

# VOTING MATTERS IN NATIVE COMMUNITIES

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## HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS

UNITED STATES SENATE

ONE HUNDRED SEVENTEENTH CONGRESS

FIRST SESSION

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OCTOBER 27, 2021  
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## VOTING MATTERS IN NATIVE COMMUNITIES

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WEDNESDAY, OCTOBER 27, 2021

U.S. SENATE,  
COMMITTEE ON INDIAN AFFAIRS,  
*Washington, DC.*

The Committee met, pursuant to notice, at 3:09 p.m. in room 628, Dirksen Senate Office Building, Hon. Brian Schatz, Chairman of the Committee, presiding.

### **OPENING STATEMENT OF HON. BRIAN SCHATZ, U.S. SENATOR FROM HAWAII**

The CHAIRMAN. Good afternoon. During today's oversight hearing entitled Voting Matters in Native Communities, we will examine the American Indian and Alaska voter experience, including ongoing challenges to exercising the right to vote in Indian Country. We will also examine the less formally documented Native Hawaiian voter experience for the first time in this Committee's history.

The legacy of Native American voter suppression is a stain on our Country's democracy. Even after gaining citizenship in 1924, American Indians and Alaska Natives did not have full access to the ballot box. In fact, it wasn't until 1962, not until 1962, that all States fully guaranteed voting rights for Native Americans. The 1965 Voting Rights Act strengthened these rights, and the 1975 amendments to the Act included further protections for language assistance and translation of voting materials. And yet 50 years later, Native Americans continue to experience voter discrimination and unjust behavior at the ballot box.

In his testimony before the Judiciary Committee hearing on Native voting rights last week, which I will enter into the record, Navajo Nation President Nez described barriers like the elimination of in-person polling locations on the reservation, distant voter registration voting sites, all-mail voting systems, lack of language assistance for Navajo-only speakers, and racial jerrymandering.

Unfortunately, Navajo's case is not unique in Indian Country. Native voters in States across the Country continue to be disproportionately affected by these types of voter suppression efforts. That simply cannot stand. Congress must take action to counterbalance this historical and ongoing discrimination. We cannot allow our most fundamental right, the right to vote, to be stripped from Native Americans.

Last week, the Senate had the opportunity to take action by passing the Freedom to Vote Act, which contains key reforms in the Native American Voting Rights Act of 2021, but that bill was

blocked. We in Congress must stay vigilant and keep up the fight to protect the franchise, especially for communities of color.

As members of the Indian Affairs Committee, we owe a particular duty to American Indians, Alaska Natives, and Native Hawaiians, to ensure that their votes are counted, not discounted. Voting is sacred and Native votes matter.

Before I turn to the Vice Chair, I would like to welcome and extend my aloha to Mr. Naalehu Anthony, and thank our witnesses for joining us today. I look forward to hearing the unique perspectives that each of you bring to this conversation.

Vice Chair Murkowski.

Senator CANTWELL. Mr. Chairman, before that, could I ask to be recorded present for the vote?

The CHAIRMAN. Without objection.

Vice Chair Murkowski.

**STATEMENT OF HON. LISA MURKOWSKI,  
U.S. SENATOR FROM ALASKA**

Senator MURKOWSKI. Thank you, Mr. Chairman, and thank you for convening this hearing at this time on this important matter.

When we think about the right to vote, it is clear, this is a freedom, this is one that is critical and important to American democracy. The right to vote, we know, has evolved tremendously over time, including with respect to the voting rights of our First Peoples.

American Indians, Alaska Natives, Native Hawaiians deserve an equal opportunity to participate in our American electoral system and political process, period. There has to be that equal opportunity.

I have been inspired by the long and storied history of how Native Americans have fought to participate in and improve our Nation through the democratic processes. This is a part of what we have seen in Alaska, where we are proud to share the legacy and the contributions of early Alaska Native civil and voting rights leaders, including Elizabeth Peratrovich. You may have seen her honored on dollar coins in our currency. She is getting that recognition that is due.

But our Nation has not always supported or honored such leaders. As our witnesses will note in their testimony, in Alaska's 1915 Territorial Act, Alaska Natives were denied citizenship unless they could prove, through individual examinations, that they had abandoned "any tribal customs or relationship," and had adopted the habits of a civilized life.

Alaska's Territorial Legislature passed a literacy test, which disenfranchised Alaska Natives who had gained citizenship in 1924. They adopted this literacy test in our State's constitution. Not a good part of our State's history.

Native civil rights leaders have worked to overcome obstacles to participation including deliberate efforts by State legislatures to deny Native Americans the right to vote through policies, such as the literacy test, or sometimes even forcing Native peoples to abandon their cultures.

The Voting Rights Act of 1965 finally made the promise to Native Americans that they would have full legal access to voting. The

Voting Rights Act was pivotal in moving our Country out of the dark Jim Crow era of American history. But the voting rights legislation, we know, has expanded several times, including back in 1975, to protect language minorities.

So with this hearing today, we have an opportunity, and you note, Mr. Chairman, that this follows on the hearing that they had last week in Senate Judiciary, but this is our opportunity as a committee to hear from Native people about the issues that continue to pose barriers to voting. These can include things like distance from government offices, geographical isolation, lack of roads, the digital divide, lower educational attachment, socioeconomic conditions, and certainly discrimination.

Some of the barriers relate to a lack of basic infrastructure in our Native communities. I know we are trying to get through the process, the bipartisan infrastructure bill, that will help us in our rural communities, most certainly. But existing disparities continue to affect access to services, and can pose obstacles to voting.

Several of my colleagues, including Senator Luján, who just spoke previously, have introduced specific legislation on Native American voting rights that I think attempts to address some of the issues that are affecting Native voting access. I hope that through this oversight hearing today, we are able to more closely examine that bill through the lens of the Indian Affairs Committee.

I am specifically looking forward to hearing about how the Native Voting Rights legislation might be implemented, funded, and actually work on the ground. We have a good panel in front of us today, and we thank them for joining us. I want to give a particular welcome to Julie Kitka, who is the President of the Alaska Federation of Natives, who is going to be providing testimony on this very important matter today. She is no stranger to this Committee, and she is clearly one that we will want to listen to in this very important discussion.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Vice Chair Murkowski.

Are there any other members wishing to make an opening statement?

We are going to introduce all of the testifiers in order, but I would like Senator Cortez Masto to introduce her guest.

**STATEMENT OF HON. CATHERINE CORTEZ MASTO,  
U.S. SENATOR FROM NEVADA**

Senator CORTEZ MASTO. Thank you, Chairman Schatz, Ranking Member Murkowski, for holding this important hearing today. I am so excited to be able to introduce one of today's witnesses, Pyramid Lake Paiute Tribal Chairwoman Janet Davis. She is an elected leader, she is a community advocate, a former elementary school teacher. Chairwoman Davis has been an active member of the Native community in Nevada for decades.

She has been a particularly strong champion for voting rights for Native American voters located in Nevada. During the 2016 Presidential election, Chairwoman Davis advocated for the Pyramid Lake Paiute Tribe in Federal court and in doing so, successfully helped establish a new polling place on the reservation. Last year during the height of the coronavirus pandemic, Chairwoman Davis

did all she could to encourage Native Americans in Nevada to participate in the election. She canvassed for her local community, she helped fellow tribal members register to vote, and she ensured that tribal members worked the polls during the election.

As members of Congress, we should be doing everything possible to encourage participation in the democratic process and ensure that all eligible voters, including Native American voters, are able to exercise the right to cast a ballot, just as Chairwoman Davis has done for her community.

So I hope my colleagues join me in welcoming Chairwoman Davis. Thank you.

The CHAIRMAN. Thank you, Senator Cortez Masto. Senator Cantwell has an opening statement as well.

**STATEMENT OF HON. MARIA CANTWELL,  
U.S. SENATOR FROM WASHINGTON**

Senator CANTWELL. Thank you, Mr. Chairman. I want to thank you and Vice Chair Murkowski for holding this important hearing and thank all our witnesses for participating. I originally thought that Fawn Sharp from our State, former chair of the National Congress of American Indians, former chair of the Quinault Tribe, was going to be with us. But I am sure she will be submitting information.

Washington State has been a leader in the accessibility and security of elections. We have had record turnouts, sometimes as high as 83 or 84 percent. So it is imperative, I believe, that legislation like the Freedom to Vote Act, or the Native American Voting Rights Act that Senator Luján recently introduced, are important proposals. Tribal communities not only need easier access to voting, but they need to feel that their ballots are secure.

The State of Washington has comprehensive voting rights and much of that has been possible because of the tireless work and advocacy on these issues by tribal leaders in my State. I want to thank them for that.

In 2019, the Washington legislature passed a similar bill to the one we are discussing today, the Native American Voting Rights Act of Washington. This bill helped increase voter registration and turnout in Native communities by expanding voter services, improving accessibility on tribal lands, and maintaining an incredibly safe and secure system. Just yesterday, we were excited to know that now former, as of yesterday, Republican Secretary of State Kim Wyman may be joining the Biden Administration to lead Election Security's and Department of Homeland Security's cybersecurity infrastructure security agency. I hope if this is the case, that Kim will bridge the gap in other States for some of the things that we have been able to do in the State of Washington, and help with these issues.

There is nothing more important than giving people the right to vote, making sure those votes are secure and increasing voter participation. I am so happy that this focus should be not a partisan issue but really one that is important to the geography of all Americans, but some who live in some of the most remote parts of the United States.



So I hope that we will work with all of our colleagues to make sure that this kind of improvement to our system is implemented.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

I will now turn to our witnesses. Senator Cortez Masto introduced Ms. Janet Davis. Senator Murkowski introduced Ms. Julie Kitka. And Senator Luján had introduced Ms. Jacqueline De León.

We also have the Honorable Aaron Payment, Secretary of the National Congress of American Indians. We have Professor Patty Ferguson-Bohnee, Director of Indian Legal Clinic, Arizona State University, and Mr. Naalehu Anthony, Community Advocate and Principal of Paliku Films, in Honolulu, Hawaii.

We will start with Ms. Davis. Please proceed with your testimony. And since we have six of us, please try to confine your remarks to five minutes or less. Thank you very much.

**STATEMENT OF HON. JANET DAVIS, CHAIRWOMAN, PYRAMID LAKE PAIUTE TRIBE**

Ms. DAVIS. Thank you, Senator, for the introduction. Nu Janet Davis mee nanea'a. Nu cui ui dicutta. Good afternoon. Chairwoman Janet Davis here from the Pyramid Lake Paiute Tribe in Nevada.

I know how important it is for the Native people to vote, for the following reasons: to represent our Native views, to build a diversified road to elections, to honor our ancestors and those fighting to have our right to vote recognized. We as Native people, we take political action by casting our vote through those who make sure Federal Government fulfills its trust obligation to us.

Tribes across the Nation have some of the greatest needs for health care, housing, employment, education, and human services. We can address these issues. We make changes possible through voting and political action. We let the politicians know that we are here, we vote, and we count.

Voting restrictions and discriminatory laws discourage potential voters from wanting to vote. Historically, tribes and voters have been blocked from voting. The Natives were the last class of people to get the right to vote. Old people know what the battles were to earn that right. They are our biggest voting group on the reservation. Young people don't know the battles. It has been a challenge to get them educated on the importance to voting.

Native voters face limitations to polling locations; most are located off reservation and usually great distances from our reservations. The poll workers are usually non-Native and sometimes not very welcoming.

County clerks do not reach out to tribes to employ poll workers. We as tribal people need to get our Native people interested and get them to apply.

There is a great need for voting rights protections to provide for equal access to voting. Our tribe, along with the Walker River Paiute Tribe, filed a Federal lawsuit in 2016 requesting that we have a polling location on our reservation as well as early voting on our reservation. If there were Federal voting rights protections that allowed for equal voting rights, it would be so much easier for all to vote.

Here in Nevada voters are allowed to vote via mail or at the polling location. The State legislature also passed legislation that will allow for all reservations to request a voting location on their reservations. We are still working to educate tribes on what that will take.

In last year's general election, a number of tribes did have drop boxes located on tribal lands. What we are finding out is that county clerks are not familiar with the laws or their responsibilities to assist tribes. What I see is that Tribes need legal assistance in dealing with voting rights. Each tribe should not have to threaten a lawsuit for equal voting rights.

We were lucky to have Four Directions assist our tribes with the 2016 lawsuit. It also took time to gather information from our voters and compile statistics. This takes time and money that tribes don't have. With States passing laws to limit and hinder voting by Natives there is a great need for Congressional action.

The State legislatures are seeing the strength in the Native vote, which they haven't seen before. Native grassroots groups are banding together and are becoming voting blocks. Our reservation people are voters and that is mainly due to us having our own polling location on our reservation and all of our Native people are poll workers. We now have a good working relationship with our county clerk.

True representation for Native voters and communities means that tribal voters find it easy to register to vote and have easy access to a voting location. It means that Native people are working the polls and are welcoming to Native voters.

What would the protections in the Native American Voting Rights Act of 2021 mean to us as Native voters? It would mean that the Federal Government is meeting its trust responsibility to protect and promote Native-Americans' exercise of their constitutionally guaranteed right to vote, including the right to register to vote and the ability to access all mechanisms for voting; to establish tribal administrative review procedures for a specific subset of State actions that have been used to restrict access to the polls on Indian lands; to expand voter registration under the National Voter Registration Act of 1993 to cover Federal facilities; to afford equal treatment to forms of identification unique to Indian Tribes and their members; to ensure Indians and Alaska Natives experiencing homelessness, housing insecurity, or lacking residential mail pick-up and delivery can pool resources to pick up and return ballots; to clarify the obligations of States and political subdivisions regarding the provision of translated voting materials for American Indians and Alaska Natives under Section 203 of the Voting Rights Act of 1965, 52 U.S.C. 10503; to provide Tribal leaders with a direct pathway to request Federal election observers and to allow public access to the reports of those election observers; to study the prevalence of nontraditional or nonexistent mailing addresses in Native communities and identify solutions to voter access that arise from the lack of an address; and to direct the Department of Justice to consult on an annual basis with Indian Tribes on issues related to voting.

This is an act that needs to be passed before the next election. Tribes also need funding to help enforce the initiatives set forth in this act.

In Nevada we are working to be proactive in making sure that all of our people have fair and easy access to the polls. We want our people working the polls, on and off the reservation.

There are so many opportunities that we have once we vote. Our voices become stronger when working to pass State legislation. An example of this is, and we are proud to say that we worked to pass AB262, a tuition waiver bill that allows our Native Nevadan students to attend State colleges and universities tuition free. We also become more involved at all levels of State government as voters are listened to.

Also, the Nevada State Legislature passed Senate Bill 492 to provide Indian Tribes the ability to request a polling location either for early voting or election day on Indian reservations or colonies to improve access to elections. Furthermore, Assembly Bill 137 established once a polling location is established, it must continue to serve as a polling location for future elections. That is the power of Native voting.

Thank you all for listening today.

[The prepared statement of Ms. Davis follows:]

PREPARED STATEMENT OF HON. JANET DAVIS, CHAIRWOMAN, PYRAMID LAKE PAIUTE  
TRIBE

Nu Janet Davis mee nanea'a. Nu cui ui dicutta.

Voting restrictions and discriminatory laws discourage potential voters from wanting to vote. Historically, tribes and voters have been blocked from voting. The natives were the last class of people to get the right to vote. Old people know what the battles were to earn that right. They are our biggest voting group on the reservation. Young people don't know the battles. It's been a challenge to get them educated on the importance to voting.

Native voters face limitations to polling locations; most are located off reservation and usually great distances from reservations. The poll workers are usually non-native and sometimes not very welcoming. County clerks do not reach out to tribes to employ poll workers; we as tribal people need to get out native people interested and get them to apply.

There is a great need for voting rights protections to provide for equal access to voting. Our tribe, along with the Walker River Paiute Tribe filed a federal lawsuit in 2016 requesting that we have polling location on our reservation as well as early voting on our reservation.

If there were federal voting rights protections that allowed for equal voting rights, it would be so much easier for ALL to vote. Here in Nevada voters are allowed to vote via of mail or at the polling location. The State legislature also passed legislation that will allow for all reservations to request a voting location on their reservations; we are still working to educate tribes on what that will take. In last year's general election, a number of tribes did have drop boxes located on tribal lands. What we're finding out is that county clerks are not familiar with the laws or their responsibilities to assist tribes.

What I see is that Tribes need legal assistance in dealing with voting rights. Each tribe should not have to threaten a law suit for equal voting rights. We were lucky to have Four Directions assist our tribes with the 2016 lawsuit. It also took time to gather information from our voters and compile statistics. This takes time and money that tribes don't have. With states passing laws to limit and hinder voting by natives there is a great need for Congressional action.

The state legislatures are seeing the strength in the native vote, which they haven't seen before. Native grassroots groups are banning together and are becoming voting blocks. Our reservation people are voters and that's mainly due to us having our own polling location on our reservation and all of our native people are poll workers. We now have a good working relationship with our county clerk.

True representation for Native Voters and communities means that tribal voters find it easy to register to vote and have easy access to a voting location. It means that native people are working the polls and are welcoming to native voters.

What would the protections in the Native American Voting Rights Act of 2021 mean to us as Native voters?

It would mean that:

- (1) the Federal Government is meeting its trust responsibility to protect and promote Native-Americans' exercise of their constitutionally guaranteed right to vote, including the right to register to vote and the ability to access all mechanisms for voting;
- (2) to establish Tribal administrative review procedures for a specific subset of State actions that have been used to restrict access to the polls on Indian lands;
- (3) to expand voter registration under the National Voter Registration Act of 1993 to cover Federal facilities;
- (4) to afford equal treatment to forms of identification unique to Indian Tribes and their members;
- (5) to ensure American Indians and Alaska Natives experiencing homelessness, housing insecurity, or lacking residential mail pickup and delivery can pool resources to pick up and return ballots;
- (6) to clarify the obligations of States and political subdivisions regarding the provision of translated voting materials for American Indians and Alaska Natives under section 203 of the Voting Rights Act of 1965 (52 U.S.C. 10503);
- (7) to provide Tribal leaders with a direct pathway to request Federal election observers and to allow public access to the reports of those election observers;
- (8) to study the prevalence of nontraditional or nonexistent mailing addresses in Native communities and identify solutions to voter access that arise from the lack of an address; and
- (9) to direct the Department of Justice to consult on an annual basis with Indian Tribes on issues related to voting.

This is an act that needs to be passed before the next election. Tribes also need funding to help enforce the initiatives set forth in this act.

In Nevada we are working to be proactive in making sure that all of our people have fair and easy access to the polls. We want our people working the polls, on and off reservation.

There are so many opportunities that we have once we vote. Our voices become stronger when working to pass state legislation. We are proud to say that we worked to pass AB262 a tuition waiver bill that allows our Native Nevadan students to attend state colleges and universities tuition free. We also become more involved at all levels of state government as voters are listened to.

The CHAIRMAN. Thank you very much, Ms. Davis.  
Now we have Julie Kitka, the President of AFN.

**STATEMENT OF HON. JULIE KITKA, PRESIDENT, ALASKA  
FEDERATION OF NATIVES**

Ms. KITKA. Good afternoon. Aloha, Chairman Schatz, and Vice Chairman Murkowski and members of the U.S. Senate Committee on Indian Affairs.

Thank you for the opportunity to testify today. My name is Julie Kitka and I have the honor of serving as the President of the Alaska Federation of Natives, or AFN.

Established in 1966 by our early leaders to achieve a fair and just settlement of aboriginal land claims, AFN is the oldest and largest statewide Native organization in Alaska. It counts as our members nearly half the federally recognized tribes in our Country and regional and village Native corporations formed under our land claims, and all of the regional nonprofit tribal consortia and nonprofits administering programs under the Indian Self-Determination Act.

Having worked to overcome the decades-long disenfranchisement of Alaska Native voters, AFN is well positioned to help the Committee understand the continuing need to protect the foundational rights of Alaska Natives to express their decisions in voting.

Before turning to the topic of today's hearing, I want to remind the Committee that we are still dealing with unprecedented change going on in our lives. Rapid change has been a key part of our lives for a number of decades and this change and disruption continues. Working together with our Congressional delegation and others, we have made lasting improvements: extending life expectancy, reducing poverty, increasing access to life-saving health care, and building the capacity to stand on our own two feet.

I want to express my deepest appreciation for the Federal help we have received to try and combat the pandemic and the economic collapse which affects us all. The acceleration of technological change, while with many benefits, still exasperates inequities, especially in our rural remote communities. Your willingness to craft solutions with this understanding would be greatly appreciated.

Further, I take to heart the national policy reinvigorating our Country and strengthening our infrastructure and democracy to deal with increasing competition across the world. Voting rights legislation to me is a foundation to strengthen democracy and the rule of law.

I also want to thank Senator Murkowski for recognizing Elizabeth Peratrovich. She and her husband Roy were a team, and they are icons in our State on overcoming discrimination in voting rights. We sometimes think about Elizabeth Peratrovich as part of our history, but I can remember meeting her husband Roy when he was a superintendent at the Bureau of Indian Affairs, and he would have behind his desk pictures of his grandkids, and he even put my daughter up there with his grandkids.

Elizabeth Peratrovich and her impacts, and her husband, and all the other people who supported her and helped her, is our current history. It is not old.

Today I want to focus in my testimony on four issues. First, I want to dispel the false narrative that voting rights violations are a thing of the past in Alaska, and attributable to previous administrations. The facts, evidence and judicial decisions say otherwise and point to the role of current election officials in those violations.

Every successful enforcement action on behalf of Alaska Natives under the Voting Rights Act in the past quarter-century has occurred because of violations which occurred, in whole or in part, while the current leadership of the Alaska Division of Elections has been in place. This includes the Nick litigation on behalf of the Yup'ik-speaking villages in the Bethel area as well as the Yup'ik-speaking villages in Dillingham and other regions, and the Gwich'in-speaking villages in the Yukon-Koyukuk region. More regions of Alaska are currently designated for Federal observers under the Voting Rights Act than the remainder of the United States, because of those violations.

Second, I want to briefly explain how Alaska's Election Director has exercised discretionary authority under Alaska law to impede equal access to Alaska Natives to voting opportunities. Those discretionary acts have included seeking to close in-person voting loca-

tions in Alaska Native villages, such as designating some villages permanent absentee voting sites, proposing vote by mail despite language and illiteracy barriers that require in-person bilingual assistance for elders to cast effective ballots.

Under the current Director's watch, Federal Help America Vote Act funds designated for uses including language assistance languished in interest-bearing accounts, while the Director prioritized opening a new elections office in the small non-Native community of Wasilla, just outside of Anchorage. Rural election workers were required to be volunteers and paid a stipend of \$100, or about 15 cents an hour, versus urban election workers who were hired and paid \$15 an hour.

For years, the Director rejected requests by Alaska Native villages for early voting sites; at the same time early voting locations proliferated in the predominately non-Native urban areas. Only after AFN intervened on behalf of these villages and engaged in self-help to open those locations did the Director acquiesce.

Third, I want to emphasize that the pre-clearance requirements of Section 5 stopped voting discrimination before it occurred in Alaska. The straightforward, cost-effective, and timely pre-clearance mechanism has been replaced by years of disenfranchisement of Alaska Native voters, while discriminatory practices have been challenged in the courts.

Alaska has incurred a monetary price in the millions of dollars it has had to pay for these discriminatory practices. But the far greater cost has been to the thousands of Alaska Natives disenfranchised while voting cases wound their way through the courts.

Fourth, I want to emphasize that these bills are needed to address Alaska's present and ongoing discrimination against Alaska Natives. This is not the time for half-measures that will leave Alaska Native voters without the full protections guaranteed by the Constitution and the broad plenary powers that Congress has to regulate its relations with federally recognized tribes through free and equal access to the political process. These bills are complementary provisions that the Senate must pass immediately. Anything short of passage of both would reflect a lack of commitment to eradicating, once and for all, the first-generation voting barriers that Alaska Native voters face every day.

Protecting the right to vote is not a partisan issue. It is a fundamental civil rights issue for Alaska Natives. Everyone suffers and elected government has less legitimacy each time an Alaska native is prevented from registering to vote or is turned away at the polls. Now is the time to act, now is the time to pass S. 4, the John R. Lewis Voting Rights Advancement Act of 2021, and Title III of that bill, NAVRA, which is code named after a great Alaska Native civil rights leader, Elizabeth Peratrovich.

Thank you for your attention and your commitment to making voting fully accessible to Alaska Natives and other voters in Indian Country. I welcome the opportunity to answer any questions you may have now or in writing following the hearing.

Thank you.

[The prepared statement of Ms. Kitka follows:]

The CHAIRMAN. Thank you, Ms. Kitka.

PREPARED STATEMENT OF HON. JULIE KITKA, PRESIDENT, ALASKA FEDERATION OF NATIVES

**Introduction**

Chairman Schatz, Vice Chairwoman Murkowski, and Members of the U.S. Senate Committee on Indian Affairs, thank you for the opportunity to testify today on “Voting Matters in Native Communities.” My name is Julie Kitka, and I am the President of the Alaska Federation of Natives (AFN).<sup>1</sup>

Established in 1966 to achieve a fair and just settlement of aboriginal land claims, AFN is the oldest and largest statewide Native membership organization in Alaska. Our members include most of the federally recognized Alaska Native tribes; most of the regional and village Native corporations (ANCs) established under the Alaska Native Claims Settlement Act of 1971 (ANCSA);<sup>2</sup> and all of the regional nonprofit tribal consortia that contract or compact to administer federal programs pursuant to the Indian Self-Determination and Education Assistance Act of 1975 (ISDEAA).<sup>3</sup>

Having worked to overcome the decades-long disenfranchisement of Alaska Native voters, and counting as members nearly 500 federally-recognized tribes and ANCSAs, AFN is well positioned to help the Committee understand the continuing need to protect the Alaska Native vote. The provisions in S.4, The John R. Lewis Voting Rights Advancement Act of 2021 (VRAA), and Title III of that bill, The Frank Harrison, Elizabeth Peratrovich, and Miguel Trujillo Native American Voting Rights Act of 2021 (NAVRA), are essential to address the obstacles that continue to impede the political participation of Alaska Natives.

I want to begin by acknowledging the Committee’s important work on H.R.1688, the Native American Child Protection Act, a bipartisan bill that Representative Don Young of Alaska supports as an original co-sponsor. H.R. 1688 strengthens programs related to the prevention, investigation, treatment, and prosecution of family violence, child abuse, and child neglect involving Native children and families. These are critical issues for Alaska Natives, and I commend the Committee for moving forward with their discussion of the House legislation.

Before turning to the topic of today’s hearing, I want to remind the Committee that we are still dealing with unprecedented change going on in our lives. Rapid change has been a key part of our lives for a number of decades and this change and disruption continues. Working together with our Congressional Delegation, we have made lasting improvements—extending life expectancy, reducing poverty, increasing access to life-saving health care, and building the capacity to stand on our own two feet. I want to express my deepest appreciation for the federal help we have received to try and combat the pandemic and economic collapse which affects us all. The acceleration of technological change while with many benefits still exacerbates inequities, especially in our rural remote communities. Your willingness to craft solutions with this understanding would be greatly appreciated.

Today, I will be focusing on four issues.

First, I will dispel the false narrative that voting rights violations are a thing of the past in Alaska, attributable to previous administrations. The facts, evidence and judicial decisions say otherwise and point to the role of the current Director of the Division of Elections in those violations. It is very uncomfortable to point to an individual, and may reflect the systems in place more than a single person. Every successful enforcement action on behalf of Alaska Natives under the Voting Rights Act in the past quarter-century has occurred because of violations which occurred, in whole or in part, during the tenure of Alaska’s current Director of the Divisions of Elections (DOE). Under Alaska law, DOE’s Director is responsible for the conduct of all state elections including compliance with requirements under federal law.<sup>4</sup> Internal documents from DOE show that the current Director issued policy decisions that were knowing violations of federal law. Those violations have continued to the present, resulting in ongoing federal court oversight of Alaska. More regions of Alaska are currently designated for federal observers under the Voting Rights Act than in the remainder of the United States.

Second, I will explain how the current Director of DOE has exercised discretionary authority under Alaska law to impede equal access of Alaska Natives to voting opportunities. The current Director has pushed for closing in-person voting locations in Alaska Native villages, whether through designating some villages as Permanent Absentee Voting (PAV) sites or proposing vote-by-mail despite large numbers of Limited-English Proficient (LEP) Alaska Native Elders whose language and illiteracy barriers require in-person bilingual assistance to cast effective ballots. Under the current Director’s watch, federal Help America Vote Act (HAVA)<sup>5</sup> funds designated for uses including language assistance languished in interest-bearing accounts, while the Director prioritized opening a new elections office in the small non-Native community of Wasilla, just outside of Anchorage. Rural election workers

were required to be volunteers and paid a stipend of \$100 (or \$ .15/hr) vs urban election workers were hired and paid \$15.00/hr. For years, the Director rejected requests by Alaska Native villages for early voting sites at the same time early voting locations proliferated in the predominately non-Native urban areas. Only after AFN intervened on behalf of those villages and engaged in self-help to open those locations did the Director acquiesce.

Third, I will briefly describe how the preclearance requirements of Section 5 stopped voting discrimination before it occurred in Alaska. In the absence of Section 5 coverage following the Shelby County decision, voting rights violations have flourished. Elections officials, led by the Director of DOE, consistently have provided unequal opportunities for Alaska Natives to register to vote, to cast a ballot and to have their ballot counted, compared to non-Natives living in urban areas. The unfettered discretion of state officials has directly led to a decade of successful voting rights cases brought by Alaska Natives. The straight-forward, cost-effective and timely preclearance mechanism has been replaced by years of disenfranchisement of Alaska Native voters while discriminatory practices have been challenged in the courts. Alaska has incurred a monetary price in the millions of dollars it has had to pay Alaska Natives for their attorneys' fees and costs. But the far greater cost has been to the thousands of Alaska Natives disenfranchised during the pendency of the litigation.

Fourth, I will conclude with an explanation of why both the VRAA and NAVRA are needed to address Alaska's present and ongoing discrimination against Alaska Natives. This is not the time for half-measures that will leave Alaska Native voters without the full protections guaranteed by the Fourteenth and Fifteenth Amendments, the Elections Clause to the United States Constitution and the broad plenary powers that Congress has to regulate its relations with federally recognized tribes through free and equal access to the political process. The VRAA and NAVRA are complimentary provisions that the Senate must pass immediately. Anything short of passage of both the VRAA and NAVRA would reflect a lack of commitment to eradicating, once and for all, the first-generation voting barriers that Alaska Native voters face every day.

### **The Prevalence of Voting Discrimination Against Alaska Natives**

Alaska Natives were the last of the ingenuous peoples in this country to obtain our fundamental right to vote. I will only briefly describe some of the voting discrimination against Alaska Natives, summarizing some of the details that are presented in Attachments A and B of my written testimony.<sup>6</sup>

Alaska Natives, like all of the First Peoples, were disenfranchised for much of our history. In Alaska's 1915 Territorial Act, Alaska Natives were denied citizenship unless they could prove through individual examination, conducted by non-Native examiners, that they had abandoned "any tribal customs or relationship" and adopted "the habits of a civilized life."<sup>7</sup> Thus, Alaska Natives could only become eligible to become citizens, based upon the subjective and often racist whims of non-Native decisionmakers, and only if the Alaska Natives gave up their cultural identity. The Indian Citizenship Act of 1924, which formally made all American Indians and Alaska Natives citizens of the United States who had not already become so, did little to improve the access of Alaska Natives to the ballot.

In 1925, Alaska's Territorial Legislature responded to the Indian Citizenship Act of 1924 by passing a literacy test requirement for voting. Two of Alaska's leading newspapers at the time laid bare what was behind the new law:

The *Alaska Daily Empire* stated that Alaska Natives "cannot be even remotely considered as possessing proper qualifications" for voting, and the *Fairbanks Daily News-Miner* warned of Native voters of a "lower order of intelligence." Supporters of the literacy test ran an advertisement in the Juneau newspaper stating that its purpose was "to prevent the mass voting of illiterate Indians" and that the test was an "opportunity to keep the Indian in his place."<sup>8</sup>

The literacy test was designed to exploit the illiteracy of most Alaska Natives, who were denied schooling opportunities by educational discrimination that failed to provide any public schools in Alaska Native villages regardless of population.<sup>9</sup> Compounding that discrimination, courts in Alaska upheld state efforts to maintain segregated schooling that denied admission to any Alaska Natives that non-Native officials deemed to be "uncivilized" through application of offensive cultural and racial stereotypes.<sup>10</sup>

The discriminatory purpose of the 1925 Literacy Test was evident, much like what is motivating modern day violations: to prevent Alaska Natives from being part of the body politic and to elect representatives responsive to their needs.



Figure 1. Advertisement with a racial appeal by non-Native candidates for the legislature.\*

Non-Natives feared the political power that Alaska Native voters could wield if they were allowed to register to vote and cast ballots on an equal footing. The same motivations remain present today, as I will show in some of the internal correspondence from Alaska's Division of Elections.

Alaska Natives also faced discrimination paralleling much of what was directed against Black citizens in the South. They were denied access to housing through race based restrictive covenants that barred Alaska Natives and persons of color from owning homes in many communities. Native families attempting to dine out or show encountered signs in businesses that read, "No Natives, No Dogs" or advertised "All White Help." Movie theaters and other places of public accommodation were segregated, with Alaska Natives and non-White patrons confined to balcony areas with derogatory references such as "N\_\_\_\_\_er Heaven."<sup>11</sup>

Through their work with the Alaska Native Sisterhood and the Alaska Native Brotherhood, Elizabeth and Roy Peratrovich began lobbying in 1941 for an anti-discrimination bill in Alaska's Territorial Legislature. Four years later, the bill had not moved. A Territorial Senator spoke out against the bill, denouncing efforts to desegregate Alaska's social and economic life by arguing, "Who are these people, barely out of savagery, who want to associate with us whites, with 5,000 years of recorded civilization behind us?"<sup>12</sup> Elizabeth Peratrovich responded forcefully, decrying Alaska's Jim Crow practices fostered by non-Natives who "believe[d] in the superiority of the white race."<sup>13</sup> She continued, "I would not have expected that I, who am barely out of savagery, would have to remind gentlemen with five thousand years of recorded civilization behind them, of our Bill of Rights."<sup>14</sup>

Alaska's Territorial Legislature took action by enacting the Alaska Equal Rights Act of 1945. The Act protected equal access to public accommodations to Alaska Natives and all non-Whites, providing that "All citizens shall be entitled to the full and equal enjoyment of accommodations, advantages, facilities, and privileges" of public places.<sup>15</sup> Sadly, although Elizabeth Peratrovich lived to see the Alaska Equal Rights Act signed into law, she passed away in 1958, long before other discriminatory laws in Alaska, such as the Territorial and State literacy tests, were nullified by the federal Voting Rights Act (VRA).<sup>16</sup> I can think of no greater honor to bestow upon the first lady of civil rights for Alaska Natives, Elizabeth Peratrovich, than including her name on NAVRA.

When schooling began to become available after statehood in 1959, it was provided to Alaska Native children by requiring them to fly thousands of miles from their homes to attend boarding schools, including some as far away as the east coast of the United States. Another alternative was for Alaska Native children to effectively become laborers for non-Native households who took them in to allegedly provide them with access to public schooling in Alaska's urban centers. Alaska Native students were largely girls, with Alaska Native boys mostly staying home to assist their families with subsistence hunting and fishing.

Girls sent away to schooling frequently were sexually assaulted, subjected to mental and physical abuse, targeted with racial slurs, and segregated among student populations to make it difficult (and for some students impossible) to learn anything. Boys left behind in their villages then are today's male Elders who suffer the highest rates of limited-English proficiency and illiteracy. "By 1972, only 2,200 out of over 51,000 Alaska Natives had a high school education,"<sup>17</sup> with illiteracy rates exceeding those of Black voters in every southern state covered by Section 5 of the Voting Rights Act.

Alaska Natives today bear the scars of educational discrimination, which can limit our ability to participate effectively in the voting process. "In 2002, the Alaska Advisory Committee to the U.S. Commission on Civil Rights found that Alaska Native students 'score lower on achievement tests than any other minority group, and considerably lower than White students.' Over 80 percent of Alaska Native graduating seniors were not proficient in reading comprehension."<sup>18</sup>

Language and literacy barriers were prevalent in Senator Murkowski's successful effort to become the first United States Senate candidate in more than 50 years to win electoral office in a write-in campaign in 2010. In that case, a federal court rejected efforts to throw out write-in votes that clearly expressed the voter's intent for Senator Murkowski, but misspelled her last name.<sup>19</sup> One can imagine how a different electoral result would have occurred in the absence of substantial efforts by Alaska Native villages to assist LEP and illiterate Elders in identifying their candidate of choice by writing it out as best they could.

\*The Figures and attachments to this prepared statement have been retained in the Committee files.

Alaska's well-documented history of voting discrimination has been prevalent throughout recent years, in a series of decisions by both the U.S. Department of Justice and federal courts examining claims against the State's two election officials responsible for administering the state's elections: the Lieutenant Governor and the Director of the Division of Elections. As described in the attached article, contemporary discrimination by those election officials has included, among other things:

- Retrogression, or backsliding, by failing to provide language assistance according to the plan that the State of Alaska precleared with the U.S. Department of Justice;
- Unequal compensation for poll workers in many Alaska Native villages, compared to the compensation received by poll workers in urban polling locations;
- Disparate use of federal Help America Vote Act of 2002 (HAVA) funding, including use of funds to open a new elections office and voter registration site in the predominately non-Native community of Wasilla, while failing to use funds for language assistance until the State was sued in federal court;
- Widespread designation of rural Alaska Native villages as Permanent Absentee Voting (PAV) sites, in which all voting materials and information was sent by mail in English, providing no in-person language assistance for LEP Alaska Native voters who were unable to read voting materials or to vote effectively without assistance;
- Shirking responsibility to provide language assistance to Alaska Native voters by sending English-only materials to radio stations and villages asking them to provide translations "if available;"
- Attempting to "realign" (a euphemism for "close") polling places in Alaska Native villages and consolidating them with other Native villages accessible only by air travel, weather permitting, a practice the U.S. Department of Justice stopped through its Section 5 review process;
- Declining to provide early voting sites in Alaska Native villages, instead only authorizing some sites after AFN, through my staff's efforts, to recruit workers in 128 villages to provide early voting services in just eleven days (due to an arbitrary deadline set by the State), only to be followed by the Director of the Division of Elections falsely claiming credit in her public statements for the work that AFN did;
- Failing to implement any meaningful efforts at Yup'ik language assistance in Alaska Native villages in the Bethel Census Area until State officials were sued in *Nick v. Bethel*,<sup>20</sup> and even then the efforts by those officials were so poor that a federal judge entered a preliminary injunction against them after finding a substantial likelihood of success on the merits that the State had violated Sections 203 and 208 (the voter assistance provision) of the Voting Rights Act in 2008;
- Engaging in intentional discrimination against Alaska Native voters, with State officials including the Director of the Division of Elections, directing election staff to limit all Yup'ik language materials and information to the "Bethel Census Area only" in repeated written correspondence;
- Ending the employment of the one Yup'ik language coordinator on the last day that the *Nick v. Bethel* settlement agreement was in effect, and not replacing her until after the State officials were sued a second time for violating Section 203 in three other census areas in *Toyukak v. Treadwell* in 2013;
- Directing the one permanent bilingual Yup'ik bilingual coordinator hired after the *Toyukak* litigation was filed to spend most of his time doing data entry of voter registration records and voting history, instead of the language assistance needed throughout Alaska;
- Arguing in the *Toyukak* litigation that the Fifteenth Amendment did not apply to Alaska Natives because they were Alaska Natives;
- Maintaining that the State could paternalistically decide what election information Alaska Natives were entitled to know, with the State contending that Alaska Natives could receive less information than non-Native voters received in English simply because they were Natives;
- Failing to translate most ballot measures and materials in the Gwich'in language, even after being warned by the U.S. Department of Justice of the need to translate voting information provided on electronic voting machines;
- Failing to provide effective language assistance in three regions of Alaska, the Dillingham, Kusilvak (formerly known as Wade Hampton, named after a Confederate General who advocated forced segregation of the races), and Yukon-

Koyukuk Census Areas, as determined by a federal judge in *Toyukak v. Treadwell*, the first Section 203 language assistance case fully litigated through trial to a decision since 1980;

- Falling short of compliance with the requirements of the Toyukak order, as documented by federal observers in several elections since 2014;<sup>21</sup> and
- Most recently, in 2020, a state court suspended Alaska’s witness signature requirement (which mandated a witness outside of the voter’s household verify the signature was the voter’s), which would have prevented Alaska Native voters subject to village lock-down orders to limit the spread of COVID-19 from being able to vote.<sup>22</sup>

Many of these practices which I have described, as well as other examples in a comprehensive report by NARF,<sup>23</sup> are the very ones that would be stopped by the amendments to the Voting Rights Act included in S.4 and Title III of the bill, NAVRA.

**All Judicial Findings of Voting Rights Violations in the State of Alaska Have Occurred under the Current Director of the Division of Elections.**<sup>24</sup>

Prior to the reauthorization of the VRA in 2006, Alaska had done little to comply with federal requirements under Section 203 of the Act. As the Alaska report included in the congressional record observed, “[s]ince its inclusion in the VRA in 1975, Alaska appears to have not complied with its obligation to provide voting assistance in Alaska Native languages.”<sup>25</sup> This record of deliberate inaction and indifference by Alaska came despite clear evidence that Alaska’s election officials knew about their responsibilities under the VRA but chose to ignore them, including:

- Correspondence from the U.S. Department of Justice informing Alaska of its coverage under Section 4(f)(4) of the Act in 1975;
- Correspondence from the U.S. Department of Justice informing Alaska of its coverage under Section 203 of the Act, following each determination made under that Section in 1975, 1982, 1992, 2002, 2006, and 2011;
- In 1981, Alaska submitted its language assistance plan to the U.S. Department of Justice for preclearance, which it received based upon its assurances that it would provide bilingual translations for voting information in all Alaska Native languages covered by Sections 4(f)(4) and 203 of the VRA;
- Correspondence from the U.S. Department of Justice periodically informed Alaska of its concerns that the State was not providing language assistance contrary to its precleared language plan and the requirements of Sections 4(f)(4) and 203 of the VRA;
- Alaska election officials acknowledged receipt of the Alaska report in 2006, which documented their violations of the VRA, with those officials denying that there were any violations.

At the same time that Division of Elections officials denied they were violating the VRA, they acknowledged their awareness of those violations and their plans to address them. But all of those plans were put on hold by what they considered higher priorities: the 2006 and 2007 elections. Admissions by DOE officials made clear that they did not consider the State’s failure to provide bilingual outreach, information and assistance to Alaska Natives as important as running English-only elections that facilitated voting by non-Natives:

- Whitney Brewster, who was the predecessor of the current DOE Director,<sup>26</sup> admitted under oath that DOE “started looking in April 2006” at improving its language plan, but “put it aside as we were conducting our major statewide election as well as our REAA/CSRA election . and we picked it back up after the election and then we were hit with another statewide special election in April of 2007”;
- Shelly Growden, a supervisor who reported to Ms. Brewster and the current DOE Director until her retirement, acknowledged that Alaska had done little to provide language assistance until approximately when Alaska was sued in the Nick litigation. “We started working on updating the plan in 2007. The Division was hit with a statewide special election. After that special election in April, we started making updates to our language assistance plan.”
- Ms. Brewster crystallized the priorities of DOE officials by making clear that language assistance for Alaska Native voters simply was not on par with other legal requirements for Alaska’s elections: “Language assistance is not the only

assistance that the Division of Elections provides . We have . the demands of every voter in the state.”

When the current Director of DOE took over supervision of Alaska’s elections, she admitted that her office was not performing most of the tasks required by Alaska’s precleared 1981 language assistance plan. Specifically, contrary to the plan that Alaska told the U.S. Department of Justice it used for its elections:

- The State did not track the language abilities of its voting registrars and prior to May 2008 had never translated any voter registration information into Yup’ik;
- Alaska election officials had never produced and used Yup’ik video recordings for elections information, which according to Whitney Brewster, “based on precedent, it hadn’t been done”;
- With the exception of two incomplete and poorly translated 30-second radio ads aired by the State in 2006, the DOE had never produced and used Yup’ik audio recordings for elections information. Instead, the State tried to place its legal duty to translate on radio stations, asking station personnel to translate English-only voting information “if available”;
- Alaska election officials never traveled to Yup’ik villages to work with interpreters in preparing audio recorded translations because according to the Director, “We do not” do that;
- State officials never confirmed the English and Yup’ik language skills and literacy abilities of election workers designated as their Yup’ik translators and often had had no translators in the polls; and
- All Yup’ik translators required to translate “on the spot” without uniform Yup’ik translations; in 2008, no uniform translations for offices on ballot, instructions, and other key information.

Although Section 203 of the VRA placed the duty to provide language assistance on the State of Alaska, the State’s Director of DOE responsible for administering elections, admitted that Yup’ik translations were only available if voters engaged in self-help: “They would have to have an individual translate the . English version for them.” As Regional supervisor Becka Baker explained, oral Yup’ik translations were not provided because “All our communications are done in English.”

Division of Elections officials conceded that most voting announcements communicated to voters in English was not offered in any Alaska Native language, including critical information such as:

- The right of voters to receive language assistance in Alaska Native languages during the registration and voting process;
- How to complete a questioned ballot;
- Polling place information and how to get that information in Alaska Native languages;
- Absentee voting information;
- Information that tribal ID cards, which the State admits are an acceptable form of voter identification, can be presented at the polls to vote;
- Information about the petition process and status reports about petitions;
- Candidate statements provided to voters in English;
- Maps of election districts, boundary lines, & explanatory information;
- Information about becoming an election worker;
- Polling place information;
- How to contact an elections office by phone;
- Voter purges and notices;
- Polling place notices and forms;
- Notices requesting public comments about changes such as polling place closures;
- Vote-by-mail notices;
- Information about new voting equipment;
- Voting machine instructions;
- And all other voting information included in Alaska’s 100+ page Official Election Pamphlet (OEP).

Alaska officials similarly failed to provide any audio translations into the Yup’ik language, even after acquiring voting machines in 2005 that were capable of accommodating up to nine languages. The State took no further action, and only started

considering the use of audio ballots after the U.S. Department of Justice contacted state officials in Fall 2007 to inform Alaska its failure to provide audio translations in Yup'ik violated the VRA. Even then, Alaska failed to provide any audio translations until State election officials were sued.

In the summer of 2007, Yup'ik-speaking Alaska Native voters and villages sued the State of Alaska for failing to provide language assistance in violation of Section 203 of the VRA and denying voter assistance in violation of Section 208 of the VRA. The State of Alaska denied their violations, claiming that contrary to the evidence that they had ignored the 1981 language plan it had "been providing minority language assistance under a plan precleared by the United States Department of Justice for over 26 years."

A federal judge found otherwise. On July 30, 2008, the Nick court issued an injunction that determined based upon the evidence that Alaska election officials had violated the language assistance and voter assistance provisions of the VRA:

Based on the evidence presented, the Court finds that the Plaintiffs have met their burden and established that they are likely to succeed on the merits on the language assistance claims brought under sections 203 and 4(f)(4) of the VRA, and the voter assistance claims brought under section 208 of the VRA. In reaching this conclusion, the Court relies on affidavits, depositions and other evidence showing that the State has failed to: provide print and broadcast public service announcements (PSA's) in Yup'ik, or to track whether PSA's originally provided to a Bethel radio station in English were translated and broadcast in Yup'ik; ensure that at least one poll worker at each precinct is fluent in Yup'ik and capable of translating ballot questions from English into Yup'ik; ensure that "on the spot" oral translations of ballot questions are comprehensive and accurate;" require mandatory training of poll workers in the Bethel census area, with specific instructions on translating ballot materials for Yup'ik-speaking voters with limited English proficiency.<sup>27</sup>

In issuing the injunction, the Nick court rejected the argument made by Alaska officials, including the current Director of the DOE, that Alaska Native voters were not entitled to relief because Alaska was taking steps in 2008, for the first time since becoming covered by Sections 4(f)(4) and 203 in 1975, to begin to provide a nascent form of language assistance. The Court reasoned:

Therefore, while the State contends that an injunction is unnecessary, the court disagrees in light of the fact that: 1) the State has been covered by Sections 203 and 4(f)(4) for many years now; 2) the State lacks adequate records to document past efforts to provide language assistance to Alaska Native voters; and 3) the revisions to the State's [language program], which are designed to bring it into compliance, are relatively new and untested. For all these reasons, the court concludes that injunctive relief is both appropriate and necessary.<sup>28</sup>

The Nick court also found that Alaska election officials violated the voter assistance provisions in Section 208 of the VRA:

Plaintiffs have demonstrated that they are likely to prevail on their section 208 voter assistance claim as well. That claim asserts that poll workers have regularly failed to allow voters (or apprise voters of their right) to bring an individual of their choice into the voting booth to assist them in the voting process. While the evidence on this claim is more anecdotal, it nonetheless satisfies the Plaintiffs' burden for injunctive relief. This evidence primarily consists of affidavits and deposition testimony showing that some poll workers in the Bethel census area do not understand that blind, disabled or illiterate voters have the right to receive assistance from a "helper" of their choosing. For example, Plaintiff Anna Nick has heard poll workers in Akiachak tell other voters that they "cannot bring anyone with them into the booth because their vote must remain private." Similarly, Elena Gregory, a resident of the village of Tuluksak, reports being told by a poll worker that she "could not help the others vote if they did not understand" the ballots written in English. In her declaration, she states: "I have voted in an election where the poll worker told me that elders could not have help interpreting or reading the ballots, and that everyone had to be 50 feet away from the person voting." And in the city of Bethel of the village of Kwigillingok, election workers have failed to offer assistance to voters who needed it, and who were entitled to it under section 208.<sup>29</sup>

In short, the federal court in Nick found that Alaska election officials had taken no steps to comply with the VRA in 2006, placed their beginning efforts on hold and only resumed those efforts after being sued by Alaska Native voters and villages.

If the *Nick* case was the only successful litigation brought against Alaska's election officials, it would provide powerful evidence sufficient to establish the need for the remedies in the VRAA and NAVRA to voting discrimination against Alaska Natives. But it is not the only example. After *Nick*, the current Director of the Division of Elections appeared to engage in intentional discrimination to deny the language assistance to Alaska Native voters in other regions of Alaska. Following the 2011 coverage determinations, Alaska was notified it has to provide language assistance to Alaska Native voters, including those residing in the Dillingham, Kusilvak (Wade Hampton<sup>30</sup> at the time), and the Yukon-Koyukuk regions.<sup>31</sup> In addition, the U.S. Department of Justice sent the Director of the Division of Elections, in this instance the Director, a notice letter of its coverage and a reminder of the need to comply fully with the requirements of Section 203 of the VRA. A copy of the letter is included as Figure 2.

Figure 2. Department of Justice Notice Letter to Gail Fenumiai, Director of DOE.

These notices made it clear to Alaska and the Director of their legal duties to provide language assistance in all areas covered by Section 203 of the VRA, including the three regions noted above. In 2012, a year after receiving that letter, the Director was contacted by the U.S. Department of Justice and notified of its concern that Alaska was failing to translate voting information. See Figure 3.

Figure 3. Internal DOE e-mail regarding lack of information in Alaska Native languages. Like the Director, Alaska's regional elections supervisors also knew where language Assistance in Alaska Native villages was required. For example, Becka Baker, who supervised elections in two Yup'ik-speaking regions, admitted that Yup'ik language assistance was required in all of the villages in those regions:

Q: Are there any communities in Dillingham that you're aware of that have LEP rates that would be less than 5 percent?

A: Right off the top of my head, no.

Q: Okay. What about Wade Hampton?

A: No.<sup>32</sup>

Alaska's Director of DOE and her staff plainly knew about the requirements of language assistance from several sources: notification and requests for language assistance from the Native American Rights Fund (NARF) and AFN; the court order in the *Nick* litigation; official notices from the U.S. Department of Justice, which included a copy of Section 203 of the VRA; and communications from the Department of Justice informing the Director and her staff that Alaska was violating Section 203. Despite that information, Alaska's Yup'ik language coordinators admitted they had no duties to provide language information in the Dillingham and Wade Hampton Census Areas.<sup>33</sup>

Between 2008 and 2012, DOE's own records showed that few Alaska Natives received any information in their covered languages before Election Day, despite the distribution of an Official Election Pamphlet to voters in English that had more than 100 pages of information about registration and voting.<sup>34</sup> In the Dillingham Census Area, Alaska provided Yup'ik translators for pre-election materials and information only 25 percent of the time, while Yup'ik translators were provided in the Wade Hampton (Kusilvak) Census Area just 37 percent of the time. In the Gwich'in-speaking communities of Artic Village and Venetie, Gwich'in speaking translators were only provided by DOE 31 percent of the time.

Alaska's record on providing language assistance on Election Day was not much better. For that same 2008 to 2012 period, the Director's office failed to have an in-person bilingual translator for all election hours 48 percent of the time in the Dillingham Census Area and 22 percent for the Wade Hampton (Kusilvak) Census Area. No sample ballots were translated into the Gwich'in language.<sup>35</sup>

The reason language assistance was not provided in regions of Alaska outside of the Bethel Census Area is apparent, and is confirmed by the internal documents and communications of the Director's office: intentional discrimination. The Director made a "policy decision" to limit Yup'ik language assistance to the only region covered by the *Nick* order and settlement agreement: the Bethel Census Area. Internal documents, such as those below, included limitations on Yup'ik to "BCA only," referring to the Bethel region. Thousands of other LEP Yup'ik-speaking voters were denied language assistance in violation of Section 203.

Figure 4. DOE documentation directing that language assistance be limited to Bethel region.

Even more disturbing, Alaska election officials treated the availability of language assistance in the Bethel region following the *Nick* litigation as a secret that should not be shared with LEP voters in other areas of the state. The following e-mail, in which the Director was copied, is illustrative of their discriminatory intent. In the

e-mail, the Yup'ik language coordinator informed the Director that a Yup'ik-speaking tribal administrator from Emmonak, located in the Wade Hampton (Kusilvak) Census Area asked why LEP voters in her region were not receiving election information in Yup'ik.

Instead of addressing the complaint, DOE staff acknowledged that Emmonak had told them "they need language assistance" in a 2012 survey, but questioned how the Tribal Council "would know we have Yup'ik materials." The state's Yup'ik language coordinator confirmed that she did not send translations, noting "I'm pretty sure that I only sent the Yup'ik ads and sample [ballots] to the BCA [Bethel Census Area] outreach workers." See Figure 5.

Figure 5. Director Fenumiai's DOE staff discussing intent to restrict language assistance.

Voters in the Gwich'in-speaking villages in the Yukon-Koyukak region fared little better. One of the Director's staff members told a Gwich'in translator that it "would be fine" if only two out of four 2008 ballot measures were translated into the Gwich'in language, providing LEP voters with no information in their language about the other two. See Figure 6.

Figure 6. DOE communication indicating only two out of four ballot measures to be translated. DOE provided no Gwich'in translations at all following the 2008 election, until DOE staff reached out to a translator over five years later in December 2013. The Director's office only did so after the State of Alaska was sued again for failing to provide language assistance in the Yukon-Koyukak Census Area. At that time, not only were no voting materials translated into Gwich'in, the State also failed to provide audio translations on the voting machines in Gwich'in.<sup>36</sup>

Even when the Director's office provided translations in Alaska Native languages, they were unconcerned about whether the translations accurately translated what was on the ballot and whether those translations allowed LEP Elders to cast an informed vote. I will give two examples.

In 2009, there was a ballot measure that "would change the law to require notice to the parent or guardian of a female under the age of 18 before she has an abortion."<sup>37</sup> Although Alaska's DOE translated the ballot measure into Yup'ik, the translation completely altered the meaning of the ballot measure so it bore no resemblance to the actual measure written in English. As Figure 7 shows, Professor Walkie Charles, the preeminent expert on the Yup'ik language, determined that the State's actual translation was that the ballot measure "would change the law to require notice to the parent or guardian of a female under the age of 18 before she gets pregnant." An LEP Yup'ik voter would think that they were being asked to vote on a measure requiring parental permission for minor females to get permission to get pregnant, not to get an abortion.

Figure 7. DOE's erroneous translation of abortion consent ballot measure.

In a second example, Alaska's DOE knew that their Yup'ik translation was incorrect, but proceeded using it anyway. As Figure 8 shows, Alaska's Yup'ik translator explained that the translation for absentee voting in the information being provided to LEP Yup'ik voters was mistranslated to mean "to vote for a long time."

Figure 8. DOE e-mail identifying an incorrect Yup'ik translation.

When Alaska's Yup'ik language coordinator told her supervisor about the mistake, the supervisor agreed that the translation should be used as-is. The language coordinator minimized its impact by arguing, "I don't think it will cause too much confusion." Referring to the Nick plaintiffs, the coordinator explained, "We'll be criticized by the plaintiffs if they catch it, but what the heck, it's a similar word and hope that it goes right over their heads!" The language coordinator's supervisor agreed to use the inaccurate translation.

Figure 9. Alaska Elections Supervisor approving use of inaccurate translation. In *Toyukak v. Treadwell*, Alaska Native voters and villages from three additional regions of Alaska (Dillingham, Wade Hampton/Kusilvak, and Yukon-Koyukak) sued the State of Alaska, the Director and other elections staff in 2013. They alleged violations of Section 203 of the VRA and the Fourteenth and Fifteenth Amendments. In opposing the litigation, the Director's office argued through its counsel that the Fifteenth Amendment was inapplicable to Alaska Natives. The federal court rejected Alaska's argument:

I've considered the position of the State that the Fifteenth Amendment does not apply in this case because this is a case that is focused primarily on limited-English proficiency and yet, given that specific language that is at issue here, the one that the addressed solely to Native Alaskans and American Indians, I do see that the strictures of the Fifteenth Amendment do apply.<sup>38</sup>

Following a two week trial in the summer of 2014, the federal court found that Alaska officials, including the Director, had violated Section 203 of the VRA. A copy of the decision is included as Attachment D.

In September 2015, the federal court entered a Stipulation and Order to impose remedies for Alaska's violations of Section 203. That relief included, among other things: mandatory poll worker training; pre-election outreach in Gwich'in and Yup'ik in all of the covered Alaska Native villages in the three regions; bilingual voting information, materials and public service announcements; use of translation panels to provide accurate translations; translations into several dialects of Yup'ik to ensure that the translations were understandable to all LEP voters; and trained bilingual poll workers in all covered Alaska Native villages in the three regions. To ensure that these remedies were implemented, the federal court retained jurisdiction over the case through the end of 2020. In addition, the court authorized the appointment of federal observers under Section 3(a) of the VRA to act as the court's eyes and ears in the polling places to monitor the State's progress.<sup>39</sup>

By the end of 2020, over six years after the federal court first granted relief in Toyukak, the Director's office was still not in compliance with Section 203 in the Dillingham, Kusilvak and Yukon-Koyukak regions. Federal observer reports and Alaska's own records documented the continued failure to meet the requirements in the court's order. Despite mandating training for all poll workers, more than one-third have never been trained. Of those who were trained, many received no instruction on providing bilingual assistance. Alaska does not provide pre-election outreach in many of the covered Alaska Native villages, failing to offer translations of critical information, such as ballot measures, that will allow Native voters to cast effective ballots. In the 2016 Primary election, outreach was offered in just six of the more than three dozen Alaska Native villages. In the 2018 statewide election, no outreach was offered in any of the villages in the Yukon-Koyukak region. Bilingual translators were not provided in many villages on Election Day for every election since 2014. In the 2018 election, DOE failed to provide translated sample ballots in 53 percent of all covered villages. In that same election, 60 percent of village precincts lacked voting machines with audio translations.<sup>40</sup>

As a result of these violations, the *Toyukak* plaintiffs filed a motion to extend the terms of the court's order for the three regions of Alaska. State officials agreed to the extension. Court oversight remains in place through December 31, 2022. In addition, the three regions of Alaska remain certified for federal observers for all elections through the end of 2022. Notably, today there is more federal observer coverage in Alaska than the rest of the United States combined.

To summarize, every violation of the VRA that has been found by a federal court has occurred under the supervision of the current Director of the Division of Elections. Far from being attributable to previous administrations, Alaska's violations have been under the same Director of DOE and have continued to the present. Those violations have necessitated federal court oversight through at least the end of next year. The violations provide powerful evidence of the need to strengthen protections for Alaska Natives through passage of the VRAA and NAVRA.

The current Director of the Division of Elections exercises discretionary authority to deny Alaska Natives equal voting opportunities, necessitating passage of the VRAA and NAVRA.

Alaska's expenditure of federal Help America Vote Act (HAVA) funds likewise makes clear that the Director and DOE staff made Alaska Native language assistance a priority only when required to do so by a federal court through an action to enforce Section 203 of the VRA. Although HAVA funds were provided by the federal government to improve language accessibility in elections, the Director chose two paths outside of litigation: to use the funds to expand access of non-Natives to the voting process, such as by opening a new DOE office in the non-Native community of Wassila; and holding the balance of the funds in interest-bearing accounts. Figure 10 shows that DOE's use of HAVA funds for language assistance was directly tied to the Nick litigation:

Figure 10. Alaska's use of HAVA funds and relationship to timing of the Nick litigation.

The Director of the Division of Elections also has exercised her discretion to deny Alaska Native voters equal early voting opportunities.<sup>41</sup> Like over two-thirds of all states,<sup>42</sup> Alaska offers early voting (also called absentee in-person voting) for statewide elections.<sup>43</sup> State law provides that "[f]or 15 days before an election and on election day, a qualified voter . . . may vote in locations designated by the director."<sup>44</sup> Early voting allows eligible voters to cast ballots in person, just as they can do on the day of the election.<sup>45</sup> However, the location of early voting sites can effectively discriminate against Native voters by denying them in-person early voting opportunities equal to that of non-Natives.<sup>46</sup> Prior to 2014, Alaska's early voting sites were in predominately urban non-Native areas and a few rural "hub-communities."<sup>47</sup>

The disparity becomes readily apparent by looking at the census data for the locations where in-person early voting was provided. For example, in the November



2012 election, the City of Anchorage, where non-Natives comprise about 92 percent of the total population,<sup>48</sup> had four absentee voting locations open during the entire fifteen-day early voting period.<sup>49</sup> The Matanuska-Susitna Borough, where non-Natives comprise about 94 percent of the total population and which has less than one-third the population of Anchorage,<sup>50</sup> had five absentee voting locations open during the entire early voting period.<sup>51</sup>

In sharp contrast, three of the regions with the largest percentage of Native voters were limited to just a handful of in-person early voting locations. The Bethel Census Area, home to at least 39 villages<sup>52</sup> and where Natives comprise about 83 percent of the total population,<sup>53</sup> had only three early voting locations: Bethel, Aniak and Kasigluk.<sup>54</sup> Of those, only Kasigluk is a predominantly Native community. The other 36 Native villages had no early voting. Furthermore, these voters did not have the option of flying to one of the three early voting locations (if anyone would fly to vote), because voters must vote in their assigned precinct in order to ensure their vote counts; if a voter from Chefnak went to Kasigluk for example, he or she would have to vote a questioned ballot. Even worse, the Kusilvak Census Area, which has at least fifteen villages and in which 95 percent of the total population is Native,<sup>55</sup> had only a single early voting location at St. Mary's.<sup>56</sup> The Dillingham Census Area, with more than one dozen villages<sup>57</sup> and Natives comprising nearly three-quarters of the total population,<sup>58</sup> had just one early voting site in Dillingham.<sup>59</sup> With a handful of exceptions, early voting was nearly universally unavailable in Native villages.

Beginning in at least 2011, AFN, other organizations, corporations, tribal councils, and voters, began requesting that DOE establish early-voting locations in Native villages.<sup>60</sup> The ANCSA Regional Corporation CEO's explained why in-person absentee voting in advance of the scheduled elections was necessary:

This is very important to people in our communities because, in August especially [during the primary election], subsistence fishermen and those who are berry picking are likely to be gone for significant periods of time. They often cannot be at voting locations on the exact date of the election. Similar problems often arise in November as well [during the general election], when the weather adds to travel problems. Moreover, given how slow and unpredictable absentee by mail voting can be, many people in our community do not trust this option. Voting by fax is also not considered an option because almost no one has their own personal fax machine, and to fax from the tribal or municipal office costs the voter between \$1 to \$3 per page; there should be no cost associated with voting. The lack of personal fax machines also eliminates private voting rights, forcing individuals to share their choices if they want to participate in the election.<sup>61</sup>

Moreover, the Native corporations emphasized the inequality of offering early voting to those "who live in urban areas like Fairbanks, Anchorage, and Juneau," asserting "that our rural residents should have the same access to the polls as urban Alaskans."<sup>62</sup> DOE acknowledged receiving several letters from Native groups raising similar concerns.<sup>63</sup> Nevertheless, the DOE's response ignored the obvious unequal treatment, even questioning why in-person early voting was needed there. Instead, the Director of DOE maintained that "there are several ways other than early in-person voting that residents of your community can vote prior to Election Day" that she argued "will be effective and will not result in disenfranchisement."<sup>64</sup> The Director also blamed the Section 5 preclearance requirement for the discriminatory treatment of Natives, contending that it precluded the DOE from making "further adjustments or changes for the 2012 elections."<sup>65</sup>

In August 2013, following the Shelby County decision removing Alaska from coverage for the Section 5 preclearance requirements, at least half a dozen Native organizations and three tribal councils again requested early voting in the villages with the hope that it could easily be done since the preclearance the DOE complained about was no longer required.<sup>66</sup> In response to those requests, DOE conceded that preclearance was "no longer required."<sup>67</sup> Nevertheless, instead of granting the repeated request, DOE's Director devised a new three-step process as a condition for adding locations in Native villages. First, regardless of any previous requests they had made, tribal councils were required to respond to a survey.<sup>68</sup> There were several different versions of the survey, with the questions worded slightly differently for no clear reason. All surveys were in English and the key question was often buried in a lengthy and sometimes incomprehensible paragraph describing all the various ways to cast a ballot. Each did ask the village to opt-in by indicating "if they would like an absentee in-person voting location" as well as requiring the tribal council to state that "it is willing to serve as the absentee voting location."<sup>69</sup> If the tribal council did not respond, DOE took no further action.<sup>70</sup> Second, if the tribal

council responded to the survey, DOE sent out a second letter asking them to reaffirm their earlier response on “whether the tribal council office would agree to serve as the absentee voting location.”<sup>71</sup> Third, the tribal council, not the DOE, was required to “designate an individual to serve as the absentee voting official.”<sup>72</sup> Only then would DOE consider establishing an in-person early voting location in a Native village.<sup>73</sup> Despite the many requests already made from organizations representing dozens of tribes, the Director noted that only two, Chevak and Larsen Bay, had succeeded in negotiating these confusing bureaucratic requirements.<sup>74</sup>

In early 2014, in the months leading up to the primary and general elections, the DOE had still taken no steps to establish in-person early voting locations in Native villages. These stalling tactics prompted Native organizations to again request that rural villages be treated equally to non-Native urban areas. Specifically, they asked for the provision of “early voting in every village without requiring villages to ‘opt-in’ by survey or otherwise. Urban communities are not required to opt-in to early voting, and rural Alaska should have as equal access to voting as urban Alaska.”<sup>75</sup> They likewise requested that DOE provide an additional early voting station during the three-day Alaska Federation of Natives conference to make it more accessible to the thousands of voters who attend that conference.<sup>76</sup> DOE waited more than one month to respond, rejecting both requests.<sup>77</sup> The Director rationalized the disparate treatment to Native villages by asserting that adequate voting locations and absentee voting officials “have historically been more easily found in more populated and/or urban areas.”<sup>78</sup>

Ultimately, in-person early voting locations were only established in Native villages after AFN, the ANCSA CEO’s Association, and Get Out The Native Vote agreed to engage in self-help and pay the costs.<sup>79</sup> In June 2014, the Native groups took on a burden not required for non-Native groups or voters living in urban areas of Alaska. They performed DOE’s statutory duty<sup>80</sup> by identifying voting locations and recruiting absentee voting officials.<sup>81</sup> A total of 128 villages throughout rural Alaska were designated by the Native groups and approved by DOE for in-person early voting locations.<sup>82</sup>

Afterwards, DOE’s director attempted to claim credit for making early voting accessible in the villages.<sup>83</sup> AFN sharply rebuked her efforts, explaining that Native organizations were “[t]ired of having our repeated requests rejected” and “offered to do the work for the DOE and organize new early voting locations ourselves. The DOE did not do this—we did.”<sup>84</sup> DOE then attempted to limit the number of ballots sent to the Native early voting locations to between 25 and 50, even though most of locations had hundreds of voters.<sup>85</sup>

While Alaska Native voters finally secured early voting opportunities, they did so only after substantial struggles and requirements not imposed on non-Natives. The examples of the use of HAVA funds and the creation of early voting sites highlights the importance of strong federal legislation to protect the voting rights of Alaska Native voters.

While some critics of the VRAA and NAVRA have maintained that voting rights should be “left to the states,” the Alaska experience has shown why that argument is specious. Left to her own devices, the current Director of the Division of Elections repeatedly has exercised her discretion to expand registration and voting opportunities for non-Natives, while denying those opportunities to Alaska Native voters. The VRAA and NAVRA are strong medicine needed to address the discrimination of Alaska’s election officials.

Before Shelby County, the preclearance requirements of Section 5 stopped discrimination by the current Director of the Division of Elections against Alaska Natives before it occurred.

AFN filed an amicus curiae brief in Shelby County in support of the Section 5 coverage formula and the coverage of Alaska under it. In that brief, AFN cited several examples of how preclearance stopped voting discrimination against Alaska Natives. For example, in 1993, the U.S. Department of Justice objected to Alaska’s statewide legislative redistricting plan because it reduced the Alaska Native voting age population in House District 36, despite the presence of highly racially polarized voting. Similarly, Section 5 prevented Alaska from implementing a newly proposed language assistance plan in 2008, which Alaska officials designed to reduce language assistance provided under its precleared 1981 language plan in an effort to undermine the Nick litigation.

Section 5 also was an effective means of blocking discrimination that occurred under the supervision of the current Director of the Division of Elections.

In May 2008, within weeks of when the Director assumed her position, Alaska submitted for preclearance a plan to eliminate precincts in several Native villages.<sup>86</sup> State officials proposed to (1) “realign” Tatitlek, a community in which about 85 percent of the residents are Alaska Native, to the predominately white community Cor-

dova, located over 33 miles away and not connected by road; (2) consolidate Pedro Bay, where a majority of residents are Alaska Native, with Iliamna and Newhalen, located approximately 28 miles away, are not connected by road, and were the subject of a critical initiative on the August 2008 ballot; and (3) consolidate Levelock, in which about 95 percent of residents are Alaska Native, with Kokhanok, approximately 77 miles apart and not connected by road. In other words, the DOE was attempting to combine precincts accessible to one another only by air or boat with high concentrations of Alaska Native voters.

The Department of Justice responded with a More Information Request (MIR) letter requesting information about reasons for the voting changes, distances between the polling places, and their accessibility to Alaska Native voters. The Department inquired about “the methods of transportation available to voters traveling from the old precinct to the new consolidated precinct” asking that if there were no roadways connecting them that the State “indicate how voters will get to the consolidated location.” The MIR suggested that Alaska’s election officials had not consulted with Native voters about the changes and requested a “detailed description” of efforts “to secure the views of the public, including members of the minority community, regarding these changes.” Finally, the MIR documented that when Department of Justice personnel communicated with State officials, they learned that Alaska also was taking steps to implement an unsubmitted voting change designating “specified voting precincts” as “permanent absentee by-mail precincts.”

Rather than responding and submitting the additional voting changes for Section 5 review, the Director abruptly withdrew the submission two weeks later.<sup>87</sup>

Alaska’s election officials, including their current Director of the Division of Elections, have shown that time and again, they cannot be trusted to exercise their discretion to provide equal registration and voting opportunities to Alaska Natives. The VRAA and NAVRA are needed to provide a failsafe against the discriminatory actions of the Director and other Alaska election officials. In the absence of Section 5 coverage, which stopped discrimination in its tracks before it could disenfranchise Alaska Native voters, those same voters and organizations like AFN that represent them are left with pursuing relief through the federal courts. As I will explain in the next section, the VRAA and NAVRA both add important weapons to the arsenal available to fight discrimination.

Without the protections in both bills, Alaska Native voters will be left to have their fundamental right to vote rise or fall at the whims of election officials, such as the Director of DOE, who have proven they will not exercise their statutory discretion in a nondiscriminatory manner.

Enactment of both the VRAA and NAVRA is necessary to protect Alaska Native voters from current discrimination that impedes their equal access to registration, voting, and having their ballots count.

In *Shelby County v. Holder*,<sup>88</sup> the D.C. Circuit Court of Appeals showed the dangers of the Third Branch engaging in dictum. The question of Alaska’s coverage under Section 5’s preclearance provisions was not before the Court. No evidence was taken by the court from Alaska Natives who have experienced Alaska’s long history of past and present voting discrimination first-hand. Nevertheless, the appellate court speculated that the Section 5 coverage formula might be imprecise because some jurisdictions, such as Alaska, were “swept in” under preclearance despite “little or no evidence of current problems.”<sup>89</sup>

The record I have described demonstrates the dangers of federal courts ruling on factual questions that are not before them. The “case or controversy” requirement necessitates that judicial rulings be limited to only those facts and legal questions before the court. The continued need for coverage of Alaska was not one of those questions that the appellate court could consider properly in *Shelby County*. Nevertheless, at least the appellate court’s non-binding dictum had no effect on the continued—and necessary—coverage of Alaska under Section 5.

The same cannot be said of the Supreme Court’s 2013 decision. In *Shelby County*, a narrow 5–4 majority of the Court ignored the broad enforcement powers that the Constitution conferred on Congress to remedy voting discrimination<sup>90</sup> by usurping that authority to overrule the sound judgments that the Senate and House made in the 2006 reauthorization of Section 5 of the Voting Rights Act. Although the case involved a single county in Alabama covered under a different provision of the Voting Rights Act, Section 4(b) of the Act, the Supreme Court broadly intruded on powers reserved to Congress to expand its decision to include all states and political subdivisions covered by Section 5, including those like Alaska that were covered under Section 4(f)(4) of the Act. With the issue of the continued need for coverage of Alaska not properly before the Court, five Justices struck down all of Section 5’s coverage formulas, including the one covering Alaska.<sup>91</sup>

The impact that the loss of Section 5 coverage has had on Alaska Natives cannot be overstated. AFN's members and the Alaska Native voters they represent saw critical protection for their voting rights disappear overnight. Preclearance effectively stopped discrimination before it occurred, whether it was through the intentional discrimination of Alaska's Division of Elections to willfully ignore the language assistance requirements for Alaska's indigenous peoples or to limit efforts to disenfranchise Alaska Native voters by eliminating in-person voting opportunities or consolidating polling places with far-flung communities that voters could not reach.

As explained in the previous section, in the absence of Section 5, Alaska's election officials have accelerated efforts to replace in-person voting with mail-in Permanent Absentee Voting (PAV) voting that denies LEP voters with much-needed language assistance. Often, mail-in voting simply is not feasible in villages where mail service is too unpredictable and unreliable to allow Alaska Natives to exercise their fundamental right to vote. Unequal opportunities for in-person early voting are provided to Alaska Natives, who are compelled to engage in self-help for services that the Division of Elections prioritizes for non-Native communities where registration and voting already is much more accessible.

The expensive and time-consuming *Toyukak* litigation itself was a byproduct of Shelby County's assault on the voting rights of Alaska Natives. Immediately after that decision, when Division of Elections personnel, including the current Director, were informed of widespread violations of language assistance requirements for Gwich'in and Yup'ik speaking villages in three regions of Alaska, they demurred. Rather than taking efforts to correct their violations of Section 203 of the Voting Rights Act, Alaska's election officials rejected their legal duties and forced Alaska Native voters and villages to sue them. Despite being fast-tracked to secure relief before the 2014 election, it was a year before the case went to trial. The case was marred by the State of Alaska's racially discriminatory argument that the Fifteenth Amendment did not apply to Alaska Natives. Following a two-week bench trial, which cost the plaintiffs and the State of Alaska over \$2 million, the federal court issued a decision several months later, in September 2014, holding that election officials violated Section 203 of the Voting Rights Act.<sup>92</sup>

Other decisions by the Supreme Court have exacerbated Shelby County's impact on ensuring that Alaska Natives, like all Americans, have equal opportunities to exercise their most fundamental right, the right to vote. Those decisions, which have been discussed in detail by other witnesses during the hearings on S.4 and its House counterpart, H.4, include:

- *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, in which the Court diminished the ability of organizations and individuals seeking relief from voting discrimination to recover their reasonable attorneys' fees and costs under the Voting Rights Act, by rejecting the well-accepted catalyst theory to determine litigants who qualified as "prevailing parties";<sup>93</sup>
- *Purcell v. Gonzalez*, a decision that gave rise to the so-called "Purcell Principle," which discourages federal courts from providing substantive relief from voting discrimination if it would potentially disrupt administration of elections, even where a voting rule, procedure or practice was adopted by election administrators close to an election;<sup>94</sup> and
- *Brnovich v. Democratic National Committee*, decided on July 1 of this year, in which the Supreme Court substantially narrowed the scope of vote denial or abridgment claims by rewriting Section 2 of the Voting Rights Act to use a new "totality of the circumstances" test inconsistent with the plain language of the Act and over a half century of jurisprudence interpreting the Act's general non-discrimination provision.<sup>95</sup>

Current discrimination against Alaska Natives is neither sophisticated nor covert. The examples I have described show that intentional discrimination by Alaska's election officials are done openly and comprise the most basic efforts to reduce opportunities by Alaska Natives to register to vote, cast ballots, and to have their votes counted. Each of these four Supreme Court decisions makes it more difficult for Alaska Natives to eliminate these barriers to their political participation. S.4 includes critically needed fixes that will clarify congressional intent on the proper scope of protections under the Voting Rights Act.

#### **AFN joins NARF in its support for passage of the VRAA**

NARF and other civil rights organizations have described in detail the reasons why the provisions in the VRAA are needed to ensure that all minority voters, including Alaska Native voters, have equal access to the political process.

I am going to limit my comments on the VRAA to one provision that is important for protecting the voting rights of Alaska Natives: the *Brnovich* fix. *Brnovich* is an especially pernicious decision not just for the impact it has on Alaska Native voters but because a judicially active majority wrongfully usurped the role of Congress to write legislation. In the 1982 amendments to the Voting Rights Act, Congress made clear its intent on the broad scope that vote denial or abridgment claims were to be given under Section 2 of the Act. Despite four decades of jurisprudence respecting that broad scope, Justice Alito's opinion in *Brnovich* purports to rewrite the statute to add a gloss of several new "factors" to be considered for the first time in voting rights enforcement actions.

*Brnovich* itself involved challenges to two voting procedures in Arizona that substantially restricted the ability of Native voters to cast ballots that were counted: a prohibition of out-of-precinct voting and making it unlawful for the ballots of Native voters lacking access to reliable mail service or transportation to be collected and delivered to drop boxes or election offices at the voter's request.

I will focus my remarks on the second prohibition on ballot collection.

In the face of strong evidence that Arizona's ballot collection ban had a disproportionately great impact on Native voters with nontraditional addresses and lack of access to mailing facilities, Justice Alito contrived several factors to reject such claims. In particular, he wrote that "the size of the burden imposed by a challenged voting rule is highly relevant. Mere inconvenience cannot be enough to demonstrate a violation of § 2."<sup>96</sup> In addition, Justice Alito contended:

The size of any disparities in a rule's impact on members of different racial or ethnic groups is also an important factor to consider. Small disparities are less likely than large ones to indicate that a system is not equally open. To the extent that minority and non-minority groups differ with respect to employment, wealth, and education, even neutral regulations, no matter how crafted, may result in some predictable disparities in rates of voting and noncompliance with voting rules. The size of any disparity matters. What are at bottom very small differences should not be artificially magnified.<sup>97</sup>

In *Brnovich*, the majority found that even though the ballot collection ban disenfranchised thousands of Native voters, that number was small because it constituted a very small fraction of all voters in Arizona.

The exception for so-called "de minimis" violations of the Voting Rights Act could have a similar effect in Alaska. Most Alaska Native villages have populations of less than 350, with an even smaller number of registered voters. Application of so-called "neutral" election procedures that required a certain threshold of voters for in-person registration, early voting and Election Day voting, could effectively deny those same opportunities to most, if not all, Alaska Native villages. That would further cement the practices in which the current Director of the DOE has engaged, by establishing two tiers of voting citizens in Alaska: those living in urban areas that are predominately non-Native and are entitled to a multitude of voting opportunities; and those living in rural areas that are predominately Alaska Native and receive only a fraction of the registration and voting access.

As a result, AFN strongly supports the VRAA and the fixes it provides to decisions such as Justice Alito's in *Brnovich*, which is a clear example of legislating from the bench in a manner that would disenfranchise thousands of Alaska Natives.

**NAVRA offers complimentary protections for Alaska Natives needed to strengthen the protections offered to all minority voters in the VRAA.**

NAVRA is an especially important part of S.4 because it targets the unique barriers that Alaska Native and American Indian voters experience when they attempt to register to vote, to cast a ballot and to have that ballot counted. Equally important, Congress has broad authority to enact NAVRA to remedy voting discrimination not just through its Enforcement Clause powers under the Reconstruction Amendments, but also through its constitutional abilities to regulate relations with Tribes and their citizens in the Government-To-Government relationship the United States has with federally recognized Tribes. NAVRA spells out that authority very clearly in its introductory section.

I am going to concentrate on some of NAVRA's provisions next to explain why they are needed to protect Alaska Native voters.

*A Native American Voting Task Force Grant Program is needed.*

As an initial matter, Section 304 of NAVRA establishes a Native American Voting Task Force Grant Program, seeking to improve voter registration and ballot access in Native American communities through many methods. A fully funded grant pro-

gram purposed to expand registration and voting opportunities for rural Alaska and the rest of Indian Country is critical to securing equal access for Native voters.

Far too often, Tribes, Native organizations or individuals, like AFN, are compelled to engage in self-help to secure the most basic services that are provided on a routine basis at no-cost to non-Natives. That is apparent in some of the actions Alaska's election officials have taken in registration and voting opportunities in Alaska Native villages.

Passage, implementation and funding of a Grant Program would go a long way to providing resources for efforts in the future, as well as others like: outreach; establishing early voting sites; improving bilingual materials and assistance; enhancing election official training; and encouraging greater cooperation by election officials with Alaska Native governments and organizations such as AFN.

I want to emphasize the importance of ensuring that funds for the Grant Program actually are used for their designated purposes, and are not simply a means for a state to earn interest or use funds to subsidize programs election officials are required to provide already. That is precisely what happened in Alaska. For years, Alaska left federal HAVA funds untouched, accruing interest on the funds. When Alaska officials began using the funds in earnest, they did so to improve registration and voting of non-Natives for whom both already were accessible, at the expense of neglecting Alaska Native communities. There must be accountability for how those funds are used.

*NAVRA makes registration and voting more accessible in Alaska Native communities*

Section 305 of NAVRA amends §7 of the National Voter Registration Act of 1993<sup>98</sup> by adding as designated voter registration sites those federally funded facilities located on Indian land or primarily engaged in providing services to Native Americans. This provision is important for two reasons. First, many Alaska Native villages have federally funded offices that help service programs that are essential to the social, economic and health needs of residents. Second, those offices are not currently required to offer voter registration services. Section 305 would cure that deficiency through the common-sense measure of requiring existing federal service centers in rural Alaska to simply add voter registration to the mandated services they provide already.

Section 306 would allow Tribal Governments to designate at least one in-person polling site on the Tribe's Indian lands, which includes ANCSA lands, to prevent the reduction of polling places on those lands, and provide additional polling sites based upon several criteria such as the number of voters assigned to polling places, travel distances and time to reach polling sites, transportation barriers, waiting times, and other factors. This measure responds to a growing problem in Alaska. Far too often, citing expense and inconvenience to their office, Division of Elections staff have sought to avoid federal language assistance mandates by designating Alaska Native villages as Permanent Absentee Voting sites. Such designations effectively can disenfranchise all voters in villages that receive that designation. NAVRA would stop that discriminatory practice. In its place, it would leave the authority for determining the polling place for Alaska Native villages where it properly belongs: in the hands of the Tribal Government for that village. In the process, this measure helps preserve the right to vote of all Alaska Natives through the simple act of allowing sovereign Tribal Governments to decide the best interests of their voters, and not be subject to the discriminatory whims of non-Native officials located hundreds of miles away.

Voting during the COVID-19 pandemic increasingly has relied upon alternatives to in-person voting, such as mail-in voting. When such alternatives are appropriate (that is, for voters other than LEP Tribal Elders who need in-person language assistance and those voters lacking reliable mail service), NAVRA facilitates their use in Alaska Native communities. Tribal Governments may designate at least one building per voting precinct as ballot pickup and collection sites. At the request of Tribes, mail-in and absentee ballots are to be provided to registered Native voters without requiring a residential address or completed application for the ballot. Tribally designated buildings may be substituted for required residential or mailing addresses. At least one ballot drop box must be provided for each Tribal Nation's lands, with additional drop boxes provided if the totality of the circumstances demonstrates their need. In-person early voting opportunities must be offered on Tribal lands if a State or political subdivision offers them elsewhere, which must provide at least a 10-hour period to vote for each day early voting sites are open.

Provisional ballots have impaired the ability of many Alaska Native voters to cast effective ballots. Section 306 of NAVRA addresses the problems of forcing Native voters to travel extensive distances to resolve any deficiencies preventing the counting of their ballot. Under NAVRA, Native voters must be provided clear notice of

any errors or issues with their ballots, and be allowed to resolve those issues at any polling place on Indian lands or through alternative means such as facsimile. The bill also resolves a barrier created by the Help America Vote Act by creating a private cause of action for Native voters to enforce the provisional ballot requirements in NAVRA. That fix will ensure that Native voters, or their Tribal Governments, are able to take legal action against any recalcitrant election officials who fail to comply with provisional ballot mandates.

Section 307 of NAVRA offers an important recognition of Tribal Sovereignty in the voting process. It requires that any State or political subdivision seeking to remove a voter registration or polling site on Indian lands must either obtain the consent of the Tribal Government or institute a declaratory judgment action in the U.S. District Court for the District of Columbia. Alternatively, the change may be submitted for review and approval by the Attorney General after consultation with the Tribal Government. This provision ensures that approval authority for changes in voting locations affecting Alaska Native voters comes from Tribal Governments, not non-Native election officials.

*Acceptance of Tribal identification to confirm Native voters' identities*

Voter identification problems faced by Native voters are the focus of Section 308 of NAVRA. Under that provision, if a state or political subdivision requires identification to register to vote or to cast a ballot, they must accept an identification card issued by a federally recognized Tribe, the Bureau of Indian Affairs, the Indian Health Service, or any other Tribal or Federal agency that issues identification cards to eligible Native voters. This remedy cannot be circumvented by requiring multiple forms of identification. Election officials also must consult with Tribes to ensure that any identification that must be submitted online is accessible to Native voters.

Like the other provisions of NAVRA, this is a much-needed common-sense measure. Because so many Alaska Native villages are located off the state road system in places where ATVs or snowmobiles—not cars—are used, thousands of Alaska Native voters lack a Real ID driver's license issued by the State Department of Motor Vehicles. Instead, they use identification issued by Federal agencies, the ANCs or their village corporations, including when they use public transportation.

Section 308 of NAVRA recognizes this common usage of identification cards that are not issued by state governments. It ensures that the unique circumstances of Alaska Native voters, which range from inability to get a state identification card because they lack a birth certificate or other required documentation, or they simply do not need one because of where they live, is not a means to disenfranchise them.

*Ballot collection procedures can resolve some transportation issues*

NAVRA also facilitates ballot collection from Native voters who often lack access to reliable and affordable transportation to get to voting locations, post offices or drop boxes. Section 309 permits any person to return a sealed ballot of a voter residing on Indian lands, as long as the person returning the ballot receives no compensation. There is no limit placed on the number of ballots that may be returned. Organizations collecting and returning sealed ballots are required to keep a record of the materials collected and the location and date the ballot materials were submitted.

*Section 203 of the VRA is amended to fix a proviso used to disenfranchise Native voters*

Section 310 of NAVRA includes a simple, but important, fix to the language assistance provisions of the Voting Rights Act. As currently written Section 203 provides that covered jurisdictions do not have to provide written translations for languages that are “historically unwritten.”<sup>99</sup> For decades, Alaska election officials used this proviso to deny all language assistance to Alaska Native voters.

In the *Nick* litigation, Alaska election officials argued that no written translations of voting materials and information were required because they claimed that all Alaska Native languages are “historically unwritten.” They made that argument even though several Alaska Native languages including but not limited to Gwich'in, Inupiaq and Yup'ik, are written and widely used by Native voters and even Alaska's own poll workers.<sup>100</sup> The federal court in *Nick* ultimately found that even where a language is “historically unwritten” bilingual written translations might be needed to ensure that oral language translations were accurate and effective.<sup>101</sup> However, that narrow construction of Section 203's requirements leaves all LEP Alaska Native voters vulnerable to a contrary interpretation that may revert back to placing the entire burden of translations on bilingual workers to interpret complex ballot measures on-the-spot.

This section of NAVRA cures this problem by providing that Native voters in jurisdictions covered by Section 203 for their language may receive written translations in their language if their Tribal Government determines that written translations are needed. Again, that ensures that Tribal Governments, not non-Native election officials or federal judges, are the ones who decide whether written translations are to be provided in the covered Alaska Native language.

*NAVRA's remaining provisions facilitate Alaska Native voting*

Section 311 of NAVRA allows Tribes to request that the Attorney General send federal observers by identifying one or more instances in which a voting rights violation is expected to occur in an election. That provides Tribal Governments in Alaska a means to request early intervention by the U.S. Department of Justice if it appears that Alaska's election officials are failing to comply with one or more provisions of federal voting rights law.

Section 312 recognizes Tribal jurisdiction to detain or remove any non-Indian unaffiliated with the Federal or a State or local government who intimidates, harasses or impedes the conduct of an election or voting. This provision acknowledges authority that Tribal Governments have already. In Alaska, this section is especially important because most Alaska Native villages lack any access to or coverage by state law enforcement officials. If Tribal Government officials do not have that authority, which NAVRA provides, it would leave unaddressed efforts to disenfranchise Alaska Native voters through direct suppression.

Section 313 requires the Attorney General annually consult with Tribal Nations regarding Federal elections. While this is something that should occur without legislation, far too often it does not.

Section 314 provides for recovery of attorneys' fees, litigation expenses and expert fees to a prevailing party in any enforcement action brought under NAVRA. As I have explained briefly in my discussion of the Buckhannon decision, more restrictive attorneys' fees provisions can significantly hamper enforcement of federal voting rights protections for Alaska Natives.

Section 315 directs the Government Accounting Office (GAO) to conduct a study and report on the prevalence of nontraditional or nonexistent mailing addresses for Native voters and to identify alternatives to resolve those barriers. Finally, Section 316 requires consultation with the U.S. Postal Service to resolve addressing problems. Both of these are significant issues in Alaska.

AFN applauds the Senate for including NAVRA in the bill, to help ensure that all Alaska Natives have equal access to the voting process.

**The Senate should pass S.4, including both the VRAA and NAVRA, to protect voting by Alaska Natives from discrimination by Alaska's election officials**

Protecting the right to vote is not a partisan issue. It is a fundamental civil rights issue for Alaska Natives. Everyone suffers, and elected government has less legitimacy, each time an Alaska Native is prevented from registering to vote or is turned away at the polls. Now is the time to act. Now is the time to pass S.4, the John R. Lewis Voting Rights Advancement Act of 2021, and Title III of that bill, The Frank Harrison, Elizabeth Peratrovich, and Miguel Trujillo Native American Voting Rights Act of 2021.

Thank you very much for your attention and your commitment to making voting fully accessible for Alaska Natives and other voters in Indian Country. I welcome the opportunity to answer any questions you may have.

**ENDNOTES**

1 I have served as AFN's President for 30 years. For nearly 15 years, I have been a Director for Chugach Alaska Corporation (CAC), the Alaska Native regional corporation for the Chugach region. I also serve as a Commissioner for the Denali Commission (DC), an independent federal agency designed to provide critical utilities, infrastructure, and economic support throughout Alaska, including remote tribal communities. Two of my proudest accomplishments as a DC Commissioner have been overseeing the build out of 120 rural village-based clinics, supporting the establishment of rural regional hospitals and the replacement of leaking fuel farm tanks throughout the state. I hold a B.A. degree in Business Administration from Alaska Pacific University; an Honorary Doctorate in Humane Letters from the University of Alaska, Anchorage (2004) and an Honorary Doctorate in Law from the University of Alaska, Fairbanks (2014)

2 43 U.S.C. § 1601 *et seq.*

3 25 U.S.C. § 5301 *et seq.*



4 See generally ALASKA STAT. § 15.10.105 (2006) (director of elections division is responsible for “the supervision of central and regional election offices, the hiring, performance evaluation, promotion, termination, and all other matters relating to the employment and training of election personnel, and the administration of all state elections” and activities under the National Voter Registration Act of 1993).

5 Pub. L. No. 107–252, 116 Stat. 1666 (2002).

6 Attachment A, James Thomas Tucker, Natalie 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 (2017); Attachment B, Alaska Advisory Comm. to the U.S. Comm’n on Civil Rights, Advisory Mem. on Alaska Native Voting Rights (Mar. 27, 2018).

7 Tucker, Landreth & Dougherty-Lynch, *supra*, at 330.

8 *Id.*

9 *Id.* at 330–31.

10 See *id.* at 331–32 (quoting *Davis v. Sitka School Board*, 3 Alaska 481, 489–90 (D. Alaska Terr. 1908)).

11 JAMES THOMAS TUCKER, THE BATTLE OVER BILINGUAL BALLOTS: LANGUAGE MINORITIES AND POLITICAL ACCESS UNDER THE VOTING RIGHTS ACT 235–48 (2009).

12 *Id.* at 237.

13 *Id.*

14 Fran Ulmer, Honoring Elizabeth Wanamaker Peratrovich, Alaska House of Representatives (May 1, 1992).

15 TUCKER, *supra*, at 237.

16 42 U.S.C. §§ 1973 to 1973aa-6.

17 *Id.*

18 *Id.* at 332–33.

19 See Federal judge dismisses challenge to Murkowski’s re-election, CNN (Dec. 28, 2010), available at <http://www.cnn.com/2010/POLITICS/12/28/alaska.senate.race/index.html>.

20 *Nick v. Bethel*, No. 3:07-cv-00098–TMB (D. Alaska filed June 11, 2007); see also Tucker, Landreth & Dougherty-Lynch, *supra*, at 350–58 (discussing the *Nick* litigation).

21 Tucker, Landreth & Dougherty-Lynch, *supra*; Alaska Advisory Comm. to the U.S. Comm’n on Civil Rts., *supra*.

22 *Arctic Village Council vs. Meyer*, No. 3AN–20–7858 CIL, 2020 WL 6120133 (Alaska Oct. 5, 2020).

23 See James Thomas Tucker, Jacqueline De León & Dan McCool, Obstacles at Every Turn: Barriers to Political Participation Faced by Native American Voters (NARF June 2020) <<https://vote.narf.org/obstacles-at-every-turn/>>.

24 Prior to the *Nick* case filed in 2007, a lawsuit was filed by the Native Village of Barrow against the municipal government for failing to provide translations of a ballot measure into the Inupiaq language. The case was settled before any judicial finding was made. See Natalie Landreth & Moira Smith, Voting Rights in Alaska: 1982–2006, 17 S. CAL. REV. LAW & SOC. JUST. 79, 116–17 (2007).

25 Landreth & Smith, *supra*, at 110 (reprinting the Alaska report included in the record supporting passage of the Voting Rights Act Reauthorization Act of 2006).

26 Ms. Brewster was removed from her position as Director of DOE and reassigned to direct Alaska’s Department of Motor Vehicles just days after her deposition in the *Nick* case.

27 Preliminary Injunction in *Nick*, *supra*, Docket No. 327, at 7–8. A copy of the injunction is included as Attachment C to my testimony.

28 *Id.* at 8.

29 *Id.* at 9.

30 Wade Hampton was a Confederate general and an ardent segregationist. Naming a predominately Alaska Native region after a racist leader of the Confederacy offers a good window into the hearts of Alaska’s elected officials responsible for naming it.

31 See U.S. Dep’t of Commerce, Bureau of the Census, Voting Rights Act Amendments of 2006, Determinations under Section 203, 76 Fed. Reg. 63602 (Oct. 13, 2011).

32 Deposition of Becka Baker, 55:18–23.

33 Deposition of Dorie Wassilie, 134:13–19; Deposition of Bryan Jackson, 27:23–28:12.

34 Alaska law requires that the Official Election Pamphlet be sent to every Alaska household with at least one registered voter at least 22 days before any state-



58 See U.S. Census Bureau, Quickfacts: Dillingham Census Area, Alaska, available at <http://www.census.gov/quickfacts/> (enter “Dillingham Census Area, Alaska” in field that says “Enter state, county, city, town, or zip code”).

59 See 2012 OEP REGION IV, *supra* note 56, at 9–11.

60 See generally Stmt. of Interest of the Alaska Fed’n of Natives at 2, *Toyukak v. Treadwell*, case no. 3:13-cv-00137- SLG (D. Alaska filed July 3, 2014) [AFN Stmt. of Interest] (referring to requests for the preceding three years “that the DOE automatically provide early (absentee-in-person) voting locations throughout rural Alaska”).

61 Letter from Kim Reitmeier, Exec. Dir. of ANCSA Regional Ass’n, to Gail Fenumiai, Dir., Div. of Elections (July 26, 2012).

62 *Id.*

63 See Letter from Gail Fenumiai, Dir., Div. of Elections, to Kim Reitmeier, Exec. Dir. of ANCSA Regional Ass’n 1 (Aug. 1, 2012).

64 *Id.* at 1–2.

65 Letter from Gail Fenumiai, Dir., Div. of Elections, to Kim Reitmeier, Exec. Dir. of ANCSA Regional Ass’n 2 (Aug. 1, 2012).

66 See Letter from Gail Fenumiai, Dir., Div. of Elections, to Myron Naneng, President of Ass’n of Village Council Presidents 1 (Aug. 1, 2012) (listing the organizations). Some of the organizations represented several tribal councils. For example, the letter sent by Mr. Naneng was on behalf of the “56 federally recognized Tribes on the Yukon- Kuskokwim Delta” seeking early voting “in all villages in rural Alaska for the 2014 election cycle.” Letter from Myron Naneng, President of Ass’n of Village Council Presidents, to Gail Fenumiai, Dir., Div. of Elections 1 (Aug. 15, 2013).

67 See Letter from Gail Fenumiai, Dir., Div. of Elections, to Myron Naneng, President of Ass’n of Village Council Presidents 1 (Aug. 1, 2012).

68 *Id.* at 2.

69 *Id.*

70 *See id.*

71 *Id.*

72 *Id.*

73 *See id.*

74 *Id.*

75 See Letter from Jason Metrokin, Chair of ANCSA Regional Ass’n, to Gail Fenumiai, Dir., Div. of Elections 1 (Apr. 7, 2014).

76 *Id.* at 2.

77 See Letter from Gail Fenumiai, Dir., Div. of Elections, to Jason Metrokin, Chair of ANCSA Regional Ass’n 1–2, 4 (May 9, 2014).

78 *Id.* at 2.

79 See Alaska Fed’n of Natives, AFN and ANCSA Regional Ass’n Release Final List of New Absentee Early Voting Sites in Rural Alaska (July 16, 2014) [Rural Alaska Early Voting], <http://www.nativefederation.org/afn-and-ncsa-regional-association-release-final-list-of-new-absentee-early-voting-sites-in-rural-alaska/>.

80 See generally ALASKA STAT. § § 15.15.060 (2000) (DOE’s director “shall pay the cost of necessary election expenses incurred in securing a place for holding the election.”) (emphasis added); 15.20.045 (2014) (“The director or election supervisor may designate persons to act as absentee voting officials” and the “director may designate . . . locations at which absentee voting stations will be operated on or after the 15th day before an election up to and including the date of the election”) (emphasis added); see also 6 ALASKA ADMIN. CODE § 25.500(a) (2008) (“Absentee voting stations will be established through the direction and approval of the director” of the DOE) (emphasis added).

81 *See* Rural Alaska Early Voting, *supra*.

82 *See id.*

83 See Trial Tr. 1714:5–17, *Toyukak v. Treadwell*, case no. 3:13-cv-00137–SLG (D. Alaska July 2, 2014) (Gail Fenumiai Test.).

84 AFN Stmt. of Interest, *supra*, at 2–3.

85 See Letter from Andrew Guy, President & CEO of Calista Corp., to Lt. Gov. Mead Treadwell, Gail Fenumiai, Dir., Div. of Elections, & Becka Baker, Region IV Super. (July 31, 2014).

86 See Letter from Christopher Coates, Chief, Voting Section, to Gail Fenumiai, Director, Division of Elections, dated July 14, 2008.

87 See Letter from Christopher Coates, Chief, Voting Section, to Gail Fenumiai, Director, Division of Elections, dated Sept. 10, 2008.

88 570 U.S. 529 (2013).

89 679 F.3d 848, 880–81 (D.C. Cir. 2012).

90 See U.S. CONST. amend. XIV § 5; U.S. CONST. amend. XV § 2.

91 See 570 U.S. 529 (2013). 92 See Tucker, Landreth & Dougherty-Lynch, *supra*, at 358–82. 93 532 U.S. 598 (2001).

94 549 U.S. 1 (2006) (per curiam).

95 141 S.Ct. 2321 (2001).

96 *Brnovich*, 141 S.Ct. at 2338.

97 *Id.* at

98 52 U.S.C. § 20506(a).

99 See generally 52 U.S.C. § 10503(c) (“Provided, That where the language of the applicable minority group is oral or unwritten or in the case of Alaskan 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.”).

100 See generally TUCKER, *supra*, at 91–98, 280–85; see also Tucker, Landreth & Dougherty-Lynch, *supra*, at 354–55.

101 See Tucker, Landreth & Dougherty-Lynch, *supra*, at 355–57.

Now we have Jacqueline De León, Staff Attorney at the Native American Rights Fund in Boulder, Colorado.

**STATEMENT OF JACKQUELINE DE LEÓN, STAFF ATTORNEY,  
NATIVE AMERICAN RIGHTS FUND**

Ms. DE LEÓN. Thank you, Senator Luján, for that kind introduction, and for championing NAVRA. And thank you, Chairman Schatz and Vice Chair Murkowski, for the opportunity to testify.

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, known as NARF, the Nation’s largest and oldest non-profit dedicated to advancing the rights of Native Americans.

My testimony will focus on the need to pass the Native American Voting Rights Act, and to fully restore the Voting Rights Act, due to ongoing present-day neglect and racial discrimination that is stripping Native Americans of their political power.

In 2018, the Native American Voting Rights Coalition completed field hearings across Indian Country which I co-led. We heard from approximately 125 witnesses about voting in Federal and State elections. Our findings are extensively documented in a report which I have submitted to this Committee. I am humbled to be carrying their stories, tears, and demand for action with me today.

Today, many Native American reservations are rural, distant from the nearest off reservation border town, because of official policies to forcibly remove and segregate Natives on remote and undesirable land. Travel to voting services, DMVs and post offices can be over 100 miles away. Due to ongoing discrimination and governmental neglect, many Native Americans live in overcrowded homes that do not have addresses, do not receive mail, and are located on dirt roads that can be impassable in wintry November.

The Native American Voting Rights Act championed in the House by two Native members, Republican Tom Cole and Democrat Sharice Davids, would address the glaring structural deficiencies facing Native communities by mandating on-reservation voting services and accommodations for homes that do not receive mail delivery and do not have residential addresses.

It would also ensure access by requiring services be equitable of and off reservations.

NARF has also successfully brought Native American voting rights cases in the last four years including challenges to North Dakota’s voter ID law that required a residential address on IDs

when the State knew that there were homes on the Native American reservations that did not have addresses on them, a challenge to Montana's ballot collection ban, where tribes in Montana do not have residential mail delivery, a challenge to Alaska's witness signature requirement during the pandemic, when elderly and single mothers would have had to break quarantine in order to comply, and a 2020 lawsuit challenging the refusal to open an in-person polling location on the Blackfeet Reservation.

I would like to pause on that last case. Pondera County chose to keep in-person voting at their county seat, which ensured access for the over 90 percent white residents, but attempted to deny in-person voting to Blackfeet tribal members who do not get mail delivered to their homes and would have had to travel 120 miles to vote.

Indeed, relying upon the 14th and 15th amendments and the VRA, Native Americans have filed nearly 100 lawsuits with a success rate of over 90 percent. The cases have been litigated in front of judges appointed by Republican and Democratic Presidents. In short, the facts are so bad, we nearly always win. Yet the Supreme Court's hostility toward voting rights imperils the ability of Native litigants to get the relief they deserve. In *Shelby County v. Holder*, the court suspended Section 5, robbing Native voters in Arizona, Alaska, parts of South Dakota and North Carolina from pre-clearance protections. And in *Brnovich v. DNC*, the Supreme Court upheld two voting restrictions that have a disparate impact on Native American voters, contrary to the express purpose of Section 2.

The need for action is urgent and compelling. For example, just last year, tribes and GOTV organizations successfully challenged a ballot collection ban in Montana under the State's right to vote provision. Yet the legislature passed another ballot collection ban this year, in a move that the Montana Advisory Committee to the U.S. Commission on Civil Rights described as intentional discrimination that will increase barriers to voters for Native Americans on reservations in Montana.

NARF has collected extensive evidence of the racism faced by Native American voters in recent years by voting officials. In 2018, a San Juan County clerk in Utah committed fraud and backdated a false complaint against a Native American candidate. Less than ten years ago, Native American voters were humiliated and forced to vote out of a chicken coop. This year, county officials spent \$180,000 fighting against providing early voting on the Pascua Yaqui Reservation.

I urge this Committee to do the necessary work of investigating and recording these injustices to fully restore the Voting Rights Act and to pass the Native American Voting Rights Act. Thank you.

[The prepared statement of Ms. De León follows:]

PREPARED STATEMENT OF JACQUELINE DE LEÓN, STAFF ATTORNEY, NATIVE AMERICAN RIGHTS FUND

### **I. Introduction**

Thank you Chairman Schatz, Ranking Member Murkowski, and Members of the Committee for having me testify today on the urgent need to protect the Native American vote. My name is Jacqueline De León, I am a member of the Isleta Pueblo in New Mexico, and I am a staff attorney with the Native American Rights Fund (NARF). My testimony focuses on the state of Native American voting rights and

the pressing need to pass Senator Lujan's Native American Voting Rights Act and the John Lewis Voting Rights Advancement Act.

Since 1970, NARF has provided legal assistance to tribes, organizations, and individuals nationwide who might otherwise have gone without adequate representation. NARF has successfully asserted and defended the most important rights of Native Americans<sup>1</sup> 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 501(c)(3) organization that focuses on applying existing laws and treaties to ensure that the Federal and state governments live up to their legal obligations to tribes and Native Americans.

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 Native American matters. A staff of seventeen attorneys handle 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 legal precedents and establishing important principles of Indian law. Voting rights cases fall under NARF's priority area of promoting Native American human rights. Unfortunately, there remains much work to be done.

## **II. Legal and Historical Background of Native American Disenfranchisement**

Throughout history, states have actively resisted Native American participation in American democracy. Even after the passage of the Fifteenth Amendment, Minnesota's Constitution prohibited Native Americans from voting unless they "adopted the language, customs and habits of civilization."<sup>2</sup> South Dakota passed a law in 1903 that prevented Native Americans from voting while "maintaining tribal relations."<sup>3</sup> In North Dakota, the State Supreme Court in 1920 granted only those Native Americans who had assimilated the right to vote because they "live the same as white people . . . [and required] that they have severed their tribal relations."<sup>4</sup>

Even after the passage of the Indian Citizenship Act in 1924, states and local jurisdictions prevented Native Americans from registering to vote and voting.<sup>5</sup> In 1928, the Arizona Supreme Court held that Native Americans, despite being United States citizens, were excluded from registering to vote because they were wards of the Federal government.<sup>6</sup> That decision equated Native Americans with incompetents and stood for twenty years. Montana excluded Native Americans from voting and holding office from its territorial establishment, and took measures to prevent Native Americans from voting.<sup>7</sup> South Dakota had a law in effect until 1939 that prevented Native Americans from holding public office.<sup>8</sup> And 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.<sup>9</sup> Utah and North Dakota became the last states to afford on-reservation Native Americans the right to vote in 1957 and 1958, respectively.<sup>10</sup> When the right to vote was finally secured, steps were then taken to prevent Native Americans from participating in elections and being elected to office.<sup>11</sup>

Language barriers have also historically been exploited to deny the right to vote. Like African Americans, Native Americans who were fluent only in their Native languages and unable to read or write in English because they were denied equal educational opportunities, were disenfranchised by literacy tests designed to keep them from voting. An Arizona statute stipulated that only individuals who could read the United States Constitution in English could vote.<sup>12</sup> 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."<sup>13</sup>

Whether through state constitutional provisions, residency requirements, requirements to abandon tribal culture, taxation, guardianship, or literacy tests, states and local jurisdictions with substantial Native populations have, like states in the South in the Jim Crow era, been creative in crafting various stratagems and legal devices that denied the right to vote to Native Americans. It was not until the passage of the Voting Rights Act (VRA) that Native Americans were promised full legal access to the franchise. However, that promise has not yet been realized for Native Americans.

## **III. Obstacles to Voting for Native Americans**

Native Americans face many obstacles to voting. Obstacles can 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.

Today, many Native American reservations are located in extremely rural areas, distant from the nearest off-reservation border town. This was by design, as official government policies forcibly removed Native Americans and segregated them onto the most remote and undesirable land. As a result of these policies, travel to county seats for voting services can astoundingly be hundreds of miles away. Services such as DMVs and post offices can also require hours of travel. As detailed extensively below, the impacts of discrimination are not only in the past. Due to ongoing discrimination and governmental neglect, many Native Americans live in overcrowded homes that do not have addresses, do not receive mail, and are located on dirt roads that become impassable with inclement weather. Lack of broadband Internet, cell phone coverage, or the economic means for transportation to in-person assistance means there are Native Americans that cannot access basic government services.<sup>14</sup>

Too often, these vulnerabilities are exploited by state laws and county rules that undermine the ability for Native Americans to cast their ballot. As a result, voting in Native communities is difficult and can even be impossible. The exploitation of these vulnerabilities is at times intentional and the result of overt racist discrimination. Federal action is needed to protect Native Americans from this abuse. Passage of the Native American Voting Rights Act would help overcome the structural deficiencies present in Native American communities that too often make voting unreasonably difficult. A fully functioning and restored Voting Rights Act would provide a backstop against discrimination.

#### *Field Hearings*

To better understand the barriers preventing Native American access to the ballot, in 2015, NARF founded the Native American Voting Rights Coalition (NAVRC), a coalition of national and regional grassroots organizations, academics, and attorneys advocating for Native Americans' equal access to the political process. NAVRC 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, NAVRC completed a series of nine field hearings in seven states on the state of voting rights in Indian Country. I, along with former NARF pro bono counsel, Dr. James Tucker, Ph.D., had the honor of attending all of these hearings. We heard from approximately 125 witnesses from dozens of tribes around the country, generated thousands of pages of transcripts with their testimony about the progress of Native Americans in non-tribal elections, and documented 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 humbled to be carrying their stories with me here today.

The field hearings made clear that across this country Native Americans face unjust barriers that prevent them from having equal 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; and (11) overt and intentional racial discrimination against Native Americans.

In addition to this daunting list of factors, language access also remains an obstacle for some 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 of the Voting Rights Act

helps Limited-English Proficient (LEP) American Indian and Alaska Native voters overcome barriers to political participation by requiring 35 political subdivisions in nine states to provide bilingual written materials and oral language assistance.<sup>15</sup> Despite these broad protections, jurisdictions have often failed to provide the required translations, forcing Native voters to file costly lawsuits.

Even if Native American voters can overcome these barriers and register to vote, the field hearings showed that they face an additional set of barriers to cast their ballot. Such barriers include: (1) unequal funding for voting activities in Native communities; (2) lack of pre-election information and outreach; (3) cultural and political isolation; (4) unequal access to in-person and early voting; (5) barriers caused by vote-by-mail; (5) state laws that create arbitrary population thresholds to establish polling places; (6) the use of the Americans with Disabilities Act to deny polling places on reservation lands; and (7) the lack of Native American poll workers.

These barriers are extensively documented in a report that I co-authored with Dr. Tucker and Professor Daniel McCool, released in June of 2020, *Obstacles at Every Turn: Barriers to Political Participation Faced by Native American Voters*.<sup>16</sup> We have added an addendum to that report reflecting on the 2020 election cycle and the outcome of the 2021 legislative session, which I have submitted to this Committee.

While additional evidence is found in the *Obstacles* report, here is a sampling of some of the physical barriers faced by Native voters:

- 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. . . .”<sup>17</sup>
- In Nye County, Nevada, the combined effects 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 away each way by road. Travel time is at least five or ten hours, respectively, if the weather conditions permit.
- 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.
- In Arizona, the nearest polling place for some tribes is off reservation.<sup>10</sup> 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.<sup>11</sup>
- 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.<sup>22</sup>

These distances are not only objectively unreasonable, but the burden imposed by them is compounded by the extreme poverty, poor roads, and lack of access to transportation faced by Native Americans. Vote by mail is often no solution, since across Indian Country many Native communities do not have residential mail delivery and homes are unaddressed.<sup>18</sup> As a result, across Indian Country, it is simply too costly to vote.

What these distances and conditions communicate to Native Americans is that the American electoral system is not designed for their lives, and, by extension, is not for them. The Federal trust responsibility between the Federal government and tribes compels Congress to act to ensure Native Americans enjoy the same rights, benefits, and privileges as all Americans. This does not mean a diminishment of tribal sovereignty. Rather, in the Federalist system, there is room for robust Federal, state, and tribal governments. Native Americans are Americans. We deserve a fair opportunity to participate in all levels of America’s electoral system, to make choices, and to vote and advocate for representatives and policies that are responsive to our needs and that shape American society.



The Native American Voting Rights Act faces these structural deficiencies head on by mandating on reservation election services and making accommodations for the lack of residential addressing and mail delivery. Congress must act expeditiously to remedy these structural deficiencies that continue to unjustly hinder Native American participation in American political life.

#### *Litigation*

Besides leading the NAVRC, NARF has also successfully brought a number of seminal Native American voting rights lawsuits in the last four years, including challenges to North Dakota's voter ID law,<sup>19</sup> a challenge to Montana's absentee ballot collection ban,<sup>20</sup> a challenge to Alaska's witness signature requirement during the COVID-19 pandemic,<sup>21</sup> and a lawsuit challenging the refusal of Pondera County, Montana, to open an in person polling location on the Blackfeet Reservation for the 2020 General Election.

This recent successful litigation aligns with the longstanding trend of successful outcomes in Native American voting rights cases. Relying upon the Fourteenth and Fifteenth Amendments, and various sections of the VRA, Native American voters have filed nearly a hundred lawsuits in an effort to gain equal access to election procedures and to have an equal opportunity to elect candidates of their choice. Prior to the last election cycle, out of the known 94 Native American voting rights cases, there have been victories or successful settlements in 86 cases, and partial victories in two others. That is a success rate of over 90 percent.<sup>23</sup> These cases have been litigated in front of judges appointed by Republican and Democratic Presidents, and yet the overwhelming factual patterns established in Native American voting rights cases compel relief. In short, the facts are so bad that Native Americans nearly always win.

It is worth pausing to reflect on the egregious facts underlying the refusal to provide a polling place in Pondera County, Montana, this past election. In Montana, in response to the global pandemic, county officials were given the option of conducting their elections by mail. Yet, Pondera County chose to maintain its in-person polling location at its county seat, ensuring access for the over 90 percent White residents. Blackfeet tribal members requested in-person access as well. After all, the homes on the Blackfeet Reservation do not receive residential mail delivery and so Native Americans are forced to travel to their rural post office a significant distance away and that is only open limited hours to get their mail and ballots. County officials refused, instead insisting that Blackfeet tribal members travel 120 miles round trip to the county office in Conrad, Montana, to vote. NARF was forced to bring a suit on behalf of the Blackfeet in Federal court alleging violations of the Constitution and VRA. Only after suit was filed did Pondera County agree to provide on-reservation access.

Bringing a lawsuit alleging discrimination is an arduous process that NARF does not undertake lightly. Indeed, in the lead up to the 2020 General Election in Montana, NARF negotiated with two other counties that refused to provide on-reservation access, despite providing access to their majority non-Native communities, ultimately reaching a resolution without the need for litigation. Indeed, despite widespread voter suppression and discrimination in Indian Country, NARF does not have the resources to bring every case. Litigation is costly and time consuming, and voters are often disenfranchised while litigation is pending.

For example, the effort and resources necessary to mount a legal challenge to North Dakota's voter ID law were significant. In North Dakota, the state required IDs with addresses on them despite knowing that Native Americans throughout North Dakota lacked addresses at their homes.<sup>24</sup> This led to widespread disenfranchisement of Native Americans. This discrimination was deeply felt. As our Plaintiff, United States Marine Corp. veteran Elvis Norquay, explained in his testimony before the House Administration Subcommittee on Elections last year, "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."<sup>25</sup>

The Federal court found that the state violated the Fourteenth Amendment, holding that "it is clear that a safety net is needed for those voters who simply cannot obtain a qualifying ID with reasonable effort."<sup>26</sup> The total sought for Plaintiffs' attorneys' fees and litigation expenses was \$1,132,459.41. This sum represents \$832,977 in attorneys' fees and \$299,482.41 in litigation expenses, including expert reports. Thousands of attorney hours over almost two years were expended in order to build a legal record and respond to numerous motions filed by the state in defense of the law. After the successful outcome in that case, the North Dakota legislature again enacted a voter ID law that had the same disenfranchising effects. NARF

was again forced to bring litigation. Eventually, NARF waived its attorney fee motion for the second half of the case in order to help secure a successful settlement.

This whack-a-mole pattern of repeated violations of Native American voting rights is common across Indian Country. For example, numerous lawsuits alleging voting rights violations have been filed in South Dakota, including the only Section 2 case brought on behalf of plaintiffs under the U.S. Department of Justice during the Trump Administration.<sup>27</sup> In Montana, repeated successful litigation has challenged the disenfranchisement of Native Americans.<sup>28</sup> In Utah, San Juan County has had near constant, successful, voting rights litigation brought against it since the United States first brought suit on behalf of the Navajo in 1983.<sup>29</sup>

Given this influx of contemporary discrimination and disparate impacts necessitating relief, a robust Voting Rights Act is even more critical. Restoration of Section 2 is especially important to Indian Country.

#### *Brnovich and Shelby County*

The Supreme Court's recent decision in *Brnovich v. DNC*, was especially devastating to Native American voters. The decision was notable not only because the decision upheld two voting restrictions while disregarding the disparate impacts on thousands of Native Americans, but also because it undermined Section 2 in the wake of the Supreme Court's suspension of Section 5.

The suspension of Section 5 following the invalidation of the coverage formula in *Shelby County v. Holder*<sup>30</sup> negatively impacted Indian Country. Arizona and Alaska, both with substantial Native American populations, were previously covered under Section 5, resulting in protection for those groups.

In 2008, Alaska attempted to eliminate polling locations in the Alaska Native communities of Tatitlek, Pedro Bay, and Levelock and force Native voters to travel to predominately white communities to cast their ballots. These non-Native communities were not only a significant distance but also can only be accessed by boat or plane during fair weather. Under Section 5, the United States responded to Alaska with several detailed More Information Requests about the impact the move would have on Native American voters. In response, Alaska withdrew its discriminatory proposals.<sup>31</sup>

When Section 5 was still in effect in 2011, Arizona attempted to preclear restrictive ballot collection regulations that were eventually at issue in *Brnovich*. Bans on ballot collection, also disparagingly referred to as "ballot harvesting," can disproportionately and severely impact Native communities. Because of high poverty rates, lack of access to transportation, and lack of mail delivery, Native Americans often pick up and drop off mail for each other. When the DOJ requested more information on the impact of a ballot collection ban on minorities in Arizona, the legislature withdrew its request. Immediately post-Shelby, the ballot collection ban went into effect. Distressingly, the Supreme Court has since upheld the ballot collection ban despite the clearly documented disparate impact on Native Americans. The Court also upheld a ban on out of precinct voting that also disproportionately impacts Native Americans whose lack of residential addresses results in them being placed in the wrong precinct through no fault of their own. When these Native Americans show up to vote, they are in the wrong precinct according to the state records and no part of their ballot will be counted.

The very upholding of these discriminatory laws demonstrates that the reasoning employed by the Supreme Court was flawed. However, three of the Court's new *Brnovich* factors are particularly worrisome for Native American litigants. First, the *Brnovich* decision abrogated Section 2's promise of "equal opportunity" for all voters under its Factor #3 by instructing lower courts that, in evaluating whether a voting rule violated the VRA, "the size of any disparities in a rule's impact on members of different racial or ethnic groups is also an important factor to consider."<sup>32</sup> The Court thus upheld the challenged out-of-precinct policy despite the District Court's finding that 1 percent of Native voters, compared to just 0.5 percent of white voters voted in the wrong precinct. It reasoned that—in either case—99 percent or more of voters in each racial category were unaffected by the rule.<sup>33</sup>

The Supreme Court's cramped understanding of disparate impact under the VRA led it to uphold a law flatly inconsistent with the statute's purpose: to ensure all voters have an equal opportunity to participate in elections regardless of their race.<sup>34</sup> The Ninth Circuit panel below, reviewing en banc the district court's findings of fact concerning rates of out-of-precinct voting by white and minority voters, found a violation of Section 2 based in part on the evidence that minority voters voted out of precinct at "twice the rate of whites."<sup>35</sup> This method of analyzing the quantitative data by focusing on whether and how minority voters are affected differently than their white counterparts comports with the VRA's text and purpose.

The Supreme Court's analysis focuses instead on the proportion of unaffected voters and thus misses the point entirely.

Furthermore, this reading of Section 2 led it to uphold a law that concededly disenfranchises a full percent of a state's Native voters. Such a rule has deeply troubling implications for many Tribes. Many of Arizona's nearly 320,000 Native American people<sup>36</sup> live on remote reservations each comprising far less than 1 percent of the state's total Native population. And a law that disenfranchises a percentage of Native voters translates to thousands of disenfranchised voters. A voting rule or policy which prevents every eligible Native voter living on the Kaibab Paiute reservation (along the remote Arizona Strip) or Havasupai reservation (in the Grand Canyon) from voting could be permitted under this test.<sup>37</sup> So too could a law disenfranchising all Native Americans living on Moapa River Indian Reservation, Duckwater Reservation, or Carson Colony in Nevada.<sup>38</sup> Such a perverse outcome demonstrates the urgent need for legislative action to address the Court's hollowing of Section 2.

Second, *Brnovich* Factor #4 Court declares that, "[w]here a State provides multiple ways to vote, any burden imposed on voters who choose one of the available options cannot be evaluated without also taking into account the other available means."<sup>39</sup> This novel limitation on Section 2 vote denial claims invites state legislatures to provide voters with more options, regardless of whether the quantity of options actually resonates with the communities that find it difficult to vote.

The structural deficiencies found in reservations—poor roads, lack of vehicles, distant polling places, lack of residential mail delivery, lack of addressing, high homeless rates, for example—make it more difficult for Native Americans to take advantage of the myriad of voting options that may or may not be available. In a 2020 lawsuit brought by Native plaintiffs seeking to invalidate a ballot collection law similar to Arizona's ballot collection ban, a Montana district court determined that "Montana's elections overall are very accessible" and outlined the various options voters had to register and cast their ballots.<sup>40</sup> Nevertheless, it struck down the ballot collection limitation because it found that "while the majority of Montanans can easily access the vote by mail process by either mailing in their ballots or dropping their ballots off at election offices, Native Americans living on reservations rely heavily on ballot collection efforts in order to vote in elections."<sup>41</sup> Were that case brought in Federal courts today, the court may have felt compelled to uphold a demonstrably burdensome voting rule. Section 2 should not be so weakened.

Finally, *Brnovich* factor #5 that the "strong and entirely legitimate state interest [in] the prevention of fraud" is an "important factor that must be taken into account" in evaluating whether a rule violates Section 2<sup>42</sup> is especially concerning in Native American communities.<sup>43</sup> Invoking the fear of fraud without requiring the contested voting procedure to demonstrably prevent fraud that is actually occurring or likely to occur provides an unjustified blanket cover for laws that have discriminatory effects. For example, in this past election, the state of Alaska asserted that it needed signatures on ballots to be witnessed to prevent fraud. During the pandemic this would have meant that elders and single mothers that do not live with another eligible adult would have had to break quarantine in order to get their ballot witnessed. Yet, the state was unable to provide any instance in which a witness signature prevented fraud. And the state admitted that it does not even use the witness signatures when it is conducting fraud investigations. Consequently, the Alaska Supreme Court upheld an injunction against the witness signature requirement prior to the 2020 election.<sup>44</sup> Federal courts should likewise be required to evaluate whether the voting rule at issue in fact prevents fraud that is in fact a problem.

Even more concerning, Native voters, tribes, and Native voting rights organizations have been targets of exaggerated, if not outright fabricated, accusations of voter fraud. These charges are directed at Native voters after Native Americans assert their political power. For example, in 2002, unusually high turnout on South Dakota's Indian reservations led to a narrow victory for a Democratic Congressional candidate.<sup>45</sup> Opponents responded with repeated accusations that the win was due to rampant voter fraud on reservations and fifty affidavits were submitted to that effect; the state attorney general's office performed a thorough review and found only one alleged case that \$10 was paid to Native voters that even merited further investigation.<sup>46</sup> The backlash to these exaggerated and false claims subjected Native voters to racist abuse and spurred opinion pieces such as "Don't Let Illiterate Indians Vote."<sup>47</sup> These false allegations of voter fraud among Native Americans carried over into the 2004 elections, when the New York Times reported another "wave of false voter fraud charges that have been made against [tribal members in South Dakota]."<sup>48</sup>

In 2006, an organization called the Citizens' Equal Rights Alliance (CERA) filed a lawsuit "contending that widespread 'election fraud and/or voting rights abuses'

took place on the Crow Indian Reservation in Big Horn County, Montana” during that year’s November election, without evidence. One of the “remedies” CERA sought was that “polling places for Federal, state, county, and local district elections cannot be located within [the exterior boundaries of any particular Indian reservation].”<sup>49</sup>

Congress should not allow Section 2 of the VRA to be so tarnished. Instead, Section 2 must stand as a beacon against discrimination that can be wielded to fend off unjust attacks when Native Americans flex their political power.

#### *Legislation*

The need for Federal action is urgent and compelling. This year, legislators in states across the country have targeted vulnerable Native American voters. NARF monitored bills introduced in states with sizeable Native American populations. In just 14 states—Alaska, Arizona, California, Michigan, Minnesota, Montana, Nevada, New Mexico, North Carolina, North Dakota, Oklahoma, South Dakota, Washington, and Wisconsin—legislators introduced over 100 bills that would make it more difficult for Native Americans to vote.<sup>50</sup>

Notably, in Montana, the state legislature passed HB 530 on the very last day of its legislative session without debate. HB 530 prohibits organizations from picking up and dropping off ballots. This law was implemented after a Montana court blocked a similar law, the Ballot Interference Protection Act (BIPA), which was challenged by the Assiniboine & Sioux Tribes of Fort Peck, Blackfeet Nation, Confederate Salish and Kootenai Tribes of the Flathead Reservation, Crow Tribe, and the Fort Belknap Indian Community as well as GOTV organization Western Native Voice. Represented by NARF and the ACLU, BIPA was successfully challenged under Montana’s Constitutional right to vote provision. In September 2020, the court struck down BIPA, finding “the questions presented cannot be viewed through the lens of our own upbringings or own life experiences, but through the lens of the cold, hard data that was presented at trial about the clear limitations Native American communities in Montana face, and how the costs associated with . . . (BIPA) are simply too high and too burdensome to remain the law of the State of Montana.”<sup>51</sup>

Remarkably, despite this finding, the State legislature passed another ballot collection ban in the 2021 legislative session. That law also faced an immediate legal challenge by tribes and Native get-out-the-vote organizations, again brought by NARF and the ACLU,<sup>52</sup> which is ongoing.<sup>53</sup> The Montana Advisory Committee to the U.S. Commission on Civil Rights described how “[t]he passage of a bill that imposes the same burdens is intentional discrimination and will increase barriers to voting for Native Americans on reservations in Montana.”<sup>54</sup>

The Arizona legislature likewise passed discriminatory laws in the 2021 legislative session.<sup>55</sup> In this session, the state legislature overturned a settlement agreement reached by the Secretary of State with the Navajo Nation.<sup>56</sup> Because of confusion around Native American names and difficulty reaching Native Americans due to their housing insecurity, the Secretary had agreed to allow seven days to cure a mismatched signature ballot. However, the Arizona State Legislature, through SB 1003, now requires signatures to be cured by 7:00 PM on Election Day. This law took effect on May 7, 2021.<sup>57</sup>

Additionally, through HB 2569, the Arizona legislature, despite chronic underfunding of elections, banned private entities from donating funds to assist with administration of elections. Native American communities in Arizona are often told that providing services is impracticable because doing so would be too costly. And in the 2020 election, nine counties used grants to educate people how to safely vote during the pandemic.<sup>58</sup> The majority of the counties that relied on grants include substantial Native communities. These counties include Apache, Navajo, Coconino, Graham, Pinal, and Pima Counties. The legislature removed the ability of underserved communities to rectify these inequities.

Arizona also passed restrictive voting bills that generally make it more difficult for Native Americans to vote, including laws making it easier to be removed from the voter registration list (SB 1485 and SB 1819). Given the inequitable access and hurdles to registration faced by Native Americans in Arizona, additional restrictions on voter registration only make it more difficult for Native Americans to ultimately cast a ballot.

#### *Overt Racial Discrimination*

Finally, in case there is any doubt that Native Americans face overt discrimination on the basis of race, NARF has collected extensive evidence of the racism faced by Native voters. Native Americans continue to experience overt discrimination in their everyday lives and when they attempt to vote.

This past election, the weekend before Election Day, a man visited several bars in Glasgow, Montana, roughly ten miles from the western border of the Fort Peck Indian Reservation, in full KKK attire. None of the other bar patrons were phased, and many even supported him. Indeed, the “costume” was the winner at a local Halloween costume contest.<sup>59</sup> Though mostly associated with the Deep South, the KKK has been prominent since at least the 1920s in Glasgow, Plentywood, and Bainville, Montana—all locations that border the Fort Peck Reservation. A primary goal of the KKK in Glasgow was to undermine Native American voting rights.<sup>60</sup> As the General Counsel to the Fort Peck Assiniboine and Sioux Tribes relayed to me following the incident, “This is why satellite voting sites are so important for our tribal members. Not everyone is comfortable going into places in Glasgow, and not everyone in Glasgow is going to make our tribal members feel welcome.”

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.<sup>61</sup> In Utah, a Field Hearing witness’s 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.’”<sup>62</sup>

These racist attitudes do not stop at residents. Voting officials also discriminate against Native Americans. For example, the registration offices and polling places that primarily service Native American communities can be hostile. All of these incidents took place within the last 10 years:

- In South Dakota, Native American voters were forced to vote in a repurposed chicken coop with no bathroom facilities and feathers on the floor.<sup>63</sup>
- In Wisconsin, Native American voters were forced to vote where a sheriff’s office was located.<sup>64</sup>
- In South Dakota, Native American voters were forced to walk past a sheriff deputy who kept his hand on his gun while standing in the entrance to the only polling place on a reservation.
- In South Dakota, the approximately 1,500 Crow Creek Reservation residents comprise about 90 percent of Buffalo County’s population. Nevertheless, to register to vote or run for office, tribal members have to drive 40 miles round trip to Gann Valley, which has a population of about 12, all non-Natives. While Gann Valley’s 12 residents had full voting access, Buffalo County’s Auditor/Register of Deeds refused to provide an on-reservation early polling site to service the Crow Creek Reservation’s substantially larger population, even after Help America Vote Act (HAVA) funding was secured to cover the full cost of the voting site.<sup>65</sup>

And, too often, modern day experiences echo past instances of discrimination. In 1986, in a VRA case having to do with an unfair at-large voting system in Montana, the court also uncovered evidence that voter registration was intentionally withheld from Native American voters. The Court recounted how “[an] Indian 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. Having driven a long way to get the cards, he asked his wife, who is white, to go into the county building and request some cards. She did and was given about 50 more cards than he was.”<sup>66</sup> We heard remarkably similar testimony at the 2018 Field Hearing. A Native community activist from Montana testified how when she went to return voter registration cards the clerk would complain and hassle her for the number of voter registration cards returned. There was no law, but the clerk stated that only 70 registration cards could be returned at one time and in 2016 dropped that number to 40.

In Utah, in 2018, the San Juan County clerk committed fraud in an attempt to kick the Native American candidate off of the ballot. The District Court reinstated the Native candidate to the ballot and found the clerk likely violated the Native candidate’s constitutional rights.<sup>67</sup> Yet, no charges were brought against the clerk. Even more frustratingly, this deception echoes a 1972 case of discrimination in the very same county where a clerk misled two Navajo candidates about filing deadlines in order to undermine their candidacy. The Federal Courts were forced to order those candidates back on the ballot as well.<sup>68</sup>

It is no surprise that experiences like these have provoked a widespread distrust of the state and Federal government by Native Americans. 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. 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. Trust of local government in South Dakota was notably bad with only 5.02 percent of respondents indicating they most trusted the local government, which is especially significant considering that local governments are most often responsible for the administration of elections.

#### IV. Conclusion

Native Americans need and deserve a Native American Voting Rights Act to address the structural deficiencies that are unfairly burdening their right to vote. Native Americans also need a fully restored Voting Rights Act so they can fight back against discrimination aimed at suppressing their participation.

Thank you for inviting me here today. I am prepared to answer any questions.

#### ENDNOTES

1 I use the term Native American, American Indian, and Indian interchangeably throughout this statement. These terms include Alaska Natives.

2 Minn. Const., art. VII, § 1(4) (1858).

3 S.D. Codified Laws § 26 (1903).

4 *Swift v. Leach*, 178 N.W. 437 (N.D. 1920).

5 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).

6 *Porter v. Hall*, 271 P. 411, 417 (Ariz. 1928), overruled in part by *Harrison v. Laveen*, 196 P.2d 456 (Ariz. 1948).

7 Kaitlyn Schaeffer, *The Need for Federal Legislation to Address Native Voter Suppression*, 43 N.Y.U. REV. L. & SOC. CHANGE 712 (2019).

8 *Id.*

9 *Montoya v. Bollack*, 372 P.2d 387 (N.M. 1962); *Harrison v. Laveen*, 196 P.2d 456 (Ariz. 1948).

10 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-nativeamerican-electorate/>.

11 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).

12 Ariz. Rev. Stat. Ann. § 16–101(A)(4)-(5) (1956)

13 *Alaska Const. art. V, § 1* (1959)

14 A summary of these barriers is provided in testimony I previously submitted on February 22, 2020, in support of the Native American Voting Rights Act before the House Committee on Administration Subcommittee on Elections, available here: <https://www.congress.gov/116/meeting/house/110464/witnesses/HHRG-116-HA08-Wstate-DeLeonJ-20200211-U1.pdf>

15 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, 10508.

16 James Thomas Tucker, Jacqueline De Leon, Daniel McCool, *Obstacles at Every Turn: Barriers to Political Participation Faced by Native American Voters*, NATIVE AM. RIGHTS FUND (2020), <https://vote.narf.org/wp-content/uploads/2020/06/obstacles-at-every-turn.pdf>.

17 Field Hearing Transcripts, Bismarck Tr., Gerald Webster, 250–52.

18 *Vote By Mail*, NATIVE AM. RIGHTS FUND, <https://www.narf.org/vote-by-mail/>.

19 *Brakebill v. Jaeger*, No. 1:16-cv-008, 2016 WL 7118548, at \*1 (D.N.D. Aug. 1, 2016); *Spirit Lake Tribe v. Jaeger*, No. 1:18-cv-00222 (D.N.D.) (Complaint filed Oct. 30, 2018). My colleague, Matthew Campbell, testified to the potential for voter ID laws, including North Dakota's voter ID law, to interfere with free and fair access to the ballot. Committee on House Administration, Subcommittee on Elections, *Voting In America: The Potential For Voter ID Laws, Proof-Of-Citizenship Laws, And Lack Of Multi-Lingual Support To Interfere With Free And Fair Access To The Ballot*, May 24, 2021, available at <https://docs.house.gov/meetings/HA/HA08/20210524/112670/HHRG-117-HA08-Wstate-CampbellM-20210524.pdf>.

20 *W. Native Voice v. Stapleton*, DV–2020–377 (Mont. Dist. Ct. Sept. 25, 2020).

21 *Arctic Vill. Council v. Meyer*, No. 3AN-20-7858 CI (Alaska Super. Ct., Oct. 5, 2020), aff'd sub nom. *Alaska v. Arctic Vill. Council*, \_\_\_ P.3d \_\_\_, 2021 WL 4234997 (Alaska Sept. 17, 2021).

22 *Blackfeet Nation v. Pondera Cty.*, No. 4:20-cv-00095-DLC (D. Mont. Oct. 14, 2020) (ECF No. 9-1).

23 *Obstacles*, at 39.

24 On April 16, 2019, I testified before the House Administration Subcommittee on Elections as to the details of North Dakota's voter ID law, available at: <https://cha.house.gov/sites/democrats.cha.house.gov/files/documents/JacquelineDeLeonTestimony.pdf>.

25 February 22, 2020, Testimony of Elvis Norquay, House Administration Subcommittee on Elections, available at: [HHRG-116-HA08-Wstate-NorquayE-20200211-11.pdf](https://www.congress.gov/records/hrg/116/116-ha08-wstate-norquay-e-20200211-11) (congress.gov).

26 *Brakebill v. Jaeger*, No. 1:16-cv-008, 2016 WL 7118548, at \*10 (D.N.D. Aug. 1, 2016) (order granting preliminary injunction).

27 See Settlement Agreement, *Janis v. Nelson*, Civ. 5:09-cv-05019-KES-LLP-RLW(D.S.D. May 25, 2010) (ECF No. 143) (remediating compliance issues with HAVA); *Brooks v. Gant*, No. Civ-12-5003-KES, 2012 WL 871262 (D.S.D. Mar. 14, 2012) (settlement for closer early voting locations); *Poor Bear v. Jackson*, 2015 WL 1969760 (D.S.D. May 1, 2015) (settlement for a satellite office on the reservation); Consent Decree, *United States v. Chamberlain Sch. Dist.*, No. 4:20-cv-4084 (D.S.D. June 18, 2020) (ECF No. 4) (consent decree settling at-large method of election for the school board in district with substantial Native population); Compl., *Rosebud Sioux Tribe v. Barnett*, No. 20-cv-5058 (D.S.D. Sept. 16, 2020) (2020 complaint alleging violations of the National Voter Registration Act).

28 *Wandering Medicine v. McCulloch*, No. 1:12-cv-135 (D. Mont. Oct. 10, 2012) (defendants agreed to establish satellite offices on reservations); Consent Decree, *Jackson v. Bd. of Trs. of Wolf Point*, No. 4:13-cv-00065-BMM (D. Mont. Apr. 9, 2014) (ECF No. 70) (permanent injunction barring a -75.24 percent deviation from ideal population size in school board race); *W. Native Voice v. Stapleton*, DV-2020-377 (Mont. Dist. Ct. 2020) (ballot collection ban declared unconstitutional); *Blackfeet Nation v. Pondera Cty.*, 4:20-cv-00095-DLC (D. Mont. Oct. 14, 2020) (ECF No. 9-1) (county agreed to open satellite election offices and ballot drop boxes).

29 Consent Decree, *United States v. San Juan Cty.*, No. 2:12-cv-00039-RJS (D. Utah Nov. 9, 2015) (ECF No. 261-1); *Navajo Nation v. San Juan Cty.*, 929 F.3d 1270, 1274 (10th Cir. 2019) (affirming the District Court's resolution of vote-dilution case filed in 2011); *Grayeyes v. Cox*, No. 4:18-CV-00041, 2018 WL 3830073, at \*9 (D. Utah Aug. 9, 2018) (injunctive relief granted for likely violation of candidates due process rights); Order re Stip. Settlement, *Navajo Nation Human Rights Comm'n v. San Juan Cty.*, No. 2:16-cv-00154-JNP (D. Utah Feb. 22, 2018) (ECF No. 199) (county agreed to maintain polling places and provide language assistance).

30 *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013)

31 Brief for the Alaska Federation of Natives, Alaska Native Voters and Tribes as Amicus Curiae 35, *Shelby County v. Holder*, 570 U.S. 529 (2013), available at: [https://narf.org/bloglinks/shelby\\_county\\_brief.pdf](https://narf.org/bloglinks/shelby_county_brief.pdf).

32 *Brnovich*, 594 U.S. at \*18.

33 *Id.* at \*28.

34 NCAI Brief at 10, citing S. Rep. No. 417, at 2 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 179 ("the issue to be decided under the results test is whether the political processes are equally open to minority voters."); see also Navajo Nation Brief at 21, citing *Chisom v. Roemer*, 501 U.S. 380, 408 (1991) (Scalia, J., dissenting) ("if 'a county permitted voter registration for only three hours one day a week, and that made it more difficult for blacks to register than whites . . . [Section] 2 would therefore be violated-even if the number of potential black voters was . . . small.'").

35 *Democratic National Committee v. Hobbs*, 948 F.3d 989, 1005 (9th Cir. 2020).

36 United States Census Bureau, Race and Ethnicity in the United States: 2010 Census and 2020 Census (Aug. 12, 2021), <https://www.census.gov/library/visualizations/interactive/race-and-ethnicity-in-the-united-state-2010-and-2020-census.html>.

37 United States Census Bureau, My Tribal Area: Kaibab Indian Reservation, [HTTPS://WWW.CENSUS.GOV/TRIBAL/?AIANIHH=1720](https://www.census.gov/tribal/?AIANIHH=1720) (listing 206 residents as Native American or Alaska Native); Inter-Tribal Council of Arizona, Member Tribes: Havasupai Tribe, <https://itcaonline.com/member-tribes/havasupai-tribe/> (listing a population of about 639).

38 United States Census Bureau, supra note 18 (43,932 Nevadans identify as American Indian or Alaska Native alone); United States Census Bureau, My Tribal Area: Nevada, <https://www.census.gov/tribal/?st=32&aianihh=0975>. Moapa Indian

Reservation lists 258 residents as Native American or Alaska Native; Duckwater Indian Reservation lists 270; Carson Colony lists 303.

39 *Brnovich*, 594 U.S. at \*18.

40 *Western Native Voice v. Stapleton*, No. DV 20–0377 (Mont. 2020) at 3, ● 5–9, available at <https://narf.org/nill/documents/20200925mt-ballot-order.pdf>.

41 *Id.* at 48 ● 19; see also 47–48, ● 14–21. Although the court’s decision in this case was based primarily on state law, it expressly noted that Federal voting rights law would dictate the same result. *Id.* at 47 ● 19.

42 *Brnovich*, 594 U.S. at \*19.

43 Milan Kumar, *American Indians and the Right to Vote: Why the Courts Are Not Enough*, 61 B.C.L. REV. 1111, 1115 (2020), <https://lawdigitalcommons.bc.edu/bclr/vol61/iss3/6> (“While policies that negatively affect American Indian voters are usually adopted with the said goal of combatting voter fraud, reported cases of voter fraud have typically been very low.”).

44 *Arctic Village Council et al vs. Meyer, Kevin, et al*, DRC 3AN–20–7858CI (Alaska Super. Ct., October 5, 2020).

45 T.R. Reid, *New Indian Voters Turned Race in S.D.*, Washington Post (Nov. 8, 2002).

46 <https://www.indianz.com/News/show.asp?ID=2002/12/10/sdvote>

47 <https://www.indianz.com/News/show.asp?ID=2002/10/23/boulet>.

48 *Opinion: Bad New Days for Voting Rights*, NEW YORK TIMES (April 18, 2004), <https://www.nytimes.com/2004/04/18/opinion/bad-new-days-for-voting-rights.html>

(“Jo Colombe, a Rosebud Sioux tribal council member, said that when she worked as a poll watcher in a recent election she was accused of fraud simply for taking a bathroom break. When she returned, she said, white poll watchers charged her with copying the names of Indians who had not yet voted, and taking them out to Indians waiting in the parking lot.”).

49 AMERICAN CIVIL LIBERTIES UNION, *VOTING RIGHTS IN INDIAN COUNTRY* 51 (2009).

50 State Voting Bills Tracker 2021, Brennan Center for Justice, available at: <https://www.brennancenter.org/our-work/research-reports/state-voting-bills-tracker-2021>.

51 *W. Native Voice v. Stapleton*, No. DV–2020–0377 (D. Mont. Sept. 25, 2020).

52 *W. Native Voice v. Jacobsen*, No. DV–2021–0560 (D. Mont. May 17, 2021).

53 *W. Native Voice v. Jacobsen*, No. DV–2021–0560 (D. Mont. May 17, 2021).

54 *07-15-Native-American-Voting-Rights-Advisory-Memo.pdf* (uscrr.gov)

55 With new Arizona voting laws, Native Americans brace for more challenges to casting ballots [IN DEPTH]—Rose Law Group Reporter.

56 <https://turtletalk.files.wordpress.com/2019/11/order-and-secretary-of-state-settlement.pdf>.

57 <https://legiscan.com/AZ/supplement/SB1003/id/135006>.

58 <https://apnews.com/article/legislature-arizona-phoenix-legislation-elections-7f0b8661f5d7b673a3927bf7b4995586>.

59 <https://www.greatfallsribune.com/story/news/2020/11/02/montana-r-mankk-costume-reportedly-wins-glasgow-bar-contest/6130962002/>.

60 “Official Circular” (6 December 1924), Ku Klux Klan collection, MS 131, Box 2, Folder 163 Eastern Washington State Historical Society, Spokane, Washington, available at: <https://www.northwestmuseum.org/collections/research-archives/>.

61 *Obstacles*, at 108

62 *Obstacles*, at 44

63 *Obstacles*, at 87 (quoting Donita Loudner’s testimony, “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.”)

64 *Obstacles*, at 45

65 *Obstacles*, at fn. 270

66 *Windy Boy v. County of Big Horn*, 647 F. Supp. 1002, 1008 (D. Montana 1986).

67 *Grayeyes v. Cox*, No. 4:18–CV–00041, 2018 WL 3830073, at \*9 (D. Utah Aug. 9, 2018).

68 *Yanito v. Barber*, 348 F. Supp. 587, 593 (D. Utah 1972).

The CHAIRMAN. Thank you very much.



The Honorable Aaron Payment, Secretary of the National Congress of American Indians.

**STATEMENT OF HON. AARON PAYMENT, SECRETARY,  
NATIONAL CONGRESS OF AMERICAN INDIANS**

Mr. PAYMENT. Good morning, Chair Schatz, Vice Chair Murkowski, and members of the Senate Committee on Indian Affairs. National Congress of American Indians President could not be with us today, Fawn Sharp. She is getting a COVID test in the very narrow window that we have in order to do that for her to represent us at COP26. She is on her way there.

But on behalf of NCAI, I would like to thank you for holding this hearing today to discuss the critically important issue of voting rights. My name is Dr. Aaron Payment, chairperson of the Sault Saint Marie Tribe and the Secretary of the National Congress of American Indians.

In my 20s, I was a county deputy registrar to register others to vote and set up voter registration in tribal offices. I am also heavily involved in NCAI's partnerships with Native Vote and Get Out To Vote in a non-partisan way.

We greatly appreciate the Committee holding this important hearing to protect voting rights for all Native Americans. This is timely, with the introduction of the Native American Voting Rights Act of 2021 and the new John Lewis Voting Rights Advancement Act. Congress has a trust responsibility to enact voting rights legislation to protect constitutionally guaranteed rights of Natives to vote.

Despite being indigenous sovereigns in what is now the U.S., Natives were the last people to be granted the right to vote in 1924. Even then, it was three decades later before all Natives were able to fully participate in State elections. While some progress has been made, today there are strong forces preventing our people from fully participating in the political process. These barriers include geographic isolation, poorly maintained roads, housing insecurity, depressed economic conditions, and discrimination.

The obstacles are exacerbated by the growing number of laws across the Country seeking to purge voter information, limit voter registration, create language and residency barriers, and other mechanisms to produce discriminatory outcomes. The ability to vote is a fundamental right, and a foundational principle of any democracy. For many, barriers make it impractical or even impossible to vote.

I am going to use my brief time with you to highlight that no matter where we live, what ID cards we have, or what language we speak, Native peoples should have fair and equal access to voting. Due to the lack of residential mail delivery in some communities, poor roads, and a prevalence of homes that do not have addresses, it is harder for Natives to register, receive an absentee ballot, and reach the polls. The most direct way to ensure a more equitable access is a Federal mandate providing for on-reservation polling places and registration opportunities. Allowing tribes to designate a building whose address can be used to register, pick up, and drop off a ballot would also help tremendously.

Protections and provisions of this sort are included in the Native American Voting Rights Act, which was introduced by Senator Luján. Thank you, Senator Luján, for introducing legislation that has broad support across Indian Country. The same piece of legislation was introduced in a bipartisan fashion in the House by Representatives Tom Cole and Sharice Davids, who are the co-chairs of the Congressional Native Caucus.

For many of our people, voting participation is not possible due to overly restrictive voter ID requirements. Studies have shown that photo ID requirements in particular have chilling effect on Native voting turnout. Reasons for this are varied, but in short, for many Native people, merely getting to the DMV or Secretary of State means leaving the reservation, and in many cases having to travel up to 100 miles. These costs are prohibitive for many.

Even when Native people get registered to vote, get to the polls and provide appropriate ID, language barriers remain intact for the more than 350,000 speakers of more than 175 Native languages. Our Native speakers are the keepers of our histories, our traditions and our culture, but all too often are rejected at the polls. Again, legislation such as the Native American Voting Rights Act addresses these ID requirements and language barriers with simple, commonsense solutions like permitting individuals to vote with their a card and allowing tribes to request voter registration and ballot materials be available in their own languages.

I urge this Committee and all Congress to act to ensure that the voting rights across the Country are uniformly protective for everyone. Please enact legislation with the protections and provisions included in the Native American Voting Rights Act. We are strongest as a democracy when we are all participating by voting.

Thank you to the Senate Indian Affairs Committee for this opportunity to testify. I would be happy to answer any questions you have including some statistics, updated statistics on the number of Native Americans and those who were registered and who could be registered to vote. Thank you.

The CHAIRMAN. Thank you very much.

Next, we have Professor Patty Ferguson-Bohnee, Director of the Indian Legal Clinic at Arizona State University.

**STATEMENT OF PATTY FERGUSON-BOHNEE, DIRECTOR/  
PROFESSOR, INDIAN LEGAL CLINIC, ARIZONA STATE  
UNIVERSITY**

Ms. FERGUSON-BOHNEE. Good afternoon, Mr. Chairman, Vice Chair Murkowski, and members of the Committee. Thank you for inviting me to testify today.

The Indian Legal Clinic coordinates the Arizona Native Vote Election Protection Project, a non-partisan effort to protect Native American voting rights. We have assisted hundreds of voters through our election day volunteer program and hotline.

Our program has been successful because of support from and collaboration with local tribes committed to protecting the vote, such as the Salt River Pima-Maricopa Indian Community, the Fort McDowell Yavapai Nation, the Ak-Chin Indian Community, and organizations such as the Inter Tribal Council of Arizona.

On behalf of tribal clients, I have also litigated Section 2 cases involving redistricting, restrictive voting laws, early voting access, and language compliance under Section 203.

To understand Native American voting challenges, one must recognize the vast differences in experiences, opportunities, and realities facing on-reservation voters. Isolating conditions, such as language, socioeconomic disparities, lack of access to transportation, lack of residential addresses, lack of access to mail, the digital divide, and distance are just some of the factors that impede access to the polls and participation in the political process.

Arizona in its election policies failed to consider and often exploits these realities by suppressing the vote through ID requirements, long distances to early and election day voting sites, inadequate language assistance, bans on ballot assistance, and policies that needlessly discard ballots due to strict technicalities. In short, these factors create a complicated maze that voters must navigate, with no guarantee that reaching the end meets that your vote will be counted.

Governmental neglect has led to lack of standardized addresses, lack of access to mail delivery that further impact tribal populations. Vote by mail, for example, is not a simple, easy task. Only 18 percent of tribal voters outside of Maricopa and Pima Counties have a physical address and receive mail at home. Most rely on the limited number of post office boxes in Indian Country. Often those boxes are far away and open for limited days and hours.

While most voters in Arizona vote by mail, a method that does not require voters to show ID, this method of voting is not accessible to Native Americans. Further, non-traditional addresses make complying with Arizona's voter ID law more difficult. Tribal IDs are wrongly rejected in each election due to insufficient poll worker training or because of problems with non-standard addresses.

For example, prior to the 2020 election, 2,000 voters in Apache County were placed in suspense due to non-traditional addresses. Also, counties failed to place tribal citizens in the correct precinct, which results in their ballots being discarded or results in them being turned away without voting and redirected to a polling location which could be over 30 minutes away.

Native Americans also do not have equal access to voter registration. Many voters must travel long distances off reservation to register to vote, in some cases more than 95 miles one way. And while online voting registration is possible for off-reservation voters, this option is limited for on-reservation voters.

Many reservation voters lack telecommunication infrastructure to access the internet. Even if the voter has internet access, the State does not allow tribal IDs to be used to register to vote online.

We also know in Arizona that Native Americans have an unequal access to in-person early voting. While every county has in-person early voting off-reservation, there are limited opportunities for in-person early voting on-reservation. If offered at all, in-person early voting could be limited to a few hours on one or two days.

For example, the Hopi Tribe had a total of four hours of in-person early voting, while off-reservation had 162 hours. And members of the Kaibab Paiute Tribe had to travel 280 miles one way to participate in in-person early voting.

Post Shelby, Pima County closed the Pascua Yaqui early voting location. The tribe repeatedly requested that the county reopen this site. Since they closed the site, it required voters to travel over two hours by bus to cast an early ballot. As you heard Ms. De León say, the cost to operate an early voting site was only \$5,000 but the county spent over \$180,000 to defend its decision to close the polling location.

Prior to Shelby County, covered jurisdictions would have to consider whether a voting law would have a negative impact on minority voters. This is no longer the case. Legislation affecting voting often appears neutral with a stated goal of preventing voter fraud. Yet the effect of these laws it not added security; the effect is added layers of suppression.

Without Section 5's protection and a workable Section 2 standard, voter laws and practices will continue to be adopted that suppress the Native American vote.

I want to remind the Committee that Congress has a duty to fulfill its unique trust obligation, including in matters of voting. As Justice Kagan said in her dissent in *Brnovich*, "We are in an era of voting rights entrenchment, where too many States and localities are restricting access to voting in ways that will predictably deprive members of minority groups of equal access to the ballot box."

Thank you for the opportunity to testify. I am happy to answer any questions the Committee may have.

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

PREPARED STATEMENT OF PATTY FERGUSON-BOHNEE, DIRECTOR/PROFESSOR, INDIAN LEGAL CLINIC, ARIZONA STATE UNIVERSITY

I. Introduction and History of Native American Voting Rights

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 resulting from Arizona's voter identification law.<sup>1</sup> The Clinic works with its partners to educate Arizona's Tribal communities on election laws, voting, and redistricting.

For Native American voters, exercising the right to vote is an ongoing battle. This is especially true for states with large Native American populations and in jurisdictions where the Native vote could be decisive. After the Civil War, Congress amended the Constitution to prohibit the federal and state governments from denying or abridging a citizen's right to vote based on their "race, color, or previous condition of servitude."<sup>2</sup> However, the Fifteenth Amendment did not apply to Native Americans because the Fourteenth Amendment did not extend citizenship to Native Americans.<sup>3</sup>

When Congress passed the Indian Citizenship Act in 1924, states and local jurisdictions prevented Native Americans from registering to vote and voting.<sup>4</sup> Little progress was made in the subsequent decades, and Congress failed to assure enfranchisement or promulgate instructions on how elections should be administered in Indian Country. Montana excluded Native Americans from voting and holding office since the establishment of its territorial government, and passed measures to exclude Native Americans from voting after statehood.<sup>5</sup> South Dakota had a law in effect until 1939 that prevented Native Americans from holding public office.<sup>6</sup> 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.<sup>7</sup> Utah and North Dakota became the last states to afford on-reservation Native Americans the right to vote in 1957 and 1958, respectively.<sup>8</sup> When the right to vote was finally secured, state and local officials took steps to prevent Native Americans from participating in elections and being elected to office.<sup>9</sup> A common and effective tool for Native American dis-

enfranchisement was the use of literacy tests because of 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.<sup>10</sup>

Exercising the right to vote for Native American voters only came with protections afforded by the Voting Rights Act and enforcement of those rights has required decades of litigation. However, the Supreme Court invalidated the 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.<sup>11</sup> Since that time, efforts to suppress the vote have increased and the tactics to suppress the Native American vote have diversified by “pour[ing] old poison into new bottles.”<sup>12</sup> For Native Americans, these voter suppression efforts can have devastating impacts.

Today, only 66 percent of eligible Native American voters are registered to vote.<sup>13</sup> “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.”<sup>14</sup> Obstacles contributing to low voter turnout include geographic isolation, poorly maintained and unpaved roads, distance to polling locations, lack of election funding, discrimination, voter intimidation, lack of access to voter registration, and various technological barriers. Voter participation amongst Native Americans is further impacted by isolating conditions such as lack of access to transportation, lack of reliable mail delivery, and lack of traditional mailing addresses. Such obstacles are multiplied when combined with various election laws and procedures, such as identification requirements, limiting access to voting sites, lack of access to critical election information, inadequate language assistance, bans on ballot assistance, and policies that needlessly discard ballots based on minor technicalities. These factors create a complicated maze that voters must navigate, with no guarantee that reaching the end of the maze means that your vote will be counted.

Within this past decade, State and local policy makers have adopted additional barriers, while the tools to combat racially disparate laws have been severely curtailed by the Supreme Court’s decisions in *Shelby County v. Holder* and *Brnovich v. Democratic National Committee*.<sup>15</sup> Arizona, for example, has adopted legislative changes in response to the political gains that underrepresented groups have made in elections. These changes make voting more difficult, unnecessarily alter the procedures leading to voter confusion, and hinder democracy.

Voting is not a simple or easy task for many Native Americans. In addition to well-documented access barriers, redistricting has been used as a tool to suppress Native American voting rights and depress Native American political power.<sup>16</sup> My testimony will focus on voting challenges faced by Tribal citizens in Arizona, new threats to the ballot box, and efforts to improve access for Tribal voters.

The federal government has the power and the obligation to protect the Native Vote. Congress’ plenary power, rooted in the Indian Commerce Clause found in Article I, Section 8 of the United States Constitution, gives Congress the ultimate authority to pass legislation governing Native American affairs. The trust relationship, a moral and legal obligation to ensure the protection of Tribal interests, flows from Congress’ plenary authority.<sup>17</sup> The relationship between the federal government and Indian Tribes, “is perhaps unlike that of any other two people in existence,” where the federal government has taken the “obligations of the highest responsibility and trust.”<sup>18</sup> This includes an obligation that rests upon the federal government’s shoulders to protect Tribes from states. The Supreme Court has recognized that “because of the local ill feeling, the people of the states where [Tribes] are found are often their deadliest enemies.”<sup>19</sup> Thus, the federal government should do more to ensure that Native voters have equal access to the ballot.

## II. Barriers that Impact Voting

Long-standing inequalities impact the day-to-day life for many Native Americans, including voting. Such barriers include lack of infrastructure, socioeconomic barriers, lack of access to postal services, nontraditional addresses, language barriers, precinct/county lines, and the availability of state and county services.

### A. Infrastructure

In Arizona, many Tribal communities lack access to basic infrastructure. Many roads on reservations are unimproved dirt or gravel roads that are impassible after rain or snowfall. For example, there are over 10,000 miles of road on the Navajo Reservation, and 86 percent are unpaved.<sup>20</sup> Half of the paved roads are in poor condition.<sup>21</sup>

Other points of infrastructure such as electricity, running water, or broadband also impact voters on Tribal lands. For example, it is estimated that 30 percent of

homes on the Navajo Nation lack electricity.<sup>22</sup> Fifty-eight out of every 1,000 Native American households lack plumbing, compared to 3 out of every 1,000 white households in the country.<sup>23</sup>

Among these basic points of infrastructure, there is a growing digital divide between Tribal communities and non-Tribal communities with 18 percent percent of reservations residents lacking any Internet access and 33 percent relying on Internet services from a smartphone.<sup>24</sup> In 2018, the Arizona Statewide Broadband Strategic Plan noted that

162,328 people living on tribal lands (95 percent) have either unserved or underserved telecommunication infrastructure needs. They do not have access to fixed advanced telecommunications capabilities, and often resort to local (community anchor institutions, such as libraries and schools), for their only connection to the rest of the digital world.<sup>25</sup>

These basic infrastructure gaps impede the ability of Native American voters to participate in the electorate because of difficulty traveling to voter registration sites, early voting locations, or polling locations. These barriers also make it difficult to reach these voters and get information to them, including information regarding changes in election law, policy, procedure, the movement of polling locations, the closing or consolidation of polling locations, or other critical information. Lastly, as election systems, administrators, and civic engagement organizations increasingly rely on digital tools in voter registration drives, voter education campaigns, or as modes of official communication, Native Americans are left behind.

#### *B. Socioeconomic Barriers*

Many Native Americans in Arizona face obstacles in voting as a part of their socioeconomic reality. The poverty rate for Native Americans in Arizona is 35.7 percent.<sup>26</sup> Whereas Non-Hispanic whites in Arizona experience poverty at a rate of 10.9 percent. Native Americans in Arizona are more likely to work multiple jobs, lack reliable transportation, and lack adequate childcare resources.<sup>27</sup> Additionally, Native Americans in Arizona are more likely to work multiple jobs, lack reliable transportation, and lack sufficient child care resources.<sup>28</sup>

Another challenge impacting many Native Americans is homelessness or near homelessness due to extreme poverty and lack of affordable housing on many reservations. A study by Housing and Urban Development 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.<sup>29</sup> Some of the highest rates of near homelessness, housing insecurity, and overcrowding in Indian Country are found in Arizona. These realities impact the ability of Native Americans to have permanent physical addresses, which is critical to determining where you can vote and your level of access to early voting and election day polling locations. This lack of permanent housing should not impede their ability to exercise their right to vote.

#### *C. Non-Traditional Addresses*

Many Native American living on Arizona's Indian reservations lack traditional street addresses, and locations for homes are often identified in terms of landmarks, cross roads, and directions.<sup>30</sup> Most reservation roads 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."<sup>31</sup>

Due to the lack of traditional addresses, many Native American voters rely on post office boxes to receive their mail and may include a post office box on their state identification. "Most 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."<sup>32</sup> In Arizona, only 18 percent of reservation voters outside of Maricopa and Pima Counties have physical addresses and receive mail at home.<sup>33</sup>

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.<sup>34</sup> 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.

#### *D. Vote-by-Mail*

In Arizona, 89 percent of ballots cast in the 2020 general election were early ballots and the majority of them were cast by mail.<sup>35</sup> Although many off-reservation voters cast a ballot by mail, Native Americans do not have the same access or oppor-

tunity to vote by mail. This is because Native Americans do not have equitable, reliable, or easy access to mail services. Reservation residents in Arizona lack traditional mailing addresses resulting in lack of access to home mail delivery. Only 18 percent of Native Americans outside of Maricopa and Pima Counties receive mail at home.<sup>36</sup>

The lack of mail access contributes to Native Americans participating in Arizona's absentee voting at a significantly lower rate.

However, postal boxes are not a simple alternative because in addition to distance, delayed and reduced hours at USPS offices or contracted postal units limit the ability of Native Americans to regularly receive mail. The postmaster for the Tohono O'odham Nation "observes residents come to the post office every two or three weeks to get their mail. Due to the lack of transportation, the condition of the roads, and health issues, some go to the post office only once per month."<sup>37</sup> There are only 48 Post Offices and CPU's on Tribal lands in Arizona, a land base that includes 19.8 million acres of land and well over 100,000 residents and eligible voters. These post office boxes cost an already impoverished population \$136.00 for one year and defaulting on that payment can result in closure and total loss of access to mail.<sup>38</sup> The number of people that can be listed on a post office box is limited and if an individual's name is not listed on the box, unable to secure a post office box, or removed from a box that they shared, the voter will be unable to receive a ballot at that address.<sup>39</sup> Many of these post offices are only open for a few hours a day or a few days a week, further limiting the ability of Native Americans to access mail.

Postal delivery further inhibits vote-by-mail options for Native Americans. Access to mail is additionally inhibited due to delays in mail delivery between the voter and the county seat. Legally, ballots can begin being mailed to voters 27 days before the election.<sup>40</sup> For some voters on Tribal land it can take up to ten days to get from the county seat to the reservation and vice versa.<sup>41</sup> When compared to the time it takes for mail to travel from Scottsdale to the Maricopa County seat of Phoenix Arizona, merely 18 hours, the difference is staggering.<sup>42</sup> These delays are due in part to the USPS postal routes that take mail through a circuitous route before getting on reservations. For example, a ballot mailed from a voter in Window Rock, Arizona on the Navajo Nation, is routed to Gallup, New Mexico then Albuquerque, New Mexico then to Phoenix, Arizona, then to Show Low, Arizona, then to the Apache County seat in St. Johns, Arizona.<sup>43</sup> Because these routes are so complex, there is no good estimate for how long it will take for a ballot to reach the county recorder's office.<sup>44</sup> If it takes 10 days for a ballot to get from the county seat to the voter living on the reservation, and ten days to get back, the voter only has a seven-day window to receive the ballot, mark it, and return it to a post office in order for the ballot to arrive on time. Because Arizona does not accept postmarked ballots, voters that fall outside of this seven-day window may cast and return their ballot to USPS before election day but may nonetheless have their vote rejected if the ballot is not received by 7:00 PM on election day.<sup>45</sup> As a result of these realities, Native Americans do not experience the same level of access to receiving election information or the ability to participate in Arizona's early voting system.

In addition to mail access, Native Americans in many states, including Arizona, do not trust mail-in voting systems.<sup>46</sup> In Tribal communities, mail delivery is untimely and inconsistent, creating a preference for Native American voters to vote in person.<sup>47</sup> Further, language translations are oral, requiring in-person assistance.

#### *E. Language Barriers*

Under Section 203 of the Voting Rights Act, election officials in Arizona must provide language assistance to the Navajo Reservation and the San Carlos Apache Reservation. Navajo and Apache are unwritten languages. Because they are unwritten languages, "only oral assistance and publicity are required."<sup>48</sup> Publicity refers to the availability of materials and assistance in the minority language.<sup>49</sup> However, the availability of translations to assist Indigenous voters when voting early or to assist voters in determining their correct polling location, how to complete an early ballot, being educated on changes in Arizona election law and procedure, and other basic information needed to ensure their vote is counted is needed.

For the Navajo Nation, language barriers have widespread impact across the reservation. One third of the reservation's voting age population are limited-English proficient and over one quarter of the population are illiterate. In 2018, the Navajo Nation filed a lawsuit against the State of Arizona, Apache County, Coconino County, and Navajo County.<sup>50</sup> The Navajo Nation alleged that the state and counties failed to provide effective language assistance under Section 203 of the Voting Rights Act and failed to provide equal access to voter registration and in-person early voting.<sup>51</sup> The counties also failed to provide instructions on how to complete

an early ballot by mail in the Navajo language.<sup>52</sup> The counties failed to provide translators to serve these voters at voter registration sites and at early voting locations.<sup>53</sup> The counties also refused to provide additional early voting sites on the reservation which would have increased access to translators during the early voting process.<sup>54</sup> Lastly, over 100 votes cast by Navajo tribal members were discarded because they lacked a signature but the counties did not provide any ballot instructions in the Navajo language for early voters.<sup>55</sup> The State's official election guide used by translators has also not been consistently translated in time for early voting.

Native American voters must travel long distances to reach voter registration sites and early voting sites. When minority language assistance is not provided to educate voters on changes in Arizona election law, or instructions that require strict compliance in order for a ballot to be counted, then Native American language speakers do not have full and equitable access to the voting process.

### **III. Election Policies and Procedures**

In addition to systemic inequalities that make it difficult for Native Americans to participate in state and federal elections, laws and policies add additional hurdles. The Arizona Legislature has adopted numerous laws that make it more difficult for Native American voters to cast a ballot. However, local elections officials have the authority to determine voter registration locations, polling locations, and the option to offer vote centers, which can limit the number of discarded ballots. Election officials are also responsible for training poll workers and placing voters in voting precincts.

#### *A. Polling Locations*

Arizona's Tribal communities do not have equal or equitable access to in-person early voting and election day polling locations. Reservation communities are often at the mercy of the county officials who decide where to locate the polls. For example, members of the Kaibab-Paiute Tribe, located in Mohave County, Arizona, were required to travel 285 miles one way to participate in in-person early voting.<sup>56</sup> In 2018, only fifteen of the State's 110 in-person early voting sites were located in Tribal communities, and of those fifteen, only thirteen were placed on Tribal lands.<sup>57</sup> Thus, in a state where Tribal lands make up nearly one-third of the land mass, less than twelve percent of its early in-person voting locations were located on Tribal lands in 2018.

The amount of access to in-person early voting was inadequate. Ten (10) of the fifteen (15) in-person early voting locations on Tribal lands or in Tribal communities were open for ten (10) hours or less. In comparison, thirty-five (35) off-reservation early voting polling locations were open for 100 hours or more. Many early voting locations surpassed 150 hours of in-person early voting; only two (2) in-person early voting locations on Tribal lands surpassed 100 hours, the Tuba City Elections Office and the Chinle Voter Outreach Office, both on Navajo Reservation. The Tuba City early voting location also serves the Hopi Tribe and the San Juan Southern Paiute Tribe. The other early voting location that surpassed 100 hours served a Tribal community was the La Paz County Recorder's Office in Parker, Arizona within Colorado River Indian Tribe's "Indian Country." Other early voting locations did not provide equitable access to in-person early voting. For example, within Navajo County, the Hopi Tribe had a total of four (4) hours of in-person early voting on the reservation compared to off reservation voters in Holbrook who had 162 hours of in-person early voting available to them.

In 2020, counties in Apache, Coconino, and Navajo Counties added drop boxes, drop off locations and early voting locations to address COVID-19 restrictions and to implement settlement agreements increasing early voting access. However, other counties, such as Pima County failed to offer early voting despite requests from Tribal communities.

Failing to provide Native American voters with equal access to polling locations is one of the many ways that state and local governments make casting a ballot more difficult for Native voters. In both 2016 and 2018, Mohave County denied the Kaibab-Paiute Tribe's requests for an on-reservation Election Day polling location.<sup>58</sup> In 2018, the County asserted that the Tribe's request was made too late, and that the proposed facility did not comply with the Americans with Disabilities Act.<sup>59</sup> After many requests, in 2020, Mohave County reopened a polling location on the Kaibab Paiute Reservation. Between 2016 and 2018, the only polling location on the Yavapai Apache Nation's Reservation closed, and there were no polling locations on the Fort Yuma-Quechan or Cocopah Reservations.<sup>60</sup>



### *B. Out of Precinct Policy*

In Arizona, county officials determine precinct boundaries and decide whether to offer precinct-based voting or vote centers. This decision ultimately makes the difference between whether a ballot will be counted. In counties that use a vote center model, any voter in that county can cast a ballot at any vote center in the county and the ballot will be counted. Under Arizona's precinct-based voting system, the whole ballot is discarded if a voter casts a ballot out of precinct.

County lines that bisect and trisect reservations results in confusion and significant variances in levels of access across the reservations. While smaller reservations are often located in a single county, eight of Arizona's twenty reservations are located in two or more counties. For example, the Navajo Nation spans Apache County, Navajo County, and Coconino County. In Apache County, voters can only vote at their assigned polling place on election day. In Navajo County, voters can vote at any polling location in the county on election day, as long as you are a registered voter in that county. In Coconino County, voters can either vote at their assigned polling place or at a designated vote center which serves all voters in the county. Arizona's precinct policy is further complicated for the Navajo Nation because radio ads run across state and county lines.

Nontraditional addresses cause numerous problems for Tribal voters because the Counties can place the voter in the wrong precinct or not place them at all, resulting in confusion and unnecessary travel. For example, in 2020 a voter called the hotline to report that when she attempted to update her voter registration with the county, she explained that her physical residence was in Navajo County but her mailing address (where her Post Office Box was located) was in Apache County. Under Arizona law, the voter should have been registered in Navajo County and on Election Day, she would have had the ability to vote at any polling place in Navajo County. Instead, her voter registration reflected the precinct where her post office box was located in Apache County. As a consequence of this error, the voter had to drive an hour to her post office in Apache County on election day in order for her vote to be counted.

In the 2020 election, four of the fifteen counties in Arizona exclusively offered precinct-based voting, five offered a combination of precinct-based and vote center polling occasions, and six used exclusively vote centers. However, not every Tribe in a vote-center or hybrid county benefitted from these systems. For example, the San Carlos Apache Reservation is located across three counties, with reservation residents living in Graham and Gila Counties. Graham and Gila Counties both offered vote centers off-reservation, but only provided precinct-based voting on reservation. Yuma and Yavapai Counties have adopted an exclusively vote-center model for voting. However, neither county placed a vote center on Tribal lands.

The four counties that employed exclusively precinct-based voting were Apache County, Mohave County, Pima County, and Pinal County. Some of the State's largest Tribal areas are included in these counties, including the Navajo Nation, the White Mountain Apache Tribe, the Tohono O'odham Nation, the Gila River Indian Community, the Fort Mojave Indian Tribe, the Hualapai Tribe, the Ak-Chin Indian Community, the Pascua Yaqui Tribe, and the Kaibab Paiute Tribe. With the exception of the Fort Mojave Indian Tribe and Ak-Chin Indian Community, all of the previously mentioned tribes have reservation boundaries that cross county lines. For Native American voters living on especially remote reservations, going to the wrong precinct may result in having to drive long distances to the correct precinct or not voting at all. Arriving at the wrong precinct, coupled with the frequency at which voters are placed in the incorrect precinct because of non-standard addresses, creates broad confusion. Thus, even minor changes in precinct boundaries may result in discarded ballots.

Although voting precincts do not cross county lines, the artificial lines imposed upon reservations frequently result in the denial of the right to vote. Because Native American voters often do not receive mail at home, a voter may not be placed in a precinct, placed in the wrong precinct, or even placed in the wrong county-resulting in the ballot being discarded. Additionally, voters living on rural reservations have difficulty checking their polling locations before casting a ballot, as publicly available polling location verification tools are not equipped to process non-standard addresses.

Arizona's out of precinct policy renders voting at the wrong polling location fatal to the right to vote. Many times, the voters are placed in the wrong precinct through no fault of their own. Native American voters with nonstandard addresses are wandering through a maze as they are sent from precinct to precinct.

### C. Unequal Access to Voter Registration

Throughout the country, Native Americans report lower awareness of how and where to register to vote. In general, Native Americans report lower levels of activity by third party groups to conduct voter registration drives.<sup>61</sup>

States continue to adopt online voter registration as a tool, and currently 42 states and Washington D.C. offer online registration.<sup>62</sup> Even if a voter living on-reservation has Internet access, many states offering online voter registration require a state-issued ID to be used in the registration process, thereby excluding on-reservation voters who lack state-issued identification.<sup>63</sup> Additionally, the general lack of standard addresses amongst Native American voters renders complying with address requirements to register to vote or to produce identification on Election Day exceedingly difficult.<sup>64</sup>

In Arizona, in order to register to vote for state elections, voters must submit “documentary proof of citizenship.”<sup>65</sup> Voters that fail to produce documentary proof of citizenship are registered as a “federal-only” voter and only eligible to vote in races for federal offices: United States President, United States Senate, and for the United States House of Representatives.<sup>66</sup> Under Arizona law, documentary proof of citizenship includes Arizona Driver License or Non-Drive Identification Card, Out-of-State Driver License or Identification Card, Birth Certificate, U.S. Passport, Citizenship and Immigration Documents, and Tribal Identification Numbers and Documents.<sup>67</sup> Despite the inclusion of Tribal identification as an appropriate form of identification for registration, this form of ID is systemically excluded from Arizona’s online voter registration.

Voter registration for reservation voters has been limited to in-person voter registration opportunities. To register to vote online in Arizona you must possess an Arizona driver license or state-issued identification card. This also extends to updating voter registration online, such as change of address, party affiliation, and/or joining the early voter list to receive an absentee ballot. Until September 21, 2020, two weeks before the statutory voter registration deadline to vote in the General Election, voters registering online were unable to register with nonstandard addresses.<sup>68</sup>

Voters that lack a state-issued form of identification, but possess the other forms of qualifying identification, must register using the paper voter registration form. One of the most common methods of getting the paper voter registration forms to voters living in remote or rural Tribal communities is in the form of in-person voter registration drives at high trafficked events or locations. Otherwise, voters can request a form from the county and return it via mail. In 2020, during the COVID-19 pandemic, in-person voter registration opportunities were largely suspended due to the risk of spreading COVID because Tribal communities were already disproportionately affected. As a result of Arizona’s burdensome system, voter registration between 2016 and 2020 did not grow proportional to the population increase.<sup>69</sup> The United States District Court of Arizona acknowledged that the State had made efforts to increase remote access to voter registration but that these efforts have not resulted in equal opportunity, “[r]egistering to vote has never being easier for some, though others are not so fortunate.”<sup>70</sup>

As a result of the barriers to voter registration, Arizona has one of the lowest turnout rates in the United States.<sup>71</sup> The turnout rate for minority voters is substantially less than white voters and Native American voters vote approximately twenty-three percentage points below the statewide average.<sup>72</sup>

Because Native Americans face significant barriers to simply registering to vote, and do not have equal opportunities to register to vote, some Tribes remain drastically underrepresented and drastically underrepresented in the electorate. For example, for the Tohono O’odham Nation, less than half of their eligible voting age population is registered to vote. In the 2020 General Election, approximately 65 percent of registered voters on the Tohono O’odham Nation turned out to vote. However, when accounting for the low rate of voter registration, that results in a turnout of approximately 30.5 percent of the Tohono O’odham Nation’s voting age population.

### D. Ongoing and Emerging Obstacles

Since the Supreme Court’s decision in *Shelby County*, Arizona laws no longer have to be evaluated on the potentially racially disparate impact before they go into effect. Since 2013, the Arizona legislature has enacted a number of laws that disproportionately burden Native American voters and Tribal communities as a whole. Despite significant testimony about the harms before these laws went into effect and, in one instance, judicial determination that a law was passed with racially discriminatory intent, these laws remain in effect and stifle the potential of a fully enfranchised Arizona. While some of these laws may appear to be neutral, the realities on Arizona’s reservations can make it more challenging for Native American voters.

i. Ballot Collection (2016) (H.B. 2023)

In 2007, Arizona implemented a no-excuse early voting process known as the Permanent Early Voter List (PEVL).<sup>73</sup> Early ballots received via mail can be returned via mail or in person, either at a drop box location or in person at polling places or designated county sites.<sup>74</sup> In 2016, 80 percent of all ballots cast were early ballots<sup>75</sup> and in 2020 that number rose to 89 percent.<sup>76</sup> For Native Americans, third party ballot collection became an important get-out-the-vote (GOTV) tool to increase voter turnout and overcome barriers in access to mail. It was also a common method of assisting friends and fellow Tribal members in returning their ballots, especially those that face hurdles in returning their ballots related to socioeconomic conditions, difficulties in finding childcare, lack of access to transportation, disability, or work constraints.

Despite the fact that Arizona law already criminalized fraud involving wrongful possession or collection of another person's ballot, H.B. 2023 was enacted to make it a felony to carry anyone's ballot if they are not a family member, caregiver, household member, or a postal or election worker.<sup>77</sup> This bill added no security benefit because ballots undergo a signature verification process once received by the county, irrespective of who delivered the ballot. Only ballots with a matching signature will be counted. Forging ballots was already illegal and already prevented by signature verification, thus the law has done nothing more than prohibit effective and good faith efforts to increase voter participation and criminalize everyday activities.

The original predecessor of the modern bill was introduced in S.B. 1412 was introduced when Arizona was subject to preclearance under the Voting Rights Act.<sup>78</sup> On May 18, 2011, Arizona submitted S.B. 1412 for the United States Department of Justice (DOJ) for preclearance.<sup>79</sup> Parts of the bill were cleared, except for the third party ballot collection.<sup>80</sup> DOJ sent a letter to Arizona concerning that provision, stating the information provided with the request was "insufficient to enable [DOJ] to determine that the proposed changes have neither the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group."<sup>81</sup> DOJ requested more information but the Attorney General pulled the request and the state legislature repealed the provision.<sup>82</sup> Another ban on ballot collection was signed into law in 2013, but when voters organized to put that law on the ballot in the form of a referendum (a method to repeal law in Arizona and prohibit future laws that undercut the purpose of the referendum) the law was repealed.<sup>84</sup> Finally, the contemporary version of the law was introduced and passed in 2016 in the form of H.B. 2023.

The Ninth Circuit Court of Appeals found that H.B. 2023 violated Section 2 of the Voting Rights Act and the 15th Amendment of the United States Constitution because of its racially disparate impact and because it was passed with racially discriminatory intent. However, the Supreme Court of the United States reversed these holdings in *Brnovich v. Democratic National Committee*.

Because of the barriers in access to mail, the ban on ballot collection has disproportionately harmed Native American communities and the laws limited exceptions and constrained definitions of family do not comport with Indigenous definitions of family or kinship. Because H.B. 2023 criminalizes carrying a ballot for someone outside of the limited exceptions, it ignores Tribal family structures and limits the ability of families living on reservations to overcome existing barriers to mail.

On October 1, 2019, in a field hearing before the House Subcommittee on Election Administration in Phoenix, Arizona, the sponsor of the H.B. 2023, Senator Michelle Ugenti-Rita, was asked, "were you aware of Tribal opposition to your bill before today?" The bill sponsor responded, "Yes, sir." When asked "Did you or any members of your staff invite Tribal participation at the hearing before the Elections Committee that you chaired on H.B. 2023? That is a yes or no question." The bill sponsor responded "It is open to the public."

ii. Voter Identification at the Polls (S.B. 1072) (2019)

In 2019, the state of Arizona passed S.B. 1072 requiring the use of identification at in-person early voting locations. Between 2004 and 2019, Arizona's voter identification requirement was limited to in-person election day voting because for early voting, signature verification is used to confirm a voter's ballot. Voters that have access and the ability to vote by mail do not have to present identification.

Although Tribal identification is a valid form of identification under Arizona law, poll workers are not consistently trained on how to process Tribal ID and non-standard addresses present issues complying with voter ID laws. Poll workers often fail to recognize or accept Tribal ID which often results in wrongful refusal of a ballot or voters being wrongly given a provisional ballot.

Turning voters away for improper application of voter identification laws has been an ongoing issue across Arizona. Voters have been turned away because their identification does not match what is on the voter registration rolls. However, non-standard addresses are changed by counties on the voter registration rolls. For example, the counties instituted a process of assigning the District Service Centers' addresses as the address of the voters living on the Gila River reservation—thereby making it impossible to comply with the voter ID requirements because no one lives at the District Service Center.

iii. Ballot Curing (S.B. 1003) (2021)

In 2018, the Navajo Nation sued the state of Arizona and the three Arizona counties that spanned the reservation. One of the claims was rooted in the equal protection clause, due to unequal treatment between voters that signed the ballot but their signatures didn't match, and voters that failed to sign their ballot. This followed settlement reached in a lawsuit filed by the Republican Party that allowed voters in the 2018 General Election to have five days post election to cure their ballots by affirming their signature so their ballot could be counted.<sup>84</sup> Navajo Nation's lawsuit alleged that under the Equal Protection Clause of the 14th Amendment, unsigned ballots must be treated similarly. The Republican Party's settlement agreement, the practice of curing mismatched signatures up until five business days after the election, was codified in Arizona law in 2019.<sup>85</sup>

There were settlement agreements reached between the Navajo Nation, the State, and the three counties that included provisions related to treating unsigned ballots on par with signed ballots.<sup>86</sup> This settlement was critical to address the disparate rate at which Native Americans' ballots were unsigned, due to lack of ballot instructions in the Navajo language, to ensure that non-English speaking voters had the same opportunity to cure on par with mismatched signatures.

However, this agreement was quickly undermined. First, the Attorney General, whose office represented the Secretary of State in the settlement negotiations, objected to including the settlement language in the Election Procedures Manual. Second, the State Legislature passed a bill, S.B. 1003, to prohibit curing of unsigned ballots after election day.<sup>87</sup> Ballots with mismatched signatures have until five business days after the election.<sup>88</sup>

The clear intent of the bill's passage was to undermine the Navajo Nation's settlement without addressing either the equal protection or language access issues; instead, it sought to codify the problem that disproportionately affected Navajo voters and led to the lawsuit in the first place. When introduced in the Arizona legislature's House Committee on Government, the bill's sponsor, Senator Michelle Ugenti-Rita, referred to a lawsuit prompting the drafting of the bill. When asked by a member of the committee, "Can you share with us who brought that lawsuit and what class of votes they were bringing concerns for?" The bill sponsor responded, "I believe it was some of the Tribal nations and . . . there was an agreement reached with the Secretary of State's office . . . There was some litigation behind it, there was an issue. That's exactly why I want to address it in law."<sup>89</sup>

When S.B. 1003 passed both chambers of the Arizona legislature the Navajo Nation issued a statement saying "[t]his bill directly undermines the settlement the Navajo Nation reached in 2019 with the Arizona Secretary of State Office and Arizona Counties."<sup>90</sup> The President of the Navajo Nation, President Nez, stated that the Nation was disappointed in the actions of the Legislature "[T]o undermine the Nation's settlement with the state. The teachings of our elders tell us that the words we speak are sacred and have power. The actions of the Legislature undermine the words the state agreed to in its settlement with the Navajo Nation. This goes not only against Navajo teachings, but against the values of all Arizona citizens who should be able to trust the words of their government."<sup>91</sup> Despite the Nation's urging the Governor to veto the bill and honor the settlement agreements, the law went into effect.

iv. Ban on the Use of Private Funds (H.B. 2569) (2021)

In 2021, Arizona banned local governments that administer elections from using private funds to register voters or administer elections in Arizona. The bill's sponsor, Representative Jake Hoffman, recognized that the state of Arizona does not provide funds for the administration of elections and that it falls on the local governments to fund their elections.<sup>92</sup> In 2020, Arizona received \$11.5 million dollars in grant funding in 2020 to ensure that local election administrators could effectively respond to the public health crisis of COVID-19 and safely carry out the election.<sup>93</sup> Approximately \$10,854,120 of the \$11.5 million went to counties with that cover Tribal communities. Counties spent grants on training and paying poll workers, educating voters, renting venues that allowed social distancing, or cameras in order

to comply with Arizona law requiring livestreaming of the tabulation center, providing additional early voting, and purchasing drop boxes.<sup>94</sup>

It is critical to note that this bill severely impacts the abilities of smaller and more rural counties to administer elections because those counties do not have access to robust tax bases needed to raise revenue. This especially impacts Tribal lands. In Arizona, 42.1 percent of Arizona's total land is federal land and 27.1 percent of that federal land is Tribal.<sup>95</sup> Local revenue is primarily raised through property taxes, but federal land is beyond the taxing authority of the county government. This, coupled with the reality that rural Arizona is smaller in population and disproportionately poorer, results in a reality where some counties may lose access to voter registration and voter education simply due to lack of funds.

Deputy Elections Director Kimmy Olsen, of La Paz County, told NPR that the money the county received from private grants "was a godsend that it showed up on our doorstep the way that it did. Because like I said, us smaller counties, we do struggle to survive, to get the things that we need."<sup>96</sup> The Colorado River Indian Reservation is located within the boundaries of La Paz County.

Additional funding is necessary to assist Tribes in their voter registration and education efforts, to make Election Day, early voting, and absentee voting locations more accessible to Tribal communities, and to generally increase ballot access for Native American voters.

#### **IV. The Voting Rights Act**

Voting for Native Americans is a constant battle. Prior to 2013, the Native Vote was safeguarded by the Section 5 preclearance formula. This safeguard was lost when the Supreme Court of the United States issued its opinion in *Shelby County v. Holder*, removing one of the most powerful tools that Native American voters had to ensure equal ballot access. Before the *Shelby County* decision, Arizona was a covered jurisdiction.

In the aftermath of the Court's 2013 decision, Tribes have relied on Section 2 to protect and enforce their right to vote. Enforcing the provisions of the Voting Rights Act through Section 2 litigation is expensive and time consuming. Tribes have limited resources to bring voting litigation, and litigation does not protect the voting rights of Native Americans from bad law, as bad law goes into effect before litigation can occur. Over the last two decades, the Department of Justice has not filed a single case on behalf of Arizona's Tribes.

The Supreme Court's July 2021 decision in *Brnovich v. DNC* only rendered Section 2 litigation more untenable, as it greatly diminished Section 2's availability to successfully litigate vote denial claims in particular. At issue in *Brnovich* were two Arizona voting laws, discussed above, that disproportionately impacted Native American voters: a law throwing out ballots if a voter casts their ballot at the wrong precinct, and a law banning non-fraudulent ballot collection. In 2020, the Ninth Circuit found that both of these Arizona policies were passed with discriminatory intent because of their impact on minority voters. In an amicus brief filed by the Navajo Nation, the Tribe explained the negative impact that the ballot collection ban had on its community, stating:

Due to conditions on the Nation, many Navajos rely on others to help them pick up and drop off mail. Because mail service is severely limited on the Nation, many Navajos rely on neighbors, friends, and clan members to pick up and deliver their mail. Navajos follow a kinship system that consists of more than 100 clans. Each Navajo belongs to four different clans. When a Navajo introduces himself or herself to another person who happens to share one or more of the same clans, they become related through clan. Clan relationships are similar to that of familial relationships such as brother, sister, mother, and father. [The ballot collection ban policy] excludes these traditional Navajo familial relationships by limiting familial relationships to someone related by blood, marriage, adoption, or legal guardianship. Arizona's ballot collection law criminalizes the way in which many Navajos have historically handled their mail-in ballots, and it increases the disparity between off-reservation individuals and Navajo voters who do not have the same opportunity to vote by mail.<sup>97</sup>

In upholding Arizona's ballot collection ban and out-of-precinct policy, the majority in *Brnovich* offered five "guideposts" to consider when determining whether a voting practice violates Section 2: (1) the size of the burden imposed; (2) the degree to which it departs from what was standard practice when Section 2 was amended in 1982; (3) disparities in its impact on members of minority groups; (4) the opportunities provided by a state's voting system; and (5) the state interest being served by a challenged policy.<sup>98</sup> Thus, if the Voting Rights Act was a sword, *Brnovich* made

its blade significantly duller by adding factors that weigh against the interests of the plaintiff.

#### **V. Election Protection Program**

The Clinic engages in education, outreach, and technical assistance to assist Tribes in preparing for elections. The Clinic also educates county and state officials about the barriers to voting that Native American voters experience. As part of the Election Protection Program, the Clinic has trained hundreds of volunteers to assist Tribal voters on Election Day. We have also participated in election-related litigation to protect the rights of Native Americans to participate in the electoral process.

In 2019, the Inter-Tribal Council of Arizona began hosting “Native Vote Strategy Sessions” where Tribes and others could discuss and collaborate on addressing barriers to voting. These sessions often include invitations to County Recorders, Election Administrators, and their employees, in order for different entities to understand issues and work together to find solution. This was necessary because neither Federal nor Arizona law require Tribal consultation. While many sessions were fruitful, many counties chose not to participate or send representatives.

While we have been able to forge strong relationships and networks, we cannot force the state or counties to come to the table. An enforceable obligation requirement is necessary to ensure that those living on-reservation have equal and equitable access to voter registration, vote by mail, early voting, and election day voting.

A major part of our Election Protection Program is recruiting and training volunteers to assist voters on Election Day. The common types of incidents include: voters not found on the voter rolls, issues related to provisional ballots, failure to issue provisional ballots, lack of voter identification, voter intimidation, problems with early ballot requests, long lines, and inadequate poll worker training, problems with reservation addresses, polling locations not opening on time or closing early, and voters who were unable to vote and denied a ballot.

In 2018, the Indian Legal Clinic created a polling locator tool to assist reservation voters. No polling locator tool in Arizona accommodated nonstandard addresses. The Indian Legal Clinic worked with the Arizona Advocacy Network and U.S. Digital Response to develop a polling locator tool that relies on drop pins to determine a voter’s precinct, as opposed to a search engine that relies on standardized addresses. This tool is critical, as Arizona’s out-of-precinct policy results in 1 in 100 Native American voters’ having their ballots discarded. Still, additional solutions are necessary to fix the voting problems associated with the lack of standard residential and mailing addresses in Indian Country.

In 2020, one of the Arizona Native Vote Election Protection Program volunteers stationed in Chinle, Arizona on the Navajo Nation, witnessed the delay in opening the polling location. Reports to the Arizona Native Vote hotline came in to report that two other polling locations on the Navajo Nation, in Red Mesa, Arizona and Window Rock, Arizona, were also not opened on time resulting in voters having to wait over an hour to vote. The Clinic worked with our volunteers to take declarations and assist the American Civil Liberties Union and the Navajo Nation as they sought a court order extending the time at which the polls are closed to make up for lost time. Ultimately, the Plaintiffs were successful in extending the hours of the polling location. The Native Vote hotline received a call confirming that at least one voter was able to vote as a result of the court order.

The Clinic was also involved in two cases prior to the 2020 General Election. One involved the attempt to kick a Native American candidate off the ballot due to non-standard addresses and the other involved the closure of the early voting location on the Pascua Yaqui Reservation.

##### *A. Dedman Candidate Challenge*

In 2020, a non-Native American candidate challenged the candidacy of a member of the Navajo Nation and resident of the Navajo reservation, running for Apache County Sheriff.<sup>99</sup> Cope Reynolds, a candidate for Apache County Sheriff, challenged Joseph Dedman’s petitions for a number of reasons, including petition signers not “providing a residence address within the district of the office the candidate is seeking at the time the petition was signed.”<sup>100</sup> Reynolds also alleged that a number of signatures were unreasonable to be obtained in one day “due to time and distance.”<sup>101</sup> These allegations relate to the continuing barrier that Native Americans face when engaging with the electorate due to nonstandard addresses.

The court ultimately found that Dedman had presented a sufficient number of signatures to remain on the ballot, but nonetheless demonstrates the continued burden of nonstandard addresses.

### B. Pascua Yaqui Early Voting Case

In 2020, the Pascua Yaqui Tribe in Arizona filed a lawsuit to restore the reservation's in-person early voting location. The early voting location would have cost \$5,000 for Pima County to operate, and the Secretary of State was willing to cover the costs. Nevertheless, the County denied the Tribe an on-reservation early voting location. As a consequence of the County's denial, on-reservation voters without vehicles were required to take a two-hour round trip bus ride to cast an early ballot. Rather than spending \$5,000 to give Native voters equal access to in-person early voting, the Pima County Recorder's Office spent \$180,705.39 on legal fees to deny its decision.<sup>102</sup>

The case was settled in 2021 between the Pascua Yaqui Tribe and the newly elected Pima County Recorder, Gabriella Carzares-Kelly (Tohono O'odham), was elected. The parties signed an agreement to establish an early voting site on the Pascua Yaqui reservation before the 2022 midterm election for every statewide primary and general election.

### VI. Conclusion

More must be done to address the discriminatory practices and dilution of the Native American vote through suppressive voting laws. It is illogical to expect Tribes to expend considerable resources to litigate voting rights violations, especially when Congress has a trust responsibility to ensure that Tribes and their members have the right to vote. Part of this responsibility includes ensuring that Tribes can actually exercise their right to vote, and in that regard, the federal government has failed for decades. Congress has the opportunity to fulfill this responsibility by enacting much-needed voting rights legislation that would restore Section 2 and reduce the burden on Tribes to expend much-needed resources on voting litigation.

### ENDNOTES

1 Many thanks to Native Vote Fellows Torey Dolan and Blair Tarman-Toner who assisted in preparing this testimony.

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The CHAIRMAN. Thank you very much.

It now gives me pleasure and pride to introduce my friend, Mr. Naalehu Anthony, Principal of Paliku Films. Mr. Anthony?

**STATEMENT OF NA’ALEHU ANTHONY, COMMUNICATE  
ADVOCATE AND PRINCIPAL, PALIKU FILMS**

Mr. ANTHONY. Aloha, [phrase in Native tongue] Schatz, [phrase in Native tongue] Murkowski, and [phrase in Native tongue]. [Phrase in Native tongue] Anthony [phrase in Native tongue].

Aloha, Chairman Schatz, Vice Chair Lisa Murkowski and Committee members. My name is Na’alehu Anthony and I come from

Ka'a'awa on the island of Oahu. Mahalo for the opportunity to provide testimony on Voting Matters in Native Communities.

The stakes are high across the Country and while there are numerous examples in the continental 48 that require your thoughtful consideration, my testimony is offered to highlight the unique perspectives that we face as Native Hawaiians in our ancestral lands.

He Ali'i ka 'Aina; he Kauwa ke Kanaka: the Land is the Chief and we are its servants. This 'olelo no'eau comes to us from our ancestors. We have been caretakers of this place we call Hawaii for more than a thousand years and over that time the responsibilities that we have taken left an undeniable imprint on the trajectory of this place, and an essential connection that should not be severed.

And yet, over the last 200 years, we have shared the common story with other Native peoples testifying today, of cultural and physical genocide. With our lands and people no longer cared for by a Hawaiian governing entity and instead assimilated into the U.S. mainstream, our voice in the democratic process has dwindled.

I fear that without engagement in voting, and therefore standing with a voice of authority in government, the world view that has persisted here will no longer be the dominant one of this place. The future story with Native Hawaiians in it will be in jeopardy if we can no longer see ourselves in the reflection of that mo'olelo, that story.

There is an insidious belief in the politics of Hawaii: Hawaiians simply don't vote. I have heard it many times. And we don't actually know the truth to that statement because our political organizers lack quality data to help us truly understand voting habits and sentiment toward electoral politics amongst our Native Hawaiian community.

The possibility of holding Hawaiian-only elections disappeared in 199 with the ruling in *Rice v. Cayetano*, which also took away our ability to understand who amongst our majority-mixed-race Hawaiian community vote with their Hawaiian identity in mind. Our grassroots organizations lack the research budgets necessary to better understand who of those community members vote or do not vote, and therefore how we might be able to activate and inspire them.

We would deeply appreciate the help of this Committee to improve our access to data that will help inform and empower our community.

Underrepresented in local, statewide and national politics, Hawaiian interests, like those of many other Native peoples, have been marginalized, ignored or actively opposed time and time again. So one might ask, if voting changes nothing for us, why bother?

The threshold for "why bother" is high, not only due to the lack of faith in government, but also because of the extraordinary social and economic pressures our communities are under. We live in a place where virtually everything is imported. We have become accustomed to shipping most of our food in, even though these islands fed close to one million people before the point of Western contact. We have some of the highest costs for everything here, from milk and bread to utilities like electricity.

One of the most troubling benchmarks is the median cost of a single-family home: now more than \$1 million on the island where I live, Oahu. The economists tell us that the qualifying income for that \$1 million median home would be just about \$140,000 a year. Though local economic data for Native Hawaiian households is not as readily available as we would like, data from the Census Bureau indicates the median household income for Native Hawaiians and Pacific Islanders nationwide was just under \$67,000. Nationally, Native Hawaiians and Pacific Islanders make only half the money they would need to afford a house on Oahu.

That statistic alone threatens our ability for Native Hawaiians to vote in Hawaii, and the income figures quoted above are pre-pandemic, not yet reflecting the outsized economic burden Covid-19 has had in our community. Far too many of us have fallen through the cracks. Increasingly more and more of us find it easier to pack up and leave for other States than slip deeper and deeper into debt in an attempt to remain in our ancestral home.

This phenomenon has become even more acute with the pandemic as Hawaii has become the lifeboat for the extremely wealthy seeking the relative safety of the islands and our low Covid rates. Houses are still being bought sight unseen with cash from those who can now work remotely. Put simply, we are being forced to leave due to the high costs required to persist here.

This is problematic, as there are simply fewer of us left to vote in Hawaii elections. Those of us who remain are under increasing pressure to just make it every day.

Before the 2020 election, Hawaii saw two decades of voter turnout with percentages in the 30s and 40s, some of the lowest turnout in the United States. That figure alone should cause concern for this Committee. Individuals and communities who lack faith in and engagement with the established political systems seek other avenues to make their voices heard, as our community has with increasing visibility and effect in recent years.

A healthy democracy requires representation, and we as Native Hawaiians need our perspectives weighed and counted, so that we may and once again take on the kuleana, responsibility, for this place we call home.

I thank you for your time today and look forward to any questions that you might have. Aloha.

[The prepared statement of Mr. Anthony follows:]

PREPARED STATEMENT OF NA'ALEHU ANTHONY, COMMUNICATE ADVOCATE AND  
PRINCIPAL, PALIKU FILMS

Aloha Chair Brian Schatz, Vice Chair Lisa Murkowski, and Committee members, My name is Na'alehu Anthony and I come from Ka'a'awa on the island of O'ahu. Mahalo for the opportunity to provide testimony on "Voting Matters in Native Communities." The stakes are high across the country and, while there are numerous examples in the continental 48 that require your thoughtful consideration, my testimony is offered to highlight the unique perspectives that we face as Native Hawaiians in our ancestral lands.

He Ali'i ka 'Aina; he Kauwa ke Kanaka: the Land is the Chief and we are its servants. This 'olelo no'eau comes to us from our ancestors. We have been caretakers for this place we call Hawai'i for more than a thousand years and over that time the responsibilities that we have taken left an undeniable imprint on the trajectory of this place, and an essential connection that should not be severed.

And yet, over the last 200 years, we've shared the common story with other native peoples testifying today—of cultural and physical genocide. With our lands and peo-

ple no longer cared for by a Hawaiian governing entity and instead assimilated into the US mainstream, our voice in the democratic process has dwindled. But it is clear that the ability to vote and engage in government is critical to the continuity of the responsibility we have to this place as Native Hawaiians.

I fear that without our engagement in voting, and therefore standing with a voice of authority in government, the worldview that persisted here will no longer be the dominant one of this place. The future story of Hawai'i with Native Hawaiians in it will be in jeopardy if we can no longer see ourselves in the reflection of that mo'olelo, that story.

There is an insidious belief in the politics of Hawai'i—Hawaiians simply don't vote. It comes up again and again in conversations about engaging the Hawaiian population during each new voting cycle. "Why talk to them? Hawaiians don't vote." I have heard it many times. And we don't actually know the truth to that statement, because our political organizers lack quality data to help us truly understand voting habits and sentiment toward electoral politics amongst our Native Hawaiian community. The possibility of holding Hawaiian-only elections disappeared with the 1999 ruling in *Rice v. Cayetano*, which also took away our ability to understand who amongst our majority-mixed-race Hawaiian community vote with their Hawaiian identity in mind. Our grassroots organizations lack the research budgets necessary to better understand who of those community members vote or do not vote, and therefore how we might be able to activate and inspire them. We would deeply appreciate the help of this committee to improve our access to data that will help inform and empower our community.

But anecdotally, it's easy to extrapolate why Hawaiian voters may not see the effort of voting as worth their time. Underrepresented in local, statewide and national politics, Hawaiian interests—like those of many other native peoples—have been marginalized, ignored or actively opposed time and time again. So, one might ask, if voting changes nothing for us, why bother? The threshold for "why bother" is high, not only due to lack of faith in government, but also because of the extraordinary social and economic pressures our community members are under. We live in a place where virtually everything is imported. We have even become accustomed to shipping most of our food in, even though these islands fed close to one million people before the point of Western contact. We have some of the highest costs for everything here—from milk and bread, to utilities like electricity.

One of the most troubling benchmarks is the median cost of a single-family home: now more than one million dollars on the island where I live, O'ahu. The economists tell us that the qualifying income for that \$1.05M median home would be just about \$140,000, while the median household income on our island is \$102,100. Though economic data for Native Hawaiian households is not as readily available as we'd like, data from the census bureau indicates the median household income for Native Hawaiians and Pacific Islanders nation-wide was just under \$67,000. Nationally, Native Hawaiians and Pacific Islanders make only half the money they'd need to afford a house on O'ahu.

That statistic alone threatens the ability for Native Hawaiians to vote in Hawai'i, and the income figures quoted above are pre-pandemic, not yet reflecting the outsized economic burden COVID-19 has had in our community. Far too many of us have fallen through the cracks. We need to put food on the table, make it to our third job on time, see that our children are cared for, and political engagement just simply may not make it to the priority list. And increasingly more and more of us find it easier to pick up and leave for other states rather than slip deeper and deeper into debt in an attempt to remain in our ancestral home.

This phenomenon has become even more acute with the pandemic as Hawai'i became the lifeboat for the extremely wealthy seeking the relative safety of the islands and our low COVID rates. Houses are still being bought sight unseen with cash from those who can now "work remotely." Put simply, we are being forced to leave due to the high costs required to persist here.

These economic pressures decrease our ability as Native Hawaiians to effectuate change here for two reasons: first, there are simply fewer of us left to vote in Hawai'i elections. And those of us who remain are under increasing pressure to just make it by every day, disillusioned by a system that continues to fail this community, and with little faith in government to follow through with meaningful change in response to their voters' mandates.

Before the 2020 election, Hawai'i saw two decades of voter turnout with percentages in the 30's and 40's: some of the lowest turnout in the United States. That figure alone should cause concern for this committee. Individuals and communities who lack faith in and engagement with the established political systems seek other avenues to make their voices heard, as our community has with increasing visibility and effect in recent years. A healthy democracy requires representation, and we as

Native Hawaiians need our perspectives weighed and counted, so that we may and once again take on the kuleana—responsibility—for this place we call home.

The CHAIRMAN. Mahalo.  
Vice Chair Murkowski?

Senator MURKOWSKI. Thank you, Mr. Chairman, and thank you to all those who have joined the Committee here this afternoon, and for sharing as you have.

I am going to start my questions directed to you, Julie Kitka. Julie, thank you for your leadership at AFN. You have a decades-long tenure there that again, I mentioned to the Committee, you are no stranger to the Committee here, but you are also no stranger to these issues. You have worked through so many issues of discrimination as they relate to Alaska Native peoples. Certainly, when it comes to the voting rights issues, you have been engaged in this for many, many years. I want to thank you for your efforts and those of so many Alaska Native leaders that have worked hard to combat the disenfranchisement of Alaska Native votes.

Your testimony is very thorough, and I think shares well the concern that voting rights violations unfortunately are not a thing of the past, as you have outlined. There are some differences, I would suppose, on the need for, when we are talking about Federal voting rights legislation, there are some differences of opinion on whether or not one sees a role for the Federal Government in the administration of State elections. It is usually your States that set the rules and the elections are run at the local level.

Julie, in your statement, you have repeated it here today, it is really quite telling to know that more regions of Alaska are currently designated for Federal observers under the Voting Rights Act than in the remainder of the United States. It is an important thing to include as part of the record.

If you can share with the Committee, please, how the Section 5 pre-clearance provisions in the Voting Rights Act worked to stop voting discrimination in Alaska. I think one of the things we are trying to do here is to prevent these issues of discrimination in the first place. Can you speak to Section 5 of the Voting Rights Act?

Ms. KITKA. I can speak directly on how we dealt with Section 5. There were changes in the process. The authority was required to notify people that the changes had come. So I would get a letter in the mail that would say, on such and such and such we are changing this, we are closing this or whatever. But you were given that advance notice so that you could respond.

Sometimes the changes you just thought, oh, this is minor, put it aside, it is not a big thing. Other things were bigger. So the pre-clearance was critically important because they gave you a chance to be alerted to these changes and assess whether or not those were significant to your community or not. If they were, we could alert other people. Our tribal leaders would get them, we would get the letters. Now, since the Shelby County decision on that, the lack of the pre-clearance, we get no letters. We get no notification that this change is happening or that.

So it takes away the ability for us to respond. We believe in voting rights, in these issues, that there are mutual responsibilities. There are responsibilities for us as Native leaders, to do our part. And there are responsibilities for government.

If we are not notified of the changes, we don't have the ability to exercise our responsibility. And as I mentioned in my testimony, I probably didn't elaborate, because I know you know that our way of life creates a lot of barriers. We live in one of the largest land masses in the United States. We have tremendous diversity across our State, very remote and isolated communities.

For us to do our responsibility to participate in this democracy, for us to do our responsibility to advise government when they make changes that have negative impacts, we are blocked from doing that. Then people say, well, how is this happening right now? Why are there all these problems? It is not just bad people. It is not just ill-informed people. You are talking about people versus systems. You are talking about inertia that happens in these systems.

You talk about perceived lack of funding where election officials say, we have to tighten our belts and make money stretch further on that. At the same time, they have money in an interest-bearing account that they could use to solve it.

But the pressure is on government to cut corners or to stretch funding. Further, real human beings make decisions based on those pressures. Often, we are the ones that lose out on that. This emphasis on cost-cutting, again, the inertia. Some of it is bureaucratic. Some of it is people that are just tired of this stuff and have lost the spark and enthusiasm of what they are doing in their job and how exciting it is to be on the cutting edge on voting and empowering your people.

What we want to do is we want to exercise our responsibility. In order to exercise our responsibility on the pre-clearance, we need to be informed. So that is kind of a short answer. I could fill that out in written comments. But that is a practical example.

Senator MURKOWSKI. [Presiding.] It is a strong example, and I think we recognize that in a State, as you point out, where geography is massive, it is not just distances, it is distances that come about when you have limited communications access through broadband, when you don't have connectors by roads. So there are many ways where you are literally cut off. So how you communicate is something that is clearly a challenge for us.

We are going to turn to Senator Smith for her questioning.

**STATEMENT OF HON. TINA SMITH,  
U.S. SENATOR FROM MINNESOTA**

Senator SMITH. Thank you very much, Madam Vice Chair, and to our chair as well. Thank you also to all of our panelists today. You provided us a thorough and sobering review of the many challenges that Native voters experience as they attempt to exercise, as you attempt to exercise your freedom to vote, and the disparities that you are confronted with.

I also appreciate the way in which you highlighted the particular trust and treaty responsibilities that we have to ensure that Native voters are able to access your freedom to vote.

I would like to dive in one general question and one specific question. I am going to start with the specific question, which I am going to direct to Ms. De León. This has to do with vote by mail.

In Minnesota, we are quite fortunate to have accessible and secure vote by mail infrastructure. Minnesotans rely on this option to vote safely and securely by election day.

But of course, this strong vote by mail infrastructure relies on the Postal Service to deliver ballots to voters and to election officials on time. I have been quite concerned about this. I recently asked Postmaster General Louis DeJoy to explain how changes to first class mail service that he is putting forth will impact tribal communities. This is extremely important when it comes to voting access for Native people.

Mail access, as many of you have described, is already quite difficult in some tribal communities, especially if homes are on tribal lands, don't have traditional addresses, as you have pointed out, or if the nearest post office or post office box is miles and miles and miles away.

Ms. De León, could you talk about what we need to do, ways to improve access on tribal land, to mail-in voting when it might not be fully accessible and while voters are faced with relying in the Postal Service for speedy delivery even as they are rolling back standards of service for first class mail?

Ms. DE LEÓN. Thank you so much for that question. I think it would be important to note that vote by mail is difficult because of the structural reasons that you described. What NAVRA does, which I think is a practical solution, is it allows tribes to designate a building that has an address that can be used to register, pick up and drop off ballots.

This is important, because not only is that a familiar place for many tribal members, but it also gets rid of confusion, and it would be closer in a lot of instances than post offices that can be a significant distance away.

The nice thing is that they have actually recently implemented this exact system in Washington State, which has a lot of experience with vote by mail. That has been met with success as well.

So NAVRA extends those provisions nationwide, because as you know, the problems with mail deliver in Indian Country is a nationwide problem.

Senator SMITH. Thank you very much. I completely agree with that.

I just have a minute or two left, so I am going to ask my broad question. As you have all shown today in your testimony, there are so many ways that Native peoples' access to voting is restricted. I would like to ask you, whoever on the panel, what do you think are the one or two most important things that the Federal Government could do to address these barriers for Native and tribal communities?

I will turn to Janet Davis to begin.

Ms. DAVIS. In our case, I think it is very important that there is Federal law that will make the tribes be able to have that access throughout everywhere. As you know, even throughout, right now, States provide different avenues and restrictions to voting. I would like to say in Nevada, Nevada has been very good. They passed a State legislation, they are doing things on a State level to make access to our tribes.



I think if other States could follow that example, and if your new law is voted into place, that would actually help and designate other States to follow along as well. That is my thought, to make it uniform across the board.

Senator SMITH. Yes. So if there was a basic national standard—pardon me.

Ms. DAVIS. Yes, a national standard. So, all States are doing what they want to do at all different levels. I think that goes for all voting, even non-tribal. But there has to be consistency across, throughout all of our land as well to allow equal voting access for everyone, not only Native Americans.

Senator SMITH. Thank you very much for that.

Mr. Chair, I believe I am out of time. I yield back.

The CHAIRMAN. [Presiding.] Thank you very much, Senator Smith.

Senator Daines?

**STATEMENT OF HON. STEVE DAINES,  
U.S. SENATOR FROM MONTANA**

Senator DAINES. Chairman, thank you.

First of all, let me state by saying that ensuring that all eligible voters can vote, that they can be certain that their ballot counts, is a goal that we all share on both sides of the aisle. The Native Voting Rights Act does not further the goal of free, fair, and secure elections. In fact, looking at Montana, we have had extraordinary levels of voter turnout, 81 percent in 2020, 72 percent in 2018, 74 percent in 2016. In Montana, our legislature, our secretary of State, and our governor took the necessary steps to ensure integrity of our elections going forward.

But for months, my Democrat colleagues have felt compelled to mislead the truth and the facts about voting in Montana. So let me set the record straight.

We put in place some commonsense reforms that enjoy the support of the vast majority of Montanans, requiring photo ID. If you want to go get a library card at the library, you produce a photo ID. If you want to buy a fishing license, if you want to buy a hunting license, you produce a photo ID. That is so every county, every tribe, every State can deal with the challenges that they uniquely face.

The Native American Voting Rights Act contains a number of provisions that are ripe for fraud, such as sending unlimited absentee ballots to tribally designated public buildings, rather than directly to the voter. In her written testimony, Ms. De León talks about Montana's ballot harvesting plan. But she mischaracterizes the nature of this legislation and fails to acknowledge that Indian Country widely supported a voter passed ban on ballot harvesting in 2018. Go back and look at the specific precincts in Indian Country, widely supported.

First and foremost, the Montana law only bans people from being paid to collect ballots. It doesn't ban ballot collection in its entirety. Even the Carter Baker Commission suggested that handling of absentee ballots should be limited, and the Supreme Court, just as you noted, there are a number of legitimate reasons to limit ballot harvesting.

In Montana, we want everyone legally allowed to vote to be able to do so. We want there to be zero doubt that those votes indeed will be counted. All Montanans, Republicans, Democrats, Independents, Libertarians, should have faith in our elections.

Ms. De León, last week you testified in front of the Judiciary Subcommittee on the Constitution. At that hearing, Senator Cruz rightly pointed out that no witnesses invited by the Democrats addressed any concerns with ballot harvesting.

So to that point, what makes you so confident that no fraud will occur with paid ballot harvester?

Ms. DE LEÓN. Thank you so much for that question. I would like to make a couple of notes in response to your questions and your statement.

First, while Montana has about an 83 percent turnout, unfortunately, in Native communities, that turnout is about 65 percent, so, significantly lower. In fact, in 2014, right before Montana was sued under Section 2, Fort Salish [phonetically] provided on-reservation polling places, the turnout on reservations was about 30 percent.

So this was in our very recent history that Montana was forced to place on-reservation polling places and attempt to increase voter turnout. That has increased, but it still lags behind those of the rest of Montana.

As for the ballot collection law, I think that it is noteworthy that there was a previous ballot collection law, as you note, the 2018 initiative. Upon review, five tribes joined us in suing against that law. While we were successful in State court, under the State constitution election vote provisions, the ballot collection ban was found to be unconstitutional because of the burden it placed on Native Americans.

The most recent attempt to ban ballot collection, which would effectively make it so that organizations could not pick up and drop off ballots, was found from the Montana Advisory Committee to the U.S. Commission on Civil Rights intentional discrimination on behalf of Montana's State legislature.

The reason that I am so confident that fraud will not occur is because I can look at the past history, I can see that there is no record of a significant amount of fraud, and that in instances where fraud occurred, that is already prosecuted under laws that outlaw fraud. If we have concerns about fraud, things like ballot tracking are significant steps that States can take to ensure ballot integrity when allowing State practices like ballot collection.

I will also note that NAVRA similarly includes a provision that says you cannot be paid for the number of ballots that are collected, but that organizations can still pay individuals for getting out and picking up and dropping off ballots. Because it does take a significant amount of time and it takes a significant amount of resources to collect and drop off ballots on vast Montana reservations. That is what the most recent ballot collection ban would prohibit. That is why we continue to challenge that law in State court.

Senator DAINES. I am out of time, Mr. Chairman. Thank you.

The CHAIRMAN. Thank you.

Senator Cortez Masto?

Senator CORTEZ MASTO. Thank you.

Chairwoman Janet Davis, let me ask you this question. I think this is important for purposes of what is happening in Nevada, to talk a little bit about why I support these voting right reforms. You mentioned AB4. AB4, which was introduced and passed by legislature actually was later repealed, but it was replaced with AB321 in the 2021 legislative sessions. It made important reforms that impact our Native communities.

One of this, as my understanding of the reform was, it took away the obstacles to picking up and dropping off mail which is extremely common for Native Americans in Nevada. In other words, to pick up and drop off mail for one another, which would include the mail-in ballot.

Can you talk a little bit about why was that a barrier, and is that something our Native communities supported?

Ms. DAVIS. Our Native communities support that. As you know, for us, our post office right now, the postmaster comes whenever they want. Right now, we are dealing with, because we are a small community, if we see that lady's car down there, we race down there to check our mail. It has no set time frame for us to pick up mail.

So the narrow drop-off, ballot drop-off here that was at our administration building made it easy for people to vote and to drop off their ballots. As you know, we all live in extended family housing where there is mother, daughter, brother, maybe an uncle, an aunt, able to help drop off that ballot. But the laws that were restricting that was only that person that voted could drop off the ballot. So when the laws were changed in the State of Nevada to allow the pickup of the ballots and the drop-off, it made it more easy for our citizens, our community members to drop off their ballots.

Senator CORTEZ MASTO. Why was it important, instead of restricting just the individual who voted to drop off the ballot, to allow family members or others to drop it off?

Ms. DAVIS. Because you have people that live, again, a great distance away that may not have a car, may not have that access to drop off ballots, for whatever reason. It just made it easier and it would allow more people to cast their ballots. It just made it more easy for everyone to vote.

Senator CORTEZ MASTO. To your knowledge, was there fraud associated with that?

Ms. DAVIS. Oh, no. Definitely not. I think everyone insists that there is fraud. But for Native Americans to vote, you do it because you want to cast your vote, you do it proudly, you are not going to defraud. Again, we are trying to honor our ancestors by casting our votes. There isn't fraud involved, there hasn't been in the past. There hasn't been any fraud.

Senator CORTEZ MASTO. To my knowledge, not only, there was a lawsuit that was filed against AB4, if I am not mistaken, it was Donald J. Trump for President, Republican National Committee and Nevada Republican Party v. Barbara Cegavske, who is our Secretary of State and also happens to be a Republican. It was filed in the District Court for the District of Nevada, but it was eventually dismissed by the judge. The judge said, not only have the challengers failed to allege a substantial risk of voter fraud, but the

State has its own mechanisms for deterring and prosecuting voter fraud.

So I think it is important that we do not get caught up in the partisanship and the politics. We need to focus, if we truly are going to work in a bipartisan way, to allow voters to vote in the manner that works for them. Wouldn't you agree with that?

Ms. DAVIS. That should be the ultimate goal of all parties involved. We do want people to vote. That should be ultimately why are here today, for that matter. We want people to vote. We want to hear what they want.

So with that being said, I have to agree.

Senator CORTEZ MASTO. Thank you. Thank you, Chairwoman. I yield back.

The CHAIRMAN. Thank you, Senator Cortez Masto.

Ms. De León, simple question. Is voter fraud a concern in Indian Country? Does it happen?

Ms. DE LEÓN. No, not in significant numbers. It has not been recorded. There haven't been instances of voter fraud of note in Indian Country. There have been false accusations that have been successfully rebutted.

The CHAIRMAN. Can you give me a couple of examples, just very briefly, of allegations that have been proven to be false?

Ms. DE LEON. Sure. In South Dakota, following the election, a close election that was ultimately decided by Native voters, a Congressional election, there was a rumor, a persistent rumor of rampant fraud on the, within the reservation. In fact, 15 affidavits were submitted to that effect.

Those were all investigated and there was no finding of fraud. They were false allegations. In fact, unfortunately, the perception that Indian Country or that Native Americans are somehow incapable of running fair and safe elections is false and is damaging, because Native Americans are trustworthy Americans that absolutely can and should run elections with integrity.

The CHAIRMAN. Thank you very much.

Mr. Anthony, as you know, Hawaii consistently experiences low voter turnout, especially in districts where large number of Native Hawaiians live. Can you describe for the Committee efforts to increase Native Hawaiian voter engagement, including Aloha Rising, No Vote No Grumble, and what role Congress could play in helping to increase civic engagement among Native Hawaiians?

Mr. ANTHONY. Sure, thank you for that question. I think certainly having the resources to be able to engage voters in Hawaii is necessary, not just during the voting cycle when there is a lot of activity, but also during other opportunities where we can engage in making sure that we see the reflection of ourselves in this idea that voter engagement is important to further the trajectory of engagement to Native Hawaiians.

Most simply, it goes to this idea that we need resources, the resources to make sure that there is voter registration and that there is follow-up with some of the communities that are far out in rural areas, not unlike some of the descriptions that we have heard from other panelists today.

Certainly, I think that it is critical just to echo some of the other sentiments that we have heard by the other panelists, it is critical

for us to engage in voting, and it is critical for us to encourage everyone, not only because we have a civic duty to do so, but because it is how we have the ability to come together as communities to make the best decisions for our places and our spaces.

So certainly, the work that you are doing with Indian Affairs I think is really important for all of our communities. But specifically, the funds available to make sure that everyone understands the rules of how this is done and the ways in which we can ask for our communities to engage is critical. Thank you.

The CHAIRMAN. Thank you very much.

Professor Ferguson-Bohnee, what can we expect the impacts of the Brnovich decision to be on Native voters? Could the protections afforded Native voters under the Voting Rights Act be in doubt?

Ms. FERGUSON-BOHNEE. Yes, Mr. Chairman. The Brnovich decision has thrown a wrench in the ability to bring Section 2 cases. Native American voters will have a harder time succeeding and filing claims under the Voting Rights Act. They are severely impacted by the court's decision to adopt a de minimis impact factor, because the Native American population is already small in Arizona and reservation communities are a smaller subsection of an already small population.

So that is a huge concern for the Native American community, the opportunity to bring a case that will withstand Section 2. So yes, addressing Section 2 by creating a standard for vote denial is very important to the ability to uphold the purpose of Section 2 of the Voting Rights Act.

The CHAIRMAN. Thank you very much.

Senator Luján?

**STATEMENT OF HON. BEN RAY LUJÁN,  
U.S. SENATOR FROM NEW MEXICO**

Senator LUJÁN. Thank you very much, Mr. Chairman. Again, I want to thank you and the Vice Chair for the markup earlier, for the passage of legislation more appropriately, and also this important hearing.

Native Americans have the lowest voting rate of any American racial or ethnic group, an outgrowth of having one of the lowest voter registration rates in the United States as well.

Mr. Payment, what percentage of Native Americans are not registered to vote?

Mr. PAYMENT. I am glad I get a question. Thank you, Senator, and thank you again for introducing the legislation.

We have some updated data from the U.S. Census. There are about 7 million eligible Native voters across the Country. About 34 percent, our best estimate is about 34 percent remain unregistered to vote.

Senator LUJÁN. Mr. Payment, you answered my next question, which is what that number translates to. You said there is about 7 million. So is that approximately 2.4 million, that would equate to that 34 percent that are not registered to vote?

Mr. PAYMENT. Yes.

Senator LUJÁN. Ms. De León, you mentioned that Native Americans face many obstacles to voting. I also want to highlight, these obstacles are different from those faced by other language and eth-

nic minorities. Ms. De León, yes or no, do Native Americans face unique obstacles to voting that are not fully addressed in S. 1, and require more tailored legislation like the Native American Voting Rights Act and the John Lewis Voting Rights Act to adequately address?

Ms. DE LEÓN. Yes, absolutely.

Senator LUJÁN. Ms. Ferguson-Bohnee, some have characterized my legislation as an attempt to Federalize elections for Native voters. But the Constitution affirms that the Federal Government has a unique obligation to protect Native voting rights.

Ms. Ferguson-Bohnee, yes or no, does the Constitution grant Congress broad powers to legislate on the rights of Native voters under the authority granted in the Indian Commerce Clause, the Elections Clause, the Treaty Clause and Congress' plenary authority?

Ms. FERGUSON-BOHNEE. Yes, definitely. And Congress has exercised that in various areas.

Senator LUJÁN. Now, again, some have questioned whether the provisions of the Native American Voting Rights Act are unfunded mandates. Ms. De León, yes or no, isn't it true that the \$10 million grant program in the legislation would help with administering the requirements and the Help America Vote Act funding is available to help with the hard costs associated with running elections?

Ms. DE LEÓN. Yes, that is absolutely correct.

Senator LUJÁN. Now, some also have questioned the ability of States and precincts to administer the legislation. But we have examples in Washington State and in Nevada where we see provisions of the Native American Voting Rights Act being implemented with success. For example, Nevada got rid of ballot collection bans and has mandated polling locations on tribal lands.

Ms. Davis, yes or no, have these changes increased Native voter access?

Ms. DAVIS. Yes, it has, definitely.

Senator LUJÁN. And Ms. Davis, yes or no, in the instance of ballot collection, has there been any fraud or security problems, to your knowledge, in Nevada?

Ms. DAVIS. No, there hasn't been. Actually, it was challenged and it failed. So no, definitely not.

Senator LUJÁN. I wanted to bring attention to that particular question, because there was a question raised in the previous hearing in Judiciary about that. So that is an important answer, responding to that concern.

While 84 percent of the United States' population lives in urban areas, the majority of Native Americans and Alaska Natives live in rural communities on or near their tribal homelands, which often lack polling places. Ms. Ferguson-Bohnee, yes or no, currently do you see large disparities in access to polling locations between voters living on tribal lands and those living off tribal lands?

Ms. FERGUSON-BOHNEE. Yes, tribal voters definitely have less access to polling locations and in-person and early voting locations.

Senator LUJÁN. And Ms. Ferguson-Bohnee, yes or no, would you agree that the Native American Voting Rights Act would secure equitable access to polling places on tribal lands by ensuring a minimum of one polling location per precinct on tribal lands?

Ms. FERGUSON-BOHNEE. Yes, but just in addition, there is also a provision for larger tribes to request additional polling locations.

Senator LUJÁN. Mr. Payment, geographical isolation and the lack of mailing addresses hinders Native voters from accessing the ballot, because traditional addresses are needed to obtain non-tribal identification for voter registration. Mr. Payment, for many Native Americans, how far must one travel to get to the nearest DMV or obtain non-tribal identification?

Mr. PAYMENT. Senator, you heard my testimony, but you also heard from several of us today that it seems like a common occurrence that it as least up to an hour to drive to the DMV or Social Security office to register to vote. In some cases, it is almost as long to travel to get to poll sites as well.

Senator LUJÁN. I appreciate that very much.

Mr. Chairman, I have many other questions, but I will submit them into the record as well, and I just very much appreciate the testimony of everyone here today. I hope this is an area that we can find some common ground, work together.

But again, this legislation, as much as I would like to take credit for it, wasn't my idea. This was a result of Native American voting rights advocates coming to work with me, to present the importance of getting this done. That is why there are over 30 organizations including every known prominent Native American organization, organizations that represent tribes from across the United States, that have endorsed this legislation. So I am hopeful and prayerful that we can get his across the finish line.

Thank you very much. I yield back.

The CHAIRMAN. Thank you, Senator Luján. And thank you very much for your leadership in this space. We need it, and your bipartisan attitude and your determination on behalf of all Native peoples really helps us to advance this cause.

Vice Chair Murkowski.

Senator MURKOWSKI. Thank you. I too want to thank you, Senator, for your leadership on this.

I want to pick up, Mr. Payment, where Senator Luján left off, with the identification. Access to department of motor vehicles in Alaska and way too many of our communities is not possible. We don't have the DMV there, and there is no road out. So if you want to go get your license, you fly to a larger community.

I want to ask you, Mr. Payment, the importance of the ability for Native Americans to use tribally issued ID cards. Can you speak to the concerns that others have raised about any security issues that present themselves with regard to validity of tribally issued identification cards?

Mr. PAYMENT. Absolutely, Senator. I have a high respect for you as one of our U.S. Senators, and a close affiliation with our Alaska Native people. The conditions they live in are very similar, but more remote and more challenging than my community.

I did bring my tribal card to show you. It is an old one, so you can see my hair is black in this picture.

Senator MURKOWSKI. It doesn't look anything like you.

[Laughter.]

Mr. PAYMENT. And my hair is a little bit shorter. But we have a security strip on the back, and tribes are very guarded with our

tribal cards. There are issues of per capita, there are issues of membership services and identification, such that our identification cards are no less stringent than the State's process.

So the intimation from some that somehow we are less than either to conduct our own registration to vote or to have poll sites or to issue our own cards, these are legitimate cards that are equal to State driver's licenses. Again, to see the strip, it has data on the back of it, and a security strip. So we have very secure tribal ID cards to identify who we are as members and citizens of our tribes.

Senator MURKOWSKI. I appreciate that.

Let me ask, this was a question that was directed, I believe it was directed to Ms. De León just a moment ago, about the issue of unfunded mandates. One of the concerns that we have heard about the Native American Voting Rights Act is that it is an unfunded mandate on States. There is funding authorized, and I guess I would ask you if you are concerned about this aspect of the legislation. Can you identify what types of costs may be associated with some of the requirements that are called for, and what resources are available to States and tribes to implement some of the provisions under the Act?

Ms. DE LEÓN. Thank you so much, Senator, for a really thoughtful question.

I think we should start the conversation by just acknowledging that States have been failing their financial obligations to Native citizens. I think that States unfortunately have been very inequitable in the amount of money that they are willing to spend on tribal citizens. So they are acting a bit in a deficit there.

But there are funds available. As you mentioned, the grant program itself is funded, which will help with the transition. It also helps with the language access provisions, and also helps with poll worker training, some of the technical aspects.

As for the hard costs of starting a polling place, such as the need to buy some polling machines, to train workers, you can use HAVA funding in order to pay for those costs. We have seen satellite offices in places like South Dakota and Montana use satellite offices in order to meet the hard costs of starting a polling location in Indian Country.

I would say that the costs themselves aren't overwhelming. For a polling place, once you have acquired the machines, it is really about the labor of manning a polling place. But relative to State budgets and the like, it is relatively small. I think Professor Ferguson-Bohnee mentioned that in the Pascua Yaqui Reservation, it would have cost about \$5,000 to run the polling place. But the State spent \$180,000 fighting against it.

So we are not talking about overwhelming sums of money. And there is quite a bit of HAVA funding available throughout the Country. There is a surplus [indiscernible] Alaska, there is over a million dollars in States like Montana and South Dakota and others, over a million dollars. HAVA funding has different tiers, and those different tiers can be used for some of these hard costs. So there are available funds.

Senator MURKOWSKI. I am going to turn to you, Julie. Obviously, there are costs that are incurred when you are not only establishing the polling place, but then making sure that it is appro-



privately staffed with the trained poll workers. So as we look to different ways to make sure that there is greater access and fair and equitable access, we know that it is going to require more of those who are willing to step forward and be that poll worker. I know that in many of our villages that has been the greatest challenge, is to get sufficient people to basically work in the polling places.

So I look at some of the provisions that are included within both the John Lewis Voting Rights Act as well as the NAVRA, and a recognition that we are going to have to be training and bringing on more to ensure that these polling places are open.

So I would like your comment to that. But while I have you, and recognizing that I am over my time already, I want you to also address the issue that we have heard from the State of Alaska about concerns that ballots must be postmarked the day they are received at a postal facility located on Indian lands. We know that in Alaska, our mail delivery is oftentimes less than reliable, and that is probably putting it politely. So that is something that we are looking at within the legislation here as to how we might be able to address that.

But just two concerns here that I have raised. First is our ability to be able to find and train so we are adequately staffing the polling places, but particularly in some of these very small remote communities.

Then also the concern about this provision that says that ballots have to be postmarked the day that they are received at the postal facility. So if you can speak to those two.

Ms. KITKA. Thank you, Madam Vice Chair.

Especially during this pandemic, it has been really hard to get poll workers on that. People have been spooked by the disease and the contagiousness. So it has been difficult during this pandemic to get people.

But I want to describe really quickly the desire for people to help out is there. When we helped the State a number of years ago, when they said there wasn't any communities that wanted early voting spots, and we deployed a small group of people to contact them, we got 50 villages within just a matter of a couple of days of people wanting to have that.

We had them work with the State, fill out a form, email it back. We had one elder in one of our communities that didn't have a car, didn't have a four-wheeler, that walked miles to get to the tribal hall on that, to be able to use their internet to fill out the form to have an open voting area for her village on that.

The desire for people to have early voting and polling spots that are accessible to our people is there. It is overcoming the barriers. And also making sure that there are equities. I said in my testimony that when we had all these early voting spots that the State said, well, we will offer you an honorarium. People are working hours and hours for the honorarium, and the honorarium was \$100 for the whole time on that. When we calculated out how much that was, people were paid 15 cents an hour.

It is not the money, it is the lack of equity and the lack of respect for people wanting to commit their time to do it. At the same time, in the urban areas, they were hiring more people to build up their operations, to handle them, and they were paying them all \$15 an

hour. It was the inequity; it is not that people don't want to help out, don't want to volunteer, don't want to go to that extra effort. We found in our early voting process tremendous desire for people to help out and participate.

But I do think we are going to have added burdens with this pandemic as people get spooked by the contagiousness of the pandemic.

And your second question?

Senator MURKOWSKI. This was on the language in the bill currently that says that ballots have to be postmarked the day they are received at a postal facility, and the concerns that we have with reliability of a postal service, when you have weather issues, and just the challenges of getting mail in and out of villages.

Ms. KITKA. Yes. No, there is no doubt that we have storms all the time, which change things. We have a lot of dedicated people trying to deliver mail, but you can't take it to the bank. There are many obstacles; many things fall through the cracks. You cannot require the date stamp on that to make that work.

Senator MURKOWSKI. Okay, we will look at addressing that.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Lankford?

**STATEMENT OF HON. JAMES LANKFORD,  
U.S. SENATOR FROM OKLAHOMA**

Senator LANKFORD. Mr. Chairman, thank you very much.

I am not going to have a question to be able to ask, but I have a couple of comments and things that I want to be able to mention.

First off, I want to say thank you to all the witnesses who are coming. I have appreciated being able to listen in and being a part of the dialogue today, to be able to get some additional background on this. So I appreciate very much your engagement and what you are doing to make sure every person has not only the opportunity to vote, but the ability to be able to vote in America. That is essential to who we are as Americans that everyone has that opportunity and that ability to be able to get their vote in.

So thanks for that engagement. We need folks who are going to continue to speak out for every single person across the country to be able to have that opportunity and ability to be able to vote.

There are some questions I am going to continue to be able to go through. Oklahoma is unique in some ways in Indian Country and how that actually works for us. The definitions that are in this particular bill as I am going through it and trying to do some additional research seems to, it would take almost the entire State if not the entire State of Oklahoma, because we have some areas of reservation, some areas of non-reservation, some tribal areas, and they are listed as non-reservation tribal areas.

So we are trying to figure out this all-encompassing definition and what that would cause in the interaction between the States and the tribes and how that would actually operate there. This has been an area that we have been very, very engaged in in Oklahoma and have not had issues, thankfully, of opportunity and ability for individuals to be able to vote in Oklahoma from tribal areas.

So we will continue to be able to research and be able to drill down on this. It could have a pretty far-reaching effect in Okla-

homa in particular for some of the new definitions as well. So we are being very, very attentive to that.

Some of the changes that are also in the bill as well and how it would handle some of the issues like the drop boxes and what that would look like in every part of my State, what that would work with ballot harvesting and if that would then compel it or allow that when that is not in our State law, it has not been an issue in our State and has been something we have been very protective of, and how we actually handle absentee ballots.

We want to make sure that everyone has the opportunity to be able to vote early and everyone has the opportunity to be able to vote in person or, we have a no-excuse absentee as well. This would change that structure for everyone in our State.

So I am very attuned to that, to be able to make sure that we still have a basic function of how we are operating as a State in all of our voting issues.

The John Lewis bill this appears to be moving with also has an uncertainty for pre-clearance. Currently, Oklahoma is not a pre-clearance State, was not historically a pre-clearance State, did not have the same issues as some other States did in the 1940s, 1950s, and 1960s. So we were not included in that.

It is still uncertain if we would now be looped into becoming a pre-clearance State because of the uncertainty of those definitions in the John Lewis Voting Rights bill, because we don't know on what State suddenly becomes a pre-clearance and what does not based on how the definition is done.

The Federal observers, we don't know how that actually works and operates, to suddenly have Federal observers that are coming into our State elections.

Then the consent decrees or settlements that have been done in the past that appear to be something that would suddenly be, the State in the future would be punished for, when typically a consent decree or settlement, when it is done on a voting issue, it resolves the issue and moves on. The John Lewis bill reaches back 25 years and looks back to see anything that was done in the past, and may cause consequences for the future on that.

So we are trying to be attentive to all this. I have a few concerns that we are walking through on the days ahead on this and some issues that do need to be resolved, especially with the uniqueness of where we are as a State, but also to be able to continue to make sure that States and local areas are able to stay very, very engaged in the unique issues.

As everyone on this group knows, Alaska is different than Oklahoma is different than New York State or California or North Dakota or Arizona or Nevada. We want to make sure that every person has the opportunity and ability to be able to vote and that it works well for every person there.

Again, thanks for your engagement. Thanks for allowing me to be able to listen in today.

The CHAIRMAN. Thank you.

If there are no more questions for our witnesses, members may also submit follow-up written questions for the record. We want to thank all of our panelists for taking the better part of an afternoon and for some of you, the morning.

The hearing record will be open for two weeks. I want to thank all of the witnesses for their time and their testimony.

This hearing is now adjourned.

[Whereupon, at 4:49, the hearing was adjourned.]

# A P P E N D I X

## PREPARED STATEMENT OF FAWN SHARP, PRESIDENT, NATIONAL CONGRESS OF AMERICAN INDIANS

### Introduction

Chairman Schatz, Vice Chairman Murkowski, and members of the Senate Committee on Indian Affairs, on behalf of the National Congress of American Indians (NCAI), I would like to thank you for holding this hearing today to discuss the critically important issue of voting rights. My name is Fawn Sharp, Vice President of the Quinault Indian Nation, and President of NCAI.

We greatly appreciate the Committee holding this important hearing on how we can address barriers to ensure the federal government protects voting rights for all Native Americans. It is very timely with the introduction of the Frank Harrison, Elizabeth Peratrovich, and Miguel Trujillo Native American Voting Rights Act of 2021 (NAVRA) and the new John Lewis Voting Rights Advancement Act. With federal elections coming up soon, the Congress has a trust responsibility to enact voting rights legislation to protect the constitutionally-guaranteed right of Native Americans to vote.

Despite being the first inhabitants and sovereigns of what is now the United States, American Indians and Alaska Natives were the last people granted the right to vote. We were not even recognized as United States citizens with a right to vote until the Indian Citizenship Act in 1924, and it took more than three decades after that before all Native Americans were able to fully participate in state elections.<sup>1</sup>

Because many Native American reservations are rural with poor infrastructure, we still face unique barriers to making our voices heard at the ballot box. With recent court decisions and state laws increasingly taking advantage of our isolated conditions in order to make it more difficult for tribal citizens to vote, federal legislation is needed to counter the state efforts that would serve to disenfranchise Native American voters.

For example, the U.S. Supreme Court's July 2021 decision in *Brnovich v. Democratic National Committee* allows the state of Arizona to continue with practices that disenfranchise Native Americans who have to travel upwards of fifty miles to reach a post office to return their ballots.<sup>2</sup> And a law passed in the 2021 legislative session in Montana was described by the Montana Advisory Committee to the U.S. Commission on Civil Rights as "intentional discrimination. . . [that] will increase barriers to voting for Native Americans on reservations in Montana."<sup>3</sup> We are facing present-day discrimination that capitalizes on the longstanding inequities and challenges we face every day due to failures in the execution of the federal government's trust and treaty obligations.

While some progress has been made, today, there are strong forces preventing our people from fully participating in the political process. These barriers include geographic isolation, poorly maintained roads, housing insecurity, depressed socio-economic conditions, and discrimination.

The obstacles are exacerbated by the growing number of laws across the country seeking to purge voting information, limit voter registration, create language and residency barriers, and other mechanisms producing discriminatory outcomes.

The ability to vote is a fundamental right and the foundational principle of any democracy. Our people want to participate in democracy, but for many, barriers make this impractical or even impossible. I am going to use my brief time with you

<sup>1</sup>American Bar Association, Resolution 112 (adopted: February 17, 2020) (available at: <https://www.americanbar.org/content/dam/aba/directories/policy/midyear-2020/2020-mid-year-112.pdf>).

<sup>2</sup>*Brnovich v Democratic National Committee*, 594 U.S. \_\_\_\_ (2021) (available at: [https://www.supremecourt.gov/opinions/20pdf/19-1257\\_g204.pdf](https://www.supremecourt.gov/opinions/20pdf/19-1257_g204.pdf)).

<sup>3</sup>Montana Advisory Committee on the U.S. Commission on Civil Rights, Voting Access for Native Americans in Montana (June 2021) (available at: <https://www.usccr.gov/files/2021/07-15-Native-American-Voting-Rights-Advisory-Memo.pdf>).

today to highlight that no matter we live, what identification cards we have, or what language we speak, Native people should have fair and equal access to voting.<sup>4</sup>

#### *Residency/Address Requirements*

Native voters are often barred from registering to vote when election officials insist that a physical address for their residence be provided. This is a problem because some Native voters only have post office box numbers or general delivery addresses and do not have a physical address they can provide. Additionally, some Native voters live permanently in RVs, which often cannot be used to establish an address for voting purposes.

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.” As one community organizer asked rhetorically, “How do you register to vote because your address is different every couple of months?”<sup>5</sup>

Additionally, address requirements harm homeless Native voters who are often unable to register to vote. Finally, due to the lack of standardized postal service addresses on tribal lands, many Native voters are either unintentionally placed in the wrong voting precinct when they register to vote resulting in their future ballots being rejected, or, in some cases, election officials deliberately establish voting procedures disqualifying Native voters using non-traditional addresses.<sup>6</sup>

Due to the lack of residential mail delivery, poor roads, and prevalence of homes that do not have addresses, it is harder for Native Americans to register, receive an absentee ballot, and reach the polls. The most direct way of ensuring more equitable access is a federal mandate requiring on-reservation polling places and registration opportunities.

Allowing tribes to designate a building whose address can be used to register, pick up, and drop off a ballot would also help tremendously. Straightforward protections of this sort are included in the Native American Voting Rights Act, which was introduced in by Senator Luján. Let me just take a moment and thank you, Senator, for introducing legislation that has broad support across Indian Country.

Notably, this same piece of legislation was introduced in the House by Representative Tom Cole from Oklahoma, and Representative Sharice Davids from Kansas also recognizing that voting protections are a universal and collective issue.

#### *Identification and Language Requirements*

For many of our people, participation is not possible due to overly restrictive voter identification requirements. Studies have shown that photo ID requirements, in particular, have had a chilling effect on Native American voting turnout. In many states, voters are required to present identification, and far too often Tribal Nation issued identification cards are not considered acceptable for voter registration or to cast a ballot. This forces many Native people who wish to cast a vote to seek state-issued identification, which can be unreasonably difficult to obtain for many Native voters.

For instance, for many of our Native brothers and sisters, merely getting to a DMV means leaving the reservation and, in many instances, traveling 50 or even 100 miles. Additionally, it is cost-prohibitive for many. In my home state of Washington, for example, an individual seeking their very first license is going to pay nearly \$100, and that is money that is all too often needed for food, medicine, and other basic necessities.<sup>7</sup> Additionally, in many jurisdictions, an individual cannot acquire state-issued identification without a permanent mailing address, which as I’ve already discussed is something many Native voters don’t have.<sup>8</sup>

And even when Native people can get registered to vote, get to the polls, and provide appropriate identification, language barriers remain intact for the more than 350,000 speakers of our more than 175 Native languages<sup>9</sup>—these Native speakers

<sup>4</sup>National Congress of American Indians, Resolution MSP-15-030 (2015) (available at: <https://www.ncai.org/resources/resolutions/tribal-equal-access-to-voting>).

<sup>5</sup>Native American Rights Fund, *Obstacles at Every Turn: Barriers to Political Participation Faced by Native American Voters* (2020) (available at: [https://vote.narf.org/wp-content/uploads/2020/06/obstacles\\_at\\_every\\_turn.pdf](https://vote.narf.org/wp-content/uploads/2020/06/obstacles_at_every_turn.pdf)).

<sup>6</sup>*Id.*

<sup>7</sup>*Id.*

<sup>8</sup>*Id.*

<sup>9</sup>U.S Department of Education, U.S. Department of Health and Human Services, & U.S. Department of Interior, *A New Chapter for Native American Languages in the United States: A Report on Federal Agency Coordination* (October 2016) (available here: [https://acfmainstage.acf.hhs.gov/sites/default/files/documents/ana\\_a\\_new\\_chapter\\_for\\_native\\_american\\_languages\\_in\\_the\\_united.pdf](https://acfmainstage.acf.hhs.gov/sites/default/files/documents/ana_a_new_chapter_for_native_american_languages_in_the_united.pdf)).

are the keepers of our histories, our traditions, and our culture. They are revered in our Native communities, but all too often, they are rejected at the ballot box.

Over a quarter of all single-race American Indian and Alaska Natives speak a language other than English at home. Two-thirds of all speakers of American Indian or Alaska Native languages reside on a reservation or in a Native village, including many who are linguistically isolated, have limited English skills, or a high rate of illiteracy. The lack of assistance or complete and accurate translations of voting information and materials for Limited-English Proficient American Indian and Alaska Native voters can be a substantial barrier.<sup>10</sup>

Again, legislation such as the Native American Voting Rights Act addresses these identification requirements and language barriers with simple, common sense solutions like permitting individuals to vote with any Tribal Nation issued identification card, and allowing Tribal Nations to request voting registration and ballot materials be available in their own, traditional languages.

### Conclusion

I urge this Committee and all of Congress to take action to ensure that voting rights across the country are uniformly protected for everyone. Congress needs to pass legislation with the protections included in Native American Voting Rights Protection Act. We are strongest as a democracy when we are all participating equally.

I want to thank the Senate Committee for this opportunity to testify and I would be happy to answer any questions you may have.

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PREPARED STATEMENT OF JONATHAN M. NEZ, PRESIDENT OF THE NAVAJO NATION

Yá'át'ééh (Hello) Chairman Blumenthal, Ranking Member Cruz, and Members of the Subcommittee. Thank you for the opportunity to talk to you today about the importance of the Native American vote.

Native Americans were the first Americans, and yet we were the last to be granted citizenship in the United States. As citizens, Native Americans should have the same access to voting opportunities as all other citizens, but too often we find that this is not the case.

With over 27,000 square miles and 400,000 citizens, the Navajo Nation (Nation) is the largest federally recognized tribe in the United States both in terms of land mass and membership. With land spread across Arizona, New Mexico, and Utah, we are happy to say that we are represented by six U.S. Senators, and five members of the U.S. House of Representatives, but even with such a broad base of support in the United States Congress, many of our citizens still face barriers to voting that are unique to Indian Country. The main areas I will focus on in this testimony that pose a challenge when it comes to voting are: geography, language, institutional barriers, and our socio-economic realities.

### I. Geographic distance and multiple jurisdictions limit access

As stated above, the Navajo Nation has over 27,000 square miles, making it slightly larger than the state of West Virginia and nine other states. With our large land base, many of our citizens live in rural areas and travel long distances to access basic needs and services. Getting to a polling station is often a difficult task, as transportation options are limited. Our people rely on relatives or clan members for rides because most households only have one car for the entire family. Travel across the Nation can also be difficult as over 86 percent of the roads are unpaved. This burden is exacerbated when it comes to: (1) driving to voting locations located on the Nation; and (2) driving from the Nation to a County Recorder's office, or county seat.

Counties retain broad discretion on the placement of polling locations for early voting and on Election Day—including how many polling sites they are willing to place on the Nation and where. For example, in the 2018 election, the closest early voting location to Teec Nos Pos, a Navajo community located in the northern part of Apache County, Arizona, was in Fort Defiance, AZ. This resulted in Navajo voters having to travel 113 miles one way to participate in early voting.

When the Nation made a request to the County for an early polling location in Teec Nos Pos it was denied.

On the New Mexico side of the Nation, during the 2020 election, the Nation requested San Juan County to provide more drop boxes beyond the two available, but our request was denied. This resulted in Navajo voters living in Crystal having to

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<sup>10</sup>*Id.*

travel at least 54 miles, round trip, to deliver their ballot to the nearest drop box in Newcomb.

And on the Utah side of the Nation, in the 2018 election, San Juan County removed all in-person polling locations on the Nation, requiring anyone who wanted to vote in person to travel to the county seat in Monticello, a journey of 196 miles one way from the Navajo Mountain community. The Navajo Nation Human Rights Commission filed a lawsuit to restore those polling locations.

Driving off the Nation to a county seat to register or clarify a voting issue can also present unique difficulties: using the same example of Apache County, if a voter resides in Teec Nos Pos they would need to travel 211 miles one way to the county seat in St. Johns. This distance to a county seat presents a burden for those voters who must travel to correct their ballots or provide proof of residence in-person.

Many of the problems we face due to the largely rural and expansive nature of the Navajo Nation could be solved with increased polling locations per precincts and adding voter registration centers across the Nation. This would ease the burden of travel and allow more opportunities for voters to participate in state and federal elections. However, local opposition to these measures has prevented solutions that have often only been rectified by bringing challenges to court.

#### *Utah Cases*

There are two key cases in Utah that affected the voting rights of Navajo citizens. The first is *Navajo Nation v. San Juan County*.<sup>1</sup> In 2012, the Nation filed a lawsuit against San Juan County (County) alleging violations of the constitution and the Voting Rights Act. The federal district court in Utah found the County violated the constitutional rights of Native Americans living in San Juan County through its malapportioned school board district and its racial gerrymandering of its county commissioner district.

Based on these findings the District Court allowed the County an opportunity to draw new districts that were constitutionally sound and in compliance with the Voting Rights Act. When the County presented these districts to the Judge, they were rejected because he found them to be drawn predominantly based upon race. The Court then appointed a Special Master to draw new districts. After completing this task in December 2017, the District Court accepted the districts drawn by the Special Master and implemented them for the 2018 election.

The District Court also ordered the County to hold new elections for all county commission and school board seats in 2018. As a result of the new districts, two Navajo individuals were elected to the county commission, creating a Native American majority of the commission for the first time in San Juan County's history.

The second case is *Navajo Nation Human Rights Commission v. San Juan County*.<sup>2</sup> In 2014 San Juan County attempted to transition to an all-mail voting system, reducing its number of physical polling places from nine across the County down to one, located only at the County Clerk's office. After the case was filed, the County added three in-person polling sites on the Nation and provided Navajo language assistance. None of the three-added locations were accessible for the early voting period.

The Navajo Nation Human Rights Commission argued that the political process in San Juan County was not equally open to Navajo voters in violation of Section 2 of the Voting Rights Act. The three polling locations in the majority-Navajo precincts were only open on Election Day while the polling place in the majority-non-Native precinct was accessible for 14 days during the early voting period.

The case was settled in February 2018. Per the terms of the settlement agreement, the County was required to (1) continue to provide three polling locations on the Nation through the 2020 election; (2) open satellite offices in three on-the-Nation locations for in-person voting assistance during the 28-days preceding the primary and general election; and (3) provide in-person voting assistance, confirm language assistance, and discuss public notification of election deadlines, locations, and other election-related information. The settlement has been extended through the 2024 election cycle.

Although the situation in Utah has been rectified for the moment, when the current settlement expires, we may be forced to go to court once again unless Congress acts. There are some issues that are rightly decided at the local level, but when a fundamental right such as the right to vote is at stake, and states are not being responsive to the needs of their citizens, that is one of the areas when it is appropriate for the federal government to step in.

<sup>1</sup>266 F.Supp.3d 1341 (D. Ct. Utah 2018).

<sup>2</sup>215 F. Supp. 3d 1201, 1206 (D. Ct. Utah 2016).



## II. Navajo voters face language barriers in voting

The Navajo language is widely spoken by Navajo voters, and it is the first and preferred language for many Navajo people. The Navajo people are a racial and language minority under Section 2 of the Voting Rights Act and entitled to language assistance under Section 203 of the Act.<sup>3</sup> Section 2 of the Act prohibits voting practices or procedures that discriminate on the basis of race, color, or membership in one of the language minority groups identified in Section 4(f)(2) of the Act. Section 203 of the Act requires covered jurisdictions to provide language assistance to all aspects of the voting process, including during voter registration and early voting.

Navajo is traditionally an oral language, not a written one, and many Navajos struggle to read and require in-person language assistance to cast a ballot. There are sometimes differences between dialects across the Nation, so in-person translations can be particularly beneficial. Any written election material provided in the English language must also be provided in Navajo. However, providing written election materials alone is not always helpful as translations are not guaranteed to be accurate and can cause more confusion than assistance. This means that any changes to a complete vote-by-mail system would deny Navajo speakers the opportunity to vote. In this example, Navajo voters who do not speak English would be required to find their own designated individual to explain the ballot. In-person translation services are sometimes preferred. For these reasons, Navajo voters must be provided complete and accurate translations before they cast their vote.

## III. Institutional barriers limit the ability of Navajo citizens to cast their vote

Homes across the Nation are unmarked and lack formal street addresses. Navajo citizens do not enjoy at-home mail delivery and instead must rely on post office boxes to receive mail. These post office boxes are often limited in availability, shared within families, require a fee, and require traveling significant distances to access.

Post offices generally limit the number of people that can be listed on a box, causing some who share P.O. boxes with their families to be removed from the box. Even if multiple family members are able to share one box, there are not enough boxes to serve an entire community. There are a limited number of post office boxes available at each location, and across the Nation there is a critical shortage of postal service providers.

Some families also share a family box because individually they may not be able to afford their own post office box. Renting a post office box can cost a considerable amount: in Arizona the fee is \$136.00 per year, and if the fee is not paid on time, the box could be closed.<sup>4</sup> This means that if there is no availability on the family box, or if voters do not have enough money to pay the yearly fee, voters are forced to travel longer distances to secure any available post office boxes, sometimes in addition to the travel made to the initial postal service provider. This drastically limits the ability of the voter to receive important voter information or their ballot in the mail. Long travel times make checking post office boxes a hardship for voters who are elderly or disabled. Voters might also choose to check their mail less frequently, checking once a week or even as little as once every few weeks, making receipt of time sensitive information difficult.

Additionally, when the voter does utilize a post office to mail off their ballot, mail routes and timing are unreliable. Using the example of Apache County, a ballot sent from Window Rock to the county recorder in St. Johns must first route through Gallup, then to Albuquerque, then to Phoenix, then to Show Low, and then finally to St. Johns<sup>5</sup>—at a minimum taking at least 10 days from the time of sending to the time of delivery. This increases the risk of a ballot going uncounted. Because of the long delay in mailing, many Navajo citizens prefer to vote in-person or utilize drop boxes to ensure their vote is counted.

Eligible voters on the Nation should not face hardship in registering to vote, receiving important voting information, or casting their ballot. More locations on the Nation that can provide Navajo voters with voting-related services would alleviate some of these hardships. The Nation welcomes regular tribal consultation with the Postmaster General to address the mail barriers faced by Navajo voters.

<sup>3</sup> Voting Rights Act of 1965, 52 U.S.C. § 10301 *et seq.*

<sup>4</sup> Brief for the Navajo Nation as Amicus Curiae Supporting Respondents at 13, *Brnovich v. Democratic National Committee*, 594 U.S. \_\_\_\_ (2021) (No. 19–1257) [hereinafter Brief for the Navajo Nation].

<sup>5</sup> Teleconference with Samantha E. Lamb, AZ/NM Political Mail Coordinator, United States Postal Service (Sept. 29, 2020).

#### IV. Socio-economic factors create challenges for Navajo voters

Navajo citizens face disparities in education, employment, and housing. Only four percent of the Nation's enrolled citizens have obtained college degrees.<sup>6</sup> The current unemployment rate is 48.5 percent with the average household income at \$8,240, below federal poverty guidelines.<sup>7</sup> The poverty rate on the Nation is 38%—twice as high as the poverty rate in Arizona.<sup>8</sup> These socio-economic factors impede Navajo voters in many different ways. Voters lack access to vehicles; lack verifiable physical addresses; and lack secure housing.

In some parts of the Nation, only one in ten families own a vehicle.<sup>9</sup> Voters are reliant on the family vehicle, friends, relatives, or clan members to catch a ride to work or school—and often pay for fuel. When it comes to voting, whether a voter intends to vote early, deposit their ballot at a drop box, or vote in-person on Election Day, any of the available options require a dependable vehicle to travel the distance to a polling location. The Nation also occupies some of the most remote and challenging terrain in the country.<sup>10</sup> Notwithstanding the remote and expansive nature of the Nation, all of this creates an arduous journey for Navajo citizens who want to cast their vote.

Houses on the Nation are unmarked and lack traditional street addresses, meaning voters lack verifiable physical addresses. When registering to vote, a map is drawn showing where their house is located. This creates inaccuracies because on an Arizona voter registration form there is rarely enough space to show a house's location.<sup>11</sup> County officials are then left to make their best guess on the physical location of a residence, and sometimes voters are placed in the wrong precinct.

Housing is a two-fold issue because some Navajo citizens move intermittently from place-to-place and there is a lack of housing on the Nation. While most voters live in multi-generational homes, many still move from place-to-place because they cannot afford a single stable domicile. Lack of permanent housing or residency makes it hard for eligible Navajos to register to vote. With no reliable residential addresses, these voters cannot register to vote, even if they are moving around within the same precinct.

Overall, poverty combined with the rural nature of the Nation, language barriers, long distances between polling and registration sites, and state restrictions make voting for Navajo citizens uniquely challenging. These disparities hinder active participation in the political process and effectively deny Navajos living on tribal lands the right to vote.

#### Conclusion

The Nation has a strong interest in ensuring that Native Americans have an equal opportunity to participate in the electoral process the same as other U.S. citizens. Each Navajo registered to vote in state and federal elections in Arizona, New Mexico, or Utah should have the ability to cast their ballot and have that vote count.

Protecting the Native American vote requires taking into consideration the unique challenges faced by Navajo voters. The Nation has, and continues, to fight repeated efforts by the states and their political subdivisions through restrictive voting laws and policies that try their best to impede access to the polls. The Navajo Nation cannot fully rely on states to provide protections to our right to vote.

We demand that Congress enact voting rights legislation to protect the constitutionally guaranteed right of Native Americans to vote. The federal government must fulfill its trust responsibility and safeguard our Navajo citizens' right to vote. The first peoples of this country should not be the last peoples to cast their ballots.

We thank Senator Ben Ray Luján for his diligent efforts in addressing these urgent needs in Indian Country by introducing the important legislation that is the Native American Voting Rights Act. We are also thankful for Senator Leahy's work to include the Native American Voting Rights Act within the John Lewis Voting Rights Advancement Act. We look forward to working with the 117th Congress to fully realize protections for Navajos and all Native Americans who wish to exercise their inherent right to vote in the United States.

Ahéhee' (Thank you).

<sup>6</sup>Brief for the Navajo Nation. at 16.

<sup>7</sup>Navajo Nation Department of Agriculture, <https://www.agriculture.navajo-nsn.gov/>.

<sup>8</sup>Brief for the Navajo Nation. at 16.

<sup>9</sup>*Id.* at 14.

<sup>10</sup>*Id.* at 12.

<sup>11</sup>*Id.* at 16.

PREPARED STATEMENT OF HON. GARY BATTON, CHIEF, CHOCTAW NATION OF  
OKLAHOMA

Thank you for holding this hearing and the opportunity to provide written testimony. We appreciate you highlighting barriers to voting in Indian Country and looking for ways to address them. For too long, Native Americans have faced almost insurmountable obstacles when it pertains to exercising their constitutional right to vote, and it is crucial we continue to work together to rectify the issue. Native Americans are Americans; therefore, they deserve the right to participate fully in our electoral system.

See comments below submitted to the White House earlier this year on the same topic. We want to remain consistent in our message and partnership to find ways to address and improve voting access for our Choctaw and Native people in every part of the United States. We thank you for your efforts and support all legislation that promotes accepting tribal IDs as acceptable forms of ID for voting, as well as to strengthen our citizens' access to voting.

LIBBY WASHBURN, SPECIAL ASSISTANT TO THE PRESIDENT FOR TRIBAL AFFAIRS  
DOMESTIC POLICY COUNCIL

Halito, Ms. Washburn:

Thank you for your leadership on the Domestic Policy Council to bring attention and solutions to improve Native voting rights across the country. The Choctaw Nation of Oklahoma is committed to increasing voter participation for our citizens and providing good information to help increase voter education and turnout. We have implemented a candidate survey to get to know candidates who are running for state legislative offices. Furthermore, we have methods in place to identify and support Native candidates in Oklahoma, and to identify candidates' knowledge of tribal sovereignty. This is an effective tool to help share information with our tribal citizens as they prepare for election day, and we are consistently looking for new and inventive ways to share election information with our Choctaw people.

Nationally, we have more than 200,000 tribal citizens; a few years ago, we rolled out a new tribal membership/ID card that was designed to be a free, useful tool for the Choctaw people. We made sure our new cards had photo identification, expiration dates, and identification numbers so that they could be practically useful in many different scenarios. We always enjoy hearing how Choctaw people practice tribal sovereignty by using their Choctaw Nation ID to board airplanes, visit governmental offices, and vote. The State of Oklahoma accepts tribal membership cards as valid forms of ID for voting; however, many states do not accept them. We take pride in providing this free identification card to our Choctaw people and would like our tribal citizens to be able to use them at ballot boxes across the country. Unlike state driver's licenses or other state IDs, our tribal membership card is completely free of charge.

The fact that some states accept tribal IDs and others do not creates unnecessary ambiguity and confusion for our citizens. We have many Choctaws who live in Texas, just outside our reservation boundaries; they are not permitted to use their IDs to vote, but friends and relatives a few miles away in Oklahoma can. The creation of a standard, universal acceptance by all states would increase our tribal citizens' access to voting.

We want to be a partner to help create the solution of standard acceptance of tribal ID cards for voting. Please reach out to Sara Jane Smallwood Cocke [ssmallwood@choctawnation.com](mailto:ssmallwood@choctawnation.com) and Jackson Stuteville [jkstuteville@choctawnation.com](mailto:jkstuteville@choctawnation.com) as points of contact if we may provide any additional information to work together.

Thank you again for your work to improve access to voting for Native people. The Choctaw Nation of Oklahoma is proud to be a partner in these efforts.

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RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. BRIAN SCHATZ TO  
JACQUELINE DE LEÓN

*Question 1.* The Native American Voting Rights Act of 2021 establishes a Native American Voting Task Force with the goal of improving voter outreach and education, facilitating collaboration between local election officials and Tribes, improving language access, and participating in future redistricting efforts. To your knowledge, have similar programs resulted in successful collaboration with local election officials in Indian Country? And would a Native American Voting Task Force be helpful in states that do not currently have a program like this? Have similar pro-

grams resulted in successful collaboration with local election officials in Indian Country?

Answer. The taskforce created by the Native American Voting Rights Act (NAVRA) is modeled after the New Mexico Native American Voting Task Force (NAVTF). New Mexico Secretary of State Maggie Toulouse Oliver first announced NAVTF in April 2017 as part of the state's Native American Election Information Program (NAEIP).<sup>1</sup> The taskforce was "charged with identifying ways to boost voter registration, education and election participation in tribal communities" by "analyzing the areas of need, making recommendations for election officials across the State, and developing an action plan to address voter registration, voter education and turnout in tribal communities."<sup>2</sup> The specific objectives of NAVTF include:<sup>3</sup>

- [C]onsult[ing], advis[ing] and mak[ing] recommendations to Secretary of State Maggie Toulouse Oliver on Native American voting issues, including:
  - Increasing voter registration in Native American communities
  - Establishing adequate early voting sites
- Increasing access to the ballot
- Providing election documents in Native American languages
- Proposing statutory changes on Native American voting rights issues
- Increasing voter outreach and voter education in Native American communities
- Assisting New Mexico's counties in complying with federal voting rights statutes
- Assisting the federal government in recognizing areas of need in New Mexico's Native American communities, including in urban areas
- Streamlining and reducing inconsistencies in the voting process
- Improving translation services inclusive of language diversities
- Increasing dialogue between the task force, the counties, the state and tribal leadership
- Advocating to the legislature to address the digital divide and Internet connectivity
  - Incorporating Native American input into future redistricting efforts
- Securing additional funding for Native American voter outreach programs

The taskforce is composed "of representatives from pueblos and tribal communities across New Mexico, including one representative living in an urban area."<sup>4</sup> Ten members currently sit on the taskforce: Linda Yardley—Taos Pueblo, April K. Chavez—Santa Domingo Pueblo, Arden Kucate—Zuni Pueblo, Amanda Tolino—Northern Agency, Jamie Henio—Eastern Agency, Julie Badonie—Ft. Defiance Agency, Stacy Sanchez—Jicarilla Apache Nation, Eric Spitty—Mescalero Apache Tribe, Lisa LeFlore Davis—Ft. Sill Apache Tribe, and Laurie Weahkee—Urban Native American.<sup>5</sup> New Mexico Secretary of State, Maggie Toulouse Oliver also attends taskforce meetings.<sup>6</sup>

NAVTF's first meeting was held November 3, 2017. In the past two years it has met three times per year. Meeting agendas and minutes are publicly accessible on the Secretary of State's website. At these conferences, members present ongoing projects, provide legislative updates, and discuss upcoming elections. A Public Forum is also held for members of the public wishing to speak on related matters.

In just four or so years, NAVTF has made significant progress towards improving Native awareness of voting rights, boosting Native voter registration, and increasing Native voters' access to polls. This work will only continue to grow in importance as the Native voting age population continues to grow.<sup>7</sup>

Ahead of the 2018 election, the taskforce ensured that the state trained Native American interpreters to translate official ads for Native voters.<sup>8</sup> NAEIP also provides essential election-related materials (resolution, ballots etc.) in eight tribal languages.<sup>9</sup> In partnership with the League of Women Voters of New Mexico, NAVTF helped to publish and distribute 15,000 Native American Voter Guides.<sup>10</sup> Leading up to the 2020 general election and since then, the taskforce has continued with these initially successful projects as well as further developed projects and resources for New Mexico's Native voters.<sup>11</sup> In partnership with Native American Voters Alliance (NAVA) Education Project, NAVTF created a number of educational toolkits on registration and voting, totaling 200,000 pieces, that were disseminated to tribal communities ahead of the 2020 general election. Informational fliers on polling locations and hours were also circulated.<sup>12</sup> The partnership coordinated radio messaging about the election in some of the state's common Native languages such as Tewa, Northern Tiwa, Zuni, Navajo, and Mescalero Apache. By conducting regular gatherings with local tribal communities and tribal leaders, the taskforce gained

valuable insight into understanding what obstacles most hindered the Native vote and used this information to design strategies to overcome these challenges. For example, in learning significant of Native voters' COVID concerns with voting in person, the taskforce partnership successfully distributed a significant amount of personal protective equipment to tribal communities to ensure safe in-person voting practices.

In addition to executing successful grassroots outreach and education initiatives, the taskforce has helped to facilitate the passage of essential voter protections statutes in New Mexico, such as Senate Bill 4 from the 2020 Special Legislative Session "which strived to expanded access to vote-by-mail in the general election passed. [which] designate[d] tribal voting sites as voter convenience centers in all 23 tribal nations."<sup>13</sup> The taskforce's work and advocacy was also instrumental in the passage of the state's Native American Polling Place Protection Act (HB 231) which, among its important provisions, ensures that "a polling place located on Indian nation, tribal or pueblo land shall not be eliminated or consolidated with other polling places, nor shall the days and times of voting be modified, without the written agreement of the Indian nation, tribe or pueblo where the polling place is located[.]"<sup>14</sup>

Though causation cannot definitively be concluded here, there has been a notable correlative increase in the number of Native voter turnout and the successful election of Native representatives since the taskforce's creation. In the 2020 election, some tribal precincts saw "turnout [of] over 70 percent, including the precincts for Tesuque and Nambe Pueblos in Santa Fe County. . . . In fact, Tesuque Pueblo has a far higher rate of voter turnout in this election than any other recognized tribal nation in the state. A whopping 78.7 percent of voters registered in the Tesuque Pueblo precinct cast a ballot-which also puts the pueblo ahead of the 67.5 percent of voters who cast ballots statewide, and the 75.6 percent turnout in Santa Fe County."<sup>15</sup> Furthermore, "all eight Native American candidates running for seats in the [New Mexico's] Legislature won their races, and Haaland, who is a member of Laguna Pueblo, was reelected to New Mexico's 1st Congressional District."<sup>16</sup>

Yet, while New Mexico has seen significant progress for the Native Vote since the commencement of NAVTF, there is still work to do. "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 builds bridges between Native and non-Native communities to start a dialogue. 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."<sup>17</sup> New Mexico's Native American Voting Task Force is emblematic of such collaboration. It should be looked to as a success story on which other state's taskforces under NAVRA should be modeled.

*Question 1a.* Would a Native American Voting Task Force be helpful in states that do not currently have a program like this?

Answer. Absolutely. Native voters in New Mexico are not alone in having to face myriad obstacles to registration and voting. "Native Americans were one of the last ethnic groups to get the right to vote.. Historically, Native Americans have some of the lowest voter turnout rates of any ethnic group in the country."<sup>18</sup> Just as in New Mexico, there are many other states in which the percentage of Native citizen voting age population (CVAP) is similar, if not greater than in New Mexico,<sup>19</sup> yet Native voters similarly remain underrepresented at the polls. For example, nationwide, there were "approximately 3.7 million Natives and Alaska Natives of voting age [] represented in [the 2020] election's crucial swing states: Arizona—5.6 percent, Colorado—2.5 percent, Michigan—1.4 percent, Minnesota—1.8 percent, Nevada—2.5 percent, North Carolina—2.1 percent, Wisconsin—1.5 percent,"<sup>20</sup> yet 34 percent of eligible Native voters (equivalent to about 1.2 million) are not yet even registered to vote and the turnout rate nationwide for AI/AN voters is 1 to 10 percentage points lower than other racial/ethnic groups.<sup>21</sup> The achievements and ongoing progress being made by New Mexico's NAVTF hard work will prove to be advantageous if extended to Native voters across the entire country, especially so in the 15+ or so other states with critical, yet still underrepresented, Native voting populations.

*Question 2.* English-only ballots are reportedly a barrier for speakers of Indigenous languages. Has the Native American Voting Rights Coalition documented specific instances of poll workers denying language assistance to Native voters? How can Congress ensure language assistance services are provided to Native voters?

Has the Native American Voting Rights Coalition documented specific instances of poll workers denying language assistance to Native voters?

Answer. I understand this question is intended to ask about the level of compliance with Section 203 of the Voting Rights Act (VRA) documented by NAVRC. As phrased, the question refers to “specific instances of poll workers denying language assistance,” which is focused on compliance issues under Section 208 of the VRA. I will briefly explain the differences between the two statutory provisions and how they compliment one another in making elections more accessible for limited-English proficient (or “LEP”) American Indian and Alaska Native voters.

Congress enacted Section 208 of the VRA in 1982.<sup>22</sup> Section 208 provides, “Any 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.”<sup>23</sup> Therefore, Section 208 gets at the question you have asked: namely, whether any LEP Native voters have been denied language assistance from the person of their choice, such as a relative or friend who accompanied them into the polling place. NARF was counsel of record in *Nick v. Bethel*, in which the District Court of Alaska granted an injunction against the State of Alaska because it had denied LEP Yup’ik-speaking voters of language and voter assistance from the person of their choice.<sup>24</sup>

Section 203 is broader than Section 208 because it affirmatively requires a covered jurisdiction to provide language assistance to LEP voters in each language that triggered coverage. Specifically, the statute provides that prior to the sunset date in 2032, “no covered State or political subdivision shall provide voting materials only in the English language.”<sup>25</sup> It elaborates, “Whenever any State or political subdivision subject to the prohibition of subsection (b) of this section provides any 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.”<sup>26</sup> “Voting materials” is expansively defined to include “registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots.”<sup>27</sup> In other words, Section 203 requires that it provide oral and written (where the language is a written one) translations of all information, materials, forms, instructions and ballots provided to voters in English and to provide in-person voting assistance at voting locations. Unlike Section 208, which applies nationwide and prohibits denial of voter and language assistance, Section 203 mandates that covered jurisdictions actually provide language assistance. Turning back to the first paragraph of my response, it is my understanding that is the question you are asking: whether jurisdictions that are required to provide language assistance to LEP American Indian and Alaska Native voters have done so. I will focus the balance of my response on the answer to that question.

Jurisdictions covered under Section 203 have a lengthy record of failing to offer language assistance to LEP Native voters. The U.S. Department of Justice’s website lists approximately one dozen enforcement actions it has successfully brought under Section 203 in Indian Country dating back to *United States v. San Juan County, NM* in 1979, less than four years after Section 203 was signed into law.<sup>28</sup> NARF likewise has been active in bringing litigation to enforce the language assistance provisions of the Voting Rights Act, including nearly a decade of litigation in Alaska.<sup>29</sup> For your convenience, I have attached a copy of one of the articles that documents Alaska’s violations of Section 203, which I also will briefly summarize.

One of the more notable examples of a covered jurisdiction failing to provide language assistance to Native voters occurred in Alaska and was litigated in *Toyukak v. Treadwell*,<sup>30</sup> under Section 203 of the VRA. There, Alaska election officials failed to offer language assistance despite the previous judicial rulings requiring voter information provided in English must also be provided in the covered Alaska Native languages in a form intended to effectively communicate all of that information to voters in a manner they understood.<sup>31</sup> The court also held that Section 203 does not permit election officials to diminish the content and extent of information that must be provided.<sup>32</sup> Yet, even after *Toyukak* federal observers continued to report violations. For example, during the 2016 election cycle, Alaska’s bilingual poll workers or interpreters were not trained on how to translate the ballot or procedural instructions in the covered Alaska Native languages.<sup>33</sup> Federal observers also documented there were no voting materials available in the covered Alaska Native language in six villages, and the “I voted” sticker was the only material in a Native language in two other villages.<sup>34</sup> The attached article details these and other examples of continuing violations of the language assistance mandate.

San Juan County, Utah has refused to comply with Section 203. For example, when a Navajo voter asked a poll worker about some of the issues on the ballot he

did not understand, they told him, “[w]ell, if you don’t understand it, don’t vote on it.”<sup>35</sup> In 2014 the County removed all language assistance by switching to a vote-by-mail system. As a result, many voters received an English ballot they could not read, so they simply did not vote,<sup>36</sup> effectively denying LEP Navajo voters an opportunity to vote.<sup>37</sup> A federal court found that the use of English-only voting materials and all mail-in voting violated Section 203. There are several other examples, which we have described in the materials accompanying my testimony and these responses.

*Question 2a.* How can Congress ensure language assistance services are provided to Native voters?

Answer. Currently, Section 203 of the VRA helps LEP American Indian and Alaska Native voters overcome barriers to political participation but falls short of adequately addressing this obstacle to voting access and democratic representation. For example, Section 203 only requires the state or political subdivision to furnish oral instructions, assistance, and other voting information if the covered language is considered to be “historically unwritten.”<sup>38</sup> Jurisdictions and some courts have misconstrued this limitation to mean that written translations are never required for American Indian and Alaska Native languages, even where a written language is widely used.<sup>39</sup> For example, written forms of Choctaw, Navajo and Yup’ik are extensively taught in schools, and common use includes publication of books, notices, signs and other information in those languages. In the Nick litigation, we found that about 90 percent of Alaska’s Yup’ik-speaking poll workers read and used written Yup’ik in their daily lives. For that reason, in the Nick and Toyukak orders, Alaska was required to prepare bilingual written materials in the Yup’ik and Gwich’in languages because those written translations were necessary to provide complete, accurate and uniform translations of information voters received in English.

Effective just yesterday, December 8, 2021, 12 political divisions of Alaska have to provide language assistance in Alaskan Native languages, and an additional 94 political subdivisions in 12 states have to provide language assistance in thirteen American Indian language groups that include dozens of different dialects.<sup>40</sup>

Congress must do more, such as ensuring that the Department of Justice has the resources to enforce the language assistance requirements in covered jurisdictions for all public elections.<sup>41</sup> NAVRA’s provisions on this issue—a) the creation of a Native American Voting Taskforce to investigate and address this issue and provide for federal observers to document compliance efforts; and b) that states and political subdivisions provide bilingual written materials in native languages in which tribes have requested written translations because it is for languages that are commonly used in written form, such as Choctaw, Navajo and Yup’ik.

*Question 3.* The Native American Voting Rights Act of 2021 (NAVRA) defines Indian lands as:

“(A) Indian country as defined under section 1151 of title 18, United States Code;

(B) any land in Alaska owned, pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.), by an Indian Tribe that is a Native village (as defined in section 3 of that Act (43 U.S.C. 1602)) or by a Village Corporation that is associated with an Indian Tribe (as defined in section 3 of that Act (43 U.S.C. 1602));

(C) any land on which the seat of the Tribal government is located; and

(D) any land that is part or all of a Tribal designated statistical area associated with an Indian Tribe, or is part or all of an Alaska Native village statistical area associated with an Indian Tribe, as defined by the Census Bureau for the purposes of the most recent decennial census.”

In light of the Supreme Court’s decision in *McGirt v. Oklahoma*, is there merit to the concern that NAVRA would be too complicated—or even impossible—to implement in Oklahoma?

Answer. No. *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) does not complicate, nor frustrate, the implementation of NAVRA. In fact, it is quite the contrary. Furthermore, *McGirt* has no altering effect on the contents bill.

The *McGirt* decision formally settled the land status question for the Creek Nation,<sup>42</sup> decisively holding that these lands remain “Indian Country” as defined by 18 U.S.C. § 1151.<sup>43</sup> In determining “whether the land these treaties promised remains an Indian reservation for purposes of federal criminal law” the Supreme Court held that “[b]ecause Congress has not said otherwise, we hold the government to its word.” *McGirt v. Oklahoma*, 140 S. Ct. at 2459. In doing so, the Supreme Court has now clarified, where before significant ambiguity existed, to which lands NAVRA will apply.

Prior to *McGirt's* determining the scope of category (a) under NAVRA's definition of Indian lands would have been unclear and tedious to implement. But, in definitively clarifying the jurisdictional bounds of Indian Country, the parameters of category (a) are now more apparent than ever before. Consequently, the process or determining where NAVRA applies in Oklahoma has become more straightforward.

*McGirt* not only makes the implementation of NAVRA possible, but more than that makes it practically more feasible, by adding certainty and clarity to its application. As Justice Gorsuch counsels in his opinion, "[I]t is unclear why pessimism should rule the day. With the passage of time, Oklahoma and its Tribes have proven they can work successfully together as partners." *McGirt v. Oklahoma*, 140 S. Ct. at 2481.

#### ENDNOTES

1. "Starting in 1978, the Office of the Secretary of State in New Mexico established an avenue to assist Native Americans in the electoral process. Native American interpreters were hired to interpret state election documents in various New Mexico tribal language dialects. These interpreters also informed tribal members about voter information and candidate requirements needed during an election.

In 1988, the Department of Justice, took legal action in New Mexico to extend greater election information to Native Americans based on the minority language assistance amendments to the Federal Voting Rights Act of 1965. As a result of these actions, the Native American Election Information Program was established in the Office of the Secretary of State, within the Bureau of Elections, to assist in developing voter education projects for 11 New Mexico counties with substantial Native American populations: Bernalillo; Cibola; McKinley; Otero; Rio Arriba; Sandoval; San Juan; Santa Fe; Socorro; Taos; and Valencia.

Over the years, NAEIP has served New Mexico tribes and its tribal members. The goals of the program are to provide voter education and to ensure compliance with the minority language assistance amendments of the Federal Voting Rights Act of 1965. To accomplish these goals, the program is designed to communicate with Native American voters on a wide range of information, voter and candidacy requirements, electoral process and participation. The program provides technical assistance to New Mexico tribes and New Mexico County Clerks for statutory compliance on the federal and state election laws, oral assistance and voter education programs."

<https://www.sos.state.nm.us/voting-and-elections/native-american-election-information-program/>

2. Press Release: "Secretary of State Toulouse Oliver Announces Native American Voting Taskforce." April 21, 2017. New Mexico Secretary of State.

<https://realfileee3072ab0d43456cb15a51f7d82c77a2.s3.amazonaws.com/9ede6ac9-5ad6-4fba-b9f1-262c25c935b0?AWSAccessKeyId=AKIAJBKPT2UF7EZ6B7YA&Expires=1638655408&Signature=jaZMQfSZvDLUkN0bMtJmh6JXxPk%3D&response-content-disposition=inline%3B%20filename%3D%22Secretary%20of%20State%20Toulouse%20Oliver%20Announces%20Native%20American%20Voting%20Taskforce%20C3%A2%3F%3F%2004-21-2017.pdf%22&response-content-type=application%2Fpdf>

3. <https://www.sos.state.nm.us/voting-and-elections/native-american-election-information-program/native-american-voting-task-force/>

4. Press Release: "Secretary of State Toulouse Oliver Convenes Native American Voting Task Force" November 3, 2017. New Mexico Secretary of State.

<https://realfileee3072ab0d43456cb15a51f7d82c77a2.s3.amazonaws.com/c69db1ce-ea32-4505-9636-41c57cd941f8?AWSAccessKeyId=AKIAJBKPT2UF7EZ6B7YA&Expires=1638655880&Signature=nJKrLofISagEc9FGQWAT8UL5wjs%3D&response-content-disposition=inline%3B%20filename%3D%22Secretary%20of%20State%20Toulouse%20Oliver%20Convenes%20Native%20American%20Voting%20Task%20Force%20C3%A2%3F%3F%2011-03-2017.pdf%22&response-content-type=application%2Fpdf>

5. "Native American Voting Taskforce," New Mexico Secretary of State website, available at: <https://www.sos.state.nm.us/voting-and-elections/native-american-election-information-program/native-american-voting-task-force/>

6. "Native American Voting Taskforce," New Mexico Secretary of State website, available at: <https://www.sos.state.nm.us/voting-and-elections/native-american-election-information-program/native-american-voting-task-force/>



7 “Native Americans—either as a single ethnic group or in combination with other ethnicities—make up a key population. at 12.4 percent of New Mexico’s population, according to the latest Census Bureau data. That’s an increase of about 20 percent from 2010.” Yet, the Native vote age population is currently underrepresented.” Curtis Segarra. “Redistricting: Protecting the Native American Vote in New Mexico.” KRQE News 13. Sept. 16, 2021. Updated Sept. 18, 2021 available at: <https://www.krqe.com/plus/data-reporting/redistricting-protecting-the-native-american-vote-in-new-mexico>;

See also, *AI/AN alone or in combo CVAP percentage of total state CVAP grew from 9.7 percent in 2010 to 11.5 percent in 2020. National Congress of American Indians Policy Research Center, Research Policy Update: Native Vote Report: 2020 Decennial Census Redistricting Data and the AI/AN Voting Age Population.* Oct. 8, 2021. [https://www.ncai.org/policy-research-center/research-data/prc-publications/Native\\_Vote\\_Report\\_2020\\_Redistricting](https://www.ncai.org/policy-research-center/research-data/prc-publications/Native_Vote_Report_2020_Redistricting)

*File and AIAN Voting Age Population FINAL 10 8—2021.pdf (AI/AN alone or in combo CVAP percentage of total state CVAP grew from 9.7 percent in 2010 to 11.5 percent in 2020.)*

8 “New Mexico Trains Native American Interpreters for Election” Associated Press. Oct. 1, 2018. [https://www.abqjournal.com/1227923/new-mexico-trains-native-american-interpreters-for-election.html?fbclid=IwAR1DxFwYpECRzixwtpEqMRSkDNap4besuAyTc6F7jHjxW\\_5DL0KxYBNVRPo](https://www.abqjournal.com/1227923/new-mexico-trains-native-american-interpreters-for-election.html?fbclid=IwAR1DxFwYpECRzixwtpEqMRSkDNap4besuAyTc6F7jHjxW_5DL0KxYBNVRPo)

9 NM Secretary of State’s Office: Native American Election Information Program (NAEIP) 2020 General Election School presentation. <https://www.nmlegis.gov/handouts/IAC%20080420%20Item%201%20SOS%20NAEIP.pdf>

10 “League of Women Voters Publishes Native American Voter Guide for New Mexico Indian Country.” League of Women Voters of New Mexico. Oct. 2, 2018, available at: <https://www.lwvnm.org/news.html>; <https://www.lwvnm.org/VGuide2018/>

11 Minutes from the Native American Voting Task Force Meeting. January 14, 2021. <https://realfileee3072ab0d43456cb15a51f7d82c77a2.s3.amazonaws.com/ef6f3aec-85a2-4d3c-a115-eee2ec87f5fb?AWSAccessKeyId=AKIAJBKPT2UF7EZ6B7YA&Expires=1638665758&Signature=xvgUVYqCZqaZAh%2B1722CTSw1l4o%3D&response-content-disposition=inline%3B%20filename%3D%22Jan%2014-2021%20Final%20Draft%20NAVTF%20Mtg%20Mins.pdf%22&response-content-type=application%2Fpdf>

12 NAVA’s GOTV materials available at: <https://www.navaeducationproject.org/gotv-materials>

13 New Mexico Indian Affairs Department: FY 2020 Annual Report. 17. [https://www.nmlegis.gov/handouts/IAC%20092920%20Item%201%20IAC-%20STCA\\_AnnualRpt\\_2020\\_IAD.pdf](https://www.nmlegis.gov/handouts/IAC%20092920%20Item%201%20IAC-%20STCA_AnnualRpt_2020_IAD.pdf)

14 HB 231/a page 1. Section 1–3-7.2(A) of NMSA 1978.

15 Leah Cantor, “The Power of the Native Vote” Santa Fe Reporter. Nov. 6, 2020, available at: <https://www.sfreporter.com/news/2020/11/06/the-power-of-the-native-vote/>

16 *Id.*

17 Dr. James Thomas Tucker, *et al.*, *Obstacles at Every Turn: Barriers to Political Participation Faced by Native American Voters*, Native American Rights Fund (2020) at 125 and n. 1011, citing NAVRC Field Hearings: Isleta Tr. Helen Padilla at 64. Available at: [https://vote.narf.org/up-content/uploads/2020/06/obstacles\\_at\\_every\\_turn.pdf](https://vote.narf.org/up-content/uploads/2020/06/obstacles_at_every_turn.pdf)

18 Press Release: “Secretary of State Toulouse Oliver Announces Native American Voting Taskforce.” April 21, 2017. New Mexico Secretary of State. <https://realfileee3072ab0d43456cb15a51f7d82c77a2.s3.amazonaws.com/9ede6ac9-5ad6-4fba-b9f1-262c25c935b0?AWSAccessKeyId=AKIAJBKPT2UF7EZ6B7YA&Expires=1638655408&Signature=jaZMQfSZvDLUkN0bMtJmh6JXxPk%3D&response-content-disposition=inline%3B%20filename%3D%22Secretary%20of%20State%20Toulouse%20Oliver%20Announces%20Native%20American%20Voting%20Taskforce%20%3%A2%3F%3F%2004-21-2017.pdf%22&response-content-type=application%2Fpdf>

19 “The share of New Mexicans who identify themselves as Indigenous by race or by combined ancestry is 12.4 percent. Alaska is the most predominantly Native American state, followed by Oklahoma and then New Mexico.” Associated Press. “Native Americans Aim to Boost Voting Power in New Mexico.” Sept. 20, 2021,

available at: <https://www.usnews.com/news/best-states/new-mexico/articles/2021-09-20/native-americans-aim-to-boost-voting-power-in-new-mexico>

20 Mary Annette Pember, “Native Vote plays powerful role, especially in swing states.” *Indian Country Today*. Oct. 29, 2020, available at: <https://indiancountrytoday.com/news/native-vote-plays-powerful-role-especially-in-swing-states>

21 National Congress of American Indians, “Every Vote Counts Fast Facts” fact-sheet, available at: [https://www.ncai.org/initiatives/campaigns/NCAI\\_NativeVoteInfographic.pdf](https://www.ncai.org/initiatives/campaigns/NCAI_NativeVoteInfographic.pdf)

22 See Voting Rights Act Amendments of 1982, Pub. L. No. 97–205, § 5, 96 Stat. 131, 134–135.

23 52 U.S.C. § 10508 (previously codified as 42 U.S.C. § 1973aa-6 (2000)).

24 *Nick v. Bethel*, Case No. 3:07-cv-00098–TMB–MMM–KS (D. Alaska filed July 30, 2008), Dkt. 327, Order Granting Pls.’ Mot. for Prelim. Injunction at 9–10.

25 52 U.S.C. § 10503(b)(1).

26 52 U.S.C. § 10503(c).

27 52 U.S.C. § 10503(b)(3)(A).

28 See U.S. Dep’t of Just., Civ. Rts. Div., Voting Section, Voting Section Litigation, available at <https://www.justice.gov/crt/voting-section-litigation> (look under “Cases Raising Claims Under the Language Minority Provisions of the Voting Rights Act”).

29 See James Thomas Tucker, Natalie 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, 358–72 (2017).

30 Joint Motion for Settlement. No. 3:13-cv-00137 (D. Alaska Sept. 30, 2015).

31 See Dr. James Thomas Tucker, et al., *Obstacles at Every Turn: Barriers to Political Participation Faced by Native American Voters*, Native American Rights Fund (2020) at 61, available at: <https://vote.narf.org/wp-content/uploads/2020/06/obstacles-at-every-turn.pdf>; see *Nick v. Bethel*, No. 3:07-cv-00098–TMB 2010 WL 11640036 (D. Alaska 2007).

32 See *id.* at 363.

33 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).

34 See *Obstacles at Every Turn* at 61.

35 Testimony from NAVRC Field Hearings: Isleta Tr., Wilfred Jones at 25–27.

36 Testimony from NAVRC Field Hearings: Tuba City Tr., James Attakai at 14.

37 See *Navajo Nation Human Rights Commission v. San Juan County*, No. 2:16-cv-00154–JNP (D. Utah Feb. 2018).

38 See 52 U.S.C. § 10503(c).

39 See Tucker, *supra* note 5, at 54.

40 See NARF et al., Acting Census Director Identifies Jurisdictions that Must Provide Language Assistance under Section 203 of Voting Rights Act (Dec. 8, 2021), available at [https://www.lawyerscommittee.org/wp-content/uploads/2021/12/Section-203-coverage-determinations\\_Dec-2021\\_Draft\\_1245-pm-PT-LCJ.pdf](https://www.lawyerscommittee.org/wp-content/uploads/2021/12/Section-203-coverage-determinations_Dec-2021_Draft_1245-pm-PT-LCJ.pdf).

41 See 28 C.F.R. § 55.10.

42 And subsequently extended to all Five Tribes in addition to the Quapaw Nation, see e.g. Curtis Killman, “State Appellate Court Extends *McGirt* Ruling to Include Quapaw Nation.” *TulsaWorld*, Oct. 21, 2021, updated Dec. 1, 2021 available at: [https://tulsa-world.com/news/state-and-regional/state-appellate-court-extends-mcgirt-ruling-to-include-quapaw-nation/article\\_55a45f32-3290-11ec-8b4d-c3254cce02d7.html](https://tulsa-world.com/news/state-and-regional/state-appellate-court-extends-mcgirt-ruling-to-include-quapaw-nation/article_55a45f32-3290-11ec-8b4d-c3254cce02d7.html)

43 “Indian country. means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation..”

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. BEN RAY LUJÁN TO  
PATTY FERGUSON-BOHNEE

*Question 1.* Ms. Ferguson-Bohnee, the Supreme Court *Brnovich* case held that Arizona’s voting restrictions did not violate Section 2 of the Voting Rights Act. This decision disparately affected Native American voters, making it more difficult for them to rely on affirmative litigation under Section 2’s promise of “equal opportunity” for all voters. Would passing the Native American Voting Rights Act and the John Lewis Voting Rights Advancement Act help to reaffirm the Voting Rights

Act's purpose of ensuring that all voters, regardless of their race or ethnic group, have an equal opportunity to participate in elections?

Answer. Yes, passing the Native American Voting Rights Act (NAVRA) and the John Lewis Voting Rights Advancement Act ("John Lewis Act") would help to reaffirm the Voting Rights Act's purpose and intent of ensuring that all voters, regardless of their race or ethnic group, have an equal opportunity to participate in elections by casting a ballot and having that ballot counted.<sup>1</sup> When Congress passed the Indian Citizenship Act of 1924, states and local jurisdictions continued to prevent Native Americans from registering to vote and participating in elections.<sup>2</sup> The provisions of NAVRA remedy the failures of the Indian Citizenship Act and fulfill Congress's trust responsibility to Tribes by enacting key measures that directly address voter inequalities in Indian Country and addressing the ongoing disenfranchisement of Native American voters that has persisted since 1924. Additionally, the John Lewis Act offers solutions to the judicial undermining of the Voting Rights Act of 1965. Taken together, these two pieces of legislation would expand the franchise and ensure that all voters have access to the political process.

The Voting Rights Act has been a powerful and successful mechanism to eliminate discriminatory practices and procedures against racial and language minorities. The Voting Rights Act sought to overcome legal barriers put in place by state and local governments to prevent minorities from exercising the right to vote guaranteed under the Fifteenth Amendment.<sup>3</sup> In addition, Congress included the language minority provisions in Section 203 and Section 4(f)(4) of the Voting Rights Act to enforce the guarantees of the Fourteenth and Fifteenth Amendments. Section 203 seeks to prohibit discrimination against citizens of language minorities in voting and requires that voting materials be provided in the minority language.

[T]hrough the use of various practices and procedures, citizens of language minorities have been effectively excluded from participation in the electoral process. Among other factors, the denial of the right to vote of such minority group citizens is ordinarily directly related to the unequal educational opportunities afforded them resulting in high illiteracy and low voting participation. The Congress declares that, in order to enforce the guarantees of the fourteenth and fifteenth amendments to the United States Constitution, it is necessary to eliminate such discrimination by prohibiting these practices, and by prescribing other remedial devices.<sup>4</sup>

Tribal voters face ongoing challenges in receiving language assistance under the Voting Rights Act.<sup>5</sup> In 2018, for example, the Navajo Nation sued Arizona and three counties for failure to provide language assistance, specifically instructions on how to complete an early ballot, in the Navajo language.<sup>6</sup>

Section 2, the heart of the Voting Rights Act, prohibits voting practices or procedures that result in the denial or abridgment of the right to vote on account of an individual's race, color, or membership in a language minority group.<sup>7</sup> While Native voters have won many cases under the Voting Rights Act, the Fourteenth Amendment, and the Fifteenth Amendment, enforcing voting rights is expensive and time consuming. In the aftermath of the United States Supreme Court's decision in *Shelby County v. Holder*, which invalidated the preclearance coverage, Tribes previously covered by Section 5 have been forced to solely rely on Section 2 to protect their right to vote.<sup>8</sup> However, the Supreme Court's decision in *Brnovich v. DNC* weakened Section 2 and creates new factors for courts to consider in Section 2 vote

<sup>1</sup>The Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 52 U.S.C. §§ 10301-10314, 10501-10508, 10701-10702).

<sup>2</sup>Pub. L. No. 68-175, 43 Stat. 254 (1924) (codified as amended at 8 U.S.C. § 1401 (b)); Patty Ferguson-Bohnee, *How the Native American Vote Continues to be Suppressed*, 45 ABA Hum. Rts. 16 (2020).

<sup>3</sup>The Fifteenth Amendment provides that "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." U.S. CONST., AMEND. XV.

<sup>4</sup>52 U.S.C. § 10503(a) (2006).

<sup>5</sup>DAN MCCOOL ET AL., NATIVE VOTE: AMERICAN INDIANS, THE VOTING RIGHTS ACT, AND THE RIGHT TO VOTE (Cambridge 2007) 45-68; *Oregon v. Mitchell*, 400 U.S. 112 (1970); Patty Ferguson-Bohnee, *The History of Indian Voting Rights in Arizona: Overcoming Decades of Voter Suppression*, 45 ASU LAW J. 1112-18 (2015); see generally JAMES TUCKER, THE BATTLE OVER BILINGUAL VOTING RIGHTS 235-92 (Routledge 2016).

<sup>6</sup>*Navajo Nation v. Regan*, No. 18018329, Complaint, (D. Arizona 2018).

<sup>7</sup>52 U.S.C. § 10302.

<sup>8</sup>570 U.S. 529 (2013).

denial cases. This decision weakens the Voting Rights Act's promises and can only be addressed through subsequent legislation.<sup>9</sup>

In *Brnovich v. DNC*, the Court further diminished protections under the Voting Rights Act, particularly vote denial claims under Section 2. The majority in *Brnovich* set forth five “guideposts” to consider when determining whether a voting practice violates Section 2: (1) the size of the burden imposed; (2) the degree to which it departs from what was standard practice when Section 2 was amended in 1982; (3) disparities in its impact on members of minority groups; (4) the opportunities provided by a state's voting system; and (5) the state's interest in enforcing the challenged policy.<sup>10</sup> Thus, the majority opinion added factors that weigh against the interests of minority plaintiffs and, when combined with the expensive costs of litigation, undermines the original intent of Section 2. This is especially harmful for Native Americans who are subject to ongoing disparities or discrimination due to the size of their population in comparison to the larger electorate.

The John Lewis Voting Rights Act would clarify the standard for a Section 2 vote denial or abridgement violation. While the John Lewis Voting Rights Act would not restore preclearance to all states previously covered by Section 5, such as Arizona, the Native American Voting Rights Act would provide essential protections for Native American voters. The need for these protections is well documented in the Native American Voting Rights Coalition's field hearings.<sup>11</sup>

Congress has the authority and the responsibility to reaffirm the Voting Rights Act's purpose by enacting legislation pursuant to the enforcement clauses of the Fourteenth and Fifteenth Amendments. Voting is a fundamental right, and because Native Americans' right to equal protection under the law is jeopardized by states' enactment of racially discriminatory voting laws and procedures, Congress may exercise its Fourteenth and Fifteenth Amendment authority to protect the rights of Native American voters.<sup>12</sup> The Fourteenth Amendment prevents states from invidiously discriminating against certain people with respect to voting.<sup>13</sup> Furthermore, the Fifteenth Amendment provides that “[t]he 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 conditions of servitude,” and it empowers Congress to enforce the provision by enacting “appropriate legislation.”<sup>14</sup> Despite passage of the Indian Citizenship Act, many states prevented Native Americans from voting.

The United States has a trust relationship with Tribes and their members. This relationship has been defined as requiring the United States to meet the highest moral obligations by ensuring the protection of Tribal and individual Indian lands, assets, resources, treaty rights, and other rights, such as voting rights.<sup>15</sup> This is a well-established legal obligation that originates from the unique, historical relationship between the United States government and Indian Tribes. Article I, Section 8 of the United States Constitution provides that Congress shall have the power “to regulate commerce with foreign nations and among the several states, and with the Indian Tribes,” acknowledging that Tribes are distinct from the federal government, the states, and foreign nations. The United States authorized Congress to enact laws governing Indian affairs through the Indian Commerce Clause.<sup>16</sup>

Furthermore, Congress has exclusive authority to legislate concerning Tribal matters and may regulate pursuant to its Constitutional powers, which are recognized as plenary.<sup>17</sup> The Supreme Court analyzed the scope of Congress's plenary authority over Tribal matters in *United States v. Kagama*.<sup>18</sup> In upholding Congress's power to enact legislation governing relations with Indian Tribes, the Court ex-

<sup>9</sup> 141 S. Ct. 2321 (2021).

<sup>10</sup> *Brnovich*, 141 S. Ct. at 2336–43.

<sup>11</sup> NARF, OBSTACLES AT EVERY TURN: BARRIERS TO POLITICAL PARTICIPATION FACED BY NATIVE AMERICAN VOTERS (June 2020).

<sup>12</sup> See generally *Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964) (describing “the right of suffrage” as a fundamental matter in a free and democratic society).

<sup>13</sup> *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 666–68 (1966) (finding Virginia's poll tax unconstitutional under the Equal Protection Clause of the Fourteenth Amendment).

<sup>14</sup> U.S. CONST. AMEND. XV; see also *Democratic Nat'l Comm. v. Hobbs*, 948 F.3d 989, 1010 (9th Cir. 2020).

<sup>15</sup> 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).

<sup>16</sup> 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 Env't and Admin. Law, Vol VI: 2, 401 (2017), available at <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1063&context=mjeal>.

<sup>17</sup> *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).

<sup>18</sup> 118 U.S. 375 (1886).

plained that such authority is implied not only by general Constitutional principles, but also by the nature of the federal government's relationship with the Tribes, with the federal government acting as a protectorate. In undertaking this responsibility, the United States has charged itself with "obligations of the highest responsibility and trust."<sup>19</sup> These obligations are moral as well as legally enforceable, and they require the federal government to ensure the proper administration of federal law with respect to the Tribes. Additionally, the trust relationship includes the obligation to protect Tribes from the states. As the Supreme Court noted in *Kagama*, "[b]ecause of the local ill feeling, the people of the states where [Tribes] are found are often their deadliest enemies."<sup>20</sup>

Given the scope of Congress's plenary authority to legislate on Tribal matters, the explicit and implicit powers under the Indian Commerce Clause and the Fourteenth and Fifteenth Amendments, and the obligations imposed pursuant to the trust relationship, Congress has the authority and duty to provide a legislative solution to the ongoing attack on the voting rights of Native Americans.<sup>21</sup> The Native American Voting Rights Act would address current disparities in access to the ballot box, challenges faced by voters with nontraditional addresses, and the lack of postal services on Native American reservations. It would also require jurisdictions to accept Tribal IDs. Such provisions reaffirm the purpose of the Voting Rights Act, as Native Americans do not currently have equal access to election day polling locations, early voting locations, or vote-by-mail.<sup>22</sup> This lack of access is due to socioeconomic conditions as well as institutional barriers. For example, on the rare occasion that on-reservation early voting is offered in Arizona, it is typically limited to a few hours on a couple of days. Residents of the Kaibab Paiute Reservation must travel over 280 miles one way to participate in early voting. Additionally, in 2018, the Hopi Tribe had four hours of in-person early voting while off-reservation voters in Holbrook, Arizona had 162 hours of in-person early voting.

Additionally, NAVRA would require each State to permit any person to return a sealed ballot on behalf of a voter living in Indian Country. Allowing third-party ballot collection would significantly increase voter turnout and assist in overcoming barriers in access to mail, as it is currently a felony under Arizona law to carry another's ballot if they are not a family member, caregiver, household member, or a postal or election worker.<sup>23</sup>

The John Lewis Voting Rights Advancement Act also assists in reaffirming the purpose of the Voting Rights Act by attempting to solve judicial undermining of the Voting Rights Act in three ways. First, it codifies the legal standard for Section 2 vote dilution claims articulated in *Thornburg v. Gingles*.<sup>24</sup> Second, it establishes a distinct "totality of the circumstances" test that applies to Section 2 vote denial and abridgement claims.<sup>25</sup> Third, it explicitly prohibits a court from considering whether an election practice or procedure imposes a material burden on the total number or share of members of a protected class; the degree to which the challenged policy has a long pedigree; the use of similar practices in other states or political subdivision; the availability of other forms of voting unimpacted by the challenged procedure; a prophylactic impact on potential criminal activity by individual voters, where such crimes have not been committed in the state in substantial numbers; and mere reference to interests in preventing voter fraud or promoting voter confidence.<sup>26</sup>

By enacting NAVRA, Congress would fulfill its trust responsibility to ensure that Tribes and their members have the right to vote, and that such right is protected. Additionally, the legislation would address the shortcomings of the Indian Citizenship Act and—in combination with the John Lewis Act—would restore Section 2 of the Voting Rights Act and clarify the standard for Section 2 vote denial claims, thereby restoring the spirit and purpose the Voting Rights Act. Furthermore, pass-

<sup>19</sup> *Cherokee Nation v. Georgia*, 30 U.S. 1, 10 (1831).

<sup>20</sup> *Kagama*, 118 U.S. at 384.

<sup>21</sup> For a more in-depth discussion of the trust relationship, see Native Voting Rights: Exploring Barriers and Solutions, Hearing Before the H. Subcomm. on Elections, 116th Cong. 1, 3–4 (2020) (statement of Patty Ferguson-Bohnee, Dir., Indian Legal Clinic, Sandra Day O'Connor Coll. of L.).

<sup>22</sup> See generally Native Voting Rights: Exploring Barriers and Solutions, Hearing Before the H. Subcomm. on Elections, 116th Cong. (2020) (statement of Patty Ferguson-Bohnee, Dir., Indian Legal Clinic, Sandra Day O'Connor Coll. of L.).

<sup>23</sup> ARIZ. REV. STAT. § 16–1005.

<sup>24</sup> See *Thornburg v. Gingles*, 478 U.S. 30 (establishing the specific factors courts must consider in a "totality of the circumstances" analysis).

<sup>25</sup> 25 S.4, 117th Cong. § 101 (2021).

<sup>26</sup> *Id.*

ing such legislation would reduce the current burden on Tribes and Tribal members to litigate for their right to vote in accordance with the Voting Rights Act.

*Question 2.* Ms. Ferguson-Bohnee, you state in your testimony that the lack of formal addresses on Tribal lands makes it difficult for voters to comply with address requirements to register to vote or to produce identification to vote on Election Day. You also state that the lack of a formal address can cause election officials to place Native voters in the wrong precinct. In many states, like Arizona, a voter's entire ballot is discarded if they cast a ballot out of precinct. This is complicated by the fact that for many Tribes, more than one precinct crosses their Tribal lands. For example, in New Mexico the Navajo Nation spans five counties and over 60 precincts. Do nontraditional addresses often cause counties to place Native voters in the wrong precinct or not place them in any precinct at all? How often does this occur?

Answer. Yes, many Native Americans living on-reservation lack traditional street addresses, and landmarks and cross roads are frequently used to identify the location of homes.<sup>27</sup> Further, many of the roads on Indian reservations are unnamed and not serviced by the U.S. Postal Service due to the poor quality of road systems on Indian reservations.<sup>28</sup> In light of the lack of traditional addresses, many Native Americans receive their mail at post office boxes and may include a post office box on their state identification. In Arizona, only 18 percent of voters living on-reservation outside of Maricopa and Pima Counties have a physical address and receive mail at home.<sup>29</sup>

The lack of traditional addresses in Indian Country renders compliance with address requirements when registering to vote and producing identification on election day especially difficult. In addition, nontraditional addresses frequently cause counties to place Native American voters in the wrong precinct or not place Native American voters in any precinct at all.

We have documented issues with precinct placement during each election since the Indian Legal Clinic began the Native Vote Election Protection Project. Each election cycle, we document numerous incidents of voters placed in the wrong precincts due to their nonstandard addresses, many of whom were either denied a ballot or directed to polling locations outside of their rightful precinct. Leading up to the 2020 election, over 2,000 Native American voters in Apache County were not placed in any precinct because the County could not confirm the correct polling locations for these nonstandard addresses. Instead, these voters were placed on a suspense list. When voters showed up at the polls on election day, they were not on any list, and the poll workers were instructed to call the county to determine the correct precinct. However, due to the overwhelming number of calls, some calls went unanswered.

In some cases, the voter is assigned a polling place closest to their post office box, which could be thirty minutes to two hours from where they live. This confusion happens across Indian Country in Arizona. For example, in 2016, poll workers in Maricopa County gave a Native American voter a provisional ballot because the voter registration rolls listed the voter's physical address, while her identification displayed the address of her post office box.<sup>30</sup> Additionally, in the 2016 General Election, voters living on the Gila River Indian Reservation were assigned to the wrong precinct.<sup>31</sup> The Native Vote Hotline directed voters to the correct precinct, but some left without voting.<sup>32</sup> In the same election, voters on the San Carlos Apache Reservation were sent back and forth between two polling locations in different precincts.<sup>33</sup> Both precincts informed the voters that they were not registered in that precinct, and poll workers did not offer the voters a provisional ballot.<sup>34</sup> In 2020, voters on the Gila River Reservation were redirected to vote at the precinct associated with their post office box even when the voter confirmed that s/he lived in the precinct.

<sup>27</sup>Native American Voting Rights Coalition, *Voting Barriers Encountered by Native Americans in Arizona, New Mexico, Nevada, and South Dakota* at 3, 5 (Jan. 2018).

<sup>28</sup>Brief for National Congress of American Indians et al. as Amici Curiae Supporting Petitioners at 11–12, *Crawford v. Marion County*, 553 U.S. 181 (2008) (nos. 7–21 & 7–25), available at [https://sct.narf.org/documents/crawford/merits/amicus\\_ncai.pdf](https://sct.narf.org/documents/crawford/merits/amicus_ncai.pdf).

<sup>29</sup>*Democratic Nat'l Comm. v. Reagan*, 329 F. Supp. 3d 824, 869–70 (D. Ariz. 2018).

<sup>30</sup>ARIZONA STATE UNIVERSITY INDIAN LEGAL CLINIC, *NATIVE VOTE—ELECTION PROTECTION PROJECT 2016 ELECTION REPORT 1*, 11 (2018), available at <https://law.asu.edu/sites/default/files/pdf/2016-native-vote-election-protection-report.pdf>.

<sup>31</sup>*Id.*

<sup>32</sup>*Id.* at 11–12.

<sup>33</sup>*Id.* at 12.

<sup>34</sup>*Id.*

*Question 3.* Ms. Ferguson-Bohnee, would allowing Tribes to designate a Tribal building whose address can be used by voters to register, pick up, and drop off a ballot help ensure that Native voters can access the ballot box? Would this provision also help ensure that Native voters are placed in the correct precinct and that their votes are counted?

Answer. Yes, allowing Tribes to designate at least one building in each precinct as a ballot pickup and collection location would address several of the obstacles that voters living on-reservation face, including the issues associated with nontraditional addresses and vote-by-mail. This provision would also help to ensure that Native American voters are placed in the correct precinct and that their votes are counted. Considering extreme poverty and lack of affordable housing in many reservation communities, many Native Americans experience homeless or near homelessness. This ultimately impacts the ability of Native American voters to maintain a permanent physical address, which is critical to maintain an active voter registration status, as Arizona law requires voters to provide a residential address. Designated Tribal buildings for voter registration, ballot pick up, and ballot drop off would assist these voters by providing them with a consistent physical address to use when voting or registering to vote. Furthermore, a designated Tribal building will assist voters that lack equitable access to mail, as lack of access to mail contributes to Native Americans participating in Arizona's absentee voting at a significantly lower rate. Post office boxes are not an adequate alternative to home mail delivery, as some reservation residents must travel up to seventy miles in one direction to get mail.<sup>35</sup> In addition to distance, limited hours at USPS offices or contracted postal units limit Native Americans' ability to regularly receive mail. For example, Arizona's Tribal land base consists of 19.8 million acres and more than 100,000 residents, yet there are only 48 post offices and contracted postal units on Tribal land. Allowing Tribes to designate buildings as additional locations to receive and drop off a ballot will increase the number of locations where voters can access the ballot and register to vote. As discussed above, nontraditional addresses cause various problems for Native American voters because counties may place voters in the wrong precinct or fail to place the voter in altogether. Further, under Arizona's out-of-precinct policy, the entire ballot is discarded if a voter casts a ballot in the wrong precinct. Allowing voters living on Tribal lands to use the address of a designated Tribal building as their residential and mailing address would ensure that Native American voters are placed in the correct precinct and that their ballots are counted. If county boundaries respect the tribal subdivision boundaries, this could improve the ability to identify precincts for Tribal members. For example, the Gila River Indian Community has seven districts, and these districts align with the voting precincts. All of the voters who live in District 4 are assigned the District 4 Service Center address as their residential address in the voter registration database.

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RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. BRIAN SCHATZ TO  
PATTY FERGUSON-BOHNEE

*Question 1.* Do you see patterns in voting turnout within Native American communities? What can we learn from those patterns to improve voter access and address other barriers to the ballot those communities currently experience?

Answer. 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.<sup>1</sup> 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.<sup>2</sup> 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

<sup>35</sup> Brief of Amici Curiae NCAI at 12, *Crawford v. Marion County* (2008).

<sup>1</sup>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>.

<sup>2</sup>Native American Voting Rights Coalition, Voting Barriers Encountered by Native Americans in Arizona, New Mexico, Nevada, and South Dakota at 3, 5 (Jan. 2018) (hereinafter "NAVRC Study").

digital divide. Changes to voting processes interact with these isolating conditions to limit Native American voter participation.

Turnout for Native Americans in Arizona consistently lags behind the state's average. In 2016, the turnout for the state was 74.71 percent.<sup>3</sup> For Tribal communities, half of Arizona's reservations had turnout below 50 percent of registered voters. In 2018, the turnout for the state was 64.85 percent,<sup>4</sup> but for Tribal communities the average turnout was 44 percent with some Tribal precincts seeing turnout as low as 22 percent. In 2020, the State's turnout was 79.9 percent.<sup>5</sup> For Tribal communities, the average turnout was around 60 percent.

These patterns in Arizona demonstrate that unequal access to voter registration opportunities, in-person early voting locations, voter identification and socio-economic barriers that impede access to the ballot ultimately impede turnout and overall participation of Native Americans in the electorate overall. While there was a significant increase in the 2020 participation rates, Native American registration and turnout lag behind.

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."<sup>6</sup> The Native American Voting Rights Act seeks to improve opportunities for Native Americans when registering to vote, accessing polling places, and casting a ballot. 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.

Arizona Native Vote Turnout in 2016 and 2020 Presidential Elections

TRIBE	2016 REG. VOTERS	2016 BAL-LOTS CAST	2016 TURN-OUT	2020 REG. VOTERS	2020 BAL-LOTS CAST	2020 TURN-OUT
Ak-Chin	410	234	57%	485	333	69%
Fort McDowell	551	252	46%	617	367	59%
Gila River	4450	2107	47%	5520	2758	50%
Havasupai	129	38	29%	152	63	41%
Hopi	9346	5293	57%	10595	7443	70%
Hualapai	617	241	39%	580	301	52%
Kaibab-Paiute	151	71	47%	143	95	66%
Pascua Yaqui	1951	974	50%	2302	1298	56%
Salt River	3581	1802	50%	3738	2165	58%
Tohono O'odham	3224	1934	60%	3477	2253	65%
White Mountain Apache	12931	8230	64%	14070	9993	71%
Navajo Nation	38019	20506	54%	40341	26208	65%

*Question 2.* The Native American Voting Rights Act of 2021 (NAVRA) defines Indian lands as:

(A) Indian country as defined under section 1151 of title 18, United States Code;

<sup>3</sup> ARIZONA SECY STATE, Voter Registration and Historical Election Data, <https://azsos.gov/elections/voter-registration-historical-election-data> (last visited Nov. 23, 2021).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> 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>.



(B) any land in Alaska owned, pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.), by an Indian Tribe that is a Native village (as defined in section 3 of that Act (43 U.S.C. 1602)) or by a Village Corporation that is associated with an Indian Tribe (as defined in section 3 of that Act (43 U.S.C. 1602));

(C) any land on which the seat of the Tribal government is located; and

(D) any land that is part or all of a Tribal designated statistical area associated with an Indian Tribe, or is part or all of an Alaska Native village statistical area associated with an Indian Tribe, as defined by the Census Bureau for the purposes of the most recent decennial census.

In light of the Supreme Court's decision in *McGirt v. Oklahoma*, is there merit to the concern that NAVRA would be too complicated—or even impossible—to implement in Oklahoma?

Answer. No, there should be no concern that the application of NAVRA in Oklahoma would be too complicated. The Native American Voting Rights Act is largely compatible with the administration of elections in Oklahoma. Even in light of the McGirt decision, NAVRA will not dramatically change the landscape of Oklahoma's election law, nor will NAVRA be too complex to implement in Oklahoma. Rather, the minor changes brought by NAVRA will be easily implemented because of existing processes in Oklahoma or because they eliminate additional steps. A review of voter registration, absentee ballot, polling locations, and vote by mail suggests that NAVRA fits within Oklahoma's election administration processes.

#### **Voter Registration**

NAVRA provides that Tribal buildings can serve as residential addresses and mailing addresses for the purposes of voter registration on Indian lands.<sup>7</sup> Oklahoma law already provides that voters can provide directions to a home or provide a legal description.<sup>8</sup> Addresses or locations of Tribal buildings will likely be easier for the county to distinguish than directions or descriptions of nontraditional addresses.

#### **Absentee Voting**

NAVRA contains several provisions with respect to absentee voting that are largely compatible with Oklahoma law. NAVRA requires a minimum of one early voting location on Tribal lands during the early voting period.<sup>9</sup> This is compatible with Oklahoma law, as the State requires that the county election board serve as an in-person early voting site.<sup>10</sup> Pursuant to NAVRA, only twelve (12) of Oklahoma's seventy-seven (77) counties—Bryan, Duncan, Grady, Hughes, Jefferson, Johnston, McIntosh, Muskogee, Ottawa, Pontotoc, Rogers, and Tulsa—may have to add a second early voting location (if the county election board is not already located on Indian land) for the reservations affirmed since McGirt.<sup>11</sup>

Furthermore, NAVRA requires that early voting on Indian lands be for 15 days prior to the election for no less than 10 hours starting some time before 9:00 AM and after 5:00 PM.<sup>12</sup> Oklahoma recently expanded early voting to allow for three days of early voting from 8:00 AM to 6:00 PM, and the Saturday immediately preceding the election from 8:00 AM to 2:00 PM.<sup>13</sup> Thus, Oklahoma currently provides a multi-day early voting period. Under NAVRA, it would have to extend the early voting period on Indian land.

#### **Polling Locations**

NAVRA requires a minimum of one polling location in each precinct in which there are eligible voters that reside on Indians lands in a location selected by the Tribe and at no cost to the Indian Tribe regardless of the population or number of registered voters residing on Indian lands.<sup>14</sup> This is largely consistent with Oklahoma law, as the State already requires that the county provide one polling location per precinct.<sup>15</sup>

<sup>7</sup> S.4, 117th Cong. § 306 (e)(4) (2021).

<sup>8</sup> OKLAHOMA STATE ELECTION BOARD, Oklahoma Voter Registration Application, Instructions, Sec. 5 (2019) available at <https://oklahoma.gov/content/dam/ok/en/elections/forms/voter-registration-application.pdf>.

<sup>9</sup> S.4, 117th Cong. § 306 (g)(1).

<sup>10</sup> VOTE 411, Vote in My State, Oklahoma, VOTE.ORG, available at <https://www.voted11.org/oklahoma>.

<sup>11</sup> These areas are already covered by NAVRA. See S.4, 117th Cong. § 303(3)(D).

<sup>12</sup> S.4, 117th Cong. § (f-g)(3).

<sup>13</sup> 26 O.S. § 14–115.4(A).

<sup>14</sup> S.4, 117th Cong. § 306 (a)(2)(A).

<sup>15</sup> 26 O.S. § 3–120(A).

Additionally, NAVRA provides that counties must allow eligible voters the opportunity to cast ballots out of precinct, without fear that that the entire ballot will be discarded.<sup>16</sup> If the County does not have an express voting machine or something similar which can print the voter's ballot for his/her precinct, the election administrator can disregard any races cast out of precinct.

### Ballots

NAVRA's provisions with respect to provisional ballots require that voters receive written notice as to why they received a provisional ballot, allows voters an opportunity to submit additional documentation in order for the ballot to be counted, and requires the county to notify the voter if and why their ballot was rejected.<sup>17</sup> Oklahoma currently has a process in place to notify voters in writing when their ballot affidavit is rejected, and therefore provides a model for implementing these provisions.<sup>18</sup>

### Voter Identification

NAVRA provides that voters can use Tribal ID when registering to vote or as voter ID to cast a ballot. Oklahoma law already provides for the use of Tribal ID when voting in person.<sup>19</sup> Thus, Oklahoma law would need only to adapt to allow Tribal IDs to be used for voter registration.

### Conclusion

The *McGirt* decision should not result in any additional requirements on Oklahoma election administrators. NAVRA will make Oklahoma eligible for grant opportunities that can offset the costs or burden of implementing NAVRA's provisions. Since NAVRA is largely compatible with Oklahoma law, these should be limited to increased early voting and processing out of precinct ballots. Instead, NAVRA will provide opportunities for funding and serve to strengthen the State-Tribal relationship between Oklahoma and the six Nations with affirmed reservations.

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RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JOHN HOEVEN TO  
HON. AARON PAYMENT

*Question 1. The right to vote is fundamental to our democracy, and we must make sure that all eligible voters have the opportunity and ability to cast their ballot. Ensuring free, fair, and secure elections and making sure that voters know their ballot counts are bipartisan priorities. How can States and Tribes better work together in a spirit of cooperation and consultation to help resolve voting issues when they may arise?*

The right to vote is fundamental to our democracy, and we must make sure that all eligible voters have the opportunity and ability to cast their ballot. Ensuring free, fair, and secure elections and making sure that voters know their ballot counts are bipartisan priorities.

The U.S. Constitution vests authority in the States to conduct their own elections. I have heard concerns from my home state that a number of the voting proposals put forth at the federal level would interfere with the state's responsibility to administer elections. Additionally, in a frontier state like North Dakota, there are several logistical and resource challenges that would arise if a number of the federal mandates discussed during this hearing were to be implemented.

Answer. The Native American Voting Rights Act (NAVRA) recognizes that Tribal Nations have, for far too long, been ignored when it comes to exercising the right to vote. NAVRA represents simple, straightforward steps that can be taken to ensure that Tribal Nations' sovereignty is respected and that Native people are able to exercise their right to vote. In order to ensure that Tribal Nations have meaningful protections and a meaningful say in the elections carried out on their sovereign territories, the protections in NAVRA need to be enacted. Passing NAVRA is (or similar protections are passed) is the best way to promote States and Tribal Nations working together in a spirit of cooperation and consultation to address ongoing issues.

*Question 2. One bill discussed during this hearing, the Native American Voting Rights Act, would require that an absentee ballot be sent to every registered voter. How would the State of North Dakota—which does not require voter registration—be expected to comply with this requirement?*

<sup>16</sup> S.4, 117th Cong. § 306 (a)(2)(I).

<sup>17</sup> S.4, 117th Cong. § 306 (e)(7).

<sup>18</sup> 26 O.S. § 14-133.

<sup>19</sup> 26 O.S. § 7-114 (A)(4).

Answer. The purpose of the Native American Voting Rights Act (NAVRA) is to ensure that Tribal Nations' concerns are treated with the seriousness and respect required by a sovereign, and to ensure that voting decisions on tribal lands are governed by a tribally-driven process. In order to allow all people to more freely access the ballot, NAVRA requires that an absentee ballot be sent to every registered voter.

*Question 3.* Under the Native American Voting Rights Act, individuals other than the voter would be permitted to return a ballot. How can it be ensured that the integrity of the voter's ballot is maintained if the ballot can be in the possession of someone other than the voter?

Answer. The Native American Voting Rights Act (NAVRA) ensures the integrity of the vote by requiring the vote to be sealed by the voter prior to someone else returning the ballot, the individual returning the ballot cannot be compensated for doing so, and the ballot must be returned to officially designated polling places. Additionally, once received, as with any ballot, there is system of checks in place to ensure the ballot submitted was actually cast by the individual in question.

Additionally, absentee and mail-in balloting have been successfully used in elections. As with absentee/mail-in balloting, federal and state government take reasonable precautions to ensure the integrity of the ballots cast. Nothing in NAVRA alters the system of checks already in place to ensure election integrity, but NAVRA will increase voter participation making our democracy a truer representation of the people it serves.

*Question 4.* Locating a sufficient number of Election Day workers and volunteers is already challenging. Are you concerned that legislative proposals at the federal level to mandate early voting hours and require additional polling locations could pose logistical and financial challenges, particularly for more rural and low population density states?

Answer. One common-sense solution to increasing voter turnout and increasing the availability of volunteers on Election Day is to legislate a paid voting holiday. Until that occurs, ensuring workers are fairly compensated—particularly in rural areas with fewer job opportunities—is one way to increase the supply of available workers. Coordinating with national, regional, and local entities to locate and train volunteers will also assist in this matter. Ultimately, Tribal Nations are primarily concerned with making sure barriers are removed to accessing the ballot. If removing those barriers creates new challenges, Tribal Nations are prepared to find new solutions. Doing nothing though is no longer acceptable, which is why the Native American Voting Rights Act needs to be passed and implemented to the fullest extent possible.

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RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. BEN RAY LUJÁN TO  
HON. AARON PAYMENT

*Question 1.* Mr. Payment, geographic isolation and the lack of mailing addresses continue to disenfranchise Native voters. Unfortunately, these factors are often not taken into account by States and precincts when administering elections, especially because traditional addresses are needed to obtain non-Tribal identification and for voter registration. Are many Tribal members without a permanent mailing address denied state-issued identification, or denied voting opportunities when they present a Tribal I.D. without a residential address?

Answer. Non-traditional mailing addresses include a wide range of circumstances, including but not limited to:

- Addresses that do not contain a house number;
- Addresses that do not contain a street name;
- General delivery addresses;
- Rural route and box number addresses;
- Highway contract route and box number addresses;
- Post office box delivery addresses;
- Addresses that include location descriptions;
- Addresses that are based on geographic coordinates; and
- Addresses utilizing census geographic codes.

The reality is that non-traditional mailing addresses are prevalent among American Indian and Alaska Natives residing on tribal lands. For example, in Arizona, outside of metropolitan Phoenix and metropolitan Tucson, only 18 percent of Native American voters have home mail delivery—which is due to a combination of cir-

cumstances, including the lack of traditional mailing addresses. The result of requiring a traditional mailing address is the inability for many Native people to get state-issued identification, to register to vote, to receive mail-in ballots, and ultimately, to exercising one's right to vote.

While this issue affects rural individuals most often, it is also an issue for some urban Native people as well. Many Native people move to cities for education or employment opportunities, but maintain their permanent address on the reservation. This can result in barriers to registering to vote and in missing mail, including information about voting and/or mail-in ballots.

Thus, the short answer to your question is: Yes, many tribal members without a permanent mailing address are denied voting opportunities.

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**\*RESPONSES TO THE FOLLOWING QUESTIONS WERE NOT AVAILABLE  
AT THE TIME THIS HEARING WENT TO PRINT\***

WRITTEN QUESTIONS SUBMITTED BY HON. BRIAN SCHATZ TO NA'ALEHU ANTHONY

1. Historical distrust has an impact on civic engagement in Indigenous communities. Can you expand more on the role history plays in contributing to Native Hawaiian voter turnout? What can be done to address it?

2. Lack of residential addresses, poor infrastructure, and voter intimidation are some of the issues that Native voters face. Do Native Hawaiian voters face similar issues?

3. Do you see a pattern in Native Hawaiian voter turnout in the recent election? What can we learn from those patterns and how can Congress utilize those trends to increase civic engagement in the Native Hawaiian community?

