling locations may become completely inaccessible on Election Day.

State and local election administration officials often provide very limited access to early voting and satellite voting for Native voters. In recent years, an increasing number of claims have been brought under Section 2 of the Voting Rights Act challenging unequal access to early voting locations. For example, in *Wandering Medicine vs. McCulloch*, which was eventually settled in the 9th Circuit, voters from three tribal nations in Montana filed suit in an effort to get three Montana counties to establish satellite registration and voting sites on their reservations, which they had not done before. In these three counties, Indian voters had to travel 189-322 percent

[1] Tova Wang, Ensuring Access to the Ballot for American Indians & Alaska Natives: New Solutions to Strengthen American Democracy (Demos).

farther than their non-Native counterparts. Compounding the challenges associated with these distances, the poverty rate among American Indians in these counties is 100-400 percent higher than white residents. The cost of gas and access to transportation can be prohibitive for individuals living in severe poverty or on a fixed income, particularly for many American Indians and Alaska Natives who live in remote, isolated locations.

We have seen that making voting more accessible makes a big difference in tribal communities. For most voters, the concept of "election day" is a thing of the past. More and more voters are casting their ballots early at satellite voting locations or via mail-in ballots. In 2018, 40 percent of voters nationwide voted early, and evidence suggests that improving access to early voting is a particularly effective strategy for increasing participation among non-white voters.

In 2016, the Pyramid Lake Paiute and Walker River Paiute tribes successfully argued that their members were being denied equal access to the polls due to long distances Native voters must travel to vote early or cast ballots on Election Day. The Pyramid Lake Paiute and Walker River Paiute tribes won an emergency federal court order requiring the establishment of satellite polling places on two northern Nevada reservations weeks before the 2016 Election. Researchers have concluded that this resulted in an estimated 1124 percent increase in voter turnout on those reservations.[2]

The Native American Voting Rights Act would empower tribal nations to request a polling place and early voting site on their reservations. Allowing tribal nations who do not currently have a conveniently located polling place or early voting location on their lands to determine where one should be located has the potential to substantially improve voting access for American Indians and Alaska Natives. As sovereign governments, tribal elected leaders are uniquely qualified to assess and address the needs of their citizens and should be able to designate polling locations on their lands.

While many of the barriers Native voters encounter, including inequitable access to registration and polling sites, violate the Voting Rights Act, enforcement is incredibly costly and time-consuming. The U.S. Department of Justice, which has responsibility for enforcing the Voting Rights Act, has not brought a case on behalf of Native voters in nearly 20 years, leaving the burden on Native voters to defend their own rights. Without federal enforcement, tribal nations and their members are forced to spend excessive resources to bring litigation against states. For example, the tribal nations who litigated the *Wandering Medicine* case spent several hundred thousand dollars to litigate that case. The Native American Voting Rights Act would empower tribal governments to address these issues without resorting to litigation, and would foster greater partnership between states and tribal nations.

---

[2] Schroedel, Jean, et al, "Assessing the Efficacy of Early Voting Access on Indian Reservations: Evidence from a Natural Experiment in Nevada," (2018), http://research.cgu.edu/democratic-renewal/wp-content/uploads/sites/26/2018/10/AssessingEarlyVotingAccess.pdf.

The record for this hearing will clearly demonstrate that there is a need to implement a multi-pronged strategy to improve access to polls, with the overall goal of assuring that American Indians and Alaska Natives have an equal opportunity to participate in that most fundamental of all rights, the right to vote. The Native American Voting Rights Act will help ensure that all Native voters have equal access to the ballot box. Thank for the opportunity to submit this testimony. We look forward to working with you on this important legislation.

EXECUTIVE COMMITTEE

PRESIDENT
Fawn R. Sharp
Quinault Indian Nation

FIRST VICE-PRESIDENT
Aaron Payment
Sault Ste. Marie Tribe of Chippewa Indians

RECORDING SECRETARY
Juana Majel-Dixon
Pauma Band of Luiseño Indians

TREASURER
Clinton Lageson
Ketalize Indian Tribe

REGIONAL VICE-PRESIDENTS

ALASKA
Rob Sanderson, Jr.
Tlingit & Haida Indian Tribes of Alaska

EASTERN OKLAHOMA
Norman Hildebrand
Wyandotte Nation

GREAT PLAINS
Larry Wright, Jr.
Ponca Tribe of Nebraska

MIDWEST
Shannon Holsey
Stockbridge Munsee Band of Mohican Indians

NORTHEAST
Tina Abrams
Seneca Nation of Indians

NORTHWEST
Leonard Forsman
Suquamish Tribe

PACIFIC
Erica Mae Macias
Cahuilla Band of Indians

ROCKY MOUNTAIN
MARK POLLOCK
Blackfeet Nation

SOUTHEAST
Nancy Carnley
Ma-Chis Lower Creek Indian Tribe of Alabama

SOUTHERN PLAINS
Robert Tippeconnie
Comanche Nation

SOUTHWEST
Vacant

WESTERN
Alan Mandell
Pyramid Lake Paiute Tribe

CHIEF EXECUTIVE OFFICER
KEVIN ALLIS
Forest County Potawatomi Community

NCAI HEADQUARTERS
1516 P Street, N.W.
Washington, DC 20005
202.466.7767
202.466.7797 fax
www.ncai.org

NATIONAL CONGRESS OF AMERICAN INDIANS

The National Congress of American Indians
Resolution #ABQ-19-068

TITLE: Support Legislation to Ensure Voting Rights for Native Americans and Alaska Natives

WHEREAS, we, the members of the National Congress of American Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants the inherent sovereign rights of our Indian nations, rights secured under Indian treaties and agreements with the United States, and all other rights and benefits to which we are entitled under the laws and Constitution of the United States and the United Nations Declaration on the Rights of Indigenous Peoples, to enlighten the public toward a better understanding of the Indian people, to preserve Indian cultural values, and otherwise promote the health, safety and welfare of the Indian people, do hereby establish and submit the following resolution; and

WHEREAS, the National Congress of American Indians (NCAI) was established in 1944 and is the oldest and largest national organization of American Indian and Alaska Native tribal governments; and

WHEREAS, the Indian Citizenship Act in 1924 affirmed the rights of Native Americans to vote but this right was not secured until 1970 when the United States Supreme Court upheld the prohibition on using literacy tests as a voter qualification; and

WHEREAS, when the right to vote was finally secured, steps were taken to prevent Native Americans from participating in elections and being elected to office; and

WHEREAS, today, that right continues to be challenged through the passage of new laws and practices that fail to even consider the potential disparities the changes have on Native American and Alaska Native voters; and

WHEREAS, access to the polls and participation in the political process are impacted by isolating conditions such as language barriers, socioeconomic disparities, lack of access to transportation, lack of residential addresses, lack of access to mail, the digital divide, distance, and education; and

WHEREAS, many Native Americans and Alaska Natives living on reservations lack traditional street addresses and as a result these communities rely on post office boxes or other locations to receive their mail and may include a post office box on their state identification; and

WHEREAS, as a result, voters may be placed in the wrong precinct, their identification address may not match the voter rolls, and voters may not receive their election mail timely, if at all; and

WHEREAS, Native Americans and Alaska Natives are less likely to have the forms of identification that satisfy state identification laws for voter registration and voting; and

WHEREAS, Native Americans and Alaska Natives do not have the same access to voter registration and polling locations as off-reservation voters, and voter turnout for Native Americans and Alaska Natives is the lowest in the country, as compared to other groups; and

WHEREAS, polling location decisions are often made without the input of Native Americans and Alaska Natives Tribes; and

WHEREAS, 357,409 Native Americans and Alaska Natives reside in 57 jurisdictions covered by Section 203 of the Voting Rights Act, which requires that language assistance must be provided for all phases of the voting process and despite this clear instruction, some jurisdictions fail to provide effective language assistance; and

WHEREAS, without protections in place, new voting laws and practices will continue to be adopted that suppress the Native American and Alaska Native vote; and

WHEREAS, legislation has been introduce in both the House and Senate to protect the voting rights of Native Americans and Alaska Natives; and

WHEREAS, NCAI previously adopted standing resolutions #MSP-15-030 "Tribal Equal Access to Voting" and #ATL-14-054 "Supporting Amendments to Voting Rights Act to Ensure Access to the Vote in Indian Country" to ensure Native American and Alaska Native voting rights, and this resolution further builds on said resolutions.

NOW THEREFORE BE IT RESOLVED, that the National Congress of American Indians (NCAI) supports and encourages Congress to pass legislation to remove voting barriers for Native Americans and Alaska Natives by:

1. Establishing a Native American Voting Rights Task force to provide funds to tribal and state consortiums for purposes of boosting Native voter registration, education, and election participation in tribal communities;
2. Providing equal access to voter registration and polling sites to increase Native American and Alaska Native access at each stage of the voting process;
3. Ensuring equal treatment for tribal identification by directing election officials and voting precincts to treat tribal identification cards like state and local identification cards for purposes of voting;
4. Requiring jurisdictions to give notice and obtain consent from Native American and Alaska Natives tribal nations before making any changes to polling locations;

5. Requiring adequate language assistance by directing states to consult with tribal nations on appropriate methods for furnishing instructions, assistance, and other information related to registration and voting under Section 203 of the Voting Rights Act;
6. Providing tribal leaders a direct pathway to request federal election observers;
7. Requiring the United States Department of Justice to conduct annual voting consultation with tribal nations given the persistent, unrelenting threats to the right to vote for Native American and Alaska Native citizens; and

BE IT FURTHER RESOLVED, that NCAI encourages tribal organizations, leaders, organizers, and voters to support and advocate for improving Native American voting rights and election administration; and

BE IT FURTHER RESOLVED, that the NCAI supports legislation consistent with this resolution; and

BE IT FINALLY RESOLVED, that this resolution shall be the policy of NCAI until it is withdrawn or modified by subsequent resolution.

CERTIFICATION

The foregoing resolution was adopted by the General Assembly at the 2019 Annual Session of the National Congress of American Indians, held at the Albuquerque Convention Center, October 20-25, 2019, with a quorum present.

Fawn Sharp, President

ATTEST:

Juana Majel Dixon, Recording Secretary

Judy Perry Martinez
President
321 N. Clark Street, Chicago, IL 60654-7598
T 312.988.5109 • F 312.988.5100
abapresident@americanbar.org
americanbar.org

February 28, 2020

The Honorable Marcia L. Fudge
Subcommittee on Elections
Committee on House Administration
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Rodney Davis
Subcommittee on Elections
Committee on House Administration
U.S. House of Representatives
Washington, D.C. 20515

Re: Removing Barriers to Native American Voting Rights

Dear Chairwoman Fudge and Ranking Member Davis:

On behalf of the American Bar Association (ABA), which is the largest voluntary association of lawyers and legal professionals in the world, I write to commend you for recently holding a hearing on barriers to Native American voting rights and on H.R. 1694, the Native American Voting Rights Act of 2019. The ABA offers the following comments and requests that they be made part of the hearing record.

The ABA has repeatedly advocated for the federal government to fulfill its unique trust and treaty obligations owed to all Native Tribes. Pursuant to this obligation, the federal government has the responsibility to ensure that Native Americans and Alaska Natives have the ability to exercise their fundamental right to vote.

In furtherance of this federal responsibility and our long-standing commitment to protecting voting rights and increasing voter participation, the ABA adopted additional policy earlier this month that acknowledges the serious voting barriers faced by Native Americans and Alaska Natives and urges specific remedial actions to remove these barriers and establish mechanisms to safeguard their future access to the polls.

Presently, 1.2 million eligible Native American voters are not registered to vote. In 2018, the Native American Voting Rights Coalition released a report that documented the obstacles that have impeded the ability of Native Americans and Alaska Natives to participate in the voting process. Language barriers, poverty, lack of access to transportation, lack of residential addresses, lack of access to mail, the digital divide, and distance are just some of the obstacles included in that report. Election laws and policies create additional barriers, such as voter identification laws and lack of polling locations on or near Tribal lands. The full report is available at: https://www.narf.org/wordpress/wp-content/uploads/2018/01/2017NAVRCsurvey-summary.pdf

To rectify voter participation barriers, the ABA urges federal, state, local, territorial, and tribal governments to enact legislation that:

(1) Provides equal access to voter registration and polling sites for Native American and Alaska Natives to increase Native American and Alaska Native access at each stage of the voting process;
(2) Ensures equal treatment for Tribal identification by directing election officials and voting precincts to treat Tribal identification cards like state and local identification cards for purposes of voting and registering to vote;
(3) Requires jurisdictions to give notice and obtain consent from Native Americans and Alaska Native Tribes before eliminating the only polling location or voter registration site on tribal lands; closing or moving a polling place or voter registration site to a location one mile or further from the current location; or other aspects of election administration; and
(4) Requires adequate language assistance by directing states to consult with Tribes on appropriate methods for furnishing instructions, assistance, and other information related to registration and voting under Section 203 of the Voting Rights Act.

The ABA also urges the federal government to improve voter outreach and access in Indian Country by:

(1) Providing Tribal leaders a direct pathway to request Federal election observers;
(2) Requiring the United States Department of Justice to conduct annual voting consultation with Indian Tribes; and
(3) Establishing a Native American Voting Rights Task Force under the Office for Civil Rights at the Office of Justice Programs of the Department of Justice, in coordination with the Department of the Interior, to provide grant funds to Tribal and state consortiums for purposes of boosting Native voter registration, education, and election participation in Tribal communities.

We note that H.R. 1694 (Lujan, D-NM), legislation that was examined during the hearing, includes provisions to accomplish each of these goals. We support this legislation without reservation and urge Congress to promptly pass it.

Thank you for the opportunity to share the views of the ABA on this timely issue.

Sincerely,

Judy Perry Martinez

cc: Members of the House Administration Subcommittee on Elections

"Every promise that was made to us has been broken": The Comprehensive Field Hearing Report On Historical and Contemporary Barriers to Political Participation by Native American Voters

by

THE NATIVE AMERICAN RIGHTS FUND

Contributing Authors:
Dr. James Thomas Tucker[1]
Jacqueline De León[2]
Professor Dan McCool

PART I

A. ACKNOWLEDGEMENTS

Jacqueline De León, Staff Attorney at the Native American Rights Fund (NARF), and Dr. James Thomas Tucker, Pro Bono Voting Rights Counsel for NARF, served as Co-Directors for the field hearings and the resulting report. In addition to planning the hearings, both attended all nine of the field hearings and co-chaired several of them.

Natalie Landreth, Senior Counsel at NARF, filled numerous critical roles during the field hearings, including fundraising efforts, collaboration on the subject matter covered at the hearings, testimony, as a co-chair at the Sacramento field hearing, and reviewing and editing this report. The field hearings would not have happened without her wise counsel and unflagging support.

Many members of the Native American Voting Rights Coalition (NAVRC) participated in the field hearing planning committee: Matt Campbell, Chrissie Castro, Monique Castro, Maria Dadgar, Virginia Davis, Jacqueline De León, Amber Ebarb, Patty Ferguson-Bohnee, Arusha Gordon, Michael Johnson, Marcia Johnson-Blanco, Natalie Landreth, Travis Lane, Dan Lewerenz, Dan McCool, Whitney Sawney, Jean Schroedel, OJ Semans, Sr., Concetta Tsosie de Haro, Dr.

---

[1] S.J.D. and LL.M., University of Pennsylvania; J.D., University of Florida; M.P.A., University of Oklahoma; B.A., Arizona State University, Barrett Honors College. Pro Bono Voting Rights Counsel to the Native American Rights Fund; Vice Chair, Census Bureau National Advisory Committee on Racial, Ethnic, and Other Populations (NAC). Co-Director, Field Hearings for the Native American Voting Rights Coalition.

[2] J.D., Stanford University; B.A., Princeton University. Enrolled member of the Isleta Pueblo in New Mexico. Staff Attorney, Native American Rights Fund. Co-Director, Field Hearings for the Native American Voting Rights Coalition.

James Thomas Tucker, and Joel Williams. Organizations that contributed to the field hearings include California Native Vote Project, Four Directions, the Inter Tribal Council of Arizona, the Lawyers' Committee for Civil Rights Under Law, the National Congress of American Indians, the Navajo Nation, the Navajo Nation Department of Justice, and Western Native Voice.

The logistics of the field hearings would not have been possible without the tireless work of Jill Rush, Office Manager/Legal Administrator of NARF's Anchorage office, who coordinated witness travel and food services at several of the field hearing sites. Matt Campbell, Michael Johnson, Dan Lewerenz, and Mauda Moran of NARF each provided substantial assistance and support throughout the field hearings. We thank NARF law clerks Jessica Allison, Caleb Norris, Remi RiChard, and Beth Wright for their research and writing contributions.

Two law firms offered pro bono assistance in conducting the field hearings. Dorsey & Whitney LLP and its Indian & Alaska Native Practice Group provided extensive background information on voting laws in states that were the subject of the field hearings. Several attorneys at Wilson Elser Moskowitz Edelman & Dicker LLP prepared summaries of the field hearing transcripts that facilitated preparation of the report: Jason Canne, Natasha Quest, Beata Shapiro, Kara Thorvaldsen, and Marissa Tripolsky (Boston); Amanda Ebert, Jordan Montet and Alia Najjar (Las Vegas); Kam Cole, David Hoynacki, Angela Michaels, Leo Vaisburg, and Kelly Van Nort (San Diego); and John Cahill (White Plains). Special thanks to Wilson Elser's Marketing Department and Jacqueline Harding, Chair of Wilson Elser's Pro Bono Committee, for her support in this endeavor.

We also would like to thank the Carter Center, the Center's Democracy Program, and Dr. David Carroll, Director, and Avery Davis-Roberts, Associate Director, for their support in hosting a two day convening of election officials, advocates, and grassroots organizers to discuss policy responses to the barriers identified in this report. More information about the Carter Center's convening is available at https://www.cartercenter.org/news/features/p/democracy/native-american-voting-breaking-down-barriers.html. The Carter Center has been a tireless advocate for publicizing findings from the field hearings, including through outreach to the National Association of Secretaries of State and other organizations.

Verbatim transcripts were produced by an intrepid group of court reporters, many of whom had to travel a great distance to get to their assigned hearing location: Elizabeth Lundquist (Bismarck); Vicky St. George (Milwaukee); Marty Herder (Phoenix); Rachel Mcroy (Portland); Renee Papierniak (San Diego); Carla Kimbrough (Tulsa); Rose Harms (Isleta); Sangeet Ryan (Sacramento); and Theresa Hatathlie (Tuba City). Darrel Dyer of U.S. Legal Support's office in Portland provided invaluable assistance in scheduling reporters for most of the locations in 2018.

Acknowledgments for each location are provided below, along with the witnesses who testified at each hearing. The depth and breadth of this report could not have occurred without the testimony of the witnesses, who have played an invaluable role in identifying the many barriers that exist to Native voters.

1. **Bismarck, North Dakota (September 5, 2017):**

The hearing was held at the Bismarck Event Center in Bismarck, North Dakota, thanks to the support of the United Tribes Technical College in Bismarck and its President, Leander McDonald. Jacqueline De León and Dr. James Thomas Tucker served as questioners. OJ Semans, Sr., Executive Director of Four Directions, served as hearing Chair.

Witnesses included, in order of their testimony (an asterisk indicates a community member offering a public comment): Hon. Donita Laudner, Buffalo County, South Dakota County Commissioner; Gerald Stiffarm; Hon. Sharon Stewart-Peregoy, Representative, Montana State Legislature; Erica Shelby; Matt Campbell; Carol Davis; Lynn Davis; Patrick Yawakie; Hon. Roman Marcellais, Acting Chairman, Turtle Mountain Band of Chippewa Indians; Professor Gerald Webster, University of Wyoming Department of Geography; Hon. Gary Collins, Former Chairman of the Arapaho Tribe; and Hon. Timothy Purdon, Former U.S. Attorney for the District of North Dakota.

2. **Milwaukee, Wisconsin (October 16, 2017):**

The hearing was held at the National Congress of American Indians (NCAI)'s 74th Annual Convention and Marketplace in the Wisconsin Center, in Milwaukee, Wisconsin, thanks to the support of NCAI and its Executive Director, Jackie Johnson Pata. We are grateful for the assistance of Amber Ebarb, Whitney Sawney, and Concetta Tsosie de Haro of NCAI. Jacqueline De León and Dr. James Thomas Tucker served as questioners. OJ Semans, Sr., Executive Director of Four Directions, served as hearing Chair.

Witnesses included, in order of their testimony (an asterisk indicates a community member offering a public comment): Matt Dannenberg; Stephanie Thompson; Tony Brown; Paul Demain; Hon. Fred Kessler, Representative, Wisconsin State Legislature; Burton Warrington; Carolyn Beaulieu; Hon. Regina Gasco-Bentley, Chairwoman, Little Traverse Bay Bands of Odawa Indians; Hon. Vinton Hawley, Chairman, Pyramid Lake Paiute Tribe; Linea Sundstrom*; Hon. Aaron Payment, Chairman, Sault St. Marie Tribe of Chippewa Indians; Hon. Debra Haaland, Congresswoman, New Mexico's First Congressional District; and Joseph Ray.*

3. **Phoenix, Arizona (January 11, 2018):**

The hearing was held at the Beus Center for Law and Society at Arizona State University's Sandra Day O'Connor College of Law, thanks to the support of Dean Douglas Sylvester, Professor Patty Ferguson-Bohnee, Jennifer Williams, Danielle Williams, Kate Rosier and the Indian Law Program (ILP). Thanks to the State Bar of Arizona's Indian Law Section and the ILP for sponsoring a reception the evening before the field hearing and to Ernesto Lopez of Ernie's Catering for lunch on the day of the hearing. We thank Arvis Dosela and the Aravaipa Apache Crown Dancers for their inspirational performance during the field hearing.

Travis Lane, Assistant Director of the Inter Tribal Council of Arizona (ITCA), worked closely with Professor Ferguson Bohnee to identify and recruit many of the witnesses. NAVRC members who participated as questioners included Jacqueline De León, Patty Fergsuon Bohnee, and Dr. James Thomas Tucker. Maria Dadgar, Executive Director of ITCA, served as hearing chair.

Witnesses included, in order of their testimony (an asterisk indicates a community member offering a public comment): Solveig Parson; Brian Curley-Chambers; Rani Williams; Professor Dan McCool, Professor Emeritus, University of Utah Department of Political Science; Edison Wauneka; Travis Lane; Hon. Verlon Jose, Vice Chairman, Tohono O'odham Nation; Hon. Roland Maldonado, Chairman, Kaibab Band of Paiute Indians; Hon. Stephen Roe Lewis, Governor, Gila River Indian Community; Angela Salazar-Willeford; Joyce Lopez; Claude Jackson; Natalie Landreth; Sarah Gonski; Hon. Steve M. Titla, Commissioner, Arizona Citizens Clean Elections Commission; Norm Deweaver; Dr. James Thomas Tucker; Jamescita Peshlakai*; Sarah Crawford*; Kris Beecher*; Kenosha Skinner*; Allyson Van Seggern*; Devon Saurez*; and Desirae Deschine.*

4. **Portland, Oregon (January 24, 2018):**

The hearing was held at the Affiliated Tribes of Northwest Indians (ATNI) Winter Convention at the Hilton Double Tree Lloyd's Center, thanks to the support of ATNI's President, the Hon. Leonard Forsman, Chairman of the Suquamish Tribe. The hearing would not have been possible without the substantial assistance of Julie Johnson, Matthew Tomaskin, and Theresa Sheldon, who coordinate ATNI's Native Vote efforts and took the lead on identifying and recruiting witnesses. Thanks also to John Dossett of NCAI, who served as a questioner, and to Marci McLean and Alissa Snow of Western Native Voice. Jacqueline De León and Dr. James Thomas Tucker served as hearing co-chairs.

Witnesses included, in order of their testimony (an asterisk indicates a community member offering a public comment): Hon. Henry Cagey, Chairman, Lummi Nation and Lummi Indian Business Council; Hon. Teresa Taylor, Councilwoman, City of Ferndale, Washington; Barbara Lewis; Rhonda Medcalf*; Patricia (Patsy) Whitefoot; Julie Johnson; Mathew Tomaskin; Hon. Jim Thomas,* Chairman of the TANF Committee for Affiliated Tribes; Hon. Brian Cladoosby, Chairman, Snohomish Tribe; Hon. Joe Pakootas, Former Chairman, Colville Tribes; Hon. Norma Sanchez, Councilwoman, Colville Tribes; Hon. Theresa Shelden,* Councilwoman, Tuliap Tribe; Valdez Bravo; Mike Tulee; Hon. Carina Miller, Councilwoman, Confederate Tribes of Warm Springs; and Hon. Carol Evans, Chairwoman, Spokane Tribal Business Council.

5. **San Diego, California (February 5, 2018):**

The hearing was held at the California Nations Indian Gaming Association (CNIGA)'s 23rd Annual Western Indian Gaming Conference at the Harrah's Resort Southern California on tribal lands of the Rincon Band of Luiseño Indians, thanks to the support of Susan Jensen, Executive Director and Ambar Mohammed of CNIGA. Several others contributed to the planning for the field hearing, including Alva Johnson and Deron Marquez of San Manuel Band of Mission Indians, Connie Reitman-Solas of the Inter Tribal Council of California, and Tracy Stanhoff of the American Indian Chamber of Commerce of California. Chrissie Castro, Executive Director of the California Native Vote Project, and Monique Castro worked closely with the planning team to identify witnesses. A special thanks to Professor Jean Schroedel and her colleague, Professor Melissa Rogers of the Claremont Graduate University, as well as Steve Reyes, Chief Counsel to the Secretary of State of California for their participation. Jacqueline De León and Dr. James Thomas Tucker served as hearing co-chairs.

Witnesses included, in order of their testimony (an asterisk indicates a community member offering a public comment): Professor Jean Schroedel, Claremont Graduate University, School of Social Science, Policy & Evaluation; Melissa Rogers, Claremont Graduate University, School of Social Science, Policy & Evaluation; Amy Nantkes*; Terria Smith; Kenny Ramos; Robin Thundershield; Lupe Lopez-Donaghey; and Monique Castro.

6. **Tulsa, Oklahoma (February 23, 2018):**

The hearing was held at the University of Tulsa College of Law, Native American Law Center, in Tulsa, Oklahoma, thanks to the generous support of Dean Lyn Entzeroth, Professor Vicki Limas, Professor Judith Royster, and Barbette Veit. Professor Dan McCool, Dan Lewerenz, and Four Directions assisted in witness recruitment. Jacqueline De León and Dr. James Thomas Tucker served as hearing co-chairs.

Witnesses included, in order of their testimony (an asterisk indicates a community member offering a public comment): Christina Blackcloud; Mike Keahan; Bobbie Saupitty; Brian Jones; Anna Langthorn; Kevin Barnett*; and Hon. Chuck Hoskin, Jr., Secretary of State, Cherokee Nation.

7. **Isleta Pueblo, New Mexico (March 9, 2018):**

The hearing was held at the University of New Mexico School of Law's "50 Years of the Indian Civil Rights Act Symposium" on tribal lands at the Isleta Resort & Casino, in the Isleta Pueblo, New Mexico, thanks to the support of the University of New Mexico School of Law and Professor Barbara Creel, Director of the law school's Southwest Indian Law Clinic. Martin Aguilar, Native American Elections Information Program Liaison in the New Mexico Secretary of State's Office, offered substantial assistance. NAVRC members Arusha Gordon from the Lawyers' Committee for Civil Rights Under Law and Maya Kane participated as questioners. Jacqueline De León and Dr. James Thomas Tucker served as hearing co-chairs.

Special thanks to the Honorable Maggie Toulouse Oliver, Secretary of State of New Mexico, who generously provided her time and staff assistance through her Native American Voting Task Force in recruiting witnesses for the hearing. We also appreciate assistance of Theresa Romero for facilitating the Coalition's work with Secretary Oliver.

Witnesses included, in order of their testimony (an asterisk indicates a community member offering a public comment): Terry Whitehat; Wilfred Jones; Helen Padilla; Hon. Leon Reval, Councilman, Jicarilla Apache Nation; Hon. Max Zuni, Lieutenant Governor, Isleta Pueblo; Shirlee Smith; Joseph Ray*; Hon. Maggie Toulouse Oliver, Secretary of State, State of New Mexico; Pamela Mahooty*; Surete Shije*; Martin Aguilar; Hon. Everett Chavez, Governor, Santo Domingo Pueblo; Linda Yardley; Hon. Debra Haaland, Congresswoman, New Mexico's First Congressional District; Laurie Weahkee; and Amber Carillo.

8. **Sacramento, California (April 5, 2018):**

The hearing was held at the 2019 California Tribal Water Summit at the McClellan Conference Center in Sacramento, California, thanks to the support of Anecita Agustinez, Tribal Policy Advisor, California Department of Water Resources and the California Department of Water Resources. California Native Vote Project, Connie Reitman-Solas of the Inter Tribal Council of California, and Four Directions each assisted with logistics and witness recruitment for the hearing. Jacqueline De León, Natalie Landreth, and Dr. James Thomas Tucker served as hearing co-chairs.

Special thanks to the Honorable Alex Padilla, Secretary of State of California, who generously provided his time, and his Chief Counsel, Steve Reyes, for their efforts to make the hearing a success.

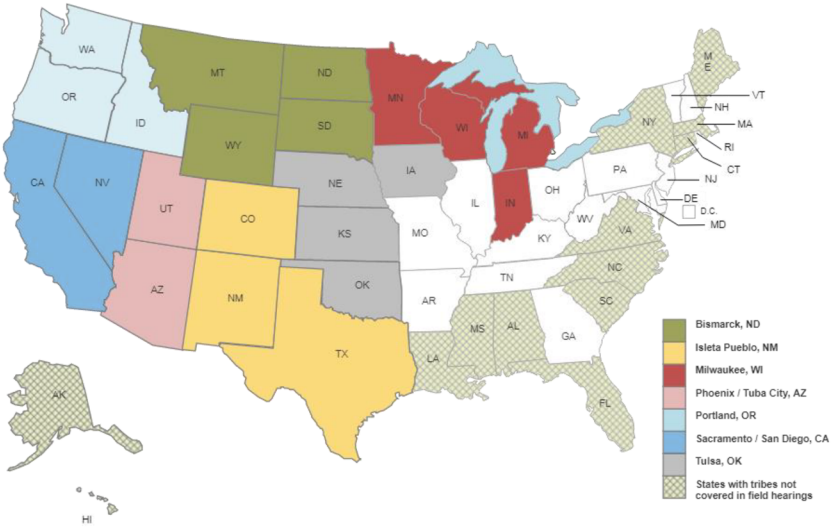
Witnesses included, in order of their testimony (an asterisk indicates a community member offering a public comment): Beverly Harry; Thomas Eugene; Hon. Carlos Negrete, Councilman, Middletown Rancheria of Pomo Indians; Hon. Buster Attebery, Chairman, Karuk Tribe; Fatima Abbas; Dr. Joseph Dietrich; Dr. Joseph Lake; Hon. Alex Padilla, Secretary of State, State of California Ruthie Maloney; Michael Fresques; Erik Rydberg; Chrissie Castro; and Robin Thundershield.

9. **Tuba City, Arizona (April 25, 2018):**

This hearing was held at the Tonaneesdizi Chapter House on tribal lands of the Navajo Nation in Tuba City, Arizona, thanks to the support of Hon. Ethel Branch, Attorney General of the Navajo Nation, and Katherine Belzowski of the Navajo Nation Department of Justice. Theresa Hatathlie, served as Moderator. Derrick Beetso, Jacqueline De León, Patty Ferguson Bohnee, and Dr. James Thomas Tucker served as questioners. Attorney General Branch served as Chair

Witnesses included, in order of their testimony (an asterisk indicates a community member offering a public comment): James Atakai; Moroni Benally; Hon. Patty Hansen, Recorder, Coconino County, Arizona; Alta Edison; Darrell Marks; Hon. Edbert Little, General Director, Navajo Election Administration; Angelo Baca; Shirlee Smith*; and Brian Curley-Chambers.

Native American Voting Rights Coalition
Field Hearing Regions



B. INTRODUCTION AND SUMMARY OF REPORT

1. Overview of Findings

In 2015, the Native American Rights Fund (NARF) created the Native American Voting Rights Coalition (NAVRC), a coalition of national and regional grassroots organizations, academics and attorneys advocating for the equal access of Native Americans to the political process. To begin this important work, the Coalition needed a more complete understanding of the barriers that Native Americans face when trying to register and participate in elections. So the Coalition conducted the series of field hearings chronicled in this report with the goal of pursuing remedies for the problems we uncovered.

The hearings had two other purposes: (1) to assist in the development of better public policy and (2) to promote public education on voting rights in Indian Country. Technology, the Internet, mail-in voting, online registration, and polling places located in the local elementary school where you just stop by to vote on the way home, have fostered a view that it is easy to vote now. For many Americans that is true. The field hearings revealed that this is not true for Native Americans.

Instead, they continue to face a wide array of first generation barriers to voting – actual barriers to voting – that are in fact preventing them from exercising their rights to vote and stripping them of their political power.

There are 573 federally recognized Indian tribes in the United States. They are not "groups" – there are functioning governments, sovereigns, that maintain individual government-to-government relationships with the United States. They exercise degrees of civil, criminal and regulatory jurisdiction, and there is an entire section of the United States code (Title 25) that consists of laws applying just to them. They hold a unique place in the American political landscape. As is clear in this report, they are also subject to unique barriers to voting.

There are approximately 6.8 million American Indians and Alaska Natives living in the United States today. This is likely a very low estimate, as the American Community Survey that this number is based on notoriously undercounts Native Americans. While a smaller segment of the U.S. population, they are increasing in population, and they are often concentrated in communities that make them a political force.

In fact, Native American voters have made a difference in elections for both political parties in numerous states. They are regularly determinative in the Dakotas, Alaska, and parts of the Southwest. They are determinative in Congressional districts in an even greater number of states. Perhaps this ability to "swing" elections has made them the target of voter suppression tactics in communities that are not used to Native Americans flexing their political power.

Native Americans have been subject to genocide and racism for more than 500 years. For the first 150+ years of the existence of the United States, Native Americans were not allowed to vote. In 1924, the Indian Citizenship Act formally made them U.S. citizens, but states continued to prevent them from voting for much longer, arguing that they: (1) did not pay taxes, (2) were under guardianship of the U.S. and therefore were incompetent to vote, (3) were not literate in English, and (4) were more citizens of the tribes and too closely tied to tribal culture to be citizens of the states in which they lived. The passage of the Voting Rights Act (VRA) had the effect of bringing voting rights to Indian Country and Native Americans began to challenge many of those barriers. The addition of the language assistance provisions in 1975 further made it possible for those who still spoke Native languages to vote and also gave Native Americans a mechanism to enforce language access to the ballot through the courts. They have been roundly successful in doing so. Overall, given the appalling facts underlying Native American voting cases, Native Americans have been successful in an astounding 90+% of the cases they have brought, in liberal and conservative districts alike.

Although Native Americans are among the fastest growing populations in the United States, there are strong forces preventing their full political participation. The factors discouraging political participation are: (1) geographical isolation; (2) physical and natural barriers; (3) poorly maintained or non-existent roads; (4) distance and limited hours of government offices; (5) technological barriers and the digital divide; (6) low levels of educational attainment; (7) depressed socio-economic conditions; (8) homelessness and housing insecurity; (9) non-traditional mailing addresses such as post office boxes; (10) lack of funding for elections; (11) and discrimination against Native Americans.

In addition to this daunting list of factors, language is "one of the closing gaps in the election process" for Native American voters. Over one quarter of all single-race Native Americans speak a language other than English at home. Section 203 of the VRA, the language assistance provisions, helps these voters overcome language barriers by requiring covered jurisdictions to provide bilingual written election materials and oral language assistance. This provision applies to all "voting materials," which is broadly defined as anything produced by a jurisdiction for an election.

Under the 2011 determinations of jurisdictions that required language assistance, Native American languages were the second most common language group after Spanish. Section 203 language assistance protections were required in 33 political subdivisions in five states. This rose to 35 jurisdictions in nine states in the 2016 determinations. Despite these broad protections, jurisdictions have often failed to provide the required translations, forcing Native American voters to file lawsuits in Alaska, Arizona, New Mexico, Utah.

The field hearings revealed that Native American voters faced significant hurdles at the very first step to voting: registration. Despite the protections offered by the National Voter Registration Act (NVRA), the Help America Vote Act (HAVA), and the VRA, the field hearings revealed that there were many barriers to registration: (1) lack of traditional mailing addresses, (2) homeless and housing instability, (3) voter identification requirements (which can be hard for many Native Americans to obtain), (4) unequal access to online registration, (5) unequal access to in-person voter registration, (6) restrictions on access to voter registration forms, (7) denial of voter registration opportunities due to previous convictions, (8) rejection of voter registration applications, (9) voter purges, and (10) failure to offer registration opportunities at polling places on Election Day.

Even if Native Americans are able to register, the field hearings showed that they then face another set of barriers to actually casting a ballot. These include: (1) unequal funding for voting activities in Indian communities; (2) lack of pre-election information and outreach; (3) cultural and political isolation; (4) unequal access to in-person voting; (5) unequal access to early voting; (6) barriers *caused* by vote-by-mail, which are numerous; (6) barriers posed by state laws that create arbitrary population thresholds in order to establish polling places; (7) the use of the ADA to deny polling places on reservation lands; and (8) the lack of Native American election workers.

The field hearings revealed yet another set of hurdles in the form of barriers to having their ballots counted. Assuming a Native American can register and then vote, they then faced additional barriers including: (1) lack of ballot canvassing opportunities; (2) failure to count ballots cast out-of-precinct; (3) ballot harvesting bans and similar laws; and (4) lack of information about ballot status (whether it was counted) and the inability to correct errors.

Further, even if Native American voters are able to register and vote, they testified that they often could not elect candidates of their choice due to the devastating effects of "packing" and "cracking" their representative districts. Additionally, Native American candidates face difficulty even getting on a ballot to represent themselves because of the lack of resources in their campaigns.

In sum, through its field hearings, the NAVRC found that every barrier imaginable is deployed against Native American voters. The attorneys in the Coalition were shocked at the depth and breadth of the violations across the country. This report is just the first step in trying to correct the decades-long suppression of Native American voters.

Federal and state legislation would go a long way toward remedying many of the barriers identified here. Doing so is critically important for Native Americans because exercising their voting power can help them improve their: (1) socio-economic status, (2) self-determination, (3) land rights, (4) water rights and (5) health care among other things. Simply put, Native American political power improves their lives, the lives of their children and the American electorate in general.

2. About the Native American Rights Fund (NARF) and the Native American Voting Rights Coalition (NAVRC)

Since 1970, the Native American Rights Fund (NARF) has provided legal assistance to Indian tribes, organizations, and individuals nationwide who might otherwise have gone without adequate representation. NARF has successfully asserted and defended the most important rights of Indians and tribes in hundreds of major cases, and has achieved significant results in such critical areas as tribal sovereignty, treaty rights, natural resource protection, Indian education, and voting rights. NARF is a non-profit 501c(3) organization that focuses on applying existing laws and treaties to guarantee that the federal and state governments live up to their legal obligations.

NARF is headquartered in Boulder, Colorado, with branch offices in Washington, D.C., and Anchorage, Alaska. NARF is governed by a volunteer board of directors composed of thirteen Native Americans from different tribes throughout the country with a variety of expertise in Indian matters. A staff of sixteen attorneys handles over fifty major cases at any given time, with most of the cases taking several years to resolve. Cases are accepted on the basis of their breadth and potential importance in setting precedents and establishing important principles of Indian law.

In 2015, NARF began the Native American Voting Rights Coalition, or NAVRC, a coalition of national and regional grassroots organizations, academics, and attorneys advocating for the equal access of Native Americans to the political process.[3] It was founded to facilitate collaboration between its members on coordinated approaches to the many barriers that Native Americans face in registering to vote, casting their ballot, and having an equal voice in elections.

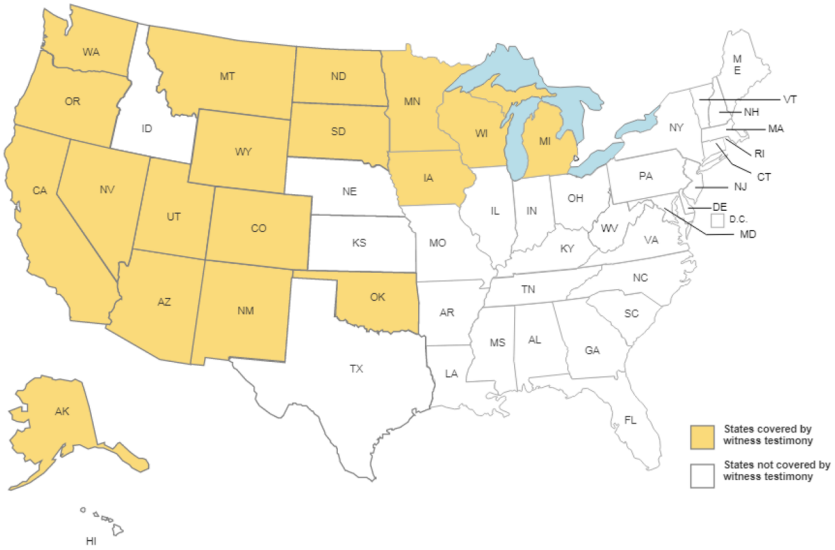
To begin its work, the NAVRC needed a more complete understanding of the types of barriers that Native Americans face in trying to access the ballot box. In late spring 2016, the Kellogg Foundation[4] funded the first comprehensive, multi-state study of the problems and challenges facing Native American voters.

---

[3] For more information about the NAVRC, *see About the Native American Voting Rights Coalition*, *available at* https://www.narf.org/native-american-voting-rights-coalition/.

[4] The W.K. Kellogg Foundation (WKKF), founded in 1930 as an independent, private foundation by breakfast cereal pioneer Will Keith Kellogg, is among the largest philanthropic foundations in the United States. Guided by the belief that all children should have an equal opportunity to thrive, WKKF works with communities to create conditions for vulnerable children so they can realize their full potential in school, work and life.

Native American Voting Rights Coalition
States Covered by Witness Testimony



3. **The NAVRC's Field Hearings**

Led by NARF, in April 2018 NAVRC completed a series of nine field hearings in seven states on the state of voting rights in Indian Country. Approximately 125 witnesses from dozens of tribes in the Continental United States generated thousands of pages of transcripts with their testimony about the progress of the Native Americans in non-tribal elections, and the work that remains to be done. Field hearings were not conducted in Alaska because the Alaska Advisory Committee to the U.S. Commission on Civil Rights already had a similar effort underway. Coalition members also were familiar with Alaska's barriers after several years of voting rights litigation there.

The field hearings were conducted at the following locations: Bismarck, North Dakota on September 5, 2017; Milwaukee, Wisconsin on October 16, 2017; Phoenix, Arizona on January 11, 2018; Portland, Oregon, on January 23, 2018; on the tribal lands of the Rincon Band of Luiseño Indians north of San Diego, California, on February 5, 2018; Tulsa, Oklahoma on February 23, 2018; on the tribal lands of the Isleta Pueblo just outside of Albuquerque, New Mexico on March

8, 2018; Sacramento, California on April 5, 2018; and on the tribal lands of the Navajo Nation in Tuba City, Arizona on April 25, 2018.

Witnesses included tribal leaders, community organizers, academics, politicians, and Native voters. They shared their experiences in voter registration and voting in federal, state, and local (non-tribal) elections. Topics addressed included whether Native voters have equal access to location of voter registration and in-person voting sites, early voting, poll worker opportunities, and treatment at the polls, and whether voter identification requirements, redistricting, language, or other forms of discrimination prevent them from being able to participate effectively in the political process.

Field hearings were the most efficient way to learn about barriers that voters face in Indian Country: directly from the people on the ground. Many reservations are geographically, linguistically, and culturally isolated from the rest of the population. Native voters living on and off the reservation often lack adequate resources for their basic needs, including transportation and modern means of communication. Broadband penetration has occurred on fewer than ten percent of all reservations. In-person meetings are the most effective way of reaching out to Native voters in remote areas.

The field hearings had three purposes:

First, findings from the hearings will play a critical role in development of and response to public policy. The hearings identified barriers to Native voting, including laws, regulations, policies and procedures. That information will be used to identify policy solutions at the federal, state, and local level. In some cases, those solutions may involve proposed legislative or regulatory fixes. In other cases, they may involve reaching out directly to election officials to propose collaborative solutions with tribes to improve access to the voting process.

Equally important, the hearings allowed NAVRC to develop a record of discrimination. The statements of witnesses who appeared at the field hearings were transcribed verbatim by certified court reporters. Those statements were analyzed to identify trends and common themes, which are provided in this report.

This record can be used to support legislation or regulations that remedy barriers faced by Native voters. In addition, this record is available to combat proposals with a discriminatory purpose or effect.

Second, the hearings will assist NAVRC members in the pursuit of other legal remedies to expand opportunities for Native voters to participate in the political process. The hearings yielded information about barriers to registration and voting that were unknown previously among NAVRC members or were not sufficiently developed for a response. Hearing participants who offered first-hand knowledge of discrimination and voting rights violations and may be available to serve as either plaintiffs or fact witnesses in any litigation that might be brought.

Third, the hearings helped promote public education on voting rights in Indian Country. Many barriers that Native voters face in registering to vote and participating in non-tribal elections can

seem intractable. Distances to voting locations, lack of Native poll workers, the absence of language assistance, racial bloc voting, intimidation, direct forms of voter suppression through mechanisms such as restrictive voter identification requirements, and discriminatory redistricting practices often marginalize Native voters. Participating in the field hearings empowered Native voters by informing them that they do not have to accept the status quo. Their voices do matter, and the hearings educated them on remedies available to provide them with a meaningful exercise of their fundamental right to vote.

Non-Natives likewise benefited from the hearings. There is a widespread misguided conclusion that the types of voting barriers facing Native American communities – such as inaccessible polling locations, lack of registration opportunities, and even overt discrimination – no longer exist. The hearings allowed participants to highlight that barriers to registering to vote, casting a ballot, and having that ballot counted, are prevalent throughout Indian Country.

4. Impact of Native American Voters

There are 573 federally recognized Indian tribes within the United States.[5] According to the American Community Survey estimates – which likely undercounted Native American population[6] – there are nearly 6.8 million American Indian and Alaskan Natives living in the United States of one or more races.[7] Of those, approximately 4.7 million are over the age of 18.[8]

Native Americans voters have the potential to become potent political forces. For example, the National Congress of American Indians reports that "one of the states with the closest margin in the 2016 Presidential Election was Michigan with a margin of 0.3%. With more than 100,000 Native people age 18 and older in Michigan, the Native people eligible to vote was 4 times more than the margin of victory in that state."[9]

Native voters have made the difference in elections for candidates from both major political parties. In 2002, South Dakota Senator Tim Johnson (D-SD) was re-elected by 500 votes when the final votes were counted on the Pine Ridge Reservation.[10] In 2010, Senator Lisa Murkowski, (R-AK) credited her victory in large part to mobilized Alaska Native voters that supported her

---

[5] Indian Entities Recognized by and Eligible To Receive Services From the United States Bureau of Indian Affairs, 84 Fed. Reg. 1,200-05 (Feb. 1, 2019) (listing federally recognized tribes and Alaska Native villages).

[6] Norm DeWeaver, *American Survey Data on the American Indian/Alaska Native Population: A Look behind the Numbers* (Feb. 18, 2013), *available at* http://www.ncai.org/policy-research-center/initiatives/ACS_data_on_the_AIAN_Population_paper_by_Norm_DeWeaver.pdf.

[7] U.S. Census Bureau, Annual Estimates of the Resident Population by Sex, Single Year of Age, Race Alone or in Combination, and Hispanic Origin for the United States: April 1, 2010 to July 1, 2017, *available at* hyperlink through https://www.census.gov/newsroom/facts-for-features/2018/aian.html.

[8] *Id.*

[9] National Congress of American Indians, 2018 Native Vote: An Update for Tribal Leaders, Every Native Vote Counts (2018), *available at* http://www.nativevote.org/wp-content/uploads/2018/02/Native-Vote-2018-Analysis-WEB-VERSION-FINAL.pdf.

[10] *Id.*

unorthodox win through a write-in election.[11] In 2012, Senator Heidi Heitkamp (D-ND) attributed her 1% margin win to the Native vote in North Dakota.[12]

In extremely close contests in Montana, Senator John Tester (D-MT) has depended on the Native vote. There are over 50,000 voting age Native Americans in Montana with more than 17,000 votes coming from the Indian reservations.[13] In 2006, Tester won by the slim margin of 3,562 votes and his 2012 win was also attributed in significant part to the Native vote.[14]

Native American tribes also have made forays into politics by endorsing candidates. For example, the Nebraska tribes that include the Ponca, the Omaha, the Santee Sioux and the Winnebago jointly endorsed candidates they believed would support Indian issues.[15] In the 2000 election Senator Maria Cantwell (D-WA) was endorsed by 12 tribes, which was critical to her win and to that year's 50-50 split in the US Senate.

Yet, only 66% of the eligible Native American voting population is registered to vote.[16] With only 66% percent being registered, there are over 1,000,000 eligible Native Americans who are of voting age and are U.S. citizens who are not registered.[17]

While NARF and the members of the NAVRC address the issues in this report for their own sake, because they are wrongs that must be addressed as a moral matter, it is also clear that Native Americans are a potent but untapped political force. That is perhaps why they are the targets of such widespread and multi-faceted suppression efforts. This report is meant to be the first step of many toward changing the Native American political landscape.

---

[11] National Congress of American Indians, *Fast Facts*, Every Native Vote Counts (2012), *available at* http://www.ncai.org/initiatives/campaigns/NCAI_NativeVoteInfographic.pdf ("Native Vote Infographic").

[12] *Id.*

[13] *Id.*

[14] Mark Dennison, *News Analysis: How Tester Won Montana's U.S. Senate Race,* MISSOULIAN (Nov. 11, 2012), *available at* https://missoulian.com/news/local/news-analysis-how-tester-won-montana-s-u-s-senate/article_550a66e8-2bbf-11e2-ae5c-001a4bcf887a.html.

[15] Nebraska Democratic Party, *Nebraska's Tribes Make Historic Joint Endorsement of Democratic Candidates*, (Oct. 17, 2018), *available at* https://nebraskademocrats.org/press-releases/nebraskas-tribes-make-historic-joint-endorsement-of-democratic-candidates/.

[16] Native Vote Infographic, *supra* note 11.

[17] *Id.*

PART II[18]

Figure 1

A. HISTORICAL BARRIERS TO VOTING IN INDIAN COUNTRY

1. Attempts to Annihilate Native American Populations

Native Americans have been subjected to 500 years of racism and genocide. The conflict between the Indigenous peoples of the so-called "New World" and people from other continents is perhaps the longest-running war in human history.[19] The predominant response of both invader and defender was to engage in a violent contest for control over land, resources, and political control. That conflict has changed over time in intensity, mode, and character, but it continues to this day.

After the United States became a nation, it pursued a policy toward Native Americans that often was annihilationist, with many non-Native leaders urging the complete destruction of Native peoples. Sentiments such as these were common:

---

[18] Part II authored by Daniel McCool, Professor of Political Science and Director of the American West Center at the University of Utah.

[20] Jeff Barnard, *When Did People First Come to North America?* (Sept. 22, 2008), *available at* http://www.nbcnews.com/id/26819601/ns/technology_and_science-science/t/when-did-people-first-come-north-america/#.W5AaVRSmv7Y

- The governor of Colorado: "…unless removed by the government the [Utes] must necessarily be exterminated…."[20]
- General William T. Sherman (the signatory of the 1868 Navajo Treaty): "We must act with vindictive earnestness against the Sioux, even to their extermination, men, women, and children."[21]
- Colonel Patrick Edward Connor: "Shoot every male Indian." [referring to Shoshones and Bannocks][22]
- Colonel John Chivington: "Kill and scalp all, big and little; nits make lice." [referring to Arapaho and Cheyenne][23]
- The editor of the *Denver Rocky Mountain News*: "A few months of active extermination against the red devils will bring quiet, and nothing else will." [referring to Utes][24]
- The *Delores News*: "…kill the red-skinned devils, until there is not enough of them left to rob a 'hen-roost.'" [referring to Utes][25]
- General James Carleton: "Kill every…Navajo Indian who is large enough to bear arms… No women or children will be harmed."[26]

By the beginning of the American Civil War, most eastern tribes had been decimated, subdued by force, or removed. Many tribes east of the Mississippi simply ceased to exist or survived only in small remnants. Even during the Civil War, when military resources were stretched to their breaking point, the U.S. still committed troops to the battle against Native Americans. In 1862, when starving Dakota Sioux Indians in Minnesota revolted against those who had deprived them of their food sources, the government reacted with the largest mass hanging in history.[27] The following year, nearly an entire village of Shoshone people was massacred on the Bear River in what is today Idaho.[28] The site of this tragedy—possibly the worst massacre of Indian people in

---

[21] LAUGHLIN MCDONALD, AMERICAN INDIANS AND THE FIGHT FOR EQUAL VOTING RIGHTS 154 (2010).

[21] EVAN CONNELL, SON OF THE MORNING STAR: CUSTER AND THE LITTLE BIGHORN 132 (2011).

[22] Reference Series No. 232: *Alamo Massacre*, Idaho State Historical Society (Feb. 1971) *available at* https://history.idaho.gov/wp-content/uploads/0232.pdf.

[23] DAVID SVALDI, SAND CREEK AND THE RHETORIC OF EXTERMINATION 9 (1989).

[24] JACK UTTER, AMERICAN INDIANS: ANSWERS TO TODAY'S QUESTIONS 127 (Univ. of Okla. Press 2nd ed. 2001).

[25] Robert McPherson & Rusty *Salmon, Cowboys, Indians, and Conflict: The Pinhook Draw Fight*, *1881*, 69 UTAH HIST. Q. 4, 9 (Winter 2001).

[26] FRANK MCNITT, NAVAHO EXPEDITION: JOURNAL OF A MILITARY RECONNAISSANCE FROM SANTA FE, NEW MEXICO, TO THE NAVAHO COUNTRY, MADE IN 1849 BY LIEUTENANT JAMES H. SIMPSON 429 (1964).

[27] *See* PAUL BECK, COLUMNS OF VENGEANCE: SOLDIERS, SIOUX, AND THE PUNITIVE EXPEDITIONS, 1863-1864 (2014); MICHAEL CLODFELTER, THE DAKOTA WAR: THE U. S. ARMY VERSUS THE SIOUX, 1862-1865 (2006).

[28] BRIGHAM MADSEN, THE SHOSHONI FRONTIER AND THE BEAR RIVER MASSACRE (1985).

history--was not preserved as an historical monument; today it is simply a hay field.[29] The following year, a peaceful village of Arapahos and Cheyenne was slaughtered at Sand Creek in Colorado Territory.[30]

After the war, when military resources were more available, active warfare against Native Americans became widespread throughout the American West. In 1868, Lt. Col. George Armstrong Custer killed most of the Native people at an encampment on the Washita River in so-called "Indian Territory."[31] That same year the Navajos, after four years of deadly imprisonment, signed a treaty that allowed them to return to a small portion of their traditional homeland, starving and destitute.[32]

General William Sherman—no friend of the Indian, described in 1868 what happened to the Native people of the southern plains after they signed a treaty: "The poor Indians are starving. We kill them if they attempt to hunt and if they keep within the Reservations they starve."[33] As late as 1890, the U. S. Army was still massacring Native people, that time at Wounded Knee in South Dakota.[34]

2. Attempts to Forcibly Assimilate

This brief review of history recounts only a small portion of the atrocities and injustices committed against Native Americans, but it reveals the deep hatred and racism that many Americans expressed toward Native people; these attitudes frequently were directly reflected in government policy.

The next stage of policy was forced assimilation. Instead of murdering every last Indian, they felt the best policy was to absorb them, whole cloth, into the dominant society. In that fashion, Native Americans would simply wither away, a policy manifestation of the "vanishing Indian."[35] Native people had only two choices: conform to European culture, or be destroyed.[36] One of the greatest proponents of assimilation was John Wesley Powell. Powell, more than any other individual, initiated the study of ethnology, and nurtured the new scientific field of Anthropology. In the last three decades of the Nineteenth Century he had an enormous impact on the development of

---

[29] A roadside marker near the site makes the stunning claim that ninety "combatant women and children" were killed in the massacre (the number was probably much higher). The marker was placed by the Boy Scouts and the Daughters of the Utah Pioneers.

[30] STAN HOIG, THE SAND CREEK MASSACRE (1974).

[31] JEROME GREEN, WASHITA: THE U. S. ARMY AND THE SOUTHERN CHEYENNE, 1867-1869 (2004).

[32] PETER IVERSON, DINÉ: A HISTORY OF THE NAVAJOS (2002).

[33] PAUL HUTTON, PHIL SHERIDAN AND HIS ARMY 33-35 (1985).

[34] HEATHER COX RICHARDSON, WOUNDED KNEE: PARTY POLITICS AND THE ROAD TO AN AMERICAN MASSACRE (2010).

[35] Kathryn Fort, *The Vanishing Indian Returns: Tribes, Popular Originalism, and the Supreme Court*, 57 ST. LOUIS L.J. 297, 297-38 (2013).

[36] FREDERICK HOXIE, A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS, 1880-1920 (2001).

national policy toward Indians. In 1874 he declared that the nation faced two choices in regard to Native people: "...we must either protect him or destroy him."[37]

The "protection" to which Powell referred took two forms. One was to attempt to prevent Anglos living in western states, especially those living close to reservations, from continuing the policy of total extermination. The U. S. Supreme Court recognized this threat in its landmark 1886 case of *United States v. Kagama*: "Because of the local ill feeling, the people of the States where they [Indians] are found are often their deadliest enemies."[38] This conflict between Native people and non-Natives who live near Indian reservations continues to this day.

The second aspect of assimilationist "protection" was a concerted effort to destroy Native culture, language, and autonomy, and convert Indians into social and economic facsimiles of Europeans. The policy was expressed primarily through two mandates.

First, the 1887 Dawes Severalty Act, also called the Allotment Act, resulted in the loss of millions of acres of reservation lands to white settlers. It was a feeble attempt to make Indians into farmers, each with his 160 acres. However, often the best farmland was sold for a pittance to Anglo farmers, leaving Natives to attempt to farm on less fecund acreage. And many Indian allotments were later sold under less than honorable circumstances to non-Indians.[39] A cursory examination of reservations that were heavily allotted will verify this (see, for example, the Uintah and Ouray Reservation in Utah, or the eastern portion of the Navajo Reservation in New Mexico).

The second component of forced assimilation involved education. Native children were forced to abandon their culture and language, and often removed from their homes and sent off to far-away boarding schools. As one scholar put it, it was "education for extinction."[40] This great engine of cultural destruction took a tremendous toll on Indian children, often depriving them of an adequate Anglo education due to inferior schools, while simultaneously taking from them their identity and cultural anchors.[41] The problems caused by inadequate education, including culturally inappropriate or racist education, continue to have a negative impact on Native peoples today.[42]

Despite the extraordinary historical challenges faced by Native Americans, they managed to survive into the Twentieth Century. Their population bottomed out at slightly more than a quarter-

---

[37] J. W. POWELL AND G. W. INGALLS, REPORT OF SPECIAL COMMISSIONERS ON THE CONDITION OF THE UTE INDIANS OF UTAH; THE PAIUTES OF UTAH, NORTHERN ARIZONA, SOUTHERN NEVADA, AND SOUTHEASTERN CALIFORNIA; THE GO-SI-UTES OF UTAH AND NEVADA; THE NORTHWESTERN SHOSHONES OF IDAHO AND UTAH; AND THE WESTERN SHOSHONES OF NEVADA; AND REPORT CONCERNING CLAIMS OF SETTLERS IN THE MO-A-PA VALLEY, SOUTHEASTERN NEVADA 25(1874).

[38] *U. S. v. Kagama*, 118 U. S. 375 (1886).

[39] Dawes Act, ch. 119, 24 Stat. 388 (1887) (codified at 25 U.S.C. §§ 331-34); *see also* D. S. OTIS, THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS (Francis Paul Prucha ed., Univ. of Okla. Press 2014) (originally published as a report in 1934).

[40] DAVID WALLACE ADAMS, EDUCATION FOR EXTINCTION: AMERICAN INDIANS AND THE BOARDING SCHOOL EXPERIENCE, 1875-1928 (1995).

[41] *See, e.g.*, MATTHEW FLETCHER, AMERICAN INDIAN EDUCATION: COUNTERNARRATIVES IN RACISM, STRUGGLE, AND THE LAW (Routledge 2008); JON REYNOR & JEANNE EDER, AMERICAN INDIAN EDUCATION: A HISTORY (Univ. of Okla. Press, 2d ed. 2017).

[42] *See, e.g.*, DONNA DEYHLE, REFLECTIONS IN PLACE: CONNECTED LIVES OF NAVAJO WOMEN (2009).

million people in 1890—down from millions, perhaps tens of millions before the arrival of the Europeans. Since then, Native Americans began to increase.[43] The Indians had not vanished; instead, they were managing to eke out an existence for themselves and began to reassert their autonomy and culture. To prevent this from happening, their "deadliest enemies" attempted to ensure that Native peoples would remain powerless, and the most effective way to accomplish that goal was to prevent them from voting.

3. Historical Denial of Indian Voting

The Fifteenth Amendment to the U.S. Constitution reads: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." However, this did not stop many states, principally western states, from barring American Indians from voting. Several strategies were employed to accomplish that goal.

a. State Constitutional Prohibitions

Many state constitutions were written prior to the passage of the Fifteenth Amendment, and limited voting to white citizens only, such as California's.[44] However, even after the passage of the Fifteenth Amendment, some state constitutions continued to exclude Native people from voting.

The constitutions of Idaho, New Mexico, and Washington prohibited "Indians not taxed" from voting, mimicking language in Article 1, Section 2, and the Fourteenth Amendment in the U.S. Constitution. They did not prohibit white people who did not pay taxes from voting.

Minnesota's Constitution created a cultural purity test; it originally prohibited Indians from voting unless they "adopted the language, customs, and habits of civilization." Each potential Native voter had to go before a district court and endure an examination to prove they met those requirements.[45] No other ethnic or racial group was forced to give up its culture in order to vote.

b. **Residency Requirements**

In 1924, the Indian Citizenship Act made most Native Americans citizens of the U.S., and the Nationality Act of 1940 made all Native people citizens.[46] However, many states still did not regard them as citizens of their state, and argued they were ineligible to vote because they were not residents of that state. In 1948, the state of New Mexico argued in *Trujillo v. Garley* that Indians were not state residents and therefore had no right to vote. A district court disagreed, recognizing for the first time that Native people in that state had the right to vote.[47]

---

[43] RUSSELL THORNTON, POPULATION HISTORY OF NATIVE NORTH AMERICAS 9-50 (Michael Haines et al. eds., Cambridge Univ. Press 2000); *see also* THOMAS MANN, 1491: NEW REVELATIONS OF THE AMERICAS BEFORE COLUMBUS (2006); DAVID STANNARD, AMERICAN HOLOCAUST: THE CONQUEST OF THE NEW WORLD (1993).

[44] FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 157 (1942).

[45] MINN. CONST., art. VII, § 1(4) (1858).

[46] The Indian Citizenship Act, ch. 233, 43 Stat. 253 (1924) (codified at 8 U.S.C. § 1401(b)(1994)). The Nationality Act of 1940, ch. 876, 54 Stat. 1137, made it clear that people living in territories, such as Alaska and Hawaii, were indeed citizens.

[47] *Trujillo v. Garley*, Civ. No. 1353 (D.N.M. 1948).

Utah made the same argument in 1956. An opinion of the state's Attorney General declared: "Indians who live on the reservations are not entitled to vote in Utah." He went on to say that if they moved off the reservation they could vote. In other words, if they gave up their home, and their homeland, and lived among people of an entirely different culture, then they could vote.[48]

In *Allen v. Merrell*, a Ute man living on the reservation filed suit, claiming that Utah's prohibition on voting violated the Fourteenth and Fifteenth Amendments. He lost in the state Supreme Court, which ruled that Indian people were largely cared for by the federal government, and that Indians were not interested "in being involved with state government and its local units, and are much less interested in it than are citizens generally." Mr. Allen immediately appealed to the U. S. Supreme Court. At that time in 1957, Utah was the last state in the Union to categorically prohibit reservation Indians from voting, and the state legislature perhaps saw the writing on the wall and repealed the offending statute before the U. S. Supreme Court could render a decision.[49]

c. Requirements to Abandon Tribal Culture

Many of the efforts to prevent Native people from voting were grounded solidly on cultural imperialism. Much like the phrase in Minnesota's Constitution, some states required that Native people give up their indigenous identity to vote.

The state of South Dakota passed a law in 1903 that prevented Indians from voting while "maintaining tribal relations."[50] In North Dakota, the state Supreme Court in 1920 granted some Indians the right to vote because they "live the same as white people; they are law-abiding, do not live in tribes under chiefs; that they marry under the civil laws of the state the same as whites, and that they are Christians; that they have severed their tribal relations…."[51] This case established both a cultural and religious test for voting.

d. Taxation

A common theme in the long tradition of preventing Native people from voting is to withhold the franchise from "Indians not taxed," or some variation thereof. Indians do pay some taxes, but not others. For example, they do not pay property taxes on homes on the reservation. Of course, people who rent their domiciles do not pay property taxes either, but the vote has never been denied to them.

In 1917, Indian voters in Minnesota were turned away from the polls, and sued, but lost in *Opsahl v. Johnson*; the judge ruled they could not vote because they did not pay the same taxes as whites.[52] In 1940—the same year the Nationality Act was passed and all Native people became,

---

[48] *See* DANIEL MCCOOL, SUSAN OLSON & JENNIFER ROBINSON, NATIVE VOTE: AMERICAN INDIANS, THE VOTING RIGHTS ACT, AND THE RIGHT TO VOTE 95-97 (2007).

[49] *Allen v. Merrell*, 305 P.2d 490 (Utah 1956), *vacated as moot*, 353 U.S. 932 (1957).

[50] S.D. CODIFIED LAWS, § 26 (1903).

[51] *Swift v. Leach*, 178 N.W. 437, 45 N.D. 437 (N.D. 1920).

[52] *In re Liquor Election in Beltrami Cty.*, 163 N.W. 988, 138 Minn. 42 (Minn. 1917). For an excellent survey of laws preventing Native people from voting in the late 1920s (after the Indian Citizenship Law had passed), see Neil Houghton, *The Legal Status of Indian Suffrage in the United States*, 19 Cal. L. Rev. 507 (1931).

unequivocally, citizens, a survey found that five states—Idaho, Maine, New Mexico, Mississippi, and Washington—did not allow "Indians not taxed" to vote.[53]

The issue arose again in the New Mexico case of *Trujillo v. Garley*. Mr. Trujillo, who had served for three years in the Marine Corps in World War II, was turned away when he tried to register to vote, the clerk claiming that he was ineligible because he was an "Indian not taxed." Mr. Trujillo pointed out that he paid several different types of taxes, but not property taxes. Thus, the interpretation of that phrase, "Indians not taxed," had been contorted to apply to a specific type of tax. The U.S. District Court decided in Mr. Trujillo's favor, ruling that the discriminatory application of that phrase violated the Fourteenth and Fifteenth Amendments. The Court explained, "Any other citizen, regardless of race, in the State of New Mexico who has not paid one cent of tax of any kind or character, if he possesses the other qualifications, may vote."[54]

The *Trujillo* case did not put this issue to rest. Local jurisdictions continued to deny Native people the right to vote based on whether they paid property taxes. In 1973, a county in Arizona refused to seat a Navajo who had won a county commissioner election. The county argued that he was not eligible to hold the seat because he did not pay property taxes. The court disagreed, and seated the Navajo.[55] Two years later, in New Mexico, white voters attempted to invalidate the results of a school board election in which many Navajos had voted, despite the fact that Navajo children made up two-thirds of the pupils in the district. Again, the Native voters won the case.[56]

Despite these and other court victories, some local jurisdictions and Anglo voters continue to make the argument that Native Americans who live on reservations should not be allowed to vote.

e. Guardianship

Most states argued that they have a legitimate interest in preventing people from voting who are mentally incompetent or insane. They contend that if those individuals were allowed to vote, they could be manipulated by others to vote a certain way. This goal is usually accomplished by a provision in state law or state constitution that prohibits voting by individuals "under guardianship," or are formally judged insane, or incompetent. However, with a truly imaginative twisting of this concept, it has been used to prevent American Indians from voting.

Perhaps the most notorious case came from Arizona, where the State Constitution provides that "No person under guardianship, non compos mentis or insane, shall be qualified to vote." When two Pima Indians attempted to register to vote in the first presidential election following the passage of the 1924 Indian Citizenship Act, they were refused. The county clerk told them they were "under guardianship" and therefore could not vote. Neither of these two individuals was insane, so they sued in the Arizona Supreme Court.

In *Porter v. Hall* in 1928, Arizona sided with the county clerk, arguing the Indians were legally excluded from registering to vote because, in the famous 1831 Indian law case of *Cherokee Nation v. Georgia*, Chief Justice Marshall had written that the Indians' relationship with the U.S.

---

[53] COUNCIL OF STATE GOVERNMENTS, VOTING IN THE UNITED STATES: QUALIFICATIONS AND DISQUALIFICATIONS, ABSENTEE VOTING, VOTING RIGHTS OF PERSONS IN MILITARY SERVICE (1940).

[54] This case is described in detail in NATIVE VOTE, *supra* note 49, at 12-14.

[55] *Shirley v. Super. Ct.*, 109 Ariz. 510 (Ariz. 1973).

[56] *Prince v. Bd. of Educ. of Cent. Consol. Indep. Sch. Dist. No. 22*, 543 P.2d 1176, 88 N.M. 548 (N.M. 1975).

government "resembles that of a ward to his guardian."[57] To Marshall, guardianship was a loose metaphor; for the state of Arizona, it was an excuse to prevent Indians from voting. The State Supreme Court accepted that argument, contrasting "the Indian" with "a normal person" and ruled they were ineligible to vote despite being United States citizens. That case stood for twenty years.

In 1948, two Mohave men from the Fort McDowell Indian Reservation attempted to vote. One of them, Frank Harrison, was a returning World War II veteran, and this election would be his first opportunity to vote in a presidential election following his service to his country. When Harrison and his fellow Piman, Harry Austin, went to the county clerk's office in Maricopa County, Clerk Roger Laveen flatly refused to register them, citing the *Porter* case and the constitutional provision concerning guardianship. Harrison and Austin filed sued in Superior Court and lost. Once again, a state court had ruled that the relationship between the federal government and tribes, commonly referred to as the trust relationship, was tantamount to insanity.

Harrison and Austin appealed to the state Supreme Court, and the resulting case, *Harrison v. Laveen*, garnered national attention.[58] Once again the State of Arizona argued that Indians should not be allowed to vote, noting that "Congress keeps a tight rein on the reservation Indian," portraying Native people as animals to be protected by the State. Attorneys for the United States pointed out a very different role for the Native American plaintiffs, and it is worth quoting at length a passage from their amicus brief:

> During the last war, when large numbers of Indians left the reservations for service in the armed forces and industrial jobs, they were made intensely aware of the discriminations which are enforced against Indians, and they rightly resented a situation where they are allowed to participate in upholding democratic principles as soldiers, but are considered unprepared to share in protecting those principles in peace time.

This time, the Arizona Supreme Court reached a different verdict. Justice J. J. Udall noted that it required a "tortuous construction" of the guardianship language in the state constitution to apply it to American Indians.[59] Finally, in 1948, Indians had the right to vote in Arizona—the same year that Native people in New Mexico won the right to vote through litigation.

f. Literacy Tests

Literacy tests became notorious in the American South as an instrument of racist voting laws.[60] Until prohibited by the Voting Rights Act in 1965 and the 1970 amendments, literacy tests were used to prevent, not just African Americans in the South from voting, but Native Americans as

---

[57] *Porter v. Hall*, 34 Ariz. 308 (Ariz. 1928), *overruled in part*, *Harrison v. Laveen,* 67 Ariz. 337 (Ariz. 1948); *see also Cherokee Nation v. Georgia,* 30 U.S. 1, 17 (1831).

[58] *Harrison v. Laveen*, 67 Ariz. 337 (Ariz. 1948).

[59] This fight for Native voting rights in Arizona is described in detail in NATIVE VOTE, *supra* note 49, at 15-18, and in Patty Ferguson-Bohnee, *The History of Indian Voting Rights in Arizona: Overcoming Decades of Voter Suppression*, 47 Ariz. St. L. J. 1099, 1106 (2015).

[60] For a compendium of literacy tests in the South before the passage of the Voting Rights Act, see generally Civil Rights Movement Veterans, *Civil Rights Movement Voting Rights: Are You "Qualified" to Vote?, available at* http://www.crmvet.org/info/lithome.htm.

well. A survey of states in 1940 found that eighteen states had some form of a literacy test; six of those were western states with substantial Indian populations (Alaska was not yet a state at that time).[61]

For example, Arizona statute stipulated that only individuals who could read the U. S. Constitution in English could vote.[62] When Alaska became a state in 1959, the state's new constitution required that a voter "shall be able to read or speak the English language as prescribed by law."[63] Then, as now, many Alaska Natives spoke only their Native language, thus the new constitution effectively prevented them from voting. This provision was later overturned.[64]

States and local jurisdictions with substantial Native populations have, like states in the South in the Jim Crow era, been quite creative in crafting various stratagems and legal devices that denied the right to vote to Native Americans. Of course, the real reason why states did not want Indians to vote is because they could then actually wield political power and influence. At the dawn of the Twentieth Century, there was little concern that Indian people would somehow exert themselves politically. They had been reduced to a tiny fraction of their population, nearly all their land and resources had been taken from them, and they were confined to reservations which were, in nearly all cases, just a small remnant of their traditional homeland. They were starving, not lobbying Congress.

But slowly, that began to change as Native people began to recover from the years of annihilation and forced assimilation. The next section will explain how Native people pulled themselves out of the deep pit of near-extinction to become a potent political force.

4. From Despair to Empowerment

To transition from a state of powerlessness to a force to be reckoned with requires a combination of approaches and strategies. Native people, and their allies, utilized all of the political, social, and economic tools at their disposal to effect this dramatic change. It was the combination of new and more progressive laws, combined with significant victories in court that changed the fundamental orientation of American Indian policy in the U. S. But ultimately it was activism on the part of Native people themselves that was the catalyst to a Native resurgence.

a. Statutes

Since the passage of the 1924 Indian Citizenship Act, the U. S. Congress has changed course in dramatic ways when it comes to American Indian policy. Ten years after the passage of that Act, in 1934, a Congress dominated by non-western legislators, and goaded by a progressive FDR and his activist Secretary of the Interior, Harold Ickes, passed one of the most important pieces of legislation in history: the Indian Reorganization Act (IRA).

---

[61] COUNCIL OF STATE GOVERNMENTS, *supra* note 54.

[62] Glenn A. Phelps, *Representation Without Taxation: Citizenship and Suffrage in Indian Country* 9 AM. INDIAN Q. 135, 136 (1985).

[63] Gordon Harrison, *Alaska's Constitution: A Citizen's Guide* (4th ed. Alaska Legislative Affairs Agency Apr. 2018), *available at* http://w3.legis.state.ak.us/docs/pdf/citizens_guide.pdf.

[64] *See Nick v. Bethel*, Case No. 3:07-cv-00098-TMB (D. Alaska 2007); *Toyukak v. Mallott*, Case No. 3: 13-cv-00137-SLG (D. Alaska 2014).

The IRA set up the basic structure of Indian self-government, and essentially made reservations political jurisdictions, each with its own set of rights, freedoms, and responsibilities. The IRA's objective was to "conserve and develop Indian lands and resources; to extend to Indians the right to form business and other organizations; to establish a credit system for Indians; to grant certain rights of home rule to Indians; to provide for vocational education for Indians…."[65] The Act also put an end to the devastating policy of allotment that began with the Dawes Severalty Act in 1887.

The Act was often administered in a heavy-handed manner, and it imposed a governing structure that was European in design, rather than Native. However, it did provide a foundation for a permanent Native political presence. Instead of vanishing, Native people would be self-governing. The IRA, combined with the Indian Citizenship Act, created the new dynamic that Native people could be both citizens of their tribes, and citizens of the United States and its sub-units.

But Congress and the United States were inconstant in their approach toward Native Americans. Twenty years after the passage of the IRA, from the mid-1940s to the mid-1960s, with a more conservative Congress and president in power, western senators and legislators pushed through a radically different policy called "termination." The goal of the new policy was to "de-Indianize" the country by terminating Indian reservations, tribal governments, and the separate legal and political status of American Indians.[66] Like most anti-Indian legislation, this policy was promoted by western senators and congressmen.[67] In effect, it was an effort to abrogate all of the hundreds of treaties signed with Indian tribes in one fell swoop.

Termination was paired with a policy termed "relocation." That policy was an effort to take Native people off reservations and spread them out in various locations around the country. The impact of that effort is why there are a surprising number of Native people in cities such as Los Angeles and Cleveland.[68] Forced assimilation was once again the policy of the United States.

The tremendously negative impact that termination and relocation had on Native people soon became evident, although the federal government did not abandon that policy until 1970. Even today, some of the terminated tribes have not been reinstated. As the failures of termination became obvious, another major swing in Indian policy occurred.

The 1975 Indian Self-Determination Act and Education Assistance Act fundamentally changed the course of American Indian policy. The Act's statement of purpose is quoted at length because it forms the foundation of modern tribal government and sovereignty:

> (a) The Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian people for

---

[65] Indian Organization Act, 48 Stat. 984 (1934).

[66] Michael C. Walch, *Terminating the Indian Termination Policy*, 35 STAN. L. REV. 1181 (1983).

[67] Senator Arthur Watkins of Utah was the primary sponsor of Indian termination and relocation. Senator John McCain was one of the few western senators who usually supported Native Americans. *See* John D'Anna, *As With Everything Else in his Life, John McCain's Legacy with Native Americans Was Complicated*, USA TODAY (Aug. 27, 2018), *available at* https://www.usatoday.com/story/news/politics/arizona/2018/08/27/mccain-legacy-native-american-issues-complicated/1102315002/. For a laudatory eulogy of McCain, see National Congress of American Indians, *The Former Chairman of Senate Committee on Indian Affairs Senator John McCain Passes On* (Aug. 26, 2018), *available at* http://www.ncai.org/news/articles/2018/08/26/the-former-chairman-of-senate-committee-on-indian-affairs-senator-john-mccain-of-arizona-passes-on.

[68] DONALD FIXICO, TERMINATION AND RELOCATION: FEDERAL INDIAN POLICY, 1945-1960 (1990).

> self-determination by assuring maximum Indian participation in the direction of educational as well as other Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities.
>
> (b) The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from Federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services.[69]

This law unequivocally committed the federal government to a policy of recognizing the sovereignty and self-governance of Indian tribes, and allowing tribes, not the Bureau of Indian Affairs or some other entity, to control tribal programs. However, this critical shift in power to self-determination did not in any way diminish the role of tribal members as citizens and eligible voters in federal, state, and local levels of government. Unfortunately, their ability to vote and participate politically in these other levels of government on a par with non-Indians would require decades of litigation and the passage and enforcement of the Voting Rights Act of 1965 (VRA).

The VRA initially had its primary impact on African Americans voters in the South. However, many of the same stratagems used by southern jurisdictions to prevent African American voters from having equal access to the polls were also employed by jurisdictions in other parts of the country to suppress voting among other minorities, including Native Americans. Thus, the applicability of the Act began to broaden as other minorities realized that the law could help them achieve equal voting rights.[70]

The earliest voting rights lawsuits on behalf of Native Americans were brought under the Fourteenth and Fifteenth Amendments. At that time, the original coverage formula in Section 4 of the Act covered Native areas in Arizona, Alaska, and South Dakota, so it did not take long for Native Americans to realize that the VRA could help them achieve equal voting rights.

The Act gained even greater relevance to Indian Country after the 1975 amendments added Section 203 protections for language minorities.[71] That same year, the U. S. Commission on Civil Rights

---

[69] 25 U.S.C. § 450(a)-(b); *see also* Geoffrey Strommer & Stephen Osbourne, *The History, Status, and Future of Tribal Self-Governance under the Indian Self-Determination and Education Assistance Act*, 39 AM. INDIAN L. REV. 1, 21 (2015).

[70] Two books by voting rights attorney Laughlin McDonald explain this expansion. *See* LAUGHLIN MCDONALD, A VOTING RIGHTS ODYSSEY: BLACK ENFRANCHISEMENT IN GEORGIA (2003); LAUGHLIN MCDONALD, AMERICAN INDIANS AND THE FIGHT FOR EQUAL VOTING RIGHTS (2011).

[71] For a more detailed discussion of Section 203 see JAMES THOMAS TUCKER, THE BATTLE OVER BILINGUAL BALLOTS: LANGUAGE MINORITIES AND POLITICAL ACCESS UNDER THE VOTING RIGHTS ACT (2009). For opposing perspectives on Section 203 see generally Roger Clegg, *Policy and Constitutional Objections to Section 203 of the Voting Rights Act*, and James Thomas Tucker, *The Continuing Need for the Language Assistance Provisions of the*

issued a report titled "*The Voting Rights Act: Ten Years After*," that noted progress had been made in forcing unfair jurisdictions to change their voting laws, but that "problems encountered by Spanish-speaking persons and Native Americans in covered jurisdictions are not dissimilar from those encountered by Southern blacks."[72] A brief summary of some of the voting rights cases in Indian Country brought under the VRA and the Fourteenth and Fifteenth Amendments illustrate the Act's impact in Indian Country.

In conclusion, the federal policies through legislation enacted by Congress has been irregular and often discriminatory in its treatment of Native Americans. Legislation has varied from brutally regressive to inspired. Congress and the President, elected by popular majorities, frequently failed to protect and preserve the rights of Native Americans, even when they were the law of the land through treaties. But courts have a degree of insularity from popular vagaries and several landmark cases have profoundly impacted Native Americans.

b. Court Cases

At the dawn of the Twentieth Century, the future looked bleak for American Indians. Federal policy was based on the assumption that Native peoples would be swallowed up by the dominant culture and cease to exist as a separate legal and cultural entity. But the courts occasionally provided rare victories for tribes that assisted them in resisting total absorption in white society. Indian case law is enormously complicated and voluminous, but basic trends can be identified.

Although many court decisions have gone against Native interests, in some cases the judicial branch treated Native Americans with greater fairness than federal, state and local governments. Many landmark Indian cases, such as *Winters v. U.S.* (water rights), *Williams v. Lee* (tribal sovereignty), and the *Boldt* decisions (fishing rights) were significant victories for Indigenous rights.[73] In all these cases local interests and western states fiercely opposed Native rights, and continued to battle tribes in court in an effort to limit Native rights to water and resources and Indian sovereignty.[74]

Many Native victories in court occurred during the 1960s and 1970s. Another limiting factor was that tribes often had to rely on the U. S. Department of Justice to sue on their behalf, but the fealty of that Department to Native rights varied with administrations.

Going to court, like going to the U.S. Congress, for redress of Native grievances has always been fraught with difficulties, with varying degrees of success. However, Native Americans have demonstrated an amazing persistence in fighting for their rights and utilizing both litigation and legislation to achieve that goal is part of that persistence. As the struggle against first annihilation, then forced assimilation, continued, it became increasingly clear to Native Americans that they

---

Voting Rights Act, *in* THE MOST FUNDAMENTAL RIGHT: CONTRASTING PERSPECTIVES ON THE VOTING RIGHTS ACT (Daniel McCool ed., 2012).

[72] U.S. COMM'N ON CIVIL RIGHTS, REPORT: THE VOTING RIGHTS ACT: TEN YEARS AFTER 329 (1975).

[73] *Williams v. Lee*, 358 U. S. 217 (1959); *Winters v. United States*, 207 U.S. 564 (1908); *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F 2d 676 (9th Cir. 1975).

[74] For an understanding of this very complex legal struggle, see CHARLES WILKINSON, INDIANS, TIME, AND THE LAW (1988), AND DAVID WILKINS & K. TSAININA LOMAWAIMA, UNEVEN GROUND: AMERICAN INDIAN SOVEREIGNTY AND FEDERAL LAW (2002).

were the most effective advocates of their own interests. This led to the formation of numerous Indian organizations that work on behalf of Native peoples.

c. Native Activism

In the latter half of the Nineteenth Century, the only political entities that lobbied on behalf of American Indians were organizations such as the Indian Rights Association, the Lake Mohonk Conference/Friends of the Indian, and other non-Indian organizations. They fought assiduously against the total annihilation of Indians but viewed forced assimilation as the only way to prevent Native people from being totally wiped out. These advocates were well-meaning and benign compared to their contemporaries who advocated for extermination. But they fundamentally misunderstood Native Americans and underestimated their capacity for resilience and survival.[75]

American Indians have long understood that they were their own best protectors, but after Native Americans achieved complete citizenship following the 1924 Indian Citizenship Act and the 1940 Nationality Act, it became possible for them to take an increasingly active role in lobbying for their own behalf.[76] An additional impetus was World War II, when thousands of Native men joined the armed forces and fought on behalf of the ideals of American democracy.

When they returned, they were not about to accept an inferior role in the governing process.[77] Native veterans helped form the National Congress of American Indians (NCAI) in 1944. It soon became involved in fighting for equal voting rights, and played a major role in the Arizona case, *Harrison v. Laveen*, that resulted in voting rights for Native people in that state. NCAI continues to be one of the most effective advocates of Native rights in the U.S.[78]

Native rights were given an additional boost as part of the civil rights movement of the 1950s and 1960s. Indian activism spiked, and several new Indian organizations came into existence, such as the militant American Indian Movement and regional and local organizations. This activism resulted in several high-profile protests and confrontations at places including Alcatraz, Wounded Knee, and Washington, D. C.[79]

The principal legacy of that era was a realization that Native people could organize effectively, and on many different levels, and have a direct impact on public policy that affected them. During that era, the Native American Rights Fund (NARF) was formed in 1971. Since then, NARF has been one of the most effective advocates of Indigenous rights in court.[80]

---

[75] The best history on this era is provided by two books. *See* FREDERICK HOXIE, A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS, 1880-1920 (2001); WILLIAM HAGAN,THE INDIAN RIGHTS ASSOCIATION: THE HERBERT WELSCH YEARS, 1882-1904 (1985).

[76] *See* FRED HOXIE, THIS INDIAN COUNTRY: AMERICAN INDIAN ACTIVISTS AND THE PLACE THEY MADE (2012); CHARLES WILKINSON, BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS (2006).

[77] *See* ALISON BERNSTEIN, AMERICAN INDIANS AND WORLD WAR II (1991).

[78] *See* National Congress of American Indians, About NCAI, *available at* http://www.ncai.org/about-ncai.

[79] For a perspective on that era from an activist who participated in it, see VINE DELORIA, CUSTER DIED FOR YOUR SINS: AN INDIAN MANIFESTO (Univ. of Okla. Press 2d ed. 1988).

[80] *See* Native American Rts. Fund, About Us, *available at* https://www.narf.org/about-us/.

Today there are dozens of Native American groups that work on behalf of Native people. They often work in conjunction with non-Native groups when they share common interests. These groups are involved in a panoply of issues, but many of them have realized that, at the very core of governance is the act of voting. NCAI began the "Native Vote" campaign in 2008 with other civil rights organizations, such as the Lawyers' Committee for Civil Rights Under Law.

In 2015, NARF formed the Native American Voting Rights Coalition.[81] Joining the Coalition's efforts to ensure fair elections for Native people are national organizations such as the ACLU, NARF, NCAI, Fair Elections Network, and the Lawyers' Committee. Regional and local organizations have likewise been active in the Coalition, including Four Directions, based in South Dakota, Western Native Voice, based in Montana, the California Native Vote Project, the Inter Tribal Council of Arizona, and the Navajo Nation's Department of Justice.[82]

B. THE VOTING RIGHTS ACT: SUMMARY OF CASES ON BEHALF OF NATIVE AMERICAN VOTERS

The Voting Rights Act is arguably the most effective civil rights law ever passed because voting is at the heart of our democratic form of government. The Act has become, as one legal scholar put it, "a sacred symbol of American Democracy."[83] The VRA has literally changed the face of the American electorate, including Indian Country. This has required a nearly constant barrage of cases to challenge unfair voting laws and practices.

The struggle for equal voting rights has expanded from direct denial of voting rights to the dilution of voting rights, or, as the VRA proclaims, "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to **deny or abridge** [emphasis added] the right of any citizen of the United States to vote on account of race or color."[84] The addition of Section 203, the language assistance provision, in 1975, provided tribes with another tool with which to fight for equal access to election procedures.[85]

Relying upon the Fourteenth and Fifteenth Amendments, and the various sections of the VRA, Native American voters have filed dozens of lawsuits in an effort to gain equal access to election procedures and have an equal opportunity to elect candidates of their choice. A review conducted in 2008 of all voting rights cases involving Native Americans and Alaska Natives as plaintiffs found 74 cases, filed in fifteen states. The Native plaintiffs lost only four of these cases, with partial success in two, and victories or successful settlements in the remaining 68 cases.[86] That is an impressive record of success often based upon dismal facts.

---

[81] *See* Native Vote, Every Native Vote Counts, *available at* http://www.nativevote.org.

[82] *See* Four Directions, *available at* http://www.fourdirectionsvote.com; Western Native Voice, *available at* https://www.westernnativevoice.org/about_us; California Native Vote Project, *available at* https://canativevote.org; Inter Tribal Council of Arizona, *available at* http://itcaonline.com; Affiliated Tribes of Northwest Indians,: *available at* https://www.atnitribes.org/about-atni.

[83] Richard Pildes, Introduction to THE FUTURE OF THE VOTING RIGHTS ACT xi (David Epstein et al. eds. 2006).

[84] Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 § 2 (enforcing the Fifteenth Amendment to the U.S. Constitution).

[85] *See* TUCKER, *supra* note 72.

[86] *See* NATIVE VOTE, *supra* note 49 at 48-67, Table 3.1.

Since 2008, the following eighteen[87] cases have been filed. They are arranged into five categories to indicate the breadth of challenges and problems that face Native voters:

1. **Language Assistance**

Nick v. Bethel, No. 3:07-cv-00098, (D. Alaska Feb. 2010).

> **Settlement following Preliminary Injunction:**[88] Following the issuance of a preliminary injunction, the State of Alaska and the city of Bethel agreed to comply with Section 203 of the Voting Rights Act by ensuring that at least one Yup'ik trained translator is available at each polling place at all times that it is open. The settlement also requires providing mandatory training for all translators who work at city elections, providing a Yup'ik-English glossary of election terms, by making any election-related announcements in Yup'ik, providing notice that Yup'ik translations will be available at election events, and translating all initiatives and referenda into written Yup'ik.

Toyukak v. Treadwell, No. 3:13-cv-00137-SLG, (D. Alaska Sept. 30, 2015).

> **Settlement following Plaintiff victory at Trial:**[89] In the Dillingham Census Area, Wade Hampton Census Area, and Yukon-Koyukuk Census area, the State of Alaska was found liable for violating Section 203 of the VRA following a two-week trial. The State agreed to comply with Section 203 by providing materials and language assistance for Yup'ik and Alaskan Athabascan (in Yukon-Koyukuk Census Area) speakers.

Navajo Nation Human Rights Comm. v. San Juan Cty., No. 2:16-cv-00154-JNP, (D. Utah Feb. 2018).

> **Settlement**:[90] Beginning in 2018, San Juan County agreed to comply with Section 203 of the Voting Rights Act by providing in-person voter assistance (English and Navajo) at several locations on the Navajo Reservation during the 28 days before every election, maintaining three polling places on the Navajo Reservation with Navajo language assistance, and taking various steps to ensure quality interpretation of election information and materials into the Navajo language.

2. **Redistricting/malapportionment/at-large elections**

Samuelsen Jr.. v. Treadwell, No. 3:12-cv-00118-SLG, (D. Alaska June 27, 2012).

---

[87] There are two cases pending in Arizona that have not been included because settlement and or decision was in process at the time of publishing this report. Only those 18 cases of which we know the disposition have been included at this time. Those two cases are captioned *Navajo Nation v. Brewer* and *Navajo Nation v. Hobbs.*

[88] ACLU, Settlement Agreement with the State of Alaska, *available at* https://www.aclu.org/legal-document/nick-et-al-v-bethel-et-al-settlement-agreement-state-alaska.

[89] Stipulated Judgment and Order, *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG, (D. Alaska Sept. 30, 2015) *available* at https://www.narf.org.

[90] Lawyers' Committee for Civil Rights, *Settlement Announced in Navajo Nation Human Rights Commission v. San Juan County*, *available at* https://lawyerscommittee.org/settlement-announced-navajo-nation-human-rights-commission-v-san-juan-county/.

Voluntary Dismissal:[91] The plaintiffs voluntarily dismissed the action. When the case was initially brought, the State of Alaska had begun to implement its statewide redistricting plan in violation of Section 5 of the VRA. On the eve of the hearing on the plaintiffs' motion for a preliminary injunction, the U.S. Department of Justice precleared the plan notwithstanding its implementation. As administrative determinations to preclear a voting change under Section 5 are final and not subject to further judicial review, and the Alaska Redistricting Board's Amended Proclamation redistricting plan was precleared such that it mooted the plaintiffs' claims, the plaintiffs dismissed their case.

Jackson v. Bd. of Treasurers. of Wolf Point Sch. Dist. No. 45-45A, No. CV-13-65-GF-BMM-RKS, (D. Mont. Apr. 9, 2014).

Consent Decree:[92] The parties stipulated District 3 had a -75.24% deviation from the ideal population size given it elects 3 members to the board. The population for the 45-45A school district had a +120.49% deviation size from the ideal population size given that it elects 5 members to the Board. Defendants conceded this is a violation of the one person, one vote standard of the Equal Protection Clause of the 14th Amendment, and agreed to be permanently enjoined from administering, implementing, or conducting future elections for the Board of Trustees under that plan and the defendants agreed to remedy the districting disparities.

Large v. Fremont Cty., 709 F. Supp. 2d 1176 (D. Wy. 2010).

Holding: The court found that at-large elections for the Fremont County Commission diluted Indian voting strength and are in violation of Section 2 of the Voting Rights Act because the Eastern Shoshone and Northern Arapaho Tribes are geographically compact and their minority group is politically cohesive; the Freemont county's white majority votes sufficiently block a minority candidate; the elections in the county are racially polarized; the Shoshone and Northern Arapaho bear the effects of discrimination in education, employment, and health that limit their political participation; campaigns have been characterized by racial appeals; very few minority members have been elected to office; there is a lack of responsiveness to the needs of the minority group; and the policy underlying the at-large system is tenuous.

Cottier v. Martin, 604 F.3d 553, (8th Cir. 2010).

Holding: The Eighth Circuit determined that the district court did not commit clear error in finding that although the plaintiffs successfully proved that the minority group was compact and politically cohesive, they failed to show that the white majority in the city voted sufficiently as a bloc, usually to defeat an Indian candidate. The Eighth Circuit rejected the appeal and affirmed the district court's initial finding.

---

[91] Motion to Dismiss Action Voluntarily, *Samuelsen v. Treadwell*, No. 3:12-cv-00118-SLG (D. Alaska June 27, 2012) *available at* http://redistricting.lls.edu/files/AK%20samuelsen%2020120627%20MTD.pdf.

[92] Consent Decree, Jackson v. Bd. of Treasurers. of Wolf Point Sch. Dist. No. 45-45A, No. CV-13-65-GF-BMM-RKS (D. Mont. Apr. 9, 2014), *available at* https://www.aclumontana.org.

Navajo Nation v. San Juan Cty., 929 F.3d 1270, 1274 (10th Cir. 2019).

Holding: The Tenth Circuit affirmed the district court's holding that San Juan County was not required to draw and maintain districts in perpetuity under a past consent decree. As such, the court concluded the county did not have a compelling government interest in maintaining its racially-motivated districting decisions as they were drawn in 1986, and maintained in 2011, and the County's Commission Districts violated the Equal Protection clause.

3. Election Procedures

Spirit Lake Tribe v. Benson Cty., No. 2:10-cv-95, (D.N.D. Oct. 6, 2011).

Consent Decree:[93] The court issued an initial preliminary injunction and the county eventually agreed to a consent decree in response to the county's elimination of 7 of 8 polling places in an attempt to implement vote by mail. The consent decree kept the two reservation polling places open but denied a request to reopen a third polling place near the reservation.

Brooks v. Gant, No. Civ-12-5003-KES, 2012 WL 871262 (D.S.D. Mar. 14, 2012).

Holding: The motion for a preliminary injunction to compel South Dakota to establish satellite early voting locations with Shannon County was mooted because during a prior hearing, the defendants promised to grant the full 46 days of early voting to occur at a satellite location within Shannon County for the 2012 elections. In addition, the county promised to seek preclearance, do everything in its power to ensure that early voting occurs, and reimburse Shannon County with associated costs.

Wandering Medicine v. McCulloch, No. 1:12-cv-135 (D. Mont. Oct. 10, 2012).

Holding: The court denied the motion for a preliminary injunction because the plaintiffs failed to show a discriminatory intent. The court relied on evidence that although Native Americans face greater hardships to in-person absentee voting than residents of the counties who do not live on the reservation, they had successfully elected candidates they wanted in the past.

Settlement:[94] Montana state and county election officials ultimately settled the case, agreeing to establish satellite office on the reservations twice a week through Election Day.

Poor Bear v. Jackson Cty., No. 5:14-cv-05059-KES, 2015 WL 1969760 (D.S.D. May 1, 2015).

---

[93] Federal Jud. Ctr., *Suit to Reopen Polling Places On An Indian Reservation* (Oct. 15, 2015), *available at* https://www.fjc.gov/sites/default/files/2015/EE-ND-2-10-cv-95-Spirit-Lake.pdf.

[94] ACLU of Mont., *Wandering Medicine v. Montana Secretary of State*, *available at* https://www.aclumontana.org/en/cases/wandering-medicine-v-montana-secretary-state.

Settlement:[95] Defendants agreed to open a satellite office in Wanblee on the Pine Ridge Reservation for the 2014 election. Subsequently, the county entered a binding agreement with the State, committing itself to opening a location in proximity to the reservation for federal general and primary elections through 2022.

Sanchez v. Cegavske, 214 F. Supp. 3d 961 (D. Nev. 2016).

Holding: The court ordered early in-person voting in Nixon (32 miles from nearest center) and Schurz (34 miles from nearest center) Counties. The court also granted the motion for in-person Election Day voting in Nixon as the 16-mile distance to a polling location equates to an undue burden. Although 16 miles is closer than the location to early voting, the court took into consideration that it was only open for one day. The motion was denied in regard to a request for in-person voter registration in Nixon and Schurz.

Grayeyes v. Cox, No. 4:18-cv-00041, 2018 WL 3830073 (D. Utah Aug. 9, 2018).

Holding: After Native American San Juan county commissioner candidate Willie Greyeyes was removed from the ballot by a San Juan County election official, he filed suit to reinstate his candidacy. The motion for a preliminary injunction was granted and all challenges to the plaintiff's candidacy and voter status were voided. Not only did the challenger fail to follow proper procedure in filing a candidacy challenge, but there is evidence that a county employee solicited the individual to file the voter challenge, thereby denying the plaintiff with due process. This challenge was also filed incorrectly.

4. Voter Identification

Brakebill v. Jaeger ("Jaeger I"), No. 1:16-CV-008, 2016 WL 7118548, at *1 (D.N.D. Aug. 1, 2016).

Holding: The motion for preliminary injunction was granted under the Equal Protection Clause of the 14th Amendment blocking North Dakota's voter ID law that limited the types of IDs accepted, required a residential street address, and eliminated all fail safe options for voters without IDs because the sever burdens imposed on Native voters outweighed the State's interests.

Brakebill, et al. v. Jaeger II (ND)**:**

Ongoing: Following the issuance of a preliminary injunction in *Jaeger I*, North Dakota amended its laws to allow for supplemental documentation in addition to an ID and to allow for voters to cast set-aside ballots that could be cured with a qualifying ID. This version of the law was again challenged and the District Court issued a preliminary injunction expanding the types of IDs allowed and allowing for PO Boxes to be used on IDs. The Eighth Circuit overturned the issuance of the preliminary injunction because the relief fashioned by the District Court was too broad. The case is ongoing.

---

[95] Lawyers' Committee for Civil Rights, *Satellite Early Voting Office to Open in Wanblee, South Dakota, After Civil Rights Complaint* (Oct. 16, 2014), *available at* https://lawyerscommittee.org/satellite-early-voting-office-to-open-in-wanblee-south-dakota-after-civil-rights-complaint/.

Spirit Lake Tribe. v. Jaeger, No. 1:18-cv-00222 (D.N.D.) (Complaint filed Oct. 30, 2018).

Ongoing: Tribes Spirit Lake Tribe and Standing Rock Sioux Tribe, along with individual plaintiffs, challenged North Dakota's voter ID law alleging the law is unconstitutional and violates Section 2 of the Voting Rights Act. They seek as-applied relief. This case is ongoing.

5. Help America Vote Act / Section 5

Janis v. Nelson, Civ. 09-5019 (D.S.D. May 25, 2010).

Settlement:[96] Facing compliance issues with HAVA, the State agreed to train election officials and volunteers on felony qualifications. The State updated statutory qualifications to require a notice component informing those voters who have lost their right to vote due to felony disqualifications.

Of these eighteen cases, the Native plaintiffs either won or settled to their satisfaction all but one or two. When combined with the cases prior to 2008, the total number of cases is 92 at the time of the printing of this report, with victories or successful settlements in 85 cases and partial victories in two cases. That is a success rate of 92 percent.

Such a startling number of court victories indicates that the VRA plays an ongoing and vital role in protecting the voting rights of Native voters. It also makes it clear that state and local jurisdictions continue to "deny or abridge" the rights of Native voters, especially after the *Shelby County* case emasculated Section 5.

C. CONCLUSION

The quest for equal voting rights has been a long struggle. VRA cases are typically long and complicated, and usually involve competing expert witnesses, as well as lay witnesses. This makes most cases very expensive and time-consuming. Without the prophylactic effect of Section 5, problematic jurisdictions can be sued successfully, but then immediately enact yet another unfair voting law and necessitate yet another lawsuit.

But the ultimate test of success is whether Native Americans can actually elect candidates of their choice. Those candidates do not necessarily have to be Native, but there are a record number of Native people running for office.[97] That is a reminder that voting is just the first step in participating in the political process.[98] As Natives become successful in winning races, elective bodies will undoubtedly become more sensitive to the issues that are important to Native people.

---

[96] ACLU. *Janis v. Nelson – Settlement Agreement*, *available at* https://www.aclu.org/legal-document/janis-v-nelson-settlement-agreement.

[97] *See* Julie Tukewitz, *There's Never Been a Native American Congresswoman. That Could Change in 2018*, N.Y. TIMES, Mar. 19, 2018; Ben Neary, *Native American Politics Heat Up in Wyoming*, ASSOCIATED PRESS, Sept. 2, 2014; Joanna Walters, *Meet the Trailblazing Native American Leading a Surge in Voter Activism*, THE GUARDIAN, Sept. 17, 2016.

[98] *See* Chrissie Castro, et al., Advance Native Political Leadership, *Addressing the Strengths, Structural Barriers and Opportunities to Getting Native Americans Into Elected Leadership* (2016), *available at* https://advancenativepl.org/wp-content/uploads/2016/10/ANPL-Political-Power-09-22-16.pdf; Four Directions, *Case Studies*, *available at* http://www.fourdirectionsvote.com/case-studies/.

The history of American Indian policy, the sad legacy of violated treaties and broken promises, and the long fight for voting equality make it clear why Native Americans distrust government and have a sense that state and local jurisdictions are often hostile to Native voting. The hearings summarized in this report reflect that unfortunate reality. Until our country lives up to its professed creed of equal rights for all, and free and fair elections, there will be a continuing need for litigation under the VRA, and a willingness on the part of Native Americans to continue fighting for an opportunity to elect candidates of their choice and fully participate in America's great experiment with democracy.

PART III

A. OVERVIEW OF CONTEMPORARY IMPEDIMENTS TO POLITICAL PARTICIPATION

1. General Factors Discouraging Participation

The American Indian and Alaska Native (AIAN) population is one of the fastest growing population groups in the United States. According to the 2010 Census, the number of people identifying themselves as AIAN alone or in combination with one or more other races increased nearly three times as fast as the total U.S. population, growing by 27 percent from 4.1 million in 2000 to 5.2 million in 2010.[99] As of 2017, the AIAN population, including those of more than one race, is estimated to be 6.7 million, comprising approximately two percent of the total population.[100] By 2060, the AIAN population is projected to be 10.2 million alone or in combination with one or more other races, comprising about 2.4 percent of the estimated total population.[101]

Nearly half of all states have a substantial AIAN population. In 2016, 21 states had a population of 100,000 or more Alaska Natives or American Indian residents, alone or in combination with another race.[102] Alaska had the largest percentage of AIAN residents, who comprised 19.9 percent of the state's population in 2016. Other states in the top five included Oklahoma (13.7 percent), New Mexico (11.9 percent), South Dakota (10.4 percent) and Montana (8.4 percent).[103] In 2016, California had the largest estimated AIAN population, with nearly 1.1 million AIAN residents.[104] American Indians and Alaska Natives reside in every region of the United States, whether rural or urban.

Urban Natives are often overlooked despite their sizable presence in major metropolitan areas. In 2010, New York City had a population of over 111,000 American Indians and Alaska Natives,

---

[99] U.S. Census Bureau, Population Division, 2010 Census Briefs, The American Indian and Alaska Native Population: 2010, at 3-4 (Jan. 2012) ("AIAN Census Brief").

[100] U.S. Census Bureau, Population Division, Annual Estimates of the Resident Population by Sex, Age, Race and Hispanic Origin for the United States and States: 2016 Population Estimates, Table PEPASR5H (June 2017).

[101] U.S. Census Bureau, Population Division, Table 10, Projections of the Population by Sex, Hispanic Origin, and Race for the United States: 2015 to 2060 (NP2014-T10) (Dec. 2014).

[102] U.S. Census Bureau, Population Division, Annual Estimates of the Resident Population by Sex, Age, Race Alone or in Combination, and Hispanic Origin for the United States and States: April 1, 2010 to July 1, 2016 (June 2017) ("2016 AIAN Estimates"). The 21 states were Alaska, Arizona, California, Colorado, Florida, Georgia, Illinois, Michigan, Minnesota, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, Virginia, Washington and Wisconsin. *See id.*

[103] U.S. Census Bureau, Facts for Features: American Indian and Alaska Native Heritage Month: November 2017 (Oct. 6, 2017), *available at* https://www.census.gov/newsroom/facts-for-features/2017/aian-month.html ("2017 AIAN Summary").

[104] 2016 AIAN Estimates, *supra* note 103, for California.

alone or in combination with another race,[105] the largest such population of any U.S. city. Other cities ranked by order of their AIAN population include Los Angeles, California (54,236); Phoenix, Arizona (43,724); Oklahoma City, Oklahoma (36,572); Anchorage, Alaska (36,062); Tulsa, Oklahoma (35,990); Albuquerque, New Mexico (32,571); Chicago, Illinois (26,933); Houston, Texas (25,521); and San Antonio, Texas (20,137).[106]

Regardless of whether they live in urban or rural areas, members of the 573 federally recognized tribes[107] face many contemporary barriers to political participation. Although many other American voters share some of these obstacles,[108] no other racial or ethnic group faces the combined weight of these barriers to the same degree as Native voters in Indian Country. Moreover, the government-to-government relationship between the tribes and the United States is unique to the American Indian and Alaska Native population. Regardless of the source, the right to vote "can be jeopardized when structural barriers prevent or make it unnecessarily difficult for an eligible voter to participate in our electoral democracy."[109]

The first step is to identify the barriers and educate election officials and policy makers about them, through reports such as this one. In addressing these issues, "there isn't a magic bullet or an overnight solution."[110] Instead, it requires a comprehensive approach to minimize or eliminate the disenfranchising effects. There needs to be an ongoing partnership between election officials and tribes to address these barriers. They cannot be addressed from the top-down, with election officials telling tribal officials what they are going to do. It needs to be a bottom-up approach with "an active group of tribal members that want to partner."[111]

2. Geographic Isolation

The isolated locations of tribal lands and the dispersion of those living in urban areas contribute to the political exclusion of Native Americans. "Academics … have found that the further one has to travel to vote … dampens down the likelihood that one will actually vote. It makes common sense. In fact, studies have found in urban areas that if you move a polling place as little as a quarter of a mile there is a statistically significant decrease in the propensity to vote."[112]

---

[105] AIAN Census Brief, *supra* note 100, at 11.

[106] *Id.*

[107] 84 Fed. Reg. 1,200-05 (Feb. 1, 2015).

[108] As California Secretary of State Alex Padilla explained, "The systemic challenges that impede access to the voting booth, not just for Native Americans but others, are very familiar… They're the same that attempt to repress turnout and registration for Latinos and others. Namely, these factors include education attainment levels, the digital divide, access to transportation, poverty rates, or just frankly less experience in civic participation within the family." Sacramento Tr., Alex Padilla, 108.

[109] Sacramento Tr., Alex Padilla, 103-04.

[110] Isleta Tr., Maggie Toulouse Oliver, 134.

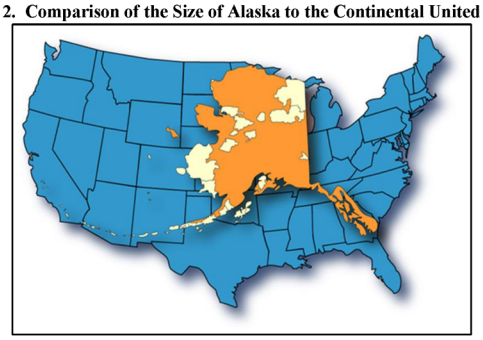
[111] Isleta Tr., Maggie Toulouse Oliver, 130-31.

[112] San Diego Tr., Jean Schroedel, 13.

Approximately one-third of all AIAN persons in the United States live in Hard-to-Count Census Tracts – roughly 1.7 million out of 5.3 million people from the 2011-2015 American Community Survey (ACS) estimates.[113] Hard-to-Count Census Tracts include those Census Tracts "in the bottom 20 percent of 2010 Census Mail Return Rates (i.e. Mail Return Rates of 73 percent or less) or tracts for which a mail return rate is not applicable because they are enumerated in 2010 using the special Update/Enumerate method."[114] The states with the greatest percentage of the AIAN population in Hard-to-Count Census Tracts reside in the western states: New Mexico (78.6 percent), Arizona (68.1 percent), and Alaska (65.6 percent).[115] Geographical isolation plays one of the most significant reasons for why those states have such a large percentage of their AIAN population in Hard-to-Count areas.

Alaska presents a particularly compelling example of how geographical barriers impact registration and voting. The logical starting point for that example is to illustrate the sheer size of the largest state:

Figure 2. Comparison of the Size of Alaska to the Continental United States.



Despite its size, the rural areas of Alaska generally are very sparsely populated. As an example, NARF brought a voting rights action on behalf of the largest group of Yup'ik-speaking Alaska Natives: those residing in villages in the Bethel Census Area. The Bethel Census Area covers an

[113] *See* The Leadership Conference Education Fund, Table 1a: States Ranked by Number of American Indian/Alaska Natives (race alone or combination) living in Hard-to-Count (HTC) Census Tracts, *available at* http://civilrightsdocs.info/pdf/census/2020/Table1a-States-Number-AIAN-HTC.pdf.

[114] *Id.*

[115] *See* The Leadership Conference Education Fund, Table 1b: States Ranked by Percent of American Indian/Alaska Natives (race alone or combination) living in Hard-to-Count (HTC) Census Tracts, *available at* http://civilrightsdocs.info/pdf/census/2020/Table1b-States-Percent-AIAN-HTC.pdf.

area of over 40.5 million square miles[116] or roughly the size of the state of Tennessee.[117] However, in 2016, the Bethel Census Area had a total estimated population of just 17,968, a population density of just 0.4 persons per square mile.[118]

While the geographical challenges to reaching the AIAN population in Alaska can be extreme, they are not unique to Alaska.

The Havasupai Indian Reservation in Arizona, which is located at the bottom of the Grand Canyon, is among the nation's most isolated reservations. There are no roads to Supai Village at the bottom of the Grand Canyon. "You have the choice of riding a horse or a mule, or hiking, and it is … 8 miles from Hilltop and it's not an easy trip down there." Coconino County has to send supplies down by helicopter the week before. The supplies are "unloaded on a sand bar, and we hope somebody shows up and takes them to our polling place…" The County used to have a county employee hike out of the Grand Canyon with ballots at 3 a.m., but now has the county employees spend the night there.[119]

Some of the tribes above the Grand Canyon fare little better. Members of the Kaibab Paiute Band of Indians on the North Rim of the Canyon in northern Arizona are extremely isolated from the Mojave County seat in Kingman. "Nobody goes to the County seat. We have to go up to Utah, through Nevada, through Las Vegas, I-40, and go all the way about five-and-a-half hours to get to the County seat. We don't really have direct communication with them…."[120] As a former Tribal Vice Chairman explained, "With living in a rural area that is spread out, all things that we do, we face the same challenges, whether it's economic development, whether it's voting, whether it's impacting local government."[121]

Tribes in the Pacific Northwest face many of the same challenges. For example, the Colville Reservation is approximately 1.4 million acres and occupies the geographical area north of central Washington State in an area slightly larger than the State of Delaware. In terms of both land base and travel membership, the Colville Reservation is one of the largest Indian tribes in the Pacific Northwest. The area is rural and heavily wooded. Most residents live in one of four communities on the reservation (Nespelem, Omak, Keller or Inchelim), which are separated by mountain passes and often require significant drive times. Public transportation is limited. The reservation's geographic isolation contributes to a median household income less than half the state average.[122]

---

[116] U.S. Census Bureau, QuickFacts: Bethel Census Area, Alaska ("BCA QuickFacts"), *available at* https://www.census.gov/quickfacts/fact/table/bethelcensusareaalaska/PST045216.

[117] *See* U.S. Census Bureau, QuickFacts: Tennessee ("Tennessee QuickFacts"), *available at* https://www.census.gov/quickfacts/TN.

[118] *See* BCA QuickFacts, *supra* note 117. That compares to a population density of 153.9 persons per square mile in Tennessee. *See* Tennessee QuickFacts, *supra* note 118.

[119] Tuba City Tr., Patty Hansen, 96-97; *see also* Phoenix Tr., Rani Williams, 25.

[120] Phoenix Tr., Roland Maldonado, 119.

[121] Phoenix Tr., Roland Maldonado, 120.

[122] Portland Tr., Norma Sanchez, 119-120.

Many Midwestern and Northern Plains tribes also are not immune from the challenges of isolation. For example, the Red Lake Indian Reservation in northwestern Minnesota, which has the state's second largest AIAN population, is separated from much of the rest of the state. Many reservations are located far from urban areas and are connected (if at all) by roads that are susceptible to changing weather conditions, such as those posed by the often-treacherous weather in the region.

Geographic isolation of Native voters also is present in the cities. Urban areas like Los Angeles have large numbers of Native voters who moved during the Relocation Era. It resulted in a "lot of cultural disconnection" from their tribes, and many suffered from hardship and poverty.[123] That was largely by design.

"[I]n urban centers, the Bureau of Indian Affairs when they were managing the relocation program, ... strategically placed our Indian families away from each other, and so as not to form ... Indian ghettos or ethnic enclaves as other communities had. So as a result of that, very strategic, very deliberate isolation practice, traditional community organizing methods that other communities use such as door knocking or ... outreaching in supermarkets or things like that, they don't work for our community... [T]hat geographic dispersement poses a huge barrier for us to be able to reach voters, to educate voters, to know where our people are so we have to really rely on event-based or center-based kinds of outreach. So that is a huge barrier."[124]

That isolation poses considerable challenges in Los Angeles, where the number of Native Americans lacking access to a vehicle is three times higher than the rest of the population. Even when transportation is available, the distances and traffic can be daunting. It takes two hours or longer for Natives from opposite sides of Los Angeles County to get to the urban Indian center.[125] As a community organizer explained, "[I]f you rely on public transportation and you want to go vote, some people have to take three buses just to get to one polling place, and then to be there for maybe an hour or two hours ... to get back. So it's like a full day itself." Most Natives facing that barrier cannot vote.[126]

3. **Physical and Natural Barriers**

Native Americans often are also isolated due to physical features such as mountains, canyons, oceans, rivers, and vast expanses of unoccupied land. The topography of the Grand Canyon impedes travel by not only the Havasupai who live inside the Canyon, but also the Goshute, Hopi, Navajo, Paiute, Ute, and Zuni tribes that are in and around the Canyon.

Alaska Native villages face even more daunting challenges. Hundreds of miles of mountains, tundra, wetlands, oceans and raging rivers often separate villages from the nearest community with

---

[123] San Diego Tr., Monique Castro, 135-37.

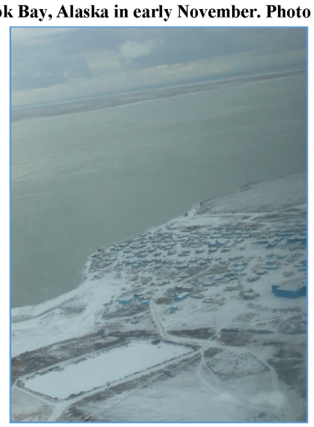
[124] Sacramento Tr., Chrissie Castro, 160-61. Urban Native voters "really want to be in a space," such as an Indian Center, where they can meet to discuss what is on the ballot. Voter guides and one-on-one discussions can help, but having a central location tends to be the most effective means of outreach. *Id.* at 168-70.

[125] Sacramento Tr., Chrissie Castro, 165-66; *see also* San Diego Tr., Monique Castro, 119.

[126] San Diego Tr., Robin Thundershield, 98.

jet air service, or hub. For example, travel to Toksook Bay, Alaska, the first community to be counted in the 2020 Census, by bush plane requires flying from Bethel across over 115 miles of the remote Yukon Delta National Wildlife Refuge.

Figure 3. Toksook Bay, Alaska in early November. Photo by James Tucker

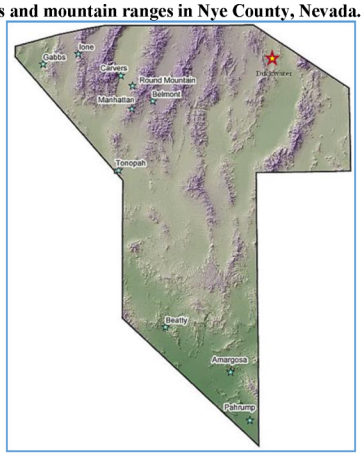


Many other tribes in the Continental United States are separated from off-reservation communities by similar topographical barriers. On the Yakama Nation, it takes one hour to drive just seven miles.[127] In Nevada, there are approximately 80 mountain ranges that run north and south. It requires many Native voters living on reservations to drive around the mountain ranges to get to non-tribal governmental offices.[128]

[127] Portland Tr., Matthew Tomaskin, 92-94.

[128] Sacramento Tr., Beverly Harry, 16-17.

Figure 4. Communities and mountain ranges in Nye County, Nevada. Map by James Tucker



Nye County is the largest county in Nevada and the third largest county in the United States. Distances between communities are made even greater by the additional mileage necessary to going around the mountain ranges throughout the County. The Duckwater Reservation is located in the northeastern corner of the County, presenting some of the longest drives in the Continental United States to reach the County's two election offices in Tonopah and Pahrump.

Physical barriers are even present for tribes located in states that are not commonly thought of as having isolated communities. Three examples from California illustrate the point.

In southern California, the San Luiseno Band of Indians are located in the San Jacinto Mountains. Tribal members identified their location as a significant barrier to voting. The nearest non-tribal services, including the closest county polling place, are at the bottom of the mountain, which are located at least 40 minutes away each way in favorable driving conditions that disappear with inclement weather.[129]

Many northern California tribes face similar challenges. The Middletown Rancheria of Pomo Indians is located about 45 minutes each way from the Lake County seat. It is necessary to drive around the mountains and a lake, even though the distance is not far "as the crow flies."[130] The Karuk Tribe, which is located just south of the Oregon border, faces much more extreme barriers. Tribal members who live in Yreka have to travel 80 miles on a road that follows the Klamath River to Happy Camp on a very mountainous, treacherous drive. It is common for rockslides to block the road, which can make it impossible to get to county services including polling places.[131]

---

[129] San Diego Tr., Monique Castro, 116.

[130] Sacramento Tr., Carlos Negrete, 43.

[131] Sacramento Tr., Buster Attebery, 55-56; Sacramento Tr., Fatima Abbas, 61.

4. Poor or Non-Existent roads

Distance and physical barriers are compounded by an absence of paved roads to connect tribal lands with off-reservation communities. Even where roads are present, Native voters often lack reliable transportation to travel the vast distances to elections offices and county seats. Inclement weather conditions frequently make such travel impossible, particularly in early November when general elections are held.

Nearly all of rural Alaska, which is dominated by Alaska Native communities, is not on the state road system. Access to those communities is typically by air or by boat. In the winter months, when the conditions permit, villages also may be connected by "ice roads," which are traversed by snowmobile or ATVs that travel on frozen rivers. For communities that are not regional "hubs" like Bethel and Dillingham, air services are provided by "bush pilots" who use runways that are little more than gravel roads. Flights are limited to Visual Flight Rules (VFR) conditions when the rough-hewn runways are not iced over.

Figure 5. Unmarked road on the Turtle Mountain Reservation, Election Day, November 6, 2018. Photo by Jacqueline De León

Because of the limited accessibility to over 200 geographically isolated rural and Alaska Native communities, travel is much more constrained by the dominant weather conditions than any other location in the Continental United States. It is not unusual for villages to be inaccessible by air for several weeks due to inclement weather, icing conditions, and above all fog. Flights are cancelled or delayed even under the best weather conditions, when the fog may linger late into the day.

Geography and weather have a tremendous impact on the mail service, which impedes – or in some cases makes impossible – efforts to vote by mail. The extraordinary efforts that postal workers make to deliver mail to isolated Alaska Native villages are truly commendable. But rural Alaska may be one of the few places in the world in which the immortal words of Herodotus do not always ring true: "Neither snow, nor rain, nor heat, nor gloom of night, stays these couriers from the swift completion of their appointed rounds." Unpredictable weather conditions in the outer reaches of Alaska always have the final say in the delivery and pick-up of mail, including the critical voting communications being sent by the state's Division of Elections.

Among the tribes located in the Continental United States , unpaved and poor driving conditions add to the isolation that is part of the daily lives of much of the Native population residing on rural reservations. In the Four Corners area (Arizona, Colorado, New Mexico and Utah), "[r]oad conditions on both Navajo and Hopi reservations become extremely tricky and dangerous in the wintertime causing expensive repair work on personal and school vehicles. The vehicles travel over deeply mud-rutted and pot-holed roads, which have been damaged by snow and rain, ruining and damaging wheel alignment and tires."[132]

Figure 6. Student walking home after her school bus became stuck in mud on tribal lands (San Juan County Roads Department photo as published in *Navajo-Hopi Observer*, Dec. 16, 2014).

Weather conditions make roads impassable. In San Juan County, Utah, "When it snows, it snows. When it rains, it rains, and it washes out all the dirt roads that we have, all of the washes that we have to cross on the dirt roads that are washed out."[133] Roads get muddy when it snows, and buses get stuck. Similarly, in 2016, the road over a mountain pass connecting Karuk tribal members in Yreka, California with Happy Camp was snowed in and was impassable for at least one month. The Tribe had to use Forest Service snowplows to clear out an old deer hunting road to provide emergency access.[134]

---

[132] Rosanda Suetopka, *Wet Weather Wreaks Havoc on Rez Bus Routes*, NAVAJO-HOPI OBSERVER (Dec. 16, 2014), *available at* https://www.nhonews.com/news/2014/dec/16/wet-weather-wreaks-havoc-on-rez-bus-routes/.

[133] Isleta Tr., Wilfred Jones, 17.

[134] Sacramento Tr., Buster Attebery, 56.

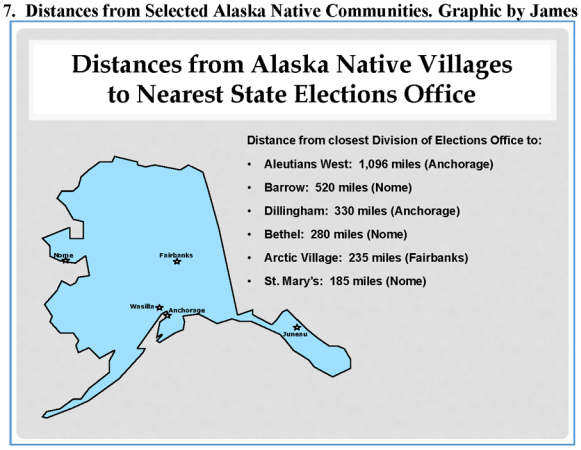
A community organizer explained the impact that lack of paved roads and snowplows has on political participation by tribal members. "[I]t cannot be underestimated just how hard it is for some folks to vote. The roads, if it rains" or "there's snow," there are many "dirt roads that a lot of our people have to cross many miles to get to" that may be impassable. The absence of Native representation at state and local levels exacerbates the problem because non-Native elected officials deny critical infrastructure, including roads and bridges, to Native residents.[135] For example, the non-Native areas such as Blanding "all have pebble roads to homes" that are absent from roads even in Navajo communities located off the reservation.[136]

5. Distance, Travel Time, and Limited Hours of Non-Tribal Government Offices

The corollary to geographic isolation is that many Native Americans have to travel vast distances to get to the off-reservation communities that provide them with critical services such as driver's licenses their local election offices to register to vote. "Time is the principal cost of voting: Time to register; to discover what parties are running; to deliberate; to go to the polls; to mark the ballot. Since time is a scarce resource, voting is inherently costly." That means that the greater the distance to register or to actually vote, the less likely someone is to cast a ballot," or what is referred to as "the tyranny of distance."[137]

Nowhere are distances and travel times greater than they are for Alaska Natives living in remote communities spread throughout Alaska and its Aleutian Islands chain. Those distances generally require using jet service that can cost hundreds, and in some cases even thousands, of dollars to some of the most economically disadvantaged populations in the United States.

Figure 7. Distances from Selected Alaska Native Communities. Graphic by James Tucker



[135] Isleta Tr., Laurie Weahkee, 195, 221.

[136] Isleta Tr., Terry Whitehat, 19.

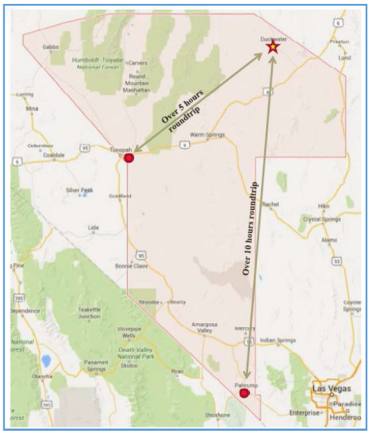
[137] Bismarck Tr., Gerald Webster, 250-52.

Although the distances and travel times are less extreme than those faced by many Alaska Native villages, they can still prevent tribal members in other areas of the United States from accessing government services including voter registration.

Voters surveyed from the Duck Valley, Pyramid Lake, Walker River and Yerington Tribes in Nevada identified travel distance as "the single biggest obstacle to registering. Among those who were registered to vote, 10 percent stated that it was difficult for them to travel to register. Among [those] … not registered, a whopping 34 percent said that it would be difficult for them to travel to a place to register… But travel distance was also identified by the respondents as a major factor that inhibited voting…"[138]

Turning back to Nye County, Nevada, the combined effect of geographical isolation and mountainous terrain results in lengthy travel times to get to either of the County's two election offices. The closest elections office is in Tonopah, 140 miles each way by road from the Duckwater Reservation. The Pahrump elections office is 303 miles each way by road. Travel time is at least five hours or ten hours, respectively, if the weather conditions permit.

Figure 8. Travel times from the Duckwater Reservation to Nye County, Nevada elections offices. Map by James Tucker



Travel time for many other Nevada tribes is several hours to reach county seats and non-tribal elections offices. Voters on the Pyramid Lake Reservation have as much as a 100-mile round-trip

[138] San Diego Tr., Jean Schroedel, 17-18.

drive to get to the elections office in Reno. Voters on the Walker River Reservation have a 70-mile round-trip drive to get to the county office in Schurz.[139]

Southwestern tribes face similar barriers. Navajos in San Juan County, Utah living on tribal lands have to drive to Blanding or Monticello for any government services. From Navajo Mountain, Utah, which is near Lake Powell, it is about 200 miles (a four or five-hour drive) each way, weather conditions permitting. It requires driving south into northern Arizona on U.S. highway 98 to U.S. highway 160 in Navajo County, Arizona to U.S. highway 191 north back into Utah.[140]

Montezuma Creek is the closest Navajo community to Monticello, which is a 75 mile drive each way. "So in order for people to do business … like vehicle registration, any healthcare issues, as well as voting issues," it is necessary to travel great distances. "That's a burden to our people." It poses difficulties in giving Native voters "more say in the decision-making at the county level."[141]

Northern Plains tribal members also have to travel great distances to reach their county government offices. In Montana, some members of the Northern Cheyenne Tribe have to drive as much as 120 miles roundtrip. Many tribal members of the Confederated Salish and Kootenai Tribes of the Flathead Nation have roundtrip drives of up to 140 miles, and those on the Crow Indian Reservation have as much as a 150-mile roundtrip drive.[142] For a potential Native voter on the Standing Rock Reservation, the mean distance to a driver's license site is nearly 61 miles. From the Fort Berthold Reservation to a driver's license office is nearly 50 miles.[143]

But these great distances and lengthy travel times only tell part of the story. Natives have to travel much farther for basic government services like driver's licenses and voter registration than non-Natives.

In Blaine County, Montana, Native Americans are forced to travel, on average, 31.5 miles to obtain a state-issued identification, compared to an average of 9.8 miles for non-Natives.[144] "[I]n North Dakota, Native Americans, on average, must travel twice as far as non-Native Americans to visit a driver's license site."[145] Natives living on the Rosebud Sioux Reservation in South Dakota have to drive an average of 44.8 miles to obtain a state identification card, compared to 16.8 miles for non-Natives.[146]

Yet, those are not the only issues. Most of the locations that Native voters must use to obtain a photo identification are open for reduced hours or only a handful of days each month. In North

---

[139] San Diego Tr., Jean Schroedel, 21-22; San Diego Tr., Amy Nantkes, 47-48, 50-51.

[140] Isleta Tr., Terry Whitehat, 11-18.

[141] Isleta Tr., Wilfred Jones, 16.

[142] Bismarck Tr., Stewart-Peregoy, 103 (Crow, Northern Cheyenne); Bismarck Tr., Erica Shelby, 140, 157 (Flathead).

[143] Bismarck Tr., Gerry Webster, 270 (Standing Rock).

[144] Bismarck Tr., Gerry Webster, 257.

[145] Bismarck Tr., Matt Campbell, 167; *see also* Bismarck Tr., Gerry Webster, 269-70.

[146] Bismarck Tr., Gerry Webster, 257.

Dakota, there are 27 driver's license sites in 53 counties. There is one site for every 2,600 square miles. Only four locations are open five days a week. Twelve locations are open less than six hours on one day a month.[147]

Similar barriers were identified by tribal members in the Pacific Northwest. "[S]tate, federal and county offices need to be open and available for public use consistent with the public's working hours instead of being closed early" and with "staggered hours" that prevent many Native Americans from using them.[148]

In Wisconsin, Native Americans face significant barriers registering to vote because the Department of Motor Vehicles is only open sometimes and in some places in Northern Wisconsin, where many tribal members live, only one day out of the month. Tribal members may have to drive up to 90 miles because of the limited locations where voter registration is available. Currently, the only in-person registration locations are through the township clerk, county clerk, and Department of Motor Vehicles.[149]

Limiting the access of Native Americans to voter registration offices or offices like motor vehicles departments where prerequisites to voting such as photo identification must be obtained harkens back to similar barriers faced by black voters in the South prior to passage of the Voting Rights Act.

6. Technological Barriers and the Digital Divide

Among all population groups, the digital divide including lack of access to cellular and broadband resources is most profoundly felt in Indian Country. The absence of those resources presents a substantial barrier to Native American political participation.

People residing in tribal areas have virtually no access to computers or the Internet, with the Federal Trade Commission estimating broadband penetration in tribal communities at less than ten percent.[150]

---

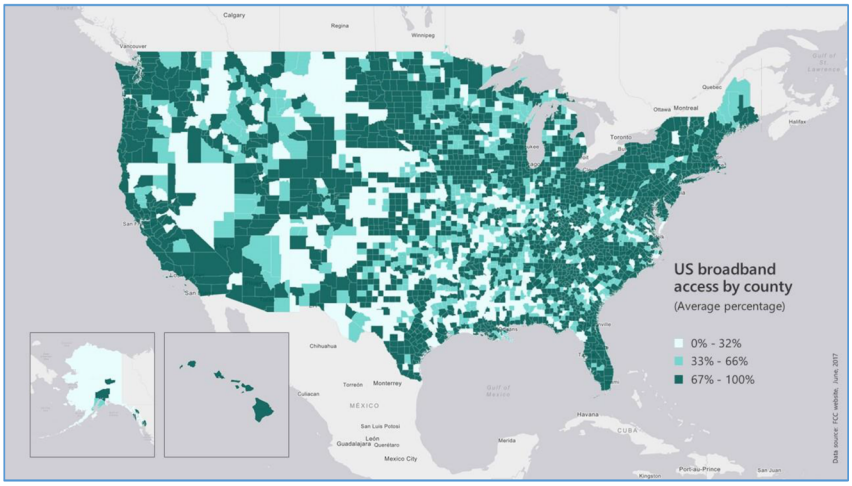
[147] Bismarck Tr., Gerry Webster, 269.

[148] Portland Tr., Patsy Whitefoot Test., 77.

[149] Milwaukee Tr., Paul Demain, 69-78, 79-86, 94, 96, 110-13.

[150] Parkhurst et al., The Digital Reality: E-Government and Access to Technology and Internet for American Indian and Alaska Native Populations 3 (referring to an FTC study), *available at* https://pdfs.semanticscholar.org/4bb4/f5efcd1cf4ec342b5d45dd824bb10d9bb0f2.pdf.

Figure 9. Broadband Access by County or County Equivalent.[151]



As this map depicts, broadband access generally is unavailable to Alaska Natives outside of Anchorage, Fairbanks and Juneau. In the Continental United States, most tribal members living in rural areas in the Southwest, parts of California, the northern and southern Plains, and pockets of the Great Lakes region lack broadband access.

The absence of reliable and accessible broadband is a common theme throughout Indian Country. In rural areas of Nevada where reservations are located, "it's really, really difficult to get broadband or to even have a fax machine out there." There is no reliable Internet access.[152]

Pacific Northwest tribes located in rural areas, such as members of the Lummi and Yakama Tribes, do not have home Internet access, which is "a huge barrier."[153] When tribal members in Washington State move, they have to drive to update their voter registration because they cannot do it online.[154]

---

[151] Brad Smith, President of Microsoft, *A rural broadband strategy: connecting rural America to new opportunities* (July 10, 2017), *available at* https://blogs.microsoft.com/on-the-issues/2017/07/10/rural-broadband-strategy-connecting-rural-america-new-opportunities/.

[152] Sacramento Tr., Beverly Harry, 20-21; *see also* San Diego Tr., Jean Schroedel, 34.

[153] Portland Tr., Barbara Lewis, 51; *see also* Portland Tr., Matt Tomaskin, 92-94; Portland Tr., Carol Evans, 205.

[154] Portland Tr., Rhonda Medcalf, 52.

The digital divide also remains a big barrier on tribal lands in the Southwestern states. New Mexico passed a comprehensive community broadband bill to try to begin to address those critical infrastructure issues, but the governor vetoed it. But advocates for Native voters have not given up. "What the state does comprehensively to address the digital divide in rural New Mexico at large will directly impact our tribal communities in a positive way. So we are very strong advocates of any and all of that work."[155]

Although the FCC claimed the percentage of those living on tribal lands lacking broadband access was considerably lower,[156] the United States Government Accountability Office (GAO) determined that the FCC's estimate wrongly used broadband availability numbers rather than the actual access to broadband.[157]

The GAO explained that even where some broadband access may be available, depressed socio-economic conditions, as well as service denials, often prevent American Indians and Alaska Natives from having access to or using online resources including the Internet. For example, the cost or inconvenience of driving to a location where Internet access can be obtained, or the cost of getting Internet service in those areas in Indian Country where it may be offered, prevents many American Indians and Alaska Natives from going online.[158]

Tribal leaders reported members having to pay $130 per month to access broadband on tribal lands.[159] According to the FCC, this is "approximately one-and-a-half times the average rate providers charge for comparable services in urban areas."[160] As a tribal member from New Mexico explained, "Some of our areas are still very much dark. We don't have the kind of robust internet connectivity because what's available is too expensive, and we can't afford to be connected with the kind of bandwidth that we'd like."[161]

Even when residents are able to pay the high cost to subscribe for broadband, their services are often limited by poor quality of service.[162] Such examples consist of "routine outages, slow speeds, and high latency keep people on tribal lands from consistently accessing the Internet."[163] Some tribal members do not even have the option of paying higher rates for access since even where

---

[155] Isleta Tr., Maggie Toulouse Oliver, 137-38; Isleta Tr., Everett Chavez, 158.

[156] GAO, BROADBAND INTERNET-FCC's Data Overstate Access on Tribal Lands, United States Government Accountability Office, 1 (September 2018), *available at* https://www.gao.gov/assets/700/694386.pdf.

[157] *Id.* at 14, 25

[158] *See* Gerry Smith, *On Tribal Lands, Digital Divide Brings New Form of Isolation*, HUFFPOST, Apr. 23, 2012, *available at* https://www.huffingtonpost.com/2012/04/20/digital-divide-tribal-lands_n_1403046.html.

[159] *See* BROADBAND INTERNET-FCC's Data Overstate Access on Tribal Lands, United States Government Accountability Office, 20 (September 2018), https://www.gao.gov/assets/700/694386.pdf at 20-21.

[160] *Id.* at 21.

[161] Isleta Tr., Everett Chavez, 158.

[162] BROADBAND INTERNET-FCC's Data Overstate Access on Tribal Lands, United States Government Accountability Office,at 22 (September 2018), https://www.gao.gov/assets/700/694386.pdf..

[163] *Id.* at 22 n.41.

broadband service may be available to reservation residents, some providers choose to deny services for reasons such as "high-costs, administrative barriers, or technical limitations."[164]

Even in tribal areas where broadband is available, Native voters often lack access to computers or other devices to access it.[165] Computer access is non-existent on many areas on the Navajo Nation, especially where those areas lack access to even more basic resources like electricity and running water.[166]

The United States Census Bureau has acknowledged the lack of broadband access in its efforts to prepare for the 2020 Census. The upcoming decennial Census enumeration "will offer the opportunity and encourage people to respond via the Internet…"[167] However, the digital divide is most profoundly felt among the Alaska Native and American Indian population. To illustrate that fact, a mapping tool shows how Hard-to-Count Census Tracts correlate with reservations.[168]

During Tribal Consultations between the Census Bureau and tribal members, the Bureau received feedback that "[s]ome tribes reported that internet response is currently not a viable option for members and requested an in-person enumerator – specifically a local, tribal person."[169] In particular, connectivity was reported to be an issue "in rural areas including Alaska, Navajo Nation, Pueblos [in New Mexico]."[170]

Lack of reliable cellular phone service on tribal lands likewise is a substantial barrier to political participation. Forty percent of the Navajo Nation lacks cell phone coverage, with sixty percent lacking two-way radio coverage. "That means as a public safety matter, our people can't call for help when they need it, and our police can't call for backup when they need it."[171] On tribal lands in the Pacific Northwest, it is necessary to go to certain areas to make calls.[172] Notably, some tribes that have limited Internet access, such as Thule River in California, lack cellular service.[173]

---

[164] *Id.* at 24-25.

[165] San Diego Tr., Jean Schroedel, 34.

[166] *See* Isleta Tr., Shirlee Smith, 92; Tuba City Tr., Ethel Branch, 8.

[167] U.S. Census Bureau, 2020 Census Operational Plan: A New Design for the 21st Century 8 (version 3.0) (Sept. 2017), *available at* https://www2.census.gov/programs-surveys/decennial/2020/program-management/planning-docs/2020-oper-plan3.pdf.

[168] *See* Mapping Hard to Count (HTC) Communities for a Fair and Accurate 2020 Census, *available at* http://www.censushardtocountmaps2020.us/.

[169] *See* U.S. Census Bureau, Office of Congressional and Intergovernmental Affairs, PowerPoint Presentation, Briefing on American Indian Alaska Natives 2020 Tribal Consultation Meetings 10 (May 26, 2016) ("Tribal Consultations"), *available at* https://www2.census.gov/cac/nac/meetings/2016-05/2016-alexander.pdf.

[170] *Id.*

[171] Tuba City Tr., Ethel Branch, 8.

[172] Portland Tr., Carol Evans, 205.

[173] Sacramento Tr., Thomas Eugene, 37.

The digital divide is also a generational phenomenon in Indian Country. Tribal Elders may use flip phones, but they are not as comfortable accessing the Internet through their phones as younger Natives.[174] The Census Bureau was informed in its Tribal Consultations that while tribes are increasingly using social media to connect with tribal members, those resources are often not generally accessible by Tribal Elders. For online enumeration, Census was informed that where broadband is available, the "younger generation will go online and respond."[175]

Lack of reliable broadband and cellular service limits voter outreach and engagement. That prevents election officials from using in many tribal communities the "less expensive, nontraditional media outreach … [through] use of social media and digital communications," such as what is done "in an urban setting."[176] In New Mexico, "if people go one mesa too far or one hill too far… we really can't even communicate with one another on Election Day."[177]

One outreach worker described how mountains blocked her service, and by the time she received voice mail messages from Native voters who could not locate their polling place, "the polls were already closed."[178] Lack of broadband and cellular infrastructure "really does negatively impact voter engagement." More broadband access would be "extremely helpful in getting more people out to vote…"[179]

7. Low Levels of Educational Attainment

Native Americans have lower rates of educational attainment. Among the American Indian and Alaska Native population who are 25 years of age and older, 20.1 percent had less than a high school education.[180] For the period from 2006-2010, the number of American Indians and Alaska Natives without a high school diploma was 1.6 times higher than the non-AIAN population, with 23 percent of adults lacking a high school diploma.[181] Employment is generally the greatest indicator of income, and income directly influences a family's ability to bear the costs associated with voting such as gas money, accessing childcare, and taking time off of work.

Illiteracy also is very prevalent among Limited-English Proficient (LEP) American Indians and Alaska Natives, especially among Tribal Elders. In areas covered by Section 203 of the Voting

---

[174] Sacramento Tr., Beverly Harry, 21.

[175] Tribal Consultations, at 10.

[176] Isleta Tr., Maggie Toulouse Oliver, 118, 137.

[177] Isleta Tr., Laurie Weahkee, 196.

[178] Phoenix Tr., Joyce Lopez, 173-74.

[179] Isleta Tr., Laurie Weahkee, 194-95.

[180] *See* U.S. Census Bureau, 2016 American Community Survey 1-Year Estimates, Selected Population Profile in the United States: American Indian and Alaska Native alone (300, A01-Z99) ("2016 AIAN Profile"), *available at* https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk.

[181] Nancy Pindus et al., U.S. Dep't of Housing and Urban Development, Housing Needs of American Indians and Alaska Natives in Tribal Areas (U.S. Dep't of Hous. and Urb. Dev. 29 (2017)).

Rights Act, illiteracy among LEP voting-age citizens is many times higher than the national illiteracy rate of 1.31 percent in 2016.[182]

In Alaska, in Section 203-covered areas for which Census data is available, the illiteracy rate among LEP Alaska Natives of voting age is 40 percent for Aleut-speakers, 28.4 percent for Athabascan-speakers, 15 percent for Yup'ik-speakers, and 8.2 percent for Inupiat-speakers.[183]

In Arizona, in covered areas for which Census data is available, the illiteracy rate among LEP American Indians of voting age is 25 percent for Navajo-speakers and 6.8 percent for Apache-speakers.[184]

In Mississippi, in covered areas for which Census data is available, the illiteracy rate among LEP American Indians of voting age is 34 percent for Choctaw-speakers.[185]

Finally, in New Mexico, in covered areas for which Census data is available, the illiteracy rate among LEP American Indians of voting age is 19.1 percent for Navajo-speakers and 6.7 percent for Apache-speakers; data was not available for speakers of the Pueblo languages.[186]

As a tribal member from the Pacific Northwest explained, "Illiteracy is high on the reservation. We have a high dropout rate. Reading the ballots and reading voter pamphlets is pretty complicated for me myself even, so going through the pamphlets are not easy. So my own family … will not read it, they will ask which way to vote, getting through these ballots is hard for people to understand."[187]

---

[182] *See* U.S. Census Bureau, Flowchart of How the Law Prescribes the Determination of Covered Areas under the Language Minority Provisions of Section 203 of the Voting Rights Act 2 (Dec. 5, 2016), *available at* https://www.census.gov/rdo/pdf/2_PrescribedFlowFor203Determinations.pdf. "Illiteracy" is defined as including those persons who "have less than a 5th grade education." *Id.*

[183] *See* U.S. Census Bureau, Voting Rights Determination File: Section 203 Determinations (Dec. 5, 2016), Public Use Data File and Technical Documentation (Excel spreadsheet of "Determined Areas Only") ("Section 203 Determination File"), *available at* https://www.census.gov/rdo/data/voting_rights_determination_file.html. In Alaska, the illiteracy rate among LEP voting-age citizens in covered areas compares to the national illiteracy rate of 1.31 percent as follows: 30.5 times higher for Aleut-speakers; 21.7 times higher for Athabascan-speakers; 11.4 times higher for Yup'ik-speakers; and 6.3 times higher for Inupiat-speakers. *See id.*

[184] *See* Section 203 Determination File, *supra* note 184. In Arizona, the illiteracy rate among LEP voting-age citizens in covered areas compares to the national illiteracy rate of 1.31 percent as follows: 19.1 times higher for Navajo-speakers; and 5.2 times higher for Apache-speakers. *See id.*

[185] *See* Section 203 Determination File, *supra* note 184. In Mississippi, the illiteracy rate among LEP voting-age citizens in covered areas compares to the national illiteracy rate of 1.31 percent as follows: 25.9 times higher for Choctaw-speakers. *See id.*

[186] *See* Section 203 Determination File, *supra* note 184. In New Mexico, the illiteracy rate among LEP voting-age citizens in covered areas compares to the national illiteracy rate of 1.31 percent as follows: 14.6 times higher for Navajo-speakers; and 6.7 times higher for Apache-speakers. *See id.*

[187] Portland Tr., Henry Cagey, 16.

In many cases, illiteracy is a product of the cultural traditions of the tribe. Many members of the Yurok Tribe in northern California cannot read because they are "an oral tradition people," passing on their stories through spoken words and not writing. Voting materials that are in audio, rather than written form, are more likely to be used.[188]

Low levels of educational attainment among Native voters contributes to what is perceived as "apathy" to voting.[189] As one tribal member explained, "I know a couple of people who don't vote because they don't read. Even during the tribal elections, they don't vote."[190]

Chuck Hoskin, Jr., the Secretary of State of the Cherokee Nation, concisely stated the impact that lower educational attainment has on Native Americans. "I think the more marginalized the population is, the more difficult it may be to access that sort of information through the mediating institutions that you would expect to provide that through the media and other sources. When you get a population that perhaps has some lower education attainment than the greater population, there's a challenge to accessing and understanding some of that information."[191]

8. Depressed Socio-Economic Conditions

Socio-economic barriers likewise make the voting process less accessible for Native Americans. There is a "very large body of scholarly research that shows that economic sociodemographic factors are closely related to electoral participation. Not surprisingly, poor people vote at much lower rates than those who are affluent. And American Indians are amongst the poorest people in the United States."[192]

Native Americans, "[l]ike all Americans … live in the wealthiest country in the world … Yet, of course, when you cross the reservation line, the world around us changes dramatically." The Navajo Nation and other tribes are in a "developing nation status" [193] with the attendant challenges found in "a third world country."[194] Access to basic services that people living off of tribal lands take for granted, like households with access to running water and electricity, are absent in much of Indian Country.[195]

---

[188] Sacramento Tr., Ruthie Maloney, 133.

[189] Tulsa Tr., Chuck Hoskin, Jr., 141.

[190] Portland Tr., Cagey Test., 17.

[191] Tulsa Tr., Chuck Hoskin, Jr., 124.

[192] San Diego Tr., Jean Schroedel, 13.

[193] Tuba City Tr., Ethel Branch, 8.

[194] Sacramento Tr., Ruthie Maloney, 130-31.

[195] *Id.*; Tuba City Tr., Ethel Branch, 8; Isleta Tr., Debra Haaland, 209-10.

Native peoples have the highest poverty rate of any population group, 26.6 percent, which is nearly double the poverty rate of the nation as a whole.[196] The poverty rate was even higher on federally recognized Indian reservations and Alaska Native villages, at 38.3 percent.[197] The median household income of single-race American Indian and Alaska Native households in 2016 was $39,719, far below the national median household income of $57,617.[198]

High poverty rates are prevalent throughout Indian Country. Nearly half of the members of the Gila River Indian Community and the San Carlos Apache Tribe are below the poverty line, more than triple the rate in Arizona.[199] The Middletown Rancheria of Pomo Indians of California is a rural area that is in the poorest county in the state.[200] In northern Nevada, the poverty rates are roughly twice the national average on four reservations: 23 percent at Duck Valley and Yerington, 25 percent on Pyramid Lake, and 31 percent at Walker River.[201] The median income of tribal members on the Colville Reservation in Washington is less than half the median income statewide.[202]

Native Americans consistently have higher poverty rates than non-Natives, even when they live in the same communities. For example, in Big Horn County, Montana, the Native-American poverty rate is nearly 30 percent, roughly two and a half times higher than non-Natives in the County. In Rosebud County, Montana, 26 percent of Native Americans were below the poverty line, compared to just nine percent of the County's non-Native population.[203] "[P]overty plays a real part in voting on the reservation."[204]

The same is true for urban Natives. In Seattle, Washington, the average household income is nearly $60,000. However, Native American households have an annual income of just $40,000. The income disparity not only makes it difficult for Native Americans to make ends meet in King County, but it impedes their political participation.[205]

---

[196] U.S. Census Bureau, Profile America Facts for Features: CB16-FF.22, American Indian and Alaska Native statistics, *available at* https://www.census.gov/newsroom/facts-for-features/2016/cb16-ff22.html (Nov. 2, 2016) ("2016 AIAN FFF").

[197] U.S. Census Bureau, Table B17001C: Selected Population Profile in the United States: 2015 American Community Survey 1-Year Estimates (last visited on Feb. 7, 2018), *available at* https://factfinder.census.gov/bkmk/table/1.0/en/ACS/15_1YR/B17001C/0100000US|0100089US.

[198] 2017 AIAN Summary, *supra* note 104, at 19.

[199] Phoenix Tr., Stephen Lewis, 127; Phoenix Tr., Steve Titla, 241.

[200] Sacramento Tr., Carlos Negrete, 42.

[201] San Diego Tr., Jean Schroedel, 13.

[202] Portland Tr., Norma Sanchez, 119-120.

[203] Bismarck Tr., Webster Test., 255-256.

[204] Bismarck Tr., Carol Davis, 210.

[205] Portland Tr., Mike Tulee, 179.

The unemployment rate of those American Indians and Alaska Natives aged 16 and older in the workforce was 12 percent.[206] Many reservations have few employment opportunities available.[207] Lack of jobs leaves about 19.2 percent of all Native Americans without health insurance.[208]

According to the Census Bureau, 13.4 percent of all occupied American Indian and Alaska Native households lacked access to a vehicle, making it impossible to travel great distances to register and vote.[209] "If you have transportation challenges, whether it's an unreliable vehicle, or maybe lack of a vehicle, and lack of access to effective public transportation, that does serve as a barrier to civic participation."[210] Lack of transportation was reported as a common problem throughout Indian Country.[211] Many families only have one vehicle, and its use to travel to work prevents others in the household from using it to register or to vote.[212]

Native voters do their best to overcome their lack of transportation. Many hitchhike.[213] Others have relatives drive them to government offices and polling places.[214] But just getting from one community to another community on or off the reservation, even if it is only a short distance, can be very difficult for Native Americans to overcome.[215]

9. Homelessness and Housing Insecurity

The housing crisis facing Native Americans cannot be overstated. Poverty and lack of housing units have the cumulative effect of leaving many Native American voters homeless or near homeless, which, in turn, makes it substantially more difficult for Native Americans to register to vote, receive a ballot by mail, and cast a ballot.

Various factors contribute to housing instability including population growth, income, education, and employment. In each of these categories, as discussed above, Native Americans fare poorer than Non-Native Americans and in turn are more susceptible to housing instability. Lack of resources leave many tribal communities unable to provide for their homeless populations. In a

---

[206] *Id.* 2017 AIAN Summary, *supra* note 104, at 19.

[207] *See* Tuba City Tr., Ethel Branch, 8; Sacramento Tr., Buster Attebery, 57; Portland Tr., Norma Sanchez, 148-149.

[208] *Id.* 2017 AIAN Summary, *supra* note 104, at 19; *see also* Sacramento Tr., Beverly Harry, 17-18.

[209] *Id.* 2017 AIAN Summary, *supra* note 104, at 19.

[210] Sacramento Tr., Alex Padilla, 108.

[211] Tulsa Tr., Christina Blackcloud, 9-10 (Meskwaki Settlement in Iowa); Bismarck Tr., Matt Campbell, 167 (North Dakota); Phoenix Tr., Verlon Jose, 104-05 (Tohono O'odham in Arizona); Phoenix Tr., Rani Williams, 27, Phoenix Tr., Solveig Parson, 30, Phoenix Tr., Joyce Lopez, 175, 202, Phoenix Tr., Claude Jackson, 203 (Arizona tribal members living on the reservation); Isleta Tr., Maxi Zuni, 101-02 (Isleta Pueblo in New Mexico); Isleta Tr., Wilfred Jones, 17 (Navajo voters in San Juan County, Utah); Sacramento Tr., Thomas Eugene, 36 (Thule River in California).

[212] Milwaukee Tr., Regina Gasco-Bentley, 130-38.

[213] Tuba City Tr., James Attakai, 27.

[214] Isleta Tr., Wilfred Jones, 17; Phoenix Tr., Verlon Jose, 104-05.

[215] Bismarck Tr., Webster Test., 264.

survey conducted by the Department of Housing and Urban Development, only 46% of tribal communities had homeless shelters.[216]

According to the 2016 ACS, only 52.9 percent of single-race American Indian and Alaska Native householders owned their own home, compared to 63.1 percent of the total population.[217] American Indians and Alaska Natives also experience high levels of literal homelessness and near homelessness.[218]

When defining "literal homelessness" as living on the street and "near homelessness" as living in a place that is not one's own (i.e., not having their own home – couch surfing, living with a friend, doubling up, etc.), the Department of Housing and Urban Development (HUD) discovered that 99.8 percent of tribes surveyed said that their members experience near homelessness[219] and 88 percent of tribes also stated that, despite "doubling up" or living with a friend, their members also experience literal homelessness.[220]

The survey data collected was unable to produce a reliable estimate as to how many American Indians and Alaska Natives live in literal homelessness. However, a Point-In-Time survey, conducted by HUD estimates that 15,136 American Indians and Alaska Natives were literally homeless on a single night in January of 2015.[221] According to data from the U.S. Department of Housing and Urban Development, although "only 1.2 percent of the national population self-identifies as AI/AN 4.0 percent of all sheltered homeless persons, 4.0 percent of all sheltered homeless individuals, and 4.8 percent of all sheltered homeless families self-identify as Native American or Alaska Native."[222]

The Native American population likewise experiences higher rates of homelessness among veterans than other population groups. Specifically, "2.5 percent of sheltered, homeless veterans were American Indian or Alaska Native, although only 0.7 percent of all veterans are American Indian or Alaska Native."[223]

---

[216] Nancy Pindus et al., Housing Needs of American Indians and Alaska Natives in Tribal Areas 84 (U.S. Dep't of Hous. and Urb. Dev. 2017).

[217] *See* 2017 AIAN Summary, *supra* note 104.

[218] Pindus, supra note 217, at 76-77.

[219] *Id.* at 79.

[220] *Id.* at 82.

[221] *Id.* at 84.

[222] Substance Abuse and Mental Health Services Administration (SAMHSA), Expert Panel on Homelessness among American Indians, Alaska Natives, and Native Hawaiians 5 (2012), *available at* https://www.usich.gov/resources/uploads/asset_library/Expert_Panel_on_Homelessness_among_American_Indians%2C_Alaska_Natives%2C_and_Native_Hawaiians.pdf.

[223] *Id.* at 8 (citing HUD & VA, Veteran Homelessness: A Supplemental Report to the 2010 Annual Homeless Assessment Report to Congress).

The Department of Housing and Urban Development has estimated that, out of 399,400 households in tribal areas, 67,900 households include someone who qualifies as near homeless.[224] There are an estimated 42,100 to 84,700 individuals living in near homelessness in tribal areas.[225] Seventeen percent of American Indians and Alaska Natives surveyed stated that they have people living in their household only because they have nowhere else to go.[226]

When defining overcrowding as homes in which there were more than one occupant per room, an estimated 64,000 homes in tribal areas were overcrowded.[227] Of those 64,000 homes, an estimated 11,000 homes were both overcrowded and severely inadequate.[228] This data illustrates that homelessness, both literal and near, are a major problem for native populations.

Housing shortages are also pervasive on Indian lands. Many factors contribute to the lack of available homes including budget constraints, inadequate infrastructure, planning or permit delays, and lack of developable land.[229] Lack of affordable housing for low income families is especially acute on Native lands.[230] This data illustrates the need for additional housing in tribal areas in order to avoid overcrowding. An estimate of 27,000 new units are required to solve the problem of overcrowding alone.[231] A total estimate of 68,000 new units are required to replace all severely inadequate housing *and* eliminate overcrowding in tribal areas.[232]

Because these estimates do not include data for future need and because they are based on the population data provided from the 2014 census, the total number of units needed may be considerably larger than provided by these data estimates.[233]

10. Non-Traditional Mailing Addresses

Even for those who have a home, access to voting in Indian Country and among urban Native voters is made substantially more difficult because of the prevalence of non-traditional mailing addresses. In Arizona, only 18 percent of Native American voters have home mail delivery outside

---

[224] Pindus, supra note 217, at 85.

[225] *Id.*

[226] *Id.*

[227] *Id.* at 74

[228] *Id.*

[229] *Id.* at 58

[230] *Id.*

[231] *Id.* at 76

[232] *Id.*

[233] *Id.*

of the urban Maricopa (metropolitan Phoenix) and Pima (metropolitan Tucson) areas.[234] Getting mail-in ballots to the right addresses is a "big problem" for Native voters.[235]

The Census Bureau's 2015 National Content Test (NCT) Report illustrates these points. Among all of the population groups included in the 2015 NCT, the AIAN population experienced the lowest 2010 Census mail response rate, at 57.8 percent.[236]

Non-traditional mailing addresses are prevalent among American Indians and Alaska Natives residing on tribal lands. Non-traditional mailing addresses encompass "noncity-style addresses, which the Census Bureau defines as those that do not contain a house number and/or a street name."[237] Examples of noncity-style mailing addresses include:

- General delivery
- Rural route and box number
- Highway contract route and box number
- Post office box only delivery

> Noncity-style addresses used by the Census Bureau also include location descriptions such as "BRICK HOUSE with ATTACHED GARAGE ON RIGHT," structure points (geographic coordinates), and census geographic codes including state code, county code, census tract number, and census block number.

It is commonplace for homes on tribal lands to use noncity-style mailing addresses. In some cases, multiple unrelated families live in a single housing unit, making it difficult to receive mail.[238]

Throughout Indian Country, many Native voters can only receive election mail through post office boxes.[239] There is an insufficient supply of post office boxes on or near tribal lands to meet the high demand, requiring many tribal members to obtain post office boxes in communities that can

---

[234] Phoenix Tr., Sarah Gonski, 232.

[235] Portland Tr., Henry Cagey, 21.

[236] *See* U.S. Census Bureau, 2015 National Content Test Race and Ethnicity Analysis Report 32, table 2 (Feb. 28, 2017).

[237] U.S. Census Bureau, 2020 Census Local Update of Census Addresses Program Improvement Project Recommendations 2 (Apr. 13, 2015), *available at* https://www2.census.gov/geo/pdfs/partnerships/2020_luca_recommendation.pdf.

[238] Sacramento Tr., Thomas Eugene, 34.

[239] Sacramento Tr., Beverly Harry, 16 (Pyramid Lake in Nevada); Sacramento Tr., Thomas Eugene, 34 (Thule River in California).

be located more than 100 miles away.[240] That causes multiple families to share a single post office box, including unrelated adults living in different households.[241]

When a family is kicked off a shared mailbox, they are effectively disenfranchised because there is no way for them to receive early ballots they have requested by mail.[242] The same result could occur when county officials do not accept tribal post office box addresses, such as on the Gila River Indian Community in Pinal County, Arizona.[243]

Additionally, mailboxes may be on the side of the road far from where the home(s) associated with them are located, with the mailbox identified only by a General Delivery number, Rural Route, or box number.

Another complicating factor is when Native voters receive their mail from a post office across state or county lines because it is the closest location to their home. Many Navajo voters have difficulty getting mail "because of the state line" between Arizona and Utah. Navajos who live in Kayenta and Navajo Mountain in San Juan County, Utah have post office boxes with Arizona zip codes.[244]

In Navajo Mountain, Utah, there is a small post office in the chapter house that is located in Utah. However, it uses a Tonalea, Arizona zip code because it is a sub-branch of the post office on the Arizona side of the border. The county clerk disqualifies Utah residents there claiming they live in Arizona because of their post office address. San Juan County uses "all sorts of methods like that to reduce the number of voters" and purge them from the voting list.[245]

Many homes can only be identified by a geographic location (e.g., "hogan located three miles down dirt road from Hardrock Chapter House"). Others may be located by reference to a BIA, state, or county road mile marker (e.g., "the house located on the right side of BIA-41 between highway marker 17 and highway marker 18") or intersection (e.g., the house at the intersection of BIA-41 and BIA-15").[246] Verlon Jose, the Vice Chairman of the Tohono O'odham Nation in Arizona, explained the difficulty in identifying homes on tribal lands:

> Most people on the reservation … don't have a physical address, 123 Main Street or something like that. You ask me where I live [and] I'm going to say over there

---

[240] Tuba City Tr., Alta Edison, 63.

[241] Phoenix Tr., Natalie Landreth, 225; Phoenix Tr., Sarah Gonski, 231-32; Phoenix Tr., Steve Titla, 261; Tuba City Tr., Darrell Marks, 140-41.

[242] Phoenix Tr., Rani Williams, 24-25; *see also* Tuba City Tr., Patty Hansen, 48; Tuba City Tr., Darrell Marks, 141-42.

[243] Phoenix Tr., Stephen Lewis, 130-33.

[244] Tuba City Tr., James Attakai, 20-21, 25-26; *see also* Tuba City Tr., Moroni Benally, 35-36.

[245] Tuba City Tr., James Attakai, 20-21.

[246] Phoenix Tr., Rani Williams, 40-41; Phoenix Tr., Edison Wauneka, 95-96; Tuba City Tr., Alta Edison, 84-85; Tuba City Tr., Darrell Marks, 117; Sacramento Tr., Ruthie Maloney, 134.

> by the dead coyote, past the dead cow, over there by the Saguaro with two arms sticking out and just beyond the Palo Verde tree. That's my house. We have Post Office boxes. So a lot of people use their Post Office box. When I'm required … to give a physical address, they always tell me just put something there. So I put 26.5 to Power Road. Where is that? I don't know. You asked me for my address, so here it is. I went to Power Road, and 26.5 is mile marker 26, half a mile between 26 and 27, put that down. So I use that for my physical address.... Past the corral and the water tank, that's where I live. So it's kind of hard, and we face those challenges when they vote. So when people register to vote they'll put their Post Office box, they get in Sells, they get in Santa Rosa, they get in Topawa, but they come from the rural communities out there.[247]

Addressing also is an issue for urban Natives. Many Natives move to cities for school or for jobs and maintain their permanent address on the reservation. That can lead to them missing mail, including voting information and mail-in ballots.[248]

In the 2018 primary election in Arizona, the Native Vote hotline received reports from Native voters who were living in the metropolitan Phoenix area but could not travel back to Coconino County, where they were registered to vote.[249] Many Native voters have multiple addresses. "I … jump back and forth, actually, between two addresses; one on the reservation, one off. And, like, I kind of pick and choose … which one I use at which time."[250]

Darrell Marks, a member of the Navajo Nation, explained how many of these addressing issues have personally impacted him. His family has a rural residence in Tonalea, Arizona that lacks a street address. At different times, it has been identified by reference to geography, such as "the brown house five miles south of the trading post, and at another point it was 5.3 miles on bus route such and such." It caused problems because the family used a Kaibeto post office box while he was going to school in Page. When he graduated from high school, his tribal voting station was in Tonalea but he was registered to vote in Page through his post office box there. He now resides and works in Flagstaff, despite being registered to vote 130 miles away in Page. He can only get his mail in Page once or twice per month, which can delay his receipt of voting materials and has caused him to miss the deadline for voting by mail.[251]

11. Lack of Resources and Funding

---

[247] Phoenix Tr., Verlon Jose, 101, 103-04.

[248] Tuba City Tr., Darrell Marks, 137-39.

[249] Tuba City Tr., Brian Curley-Chambers, 223.

[250] San Diego Tr., Kenny Ramos, 88.

[251] Tuba City Tr., Darrell Marks, 113-16.

Figure 10. Polling Place in Atmautluk, AK. Photo by James Tucker

In the United States, election administration is chronically underfunded.[252] Research conducted by the National Conference of State Legislatures concluded the United States has failed to adequately invest in buying voting machines, designing polling places, training poll workers, and updating policies.[253] Today, election funding and the costs associated with election administration come from "multiple levels of government including federal, state, local and smaller political subdivisions."[254] Despite the multiple levels of government funding, however, efficient election administration and funding shortages remain obstacles.

The United States' election system is dependent on localism.[255] While "most mature democracies use a national bureaucracy to administer elections, the American system is highly decentralized."[256] Elections are run by states and states often delegate localities to carry out basic tasks like registering voters and counting ballots.[257] These localities – counties or cities or

---

[252] HEATHER K. GERKEN, THE DEMOCRACY INDEX: WHY OUR ELECTION SYSTEM IS FAILING AND HOW TO FIX IT 1 (2009).

[253] NCSL, *Election Costs: Who Pays and with Which Funds*, *available at* http://www.ncsl.org/research/elections-and-campaigns/election-costs-who-pays-and-with-which-funds.aspx (last visited July 3, 2019) ("NCSL Who Pays").

[254] *Id.*

[255] GERKEN, *supra* note 253, at 20.

[256] *Id.*

[257] *Id.*

townships – not only run elections on behalf of the state under state rules, but they are also expected to pay for most of the election administration.[258]

The federal government's most significant funding to local election administration was through the Help America Vote Act of 2002. [259] States typically contribute some of their own funds but the amounts differ greatly.[260]

Additionally, election administration requires training and supplying election officials and up to date voting equipment. These costs are divided into three categories with each state either providing mandatory training, voluntary training, or no training but providing handbooks of election laws.[261]

Costs associated with different levels of training also differ amongst states. Even though purchasing new or updated voting equipment is typically a cost bore by counties, States like Maryland, Mississippi, Missouri, Montana, Idaho and Vermont will pay for a portion of this equipment.[262] Despite this data, states are still unclear as to "how much election administration costs within [their] own borders due to the complexity of elections and the involvement of several levels of government."[263]

The underfunding of election systems is compounded in small and rural election systems which are especially likely to be both understaffed and underfunded.[264] This underfunding is pervasive since half of the jurisdictions in the United States have fewer than 1,400 voters and two-thirds have fewer than 10,000 voters.[265] Yet, small and rural communities often do not have the capacity to deal with election administration's upfront unforeseen costs including "money for personnel, polling place locations, ballot printing, voter information dissemination, cybersecurity protection and keeping up with changing state legislation regulation elections."[266]

Small jurisdictions also often cannot afford to hire staff and instead make do by having their election superintendents fill multiple roles.[267] What is more, election administration costs are

---

[258] NCSL Who Pays, *supra* note 254.

[259] *Id.*

[260] *Id.*

[261] NCSL, *Election Costs: What States Pay*, *available at* http://www.ncsl.org/research/elections-and-campaigns/election-costs.aspx (last visited July 3, 2019) ("NCSL What States Pay").

[262] *Id.*

[263] NCSL Who Pays, *supra* note 254.

[264] GERKEN, *supra* note 253, at 101.

[265] *Id.*

[266] NCSL Who Pays, *supra* note 254.

[267] *Id.*

difficult to bear in rural areas because there tends to be a higher cost per voter.[268] For example, a larger county may pay less per ballot for printing costs than a smaller county due to economies of scale.[269] The costs of servicing polling places in rural areas can also be higher as more time and money is expended towards sending election administrators to polling places that are far from county seats.[270] The equipment used to cast and tabulate votes is also expensive.[271]

In Indian country, not only are Native communities often serviced by underfunded rural election systems, funding scarcity is coupled with confusion or hostility from localities about funding election activities on tribal lands. Confusion arises when counties do not understand their obligations to Native American constituents who at times are served by their own governments instead of county resources.

For example, Native Americans may utilize their own police forces instead of using county officers. Consequently, county election officials may offer Native communities polling access on parity with the other county constituents only if the tribe agrees to pay for any costs of accommodation. However, Native Americans, as citizens of the United States, and the states and counties where they reside, are entitled to equal access to cast their ballot without additional cost.

Hostility also arises from election officials who may have deep seated animosity toward Native communities and people. For example, county officials that were presented with funding have still refused to provide polling locations on Native lands.[272]

12. **Discrimination Against Native Americans**

Given the abundant impediments to voting in Indian Country, it is no surprise that Native Americans remain disengaged from political participation in federal, state, and local elections. Yet, it is impossible to fully understand voting barriers in Indian Country without examining the traumatic relationship Native Americans have had, and continue to have, with these governments. Antipathy and distrust persist because of past and ongoing actions that discriminate against Natives.

a. Distrust of non-tribal governments

---

[268] Michael D. Hernandez, *Worlds Apart: Urban and Rural Voting*, THE CANVASS: STATES AND ELECTION REFORM (Oct. 2014), *available at* http://www.ncsl.org/Documents/legismgt/elect/Canvass_Oct_2014_No_52.pdf.

[269] NCSL What States Pay, *supra* note 262.

[270] *Id.*

[271] NCSL Who Pays, *supra* note 254.

[272] *See* NAVRC Report, *supra* note 5, at 11 ("Direct pressure should also be applied to Buffalo County, which has continued to deny equal opportunity to vote and register to vote for members of the Crow Creek Sioux Tribe even with the availability of HAVA funds. Buffalo County's county courthouse is in a community of less than 12 people and the County Auditor refuses to open a satellite for more than a few hours each election in Fort Thompson, a community of more than 1,400 Native Americans more than 55 miles round-trip from the county courthouse.")

In the fall of 2016 and spring of 2017, NAVRC oversaw one of the most comprehensive in-person surveys ever conducted in Indian Country about barriers faced by Native voters. A total of 2,800 Native voters in four states completed the in-person survey.[273] In all four states, Native voters expressed the greatest trust in their tribal governments.

Although the federal government was identified by respondents as the most trusted of non-tribal governments (federal, state, local), the level of trust ranged from a high of just 28 percent in Nevada to a low of only 16.3 percent in South Dakota.[274] Trust of local government in South Dakota was notably bad with only 5.02% of respondents indicating they most trusted the local government, which is especially significant considering it is the local governments that are most often responsible for the administration of elections.

As discussed in Part II,[275] Native Americans have faced sustained assaults against their sovereignty and their right to vote. States ratified Constitutions that specifically excluded Native people from voting,[276] established cultural purity tests to determine if Native people had sufficiently assimilated before granting them the right to vote,[277] and argued Native self-governance was incompatible with participation in state run elections.[278] This legacy of equating voting with an abandonment of cultural and political sovereignty has resulted in a continued skepticism toward voting within Native communities.

Furthermore, states often made the experience of voting embarrassing for Native voters. Not only would states demand that Native vote disavow and prove they were no longer culturally Native American, states would also impose literacy tests that were impossible for Native voters to pass given their lack of fluency in English.[279]

Clerks also turned away Native voters alleging they were incompetent to vote because of the federal trust responsibility over tribes which was referred to in legalese as a "guardianship." The

---

[273] *See* NAVRC Report, *supra* note 5. The survey respondents included 644 Native voters in Arizona, 1,052 in Nevada, 602 in New Mexico, and 502 in South Dakota. NAVRC Report, *supra*, at 8, 38, 67.

[274] *See* NAVRC Report, *supra* note 5, at 15, 45, 77, 111. Respondents were asked, "Which government do you trust most to protect your rights?" *Id.* at 15, 45, 76-77. Among respondents in the other two states, 22.1 percent identified the federal government in Arizona and 27.4 percent identified the federal government in New Mexico. *See id.* at 77, 111.

[275] *See supra* Part II, Historical Denial of Indian Voting.

[276] COHEN, *supra* note 45 at 157.

[277] 1858 MINN. CONST., Art. 7, § 1(4), *available at* http://www.mnhs.org/library/constitution/transcriptpages/dt.php.

[278] *Trujillo v. Garley,* Civ. No. 1353 (D.N.M. 1948); *Allen v. Merrell,* 305 P.2d 490, 6 Utah 32 (Utah 1956), *vacated as moot*, 353 U.S. 932 (1957).

[279] Harrison, *supra* note 64; Glenn Phelps, *Representation Without Taxation: Citizenship and Suffrage in Indian Country*, 9 AM. INDIAN Q. 136 (1985).

Arizona Supreme Court accepted this reasoning – that Native Americans were incompetent to vote – in a case that stood for twenty years.[280]

To this day, some elders that can recall humiliating voter experiences discourage younger generations from voting out of disregard for federal and state systems that were cruel to them and a lingering fear that participation in these systems will undermine tribal sovereignty. As one community member explained "People are still apprehensive because it's been taught we can participate in our elections but that's not our election. So if there is a county election or a state election or a federal election, elders tell their children and it's still true today they don't participate in voting because they feel it's an infringement on our sovereignty"[281]

Consequently, distrust between Native Americans and local, state, and federal governments abounds and was testified to throughout the field hearings. A sampling of these sentiments:

- *And I think in general, just a lack of, distrust, of government. Years of discrimination and injustice support that American Indians don't trust government and don't want to participate in this government process.*[282]
- *Why it's so hard for Native Americans to vote in local elections in Los Angeles is . . . just issues between the United States government and Native Americans and how every promise that was made to us has always been broken. So the amount of distrust among Native Americans and the government is not really good.*[283]
- *Isolating, keeping isolated, because a lot of it was no trust was really in between from the federal, the state, and county side.*[284]

Not only do many Native Americans not trust the local, state, and federal governments, they also do not feel supported by these institutions.

As one community member recounted, "[O]ur lives have been severely compromised by the racists and discriminatory impact of boarding schools, public education, and the harmful federal and state policies that go towards Indian families. Colonization for us meant the control of tribal people by the appropriation of our lands. State and federal jurisdictions over our children and the suppression of our tribal traditions and culture."[285]

As these injustices continue to manifest themselves in present day inequities – poverty, lack of housing, inadequate roads and infrastructure, to name a few – voters disengage from the political process and become apathetic, firm in the belief that nothing will ever change. One witness

---

[280] *Porter v. Hall*, 34 Ariz. 308 (Ariz. 1928).

[281] Portland Tr., Matthew Tomaskin, 95-96.

[282] Phoenix Tr., Travis Lane, 94.

[283] San Diego Tr., Robin Thundershield, 98 (this is also the source of the quote for the title of this report).

[284] Isleta Tr., Shirlee Smith, 85.

[285] Portland Tr., Patricia Whitefoot, 70.

described how his parents would tell him "We don't get no help from the county. Why should I vote? . . . Leave them alone. Don't bother. That's their system, don't bother."[286]

A tribal councilman explained how "we are from a very rural area, the poorest county in California. We, like most poor communities, have an issue with people wanting to vote. It's not the access to vote. It is the desire to vote. There's no passion their vote sometimes."[287] A tribal member reflected how "[y]ou know, alcoholism, high unemployment and things like that that just affect our ability to feel good about ourselves and really want to voice our opinions and vote."[288]

b. Present Day Overt Discrimination

Native Americans continue to experience overt discrimination in their everyday lives and when they attempt to vote. In Arizona, racial tensions are so fraught that the pipes sending water to the reservation are regularly blocked by border town residents.[289] In Utah, a witness' Native grandson attempted to play baseball and was accosted by a non-Native woman who "started screaming at him, 'Who in the hell do you think you are? You think you're that good? You damn welfare people are starting to take over'"[290]

Paternalistic racist attitudes are also prevalent. A Native high-schooler was denied a place on the school volleyball A team because, although she was better than girls on the A team, "the coach said he thought she would feel more comfortable on the B team. And she was so angry . . . she ended up quitting."[291]

In South Dakota, a poll worker described as a "[n]ice little old lady" was concerned about where she would be sitting while servicing a Native American community and asked field organizers where's a place "that's going to be safe? We don't want to be around people who are drinking. We don't want to be around, you know people who are going to harass us."[292]

Additionally, witnesses throughout the country reported the use of police presence to intimidate voters. In Wisconsin, at locations where there are large Native American communities, "they will have a police officer kind of sit in a parking lot of places, whether that's the grocery store near a polling location, and kind of just run the names of everybody that's going by. So you have people that are trying to turn out to vote that they see a police car there and immediately they are like . . . [d]id I pay that fine. I'm not going to vote because I don't want to risk going to jail." In the

---

[286] Isleta Tr., Wilfred Jones, 28.

[287] Sacramento Tr., Carlos Negrete, 42.

[288] Portland Tr., Carol Evans, 193.

[289] Phoenix Tr., Roland Maldonado, 156.

[290] Isleta Tr., Wilfred Jones, 33-34.

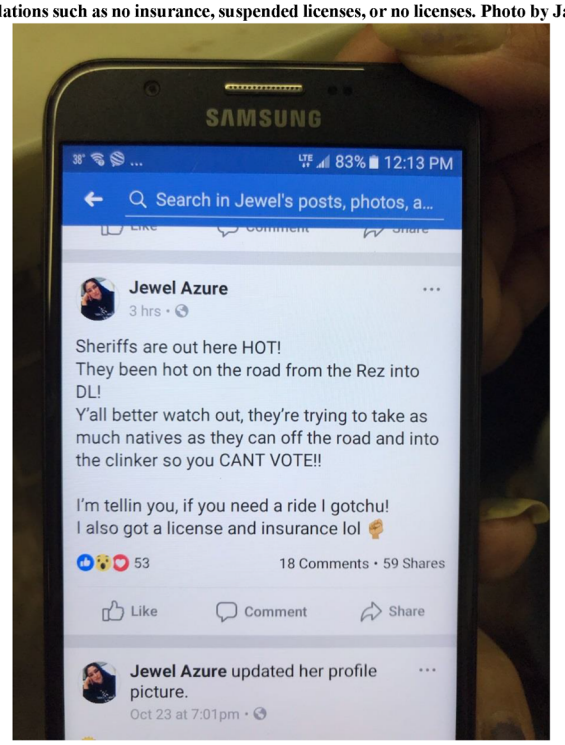
[291] Portland Tr., Barbara Lewis, 42.

[292] Bismarck Tr., Donita Loudner, 51.

Wisconsin town of Keshena, the polling location is inside of a Sherriff's office which is a "big barrier for many people."[293]

In Guadalupe, Arizona, located 100 miles from the border, there was a border patrol van parked in the parking lot of the polling location. A poll watcher recalled there was "no reason for that border patrol van to be there except to intimidate and coerce and turn voters away."[294]

Figure 11. In North Dakota, Spirit Lake tribal member Jewel Azure warns community members on Election Day, 2018 after observing a heavier police presence than usual on Highway 20 between the reservation and the frequented nearby town of Devil's Lake resulting in an unusually large number of detained Native American individuals for violations such as no insurance, suspended licenses, or no licenses. Photo by Jacqueline De León



[293] Phoenix Tr., Stephanie Thompson, 27.

[294] Phoenix Tr., Ally Von Seggern, 212-13.

Racist attitudes tangibly effect the ability for Native Americans to vote, forcing voters to register and cast their ballots in substandard facilities and hostile conditions. For example:

- In South Dakota, voters were forced to vote in a repurposed chicken coop[295]
- In Montana, the number of registration cards accepted by county officials from Native community organizations was arbitrarily limited to 70 after community organizers were hassled and given "dirty looks" for bringing in too many at a time.[296]
- In South Dakota, the Buffalo County Seat was located Gann Valley which had a population of 12 and was the smallest county seat in the nation. As county seat, the residents of Gann Valley were provided a fully funded polling place that offers early voting and registration opportunities in line with the rest of the state. Twenty-five miles away on the Crow Creek reservation, however, Fort Thompson's 1,200 residents had no early voting location in 2014 and only one satellite voting site open on 2014 Election Day.[297]
- Voters are regularly forced to travel to border towns to cast a vote where there are "issues" and "hostile attitude[s]"[298] and "racist stereotypes"[299] where community members describe being "too intimidated to get the nearest polling" location[300] since the county seat "may or may not be welcoming to Native Americans coming from a reservation community."[301]

These negative experiences are exacerbated and reinforced today when Native Americans are denied equal opportunities to register to vote and to cast ballots that are counted.

Ultimately, Native American voters are only asking for the opportunity to cast their votes like every other American. As one tribal member explained "[s]o, yes, I would like you, person at the poll, to respect me as a Native American, respect my culture. But if you can't do that, because if you're going to tell me, say: Well I'm going to have to learn about African-Americans, Hispanics, Mexicans, or whatever they're calling us, then do this. Treat me as a human being and be respectful to my elders, respectful to my children."[302]

---

[295] Bismarck Tr., Donita Loudner, 33.

[296] Bismarck Tr., Erica Shelby, 140.

[297] Bismarck Tr., Donita Loudner, 23-24.

[298] Phoenix Tr., Lewis, 135.

[299] Portland Tr., Lewis, 139-41.

[300] San Diego, Nantkes, 51.

[301] Portland Tr., Miller, 175.

[302] Phoenix Tr., Claude Jackson, 186.

PART IV

A. LANGUAGE BARRIERS AND LACK OF EFFECTIVE LANGUAGE ASSISTANCE

Language is "one of the closing gaps in the election process" for Native voters.[303] Over a quarter of all single-race American Indian and Alaska Natives speak a language other than English at home.[304] Two-thirds of all speakers of American Indian or Alaska Native languages reside on a reservation or in a Native village,[305] including many who are linguistically isolated, have limited English skills, or a high rate of illiteracy.[306]

The lack of assistance or complete and accurate translations of voting information and materials for Limited-English Proficient (LEP) American Indian and Alaska Native voters can be a substantial barrier. "If you require language assistance to register or cast a ballot, whether it's in English or another language, culturally competent and respectful assistance, for that matter, that too can be either a barrier or a discouragement from participating."[307]

Section 203 of the Voting Rights Act (VRA) helps LEP voting-age U.S. citizens overcome language barriers to political participation by requiring covered jurisdictions to provide bilingual written materials and oral language assistance.[308] The requirements apply to four language groups: Alaska Natives; American Indians; Asian-Americans; and persons of Spanish Heritage, as well as the distinct languages and dialects within those groups.[309]

Language assistance must be provided for voting activities in every type of public election conducted in a covered jurisdiction and its political subdivisions, including primary, general, and special elections.[310] Section 203 applies regardless of whether a public election is to fill an office, to remove an elected official, or to vote on a bond issue, ballot question, or referendum.[311]

---

[303] Isleta Tr., Martin Aguilar, 146.

[304] 2016 AIAN FFF, *supra* note 197 (27 percent).

[305] *See* U.S. Census Bureau, Native American Languages Spoken at Home in the United States and Puerto Rico: 2006-2010 at 2 (Dec. 2011).

[306] *See* U.S. Census Bureau, Public Use Data File for the 2016 Determinations under Section 203 of the Voting Rights Act, *available at* https://www.census.gov/rdo/data/voting_rights_determination_file.html (Dec. 5, 2016).

[307] Sacramento Tr., Alex Padilla, 108-09.

[308] *See* 52 U.S.C. § 10503. Other permanent provisions likewise can be used to ensure that LEP voters receive assistance. Section 2, the VRA's permanent non-discrimination provision, applies nationwide and has been used to secure language assistance for voters who are denied equal voting opportunities by English-only election procedures. *See* 52 U.S.C. 10301; TUCKER, *supra* note 72, at 43-45. Section 208 supplements the language assistance provisions by protecting the right of any voter, including language minority citizens, who needs assistance at the polls, to receive that assistance from the person of their choice. *See* 52 U.S.C. § 10508.

[309] *See* 52 U.S.C. § 10503(e).

[310] *See* 28 C.F.R. § 55.10.

[311] *See id.*

1. Legal Requirements and Section 203 Coverage

Jurisdictions covered by Section 203 generally must ensure that all "voting materials" they provide in English are also provided to voters in the languages of all groups or sub-groups that triggered Section 203 coverage.[312] The standard is straight-forward. "[I]nformation that is provided in English should be mirrored in the minority language."[313]

"Voting materials" include: voter registration materials, voting notices such as information about opportunities to register, registration deadlines, polling place information (including the times they are open, their location, and the voter's election precinct assignment), absentee voting, voting materials provided by mail, all election forms, polling place activities and materials, instructions, publicity, ballots, and other materials or information relating to the electoral process.[314]

Written materials may not have to be provided to some members of certain Alaska Native and American Indian groups whose languages historically are unwritten.[315] Instead, for any group whose language has been found to be "historically unwritten," the covered jurisdiction must provide "oral instructions, assistance, or other information relating to registration and voting" in the covered language.[316]

However, even for those Alaska Native or American Indian languages found to be "historically unwritten," federal courts have required that written translations must be provided to poll workers in the covered language anyway in order to ensure that oral translations are complete, clear, and accurate reflections of the information provided to voters in English.[317]

Jurisdictions covered by Section 203 also must provide oral language assistance to voters.[318] Oral language assistance includes "announcements, publicity, and assistance" to the extent such assistance is needed to allow the language group triggering coverage to participate effectively in elections.[319] Oral language assistance must be available to language minorities "who cannot effectively read either English" or the covered minority language.[320]

---

[312] *See* 52 U.S.C. § 10503(b)(1). An extended discussion of what jurisdictions must do to comply with Section 203 is provided in TUCKER, *supra* note 72, at 90-105, 261-89.

[313] Phoenix Tr., Brian Curley-Chambers, 20.

[314] *See* 52 U.S.C. § 10503(c); 28 C.F.R. §§ 55.15, 55.18.

[315] *See* 52 U.S.C. § 10503(c). Notably, there is no actual definition for the term "historically unwritten," which is found nowhere else in law. It appears to have been invented for Section 203.

[316] *Id.*

[317] *See* TUCKER, , *supra* note 72, at 284-86 (summarizing rulings in *Nick v. City of Bethel*, case no. 3:07-cv-0098-TMB (D. Alaska filed June 2007); *Apache County v. United States*, Civil Action No. 77-1515, mem. op. (D.D.C. June 12, 1980) (three-judge court).

[318] *See generally* 52 U.S.C. § 10503(b)(3)(A) (defining "voting materials" as including "assistance").

[319] 28 C.F.R. § 55.20(a).

[320] *Id.* at § 55.20(b).

Furthermore, covered jurisdictions are required to provide bilingual poll workers or "helpers" to language minority voters at polling places on Election Day.[321] Jurisdictions should be proactive in recruiting bilingual poll workers who are members of the covered language minority group to ensure that oral language assistance is available.[322] If they fail to do so, they also may violate Section 2 of the VRA,[323] which prohibits discriminatory poll official appointment policies or practices.[324]

A jurisdiction becomes covered under Section 203 if the Director of the Census determines that two criteria are met. First, a population threshold, or "trigger," must be met. Within a political subdivision of a state, LEP voting age citizens[325] in a single language group[326] must either: (a) number more than 10,000 ("10,000 Person Trigger"); (b) comprise more than five percent of all voting age citizens ("Five Percent Trigger"); or (c) comprise more than five percent of all American Indians or Alaskan Native voting age citizens of a single language group residing on an Indian reservation ("Reservation Trigger").[327] A state may only be covered for a language using the Five Percent Trigger.[328] A person is LEP if he or she is "unable to speak or understand English adequately enough to participate in the electoral process."[329]

---

[321] *Id.* at § 55.20(c).

[322] *See* U.S. COMM'N ON CIVIL RTS., A CITIZEN'S GUIDE TO UNDERSTANDING THE VOTING RIGHTS ACT 16 (1984). The jurisdiction also should take appropriate steps to confirm that "bilingual" poll workers actually are bilingual in English and the covered minority language, and also are able to read and write in both languages, if applicable. *See id.* For more discussion, *see* TUCKER, *supra* note 72, at 102-05.

[323] 42 U.S.C. § 1973.

[324] *See Harris v. Graddick*, 593 F. Supp. 128 (M.D. Ala. 1984). The absence of minority language poll officials may discourage language minority citizens from voting because they do not feel welcome at polling places, particularly if they have been mistreated at the polls in the past or no language assistance is available for them in the present. *See id.* at 131–32; U.S. COMM'N ON CIVIL RTS., THE VOTING RIGHTS ACT: UNFULFILLED GOALS 79–80 (1981).

[325] "A person is in the voting age population if that person is at least 18 years old . . . That is measured by the American Community Survey as well as the 2010 Census." U.S. Census Bureau, *Statistical Modeling Methodology for the Voting Rights Act Section 203 Language Assistance Determinations* 7 (Dec. 2011) [hereinafter "Statistical Modeling"], *available at* http://www.census.gov/rdo/data/voting_rights_determination_file.html (click on the link marked "Download the October 13th, 2011 public use data" then open "StatisticalModelingMethodology.pdf". "A person's U.S. citizenship is measured by the American Community Survey." *Id.*

[326] A single language group does "not permit subgroups of languages to be aggregated together to trigger coverage for the entire language group. For example, Chinese, Korean, and Vietnamese could not be aggregated together to meet the 5 percent trigger for Asian American language coverage." TUCKER, *supra* 72, at 82. Instead, each language within the Asian language group, such as Chinese, must "meet the trigger individually." *Id.*

[327] *See* 52 U.S.C. § 10503(b)(2)(A)(i); *see also* Statistical Modeling, *supra* note 326, at 10-11 (describing the statistical formulas used for political subdivisions of states and American Indian Area & Alaska Native Area Level Coverage).

[328] *See* 52 U.S.C. § 10503(b)(2)(A)(i)(II)-(III); TUCKER, *supra* note 72, at 78; *see also* Statistical Modeling, *supra* note 326, at 8, 10 (describing the statistical formula used for statewide coverage using the Five Percent Trigger).

[329] 52 U.S.C. § 10503(b)(3)(B).

Second, the illiteracy rate of the language minority voting age citizens meeting the population threshold must exceed the national illiteracy rate.[330] "Illiteracy" means "the failure to complete the 5th primary grade,"[331] and was adopted to conform to the Census definition of that term.[332] The 2016 Section 203 determinations were calculated using a national illiteracy rate for voting age citizens of 1.31 percent, an increase from the 1.16 percent used in the 2011 determinations.[333]

2. **Decreased Coverage in 2011 for AIAN Languages**

Under the 2011 determinations, coverage in American Indian languages was the second most common language group covered (after Spanish), encompassing 33 political subdivisions of five states.[334] Nevertheless, American Indian coverage experienced a sharp decline from the 81 political subdivisions in 18 states covered under the 2002 Determinations.[335] American Indian coverage increased in just two states, with Arizona and Mississippi each adding one county. South Dakota, in which 18 counties were covered following the 2002 Determinations, no longer has *any* counties covered under Section 203.[336]

There are several possible explanations for the decrease in American Indian coverage. In at least one case, the Census Bureau included one of the languages identified in the 2002 Determinations, Zuni, in another language group, Pueblo.[337] Some of the coverage loss also may have been attributable to the declining number of tribal elders who are LEP, which appears to have played a significant factor in decreased American Indian coverage in some of the earlier Section 203 determinations.[338]

---

[330] *See* 52 U.S.C. § 10503(b)(2)(A)(ii).

[331] 52 U.S.C. § 10503(b)(3)(E). *See also* Statistical Modeling, *supra* note 326, at 8 ("A person is said to be illiterate if the person has less than a fifth grade education, i.e., that the person has only completed the fourth grade or lower. That is measured by the American Community Survey.").

[332] *See* 121 CONG. REC. H4719 (daily ed. June 2, 1975) (statement of Rep. Edwards).

[333] *See* U.S. Census Bureau, *How the Law Prescribes the Determination of Covered Areas under the Language Minority Provisions of Section 203 of the Voting Rights Act* (Dec. 2016) (flowchart), *available at* https://www2.census.gov/programs-surveys/decennial/rdo/about/voting-rights-determination/2_PrescribedFlowFor203Determinations.pdf; Statistical Modeling, *supra* note 326, at 35.

[334] *See* Department of Commerce, Voting Rights Act Amendments of 2006, Determinations Under Section 203, 76 Fed. Reg. 63,602 to 63,607 (Oct. 13, 2011) (2011 Determinations).

[335] *See* Department of Commerce, Voting Rights Act Amendments of 1992, Determinations Under Section 203, 67 Fed. Reg. 48,871 to 48,877 (July 26, 2002) (2002 Determinations).

[336] *Compare* 2011 Determinations, *supra* note 335, *with* 2002 Determinations, *supra* note 336.

[337] *Compare* 2011 Determinations, *supra* note 335, *with* 2002 Determinations, *supra* note 336 (illustrating how jurisdictions in New Mexico that were covered for Zuni under the 2002 Determinations now are covered for Pueblo languages). The Pueblo group also includes the Havasupai, Keres, Tiwa, and Towa Indian languages, which the Census Bureau identified separately in the Section 203 determinations it issued in 1992. *See* TUCKER, *supra* note 72, at 117, 331-32.

[338] For example, Oklahoma had 23 counties covered for an American Indian language in the first Section 203 determinations made between 1975 and 1977. *See id.* at 342. As a result of the addition of the Nickles Amendment in the 1982 Amendments to the VRA, which added the "limited-English proficient" requirement to the coverage formulas, only one county was covered for an American Indian language in Oklahoma following the 1984 coverage

However, most of the loss in coverage appears to be the combined result of census undercounts and statistical sampling that can have a disproportionate impact on very small American Indian and Alaska Native voting-age citizen populations. That is especially true for LEP voters who reside on more sparsely populated and geographically isolated reservations. The Census Bureau has acknowledged that "the sampling error or uncertainty of the estimates of the characteristics needed for Section 203 is a weakness particularly for jurisdictions with small (ACS) samples within the period 2005-2009," the period used for the 2011 Determinations.[339]

Under previous determinations, the Census Bureau used the decennial long form questionnaire sent to one in six U.S. households; in contrast, the ACS used in the 2011 Determinations was sent to an average of one in eight U.S. households in the 5-year sample period.[340] The use of a smaller sample of population has resulted in "larger margins of error than the long-form estimates, particularly for determinations involving the small populations defined in Section 203."[341] Unfortunately, that may have contributed to the dramatic loss of coverage for American Indian languages, which was down nearly 60 percent (48 out of 81 political subdivisions, with 13 states losing all coverage) compared to the 2002 Determinations.[342]

3. Coverage in 2016 for AIAN Languages

The loss of coverage for American Indian languages continued to be a theme in the 2016 Section 203 determinations for Arizona, where four counties (Maricopa, Mohave, Yavapai, and Yuma) dropped out. All coverage was lost there for the Hopi, Tohono O'Odham, Yacqui, and Yuman languages; only Apache (in Gila, Graham, and Pinal Counties) and Navajo (in Apache, Coconino, and Navajo Counties) remain covered.[343]

As a result of the 2016 determinations, seven Arizona reservations lost coverage and one regained coverage.[344]

---

determinations. *See id.* Even after Congress amended the VRA to add the Reservation Trigger to remove the discriminatory impact of the Nickles Amendment, only one county remained covered in Oklahoma after the 1992 coverage determinations. *See id.* That is likely because there were not enough LEP tribal elders alive who spoke Cherokee (the predominant American Indian language covered in Oklahoma) to trigger coverage by 1992. *See id.*

[339] Statistical Modeling, *supra* note 326, at 12.

[340] *See* U.S. Census Bureau, *Memorandum Regarding the 2011 Determinations* 6 (Dec. 2011), *available at available at* http://www.census.gov/rdo/data/voting_rights_determination_file.html (click on the link marked "Download the October 13th, 2011 public use data" then open "02_RecommendationMemo.pdf").

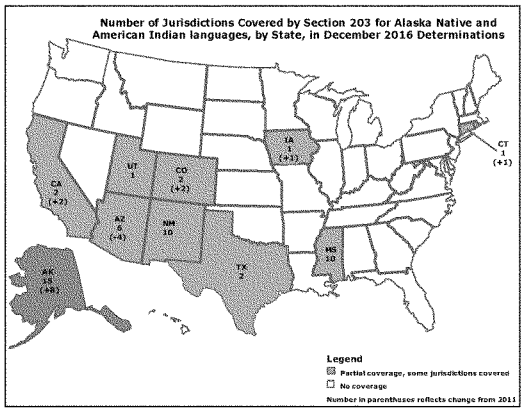
[341] *Id.*

[342] *Compare* 2011 Determinations, *supra* note 335, *with* 2002 Determinations, *supra* note 336.

[343] *Compare* 2011 Determinations, *supra* note 335, *with* Department of Commerce, Voting Rights Act Amendments of 2006, Determinations Under Section 203, 81 Fed. Reg. 87,532 to 87,538 (Dec. 5, 2016) (2016 Determinations).

[344] Phoenix Tr., Brian Curley-Chambers, 23.

Figure 12. Changes in Coverage for AIAN Languages between 2011 and 2016. Graphic by James Tucker



Following the 2016 determinations, American Indian language assistance must be provided in 35 political subdivisions in nine states, up from the 33 political subdivisions of five states covered in the 2011 determinations. The four states in which coverage was added include two each in California and Colorado and one each in Connecticut and Iowa. In each case, these "newly covered" political subdivisions in California, Colorado, and Iowa restored Section 203 coverage in the 2002 determinations that was lost in the 2011 determinations.

Figure 13. American Indian and Alaska Native languages covered by Section 203, by State in 2016. Graphic by James Tucker

Language	Political Subdivisions Covered	Affected States
Navajo	11	AZ, NM, UT
Choctaw	10	MS
Yup'ik (Alaska Native)	9	AK
Inupiat (Alaska Native)	6	AK
American Indian (all other AI Tribes)	5	CA, CT, IA, TX
Apache	5	AZ, NM
Ute	4	CO, NM, UT
Alaska Athabascan (Alaska Native)	3	AK
Pueblo	3	NM, TX
Aleut	1	AK

Alaska Native language assistance must be provided in 15 political subdivisions of Alaska, which is an increase of eight political subdivisions from 2011. That increase resulted from requests to the Census Bureau from NAVRC to oversample the less populous rural areas of Alaska where coverage was lost in 2011. The Bureau did so to account for Alaska Native villages that were not covered in the previous determinations because the sample size was too small to be identified by the ACS. The result was that the pre-*Shelby County* statewide

coverage of Alaska for Alaska Native languages was nearly replicated for the language assistance requirements under Section 203.

The loss of coverage for the four American Indian languages in Arizona does not mean that there is no longer a need for language assistance in those languages. Quite the contrary.[345]

The Tohono O'odham Nation "is concerned about the decision to drop the language from the list of Section 203 language under the Voting Rights Act. This is wrong, and it means that the County Recorder's office [is] no longer required by law to provide elections material." They do not know "how detrimental" it will be without the language assistance, "but what we do know, and what we do believe is that it should be a right provided to us. Because Tohono O'odham, the O'odham language, is our first language."[346]

Similarly, although Oklahoma has not been Section 203-covered for American Indian languages since Adair County lost coverage in 2002,[347] there are still some communities of Cherokees where translators are needed. They are not currently covered because they include a small number of tribal Elders that is shrinking over time. It would be helpful to have bilingual poll workers in those communities, providing translations such as those already provided for social services.[348] The same issues emerge from other areas of Indian Country, such as Wisconsin, where Elders, who comprise as much as a third of their tribe, speak English but have problems understanding election terms in English.[349]

There are at least a few examples of Arizona election officials agreeing to continue to provide assistance in American Indian languages, even when the language is not covered. Coconino County provides a bilingual San Juan Paiute speaker despite only being covered for the Navajo language. In addition, the County continues to provide Hopi language assistance at the Moencopi and Tuba City polling places.[350] Although Gila County lost coverage for American Indian languages in 2016, the county continues to employee Apache-speaking outreach workers on the San Carlos Reservation.[351]

Nationally, 357,409 AIAN persons reside in a jurisdiction covered by Section 203 of the Voting Rights Act, where assistance must be provided in the covered Native language.[352] Alaska, Arizona, and New Mexico have the largest number of LEP voting-age citizens. Between them, they account

---

[345] Phoenix Tr., Brian Curley-Chambers, 38.

[346] Phoenix Tr., Verlon Jose, 114, 116.

[347] *See* TUCKER, *supra* note 72, at 342.

[348] Tulsa Tr., Chuck Hoskin, Jr., 135-37.

[349] Milwaukee Tr., Regina Gasco-Bentley, 130-38.

[350] Tuba City Tr., Patty Hansen, 52-53.

[351] Phoenix Tr., Brian Curley-Chambers, 23; Tuba City Tr., Brian Curley-Chambers, 229.

[352] U.S. Census Bureau, Press Release: Census Bureau Releases 2016 Determinations for Section 203 of the Voting Rights Act (Dec. 5, 2016), *available at* https://www.census.gov/newsroom/press-releases/2016/cb16-205.html.

for approximately 87 percent of the AIAN persons of voting age who reside in an area required to provide language assistance in an Alaska Native or American Indian language:

Figure 14. Comparison Between the Top Three States with Limited-English Proficient AIAN Populations. Graphic by James Tucker

Alaska	Arizona	New Mexico
54,275 Alaska Natives live in one of the 15 areas covered by Section 203 for an Alaska Native language.	123,470 American Indians live in one of the six counties covered by Section 203 for an American Indian language.	132,955 American Indians live in one of the 10 counties covered by Section 203 for an American Indian language.
At least 10 percent of all Alaska Natives in covered areas are of voting age and LEP in an Alaska Native language.	At least 14.5 percent of all American Indians in covered areas are of voting age and LEP in an American Indian language.	At least 8 percent of all American Indians in covered areas are of voting age and LEP in an American Indian language.
LEP Alaska Natives are located in approximately 200 villages and communities in the 15 covered areas.	Approximately 96.7 percent of all American Indians who are LEP and reside in a county covered for Native language assistance reside in just three counties: Apache, Coconino, and Navajo.	91.1 percent of all American Indians and 89.3 percent of all voting-age American Indians who are LEP and live in a covered county live in just four counties: Bernalillo, McKinley, Sandoval, and San Juan.

Language poses a barrier to political participation for several reasons. LEP American Indians and Alaska Natives, like other LEP populations, are generally among the hardest to reach among all voters. Outreach and publicity communications written or transmitted in English usually are not understood unless they are translated into the applicable Native language. In-person communication through trained bilingual enumerators yields the best results; however, those efforts can be confounded by the lack of enumerators fluent in the language, geography, and adequate funding to reach the LEP population.

But equally important, Native voters "feel more comfortable" getting voting information "in Native language" because it is their "first language.… If you explain something to me in O'odham I would receive it a lot better than if you explain it to me in English, because that's not my language, that's your language."[353]

4. Written Translations in AIAN Languages

It can be difficult to obtain complete and accurate translations of American Indian and Alaska Native languages for several reasons. First, Section 203 provides that "in the case of Alaska

[353] Phoenix Tr., Verlon Jose, 137-38.

Natives and American Indians, if the predominant language is historically unwritten, the State or political subdivision is only required to furnish oral instructions, assistance, or other information relating to registration and voting."[354] This qualification, which is known as the "Stevens Proviso" after its sponsor, Alaska Senator Ted Stevens, has been interpreted to mean that written translations need not be prepared if a language has no written form or is not used in written form. It does not mean that written translations are never required.[355]

Unfortunately, the Stevens Proviso has been used by some jurisdictions as an excuse to not provide any language assistance at all. That is precisely what happened in Alaska, leading a federal court in *Nick v. Bethel* make three critical findings. First, "the exemption from the VRA's written assistance requirement must be applied on a language-by-language basis," which meant that there was no categorical exclusion for providing written translations in American and Alaska Native languages. Second, even if written translations are not required, it merely changes the mode of communicating the translation; that is, all voting information provided in English still had to be provided through oral translations. Third, the difficulty of requiring each bilingual poll worker to provide "on-the-spot" translations meant that written translations often would be necessary. The court explained that a covered jurisdiction "may need to produce certain written materials in order to provide effective oral assistance to Yup'ik voters."[356]

The State of Alaska ignored those findings. That led to Alaska Native villages and voters filing a second lawsuit, *Toyukak v. Treadwell*, after language assistance was denied to Yup'ik-speaking voters in the Dillingham and Wade Hampton Census Areas and to Gwich'in in the Yukon-Koyukuk Census Area. Recalcitrant Alaska election officials argued that Alaska Native voters were entitled to less voting information than voters received in English, and that they had the sole discretion to decide what should be translated.[357] Remarkably, they went even further, arguing that the Fifteenth Amendment to the United States Constitution did not even apply to Native voters.[358]

The United States Department of Justice disagreed, filing a State of Interest "to 'set out the Attorney General's position that, contrary to Defendants' argument, Section 203 requires providing all the election information in the covered minority languages.' The Stevens Proviso did not exempt Native languages from the statutory mandate; it 'addresses only the question of how the required translation is to be accomplished, not whether it must be done.'"[359] As the Department explained, "'[c]ontrary to Defendants' position, the guidance to 'take all reasonable steps' [to provide language assistance] does not exempt a covered jurisdiction. . . . Rather, it

---

[354] *See* 52 U.S.C. § 10503(c).

[355] *See* TUCKER, *supra* note 72, at 94-98.

[356] *Id.* at 284-85.

[357] *See* James T. Tucker, Natalie A. Landreth & Erin Dougherty Lynch, *"Why Should I Go Vote Without Understanding What I Am Going to Vote For?": The Impact of First Generation Voting Barriers on Alaska Natives*, 22 MICH. J. RACE & LAW 327, 360-61 (2017).

[358] *See id.* at 361-62.

[359] *Id.* at 362.

articulates the requirement that the jurisdiction take the necessary steps to provide the information contained in all election materials . . . in a form that enables protected voters to participate effectively.'"[360]

Finally, just as the *Nick* court already had concluded, the Department pointed out "that the Stevens Proviso did not bar the use of written translations: '[J]urisdictions are free to translate information and materials in that written form to supplement its oral translation program where it can assist in outreach and training, and to help ensure consistent and accurate translations.'"[361]

The federal court agreed with the *Toyukak* plaintiffs and the United States. As an initial matter, the court rejected "'the position of the State that the Fifteenth Amendment does not apply in this case,'" finding that "'the Ninth Circuit recognized applicability of that Amendment to the rights of Native Alaskans and American Indians to exercise the right to vote.'"[362] The court succinctly explained why the Stevens Proviso did not exempt a jurisdiction covered for American Indian and Alaska Native languages from compliance with Section 203:

> [T]he goal of the Voting Rights Act is to accord equal opportunity for all citizens to participate in elections and it would be, in my mind, inconsistent with that goal to have a lower level of assistance provided to limited-English proficient Alaska Native and American Indian citizens than is provided to other individuals that fall within the category that Congress identified as needing assistance in elections . . . . [T]he [Stevens] [P]roviso should be interpreted as altering only the means by which in- formation relating to registration and voting is communicated to limited-English proficient Alaska Natives but it does not permit [Alaska's Division of Elections] to diminish the content and extent of the information that must be provided.[363]

Following a two-week trial, the court found that the *Toyukak* plaintiffs had established that Alaska violated Section 203. The court entered an agreed-upon order with comprehensive remedial measures that required federal court oversight and federal observers in the three regions of Alaska through the end of 2020.[364]

Even after nearly a decade of litigation clarifying that the Stevens Proviso does not excuse all jurisdictions from providing written translations in American Indian and Alaska Native languages, many jurisdictions continue to take that position. The Proviso can still be a "major drawback to Native Americans" because of that misinterpretation.[365]

---

[360] *Id.*

[361] *Id.*

[362] *Id.* at 363.

[363] *Id.*

[364] *Id.* at 364-77.

[365] Phoenix Tr., Brian Curley-Chambers, 20.

Some Native languages use written forms that are widely used. In the *Nick* litigation, nearly 89 percent of the State's bilingual poll workers reported that they read written Yup'ik, which was widely taught through bilingual instruction in the public schools in the Bethel region.[366] Similarly, the Navajo language is written and interpreters can read and write the voting materials and information to be communicated to voters.[367] The Navajo Nation has provided translations of tribal ballots written in Navajo, and those translations have been well received and widely used, especially by younger voters who are eager to read them to Tribal Elders.[368]

Indeed, the absence of materials written in American Indian and Alaska Native languages makes it much more difficult to provide complete, accurate and uniform translations of English-language voting materials.[369] Shirlee Smith, the Navajo interpreter for Bernalillo County, New Mexico, explained:

> So when you're interpreting this stuff, all this election information, when you're looking at this and you're going to interpret the election process or procedures, it's really hard to do it traditional when you're sitting down with an Elder because we don't have English words that we can say to our Elders about whatever the election process is.[370]

For some languages, translations are provided through audio recordings.[371] But that does not always work. Imagine having to listen to lengthy translations explaining how to register to vote. The experience would be as viable as asking someone to patiently listen to highly technical stereo instructions. In Coconino County, Arizona, audio translations are provided for some voter information, but the elections office gets few requests for them. The long versions, when there are ballot questions, can be over two hours long.[372]

It also presents other challenges to socio-economically disadvantaged voters. When county election officials provided translations on the Tohono O'odham Nation, they distributed a compact disc. The Nation's Vice-Chairman asked his mother if she had received one and she responded, "Why would I get one? I don't even have a CD player."[373]

That has led many Tribal Elders in the New Mexico Pueblos who speak traditional languages to reject using recorded translations, leaving one-on-one communications with an interpreter as the

---

[366] *See* TUCKER, *supra* note 72, at 282-83.

[367] Isleta Tr., Shirlee Smith, 88.

[368] Tuba City Tr., Edgar Little, 168-69; Tuba City Tr., Shirlee Smith 206.

[369] Tuba City Tr., Patty Hansen, 102-03 (observing that written translations in Navajo makes it easier for bilingual poll workers to ensure that election terms are being uniformly translated the same way).

[370] Isleta Tr., Shirlee Smith, 87.

[371] Phoenix Tr., Brian Curley-Chambers, 20.

[372] Tuba City Tr., Patty Hansen, 104-05; Tuba City Tr., Alta Edison, 104-05.

[373] Phoenix Tr., Verlon Jose, 115.

only viable option.[374] For example, in the New Mexico community of Tohajiilee, outreach coordinator Shirlee Smith found that "people open up," it built trust, and voters felt comfortable asking questions about the voting process.[375]

But that sort of assistance has its own perils. A tribal Elder who received a mail-in ballot did not complete it because she needed assistance in Navajo. At the next election, she showed up to vote in person and asked for help to complete the ballot she received previously. The interpreter explained to her that "the vote already took place." Both had tears in their eyes when they realized the elder's vote would not be counted.[376]

5. Translation Challenges

Several other challenges must be overcome in providing effective language assistance to Native voters.

Ballot measures, which are common in the western states where language assistance is required in American Indian and Alaska Native languages, use complicated language that can be challenging for even the most skilled bilingual workers to translate. Ballot questions can be very confusing. One ballot question may actually invalidate another. They also may be written with double negatives so that voting "yes" may actually be voting against it.[377]

In Alaska, a readability analysis determined that the average ballot question and voting materials were written at a 16th grade, or college graduate, level of education.[378] That leads to mistakes that can make the ballot question's meaning unintelligible. For example, a poll worker in the *Nick* litigation translated an initiative on a natural gas pipeline by using the Yup'ik word "for 'gas' meaning the bodily function rather than the natural resource."[379] The confusing wording of ballot measures has led some Native organizers to have it "shortened … to get to the point of what it really means."[380]

Moreover, the difficulty in preparing complete, accurate, and uniform translations of voting materials (including instructions) is compounded by the absence of words in Native languages for many English terms, such as "caucus."[381] Merely using the English terms does not help because voters may not understand them.[382] Determining how to address this barrier requires closely

---

[374] Isleta Tr., Shirlee Smith, 88.

[375] Isleta Tr., Shirlee Smith, 82-84.

[376] Isleta Tr., Shirlee Smith, 93-94; Tuba City Tr., Shirlee Smith 217-18.

[377] Sacramento Tr., Chrissie Castro, 169.

[378] *See* TUCKER, *supra* note 72, at 270-71.

[379] *Id.* at 274-75.

[380] San Diego Tr., Monique Castro, 123-24.

[381] Portland Tr., Julie Johnson, 248-49.

[382] Portland Tr., Carol Evans 249.

coordinating with trained linguists from Native communities to provide effective translations. Voting and election terminologies require "additional skill set and clarity."[383]

For election terms lacking a counterpart in the Native language, it is necessary to translate the concept. For example, for a political office, "you're describing everything what that individual is doing, what that position is about."[384] A translator into the Tewa language at the Taos Pueblo explains to voters, "'What I'm telling you cannot be translated into our way, but here's another way you can look at it.'"[385] Because of these difficulties in finding equivalent terms, translations for a single voter in Navajo can take 40 minutes one-on-one when there is a ballot measure.[386]

Election programs and voting information also needs to be provided "in a culturally and language-sensitive way that is tailored" to each Native community.[387] That includes providing translations in the dialect of the community. Dozens of different dialects are widely spoken among the major American Indian and Alaska Native languages. In the *Toyukak* litigation, translation was required into "several Yup'ik dialects in addition to the translations already made in the Central Yup'ik dialect."[388]

Navajo also has different dialects and "is not just one language." There is a "basic language," "traditional language," as well as dialects that vary depending upon the part of the Navajo Nation where the voter is located. Dialects include Western Agency, Eastern Agency, Central, among others.[389] The Navajo dialects are "slightly different" languages. The majority of the words are the same, "but there are certain things we pronounce differently." For example, when a word in the Western Agency dialect was used in the eastern portion of the Navajo Nation, the interpreter was scolded and told "don't ever say that."[390] In a similar vein, the Pueblos in New Mexico use a "traditional" language that can include some Spanish mixed in with it.[391]

A constant theme is that local election officials responsible for addressing these many barriers are simply not given the resources to do so. As Martin Aguilar, explained, "One of the prohibitions is always the funding. How do we get more money to buy more radio spots when we do our county proclamation? What radio stations do we go to? Do we go to the public radio stations? Do we go to the commercial radio stations? Each set of stations have different policies."[392]

---

[383] Tuba City Tr., Angelo Baca, 179.

[384] Isleta Tr., Shirlee Smith, 89.

[385] Isleta Tr., Linda Yardley, 167.

[386] Tuba City Tr., Alta Edison, 67.

[387] Isleta Tr., Maggie Toulouse Oliver, 122-23; *see also* Isleta Tr., Surete Shije, 140.

[388] Tucker, Landreth & Dougherty Lynch, *supra* note 358, at 376.

[389] Isleta Tr., Shirlee Smith, 87, 104; Tuba City Tr., Shirlee Smith 207.

[390] Isleta Tr., Shirlee Smith, 104-05.

[391] Isleta Tr., Shirlee Smith, 87.

[392] Isleta Tr., Martin Aguilar, 147.

The challenges for some areas can be substantial. For example, Sandoval County is required to provide language assistance in the Navajo, Keres and Towa (Jemez Pueblo) languages. The clerk must "interpret election documents" including "proclamations, the constitutional amendments, the referendum questions, the ballots." A public radio station is used for five-minute blocks in the Keres, Towa and Southern Towa languages. Fifteen minutes total to provide translations in three languages for all of the information voters receive in English.[393]

6. Denial of Voter Assistance

Section 208 of the VRA provides that "[a]ny voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of the voter's union."[394] Congress added this amendment because it determined that blind, disabled, elderly, and illiterate were susceptible to having "their vote unduly influenced or manipulated" without assistance.[395] Like the mandate for minority language assistance contained in Section 203, voter assistance under Section 208 must be provided at every stage of the voting process, from registration through actually casting a ballot.[396]

Section 208 complements Section 203 by requiring jurisdictions to permit voters who are not proficient or literate enough to understand a ballot or voting materials to receive assistance from the person of their choice. The person providing assistance does not have to be a registered voter or even eligible to register to vote. A Tribal Elder who wishes to receive a translation in Navajo from their 14-year-old granddaughter is entitled to receive that assistance, even though the granddaughter cannot vote herself.

Despite Section 208's clear mandate, election officials consistently violate it. In a 2005 survey of all jurisdictions covered at that time under Section 203, 89.7 percent of the 263 responding election officials reported voter assistance practices that violated Section 208. In many cases "limiting voter-assistance practices resulted from jurisdictions complying with more restrictive state laws. More than half of all respondents did not permit voters to receive assistance from their own children because of state requirements that only eligible voters were qualified to be poll workers."[397]

In the *Nick* litigation, there were several instances in which Alaska violated Section 208. In Akiachak, poll workers did not provide assistance inside the voting booth. In Bethel, a Yup'ik voter was denied assistance in completing his ballot because poll workers said his vote had to be private. In Tuluksak, a Yup'ik voter "voted in an election where the poll worker told [her] that

---

[393] Isleta Tr., Martin Aguilar, 146-47.

[394] Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 5, 96 Stat. 131, 134–35 (codified as Section 208 of the VRA at 52 U.S.C. § 10508).

[395] S. REP. NO. 97-417, at 62 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 240.

[396] *See* S. REP. NO. 97-417 at 63 (1982), *reprinted in* 1982 U.S.C.C.A.N. 241.

[397] TUCKER, *supra* note 72, at 151.

elders could not have help interpreting or reading the ballots, and that everyone had to be 50 feet away from the person voting." Poll workers in Kwigillingok denied use of translators inside the voting booth. Assistance was also denied in Tuntutuliak, with poll workers told "not to help voters."[398] Relying upon this evidence, the federal court granted the plaintiffs a preliminary injunction to stop the voter assistance violations.[399]

Denial of voter assistance to Native voters persists. Many instances appear linked to a lack of poll worker training or supervision over the voting process. For example, a tribal member from Washington reported that voters are not informed that they are entitled to get assistance from the person of their choice.[400] At polling places on the Gila River Indian Community in Arizona, outreach workers have had to tell poll workers that those needing assistance are entitled to get it from the person of their choice.[401]

In 2016, a particularly egregious incident occurred when poll workers did not stop a voter from directly confronting, and then harassing, a Native voter. A blind member of the Pasqua Yaqui Tribe at the Guadalupe polling place was actually getting assistance from a poll worker. Another voter did not understand that the blind voter was receiving assistance and "started taking pictures, yelling, screaming" at the blind voter. This sort of harassment not only deters Section 208 assistance, but likely violates federal and state laws prohibiting voter intimidation.[402]

7. Failure of Covered Jurisdictions to Provide Required Language Assistance

While there are many difficulties in providing language assistance in American Indian and Alaska Native languages, those barriers are not insurmountable. Election officials who make the commitment to work with tribal governments to ensure that effective language assistance is provided can ensure that they comply with Section 203. When New Mexico started its Native American Election Information Program, voter registration was low and Native voters "didn't know anything about voter registration, absentee voting, early voting." In 1998, there were only 103 registered voters on Navajo tribal lands in Bernalillo County, which has climbed to over 1,000 today. The Isleta Pueblo has increased from 356 registered voters to over 1,500. Both are a result of language assistance, outreach, and voter education.[403]

Unfortunately, the story from Indian Country is that is not happening for all covered registration and voting activities. Alaska's failure to provide effective language assistance resulted in the court remedies in the *Nick* and *Toyukak* litigation. Similar narratives emerge from three of the other covered states with large populations of LEP American Indian voters.

---

[398] *Id.* at 276-66.

[399] *See Nick v. City of Bethel*, case no. 3:07-cv-0098-TMB, docket 327 at 9-10 (D. Alaska filed July 30, 2008).

[400] Oregon Tr., Cagey Test., 17-18.

[401] Phoenix Tr., Joyce Lopez, 208-09.

[402] Phoenix Tr., Ally Von Seggern, 213-14.

[403] Isleta Tr., Shirlee Smith, 79-80, 84-85.

a. Alaska[404]

The expectation was that the *Nick* settlement in 2010 would serve as a model for language assistance not only for Yup'ik speakers, but statewide. This expectation was not realized. Rather than simply using the same methods of translations to other areas covered for Alaska Native languages, state officials chose a different path: they limited application of the *Nick* remedies to the Bethel Census Area. Alaska Department of Elections (DOE) officials soon received indications that the decision to limit language assistance in this fashion violated the law. In October 2012, one wrote that she had "a disturbing call yesterday with the Department of Justice regarding our language assistance … and the lack of us having any PSAs relating to information appearing on the ballot."[405] She explained, "Since we send out an English voter pamphlet that contains a sample ballot, they say we must also provide information in Native languages about the sample ballot."[406] In February 2013, at the Director's manager's meeting, DOE officials discussed that "we might have a new lawsuit against us about language assistance."[407] Even with that knowledge, the DOE still made no effort to provide language assistance to Native voters outside of the Bethel Census Area.

The absence of language assistance was particularly acute for pre-election information provided to every voter in English. By state law, Alaska is required to mail its Official Election Pamphlet (OEP) to every household with a registered voter at least twenty-two days prior to a statewide general election or an election with a ballot measure.[408] The OEP, which is frequently 100 pages or longer,[409] contains a tremendous amount of information necessary to cast an informed ballot on Election Day, including: candidate statements; Judicial Council recommendations for retention of judicial candidates; sample ballots for all offices; for each ballot proposition, the full text, statement of costs, neutral summary, and pro and con statements; statements explaining bond propositions; material submitted by political parties; constitutional convention questions; and any other information on voting procedures the lieutenant governor considers important.[410] Absent complete, clear, and accurate translations into Native languages of the pre-election information disseminated to voters in English, Alaska Natives were effectively denied an opportunity to meaningfully participate in the election process.

This prompted Alaska Native voters outside the Bethel Census Area to file a second lawsuit in July 2013.[411] *Toyukak v. Treadwell* would become the first Section 203 case fully tried through a

---

[404] The text on Alaska that follows is drawn from Tucker, Landreth & Dougherty Lynch, *supra* note 358, at 358-59, 372-74, 376-79.

[405] Trial Tr. 881:15-884:2, *Toyukak v. Treadwell*, No. 3:13-cv-00137 (D. Alaska June 26, 2014) (quoting Exhibit 330).

[406] *Id.* at 883 (referencing Exhibit 330).

[407] *Id.* at 661 (referencing Exhibit 321).

[408] *See* ALASKA STAT. §§ 15.58.010 (2014), 15.58.080 (2000).

[409] *See*, *e.g.*, Official Election Pamphlets, *available at* http://www.elections.alaska.gov/Core/publications.php.

[410] *See* ALASKA STAT. § 15.58.020 (2014).

[411] *See* Complaint at ¶ 38, *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska July 22, 2013), docket No. 1.

decision in thirty-four years.[412] The plaintiffs included two individual voters and four tribal councils from three different regions of Alaska. The Bethel Census Area lies between these regions: the Kusilvak Census Area is to the northwest, the Yukon-Koyukuk Census Area to the northeast, and the Dillingham Census Area to the south. Four plaintiffs represented Yup'ik-speaking LEP voters in the Dillingham and Kusilvak regions, including some close to the Bethel area who speak the Central Yup'ik dialect, and many who speak the Bristol Bay, Chevak/Hooper Bay, Norton Sound, Nunivak, and Yukon dialects (among others). Two tribal councils from Arctic Village and Venetie represented LEP voters who speak the Athabascan language of Gwich'in. In addition to a Section 203 claim, this time the plaintiffs brought a claim under the Fourteenth and Fifteenth Amendments to the United States Constitution because, as a result of the *Nick* case, DOE officials knew they were denying equal registration and voting opportunities to Natives, but had persisted in their violations.

After weighing the evidence following a two-week trial in June and July 2014, the federal district court issued a decision on record in early September 2014. The court concluded that "based upon the considerable evidence," the plaintiffs had established that DOE's actions in the three census areas were "not designed to transmit substantially equivalent information in the applicable minority . . . languages." The public service announcements and translated materials DOE offered to Natives were "only a limited subset of the election materials" and were not a "substantial equivalent" of what the Division provided in English. In particular, the court found the greatest disparity in the dissemination of voting information in the OEP:

> [It is] [s]ignificant to the Court that the English version of the official election pamphlet that is mailed in English in every household in the state with a registered voter a few weeks before the election is not available in any language, English or otherwise, at the polling sites due to statutory restrictions on campaigning at the polling place. So what you have at the polling place is the ballot language and the list of candidates but not the material that is distributed in English in the official election pamphlet, such as the pro/con statements and the neutral summaries for ballot measures, the candidate statements, and other information in the official pamphlet.

The evidence did not support the State's argument that its outreach workers disseminated pre-election information. DOE failed to provide any outreach worker in villages where a tribal administrator had declined assistance even where Census numbers indicated a covered population, an approach that violated Section 203. Where outreach workers were available, they were limited to working no more than five hours before each election to translate for every voter in the village – which in some cases was hundreds of voters – and were not paid at a rate consistent with "comprehensive translators and interpreters." There was also no evidence that workers were provided with copies of the OEP or informed that they were expected to translate it into the Native language spoken in their village. The four minutes that DOE included on language assistance on its training video and its written materials focused solely on Election Day, and did not include any instructions that pre-election translations and assistance were to be offered. The lack of pre-

[412] *See Apache County v. United States*, Civil Action No. 77-1515, mem. op. (D.D.C. June 12, 1980) (three-judge court).

election assistance could not be redressed on Election Day because Alaska's electioneering statutes barred anything beyond translating the ballot in the polling place, such as by providing translations of candidate statements and pro/con statements of ballot measures.

The court found that the language needs in each of the three census areas were not being met. The plaintiffs had "demonstrated that there are different dialects in Dillingham and [Kusilvak] from the Central Yup'ik dialect in Bethel." There was evidence that "different individuals ... raised this concern with the Division over the past several years," but the Division "only translated its Yup'ik materials solely into the Central Yup'ik dialect" and other dialects were not represented among translation panel members. As a result, while "a Yup'ik sample ballot is a sound idea for the provision of language assistance services, its value outside of the Bethel Census Area [was] limited."339 As to the Yukon-Koyukuk Census Area, during 2014 the DOE had "approached with some renewed energy the goal of providing meaningful oral language assistance to Gwich'in LEP Alaska Natives," but it had "not yet provided the substantial equivalent there." Accordingly, the State of Alaska violated Section 203 of the VRA because its "standards, practices, and procedures" did not permit LEP voters in the three "census areas to receive information about elections... that is substantially equivalent to that provided . . . to English speaking voters."[413]

The *Toyukak* plaintiffs and Alaska officials worked collaboratively to produce a proposed stipulation and judgment that was entered by the court in late September 2015. The thirty-three page order identifies comprehensive procedures to be put into place to remedy Alaska's Section 203 violations that account for practical issues faced by election administrators. In recognition of voting barriers that predated even the *Nick* litigation, the order includes strong relief to cure the violations, such as federal observers to document compliance efforts and court oversight enforceable by its contempt powers through the end of 2020.[414]

Reports filed by federal observers in 2016 suggest that Alaska's efforts fell short of fully remedying the Section 203 violations and complying with the *Toyukak* Order. Some two years after Judge Gleason's September 2014 bench ruling for the Plaintiffs and entry of her interim remedial order, bilingual poll worker training was spotty or lacking for several villages. Federal observers were present for both the August 2016 Primary and November 2016 General Election in villages located in the three census areas. Out of the 120 poll workers interviewed by the federal observers for those elections, only 46 percent (55 poll workers) reported that they had been trained in 2016. In contrast, four percent (5 poll workers) reported receiving training in 2015, ten percent (12 poll workers) reported being trained two or more years earlier, 39 percent (47 poll workers) reported they had never been trained, and one percent declined to answer. Some of the poll workers who did receive training indicated that it was "conducted in English by a non-Native instructor from the Election Office." Bilingual poll workers or interpreters were not trained on "how to translate the contents of the ballot or how to provide procedural instructions" in the covered Alaska Native languages.[415]

---

[413] Tr. of Decision of the Court, *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska Sept. 3, 2014).

[414] *See* Stipulated Judgment and Order, *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska Sept. 30, 2015), docket no. 282.

[415] *See* Federal Observer Reports for 2016 Elections, *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG, docket no. 295, attachments 295-1 to 295-33 (D. Alaska filed Dec. 13, 2016).

In a marked improvement, most, but not all, of the villages had a bilingual poll worker available. In the August 2016 Primary Election, federal observers reported there was no bilingual poll worker available in three out of the nineteen Native villages they observed. In Koliganek, a bilingual poll worker was only available "on call" and was "not present at the polling place." No bilingual assistance was available at polling places located in Dillingham, Kotlik, and Marshall during a portion of the time federal observers were there when the observers documented the only bilingual worker took a break or left the polling place. In the November 2016 General Election, federal observers reported there was no bilingual poll worker available in just one of the twelve Native villages they observed. While federal observers were present, they reported that no bilingual assistance was available at Fort Yukon for an hour and twenty minutes when the interpreter left the polling place. In Venetie, one of the Plaintiff villages, the only Gwich'in-speaking poll worker left three and one-half hours before the polling place closed, and did not return.

For both elections in 2016, many voting materials were unavailable in the applicable Alaska Native language and dialect. Almost all signage was in English only. Among the nineteen villages in which federal observers were present for the August 2016 primary election, they observed that no voting materials were available in Alaska Native languages in six villages: Alakanuk, Kotlik, Arctic Village, Beaver, Fort Yukon, and Venetie. The "I voted" sticker was the only material in an Alaska Native language in Marshall and Mountain Village. Only the Yup'ik glossary was observed in Emmonak. Ten villages had a sample ballot written in Yup'ik, but only two – Koliganek and Manokotak – had written translations of the candidate lists. Only one village, Aleknagik, had a written translation of the OEP available for Yup'ik-speaking voters.

In the November 2016 General Election, federal observers documented that half of the twelve polling places they observed did not have a translated sample ballot available for voters. Five villages – New Stuyakok, Alakanuk, Hooper Bay, Arctic Village, and Venetie – had no translated sample ballot at all, while the Gwich'in sample ballot in Fort Yukon was "kept at the poll workers' table" and was not provided by the voting machine where voters could use it. The absence of written voting materials had its greatest impact in villages where a trained bilingual poll worker was not present at all times during the election. In sum, Alaska has made some improvements and committed to changing to better serve its voters, but almost 40 years of violating the VRA cannot be changed overnight. This illustrates why the settlement agreement requires court oversight through the end of 2020, and may require an even longer period.

b. Arizona

Arizona has a lengthy history of failing to comply with Section 203. Starting in the late 1970s, shortly after several counties in the state became covered for American Indian languages, federal enforcement was necessary. The Department of Justice pursued litigation "because there was no election-related information going to the Navajo people." The lawsuit was resolved by a consent decree that required "outreach to educate the Navajo people in their respective languages" about

"election related information."[416] The decree required hiring outreach workers, which led Apache County to hire two who provided election information to the Navajo Chapters.[417]

Unfortunately, those violations have persisted. A recent study by the Indian Law Clinic at Arizona State University's Sandra Day O'Connor School of Law found that in the 2016 election, only one-third of Arizona's nine counties covered for American Indian languages likely complied with Section 203. The three counties actively worked with the tribes and communicated with voters in the covered language. For example, Navajo County worked with the Navajo Nation Election Administration to provide translations to voters. Together they prepared tools for providing election information in Navajo, such as CDs containing audio translations and a 38-page glossary of election terms. [418]

Another third of Arizona's covered counties only partially complied with Section 203. In Apache County, no language assistance was offered in the Zuni language because that portion of the county was believed to be uninhabited. Apache County also failed to provide translations for voter registration information, voter identification information, general election information, or any information about early voting.[419]

Coconino County did not provide translation material for distribution; instead only bilingual poll workers were provided at voting locations.[420] The County also failed to provide translations for voter registration information, voter identification information, or information about early voting.[421]

It was unclear whether the remaining three Arizona counties provided assistance in the covered American Indian language. Mohave County reported that it made inquiries to three tribes between 2012 and 2014 "but no translation efforts resulted." Although the Section 203 determinations were made by using updated Census data and are unreviewable, the County claimed that it was told that it was "a dying language that requires no translation efforts."[422] However, covered counties cannot avoid the requirement of providing language assistance by relying upon the lack of a response from a tribal official as a basis for saying that assistance is not needed.[423]

c. **New Mexico**

---

[416] Phoenix Tr., Edison Wauneka, 78.

[417] *See Apache County v. United States*, Civil Action No. 77-1515, mem. op. (D.D.C. June 12, 1980) (three-judge court).

[418] Phoenix Tr., Brian Curley-Chambers, 20-21.

[419] Tuba City Tr., Brian Curley-Chambers, 227.

[420] Phoenix Tr., Brian Curley-Chambers, 21-22.

[421] Tuba City Tr., Brian Curley-Chambers, 227.

[422] Phoenix Tr., Brian Curley-Chambers, 22-23.

[423] Phoenix Tr., Brian Curley-Chambers, 43-44.

Despite its success in closing the gap in Native voter registration and participation, New Mexico's language program is underfunded. That poses substantial challenges for the Secretary of State in working with the counties to provide effective language assistance.[424] Funding impacts the number of in-person voting locations. It costs money to hire interpreters and poll workers, which can reduce the number of in-person voting locations on tribal lands.[425]

It also limits when and how often language assistance is available. Outreach cannot be a "one-off" that is only done right before an election. It needs to happen consistently. "We know we're not going to change tribal participation overnight in New Mexico or anywhere else in the country, so we have to be in this for the long term to try to make systemic change for the long term.... There has to be a consistent and committed ongoing communication with those individuals and with the leadership and with the members of the community."[426]

The most common complaint from New Mexico Tribes and Pueblos is that little contact of any kind is happening. Voters are not getting enough pre-election outreach and interpreters to explain to them what is on the ballot.

Tribal Elders at the Isleta Pueblo do not understand the ballots written in English. "They don't know what a bond is or a levy is or even some of the people that are running, the positions that they're running in." They need more interpreters to go to tribal functions and provide information to Elders in their Native language.[427]

The nineteen Pueblos in New Mexico engaged in self-help through what they called the "Pueblo Platform," including creating their own voter information guide on the positions of candidates on key issues that mattered to Native voters. Each of the Pueblos took responsibility to find interpreters for the voter guide into the Keres, Tewa, or Towa languages. "[T]he impact that the federal government has on tribal communities and tribal people is more than any other member of U.S. society. It's very important that that information get out to Native American voters." It led to an increase in voter registration and turnout.[428]

However, as one community organizer complained, tribes should not be forced to engage in self-help to provide the language assistance that non-tribal governments covered by Section 203 are required to offer. It is not "fair for them to ... ask a tribe, 'You should pay for this language piece" or "You should do all this other stuff.' ... we are citizens of the United States of America" in addition to being citizens of their tribes.[429]

---

[424] Isleta Tr., Maggie Toulouse Oliver, 124-25.

[425] Isleta Tr., Martin Aguilar, 149.

[426] Isleta Tr., Maggie Toulouse Oliver, 122, 127-28.

[427] Isleta Tr., Maxi Zuni, 100.

[428] Isleta Tr., Helen Padilla, 42-44, 57, 59.

[429] Isleta Tr., Laurie Weahkee, 215-16.

d. **San Juan County, Utah**

Language is a significant barrier in San Juan County, Utah. Many Native voters need an interpreter to obtain access to government services.[430] However, the County has failed in every respect to comply with Section 203.

The County does not have an outreach worker who speaks Navajo. As a result, Navajo assistance is not provided for voters calling into the San Juan County elections office.[431]

Although the County publishes a voter information guide in English that is distributed before elections. It is not translated into Navajo.[432] A Navajo voter asked poll workers that was available in English.

> I wanted to know what information is disseminated to us, as Native Americans, in terms of being able to understand thoroughly, if it could be in the English version as well as being interpreted back into the Native Navajo language... I really didn't understand what some of the issues were on the ballot at that time, especially this last election... I started asking questions on, 'What does it mean?' regarding several of the state constitutional amendments that was on the ballot as well as some of the state judges and attorneys.... 'How ... will that affect me as a Navajo on the reservation? What does it mean to amend a certain section of the state constitution?' There was nobody to explain that to me in Navajo. What they told me is, 'Well, if you don't understand it, don't vote on it.'[433]

As a result, Navajo voters in San Juan County have never received any information about ballot questions in Navajo before the election. Often, they simply do not vote on the initiatives and ballot questions because they do not understand them. They vote only for candidates.[434]

Some voters do not vote at all because of the lack of language assistance. "'We don't get no help from the county. Why should I vote?' That was the mentality that we grew up with. 'Leave them alone... Don't bother. That's their system,' is what we were told."[435]

Even more pernicious, San Juan County switched to a vote-by-mail system to take away all language assistance. No translations were provided to LEP Navajos on ballot information, including candidates and initiatives.[436] Only one polling place in Monticello was going to be kept,

---

[430] Isleta Tr., Wilfred Jones, 17.

[431] Tuba City Tr., Moroni Benally 38.

[432] Tuba City Tr., Moroni Benally, 40-41.

[433] Isleta Tr., Wilfred Jones, 25-27.

[434] Isleta Tr., Wilfred Jones, 27-28.

[435] Isleta Tr., Wilfred Jones, 27-28.

[436] Isleta Tr., Terry Whitehat, 10.

three or four hours each way.[437] The impact was profound. Many voters who received an English language ballot they could not read simply did not vote.[438] Others had their ballots invalidated when LEP Navajo voters were unable to read and understand the instructions on how to complete the ballot and envelope.[439] In 2018, the County settled after being sued, agreeing to restore the three closed polling places and to provide the mandated language assistance.[440]

B. BARRIERS TO VOTER REGISTRATION

1. Legal Overview

a. The National Voter Registration Act

The National Voter Registration Act (NVRA)[441] was introduced on the first day of the 103rd Congress in order to make it easier for citizens to register to vote.[442] There are four stated goals of the NVRA:

> (1) to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office;
>
> (2) to make it possible for Federal, State, and local governments to implement this chapter in a manner that enhances the participation of eligible citizens as voters in elections for Federal office;
>
> (3) to protect the integrity of the electoral process; and
>
> (4) to ensure that accurate and current voter registration rolls are maintained.[443]

The NVRA does not apply to any states that did not or do not have voter registration requirements on or after August 1, 1994 or states in which voters can register the day of an election at their polling place.[444] For all other states, the NVRA requires that citizens are able to register to vote in at least three ways: by applying simultaneously with an application for a driver's license, by mail, or in person at certain federal and state governmental offices and other nongovernmental offices.[445]

---

[437] Tuba City Tr., James Attakai 14.

[438] Tuba City Tr., James Attakai 14.

[439] Tuba City Tr., Moroni Benally, 44-45.

[440] *See Navajo Nation Human Rights Commission v. San Juan County*, No. 2:16-cv-00154-JNP (D. Utah Feb. 2018).

[441] 52 U.S.C. §§ 20501–20511.

[442] 139 CONG. REC. E17-03 (daily ed. Jan. 5, 1993) (statement of Sen. Swift).

[443] 52 U.S.C. § 20501.

[444] 52 U.S.C. § 20503(b). The states that are not covered at Idaho, Minnesota, New Hampshire, North Dakota, Wisconsin, and Wyoming. The NVRA also does not cover US territories. *See* U.S. Dep't of Justice, *National Voter Registration Act of 1993 (NVRA) Questions and Answers*, *available at* https://www.justice.gov/crt/national-voter-registration-act-1993-nvra (last updated Aug. 7, 2017) ("NVRA Q&A").

[445] 52 U.S.C. § 20503(a).

Though the NVRA is supposed to make it easier for US citizens to vote, in practice it has less force in Indian Country.

Under the NVRA states must develop driver's license applications that simultaneously serve as a voter registration application.[446] Applications to update an individual's driver's license address must likewise serve to update voter registration rolls unless the applicant specifies otherwise.[447]

However, Native Americans living on reservations often do not apply for and possess a drivers' licenses. Securing a driver license can be costly – the license may require a fee, there are often costs associated with obtaining underlying documentation necessary to obtain the ID, the distance Natives living on reservations must travel to reach driver's license sites are often prohibitively far, and drivers' licenses are not always required for everyday life in reservation communities.

A closer look at reservation communities in North Dakota highlights how impractical it is for Native Americans to travel to driver's license sites. The average travel time is a little over an hour. This burden is compounded since Native Americans in North Dakota lack access to transportation at twice the rate of white households.[448]

Figure 15. An Analysis of the Effects of North Dakota's Voter Identification Law on Potential White and Native American Voters[449] Graphic source: University of Alabama

[446] 52 U.S.C. § 20504(a)(1).

[447] 52 U.S.C. § 20504(d).

[448] Professor Gerald Webster, An Analysis of the Effects of North Dakota's Voter Identification Law on Potential white and Native American Voters, Appendix, 11.

[449] Professor Gerald R. Webster, *An Evaluation of the Effects of Adding a Second Voter Registration/Polling Site in Three Montana Counties*, 2012.

Mean Travel Distances and Times for Native Americans Residing on Reservations in North Dakota to Travel to a Driver's License Site (DLS)

Reservation	Mean Travel Distance for Voting Age Native Americans	Mean Travel Time for Voting Age Native Americans
Ft. Berthold	49.6 miles	84.6 minutes
Turtle Mountain	11.0 miles	17.4 minutes
Spirit Lake	14.0 miles	25.3 minutes
Standing Rock	60.8 miles	106.62 minutes
Lake Traverse	40.1 miles	64.3 minutes
All Reservations	29.4 miles	50.3 minutes

SOURCE: Calculated by the University of Alabama Cartographic Research Laboratory.

Even when Native Americans manage to make it to drivers' license sites, members have expressed skepticism that their registrations have been completed in compliance with NVRA's requirements. Rhonda Medcalf, a tribal member living in Oregon, described how, after travelling the 45 mile drive to either Skagit County or Snohomish County, "[y]ou think you are registered to vote, but the DMV does not turn in those applications, so lots of people often miss out on voting because the DMV does not always turn in those documents."[450] Another advocate reported that "[o]ne of the poll workers told me that perhaps the—when some of the voters register at the—when they're getting their drivers license or identification at the MVD ["Motor Vehicles Division"], perhaps the MVD is not finishing the registration and submitting that to the Secretary of State or wherever it has to go. So perhaps that is an issue."[451]

This mistrust is not based on mere speculation. Hostility and negligence toward Native Americans was established in the 2007 suit *United States v. Cibola County*, where the United States filed a complaint against Cibola County, NM for violation of the NVRA and the Help America Vote Act ("HAVA" – discussed in detail below).[452] The complaint alleged that the county failed to ensure that valid voter registration forms (many from residents of Laguna Pueblo), were processed for the November 2004 general election.[453] Moreover, the county was accused of removing voter names from registration lists without general causes.[454] In response to these accusations, the entered an order approving a joint stipulation through 2006, which required Cibola County to comply with

[450] Portland Tr., Rhonda Medcalf, 52.

[451] Phoenix Tr., Devon Suarez, 217.

[452] United States v. Cibola County, No. 93-1134-LH/LFG (D.N.M. 2007).

[453] *Id.*

[454] *Id.*

the requirements of the NVRA and correct their practices.[455] The county agreed to make "all phases of the election process as accessible to the Native American populations at the Acoma, Laguna, and Ramah reservations within Cibola County as they are to the remainder of the County's population.[456]

The NVRA also requires that states adopt a mail voter registration application developed by the Election Assistance Commission or develop their own that meets the requirements of the NVRA.[457] Like the driver's license application, it must not require any additional information besides what is necessary to confirm an applicant's eligibility to vote; it must specify each eligibility requirement and provide a place for the applicant to sign to confirm he or she meets the requirements; and it must inform the voter that his or her choice on whether to vote is to remain confidential, as is the location at which he or she filled out the application.[458]

Yet, because many Native voters lack traditional mailing addresses they are less likely to take advantage of NVRA's registration by mail forms. The lack of stable housing or homelessness might make it impossible for individuals to provide an adequate mailing address.

Next, regardless of whether the state uses the Election Assistance Commission's form or creates its own, states are required to distribute the forms through various governmental and private entities, "with particular emphasis on making them available for organized voter registration programs."[459] Some state agencies are required to serve as voter registration centers, and states are required to designate others for the same purpose.[460] Those agencies that are required to provide voter registration applications are ones that provide public assistance[461] and any that provide "[s]tate-funded programs primarily engaged in providing services to persons with disabilities."[462] Each state must also designate other offices as registration agencies.[463] These offices can include "public libraries, public schools, offices of city and county clerks (including marriage license bureaus), fishing and hunting license bureaus, government revenue offices, unemployment

---

[455] United States v. Cibola County, No. 1:93-v-01134-LH-LFG (D.N.M. 2007).

[456] *Id.* at 6.

[457] 52 U.S.C. § 20505(a). The EAC's form is available at U.S. Election Assist. Comm'n, *Register to Vote in Your State by Using this Postcard Form and Guide*, *available at* https://www.eac.gov/assets/1/6/Federal_Voter_Registration_ENG.pdf (last visited Feb. 12, 2019).

[458] 52 U.S.C. § 20508(b).

[459] 52 U.S.C. § 20505(b).

[460] 52 U.S.C. § 20506.

[461] 52 U.S.C. §20506(a)(2)(A). These include, but are not limited to, offices that provided any of the following federal assistance programs: the Supplemental Nutrition Assistance Program, the Special Supplemental Nutrition Program for Women, Infants and Children, the Temporary Assistance for Needy Families program, Medicaid, and the State Children's Health Insurance Program. *See* NVRA Q&A, *supra* note 445.

[462] 52 U.S.C. § 20506(a)(2). These state-funded programs are usually those that offer vocational rehabilitation, transportation, job training, education counseling, rehabilitation, or independent-living services for people with disabilities. *See* NVRA Q&A, *supra* note 445.

[463] 52 U.S.C. § 20506(a)(3).

compensation offices," other offices that provide services to people with disabilities, and any other federal or nongovernmental office that agrees to operate as a registration agency.[464]

These agencies, however, are often state run and are less- utilized by Native Americans who live primarily within their reservation lands. Additionally, Native Americans do not exclusively interact with state services because they may instead rely upon federal programs offered in fulfillment of the federal government's treaty obligations. For example, Native Americans may receive food commodities from the US Department of Agriculture instead of public assistance benefits.[465]

Finally, besides specifying how states must facilitate voter registration, the NVRA also provides some limits on when states can remove voters from their registration lists. States must comply with the Voting Rights Act of 1965 in maintaining rolls that are uniform and nondiscriminatory.[466] There are only six instances in which the NVRA says that states may remove voters: (1) upon the death of the registrant; (2) upon the registrant's written confirmation that his or her address has changed to a location outside the registrar's jurisdiction; (3) when the registrant fails to respond to adequate notice that he or she is about to be removed from the rolls *and* fails to vote in two consecutive Federal general elections following the notice; (4) on the request of the registrant; (5) because of mental incapacity, as provided for in state law; and (6) on criminal conviction of the registrant,[467] as provided for in state law.[468]

The Act is very particular about how states must provide adequate notice by mail that a registrant is about to be removed from the rolls. It must be sent in a postage prepaid and pre-addressed return card, sent by forwardable mail. It must provide a place for the registrant to provide his or her current address and encourage the voter to provide that information before the registration deadline for the next election.[469] The notice must inform the voter that if they fail to reply before the registration deadline, they might be required to provide confirmation of their address in the next

---

[464] 52 U.S.C. § 20506(a)(3)(B). The statute is unclear how many additional offices the state has to designate as registration agencies, so the first NVRA study after the passage of the Act found that only twenty-one of the forty-three responding states designated more than one such agency, whereas four did not designate any additional agencies. Fed. Election Comm'n, The Impact of the National Voter Registration Act of 1993 on the Administration of Federal Elections (1997), *available at* https://www.fec.gov/about/reports-about-fec/agency-operations/impact-national-voter-registration-act-1993-administration-federal-elections-html/.

[465] *See* USDA Food & Nutrition Serv., U.S. Department of Agriculture, Food Distribution Program on Indian Reservations, *available at* https://www.fns.usda.gov/fdpir/food-distribution-program-indian-reservations.

[466] *See generally* NVRA Q&A, *supra* note 445 ("For example, some general programs involve a State undertaking a uniform mailing of a voter registration card, sample ballot, or other election mailing to all voters in a jurisdiction, and then using information obtained from returned non-deliverable mail as the basis for correcting voter registration records . . . or for initiating the notice process.").

[467] In furtherance of this provision, the United States Attorney General is required to inform each state's chief election official when a state citizen has been criminally convicted in federal court. *See* 52 U.S.C. § 20507(g)(1)-(2). In turn, the chief election official is required to notify registration officials in that individual's local jurisdiction. 52 U.S.C. § 20507(g)(5).

[468] EAC, *supra* note 458, at 46.

[469] 52 U.S.C. § 20507(d)(2).

election; failure to vote in either of the following two elections will result in their removal from the voter registration roll.[470] Individuals who move and fail to respond to one of these notices can still vote in the following election, but there are different provisions regarding how and where the individual must vote depending on where they moved.

Because of the aforementioned address and postal service issues, Native Americans are more likely to move and less likely to receive notice that they will be removed from the rolls. Additionally, while the sample Election Assistance Commission form does provide a way for voters to specify their address given the nearest intersection and nearby landmarks,[471] this option harder to process than those who have traditional mailing addresses, which can lead to Native voters erroneously being removed from voter rolls. Given these numerous impediments, Native Americans are less likely to benefit from NAVRA's various assistances and therefore remain less likely to register to vote.

b. Help America Vote Act

The Help America Vote Act was passed in 2002 in response to the controversy surrounding the 2000 Presidential election.[472] The Act has three basic goals: first, establishing standards such that blind and disabled voters and every language minority will be able to vote; second, allowing for voters to cast provisional ballots and informing them of this right; and third, requiring each state to create a statewide voter registration list and system for voters to register by mail.[473] The Act also established the Election Assistance Commission (EAC) to assist states in implementing the mandates.[474] The EAC must maintain a National Voter Registration form, conduct research, and administer a national publication that includes shared practices and other resources to improve elections.[475] Finally, and crucially, the act provides funding for states to replace voting systems and improve election administration. [476]

Despite HAVA's national requirements, states still maintain a great deal of discretion in how they administer their federal elections and expend their HAVA funds.[477] HAVA's mandates have not always been enforced equitably in Indian Country, requiring litigation to force states to comply.

---

[470] 52 U.S.C. § 20507(d)(2).

[471] *See* EAC, *supra* note 458.

[472] Help America Vote Act, 52 U.S.C. §§ 20901–21145 (2012); Herbert E. Cihak, *The Help America Vote Act: Unmet Expectations?*, 29 U. ARK. LITTLE ROCK L. REV. 679, 680–81 (2007).

[473] 148 CONG. REC. S709-03 (daily ed. Feb. 13, 2002) (statement of Sen. Dodd).

[474] *Id.*

[475] *Id.*

[476] U.S. Election Assist. Comm'n, Help America Vote Act ("EAC HAVA"), *available at* https://www.eac.gov/about/help-america-vote-act/.

[477] *See generally* 52 U.S.C. § 21085 ("The specific choices on the methods of complying with the requirements of this subchapter shall be left to the discretion of the State."); *see also id.* at § 21084 (stating that the Act only provides for minimum requirements and states can choose to establish stricter election technology and administration requirements if they so choose).

For example, in Alaska, state officials were aware of problems with their language assistance program in the spring of 2006, but waited until they were forced through litigation, *Nick v. Bethel*, to address the language needs and expend HAVA funds on language assistance for Yup'ik speaking voters in the Bethel Census Area.[478] Alaska's election officials previously had used federal HAVA funds to open a new elections office in the predominately non-Native community of Wasilla, which had a population of less than 8,000. [479]However, state officials chose not to use any funds for language assistance for tens of thousands of Alaska Natives until after the *Nick* case was filed, even though that was one of the approved uses for the federal appropriation. Post litigation, election officials used a small percentage of the HAVA appropriation so that no state funds would have to be used to make voting accessible to Limited-English Proficient (LEP) Alaska Native voters.

Litigation has also forced states to comply with HAVA's requirements to provide for provisional ballots in instances where voters are registered and eligible to vote in the jurisdiction but do not show up on the official list of eligible voters or the election official believes that the individual is not eligible to vote in that jurisdiction[480] and HAVA's voter registration list requirements.[481]. Despite HAVA's clear mandates Native voters were erroneously removed from voter rolls and not offered provisional ballots after receiving probation for felony convictions. In *Janis v. Nelson*, South Dakota agreed to train election officials and volunteers on felony qualifications and updated statutory qualifications to require notice to those who had lost their right to vote due to felony convictions and penalties.[482]

Finally, and most disturbingly, states have even chosen to forgo usage of HAVA funding rather than service Native American voters. In *Poor Bear v. The County of Jackson*, the plaintiffs alleged Jackson County acted in violation in the equal protection clause by failing to use available HAVA funding to create a satellite polling office in Wanblee, South Dakota.[483] The Court agreed that such the failure to use the funding could constitute a violation of the Equal Protection clause.[484] South Dakota eventually agreed to open a satellite office in Wanblee on the Pine Ridge Reservation for the 2014 election and the county entered a binding agreement with

---

[478] Order Re: Plaintiffs' Motion for a Preliminary Injunction Against the State Defendants, *Nick v. Bethel*, No. 3:07-cv-00098-TMB, docket no. 327 at 8 (D. Alaska July 30, 2008).

[479] U.S. Census Bureau, QuickFacts, Wasilla City, Alaska, Population estimates as of April 1, 2010, *available at* https://www.census.gov/quickfacts/fact/table/wasillacityalaska/LND110210 (population in 2010 was 7,816, of whom over 80 percent were White alone).

[480] 52 U.S.C. § 21082(a).

[481] *Id.* at § 21083(a)(1)(A). This provision also governs the maintenance of these lists and requires that they are adequately safeguarded. *Id.* at § 21083)(a)(2)–(3).

[482] *Janis v. Nelson*, Civ. 09-5019 (D.S.D. May 25, 2010).

[483] *Poor Bear v. Jackson County*, No. 5:14-CV-5059-KES, 10 (D.S.D. 2015).

[484] *Id.*

the State, committing itself to opening a location in proximity to the reservation for federal general and primary elections through 2022.[485]

2. Litigation Under the Fourteenth and Fifteenth Amendments and the Voting Rights Act

For Native Americans, the Fourteenth Amendment, guaranteeing equal protection under the laws, did not confer any rights upon its ratification in 1868.[486] The Fifteenth Amendment's guarantee that the right to vote shall not be denied or abridged on account of race or color likewise did not apply to Native Americans upon its ratification. Native Americans came under the protection of these Amendments, at least in theory, upon the enactment of the Indian Citizenship Act of 1924.[487] In practice, however, as discussed in Part II, the Act conferring the right to vote on Native Americans did not prevent the States from restricting or even abolishing that right in numerous ways.[488]. It was not until the enactment of the Voting Rights Act in 1965 that the right of Native Americans to vote in state and federal elections was regularly enforced. Voting rights cases in recent decades have consistently been filed under the Voting Rights Act, enforced via Congress' powers under the Fourteenth Amendment.[489] Constitutional challenges also are brought under the Fourteenth and Fifteenth Amendments. Often cases advance both Voting Rights Act and Constitutional challenges at the same time.

a. The Voting Rights Act

The Voting Rights Act was passed as a response to the attacks on protesters in Selma, Alabama and the murder of several voting rights activists elsewhere.[490] Prior to the Act, the Department of Justice was trying to defeat discriminatory election practices on a case-by-case basis; Congress found that this was ineffective and passed legislation to provide a more comprehensive framework for quelling discrimination in elections.[491] In particular, Section 2 of the Voting Rights Act has provided the mechanism for enforcement of many voting rights violations.

The text of § 2 reads:

---

[485] *See* Lawyers' Committee for Civil Rts. Under Law, Press Statement, *available at* https://lawyerscommittee.org/satellite-early-voting-office-to-open-in-wanblee-south-dakota-after-civil-rights-complaint/.

[486] *See Elk v. Wilkins*, 112 U.S. 94, 103 (1884) (finding that the right to vote "cannot apply to a denial of the elective franchise to Indians not taxed, who form not part of the people entitled to representation.").

[487] 43 Stat. 253 (1924) (codified as amended at 8 U.S.C. § 1401(b) (2006)).

[488] *See also* Ryan D. Dreveskracht, *Enfranchising Native Americans After Shelby County v. Holder: Congress's Duty to Act*, 10 NAT. LAWYERS GUILD REV. 193, 194 (2013).

[489] *See* Jeanette Wolfley, *Jim Crow, Indian Style*, 16 AMER. INDIAN L. REV., 167, 193 (1991).

[490] U.S. Dep't of Just., *History of Federal Voting Rights Laws* (July 28, 2017), *available at* https://www.justice.gov/crt/history-federal-voting-rights-laws.

[491] *Id.*

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or implied by any State or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color.[492]

Originally, the Act only prohibited intentional discrimination in the administration of elections.[493] However, the Act was amended in 1982 to disavow this approach and provide that there could be a violation of § 2 when a jurisdiction's imposed voting requirements are not equally open to members of a protected class because of discriminatory impact—that is, when "its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."[494]

The statute expressly provides that a violation of § 2 depends on the totality of the circumstances.[495] Section 2 does not give minorities a right to have representatives proportionate to their population; it only protects their equal access to the actual voting process.[496] As a result, a challenge against alleged discriminatory practices uses "a multifactored inquiry under which a single factor can neither establish liability nor immunize a challenged practice."[497]In making this assessment, courts can look to nine factors set out in a Senate Report on the 1982 amendment.[498]

---

[492] 52 U.S.C. §10301(a); Pub. L. 97-205, § 3, 96 Stat. 131.

[493] Voting Rights Act of 1965 § 2, Pub. L. 98-110, 79 Stat. 437; *see Mobile v. Bolden*, 446 U.S. 55 (1980) (holding that plaintiffs bringing a claim under § 2 had to show that there was a discriminatory purpose behind the challenged standard, practice, or procedure).

[494] 52 U.S.C. § 10301(b); Pub. L. 97-205, §3, June 29, 1982, 96 Stat. 134.

[495] *Id.*

[496] *See* 52 U.S.C. § 10301(b).

[497] Ellen D. Katz, *Section 2 After Section 5: Voting Rights and the Race to the Bottom*, 59 WM. & MARY L. REV. 1961, 1969 (2018).

[498] S. REP. NO. 97-417, at 28-29 (1982).

1. The extent of any history or official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

2. The extent to which voting in the elections of the state or political subdivision is racially polarized;

3. The extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. If there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. The extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. Whether political campaigns have been characterized by overt or subtle racial appeals;

7. The extent to which members of the minority group have been elected to public office in the jurisdiction;

Courts must make a highly fact-specific inquiry into the facts surrounding a challenged standard, practice, or procedure which relies both on the present alleged burdens to voting for minority voters and the historical discrimination against that protected class in that particular jurisdiction.

b. Equal Protection

Likewise, Native Americans have brought successful Constitutional challenges under the Equal Protection clause of the Fourteenth Amendment.[499] These Equal Protection challenges require federal courts to: (a) "consider the character and magnitude of the asserted injury to the rights protected," that the plaintiff seeks to vindicate and (b) "identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by the rule."[500] In spite of asserting that voting rights are "fundamental," the Court has also repeatedly recognized that some burden on individual voters is inevitable.[501] Accordingly, a state election law that imposes only "reasonable, nondiscriminatory restrictions" upon the rights of voters is justified by "the State's important regulatory interests."[502]

Meeting the highly fact specific standards required to prove both VRA and Equal Protection claims means that litigation is expensive to bring, requiring numerous expert reports and fact collecting investigations. For example, the last three voting rights cases brought by the Native American Rights Fund each required upfront expenditures of over 1 million dollars.[503] Consequently, bringing suit is often prohibitively expensive and meritorious cases are left unpursued. However, as discussed in Part II, when these resources are marshalled and cases brought, Native Americans have successfully established voting rights violations on a numerous and consistent basis including violations due to disproportionate distances to travel to register and vote, unfairly burdensome identification requirements, and violations of the one person one vote standard through discriminatory apportionment schemes.

3. **Lack of a Traditional Mailing Address as a Barrier to Registration**

---

8. Whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group; and

9. Whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

[499] Voting rights cases may also include a Fifteenth Amendment claim but proving these claims requires a showing of discriminatory intent. *City of Mobile v. Bolden*, 446 U.S. 55 (1980). Rather than reaching whether Plaintiffs have succeeded showing this higher burden courts will often find violations of the Equal Protection clause or the VRA before reaching any Fifteenth Amendment claims.

[500] *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).

[501] *Id.* at 788; *Burdick v. Takushi*, 504 U.S. 428, 433 (1992).

[502] *Id.* at 434.

[503] *Brakebill v. Jaeger (Phase I)*, No. 1:16-cv-008, 2016 WL 7118548 (D.N.D. Aug. 1, 2016) sought attorneys' fees and litigation costs of $1,132,459.41.

Native voters are often barred from registering to vote when election officials insist that a physical address for their residence be provided.[504] For example, a tribal member in Washington explained, "the state mail-in process requires a physical address and many of our members only have post office box numbers, some of them only have a general delivery address. This requirement sets up another hurdle for our membership in our voting process."[505]

Another problem arises when a Native voter's post office box is located in a different county or state where the voter resides. In Montana, tribal members who get their mail through post office boxes in Lodge Pole have to use the address "Lodge Pole Route," their box number, followed by "Dodson, Montana," which is located in Phillips County. However, the locations of their residences are in Precinct 15, which is in Blaine County. When they attempt to register, Blaine County requires the "legal description" of their address, which they have difficulty obtaining.[506]

Montana law allows election administrators to deny voter registration based on geographical descriptions using the subjective standard in which it is determined that "the location of the elector's residence" may not "be easily determined."[507] That is frequently the case for non-traditional mailing addresses.

Compounding the risk that registration applications will not be processed or will be cancelled, state law provides for sending a confirmatory registration notice "by nonforwardable, first class mail."[508] If Native voters have changed their addresses, which commonly happens even when their physical residences remain the same, their registrations will be cancelled when the notices are returned as undeliverable. The Native voters will have no notice that they are not registered until they try to vote on Election Day. To the extent these state confirmatory procedures have a discriminatory impact on Native voters or otherwise violate the VRA, they are unlawful.[509]

Native voters living in Navajo Mountain, Utah use postal boxes located in their Chapter House, which has a Tonalea, Arizona zip code. The San Juan County, Utah clerk disqualifies the Utah residents trying to register to vote because of their Arizona postal address.[510]

In some counties, local election officials will create artificial addresses to allow voters to register and to receive election materials by mail or will create a "911 address" to make it easier for emergency services to locate them.[511] However, the 911 address can be useless if not used to

---

[504] San Diego Tr., Terria Smith, 55, 89-90.

[505] Portland Tr., Norma Sanchez T, 122.

[506] Bismarck Tr., Gerald Stiffarm, 79.

[507] Mont. Stat. § 13-2-208(1).

[508] Mont. Stat. § 13-2-207. Federal law may permit the use of nonforwardable mail in processing voter registration applications, subject to the certain qualifications. *See* 52 U.S.C. § 20505(d).

[509] *See* 52 U.S.C. § 20507(b)(1).

[510] Tuba City Tr., James Attakai, 25-26.

[511] Tuba City Tr., Patty Hansen, 62.

register to vote[512] or if voters have not received their physical address card when they complete their voter registration application.[513] On the Turtle Mountain Reservation in North Dakota, a large majority of Native voters do not know their residential 911 address.[514]

Transitory residences both on and off the reservation likewise pose barriers to voting. On the Lummi Reservation in Washington, the tribal housing authority has 400 rental units and "40 percent of those people change every month."[515] As one community organizer asked rhetorically, "How do you register to vote because your address is different every couple of months"?[516]

Some Native voters permanently live in Recreational Vehicles (RVs). However, election officials frequently treat the RVs as mobile vehicles that cannot be used for establishing an address. In northern California, many members of the Karuk Tribe and other tribes in the area reside in RVs or tents in one of the two national forests because of the lack of housing. RVs are considered temporary housing, even if people live in them for years. That makes it difficult for them to register to vote because they lack permanent addresses and have to use post office boxes located in another community, such as Yreka. They have not been able to determine to how these tribal members can participate in local elections. Tribal members are afraid that if they try to register to vote, they will be accused of voter fraud, as many members of the Hmong community were in Siskiyou County.[517]

Homeless tribal members in urban areas often are unable to register to vote. In Seattle, Native Americans comprise seven percent of the homeless despite only being one percent of the city's population.[518] Election officials in urban areas do not reach out to Native voters who are homeless to tell them that they can register to vote, such as by identifying the cross streets where they typically are located. That contributes to non-voting.[519] Other homeless Natives are told they cannot vote because they lack a permanent address.[520]

Although the State of Washington allows voters without traditional mailing addresses to register to vote, they still must provide a ballot mailing address that is certified as physically deliverable. However, that system often breaks down.

---

[512] Bismarck Tr., O.J. Semans, Sr., 221-22.

[513] Bismarck Tr., Sharon Stewart-Peregoy, 109.

[514] Bismarck Tr., Matt Campbell, 184.

[515] Portland Tr., Henry Cagey, 22; *see also* Tulsa Tr., Christina Blackcloud, 13 (describing the highly transitory nature of families in the Meskwaki Settlement in Iowa due to a housing shortage).

[516] San Diego Tr., Terria Smith 89.

[517] Sacramento Tr., Buster Attebery, 57; Sacramento Tr., Fatima Abbas, 60-65.

[518] Portland Tr., Mike Tulee, 210.

[519] San Diego Tr. Robin Thundershield, 132-33.

[520] San Diego Tr., Terria Smith, 87-88.

In Oregon, a Tribal leader reiterated that concern. "We have over 30 members in our enrollment rolls with general delivery addresses… I am concerned that these members may not have the ability to register or receive their election ballots." Without mail-in addresses for so many potential voters, the system fails those whose "whereabouts are unknown or that they are homeless."[521]

The lack of standardized postal service addresses on tribal lands causes many Native voters to be placed in the wrong voting precinct when they register to vote. That results in voters having their ballots rejected. For example, in the 2016 election, two Native voters living in the same house in Arizona were placed in different precincts. One was told they were in the wrong precinct and their ballot was rejected despite living at the same address.[522]

In some cases, election officials deliberately establish voting procedures that disqualify Native voters using non-traditional mailing addresses. In South Dakota, identification such as a driver's license is required to vote. However, the identification must have a mailing address in order to be accepted. This is problematic because many tribal members, such as those living on the Crow Creek Reservation in Buffalo County, do not have a mailing address and instead receive mail at a physical address.[523]

Similarly, a tribal member described similar efforts to disenfranchise Native voters in Montana. In 2015, "state and local governments attempted to suppress American Indian vote through vote-by mail" because tribal members lacked traditional mailing addresses. In 2017, Montana again attempted to use mail-in voting to suppress the Native vote, which was the swing vote for the special election to fill the vacancy created by Congressman Ryan Zinke's appointment as Secretary of the Interior. Ultimately, both attempts failed after tribal members serving in the Montana Legislature cobbled together coalitions to defeat them.[524]

4. Homelessness and Housing Instability as Barriers to Registration

Likewise, homelessness and near homelessness makes it difficult or impossible for Native Americans to register to vote. As discussed in detail in Part III, homelessness and near homelessness are pervasive throughout Native American lands and in urban areas Native Americans are disproportionately homeless.

The Councilwoman of the Colville Tribe in Oregon described how "[w]e have so many members that we are socially serving through our tribes that can't make ends meet or are homeless because there is no unemployment" and explained how "fifty-five more have addresses in care of our enrollment department, which means that our enrollment department has no mail-in address for them."[525] Homelessness is not confined to those who are unemployed either. Housing remains

---

[521] Portland Tr., Norma Sanchez, 122-23.

[522] Phoenix Tr., Sarah Gonski, 238-39.

[523] Bismarck Tr., Donita Loudner, 32.

[524] Bismarck Tr., Sharon Stewart-Peregoy, 92.

[525] Portland Tr., Norma Sanchez, 122-123.

scarce on Indian reservations. One employed tribal member lived "in a tent for the first five months of his employment because that's how hard it is to find housing."[526]

In Seattle, Native Americans comprise seven percent of the homeless despite only being one percent of the city's population.[527] Election officials in urban areas do not reach out to Native voters who are homeless to tell them that they can register to vote, such as by identifying the cross streets where they typically are located. That contributes to non-voting.[528] Even in states where a homeless person can register to vote if they use cross-streets, this process is not well known.[529]

Near homelessness is also common throughout Native American communities. The former Chairman of the Lummi Nation described how "residents come and go, so it's a big problem with that. We have . . .400 rental units that we have at Lummi, and I think 40 percent of those people change every month so it's a problem."[530] Moving from home to home is common among tribal members.[531] Some relationships can be tenuous, facilitating frequent moves since "one day they're living with an aunt and then there is a big falling out and they can't stay there any more so then they move in with their cousin."[532] When living near homeless it is difficult to register since "how do you register to vote because your address is different every couple of months maybe."[533]

Intergenerational living, when many people live in one home, is also common. This type of living with many voting age adults in a single household makes it difficult to register since "you only have one person or two people that have the bills in their name, now you have multiple adults that no longer have access to any kind of physical address to prove that they're living there."[534]

Keeping track of the near homeless is difficult and can be hard to understand from an outsider's perspective. At times, residence in a home is simply a person who is moving based on the good will of a distant family member or friend. At other times, residence in a home reflects deep familial ties even if upon first blush the relationships appear superficial. As a community member from the Tonalea Chapter of the Navajo Nation explained "[s]o a non-native stepping in saying, 'Well, let me help you identify where you live,' and trying to understand the dynamics of a family make-up—I mean, in my family my last name is Marks.... My brother and my sister have different last names, but they all are using my mother's address. So there are four different last names in that home. That would be confusing to try to explain to anybody who doesn't understand why people have a different last name, but they all have the same clan or they all come from the same person,

---

[526] Sacramento Tr. Fatima Abbas, 60.

[527] Portland Tr., Mike Tulee, 210.

[528] San Diego Tr., Robin Thundershield, 132-33.

[529] San Diego Tr., Terria Smith, 87-88.

[530] Portland Tr. Henry Cagey, 20-21.

[531] San Diego Tr. Terria Smith, 88.

[532] San Diego Tr., Kenneth Marks, 89.

[533] *Id.*

[534] Milwaukee Tr., Stephanie Thompson, 19.

especially as my family continues to put home sites next to my mother's home. Right?"[535] Crafting policy related to these homeless and near homeless dynamics requires close consultation with the tribe to untangle these different community needs.

5. Voter Identification Requirements Impacting Registration and Voting

Figure 16. Turtle Mountain tribal member Elvis Norquay receives a tribal ID in advance of the 2018 Election. Photo by Jacqueline De León

[W]e were the first here, and we were the last to get the right to vote. We were here for thousands of years. My tribe never moved. . . . I live a stone's throw away from where my great grandfather was born in a wigwam. . . . this is my community. And to have these things thrown at us . . . nitpicking of these IDs and all this kind of thing, it's like we have to prove that we're able to vote in a system that's being pressed on us."[536]

[535] Tuba City Tr., Darrell Marks, 123-125.

[536] Milwaukee Tr., Stephanie Thompson, 46-47.

For most Americans, obtaining an identification is a rite of passage. Getting a driver's license is a simple act of going to the local Department of Motor Vehicles (DMV), the complicated part is passing the driver's test. But for many Native Americans, this rite of passage does not exist. There are numerous reasons why some Native Americans do not have or need identification. As states increasingly move toward requiring identification to register or vote, however, Native Americans are being excluded from accessing the ballot box. Following implementation of voter ID laws, heavily Native American areas have seen a "sharp decrease in voters"[537] and reports of hundreds of ballot rejections because of a lack of identification.[538]

a. State Issued Identification Can Be Unreasonably Difficult for Native Americans to Obtain

Obtaining a state issued ID is unreasonably difficult for many Native American voters. State run DLS or DMVs are not present on reservation lands.[539] Consequently, Native Americans have to travel off the reservation in order to obtain a state issued ID. The distances to many of these DMVs is prohibitively far, with tribal members describing traveling over an hour to get a state issued ID.[540] For example, in Keshena, Wisconsin, tribal members describe having to drive an hour and 20 minutes to the nearest DMV.[541] In North Dakota, tribal members must travel an average of an hour to reach the nearest DLS, with the average Standing Rock Sioux member having to travel over an hour and a half to reach the nearest site.[542]

Even when a DMV may be located closer, tribal members describe having to make a "60 to 80, 90 mile drive" to access DMVs that are open on a consistent basis that provide full services.[543] One anecdote describes the burdens one voter had to face to try and get obtain an ID:

> … for four months she was taking a woman because there is a DMV that's in the next town over, it's open one day a week. And so you kind of – you have to make that one day trip over, about 20 miles away, in order for you to go there the one day a week, otherwise you miss your opportunity and then you have to drive a substantial amount away in order to get to the next DMV that's open more regularly. So she had been taking this woman for four months, taking this woman down to this DMV office [located in Minocqua, Wisconsin] that's open one day a week. They continuously were having computer issues. So after four months of trying to get this woman to get her ID so she was able to register early, she ended

[537] Phoenix Tr., Steve Titla, 245.

[538] Phoenix Tr., Solveig Parson, 19.

[539] Milwaukee Tr., Paul DeMain, 72-73.

[540] Milwaukee Tr., Stephanie Thompson, 23-24.

[541] Milwaukee Tr., Stephanie Thompson, 23.

[542] Professor Gerald Webster, An Analysis of the Effects of North Dakota's Voter Identification Law on Potential white and Native American Voters, Appendix, 22

[543] Milwaukee Tr., Paul DeMain, 72-73.

> up kind of throwing her hands in the air and took this woman – like they had to take an entire day trip to get her to the nearest DMV which was open and available during the times that she had. There's a lot of stories like that that I keep running into.[544]

Not having a nearby DMV can impact the ability for an individual to meet an identification requirement to vote. For example, when a disabled tribal member attempted to vote she was – erroneously – told that she could not vote with an identification that had recently expired and she was told by the poll worker to go to a DMV to update her ID. The nearest DMV was over an hour away and the disabled woman did not end up voting.[545]

For impoverished Native Americans, the cost of an identification is often prohibitively expensive. Even nominal fees for an identification can present a barrier.[546] In some states, drivers' licenses are notably expensive. In Washington State the first driver's license cost is $89 and a renewal is $54. Though "these costs seem modest to some, they create an obstacle to tribal members who simply cannot afford it" since many Native Americans "live in a rural area where the unemployment is high and opportunities are few."[547]

Moreover, drivers' licenses are not required for every day life, so expenditure on an identification is not a priority. One tribal leader described how their members "don't want to pay for an ID because a lot of them don't even have a bank account. We have our own bank system, so with their Tribal ID, they can cash any check that they're given through our social system with that. So why would they pay for other thing—the other ID if they don't have a reason for it."[548]

Obtaining a state ID usually requires underlying documentation. One advocate described how "we really oppose ID" because "[w]e see many elders struggling to get a birth certificate, to get a driver's license" She detailed how an elderly tribal member's birth certificate was not usable because it did not have her name on it since "her birth certificate was in the day when they named her 'Baby Girl"[549] Simply put, "the types of ID initially listed as accepted as terms of proof did not take into consideration the types off documents that are easily accessible to Native American voters."[550] As a consequence "Native American voters had a very difficult time obtaining a photo identification."[551]

---

[544] Milwauke Tr. Stephanie Thompson, 23-24.

[545] Milwaukee Tr. Stephanie Thompson, 26-27.

[546] Sacramento Tr., Alex Padilla, 109.

[547] Portland Tr., Norma Sanchez, 124.

[548] Portland Tr., Norma Sanchez, 157-158.

[549] Isleta Tr., Andrea Weahkee, 197.

[550] Phoenix Tr., Steve Titla, 245.

[551] *Id.*

Native American names may seem alien to non-Natives, making it more likely that there will be error on their identification card. One witness explained the difficulty facing one voter who:

> had to vote provisionally at Komatke due to a misspelling of her name on her voter ID card. The State had sent her an ID card with her name incorrectly spelled. She had called to address this issue, gotten another misspelling on the second ID card. Called in again. Gotten a correct spelling on her ID card, but then gone into the polling place and poll workers were not able to find her on the registration. So she had to vote provisional.[552]

Community activists reported poll workers erroneously turning voters away or forcing them to use provisional ballots, especially when acceptable forms of alternative identification were used. For example, one activist in Montana described how "through misinformation the poll workers weren't accepting mail as a form of identification, which is an acceptable form" and another required "excessive amounts of identification, when all that was needed is the last four digits of the voter's social security number." In Arizona, voters report that "alternative forms of ID were not aggressively being asked for" resulting in eligible voters being turned away and another observed how "no list of acceptable forms at the polling station that was readily available. When asked, the poll workers seemed to fumble around and look for what kind of IDs would actually be acceptable.[553]

Witnesses also explained how outstanding fines and fees keep the DMV from issuing identification cards making it "[s]o they can't even go in and get a driver's license, so they can register to vote, so that's a barrier."[554]

b. Tribal IDs Are Not Readily Accepted As Qualifying Identification

Tribal IDs are not automatically accepted for registration and voting purposes, especially if the tribal member has a tribal ID card issued outside of the state. For example, there is "resistance" to accepting Cherokee IDs in Texas.[555] Even in states that accept tribal IDs, not all tribes issue tribal IDs so a tribal member would still need to obtain another form of qualifying ID in order to vote.[556] Not all states include tribal IDs when crafting their ID laws. The Secretary Treasurer of the Mille Lacs Band of the Ojibwe explained how, even though tribal IDs were now accepted in Minnesota, "there was a period where tribes had to fight the Secretary of State for their tribal ID cards to be valid for voting."[557] At the time of the field hearings, Iowa was not accepting tribal IDs.[558]

---

[552] Phoenix Tr., Solveig Parsons, 13.

[553] Phoenix Tr., Kris Beecher, 53.

[554] Portland Tr., Carol Evans, 192.

[555] Tulsa Tr., Chuck Hoskin Jr., 128-129.

[556] Isleta Tr., Amber Carrillo, 233.

[557] Milwaukee, Caroline Beaulieu, 121.

[558] Tulsa Tr., Christina Blackcloud, 9.

Following advocacy by tribal members, there was a legislative fix and Iowa began accepting tribal IDs.[559] Furthermore, previously having a tribal ID be recognized as an acceptable form of ID is no guarantee a state will continue to accept tribal IDs. For example, one witness described the uncertainty faced by tribes:

> so they weren't accepting tribal IDs or the enrollment paperwork up until two years ago, and then they began accepting them, but now they're going back to thinking they won't be accepting them because some of the ID requirements have changed on the federal level. So they're now telling the tribe that they need to update their ID equipment, and we need to purchase this like machine that costs thousands of dollars in order for our tribal IDs to be valid and be able to be used in that way.[560]

Even if a state accepts a tribal ID, states may also require the identification to contain certain information in order to be deemed valid. For example, in Nevada the state was resistant to accepting the Pyramid Lake Paiute Tribe's IDs until the tribe advocated for their inclusion and showed the state that the IDs contain the same security features as Nevada.[561] Additionally, many tribal IDs do not contain expiration dates since "we don't quit being Indian at some particular point" and laws that require an expiration date on an ID would exclude otherwise qualifying IDs.[562] Updating tribal IDs to contain specialized information or security features is expensive[563] and may be unattainable to impoverished tribes.

Tribal IDs can be unfamiliar outside of tribal communities. One community member described taking his mother to a bank when the bank manager dismissed her tribal ID stating "I need a real form of identification" which the tribal member took as an insult.[564]Similarly, multiple witnesses reported poll workers unfamiliar with tribal IDs rejecting tribal IDs as an acceptable form of identification regardless of whether or not tribal ID was supposed to be accepted under state law.[565] One community organizer explained how "[a]s Native American people we were able to go to the polls with our tribal ID. There's been a couple times where there's been polls that aren't aware that they can utilize that, so they've been turned away."[566] The questioning of a tribal ID by a person in a position of authority can also be insulting and embarrassing to the tribal member. One tribal member described how upon presentation of tribal ID the poll workers would remark "Don't you have anything else?" and they would "give it back to you, and they don't want to accept your

---

[559] *See* State of Iowa, Iowa Secty. of State, Secretary Pate announces use of Tribal IDs as a valid form of identification for elections (Aug. 21, 2018), *available at* https://sos.iowa.gov/news/2018_08_21.html.

[560] Milwaukee Tr., Stephanie Thompson, 30-31.

[561] Milwaukee Tr., Vinton Hawley, 147.

[562] Milwaukee Tr., Paul DeMain, 78.

[563] Milwaukee Tr., Stephanie Thompson, 30-31; Tulsa Tr., Chuck Hoskin Jr., 128.

[564] San Diego Tr., Kenneth Ramos, 63.

[565] Isleta Tr., Laurie Weahkee, 213; Phoenix Tr., Angela Willeford, 164; Milwaukee Tr., Stephanie Thompson, 17; Phoenix Tr., Steve Titla, 246.

[566] Phoenix Tr., Angela Willeford, 164.

form of identification, although that is, in fact, a government form of identification."[567] Outsiders observing the polls in Wisconsin were "appalled seeing how many Native people were being turned away" and felt "it wasn't with reason. They were being told they couldn't use their tribal IDs. . ."[568] "[P]eople just don't know at the county level what they can do, what they can't do, what's acceptable, what's not."[569]

As states increasingly move to online voter registration these systems are not always inclusive of tribal IDs, even if a tribal ID would be acceptable to register in person. Instead, the online forms may only accept drivers' license numbers and do not include an option for a tribal membership number.[570] As one member of the Colville Tribe in Washington explained, this type of exclusion is "really tough for a lot of our tribal members. They can register online, but you have to have a Washington State driver's license to do that. Many of our tribal members do not have a Washington State driver's license. The only I.D. some them may have is their tribal membership I.D."[571]

c. Identification Requiring an Address Will Exclude Native Americans

As one witness bluntly assessed, requiring an address on an identification "screws everything up."[572] As discussed, Native Americans often lack an address for a variety of reasons such as homelessness, near homelessness, or an unaddressed home. Given the housing insecurity and lack of regular postal service, many Native Americans use PO Boxes to conduct their affairs and their tribal IDs will contain no address or PO Box instead of a residential address.[573] If a current residential address is required on the identification the ID may become quickly out of date since Native Americans "move around quite a bit and sometimes we'll forget to update our information they try to go vote and then they have those challenges."[574]

The Governor of the Gila River Indian Community located in Arizona described in detail how the lack of address on the reservation in concert with the requirement of an identification led to the disenfranchisement of his community:

> The first issue with the voter ID law that the community finds is that our Tribal IDs do not include an address. The second issue is that individuals living on the Pinal County portion of the reservation do not have standard street addresses as well. Tribal members do not receive mail at their homes, but must pay for and obtain a Post Office box. Tribal members can either use their Post Office box or non standard address on their Arizona Identification. The third issue is that individuals

[567] Isleta Tr., Laurie Weahkee, 213.

[568] Milwaukee Tr., Stephanie Thompson, 17.

[569] San Diego Tr., Terria Smith, 84.

[570] Phoenix Tr., Travis Lane, 87.

[571] Portland Tr., Joe Pakootas, 191.

[572] Bismarck Tr., Donita Loudner, 32.

[573] Tulsa Tr., Chuck Hoskin Jr., 131.

[574] Phoenix Tr., Verlon Jose, 154; Phoenix Tr., Stephen Lewis, 130-31; Bismarck Tr., Donita Loudner, 32.

> may change mailing addresses or move between elections, which can impact the addresses on a person's ID. In 2012 the voter ID law was strictly enforced on the Pinal County portion of the registration. Many Gila River voters were turned away from the polls when the voter's were turned away from the polls when the voter's address did not match the voter roles... The community subsequently learned that since our Tribal Citizens of Pinal County lacked traditional addresses, the addresses used by Tribal members are not compatible with the voter registration system used by the county. Thus, the County reassigned all our voter's physical addresses to be the service centers where they vote . . . and resulted in the voters again being denied a regular ballot.[575]

Not only were tribal members who did not have traditional addresses tasked with having IDs with addresses on them, the addresses that they did use were incompatible with the state's voter registration system. There was no conceivable way for these tribal members to comply with registration prior to the election.

d. Identification Requirements Have a Chilling Effect on Native Communities

Given the multitude of ways voter ID laws can lead to the disenfranchisement of Native Americans, it is no surprise that not one witness spoke in favor of voter identification laws. Rather, identification laws are seen as "a solution in search of a problem . . . imposed without a shred of real evidence that here has been voter fraud."[576] Identification laws pose a significant burden on Native American voters, and are viewed as "hard and intimidating."[577] Due to the misinformation and intimidation around voter ID, one community member advocated for increased education in the form of "big signs . . . right there at the polling stations of the acceptable forms of identification that you can use to prove you are who you say you are, and prove that you're on the registration."[578]

e. Case Study: North Dakota's Voter ID Law and Native American Disenfranchisement

Given the disproportionate burdens voter ID laws impose on Native Americans, voter ID laws pose a risk of being utilized to disenfranchise Native American communities. In North Dakota, a voter ID law combined with a residential address requirement led to the widespread disenfranchisement of Native Americans and continues to impose severe burdens on their ability to vote.

---

[575] Phoneix Tr., Stephen Lewis, 130-31.

[576] Tulsa Tr., Chuck Hoskin Jr., 128.

[577] Bismarck Tr., Donita Loudner, 32.

[578] Phoenix Tr., Kris Beecher, 54-55.

North Dakota has had voter ID laws in place since 2004.[579]. It required voters to present identification, but had fail-safe mechanisms that allowed a voter to cast their ballot if a poll worker could vouch for their identity or the voter signed an affidavit, under penalty of perjury, that he or she was qualified to vote.[580] In 2011, the North Dakota legislature considered enacting a new voter ID law that would have limited the valid forms of voter ID and would have eliminated the fail-safe affidavit system and only contained a limited form of the voucher system.[581] Throughout consideration of the bill, legislators on both sides of the aisle raised concerns about disenfranchisement.[582] Additionally, the legislature was informed during these deliberations that there were Native Americans that lacked residential addresses and even if they did have an address, that address may not be known to them.[583] The legislature ultimately decided, 38-8, not to enact the proposed changes to the voter ID laws given the concerns about disenfranchisement.[584]

The next year, Democrat Heidi Heitkamp unexpectedly won the 2012 election for US Senate by less than 3,000 votes.[585]. The local and national media credited her success to the votes of the Native American community. [586] After Senator Heitkamp's win the Republican led legislature quickly changed course. In the legislative session immediately following Senator Heitkamp's victory, the North Dakota legislature greatly restricted the acceptable forms of voter identification which also required a residential address, and eliminated the two fail-safe mechanisms – vouchers and affidavits. [587] Despite the concerns about disenfranchisement raised the immediately preceding legislative session, and a lack of instances of voter fraud in the 2012 election, the legislature passed

---

[579] Native Am. Rts. Fund, *North Dakota Again Passes Discriminatory Voter ID Law* (May 9, 2017), *available at* https://www.narf.org/north-dakota-voter-id-law/.

[580] *Id.*

[581] *Hearing Minutes on H.B. 1447 Before H. Political Subdivision Comm.*, 62nd Leg. Assemb. 1 (N.D. Apr. 12, 2011).

[582] *Hearing Minutes on H.B. 1447 Before H. Political Subdivision Comm.*, 62nd Leg. Assemb. 1 (N.D. Apr. 12, 2011) (statement of Sen. Ronald Sorvaag, S. Comm. On Political Sub"[w]e don't want people voting if they are not suppose [sic] to vote but we don't want to disenfranchise people either by making the process to [sic] cumbersome.").

[583] *Hearing Minutes on H.B. 1447 Before H. Political Subdivision Comm.*, 62nd Leg. Assemb. 2 (N.D. Apr. 20, 2011) (statement of Jim Silrum "We are also going to need to work with the tribal governments to make sure because a couple of our counties that have reservations in the state have not completed their 911 addressing. Even if they have the residence of those counties don't know what their 911 address is.).

[584] *Brakebill* First Amend. Compl. ¶ 37, ECF No. 77.

[585] *See* Jim Fuglie, *United States Senator Mary Kathryn (Heidi) Heitkamp. How About That?*, The Prairie Blog (Nov. 9, 2012), *available at* http://theprairieblog.areavoices.com/2012/11/09/united-states-senator-mary-kathrynheidi-heitkamp-how-about-that/; AnnMaria De Mars, *Native Americans: Why Heidi Heitkamp Won & Nate Silver Was Wrong?*, AnnMaria's Blog (Nov. 19, 2012), *available at* http://www.thejuliagroup.com/blog/?p=2808; *American Indian Voters and Indian Organizers Gave N.D. Senate Edge to Democrat Heidi Heitkamp* (Nov. 8, 2012), *available at* https://www.dailykos.com/stories/2012/11/8/1158417/-American-Indian-votersand-Indian-organizers-gave-N-D-Senate-edge-to-Democrat-Heidi-Heitkamp.

[586] *Id.*

[587] *See* N.D. Cent. Code § 16.1-05-07.

the new restrictive requirements.[588] The legislature never analyzed whether the Native American voters it was told lacked addresses in 2011 still lacked addresses– indeed, those Native American voters continue to lack addresses to this day. Voters were required to present a residential address on one of the following acceptable forms of ID: a North Dakota Driver's License or non-identification card, a tribal government ID, or an alternative form of identification prescribed by the Secretary of State, which included a student identification certificate or a long-term care identification certificate.[589] As expected, the impact on the Native American vote in 2014 was severe. In 2015 North Dakota amended voter ID laws, even further restricting the forms of acceptable ID.[590]

In 2016, NARF filed suit on behalf of seven Turtle Mountain plaintiffs that were disenfranchised by the laws, many of whom did not possess an ID with a residential address and were turned away from the 2014 election despite being qualified voters. The U.S. District Court found that the law violated the U.S. Constitution.[591] In his decision, Judge Hovland stated, "it is clear that a safety net is needed for those voters who simply cannot obtain a qualifying ID with reasonable effort."[592]

Undeterred, the next year the Legislature again passed another voter ID law that still required that the voter possess one of the few forms of qualifying ID, it just allowed for supplemental documentation and a grace period where the voter could return with qualifying ID. It did not make it easier for Native Americans to obtain ID or get rid of the residential address requirement. The Court again granted an injunction barring the State from enforcing the newest version of the voter ID law due to the unfair burdens placed upon Native American voters, especially those that did not have residential addresses they could present on their IDs.[593] The State filed an appeal to the Eighth Circuit seeking an order to stay the District Court's injunction which the court granted in advance of the 2018 election.[594] In making its decision the Court stated "even assuming that some communities lack residential street addresses, that fact does not justify a statewide injunction that prevents the Secretary from requiring a form of identification with a residential street address from the vast majority of residents who have residential street addresses."[595] On October 9, 2018, the

---

[588] Brakebill First Amend. Compl. ¶ 50-52, ECF No. 77.

[589] *See* N.D. Cent. Code § 16.1-05-07.

[590] *Brakebill* First Amend. Compl. ¶ 87-89, ECF No. 77.

[591] *Brakebill v. Jaeger*, No. 1:16-cv-008, 2016 WL 7118548, at *13 (D.N.D. Aug. 1, 2016) (order granting preliminary injunction).

[592] *Id.* at *10.

[593] *Brakebill v. Jaeger*, No. 1:16-cv-008, 2018 WL 1612190 (D.N.D. April 3, 2018) (order granting second preliminary injunction).

[594] *Brakebill v. Jaeger*, 905 F.3d 553 (8th Cir. 2018).

[595] *Brakebill*, No 18-1725, Slip. Op. at 7.

Supreme Court denied the emergency appeal.[596] However, a dissenting opinion from Justice Ginsburg and Kagan notes that there was a significant risk of disfranchisement should the State be permitted to enforce the ID requirements.[597]The difficulty Native Americans face obtaining an ID and the lack of residential addresses on homes has left the Native American vote in North Dakota vulnerable to attack. Given this unfairness, litigation is ongoing, including an additional suit brought by individual plaintiffs, the Spirit Lake Tribe, and the Standing Rock Sioux Tribe[598]

6. **Unequal Access to Online Registration**

According to the National Conference of State Legislatures, as of October 2018, "a total of 37 states plus the District of Columbia offer online registration, and one other state (Oklahoma) has passed legislation and is currently phasing in implementation of their online registration."[599] Cost savings is widely touted as a reason for states to shift to all-online or predominately-online models. For example, Arizona reported in 2010 that its per-registration costs dropped from 83 cents for paper applications to 3 cents for online registration.[600] However, an increasing focus on online voter registration often comes at the expense of Native Americans who lack access to it.

Having online voter registration can be a good option if it offers more opportunities for people to register to vote. "But if you have that as an exclusive option or a primary option … it would exclude those that do not have readily available access to the Internet. And we know these people are disproportionately low income, older, or disadvantaged communities, in other words, rural communities. All of which we're talking about in the case of rural Indian reservations."[601] As California Secretary of State Alex Padilla explained, "If you have a weak or no Internet connection, for that matter, which we see a lot in rural area and other low income areas, accessing important election information from the Secretary of State's Web site or a county elections office Web site can be a challenge."[602]

Before states move to an online voter registration system, it is critical to ensure that every tribal community is connected to the Internet. The data from Arizona, which has led the move to online voter registration, illustrates the disparate impact of technological barriers to Native voters. In 2016, about 40 percent of all voter registrations in Arizona were done online. But only 6.7 percent of Native Americans have registered online because of their lack of access to broadband.[603]

---

[596] *Id.*

[597] *Id.*

[598] *Spirit Lake Tribe v. Jaeger*, No. 1:18-cv-222, 2018 WL 5722665, at *1 (D.N.D. Nov. 1, 2018) (order denied temporary restraining order).

[599] National Conference of State Legislatures, Online Voter Registration Overview (Oct. 10, 2018), *available at* http://www.ncsl.org/research/elections-and-campaigns/electronic-or-online-voter-registration.aspx.

[600] *Id.*

[601] San Diego Tr., Melissa Rogers, 37.

[602] Sacramento Tr., Alex Padilla, 108.

[603] Phoenix Tr., Natalie Landreth, 224.

As Congresswoman Debra Haaland explained, "[Y]ou can register to vote online and if we don't give … broadband access to all of our rural communities, which many Native American communities are, then we shoot ourselves in the foot by taking away that opportunity for them to even register to vote…"[604]

7. Unequal Access to In-Person Voter Registration

The barriers that geography and distance pose to reaching county seats limit opportunities for Native Americans to register to vote.[605] In some cases, the distances do not seem great. The roundtrip driving distance from the Meskwaki Settlement in Iowa to the closest DMV office is 20 miles.[606] However, even those seemingly smaller distances limit access to tribal members lacking transportation.

The distances are much greater for other Native voters. In Michigan, many Chippewa voters have to travel as far as 100 miles roundtrip to register to vote.[607] In South Dakota, the Crow Creek Reservation comprises about 90 percent of Buffalo County. Nevertheless, to register to vote or run for office, tribal members have to drive as far as 180 miles roundtrip to get to Gann Valley, which has a population of only about a dozen non-Natives.[608]

Many Native voters in the Southwest face similar distance barriers to register. The Navajo Nation has 31 Chapter Houses in Apache County, Arizona. The farthest Chapter is 220 miles away from the county seat. The average distance to the Chapter Houses is about 50 miles. The absence of accessible registration sites on tribal lands greatly inhibits Navajo voter participation in non-tribal elections.[609]

8. Unequal Funding For Voter Registration Efforts on Tribal Lands

Funding for most voter registration initiatives is discretionary. Unfortunately, this means Native Americans are rarely on the receiving end of registration efforts. Some states leave funding and implementation of voter drives entirely up to counties.[610] However, receiving funding from either states or counties can be difficult. Fraught relationships between states, counties, and reservation communities, where states and counties do not believe reservation communities are entitled to funding, can leave reservation communities out of any funded registration efforts. One councilwoman explained how tribal members in her community expected the tribe to secure government funding to assist them in voting efforts. However, she described how acquiring this

---

[604] Isleta Tr., Debra Haaland, 190-91.

[605] *See supra* notes 113-50 and accompanying text.

[606] Tulsa Tr., Christina Blackcloud, 11.

[607] Milwaukee Tr., Aaron Payment, 163.

[608] Bismarck Tr., Donita Loudner, 23, 43.

[609] Phoenix Tr., Edison Wauneka, 93.

[610] Portland Tr., Valdez Bravo, 202.

funding was unlikely since her people did not "understand" just "how the government and states look at us if we fight to get equal funding."[611]

Often, counties may not even engage in additional registration initiatives leaving registration to civic engagement groups or political parties.[612] According to Native American Voting Rights Coalition Survey results, however, "most respondents were not aware of any voter registration drives in their community. There were generally low levels of activity by third-party groups to conduct registration drives, with just 29% of Arizona and 33% of New Mexico respondents indicating awareness of third party registration drives. Slightly higher numbers were recorded in South Dakota (44%) and Nevada (43%)." [613] One witness described "an elderly woman, I would say maybe in her sixties, and she told me, she said 'All of my life, I've lived here at the Pueblo, and I've lived here in this house for many, many years, and this is the first time ever, ever at Isleta that I've ever had anyone ask me if I ever wanted to register to vote.'"[614]

Ultimately, registration outreach in Native communities is few and far between. New Mexico Secretary of State Oliver called for systemic change since "[t]oo often, we see the work that is done to try to educate and register and increase voter participation in our tribal communities as these sort of one-off things right before an election…These things need to happen consistently, and we have to be playing the long game. "[615] Community activists echoed these sentiments, recognizing a need for registration opportunities "every time there is a tribal event."[616] However, such efforts require resources which activists acknowledged were lacking.[617]

9. Restrictions on Obtaining and Turning in Multiple Voter Registration Forms

State and local limits on the number of voter registration applications that can be obtained or returned are common tactics used to suppress Native voting.

In *Bone Shirt v. Hazeltine*, the federal court found "credible" the testimony of Native organizers whose registration efforts in South Dakota were suppressed by the non-Native county auditors who run local elections. In Bennett County, an auditor only allowed an Oglala Sioux tribal member to pick up ten voter registration applications and instructed unused ones to be returned. The Fall River County auditor limited to twenty the number of applications a Pine Ridge tribal member could pick up. State law did not impose those limitations, which were done at the whim of local elections officials.[618]

---

[611] Portland Tr. Norma Sanchez, 228.

[612] Portland Tr. Valdez Bravo, 202.

[613] NAVRC Report, *supra* note 5, at 5.

[614] Isleta Tr., Helen Padilla, 46.

[615] Isleta Tr., Maggie Toulouse Oliver, 122.

[616] Isleta Tr. Linda Yardley, 166.

[617] Tuba City Tr., James Attakai, 28.

[618] 336 F. Supp.2d 976, 1025-26, 1036 (D.S.D. 2004).

Similar tactics have been used in Montana. In *Windy Boy v. Big Horn County*, Native candidates and outreach workers were restricted in the number of voter registration cards they could get. One Native candidate was denied registration cards altogether by a county official and had to obtain them at the State Capitol. A tribal member testified that he was "given only a few voter registration cards and when he asked for more was told that the county was running low." He then asked his wife, who is non-Native, to go into the county building and request the cards; she was given 50 more cards than he received. At least one election administrator "numbered cards given to Indians and told them they could not get more until the numbered cards were returned," with evidence that no similar restriction was placed on non-Natives.[619]

These barriers persist today. A Montana community organizer said that Natives continue to be "hassled" when they return what election officials believe are too many completed voter registration cards. In 2014, they were told that they were restricted to bringing in no more than 70 completed voter registration cards at one time. In 2016, election officials told them that number was reduced to 40. Many poll workers told Native organizers not to bring in more voter registration cards than the poll workers could handle.[620]

NARF experienced similar difficulties in 2016 in Elko County, Nevada. The Duck Valley Shoshone-Paiute tribe, located in the northern part of the county straddling the Idaho border, requested assistance in a voter registration drive. The county clerk limited the number of applications provided for those efforts, requiring the use of numbered applications. In sharp contrast, the clerk in Owyhee County, Idaho encouraged Duck Valley tribal members who lived on the Idaho portion of the reservation to print or photocopy an electronic copy of the state voter registration form; no numbered original was required.

10. Denial of Voter Registration Opportunities Because of Previous Convictions

Crimes that occur on the reservation do not fall within the criminal jurisdiction of states. While tribes retain jurisdiction over their own members for some criminal offenses, the Major Crimes Act, 18 U.S.C. § 1153, lists and defines most of the crimes over which the federal government has jurisdiction in Indian country. Consequently, Native American defendants often face federal charges for offenses that may have been adjudicated less harshly in the tribal system or state system. As the Sentencing Commission observed, "Congress' decision in 1990 to make the federal sentencing guidelines applicable to the Major Crimes Act and other offenses arising in Indian country stimulated concerns that Native American defendants would be treated more harshly by the federal sentencing system than if Indian defendants were prosecuted by their respective states for the same or similar offenses."[621]

---

[619] 647 F. Supp. 1002, 1008 (D. Mont. 1986).

[620] Bismarck Tr., Erica Shelby, 140, 145.

[621] United States Sentencing Commission Tribal Issues Advisory Group, Report of the Tribal Issues Advisory Group, p. 17, May 16, 2016, *available at* https://www.wsj.com/articles/federal-panel-reviewing-native-american-sentencing-1429608601.

Additionally, "[o]ne of the main issues on felonies especially is that there are crimes that, yeah, those are felonies. That's murder, sex assault, that's arson, that's assault with a deadly weapon, something like that. But then there are a number of other crimes. . . [t]hey could either be charged as a misdemeanor or as a felony."[622] Witnesses allege that Native Americans are more likely to be charged more severely. For example, one witnesses described how one community member received eight years for shooting a dog that had bitten multiple children including his own.[623] In 2015, federal judges, prosecutors, and tribal leaders urged a federal review by the United Sentencing Commission to investigate the concern that Native Americans living on reservations faced disproportionately harsher punishments than other racial groups for the same crimes.[624] While the conclusions of that report were inconclusive because "data currently does not exist to conduct a meaningful disparity analysis" the report nevertheless acknowledged that "there is a widespread perception among Native Americans, many federal prosecutors, federal defenders, and some federal and state judges that Indians are subject to sentencing disparities."[625]

Native Americans also make up a disproportionate portion of the federal caseload. According to a 1999 seminal report conducted by a Bureau of Justice Statistics. Native Americans are incarcerated at a rate 38% higher than the national average.[626] According to US Sentencing Commission data, in 2013, Natives constituted 57.5% of the caseload in South Dakota but only 8.5% of the total population.[627] Other states with especially high caseloads of Native Americans included Montana (33%), North Dakota (25%), Minnesota (14%), Oklahoma (13%).

Witnesses reported high rates of felony convictions among their communities.[628] As a result many Native Americans are restricted, or believe they are restricted, from voting. Felony disenfranchisement rules vary widely between states. Some states such as California allow for voting rights to be restored automatically after completion of a sentence including prison and parole, while others like Iowa permanently disenfranchise anyone with a felony conviction unless the individual has voting rights restored by the government.

---

[622] Phoenix Tr., Claude Jackson, 203-204.

[623] Sand Diego Tr. Terria Smith, 55-56.

[624] Dan Frosch, *Federal Panel Reviewing Native American Sentencing*, WALL ST. J. (Apr. 21, 2015), *available at* https://www.wsj.com/articles/federal-panel-reviewing-native-american-sentencing-1429608601.

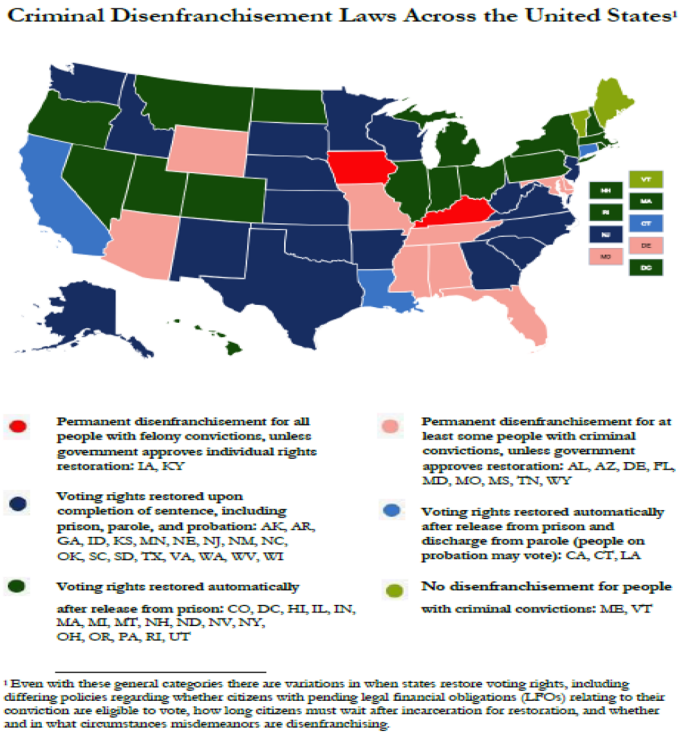
[625] U.S. Sentencing Comm'n Tribal Issues Advisory Group, Report of the Tribal Issues Advisory Group 15 (May 16, 2016), *available at* https://www.wsj.com/articles/federal-panel-reviewing-native-american-sentencing-1429608601.

[626] Lawrence Greenfield & Steven K Smith, Bureau of Justice Statistics American Indians and Crime (Feb. 1999), *available at* https://bjs.gov/content/pub/pdf/aic.pdf.

[627] U.S. Sentencing Comm'n, Quick Facts Native Americans in the Federal Offender Population, 2013, *available at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Native_American_Offenders.pdf.

[628] San Diego Tr., Terria Smith 56.

Figure 17. Criminal Disenfranchisement in the U.S.
Graphic by Brennan Center for Justice at NYU School of Law[629]



Today, widespread confusion about the eligibility of former felons to vote persists throughout Native American communities.[630] As one community member explained "in my community . . . there are a lot of folks who have had felony convictions that reside on the reservation who believe that they are no longer permitted to vote, that they've lost their voting rights due to their felony conviction. However, I have just learned, through this process, that that is misinformation. That you actually are permitted to vote after you're off of probation. I had no idea about this. I'm very,

[629] Brennan Ctr. for Just., Criminal Disenfranchisement Laws Across the United States (updated May 31, 2019), *available at* https://www.brennancenter.org/sites/default/files/legal-work/2019.5.31_Criminal_Disenfranchisement_Map.pdf.

[630] Sacramento Tr., Thomas Eugene, 40.

very angry. Because a lot of folks are disenfranchised with felony convictions on a reservation legitimately and then there is some instances where it's not so legitimate."[631]

Formerly incarcerated individuals also internalize shame that keeps them from voting. A tribal member describes how his father, who became college educated after serving time, was "affected" by being a felon and never voted again.[632] Many "veterans that have been registered as a felon because they had issues with PTSD" are also "embarrassed to come forward" to vote."[633] Another formerly incarcerated felon that was eligible to vote went in to the polling location to vote for the first time when someone "kind of made a comment about his criminal history, and he felt embarrassed and shamed, walked out the door and never voted."[634]

Poverty also keeps formerly incarcerated individuals from completing their sentences. Even Natives who have "slight records. . . are not able to take care of their probationary items or their fines" which "exempts them from being able to gain voter access"[635]

The belief that a felony conviction disqualifies a voter from ever voting again is so pervasive it even effects tribal elections since "you think, well, I can't vote ever. You don't realize that you can vote in your own Tribal Election."[636]

11. Rejection of Voter Registration Applications

It is commonplace throughout Indian Country for election officials to reject or fail to timely process voter registration applications. In some cases, the applications are rejected because Native voters have non-traditional mailing addresses that do not conform to the physical addresses required for voter registration.[637] In others, the applications do not include mandated information for voter identification laws, again often due to addresses that rely upon rural routes, general delivery, post office boxes, or even geographical descriptions. Voter identification laws can have a particularly devastating impact on the political participation of Native voters.[638]

Determination of whether a voter registration application will result in registration often depends on the subjective judgments made by the election officials processing them, such as what is contemplated under the Montana statute discussed earlier.[639] The National Voter Registration Act

---

[631] San Diego Tr., Terria Smith, 56.

[632] Phoenix Tr., Claude Jackson, 206-207.

[633] *Id.*

[634] Milwaukee Tr., Stephanie Thompson, 23.

[635] Portland Tr., Mike Tulee, 209.

[636] Phoenix Tr., Claude Jackson, 183.

[637] *See supra* notes 235-52, 505-24 and accompanying text (discussing barriers that non-traditional mailing addresses pose to Native voting).

[638] *See supra* notes 536-98 and accompanying text (discussing barriers that voter identification requirements pose to Native voting).

[639] *See* Mont. Stat. § 13-2-208(1).

(NVRA) mandates that "the appropriate State election official … send to each applicant … the disposition of the application."[640] However, far too often that does not occur, or the notice is sent by nonforwardable mail so the applicant never receives it.

Community organizers on tribal lands have said that even if Native applicants are notified that their application contains errors, many will not follow up with the elections office to resolve them. For example, during voter registration drives before each election, an organizer said that approximately 50 registration cards are rejected. Of those 50 rejected cards, half of the Native applicants will not respond.[641] Their failure to address the issue often rests on the barriers that generally impede Native voter participation: time and distance to registration offices, lack of transportation, or even the cost of a postage stamp.

The failure of state Departments of Motor Vehicles (DMVs) to timely transmit voter registration applications also results in vote denial. Several cases or pre-litigation complaints have been brought against state agencies in Indian Country for violating Section 5 of the NVRA.[642] That Section requires transmission of completed voter registration applications to the state elections office within ten days, or no later than five days if the application is accepted within five days before the registration deadline.[643]

Violations of Section 5 persist. For example, tribal members in Washington State have reported that voter registration applications submitted to DMV locations in Skagit County and Snohomish County are not being timely processed. "You think you are registered to vote, but the DMV does not turn in those applications, so lots of people often miss out on voting."[644]

In Nevada, an investigation by Demos and Project Vote revealed at least one DMV location had stopped sending voter registration applications to the county clerk, with a box of "probably 200" voter registration changes of address dating back to 2012 not sent until more than a year later.[645] On March 9, 2017, the State of Nevada entered into a Memorandum of Agreement to resolve additional Section 5 violations that persisted despite an earlier settlement.[646]

---

[640] 52 U.S.C. § 20507(a)(2).

[641] Bismarck Tr., Erica Shelby, 150-151.

[642] *See*, *e.g.*, *Valdez v. Squier*, 676 F.3d 935 (10th Cir. 2012) (New Mexico); *National Council of La Raza v. Cegavske*, 2017 WL 2683683 (D. Nev. June 21, 2017) (approving attorneys' fees award following settlement of case brought against the State of Nevada).

[643] 52 U.S.C. § 20504(e).

[644] Portland Tr., Rhonda Medcalf, 52.

[645] *See* Demos & Project Vote, Notice Letter Regarding "Nevada's Non-Compliance with Section 5 of the National Voter Registration Act" at 6 (Mar. 7, 2016), *available at* http://www.projectvote.org/wp-content/uploads/2016/03/Notice-Letter-on-Nevadas-NVRA-Sec-5-Violations-3.7.16.pdf.

[646] *See* Execution Copy, Memorandum of Understand (Mar. 9, 2017), *available at* http://www.projectvote.org/wp-content/uploads/MOU-NV-DMV-3.13.17.pdf.

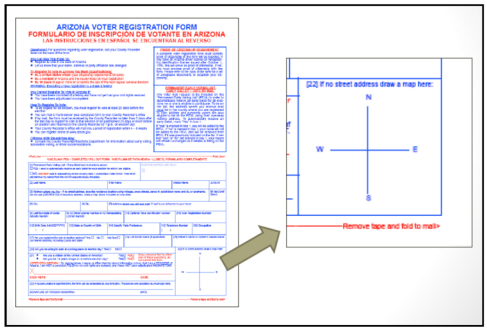
The failure to timely process voter registration applications, or the rejection of applications due to technical issues, has had a significant impact on Native voters in Utah. In San Juan County, the county clerk regularly rejects voter registration applications from Native voters or takes other steps to purge them from the registration list.[647] That has contributed to an abysmal registration rate. About 13,000 out of the approximately 21,000 Native Americans eligible to register to vote in Utah are not registered, or roughly 62 percent of the eligible Native voting population. Although nearly half of all Navajo voters vote in tribal elections, Native voter turnout in Utah was between 32 and 41 percent, even with the very low voter registration rate.[648]

12. Voter Purges

Even when Native voters with non-traditional mailing addresses are registered, they may still be purged because of those addresses. Local election officials euphemistically refer to voter purges as "list maintenance procedures." Regardless of what they are called, the effect is the same. They disproportionately deprive Native Americans of their fundamental right to vote.

In 2012, Apache County, Arizona purged 500 Navajo voters because the County Recorder claimed their addresses were "too obscure" and the Recorder alleged that they could not be assigned to a precinct. The County Recorder failed to accept a P.O. Box and the applicants' drawing on the voter registration form to show the location of their home. Under the NVRA, election officials are required to accept the voter's drawing to identify their precinct and cannot deny a voter registration application or purge an existing application because it uses a non-traditional address or has to be identified on a map by landmarks or geographic features.

Figure 18. Section of Arizona's voter registration form to identify location of non-traditional address.



In places required to provide language assistance under Section 203, information about voter purges typically is not provided in the covered Native language. Many Native voters vote infrequently in non-Tribal elections, causing their registration to be purged if they do not respond to a NVRA notice that may be written in a language they do not read, if they are able to read at all.

---

647 Tuba City Tr., James Attakai, 20-21, 25-26.

648 Tuba City Tr., Moroni Benally, 33-34.

In NARF's Alaska litigation in the *Nick* and *Toyukak* decisions, a handful of villages received public service announcements about the State's voter purges in the Central Yup'ik dialect. Most Alaska Native voters received no information at all in their Native dialect or anything beyond postcards written in English that they could not understand.

In some cases, counties conduct voter purges through other methods. In Rosebud County, South Dakota, the county auditor sent out letters to all registered voters in the county after the county commission districts were redistricted, informing them that they needed to re-register because they were no longer able to vote. That information was false; no such purge was actually conducted. However, the auditor never sent voters a retraction letter, leading many Native voters to believe they could no longer vote.[649]

Once purged, many Native voters will not vote again in non-Tribal elections. Effectively, a voter purge can result in permanent disenfranchisement. Far too often, that is precisely what election officials intend to accomplish in Indian Country.

13. Failure to Offer Voter Registration Opportunities at Polling Places on Election Day

States have wide discretion to determine the cut-off dates for voter registration. In the 1972 case *Dunn v. Blumstein*, the Supreme Court held that a Tennessee law requiring voter registration 30 days prior to the election did not unnecessarily burden the citizens' right to vote.[650] Tennessee argued that the period of 30 days was necessary for the state to complete administrative tasks in preparation for the actual vote.[651] The court ultimately determined that Tennessee's law presented a compelling state interest to prevent fraud and 30 days was an acceptable period of time to complete the requisite tasks.[652] The next year, in *Marston v. Lewis*[653] and *Burns v. Fortson*, the Supreme Court affirmed 50 day cut-off periods but stated that 50 days might be reaching the outer constitutional limits.[654]

In the intervening forty-plus years there have been advancements in the voter registration process. HAVA addressed a number of improvements to voting systems and voting access.[655] The act mandates new minimum standards for states to follow in election administration and provides funding for states to replace voting systems and improve election administration.[656] The Act also requires states to maintain a statewide voter registration database. Given the advent of more

---

[649] Bismarck Tr., Donita Loudner, 54-55.

[650] *Dunn v. Blumstein*, 405 U.S. 330 (1972).

[651] *Id.* at 348-49.

[652] *Id.*

[653] *Marston v. Lewis*, 410 U.S. 679 (1973).

[654] *Id.*

[655] *See* EAC HAVA, *supra* note 477.

[656] *Id.*

accessible internet, HAVA helped states to implement new methods of voter registration including online.[657] Some states have been able to take advantage of streamlined voter registration systems to establish same day voter registration, essentially removing the state interest in a cut-off period for voter registration.[658] Although this has been the new trend, it is not the majority practice yet.

Currently Idaho, Montana, Wyoming, Colorado, Utah, California, Minnesota, Iowa, Wisconsin, Illinois, California, Hawaii, Michigan, Maryland, Washington D.C., Connecticut, Vermont, New Hampshire, and Maine offer same day registration. [659] North Carolina offers same day registration for voters taking part in early voting. New Mexico and Washington have passed legislation to allow same day voter registration but have not yet implemented it.[660] States still requiring voter registration cut-offs prior to Election Day are doing so between 8-30 days.[661]

The opportunity for same day registration leads to positive voter turnout with an average increase between 3-7%.[662] Same day voter registration would solve issues encountered by Native voters where "they had registered too late, or they weren't registered, even when they would have been an eligible voter."[663] One advocate describes the satisfaction of same day registration opportunities: "I worked in Minnesota, so we had election day voter registration which I loved because I didn't spend the day having to tell people I'm sorry they didn't get registered so they couldn't vote."[664] Furthermore, "[s]ame-day voter registration would be helpful to the Native population, particularly if members of the community are highly mobile, due to moving around to seek employment or due to being housing insecure. Same-day voter registration would also prevent someone who has recently moved form being disenfranchised."[665]

However, given the lack of reliable internet access on tribal reservations, same day registration implementation may be delayed in Indian Country. States relying on paper registration argue they should be able to maintain cut-off periods for voter registration to give registrars time to receive the paperwork, organize the data, and minimize fraud.[666]

In states that do not offer same day registration, voters report being turned away by non-Native poll workers without being offered the opportunity to register in future elections. One advocate recounted how "they proceeded to look to see if they could find him on the inactive list, and their

---

[657] *Id.*

[658] *Id.*

[659] *Id.*

[660] *Id.*

[661] NCSL, Same Day Voter Registration, *available at* http://www.ncsl.org/research/elections-and-campaigns/same-day-raegistration.aspx.

[662] *Id.*

[663] Phoenix Tr., Solveig Parsons, 31.

[664] Tuba City Tr. Patty Hansen, 111.

[665] Portland Tr., Valdez Bravo, 204.

[666] Jay M. Mitzer, *Validity of Statue Limiting Time Period for Voter Registration*, 56 A.L.R. 6th 523. (2010).

computer system went down. They were slow and had to reboot them, but in the end they were not able to open up their inactive roll list…I know someone asked someone on the panel if he – if any of these individuals were asked to be registered. No one had asked him, that I recalled. And so he went without renewing his registration at all."[667]

C. BARRIERS TO CASTING A BALLOT

1. Unequal Funding for Voter Activities on Tribal Lands

> *You go take them in there to vote, and it was a chicken coop. It was an old chicken coop. It still had dirt on the floor. You go in there, and it had enough for one desk. And you had three people sitting around there, and you could barely come in. There was no place to vote. You had to take it outside to vote. You could see the -- where the chickens used to lay: You know, those little boxes. They would still have those around outside. And no bathroom facilities. . . So I went in front of the county commission in Hughes County, our county seat or our county capital. And I got on the agenda, and I asked them, "Whatever happened with, you know, these funds that they set down for us?· You guys got a chicken coop.*[668]

Due to chronic underfunding of elections,[669] counties often face tough choices about how and where to expend resources. Even so, Native Americans are entitled to receive "the necessary resources and staff to ensure that native voters are registered to vote, they're informed, and they have the same access as the rest of the people in the county."[670] Yet when looking to cut costs, it is often the Native American communities that face cutbacks.[671]

Polling locations intended to service Native American populations are often underfunded with inadequate facilities and equipment, resulting in long wait times or inability for voters to cast a ballot. Voters described how "we don't have adequate . . . voting machines, the resources available. The last election, the voting machine broke in Oljato Senior Citizen. A lot of people were in line and people were frustrated, and then they had a back up, I guess, that became available until after an hour late."[672] Another witness described how equipment failures and tardy poll workers led to disenfranchisement when "[e]arlier arrivals had to wait because of problems with the table that is used during the voting, or there were no poll workers, and so a lot of voters arrived before the poll workers did."[673]

---

[667] Phoenix Tr., Sarah Crawford, 51.

[668] Bismarck Tr., Donita Loudner, 33-34

[669] Tuba City Tr., Edgar Little, 150-151.

[670] Tuba City Tr., Patty Hansen, 55-56.

[671] *Id.*

[672] Tuba City Tr., James Attakai, 14.

[673] Tuba City Tr., Brian Curley-Chambers, 222.

Native American communities also saw a removal of remote ballot drop boxes as a "cost saving measure" despite protests from community members.[674] One tribal leader described how, upon the move to all vote by mail former polling centers were not replaced with ballot drop boxes, which he took to be as a sign of disrespect. He urged "…the local, county, state, election officials must look at tribes as governments, pure and simple. They are not. They are looking at us as an inconvenience. Every place Colville had a polling place in the past, they need to have a drop box today. That is---that goes without saying. It is crazy that they penalize them by not giving them access maybe like other rural communities around the state."[675]

Native communities also report that instead of being provided funding on par with other citizens, the counties demand payment in order to provide services.[676] This disparity is deeply felt since"[w]e are citizens of the state of New Mexico. We have a dual citizenship with our own tribal communities. Now that's something that I just don't think is fair."[677]

Political parties and get out the vote organizations likewise fail to expend resources in tribal areas. Native communities in rural, difficult to service areas with relatively low population sizes, are often viewed as locations where "there is no return" so "they're not going to spend the money" and instead will focus on more densely populated areas since "[i]t's easy for them to maneuver rather [than] organize an office in Warm Springs, pay somebody to go to Warm Springs, pay somebody's room, meals, mileage, whatever, where it's easier to pay a person to walk ten blocks."[678] One community organizer described how, despite enthusiasm for candidates political parties would not expend resources in Native communities: "he could only give us like 12 yard signs and the people in my reservation kept bugging me and asking me where is our Hillary signs, where is our Obama signs. They supported these candidates. But at the national level, they just saw that we weren't worth the effort because we weren't a swing state, or you know, our numbers just wasn't there enough to infuse any cash or any resources to secure the position of that individual on the ballot, and it goes down the ballot, too."[679]

2. Lack of Pre-Election Information and Outreach

Pre-election information can be critical to informing voters about "changes in the election format … when to register, when to vote, and where to vote in the election."[680] A federal court explained the importance of voting information to voters before elections:

---

[674] Portland Tr., Matthew Tomaskin, 93.

[675] Portland Tr., Brian Cladoosby, 161.

[676] Isleta Tr., Laurie Weahkee, 215-216.

[677] *Id.*

[678] Portland Tr., Matthew Tomaskin, 243.

[679] Portland Tr. Matthew Tomaskin, 91-92.

[680] *United States v. Metropolitan Dade County, Fla.*, 815 F. Supp. 1475, 1478 (S.D. Fla. 1993) (holding that a voter information pamphlet with that information was a "voting material" that had to be translated under Section 203 of the VRA).

> Voting without understanding the ballot is like attending a concert without being able to hear. [Without pre-election information in a medium they understand], the voter … may not understand the office for which the various candidates are running, and surely cannot understand the various propositions, ranging from bond authorizations to constitutional amendments. [T]he meaningful right to vote extends beyond the immediate four corners of the voting machine.[681]

Native voters who are denied pre-election access to information about the voting process, candidates or ballot measures often cannot meaningfully exercise their fundamental right to vote.

Nevertheless, lack of information is the prevailing paradigm that Native voters face.[682] "[U]nbiased information about candidates and ballot question is difficult to come by."[683] Changes in voting precincts are not communicated, leading to disenfranchisement when voters show up at the wrong location.[684] Native voters are not told they can vote by affidavit if there is an issue with their registration that could be corrected so their ballot is counted, causing them to leave without voting.[685] Early voting procedures are not disseminated to voters, and voters do not know they are still able to cast a ballot if they are in line when the polls close.[686] Robocalls and phone-banking, which are widely used in urban areas to educate voters, are not targeting the rural tribal areas.[687]

Even when onerous restrictions such as voter identification laws are enacted, states are indifferent about providing Native voters with information they need to comply with those laws. After North Dakota passed the voter ID law in 2013, the Secretary of State took over a year to post information about the new voting requirements on their website. Native voters were left on their own to learn about the North Dakota law, which often happened on Election Day when they were turned away because they lacked the requisite identification.[688]

The lack of outreach and publicity likewise applies to candidates running for office. Native voters complained that local officials do not campaign in areas where they live or provide information about their positions on issues.[689] Tribal members in Montana requested a meeting with Ryan Zinke, a candidate during the 2014 Special Election, and were turned down three times. Mr. Zinke informed them that the best he could do was to call them.[690]

---

[681] *United States v. Berks Cty., Pa.*, 250 F. Supp. 2d 525, 527 (E.D. Pa. 2003) (requiring translations of pre-election voting information into Spanish under Section 4(e) of the VRA).

[682] *See* Milwaukee Tr., Aaron Payment, 152-73.

[683] Tulsa Tr., Chuck Hoskin, Jr., 123.

[684] Bismarck Tr., Sharon Stewart-Peregoy, 110-11.

[685] Bismarck Tr., Donita Loudner, 48.

[686] Milwaukee Tr., Debra Haaland, 173-90.

[687] Portland Tr., Carol Evans, 225.

[688] Bismarck Tr., Carol Davis, 195-96.

[689] Portland Tr., Teresa Taylor, 48.

[690] Bismarck Tr., Gerald Stiffarm, 80.

The deliberate indifference of candidates and elected officials to Native voters has a double impact. "Many in the community have no idea who to support"[691] and they would vote if they had more information.[692] Without interactions with or information about candidates, many Native Americans do not vote.[693] The press contributes to this barrier. In many cases, there is little coverage of what is happening in elections or how it impacts Native voters until after the election. The press then criticizes Native voters it did not educate for their low participate rate.[694]

The absence of consultation with Tribes about voting procedures also contributes to Native voters' lack of information. Tribal members complained that in Montana, Governor Steve Bullock did not seek the input of the tribes before pursuing a vote-by-mail initiative. As State Representative Sharon Stewart Peregoy, explained, "Sometimes, politics moves ahead of itself and tends to forget the people who these decisions, these backroom decisions, [are] impacted adversely."[695]

Tribes and Native organizations desperately attempt to provide fill the information vacuum left by election officials and candidates. Throughout Indian Country, they try to educate Native voters about who and what is on the ballot and why they are directly affected by the election outcomes.[696] As one community organizer explained,

> We have to educate our own people because others do not come onto the reservation to educate us. They're not going to come on the reservation unless it's somebody who is running for something they expect us to support, and you won't see that unless it's a tribal member… [W]e do it ourselves in our government … we ask them to come in and speak. We try to push out the pamphlets, but it's all on us. And so that's probably the difference why they come out and forage for you to drag you in there and beat you over the head and say, hey, put your ballot in the box.[697]

Tribes are left to prepare their own pamphlets and score cards "so people know what issues are important to us and then they're educated so they can make their choice."[698]

However, it can be difficult for tribes and Native organizations to provide the information services not offered by election officials. That is especially true if there is no place for Native voters to go on the reservation or in the absence of a tribal community center in urban areas. Satellite offices established by local jurisdictions permit potential voters to discuss voting and their views on the

---

[691] Portland Tr., Teresa Taylor, 26.

[692] Bismarck Tr., Donita Loudner, 55.

[693] Bismarck Tr., Sharon Stewart-Peregoy, 104.

[694] Portland Tr., Carol Evans 224.

[695] Bismarck Tr., Sharon Stewart-Peregoy, 112.

[696] Portland Tr., Carol Evans, 192.

[697] Portland Tr., Norma Sanchez, 231-32.

[698] Milwaukee Tr., Aaron Payment, 154.

elections.[699] As community organizer Patrick Yawakie explained, "[C]reating a place that shows a community's interest in elections in important… it shows that the community cares about who they elect and creates dialogue amongst individual voters."[700]

3. Cultural and Political Isolation of Native Voters From Rest of the Electorate

During the termination era – a period of time where the government attempted to disband Native American tribes and sell their land – the government also sought to relocate Native Americans into urban areas. In 1956, the government passed the Indian Relocation Act which promised economic opportunity and support if a tribal member voluntarily relocated off the reservation. Relocation offices were set up in Chicago, Denver, Los Angeles, San Francisco, San Jose, St. Louis, Cincinnati, Cleveland and Dallas. The promises of support, however, went unfulfilled with 55% of those who relocated returned to their communities.[701] Nevertheless, as a legacy of this policy major cities contain significant populations of urban Indians. Los Angeles County has the largest concentration of persons claiming to be fully or partially American Indian descent.

The point of the relocation was assimilation, and that legacy affects Native Americans in urban areas today. Urban Indians report unique challenges because "we have no land base . . . for ceremonial grounds, like many other states have, or reservations . . . no land base so that we can call together for any sort of call to action . . .We don't even have a community center for Natives to gather. . .We have no discussion, we have no dialogue amongst each other, and then from there we disappear amongst the rest of the people's, amongst the rest of the ethnic groups."[702]

Given the lack of a cohesive community witnesses report "there is nobody . . . saying, 'Hey, let's get out and vote.' We see a lot of push for the Latino vote. We see a lot of push for the Vietnamese vote.But we don't see propaganda coming into our homes and saying, 'Get out the Native vote.'"[703] Voters lament that "[a]s a Native person, I wish I had more of a connection to who these candidates are. When I want to find out about them I don't get any responses from them. I don't know if it's because I'm Native or maybe they think I am not important at all . . . The propaganda that I get in the mail propaganda that don't pertain to me."[704]

Community activists advocate for "provid[ing] Native Americans with their own voting place at a place that we're comfortable with" since such a place "of my own culture, if there is a trusted community member, a leader, I will take the time to listen to them, rather than somebody else approaching me and talking about something that is of no interest to me. But if I see a trusted, familiar face that's talking about it, I'm definitely going to take the time to listen to what they have

---

[699] Bismarck Tr., Patrick Yawakie, 233.

[700] Bismarck Tr., Patrick Yawakie, 236.

[701] *See* National Inst. of Health, Native Voices, 1953: Congress Seeks to Abolish Tribes, Relocate American Indians, *available at* https://www.nlm.nih.gov/nativevoices/timeline/488.html.

[702] San Diego Tr., Lupe Lopez-Donaghey, 107.

[703] San Diego Tr., Lupe Lopez-Donaghey, 107-08.

[704] San Diego Tr., Brighid Pulskamp, 108-09.

to say."[705] Community activists also report success by making voter resources "idigenized." The guides were popular and "got a lot of likes and forwards and people downloaded it" and were "more confident in voting."[706]

4. Unequal Access to In-Person Voting

Native voters generally must travel greater distances to get to their polling places than non-Native voters living in the same counties. Often, polling places are located in predominately non-Native county seats or non-Native communities. In many cases, the more populous Native communities are denied in-person voting on tribal lands and must travel off the reservation to vote. Local jurisdictions justify the absence of polling places because there are not enough registered voters in Native communities, with registration numbers depressed because of the lack of in-person voting.[707] What is striking is how distance issues impede voting by Native Americans throughout the country.

In Arizona, the nearest polling place for some tribes is off reservation.[708] The closest polling station to the Kaibab Paiute Tribe is about 30 miles away. One community is located on the east side of the reservation 15 miles farther away, which means they must travel about 90 miles roundtrip to vote at their polling place.[709]

Tribes in California face similar issues. Distance poses a barrier to getting to polling places for many members of the Karuk Tribe. People living in communities like Seiad or Horse Creek have to travel 40 to 50 miles roundtrip to a polling place in Happy Camp.[710] Prior to 2018, when the Thule River Reservation was finally able to get a polling place, voters had to drive about 50 miles roundtrip to vote, despite having 700 members of voting age.[711]

Starting in the 1960s, the Sault Ste. Marie Tribe of Chippewa Indians in the Upper Peninsula of Michigan began to become politically active as the American Indian Movement and the Civil Rights Movement took hold. Tribal members were excited about participating. Local election officials responded by shutting down the precinct where they vote, which "shut down participation." Today, many tribal members have to drive 100 miles roundtrip to cast their ballots, creating a significant lack of access that depresses Native turnout.[712]

---

[705] San Diego Tr. ,Robin Thundershield, 102-03.

[706] Sand Diego Tr., Monique Castro, 120.

[707] *See infra* notes 827-37 and accompanying text.

[708] Phoenix Tr., Solveig Parson, 16.

[709] Phoenix Tr., Roland Maldonado, 120-21.

[710] Sacramento Tr., Buster Attebery, 66.

[711] Sacramento Tr., Thomas Eugene, 29.

[712] Milwaukee Tr., Aaron Payment, 159.

In Minnesota, a member of the Mille Lacs Band of the Ojibwe explained that distances pose a significant barrier to many members of the state's eleven tribes. They commonly must travel 40 miles roundtrip to vote.[713]

Similar barriers are present for tribes throughout Montana. On the Flathead Reservation, which comprises two-thirds of the land mass of Lake County and is about 1.2 million acres, tribal members requested that the County open two satellite voting offices. County officials chose to place them in two remote locations far from the larger tribal communities. The satellite offices are located just four miles apart, with one accessible to 200 Native voters and the other to 40 Native voters. Hundreds of other Native voters had to travel vast distances to reach those offices.[714]

In Blaine County, Montana, when the Lodge Pole precinct was merged with the Hays precinct, Native voters were forced to travel up to 114 miles roundtrip to their new polling location.[715] In Big Horn County, the distances are not as great, but Native voters nonetheless must travel twice as far to reach their polling places as non-Natives, 44 miles round-trip for Natives compared to 23.2 miles for non-Natives.[716] Native voters who live in Hot Springs, Montana, must drive 94 miles roundtrip to reach their polling place in Thompson Falls.[717]

Distance also is an issue for Native voters in Nevada because of the isolated location of several reservations, many of which lack polling places. Native voters often have to drive 80 to 100 miles roundtrip to cast a ballot.[718] On the Pyramid Lake Reservation in Nevada, 99-year old Flora Green, a tribal member, had never cast a ballot in a non-tribal election. She explained, "I have never had the opportunity to vote here on my reservation." When a polling place was opened on the reservation for the first time in 2016 as a result of the *Sanchez* decision, Ms. Green was able to vote for the first time.[719]

Rural tribes in New Mexico likewise are impacted by great distances to drive to voting locations. In contrast, in urban areas like Albuquerque, voters live within a mile of their polling place.[720]

In North Dakota, Native voters have to travel twice as far as non-Native voters to reach their polling places. On average, Native voters must drive 40 miles roundtrip to vote, compared to 22 miles for non-Natives.[721] Driving distances are even greater for some Native voters. Members of

---

[713] Milwaukee Tr., Carolyn Beaulieu, 119-29.

[714] Bismarck Tr., Erica Shelby, 128; Bismarck Tr., Gerald Stiffarm, 128.

[715] Bismarck Tr., Gerald Stiffarm, 75.

[716] Bismarck Tr., Gerald Webster, 257.

[717] Bismarck Tr., Patrick Yawakie, 202.

[718] Sacramento Tr., Beverly Harry, 4-5.

[719] San Diego Tr, Amy Nantkes, 47-48.

[720] Isleta Tr., Maggie Toulouse Oliver, 118.

[721] Bismarck Tr., Matt Campbell, 174.

the Standing Rock Sioux Tribe who live in Fort Yates, where the tribal headquarters is located, must travel over 120 miles roundtrip to Bismarck to vote.[722]

In Buffalo County, South Dakota, most members of the Crow Creek Tribe reside 40 miles roundtrip from their polling place, which is located in a small non-Native community off the reservation. Non-Native poll workers use that distance to disenfranchise even voters who are able to make the drive. If Native voters show up without their identification, rather than informing them that they can sign an affidavit, election workers force voters to return home for their identification.[723]

Many members of Utah's eight federally recognized tribes also have long drives to their polling places, if they have access to transportation. Even though about half the population of San Juan County, Utah is Navajo, the county placed its only in-person polling place in Monticello, which is 84 percent non-Native. There was no in-person voting location in the predominately Navajo southern part of the county. Prior to getting relief from a federal court, voters in Navajo Mountain would have to drive about nine hours roundtrip to cast their ballot.[724]

The distances are not as great for Goshute voters in Utah, who have to drive over an hour each way to get to their polling place. Citizens of the Ute Nation must drive about 45 minutes each way to their polling place. Many lack access to transportation, and no public transportation is available.[725]

5. Unequal Access to Early Voting

Early voting can be a positive force for Native voters, if it accounts for the barriers that they face in participating in non-tribal elections. When election officials coordinate with tribal governments and schools to provide information about the location and schedule of early voting, it can improve turnout.[726] When that does not happen, it can confuses voters, causing them to worry that they are dropping their early ballot off at the wrong place or that they have not filled it out correctly so it will not be counted.[727] Pre-election outreach and publicity must be combined with early voting locations that are accessible to Native voters.

That requires that election officials commit sufficient resources to make early voting equally available to all voters, including Native voters on tribal lands. Martin Aguilar, who is a liaison in New Mexico's Native American Elections Information Program explained:

---

[722] Bismarck Tr., Erica Shelby, 157.

[723] Bismarck Tr., Donita Loudner, 20.

[724] Isleta Tr., Terry Whitehat, 37; Tuba City Tr., James Attakai, 14.

[725] Tuba City Tr., Moroni Benally, 32, 37-38, 42.

[726] Phoenix Tr. Verlon Jose, 113.

[727] Tuba City Tr., Darrell Marks Test, 116.

> … Like anything else, the early-voting site has money attached. It costs us money to hire the precinct board, you know, to take over the voting machine, the number of hours we have to pay the actual staff to be there. So that can be one prohibition of not having enough early-voting site, but within the law there, we can expand, not only on fixed sites, but the law also opens the early-voting sites to mobile sites, meaning that if we use – the old example is the mobile library. You know, we can knock out the books and put the voting machines in there. It's been done before.[728]

New Mexico gives Tribal governments the authority to request early voting sites, which makes a significant difference. In the 2018 primary election there were 24 early voting sites for 23 tribes.[729]

Tribal governments in New Mexico establish close working relationships with county election officials. For instance, the Jicarilla Apache Tribe works with Rio Arriba County to identify the best dates and times to have early voting at the three early voting sites located on tribal lands.[730] Tribal governments must be proactive in those relationships and not allow county election officials to determine when early voting sites are open. They need to "[t]ell the county we need the full early voting from the day it starts to the day it ends."[731]

When the decisions for when and where early voting will be available are made without the input of Tribal governments, it often leads to much more limited voting opportunities than those provided to non-Native voters. In Arizona, the Navajo Nation was provided with "the bulk of the early voting locations," with other Tribes having less access. However, the Navajo early voting sites were only open "for short periods, maybe one day or three days." For example, in Coconino County, an early voting location closed after just three days. "After that, voters had to travel significantly farther distance in order to get to the nearest location which would have been Tuba City from the Leupp community." Election officials did not take into account that closing early voting after just a few days had a severe impact on Navajo Chapter districts lacking any early voting location, making travel distances even greater for those voters.[732]

Overall, unequal access to early voting was a common thread throughout Indian Country. In Arizona in the 2016 general election, there were a total of 89 early-voting locations. Of those locations, 23 were on reservations, compared to 66 off reservations. "Off-reservation early-voting locations were open for multiple days, ranging from being open and operating on October 12th-November 3rd…In contrast … early-voting locations on the White Mountain Apache and San Carlos Apache reservations only had the opportunity for early voting in-person for only one day, and on that one day, only open for four hours."[733]

---

[728] Albuquerque Tr., Martin Aguilar, 149.

[729] Isleta Tr., Martin Aguilar, 148.

[730] Albuquerque Tr., Leon Reval, 50.

[731] Tuba City Tr., Shirlee Smith, 212.

[732] Tuba City Tr., Brian Curley-Chambers, 230-31, 241.

[733] Phoenix Tr., Rani Williams, 26.

In addition, distance to early voting locations in Arizona posed a significant barrier to Native voters. Many Native voters living on reservations in Arizona have to travel between 60 to 200 miles roundtrip to access the closest early voting location.[734] In Navajo County, there were six different early voting locations that required many Navajo voters to drive an average of 40 miles roundtrip. For Native voters in other Arizona Counties, the early voting locations were 80 miles or more roundtrip from where they resided.[735] In Apache County, a voter residing in Teec Nos Pos would have to drive 150 miles roundtrip to reach the closest voting center in Chinle.[736]

Far too often, Native voters are not offered any early voting locations on tribal lands. In the poorest areas of Nevada, where several reservations are located, no early voting or satellite voting locations were established.[737] In Oklahoma, early voting for rural locations tends to be more difficult because often there is only one early voting location per county, in the county seat. Those locations are not accessible to Native voters living in outlying areas.[738]

6. Barriers Caused by Vote-By-Mail (VBM)

Elections conducted by mailing in the ballot, or Vote-By-Mail (VBM), have gained a lot of traction in recent years. In 1972, only four percent of all ballots were cast by mail. By 2008, thirty percent of all ballots nationwide were cast by mail. In some states that offered a mail-in voting option, up to half of all ballots were cast using that option. VBM has expanded purportedly as a means to make voting more accessible.[739]

According to the National Conference of State Legislatures (NCSL), at least 22 states currently use some form of VBM for their elections, with three states (Colorado, Oregon and Washington) conducting all of voting by mail. NCSL's explains how it works:

> For these elections, all registered voters receive a ballot in the mail. The voter marks the ballot, puts it in a secrecy envelope or sleeve and then into a separate mailing envelope, signs an affidavit on the exterior of the mailing envelope, and returns the package via mail or by dropping it off. Ballots are mailed out well ahead of Election Day, and thus voters have an "election period," not just a single day, to vote.... [T]his does not preclude in-person voting opportunities on and/or before Election Day. For example, despite the fact that all registered voters in Colorado are mailed a ballot, voters can choose to cast a ballot at an in-person vote center

[734] Phoenix Tr., Rani Williams, 27.

[735] Tuba City Tr., Brian Curley-Chambers, 241-42.

[736] Phoenix Tr., Edison Wauneka, 98.

[737] San Diego Tr., Jean Schroedel, 11.

[738] Tulsa Tr., Anna Langthorn, 105-06.

[739] Sacramento Tr., Joseph Dietrich, 76-78.

> during the early voting period or on Election Day (or drop off, or mail, their ballot back).[740]

NCSL's description, evoking a tranquil scene in which all voters receive VBM ballots that they can cast at their leisure – even at conveniently located early voting sites – seems compelling. However, as NCSL acknowledges, for much of Indian Country and other rural areas, it does not comport with reality.[741] Unless it is combined with a host of other election procedures to address barriers to registration and voting, VBM often leaves Native voters without a voice in the political process.

There is some support for using VBM in Indian Country. One witness suggested that VBM should be layered onto other methods of voting such as early voting.[742] Another believes that "We should all vote by mail all the time," in part because it is preferable to being "forced to go to a polling location … that is probably run by non-Native citizens."[743]

However, the majority of those who testified about VBM opposed it, sometimes in very strong terms. According to a tribal member from Montana, "vote-by-mail is regressing…I would see it as a Jim Crow law."[744] The Inter Tribal Council of Arizona opposes vote by mail. "It's a good idea if you don't need language assistance, if you can get mail at your home. But we know the Tribal communities' post offices are in areas where there … could be 20 or more miles to access it, or the hours are limited compared to post offices in your public communities. People don't look to the mail as a way to vote."[745] At best, Native voters have "mixed feelings" about VBM.[746]

The reluctance of Native voters to embrace VBM is a result of cultural, historical, socio-economic, and language barriers to voting that is not conducted in person. It also is grounded in negative experiences that they have had were VBM is implemented in whole or in part.

a. Distrust of VBM and Preference for In-Person Voting

It can be challenging to get Native voters to participate in non-tribal elections.[747] Grassroots organizers and tribes often struggle to get voters excited about a voting process that has historically excluded them or continues to be used to marginalize tribes and their members.

---

[740] NCSL, Dylan Lynch, All-Mail Elections (aka Vote-By-Mail), Introduction (June 27, 2019) ("All-Mail Elections"), *available at* http://www.ncsl.org/research/elections-and-campaigns/all-mail-elections.aspx.

[741] *See generally id.* at "Possible Disadvantages."

[742] Milwaukee Tr., Paul Demain, 69-78, 79-86, 94, 96, 110-111, 112-113.

[743] Tulsa Tr., Anna Langthorn, 105-06.

[744] Bismarck Tr., Sharon Stewart-Peregoy, 105.

[745] Phoenix Tr., Travis Lane, 87-88.

[746] Isleta Tr., Laurie Weahkee, 196.

[747] *See supra* notes 274-303 and accompanying text.

Increasing access to in-person voting by Native Americans on Election Day, especially at polling places located on tribal lands, has played a significant role in increasing turnout. "[P]eople like to vote in person, because there's a community attitude, almost carnival-like attitude." Tribes create a festive environment with food and events to encourage Native voters to participate.[748] As a result, a consistent theme is that Native voters on both reservations[749] and in urban areas "want to go into a space" to vote, such as polling place in their community.[750]

At the Isleta Pueblo in New Mexico, "Traditionally … we vote only one day, and that's what they think when this voting process goes through, that it's that one day." They are told, "'No. It's almost two weeks of early voting. You can go any time you want to go.' Some people want to stand in line. They like the idea of voting that one day. I enjoy it. I don't mind it. I really enjoy having a hundred people standing in line. I can greet them, talk to them. It would be nice if people would come down to our polling places. They'd be impressed with what we do."[751]

The preference for in-person voting also has its roots in the high levels of distrust that Native voters have for non-tribal governments. Native voters have "the least trust in the local levels" of non-tribal governments, such as the state and county officials running the elections. That distrust is manifest in their opinions on VBM compared to other methods of casting ballots. About 89 percent somewhat trusted that their in-person ballot would be counted. "Vote by mail, in contrast, garnered much lower levels of trust. Only 24 percent had complete trust. And the same percentage, 24 percent, had no trust in voting by mail." The high levels of distrust for VBM show that it "is not a viable substitute for in-person or voting at an early election site someplace where the individuals put the ballots themselves in the box."[752]

The voting experiences of Native voters corroborate their lack of trust that their mail-in ballot will be counted.[753] In the 2016 election in Arizona, voters at the Bylas precinct and the Pasqua Yaqui Tribal Center were told they had to vote by provisional ballot because they were either on the permanent early voting list or in one case told a voter she had "voted early already, even though she insisted that she had not."[754]

As Thule River tribal member Thomas Eugene explained in describing his concerns with absentee ballots returned by mail in California, "I don't know where those ballots would really go… once

---

[748] Phoenix Tr., Kris Beecher, 56.

[749] Isleta Tr., Max Zuni, 102 (Isleta Pueblo in New Mexico).

[750] Sacramento Tr., Chrissie Castro, 166.

[751] Isleta Tr., Max Zuni, 102.

[752] San Diego Tr., Jean Schroedel, 19-20.

[753] Phoenix Tr., Natalie Landreth, 225.

[754] Phoenix Tr., Solveig Parson, 13.

they're in the mail, where do they go from there?"[755] Voters express similar concerns in other states. "That's what I've heard several times, 'Was it counted? I mailed it in.'"[756]

The negative experiences that Native voters continue to have with non-tribal governments play a significant role in their fear of VBM. Researchers found that Native voters did not want to put their addresses on the mail-in ballots because they believed that their addresses would be used to discriminate against them.[757] This is a remarkable finding because it so closely parallels the experience of African American voters in the South.[758]

Native voters also expressed concerns that VBM is less secure than voting in a polling place. The lack of security increases the distrust that some voters have in the process.[759]

These experiences and concerns raise questions about the efficacy of VBM in any area with a significant population of American Indian or Alaska Native voters. As one researcher explained, "[G]iven that these levels of veracity and the trust in the veracity of state and local government," there is skepticism that "vote by mail would have anything positive to offer." It does not raise trust and does not increase participation by Native voters. It does not counter the underlying social effects in the same way that local voting would.[760] In short, VBM is more likely to discourage Natives from voting than it is to improve their access to the political process.

b. VBM Replicates the "Tyranny of Distance"

The voting barriers imposed by the "tyranny of distance"[761] are largely replicated for Native voters through VBM even though that was a "major issue" it was designed to resolve.

Academics have examined the question of accessibility, "which is the combination of travel distance versus an impedence." An impedence is anything that prevents someone from getting to their desired destination, such as lack of access to a vehicle, the cost of gasoline, poor public transit, or traffic. Any of those could prevent voters from getting to their polling places.[762] A 2005 study found that increasing distance to polling places reduces turnout. Coupling distance with any

---

[755] Sacramento Tr., Thomas Eugene, 34.

[756] Isleta Tr., Max Zuni, 102.

[757] Sacramento Tr., Joseph Dietrich, 89-90.

[758] *See generally* James Thomas Tucker, *Affirmative Action and [Mis]representation: Part I – Reclaiming the Civil Rights Vision of the Right to Vote*, 43 HOW. L.J. 343, 345-46 (2000) (summarizing evidence of how efforts by black voters to register subjected them to discrimination including "losing their job or their business, hav[ing] loans denied to them, see[ing] their rent increase, be evicted from their home, or have basic government services taken away after local newspapers printed their name so that everyone in the community would know what they had done").

[759] Sacramento Tr., Joseph Dietrich, 93.

[760] Sacramento Tr., Joseph Dietrich, 87.

[761] Bismarck Tr., Gerald Webster, 250-52.

[762] Sacramento Tr., Joseph Dietrich, 78.

impediment is "a significant factor in predicting voter turnout." Similarly, where a voter's residence is close to a polling place, that has a significant impact.[763]

"Initially the research indicated that vote by mail could be the viable alternative in reducing travel distance and impediment issues. However, all of the subsequent research seems to indicate that that is not the case. And there's no the substitution effect that you would expect in switching from in-person voting to vote by mail in all populations." Some population groups do not adopt mail-in voting. Demographics, educational attainment, and socio-economic status impact who uses it. The lower the level of economic resources or education, the less likely voters are to cast ballots by mail.[764]

Barriers continue to exist to Native voters with vote by mail. Distances to post offices or mailboxes and infrequent or unreliable mail service are a common problem on many reservations. When drop boxes are available, they can be located miles away from where voters live.[765] On the Quinault Reservation, it is about 25 miles each way to the post office.[766] Other distance or time issues with mail service come into play. "It's that rural delivery doesn't drop mail off every day. Or you have to go into town between 1:00 and 3:00 to pick up your mail at the post office. Those are all limiting factors that … become impedances to that accessibility…"[767]

Eight counties in Arizona have shifted to using vote centers for mail-in-voting instead of having any polling places. Coconino County has not done this because it would make voting more difficult for Native voters. As Coconino County Recorder Patty Hansen explained, "Vote centers work very well in urban areas. They just don't work well in rural areas."[768] The same is true for the impact of VBM on Native Americans, for whom it does not resolve – and in some cases can exacerbate – distance issues. Voters still "have to drive it to the post office,"[769] which can be a significant problem if election mail is being delivered several hours away from the Native voter's home.[770]

c. Barriers Posed by Non-Traditional Addresses Remain under VBM

The NCSL observed, "Native Americans on reservations may in particular have difficulty with all-mail elections. Many do not have street addresses, and their P.O. boxes may be shared."[771]

---

[763] Sacramento Tr., Joseph Dietrich, 78-79.

[764] Sacramento Tr., Joseph Dietrich, 79-80.

[765] Portland Tr., Norma Sanchez, 154-55.

[766] Sacramento Tr., Joseph Lake, 91.

[767] Sacramento Tr., Joseph Dietrich, 90-91.

[768] Tuba City Tr., Patty Hansen, 56.

[769] Tuba City Tr., Patty Hansen, 60-61.

[770] *See supra* notes 249-52, 745, 765-67 and accompanying text; *infra* notes 769-70, 778-79, 795-98, 899-903 and accompanying text.

[771] *See* All-Mail Elections, *supra* note 741, at "Possible Disadvantages."

Because of the widespread use of these nontraditional mailing addresses, Native voters often do not receive VBM ballots at their homes. That has made it "difficult" for members of the Gila River Indian Community to vote, especially in Pinal County.[772] The barriers posed by the widespread use of non-traditional mailing addresses by Native voters are implicated in several ways by VBM.

Native voters may have difficulty or even be prevented from registering to vote in VBM jurisdictions because they lack a physical mailing address.[773] Members of the Navajo Nation who have removed from their shared post office boxes "prevents voters from having the ability to vote early ballot by mail."[774] Some jurisdictions will not mail a VBM ballot to post office boxes.[775] Navajo voters living in San Juan County, Utah who have mail delivered to post office boxes located in Arizona have been denied VBM ballots.[776]

Native voters also are a highly mobile population. According to the 2016 ACS, approximately 15.5 percent of the AIAN population was residing in a different house than the one they reported a year earlier.[777] Many Native voters have multiple addresses, including their permanent residence on the reservation, their current home, a temporary address for work or school, and a post office address often located far from tribal lands several hours away.[778] As one organizer explained, "We depend on tribal members to mail-in their ballots but many move around a lot and don't seem to receive their ballot."[779]

Native voters often do not check their mail regularly. Tribal members surveyed in Nevada reported that they picked up their mail infrequently because of the travel distance and lack of transportation.[780] In some cases, Native voters in California reported going months without access to their mail.[781] Mail service also is unreliable even where it is available. Among Native voters in Arizona, "a problem persists where mail is not delivered in either a timely manner or sometimes not at all."[782] "If you don't have readily available access to the mail, if your mail is often lost, you're less likely to vote."[783]

---

[772] Phoenix Tr., Stephen Lewis, 130.

[773] Portland Tr., Norma Sanchez, 122.

[774] Phoenix Tr., Rani Williams, 24-25.

[775] Portland Tr., Brian Cladoosby, 133.

[776] Tuba City Tr., Moroni Benally, 32.

[777] *See* U.S. Census Bureau, 2016 American Community Survey 1-Year Estimates, Selected Population Profile in the United States: American Indian and Alaska Native alone (300, A01-Z99) ("2016 AIAN Profile"), *available at* https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk.

[778] *See supra* note 771.

[779] Oregon Tr., Teresa Taylor, 25.

[780] San Diego Tr., Jean Schroedel, 33.

[781] Sacramento Tr., Thomas Eugene, 34-35.

[782] Phoenix Tr., Rani Williams, 24.

[783] San Diego Tr., Melissa Rogers, 38.

"As one researcher explained, "anything that complicates the system, like a nontraditional address, vote by mail doesn't react very well to that. Vote by mail is designed for very stable populations who live in the same spot for a number of years, who get their mail delivered on a routine basis… It does not like nontraditional living arrangements."[784] That is a significant reason why VBM is ill-suited for many Native voters regardless of whether they live on or off tribal lands.

d. Increased Confusion and Misplaced VBM Ballots

Native voters often are overwhelmed by mail-in ballots. For example, a tribal member explained, "[W]hen I received my mail-in ballot … there was so much different contents inside of it I didn't know where to start. I didn't know what it meant. And right then and there it was discouraging… It was at the very bottom of things I wanted to do because there was so much of it."[785]

Voter confusion is especially prevalent among Tribal Elders. Culturally, it is expected that younger tribal members will assist Elders without being asked to do so. That is missing when Elders receive VBM ballots in their mail. Native elders who get their ballot in the mail "don't know what it is" and "don't understand what they're doing."[786] The barrier is even more pronounced where the Elder has literacy or English language barriers and does not understand the VBM ballot or the instructions that accompany it.

Some tribal members complained that their VBM ballot gets set aside, and then forgotten. A Native voter from Washington State reported that for her tribe, filling out a ballot has been a hindrance. Voters may receive the ballot and a voter pamphlet very early, and both gets set aside with much of the "junk mail" that they receive. Turnout has decreased among tribal members after the state shifted to an all-VBM system.[787] As a tribal Vice Chairman from Arizona explained, "[How many times do we get stuff in the mail or comes to us and we don't read it, and then we're waiting, hey, when are we going to go vote?"[788]

e. Postage Costs are a Barrier to VBM

Voters who face socio-economic barriers and high poverty rates are especially vulnerable to disenfranchisement under a VBM system in which the postage for returning the ballot is not prepaid. "If you can't afford a postage stamp, you can't buy one very easily," and studies show that people are less likely to vote.[789] The practical effect of requiring voters to pay for their own postage is that VBM can function as a poll tax.

---

[784] Sacramento Tr., Joseph Dietrich, 96.

[785] San Diego Tr., Robin Thundershield, 102.

[786] Tuba City Tr., Alta Edison, 59.

[787] Portland Tr., Carol Evans, 191.

[788] Phoenix Tr., Verlon Jose, 153.

[789] San Diego Tr., Melissa Rogers, 38.

Several Native voters who testified at the April 2018 field hearing in Portland, Oregon, described the discriminatory impact of postage costs for returning VBM ballots. In King County, Washington, VBM was "a problem for low income families to pay for postage stamps." It was more important for Native voters to purchase food and clothing for their household than to purchase a stamp to cast a ballot.[790] Another tribal member explained, the money Native voters have to spend on a stamp may be a decision to not buy something for their lunch.[791] They did not want to be "hassled" with having to pay the cost of returning their ballot.[792]

Following the field hearings, some states enacted legislation to pay the postage costs for returning VBM ballots. In July 2018, Washington decided to provide prepaid postage for VBM ballots for the first time since becoming an all-VBM state in 2011. State officials made the change "reluctantly" after King County appropriated funds to pay for postage.[793] In Oregon, which has been an all-VBM state since 2000, Governor Kate Brown signed a law to provide prepaid postage for mail-in ballots.[794]

Many state and local jurisdictions continue to place the burden of paying for return postage for mail-in ballots onto the voters, including Native Americans. That cost will remain a barrier for Native voters who cannot afford it.

f. Lack of Timely Access to Mail through Post Offices Impedes VBM

VBM replaces polling places with post offices. That poses problems for many voters living on tribal lands.

"People … have to pay to have post office boxes and then travel to the post office to get their ballot, either obtain it or send it back. And this is less easy than one might think. For example, going back to the Nevada reservations, the post office on the Pyramid Lake Reservation … is open from 9:30 to 3:30 Monday through Friday. So there are no Saturdays, no weekends for people working. But it's even worse because there is a sign at the post office on the wall that states if you want to pick up mail you can only do so from 1:30 to 3:30. Again, not exactly good hours for people who have jobs."[795]

---

[790] Portland Tr., Mike Tulee 187-88, 220.

[791] Portland Tr., Carol Evans, 220-21.

[792] Portland Tr., Teresa Taylor, 25.

[793] Ryan Blethen, *Ballots are on the way for Washington state voters, who won't have to dig for stamps anymore*, SEATTLE TIMES (July 19, 2018), *available at* https://www.seattletimes.com/seattle-news/politics/ballots-are-on-the-way-for-washington-state-voters-who-wont-have-to-dig-for-stamps-anymore/.

[794] Sarah Zimmerman, *Oregon to cover mail-in ballot postage*, MAIL TRIB. (Aug. 2, 2019), *available at* https://mailtribune.com/news/happening-now/oregon-to-cover-mail-in-ballot-postage.

[795] San Diego Tr., Jean Schroedel, 14-15.

Reduced hours for postal offices located on reservations is typical, regardless of whether the tribe is located in Arizona[796] or in Washington. The post office closes early and there is no drop box outside for after hours. "I think that cuts off our voice when we are mandated by the hours of the postal system."[797]

A related issue arises from the delays caused by returning mail through post offices located in isolated communities. In rural areas, it takes longer for mail to be returned to the election office. For example, for a voter who returns their ballot by mail on Navajo lands in Leupp, Arizona, the ballot will have to be routed to Winslow, then Phoenix, and finally back to Flagstaff. It could add several days.[798]

Postal delays in delivering VBM ballots to voters or returning them to the elections office can be even greater in Alaska. It is not unusual for Alaska Native villages to be inaccessible by air for several weeks due to inclement weather, icing conditions, and above all fog. Unpredictable weather conditions in rural Alaska always have the final say in the delivery and pick-up of mail.

g. Lack of Access to Drop Boxes or "Voting Centers" for VBM

Cost savings is one of the biggest advantages touted by VBM proponents. "Jurisdictions may save money because they no longer need to staff traditional polling places with poll workers and equip each polling place with voting machines."[799] But that cost savings comes at a price.

Native voters consistently have complained that they lack convenient access to drop boxes to return their VBM ballots. Far too often, those drop boxes have only been located off of tribal lands, in many cases great distances from Native American communities. For example, tribal members in Washington State have to drive 45 miles each way to get to the closest drop box, if they forget to return ballots in the mail.[800] Another was ten miles each way for tribal members lacking transportation.[801]

There were several examples of tribes in Washington State that have been denied drop boxes by local elections officials. In 2017, the Confederated Tribes of the Colville Indian Reservations requested that the Okanogan County Auditor provide a ballot drop box, but the request was denied.[802] For a decade, efforts by the Tulalip Tribes to get a drop box from the county were

---

[796] Phoenix Tr., Stephen Lewis, 130.

[797] Portland Tr., Norma Sanchez, 162-63.

[798] Tuba City Tr., Alta Edison, 63-64.

[799] *See* All-Mail Elections, *supra* note 741, at "Possible Advantages."

[800] Portland Tr., Carol Evans, 191.

[801] Portland Tr., Norma Sanchez, 154-55.

[802] Portland Tr., Norma Sanchez, 123-24.

rebuffed. They had to resort to creating their own lock box.[803] Other tribes have had success in getting drop boxes on tribal lands, but only after numerous requests to county officials.[804]

Some VBM jurisdictions offer voting centers for residents to obtain assistance and to drop off their ballots. While they can be convenient for many voters living in urban areas, they are inaccessible to Native voters living in isolated rural areas.

San Juan County, Utah exploited this isolation in establishing a voting center in the county seat. Many Navajo and Ute voters are "immobile due to age, illness, and access to transportation." When San Juan County changed to a vote-by-mail system, "ballot boxes were in distant places like Monticello," located off-reservation. "Long distances and lack of ... ballot stations" had a significant impact even among voters who ordinarily vote at higher rates.[805]

Alaska considered a proposal to establish voting centers in selected communities in combination with a VBM system. However, that proposal was not feasible in rural areas required to provide language assistance to Alaska Native voters.

To comply with Section 203 and the *Nick* and *Toyukak* orders, Alaska's Division of Elections would have to establish voting centers in the over 200 Native villages and communities outside of the state's road system. Each of those voting centers would have to have fully trained bilingual election workers who could provide complete, accurate, and uniform translations in all of the covered Native languages. Each voting center would have to be open for at least the same period as early voting locations. Those requirements would eliminate any projected cost savings for mail-in voting in Alaska.

h. Absence of In-Person Language and Voter Assistance through VBM

In-person voting has several advantages over VBM. "[I]f you have questions about the ballot, being in-person, [there are] people to help you ... especially for those who do not have a lot of experience with voting, who ... maybe have low education attainment, have not as much information about the voting process, about the candidates, about the ballots. So having access to people that can help you with the ballot gives an intrinsic value to in-person voting.... With on-site voting ... people feel more trust that their vote is being counted and are likely to engage in it. It also reduces ... these problems with these errors, right, that make those ballots and those particular votes thrown out."[806] You cannot do these things "via mail."[807]

---

[803] Portland Tr., Theresa Shelden, 163-64.

[804] Portland Tr., Brian Cladoosby, 129.

[805] Tuba City Tr., Moroni Benally, 32.

[806] San Diego Tr., Melissa Rogers, 43-44; *see also* Phoenix Tr., Steve Titla, 245 ("Native Americans vote at the polls in higher numbers than off reservation do because of language translation, socio-economic issues and cultural reasons.").

[807] San Diego Tr., Jean Schroedel, 36.

It is essential that voter assistance sites that are accessible for Native voters are available on Election Day when vote-by-mail is used. Polling locations on tribal lands cannot be eliminated but must be converted to assistance sites to provide language assistance.[808]

For example, in a November 2009 school district special election, Coconino County, Arizona had voter assistance available for Navajo voters to receive language assistance. There were ballot replacement sites for voters who did not receive their ballots in the mail. Assistance was provided at post offices in Cameron and Leupp and voters were encouraged to complete their ballots and turn them in when they received them. Outreach workers attended Chapter House meetings and public events to hand out voter materials and give instructions. They ran Navajo language ads about the election. Those efforts increased turnout to 16.5 percent, up from just 9.1 percent in the previous special election in 2004.[809]

Where in-person assistance is unavailable for VBM elections, Native voters – especially Tribal Elders with the greatest need for language or voter assistance – are disenfranchised. In New Mexico, an Elder who received a mail-in ballot did not complete it because she needed assistance in Navajo. At the next election, she showed up to vote in person and asked for help to complete the ballot she received previously. The interpreter explained to her that "the vote already took place." Both had tears in their eyes when they realized the Elder's vote would not be counted.[810]

i. Other Forms of Disenfranchisement through VBM

Like other methods of election, VBM can disenfranchise Native voters. In some cases, disenfranchisement occurs when Native voters are not informed about the consequences of VBM. In Arizona, political parties and groups have signed up Navajo voters to be on the permanent early voting list without explaining what it is. It has resulted in a higher number of Native voters having to cast provisional ballots on Election Day.[811] Similarly, many members of the Salt River Pima Maricopa Indian Community did not understand the check box on their voter registration form to be placed on the permanent early voting list, through which vote-by-mail is used. When they went to the polling locations and did not have the envelope for their mail-in ballot, they had to vote by provisional ballot.[812]

In other cases, disenfranchisement is what drives VBM. In San Juan County, Utah, the County switched to mail-in voting to eliminate language assistance available through polling places.[813]

---

[808] Tuba City Tr., Patty Hansen, 50-51.

[809] Tuba City Tr., Patty Hansen, 47-49.

[810] Isleta Tr., Shirlee Smith, 93-94; Tuba City Tr., Shirlee Smith 217-18.

[811] Tuba City Tr., Patty Hansen, 51-52.

[812] Phoenix Tr., Angela Willeford, 162.

[813] Tuba City Tr., James Attakai 14; Tuba City Tr., Moroni Benally, 32.

Moreover, VBM raises the issue of "lost votes."[814] Scholars led by Charles Stewart, a Professor of Political Science at MIT, and colleagues at Cal Tech "found that as much as one-quarter of all votes get lost or our ballots get lost when using these vote-by-mail options."[815] There are a variety of reasons for lost votes. The voter may not receive the ballot. The ballot may not be delivered to local election officials. There may be difficulties verifying who completed the ballot or if they are registered. A voter may fill out the ballot or the envelope incorrectly so the ballot is "administratively compromised." There is an increased risk of "errors or malfeasance" by election officials.[816]

VBM also increases opportunities for election officials to exercise their "enormous discretion" to throw out votes. There have been complaints in some VBM states "that local officials have been marking ballots as invalid because they believe the signature on the outer envelope does not match the one they have for the person on record."[817] One study found that 13 percent of all mail-in votes were not tabulated due to either administrative or postal errors.[818]

j. VBM Widens the Gap between Non-Native and Native Voting

When the various impacts of VBM are considered in the context of the general barriers that American Indians and Alaska Natives face in registration and voting, it is unsurprising that it does not work well for Native voters. At best, "when taken with the socioeconomic conditions and the mail issues present on many reservations … vote-by-mail would appear to have little chance for a meaningful impact."[819] At worst, VBM drives down Native participation.

In examining data from the *Wandering Medicine* case in Montana, Dr. Jean Schroedel of Claremont Graduate University and Dr. Gerald Webster of the University of Wyoming found that the conditions of Native voters in Big Horn, Blaine, and Rosebud Counties made it likely that mail-in voting would depress participation. Native voters in those counties have consistently higher levels of unemployment, lower educational attainment, farther travel distances, and less access to transportation.[820]

On Montana reservations with predominately Native populations, between ten to fifteen percent of ballots were mailed, compared to 33 percent in non-Native precincts. The study shows that Native voters do not switch to vote-by-mail "despite the distance and financial considerations." The expectations in Montana are consistent with the research on which groups are most likely to adopt it. That leads to the conclusion that vote-by-mail "has little chance of helping and having a

---

[814] Sacramento Tr., Joseph Dietrich, 81.

[815] San Diego Tr., Jean Schroedel, 14; *see also* Sacramento Tr., Joseph Dietrich, 82 (same).

[816] Sacramento Tr., Joseph Dietrich, 81.

[817] San Diego Tr., Jean Schroedel, 15.

[818] Sacramento Tr., Joseph Dietrich, 82.

[819] Sacramento Tr., Joseph Dietrich, 92.

[820] Sacramento Tr., Joseph Dietrich, 84.

meaningful impact" for Native voters.[821] Indeed, VBM in Montana would likely widen the disparity in turnout between Native and non-Native voters.[822]

Similar conclusions were reached on data from Native voters in Nevada and South Dakota. Lower rates of trust in non-tribal governments contributed to the lack of use among Native voters. Among members of the Duck Valley, Pyramid Lake, Walker River and Yerrington Tribes in Nevada, only 39 percent of Native respondents completely trusted that their vote would be counted as intended, compared to 66 percent of the predominately non-Native people living off the reservation. In South Dakota, only five percent of Native voters felt that the local non-tribal government would protect their rights.[823]

Analysis of the use of VBM in Washington State indicates that it has "had little impact in increasing participation in the Native American community." The data show that there is no statistically significant increase in voter participation between 2008 and 2012 in precincts in which 30 percent or more of the residents are American Indian. The largest areas examined included the Colville, Quinault, and Yakama Reservations. Instead, VBM "appears to have little impact in broadly increasing participation. It works really well for those already participating or who benefit from high education levels" and higher socio-economic status, but not for Native Americans who face greater barriers to participating in non-tribal elections.[824]

VBM has had a questionable impact and has driven down Native voting in some areas. "It's not a silver bullet. It's not something that's going to correct all the problems that are created by travel distance. And it still leaves logistical issues, it still leaves trust issues, it still leaves the notion of a limited portal to participation in democratic institutions and processes…"[825]

The barriers that VBM imposes on Native voters may not be resolved if a mail-in voting system is layered on top of the existing methods of election. "[W]here vote by mail exists, it becomes the dominant paradigm… [T]he local instances tend to just kind of melt away into the background, and everybody begins to rely on vote-by-mail… So when you're a minority group or a group of limited access to voting in some way, it takes the focus … off of making sure that those communities are still served and still have access. And that's sort of the magic elixir of vote by mail, is 'Oh, we fixed that problem,' but actually maybe you didn't. It seems like you did, and it seems like you put a magical potion out there, but actually the problem still remains, because those communities may not be served. You may not have done what you think you've done, and that's concerning."[826]

---

[821] Sacramento Tr., Joseph Dietrich, 84-85.

[822] Sacramento Tr., Joseph Dietrich, 95-96.

[823] Sacramento Tr., Joseph Lake, 85-86.

[824] Sacramento Tr., Joseph Lake, 87-90.

[825] Sacramento Tr., Joseph Dietrich, 91.

[826] Sacramento Tr., Joseph Dietrich, 101.

7. Barriers Posed by Population Thresholds for Polling Places

Laws in many states give county clerks the discretion to designate precincts in rural and tribal areas as all vote-by-mail if they do not meet a designated threshold of registered voters.

California Elections Code 3005(a) permits registrars of voters to designate precincts with fewer than 250 voters as "vote-by-mail." Similarly, Nevada Revised Statutes § 293.343 provides that a registered voter residing in an "election precinct in which there were not more than 200 voters registered for the last preceding general election, or in a precinct in which it appears to the satisfaction of the county clerk and Secretary of State that there are not more than 200 registered voters," may be required to vote-by-mail.

This form of official discretion has the effect of suppressing Native voter participation. The Duck Valley Shoshone-Paiute Tribe, which straddles the Nevada and Idaho border, illustrates the point. According to 2017 ACS estimates, Owyhee, Nevada, where the Tribe is headquartered, has a total population of 1,104 people, of whom 780 are 18 years of age or older.[827] The Tribe has approximately 700 tribal members registered to vote for tribal elections who live in Elko County. Elko County designated Owyhee, which is in Precinct 29, as an all-VBM location with no in-person voting location.

In the November 2014 General Election, only 135 people were registered to vote in Precinct 29 in Owyhee,[828] a registration rate of just 19.5 percent of the 2010 Census count of 694 people of voting age.[829] Even with the reduced registration rate, Native voters in Precinct 29 had turnout of just 42 percent in the 2014 General Election compared to 55.6 percent for the county as a whole.[830] In contrast, every in-person voting location had turnout exceeding the countywide average.[831] If the Duck Valley turnout is calculated using the number of eligible persons from the 2010 Census, the turnout rate in the 2014 General Election was just 8.2 percent (57 ballots cast out of 694 persons eligible to register to vote), an astounding gap of 47.4 percent below the countywide average.[832]

These low registration and turnout numbers do not occur by happenstance. Depressed voter registration numbers, which prevent many Nevada tribes from meeting the threshold for requesting

---

[827] *See* U.S. Census Bureau, American FactFinder, ACS Demographic and Housing Estimates: 2013-2017 American Community Survey 5-Year Estimates, Owyhee Census Data Place, Nevada, *available at* https://factfinder/census.gov.

[828] *See* State of Nevada, County of Elko, Canvas and Abstract of the Vote of the Elko County, State of Nevada 2014 General Election Held on November 4, 2014 (under Precinct 29 Registration).

[829] *See* U.S. Census Bureau, American FactFinder, Profile of General Population and Housing Characteristics: 2010 Demographic Profile Data, Owyhee Census Data Place, Nevada, *available at* https://factfinder/census.gov.

[830] *See* State of Nevada, County of Elko, Canvas and Abstract of the Vote of the Elko County, State of Nevada 2014 General Election Held on November 4, 2014 (under Precinct 29 Ballots Cast and Turnout Percent).

[831] *See id.*

[832] *See id.*

a polling place, are "the result of past history and the racism and the prejudice" within non-Native communities.[833]

This barrier creates a vicious cycle in which vote-by-mail depresses voter registration rates on tribal lands, making it even more difficult to meet the threshold for a mandatory in-person voting location. In some cases, that cycle is broken through litigation. Shortly before the 2016 election, Native voters and tribes in northern Nevada prevailed in a federal lawsuit to obtain in-person early voting and Election Day voting locations on tribal lands.[834]

More common, however, Native organizations and tribes commit substantial resources to improve voter registration rates to meet the state's minimum threshold for mandatory in-person polling places.

A less populous reservation such as the Middletown Rancheria of Pomo Indians of California, which has about 130 members on the reservation and about 1,000 members living in the county, has been denied a polling place because the county says it does not have the funds. County officials have not allowed Tribal members to volunteer to work the polling place. Tribal officials cannot meet the state minimum threshold for establishing an in-person voting location on the reservation.[835]

Even when tribes do have enough members, it is not easy to register Native voters who have been long-denied a polling place. In New Mexico, it was a challenge to secure just 50 voters to establish a polling place on the tribal lands of the Santo Domingo Pueblo in New Mexico because of the historical exclusion of Native voters.[836]

In 2016, the Thule River Tribe in California asked Tulare County officials to establish a polling place on tribal lands. Although there were 700 tribal members of voting age, the county required the Tribe to have 250 registered voters to secure an in-person voting location. Tribal leaders complained that "we shouldn't have to meet that mark" and that a federally recognized tribe should be able to get its own polling place for non-tribal elections. After substantial efforts by the Tribe including voter education and voter registration drives, the Tribe contacted the county and was told it was 18 registered voters short and thus could not have a polling place for the Presidential Election. The tribe continued its efforts and was informed at the end of 2017 that it had a little over 300 registered voters and that a polling place would be established in 2018.[837]

8. Application of Federal Disability Laws to Deny Polling Places on Tribal Lands

---

[833] Sacramento Tr., Beverly Harry, 15.

[834] *Sanchez v. Cegavske*, 214 F. Supp.3d 961 (D. Nev. 2016).

[835] Sacramento Tr., Carlos Negrete, 44, 47.

[836] Isleta Tr., Everett Chavez, 154-55.

[837] Sacramento Tr., Thomas Eugene, 29-31.

Political participation must include independent living, which "means full inclusiveness for people with disabilities." Tribal communities need to ensure that there is "physical access to the polling places."[838] Disability advocates, like Joseph Ray and the Native American Disability Law Center (NADLC), have introduced initiatives to create more resources for the Elders and other adults with disabilities to remain independent in the community.[839] Their efforts are sorely needed, both for urban Native voters and those voting in more rural areas.

Some tribes have buildings that are compliant with the Americans with Disabilities Act (ADA). When the Thule River Tribe in California requested a polling place at its government office, it passed inspection with just a few minor adjustments.[840] However, many tribal buildings were constructed before the ADA was enacted in 1992 and do not have complete access. Those buildings need to be fully accessible for Native voters who "use a mobility device or have an issue with mobility."[841] The challenge is that tribes often lack the resources to bring polling places on tribal lands into full compliance with the ADA.

Researchers from ASU's Indian Law Clinic at the Sandra Day O'Connor College of Law found at least seven instances of accessibility violations at polling places in the 2016 election. In White River, Arizona, which is located on the Fort Apache Indian Reservation, there were two incidents. A voter in a wheelchair had to be carried down the steps by two voters because there was no wheelchair ramp. Another voter with a walker had to by three other people in line to get into and out of the building.[842] At the Gila River Indian Community, a Tribal Elder could not get out of her car. The Community's outreach worker had to tell the poll worker "that they have to bring the ballot out to the voter, to the Elder."[843]

Similar issues arose in the 2018 primary election in Arizona. "There was poor handicap access, so a lot of disabled elderly couldn't easily access polling locations, and handicap parking spaces were also an issue." One location lacked wheelchair access, requiring the Native voter to be lifted up two steps to get inside the building.[844]

NADLC documented comparable access issues for Navajo voters. The number of disabled Navajos of voting age is high. Thirty percent between the ages of 21 and 51 have a disability, climbing to seventy percent of all Navajos over the age of 64. Approximately 40,000 of all

---

[838] Isleta Tr., Joseph Ray, 109.

[839] Milwaukee Tr., Joseph Ray, 191-93.

[840] Sacramento Tr., Thomas Eugene, 31.

[841] Milwaukee Tr., Joseph Ray, 191-93.

[842] Phoenix Tr., Solveig Parson, 14-15; Phoenix Tr., Devon Suarez, 216-17.

[843] Phoenix Tr., Joyce Lopez, 208.

[844] Tuba City Tr., Brian Curley-Chambers, 222-24.

enrolled members of the Navajo Nation are disabled.[845] Disabled Navajo voters face many polling place access issues:

> Navajos with disabilities cannot get out of their vehicles because of muddy parking lots; they cannot get to a polling site entrance because of loose gravel and large rocks on the parking lots; they cannot get in doors because they are too heavy, there is no ramp, or the doors are not wide enough to accommodate a wheelchair.[846]

NADLC conducted an accessibility survey of 25 polling places on Navajo Tribal lands that are used for tribal and non-tribal elections. The survey focused on four major components: parking accessibility, sidewalks and walkways, other features, and comments about accessibility. The polling places were located in five major communities: Crownpoint, Gallup, and Shiprock, New Mexico; and Chinle and Tuba City, Arizona.[847]

The NADLC survey identified "common major deficiencies" at the surveyed polling places, including:

1. No posted signs or designated parking spaces for individuals with disabilities.

2. No designated parking spaces with sufficient room for vehicles with wheelchair lifts.

3. Uneven and unsafe parking lot surfaces consisting of dirt, loose gravel, or large rocks that are impassable and potentially muddy during inclement weather.

4. No clear and safe entrance to polling places with surfaces of loose gravel and large rocks making it difficult to maneuver wheelchairs, walkers, and potentially unsafe for individuals with visual impairments.

5. Uneven sidewalks that are one inch or higher than the surface of the parking area.

6. Impassable entrance and interior doors that have unusable knobs or "C" shape handles with thumb press buttons, rather than easily used levers.

7. No ramps or steep and unsafe ramps constructed of material that becomes slippery during inclement weather.

---

[845] Native American Disability Law Center, The Fundamental Principal of a Participatory Democracy: Equal Access for Navajos with Disabilities 2 (May 2013) ("Equal Access").

[846] *Id.* at 1.

[847] Equal Access, *supra* note 846, at 1-4.

8. Impassable and narrow entries and exits that become congested for wheelchairs and other assistive devices.[848]

Some of these issues were identified at five polling places in Tuba City, located in Coconino County, Arizona. Four of those polling places are used for non-tribal elections (Kaibeto Chapter House, Tuba City High School Pavilion, Tonalea Chapter House, and Inscription Chapter House).[849] NADLC made several recommendations, many of which required modest mechanical fixes or changes in how buildings were entered and exited. Some recommendations, such as paving the parking lots, would have greater costs associated with them.[850]

The United States Department of Justice apparently learned about NADLC's report. Without consulting NADLC, its partnering organizations, or the Navajo Nation, the Justice Department opened an investigation. In August 2016, the U.S. Department of Justice evaluated early voting and polling places on tribal lands for ADA accessibility. Thirty of 31 in Coconino County, Arizona were found to be out of compliance with the ADA. Many of those polling places located at Navajo Chapter Houses lack paved handicapped parking.[851]

When Coconino County's Recorder received the list from the Justice Department listing "all of these locations … on the reservation," her immediate response was, "I'm not going to disenfranchise those voters by moving" the voting location "to an accessible place that may be a hundred miles away. That made no sense."[852] Coconino County is exploring options to provide paved parking spots at the polling places on tribal lands.[853]

The Recorder's response is understandable and laudable. Sometimes, finding polling places in rural areas can be very difficult. For example, Coconino County recently learned that a polling place at one of the Navajo Nation's Chapter Houses would have to be relocated because the building is being closed to address safety concerns with the crumbling structure. Where a rural community has few buildings that can be used as polling places, circumstances may require looking at ways to make voting accessible for disabled voters at the available locations. It is possible to make in-person voting accessible without disenfranchising an entire community.

Coconino County uses curbside voting, which it provides at non-compliant polling places. They use a doorbell system in which the voter presses the button from their vehicle and it rings inside the polling place. The poll worker then brings the ballot out to assist the voter. The Justice Department referred to curbside voting as the "nuclear option" and made clear that it is not an acceptable long-term solution.[854]

---

[848] *Id.* at 5.

[849] *Id.* at 11-13.

[850] *See id.*

[851] Tuba City Tr., Patty Hansen, 54-55.

[852] Tuba City Tr., Patty Hansen, 94-95.

[853] Tuba City Tr., Patty Hansen, 55.

[854] Tuba City Tr., Patty Hansen, 94.

The most common issue the Justice Department identified was the lack of a paved handicapped parking spot with a ramp and posted sign indicating it was reserved for disabled voters. Even where paved parking lots were available, they often had steep grades that were not ADA compliant. Other issues included lack of ramps into the Chapter Houses, and door widths that did not comply with federal standards.

On May 7, 2018, Coconino County entered into a settlement agreement with the Justice Department to resolve the accessibility issues for the polling places located on tribal lands.[855] The agreement requires the county to "make those polling place locations accessible on Election Day" or to "relocate those locations not remediated to an alternative accessible location…"[856]

More recently, the Justice Department has investigated the other counties identified in the NADLC report. The Department entered into a settlement agreement with McKinley County, New Mexico (where Gallup and Crownpoint are located) on June 6, 2019.[857] On July 12, 2019, the Department entered into a settlement agreement with Sandoval County, New Mexico, which encompasses part of the Navajo Nation, the Jicarilla Apache Indian Reservation, and 12 Pueblos.[858] We have been informed that the Department has an ongoing investigation in San Juan County, New Mexico, which includes Shiprock on the Navajo Nation.

The Department's enforcement efforts, while laudable, have four significant flaws. First, whether urban or rural, the absence of fully accessible and ADA-compliant facilities tends to have a disproportionately high impact on minority communities, which rely upon older buildings to serve as polling places. Non-minority communities often are more likely to have modern facilities that were built to fully comply with federal disability laws. Federal authorities must be cognizant that their enforcement efforts often have a disparate impact on minority voters, as the recent investigations in counties overlapping with the Navajo Nation illustrate.

Second, the Navajo Nation Department of Justice has indicated that Justice Department attorneys did not consult with it before opening an investigation into polling place accessibility. Consultation with tribal government and partnering disability rights organizations is critical to any voting rights enforcement on tribal lands, especially where those efforts involve tribal buildings and polling place locations.

---

[855] *See* Settlement Agreement Between the United States of America and Coconino County Regarding the Accessibility of Polling Places, DJ # 204-49-91, *available at* https://www.ada.gov.

[856] *Id.* at 3.

[857] *See* U.S. Department of Justice, Press Release, Justice Department Reaches Agreement with McKinley County, New Mexico, to Ensure Accessible Voting (June 6, 2019), *available at* https://www.justice.gov/opa/pr/justice-department-reaches-agreement-mckinley-county-new-mexico-ensure-accessible-voting.

[858] *See* U.S. Department of Justice, Press Release, Justice Department Reaches Agreement with Sandoval County, New Mexico, to Ensure Accessible Voting (July 12, 2019), *available at* https://www.justice.gov/opa/pr/justice-department-reaches-agreement-sandoval-county-new-mexico-ensure-accessible-voting.

Third, the Department's settlement agreement does not account for other applicable law and alternatives to make polling locations temporarily accessible for the disabled. The federal Voting Accessibility for the Elderly and Handicapped Act provides an exception for communities in which "all potential polling places have been surveyed and no such accessible place is available, nor is the political subdivision able to make one temporarily accessible, in the area involved."[859] A location that is not ADA-compliant may be used as a polling place if the chief elections officer of the State "assures that any handicapped or elderly voter assigned to an inaccessible polling place, upon advance request of such voter (pursuant to procedures established by the chief election officer of the State) … will be provided with an alternative means for casting a ballot on the day of the election."[860]

Most commonly, jurisdictions provide curbside voting as an alternative. The voters can simply honk the horn of their car to alert election workers inside of the polling place that they are outside. The poll worker then brings a ballot out to the voter to complete in their vehicle. The voters do not have to struggle with getting a scooter or walker out of their vehicle or expend any energy entering the polling place. Admittedly, as the NADLC has pointed out, this is an imperfect solution that does not allow a disabled voter to enter the polling place and participate in the very important communal aspects of voting.[861] As witnesses explained in their opposition to all vote-by-mail systems, a common cultural approach of tribal members is to personally interact with others in their community in the voting process and to create a festive environment that celebrates their participation. That obviously is not provided when voters are unable to leave their vehicles.

Fourth, and what is most concerning, is that election officials will use the ADA as a pretext to close existing polling places or to deny new ones for tribes currently lacking in-person voting on tribal lands.

Coconino County officials are taking steps to address ADA issues raised by the Justice Department without closing any polling places on tribal lands.[862] But not every state or local official will do so. In 2018, Randolph County, Georgia proposed to close seven polling places located in predominately black communities, purportedly because they "had disability compliance issues." The plan was widely seen as an effort to suppress the minority vote. It ultimately was defeated by a 2-0 vote of the County's Board of Elections.[863]

This abusive reliance on the ADA is doubly pernicious. It is a deliberate effort to use one civil rights statute (the ADA) to deprive minority voters of their fundamental right to vote under other federal civil rights laws (the Fourteenth and Fifteenth Amendments and the Voting Rights Act). In the process, it can be used as a vehicle to disenfranchise an entire community of voters, without

---

[859] 52 U.S.C. § 20102(b)(2)(A).

[860] 52 U.S.C. § 20102(b)(2)(B)(ii).

[861] Equal Access, *supra* note 846, at 1.

[862] *See* Tuba City Tr., Patty Hansen, 54-55, 94-95.

[863] Richard Fausset, *Georgia County Rejects Plan to Close 7 Polling Places in Majority-Black Area*, N.Y. TIMES (Aug. 23, 2018), *available at* https://www.nytimes.com/2018/08/23/us/randolph-county-georgia-voting.html.

exploring other cost-effective options that would make the voting process fully accessible for everyone.

9. Impact of Same Day Voting for Tribal and Non-Tribal Elections

Voter turnout for tribal elections tends to be higher than participation in local, state, and federal elections.[864] Some tribes have sought to increase turnout in non-tribal elections by aligning the dates and locations for tribal elections and non-tribal elections. Whether this approach in fact increases turnout depends on the specific makeup of the tribal community.

For example, the Lummi Nation purposely aligned its non-tribal elections with the tribal elections with great success. Not only has this alignment increased participation it has also "helped a few of our tribal members get elected to off-reservation positions." It also provided the Lummi the practical opportunity to "help members to vote if they are not sure . . . print off their ballot if it has been lost in the mail, update their addresses with the Whatcom County Auditor's Office . . . collect the ballots in the drop box to make sure their votes counted." The Lummi also use this opportunity to educate voters on non-tribal issues. [865]

However, for some communities, such as the Navajo Nation, holding tribal elections on the same day as non-tribal elections could lead to the widespread disenfranchisement of Native voters since the county lines do not intersect with their tribal chapter houses where they vote for their tribal elections.[866] This disconnect would force a tribal member to choose between participation in their tribal elections and participation in the non-tribal election. Additionally, tribal members may live off the reservation in pursuit of work or education. Travel back to vote in their chapter house would require hours of travel. Such a voter would not be able to conceivably make both elections.[867] Ultimately, whether tribal and non-tribal elections should be aligned is a highly fact-specific inquiry that should be left to the discretion of the tribe.

10. Discriminatory Impact of Lack of Native American Full-time Election Workers and Part-Time Poll Workers

When Native Americans go to vote, they are often voting at polling locations where poll workers are non-Native.[868] When "you have folks showing up to the poll and the poll workers don't look like them, it can be a very intimidating thing."[869] A voter in Arizona reported feeling "poll workers

---

[864] San Diego Tr., Jean Schroedel, 52; San Diego Tr., Terria Smith, 57 ("You know people will drive three hours to come vote for their cousin or whoever, you know, that is running for tribal council, but you know, they won't go 1-minutes up the road to vote in the general election.")

[865] Portland Tr., Teresa Taylor, 26.

[866] Tuba City Tr., Ethel Branch, 80-81.; Tuba City Tr., Patty Hansen, 82.

[867] Tuba City Tr., Darrell Marks, 114.

[868] Milwaukee Tr. Stephanie Thompson, 17, 26; Tulsa Tr., Christine Blackcloud, 7; Tulsa Tr., Bobbity Saupitty, 76; Phoenix Tr., Sarah Crawford, 50-51.

[869] Milwaukee Tr., Matt Dannenburg, 12.

were being racist toward him" because they "were not very helpful" and "were very very short, very curt."[870] A Native voter described how "I went to the poll workers, and when you talk about racism, it's not so much so blatant, but sometimes it's just real condescending. They talk down to the voter. And, you know, some of our people who are shy, they don't really want to say anything, they just, for whatever reason, wouldn't go to district 7 to vote."[871] Another advocate described how when there are non-Native workers "There's a kind of a sense of unease when Native Americans walk into a polling place, and what typically looks like kind of a tribunal of you're going to prove that you are registered, you know, you got to prove it to us." He contrasted those experiences with "what I saw down in the 2016 election, which is more of a welcoming attitude, because they had community members there."[872]

Even when polling locations are located within Native territories, non-Natives may be the ones running elections. For example, in the Menominee territory of Keshena, which is majority Native, "the only non-Native landowners" were "all of the poll workers up until recently." These non-Natives have a long history of discrimination toward the Native people which made Native American voters' encounters with poll workers feel like "they don't want us here, we're a burden to them type of feeling."[873] Furthermore, non-Native poll workers can be especially discouraging because they may be from outside of the community and entirely unfamiliar with the people and the geography. One advocate explained how when new districts were formed and voters were turning up to vote in their old districts the poll workers "didn't know how to get" to the new polling location and "being a non-member they didn't know" to direct voters to the new polling locations.[874]

Often, Native Americans are forced to leave their communities and vote in places that are hostile and have long histories of discrimination. Interactions with non-Native poll workers in these communities are tense. The former Chairman of the Kaibab Paiute Tribe describes how the relations with the neighboring town is especially fraught – "the community has a long history of stuffing things into the delivery pipe, so as to impede the on-third water that comes to the reservation" and "almost every single household, has one or two wells drilled into this aquifer, which basically negates the [water] agreement" between the tribe and the town. Given the "impunity" with which the neighboring community acts "[i]t makes it difficult for our people to go in there and trust the workers that are there, to, you know, go in and to vote. And those are the colonial aspects and continued history of the United States on a small scale."[875] The Vice Chairman of the Tohono O'odhom Nation described how when members go to the polls in cities like Phoenix "they get treated very racist, very differently" and that its "discouraging."[876] He eloquently surmised:

---

[870] Phoenix Tr., Sarah Crawford, 50-51.

[871] Phoenix Tr., Joyce Lopez, 171-72.

[872] Phoenix Tr., Kris Beecher, 55-56.

[873] Milwaukee Tr., Stephanie Thompson, 25.

[874] Phoenix Tr., Joyce Lopez, 197-98.

[875] Phoenix Tr., Roland Maldonado, 156.

[876] Phoenix Tr., Verlon Jose, 142-43.

> When you have a right to vote, you have a right to vote and to feel safe and secure in order to exercise that right. Not to go there and be discriminated by the poll workers or people that are there, or the fellow American citizens that are standing there to vote, to treat you in those ways, because your skin color is that way, or you don't speak very good English. Those are the things that Native Americans face. Those are the things that Tohono O'odham members face living down in Tucson, in Phoenix, and everywhere else.[877]

Clerks in charge of staffing poll workers are not always receptive to attempts to place Native Americans in election positions. Advocates describe how clerks tell them they have their "poll workers kind of set . . . we're not training anybody new."[878] Additionally, the process for requesting clerks can be "tricky" and "has to be done far in advance"[879] with advocates not knowing how poll workers are recruited.[880] Finally, clerks themselves may not be conducting outreach to tribal communities to recruit poll workers.[881]

However, some counties are looking to recruit Native poll workers. The Maricopa County Recorder's Office recently established a community relations team to attempt to "diversify" since, as one representative explained "the average age of our polling workers is 72, and, of course, the majority are white."[882] Yet, simply having one or two Native poll workers may not be sufficient to defeat discrimination. In one instance new poll watchers that had recently retired to Native territories were "appalled seeing how many Native people were turned away. And from their perspective a lot of times it wasn't with reason." These poll watchers mobilized a lawyer to "set things straight with the town clerk" which led to the hiring of one Native poll worker. However, this Native poll worker reports that "when she's not present, when she has to step away to go to the bathroom or something, there is a lot of borderline racial, racist talk going on between other poll workers about the tribal people that are coming in, comments about their appearance, kind of nitpicking the things that they do or really looking over these things" which is "very intimidating for tribal people to see that."[883]

Given this discriminatory treatment, tribal members advocate "for tribal voting centers that are housed on the reservations and tribal communities and staffed with Native people from our communities."[884] Community activists likewise urge to "have Native [poll workers] there at the

---

[877] *Id.*

[878] Milwaukee Tr., Matt Dannenburg, 12.

[879] Milwaukee Tr., Linea Sundstrom, 66.

[880] Phoenix Tr., Angela Willeford, 195.

[881] Milwaukee Tr., Regina Gasco-Bentley, 137-38.

[882] Phoenix Tr., Kenosha Skinner, 62.

[883] Milwaukee Tr., Stephanie Thompson, 18.

[884] Portland Tr., Patricia Whitefoot, 80.

particular locations on reservations"[885] and that instead of "cultural sensitivity training . . . the best way to remedy a situation like that is to encourage tribal members to volunteer to be poll workers on election day."[886] And, indeed, Native involvement should not only extend to temporary poll worker positions. "It is extremely important . . . . for county election offices to have full time Native American outreach staff members so that trust and communication between the county and tribal officials and our native voters is strong"[887]

D. BARRIERS TO HAVING THE BALLOT COUNTED

1. Lack of Ballot Canvassing Opportunities

Because Native Americans are underrepresented in permanent (e.g. county clerk positions) as well as temporary election positions (e.g. poll workers) Native Americans are often locked out of observing the inner-workings of elections. This reliance on non-Native election workers breeds distrust. For example, Stephanie Thompson, a member of the Lac du Flambeau Band of Chippewa Indians described how her town supervisors were entirely comprised of non-Native males. She ran against an incumbent in what became a very competitive race. Ultimately, the incumbent prevailed by the slim margin of six votes. However, prior to the Election Day members of the Native community insisted that they had not received their requested absentee ballots. Twelve members of the Tribal Council knew they were going to be out of town on Election Day and so had requested their ballots in advance. Their numerous calls to the clerk went unreturned. When the ballots never arrived in time for the election, the Council was unable to vote. One member drove 4.5 hours from Madison to Lac du Flambeau just to cast his vote since his absentee ballot had not arrived. When he asked the clerk about why he never received his ballot she laughed. She also insisted he must have filled out the application wrong. When the election ended up being decided by such a slim margin, the Council went to the clerk in person. The clerk again insisted that all of the applications must have been filled out wrong. Ms. Thompson also explained that the clerk had signed the nomination papers for the non-Native incumbent, which Ms. Thompson described as "discouraging" because it "really doesn't feel like your vote matters or is even wanted."[888] Without a mechanism to review the absentee ballot requests, the Native voters had to rely on the word of the clerk who was an open supporter of the non-Native candidate. Instead of the positive experience of a Native candidate running competitively in a race, the election served to increase suspicion and cynicism about political participation.

2. Failure to Count Ballots Cast Out-of-Precinct

Native Americans are "highly mobile, due to moving around to seek employment or due to being housing insecure.[889] In search of economic opportunity Natives may work outside of their

[885] Phoenix Tr., Kris Beecher, 54.

[886] Phoenix Tr., Rani Williams, 35.

[887] Tuba City Tr., Patty Hansen, 46.

[888] Milwaukee Tr., Stephanie Thompson, 20-22.

[889] Portland Tr., Valdez Bravo, 204.

reservations even for extended periods of time, yet many still consider home to be their traditional homes. As one tribal member explained "People work maybe in Kayenta, but they still vote, you know, where they live."[890] However, the practicalities of working off of the reservation may make it difficult for voters to return to their homes to vote, causing Native voters to vote out of precinct where they are registered.

Even more confounding, state precincts may not be aligned with equivalent tribal precincts such as traditional chapter houses. For example, "the Shonto Chapter House is located in Navajo County, which poses problems for Navajo voters living in Coconino County and for whom that Chapter House is the closest one to where they reside."[891] Tribal members may be confused about where to vote if their tribal election location is different than that of the elections run by the counties or state. "In a lot of communities up in the Navajo Nation, it's a very frequent thing to vote at the local chapter house. If the chapter house isn't your polling location for that particular election, then we see a lot of voters with high rates of confusion."[892]Even worse, some members will refuse to go to a polling location that is not located in their chapter house, especially if a precinct divides the chapter in half.[893]

In these instances, at least in Arizona, "state law does not allow election officials to locate polling places in different counties or states, even if the closest Navajo Chapter House to voters in their county is outside the county."[894] And Coconino County Recorder testified how "Coconino County has ongoing problems between Bodaway and Cameron in trying to coordinate Chapter House districts to follow county lines."[895] Therefore, when Native voters turn up at a polling location they are not registered for, a poll worker will often furnish them with a provisional ballot. However, in Arizona, that ballot ultimately will be thrown out in its entirety.

State systems differ about whether they accept provisional ballots cast out of precinct. In Maine, out of precinct ballot are fully counted. In other states, just part of the ballot will be accepted – for example, federal or statewide offices will be counted, but the rest of the ballot is rejected. In some states, the entire ballot is rejected.

---

[890] Tuba City Tr., James Attakai, 20.

[891] Tuba City Tr., Ethel Branch, 80-81.

[892] Phoenix Tr., Sarah Gonski, 238.

[893] Tuba City Tr., Edbert Little, 166.

[894] Tuba City Tr., Patty Hansen, 81-82.

[895] Tuba City Tr., Patty Hansen, 82.

Figure 19. Chart of State Handling of Provisional Ballots Cast in the Wrong Precinct. Compiled by National Conference of State Legislatures

Full Count	Maine**
Partial Count	Alaska, Arizona, Arkansas, California, Colorado District of Columbia, Georgia, Kansas, Louisiania*, Maryland, Massachusetts, New Jersey, New Mexico, New York, Ohio***, Oregon, Rhode Island*, Utah, Washington, West Virginia
Does Not Count	Alabama, Connecticut, Delaware, Florida, Hawaii, Illinois, Indiana, Iowa, Kentucky, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, North Carolina, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Vermont, Virginia, Wisconsin, Wyoming

*Only Federal races

** Validity is only reviewed if the number of provisional ballots cast is a large enough number to affect the results of the election

*** See Ohio Code § 3505.183

In Arizona, the entire ballot is rejected. The consequences of not allowing out of precinct voting disproportionately affects Native communities:

> in the 2016 general election Native American voters were twice as likely to cast an out of precinct provisional ballot than a Anglo voter was. The rates in Maricopa County specifically were 73 percent higher for Native Americans verse an Anglo voter. 74 percent in Pima County. We see that fairly consistently. This one I though was sort of shocking. In Apache County rates of out-of-precinct voting were 138 percent higher for Native Americans than for Anglo voters in 2016.[896]

Additionally, some poll workers may not inform the voter that the reason they are voting provisionally is that they are voting out of precinct. One advocate explained how she talked to voters who describe going into a polling location and being told they are not on the rolls but "[s]omebody will work it on the back end. It will be fine." However, those voters end up having their ballots rejected because they were in the wrong place. She reports how the voters were not given an opportunity to cure, but if they had been, "many of them say: I could have gone over to

[896] Phoenix Tr., Sarah Gonski, 237.

the other location. I could have."[897] Informing voters that they are voting out of precinct and allowing "[o]ut-of-precinct voting … would alleviate a lot of problems in terms of voters getting turned away or having to go to an additional location, which a lot of times causes them to just to not vote at all because they have to go back to work or have some other obligation, or it is just taking too long."[898]

3. Ballot Harvesting Bans

The loss of preclearance means that previously covered jurisdictions freely implemented discriminatory changes as soon as they could. Take for example Arizona. While preclearance was in effect, the State submitted HB 2023, commonly called the Ballot Harvesting law, that makes it a felony to possess anyone else's early ballot, whether voted or not. This was subject to a lot of controversy from the start, and the Department of Justice made a "more information request" or MIR that usually signaled to a jurisdiction that the change might not be approved. It was withdrawn.

Right after the *Shelby County* decision, Arizona immediately implemented this controversial change and there was ample testimony describing in detail the negative impact if would have on Native voters in particular.[899] Outside of Pima and Maricopa counties, only 18 percent of Native Americans have home mail delivery.[900] They rely on post office boxes that are often very far from their homes so families commonly "pool" their mail, meaning one person who is going to town would collect it for everyone else to drop it off at the post office.[901] A number of people also cannot afford their own post office boxes, so will have their mail sent to someone who does have one.[902] If that mail contained early ballots, that good neighbor helping you with your mail would suddenly be a felon. The end result was, as one witness succinctly put it, "I wasn't going to touch them … [be] criminalized for getting a ballot, for helping a senior."[903]

This has had a disproportionate impact on Native voters in particular because of the distance from polling places, also know as the "tyranny of distance," mentioned elsewhere in this report. This somewhat unique challenge means that there are "voters who have a preference for vote-by-mail. Perhaps a disability makes them house-bound and unlikely to be able to travel to the nearest polling place, distance, these sort of factors. So it is a –it's something that really has affected the ability of organizers, communities, and lay voters to help each other vote and to make sure their ballot gets returned in time."[904] When combined with the facts, also as described elsewhere in this report, that

---

[897] Phoenix Tr., Sarah Gonski, 236.

[898] Tuba City Tr., Brian Curley-Chambers, 232-33.

[899] Phoenix Tr., Sarah Gonski, 231-32.

[900] Phoenix Tr., Sarah Gonski, 232.

[901] Phoenix Tr., Sarah Gonski 231-32.

[902] Phoenix Tr., Steven Titla, 261.

[903] Phoenix Tr., Angela Willeford, 166.

[904] Phoenix Tr., Sarah Gonski, 232-33.

many Native voters may not have access to transportation to get to a polling place or whether in the past their ballots had been rejected for being voted at the wrong precinct, the reliance on mail means the ballot harvesting ban has a peculiarly strong impact on rural Native communities.[905]

4. Lack of Information about Ballot Status and Inability to Correct Errors

It does little good for a voter to cast a ballot if their vote is not counted. It is even worse when a voter is not timely informed of errors in their ballot and given an opportunity to correct them. It renders the fundamental right to vote into little more than a formalistic exercise in which a ballot is completed, but the choices of the voter completing it will never be heard. Unfortunately, far too often, that continues to be the story of Native American political participation.

In some cases, Native voters are turned away from voting due to "simple things."[906] During the check-in process, poll workers may not find their name, even if they regularly vote at the same location. If poll workers subjectively determine that the voter's signature does not match, they will not allow the voter to receive a ballot.[907] As a result of their experiences trying to check in, many potential voters will not return because they are disenfranchised from voting, especially if they have to return with a new registration card.[908]

Errors also occur in the polling place that are beyond Native voters' control occur, but result in their vote being rejected. For example, in the 2018 primary election in Arizona, the Native Vote hotline received a complaint from a Native voter whose mail-in ballot was invalidated because of reported machine malfunctions. The voter received a notice in the mail informing her that her ballot was rejected, but she had no way to fix it. She voted provisionally.[909] In San Juan County, Utah, a voter was never informed whether his ballot counted after a voting machine malfunctioned.[910]

Similar disenfranchisement occurs when poll workers do not provide Native voters with the information they need to complete their ballot. In 2018 primary election, Navajo County poll workers failed to tell voters that a ballot had two sides. That caused Native voters to only vote on one side of their ballot, unaware that they were not being given the opportunity to make a decision on several offices and issues on the other side.[911]

The increased movement of state and local jurisdictions to alternatives to in-person voting, such as the use of mail-in ballots or VBM, also has created additional barriers to casting a ballot that is counted.

---

[905] Phoenix Tr., Sarah Gonski, 237-38.

[906] Bismarck Tr., Shelby Test., 155.

[907] Portland Tr., Norma Sanchez Test., 149.

[908] Bismarck Tr., Shelby Test., 155.

[909] Tuba City Tr., Brian Curley-Chambers, 223.

[910] Isleta Tr., Terry Whitehat, 35-36.

[911] Tuba City Tr., Brian Curley-Chambers, 223.

In Arizona, Native voters have been targeted by outside groups that send them completed forms that change their method of casting a ballot to VBM.[912] That leads to disenfranchisement when voters show up to cast their ballots in-person. Overall, 770 voters in Arizona were required to vote provisionally in the 2016 election after they were told that they had voted early already. This data shows "that voters do not know whether or not the ballots were counted," so they came to vote in-person on Election Day.[913]

At the Hondah polling place on the Gila River Reservation in Arizona, out of 236 ballots cast in the 2016 General Election, 51 were provisional ballots. "The main reason provisional ballots were given out was because they had already received a PEVL, Permanent Early Voting List ballot had already gone out in the mail for them…" The large number of provisional ballots "within that small of a community" raises "serious issues."[914]

When Native voters return their ballots by mail, they have no confidence that their votes were counted. VBM enhances the chances that minor errors will result in a ballot being tossed out.[915] Again, if an election official subjectively determines that voters did not sign their name the same way as they did when they registered, their mailed-in ballots are rejected.[916] If Native voters in Utah do not complete the envelope containing their ballots properly, their ballots get invalidated.[917]

Native voters also have no way of finding out what actual or perceived errors may have resulted in their VBM ballots being disallowed. In Arizona, Native voters are only informed that their ballots were rejected, but in most cases the voters are not told why their ballots were rejected.[918] During the 2016 election in Arizona, several Native voters called the Native Vote hotline inquiring whether the State received their early voting ballots that they returned by mail.[919]

The lack of the most basic information about a Native voter's ballot, such as whether it was tabulated, the reason it was not, and how any actual or perceived errors can be corrected, result in vote denial. It contributes to the lack of confidence that Native voters have in the political process.[920] It also makes it more likely that Native voters will not attempt to participate in the future, believing that it would simply be a hollow exercise in which their voices will not be heard.

---

[912] *See supra* notes 811-12 and accompanying text.

[913] Phoenix Tr., Solveig Parson, 19.

[914] Phoenix Tr., Kris Beecher, 51-52, 59.

[915] *See supra* notes 814-18 and accompanying text.

[916] Portland Tr., Norma Sanchez Test., 149.

[917] Tuba City Tr., Moroni Benally, 44.

[918] Tuba City Tr., Brian Curley-Chambers, 235.

[919] Phoenix Tr., Solveig Parson, 13.

[920] *See supra* notes 747-60 (describing how those issues impede voter confidence in VBM).

E. BARRIERS TO ELECTING CANDIDATES OF CHOICE AND SECURING NON-DISCRIMINATORY REPRESENTATION

When Congress reauthorized the expiring provisions of the Voting Rights Act in 2006, it found that "[s]ignificant progress has been made in eliminating first generation barriers experienced by minority voters."[921] While it is certainly true that there has been some progress since the VRA first was enacted in 1965, first generation barriers are far from a thing of the past. Rather, as this report has shown, barriers to registering to vote, casting a ballot, and having that ballot counted remain the dominant theme in Indian Country.

Congress also recognized that "vestiges of discrimination in voting continue to exist as demonstrated by second generation barriers[922] constructed to prevent minority voters from fully participating in the electoral process."[923] That is certainly true for Native voters. Frequently, jurisdictions have layered second generation barriers on top of first generation barriers to limit the ability of Native voters to vote. The combined effect of first and second generation barriers denies Native Americans any opportunity to obtain representation even in communities where they comprise a majority of the population.

"States, and especially western jurisdictions, have been quite clever and ingenious in trying to come up with ways to keep Indian people from having an equal right to vote, either outright denial of the right to vote, or some kind of an abridgment or dilution of the right to vote." Among the more than 90 voting rights cases that have been brought by Native voters, they have won more than 90 percent of the time. That "indicates serious widespread prolonged problems with fairness in voting for Native Americans… It's a dismal record of how voting jurisdictions treat Native voters."[924]

The impact of efforts to suppress Native voting and their ability to elect their chosen candidates is profound. Native Americans are dramatically underrepresented at every level of non-tribal government. Although they comprise more than two percent of the population nationally, they constitute only .2 percent of all elected officials. In California, to achieve parity for federal, state and county offices, Native Americans would need to elect at least 40 additional officials.[925]

This section explores second generation barriers, particularly how methods of election such as malapportioned and unequally drawn districts and at-large elections are combined with basic access barriers to deny American Indian and Alaska Natives with equal access to the political

---

[921] H.R. REP. NO. 109-478, at 2 (2006), *reprinted in* 2006 U.S.C.C.A.N. 618.

[922] "Second generation" voting claims are most commonly associated with redistricting or other features of the method of election system itself that result in the votes of minorities being diluted. *See* Pamela S. Karlan, *The Impact of the Voting Rights Act on African-Americans: Second- and Third-Generation Issues*, *in* VOTING RIGHTS AND REDISTRICTING IN THE UNITED STATES 121, 121-40 (Mark E. Rush ed. 1998).

[923] *Id.*

[924] Phoenix Tr., Dan McCool, 70-71.

[925] Sacramento Tr., Chrissie Castro, 163-64.

process. San Juan County, Utah highlights how non-Native election officials have exploited many of these devices to dilute Native voting strength.

1. Cracking

There are several ways that districts can be used to disenfranchise Native voters, even in places where they comprise a majority of the eligible voting-age population. "Cracking is where you divide [Native voters] up into various different districts so they can't have a majority in any of those."[926] The purpose of cracking is to "maximiz[e] the number of wasted votes." It does that by taking a compact and cohesive group of voters, such as American Indians and Alaska Natives, and splitting then "into a number of districts" in which non-Native voters "will predominate."[927]

Cracking occurs throughout Indian Country, and is particularly prevalent in statewide redistricting plans. In Wisconsin, the state legislative redistricting plan has been attacked for using cracking as one of the techniques to dilute Democratic voting strength.[928] To achieve that result, families living in homes next to each other have been placed into different voting districts. Native voters living in urban centers such as Milwaukee as well as those living on reservations in the more rural areas of the state have been split between districts to prevent them from electing their chosen candidates.[929]

In Washington State, the state's constitution and redistricting statutes provide that the legislative districts "should be drawn to coincide with the boundaries of local, political subdivisions and areas recognized as communities of interest. The number of counties and municipalities divided among more than one district should be as small as possible."[930] Native reservations and tribal communities are "communities of interest" under the state's criteria, but they are not treated that way. Instead, there are several examples of cohesive tribal communities being cracked and placed into multiple districts.[931]

Members of the Lummi Nation, located in western Whatcom County about 20 miles south of the Canadian border, are split across two districts, the 40th and 42nd districts. Half of the tribal members living on the reservation could not vote for a candidate for Congress who is a tribal

---

[926] Phoenix Tr., Dan McCool, 90.

[927] Adam Cox, *Partisan Fairness and Redistricting Politics*, 79 N.Y.U. L. REV. 751, 768 (2004).

[928] *See Gill v. Whitford*, 138 S.Ct. 1916 (2018) (staying judgment for plaintiffs challenging the plan as an unconstitutional partisan gerrymander and remanding for a determination of whether the plaintiffs can prove concrete and particularized injuries sufficient to give them standing to bring their claims).

[929] Milwaukee Tr., Paul Demain, 69-78, 79-86, 94, 96, 110-11, 112-13.

[930] Portland Tr., Barbara Lewis, 33-35; *see generally* Wash. Const. art. II, § 43(5) ("To the extent reasonable, each district shall contain contiguous territory, shall be compact and convenient, and shall be separated from adjoining districts by natural geographic barriers, artificial barriers, or political subdivision boundaries…"); Rev. Code Wash. § 44.05.090(2)(a) ("District lines should be drawn so as to coincide with the boundaries of local political subdivisions and areas recognized as communities of interest. The number of counties and municipalities divided among more than one district should be as small as possible.").

[931] Portland Tr., Barbara Lewis, 33-35.

member because the district was split during redistricting. If the Lummi Nation was not cracked, Native candidates would have a better chance of being elected to the Washington Legislature.[932]

Two of the other large reservations in Washington, the Colville Indian Reservation and the Confederated Tribes and Bands of the Yakama Nation, likewise were split between districts. The districts were drawn using the highway, so that individuals who lived west of Highway 97 were in the 14th Legislative District and those who lived east in the 15th District. However, the districts should have been drawn using the Yakima River, which is the natural boundary for the reservation. "So basically this redistricting commission cracked the reservation, the Yakama reservation." The Yakama citizens did not understand that they were not part of the same district and cast votes for representatives from the other district. They did the same thing for the Colville reservation, splitting it.[933]

Montana also has used cracking, although it has been subtler than in some of the other states. When District 21 in Montana was redistricted, "swaths of votes" were lost by peeling away a higher percentage of American Indians actually eligible to vote.[934] Although Senator Sharon Stewart-Peregoy, a member of the Crow Tribe, continues to represent the district, the reduction in Native voting strength has made it difficult to compete in the district. That is largely reflected in the District's demographics, in which American Indians below eighteen years of age comprise a large percentage of the District's Native population, leaving what the District with a bare majority of 54.7 percent American Indians.[935] That percentage has continued to drop due to the increasingly younger population of communities such as Crow Agency, where 2017 ACS estimates indicate that residents under 18 years of age comprise 39.2 percent of the total population compared to 30.5 percent in 2000.[936] Redistricting is a way to suppress voter turnout, and tribal leaders need to be more active in resisting efforts to use it to dilute Native voting strength.[937]

Cracking also is used at the local level to limit Native voting strength. In Siskiyou County, California, Native voters are split between districts used to elect the county board of supervisors. They are sufficiently numerous and compact, especially with Native voters in Yreka, to be able to elect a candidate of their choice if they were not split.[938]

2. Packing

---

[932] Portland Tr., Barbara Lewis, 48-49; Portland Tr., Julie Johnson, 83.

[933] Portland Tr., Matthew Tomaskin, 58-60.

[934] Bismarck Tr., Sharon Stewart-Peregoy, 111.

[935] *See generally* State of Montana, Legislative Snapshot: Senate District 21, *available at* https://mslservices.mt.gov/Legislative_Snapshot/SenateDistrictDetail.aspx?senate=21#DistrictDetails (American Indians and Alaska Natives comprise 7,195 out of the 13,161 persons of voting age living in District 21).

[936] *See* U.S. Census Bureau, American FactFinder, Comparison of 2017 and 2010 ACS estimates for Crow Agency CDP, Montana, *available at* https://factfinder.census.gov.

[937] Bismarck Tr., Stewart- Peregoy, 111.

[938] Sacramento Tr., Buster Attebery, 70-72; Sacramento Tr., Fatima Abbas, 70-72.

"Packing" is another common tactic used to reduce Native voting strength. It involves placing Native voters "into one or only a few districts so that the remaining districts are easier for [non-Natives] to control."[939] Packing often results from the use of malapportioned districts that violate equal population requirements to give non-Native voters disproportionate voting strength.[940] In other words, "if you have a lot of Native American voters, you pack them all into one district so they can't elect two people" in a three-member county commission plan.[941] Two examples illustrate this point.

Buffalo County, South Dakota has a three-member county commission. According to the 2000 Census, 81.6 percent of the County's slightly more than two thousand residents were American Indian or Alaska Native persons of a single race,[942] most of whom were members of the Crow Creek Sioux Tribe. The three commission districts had not been redistricted in decades, packing nearly the entire Native American population – "some 1500 people" – into one district. Non-Natives, who comprised "only 17% of the population, controlled the remaining two districts, and thus the county government."[943] The case was settled after Buffalo County admitted the plan discriminated against Native voters and agreed to be temporarily bailed-into Section 5 coverage under Section 3(c) of the Voting Rights Act.[944]

More recently, San Juan County, Utah did the same thing with its three-member county commission plan. The County packed all of the Navajo voters into a single district to limit their voting power and prevent them from having an equal opportunity to elect their candidates in other districts.[945] The county deliberately avoided redistricting after being required to implement a remedial plan in the mid-1980s as a means to preserve political hegemony by the non-Native minority. The discriminatory plan remained in effect until a federal court ordered a new plan with two majority-Navajo districts to be put into effect for the 2018 elections.[946]

As Buffalo County Commissioner and Crow Creek Tribal Member Donita Loudner explained, non-Natives use redistricting "trying to put us in these pots" in which Native voters are packed together.[947] That has been true in statewide redistricting as well as local redistricting. For example, in 2001, the South Dakota Legislature adopted a state legislative plan that a federal court found

---

[939] Pamela S. Karlan, *Lightning in The Hand: Indians and Voting Rights*, 120 YALE L.J. 1420, 1440 (2011) (reviewing LAUGHLIN MCDONALD. AMERICAN INDIANS AND THE FIGHT FOR EQUAL VOTING RIGHTS (2010)).

[940] *See infra* notes 950-71 and accompanying text (providing examples of successful cases brought by Native voters challenging the use of malapportioned districts to dilute their voting strength).

[941] Phoenix Tr., Dan McCool, 90.

[942] *See* CensusViewer, Population of Buffalo County, South Dakota: Census 2010 and 2000 Interactive Map, Demographics, Statistics, Graphs, Quick Facts, *available at* http://censusviewer.com/county/SD/Buffalo.

[943] Laughlin McDonald, Janine Pease, & Richard Guest, *Voting Rights in South Dakota: 1982-2006*, 17 S. CAL. REV. L. & SOC. JUST. 195, 214 (2007).

[944] *Id.*

[945] Phoenix Tr., Dan McCool, 69.

[946] *See infra* note 968 and accompanying text.

[947] Bismarck Tr., Loudner Test., 22.

violated Section 2 of the Voting Rights Act by packing members of the Cheyenne River Indian Reservation into District 27 with a 90 percent supermajority of Indians.[948] Native voters in Arizona also have been confronted with packed Native districts that dilute their voting strength under statewide plans.[949]

3. Violation of One Person, One Vote

Unequally populated districts are commonly used to prevent Native voters from having controlling shares of governing bodies, even when they comprise a supermajority of the jurisdiction.

One of the most egregious examples comes from Apache County, Arizona. According to the 1970 Census, American Indians constituted a little over 74 percent of the county's population of 32,300. The three districts for the county's board of supervisors had the following populations: District 1 had 1,700 people of whom 70 were Indians; District 2 had 3,900 people of whom 300 were Indians; and District 3 had 26,700 people of whom 23,600 were Indians.[950] The ideally populated district should have had approximately 10,767 people.[951] By packing most of the Native voters into District 3, the redistricting plan had a total deviation of 232 percent.[952] The court rejected the county's arguments that Native voters were "Indians not taxed" and not citizens of the United States, requiring that their numbers be excluded under equal population requirements.[953]

Similar dilution of Native voting power has persisted. In 2005, a federal court struck down commission districts in Charles Mix County, South Dakota that reduced Native voting strength through a plan with a total population deviation of a little over 19 percent.[954] In late 2013, a federal court in Montana entered a consent decree striking down malapportioned school board districts that unconstitutionally reduced Native votes to enhance non-Native voting power.[955]

San Juan County, Utah provides a recent example of how equal population violations are used to deny Native voters equal access to the political process. The case was being actively litigated

---

[948] *See Bone Shirt v. Hazeltine*, 336 F. Supp.2d 976 (D.S.D. 2004).

[949] *See* Glenn A. Phelps, *Mr. Gerry Goes to Arizona: Electoral Geography and Voting Rights in Navajo Country*, 15 AM. INDIAN CULTURE & RES. J. 63, 77-79 (1991) (describing how Navajo voters have been packed under statewide plans to minimize their voting strength).

[950] *See Goodluck v. Apache County*, 417 F. Supp. 13, 14 (D. Ariz. 1975) (three-judge court).

[951] The ideal population for a district is calculated by dividing the total population, in this case 32,300, by the number of seats in the elected body, which is three in this example.

[952] A redistricting plan's total deviation is calculated by first determining the difference in population between the least and most populated districts, in this case District 1 and District 3, which yields a difference of 25,000 (or 26,700 minus 1,700 persons). That difference is then divided by the ideally populated district, which in this case is 25,000 divided by 10,767, which equals about 232 percent.

[953] *Goodluck*, 417 F. Supp. at 14-16.

[954] *See Blackmoon v. Charles Mix Cty.*, 2005 WL 2738954 (D.S.D. Oct. 24, 2005).

[955] *See Jackson v. Board of Trustees of Wolf Point, MT*, 2014 WL 1794551, at *3 (D. Mont. Apr. 21, 2014) (attorneys' fees order).

during the field hearings. The appeal from the district court's order granting relief to the Navajo Nation and Native voters was resolved in July 2019.[956]

The odyssey of San Juan County's intentional discrimination against Native voters began in the early 1980s. At that time, members of the three-member county commission were elected at-large by all voters in the county. Despite having a substantial Native population, no Native candidate ever had been elected to the commission. The United States Department of Justice sued in 1983, settling the case by consent decree in 1984. Under the settlement, the County agreed to use three single-member districts including District 3, which was a majority-Navajo district. Following future decennial censuses, the county agreed it would adopt "fairly drawn single-member districts."[957]

As a result of the 1984 settlement, the first Native American commissioner, Mark Maryboy, was elected in 1986.[958] However, San Juan County made only small adjustments to its county commission plan for each decennial census after 1984, even though the Navajo population kept growing to where it comprised over half of the county's population.[959] By 2010, approximately 52 percent of the county's population was Native American, but non-Natives continued to control the county commission with a two member majority elected from districts with much smaller populations than the District 3, which was packed with Native voters.[960]

The Navajo Nation requested that the county commission redraw the districts following the 2010 Census because District 3 was over 92 percent Native American and had an "inordinately large population" of Native voters. The majority non-Native commissioners refused, and the Navajo Nation filed suit, challenging the county commission plan and the county's school board redistricting plan, which had a total population deviation of 38 percent.[961]

Non-Natives responded with "racist" rhetoric about the redistricting lawsuit. They argued that Navajos were incapable of managing their land, they cannot manage taxes, and they do not have transportation to attend meetings.[962] Navajo organizations and voters suffered from retaliation by the denial of social services, with non-Native officials ending productive working relationships for supporting the redistricting lawsuit.[963]

The district court found that San Juan County violated the Equal Protection Clause by purposefully keeping Navajo voters packed in District 3. The court's finding was based in large part on the

---

[956] *See Navajo Nation v. San Juan Cty.*, 929 F.3d 1270 (10th Cir. July 16, 2019).

[957] *Id.* at 1275.

[958] Phoenix Tr., Dan McCool, 68-69.

[959] Tuba City Tr., James Attakai, 12.

[960] *Navajo Nation v. San Juan Cty.*, 929 F.3d at 1275.

[961] *Id.* at 1275-76.

[962] Tuba City Tr., James Attakai, 22.

[963] Tuba City Tr., James Attakai, 26-27; Tuba City Tr., Moroni Benally 38.

county's admission that it drew District 3 "based on race" and that officials believed that result was required by the 1984 consent decree. On appeal, the Tenth Circuit concluded that the county had failed to establish that its redistricting plan was narrowly tailored to achieve a compelling interest. It reasoned, "the consent decree and settlement order themselves didn't mandate the composition of the single-member districts. Nor did they set the boundaries of those districts. So complying with the 1984 consent decree … didn't supply the county with a good reason to pack Native American voters into District 3 in 2011."[964]

The Court of Appeals also found that the district court properly struck down San Juan County's school board districts because of their violation of equal population requirements. The county had last drawn the districts in 1992, when they had a total deviation of 18.7 percent. "And the county never attempted to correct this deviation. In fact, it failed to redistrict every 10 years as required by state law." Following the 2010 Census, the total deviation had more than doubled to 38 percent,[965] well above the "10% safe harbor" supporting an inference of discrimination for local redistricting plans.[966] The appellate court rejected the county's justification that the population deviation was necessary because the districts were drawn around individual schools as "communities of interest," sparse populations, and geography.[967]

The remedial districts adopted by the district court likewise were upheld on appeal. "Two of the three county-commission districts and three of the five school-board districts are majority Native American." Under each plan, one of the majority-Native districts is "a true swing district," requiring sufficiently high Native voter turnout to win those seats. The plans kept the county seat of Monticello whole, and only split the town of Blanding and the Navajo Nation tribal lands between two districts.[968]

Equal population barriers are not confined to matters resolved through litigation, but also include legislation. In Arizona, Senate Concurrent Resolution 1034 would increase the maximum population deviation for statewide legislative plans from the current eight percent up to ten percent. That change "could be detrimental to the Native American majority minority districts."[969] It could be used to increase the deviation between Native and non-Native districts, permitting more packing of tribal communities.

A final equal population barrier was raised relating to private, non-governmental elections. Central Electric, which provides electricity in South Dakota, allows individuals to have multiple votes. "[Y]ou've got a farmer over there, that rancher over there, who has a security well or one of his

---

[964] *Navajo Nation v. San Juan Cty.*, 929 F.3d at 1280-82.

[965] *Id.* at 1283.

[966] *See generally Brown v. Thompson*, 462 U.S. 835, 842-43 (1983) (holding that a plan with a total deviation exceeding ten percent "creates a prima facie case of discrimination and therefore must be justified" by the redistricting body).

[967] *Navajo Nation v. San Juan Cty.*, 929 F.3d at 1284-85.

[968] *Id.* at 1290-92.

[969] Tuba City Tr., Brian Curley-Chambers, 233.

water wells in the son's name; and the other one's in his wife's name; and the house is in somebody else's name. That guy got three, four votes."[970] This type of election can pose a significant barrier to Native voters. However, federal courts typically subject private or quasi-government elections that base voting power on property ownership to very deferential review.[971] The best recourse would be to resolve these forms of unequal population elections by changing applicable state law governing those elections.

4. At-Large Elections

Use of at-large elections continues to be a vehicle for denying Native voters an equal opportunity to elect their chosen candidates. Native voters can have their votes diluted through "at-large districts. A number of the cases ... have at-large districts for everything from sanitary districts to county commissions. And if you are a minority in that county, even if you're 47 percent, you never elect a county commissioner."[972]

Many of the leading voting rights cases from Indian Country have successfully challenged the use of at-large elections in county governments, such as the *Windy Boy*[973] and *Blaine County*[974] decisions out of Montana and *Large v. Fremont County* in Wyoming.[975] Buffalo County, South Dakota had at-large elections until they were eliminated following a 2003 lawsuit, allowing the Native majority to elect a county commissioner for the first time.[976]

The San Juan County litigation had its genesis in at-large elections that diluted Native voting strength.[977] Prior to 1984, there were no districts in San Juan County, with all seats elected at-large. "So [a] non-Native American would run and they held all the political offices, including the county commissioner, very important seats." Districts were created only after the Navajo Nation sued, resulting in the election of the first Navajo county commissioner, Mark Maryboy.[978]

In Washington State, Yakama voters were unable to elect their candidates to county government due to at-large elections rather than smaller districts.[979] Even after at-large barriers are eliminated, it can be difficult to recruit Native candidates to run for office because their opportunities to elect

---

970 Bismarck Tr., Donita Loudner, 44.

971 *See, e.g.*, *Ball v. James*, 451 U.S. 355 (1981); *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973).

972 Phoenix Tr., Dan McCool, 89-90.

973 *Windy Boy v. County of Big Horn*, 647 F. Supp. 1002 (D. Mont. 1986).

974 *United States v. Blaine Cty.*, 363 F.3d 897 (9th Cir. 2004).

975 709 F. Supp.2d 1176 (D. Wy. 2010).

976 *See supra* notes 942-44 and accompanying text.

977 *See supra* notes 945-46 and accompanying text.

978 Tuba City Tr., James Attakai, 12; *see also* Tuba City Tr., Ethel Branch, 5 (describing the impact of at-large elections in denying Navajo voters with vital government services).

979 Portland Tr., Matthew Tomaskin, 107-09.

have been suppressed for so long. As another tribal member from Washington explained, once districts are adopted, Native voters need to be educated to understand that they have a voice in non-tribal elections, and that voice can make a difference in improving their access to critical government services.[980]

The Sault Tribe of Chippewa Indians, sometimes referred to as the "Soo Tribe," has its Tribal headquarters in Sault Ste. Marie, in Michigan's Upper Peninsula. The Tribe has about 40,000 enrolled members, with America Indians of one or more races comprising about 19.1 percent of the city's population (2,644 persons out of 13,798 persons according to 2017 ACS estimates).[981] Sault Ste. Marie has a six-member city commission and a mayor, all of whom are elected at-large through staggered elections with three commissioners elected in every odd-numbered year. If more than six candidates file declarations of candidacy for the three seats, a primary election is held so that only the top six candidates advance to the general election.[982]

Members of the Chippewa Tribe have been unable to get elected to the city commission because of the at-large method of elections and the primary election process, despite comprising one-fifth of the city's population. If a candidate runs and is perceived to be an Indian candidate, the non-Native voters turn out and vote against that person and "will target them during the election."[983] Aaron Payment, who is the Tribal Chairperson and is the First Vice President of the National Congress of American Indians explained how overt racism comes into play in city elections:

> I helped somebody run for city commission, a friend of mine, and very talented, and she's my cousin but she's light skinned so I thought okay, let's try this. And we tried really hard. And when she ran, she became the focal point of all the racist issues. If you're on the city commission, are you going to protect our land, the Indians from taking back all of our land? Those were the things that were said. Even the mayor candidate who was running unopposed was running in opposition to us taking our land into trust. And she came dead last in the process, too. She was [an] educated, brilliant person, light skinned. I thought that might do it, but we failed on that.[984]

Because the Soo Tribe is geographically compact and politically cohesive, Native voters would be able to elect their candidates of choice if the city commissioners were elected from fairly drawn single-member districts. Instead, the use of at-large elections with a primary that winnows down the number of candidates, denied the Chippewa voters of any meaningful opportunity to participate in the city elections.

---

[980] Portland Tr., Carol Evans, 211.

[981] *See* U.S. Census Bureau, American FactFinder Community Facts for Sault Ste. Marie city, Michigan, *available at* https://factfinder.census.gov; *see also id.* at Table B02010 (American Indian and Alaska Native Alone or in Combination for One or More Other Races for Sault Ste. Marie).

[982] *See* Scott Brand, *City Commission Candidates Trigger Primary*, THE SAULT NEWS (Apr. 24, 2019), *available at* https://www.sooeveningnews.com/news/20190424/city-commission-candidates-trigger-primary.

[983] Milwaukee Tr., Aaron Payment, 172-73.

[984] Milwaukee Tr., Aaron Payment, 170.

5. Other Efforts to Prevent Native American Representation

Even after Native Americans succeed in eliminating discriminatory methods of election, that does not end their struggle to secure equal access to the political process. Instead, it shifts the focus to electing candidates of their choice. Jurisdictions frequently respond through efforts to deny those candidates the right to run for office and assume that office if elected. That discrimination comes in several forms.

In the 1970s in Apache County, Arizona, non-Natives including the county attorney claimed that Tom Shirley, a Navajo tribal member who was elected to the board of supervisors, was not eligible to hold office for three reasons. First, "he lives on the Rez." Second, they claimed he did not pay taxes. Third, "if he comes into the county building and he steals some money, we can't catch him if he goes back to the Rez."[985] Shirley sued and won the right to get on the ballot.[986]

A common tactic is for election administrators to simply not provide Native candidates with accurate information and the requisite forms to file their petition to run for an elected office. San Juan County, Utah has long used this tactic to block tribal members from running for county and school board offices. In 1972, two Navajo residents who filed to run for the three-member county commission "were disqualified because the county clerk knowingly failed to inform them of the requirements."[987]

Those tactics persist even today. When Navajo Nation member Terry Whitehat decided to run for a county commission seat in San Juan County, Utah he filed for office. He asked if his application was correct because it is about a four to five hour drive each way from Navajo Mountain to the county seat in Monticello. Two weeks later, a county official contacted him and told him that he was given the wrong information on how to file. This is an example of how non-Natives attempt to hinder Native candidates from running for office.[988]

When those efforts are unsuccessful, Native American candidates are challenged for arbitrary reasons to remove them from the ballot. In 2018, two Navajo candidates ran for two different San Juan County Commission seats; Willie Greyeyes from Navajo Mountain for District 2, and Kenneth Maryboy from Mexican Water for District 3 from Mexican Water.[989] Non-Native Republicans challenged Willie Grayeyes by claiming he was not a Utah resident.[990] Grayeyes responded by filing a federal lawsuit seeking a preliminary injunction to include his name on the county's ballot.

---

[985] Tuba City Tr., James Attakai, 18.

[986] *See Shirley v. Superior Ct. in and for Apache Cty.*, 513 P.2d 939 (Ariz. 1973).

[987] Rachel Appel, *Voting Rights Matter in San Juan County*, THE SALT LAKE TRIB. (July 27, 2019), *available at* https://www.sltrib.com/opinion/commentary/2019/07/28/rachel-appel-voting/.

[988] Isleta Tr., Terry Whitehat, 14-16.

[989] Tuba City Tr., James Attakai, 17-18.

[990] Tuba City Tr., James Attakai, 24.

The facts were undisputed. Grayeyes was certified to run for a Commission seat in 2012 by the clerk/auditor, who took no action after confirming his residential address. The clerk/auditor approved Grayeyes' application to renew his voter registration in 2016.[991]

Nevertheless, on March 20, 2018, eleven days after Grayeyes filed his declaration of candidacy, Wendy Black, a non-Native, e-mailed John Nielson, the non-Native county clerk/auditor, challenging Grayeyes' candidacy. She alleged, without any evidence, "It has been brought to my attention that he may live outside of the county and state of Utah." The next day, Nielson e-mailed the county sheriff, requesting that he send someone to investigate Grayeyes' residence. On March 22, 2018, the clerk/auditor for the first time raised the statute governing voter registration challenges. On March 28, 2018, he mailed a letter to Grayeyes telling him about the challenge, which Grayeyes did not receive until April 20, 2018.[992]

On April 13, 2018, the clerk/auditor e-mailed Black, asking her to fill out a voter registration challenge form to challenge Grayeyes' residency and eligibility to vote and run for office. She responded she would do it "for the county." At the clerk/auditor's request, Black backdated the challenge to March 20, 2018 and the clerk/auditor signed it, affirming that it was sworn before him on March 20, 2018. The county subsequently issued a press release saying that Grayeyes was under investigation and might face criminal charges. In the interim, the County delayed and only sent partial responses to Grayeyes' requests for public records about the challenge. On May 9, 2018, the clerk/auditor sent Grayeyes a letter saying he was not eligible to register to vote because he did not have a "principal place of residence" in the county, and the next day sent him a letter revoking his declaration of candidacy.[993]

The federal court granted Grayeyes a preliminary injunction that reinstated him to the ballot. The court found that the clerk/auditor committed several violations of Utah law in removing Grayeyes from the ballot. He failed to resolve the challenge within 48 hours of Black filing her challenge, choosing to notify him of his untimely decision by mail instead of using an e-mail address he had used previously. His March 28, 2018 letter "intentionally misled" Grayeyes about the complaint made against him, the clerk/auditor's review process, and the absence of a valid voter challenge. He denied Grayeyes due process by not notifying him of the statutory period for responding, not fully informing him of the basis of the charge, and issuing his decision before Grayeyes' time for responding had expired. The court concluded that the clerk/auditor "ceased to be a neutral actor and combined the roles of investigator and prosecutor depriving … Grayeyes of due process."[994] Following his victory in court, Grayeyes won at the ballot box by defeating non-Native candidate Kelly Laws with 54.5 percent of the vote.[995]

---

[991] *Grayeyes v. Cox*, 2018 WL 3830073 at *2 (D. Utah Aug. 9, 2018).

[992] *Id.* at **2-3.

[993] *Id.* at **3-5.

[994] *Id.* at **6-10.

[995] State of Utah, Elections, Preliminary Election Results for San Juan County, November 6, 2018 General Election (final on Nov. 20, 2018), *available at* https://electionresults.utah.gov/elections/county/sanjuan.

Efforts at backdating documents by non-Native officials are not limited to challenges to candidacy petitions. Yvette Isburg, a member of the Crow Creek Sioux Tribe, filed to run for Buffalo County, South Dakota Auditor/Register of Deeds, the elected office responsible for administering the county's elections. No one timely filed candidacy for office to oppose her. Four Directions reported that after the filing deadline, the outgoing non-Native auditor/register of deeds "found" a candidacy form that allegedly was filed by non-Native candidate Dulcy Sinkie. Despite those efforts, and extremely racially polarized voting that saw Sinkie get 97 percent of the votes in a non-Native voting precinct, Isburg won with 56 percent of the vote.[996]

When Native candidates are elected to office that is not the end of the story. In Buffalo County, South Dakota in an earlier election, a Native American was elected sheriff. Ultimately, he was prevented from being sworn into the position because of an issue raised with "the tribal system."[997]

Another means of disenfranchising Native voters can come after candidates running as Native Americans are sworn into office. In Chippewa County, Michigan, a candidate running for state representative ran as a tribal member. After he was elected, an issue arose in the state legislature about treaty rights. The representative responded by disenrolling and denying that he was ever a tribal member.[998]

6. Unequal Access to Resources for Native American Candidates

Native Americans are underrepresented in all levels of federal, state, and local governments.[999] One reason why Native Americans are less likely to run for office is that campaigns are prohibitively expensive. For example, Congresswoman Debra Haaland, who at the time of her testimony was running for her party's primary, explained how her fundraising goals were based on the last primary election in her district which raised $1.2 million.[1000] She observed "we need more opportunities for Native folks to get involved" which means "we need more investments by individual campaigns in Indian Country."[1001] Additionally, the expenses common to campaigns may not even translate to votes within Native communities. For example, "the biggest expense is media, getting on television. You have to be able to reach your voters, and when you think about that in Indian Country – and I've traveled all over Indian country, eight miles into the desert where there's not electricity and no running water, and people live in a Hogan, and how do those people

---

[996] South Dakota Secretary of State, Unofficial Results for November 6, 2018 General Election in Buffalo County, *available at* http://electionresults.sd.gov/resultsSW.aspx?type=CTY&map=CTY&cty=14&name=Buffalo.

[997] Bismarck Tr., Loudner Test., 24.

[998] Milwaukee Tr., Aaron Payment, 152-73.

[999] Trahant, Mark, Indian Country remains underrepresented in every government office, May 13, 2019, *available at*: https://www.indianz.com/News/2019/05/13/mark-trahant-indian-country-remains-unde.asp

[1000] Isleta Tr., Debra Haaland, 209-210.

[1001] Isleta Tr., Debra Haaland, 190.

– they're not going to be watching TV at night and seeing, you know, candidates' commercials."[1002]

Second, running for office is complicated and many Native Americans do not know how to participate. As the director of the Utah League of Native American Voters explained "there is inadequate training for our Native people to run for office in part because there is complexity in navigating a different set of policies, regulations, and rules governing state and federal electoral systems."[1003] Another Native person described working on a campaign as "[i]t was tough because, to me, with all the state reporting requirements regarding campaign contributions and finding individuals to help us with the campaign that were experienced in state elections, it was one of the most difficult things that I did."[1004] "Activists call for "educating Native people who are ready to step into that realm . . . something that could turn into some kind of nonpartisan institute to train people on how to run for office."[1005]

Third, Native candidates face disproportionately far distances to fill out their candidacy paperwork making running for office more complicated and expensive. For example, in order to become part of the electric company commission's election in South Dakota one Native American candidate described how she "was forced to drive 90 miles, pick up a petition, get 15 signatures on it, and go back 90 miles to return the petition."[1006] Terry Whitehat described how when he attempted to run for office he had to travel 4-5 hours "in hopes that I'd get that information I needed to file as a candidate/I was not provided that information."[1007]

Finally, Native Americans may not connect running for office with their everyday lives. As one advocate explained "We need to educate and create the interest and somehow show the Natives how important it is to have a voice. I think a lot of the tribal people look at the issues that are discussed at those level[s], and they don't look at them as being—as important, as, say the issues on their reservation and they don't realize how [they are] actually tied."[1008]

7. Denial of Equal Access to Representation and Government Services

The ability to exercise the right to vote unencumbered by barriers that exclude American Indians and Alaska Natives matters. It means power. The power to have their voice heard. The power to open up dialogues with non-Native elected officials about issues that matter to Native voters. The power to be affirmed as citizens of the United States without sacrificing the Nation-to-Nation status of their Tribes. The power to protect and preserve their communities and the unique cultures and histories that they represent. The power to secure equal access to government services.

[1002] Isleta Tr. Debra Haaland, 209-210

[1003] Tuba City Tr., Moroni Benally, 36.

[1004] Isleta Tr., Helen Padilla, 71.

[1005] Isleta Tr., Linda Yardley, 180.

[1006] Bismarck Tr., Donita Loudner, 43.

[1007] Isleta Tr., Terry Whitehat, 15-16.

[1008] Portland Tr., Carol Evans, 21.

When Native voters are perceived to lack political power and representation, a tribal member from Washington State said elected officials ignore them.[1009] A similar narrative emerged from throughout the country, regardless of where the Native voters were located.

In Arizona, when members of the Gila River Indian Community were "fighting for our water rights back, we were at a very definite disadvantage" because we didn't have the right to vote…"[1010] That has continued in recent years. State legislators would not consider a bill sponsored by a Native American Senator that would replace Columbus Day with a Native American Day. The lack of responsiveness illustrates the importance of Native voters having a say in the legislative process. "[W]e should be able to walk into the Legislature, and have our non-Native American legislators and representatives hearing us, looking at us, and not closing their ears, not rolling their eyes, not falling asleep. Because without the votes, the numbers of our people behind us, being our armor, being our tools of power, we are powerless as leaders to speak on behalf of our people. Because simply it comes down to numbers."[1011]

California tribes have had similar experiences. In rural counties such as Del Norte and Medicino Counties in northern California, the Native voter turnout is not high enough to afford Native candidates with viable opportunities to be elected to countywide offices. Racial issues are widespread, and discrimination against tribal members is common. County officials do not want to work with tribal governments.[1012]

In urban areas, non-Native elected officials are equally overt in their disdain for issues that matter to Native voters. A focus group in Los Angeles found that public officials were not worried about being responsive to Native voters. "[O]ne of the elected officials … said, 'I don't have to worry about Native American voters because they don't vote. I don't have to worry about Native issues because they don't vote, and … I don't see them as my constituency.'"[1013] An elected official in Orange County, California, openly mocked Native American voters. When they complained about it and asked to meet with her, she refused. The official responded, "The Native vote in Orange County is powerless. We have no fear of you … So you can do whatever you want, but we're not going to meet with you."[1014]

In many cases, deliberate exclusion of Native voters relies upon an argument that they are "Indians not taxed" and should turn to their tribal governments for all essential services. When Navajo voters have demanded equal access to non-tribal services, "the response that they get is that the Navajo Nation has their own government, they take care of their own people having to do with roads, with whatever concerns they have, they have their own government that takes care of them.

[1009] Portland Tr., Patsy Whitefoot, 97-98.

[1010] Phoenix Tr., Stephen Lewis, 140.

[1011] Phoenix Tr., Jamescita Peshlakai, 47-48.

[1012] Sacramento Tr., Ruthie Maloney, 138-39.

[1013] Sacramento Tr., Chrissie Castro, 162-63.

[1014] San Diego Tr., Lupe Lopez-Donaghey, 111.

Why do we have to?" That is a false narrative intended to suppress Native voting. As the Tribal member explained, "I found out that there's more tax coming [into the County] from the Navajo Nation than from the county."[1015] In New Mexico, non-Natives are "also benefiting from tribal dollars for roadways, for gross receipts tax, everything that we have done, casinos. You know, we've contributed to the state severance tax $130 million in the past ten years."[1016]

Where Native voters are ignored by elected officials, they are denied government services or equal access to schools and jobs. San Juan County offers a compelling case study of how Native voters and their communities suffer under the tyranny of unfettered majority rule. As James Attakai explained, "[P]olitics is about the allocation and distribution of resources and power." Prior to their efforts to secure equal access to the political process, Navajo residents of San Juan County were denied those resources.[1017]

The impact of decades of exclusion of Native Americans in San Juan County has been profound. "[N]ative communities provide millions in tax dollars to San Juan County. Yet [those communities] only receive a fraction of the service dollars and county jobs that they provide," such as "basic amenities necessary for a strong and safe community regardless of ethnicity or background."[1018] Several examples illustrate the denial of basic services:

> Funding was allocated to build a highway from Oljato to Navajo Mountain to improve access of those living on Navajo Nation lands to educational facilities, public safety, and to promote economic development. A non-Native county commissioner reprogrammed the funding to other projects without telling Navajo voters.[1019]
>
> Montezuma Creek is located about a one-hour drive from Monticello. Navajo residents requested that San Juan County provide ambulance services to transport critically ill or injured patients from their community. The county commissioners responded, "No. You don't pay taxes. We cannot help you. You don't pay any property tax or nothing." They had to purchase their own ambulances despite being county residents who were supposed to be served by the county.[1020]
>
> The elderly mother of Terry Whitehat, a Navajo plaintiff in the lawsuit against San Juan County, has been denied services from a non-Native social worker who will not travel to his home. His father has renal failure, and the county tells him to go to an Indian Health Services facility even when his condition is dire and he needs

---

[1015] Phoenix Tr., Edison Wauneka, 76-77.

[1016] Isleta Tr., Leon Reval, 54-55.

[1017] Tuba City Tr., James Attakai, 12-14.

[1018] Tuba City Tr., Angelo Baca, 175.

[1019] Tuba City Tr., James Attakai, 13; *see also* Isleta Tr., Terry Whitehat, 18-19.

[1020] Isleta Tr., Wilfred Jones, 30-31.

> more immediate services from the county. Efforts to establish a hospice facility on tribal lands also were denied by the county.[1021]
>
> In the 1980s, there were a number of Navajos employed as social workers in San Juan County. Today there are none left, even though Native Americans comprise a majority of the population. The county has not hired people "of the same culture" to help Native Americans, other than one interpreter.[1022]

Suppressing the votes of the Navajo majority also resulted in the non-Native county commission advocating for the removal of the Bears Ears Monument. By gerrymandering the districts and depressing Navajo participation, non-Natives were able to prevent Native voters from maintaining protections for the Monument.[1023]

The ultimate affront resulting from vote denial is that non-Natives impose new methods of voting to make voting even more difficult for Native Americans. That is the sad legacy demonstrated by the voting rights litigation in San Juan County.[1024] That is a common tactic wherever Native voters reside. On the Ojibwe reservation in Wisconsin, in-person voter registration is unavailable. When the Lac Courte Oreilles Chippewa Ojibwe community requested a voting site at the Tribal office, the request was rejected as "cost prohibitive."[1025] Native voting and the opportunity to secure access to representation and the government services that flow from it becomes even harder.

[1021] Isleta Tr., Terry Whitehat, 20-21; Wilfred Jones, 24.

[1022] Isleta Tr., Terry Whitehat, 22; Isleta Tr., Wilfred Jones, 23-24.

[1023] Phoenix Tr., Natalie Landreth, 227-28.

[1024] *See supra* notes 945-46, 957-68, 977-78 (describing successful voting rights cases brought by Native voters against San Juan County).

[1025] Milwaukee Tr., Paul Demain, 69-78, 79-86, 94, 96, 110-111, 112-113.

CONCLUSION

If the barriers to securing representation are eliminated, whether it is through collaboration with non-tribal election officials, legislation, litigation, or some combination of those methods, it makes a significant difference. It opens up doors that were formerly closed. It builds bridges between Native and non-Native communities to start a dialogue.[1026]

In New Mexico, political participation of the Pueblos and tribes led to passage of the State Tribal Collaboration Act. "[I]t was very important at the time that the attitude be conveyed to the state government and to the state legislators and the governor that tribal people are constituents and citizens of the state of New Mexico and that there is an obligation to them just as any other constituent in the state of New Mexico."[1027]

Before Native Americans were elected to the Arizona state legislature, the non-Native legislators would meet with Native leaders about bills they wanted to move forward but nothing ever happened. After more Natives were elected, non-Native legislators were more receptive. They proposed legislation and asked for input from the Native leaders. "[W]e're able now to do something concrete."[1028]

While Native candidates are opening up the lines of communication with non-Native officials, they also help to empower and awaken Native voters. According to Norma Sanchez, "Voting us into council doesn't make us find money for you. We still have to vote on the outside, and one voice does make a difference."[1029]

Former Navajo Nation Attorney General Ethel Branch eloquently captured the importance of political empowerment to Native voters:

> So we need to ensure that those dollars from those governments are flowing here, just like they are anywhere else, and the way we can ensure that is by showing up at the polls and voting, holding our elected leaders accountable.... But if we show up and we vote, then that gives them incentives to focus resources on us, and as our population continues to grow and we as a political force grow as a nation and as a people, that will help ensure that these minimum standards are met in Indian Country, Navajo Indian Country.[1030]

In other words, voting can help Native voters improve their lives and socio-economic status. Community organizers have emphasized to Native voters, "Do you make a living wage? Probably

---

[1026] Portland Tr., Carol Evans, 194.

[1027] Isleta Tr., Helen Padilla, 64.

[1028] Phoenix Tr., Steve Titla, 255-56.

[1029] Portland Tr., Norma Sanchez, 231.

[1030] Tuba City Tr., Ethel Branch, 9.

not, but if you vote for a candidate that supports living wage, this is one way you can make a difference."[1031]

When equal access to representation occurs, the results are profound. Token representation[1032] is replaced with meaningful opportunities to govern. Indian self-determination began to take hold "when Indian people started exercising their right to vote."[1033] Native voters are empowered to not only have their voices heard, but to "protect our sovereignty rights."[1034] Native candidates of choice elected to non-tribal offices are able to influence policy on land and trust issues, health care, and water rights.[1035]

Laurie Weahkee described how a campaign to register Native voters and get them to turn out successfully protected tribal lands in New Mexico. "In an effort to protect the petroglyphs, we found ourselves losing vote after vote. We would lose city council votes. We would lose public-information-type votes. And so it became important for us to begin to figure out which candidates, which people were going to really support Native American people." Without Native participation, it was common for legislation to omit Native American projects. Native organizers changed that through their voter empowerment work, which began when they worked to oppose defeating an effort to use federal funds for a highway through the sacred lands of the Petroglyph National Monument.[1036]

Representation plays an important role of securing gatekeepers for the next generation of Native candidates. "They see somebody who looks like them running for a U.S. Senate seat, winning the U.S. Senate seat, winning the governor seat, winning a congressional seat. Then it's something that probably seemed impossible all of the sudden seems a lot more possible."[1037] That is the true legacy of the 2018 elections that saw the first Native American women elected to Congress, Debra Haaland and Sharice Davids, as well as the groundbreaking campaigns of others like Paulette Jordan, the first Native American to be a major party nominee for Governor in Idaho. They will inspire other Native Americans to run for office at every level of government.

[1031] Isleta Tr., Linda Yardley, 165-66; *see also* Isleta Tr., Amber Carrillo, 216-17.

[1032] *See generally* Tulsa Tr., Bobbie Saupitty, 63 (describing how the Comanche County, Oklahoma County Commission adopted an Indigenous People's Day to "pacify" members of the Comanche Nation but did not replace Columbus Day, instead designating it to coincide with another holiday).

[1033] Isleta Tr., Linda Yardley, 163.

[1034] Tulsa Tr., Christina Blackcloud, 35.

[1035] Sacramento Tr., Buster Attebery, 59; Portland Tr., Carol Evans, 214.

[1036] Isleta Tr., Laurie Weahkee, 191-92.

[1037] Tulsa Tr., Brian Jones, 114-15.