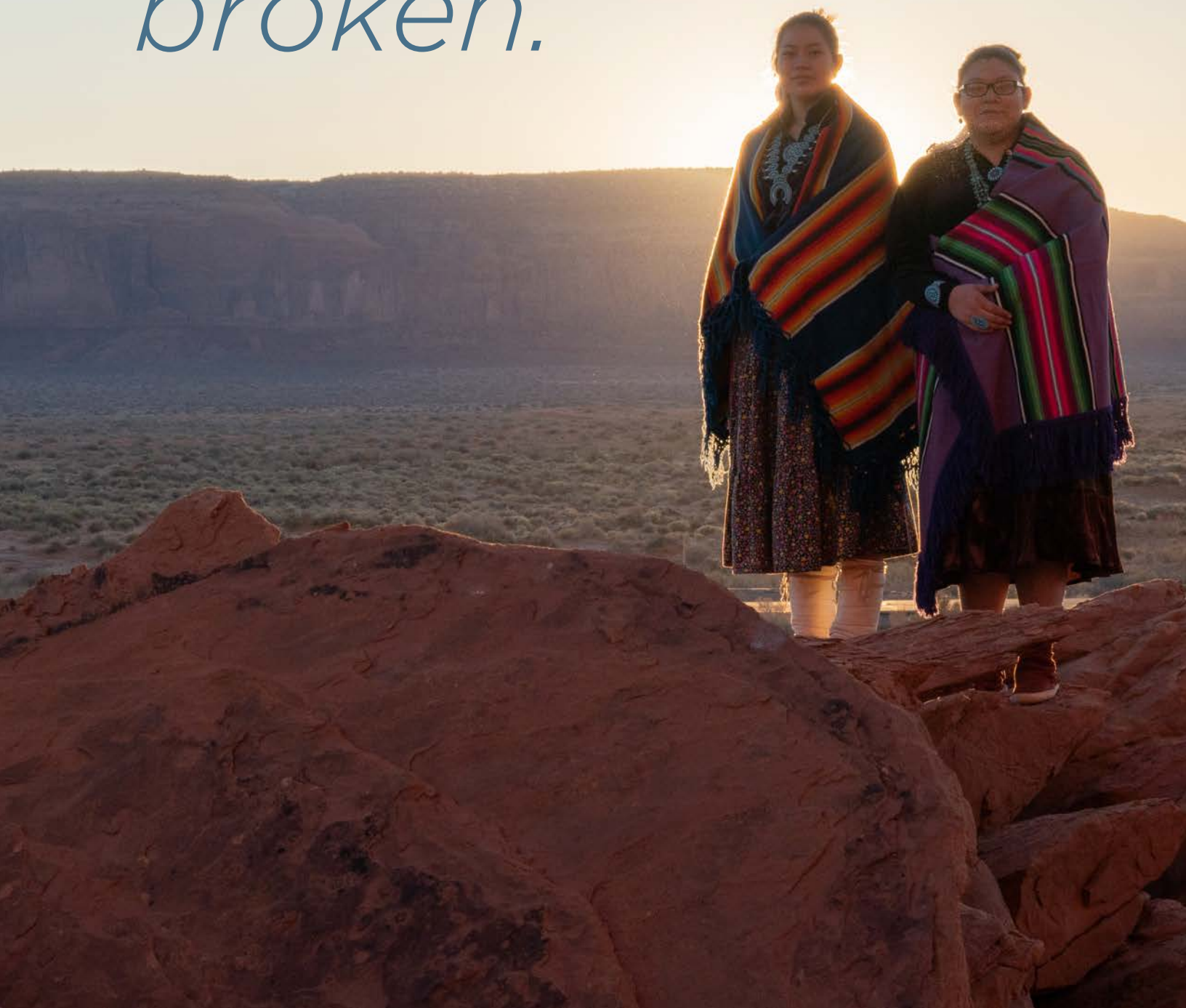


OBSTACLES AT EVERY TURN

BARRIERS TO POLITICAL PARTICIPATION FACED BY NATIVE AMERICAN VOTERS



*“Every promise
that was made
to us has been
broken.”*



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by

THE NATIVE AMERICAN RIGHTS FUND



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PART 1

OVERVIEW

Introduction and Summary of Report

1. Overview of Findings

In 2015, the Native American Rights Fund (NARF) created the Native American Voting Rights Coalition (NAVRC), a coalition of national and regional grassroots organizations, academics and attorneys advocating for the equal access of Native Americans to the political process. To begin this important work, the Coalition needed a more complete understanding of the barriers that Native Americans face when trying to register and participate in elections. So the Coalition conducted the series of field hearings chronicled in this report with the goal of pursuing remedies for the problems we uncovered.

The hearings had two other purposes: (1) to assist in the development of better public policy and (2) to promote public education on voting rights in Indian Country. Technology, the Internet, mail-in voting, online registration, and polling places located in the local elementary school where you just stop by to vote on the way home, have fostered a view that it is easy to vote now. For many Americans that is true. The field hearings revealed that this is not true for Native Americans. Instead, they continue to face a wide array of first generation barriers to voting – actual barriers to voting – that are in fact preventing them from exercising their rights to vote and stripping them of their political power.

There are 574 federally recognized Indian tribes in the United States. They are not “groups” – they are functioning governments, sovereigns, that maintain individual government-to-government relationships with the United States. They exercise degrees of civil, criminal and regulatory jurisdiction, and there is an entire section of the United States code (Title 25) that consists of laws applying just to them. They hold a unique place in the American political landscape. As is clear in this report, they are also subject to unique barriers to voting.

There are approximately 6.8 million American Indians and Alaska Natives living in the United States today. This is likely a very low estimate, as the American Community Survey that this number is based on notoriously undercounts Native Americans. While a smaller segment of the U.S. population, they are increasing in population, and they are often concentrated in communities that make them a political force.

In fact, Native American voters have made a difference in elections for both political parties in numerous states. They are regularly determinative in the Dakotas, Alaska, and parts of the Southwest. They are determinative in Congressional districts in an even greater number of states. Perhaps this ability to “swing” elections has made them the target of voter suppression tactics in communities that are not used to Native Americans flexing their political power.

Native Americans have been subject to genocide and racism for more than 500 years. For the first 150+ years of the existence of the United States, Native Americans were not allowed to vote. In 1924, the Indian Citizenship Act formally made them U.S. citizens, but states continued to prevent them from voting for much longer, arguing that they: (1) did not pay taxes, (2) were under guardianship of the U.S. and therefore were incompetent to vote, (3) were not literate in English, and (4) were more citizens of the tribes and too closely tied to tribal culture to be citizens of the states in which they lived. The passage of the Voting Rights Act (VRA) had the effect of bringing voting rights to Indian Country and Native Americans began to challenge many of those barriers.

ers. The addition of the language assistance provisions in 1975 further made it possible for those who still spoke Native languages to vote and also gave Native Americans a mechanism to enforce language access to the ballot through the courts. They have been roundly successful in doing so. Overall, given the appalling facts underlying Native American voting cases, Native Americans have been successful in an astounding 90+% of the cases they have brought, in liberal and conservative districts alike.

Although Native Americans are among the fastest growing populations in the United States, there are strong forces preventing their full political participation. The factors discouraging political participation are: (1) geographical isolation; (2) physical and natural barriers; (3) poorly maintained or non-existent roads; (4) distance and limited hours of government offices; (5) technological barriers and the digital divide; (6) low levels of educational attainment; (7) depressed socio-economic conditions; (8) homelessness and housing insecurity; (9) non-traditional mailing addresses such as post office boxes; (10) lack of funding for elections; (11) and discrimination against Native Americans.

In addition to this daunting list of factors, language is “one of the closing gaps in the election process” for Native American voters. Over one quarter of all single-race Native Americans speak a language other than English at home. Section 203 of the VRA, the language assistance provisions, helps these voters overcome language barriers by requiring covered jurisdictions to provide bilingual written election materials and oral language assistance. This provision applies to all “voting materials,” which is broadly defined as anything produced by a jurisdiction for an election.

Under the 2011 determinations of jurisdictions that required language assistance, Native American languages were the second most common language group after Spanish. Section 203 language assistance protections were required in 33 political subdivisions in five states. This rose to 35 jurisdictions in nine states in the 2016 determinations. Despite these broad protections, jurisdictions have often failed to

provide the required translations, forcing Native American voters to file lawsuits in Alaska, Arizona, New Mexico, Utah.

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

Even if Native Americans are able to register, the field hearings showed that they then face another set of barriers to actually casting a ballot. These include: (1) unequal funding for voting activities in Indian communities; (2) lack of pre-election information and outreach; (3) cultural and political isolation; (4) unequal access to in-person voting; (5) unequal access to early voting; (6) barriers *caused* by vote-by-mail, which are numerous; (7) barriers posed by state laws that create arbitrary population thresholds in order to establish polling places; (8) the use of the ADA to deny polling places on reservation lands; and (9) the lack of Native American election workers.

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

Further, even if Native American voters are able to register and vote, they testified that they often could not elect candidates of their choice due to the devastating effects of “packing” and “cracking” their representative districts. Additionally, Native American candidates face difficulty even getting on a ballot to represent themselves because of the lack of resources in their campaigns.

In sum, through its field hearings, the NAVRC found that every barrier imaginable is deployed against Native American voters. The attorneys in the Coalition were shocked at the depth and breadth of the violations across the country. This report is just the first step in trying to correct the decades-long suppression of Native American voters.

Federal and state legislation would go a long way toward remedying many of the barriers identified here. Doing so is critically important for Native Americans because exercising their voting power can help them improve their: (1) socio-economic status, (2) self-determination, (3) land rights, (4) water rights and (5) health care, among other things. Simply put, Native American political power improves their lives, the lives of their children and the American electorate in general.

2. About the Native American Rights Fund (NARF) and the Native American Voting Rights Coalition (NAVRC)

Since 1970, the Native American Rights Fund (NARF) has provided legal assistance to Indian tribes, organizations, and individuals nationwide who might otherwise have gone without adequate representation. NARF has successfully asserted and defended the most important rights of Indians and tribes in hundreds of major cases, and has achieved significant results in such critical areas as tribal sovereignty, treaty rights, natural resource protection, Indian education, and voting rights. NARF is a non-profit 501(c)(3) organization that focuses on applying existing laws and treaties to guarantee that the federal and state governments live up to their legal obligations.

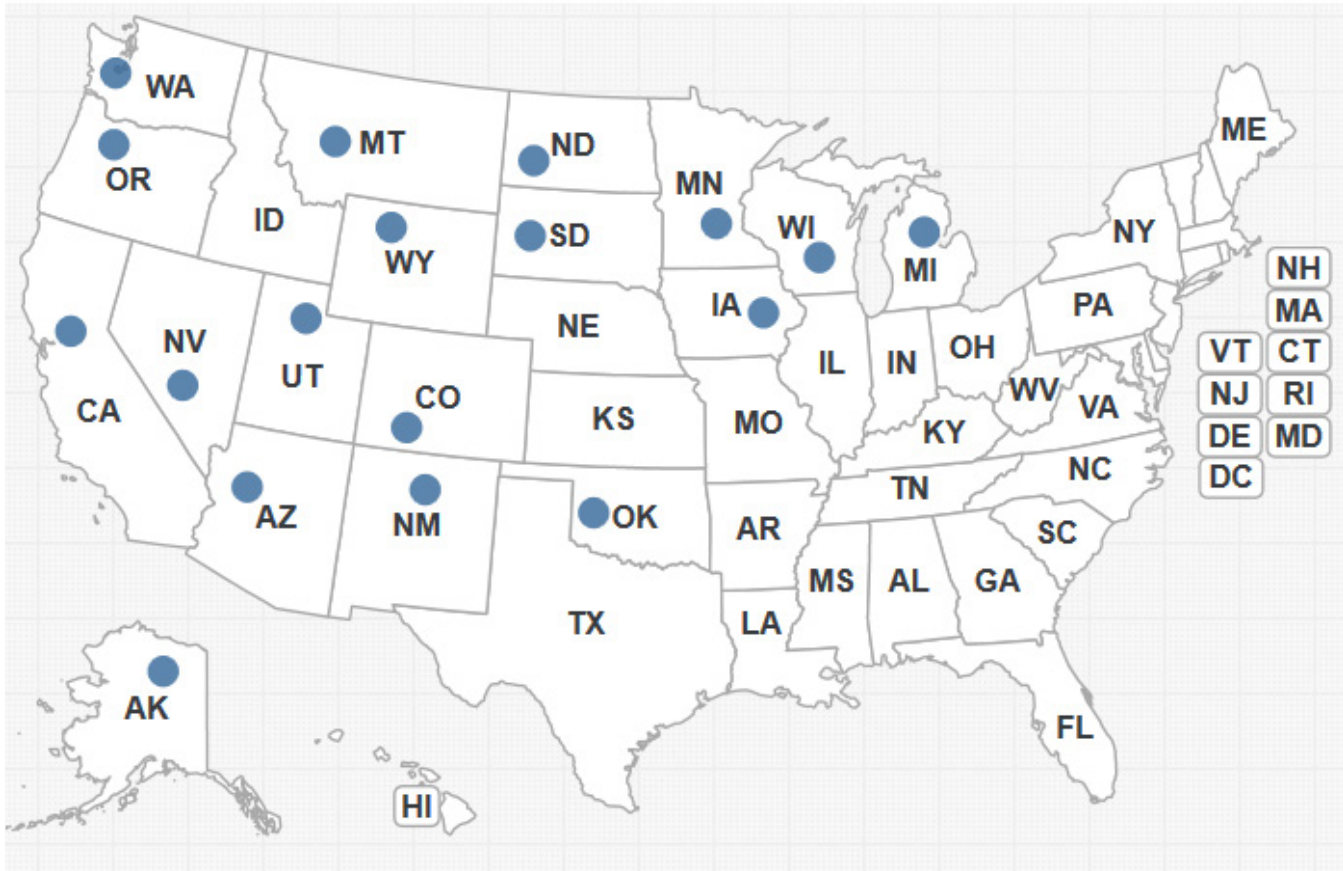
NARF is headquartered in Boulder, Colorado, with branch offices in Washington, D.C., and Anchorage, Alaska. NARF is governed by a volunteer board of directors composed of thirteen Native Americans from different tribes throughout the country with a variety of expertise in Indian matters. A staff of sixteen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

In 2015, NARF began the Native American Voting Rights Coalition, or NAVRC, a coalition of national and regional grassroots organizations, academics, and attorneys advocating for the equal access of Native Americans to the political process.¹ It was founded to facilitate collaboration between its members on coordinated approaches to the many barriers that Native Americans face in registering to vote, casting their ballot, and having an equal voice in elections.

To begin its work, the NAVRC needed a more complete understanding of the types of barriers that Native Americans face in trying to access the ballot box. In late spring 2016, the Kellogg Foundation² funded the first comprehensive, multi-state study of the problems and challenges facing Native American voters.

“...every barrier imaginable is deployed against Native American voters.”

Field Hearing Testimony



Witness testimony addressed tribes located in states marked with ●

3. The NAVRC's Field Hearings

Led by NARF, in April 2018 NAVRC completed a series of nine field hearings in seven states on the state of voting rights in Indian Country. Approximately 125 witnesses from dozens of tribes in the Continental United States generated thousands of pages of transcripts with their testimony about the progress of the Native Americans in non-tribal elections, and the work that remains to be done. Field hearings were not conducted in Alaska because the Alaska Advisory Committee to the U.S. Commission on Civil Rights already had a similar effort underway. Coalition members also were familiar with Alaska's barriers after several years of voting rights litigation there.

The field hearings were conducted at the following locations: Bismarck, North Dakota on September 5, 2017; Milwaukee, Wisconsin on October 16, 2017; Phoenix, Arizona on January 11, 2018; Portland, Oregon, on January 23, 2018; on the tribal lands of the Rincon Band of Luiseño Indians north of San Diego, California, on February 5, 2018; Tulsa, Oklahoma on February 23, 2018; on the tribal lands of the Isleta Pueblo just outside of Albuquerque, New Mexico on March 8, 2018; Sacramento, California on April 5, 2018; and on the tribal lands of the Navajo Nation in Tuba City, Arizona on April 25, 2018.

Witnesses included tribal leaders, community organizers, academics, politicians, and Native voters. They shared their experiences in voter registration and voting in federal, state, and local (non-tribal) elections. Topics addressed included whether Native voters have equal access to location of voter registration and in-person voting sites, early voting, poll worker opportunities, and treatment at the polls, and whether voter identification requirements, redistricting, language, or other forms of discrimination prevent them from being able to participate effectively in the political process.

Field hearings were the most efficient way to learn about barriers that voters face in Indian Country: directly from the people on the ground. Many reservations are geographically, linguistically, and culturally isolated from the rest of the population. Native voters living on and off the reservation often lack adequate resources for their basic needs, including transportation and modern means of communication. Broadband penetration has occurred on fewer than ten percent of all reservations. In-person meetings are the most effective way of reaching out to Native voters in remote areas.

The field hearings had three purposes:

First, findings from the hearings will play a critical role in development of and response to public policy. The hearings identified barriers to Native voting, including laws, regulations, policies and procedures. That information will be used to identify policy solutions at the federal, state, and local level. In some cases, those solutions may involve proposed legislative or regulatory fixes. In other cases, they may involve reaching out directly to election officials to propose collaborative solutions with tribes to improve access to the voting process.

Equally important, the hearings allowed NAVRC to develop a record of discrimination. The statements of witnesses who appeared at the field hearings were transcribed verbatim by certified court reporters. Those statements were analyzed to identify trends and common themes, which are provided in this report.

This record can be used to support legislation or regulations that remedy barriers faced by Native voters. In addition, this record is available to combat proposals with a discriminatory purpose or effect.

Second, the hearings will assist NAVRC members in the pursuit of other legal remedies to expand opportunities for Native voters to participate in the political process.

The hearings yielded information about barriers to registration and voting that were unknown previously among NAVRC members or were not sufficiently developed for a response. Hearing participants offered first-hand knowledge of discrimination and voting rights violations and may be available to serve as either plaintiffs or fact witnesses in any litigation that might be brought.

Third, the hearings helped promote public education on voting rights in Indian Country. Many barriers that Native voters face in registering to vote and participating in non-tribal elections can seem intractable. Distances to voting locations, lack of Native poll workers, the absence of language assistance, racial bloc voting, intimidation, direct forms of voter suppression through mechanisms such as restrictive voter identification requirements, and discriminatory redistricting practices often marginalize Native voters. Participating in the field hearings empowered Native voters by informing them that they do not have to accept the status quo. Their voices do matter, and the hearings educated them on remedies available to provide them with a meaningful exercise of their fundamental right to vote.

Non-Natives likewise benefited from the hearings. There is a widespread misguided conclusion that the types of voting barriers facing Native American communities – such as inaccessible polling locations, lack of registration opportunities, and even overt discrimination – no longer exist. The hearings allowed participants to highlight that barriers to registering to vote, casting a ballot, and having that ballot counted, are prevalent throughout Indian Country.

4. Impact of Native American Voters

There are 574 federally recognized Indian tribes within the United States.³ According to the American Community Survey estimates – which likely undercounted Native American population⁴ – there are nearly 6.8 million American Indian and Alaskan Natives living in the United States of one or more races.⁵ Of those, approximately 4.7 million are over the age of 18.⁶

Native Americans voters have the potential to become potent political forces. For example, the National Congress of American Indians reports that “one of the states with the closest margin in the 2016 Presidential Election was Michigan with a margin of 0.3%. With more than 100,000 Native people age 18 and older in Michigan, the Native people eligible to vote were 4 times more than the margin of victory in that state.”⁷

Native voters have made the difference in elections for candidates from both major political parties. In 2002, South Dakota Senator Tim Johnson (D-SD) was re-elected by 500 votes when the final votes were counted on the Pine Ridge Reservation.⁸ In 2010, Senator Lisa Murkowski, (R-AK) credited her victory in large part to mobilized Alaska Native voters that supported her unorthodox win through a write-in election.⁹ In 2012, Senator Heidi Heitkamp (D-ND) attributed her 1% margin win to the Native vote in North Dakota.¹⁰

In extremely close contests in Montana, Senator John Tester (D-MT) has depended on the Native vote. There are over 50,000 voting age Native Americans in Montana with more than 17,000 votes coming from the Indian reservations.¹¹ In 2006, Tester won by the slim margin of 3,562 votes and his 2012 win was also attributed in significant part to the Native vote.¹²

Native American tribes also have made forays into politics by endorsing candidates. For example, the Nebraska tribes that include the Ponca, the Omaha, the Santee Sioux and the Winnebago jointly

endorsed candidates they believed would support Indian issues.¹³ In the 2000 election Senator Maria Cantwell (D-WA) was endorsed by 12 tribes, which was critical to her win and to that year’s 50-50 split in the US Senate.

Yet, only 66% of the eligible Native American voting population is registered to vote.¹⁴ 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.¹⁵

While NARF and the members of the NAVRC address the issues in this report for their own sake, because they are wrongs that must be addressed as a moral matter, it is also clear that Native Americans are a potent but untapped political force. That is perhaps why they are the targets of such widespread and multi-faceted suppression efforts. This report is meant to be the first step of many toward changing the Native American political landscape.

“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.”

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PART 2

HISTORY

Part 2 authored by Professor Daniel McCool¹⁶

A. Historical Barriers To Voting In Indian Country

1. Attempts to Annihilate Native American Populations

Native Americans have been subjected to 500 years of racism and genocide. The conflict between the Indigenous peoples of the so-called “New World” and people from other continents is perhaps the longest-running war in human history.¹⁷ The predominant response of both invader and defender was to engage in a violent contest for control over land, resources, and political jurisdiction. That conflict has changed over time in intensity, mode, and character, but it continues to this day.

After the United States became a nation, it pursued a policy toward Native Americans that often was annihilationist, with many non-Native leaders urging the complete destruction of Native peoples. Sentiments such as these were common:

- The governor of Colorado: “...unless removed by the government the [Utes] must necessarily be exterminated...”¹⁸
- General William T. Sherman (the signatory of the 1868 Navajo Treaty): “We must act with vindictive earnestness against the Sioux, even to their extermination, men,



Figure 1

women, and children.”¹⁹

- Colonel Patrick Edward Connor: “Shoot every male Indian.” [referring to Shoshones and Bannocks]²⁰
- Colonel John Chivington: “Kill and scalp all, big and little; nits make lice.” [referring to Arapaho and Cheyenne]²¹
- The editor of the *Denver Rocky Mountain News*: “A few months of active extermination against the red devils will bring quiet, and nothing else will.” [referring to Utes]²²
- The *Delores News*: “...kill the red-skinned devils, until there is not enough of them left to rob a ‘hen-roost.’” [referring to Utes]²³
- General James Carleton: “Kill every...Navajo Indian who is large enough to bear arms... No women or children will be harmed.”²⁴

By the beginning of the American Civil War, most eastern tribes had been decimated, subdued by force, or removed. Many tribes east of the Mississippi simply ceased to exist or survived only in small

remnants. Even during the Civil War, when military resources were stretched to their breaking point, the U.S. still committed troops to the battle against Native Americans. In 1862, when starving Dakota Sioux Indians in Minnesota revolted against those who had deprived them of their food sources, the government reacted with the largest mass hanging in history.²⁵ The following year, nearly an entire village of Shoshone people was massacred on the Bear River in what is today Idaho.²⁶ The site of this tragedy—possibly the worst massacre of Indian people in history—was not preserved as an historical monument; today it is simply a hay field.²⁷ The following year, a peaceful village of Arapahos and Cheyenne was slaughtered at Sand Creek in Colorado Territory.²⁸

After the war, when military resources were more available, active warfare against Native Americans became widespread throughout the American West. In 1868, Lt. Col. George Armstrong Custer killed most of the Native people at an encampment on the Washita River in so-called “Indian Territory.”²⁹ That same year the Navajos, after four years of deadly imprisonment, signed a treaty that allowed them to return to a small portion of their traditional homeland, starving and destitute.³⁰

General William Sherman—no friend of the Indian, described in 1868 what happened to the Native people of the southern plains after they signed a treaty: “The poor Indians are starving. We kill them if they attempt to hunt and if they keep within the Reservations they starve.”³¹ As late as 1890, the U. S. Army was still massacring Native people, that time at Wounded Knee in South Dakota.³²

2. Attempts to Forcibly Assimilate

This brief review of history recounts only a small portion of the atrocities and injustices committed against Native Americans, but it reveals the deep hatred and racism that many Americans expressed toward Native people; these attitudes frequently were directly reflected in government policy.

The next stage of policy was forced assimilation. Instead of murdering every last Indian, they felt the best policy was to absorb them, whole cloth, into the dominant society. In that fashion, Native Americans would simply wither away, a policy manifestation of the “vanishing Indian.”³³ Native people had only two choices: conform to European culture, or be destroyed.³⁴ One of the greatest proponents of assimilation was John Wesley Powell. Powell, more than any other individual, initiated the study of ethnology, and nurtured the new scientific field of Anthropology. In the last three decades of the Nineteenth Century he had an enormous impact on the development of national policy toward Indians. In 1874 he declared that the nation faced two choices in regard to Native people: “...we must either protect him or destroy him.”³⁵

The “protection” to which Powell referred took two forms. One was to attempt to prevent Anglos living in western states, especially those living close to reservations, from continuing the policy of total extermination. The U. S. Supreme Court recognized this threat in its landmark 1886 case of *United States v. Kagama*: “Because of the local ill feeling, the people of the States where they [Indians] are found are often their deadliest enemies.”³⁶ This conflict between Native people and non-Natives who live near Indian reservations continues to this day.

The second aspect of assimilationist “protection” was a concerted effort to destroy Native culture, language, and autonomy, and convert Indians into social and economic facsimiles of Europeans. The policy was expressed primarily through two mandates.

First, the 1887 Dawes Severalty Act, also called the Allotment Act, resulted in the loss of millions of acres of reservation lands to white settlers. It was a feeble attempt to make Indians into farmers, each with his 160 acres. However, often the best farmland was sold for a pittance to Anglo farmers, leaving Natives to attempt to farm on less fecund acreage. And many Indian allotments were later sold under less than honorable circumstances to non-Indians.³⁷ A cursory examination of reservations that were heavily allotted will verify this (see, for example, the Uin-

tah and Ouray Reservation in Utah, or the eastern portion of the Navajo Reservation in New Mexico).

The second component of forced assimilation involved education. Native children were forced to abandon their culture and language, and often removed from their homes and sent off to far-away boarding schools. As one scholar put it, it was “education for extinction.”³⁸ This great engine of cultural destruction took a tremendous toll on Indian children, often depriving them of an adequate Anglo education due to inferior schools, while simultaneously taking from them their identity and cultural anchors.³⁹ The problems caused by inadequate education, including culturally inappropriate or racist education, continue to have a negative impact on Native peoples today.⁴⁰

Despite the extraordinary historical challenges faced by Native Americans, they managed to survive into the Twentieth Century. Their population bottomed out at slightly more than a quarter-million people in 1890—down from millions, perhaps tens of millions before the arrival of the Europeans. Since then, Native Americans began to increase.⁴¹ The Indians had not vanished; instead, they were managing to eke out an existence for themselves and began to reassert their autonomy and culture. To prevent this from happening, their “deadliest enemies” attempted to ensure that Native peoples would remain powerless, and the most effective way to accomplish that goal was to prevent them from voting.

3. Historical Denial of Indian Voting

The Fifteenth Amendment to the U.S. Constitution reads: “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.” However, this did not stop many states, principally western states, from barring American Indians from voting. Several strategies were employed to accomplish that goal.

a. State Constitutional Prohibitions

Many state constitutions were written prior to the passage of the Fifteenth Amendment, and limited voting to white citizens only, such as California’s.⁴² However, even after the passage of the Fifteenth Amendment, some state constitutions continued to exclude Native people from voting.

The constitutions of Idaho, New Mexico, and Washington prohibited “Indians not taxed” from voting, mimicking language in Article 1, Section 2, and the Fourteenth Amendment in the U.S. Constitution. They did not prohibit white people who did not pay taxes from voting.

Minnesota’s Constitution created a cultural purity test; it originally prohibited Indians from voting unless they “adopted the language, customs, and habits of civilization.” Each potential Native voter had to go before a district court and endure an examination to prove they met those requirements.⁴³ No other ethnic or racial group was forced to give up its culture in order to vote.

b. Residency Requirements

In 1924, the Indian Citizenship Act made most Native Americans citizens of the U.S., and the Nationality Act of 1940 made all Native people citizens.⁴⁴ However, many states still did not regard them as citizens of their state, and argued they were ineligible to vote because they were not residents of that state. In 1948, the state of New Mexico argued in *Trujillo v. Garley* that Indians were not state residents and therefore had no right to vote. A district court disagreed, recognizing for the first time that Native people in that state had the right to vote.⁴⁵

Utah made the same argument in 1956. An opinion of the state’s Attorney General declared: “Indians who live on the reservations are not entitled to vote in Utah.” He went on to say that if they moved off the reservation they could vote. In other words, if they gave up their home, and their homeland, and lived among people of an entirely different culture, then they could vote.⁴⁶

In *Allen v. Merrell*, a Ute man living on the reservation filed suit, claiming that Utah's prohibition on voting violated the Fourteenth and Fifteenth Amendments. He lost in the state Supreme Court, which ruled that Indian people were largely cared for by the federal government, and that Indians were not interested "in being involved with state government and its local units, and are much less interested in it than are citizens generally." Mr. Allen immediately appealed to the U. S. Supreme Court. At that time in 1957, Utah was the last state in the Union to categorically prohibit reservation Indians from voting, and the state legislature perhaps saw the writing on the wall and repealed the offending statute before the U. S. Supreme Court could render a decision.⁴⁷

c. Requirements to Abandon Tribal Culture

Many of the efforts to prevent Native people from voting were grounded solidly on cultural imperialism. Much like the phrase in Minnesota's Constitution, some states required that Native people give up their indigenous identity to vote.

The state of South Dakota passed a law in 1903 that prevented Indians from voting while "maintaining tribal relations."⁴⁸ In North Dakota, the state Supreme Court in 1920 granted some Indians the right to vote because they "live the same as white people; they are law-abiding, do not live in tribes under chiefs; that they marry under the civil laws of the state the same as whites, and that they are Christians; that they have severed their tribal relations...."⁴⁹ This case established both a cultural and religious test for voting.

d. Taxation

A common theme in the long tradition of preventing Native people from voting is to withhold the franchise from "Indians not taxed," or some variation thereof. Indians do pay some taxes, but not others. For example, they do not pay property taxes on homes on the reservation. Of course, people who rent their domiciles do not pay property taxes either, but the vote has never been denied to them.

In 1917, Indian voters in Minnesota were turned away from the polls, and sued, but lost in *Opsahl v. Johnson*; the judge ruled they could not vote because they did not pay the same taxes as whites.⁵⁰ In 1940—the same year the Nationality Act was passed and all Native people became, unequivocally, citizens, a survey found that five states—Idaho, Maine, New Mexico, Mississippi, and Washington—did not allow "Indians not taxed" to vote.⁵¹

The issue arose again in the New Mexico case of *Trujillo v. Garley*. Mr. Trujillo, who had served for three years in the Marine Corps in World War II, was turned away when he tried to register to vote, the clerk claiming that he was ineligible because he was an "Indian not taxed." Mr. Trujillo pointed out that he paid several different types of taxes, but not property taxes. Thus, the interpretation of that phrase, "Indians not taxed," had been contorted to apply to a specific type of tax. The U.S. District Court decided in Mr. Trujillo's favor, ruling that the discriminatory application of that phrase violated the Fourteenth and Fifteenth Amendments. The Court explained, "Any other citizen, regardless of race, in the State of New Mexico who has not paid one cent of tax of any kind or character, if he possesses the other qualifications, may vote."⁵²

The *Trujillo* case did not put this issue to rest. Local jurisdictions continued to deny Native people the right to vote based on whether they paid property taxes. In 1973, a county in Arizona refused to seat a Navajo who had won a county commissioner election. The county argued that he was not eligible to hold the seat because he did not pay property taxes. The court disagreed, and seated the Navajo.⁵³ Two years later, in New Mexico, white voters attempted to invalidate the results of a school board election in which many Navajos had voted, despite the fact that Navajo children made up two-thirds of the pupils in the district. Again, the Native voters won the case.⁵⁴

Despite these and other court victories, some local jurisdictions and Anglo voters continue to make the argument that Native Americans who live on reservations should not be allowed to vote.

e. Guardianship

Most states argued that they have a legitimate interest in preventing people from voting who are mentally incompetent or insane. They contend that if those individuals were allowed to vote, they could be manipulated by others to vote a certain way. This goal is usually accomplished by a provision in state law or state constitution that prohibits voting by individuals “under guardianship,” or are formally judged insane, or incompetent. However, with a truly imaginative twisting of this concept, it has been used to prevent American Indians from voting.

Perhaps the most notorious case came from Arizona, where the State Constitution provides that “No person under guardianship, non compos mentis or insane, shall be qualified to vote.” When two Pima Indians attempted to register to vote in the first presidential election following the passage of the 1924 Indian Citizenship Act, they were refused. The county clerk told them they were “under guardianship” and therefore could not vote. Neither of these two individuals was insane, so they sued in the Arizona Supreme Court.

In *Porter v. Hall* in 1928, Arizona sided with the county clerk, arguing the Indians were legally excluded from registering to vote because, in the famous 1831 Indian law case of *Cherokee Nation v. Georgia*, Chief Justice Marshall had written that the Indians’ relationship with the U.S. government “resembles that of a ward to his guardian.”⁵⁵ To Marshall, guardianship was a loose metaphor; for the state of Arizona, it was an excuse to prevent Indians from voting. The State Supreme Court accepted that argument, contrasting “the Indian” with “a normal person” and ruled they were ineligible to vote despite being United States citizens. That case stood for twenty years.

In 1948, two Mohave men from the Fort McDowell Indian Reservation attempted to vote. One of them, Frank Harrison, was a returning World War II veteran, and this election would be his first opportunity to vote in a presidential election following his service to his country. When Harrison and his fellow Piman, Harry Austin, went to the county clerk’s office in

Maricopa County, Clerk Roger Laveen flatly refused to register them, citing the *Porter* case and the constitutional provision concerning guardianship. Harrison and Austin filed suit in Superior Court and lost. Once again, a state court had ruled that the relationship between the federal government and tribes, commonly referred to as the trust relationship, was tantamount to insanity.

Harrison and Austin appealed to the state Supreme Court, and the resulting case, *Harrison v. Laveen*, garnered national attention.⁵⁶ Once again the State of Arizona argued that Indians should not be allowed to vote, noting that “Congress keeps a tight rein on the reservation Indian,” portraying Native people as animals to be protected by the State. Attorneys for the United States pointed out a very different role for the Native American plaintiffs, and it is worth quoting at length a passage from their amicus brief:

During the last war, when large numbers of Indians left the reservations for service in the armed forces and industrial jobs, they were made intensely aware of the discriminations which are enforced against Indians, and they rightly resented a situation where they are allowed to participate in upholding democratic principles as soldiers, but are considered unprepared to share in protecting those principles in peace time.

This time, the Arizona Supreme Court reached a different verdict. Justice J. J. Udall noted that it required a “tortuous construction” of the guardianship language in the state constitution to apply it to American Indians.⁵⁷ Finally, in 1948, Indians had the right to vote in Arizona—the same year that Native people in New Mexico won the right to vote through litigation.

f. Literacy Tests

Literacy tests became notorious in the American South as an instrument of racist voting laws.⁵⁸ Until prohibited by the Voting Rights Act in 1965 and the

1970 amendments, literacy tests were used to prevent, not just African Americans in the South from voting, but Native Americans as well. A survey of states in 1940 found that eighteen states had some form of a literacy test; six of those were western states with substantial Indian populations (Alaska was not yet a state at that time).⁵⁹

For example, an Arizona statute stipulated that only individuals who could read the U. S. Constitution in English could vote.⁶⁰ 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."⁶¹ Then, as now, many Alaska Natives spoke only their Native language, thus the new constitution effectively prevented them from voting. This provision was later overturned.⁶²

States and local jurisdictions with substantial Native populations have, like states in the South in the Jim Crow era, been quite creative in crafting various stratagems and legal devices that denied the right to vote to Native Americans. Of course, the real reason why states did not want Indians to vote is because they could then actually wield political power and influence. At the dawn of the Twentieth Century, there was little concern that Indian people would somehow exert themselves politically. They had been reduced to a tiny fraction of their population, nearly all their land and resources had been taken from them, and they were confined to reservations which were, in nearly all cases, just a small remnant of their traditional homeland. They were starving, not lobbying Congress.

But slowly, that began to change as Native people began to recover from the years of annihilation and forced assimilation. The next section will explain how Native people pulled themselves out of the deep pit of near-extinction to become a potent political force.

4. From Despair to Empowerment

To transition from a state of powerlessness to a force to be reckoned with requires a combination of ap-

proaches and strategies. Native people, and their allies, utilized all of the political, social, and economic tools at their disposal to effect this dramatic change. It was the combination of new and more progressive laws, combined with significant victories in court that changed the fundamental orientation of American Indian policy in the U. S. But ultimately it was activism on the part of Native people themselves that was the catalyst to a Native resurgence.

a. Statutes

Since the passage of the 1924 Indian Citizenship Act, the U. S. Congress has changed course in dramatic ways when it comes to American Indian policy. Ten years after the passage of that Act, in 1934, a Congress dominated by non-western legislators, and goaded by a progressive FDR and his activist Secretary of the Interior, Harold Ickes, passed one of the most important pieces of legislation in history: the Indian Reorganization Act (IRA).

The IRA set up the basic structure of Indian self-government, and essentially made reservations political jurisdictions, each with its own set of rights, freedoms, and responsibilities. The IRA's objective was to "conserve and develop Indian lands and resources; to extend to Indians the right to form business and other organizations; to establish a credit system for Indians; to grant certain rights of home rule to Indians; to provide for vocational education for Indians...."⁶³ The Act also put an end to the devastating policy of allotment that began with the Dawes Severalty Act in 1887.

The Act was often administered in a heavy-handed manner, and it imposed a governing structure that was European in design, rather than Native. However, it did provide a foundation for a permanent Native political presence. Instead of vanishing, Native people would be self-governing. The IRA, combined with the Indian Citizenship Act, created the new dynamic that Native people could be both citizens of their tribes, and citizens of the United States and its sub-units.

But Congress and the United States were inconstant in their approach toward Native Americans. Twenty years after the passage of the IRA, from the mid-1940s to the mid-1960s, with a more conservative Congress and president in power, western senators and legislators pushed through a radically different policy called “termination.” The goal of the new policy was to “de-Indianize” the country by terminating Indian reservations, government-to-government relations, and the separate legal and political status of American Indians.⁶⁴ Like most anti-Indian legislation, this policy was promoted by western senators and congressmen.⁶⁵ In effect, it was an effort to abrogate all of the hundreds of treaties signed with Indian tribes in one fell swoop.

Termination was paired with a policy termed “relocation.” That policy was an effort to take Native people off reservations and spread them out in various locations around the country. The impact of that effort is why there are a surprising number of Native people in cities such as Los Angeles and Cleveland.⁶⁶ Forced assimilation was once again the policy of the United States.

The tremendously negative impact that termination and relocation had on Native people soon became evident, although the federal government did not abandon that policy until 1970. Even today, some of the government-to-government relations have not been reinstated. As the failures of termination became obvious, another major swing in Indian policy occurred.

The 1975 Indian Self-Determination Act and Education Assistance Act fundamentally changed the course of American Indian policy. The Act’s statement of purpose is quoted at length because it forms the foundation of modern tribal government and sovereignty:

(a) The Congress hereby recognizes the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational as well as

other Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities.

(b) The Congress declares its commitment to the maintenance of the Federal Government’s unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from Federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services.⁶⁷

This law unequivocally committed the federal government to a policy of recognizing the sovereignty and self-governance of Indian tribes, and allowing tribes, not the Bureau of Indian Affairs or some other entity, to control tribal programs. However, this critical shift in power to self-determination did not in any way diminish the role of tribal members as citizens and eligible voters in federal, state, and local levels of government. Unfortunately, their ability to vote and participate politically in these other levels of government on a par with non-Indians would require decades of litigation and the passage and enforcement of the Voting Rights Act of 1965 (VRA).

The VRA initially had its primary impact on African Americans voters in the South. However, many of the same stratagems used by southern jurisdictions to prevent African American voters from having equal access to the polls were also employed by jurisdictions in other parts of the country to suppress voting among other minorities, including Native Americans. Thus, the applicability of the Act began to broaden as other minorities realized that the law could help them achieve equal voting rights.⁶⁸

The earliest voting rights lawsuits on behalf of Native Americans were brought under the Fourteenth

and Fifteenth Amendments. At that time, the original coverage formula in Section 4 of the Act covered Native areas in Arizona, Alaska, and South Dakota, so it did not take long for Native Americans to realize that the VRA could help them achieve equal voting rights.

The Act gained even greater relevance to Indian Country after the 1975 amendments added Section 203 protections for language minorities.⁶⁹ That same year, the U. S. Commission on Civil Rights issued a report titled “*The Voting Rights Act: Ten Years After*,” that noted progress had been made in forcing unfair jurisdictions to change their voting laws, but that “problems encountered by Spanish-speaking persons and Native Americans in covered jurisdictions are not dissimilar from those encountered by Southern blacks.”⁷⁰ A brief summary of some of the voting rights cases in Indian Country brought under the VRA and the Fourteenth and Fifteenth Amendments illustrates the Act’s impact in Indian Country.

In conclusion, the federal policies through legislation enacted by Congress have been irregular and often discriminatory in their treatment of Native Americans. Legislation has varied from brutally regressive to inspired. Congress and the President, elected by popular majorities, frequently failed to protect and preserve the rights of Native Americans, even when they were the law of the land through treaties. But courts have a degree of insularity from popular vagaries and several landmark cases have profoundly impacted Native Americans.

b. Court Cases

At the dawn of the Twentieth Century, the future looked bleak for American Indians. Federal policy was based on the assumption that Native peoples would be swallowed up by the dominant culture and cease to exist as separate legal and cultural entities. But the courts occasionally provided rare victories for tribes that assisted them in resisting total absorption in white society. Indian case law is enormously complicated and voluminous, but basic trends can be identified.

Although many court decisions have gone against Native interests, in some cases the judicial branch treated Native Americans with greater fairness than federal, state and local governments. Many landmark Indian cases, such as *Winters v. U.S.* (water rights), *Williams v. Lee* (tribal sovereignty), and the *Boldt* decisions (fishing rights) were significant victories for Indigenous rights.⁷¹ In all these cases local interests and western states fiercely opposed Native rights, and continued to battle tribes in court in an effort to limit Native rights to water and resources and Indian sovereignty.⁷²

Many Native victories in court occurred during the 1960s and 1970s. Another limiting factor was that tribes often had to rely on the U. S. Department of Justice to sue on their behalf, but the fealty of that Department to Native rights varied with administrations.

Going to court, like going to the U.S. Congress, for redress of Native grievances has always been fraught with difficulties, with varying degrees of success. However, Native Americans have demonstrated an amazing persistence in fighting for their rights and utilizing both litigation and legislation to achieve that goal is part of that persistence. As the struggle against first, annihilation, then forced assimilation, continued, it became increasingly clear to Native Americans that they were the most effective advocates of their own interests. This led to the formation of numerous Indian organizations that work on behalf of Native peoples.

c. Native Activism

In the latter half of the Nineteenth Century, the only political entities that lobbied on behalf of American Indians were organizations such as the Indian Rights Association, the Lake Mohonk Conference/Friends of the Indian, and other non-Indian organizations. They fought assiduously against the total annihilation of Indians, but viewed forced assimilation as the only way to prevent Native people from being totally wiped out. These advocates were well-meaning and benign compared to their contemporaries who advocated for extermination. But they fundamental-

ly misunderstood Native Americans and underestimated their capacity for resilience and survival.⁷³

American Indians have long understood that they were their own best protectors, but after Native Americans achieved complete citizenship following the 1924 Indian Citizenship Act and the 1940 Nationality Act, it became possible for them to take an increasingly active role in lobbying for their own behalf.⁷⁴ An additional impetus was World War II, when thousands of Native men joined the armed forces and fought on behalf of the ideals of American democracy.

When they returned, they were not about to accept an inferior role in the governing process.⁷⁵ Native veterans helped form the National Congress of American Indians (NCAI) in 1944. It soon became involved in fighting for equal voting rights, and played a major role in the Arizona case, *Harrison v. Laveen*, that resulted in voting rights for Native people in that state. NCAI continues to be one of the most effective advocates of Native rights in the U.S.⁷⁶

Native rights were given an additional boost as part of the civil rights movement of the 1950s and 1960s. Indian activism spiked, and several new Indian organizations came into existence, such as the militant American Indian Movement and regional and local organizations. This activism resulted in several high-profile protests and confrontations at places including Alcatraz, Wounded Knee, and Washington, D. C.⁷⁷

The principal legacy of that era was a realization that Native peoples could organize effectively, and on many different levels, and have a direct impact on public policy that affected them. During that era, the Native American Rights Fund (NARF) was formed in 1970. Since then, NARF has been one of the most effective advocates of Indigenous rights in court.⁷⁸

Today there are dozens of Native American groups that work on behalf of Native peoples. They often work in conjunction with non-Native groups when they share common interests. These groups are involved in a panoply of issues, but many of them have

realized that, at the very core of governance is the act of voting. NCAI began the “Native Vote” campaign in 2008 with other civil rights organizations, such as the Lawyers’ Committee for Civil Rights Under Law.

In 2015, NARF formed the Native American Voting Rights Coalition.⁷⁹ Joining the Coalition’s efforts to ensure fair elections for Native people are national organizations such as the ACLU, NARF, NCAI, Fair Elections Network, and the Lawyers’ Committee. Regional and local organizations have likewise been active in the Coalition, including Four Directions, based in South Dakota, Western Native Voice, based in Montana, the California Native Vote Project, the Inter Tribal Council of Arizona, and the Navajo Nation’s Department of Justice.⁸⁰

B. The Voting Rights Act: Summary Of Cases On Behalf Of Native American Voters

The Voting Rights Act is arguably the most effective civil rights law ever passed because voting is at the heart of our democratic form of government. The Act has become, as one legal scholar put it, “a sacred symbol of American Democracy.”⁸¹ The VRA has literally changed the face of the American electorate, including Indian Country. This has required a nearly constant barrage of cases to challenge unfair voting laws and practices.

The struggle for equal voting rights has expanded from direct denial of voting rights to the dilution of voting rights, or, as the VRA proclaims, “No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to **deny or abridge** [emphasis added] the right of any citizen of the United States to vote on account of race or color.”⁸²

The addition of Section 203, the language assistance provision, in 1975, provided tribes with another tool with which to fight for equal access to election procedures.⁸³

Relying upon the Fourteenth and Fifteenth Amendments, and the various sections of the VRA, Native American voters have filed dozens of lawsuits in an effort to gain equal access to election procedures and to have an equal opportunity to elect candidates of their choice. A review conducted in 2008 of all voting rights cases involving Native Americans and Alaska Natives as plaintiffs found 74 cases, filed in fifteen states. The Native plaintiffs lost only four of these cases, with partial success in two, and victories or successful settlements in the remaining 68 cases.⁸⁴ That is an impressive record of success often based upon dismal facts.

Such a startling number of court victories indicates that the VRA plays an ongoing and vital role in protecting the voting rights of Native voters. It also makes clear that state and local jurisdictions continue to “deny or abridge” the rights of Native voters, especially after the *Shelby County* case emasculated Section 5.

The Voting Rights Act is arguably the most effective civil rights law ever passed because voting is at the heart of our democratic form of government. The Act has become, as one legal scholar put it, “a sacred symbol of American Democracy.”

Since 2008, the following twenty cases have been filed. They are arranged into five categories to indicate the breadth of challenges and problems that face Native voters:

1. LANGUAGE ASSISTANCE

Nick v. Bethel, No. 3:07-cv-00098, (D. Alaska Feb. 2010).

Settlement following Preliminary Injunction:⁸⁵ Following the issuance of a preliminary injunction, the State of Alaska and the city of Bethel agreed to comply with Section 203 of the Voting Rights Act by ensuring that at least one Yup'ik trained translator is available at each polling place at all times that it is open. The settlement also requires providing mandatory training for all translators who work at city elections, providing a Yup'ik-English glossary of election terms, by making any election-related announcements in Yup'ik, providing notice that Yup'ik translations will be available at election events, and translating all initiatives and referenda into written Yup'ik.

Toyukak v. Treadwell, No. 3:13-cv-00137-SLG, (D. Alaska Sept. 30, 2015).

Settlement following Plaintiff victory at Trial:⁸⁶ In the Dillingham Census Area, Wade Hampton Census Area, and Yukon-Koyukuk Census area, the State of Alaska was found liable for violating Section 203 of the VRA following a two-week trial. The State agreed to comply with Section 203 by providing materials and language assistance for Yup'ik and Alaskan Athabascan (in Yukon-Koyukuk Census Area) speakers.

Navajo Nation Human Rights Comm. v. San Juan Cty., No. 2:16-cv-00154-JNP, (D. Utah Feb. 2018).

Settlement:⁸⁷ Beginning in 2018, San Juan County agreed to comply with Section 203 of the Voting Rights Act by providing in-person voter assistance (English and Navajo) at several locations on the Navajo Reservation during the 28 days before every election, maintaining three polling places on the Navajo Reservation with Navajo language assistance, and taking various steps to ensure quality interpretation of election information and materials into the Navajo language.

2. REDISTRICTING/MALAPPORTIONMENT/AT-LARGE ELECTIONS

Samuelsen Jr. v. Treadwell, No. 3:12-cv-00118-SLG, (D. Alaska June 27, 2012).

Voluntary Dismissal:⁸⁸ The plaintiffs voluntarily dismissed the action. When the case was initially brought, the State of Alaska had begun to implement its statewide redistricting plan in violation of Section 5 of the VRA. On the eve of the hearing on the plaintiffs' motion for a preliminary injunction, the U.S. Department of Justice precleared the plan notwithstanding its implementation. As administrative determinations to preclear a voting change under Section 5 are final and not subject to further judicial review, and the Alaska Redistricting Board's Amended Proclamation redistricting plan was precleared such that it mooted the plaintiffs' claims, the plaintiffs dismissed their case.

Jackson v. Bd. of Treasurers. of Wolf Point Sch. Dist. No. 45-45A, No. CV-13-65-GF-BMM-RKS, (D. Mont. Apr. 9, 2014).

Consent Decree:⁸⁹ The parties stipulated District 3 had a – 75.24% deviation from the ideal population size given it elects 3 members to the board. The population for the 45-45A school district had a +120.49% deviation size from the ideal population size given that it elects 5 members to the Board. Defendants conceded this is a violation of the one person, one vote standard of the Equal Protection Clause of the 14th Amendment, and agreed to be permanently enjoined from administering, implementing, or conducting future elections for the Board of Trustees under that plan and the defendants agreed to remedy the districting disparities.

Large v. Fremont Cty., 709 F. Supp. 2d 1176 (D. Wyo. 2010).

Holding: The court found that at-large elections for the Fremont County Commission diluted Indian voting strength and are in violation of Section 2 of the Voting Rights Act because the Eastern Shoshone and Northern Arapaho Tribes are geographically compact and their minority group is politically cohesive; the Fremont county's white majority votes sufficiently block a minority candidate; the elections in the county are racially polarized; the Shoshone and Northern Arapaho bear the effects of discrimination in education, employment, and health that limit their political participation; campaigns have been characterized by racial appeals; very few minority members have been elected to office; there is a lack of responsiveness to the needs of the minority group; and the policy underly-

ing the at-large system is tenuous.

Cottier v. Martin, 604 F.3d 553, (8th Cir. 2010).

Holding: The Eighth Circuit determined that the district court did not commit clear error in finding that although the plaintiffs successfully proved that the minority group was compact and politically cohesive, they failed to show that the white majority in the city voted sufficiently as a bloc, usually to defeat an Indian candidate. The Eighth Circuit rejected the appeal and affirmed the district court's initial finding.

Navajo Nation v. San Juan Cty., 929 F.3d 1270, 1274 (10th Cir. 2019).

Holding: The Tenth Circuit affirmed the district court's holding that San Juan County was not required to draw and maintain districts in perpetuity under a past consent decree. As such, the court concluded the county did not have a compelling government interest in maintaining its racially-motivated districting decisions as they were drawn in 1986, and maintained in 2011, and the County's Commission Districts violated the Equal Protection clause.

3. ELECTION PROCEDURES

Spirit Lake Tribe v. Benson Cty., No. 2:10-cv-95, (D.N.D. Oct. 6, 2011).

Consent Decree:⁹⁰ The court issued an initial preliminary injunction and the county eventually agreed to a consent decree in response to the county's elimination of 7 of 8 polling places in an attempt to implement vote by mail.

The consent decree kept the two reservation polling places open but denied a request to reopen a third polling place near the reservation.

Brooks v. Gant, No. Civ-12-5003-KES, 2012 WL 871262 (D.S.D. Mar. 14, 2012).

Holding: The motion for a preliminary injunction to compel South Dakota to establish satellite early voting locations within Shannon County was mooted because during a prior hearing, the defendants promised to grant the full 46 days of early voting to occur at a satellite location within Shannon County for the 2012 elections. In addition, the county promised to seek preclearance, do everything in its power to ensure that early voting occurs, and reimburse Shannon County for associated costs.

Wandering Medicine v. McCulloch, No. 1:12-cv-135 (D. Mont. Oct. 10, 2012).

Holding: The court denied the motion for a preliminary injunction because the plaintiffs failed to show a discriminatory intent. The court relied on evidence that although Native Americans face greater hardships for in-person absentee voting than residents of the counties who do not live on the reservation, they had successfully elected candidates they wanted in the past.

Settlement:⁹¹ Montana state and county election officials ultimately settled the case, agreeing to establish satellite offices on the reservations twice a week through Election Day.

Poor Bear v. Jackson Cty., No. 5:14-cv-05059-KES, 2015 WL 1969760 (D.S.D. May 1, 2015).

Settlement:⁹² Defendants agreed to open a satellite office in Wanblee on the Pine Ridge Reservation for the 2014 election. Subsequently, the county entered a binding agreement with the State, committing itself to opening a location in proximity to the reservation for federal general and primary elections through 2022.

Sanchez v. Cegavske, 214 F. Supp. 3d 961 (D. Nev. 2016).

Holding: The court ordered early in-person voting in Nixon (32 miles from nearest center) and Schurz (34 miles from nearest center) Counties. The court also granted the motion for in-person Election Day voting in Nixon as the 16-mile distance to a polling location equates to an undue burden. Although 16 miles is closer than the location to early voting, the court took into consideration that it was only open for one day. The motion was denied in regard to a request for in-person voter registration in Nixon and Schurz.

DNC v. Hobbs, No. 18-15845 (9th Cir. Jan. 27, 2019)

Ongoing: The Ninth Circuit *en banc* reversed the district court and held that Arizona's out of precinct policy that prevented even the partial counting of ballots filed out of precinct had a discriminatory impact on Native American, Hispanic, and African American Voters in violation of Section 2 of the Voting Rights Act. The Court also held that the criminalization of the collection of another person's ballot had a discriminatory impact

on minority voters and was intentionally discriminatory under Section 2 of the Voting Rights Act and the Fifteenth Amendment. As of this report's printing the state of Arizona has indicated it will file cert.

Grayeyes v. Cox, No. 4:18-cv-00041, 2018 WL 3830073 (D. Utah Aug. 9, 2018).

Holding: After Native American San Juan county commissioner candidate Willie Greyeyes was removed from the ballot by a San Juan County election official, he filed suit to reinstate his candidacy. The motion for a preliminary injunction was granted and all challenges to the plaintiff's candidacy and voter status were voided. Not only did the challenger fail to follow proper procedure in filing a candidacy challenge, but there is evidence that a county employee solicited the individual to file the voter challenge. The Court held that Greyeyes was denied due process.

Navajo Nation et. al. v. Hobbs, et. al., CV 18-08329-DWL (D. Ariz. Sept. 3, 2019, Sept. 12, 2019, Oct. 11, 2019, Oct. 17, 2019).

Settlements: The Navajo Nation and Navajo citizens sued the Arizona Secretary of State and Apache, Coconino, and Navajo Counties for violations of the Voting Rights Act, the First and Fourteenth Amendments, and the Arizona Constitution. To resolve the litigation, the counties agreed to (1) open additional in-person early voting polling places, (2) develop a voter registration plan to maximize voter registration, (3) provide timely radio advertisements and election information in the Navajo language, (4) provide Navajo translators at each polling place, and (5) allow voters an opportunity to cure unsigned ballots.

The Secretary of State agreed to include ballot curing of unsigned ballots in the Elections Manual and to translate the publicity pamphlet into the Navajo language.⁹³

4. VOTER IDENTIFICATION

Brakebill v. Jaeger ("Jaeger I"), No. 1:16-CV-008, 2016 WL 7118548, at *1 (D.N.D. Aug. 1, 2016).

Holding: The motion for preliminary injunction was granted under the Equal Protection Clause of the 14th Amendment blocking North Dakota's voter ID law that limited the types of IDs accepted, required a residential street address, and eliminated all fail-safe options for voters without ID, because the severe burdens imposed on Native voters outweighed the State's interests.

Brakebill, et al. v. Jaeger II (ND):

Consent Decree: Individual plaintiffs sued the North Dakota Secretary of State alleging North Dakota's voter ID law requiring a physical address violated Section II of the Voting Rights Act, the 14th and 15th amendments to the United States constitution, and Articles I and Article II of the North Dakota Constitution due to alleged higher rates of poverty, further average distance to licensing sites, unreliable, unknown, or unmarked addresses on reservations, and higher levels of homelessness. Following the issuance of a preliminary injunction in *Jaeger I*, North Dakota amended its laws to allow for supplemental documentation in addition to an ID and to allow voters to cast set-aside ballots that could be cured with a qualifying ID. This version of the law was again challenged and the District Court issued a preliminary injunction expanding the

types of IDs allowed and allowing for PO Boxes to be used on IDs. The Eighth Circuit overturned the issuance of the preliminary injunction because the relief fashioned by the District Court was too broad. The parties entered into a consent decree in conjunction with the *Spirit Lake* case. The consent decree allows a voter to mark a map to indicate where they live and have that ballot for a voter to mark a map to indicate where they live and have that ballot assigned an address prior to the final count of ballots so that the ballot is counted. Additional funding for tribes to issue IDs and DOT issuance of IDs on tribal reservations will be supported by the Secretary.

Spirit Lake Tribe. v. Jaeger, No. 1:18-cv-00222 (D.N.D.) (Complaint filed Oct. 30, 2018).

Consent Decree: The Spirit Lake Tribe and Standing Rock Sioux Tribe, along with individual plaintiffs, challenged North Dakota's voter ID law alleging the law is unconstitutional under the 1st, 14th, and 15th amendments and violates Section 2 of the Voting Rights Act. They sought as-applied relief. The parties entered into a consent decree in conjunction with the *Brakebill* case. The consent decree allows a voter to mark a map to indicate where they live and have that ballot for a voter to mark a map to indicate where they live and have that ballot assigned an address prior to the final count of ballots so that the ballot is counted. Additional funding for tribes to issue IDs and DOT issuance of IDs on tribal reservations will be supported by the Secretary.

5. HELP AMERICA VOTE ACT/SECTION 5

Janis v. Nelson, Civ. 09-5019 (D.S.D. May 25, 2010).

Settlement:²⁴ Facing compliance issues with HAVA, the State agreed to train election officials and volunteers on felony qualifications. The State updated statutory qualifications to require a notice component informing those voters who have lost their right to vote due to felony disqualifications.

Of these twenty cases, the Native plaintiffs either won or settled to their satisfaction all but one or two of these cases. When combined with the cases prior to 2008, the total number of cases is 94 at the time of the printing of this report, with victories or successful settlements in 86 cases, and partial victories in two cases. That is a success rate of over 90 percent.

C. Conclusion

The quest for equal voting rights has been a long struggle. VRA cases are typically long and complicated, and usually involve competing expert witnesses, as well as lay witnesses. This makes most cases very expensive and time-consuming. Without the prophylactic effect of Section 5, problematic jurisdictions can be sued successfully, but then immediately enact yet another unfair voting law and necessitate yet another lawsuit.

But the ultimate test of success is whether Native Americans can actually elect candidates of their choice. Those candidates do not necessarily have to be Native, but there are a record number of Native people running for office.⁹⁵ That is a reminder that voting is just the first step in participating in the political process.⁹⁶ As Natives become successful in winning races, elective bodies will undoubtedly become more sensitive to the issues that are important to Native people.

The history of American Indian policy, the sad legacy of violated treaties and broken promises, and the long fight for voting equality make it clear why Native Americans distrust government and have a sense that state and local jurisdictions are often hostile to Native voting. The hearings summarized in this report reflect that unfortunate reality. Until our country lives up to its professed creed of equal rights for all, and free and fair elections, there will be a continuing need for litigation under the VRA, and a willingness on the part of Native Americans to continue fighting for an opportunity to elect candidates of their choice and fully participate in America's great experiment with democracy.

The history of American Indian policy, the sad legacy of violated treaties and broken promises, and the long fight for voting equality make it clear why Native Americans distrust government and have a sense that state and local jurisdictions are often hostile to Native voting.

Regardless of whether they live in urban or rural areas, members of the 574 federally recognized tribes face many contemporary barriers to political participation. Although many other American voters share some of these obstacles, no other racial or ethnic group faces the combined weight of these barriers to the same degree as Native voters in Indian Country.



PART 3

CURRENT LANDSCAPE

Overview of Contemporary Impediments to Political Participation

1. General Factors Discouraging Participation

The American Indian and Alaska Native (AIAN) population is one of the fastest growing population groups in the United States. According to the 2010 Census, the number of people identifying themselves as AIAN alone or in combination with one or more other races increased nearly three times as fast as the total U.S. population, growing by 27 percent from 4.1 million in 2000 to 5.2 million in 2010.⁹⁷ As of 2017, the AIAN population, including those of more than one race, is estimated to be 6.7 million, comprising approximately two percent of the total population.⁹⁸ By 2060, the AIAN population is projected to be 10.2 million alone or in combination with one or more other races, comprising about 2.4 percent of the estimated total population.⁹⁹

Nearly half of all states have a substantial AIAN population. In 2016, 21 states had a population of 100,000 or more Alaska Natives or American Indian residents, alone or in combination with another race.¹⁰⁰ Alaska had the largest percentage of AIAN

residents, who comprised 19.9 percent of the state's population in 2016. Other states in the top five included Oklahoma (13.7 percent), New Mexico (11.9 percent), South Dakota (10.4 percent) and Montana (8.4 percent).¹⁰¹ In 2016, California had the largest estimated AIAN population, with nearly 1.1 million AIAN residents.¹⁰² American Indians and Alaska Natives reside in every region of the United States, whether rural or urban.

Urban Natives are often overlooked despite their sizable presence in major metropolitan areas. In 2010, New York City had a population of over 111,000 American Indians and Alaska Natives, alone or in combination with another race,¹⁰³ the largest such population of any U.S. city. Other cities ranked by order of their AIAN population include Los Angeles, California (54,236); Phoenix, Arizona (43,724); Oklahoma City, Oklahoma (36,572); Anchorage, Alaska (36,062); Tulsa, Oklahoma (35,990); Albuquerque, New Mexico (32,571); Chicago, Illinois (26,933); Houston, Texas (25,521); and San Antonio, Texas (20,137).¹⁰⁴

Regardless of whether they live in urban or rural areas, members of the 574 federally recognized tribes¹⁰⁵ face many contemporary barriers to political participation. Although many other American voters share some of these obstacles,¹⁰⁶ no other racial or ethnic group faces the combined weight of these barriers to the same degree as Native voters in Indian Country. Moreover, the government-to-government relationship between the tribes and the United States is unique to the American Indian and Alaska Native population. Regardless of the source, the right to vote “can be jeopardized when structural barriers prevent or make it unnecessarily difficult for an eligible voter to participate in our electoral democracy.”¹⁰⁷

The first step is to identify the barriers and educate election officials and policy makers about them, through reports such as this one. In addressing these issues, “there isn’t a magic bullet or an overnight solution.”¹⁰⁸ Instead, it requires a comprehensive approach to minimize or eliminate the disenfranchising effects. There needs to be an ongoing partnership between election officials and tribes to address these

barriers. They cannot be addressed from the top-down, with election officials telling tribal officials what they are going to do. It needs to be a bottom-up approach with “an active group of tribal members that want to partner.”¹⁰⁹

2. Geographic Isolation

The isolated locations of tribal lands and the dispersion of those living in urban areas contribute to the political exclusion of Native Americans. “Academics ... have found that the further one has to travel to vote ... dampens down the likelihood that one will actually vote. It makes common sense. In fact, studies have found in urban areas that if you move a polling place as little as a quarter of a mile there is a statistically significant decrease in the propensity to vote.”¹¹⁰

Approximately one-third of all AIAN persons in the United States live in rural areas called Hard-to-Count Census Tracts – roughly 1.7 million out of 5.3 million people from the 2011-2015 American Community Survey (ACS) estimates.¹¹¹ Hard-to-Count Census Tracts include those Census Tracts “in the bottom 20 percent of 2010 Census Mail Return Rates (i.e. Mail Return Rates of 73 percent or less) or tracts for which a mail return rate is not applicable because they are enumerated in 2010 using the special Update/Enumerate method.”¹¹² The states with the greatest percentage of the AIAN population in Hard-to-Count Census Tracts reside in the western states: New Mexico (78.6 percent), Arizona (68.1 percent), and Alaska (65.6 percent).¹¹³ Geographical isolation plays one of the most significant reasons for why those states have such a large percentage of their AIAN population in Hard-to-Count areas.

“There isn’t a magic bullet or an overnight solution.”

Alaska presents a particularly compelling example of how geographical barriers impact registration and voting. The logical starting point for that example is to illustrate the sheer size of the largest state:

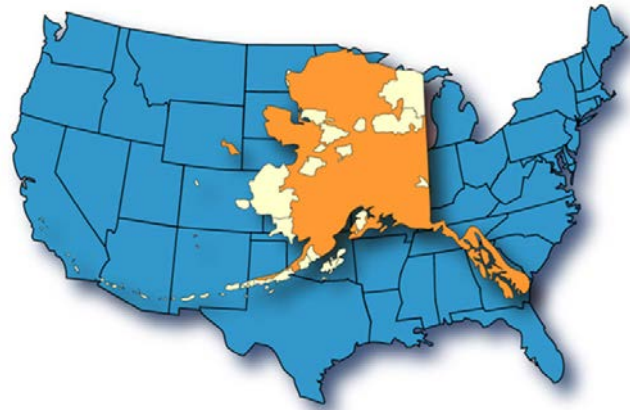


Figure 2. Comparison of the Size of Alaska to the Continental United States.

Despite its size, the rural areas of Alaska generally are very sparsely populated. As an example, NARF brought a voting rights action on behalf of the largest group of Yup’ik-speaking Alaska Natives: those residing in villages in the Bethel Census Area. The Bethel Census Area covers an area of over 40.5 million square miles¹¹⁴ or roughly the size of the state of Tennessee.¹¹⁵ However, in 2016, the Bethel Census Area had a total estimated population of just 17,968, a population density of just 0.4 persons per square mile.¹¹⁶

While the geographical challenges to reaching the AIAN population in Alaska can be extreme, they are not unique to Alaska.

The Havasupai Indian Reservation in Arizona, which is located at the bottom of the Grand Canyon, is among the nation’s most isolated reservations. There are no roads to Supai Village at the bottom of the Grand Canyon. “You have the choice of riding a horse or a mule, or hiking, and it is ... 8 miles from Hilltop and it’s not an easy trip down there.” Coconino County has to send supplies down by helicopter

the week before. The supplies are “unloaded on a sand bar, and we hope somebody shows up and takes them to our polling place...” The County used to have a county employee hike out of the Grand Canyon with ballots at 3 a.m., but now has the county employees spend the night there.¹¹⁷

Some of the tribes above the Grand Canyon fare little better. Members of the Kaibab Paiute Band of Indians on the North Rim of the Canyon in northern Arizona are extremely isolated from the Mojave County seat in Kingman. “Nobody goes to the County seat. We have to go up to Utah, through Nevada, through Las Vegas, I-40, and go all the way about five-and-a-half hours to get to the County seat. We don’t really have direct communication with them....”¹¹⁸ As a former Tribal Vice Chairman explained, “With living in a rural area that is spread out, all things that we do, we face the same challenges, whether it’s economic development, whether it’s voting, whether it’s impacting local government.”¹¹⁹

Tribes in the Pacific Northwest face many of the same challenges. For example, the Colville Reservation is approximately 1.4 million acres and occupies the geographical area north of central Washington State in an area slightly larger than the State of Delaware. In terms of both land base and travel membership, the Colville Reservation is one of the largest Indian tribes in the Pacific Northwest. The area is rural and heavily wooded. Most residents live in one of four communities on the reservation (Nespelem, Omak, Keller or Inchelim), which are separated by mountain passes and often require significant drive times. Public transportation is limited. The reservation’s geographic isolation contributes to a median household income less than half the state average.¹²⁰

Many Midwestern and Northern Plains tribes also are not immune from the challenges of isolation. For example, the Red Lake Indian Reservation in northwestern Minnesota, which has the state’s second largest AIAN population, is separated from much of the rest of the state. Many reservations are located far from urban areas and are connected (if at all) by roads that are susceptible to changing weather conditions, such as those posed by the often-treacherous

weather in the region.

Geographic isolation of Native voters also is present in the cities. Urban areas like Los Angeles have large numbers of Native voters who moved during the Relocation Era. It resulted in a “lot of cultural disconnection” from their tribes, and many suffered from hardship and poverty.¹²¹ That was largely by design.

“[I]n urban centers, the Bureau of Indian Affairs when they were managing the relocation program, ... strategically placed our Indian families away from each other, and so as not to form ... Indian ghettos or ethnic enclaves as other communities had. So as a result of that, very strategic, very deliberate isolation practice, traditional community organizing methods that other communities use such as door knocking or ... outreaching in supermarkets or things like that, they don’t work for our community... [T]hat geographic dispersment poses a huge barrier for us to be able to reach voters, to educate voters, to know where our people are so we have to really rely on event-based or center-based kinds of outreach. So that is a huge barrier.”¹²²

That isolation poses considerable challenges in Los Angeles, where the number of Native Americans lacking access to a vehicle is three times higher than the rest of the population. Even when transportation is available, the distances and traffic can be daunting. It takes two hours or longer for Natives from opposite sides of Los Angeles County to get to the urban Indian center.¹²³ As a community organizer explained, “[I]f you rely on public transportation and you want to go vote, some people have to take three buses just to get to one polling place, and then to be there for maybe an hour or two hours ... to get back. So it’s like a full day itself.” Most Natives facing that barrier cannot vote.¹²⁴

3. Physical and Natural Barriers

Native Americans often are also isolated due to physical features such as mountains, canyons, oceans, rivers, and vast expanses of unoccupied land. The topography of the Grand Canyon impedes travel by not only the Havasupai who live inside the Canyon,



Figure 3. Toksook Bay, Alaska in early November. Photo by James Tucker

but also the Goshute, Hopi, Navajo, Paiute, Ute, and Zuni tribes that are in and around the Canyon.

Alaska Native villages face even more daunting challenges. Hundreds of miles of mountains, tundra, wetlands, oceans and raging rivers often separate villages from the nearest community with jet air service, or hub. For example, travel to Toksook Bay, Alaska, the first community to be counted in the 2020 Census, by bush plane requires flying from Bethel across over 115 miles of the remote Yukon Delta National Wildlife Refuge.

Many other tribes in the Continental United States are separated from off-reservation communities by similar topographical barriers. On the Yakama Nation, it takes one hour to drive just seven miles.¹²⁵ In Nevada, there are approximately 150 mountain ranges that run north and south. It requires many Native voters living on reservations to drive around the mountain ranges to get to non-tribal governmental offices.¹²⁶

Nye County is the largest county in Nevada and the third largest county in the United States. Distances between communities are made even greater by the additional mileage necessary to going around the mountain ranges throughout the County. The Duckwater Reservation is located in the northeastern corner of the County, presenting some of the longest drives in the Continental United States to reach the County's two election offices in Tonopah and Pahrump.

Physical barriers are even present for tribes located in states that are not commonly thought of as having isolated communities. Three examples from California illustrate the point.

In southern California, the San Luiseno Band of Indians are located in the San Jacinto Mountains. Tribal members identified their location as a significant barrier to voting. The nearest non-tribal services, including the closest county polling place, are at the bottom of the mountain, which are located at least

40 minutes away each way in favorable driving conditions that disappear with inclement weather.¹²⁷

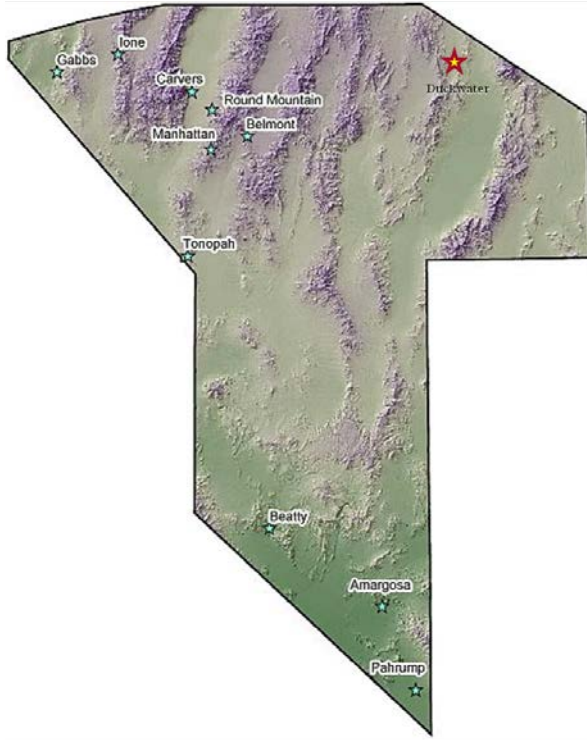


Figure 4. Communities and mountain ranges in Nye County, Nevada. Map by James Tucker

Many northern California tribes face similar challenges. The Middletown Rancheria of Pomo Indians is located about 45 minutes each way from the Lake County seat. It is necessary to drive around the mountains and a lake, even though the distance is not far “as the crow flies.”¹²⁸ The Karuk Tribe, which is located just south of the Oregon border, faces much more extreme barriers. Tribal members who live in Yreka have to travel 80 miles on a road that follows the Klamath River to Happy Camp on a very mountainous, treacherous drive. It is common for rockslides to block the road, which can make it impossible to get to county services including polling places.¹²⁹

4. Poor or Non-Existent Roads

Distance and physical barriers are compounded by an absence of paved roads to connect tribal lands with off-reservation communities. Even where roads are present, Native voters often lack reliable trans-

portation to travel the vast distances to elections offices and county seats. Inclement weather conditions frequently make such travel impossible, particularly in early November when general elections are held.

Nearly all of rural Alaska, which is dominated by Alaska Native communities, is not on the state road system. Access to those communities is typically by air or by boat. In the winter months, when the conditions permit, villages also may be connected by “ice roads,” which are traversed by snowmobile or ATVs that travel on frozen rivers. For communities that are not regional “hubs” like Bethel and Dillingham, air services are provided by “bush pilots” who use runways that are little more than gravel roads. Flights are limited to Visual Flight Rules (VFR) conditions when the rough-hewn runways are not iced over.



Figure 5. Unmarked road on the Turtle Mountain Reservation, Election Day, November 6, 2018. Photo by Jacqueline De León

Because of the limited accessibility to over 200 geographically isolated rural and Alaska Native communities, travel is much more constrained by the dominant weather conditions than any other location in the Continental United States. It is not unusual for villages to be inaccessible by air for several weeks due to inclement weather, icing conditions, and above all fog. Flights are cancelled or delayed even under the best weather con-

ditions, when the fog may linger late into the day.

Geography and weather have a tremendous impact on the mail service, which impedes – or in some cases makes impossible – efforts to vote by mail. The extraordinary efforts that postal workers make to deliver mail to isolated Alaska Native villages are truly commendable. But rural Alaska may be one of the few places in the world in which the immortal words of Herodotus do not always ring true: “Neither snow, nor rain, nor heat, nor gloom of night, stays these couriers from the swift completion of their appointed rounds.” Unpredictable weather conditions in the outer reaches of Alaska always have the final say in the delivery and pick-up of mail, including the critical voting communications being sent by the state’s Division of Elections.

Among the tribes located in the Continental United States, unpaved and poor driving conditions add to the isolation that is part of the daily lives of much of the Native population residing on rural reservations. In the Four Corners area (Arizona, Colorado, New Mexico and Utah), “[r]oad conditions on both Navajo and Hopi reservations become extremely tricky and dangerous in the wintertime causing expensive repair work on personal and school vehicles. The vehicles travel over deeply mud-rutted and pot-holed roads, which have been damaged by snow and rain, ruining and damaging wheel alignment and tires.”¹³⁰



Figure 6. Student walking home after her school bus became stuck in mud on tribal lands (San Juan County Roads Department photo as published in Navajo-Hopi Observer, Dec. 16, 2014).

Weather conditions make roads impassable. In San Juan County, Utah, “When it snows, it snows. When it rains, it rains, and it washes out all the dirt roads that we have, all of the washes that we have to cross on the dirt roads that are washed out.”¹³¹ Roads get muddy when it snows, and buses get stuck. Similarly, in 2016, the road over a mountain pass connecting Karuk tribal members in Yreka, California with Happy Camp was snowed in and was impassable for at least one month. The Tribe had to use Forest Service snowplows to clear out an old deer hunting road to provide emergency access.¹³²

A community organizer explained the impact that lack of paved roads and snowplows has on political participation by tribal members. “[I]t cannot be underestimated just how hard it is for some folks to vote. The roads, if it rains” or “there’s snow,” there are many “dirt roads that a lot of our people have to cross many miles to get to” that may be impassable. The absence of Native representation at state and local levels exacerbates the problem because non-Native elected officials deny critical infrastructure, including roads and bridges, to Native residents.¹³³ For example, the non-Native areas such as Blanding “all have pebble roads to homes” that roads servicing Navajo people – even in Navajo communities located off the reservation – do not have.¹³⁴

5. Distance, Travel Time, and Limited Hours of Non-Tribal Government Offices

The corollary to geographic isolation is that many Native Americans have to travel vast distances to get to the off-reservation communities that provide them with critical services such as driver’s licenses or their local election offices to register to vote. “Time is the principal cost of voting: Time to register; to discover what parties are running; to deliberate; to go to the polls; to mark the ballot. Since time is a scarce resource, voting is inherently costly.” That means that the greater the distance to register or to actually vote, the less likely someone is to cast a ballot,” or what is referred to as “the tyranny of distance.”¹³⁵

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

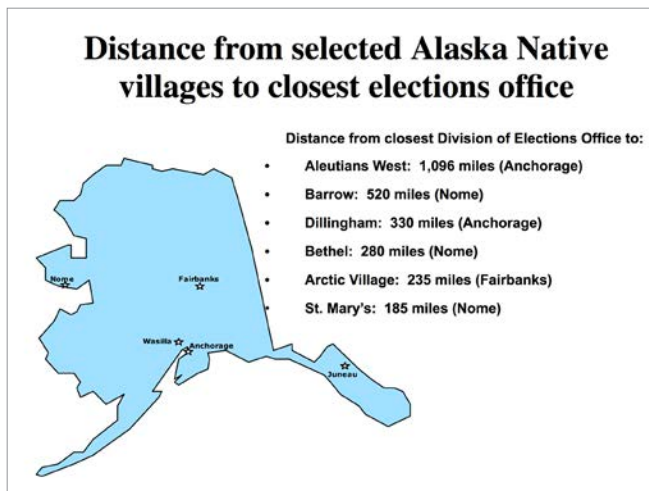


Figure 7. Distances from Selected Alaska Native Communities. Graphic by James Tucker

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

Voters surveyed from the Duck Valley, Pyramid Lake, Walker River and Yerington Tribes in Nevada identified travel distance as “the single biggest obstacle to registering. Among those who were registered to vote, 10 percent stated that it was difficult for them to travel to register. Among [those] ... not registered, a whopping 34 percent said that it would be difficult for them to travel to a place to register... But travel distance was also identified by the respondents as a major factor that inhibited voting...”¹³⁶

Turning back to Nye County, Nevada, the combined effect of geographical isolation and mountainous terrain results in lengthy travel times to get to either of the County’s two election offices. The closest elections office is in Tonopah, 140 miles each way by

road from the Duckwater Reservation. The Pahrump elections office is 303 miles each way by road. Travel time is at least five hours or ten hours, respectively, if the weather conditions permit.

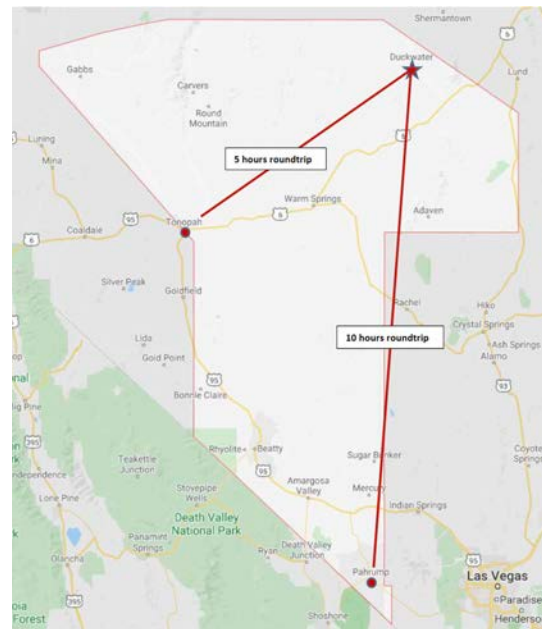


Figure 8. Travel times from the Duckwater Reservation to Nye County, Nevada elections offices. Map by James Tucker

Travel time for many other Nevada tribes is several hours to reach county seats and non-tribal elections offices. Voters on the Pyramid Lake Reservation have as much as a 100-mile round-trip drive to get to the elections office in Reno. Voters on the Walker River Reservation have a 70-mile round-trip drive to get to the county office in Schurz.¹³⁷

Southwestern tribes face similar barriers. Navajos in San Juan County, Utah living on tribal lands have to drive to Blanding or Monticello for any government services. From Navajo Mountain, Utah, which is near Lake Powell, it is about 200 miles (a four or five-hour drive) each way, weather conditions permitting. It requires driving south into northern Arizona on U.S. highway 98 to U.S. highway 160 in Navajo County, Arizona to U.S. highway 191 north back into Utah.¹³⁸

Montezuma Creek is the closest Navajo community to Monticello, which is a 75 mile drive each way. “So in order for people to do business ... like vehicle registration, any healthcare issues, as well as voting issues,” it is necessary to travel great distances. “That’s

a burden to our people.” It poses difficulties in giving Native voters “more say in the decision-making at the county level.”¹³⁹

Northern Plains tribal members also have to travel great distances to reach their county government offices. In Montana, some members of the Northern Cheyenne Tribe have to drive as much as 120 miles roundtrip. Many tribal members of the Confederated Salish and Kootenai Tribes of the Flathead Nation have roundtrip drives of up to 140 miles, and those on the Crow Indian Reservation have as much as a 150-mile roundtrip drive.¹⁴⁰ For a potential Native voter on the Standing Rock Reservation, the mean distance to a driver’s license site is nearly 61 miles. From the Fort Berthold Reservation to a driver’s license office is nearly 50 miles.¹⁴¹

But these great distances and lengthy travel times only tell part of the story. Natives have to travel much farther for basic government services like driver’s licenses and voter registration than non-Natives.

In Blaine County, Montana, Native Americans are forced to travel, on average, 31.5 miles to obtain a state-issued identification, compared to an average of 9.8 miles for non-Natives.¹⁴² “[I]n North Dakota, Native Americans, on average, must travel twice as far as non-Native Americans to visit a driver’s license site.”¹⁴³ Natives living on the Rosebud Sioux Reservation in South Dakota have to drive an average of 44.8 miles to obtain a state identification card, compared to 16.8 miles for non-Natives.¹⁴⁴

Yet, those are not the only issues. Most of the locations that Native voters must use to obtain a photo identification are open for reduced hours, or only a handful of days each month. In North Dakota, there are 27 driver’s license sites in 53 counties. There is one site for every 2,600 square miles. Only four locations are open five days a week. Twelve locations are open less than six hours on one day a month.¹⁴⁵

Similar barriers were identified by tribal members in the Pacific Northwest. “[S]tate, federal and county offices need to be open and available for public use consistent with the public’s working hours

instead of being closed early” and with “staggered hours” that prevent many Native Americans from using them.¹⁴⁶

In Wisconsin, Native Americans face significant barriers registering to vote because the Department of Motor Vehicles is only open sometimes and in some places in Northern Wisconsin, where many tribal members live, only one day out of the month. Tribal members may have to drive up to 90 miles because of the limited locations where voter registration is available. Currently, the only in-person registration locations are through the township clerk, county clerk, and Department of Motor Vehicles.¹⁴⁷

Limiting the access of Native Americans to voter registration offices or offices like motor vehicles departments where prerequisites to voting such as photo identification must be obtained harkens back to similar barriers faced by black voters in the South prior to passage of the Voting Rights Act.

6. Technological Barriers and the Digital Divide

Among all population groups, the digital divide, including lack of access to cellular and broadband resources, is most profoundly felt in Indian Country. The absence of those resources presents a substantial barrier to Native American political participation.

People residing in tribal areas have virtually no access to computers or the Internet, with the Federal Trade Commission estimating broadband penetration in tribal communities at less than ten percent.¹⁴⁸

*Many tribal members...
have roundtrip drives
of up to 140 miles.*

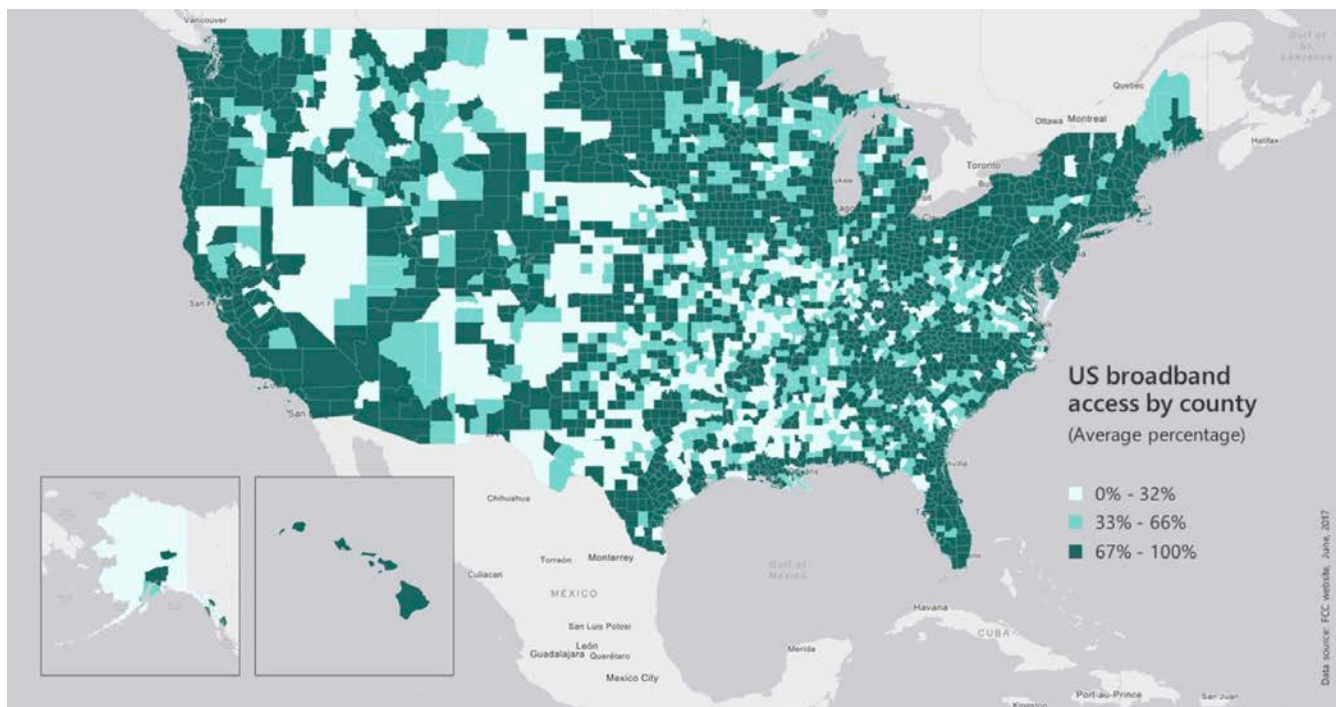


Figure 9. Broadband Access by County or County Equivalent.¹⁴⁹

As this map depicts, broadband access generally is unavailable to Alaska Natives outside of Anchorage, Fairbanks and Juneau. In the Continental United States, most tribal members living in rural areas in the Southwest, parts of California, the northern and southern Plains, and pockets of the Great Lakes region lack broadband access.

The absence of reliable and accessible broadband is a common theme throughout Indian Country. In rural areas of Nevada where reservations are located, “it’s really, really difficult to get broadband or to even have a fax machine out there.” There is no reliable Internet access.¹⁵⁰

Pacific Northwest tribes located in rural areas, such as members of the Lummi and Yakama Tribes, do not have home Internet access, which is “a huge barrier.”¹⁵¹ When tribal members in Washington State move, they have to drive to update their voter registration because they cannot do it online.¹⁵²

The digital divide also remains a big barrier on tribal lands in the Southwestern states. New Mexico passed a comprehensive community broadband bill to try to begin to address those critical infrastructure is-

ues, but the governor vetoed it. But advocates for Native voters have not given up. “What the state does comprehensively to address the digital divide in rural New Mexico at large will directly impact our tribal communities in a positive way. So we are very strong advocates of any and all of that work.”¹⁵³

Although the FCC claimed the percentage of those living on tribal lands lacking broadband access was considerably lower,¹⁵⁴ the United States Government Accountability Office (GAO) determined that the FCC’s estimate wrongly used broadband availability numbers rather than the actual access to broadband.¹⁵⁵

The GAO explained that even where some broadband access may be available, depressed socio-economic conditions, as well as service denials, often prevent American Indians and Alaska Natives from having access to or using online resources including the Internet. For example, the cost or inconvenience of driving to a location where Internet access can be obtained, or the cost of getting Internet service in those areas in Indian Country where it may be offered, prevents many American Indians and Alaska Natives from going online.¹⁵⁶

Tribal leaders reported members having to pay \$130 per month to access broadband on tribal lands.¹⁵⁷ According to the FCC, this is “approximately one-and-a-half times the average rate providers charge for comparable services in urban areas.”¹⁵⁸ As a tribal member from New Mexico explained, “Some of our areas are still very much dark. We don’t have the kind of robust internet connectivity because what’s available is too expensive, and we can’t afford to be connected with the kind of bandwidth that we’d like.”¹⁵⁹

Even when residents are able to pay the high cost to subscribe for broadband, their services are often limited by poor quality of service.¹⁶⁰ Such examples consist of “routine outages, slow speeds, and high latency keep people on tribal lands from consistently accessing the Internet.”¹⁶¹ Some tribal members do not even have the option of paying higher rates for access since even where broadband service may be available to reservation residents, some providers choose to deny services for reasons such as “high-costs, administrative barriers, or technical limitations.”¹⁶²

Even in tribal areas where broadband is available, Native voters often lack access to computers or other devices to access it.¹⁶³ Computer access is non-existent on many areas on the Navajo Nation, especially where those areas lack access to even more basic resources like electricity and running water.¹⁶⁴

The United States Census Bureau has acknowledged the lack of broadband access in its efforts to prepare for the 2020 Census. The upcoming decennial Census enumeration “will offer the opportunity and encourage people to respond via the Internet...”¹⁶⁵ However, the digital divide is most profoundly felt among the Alaska Native and American Indian population. To illustrate that fact, a mapping tool shows how Hard-to-Count Census Tracts correlate with reservations.¹⁶⁶

During Tribal Consultations between the Census Bureau and tribal members, the Bureau received feedback that “[s]ome tribes reported that internet response is currently not a viable option for members and requested an in-person enumerator – specifically a local, tribal person.”¹⁶⁷ In particular, con-

nectivity was reported to be an issue “in rural areas including Alaska, Navajo Nation, Pueblos [in New Mexico].”¹⁶⁸

Lack of reliable cellular phone service on tribal lands likewise is a substantial barrier to political participation. Forty percent of the Navajo Nation lacks cell phone coverage, with sixty percent lacking two-way radio coverage. “That means as a public safety matter, our people can’t call for help when they need it, and our police can’t call for backup when they need it.”¹⁶⁹ On tribal lands in the Pacific Northwest, it is necessary to go to certain areas to make calls.¹⁷⁰ Notably, some tribes that have limited Internet access, such as Tule River in California, lack cellular service.¹⁷¹

The digital divide is also a generational phenomenon in Indian Country. Tribal Elders may use flip phones, but they are not as comfortable accessing the Internet through their phones as younger Natives.¹⁷² The Census Bureau was informed in its Tribal Consultations that while tribes are increasingly using social media to connect with tribal members, those resources are often not generally accessible by Tribal Elders. For online enumeration, Census was informed that where broadband is available, the “younger generation will go online and respond.”¹⁷³

Lack of reliable broadband and cellular service limits voter outreach and engagement. That prevents election officials from using in many tribal communities the “less expensive, nontraditional media outreach ... [through] use of social media and digital communications,” such as what is done “in an urban setting.”¹⁷⁴ In New Mexico, “if people go one mesa too far or one hill too far... we really can’t even communicate with one another on Election Day.”¹⁷⁵

One outreach worker described how mountains blocked her service, and by the time she received voice mail messages from Native voters who could not locate their polling place, “the polls were already closed.”¹⁷⁶ Lack of broadband and cellular infrastructure “really does negatively impact voter engagement.” More broadband access would be “extremely helpful in getting more people out to vote...”¹⁷⁷

7. Low Levels of Educational Attainment

Native Americans have lower rates of educational attainment. Among the American Indian and Alaska Native population who are 25 years of age and older, 20.1 percent had less than a high school education.¹⁷⁸ For the period from 2006-2010, the number of American Indians and Alaska Natives without a high school diploma was 1.6 times higher than the non-AIAN population, with 23 percent of adults lacking a high school diploma.¹⁷⁹ Employment is generally the greatest indicator of income, and income directly influences a family's ability to bear the costs associated with voting such as gas money, accessing childcare, and taking time off of work.

Illiteracy also is very prevalent among Limited-English Proficient (LEP) American Indians and Alaska Natives, especially among Tribal Elders. In areas covered by Section 203 of the Voting Rights Act, illiteracy among LEP voting-age citizens is many times higher than the national illiteracy rate of 1.31 percent in 2016.¹⁸⁰

In Alaska, in Section 203-covered areas for which Census data is available, the illiteracy rate among LEP Alaska Natives of voting age is 40 percent for Aleut-speakers, 28.4 percent for Athabaskan-speakers, 15 percent for Yup'ik-speakers, and 8.2 percent for Inupiat-speakers.¹⁸¹

In Arizona, in covered areas for which Census data is available, the illiteracy rate among LEP American Indians of voting age is 25 percent for Navajo-speakers and 6.8 percent for Apache-speakers.¹⁸²

In Mississippi, in covered areas for which Census data is available, the illiteracy rate among LEP American Indians of voting age is 34 percent for Choctaw-speakers.¹⁸³

Finally, in New Mexico, in covered areas for which Census data is available, the illiteracy rate among LEP American Indians of voting age is 19.1 percent for Navajo-speakers and 6.7 percent for Apache-speakers; data was not available for speakers of the Pueblo

languages.¹⁸⁴

As a tribal member from the Pacific Northwest explained, "Illiteracy is high on the reservation. We have a high dropout rate. Reading the ballots and reading voter pamphlets is pretty complicated for me myself even, so going through the pamphlets are not easy. So my own family ... will not read it, they will ask which way to vote, getting through these ballots is hard for people to understand."¹⁸⁵

In many cases, illiteracy is a product of the cultural traditions of the tribe. Many members of the Yurok Tribe in northern California cannot read because they are "an oral tradition people," passing on their stories through spoken words and not writing. Voting materials that are in audio, rather than written form, are more likely to be used.¹⁸⁶

Low levels of educational attainment among Native voters contributes to what is perceived as "apathy" to voting.¹⁸⁷ As one tribal member explained, "I know a couple of people who don't vote because they don't read. Even during the tribal elections, they don't vote."¹⁸⁸

Chuck Hoskin, Jr., the Secretary of State of the Cherokee Nation, concisely stated the impact that lower educational attainment has on Native Americans. "I think the more marginalized the population is, the more difficult it may be to access that sort of information through the mediating institutions that you would expect to provide that through the media and other sources. When you get a population that perhaps has some lower education attainment than the greater population, there's a challenge to accessing and understanding some of that information."¹⁸⁹

8. Depressed Socio-Economic Conditions

Socio-economic barriers likewise make the voting process less accessible for Native Americans. There is a "very large body of scholarly research that shows that economic sociodemographic factors are closely related to electoral participation. Not surprisingly, poor people vote at much lower rates than those who

are affluent. And American Indians are amongst the poorest people in the United States.”¹⁹⁰

Native Americans, “[l]ike all Americans ... live in the wealthiest country in the world ... Yet, of course, when you cross the reservation line, the world around us changes dramatically.” The Navajo Nation and other tribes are in a “developing nation status”¹⁹¹ with the attendant challenges found in “a third world country.”¹⁹² Access to basic services that people living off of tribal lands take for granted, like households with access to running water and electricity, are absent in much of Indian Country.¹⁹³

Native peoples have the highest poverty rate of any population group, 26.6 percent, which is nearly double the poverty rate of the nation as a whole.¹⁹⁴ The poverty rate was even higher on federally recognized Indian reservations and Alaska Native villages, at 38.3 percent.¹⁹⁵ The median household income of single-race American Indian and Alaska Native households in 2016 was \$39,719, far below the national median household income of \$57,617.¹⁹⁶

High poverty rates are prevalent throughout Indian Country. Nearly half of the members of the Gila River Indian Community and the San Carlos Apache Tribe are below the poverty line, more than triple the rate in Arizona.¹⁹⁷ The Middletown Rancheria of Pomo Indians of California is a rural area that is in the poorest county in the state.¹⁹⁸ In northern Nevada, the poverty rates are roughly twice the national average on four reservations: 23 percent at Duck Valley and Yerington, 25 percent on Pyramid Lake, and 31 percent at Walker River.¹⁹⁹ The median income of tribal members on the Colville Reservation in Washington is less than half the median income statewide.²⁰⁰

Native Americans consistently have higher poverty rates than non-Natives, even when they live in the same communities. For example, in Big Horn County, Montana, the Native-American poverty rate is nearly 30 percent, roughly two and a half times higher than non-Natives in the County. In Rosebud County, Montana, 26 percent of Native Americans were below the poverty line, compared to just nine percent

of the County’s non-Native population.²⁰¹ “[P]overty plays a real part in voting on the reservation.”²⁰²

The same is true for urban Natives. In Seattle, Washington, the average household income is nearly \$60,000. However, Native American households have an annual income of just \$40,000. The income disparity not only makes it difficult for Native Americans to make ends meet in King County, but it impedes their political participation.²⁰³

In 2016, the unemployment rate of those American Indians and Alaska Natives aged 16 and older in the workforce was 12 percent.²⁰⁴ Today, many reservations continue to have few employment opportunities available.²⁰⁵ Lack of jobs leaves about 19.2 percent of all Native Americans without health insurance.²⁰⁶

According to the Census Bureau, 13.4 percent of all occupied American Indian and Alaska Native households lacked access to a vehicle, making it impossible to travel great distances to register and vote.²⁰⁷ “If you have transportation challenges, whether it’s an unreliable vehicle, or maybe lack of a vehicle, and lack of access to effective public transportation, that does serve as a barrier to civic participation.”²⁰⁸ Lack of transportation was reported as a common problem throughout Indian Country.²⁰⁹ Many families only have one vehicle, and its use to travel to work prevents others in the household from using it to register or to vote.²¹⁰

Native voters do their best to overcome their lack of transportation. Many hitchhike.²¹¹ Others have relatives drive them to government offices and polling places.²¹² But just getting from one community to another community on or off the reservation, even if it is only a short distance, can be very difficult for Native Americans to overcome.²¹³

9. Homelessness and Housing Insecurity

The housing crisis facing Native Americans cannot be overstated. Poverty and lack of housing units have the cumulative effect of leaving many Native American voters homeless or near homeless, which,

in turn, makes it substantially more difficult for Native Americans to register to vote, receive a ballot by mail, and cast a ballot.

Various factors contribute to housing instability including population growth, income, education, and employment. In each of these categories, as discussed above, Native Americans fare poorer than Non-Native Americans and in turn are more susceptible to housing instability. Lack of resources leaves many tribal communities unable to provide for their homeless populations. In a survey conducted by the Department of Housing and Urban Development, only 46% of tribal communities had homeless shelters.²¹⁴

According to the 2016 ACS, only 52.9 percent of single-race American Indian and Alaska Native households owned their own home, compared to 63.1 percent of the total population.²¹⁵ American Indians and Alaska Natives also experience high levels of literal homelessness and near homelessness.²¹⁶

When defining “literal homelessness” as living on the street and “near homelessness” as living in a place that is not one’s own (i.e., not having their own home – couch surfing, living with a friend, doubling up, etc.), the Department of Housing and Urban Development (HUD) discovered that 99.8 percent of tribes surveyed said that their members experience near homelessness²¹⁷ and 88 percent of tribes also stated that, despite “doubling up” or living with a friend, their members also experience literal homelessness.²¹⁸

The survey data collected was unable to produce a reliable estimate as to how many American Indians and Alaska Natives live in literal homelessness. However, a Point-In-Time survey, conducted by HUD estimates that 15,136 American Indians and Alaska Natives were literally homeless on a single night in January of 2015.²¹⁹ According to data from the U.S. Department of Housing and Urban Development, although “only 1.2 percent of the national population self-identifies as AI/AN 4.0 percent of all sheltered homeless persons, 4.0 percent of all sheltered homeless individuals, and 4.8 percent of all sheltered

homeless families self-identify as Native American or Alaska Native.”²²⁰

The Native American population likewise experiences higher rates of homelessness among veterans than other population groups. Specifically, “2.5 percent of sheltered, homeless veterans were American Indian or Alaska Native, although only 0.7 percent of all veterans are American Indian or Alaska Native.”²²¹

The Department of Housing and Urban Development has estimated that, out of 399,400 households in tribal areas, 67,900 households include someone who qualifies as near homeless.²²² There are an estimated 42,100 to 84,700 individuals living in near homelessness in tribal areas.²²³ Seventeen percent of American Indians and Alaska Natives surveyed stated that they have people living in their household only because they have nowhere else to go.²²⁴

“...the Department of Housing and Urban Development (HUD) discovered that 99.8% of tribes surveyed said that their members experience near homelessness...”

When defining overcrowding as homes in which there were more than one occupant per room, an estimated 64,000 homes in tribal areas were overcrowded.²²⁵ Of those 64,000 homes, an estimated 11,000 homes were both overcrowded and severely inadequate.²²⁶ A total estimate of 68,000 new units are required to replace all severely inadequate housing *and* eliminate overcrowding in tribal areas.²²⁷

Housing shortages are also pervasive on Indian lands. Many factors contribute to the lack of available homes including budget constraints, inadequate infrastructure, planning or permit delays, and lack of developable land.²²⁸ Lack of affordable housing for low income families is especially acute on Native lands.²²⁹ This data illustrates the need for additional housing in tribal areas in order to avoid overcrowding.²³⁰

Because these estimates do not include data for future need and because they are based on the population data provided from the 2014 census, the total number of units needed may be considerably larger than provided by these data estimates.²³¹

10. Non-Traditional Mailing Addresses

Even for those who have a home, access to voting in Indian Country and among urban Native voters is made substantially more difficult because of the prevalence of non-traditional mailing addresses. In Arizona, only 18 percent of Native American voters have home mail delivery outside of the urban Maricopa (metropolitan Phoenix) and Pima (metropolitan Tucson) areas.²³² Getting mail-in ballots to the right addresses is a “big problem” for Native voters.²³³

The Census Bureau’s 2015 National Content Test (NCT) Report illustrates these points. Among all of the population groups included in the 2015 NCT, the AIAN population experienced the lowest 2010 Census mail response rate, at 57.8 percent.²³⁴

Non-traditional mailing addresses are prevalent among American Indians and Alaska Natives resid-

ing on tribal lands. Non-traditional mailing addresses encompass “noncity-style addresses, which the Census Bureau defines as those that do not contain a house number and/or a street name.”²³⁵ Examples of noncity-style mailing addresses include:

- General delivery
- Rural route and box number
- Highway contract route and box number
- Post office box only delivery

Non-city-style addresses used by the Census Bureau also include location descriptions such as “BRICK HOUSE with ATTACHED GARAGE ON RIGHT,” structure points (geographic coordinates), and census geographic codes including state code, county code, census tract number, and census block number.

It is commonplace for homes on tribal lands to use noncity-style mailing addresses. In some cases, multiple unrelated families live in a single housing unit, making it difficult to receive mail.²³⁶

Throughout Indian Country, many Native voters can only receive election mail through post office boxes.²³⁷ There is an insufficient supply of post office boxes on or near tribal lands to meet the high demand, requiring many tribal members to obtain post office boxes in communities that can be located more than 100 miles away.²³⁸ That causes multiple families to share a single post office box, including unrelated adults living in different households.²³⁹

When a family is kicked off a shared mailbox, they are effectively disenfranchised because there is no way for them to receive early ballots they have requested by mail.²⁴⁰ The same result could occur when county officials do not accept tribal post office box addresses, such as on the Gila River Indian Community in Pinal County, Arizona.²⁴¹

Additionally, mailboxes may be on the side of the road far from where the home(s) associated with them are located, with the mailbox identified only

by a General Delivery number, Rural Route, or box number.

Another complicating factor is when Native voters receive their mail from a post office across state or county lines because it is the closest location to their home. Many Navajo voters have difficulty getting mail “because of the state line” between Arizona and Utah. Navajos who live in Kayenta and Navajo Mountain in San Juan County, Utah have post office boxes with Arizona zip codes.²⁴²

In Navajo Mountain, Utah, there is a small post office in the chapter house that is located in Utah. However, it uses a Tonalea, Arizona zip code because it is a sub-branch of the post office on the Arizona side of the border. The county clerk disqualifies Utah residents there claiming they live in Arizona because of their post office address. San Juan County uses “all sorts of methods like that to reduce the number of voters” and purge them from the voting list.²⁴³

Many homes can only be identified by a geographic location (e.g., “hogan located three miles down dirt road from Hardrock Chapter House”). Others may be located by reference to a BIA, state, or county road mile marker (e.g., “the house located on the right side of BIA-41 between highway marker 17 and highway marker 18”) or intersection (e.g., the house at the intersection of BIA-41 and BIA-15”).²⁴⁴ Verlon Jose, the Vice Chairman of the Tohono O’odham Nation in Arizona, explained the difficulty in identifying homes on tribal lands:

Most people on the reservation ... don’t have a physical address, 123 Main Street or something like that. You ask me where I live [and] I’m going to say over there by the dead coyote, past the dead cow, over there by the Saguaro with two arms sticking out and just beyond the Palo Verde tree. That’s my house. We have Post Office boxes. So a lot of people use their Post Office box. When I’m required ... to give a physical address, they always tell me just put something there. So I put 26.5 to Power Road. Where is

that? I don’t know. You asked me for my address, so here it is. I went to Power Road, and 26.5 is mile marker 26, half a mile between 26 and 27, put that down. So I use that for my physical address.... Past the corral and the water tank, that’s where I live. So it’s kind of hard, and we face those challenges when they vote. So when people register to vote they’ll put their Post Office box, they get in Sells, they get in Santa Rosa, they get in Top-awa, but they come from the rural communities out there.²⁴⁵

Addressing also is an issue for urban Natives. Many Natives move to cities for school or for jobs and maintain their permanent address on the reservation. That can lead to them missing mail, including voting information and mail-in ballots.²⁴⁶

In the 2018 primary election in Arizona, the Native Vote hotline received reports from Native voters who were living in the metropolitan Phoenix area but could not travel back to Coconino County, where they were registered to vote.²⁴⁷ Many Native voters have multiple addresses. “I ... jump back and forth, actually, between two addresses; one on the reservation, one off. And, like, I kind of pick and choose ... which one I use at which time.”²⁴⁸

Darrell Marks, a member of the Navajo Nation, explained how many of these addressing issues have personally impacted him. His family has a rural residence in Tonalea, Arizona that lacks a street address. At different times, it has been identified by reference to geography, such as “the brown house five miles south of the trading post, and at another point it was 5.3 miles on bus route such and such.” It caused problems because the family used a Kaibeto post office box while he was going to school in Page. When he graduated from high school, his tribal voting station was in Tonalea but he was registered to vote in Page through his post office box there. He now resides and works in Flagstaff, despite being registered to vote 130 miles away in Page. He can only get his mail in Page once or twice per month, which can delay his receipt of voting materials, and has caused him to

miss the deadline for voting by mail.²⁴⁹

11. Lack of Resources and Funding



Figure 10. Polling Place in Atmautluk, AK. Photo by James Tucker

In the United States, election administration is chronically underfunded.²⁵⁰ Research conducted by the National Conference of State Legislatures concluded the United States has failed to adequately invest in buying voting machines, designing polling places, training poll workers, and updating policies.²⁵¹ Today, election funding and the costs associated with election administration come from “multiple levels of government including federal, state, local and smaller political subdivisions.”²⁵² Despite the multiple levels of government funding, however, efficient election administration and funding shortages remain obstacles. The United States’ election system is dependent on localism.²⁵³ While “most mature democracies use a national bureaucracy to administer elections, the American system is highly decentralized.”²⁵⁴ Elections are run by states and states often delegate localities to carry out basic tasks like registering voters and counting ballots.²⁵⁵ These localities – counties or cities or townships – not only run elections on behalf of the state under state rules, but they are also expected to pay for most of the election administration.²⁵⁶

The federal government’s most significant funding to local election administration was through the Help

America Vote Act of 2002.²⁵⁷ States typically contribute some of their own funds but the amounts differ greatly.²⁵⁸

Additionally, election administration requires training and supplying election officials and up to date voting equipment. These costs are divided into three categories with each state either providing mandatory training, voluntary training, or no training, but providing handbooks of election laws.²⁵⁹

Costs associated with different levels of training also differ amongst states. Even though purchasing new or updated voting equipment is typically a cost borne by counties, States like Maryland, Mississippi, Missouri, Montana, Idaho and Vermont will pay for a portion of this equipment.²⁶⁰ Despite this data, states are still unclear as to “how much election administration costs within [their] own borders due to the complexity of elections and the involvement of several levels of government.”²⁶¹

The underfunding of election systems is compounded in small and rural election systems which are especially likely to be both understaffed and underfunded.²⁶² This underfunding is pervasive since half of the jurisdictions in the United States have fewer than 1,400 voters and two-thirds have fewer than 10,000 voters.²⁶³ Yet, small and rural communities often do not have the capacity to deal with election administration’s upfront unforeseen costs including “money for personnel, polling place locations, ballot printing, voter information dissemination, cybersecurity protection and keeping up with changing state legislation regulation elections.”²⁶⁴

Small jurisdictions also often cannot afford to hire staff and instead make do by having their election superintendents fill multiple roles.²⁶⁵ What is more, election administration costs are difficult to bear in rural areas because there tends to be a higher cost per voter.²⁶⁶ For example, a larger county may pay less per ballot for printing costs than a smaller county due to economies of scale.²⁶⁷ The costs of servicing polling places in rural areas can also be higher as more time and money is expended towards sending election administrators to polling places that are far

from county seats.²⁶⁸ The equipment used to cast and tabulate votes is also expensive.²⁶⁹

In Indian country, not only are Native communities often serviced by underfunded rural election systems, funding scarcity is coupled with confusion or hostility from localities about funding election activities on tribal lands. Confusion arises when counties do not understand their obligations to Native American constituents, who at times are served by their own governments instead of county resources.

For example, at times Native Americans may utilize their own police forces instead of using county officers. Consequently, county election officials may confuse their responsibilities toward Native voters as American citizens and county residents and may offer Native communities polling access on parity with the other county constituents only if the tribe agrees to pay for any costs of accommodation. However, Native Americans, as citizens of the United States, and the states and counties where they reside, are entitled to equal access to cast their ballot without additional cost.

Indeed, “confusion” is at times too generous of an interpretation of county official actions. Hostility also arises from election officials who may have deep-seated animosity toward Native communities and people. For example, county officials presented with funding and evidence of huge disparities in access between native and non-native communities have still refused to provide polling locations on Native lands.²⁷⁰

12. Discrimination Against Native Americans

Given the abundant impediments to voting in Indian Country, it is no surprise that Native Americans remain disengaged from political participation in federal, state, and local elections. Yet, it is impossible to fully understand voting barriers in Indian Country without examining the traumatic relationship Native Americans have had, and continue to have, with these governments. Antipathy and distrust persist because of past and ongoing actions that dis-

criminate against Natives.

a. Distrust of Non-Tribal Governments

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.²⁷¹ 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.²⁷² Trust of local government in South Dakota was notably bad with only 5.02% of respondents indicating they most trusted the local government, which is especially significant considering it is the local governments that are most often responsible for the administration of elections.

As discussed in Part II,²⁷³ Native Americans have faced sustained assaults against their sovereignty and their right to vote. States ratified Constitutions that specifically excluded Native people from voting,²⁷⁴ established cultural purity tests to determine if Native people had sufficiently assimilated before granting them the right to vote,²⁷⁵ and argued Native self-governance was incompatible with participation in state run elections.²⁷⁶ This legacy of equating voting with an abandonment of cultural and political sovereignty has contributed to a continued skepticism toward voting within Native communities.

Furthermore, states often made the experience of voting embarrassing for Native voters. Not only would states demand that Native vote disavow and prove they were no longer culturally Native American, states also imposed literacy tests that were impossible for Native voters to pass given their lack of fluency in English.²⁷⁷ Clerks turned away Native voters alleging they were incompetent to vote because of the federal trust responsibility over tribes which was referred to in legalese as a “guardianship.” The Arizona Supreme Court accepted this reasoning – that Native Americans were incompetent to vote –

in a case that stood for twenty years.²⁷⁸

To this day, some elders that can recall humiliating voter experiences discourage younger generations from voting, out of disregard for federal and state systems that were cruel to them and a lingering fear that participation in these systems will undermine tribal sovereignty. As one community member explained “People are still apprehensive because it’s been taught we can participate in our elections but that’s not our election. So if there is a county election or a state election or a federal election, elders tell their children and it’s still true today they don’t participate in voting because they feel it’s an infringement on our sovereignty.”²⁷⁹

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

- *And I think in general, just a lack of, distrust, of government. Years of discrimination and injustice support that American Indians don’t trust government and don’t want to participate in this government process.*²⁸⁰
- *Why it’s so hard for Native Americans to vote in local elections in Los Angeles is...just issues between the United States government and Native Americans and how every promise that was made to us has always been broken. So the amount of distrust among Native Americans and the government is not really good.*²⁸¹
- *Isolating, keeping isolated, because a lot of it was no trust was really in between from the federal, the state, and county side.*²⁸²

Not only do many Native Americans not trust the local, state, and federal governments, they also do not feel supported by these institutions. As one community member recounted, “[O]ur lives have been severely compromised by the racists and discriminatory impact of boarding schools, public education, and the harmful federal and state policies that go to-

wards Indian families. Colonization for us meant the control of tribal people by the appropriation of our lands. State and federal jurisdictions over our children and the suppression of our tribal traditions and culture.”²⁸³

As these injustices continue to manifest themselves in present day inequities – poverty, lack of housing, inadequate roads and infrastructure, to name a few – voters disengage from the political process and become apathetic, firm in the belief that nothing will ever change. One witness described how his parents would tell him “We don’t get no help from the county. Why should I vote? . . . Leave them alone. Don’t bother. That’s their system, don’t bother.”²⁸⁴

A tribal councilman explained how these ongoing injustices reduce the desire to vote, describing “we are from a very rural area, the poorest county in California. We, like most poor communities, have an issue with people wanting to vote. It’s not the access to vote. It is the desire to vote. There’s no passion in their vote sometimes.”²⁸⁵ A tribal member reflected how “[y]ou know, alcoholism, high unemployment and things like that that just affect our ability to feel good about ourselves and really want to voice our opinions and vote.”²⁸⁶

b. Present Day Overt Discrimination

Native Americans continue to experience overt discrimination in their everyday lives and when they attempt to vote. In Arizona, racial tensions are so fraught that the pipes sending water to the reservation are regularly blocked by border town residents.²⁸⁷ In Utah, a witness’ Native grandson attempted to play baseball and was accosted by a non-Native woman who “started screaming at him, ‘Who in the hell do you think you are? You think you’re that good? You damn welfare people are starting to take over’”²⁸⁸

Paternalistic racist attitudes are also prevalent. A Native high-schooler was denied a place on the school volleyball A team because, although she was better than girls on the A team, “the coach said he thought she would feel more comfortable on the B team. And she was so angry...she ended up quitting.”²⁸⁹

In South Dakota, a poll worker described as a “[n]ice little old lady” was concerned about where she would be sitting while servicing a Native American community and showed her stereotypical understanding of the Native community by asking field organizers where’s a place “that’s going to be safe? We don’t want to be around people who are drinking. We don’t want to be around, you know people who are going to harass us.”²⁹⁰

Additionally, witnesses throughout the country reported the use of police presence to intimidate voters. In Wisconsin, at locations where there are large Native American communities, “they will have a police officer kind of sit in a parking lot of places, whether that’s the grocery store near a polling location, and kind of just run the names of everybody that’s going by. So you have people that are trying to turn out to vote that they see a police car there and immediately they are like...[d]id I pay that fine. I’m not going to vote because I don’t want to risk going to jail.” In the Wisconsin town of Keshena, the polling location is inside of a Sheriff’s office which is a “big barrier for many people.”²⁹¹

In Guadalupe, Arizona, located 100 miles from the border, there was a border patrol van parked in the parking lot of the polling location. A poll watcher recalled there was “no reason for that border patrol van to be there except to intimidate and coerce and turn voters away.”²⁹²

Racist attitudes tangibly affect the ability for Native Americans to vote, forcing voters to register and

cast their ballots in substandard facilities and hostile conditions. For example:

- *In South Dakota, voters were degraded by being forced to vote in a repurposed chicken coop with feathers visible on the floor and no bathroom facilities.*²⁹³
- *In Montana, the number of registration cards accepted by county officials from Native community organizations was arbitrarily limited to 70 after community organizers were hassled and given “dirty looks” for bringing in too many at a time.*²⁹⁴
- *In South Dakota, the Buffalo County Seat was located in Gann Valley which had a population of 12 and was the smallest county seat in the nation. As county seat, the residents of Gann Valley were provided a fully funded polling place that offers early voting and registration opportunities in line with the rest of the state. Twenty-five miles away on the Crow Creek reservation, however, Fort Thompson’s 1,200 residents had no early voting location in 2014 and only one satellite voting site open on 2014 Election Day.*²⁹⁵
- *Voters are regularly forced to travel to border towns to cast a vote where there are “issues” and “hostile attitude[s]”²⁹⁶ and “racist stereotypes”²⁹⁷ where community members describe being “too intimidated to get to the nearest polling” location²⁹⁸ since*

In South Dakota, voters were degraded by being forced to vote in a repurposed chicken coop with feathers visible on the floor and no bathroom facilities.

the county seat “may or may not be welcoming to Native Americans coming from a reservation community.”²⁹⁹

These negative experiences are exacerbated and reinforced today when Native Americans are denied equal opportunities to register to vote and to cast ballots that are counted. Ultimately, Native American voters are only asking for the opportunity to cast their votes like every other American. As one tribal member explained “[s]o, yes, I would like you, person at the poll, to respect me as a Native American, respect my culture. But if you can’t do that, because if you’re going to tell me, say: Well I’m going to have to learn about African-Americans, Hispanics, Mexicans, or whatever they’re calling us, then do this. Treat me as a human being and be respectful to my elders, respectful to my children.”³⁰⁰



Figure 11. In South Dakota, a law enforcement officer inside the entry of a polling place on the Pine Ridge satellite voting office during the 2014 election. Photo by Donna Semans, Four Directions.

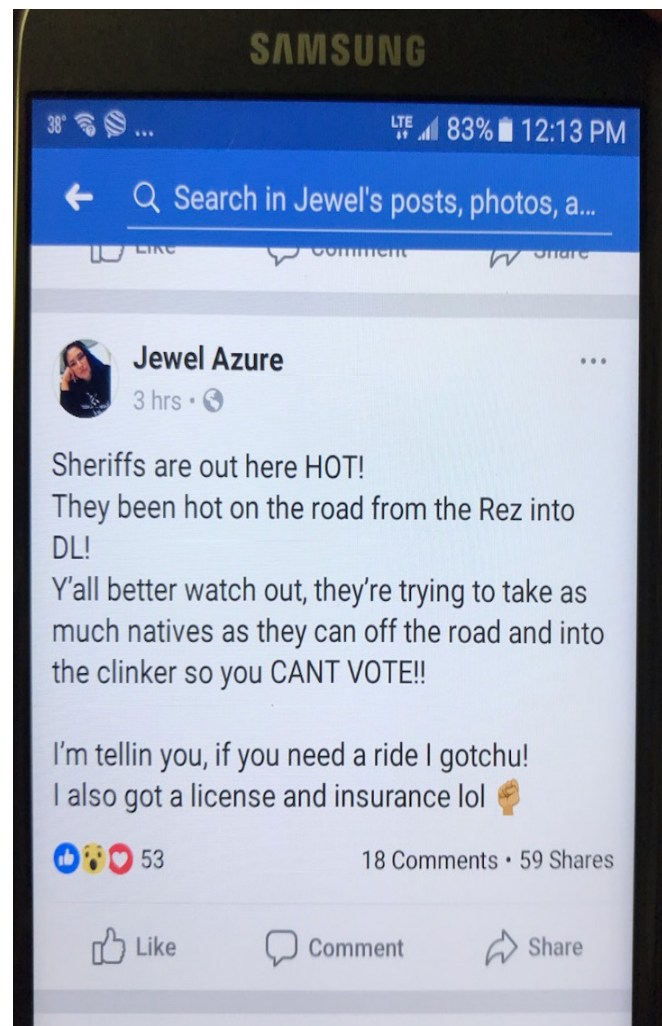


Figure 12. In North Dakota, Spirit Lake tribal member Jewel Azure warns community members on Election Day, 2018 after observing a heavier police presence than usual on Highway 20 between the reservation and the frequented nearby town of Devil's Lake resulting in a perceived unusually large number of detained Native American individuals for violations such as no insurance, suspended licenses, or no licenses. Photo by Molly Danahy, Campaign Legal Center.





*Ultimately,
Native American
voters are only
asking for the
opportunity to cast
their votes like every
other American...
“Treat me as a
human being and
be respectful to my
elders, respectful
to my children.”*

PART 4

NATIVE LANGUAGES

Language Barriers And Lack Of Effective Language Assistance

Language is “one of the closing gaps in the election process” for Native voters.³⁰¹ Over a quarter of all single-race American Indian and Alaska Natives speak a language other than English at home.³⁰² Two-thirds of all speakers of American Indian or Alaska Native languages reside on a reservation or in a Native village,³⁰³ including many who are linguistically isolated, have limited English skills, or a high rate of illiteracy.³⁰⁴

The lack of assistance or complete and accurate translations of voting information and materials for Limited-English Proficient (LEP) American Indian and Alaska Native voters can be a substantial barrier. “If you require language assistance to register or cast a ballot, whether it’s in English or another language, culturally competent and respectful assistance, for that matter, that too can be either a barrier or a discouragement from participating.”³⁰⁵

Section 203 of the Voting Rights Act (VRA) helps LEP voting-age U.S. citizens overcome language barriers to political participation by requiring covered jurisdictions to provide bilingual written materials and oral language assistance.³⁰⁶ The requirements apply to four language groups: Alaska Natives; Ameri-

can Indians; Asian-Americans; and persons of Spanish Heritage, as well as the distinct languages and dialects within those groups.³⁰⁷

Language assistance must be provided for voting activities in every type of public election conducted in a covered jurisdiction and its political subdivisions, including primary, general, and special elections.³⁰⁸ Section 203 applies regardless of whether a public election is to fill an office, to remove an elected official, or to vote on a bond issue, ballot question, or referendum.³⁰⁹

1. Legal Requirements and Section 203 Coverage

Jurisdictions covered by Section 203 generally must ensure that all “voting materials” they provide in English are also provided to voters in the languages of all groups or sub-groups that triggered Section 203 coverage.³¹⁰ The standard is straight-forward. “[I]nformation that is provided in English should be mirrored in the minority language.”³¹¹

“Voting materials” include: voter registration materials, voting notices such as information about opportunities to register, registration deadlines, polling place information (including the times they are open, their location, and the voter’s election precinct assignment), absentee voting, voting materials provided by mail, all election forms, polling place activities and materials, instructions, publicity, ballots, and other materials or information relating to the electoral process.³¹²

Written materials may not have to be provided to some members of certain Alaska Native and American Indian groups whose languages historically are unwritten.³¹³ Instead, for any group whose language has been found to be “historically unwritten,” the covered jurisdiction must provide “oral instructions, assistance, or other information relating to registration and voting” in the covered language.³¹⁴

However, even for those Alaska Native or American Indian languages found to be “historically unwritten,” federal courts have required that written

translations must be provided to poll workers in the covered language anyway in order to ensure that oral translations are complete, clear, and accurate reflections of the information provided to voters in English.³¹⁵

Jurisdictions covered by Section 203 also must provide oral language assistance to voters.³¹⁶ Oral language assistance includes “announcements, publicity, and assistance” to the extent such assistance is needed to allow the language group triggering coverage to participate effectively in elections.³¹⁷ Oral language assistance must be available to language minorities “who cannot effectively read either English” or the covered minority language.³¹⁸

Furthermore, covered jurisdictions are required to provide bilingual poll workers or “helpers” to language minority voters at polling places on Election Day.³¹⁹ Jurisdictions should be proactive in recruiting bilingual poll workers who are members of the covered language minority group to ensure that oral language assistance is available.³²⁰ If they fail to do so, they also may violate Section 2 of the VRA,³²¹ which prohibits discriminatory poll official appointment policies or practices.³²²

A jurisdiction becomes covered under Section 203 if the Director of the Census determines that two criteria are met. First, a population threshold, or “trigger,” must be met. Within a political subdivision of a state, LEP voting age citizens³²³ in a single language group³²⁴ must either: (a) number more than 10,000 (“10,000 Person Trigger”); (b) comprise more than five percent of all voting age citizens (“Five Percent Trigger”); or (c) comprise more than five percent of all American Indians or Alaskan Native voting age citizens of a single language group residing on an Indian reservation (“Reservation Trigger”).³²⁵ A state may only be covered for a language using the Five Percent Trigger.³²⁶ A person is LEP if he or she is “unable to speak or understand English adequately enough to participate in the electoral process.”³²⁷

Second, the illiteracy rate of the language minority voting age citizens meeting the population threshold must exceed the national illiteracy rate.³²⁸ “Illitera-

cy” means “the failure to complete the 5th primary grade,”³²⁹ and was adopted to conform to the Census definition of that term.³³⁰ The 2016 Section 203 determinations were calculated using a national illiteracy rate for voting age citizens of 1.31 percent, an increase from the 1.16 percent used in the 2011 determinations.³³¹

2. Decreased Coverage in 2011 for AIAN Languages

Under the 2011 determinations, coverage in American Indian languages was the second most common language group covered (after Spanish), encompassing 33 political subdivisions of five states.³³² Nevertheless, American Indian coverage experienced a sharp decline from the 81 political subdivisions in 18 states covered under the 2002 Determinations.³³³ American Indian coverage increased in just two states, with Arizona and Mississippi each adding one county. South Dakota, in which 18 counties were covered following the 2002 Determinations, no longer has *any* counties covered under Section 203.³³⁴

There are several possible explanations for the decrease in American Indian coverage. In at least one case, the Census Bureau included one of the languages identified in the 2002 Determinations, Zuni, in another language group, Pueblo.³³⁵ Some of the coverage loss also may have been attributable to the declining number of tribal elders who are LEP, which appears to have played a significant factor in decreased American Indian coverage in some of the earlier Section 203 determinations.³³⁶

However, most of the loss in coverage appears to be the combined result of census undercounts and statistical sampling that can have a disproportionate impact on very small American Indian and Alaska Native voting-age citizen populations. That is especially true for LEP voters who reside on more sparsely populated and geographically isolated reservations. The Census Bureau has acknowledged that “the sampling error or uncertainty of the estimates of the characteristics needed for Section 203 is a weakness particularly for jurisdictions with small (ACS) samples within the period 2005-2009,” the period used

for the 2011 Determinations.³³⁷

Under previous determinations, the Census Bureau used the decennial long form questionnaire sent to one in six U.S. households; in contrast, the ACS used in the 2011 Determinations was sent to an average of one in eight U.S. households in the 5-year sample period.³³⁸ The use of a smaller sample of population has resulted in “larger margins of error than the long-form estimates, particularly for determinations involving the small populations defined in Section 203.”³³⁹ Unfortunately, that may have contributed to the dramatic loss of coverage for American Indian languages, which was down nearly 60 percent (48 out of 81 political subdivisions, with 13 states losing all coverage) compared to the 2002 Determinations.³⁴⁰

3. Coverage in 2016 for AIAN Languages

The loss of coverage for American Indian languages continued to be a theme in the 2016 Section 203 determinations for Arizona, where four counties (Maricopa, Mohave, Yavapai, and Yuma) dropped out. All coverage was lost there for the Hopi, Tohono O’Odham, Yacqui, and Yuman languages; only Apache (in Gila, Graham, and Pinal Counties) and Navajo (in Apache, Coconino, and Navajo Counties) remain covered.³⁴¹

As a result of the 2016 determinations, seven Arizona reservations lost coverage and one regained coverage.³⁴²

Number of Jurisdictions Covered by Section 203 for Alaska Native and American Indian languages, by State, in December 2016 Determinations

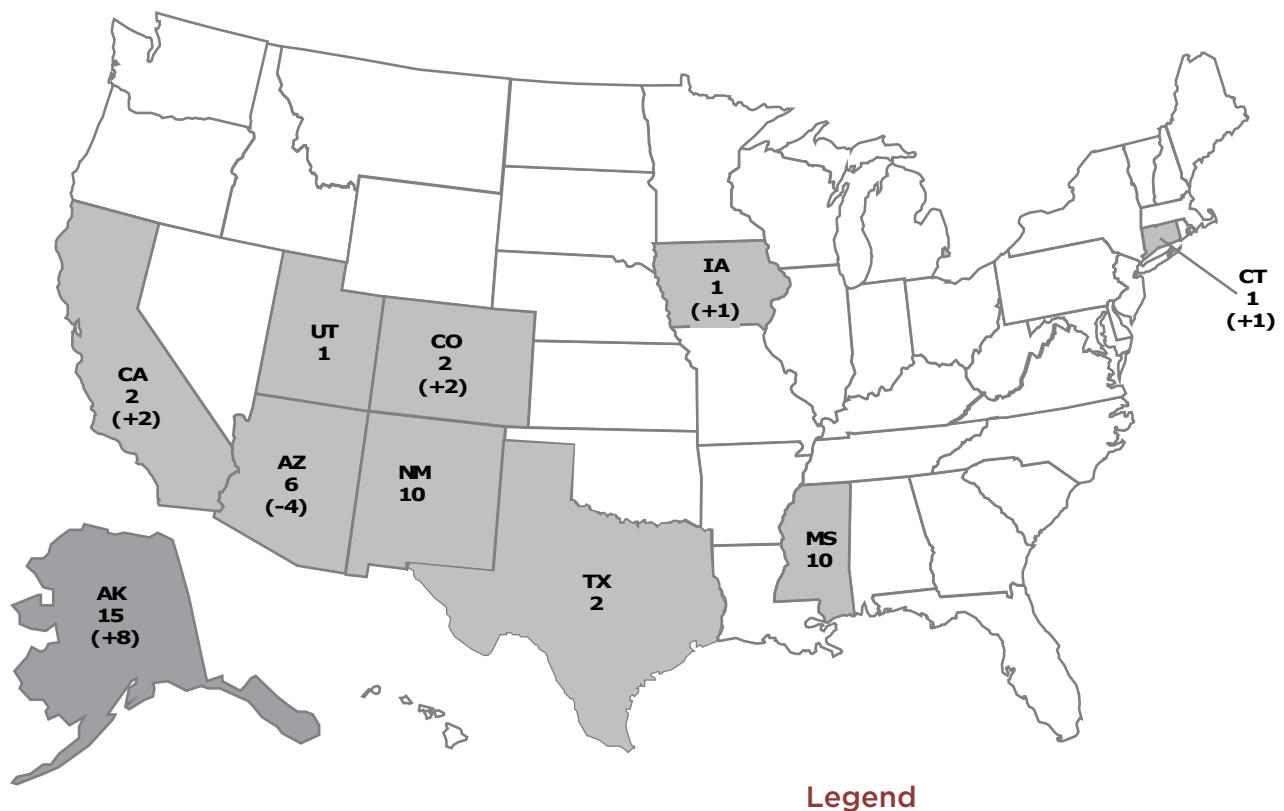


Figure 13. Changes in Coverage for AIAN Languages between 2011 and 2016. Graphic by James Tucker

Legend

Partial coverage, some jurisdictions covered

No coverage

Number in parentheses reflects change from 2011

Following the 2016 determinations, American Indian language assistance must be provided in 35 political subdivisions in nine states, up from the 33 political subdivisions of five states covered in the 2011 determinations. The four states in which coverage was added include two each in California and Colorado and one each in Connecticut and Iowa. In each case, these “newly covered” political subdivisions in California, Colorado, and Iowa restored Section 203 coverage in the 2002 determinations that was lost in the 2011 determinations.

Alaska Native language assistance must be provided in 15 political subdivisions of Alaska, which is an increase of eight political subdivisions from 2011. That increase resulted from requests to the Census Bureau from NAVRC to oversample the less populous rural areas of Alaska where coverage was lost in 2011. The Bureau did so to account for Alaska Native villages that were not covered in the previous determinations because the sample size was too small to be identified by the ACS. The result was that the pre-*Shelby County* statewide coverage of Alaska for Alaska Native languages was nearly replicated for the language assistance requirements under Section 203.

The loss of coverage for the four American Indian languages in Arizona does not mean that there is no longer a need for language assistance in those languages. Quite the contrary.³⁴³

The Tohono O’odham Nation “is concerned about the decision to drop the language from the list of Section 203 language under the Voting Rights Act. This is wrong, and it means that the County Recorder’s office [is] no longer required by law to provide elections material.” They do not know “how detrimental” it will be without the language assistance, “but what we do know, and what we do believe is that it should be a right provided to us. Because Tohono O’odham, the O’odham language, is our first language.”³⁴⁴

Similarly, although Oklahoma has not been Section 203-covered for American Indian languages since Adair County lost coverage in 2002,³⁴⁵ there are still some communities of Cherokees where translators are needed. They are not currently covered because they include a small number of tribal Elders that is shrinking over time. It would be helpful to have bilingual poll workers in those communities, providing translations such as those

LANGUAGE	POLITICAL SUBDIVISIONS COVERED	AFFECTED STATES
Navajo	11	AZ, NM, UT
Choctaw	10	MS
Yup’ik (Alaska Native)	9	AK
Inupiat (Alaska Native)	6	AK
American Indian (all other AI Tribes)	5	CA, CT, IA, TX
Apache	5	AZ, NM
Ute	4	CO, NM, UT
Alaska Athabascan (Alaska Native)	3	AK
Pueblo	3	NM, TX
Aleut	1	AK

Figure 14. American Indian and Alaska Native languages covered by Section 203, by State in 2016. Graphic by James Tucker

already provided for social services.³⁴⁶ The same issues emerge from other areas of Indian Country, such as Wisconsin, where Elders, who comprise as much as a third of their tribe, speak English but have problems understanding election terms in English.³⁴⁷

There are at least a few examples of Arizona election officials agreeing to continue to provide assistance in American Indian languages, even when the language is not covered. Coconino County provides a bilingual San Juan Paiute speaker despite only being covered for the Navajo language. In addition, the County continues to provide Hopi language assistance at the Moencopi and Tuba City polling places.³⁴⁸ Although Gila County lost coverage for American Indian languages in 2016, the county continues to employ Apache-speaking outreach workers on the San Carlos Reservation.³⁴⁹ Nationally, 357,409 AIAN persons reside in a jurisdiction covered by Section 203 of the Voting Rights Act, where assistance must be provided in the covered Native language.³⁵⁰ Alaska, Arizona, and New Mexico have the largest number of LEP voting-age citizens. Between them, they account for approximately 87 percent of the AIAN persons of voting age who reside in an area required to provide language assistance in an Alaska Native or American Indian language:

Language poses a barrier to political participation for several reasons. LEP American Indians and Alaska Natives, like other LEP populations, are generally among the hardest to reach among all voters. Outreach and publicity communications written or transmitted in English usually are not understood unless they are translated into the applicable Native language. In-person communication through trained bilingual enumerators yields the best results; however, those efforts can be confounded by the lack of enumerators fluent in the language, geography, and adequate funding to reach the LEP population.

But equally important, Native voters “feel more comfortable” getting voting information “in Native language” because it is their “first language.... If you explain something to me in O’odham I would receive it a lot better than if you explain it to me in English, because that’s not my language, that’s your language.”³⁵¹

4. Written Translations in AIAN Languages

It can be difficult to obtain complete and accurate translations of American Indian and Alaska Native languages for several reasons. First, Section 203 provides that “in the case of Alaska Natives and Amer-

ALASKA	ARIZONA	NEW MEXICO
54,275 Alaska Natives live in one of the 15 areas covered by Section 203 for an Alaska Native language.	123,470 American Indians live in one of the six counties covered by Section 203 for an American Indian language.	132,955 American Indians live in one of the 10 counties covered by Section 203 for an American Indian language.
At least 10 percent of all Alaska Natives in covered areas are of voting age and LEP in an Alaska Native language.	At least 14.5 percent of all American Indians in covered areas are of voting age and LEP in an American Indian language.	At least 8 percent of all American Indians in covered areas are of voting age and LEP in an American Indian language.
LEP Alaska Natives are located in approximately 200 villages and communities in the 15 covered areas.	Approximately 96.7 percent of all American Indians who are LEP and reside in a county covered for Native language assistance reside in just three counties: Apache, Coconino, and Navajo.	91.1 percent of all American Indians and 89.3 percent of all voting-age American Indians who are LEP and live in a covered county live in just four counties: Bernalillo, McKinley, Sandoval, and San Juan.

Figure 15. Comparison Between the Top Three States with Limited-English Proficient AIAN Populations. Graphic by James Tucker

ican 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.”³⁵² This qualification, which is known as the “Stevens Proviso” after its sponsor, Alaska Senator Ted Stevens, has been interpreted to mean that written translations need not be prepared if a language has no written form or is not used in written form. It does not mean that written translations are never required.³⁵³

Unfortunately, the Stevens Proviso has been used by some jurisdictions as an excuse to not provide any language assistance at all. That is precisely what happened in Alaska, leading a federal court in *Nick v. Bethel* to make three critical findings. First, “the exemption from the VRA’s written assistance requirement must be applied on a language-by-language basis,” which meant that there was no categorical exclusion for providing written translations in American and Alaska Native languages. Second, even if written translations are not required, it merely changes the mode of communicating the translation; that is, all voting information provided in English still had to be provided through oral translations. Third, the difficulty of requiring each bilingual poll worker to provide “on-the-spot” translations meant that written translations often would be necessary. The court explained that a covered jurisdiction “may need to produce certain written materials in order to provide effective oral assistance to Yup’ik voters.”³⁵⁴

The State of Alaska ignored those findings. That led to Alaska Native villages and voters filing a second lawsuit, *Toyukak v. Treadwell*, after language assistance was denied to Yup’ik-speaking voters in the Dillingham and Wade Hampton Census Areas and to Gwich’in in the Yukon-Koyukuk Census Area. Recalcitrant Alaska election officials argued that Alaska Native voters were entitled to less voting information than voters received in English, and that they had the sole discretion to decide what should be translated.³⁵⁵ Remarkably, they went even further, arguing that the Fifteenth Amendment to the United States Constitution did not even apply to Native voters.³⁵⁶

The United States Department of Justice disagreed, filing a Statement of Interest “to ‘set out the Attorney General’s position that, contrary to Defendants’ argument, Section 203 requires providing all the election information in the covered minority languages.’ The Stevens Proviso did not exempt Native languages from the statutory mandate; it ‘addresses only the question of how the required translation is to be accomplished, not whether it must be done.’”³⁵⁷ As the Department explained, “[c]ontrary to Defendants’ position, the guidance to ‘take all reasonable steps’ [to provide language assistance] does not exempt a covered jurisdiction. . . . Rather, it articulates the requirement that the jurisdiction take the necessary steps to provide the information contained in all election materials . . . in a form that enables protected voters to participate effectively.”³⁵⁸

Finally, just as the *Nick* court already had concluded, the Department pointed out “that the Stevens Proviso did not bar the use of written translations: ‘[J]urisdictions are free to translate information and materials in that written form to supplement its oral translation program where it can assist in outreach and training, and to help ensure consistent and accurate translations.’”³⁵⁹

The federal court agreed with the *Toyukak* plaintiffs and the United States. As an initial matter, the court rejected “the position of the State that the Fifteenth Amendment does not apply in this case,” finding that “‘the Ninth Circuit recognized applicability of that Amendment to the rights of Native Alaskans and American Indians to exercise the right to vote.’”

³⁶⁰ The court succinctly explained why the Stevens Proviso did not exempt a jurisdiction covered for American Indian and Alaska Native languages from compliance with Section 203:

[T]he goal of the Voting Rights Act is to accord equal opportunity for all citizens to participate in elections and it would be, in my mind, inconsistent with that goal to have a lower level of assistance provided to limited-English proficient Alaska Native and American Indian citizens than is provided to other

individuals that fall within the category that Congress identified as needing assistance in elections . . . [T]he [Stevens] [P]roviso should be interpreted as altering only the means by which information relating to registration and voting is communicated to limited-English proficient Alaska Natives but it does not permit [Alaska's Division of Elections] to diminish the content and extent of the information that must be provided.³⁶¹

Following a two-week trial, the court found that the *Toyukak* plaintiffs had established that Alaska violated Section 203. The court entered an agreed-upon order with comprehensive remedial measures that required federal court oversight and federal observers in the three regions of Alaska through the end of 2020.³⁶²

Even after nearly a decade of litigation clarifying that the Stevens Proviso does not excuse all jurisdictions from providing written translations in American Indian and Alaska Native languages, many jurisdictions continue to take that position. The Proviso can still be a “major drawback to Native Americans” because of that misinterpretation.³⁶³

Some Native languages use written forms that are widely used. In the *Nick* litigation, nearly 89 percent of the State's bilingual poll workers reported that they read written Yup'ik, which was widely taught through bilingual instruction in the public schools in the Bethel region.³⁶⁴ Similarly, the Navajo language is written and interpreters can read and write the voting materials and information to be communicated to voters.³⁶⁵ The Navajo Nation has provided translations of tribal ballots written in Navajo, and those translations have been well received and widely used, especially by younger voters who are eager to read them to Tribal Elders.³⁶⁶

Indeed, the absence of materials written in American Indian and Alaska Native languages makes it much more difficult to provide complete, accurate and uniform translations of English-language voting materials.³⁶⁷ Shirlee Smith, the Navajo interpreter

for Bernalillo County, New Mexico, explained:

So when you're interpreting this stuff, all this election information, when you're looking at this and you're going to interpret the election process or procedures, it's really hard to do it traditional when you're sitting down with an Elder because we don't have English words that we can say to our Elders about whatever the election process is.³⁶⁸

For some languages, translations are provided through audio recordings.³⁶⁹ But that does not always work. Imagine having to listen to lengthy translations explaining how to register to vote. The experience would be as viable as asking someone to patiently listen to highly technical stereo instructions. In Coconino County, Arizona, audio translations are provided for some voter information, but the elections office gets few requests for them. The long versions, when there are ballot questions, can be over two hours long.³⁷⁰

It also presents other challenges to socio-economically disadvantaged voters. When county election officials provided translations on the Tohono O'odham Nation, they distributed a compact disc. The Nation's Vice-Chairman asked his mother if she had received one and she responded, “Why would I get one? I don't even have a CD player.”³⁷¹

That has led many Tribal Elders in the New Mexico Pueblos who speak traditional languages to reject using recorded translations, leaving one-on-one communications with an interpreter as the only viable option.³⁷² For example, in the New Mexico community of Tohajiilee, outreach coordinator Shirlee Smith found that “people open up,” it built trust, and voters felt comfortable asking questions about the voting process.³⁷³

But that sort of assistance has its own perils. A tribal Elder who received a mail-in ballot did not complete it because she needed assistance in Navajo. At the next election, she showed up to vote in person and asked for help to complete the ballot she received

previously. The interpreter explained to her that “the vote already took place.” Both had tears in their eyes when they realized the elder’s vote would not be counted.³⁷⁴

5. Translation Challenges

Several other challenges must be overcome in providing effective language assistance to Native voters.

Ballot measures, which are common in the western states where language assistance is required in American Indian and Alaska Native languages, use complicated language that can be challenging for even the most skilled bilingual workers to translate. Ballot questions can be very confusing. One ballot question may actually invalidate another. They also may be written with double negatives so that voting “yes” may actually be voting against it.³⁷⁵

In Alaska, a readability analysis determined that the average ballot question and voting materials were written at a 16th grade, or college graduate, level of education.³⁷⁶ That leads to mistakes that can make the ballot question’s meaning unintelligible. For example, a poll worker in the *Nick* litigation translated an initiative on a natural gas pipeline by using the Yup’ik word “for ‘gas’ meaning the bodily function rather than the natural resource.”³⁷⁷ The confusing wording of ballot measures has led some Native organizers to have it “shortened ... to get to the point of what it really means.”³⁷⁸

Moreover, the difficulty in preparing complete, accurate, and uniform translations of voting materials (including instructions) is compounded by the absence of words in Native languages for many English terms, such as “caucus.”³⁷⁹ Merely using the English terms does not help because voters may not understand them.³⁸⁰ Determining how to address this barrier requires closely coordinating with trained linguists from Native communities to provide effective translations. Voting and election terminologies require an “additional skill set and clarity.”³⁸¹

For election terms lacking a counterpart in the Native language, it is necessary to translate the concept.

For example, for a political office, “you’re describing everything what that individual is doing, what that position is about.”³⁸² A translator into the Tewa language at the Taos Pueblo explains to voters, “What I’m telling you cannot be translated into our way, but here’s another way you can look at it.”³⁸³ Because of these difficulties in finding equivalent terms, translations for a single voter in Navajo can take 40 minutes one-on-one when there is a ballot measure.³⁸⁴

Election programs and voting information also need to be provided “in a culturally and language-sensitive way that is tailored” to each Native community.³⁸⁵ That includes providing translations in the dialect of the community. Dozens of different dialects are widely spoken among the major American Indian and Alaska Native languages. In the *Toyukak* litigation, translation was required into “several Yup’ik dialects in addition to the translations already made in the Central Yup’ik dialect.”³⁸⁶

Navajo also has different dialects and “is not just one language.” There is a “basic language,” “traditional language,” as well as dialects that vary depending upon the part of the Navajo Nation where the voter is located. Dialects include Western Agency, Eastern Agency, Central, among others.³⁸⁷ The Navajo dialects are “slightly different” languages. The majority of the words are the same, “but there are certain things we pronounce differently.” For example, when a word in the Western Agency dialect was used in the eastern portion of the Navajo Nation, the interpreter was scolded and told “don’t ever say that.”³⁸⁸ In a similar vein, the Pueblos in New Mexico use a “traditional” language that can include some Spanish mixed in with it.³⁸⁹

A constant theme is that local election officials responsible for addressing these many barriers are simply not given the resources to do so. As Martin Aguilar, explained, “One of the prohibitions is always the funding. How do we get more money to buy more radio spots when we do our county proclamation? What radio stations do we go to? Do we go to the public radio stations? Do we go to the commercial radio stations? Each set of stations have different policies.”³⁹⁰

The challenges for some areas can be substantial. For example, Sandoval County is required to provide language assistance in the Navajo, Keres and Towa (Jemez Pueblo) languages. The clerk must “interpret election documents” including “proclamations, the constitutional amendments, the referendum questions, the ballots.” A public radio station is used for five-minute blocks in the Keres, Towa and Southern Towa languages. Fifteen minutes total to provide translations in three languages for all of the information voters receive in English.³⁹¹

6. Denial of Voter Assistance

Section 208 of the VRA provides that “[a]ny voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter’s choice, other than the voter’s employer or agent of that employer or officer or agent of the voter’s union.”³⁹² Congress added this amendment because it determined that blind, disabled, elderly, and illiterate were susceptible to having “their vote unduly influenced or manipulated” without assistance.³⁹³ Like the mandate for minority language assistance contained in Section 203, voter assistance under Section 208 must be provided at every stage of the voting process, from registration through actually casting a ballot.³⁹⁴

Section 208 complements Section 203 by requiring jurisdictions to permit voters who are not proficient or literate enough to understand a ballot or voting materials to receive assistance from the person of their choice. The person providing assistance does not have to be a registered voter or even eligible to register to vote. A Tribal Elder who wishes to receive a translation in Navajo from their 14-year-old granddaughter is entitled to receive that assistance, even though the granddaughter cannot vote herself.

Despite Section 208’s clear mandate, election officials consistently violate it. In a 2005 survey of all jurisdictions covered at that time under Section 203, 89.7 percent of the 263 responding election officials reported voter assistance practices that violated Section 208. In many cases “limiting voter-assistance

practices resulted from jurisdictions complying with more restrictive state laws. More than half of all respondents did not permit voters to receive assistance from their own children because of state requirements that only eligible voters were qualified to be poll workers.”³⁹⁵

In the *Nick* litigation, there were several instances in which Alaska violated Section 208. In Akiachak, poll workers did not provide assistance inside the voting booth. In Bethel, a Yup’ik voter was denied assistance in completing his ballot because poll workers said his vote had to be private. In Tuluksak, a Yup’ik voter “voted in an election where the poll worker told [her] that elders could not have help interpreting or reading the ballots, and that everyone had to be 50 feet away from the person voting.” Poll workers in Kwigillingok denied use of translators inside the voting booth. Assistance was also denied in Tuntutuliak, with poll workers told “not to help voters.”³⁹⁶ Relying upon this evidence, the federal court granted the plaintiffs a preliminary injunction to stop the voter assistance violations.³⁹⁷

Denial of voter assistance to Native voters persists. Many instances appear linked to a lack of poll worker training or supervision over the voting process. For example, a tribal member from Washington reported that voters are not informed that they are entitled to get assistance from the person of their choice.³⁹⁸ At polling places on the Gila River Indian Community in Arizona, outreach workers have had to tell poll workers that those needing assistance are entitled to get it from the person of their choice.³⁹⁹

In 2016, a particularly egregious incident occurred when poll workers did not stop a voter from directly confronting, and then harassing, a Native voter. A blind member of the Pasqua Yaqui Tribe at the Guadalupe polling place was actually getting assistance from a poll worker. Another voter did not understand that the blind voter was receiving assistance and “started taking pictures, yelling, screaming” at the blind voter. This sort of harassment not only deters Section 208 assistance, but likely violates federal and state laws prohibiting voter intimidation.⁴⁰⁰

7. Failure of Covered Jurisdictions to Provide Required Language Assistance

While there are many difficulties in providing language assistance in American Indian and Alaska Native languages, those barriers are not insurmountable. Election officials who make the commitment to work with tribal governments to ensure that effective language assistance is provided can ensure that they comply with Section 203. When New Mexico started its Native American Election Information Program, voter registration was low and Native voters “didn’t know anything about voter registration, absentee voting, early voting.” In 1998, there were only 103 registered voters on Navajo tribal lands in Bernalillo County, which has climbed to over 1,000 today. The Isleta Pueblo has increased from 356 registered voters to over 1,500. Both are a result of language assistance, outreach, and voter education.⁴⁰¹

Unfortunately, the story from Indian Country is that is not happening for all covered registration and voting activities. Alaska’s failure to provide effective language assistance resulted in the court remedies in the *Nick* and *Toyukak* litigation. Similar narratives emerge from three of the other covered states with large populations of LEP American Indian voters.

a. Alaska⁴⁰²

The expectation was that the *Nick* settlement in 2010 would serve as a model for language assistance not only for Yup’ik speakers, but statewide. This expectation was not realized. Rather than simply using the same methods of translations to other areas covered for Alaska Native languages, state officials chose a different path: they limited application of the *Nick* remedies to the Bethel Census Area. Alaska Department of Elections (DOE) officials soon received indications that the decision to limit language assistance in this fashion violated the law. In October 2012, one wrote that she had “a disturbing call yesterday with the Department of Justice regarding our language assistance ... and the lack of us having any PSAs relating to information appearing on the ballot.”⁴⁰³ She explained, “Since we send out an English voter pam-

phlet that contains a sample ballot, they say we must also provide information in Native languages about the sample ballot.”⁴⁰⁴ In February 2013, at the Director’s manager’s meeting, DOE officials discussed that “we might have a new lawsuit against us about language assistance.”⁴⁰⁵ Even with that knowledge, the DOE still made no effort to provide language assistance to Native voters outside of the Bethel Census Area.

The absence of language assistance was particularly acute for pre-election information provided to every voter in English. By state law, Alaska is required to mail its Official Election Pamphlet (OEP) to every household with a registered voter at least twenty-two days prior to a statewide general election or an election with a ballot measure.⁴⁰⁶ The OEP, which is frequently 100 pages or longer,⁴⁰⁷ contains a tremendous amount of information necessary to cast an informed ballot on Election Day, including: candi-

Election officials who make the commitment to work with tribal governments to ensure that effective language assistance is provided can ensure that they comply with Section 203.

date statements; Judicial Council recommendations for retention of judicial candidates; sample ballots for all offices; for each ballot proposition, the full text, statement of costs, neutral summary, and pro and con statements; statements explaining bond propositions; material submitted by political parties; constitutional convention questions; and any other information on voting procedures the lieutenant governor considers important.⁴⁰⁸ Absent complete, clear, and accurate translations into Native languages of the pre-election information disseminated to voters in English, Alaska Natives were effectively denied an opportunity to meaningfully participate in the election process.

This prompted Alaska Native voters outside the Bethel Census Area to file a second lawsuit in July 2013.⁴⁰⁹ *Toyukak v. Treadwell* would become the first Section 203 case fully tried through a decision in thirty-four years.⁴¹⁰ The plaintiffs included two individual voters and four tribal councils from three different regions of Alaska. The Bethel Census Area lies between these regions: the Kusilvak Census Area is to the northwest, the Yukon-Koyukuk Census Area to the northeast, and the Dillingham Census Area to the south. Four plaintiffs represented Yup'ik-speaking LEP voters in the Dillingham and Kusilvak regions, including some close to the Bethel area who speak the Central Yup'ik dialect, and many who speak the Bristol Bay, Chevak/Hooper Bay, Norton Sound, Nunivak, and Yukon dialects (among others). Two tribal councils from Arctic Village and Venetie represented LEP voters who speak the Athabascan language of Gwich'in. In addition to a Section 203 claim, this time the plaintiffs brought a claim under the Fourteenth and Fifteenth Amendments to the United States Constitution because, as a result of the *Nick* case, DOE officials knew they were denying equal registration and voting opportunities to Natives, but had persisted in their violations.

After weighing the evidence following a two-week trial in June and July 2014, the federal district court issued a decision on record in early September 2014. The court concluded that “based upon the considerable evidence,” the plaintiffs had established that DOE’s actions in the three census areas were “not

designed to transmit substantially equivalent information in the applicable minority . . . languages.” The public service announcements and translated materials DOE offered to Natives were “only a limited subset of the election materials” and were not a “substantial equivalent” of what the Division provided in English. In particular, the court found the greatest disparity in the dissemination of voting information in the OEP:

[It is] [s]ignificant to the Court that the English version of the official election pamphlet that is mailed in English in every household in the state with a registered voter a few weeks before the election is not available in any language, English or otherwise, at the polling sites due to statutory restrictions on campaigning at the polling place. So what you have at the polling place is the ballot language and the list of candidates but not the material that is distributed in English in the official election pamphlet, such as the pro/con statements and the neutral summaries for ballot measures, the candidate statements, and other information in the official pamphlet.

The evidence did not support the State’s argument that its outreach workers disseminated pre-election information. DOE failed to provide any outreach worker in villages where a tribal administrator had declined assistance, even where Census numbers indicated a covered population, an approach that violated Section 203. Where outreach workers were available, they were limited to working no more than five hours before each election to translate for every voter in the village – which in some cases was hundreds of voters – and were not paid at a rate consistent with “comprehensive translators and interpreters.” There was also no evidence that workers were provided with copies of the OEP or informed that they were expected to translate it into the Native language spoken in their village. The four minutes that DOE included in language assistance on its training video and its written materials focused solely on Election Day, and did not include any instruc-

tions that pre-election translations and assistance were to be offered. The lack of pre-election assistance could not be redressed on Election Day because Alaska's electioneering statutes barred anything beyond translating the ballot in the polling place, such as by providing translations of candidate statements and pro/con statements of ballot measures.

The court found that the language needs in each of the three census areas were not being met. The plaintiffs had "demonstrated that there are different dialects in Dillingham and [Kusilvak] from the Central Yup'ik dialect in Bethel." There was evidence that "different individuals ... raised this concern with the Division over the past several years," but the Division "only translated its Yup'ik materials solely into the Central Yup'ik dialect" and other dialects were not represented among translation panel members. As a result, while "a Yup'ik sample ballot is a sound idea for the provision of language assistance services, its value outside of the Bethel Census Area [was] limited." As to the Yukon-Koyukuk Census Area, during 2014 the DOE had "approached with some renewed energy the goal of providing meaningful oral language assistance to Gwich'in LEP

Alaska Natives," but it had "not yet provided the substantial equivalent there." Accordingly, the State of Alaska violated Section 203 of the VRA because its "standards, practices, and procedures" did not permit LEP voters in the three "census areas to receive information about elections... that is substantially equivalent to that provided . . . to English speaking voters."⁴¹¹

The *Toyukak* plaintiffs and Alaska officials worked collaboratively to produce a proposed stipulation and judgment that was entered by the court in late September 2015. The thirty-three page order identifies comprehensive procedures to be put into place to remedy Alaska's Section 203 violations that account for practical issues faced by election administrators. In recognition of voting barriers that predated even the *Nick* litigation, the order includes strong relief to cure the violations, such as federal observers to document compliance efforts and court oversight enforceable by its contempt powers through the end of 2020.⁴¹²

Reports filed by federal observers in 2016 suggest that Alaska's efforts fell short of fully remedying the Section 203 violations and complying with the *Toyukak* Order. Some two years after Judge Gleason's September 2014 bench ruling for the Plaintiffs and entry of her interim remedial order, bilingual poll worker training was spotty or lacking for several villages. Federal observers were present for both the August 2016 Primary and November 2016 General Election in villages located in the three census areas. Out of the 120 poll workers interviewed by the federal observers for those elections, only 46 percent (55 poll workers) reported that they had been trained in 2016. In contrast, four percent (5 poll workers) reported receiving training in 2015, ten percent (12 poll workers) reported being trained two or more years earlier, 39 percent (47 poll workers) reported they had never been trained, and one percent declined to answer. Some of the poll workers who did receive training indicated that it was "conducted in English by a non-Native instructor from the Election Office." Bilingual poll workers or interpreters were not trained on "how to translate the contents of the ballot or how to provide procedural instructions" in the covered Alaska Native languages.⁴¹³

In a marked improvement, most, but not all, of the villages had a bilingual poll worker available. In the August 2016 Primary Election, federal observers reported there was no bilingual poll worker available in three out of the nineteen Native villages they observed. In Koliganek, a bilingual poll worker was only available "on call" and was "not present at the polling place." No bilingual assistance was available at polling places located in Dillingham, Kotlik, and Marshall during a portion of the time federal observers were there when the observers documented the only bilingual worker took a break or left the polling place. In the November 2016 General Election, federal observers reported there was no bilingual poll worker available in just one of the twelve Native villages they observed. While federal observers were present, they reported that no bilingual assistance was available at Fort Yukon for an hour and twenty minutes when the interpreter left the polling place. In Venetie, one of the Plaintiff villages, the only Gwich'in-speaking poll worker left three and

one-half hours before the polling place closed, and did not return.

For both elections in 2016, many voting materials were unavailable in the applicable Alaska Native language and dialect. Almost all signage was in English only. Among the nineteen villages in which federal observers were present for the August 2016 primary election, they observed that no voting materials were available in Alaska Native languages in six villages: Alakanuk, Kotlik, Arctic Village, Beaver, Fort Yukon, and Venetie. The “I voted” sticker was the only material in an Alaska Native language in Marshall and Mountain Village. Only the Yup’ik glossary was observed in Emmonak. Ten villages had a sample ballot written in Yup’ik, but only two – Koliganek and Manokotak – had written translations of the candidate lists. Only one village, Aleknagik, had a written translation of the OEP available for Yup’ik-speaking voters.

In the November 2016 General Election, federal observers documented that half of the twelve polling places they observed did not have a translated sample ballot available for voters. Five villages – New Stuyakok, Alakanuk, Hooper Bay, Arctic Village, and Venetie – had no translated sample ballot at all, while the Gwich’in sample ballot in Fort Yukon was “kept at the poll workers’ table” and was not provided by the voting machine where voters could use it. The absence of written voting materials had its greatest impact in villages where a trained bilingual poll worker was not present at all times during the election. In sum, Alaska has made some improvements and committed to changing to better serve its voters, but almost 40 years of violating the VRA cannot be changed overnight. This illustrates why the settlement agreement requires court oversight through the end of 2020, and may require an even longer period.

b. Arizona

Arizona has a lengthy history of failing to comply with Section 203. Starting in the late 1970s, shortly after several counties in the state became covered for American Indian languages, federal enforcement was

necessary. The Department of Justice pursued litigation “because there was no election-related information going to the Navajo people.” The lawsuit was resolved by a consent decree that required “outreach to educate the Navajo people in their respective languages” about “election related information.”⁴⁴ The decree required hiring outreach workers, which led Apache County to hire two who provided election information to the Navajo Chapters.⁴⁵

Unfortunately, those violations have persisted. A recent study by the Indian Law Clinic at Arizona State University’s Sandra Day O’Connor School of Law found that in the 2016 election, only one-third of Arizona’s nine counties covered for American Indian languages likely complied with Section 203. The three counties actively worked with the tribes and communicated with voters in the covered language. For example, Navajo County worked with the Navajo Nation Election Administration to provide translations to voters. Together they prepared tools for providing election information in Navajo, such as CDs containing audio translations and a 38-page glossary of election terms.⁴⁶

Another third of Arizona’s covered counties only partially complied with Section 203. In Apache County, no language assistance was offered in the Zuni language because that portion of the county was believed to be uninhabited. Apache County also failed to provide translations for voter registration information, voter identification information, general election information, or any information about early voting.⁴⁷

Coconino County did not provide translation material for distribution; instead only bilingual poll workers were provided at voting locations.⁴⁸ The County also failed to provide translations for voter registration information, voter identification information, or information about early voting.⁴⁹

It was unclear whether the remaining three Arizona counties provided assistance in the covered American Indian language. Mohave County reported that it made inquiries to three tribes between 2012 and 2014 “but no translation efforts resulted.” Although the Section 203 determinations were made by us-

ing updated Census data and are unreviewable, the County claimed that it was told that it was “a dying language that requires no translation efforts.”⁴²⁰ However, covered counties cannot avoid the requirement of providing language assistance by relying upon the lack of a response from a tribal official as a basis for saying that assistance is not needed.⁴²¹

c. New Mexico

Despite its success in closing the gap in Native voter registration and participation, New Mexico’s language program is underfunded. That poses substantial challenges for the Secretary of State in working with the counties to provide effective language assistance.⁴²² Funding impacts the number of in-person voting locations. It costs money to hire interpreters and poll workers, which can reduce the number of in-person voting locations on tribal lands.⁴²³

It also limits when and how often language assistance is available. Outreach cannot be a “one-off” that is only done right before an election. It needs to happen consistently. “We know we’re not going to change tribal participation overnight in New Mexico or anywhere else in the country, so we have to be in this for the long term to try to make systemic change for the long term.... There has to be a consistent and committed ongoing communication with those individuals and with the leadership and with the members of the community.”⁴²⁴

The most common complaint from New Mexico Tribes and Pueblos is that little contact of any kind is happening. Voters are not getting enough pre-election outreach and interpreters to explain to them what is on the ballot.

Some tribal Elders at the Isleta Pueblo do not understand the ballots written in English. “They don’t know what a bond is or a levy is or even some of the people that are running, the positions that they’re running in.” They need more interpreters to go to tribal functions and provide information to Elders in their Native language.⁴²⁵

The nineteen Pueblos in New Mexico engaged in self-help through what they called the “Pueblo Platform,” including creating their own voter information guide on the positions of candidates on key issues that mattered to Native voters. Each of the Pueblos took responsibility to find interpreters for the voter guide into the Keres, Tewa, or Towa languages. “[T]he impact that the federal government has on tribal communities and tribal people is more than any other member of U.S. society. It’s very important that that information get out to Native American voters.” It led to an increase in voter registration and turnout.⁴²⁶

However, as one community organizer complained, tribes should not be forced to engage in self-help to provide the language assistance that non-tribal governments covered by Section 203 are required to offer. It is not “fair for them to...ask a tribe, ‘You should pay for this language piece’ or ‘You should do all this other stuff’...we are citizens of the United States of America” in addition to being citizens of...tribes.⁴²⁷

d. San Juan County, Utah

Language is a significant barrier in San Juan County, Utah. Many Native voters need an interpreter to obtain access to government services.⁴²⁸ However, the County has failed in every respect to comply with Section 203.

The County does not have an outreach worker who speaks Navajo. As a result, Navajo assistance is not provided for voters calling into the San Juan County elections office.⁴²⁹

The County publishes a voter information guide in English that is distributed before elections. It is not translated into Navajo.⁴³⁰ A Navajo voter asked poll workers what was available in English.

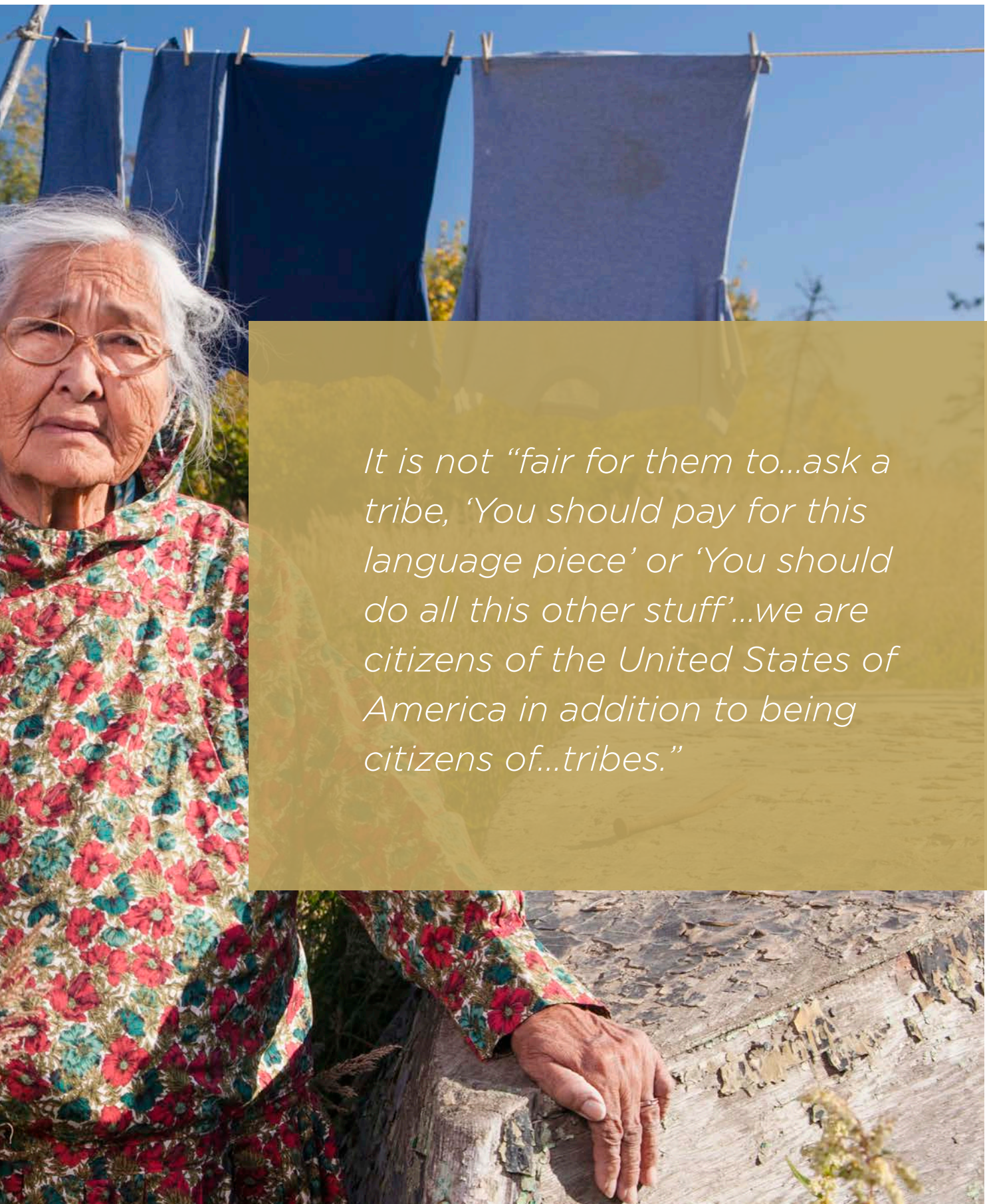
I wanted to know what information is disseminated to us, as Native Americans, in terms of being able to understand thoroughly, if it could be in the English version as well as being interpreted back into the Native Navajo language...I really didn’t un-

derstand what some of the issues were on the ballot at that time, especially this last election... I started asking questions on, 'What does it mean?' regarding several of the state constitutional amendments that was on the ballot as well as some of the state judges and attorneys.... 'How ... will that affect me as a Navajo on the reservation? What does it mean to amend a certain section of the state constitution?' There was nobody to explain that to me in Navajo. What they told me is, 'Well, if you don't understand it, don't vote on it.'⁴³¹

As a result, Navajo voters in San Juan County have never received any information about ballot questions in Navajo before the election. Often, they simply do not vote on the initiatives and ballot questions because they do not understand them. They vote only for candidates.⁴³² Some voters do not vote at all because of the lack of language assistance. "We don't get no help from the county. Why should I vote?" That was the mentality that we grew up with. 'Leave them alone... Don't bother. That's their system,' is what we were told."⁴³³

Even more pernicious, San Juan County switched to a vote-by-mail system to take away all language assistance. No translations were provided to LEP Navajos on ballot information, including candidates and initiatives.⁴³⁴ Only one polling place in Monticello was going to be kept, three or four hours each way.⁴³⁵ The impact was profound. Many voters who received an English language ballot they could not read simply did not vote.⁴³⁶ Others had their ballots invalidated when LEP Navajo voters were unable to read and understand the instructions on how to complete the ballot and envelope.⁴³⁷ In 2018, the County settled after being sued, agreeing to restore the three closed polling places and to provide the mandated language assistance.⁴³⁸





It is not “fair for them to...ask a tribe, ‘You should pay for this language piece’ or ‘You should do all this other stuff’...we are citizens of the United States of America in addition to being citizens of...tribes.”

PART 5

VOTER REGISTRATION

Barriers To Voter Registration

1. Legal Overview

a. The National Voter Registration Act

The National Voter Registration Act (NVRA)⁴³⁹ was introduced on the first day of the 103rd Congress in order to make it easier for citizens to register to vote.⁴⁴⁰ There are four stated goals of the NVRA:

- (1) to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office;
- (2) to make it possible for Federal, State, and local governments to implement this chapter in a manner that enhances the participation of eligible citizens as voters in elections for Federal office;
- (3) to protect the integrity of the electoral process; and
- (4) to ensure that accurate and current voter registration rolls are maintained.⁴⁴¹

The NVRA does not apply to any states that did not or do not have voter registration requirements on or after August 1, 1994 or states in which voters can register the day of an election at their polling place.⁴⁴² For all other states, the NVRA requires that citizens are able to register to vote in at least three ways: by applying simultaneously with an application for a driver's license, by mail, or in person at certain federal and state governmental offices and other non-governmental offices.⁴⁴³

Though the NVRA is supposed to make it easier for US citizens to vote, in practice it has less force in Indian Country.

Under the NVRA states must develop driver's license applications that simultaneously serve as a voter registration application.⁴⁴⁴ Applications to update an individual's driver's license address must likewise serve to update voter registration rolls unless the applicant specifies otherwise.⁴⁴⁵

However, Native Americans living on reservations often do not apply for and possess drivers' licenses. Securing a driver license can be expensive – the license may require a fee, there are often costs associated with obtaining underlying documentation necessary to obtain the ID, the distance Natives living on reservations must travel to reach driver's license sites are often prohibitively far, and drivers' licenses are not always required for everyday life in reservation communities.

A closer look at reservation communities in North Dakota highlights how impractical it is for Native Americans to travel to driver's license sites. The average travel time is a little over an hour. This burden is compounded since Native Americans in North Dakota lack access to transportation at twice the rate of white households.⁴⁴⁶

Even when Native Americans manage to make it to drivers' license sites, members have expressed skepticism that their registrations have been completed in compliance with NVRA's requirements. Rhonda Medcalf, a tribal member living in Oregon, described how, after travelling the 45 mile drive to either Skagit

Mean Travel Distances and Times for Native Americans Residing on Reservations in North Dakota to Travel to a Driver's License Site (DLS)

RESERVATION	MEAN TRAVEL DISTANCE FOR VOTING AGE NATIVE AMERICANS	MEAN TRAVEL TIME FOR VOTING AGE NATIVE AMERICANS
Ft. Berthold	49.6 miles	84.6 minutes
Turtle Mountain	11.0 miles	17.4 minutes
Spirit Lake	14.0 miles	25.3 minutes
Standing Rock	60.8 miles	106.62 minutes
Lake Traverse	40.1 miles	64.3 minutes
All Reservation	29.4 miles	50.3 minutes

Figure 16. *An Analysis of the Effects of North Dakota's Voter Identification Law on Potential White and Native American Voters*¹⁰²²
Graphic source: University of Alabama

County or Snohomish County, “[y]ou think you are registered to vote, but the DMV does not turn in those applications, so lots of people often miss out on voting because the DMV does not always turn in those documents.”⁴⁴⁷ Another advocate reported that “[o]ne of the poll workers told me that perhaps the—when some of the voters register at the—when they’re getting their drivers license or identification at the MVD [“Motor Vehicles Division”], perhaps the MVD is not finishing the registration and submitting that to the Secretary of State or wherever it has to go. So perhaps that is an issue.”⁴⁴⁸

This mistrust is not based on mere speculation. Hostility and negligence toward Native Americans was established in the 2007 suit *United States v. Cibola County*, where the United States filed a complaint against Cibola County, NM for violation of the NVRA and the Help America Vote Act (“HAVA” – discussed in detail below).⁴⁴⁹ The complaint alleged that the county failed to ensure that valid voter registration forms (many from residents of Laguna Pueblo), were processed for the November 2004 gen-

eral election.⁴⁵⁰ Moreover, the county was accused of removing voter names from registration lists without general causes.⁴⁵¹ In response to these accusations, the court entered an order approving a joint stipulation through 2006 which required Cibola County to comply with the requirements of the NVRA and correct their practices.⁴⁵² The county agreed to make “all phases of the election process as accessible to the Native American populations at the Acoma, Laguna, and Ramah reservations within Cibola County as they are to the remainder of the County’s population.”⁴⁵³

The NVRA also requires that states adopt a mail voter registration application developed by the Election Assistance Commission or develop their own that meets the requirements of the NVRA.⁴⁵⁴ Like the driver’s license application, it must not require any additional information besides what is necessary to confirm an applicant’s eligibility to vote; it must specify each eligibility requirement and provide a place for the applicant to sign to confirm he or she meets the requirements; and it must inform the vot-

er that his or her choice on whether to vote is to remain confidential, as is the location at which he or she filled out the application.⁴⁵⁵

Yet, because many Native voters lack traditional mailing addresses they are less likely to take advantage of the NVRA's registration by mail forms. The lack of stable housing or homelessness might make it impossible for individuals to provide an adequate mailing address.

Next, regardless of whether the state uses the Election Assistance Commission's form or creates its own, states are required to distribute the forms through various governmental and private entities, "with particular emphasis on making them available for organized voter registration programs."⁴⁵⁶ Some state agencies are required to serve as voter registration centers, and states are required to designate others for the same purpose.⁴⁵⁷ Those agencies that are required to provide voter registration applications are ones that provide public assistance⁴⁵⁸ and any that provide "[s]tate-funded programs primarily engaged in providing services to persons with disabilities."⁴⁵⁹ Each state must also designate other offices as registration agencies.⁴⁶⁰ These offices can include "public libraries, public schools, offices of city and county clerks (including marriage license bureaus), fishing and hunting license bureaus, government revenue offices, unemployment compensation offices," other offices that provide services to people with disabilities, and any other federal or nongovernmental office that agrees to operate as a registration agency.⁴⁶¹

These agencies, however, are often state run and are less utilized by Native Americans who live primarily within their reservation lands. Additionally, Native Americans do not exclusively interact with state services because they may instead rely upon federal programs offered in fulfillment of the federal government's treaty obligations. For example, Native Americans may receive food commodities from the US Department of Agriculture instead of public assistance benefits.⁴⁶²

Finally, besides specifying how states must facilitate voter registration, the NVRA also provides some

limits on when states can remove voters from their registration lists. States must comply with the Voting Rights Act of 1965 in maintaining rolls that are uniform and nondiscriminatory.⁴⁶³ There are only six instances in which the NVRA says that states may remove voters: (1) upon the death of the registrant; (2) upon the registrant's written confirmation that his or her address has changed to a location outside the registrar's jurisdiction; (3) when the registrant fails to respond to adequate notice that he or she is about to be removed from the rolls *and* fails to vote in two consecutive Federal general elections following the notice; (4) on the request of the registrant; (5) because of mental incapacity, as provided for in state law; and (6) on criminal conviction of the registrant,⁴⁶⁴ as provided for in state law.⁴⁶⁵

The Act is very particular about how states must provide adequate notice by mail that a registrant is about to be removed from the rolls. It must be sent in a postage prepaid and pre-addressed return card, sent by forwardable mail. It must provide a place for the registrant to provide his or her current address and encourage the voter to provide that information before the registration deadline for the next election.⁴⁶⁶ The notice must inform the voter that if they

The lack of stable housing or homelessness might make it impossible for individuals to provide an adequate mailing address.

fail to reply before the registration deadline, they might be required to provide confirmation of their address in the next election; failure to vote in either of the following two elections will result in their removal from the voter registration roll.⁴⁶⁷ Individuals who move and fail to respond to one of these notices can still vote in the following election, but there are different provisions regarding how and where the individual must vote depending on where they moved. Because of the aforementioned address and postal service issues, Native Americans are more likely to move and less likely to receive notice that they will be removed from the rolls. Additionally, while the sample Election Assistance Commission form does provide a way for voters to specify their address given the nearest intersection and nearby landmarks,⁴⁶⁸ this option is harder to process than those who have traditional mailing addresses, which can lead to Native voters erroneously being removed from voter rolls. Given these numerous impediments, Native Americans are less likely to benefit from the NVRA's various assistances and therefore remain less likely to register to vote.

b. Help America Vote Act

The Help America Vote Act was passed in 2002 in response to the controversy surrounding the 2000 Presidential election.⁴⁶⁹ The Act has three basic goals: first, establishing standards such that blind and disabled voters and every language minority will be able to vote; second, allowing for voters to cast provisional ballots and informing them of this right; and third, requiring each state to create a statewide voter registration list and system for voters to register by mail.⁴⁷⁰ The Act also established the Election Assistance Commission (EAC) to assist states in implementing the mandates.⁴⁷¹ The EAC must maintain a National Voter Registration form, conduct research, and administer a national publication that includes shared practices and other resources to improve elections.⁴⁷² Finally, and crucially, the act provides funding for states to replace voting systems and improve election administration.⁴⁷³

Despite HAVA's national requirements, states still maintain a great deal of discretion in how they ad-

minister their federal elections and expend their HAVA funds.⁴⁷⁴ HAVA's mandates have not always been enforced equitably in Indian Country, requiring litigation to force states to comply. For example, in Alaska, state officials were aware of problems with their language assistance program in the spring of 2006, but waited until they were forced through litigation, *Nick v. Bethel*, to address the language needs and expend HAVA funds on language assistance for Yup'ik speaking voters in the Bethel Census Area.⁴⁷⁵ Alaska's election officials previously had used federal HAVA funds to open a new elections office in the predominately non-Native community of Wasilla, which had a population of less than 8,000.⁴⁷⁶ However, state officials chose not to use any funds for language assistance for tens of thousands of Alaska Natives until after the *Nick* case was filed, even though that was one of the approved uses for the federal appropriation. Post litigation, election officials used a small percentage of the HAVA appropriation so that no state funds would have to be used to make voting accessible to Limited-English Proficient (LEP) Alaska Native voters.

Litigation has also forced states to comply with HAVA's requirements to provide for provisional ballots in instances where voters are registered and eligible to vote in the jurisdiction but do not show up on the official list of eligible voters or the election official believes that the individual is not eligible to vote in that jurisdiction⁴⁷⁷ and HAVA's voter registration list requirements.⁴⁷⁸ Despite HAVA's clear mandates Native voters have been erroneously removed from voter rolls and were not offered provisional ballots after receiving probation for felony convictions. In *Janis v. Nelson*, South Dakota agreed to train election officials and volunteers on felony qualifications and updated statutory qualifications to require notice to those who had lost their right to vote due to felony convictions and penalties.⁴⁷⁹

Finally, and most disturbingly, states have even chosen to forgo usage of HAVA funding rather than service Native American voters. In *Poor Bear v. The County of Jackson*, the plaintiffs alleged Jackson County acted in violation of the equal protection clause by failing to use available HAVA funding to

create a satellite polling office in Wanblee, South Dakota.⁴⁸⁰ The Court agreed that such failure to use the funding could constitute a violation of the Equal Protection clause.⁴⁸¹ South Dakota eventually agreed to open a satellite office in Wanblee on the Pine Ridge Reservation for the 2014 election, and the county entered a binding agreement with the State, committing itself to opening a location in proximity to the reservation for federal general and primary elections through 2022.⁴⁸²

2. Litigation Under the Fourteenth and Fifteenth Amendments and the Voting Rights Act

For Native Americans, the Fourteenth Amendment, guaranteeing equal protection under the laws, did not confer any rights upon its ratification in 1868.⁴⁸³ The Fifteenth Amendment's guarantee that the right to vote shall not be denied or abridged on account of race or color likewise did not apply to Native Americans upon its ratification. Native Americans came under the protection of these Amendments, at least in theory, upon the enactment of the Indian Citizenship Act of 1924.⁴⁸⁴ In practice, however, as discussed in Part II, the Act conferring the right to vote on Native Americans did not prevent the States from restricting or even abolishing that right in numerous ways.⁴⁸⁵ It was not until the enactment of the Voting Rights Act in 1965 that the right of Native Americans to vote in state and federal elections was regularly enforced. Voting rights cases in recent decades have consistently been filed under the Voting Rights Act, enforced via Congress' powers under the Fourteenth Amendment.⁴⁸⁶ Constitutional challenges also are brought under the Fourteenth and Fifteenth Amendments. Often cases advance both Voting Rights Act and Constitutional challenges at the same time.

a. The Voting Rights Act

The Voting Rights Act was passed as a response to the attacks on protesters in Selma, Alabama and the murder of several voting rights activists elsewhere.⁴⁸⁷

Prior to the Act, the Department of Justice was trying to defeat discriminatory election practices on a case-by-case basis; Congress found that this was ineffective and passed legislation to provide a more comprehensive framework for quelling discrimination in elections.⁴⁸⁸ In particular, Section 2 of the Voting Rights Act has provided the mechanism for enforcement of many voting rights violations.

The text of § 2 reads:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or implied by any State or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color.⁴⁸⁹

Originally, the Act only prohibited intentional discrimination in the administration of elections.⁴⁹⁰ However, the Act was amended in 1982 to disavow this approach and provide that there could be a violation of § 2 when a jurisdiction's imposed voting requirements are not equally open to members of a protected class because of discriminatory impact—that is, when “its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.”⁴⁹¹

The statute expressly provides that a violation of § 2 depends on the totality of the circumstances.⁴⁹² Section 2 does not give minorities a right to have representatives proportionate to their population; it only protects their equal access to the actual voting process.⁴⁹³ As a result, a challenge against alleged discriminatory practices uses “a multifactorial inquiry under which a single factor can neither establish liability nor immunize a challenged practice.”⁴⁹⁴ In making this assessment, courts can look to nine factors set out in a Senate Report on the 1982 amendment.⁴⁹⁵

Courts must make a highly fact-specific inquiry into the facts surrounding a challenged standard, practice, or procedure which relies both on the present

alleged burdens to voting for minority voters and the historical discrimination against that protected class in that particular jurisdiction.

b. Equal Protection

Likewise, Native Americans have brought successful Constitutional challenges under the Equal Protection clause of the Fourteenth Amendment.⁴⁹⁶ These Equal Protection challenges require federal courts to: (a) “consider the character and magnitude of the asserted injury to the rights protected,” that the plaintiff seeks to vindicate and (b) “identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by the rule.”⁴⁹⁷ In spite of asserting that voting rights are “fundamental,” the Court has also repeatedly recognized that some burden on individual voters is inevitable.⁴⁹⁸ Accordingly, a state election law that imposes only “reasonable, nondiscriminatory restrictions” upon the rights of voters is justified by “the State’s important regulatory interests.”⁴⁹⁹

Meeting the highly fact specific standards required to prove both VRA and Equal Protection claims means that litigation is expensive to bring, requiring numerous expert reports and fact collecting investigations. For example, the last three voting rights cases brought by the Native American Rights Fund each required costs and fees of over 1 million dollars.⁵⁰⁰ Consequently, bringing suit is often prohibitively expensive and meritorious cases are left unpursued. However, as discussed in Part II, when these resources are marshalled and cases brought, Native Americans have successfully established voting rights violations on a numerous and consistent basis, including violations due to disproportionate distances to travel to register and vote, unfairly burdensome identification requirements, and violations of the one person one vote standard through discriminatory apportionment schemes.

3. Lack of a Traditional Mailing Address as a Barrier to Registration

Native voters are often barred from registering to vote when election officials insist that a physical address for their residence be provided.⁵⁰¹ For example, a tribal member in Washington explained, “the state mail-in process requires a physical address and many of our members only have post office box numbers, some of them only have a general delivery address. This requirement sets up another hurdle for our membership in our voting process.”⁵⁰²

Another problem arises when a Native voter’s post office box is located in a different county or state where the voter resides. In Montana, tribal members who get their mail through post office boxes in Lodge Pole have to use the address “Lodge Pole Route,” their box number, followed by “Dodson, Montana,” which is located in Phillips County. However, the locations of their residences are in Precinct 15, which is in Blaine County. When they attempt to register, Blaine County requires the “legal description” of their address, which they have difficulty obtaining.⁵⁰³

Montana law allows election administrators to deny voter registration based on geographical descriptions using the subjective standard in which it is determined that “the location of the elector’s residence” may not “be easily determined.”⁵⁰⁴ That is frequently the case for non-traditional mailing addresses.

Compounding the risk that registration applications will not be processed or will be cancelled, state law provides for sending a confirmatory registration notice “by nonforwardable, first class mail.”⁵⁰⁵ If Native voters have changed their mailing addresses, which commonly happens even when their physical residences remain the same, their registrations will be cancelled when the notices are returned as undeliverable. The Native voters will have no notice that they are not registered until they try to vote on Election Day. To the extent these state confirmatory procedures have a discriminatory impact on Native voters or otherwise violate the VRA, they are unlawful.⁵⁰⁶

Native voters living in Navajo Mountain, Utah use postal boxes located in their Chapter House, which has a Tonalea, Arizona zip code despite the Chapter House being located in Utah. The San Juan County, Utah clerk disqualifies the Utah residents trying to register to vote because of their Arizona postal address.⁵⁰⁷

In some counties, local election officials will create artificial addresses to allow voters to register and to receive election materials by mail or will create a “911 address” to make it easier for emergency services to locate them.⁵⁰⁸ However, the 911 address can be useless if not used to register to vote⁵⁰⁹ or if voters have not received their physical address card when they complete their voter registration application.⁵¹⁰ On the Turtle Mountain Reservation in North Dakota, a large majority of Native voters do not know their residential 911 address.⁵¹¹

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.”⁵¹² As one community organizer asked rhetorically, “How do you register to vote because your address is different every couple of months?”⁵¹³

Some Native voters permanently live in Recreational Vehicles (RVs). However, election officials frequently treat the RVs as mobile vehicles that cannot be used for establishing an address. In northern California, many members of the Karuk Tribe and other tribes in the area reside in RVs or tents in one of the two national forests because of the lack of housing. RVs are considered temporary housing, even if people live in them for years. That makes it difficult for them to register to vote because they lack permanent addresses and have to use post office boxes located in another community, such as Yreka. They have not been able to determine how these tribal members can participate in local elections. Tribal members are afraid that if they try to register to vote, they will be accused of voter fraud, as many members of the Hmong community were in Siskiyou County.⁵¹⁴

Homeless tribal members in urban areas often are unable to register to vote. In Seattle, Native Americans comprise seven percent of the homeless despite being only one percent of the city’s population.⁵¹⁵ Election officials in urban areas do not reach out to Native voters who are homeless to tell them that they can register to vote, such as by identifying the cross streets where they typically are located. That contributes to non-voting.⁵¹⁶ Other homeless Natives are told they cannot vote because they lack a permanent address.⁵¹⁷

In Oregon, a Tribal leader expressed concern that the requirement of a ballot mailing address would lead to Native voters being left out since, “[w]e have over 30 members in our enrollment rolls with general delivery addresses... I am concerned that these members may not have the ability to register or receive their election ballots.” Without mail-in addresses for so many potential voters, the system fails those whose “whereabouts are unknown or that they are homeless.”⁵¹⁸

The lack of standardized postal service addresses on tribal lands causes many Native voters to be placed in the wrong voting precinct when they register to vote. That results in voters having their ballots rejected. For example, in the 2016 election, two Native voters living in the same house in Arizona were placed in different precincts. One was told they were in the wrong precinct and their ballot was rejected despite living at the same address.⁵¹⁹

In some cases, election officials deliberately establish voting procedures that disqualify Native voters using non-traditional mailing addresses. In South Dakota, identification such as a driver’s license is required to vote. However, the identification must have a mailing address in order to be accepted. This is problematic because many tribal members, such as those living on the Crow Creek Reservation in Buffalo County, do not have a mailing addresses that receive mail and instead receive mail at a physical address such as a post office box.⁵²⁰

Similarly, a tribal member described similar efforts to disenfranchise Native voters in Montana. In 2015, “state and local governments attempted to suppress American Indian vote through vote-by mail” because tribal members lacked traditional mailing addresses. In 2017, Montana again attempted to use mail-in voting to suppress the Native vote, which was the swing vote for the special election to fill the vacancy created by Congressman Ryan Zinke’s appointment as Secretary of the Interior. Ultimately, both attempts failed after tribal members serving in the Montana Legislature cobbled together coalitions to defeat them.⁵²¹

4. Homelessness and Housing Instability as Barriers to Registration

Likewise, homelessness and near homelessness make it difficult or impossible for Native Americans to register to vote. As discussed in detail in Part III, homelessness and near homelessness are pervasive throughout Native American lands and in urban areas Native Americans are disproportionately homeless.

The Councilwoman of the Colville Tribe in Oregon described how “[w]e have so many members that we are socially serving through our tribes that can’t make ends meet or are homeless because there is no unemployment” and explained how “fifty-five more have addresses in care of our enrollment department, which means that our enrollment department has no mail-in address for them.”⁵²² Homelessness is not confined to those who are unemployed either. Housing remains scarce on Indian reservations. One employed tribal member lived “in a tent for the first five months of his employment because that’s how hard it is to find housing.”⁵²³

In Seattle, Native Americans comprise seven percent of the homeless despite being only one percent of the city’s population.⁵²⁴ Election officials in urban areas do not reach out to Native voters who are homeless to tell them that they can register to vote, such as by identifying the cross streets where they typically

are located. That contributes to non-voting.⁵²⁵ Even in states where a homeless person can register to vote if they use cross-streets, this process is not well known.⁵²⁶

Near homelessness is also common throughout Native American communities. The former Chairman of the Lummi Nation described how “residents come and go, so it’s a big problem with that. We have . . . 400 rental units that we have at Lummi, and I think 40 percent of those people change every month so it’s a problem.”⁵²⁷ Moving from home to home is common among tribal members.⁵²⁸ Some relationships can be tenuous, facilitating frequent moves since “one day they’re living with an aunt and then there is a big falling out and they can’t stay there any more so then they move in with their cousin.”⁵²⁹ When living near homeless it is difficult to register since “how do you register to vote because your address is different every couple of months maybe.”⁵³⁰

Intergenerational living, when many people live in one home, is also common. This type of living with many voting age adults in a single household makes it difficult to register since “you only have one person or two people that have the bills in their name, now you have multiple adults that no longer have access to any kind of physical address to prove that they’re living there.”⁵³¹

Keeping track of the near homeless is difficult and can be hard to understand from an outsider’s perspective. At times, residence in a home is simply a person who is living based on the good will of a distant family member or friend. At other times, residence in a home reflects deep familial ties even if upon first blush the relationships appear superficial. As a community member from the Tonalea Chapter of the Navajo Nation explained “[s]o a non-native stepping in saying, ‘Well, let me help you identify where you live,’ and trying to understand the dynamics of a family make-up—I mean, in my family my last name is Marks.... My brother and my sister have different last names, but they all are using my mother’s address. So there are four different last names in that home. That would be confusing to try to explain to anybody who doesn’t understand why people have

a different last name, but they all have the same clan or they all come from the same person, especially as my family continues to put home sites next to my mother's home. Right?"⁵³² Crafting policy related to these homeless and near homeless dynamics requires close consultation with the tribe to untangle these different community needs.

5. Voter Identification Requirements Impacting Registration and Voting



Figure 17. Turtle Mountain tribal member Elvis Norquay receives a tribal ID in advance of the 2018 Election. Photo by Jacqueline De León

*[W]e were the first here, and we were the last to get the right to vote. We were here for thousands of years. My tribe never moved. . . I live a stone's throw away from where my great grandfather was born in a wigwam. . . this is my community. And to have these things thrown at us . . . nitpicking of these IDs and all this kind of thing, it's like we have to prove that we're able to vote in a system that's being pressed on us."*⁵³³

For most Americans, obtaining an identification is a rite of passage. Getting a driver's license is a simple act of going to the local Department of Motor Vehicles (DMV), the complicated part is passing the driver's test. But for many Native Americans, this rite of passage does not exist. There are numerous reasons why some Native Americans do not have or need

identification. As states increasingly move toward requiring identification to register or vote, however, Native Americans are being excluded from accessing the ballot box. Following implementation of voter ID laws, heavily Native American areas have seen a "sharp decrease in voters"⁵³⁴ and reports of hundreds of ballot rejections because of a lack of identification.⁵³⁵

a. State Issued Identification Can Be Unreasonably Difficult for Native Americans to Obtain

Obtaining a state issued ID is unreasonably difficult for many Native American voters. State run DLS or DMVs are not present on reservation lands.⁵³⁶ Consequently, Native Americans have to travel off the reservation in order to obtain a state issued ID. The distances to many of these DMVs is prohibitively far, with tribal members describing traveling over an hour to get a state issued ID.⁵³⁷ For example, in Keshena, Wisconsin, tribal members describe having to drive an hour and 20 minutes to the nearest DMV.⁵³⁸ In North Dakota, tribal members must travel an average of an hour to reach the nearest DLS, with the average Standing Rock Sioux member having to travel over an hour and a half to reach the nearest site.⁵³⁹

Even when a DMV may be located closer, tribal members describe having to make a "60 to 80, 90 mile drive" to access DMVs that are open on a consistent basis that provide full services.⁵⁴⁰ One anecdote describes the burdens one voter had to face to try and get obtain an ID:

... for four months she was taking a woman because there is a DMV that's in the next town over, it's open one day a week. And so you kind of – you have to make that one day trip over, about 20 miles away, in order for you to go there the one day a week, otherwise you miss your opportunity and then you have to drive a substantial amount away in order to get to the next DMV that's open more regularly. So she had been taking this woman for four months, taking this

woman down to this DMV office [located in Minocqua, Wisconsin] that's open one day a week. They continuously were having computer issues. So after four months of trying to get this woman to get her ID so she was able to register early, she ended up kind of throwing her hands in the air and took this woman – like they had to take an entire day trip to get her to the nearest DMV which was open and available during the times that she had. There's a lot of stories like that that I keep running into.⁵⁴¹

Not having a nearby DMV can impact the ability for an individual to meet an identification requirement to vote. For example, when a disabled tribal member attempted to vote she was – erroneously – told that she could not vote with an identification that had recently expired and she was told by the poll worker to go to a DMV to update her ID. The nearest DMV was over an hour away and the disabled woman did not end up voting.⁵⁴²

For impoverished Native Americans, the cost of an identification is often prohibitively expensive. Even nominal fees for an identification can present a barrier.⁵⁴³ In some states, drivers' licenses are notably expensive. In Washington State the first driver's license cost is \$89 and a renewal is \$54. Though “these costs seem modest to some, they create an obstacle to tribal members who simply cannot afford it” since many Native Americans “live in a rural area where the unemployment is high and opportunities are few.”⁵⁴⁴

Moreover, drivers' licenses are not required for every day life, so expenditure on an identification is not a priority. One tribal leader described how their members “don't want to pay for an ID because a lot of them don't even have a bank account. We have our own bank system, so with their Tribal ID, they can cash any check that they're given through our social system with that. So why would they pay for other thing—the other ID if they don't have a reason for it.”⁵⁴⁵

Obtaining a state ID usually requires underlying documentation. One advocate described how “we really oppose ID” because “[w]e see many elders struggling to get a birth certificate, to get a driver's license” She detailed how an elderly tribal member's birth certificate was not usable because it did not have her name on it since “her birth certificate was in the day when they named her ‘Baby Girl.’”⁵⁴⁶ Simply put, “the types of ID initially listed as accepted as terms of proof did not take into consideration the types of documents that are easily accessible to Native American voters.”⁵⁴⁷ As a consequence “Native American voters had a very difficult time obtaining a photo identification.”⁵⁴⁸

Furthermore, Native American names may seem alien to non-Natives, making it more likely that there will be error on their identification card. One witness explained the difficulty facing one voter who:

had to vote provisionally at Komatke due to a misspelling of her name on her voter ID card. The State had sent her an ID card with her name incorrectly spelled. She had called to address this issue, gotten another misspelling on the second ID card. Called in again. Gotten

“[W]e were the first here, and we were the last to get the right to vote. We were here for thousands of years.”

a correct spelling on her ID card, but then gone into the polling place and poll workers were not able to find her on the registration. So she had to vote provisional.⁵⁴⁹

Community activists reported poll workers erroneously turning voters away or forcing them to use provisional ballots, especially when acceptable forms of alternative identification were used. For example, one activist in Montana described how “through misinformation the poll workers weren’t accepting mail as a form of identification, which is an acceptable form” and another required “excessive amounts of identification, when all that was needed is the last four digits of the voter’s social security number.” In Arizona, voters report that “alternative forms of ID were not aggressively being asked for” resulting in eligible voters being turned away and another observed how “no list of acceptable forms at the polling station that was readily available. When asked, the poll workers seemed to fumble around and look for what kind of IDs would actually be acceptable.”⁵⁵⁰

Rather, identification laws are seen as “a solution in search of a problem... imposed without a shred of real evidence that there has been voter fraud.”

Witnesses also explained how outstanding fines and fees keep the DMV from issuing identification cards making it “[s]o they can’t even go in and get a driver’s license, so they can register to vote, so that’s a barrier.”⁵⁵¹

b. Tribal IDs Are Not Readily Accepted As Qualifying Identification

Tribal IDs are not automatically accepted for registration and voting purposes, especially if the tribal member has a tribal ID card issued outside of the state. For example, there is “resistance” to accepting Cherokee IDs in Texas.⁵⁵² Even in states that accept tribal IDs, not all tribes issue tribal IDs so a tribal member would still need to obtain another form of qualifying ID in order to vote.⁵⁵³ Not all states include tribal IDs when crafting their ID laws. The Secretary Treasurer of the Mille Lacs Band of the Ojibwe explained how, even though tribal IDs were now accepted in Minnesota, “there was a period where tribes had to fight the Secretary of State for their tribal ID cards to be valid for voting.”⁵⁵⁴ At the time of the field hearings, Iowa was not accepting tribal IDs.⁵⁵⁵ Following advocacy by tribal members, there was a legislative fix and Iowa began accepting tribal IDs.⁵⁵⁶

Prior recognition of a tribal ID as an acceptable form of ID is no guarantee a state will continue to accept tribal IDs. For example, one witness described the uncertainty faced by tribes:

so they weren’t accepting tribal IDs or the enrollment paperwork up until two years ago, and then they began accepting them, but now they’re going back to thinking they won’t be accepting them because some of the ID requirements have changed on the federal level. So they’re now telling the tribe that they need to update their ID equipment, and we need to purchase this like machine that costs thousands of dollars in order for our tribal IDs to be valid and be able to be used in that way.⁵⁵⁷

Even if a state accepts a tribal ID, states may also require the identification to contain certain infor-

mation in order to be deemed valid. For example, in Nevada the state was resistant to accepting the Pyramid Lake Paiute Tribe's IDs until the tribe advocated for their inclusion and showed the state that the IDs contain the same security features as Nevada.⁵⁵⁸ Additionally, many tribal IDs do not contain expiration dates since "we don't quit being Indian at some particular point" and laws that require an expiration date on an ID would exclude otherwise qualifying IDs.⁵⁵⁹ Updating tribal IDs to contain specialized information or security features is expensive⁵⁶⁰ and may be unattainable to impoverished tribes.

Tribal IDs can be unfamiliar outside of tribal communities. One community member described taking his mother to a bank when the bank manager dismissed her tribal ID stating "I need a real form of identification" which the tribal member took as an insult.⁵⁶¹ Similarly, multiple witnesses reported poll workers unfamiliar with tribal IDs rejecting tribal IDs as an acceptable form of identification regardless of whether or not tribal ID was supposed to be accepted under state law.⁵⁶² One community organizer explained how "[a]s Native American people we were able to go to the polls with our tribal ID. There's been a couple times where there's been polls that aren't aware that they can utilize that, so they've been turned away."⁵⁶³ The questioning of a tribal ID by a person in a position of authority can also be insulting and embarrassing to the tribal member. One tribal member described how upon presentation of tribal ID the poll workers would remark "Don't you have anything else?" and they would "give it back to you, and they don't want to accept your form of identification, although that is, in fact, a government form of identification."⁵⁶⁴ Outsiders observing the polls in Wisconsin were "appalled seeing how many Native people were being turned away" and felt "it wasn't with reason. They were being told they couldn't use their tribal IDs. . ."⁵⁶⁵ "[P]eople just don't know at the county level what they can do, what they can't do, what's acceptable, what's not."⁵⁶⁶

As states increasingly move to online voter registration these systems are not always inclusive of tribal IDs, even if a tribal ID would be acceptable to register in person. Instead, the online forms may

only accept drivers' license numbers and do not include an option for a tribal membership number.⁵⁶⁷ As one member of the Colville Tribe in Washington explained, this type of exclusion is "really tough for a lot of our tribal members. They can register online, but you have to have a Washington State driver's license to do that. Many of our tribal members do not have a Washington State driver's license. The only I.D. some of them may have is their tribal membership I.D."⁵⁶⁸

c. Identification Requiring an Address Will Exclude Native Americans

As one witness bluntly assessed, requiring an address on an identification "screws everything up."⁵⁶⁹ As discussed, Native Americans often lack an address for a variety of reasons such as homelessness, near homelessness, or an unaddressed home. Given the housing insecurity and lack of regular postal service, many Native Americans use PO Boxes to conduct their affairs and their tribal IDs will contain no address or PO Box instead of a residential address.⁵⁷⁰ If a current residential address is required on the identification the ID may become quickly out of date since Native Americans "move around quite a bit and sometimes we'll forget to update our information they try to go vote and then they have those challenges."⁵⁷¹

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

The first issue with the voter ID law that the community finds is that our Tribal IDs do not include an address. The second issue is that individuals living on the Pinal County portion of the reservation do not have standard street addresses as well. Tribal members do not receive mail at their homes, but must pay for and obtain a Post Office box. Tribal members can either use their Post Office box or non standard address on their Arizona Identification.

The third issue is that individuals may change mailing addresses or move between elections, which can impact the addresses on a person's ID. In 2012 the voter ID law was strictly enforced on the Pinal County portion of the registration. Many Gila River voters were turned away from the polls when the voter's were turned away from the polls when the voter's address did not match the voter roles... The community subsequently learned that since our Tribal Citizens of Pinal County lacked traditional addresses, the addresses used by Tribal members are not compatible with the voter registration system used by the county. Thus, the County reassigned all our voter's physical addresses to be the service centers where they vote . . . and resulted in the voters again being denied a regular ballot.⁵⁷²

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

d. Identification Requirements Have a Chilling Effect on Native Communities

Given the multitude of ways voter ID laws can lead to the disenfranchisement of Native Americans, it is no surprise that not one witness spoke in favor of voter identification laws. Rather, identification laws are seen as "a solution in search of a problem . . . imposed without a shred of real evidence that there has been voter fraud."⁵⁷³ Identification laws pose a significant burden on Native American voters, and are viewed as "hard and intimidating."⁵⁷⁴ Due to the misinformation and intimidation around voter ID, one community member advocated for increased education in the form of "big signs . . . right there at the polling stations of the acceptable forms of identifi-

cation that you can use to prove you are who you say you are, and prove that you're on the registration."⁵⁷⁵

e. Case Study: North Dakota's Voter ID Law and Native American Disenfranchisement

Given the disproportionate burdens voter ID laws impose on Native Americans, voter ID laws pose a risk of being utilized to disenfranchise Native American communities. In North Dakota, a voter ID law combined with a residential address requirement led to the widespread disenfranchisement of Native Americans and continues to impose severe burdens on their ability to vote.

North Dakota has had voter ID laws in place since 2004.⁵⁷⁶ It required voters to present identification, but had fail-safe mechanisms that allowed a voter to cast their ballot if a poll worker could vouch for their identity or the voter signed an affidavit, under penalty of perjury, that he or she was qualified to vote.⁵⁷⁷ In 2011, the North Dakota legislature considered enacting a new voter ID law that would have limited the valid forms of voter ID and would have eliminated the fail-safe affidavit system and only contained a limited form of the voucher system.⁵⁷⁸ Throughout consideration of the bill, legislators on both sides of the aisle raised concerns about disenfranchisement.⁵⁷⁹ Additionally, the legislature was informed during these deliberations that there were Native Americans that lacked residential addresses and, even if they did have an address, that address may not be known to them.⁵⁸⁰ The legislature ultimately decided, 38-8, not to enact the proposed changes to the voter ID laws given the concerns about disenfranchisement.⁵⁸¹

The next year, Democrat Heidi Heitkamp unexpectedly won the 2012 election for US Senate by less than 3,000 votes.⁵⁸² The local and national media credited her success to the votes of the Native American community.⁵⁸³ After Senator Heitkamp's win, the Republican led legislature quickly changed course. In the legislative session immediately following Senator Heitkamp's victory, the North Dakota legislature greatly restricted the acceptable forms of voter

identification which also required a residential address, and eliminated the two fail-safe mechanisms – vouchers and affidavits.⁵⁸⁴ Despite the concerns about disenfranchisement raised the immediately preceding legislative session, and a lack of instances of voter fraud in the 2012 election, the legislature passed the new restrictive requirements.⁵⁸⁵ The legislature never analyzed whether the Native American voters it was told lacked addresses in 2011 still lacked addresses—indeed, those Native American voters continue to lack addresses to this day. Voters were required to present a residential address on one of the following acceptable forms of ID: a North Dakota Driver's License or non-identification card, a tribal government ID, or an alternative form of identification prescribed by the Secretary of State, which included a student identification certificate or a long-term care identification certificate.⁵⁸⁶ As expected, the impact on the Native American vote in 2014 was severe. In 2015 North Dakota amended voter ID laws, even further restricting the forms of acceptable ID.⁵⁸⁷

In 2016, NARF filed suit on behalf of seven Turtle Mountain plaintiffs that were disenfranchised by the laws, many of whom did not possess an ID with a residential address and were turned away from the 2014 election despite being qualified voters. The U.S. District Court found that the law violated the U.S. Constitution.⁵⁸⁸ In his decision, Judge Hovland stated, “it is clear that a safety net is needed for those voters who simply cannot obtain a qualifying ID with reasonable effort.”⁵⁸⁹

Undeterred, the next year the Legislature again passed another voter ID law that still required that the voter possess one of the few forms of qualifying ID, it just allowed for supplemental documentation and a grace period where the voter could return with qualifying ID. It did not make it easier for Native Americans to obtain ID or get rid of the residential address requirement. The Court again granted an injunction barring the State from enforcing the newest version of the voter ID law due to the unfair burdens placed upon Native American voters, especially those that did not have residential addresses they could present on their IDs.⁵⁹⁰ The State filed

an appeal to the Eighth Circuit seeking an order to stay the District Court's injunction which the court granted in advance of the 2018 election, finding the type of relief administered by the District Court was too broad.⁵⁹¹ On October 9, 2018, the Supreme Court denied the emergency appeal.⁵⁹² However, a dissenting opinion from Justice Ginsburg and Kagan notes that there was a significant risk of disenfranchisement should the State be permitted to enforce the ID requirements.⁵⁹³ The difficulty Native Americans face obtaining an ID and the lack of residential addresses on homes has left the Native American vote in North Dakota vulnerable to attack. Given this unfairness, NARF, the Campaign Legal Center, and local counsel brought an additional suit on behalf of individual plaintiffs, the Spirit Lake Tribe, and the Standing Rock Sioux Tribe seeking narrower as-applied relief.⁵⁹⁴

In February 2020, seven years after the North Dakota voter ID bill was passed, the North Dakota Secretary of State and the plaintiffs in the *Brakebill* and *Spirit Lake* cases reached a settlement whereby the Secretary agreed to be bound by a consent decree that provides that a voter without an address, or who does not know their address, can use a map to indicate where they live. The Secretary is then responsible for assigning that voter an address so that their vote can be counted prior to the final tally of votes. The Secretary also endorsed funding for tribes to assist with the issuance of IDs and encouraged the DOT to provide free IDs on tribal lands 30 days prior to the election.⁵⁹⁵

6. Unequal Access to Online Registration

According to the National Conference of State Legislatures, as of October 2018, “a total of 37 states plus the District of Columbia offer online registration, and one other state (Oklahoma) has passed legislation and is currently phasing in implementation of their online registration.”⁵⁹⁶ Cost saving is widely touted as a reason for states to shift to all-online or predominately-online models. For example, Arizona reported in 2010 that its per-registration costs dropped from 83 cents for paper applications to 3 cents for online registration.⁵⁹⁷ However, an increas-

ing focus on online voter registration often comes at the expense of Native Americans who lack access to it.

Having online voter registration can be a good option if it offers more opportunities for people to register to vote. “But if you have that as an exclusive option or a primary option ... it would exclude those that do not have readily available access to the Internet. And we know these people are disproportionately low income, older, or disadvantaged communities, in other words, rural communities. All of which we’re talking about in the case of rural Indian reservations.”⁵⁹⁸ As California Secretary of State Alex Padilla explained, “If you have a weak or no Internet connection, for that matter, which we see a lot in rural area and other low income areas, accessing important election information from the Secretary of State’s Web site or a county elections office Web site can be a challenge.”⁵⁹⁹

Before states move to an online voter registration system, it is critical to ensure that every tribal community is connected to the Internet. The data from Arizona, which has led the move to online voter registration, illustrates the disparate impact of technological barriers to Native voters. In 2016, about 40 percent of all voter registrations in Arizona were done online. But only 6.7 percent of Native Americans have registered online because of their lack of access to broadband.⁶⁰⁰

As Congresswoman Debra Haaland explained, “[Y]ou can register to vote online and if we don’t give ... broadband access to all of our rural communities, which many Native American communities are, then we shoot ourselves in the foot by taking away that opportunity for them to even register to vote...”⁶⁰¹

7. Unequal Access to In-Person Voter Registration

The barriers that geography and distance pose to reaching county seats limit opportunities for Native Americans to register to vote.⁶⁰² In some cases, the distances do not seem great. The roundtrip driving distance from the Meskwaki Settlement in Iowa to

the closest DMV office is 20 miles.⁶⁰³ However, even those seemingly smaller distances limit access to tribal members lacking transportation.

The distances are much greater for other Native voters. In Michigan, many Chippewa voters have to travel as far as 100 miles roundtrip to register to vote.⁶⁰⁴ In South Dakota, the Crow Creek Reservation comprises about 90 percent of Buffalo County. Nevertheless, to register to vote or run for office, tribal members have to drive as far as 180 miles roundtrip to get to Gann Valley, which has a population of only about a dozen non-Natives.⁶⁰⁵

Many Native voters in the Southwest face similar distance barriers to register. The Navajo Nation has 31 Chapter Houses in Apache County, Arizona. The farthest Chapter is 220 miles away from the county seat. The average distance to the Chapter Houses is about 50 miles. The absence of accessible registration sites on tribal lands greatly inhibits Navajo voter participation in non-tribal elections.⁶⁰⁶

8. Unequal Funding For Voter Registration Efforts on Tribal Lands

Funding for most voter registration initiatives is discretionary. Unfortunately, this means Native Americans are rarely on the receiving end of registration efforts. Some states leave funding and implementation of voter drives entirely up to counties.⁶⁰⁷ However, receiving funding from either states or counties can be difficult. Fraught relationships between states, counties, and reservation communities, where states and counties do not believe reservation communities are entitled to funding, can leave reservation communities out of any funded registration efforts. One councilwoman explained how tribal members in her community expected the tribe to secure government funding to assist them in voting efforts. However, she described how acquiring this funding was unlikely since her people did not “understand” just “how the government and states look at us if we fight to get equal funding.”⁶⁰⁸

Often, counties may not even engage in additional registration initiatives leaving registration to civic engagement groups or political parties.⁶⁰⁹ According to Native American Voting Rights Coalition Survey results, however, “most respondents were not aware of any voter registration drives in their community. There were generally low levels of activity by third-party groups to conduct registration drives, with just 29% of Arizona and 33% of New Mexico respondents indicating awareness of third party registration drives. Slightly higher numbers were recorded in South Dakota (44%) and Nevada (43%).”⁶¹⁰ One witness described “an elderly woman, I would say maybe in her sixties, and she told me, she said ‘All of my life, I’ve lived here at the Pueblo, and I’ve lived here in this house for many, many years, and this is the first time ever, ever at Isleta that I’ve ever had anyone ask me if I ever wanted to register to vote.’”⁶¹¹

Ultimately, registration outreaches in Native communities are few and far between. New Mexico Secretary of State Oliver called for systemic change since “[t]oo often, we see the work that is done to try to educate and register and increase voter participation in our tribal communities as these sort of one-off things right before an election...These things need to happen consistently, and we have to be playing the long game.”⁶¹² Community activists echoed these sentiments, recognizing a need for registration opportunities “every time there is a tribal event.”⁶¹³ However, such efforts require resources which activists acknowledged were lacking.⁶¹⁴

9. Restrictions on Obtaining and Turning in Multiple Voter Registration Forms

State and local limits on the number of voter registration applications that can be obtained or returned are common tactics used to suppress Native voting. In *Bone Shirt v. Hazeltine*, the federal court found “credible” the testimony of Native organizers whose registration efforts in South Dakota were suppressed by the non-Native county auditors who run local elections. In Bennett County, an auditor only allowed an Oglala Sioux tribal member to pick up ten

voter registration applications and instructed unused ones to be returned. The Fall River County auditor limited to twenty the number of applications a Pine Ridge tribal member could pick up. State law did not impose those limitations, which were done at the whim of local elections officials.⁶¹⁵

Similar tactics have been used in Montana. In *Windy Boy v. Big Horn County*, Native candidates and outreach workers were restricted in the number of voter registration cards they could get. One Native candidate was denied registration cards altogether by a county official and had to obtain them at the State Capitol. A tribal member testified that he was “given only a few voter registration cards and when he asked for more was told that the county was running low.” He then asked his wife, who is non-Native, to go into the county building and request the cards; she was given 50 more cards than he received. At least one election administrator “numbered cards given to Indians and told them they could not get more until the numbered cards were returned,” with evidence that no similar restriction was placed on non-Natives.⁶¹⁶

These barriers persist today. A Montana community organizer said that Natives continue to be “has-sled” when they return what election officials believe are too many completed voter registration cards. In 2014, they were told that they were restricted to bringing in no more than 70 completed voter registration cards at one time. In 2016, election officials told them that number was reduced to 40. Many poll workers told Native organizers not to bring in more voter registration cards than the poll workers could handle.⁶¹⁷

NARF experienced similar difficulties in 2016 in Elko County, Nevada. The Duck Valley Shoshone-Paiute tribe, located in the northern part of the county straddling the Idaho border, requested assistance in a voter registration drive. The county clerk limited the number of applications provided for those efforts, requiring the use of numbered applications. In sharp contrast, the clerk in Owyhee County, Idaho encouraged Duck Valley tribal members who lived on the Idaho portion of the reservation to print or

photocopy an electronic copy of the state voter registration form; no numbered original was required.

10. Denial of Voter Registration Opportunities Because of Previous Convictions

While tribes retain jurisdiction over their own members for some criminal offenses, the Major Crimes Act, 18 U.S.C. § 1153, lists and defines most of the crimes over which the federal government has jurisdiction in Indian country. Consequently, Native American defendants often face federal charges for offenses that may have been adjudicated less harshly in the tribal system or state system. As the Sentencing Commission observed, “Congress’ decision in 1990 to make the federal sentencing guidelines applicable to the Major Crimes Act and other offenses arising in Indian country stimulated concerns that Native American defendants would be treated more harshly by the federal sentencing system than if Indian defendants were prosecuted by their respective states for the same or similar offenses.”⁶¹⁸

Additionally, “[o]ne of the main issues on felonies especially is that there are crimes that, yeah, those are felonies. That’s murder, sex assault, that’s arson, that’s assault with a deadly weapon, something like that. But then there are a number of other crimes. . . [t]hey could either be charged as a misdemeanor or as a felony.”⁶¹⁹ Witnesses allege that Native Americans are more likely to be charged more severely. For example, one witness described how one community member received eight years for shooting a dog that had bitten multiple children including his own.⁶²⁰ In 2015, federal judges, prosecutors, and tribal leaders urged a federal review by the United Sentencing Commission to investigate the concern that Native Americans living on reservations faced disproportionately harsher punishments than other racial groups for the same crimes.⁶²¹ While the conclusions of that report were inconclusive because “data currently does not exist to conduct a meaningful disparity analysis” the report nevertheless acknowledged that “there is a widespread perception among Native Americans, many federal prosecutors,

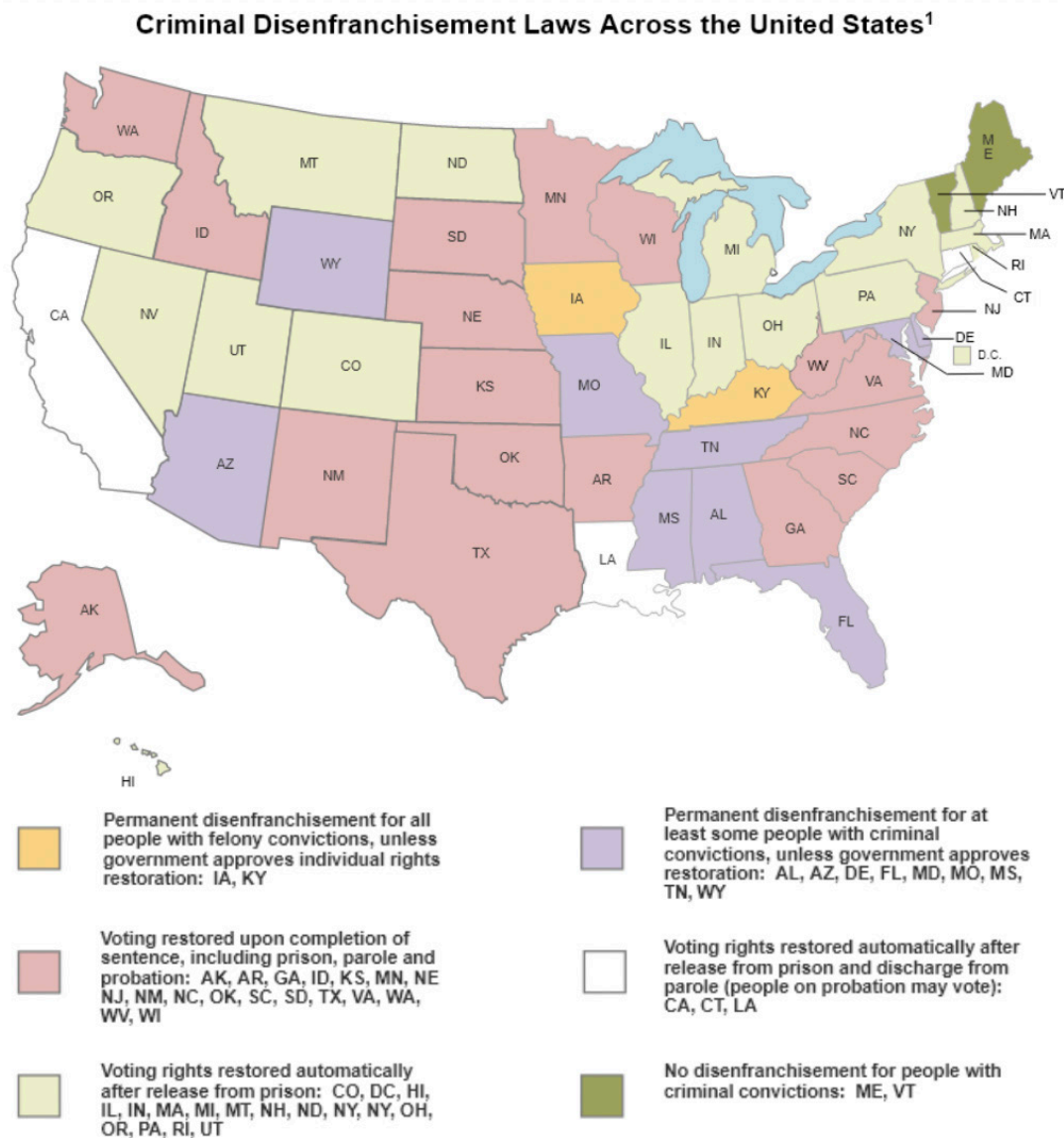
federal defenders, and some federal and state judges that Indians are subject to sentencing disparities.”⁶²²

Native Americans also make up a disproportionate portion of the federal caseload. According to a 1999 seminal report conducted by a Bureau of Justice Statistics, Native Americans are incarcerated at a rate 38% higher than the national average.⁶²³ According to US Sentencing Commission data, in 2013, Natives constituted 57.5% of the caseload in South Dakota but only 8.5% of the total population.⁶²⁴ Other states with especially high caseloads of Native Americans included Montana (33%), North Dakota (25%), Minnesota (14%), Oklahoma (13%).

Witnesses reported high rates of felony convictions among their communities.⁶²⁵ As a result many Native Americans are restricted, or believe they are restricted, from voting. Felony disenfranchisement rules vary widely between states. Some states such as California allow for voting rights to be restored automatically after completion of a sentence including prison and parole, while others like Iowa permanently disenfranchise anyone with a felony conviction unless the individual has voting rights restored by the government.

Today, widespread confusion about the eligibility of former felons to vote persists throughout Native American communities.⁶²⁶ As one community member explained “in my community . . . there are a lot of folks who have had felony convictions that reside on the reservation who believe that they are no longer permitted to vote, that they’ve lost their voting rights due to their felony conviction. However, I have just learned, through this process, that that is misinformation. That you actually are permitted to vote after you’re off of probation. I had no idea about this. I’m very, very angry. Because a lot of folks are disenfranchised with felony convictions on a reservation legitimately and then there is some instances where it’s not so legitimate.”⁶²⁷

Formerly incarcerated individuals also internalize shame that keeps them from voting. A tribal member describes how his father, who became college educated after serving time, was “affected” by being a felon



¹ Even with these general categories there are variations in when states restore voting rights, including differing policies regarding whether citizens with pending legal financial obligations (LFOs) relating to their conviction are eligible to vote, how long citizens must wait after incarceration for restoration, and whether and in what circumstances misdemeanors are disenfranchising.

Figure 18. Criminal Disenfranchisement in the U.S. Graphic by Brennan Center for Justice at NYU School of Law¹⁰²³

and never voted again.⁶²⁸ Many “veterans that have been registered as a felon because they had issues with PTSD” are also “embarrassed to come forward” to vote.⁶²⁹ Another formerly incarcerated felon that was eligible to vote went in to the polling location to vote for the first time when someone “kind of made a comment about his criminal history, and he felt embarrassed and shamed, walked out the door and never voted.”⁶³⁰

Poverty also keeps formerly incarcerated individuals from completing their sentences. Even Natives who have “slight records. . . are not able to take care of their probationary items or their fines” which “exempts them from being able to gain voter access”⁶³¹

The belief that a felony conviction disqualifies a voter from ever voting again is so pervasive it even effects tribal elections since “you think, well, I can’t vote ever. You don’t realize that you can vote in your own Tribal Election.”⁶³²

11. Rejection of Voter Registration Applications

It is commonplace throughout Indian Country for election officials to reject or fail to timely process voter registration applications. In some cases, the applications are rejected because Native voters have non-traditional mailing addresses that do not conform to the physical addresses required for voter registration.⁶³³ In others, the applications do not include mandated information for voter identification laws, again often due to addresses that rely upon rural routes, general delivery, post office boxes, or even geographical descriptions. Voter identification laws can have a particularly devastating impact on the political participation of Native voters.⁶³⁴

Determination of whether a voter registration application will result in registration often depends on the subjective judgments made by the election officials processing them, such as what is contemplated under the Montana statute discussed earlier.⁶³⁵ The National Voter Registration Act (NVRA) mandates that “the appropriate State election official ... send to each applicant ... the disposition of the application.”⁶³⁶ However, far too often that does not occur, or the notice is sent by nonforwardable mail so the applicant never receives it.

Community organizers on tribal lands have said that even if Native applicants are notified that their application contains errors, many will not follow up with the elections office to resolve them. For example, during voter registration drives before each election, an organizer said that approximately 50 registration cards are rejected. Of those 50 rejected cards, half of the Native applicants will not respond.⁶³⁷ Their failure to address the issue often rests on the barriers that generally impede Native voter participation: time and distance to registration offices, lack of transportation, or even the cost of a postage stamp.

The failure of state Departments of Motor Vehicles (DMVs) to timely transmit voter registration applications also results in vote denial. Several cases or pre-litigation complaints have been brought against state agencies in Indian Country for violating Section 5 of the NVRA.⁶³⁸ That Section requires trans-

mission of completed voter registration applications to the state elections office within ten days, or no later than five days if the application is accepted within five days before the registration deadline.⁶³⁹

Violations of Section 5 persist. For example, tribal members in Washington State have reported that voter registration applications submitted to DMV locations in Skagit County and Snohomish County are not being timely processed. “You think you are registered to vote, but the DMV does not turn in those applications, so lots of people often miss out on voting.”⁶⁴⁰

In Nevada, an investigation by Demos and Project Vote revealed at least one DMV location had stopped sending voter registration applications to the county clerk, with a box of “probably 200” voter registration changes of address dating back to 2012 not sent until more than a year later.⁶⁴¹ On March 9, 2017, the State of Nevada entered into a Memorandum of Agreement to resolve additional Section 5 violations that persisted despite an earlier settlement.⁶⁴²



The failure to timely process voter registration applications, or the rejection of applications due to technical issues, has had a significant impact on Native voters in Utah. In San Juan County, the county clerk regularly rejects voter registration applications from Native voters or takes other steps to purge them from the registration list.⁶⁴³ That has contributed to an abysmal registration rate. About 13,000 out of the approximately 21,000 Native Americans eligible to register to vote in Utah are not registered, or roughly 62 percent of the eligible Native voting population. Although nearly half of all Navajo voters vote in tribal elections, Native voter turnout in Utah was between 32 and 41 percent, even with the very low voter registration rate.⁶⁴⁴

12. Voter Purges

Even when Native voters with non-traditional mailing addresses are registered, they may still be purged because of those addresses. In 2012, Apache County, Arizona purged 500 Navajo voters because the

ARIZONA VOTER REGISTRATION FORM
FORMA DE REGISTRO ELECTORAL EN ARIZONA

FILL OUT COMPLETELY WITH A BLACK/BLUE PEN (RED SHADED BOXES ARE REQUIRED). TO BE ELIGIBLE TO VOTE A "FULL BALLOT," COMPLETE BOX 9, 10 OR 11 OR PROVIDE OTHER PROOF OF CITIZENSHIP - SEE BACK FOR DETAILS AND ADDITIONAL INSTRUCTIONS. LLENAR COMPLETAMENTE CON PLUMA DE TINTA NEGRA/AZUL (LAS CASILLAS ROJAS SON REQUERIDAS). PARA VOTAR EN UNA "BOLETA ELECTORAL COMPLETA," LLENAR LA CASILLA 9, 10 U 11 O INCLUIR OTRA PRUEBA DE CIUDADANIA - VEA LOS DETALLES EN EL REVERSO

1 Permanent Early Voting List (PEVL) / Lista Permanente de Votación Temprana Receive your early ballot by mail / Recibir su boleto de votación temprana por correo! <input type="checkbox"/> Yes, I want to be added to PEVL, and automatically get an early ballot by mail for every election for which I am eligible. (To be on PEVL, your mailing address in Box 7 must be in Arizona.) Si quiero que me agreguen a la lista PEVL, y recibir automáticamente una boleto de votación temprana por correo para cada elección. (Para estar en la lista, su dirección postal en la casilla 7 debe estar en Arizona.) <input type="checkbox"/> No, I do not want to be added to PEVL. I understand CHECKING THIS BOX will remove my name from PEVL if I was previously included / No, No quiero que me agreguen a la lista PEVL. Yo entiendo que al MARCAR ESTA CASILLA removerán mi nombre de la lista PEVL, si este estaba incluido antes.				REGISTER ONLINE / REGISTRARSE EN LINEA: WWW.SERVICEARIZONA.COM FOR MORE INFORMATION / PARA MÁS INFORMACIÓN: WWW.AZSOS.GOV BOX FOR OFFICE USE ONLY AREA SOLO PARA EL USO DE LA OFICINA S 00	
2 Last Name / Apellido		First Name / Nombre		Middle Name / Segundo Nombre Jr./Sr./III	
3 Residential Address (where you live - no P.O. Box/business address) / Domicilio Residencial (donde usted vive - no use un apartado postal ni dirección comercial) If no street address, describe location using mileage, cross streets, parcel #, subdivision name(s), or landmarks. Draw a map and/or provide latitude/longitude or geocode in Box 23 if located in a rural area without a traditional street address. / Si no tiene una dirección de calle, describa la ubicación usando millaje, cruces de calles, número de parcela, nombre de subdivisión, o detalles específicos de referencia. Dibuje un mapa y/o provea la latitud/longitud o código geográfico en la casilla 23 si está ubicado en un área rural sin un domicilio tradicional de calles.					
4 Apt./Unit/Space Apartamento/Espacio		5 City / Ciudad		6 Zip / Código Postal	
7 Mailing Address (where you get mail, if not delivered to residential address) / Dirección Postal (donde recibe su correo, si su correo no es entregado a su domicilio residencial)					
8 Last 4 Digits of Social Security # Últimos 4 Dígitos del Número de Seguro Social X X X - X X		9 AZ Driver License or Nonoperating License # / Núm. de Licencia de Manejo o Título de Licenciación de Arizona		10 Tribal ID # Núm. de Identificación Tribal	
11 Alien Registration, Naturalization Certificate, or Citizenship Certificate # / Núm. de Registro de Extranjero, Certificado de Naturalización o de Ciudadanía		12 Birth Date (MM/DD/YYYY) Fecha de Nacimiento (MM/DD/AAAA)		13 State or Country of Birth Estado o País de Nacimiento	
14 Party Preference / Preferencia de Partido <input type="checkbox"/> Republican / Republicano <input type="checkbox"/> Democratic / Democrático <input type="checkbox"/> Other / Otro: <input type="checkbox"/> None or No Party / Ningún Partido		15 Telephone Number Número de Teléfono Is this a cell phone? <input type="checkbox"/> Yes/ Sí <input type="checkbox"/> No ¿Es este número un celular?		16 Occupation / Ocupación	
17 If you were registered to vote in another state, list former address (including county and state) / Si usted estaba registrado para votar en otro estado, anote el domicilio previo (incluyendo el condado y el estado)					
18 Father's Name or Mother's Maiden Name Nombre de su padre/nombre de soltera de su madre		20 Are you willing to work at a polling place on Election Day? / ¿Está dispuesto a trabajar en un lugar de votación el Día de la Elección? <input type="checkbox"/> Yes/ Sí <input type="checkbox"/> No		21 E-Mail / Correo Electrónico	
22 Are you a citizen of the United States of America? / ¿Es usted ciudadano de los Estados Unidos de América? <input type="checkbox"/> Yes/ Sí <input type="checkbox"/> No <input type="checkbox"/> If you checked "No" to either of these questions, DO NOT submit this form. <input type="checkbox"/> Si marcó "No" a cualquiera de estas preguntas, NO presente esta forma.		23 If no street address, draw a map and/or provide the latitude/longitude or geocode here / Si no tiene domicilio de calle, dibuje un mapa y/o provea la latitud/longitud o código geográfico aquí Will you be at least 18 years old by Election Day? / ¿Cumplirás con el requisito de edad antes del Día de la Elección? <input type="checkbox"/> Yes/ Sí <input type="checkbox"/> No <input type="checkbox"/> If you checked "No" to either of these questions, DO NOT submit this form. <input type="checkbox"/> Si marcó "No" a cualquiera de estas preguntas, NO presente esta forma.			
VOTER DECLARATION - By signing below, I swear or affirm that the above information is true, that I am a RESIDENT of Arizona, I have NOT been convicted of a FELONY (or my civil rights have been restored - see back for details), and I have NOT been adjudicated/INCAPACITATED with my voting rights revoked. / DECLARACIÓN DEL VOTANTE - Al firmar abajo, yo juro o afirmo que la información anterior es verdadera, que soy RESIDENTE de Arizona, que NO se me ha condenado por un DELITO GRAVE (o que mis derechos civiles han sido restaurados - vea en el reverso los detalles), y que no se me ha declarado INCAPACITADO con mis derechos electorales revocados.					
SIGNATURE / FIRMA 		DATE / FECHA			
24 If you are unable to complete or sign the form, the form can be completed at your direction. The person who assisted you must sign here. / Si usted no puede completar o firmar la forma, ésta se puede llenar según sus instrucciones. La persona que le ayudó a hacerlo debe firmar aquí. SIGNATURE OF PERSON ASSISTING / FIRMA DE LA PERSONA QUE LE AYUDÓ DATE / FECHA					

Remove tape and fold to mail - Retirar cinta adhesiva y doblar la forma para enviarla por correo

23 If no street address, draw a map and/or provide the latitude/longitude or geocode here / Si no tiene domicilio de calle, dibuje un mapa y/o provea la latitud/longitud o código geográfico aquí

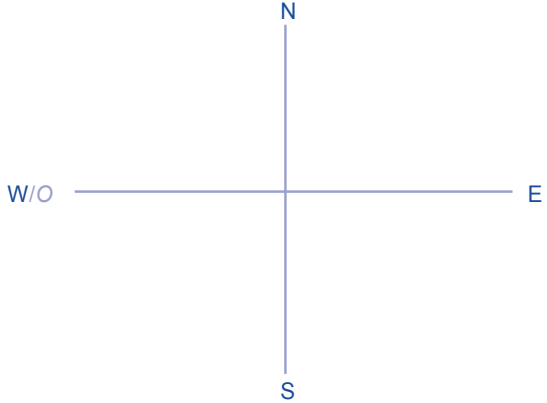


Figure 19. Section of Arizona's voter registration form to identify location of non-traditional address.

County Recorder claimed their addresses were “too obscure” and the Recorder alleged that they could not be assigned to a precinct. The County Recorder failed to accept a P.O. Box and the applicants’ drawing on the voter registration form to show the location of their home. Under the NVRA, election officials are required to accept the voter’s drawing to identify their precinct and cannot deny a voter registration application or purge an existing application because it uses a non-traditional address or has to be identified on a map by landmarks or geographic features.

In places required to provide language assistance under Section 203, information about voter purges typically is not provided in the covered Native language. Many Native voters vote infrequently in non-Tribal elections, causing their registration to be purged if they do not respond to a NVRA notice that may be written in a language they do not read, if they are able to read at all. In NARF’s Alaska litigation in the *Nick* and *Toyukak* decisions, a handful of villages received public service announcements about the State’s voter purges in the Central Yup’ik dialect. Most Alaska Native voters received no information at all in their Native dialect or anything beyond postcards written in English that they could not understand.

In some cases, counties conduct voter purges through other methods. In Rosebud County, South Dakota, the county auditor sent out letters to all registered voters in the county after the county commission districts were redistricted, informing them that they needed to re-register because they were no longer able to vote. That information was false; no such purge was actually conducted. However, the auditor never sent voters a retraction letter, leading many Native voters to believe they could no longer vote.⁶⁴⁵

Once purged, many Native voters will not vote again in non-Tribal elections. Effectively, a voter purge can result in permanent disenfranchisement. Far too often, that is precisely what election officials intend to accomplish in Indian Country.

13. Failure to Offer Voter Registration Opportunities at Polling Places on Election Day

States have wide discretion to determine the cut-off dates for voter registration. In the 1972 case *Dunn v. Blumstein*, the Supreme Court held that a Tennessee law requiring voter registration 30 days prior to the election did not unnecessarily burden the citizens' right to vote.⁶⁴⁶ Tennessee argued that the period of 30 days was necessary for the state to complete administrative tasks in preparation for the actual vote.⁶⁴⁷ The court ultimately determined that Tennessee's law presented a compelling state interest to prevent fraud and 30 days was an acceptable period of time to complete the requisite tasks.⁶⁴⁸ The next year, in *Marston v. Lewis*⁶⁴⁹ and *Burns v. Fortson*, the Supreme Court affirmed 50 day cut-off periods but stated that 50 days might be reaching the outer constitutional limits.⁶⁵⁰

In the intervening forty-plus years there have been advancements in the voter registration process. HAVA addressed a number of improvements to voting systems and voting access.⁶⁵¹ The act mandates new minimum standards for states to follow in election administration and provides funding for states to replace voting systems and improve election administration.⁶⁵² The Act also requires states to maintain a statewide voter registration database. Given the advent of more accessible internet, HAVA helped states to implement new methods of voter registration including online.⁶⁵³ Some states have been able to take advantage of streamlined voter registration systems to establish same day voter registration, essentially removing the state interest in a cut-off period for voter registration.⁶⁵⁴ Although this has been the new trend, it is not the majority practice yet.

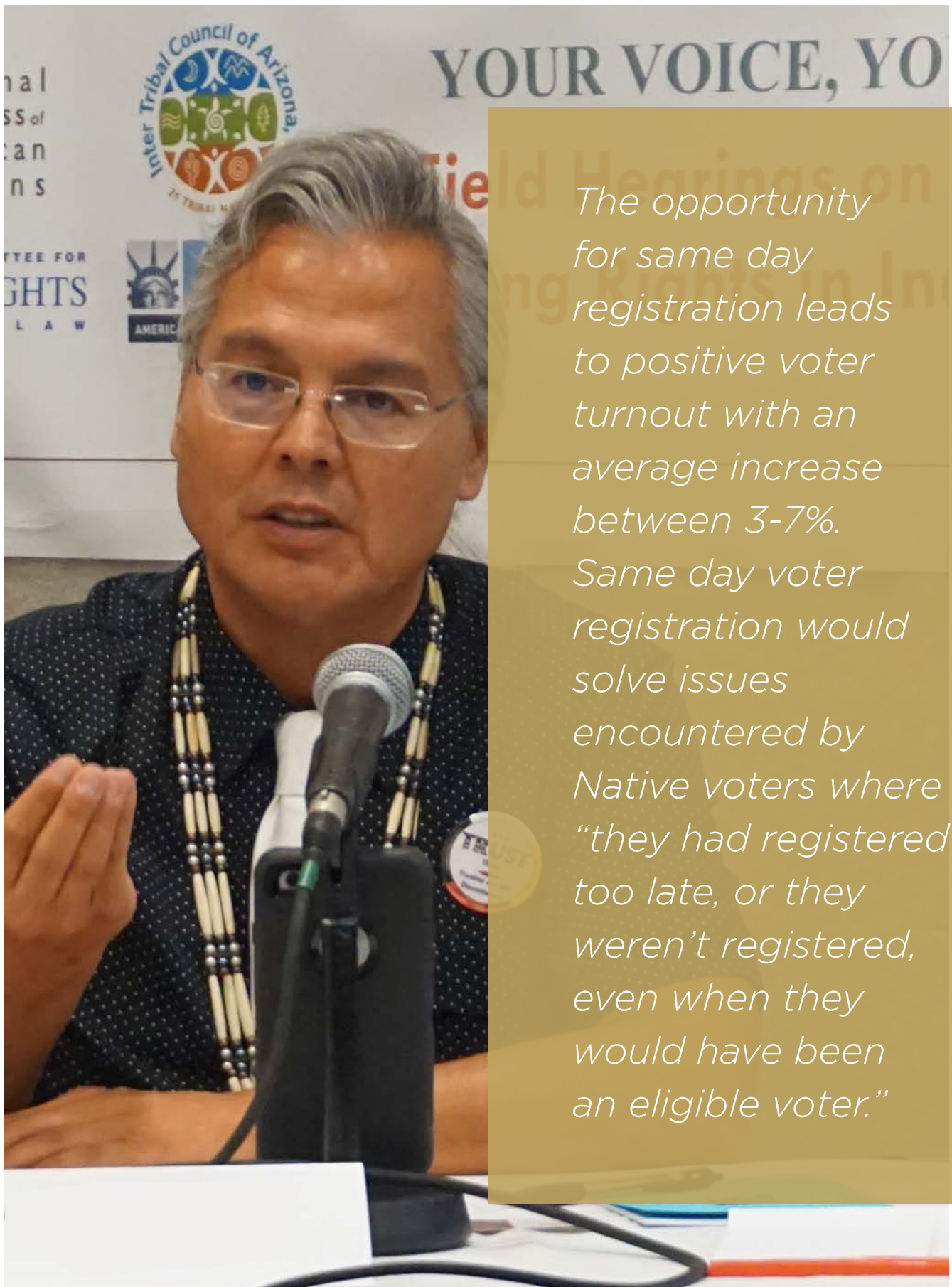
Currently Idaho, Montana, Wyoming, Colorado, Utah, California, Minnesota, Iowa, Wisconsin, Illinois, California, Hawaii, Michigan, Maryland, Washington D.C., Connecticut, Vermont, New Hampshire, and Maine offer same day registration.⁶⁵⁵ North Carolina offers same day registration for

voters taking part in early voting. New Mexico and Washington have passed legislation to allow same day voter registration but have not yet implemented it.⁶⁵⁶ States still requiring voter registration cut-offs prior to Election Day are doing so between 8-30 days.⁶⁵⁷

The opportunity for same day registration leads to positive voter turnout with an average increase between 3-7%.⁶⁵⁸ Same day voter registration would solve issues encountered by Native voters where "they had registered too late, or they weren't registered, even when they would have been an eligible voter."⁶⁵⁹ One advocate describes the satisfaction of same day registration opportunities: "I worked in Minnesota, so we had election day voter registration which I loved because I didn't spend the day having to tell people I'm sorry they didn't get registered so they couldn't vote."⁶⁶⁰ Furthermore, "[s]ame-day voter registration would be helpful to the Native population, particularly if members of the community are highly mobile, due to moving around to seek employment or due to being housing insecure. Same-day voter registration would also prevent someone who has recently moved from being disenfranchised."⁶⁶¹

However, given the lack of reliable internet access on tribal reservations, same day registration implementation may be delayed in Indian Country. States relying on paper registration argue they should be able to maintain cut-off periods for voter registration to give registrars time to receive the paperwork, organize the data, and minimize fraud.⁶⁶²

In states that do not offer same day registration, voters report being turned away by non-Native poll workers without being offered the opportunity to register in future elections. One advocate recounted how "they proceeded to look to see if they could find him on the inactive list, and their computer system went down. They were slow and had to reboot them, but in the end they were not able to open up their inactive roll list...I know someone asked someone on the panel if he – if any of these individuals were asked to be registered. No one had asked him, that I recalled. And so he went without renewing his registration at all."⁶⁶³



The opportunity for same day registration leads to positive voter turnout with an average increase between 3-7%. Same day voter registration would solve issues encountered by Native voters where “they had registered too late, or they weren’t registered, even when they would have been an eligible voter.”

PART 6

CASTING A BALLOT

Barriers To Casting A Ballot

1. Unequal Funding for Voter Activities on Tribal Lands

You go take them in there to vote, and it was a chicken coop. It was an old chicken coop. It still had dirt on the floor. You go in there, and it had enough for one desk. And you had three people sitting around there, and you could barely come in. There was no place to vote. You had to take it outside to vote. You could see the – – where the chickens used to lay: You know, those little boxes. They would still have those around outside. And no bathroom facilities. . . So I went in front of the county commission in Hughes County, our county seat or our county capital. And I got on the agenda, and I asked them, “Whatever happened with, you know, these funds that they set down for us? You guys got a chicken coop.”⁶⁶⁴

Due to chronic underfunding of elections,⁶⁶⁵ counties often face tough choices about how and where to expend resources. Even so, Native Americans are entitled to receive “the necessary resources and staff to ensure that native voters are registered to vote, they’re informed, and they have the same access as the rest of the people in the county.”⁶⁶⁶ Yet when

looking to cut costs, it is often the Native American communities that face cutbacks.⁶⁶⁷

Polling locations intended to service Native American populations are often underfunded with inadequate facilities and equipment, resulting in long wait times or inability for voters to cast a ballot. Voters described how “we don’t have adequate . . . voting machines, the resources available. The last election, the voting machine broke in Oljato Senior Citizen. A lot of people were in line and people were frustrated, and then they had a back up, I guess, that became available until after an hour late.”⁶⁶⁸ Another witness described how equipment failures and tardy poll workers led to disenfranchisement when “[e]arlier arrivals had to wait because of problems with the table that is used during the voting, or there were no poll workers, and so a lot of voters arrived before the poll workers did.”⁶⁶⁹

Native American communities also saw a removal of remote ballot drop boxes as a “cost saving measure” despite protests from community members.⁶⁷⁰ One tribal leader described how, upon the move to all vote by mail former polling centers were not replaced with ballot drop boxes, which he took to be as a sign of disrespect. He urged “...the local, county, state, election officials must look at tribes as governments, pure and simple. They are not. They are looking at us as an inconvenience. Every place Colville had a polling place in the past, they need to have a drop box today. That is—that goes without saying. It is crazy that they penalize them by not giving them access maybe like other rural communities around the state.”⁶⁷¹

Native communities also report that instead of being provided funding on par with other citizens, the counties demand payment in order to provide services.⁶⁷² This disparity is deeply felt since “[w]e are citizens of the state of New Mexico. We have a dual citizenship with our own tribal communities. Now that’s something that I just don’t think is fair.”⁶⁷³

Political parties and get out the vote organizations likewise fail to expend resources in tribal areas. Native communities in rural, difficult to service areas

with relatively low population sizes, are often viewed as locations where “there is no return” so “they’re not going to spend the money” and instead will focus on more densely populated areas since “[i]t’s easy for them to maneuver rather [than] organize an office in Warm Springs, pay somebody to go to Warm Springs, pay somebody’s room, meals, mileage, whatever, where it’s easier to pay a person to walk ten blocks.”⁶⁷⁴ One community organizer described how, despite enthusiasm for candidates, political parties would not expend resources in Native communities: “he could only give us like 12 yard signs and the people in my reservation kept bugging me and asking me where is our Hillary signs, where is our Obama signs. They supported these candidates. But at the national level, they just saw that we weren’t worth the effort because we weren’t a swing state, or you know, our numbers just wasn’t there enough to infuse any cash or any resources to secure the position of that individual on the ballot, and it goes down the ballot, too.”⁶⁷⁵

2. Lack of Pre-Election Information and Outreach

Pre-election information can be critical to informing voters about “changes in the election format ... when to register, when to vote, and where to vote in the election.”⁶⁷⁶ A federal court explained the importance of voting information to voters before elections:

Voting without understanding the ballot is like attending a concert without being able to hear. [Without pre-election information in a medium they understand], the voter ... may not understand the office for which the various candidates are running, and surely cannot understand the various propositions, ranging from bond authorizations to constitutional amendments. [T]he meaningful right to vote extends beyond the immediate four corners of the voting machine.⁶⁷⁷

Native voters who are denied pre-election access to information about the voting process, candidates or

ballot measures often cannot meaningfully exercise their fundamental right to vote.

Nevertheless, lack of information is the prevailing paradigm that Native voters face.⁶⁷⁸ “[U]nbiased information about candidates and ballot question is difficult to come by.”⁶⁷⁹ Changes in voting precincts are not communicated, leading to disenfranchisement when voters show up at the wrong location.⁶⁸⁰ Native voters are not told they can vote by affidavit if there is an issue with their registration that could be corrected so their ballot is counted, causing them to leave without voting.⁶⁸¹ Early voting procedures are not disseminated to voters, and voters do not know they are still able to cast a ballot if they are in line when the polls close.⁶⁸² Robocalls and phone-banking, which are widely used in urban areas to educate voters, are not targeting the rural tribal areas.⁶⁸³

Even when onerous restrictions such as voter identification laws are enacted, states are indifferent about providing Native voters with information they need to comply with those laws. After North Dakota passed the voter ID law in 2013, the Secretary of State took over a year to post information about the new voting requirements on their website. Native voters were left on their own to learn about the North Dakota law, which often happened on Election Day when they were turned away because they lacked the requisite identification.⁶⁸⁴

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The lack of outreach and publicity likewise applies to candidates running for office. Native voters complained that local officials do not campaign in areas where they live or provide information about their positions on issues.⁶⁸⁵ Tribal members in Montana requested a meeting with Ryan Zinke, a candidate during the 2014 Special Election, and were turned down three times. Mr. Zinke informed them that the best he could do was to call them.⁶⁸⁶

The deliberate indifference of candidates and elected officials to Native voters has a double impact. “Many in the community have no idea who to support”⁶⁸⁷ and they would vote if they had more information.⁶⁸⁸ Without interactions with or information about candidates, many Native Americans do not vote.⁶⁸⁹ The press contributes to this barrier. In many cases, there is little coverage of what is happening in elections or how it impacts Native voters until after the election. The press then criticizes Native voters it did not educate for their low participate rate.⁶⁹⁰

The absence of consultation with Tribes about voting procedures also contributes to Native voters’ lack of information. Tribal members complained that in Montana, Governor Steve Bullock did not seek the input of the tribes before pursuing a vote-by-mail initiative. As State Representative Sharon Stewart Perego, explained, “Sometimes, politics moves ahead of itself and tends to forget the people who these decisions, these backroom decisions, impacted adversely.”⁶⁹¹

Tribes and Native organizations desperately attempt to fill the information vacuum left by election officials and candidates. Throughout Indian Country, they try to educate Native voters about who and what is on the ballot and why they are directly affected by the election outcomes.⁶⁹² As one community organizer explained,

We have to educate our own people because others do not come onto the reservation to educate us. They’re not going to come on the reservation unless it’s

somebody who is running for something they expect us to support, and you won’t see that unless it’s a tribal member... [W]e do it ourselves in our government ... we ask them to come in and speak. We try to push out the pamphlets, but it’s all on us. And so that’s probably the difference why they come out and forage for you to drag you in there and beat you over the head and say, hey, put your ballot in the box.⁶⁹³

Tribes are left to prepare their own pamphlets and score cards “so people know what issues are important to us and then they’re educated so they can make their choice.”⁶⁹⁴

However, it can be difficult for tribes and Native organizations to provide the information services not offered by election officials. That is especially true if there is no place for Native voters to go on the reservation or in the absence of a tribal community center in urban areas. Satellite offices established by local jurisdictions permit potential voters to discuss voting and their views on the elections.⁶⁹⁵ As community organizer Patrick Yawakie explained, “[C]reating a place that shows a community’s interest in elections is important... it shows that the community cares about who they elect and creates dialogue amongst individual voters.”⁶⁹⁶

3. Cultural and Political Isolation of Native Voters From Rest of the Electorate

During the termination era, the government also sought to relocate Native Americans into urban areas. In 1956, the government passed the Indian Relocation Act which promised economic opportunity and support if a tribal member voluntarily relocated off the reservation. Relocation offices were set up in Chicago, Denver, Los Angeles, San Francisco, San Jose, St. Louis, Cincinnati, Cleveland and Dallas. The promises of support, however, went unfulfilled with 55% of those who relocated returned to their communities.⁶⁹⁷ Nevertheless, as a legacy of this policy

major cities contain significant populations of urban Indians. Los Angeles County has the largest concentration of persons claiming to be fully or partially of American Indian descent.

The point of the relocation was assimilation, and that legacy affects Native Americans in urban areas today. Urban Indians report unique challenges because “we have no land base . . . for ceremonial grounds, like many other states have, or reservations . . . no land base so that we can call together for any sort of call to action . . . We don’t even have a community center for Natives to gather. . . We have no discussion, we have no dialogue amongst each other, and then from there we disappear amongst the rest of the people’s, amongst the rest of the ethnic groups.”⁶⁹⁸

Given the lack of a cohesive community, witnesses report “there is nobody . . . saying, ‘Hey, let’s get out and vote.’ We see a lot of push for the Latino vote. We see a lot of push for the Vietnamese vote. But we don’t see propaganda coming into our homes and saying, ‘Get out the Native vote.’”⁶⁹⁹ Voters lament that “[a]s a Native person, I wish I had more of a connection to who these candidates are. When I want to find out about them I don’t get any responses from them. I don’t know if it’s because I’m Native or maybe they think I am not important at all . . . The propaganda that I get in the mail propaganda that don’t pertain to me.”⁷⁰⁰

Community activists advocate for “provid[ing] Native Americans with their own voting place at a place that we’re comfortable with” since such a place “of my own culture, if there is a trusted community member, a leader, I will take the time to listen to them, rather than somebody else approaching me and talking about something that is of no interest to me. But if I see a trusted, familiar face that’s talking about it, I’m definitely going to take the time to listen to what they have to say.”⁷⁰¹ Community activists also report success by making voter resources “indigenized.” The guides were popular and “got a lot of likes and forwards and people downloaded it” and were “more confident in voting.”⁷⁰²

4. Unequal Access to In-Person Voting

Native voters generally must travel greater distances to get to their polling places than non-Native voters living in the same counties. Often, polling places are located in predominately non-Native county seats or non-Native communities. In many cases, the more populous Native communities are denied in-person voting on tribal lands and must travel off the reservation to vote. Local jurisdictions justify the absence of polling places because there are not enough registered voters in Native communities, with registration numbers depressed because of the lack of in-person voting.⁷⁰³ What is striking is how distance issues impede voting by Native Americans throughout the country. In Arizona, the nearest polling place for some tribes is off reservation.⁷⁰⁴ 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.⁷⁰⁵

Tribes in California face similar issues. Distance poses a barrier to getting to polling places for many members of the Karuk Tribe. People living in communities like Seiad or Horse Creek have to travel 40 to 50 miles roundtrip to a polling place in Happy Camp.⁷⁰⁶ Prior to 2018, when the Tule River Reservation was finally able to get a polling place, voters had to drive about 50 miles roundtrip to vote, despite having 700 members of voting age.⁷⁰⁷

Starting in the 1960s, the Sault Ste. Marie Tribe of Chippewa Indians in the Upper Peninsula of Michigan began to become politically active as the American Indian Movement and the Civil Rights Movement took hold. Tribal members were excited about participating. Local election officials responded by shutting down the precinct where they vote, which “shut down participation.” Today, many tribal members have to drive 100 miles roundtrip to cast their ballots, creating a significant lack of access that depresses Native turnout.⁷⁰⁸

In Minnesota, a member of the Mille Lacs Band of the Ojibwe explained that distances pose a significant barrier to many members of the state's eleven tribes. They commonly must travel 40 miles roundtrip to vote.⁷⁰⁹ Similar barriers are present for tribes throughout Montana. On the Flathead Reservation, which comprises two-thirds of the land mass of Lake County and is about 1.2 million acres, tribal members requested that the County open two satellite voting offices. County officials chose to place them in two remote locations far from the larger tribal communities. The satellite offices are located just four miles apart, with one accessible to 200 Native voters and the other to 40 Native voters. Hundreds of other Native voters had to travel vast distances to reach those offices.⁷¹⁰

In Blaine County, Montana, when the Lodge Pole precinct was merged with the Hays precinct, Native voters were forced to travel up to 114 miles roundtrip to their new polling location.⁷¹¹ In Big Horn County, the distances are not as great, but Native voters nonetheless must travel twice as far to reach their polling places as non-Natives, 44 miles round-trip for Natives compared to 23.2 miles for non-Natives.⁷¹² Native voters who live in Hot Springs, Montana, must drive 94 miles roundtrip to reach their polling place in Thompson Falls.⁷¹³

Pre-election outreach and publicity must be combined with early voting locations that are accessible to Native voters.

Distance also is an issue for Native voters in Nevada because of the isolated location of several reservations, many of which lack polling places. Native voters often have to drive 80 to 100 miles roundtrip to cast a ballot.⁷¹⁴ On the Pyramid Lake Reservation in Nevada, 99-year old Flora Green, a tribal member, had never cast a ballot in a non-tribal election. She explained, "I have never had the opportunity to vote here on my reservation." When a polling place was opened on the reservation for the first time in 2016 as a result of the Sanchez decision, Ms. Green was able to vote for the first time.⁷¹⁵ The closest elections office in Nye County, Nevada is in Tonopah, 140 miles each way by road from the Duckwater Reservation.⁷¹⁶ Voters on the Walker River Reservation have a 70 mile roundtrip drive to get to the county office in Shurz.⁷¹⁷

Rural tribes in New Mexico likewise are impacted by great distances to drive to voting locations. In contrast, in urban areas like Albuquerque, voters live within a mile of their polling place.⁷¹⁸

In Buffalo County, South Dakota, most members of the Crow Creek Tribe reside 40 miles roundtrip from their polling place, which is located in a small non-Native community off the reservation. Non-Native poll workers use that distance to disenfranchise even voters who are able to make the drive. If Native voters show up without their identification, rather than informing them that they can sign an affidavit, election workers force voters to return home for their identification.⁷¹⁹

Many members of Utah's eight federally recognized tribes also have long drives to their polling places, if they have access to transportation. Even though about half the population of San Juan County, Utah is Navajo, the county placed its only in-person polling place in Monticello, which is 84 percent non-Native. There was no in-person voting location in the predominately Navajo southern part of the county. Prior to getting relief from a federal court, voters in Navajo Mountain would have to drive about nine hours roundtrip to cast their ballot.⁷²⁰

The distances are not as great for Goshute voters in Utah, who have to drive over an hour each way to

get to their polling place. Citizens of the Ute Nation must drive about 45 minutes each way to their polling place. Many lack access to transportation, and no public transportation is available.⁷²¹

5. Unequal Access to Early Voting

Early voting can be a positive force for Native voters, if it accounts for the barriers that they face in participating in non-tribal elections. When election officials coordinate with tribal governments and schools to provide information about the location and schedule of early voting, it can improve turnout.⁷²² When that does not happen, it can confuse voters, causing them to worry that they are dropping their early ballot off at the wrong place or that they have not filled it out correctly, so it will not be counted.⁷²³ Pre-election outreach and publicity must be combined with early voting locations that are accessible to Native voters.

That requires that election officials commit sufficient resources to make early voting equally available to all voters, including Native voters on tribal lands. Martin Aguilar, who is a liaison in New Mexico's Native American Elections Information Program explained:

... Like anything else, the early-voting site has money attached. It costs us money to hire the precinct board, you know, to take over the voting machine, the number of hours we have to pay the actual staff to be there. So that can be one prohibition of not having enough early-voting sites, but within the law there, we can expand, not only on fixed sites, but the law also opens the early-voting sites to mobile sites, meaning that if we use – the old example is the mobile library. You know, we can knock out the books and put the voting machines in there. It's been done before.⁷²⁴

New Mexico gives Tribal governments the authority to request early voting sites, which makes a significant difference. In the 2018 primary election there were 24 early voting sites for 23 tribes.⁷²⁵

Tribal governments in New Mexico establish close working relationships with county election officials. For instance, the Jicarilla Apache Tribe works with Rio Arriba County to identify the best dates and times to have early voting at the three early voting sites located on tribal lands.⁷²⁶ Tribal governments must be proactive in those relationships and not allow county election officials to determine when early voting sites are open. They need to “[t]ell the county we need the full early voting from the day it starts to the day it ends.”⁷²⁷

When the decisions for when and where early voting will be available are made without the input of Tribal governments, it often leads to much more limited voting opportunities than those provided to non-Native voters. In Arizona, the Navajo Nation was provided with “the bulk of the early voting locations,” with other Tribes having less access. However, the Navajo early voting sites were only open “for short periods, maybe one day or three days.” For example, in Coconino County, an early voting location closed after just three days. “After that, voters had to travel significantly farther distance in order to get to the nearest location which would have been Tuba City from the Leupp community.” Election officials did not take into account that closing early voting after just a few days had a severe impact on Navajo Chapter districts lacking any early voting location, making travel distances even greater for those voters.⁷²⁸

Overall, unequal access to early voting was a common thread throughout Indian Country. In Arizona in the 2016 general election, there were a total of 89 early-voting locations. Of those locations, 23 were on reservations, compared to 66 off reservations. “Off-reservation early-voting locations were open for multiple days, ranging from being open and operating on October 12th-November 3rd...In contrast...early-voting locations on the White Mountain Apache and San Carlos Apache reservations only had the opportunity for early voting in-person for only one day, and on that one day, only open for four hours.”⁷²⁹

In addition, distance to early voting locations in Arizona posed a significant barrier to Native voters.

Many Native voters living on reservations in Arizona have to travel between 60 to 200 miles roundtrip to access the closest early voting location.⁷³⁰ In Navajo County, there were six different early voting locations that required many Navajo voters to drive an average of 40 miles roundtrip. For Native voters in other Arizona Counties, the early voting locations were 80 miles or more roundtrip from where they resided.⁷³¹ In Apache County, a voter residing in Teec Nos Pos would have to drive 150 miles roundtrip to reach the closest voting center in Chinle.⁷³²

Far too often, Native voters are not offered any early voting locations on tribal lands. In the poorest areas of Nevada, where several reservations are located, no early voting or satellite voting locations were established.⁷³³ In Oklahoma, early voting for rural locations tends to be more difficult because often there is only one early voting location per county, in the county seat. Those locations are not accessible to Native voters living in outlying areas.⁷³⁴

6. Barriers Caused by Vote-By-Mail (VBM)

Elections conducted by mailing in the ballot, or Vote-By-Mail (VBM), have gained a lot of traction in recent years. In 1972, only four percent of all ballots were cast by mail. By 2008, thirty percent of all ballots nationwide were cast by mail. In some states that offered a mail-in voting option, up to half of all ballots were cast using that option. VBM has expanded purportedly as a means to make voting more accessible.⁷³⁵

According to the National Conference of State Legislatures (NCSL), at least 22 states currently use some form of VBM for their elections, with three states (Colorado, Oregon and Washington) conducting all of voting by mail. NCSL's explains how it works:

For these elections, all registered voters receive a ballot in the mail. The voter marks the ballot, puts it in a secrecy envelope or sleeve and then into a separate mailing envelope, signs an affidavit on the exterior of the mailing envelope, and returns the package via mail or by drop-

ping it off. Ballots are mailed out well ahead of Election Day, and thus voters have an “election period,” not just a single day, to vote.... [T]his does not preclude in-person voting opportunities on and/or before Election Day. For example, despite the fact that all registered voters in Colorado are mailed a ballot, voters can choose to cast a ballot at an in-person vote center during the early voting period or on Election Day (or drop off, or mail, their ballot back).⁷³⁶

NCSL's description, evoking a tranquil scene in which all voters receive VBM ballots that they can cast at their leisure – even at conveniently located early voting sites – seems compelling. However, as NCSL acknowledges, for much of Indian Country and other rural areas, it does not comport with reality.⁷³⁷ Unless it is combined with a host of other election procedures to address barriers to registration and voting, VBM often leaves Native voters without a voice in the political process.

There is some support for using VBM in Indian Country. One witness suggested that VBM should be layered onto other methods of voting such as early voting.⁷³⁸ Another believes that “We should all vote by mail all the time,” in part because it is preferable to being “forced to go to a polling location ... that is probably run by non-Native citizens.”⁷³⁹

However, the majority of those who testified about VBM opposed it, sometimes in very strong terms. According to a tribal member from Montana, “vote-by-mail is regressing...I would see it as a Jim Crow law.”⁷⁴⁰ The Inter Tribal Council of Arizona opposes vote by mail. “It’s a good idea if you don’t need language assistance, if you can get mail at your home. But we know the Tribal communities’ post offices are in areas where there ... could be 20 or more miles to access it, or the hours are limited compared to post offices in your public communities. People don’t look to the mail as a way to vote.”⁷⁴¹ At best, Native voters have “mixed feelings” about VBM.⁷⁴²

The reluctance of Native voters to embrace VBM is

a result of cultural, historical, socio-economic, and language barriers to voting that is not conducted in person. It also is grounded in negative experiences that they have had where VBM is implemented in whole or in part.

a. Distrust of VBM and Preference for In-Person Voting

It can be challenging to get Native voters to participate in non-tribal elections.⁷⁴³ Grassroots organizers and tribes often struggle to get voters excited about a voting process that has historically excluded them or continues to be used to marginalize tribes and their members.

Increasing access to in-person voting by Native Americans on Election Day, especially at polling places located on tribal lands, has played a significant role in increasing turnout. “[P]eople like to vote in person, because there’s a community attitude, almost carnival-like attitude.” Tribes create a festive environment with food and events to encourage Native voters to participate.⁷⁴⁴ As a result, a consistent theme is that Native voters on both reservations⁷⁴⁵ and in urban areas “want to go into a space” to vote, such as a polling place in their community.⁷⁴⁶

At the Isleta Pueblo in New Mexico, “Traditionally ... we vote only one day, and that’s what they think when this voting process goes through, that it’s that one day.” They are told, “No. It’s almost two weeks of early voting. You can go any time you want to go.’ Some people want to stand in line. They like the idea of voting that one day. I enjoy it. I don’t mind it. I really enjoy having a hundred people standing in line. I can greet them, talk to them. It would be nice if people would come down to our polling places. They’d be impressed with what we do.”⁷⁴⁷

The preference for in-person voting also has its roots in the high levels of distrust that Native voters have for non-tribal governments. Native voters have “the least trust in the local levels” of non-tribal governments, such as the state and county officials running the elections. That distrust is manifest in their opinions on VBM compared to other methods of

casting ballots. About 89 percent somewhat trusted that their in-person ballot would be counted. “Vote by mail, in contrast, garnered much lower levels of trust. Only 24 percent had complete trust. And the same percentage, 24 percent, had no trust in voting by mail.” The high levels of distrust for VBM show that it “is not a viable substitute for in-person or voting at an early election site someplace where the individuals put the ballots themselves in the box.”⁷⁴⁸

The voting experiences of Native voters corroborate their lack of trust that their mail-in ballot will be counted.⁷⁴⁹ In the 2016 election in Arizona, voters at the Bylas precinct and the Pasqua Yaqui Tribal Center were told they had to vote by provisional ballot because they were either on the permanent early voting list or in one case told a voter she had “voted early already, even though she insisted that she had not.”⁷⁵⁰

As Tule River tribal member Thomas Eugene explained in describing his concerns with absentee ballots returned by mail in California, “I don’t know where those ballots would really go... once they’re in the mail, where do they go from there?”⁷⁵¹ Voters express similar concerns in other states. “That’s what I’ve heard several times, ‘Was it counted? I mailed it in.’”⁷⁵²

The negative experiences that Native voters continue to have with non-tribal governments play a significant role in their fear of VBM. Researchers found that Native voters did not want to put their addresses on the mail-in ballots because they believed that their addresses would be used to discriminate against them.⁷⁵³ This is a remarkable finding because it so closely parallels the experience of African American voters in the South.⁷⁵⁴

Native voters also expressed concerns that VBM is less secure than voting in a polling place. The lack of security increases the distrust that some voters have in the process.⁷⁵⁵

These experiences and concerns raise questions about the efficacy of VBM in any area with a significant population of American Indian or Alaska Native

voters. As one researcher explained, “[G]iven that these levels of veracity and the trust in the veracity of state and local government,” there is skepticism that “vote by mail would have anything positive to offer.” It does not raise trust and does not increase participation by Native voters. It does not counter the underlying social effects in the same way that local voting would.⁷⁵⁶ In short, VBM is more likely to discourage Natives from voting than it is to improve their access to the political process.

b. VBM Replicates the “Tyranny of Distance”

The voting barriers imposed by the “tyranny of distance”⁷⁵⁷ are largely replicated for Native voters through VBM even though that was a “major issue” it was designed to resolve.

Academics have examined the question of accessibility, “which is the combination of travel distance versus an impedence.” An impedence is anything that prevents someone from getting to their desired destination, such as lack of access to a vehicle, the cost of gasoline, poor public transit, or traffic. Any of those could prevent voters from getting to their polling places.⁷⁵⁸ A 2005 study found that increasing distance to polling places reduces turnout. Coupling distance with any impediment is “a significant factor in predicting voter turnout.” Similarly, where a voter’s residence is close to a polling place, that has a significant impact.⁷⁵⁹

“Initially the research indicated that vote by mail could be the viable alternative in reducing travel distance and impediment issues. However, all of the subsequent research seems to indicate that that is not the case. And there’s not the substitution effect that you would expect in switching from in-person voting to vote by mail in all populations.” Some population groups do not adopt mail-in voting. Demographics, educational attainment, and socio-economic status impact who uses it. The lower the level of economic resources or education, the less likely voters are to cast ballots by mail.⁷⁶⁰

Barriers continue to exist to Native voters with vote by mail. Distances to post offices or mailboxes and infrequent or unreliable mail service are a common problem on many reservations. When drop boxes are available, they can be located miles away from where voters live.⁷⁶¹ On the Quinault Reservation, it is about 25 miles each way to the post office.⁷⁶² Other distance or time issues with mail service come into play. “It’s that rural delivery doesn’t drop mail off every day. Or you have to go into town between 1:00 and 3:00 to pick up your mail at the post office. Those are all limiting factors that ... become impedances to that accessibility...”⁷⁶³

Eight counties in Arizona have shifted to using vote centers for mail-in-voting instead of having any polling places. Coconino County has not done this because it would make voting more difficult for Native voters. As Coconino County Recorder Patty Hansen explained, “Vote centers work very well in urban areas. They just don’t work well in rural areas.”⁷⁶⁴ The same is true for the impact of VBM on Native Americans, for whom it does not resolve – and in some cases can exacerbate – distance issues. Voters still “have to drive it to the post office,”⁷⁶⁵ which can be a significant problem if election mail is being delivered several hours away from the Native voter’s home.⁷⁶⁶

c. Barriers Posed by Non-Traditional Addresses Remain under VBM

The NCSL observed, “Native Americans on reservations may in particular have difficulty with all-mail elections. Many do not have street addresses, and their P.O. boxes may be shared.”⁷⁶⁷ Because of the widespread use of these nontraditional mailing addresses, Native voters often do not receive VBM ballots at their homes. That has made it “difficult” for members of the Gila River Indian Community to vote, especially in Pinal County.⁷⁶⁸ The barriers posed by the widespread use of non-traditional mailing addresses by Native voters are implicated in several ways by VBM.

Native voters may have difficulty or even be prevented from registering to vote in VBM jurisdictions

because they lack a physical mailing address.⁷⁶⁹ Members of the Navajo Nation who have removed from their shared post office boxes “prevents voters from having the ability to vote early ballot by mail.”⁷⁷⁰ Some jurisdictions will not mail a VBM ballot to post office boxes.⁷⁷¹ Navajo voters living in San Juan County, Utah who have mail delivered to post office boxes located in Arizona have been denied VBM ballots.⁷⁷²

Native voters also are a highly mobile population. According to the 2016 ACS, approximately 15.5 percent of the AIAN population was residing in a different house than the one they reported a year earlier.⁷⁷³ Many Native voters have multiple addresses, including their permanent residence on the reservation, their current home, a temporary address for work or school, and a post office address often located far from tribal lands several hours away.⁷⁷⁴ As one organizer explained, “We depend on tribal members to mail-in their ballots but many move around a lot and don’t seem to receive their ballot.”⁷⁷⁵

Native voters often do not check their mail regularly. Tribal members surveyed in Nevada reported that they picked up their mail infrequently because of the travel distance and lack of transportation.⁷⁷⁶ In some cases, Native voters in California reported going months without access to their mail.⁷⁷⁷ Mail service also is unreliable even where it is available. Among Native voters in Arizona, “a problem persists where mail is not delivered in either a timely manner or sometimes not at all.”⁷⁷⁸ “If you don’t have readily available access to the mail, if your mail is often lost, you’re less likely to vote.”⁷⁷⁹

...Native voters in California reported going months without access to their mail.

“As one researcher explained, “anything that complicates the system, like a nontraditional address, vote by mail doesn’t react very well to that. Vote by mail is designed for very stable populations who live in the same spot for a number of years, who get their mail delivered on a routine basis... It does not like nontraditional living arrangements.”⁷⁸⁰ That is a significant reason why VBM is ill-suited for many Native voters regardless of whether they live on or off tribal lands.

d. Increased Confusion and Misplaced VBM Ballots

Native voters often are overwhelmed by mail-in ballots. For example, a tribal member explained, “[W]hen I received my mail-in ballot ... there was so much different contents inside of it I didn’t know where to start. I didn’t know what it meant. And right then and there it was discouraging... It was at the very bottom of things I wanted to do because there was so much of it.”⁷⁸¹

Voter confusion is especially prevalent among Tribal Elders. Culturally, it is expected that younger tribal members will assist Elders without being asked to do so. That is missing when Elders receive VBM ballots in their mail. Native elders who get their ballot in the mail “don’t know what it is” and “don’t understand what they’re doing.”⁷⁸² The barrier is even more pronounced where the Elder has literacy or English language barriers and does not understand the VBM ballot or the instructions that accompany it.

Some tribal members complained that their VBM ballot gets set aside, and then forgotten. A Native voter from Washington State reported that for her tribe, filling out a ballot has been a hindrance. Voters may receive the ballot and a voter pamphlet very early, and both gets set aside with much of the “junk mail” that they receive. Turnout has decreased among tribal members after the state shifted to an all-VBM system.⁷⁸³ As a tribal Vice Chairman from Arizona explained, “[H]ow many times do we get stuff in the mail or comes to us and we don’t read it, and then we’re waiting, hey, when are we going to go vote?”⁷⁸⁴

e. Postage Costs are a Barrier to VBM

Voters who face socio-economic barriers and high poverty rates are especially vulnerable to disenfranchisement under a VBM system in which the postage for returning the ballot is not prepaid. “If you can’t afford a postage stamp, you can’t buy one very easily,” and studies show that people are less likely to vote.⁷⁸⁵ The practical effect of requiring voters to pay for their own postage is that VBM can function as a poll tax.

Several Native voters who testified at the April 2018 field hearing in Portland, Oregon, described the discriminatory impact of postage costs for returning VBM ballots. In King County, Washington, VBM was “a problem for low income families to pay for postage stamps.” It was more important for Native voters to purchase food and clothing for their household than to purchase a stamp to cast a ballot.⁷⁸⁶ Another tribal member explained, the money Native voters have to spend on a stamp may be a decision to not buy something for their lunch.⁷⁸⁷ They did not want to be “hassled” with having to pay the cost of returning their ballot.⁷⁸⁸

Following the field hearings, some states enacted legislation to pay the postage costs for returning VBM ballots. In July 2018, Washington decided to provide prepaid postage for VBM ballots for the first time since becoming an all-VBM state in 2011. State officials made the change “reluctantly” after King County appropriated funds to pay for postage.⁷⁸⁹ In Oregon, which has been an all-VBM state since 2000, Governor Kate Brown signed a law to provide prepaid postage for mail-in ballots.⁷⁹⁰

Many state and local jurisdictions continue to place the burden of paying for return postage for mail-in ballots onto the voters, including Native Americans. That cost will remain a barrier for Native voters who cannot afford it.

f. Lack of Timely Access to Mail through Post Offices Impedes VBM

VBM replaces polling places with post offices. That poses problems for many voters living on tribal lands.

People ... have to pay to have post office boxes and then travel to the post office to get their ballot, either obtain it or send it back. And this is less easy than one might think. For example, going back to the Nevada reservations, the post office on the Pyramid Lake Reservation ... is open from 9:30 to 3:30 Monday through Friday. So there are no Saturdays, no weekends for people working. But it’s even worse because there is a sign at the post office on the wall that states if you want to pick up mail you can only do so from 1:30 to 3:30. Again, not exactly good hours for people who have jobs.⁷⁹¹

Reduced hours for postal offices located on reservations is typical, regardless of whether the tribe is located in Arizona⁷⁹² or in Washington. The post office closes early and there is no drop box outside for after hours. “I think that cuts off our voice when we are mandated by the hours of the postal system.”⁷⁹³

A related issue arises from the delays caused by returning mail through post offices located in isolated communities. In rural areas, it takes longer for mail to be returned to the election office. For example, for a voter who returns their ballot by mail on Navajo lands in Leupp, Arizona, the ballot will have to be routed to Winslow, then Phoenix, and finally back to Flagstaff. It could add several days.⁷⁹⁴

Postal delays in delivering VBM ballots to voters or returning them to the elections office can be even greater in Alaska. It is not unusual for Alaska Native villages to be inaccessible by air for several weeks due to inclement weather, icing conditions, and above all fog. Unpredictable weather conditions in rural Alaska always have the final say in the delivery and pick-up of mail.

g. Lack of Access to Drop Boxes or “Voting Centers” for VBM

Cost saving is one of the biggest advantages touted by VBM proponents. “Jurisdictions may save money because they no longer need to staff traditional poll-

ing places with poll workers and equip each polling place with voting machines.”⁷⁹⁵ But that cost saving comes at a price.

Native voters consistently have complained that they lack convenient access to drop boxes to return their VBM ballots. Far too often, those drop boxes have only been located off of tribal lands, in many cases great distances from Native American communities. For example, tribal members in Washington State have to drive 45 miles each way to get to the closest drop box, if they forget to return ballots in the mail.⁷⁹⁶ Another was ten miles each way for tribal members lacking transportation.⁷⁹⁷

There were several examples of tribes in Washington State that have been denied drop boxes by local elections officials. In 2017, the Confederated Tribes of the Colville Indian Reservations requested that the Okanogan County Auditor provide a ballot drop box, but the request was denied.⁷⁹⁸ For a decade, efforts by the Tulalip Tribes to get a drop box from the county were rebuffed. They had to resort to creating their own lock box.⁷⁹⁹ Other tribes have had success in getting drop boxes on tribal lands, but only after numerous requests to county officials.⁸⁰⁰

Some VBM jurisdictions offer voting centers for residents to obtain assistance and to drop off their ballots. While they can be convenient for many voters living in urban areas, they are inaccessible to Native voters living in isolated rural areas.

San Juan County, Utah exploited this isolation in establishing a voting center in the county seat. Many Navajo and Ute voters are “immobile due to age, illness, and access to transportation.” When San Juan County changed to a vote-by-mail system, “ballot boxes were in distant places like Monticello,” located off-reservation. “Long distances and lack of ... ballot stations” had a significant impact even among voters who ordinarily vote at higher rates.⁸⁰¹

Alaska considered a proposal to establish voting centers in selected communities in combination with a VBM system. However, that proposal was not feasible in rural areas required to provide language assis-

tance to Alaska Native voters.

To comply with Section 203 and the *Nick and Toyukak* orders, Alaska’s Division of Elections would have to establish voting centers in the over 200 Native villages and communities outside of the state’s road system. Each of those voting centers would have to have fully trained bilingual election workers who could provide complete, accurate, and uniform translations in all of the covered Native languages. Each voting center would have to be open for at least the same period as early voting locations. Those requirements would eliminate any projected cost savings for mail-in voting in Alaska.

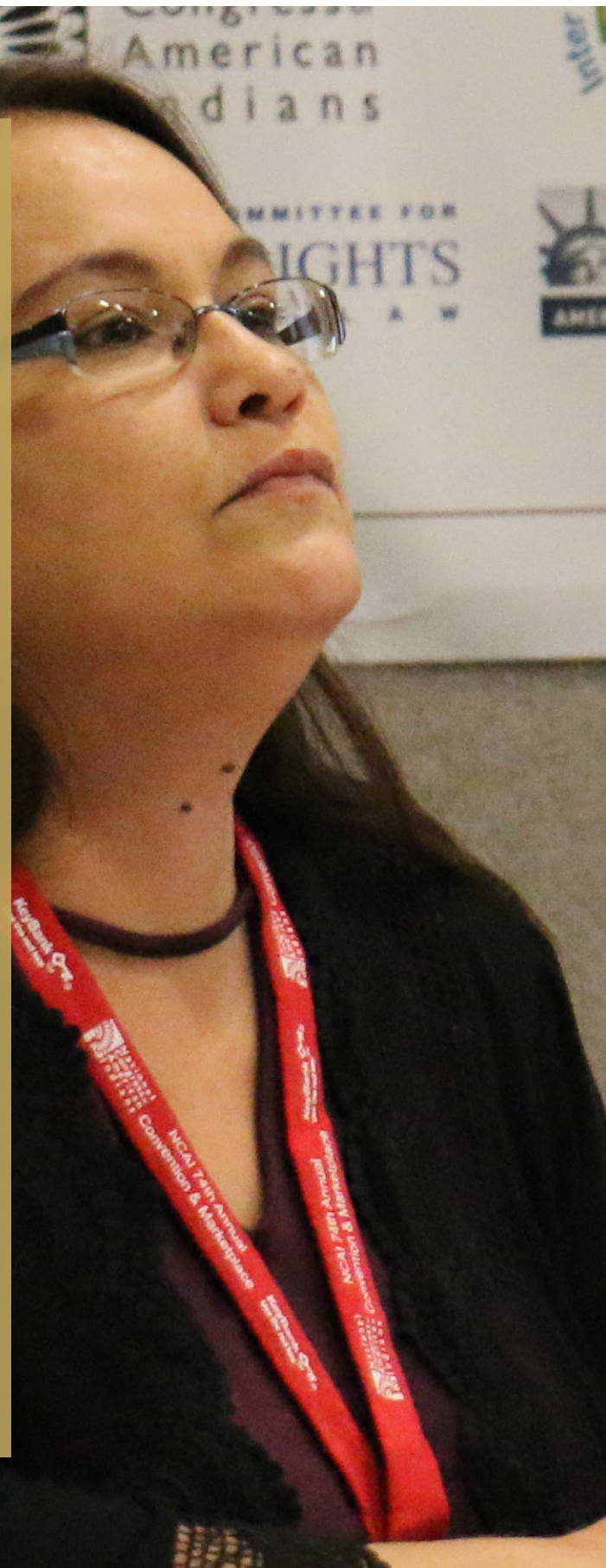
h. Absence of In-Person Language and Voter Assistance through VBM

In-person voting has several advantages over VBM. “[I]f you have questions about the ballot, being in-person, [there are] people to help you ... especially for those who do not have a lot of experience with voting, who ... maybe have low education attainment, have not as much information about the voting process, about the candidates, about the ballots. So having access to people that can help you with the ballot gives an intrinsic value to in-person voting.... With on-site voting ... people feel more trust that their vote is being counted and are likely to engage in it. It also reduces ... these problems with these errors, right, that make those ballots and those particular votes thrown out.”⁸⁰² You cannot do these things “via mail.”⁸⁰³

It is essential that voter assistance sites that are accessible for Native voters are available on Election Day when vote-by-mail is used. Polling locations on tribal lands cannot be eliminated, but must be converted to assistance sites to provide language assistance.⁸⁰⁴

For example, in a November 2009 school district special election, Coconino County, Arizona had voter assistance available for Navajo voters to receive language assistance. There were ballot replacement sites for voters who did not receive their ballots in the mail. Assistance was provided at post offices in

It is essential that voter assistance sites that are accessible for Native voters are available on Election Day when vote-by-mail is used. Polling locations on tribal lands cannot be eliminated, but must be converted to assistance sites to provide language assistance.





Cameron and Leupp and voters were encouraged to complete their ballots and turn them in when they received them. Outreach workers attended Chapter House meetings and public events to hand out voter materials and give instructions. They ran Navajo language ads about the election. Those efforts increased turnout to 16.5 percent, up from just 9.1 percent in the previous special election in 2004.⁸⁰⁵

Where in-person assistance is unavailable for VBM elections, Native voters – especially Tribal Elders with the greatest need for language or voter assistance – are disenfranchised. In New Mexico, an Elder who received a mail-in ballot did not complete it because she needed assistance in Navajo. At the next election, she showed up to vote in person and asked for help to complete the ballot she received previously. The interpreter explained to her that “the vote already took place.” Both had tears in their eyes when they realized the Elder’s vote would not be counted.⁸⁰⁶

i. Other Forms of Disenfranchisement Through VBM

Like other methods of election, VBM can disenfranchise Native voters. In some cases, disenfranchisement occurs when Native voters are not informed about the consequences of VBM. In Arizona, political parties and groups have signed up Navajo voters to be on the permanent early voting list without explaining what it is. It has resulted in a higher number of Native voters having to cast provisional ballots on Election Day.⁸⁰⁷ Similarly, many members of the Salt River Pima Maricopa Indian Community did not understand the check box on their voter registration form to be placed on the permanent early voting list, through which vote-by-mail is used. When they went to the polling locations and did not have the envelope for their mail-in ballot, they had to vote by provisional ballot.⁸⁰⁸

In other cases, disenfranchisement is what drives VBM. In San Juan County, Utah, the County switched to mail-in voting to eliminate language assistance available through polling places.⁸⁰⁹ Moreover, VBM raises the issue of “lost votes.”⁸¹⁰

Scholars led by Charles Stewart, a Professor of Political Science at MIT, and colleagues at Cal Tech “found that as much as one-quarter of all votes get lost or our ballots get lost when using these vote-by-mail options.”⁸¹¹ There are a variety of reasons for lost votes. The voter may not receive the ballot. The ballot may not be delivered to local election officials. There may be difficulties verifying who completed the ballot or if they are registered. A voter may fill out the ballot or the envelope incorrectly so the ballot is “administratively compromised.” There is an increased risk of “errors or malfeasance” by election officials.⁸¹²

VBM also increases opportunities for election officials to exercise their “enormous discretion” to throw out votes. There have been complaints in some VBM states “that local officials have been marking ballots as invalid because they believe the signature on the outer envelope does not match the one they have for the person on record.”⁸¹³ One study found that 13 percent of all mail-in votes were not tabulated due to either administrative or postal errors.⁸¹⁴

j. VBM Widens The Gap Between Non-Native and Native Voting

When the various impacts of VBM are considered in the context of the general barriers that American Indians and Alaska Natives face in registration and voting, it is unsurprising that it does not work well for Native voters. At best, “when taken with the socioeconomic conditions and the mail issues present on many reservations ... vote-by-mail would appear to have little chance for a meaningful impact.”⁸¹⁵ At worst, VBM drives down Native participation.

In examining data from the *Wandering Medicine* case in Montana, Dr. Jean Schroedel of Claremont Graduate University and Dr. Gerald Webster of the University of Wyoming found that the conditions of Native voters in Big Horn, Blaine, and Rosebud Counties made it likely that mail-in voting would depress participation. Native voters in those counties have consistently higher levels of unemployment, lower educational attainment, farther travel distances, and less access to transportation.⁸¹⁶

On Montana reservations with predominately Native populations, between ten to fifteen percent of ballots were mailed, compared to 33 percent in non-Native precincts. The study shows that Native voters do not switch to vote-by-mail “despite the distance and financial considerations.” The expectations in Montana are consistent with the research on which groups are most likely to adopt it. That leads to the conclusion that vote-by-mail “has little chance of helping and having a meaningful impact” for Native voters.⁸¹⁷ Indeed, VBM in Montana would likely widen the disparity in turnout between Native and non-Native voters.⁸¹⁸

Similar conclusions were reached on data from Native voters in Nevada and South Dakota. Lower rates of trust in non-tribal governments contributed to the lack of use among Native voters. Among members of the Duck Valley, Pyramid Lake, Walker River and Yerrington Tribes in Nevada, only 39 percent of Native respondents completely trusted that their vote would be counted as intended, compared to 66 percent of the predominately non-Native people living off the reservation. In South Dakota, only five percent of Native voters felt that the local non-tribal government would protect their rights.⁸¹⁹

Analysis of the use of VBM in Washington State indicates that it has “had little impact in increasing participation in the Native American community.” The data show that there is no statistically significant increase in voter participation between 2008 and 2012 in precincts in which 30 percent or more of the residents are American Indian. The largest areas examined included the Colville, Quinault, and Yakama Reservations. Instead, VBM “appears to have little impact in broadly increasing participation. It works really well for those already participating or who benefit from high education levels” and higher socio-economic status, but not for Native Americans who face greater barriers to participating in non-tribal elections.⁸²⁰

VBM has had a questionable impact and has driven down Native voting in some areas. “It’s not a silver bullet. It’s not something that’s going to correct all the problems that are created by travel distance.

And it still leaves logistical issues, it still leaves trust issues, it still leaves the notion of a limited portal to participation in democratic institutions and processes...”⁸²¹

The barriers that VBM imposes on Native voters may not be resolved if a mail-in voting system is layered on top of the existing methods of election. “[W]here vote by mail exists, it becomes the dominant paradigm... [T]he local instances tend to just kind of melt away into the background, and everybody begins to rely on vote-by-mail... So when you’re a minority group or a group of limited access to voting in some way, it takes the focus ... off of making sure that those communities are still served and still have access. And that’s sort of the magic elixir of vote by mail, is ‘Oh, we fixed that problem,’ but actually maybe you didn’t. It seems like you did, and it seems like you put a magical potion out there, but actually the problem still remains, because those communities may not be served. You may not have done what you think you’ve done, and that’s concerning.”⁸²²

*These low
registration and
turnout numbers
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happenstance.*

7. Barriers Posed by Population Thresholds for Polling Places

Laws in many states give county clerks the discretion to designate precincts in rural and tribal areas as all vote-by-mail if they do not meet a designated threshold of registered voters.

California Elections Code 3005(a) permits registrars of voters to designate precincts with fewer than 250 voters as “vote-by-mail.” Similarly, Nevada Revised Statutes § 293.343 provides that a registered voter residing in an “election precinct in which there were not more than 200 voters registered for the last preceding general election, or in a precinct in which it appears to the satisfaction of the county clerk and Secretary of State that there are not more than 200 registered voters,” may be required to vote-by-mail.

This form of official discretion has the effect of suppressing Native voter participation. The Duck Valley Shoshone-Paiute Tribe, which straddles the Nevada and Idaho border, illustrates the point. According to 2017 ACS estimates, Owyhee, Nevada, where the Tribe is headquartered, has a total population of 1,104 people, of whom 780 are 18 years of age or older.⁸²³ The Tribe has approximately 700 tribal members registered to vote for tribal elections who live in Elko County. Elko County designated Owyhee, which is in Precinct 29, as an all-VBM location with no in-person voting location.

In the November 2014 General Election, only 135 people were registered to vote in Precinct 29 in Owyhee,⁸²⁴ a registration rate of just 19.5 percent of the 2010 Census count of 694 people of voting age.⁸²⁵ Even with the reduced registration rate, Native voters in Precinct 29 had turnout of just 42 percent in the 2014 General Election compared to 55.6 percent for the county as a whole.⁸²⁶ In contrast, every in-person voting location had turnout exceeding the countywide average.⁸²⁷ If the Duck Valley turnout is calculated using the number of eligible persons from the 2010 Census, the turnout rate in the 2014 General Election was just 8.2 percent (57 ballots cast out of 694 persons eligible to register to vote), an astounding gap of 47.4 percent below the countywide average.⁸²⁸

These low registration and turnout numbers do not occur by happenstance. Depressed voter registration numbers, which prevent many Nevada tribes from meeting the threshold for requesting a polling place, are “the result of past history and the racism and the prejudice” within non-Native communities.⁸²⁹

This barrier creates a vicious cycle in which vote-by-mail depresses voter registration rates on tribal lands, making it even more difficult to meet the threshold for a mandatory in-person voting location. In some cases, that cycle is broken through litigation. Shortly before the 2016 election, Native voters and tribes in northern Nevada prevailed in a federal lawsuit to obtain in-person early voting and Election Day voting locations on tribal lands.⁸³⁰

More common, however, Native organizations and tribes commit substantial resources to improve voter registration rates to meet the state’s minimum threshold for mandatory in-person polling places.

A less populous reservation such as the Middletown Rancheria of Pomo Indians of California, which has about 130 members on the reservation and about 1,000 members living in the county, has been denied a polling place because the county says it does not have the funds. County officials have not allowed Tribal members to volunteer to work the polling place. Tribal officials cannot meet the state minimum threshold for establishing an in-person voting location on the reservation.⁸³¹

Even when tribes do have enough members, it is not easy to register Native voters who have been long-denied a polling place. In New Mexico, it was a challenge to secure just 50 voters to establish a polling place on the tribal lands of the Santo Domingo Pueblo in New Mexico because of the historical exclusion of Native voters.⁸³²

In 2016, the Tule River Tribe in California asked Tulare County officials to establish a polling place on tribal lands. Although there were 700 tribal members of voting age, the county required the Tribe to have 250 registered voters to secure an in-person voting location. Tribal leaders complained that “we

shouldn't have to meet that mark" and that a federally recognized tribe should be able to get its own polling place for non-tribal elections. After substantial efforts by the Tribe including voter education and voter registration drives, the Tribe contacted the county and was told it was 18 registered voters short and thus could not have a polling place for the Presidential Election. The tribe continued its efforts and was informed at the end of 2017 that it had a little over 300 registered voters and that a polling place would be established in 2018.⁸³³

8. Application of Federal Disability Laws to Deny Polling Places on Tribal Lands

Political participation must include independent living, which "means full inclusiveness for people with disabilities." Tribal communities need to ensure that there is "physical access to the polling places."⁸³⁴ Disability advocates, like Joseph Ray and the Native American Disability Law Center (NADLC), have introduced initiatives to create more resources for the Elders and other adults with disabilities to remain independent in the community.⁸³⁵ Their efforts are sorely needed, both for urban Native voters and those voting in more rural areas.

Some tribes have buildings that are compliant with the Americans with Disabilities Act (ADA). When the Tule River Tribe in California requested a polling place at its government office, it passed inspection with just a few minor adjustments.⁸³⁶ However, many tribal buildings were constructed before the ADA was enacted in 1992 and do not have complete access. Those buildings need to be fully accessible for Native voters who "use a mobility device or have an issue with mobility."⁸³⁷ The challenge is that tribes often lack the resources to bring polling places on tribal lands into full compliance with the ADA.

Researchers from ASU's Indian Law Clinic at the Sandra Day O'Connor College of Law found at least seven instances of accessibility violations at polling places in the 2016 election. In White River, Arizona, which is located on the Fort Apache Indian Reserva-

tion, there were two incidents. A voter in a wheelchair had to be carried down the steps by two voters because there was no wheelchair ramp. Another voter with a walker had to be helped by three other people in line to get into and out of the building.⁸³⁸ At the Gila River Indian Community, a Tribal Elder could not get out of her car. The Community's outreach worker had to tell the poll worker "that they have to bring the ballot out to the voter, to the Elder."⁸³⁹

Similar issues arose in the 2018 primary election in Arizona. "There was poor handicap access, so a lot of disabled elderly couldn't easily access polling locations, and handicap parking spaces were also an issue." One location lacked wheelchair access, requiring the Native voter to be lifted up two steps to get inside the building.⁸⁴⁰

NADLC documented comparable access issues for Navajo voters. The number of disabled Navajos of voting age is high. Thirty percent between the ages of 21 and 51 have a disability, climbing to seventy percent of all Navajos over the age of 64. Approximately 40,000 of all enrolled members of the Navajo Nation are disabled.⁸⁴¹ Disabled Navajo voters face many polling place access issues:

Navajos with disabilities cannot get out of their vehicles because of muddy parking lots; they cannot get to a polling site entrance because of loose gravel and large rocks on the parking lots; they cannot get in doors because they are too heavy, there is no ramp, or the doors are not wide enough to accommodate a wheelchair.⁸⁴²

NADLC conducted an accessibility survey of 25 polling places on Navajo Tribal lands that are used for tribal and non-tribal elections. The survey focused on four major components: parking accessibility, sidewalks and walkways, other features, and comments about accessibility. The polling places were located in five major communities: Crownpoint, Gallup, and Shiprock, New Mexico; and Chinle and Tuba City, Arizona.⁸⁴³

The NADLC survey identified “common major deficiencies” at the surveyed polling places, including:

1. No posted signs or designated parking spaces for individuals with disabilities.
2. No designated parking spaces with sufficient room for vehicles with wheelchair lifts.
3. Uneven and unsafe parking lot surfaces consisting of dirt, loose gravel, or large rocks that are impassable and potentially muddy during inclement weather.
4. No clear and safe entrance to polling places with surfaces of loose gravel and large rocks making it difficult to maneuver wheelchairs, walkers, and potentially unsafe for individuals with visual impairments.
5. Uneven sidewalks that are one inch or higher than the surface of the parking area.
6. Impassable entrance and interior doors that have unusable knobs or “C” shape handles with thumb press buttons, rather than easily used levers.
7. No ramps or steep and unsafe ramps constructed of material that becomes slippery during inclement weather.
8. Impassable and narrow entries and exits that become congested for wheelchairs and other assistive devices.⁸⁴⁴

Some of these issues were identified at five polling places in Tuba City, located in Coconino County, Arizona. Four of those polling places are used for non-tribal elections (Kaibeto Chapter House, Tuba City High School Pavilion, Tonalea Chapter House, and Inscription Chapter House).⁸⁴⁵ NADLC made several recommendations, many of which required modest mechanical fixes or changes in how buildings

were entered and exited. Some recommendations, such as paving the parking lots, would have greater costs associated with them.⁸⁴⁶

The United States Department of Justice apparently learned about NADLC’s report. Without consulting NADLC, its partnering organizations, or the Navajo Nation, the Justice Department opened an investigation. In August 2016, the U.S. Department of Justice evaluated early voting and polling places on tribal lands for ADA accessibility. Thirty of 31 in Coconino County, Arizona were found to be out of compliance with the ADA. Many of those polling places located at Navajo Chapter Houses lack paved handicapped parking.⁸⁴⁷

When Coconino County’s Recorder received the list from the Justice Department listing “all of these locations ... on the reservation,” her immediate response was, “I’m not going to disenfranchise those voters by moving” the voting location “to an accessible place that may be a hundred miles away. That made no

Election officials will use the ADA as a pretext to close existing polling places or to deny new ones for tribes currently lacking in-person voting on tribal lands.

sense.”⁸⁴⁸ Coconino County is exploring options to provide paved parking spots at the polling places on tribal lands.⁸⁴⁹

The Recorder’s response is understandable and laudable. Sometimes, finding polling places in rural areas can be very difficult. For example, Coconino County recently learned that a polling place at one of the Navajo Nation’s Chapter Houses would have to be relocated because the building is being closed to address safety concerns with the crumbling structure. Where a rural community has few buildings that can be used as polling places, circumstances may require looking at ways to make voting accessible for disabled voters at the available locations. It is possible to make in-person voting accessible without disenfranchising an entire community.

Coconino County uses curbside voting, which it provides at non-compliant polling places. They use a doorbell system in which the voter presses the button from their vehicle and it rings inside the polling place. The poll worker then brings the ballot out to assist the voter. The Justice Department referred to curbside voting as the “nuclear option” and made clear that it is not an acceptable long-term solution.⁸⁵⁰

The most common issue the Justice Department identified was the lack of a paved handicapped parking spot with a ramp and posted sign indicating it was reserved for disabled voters. Even where paved parking lots were available, they often had steep grades that were not ADA compliant. Other issues included lack of ramps into the Chapter Houses, and door widths that did not comply with federal standards.

On May 7, 2018, Coconino County entered into a settlement agreement with the Justice Department to resolve the accessibility issues for the polling places located on tribal lands.⁸⁵¹ The agreement requires the county to “make those polling place locations accessible on Election Day” or to “relocate those locations not remediated to an alternative accessible location...”⁸⁵²

More recently, the Justice Department has investigated the other counties identified in the NADLC report. The Department entered into a settlement agreement with McKinley County, New Mexico (where Gallup and Crownpoint are located) on June 6, 2019.⁸⁵³ On July 12, 2019, the Department entered into a settlement agreement with Sandoval County, New Mexico, which encompasses part of the Navajo Nation, the Jicarilla Apache Indian Reservation, and 12 Pueblos.⁸⁵⁴ We have been informed that the Department has an ongoing investigation in San Juan County, New Mexico, which includes Shiprock on the Navajo Nation.

The Department’s enforcement efforts, while laudable, have four significant flaws. First, whether urban or rural, the absence of fully accessible and ADA-compliant facilities tends to have a disproportionately high impact on minority communities, which rely upon older buildings to serve as polling places. Non-minority communities often are more likely to have modern facilities that were built to fully comply with federal disability laws. Federal authorities must be cognizant that their enforcement efforts often have a disparate impact on minority voters, as the recent investigations in counties overlapping with the Navajo Nation illustrate.

Second, the Navajo Nation Department of Justice has indicated that Justice Department attorneys did not consult with it before opening an investigation into polling place accessibility. Consultation with tribal government and partnering with disability rights organizations is critical to any voting rights enforcement on tribal lands, especially where those efforts involve tribal buildings and polling place locations.

Third, the Department’s settlement agreement does not account for other applicable law and alternatives to make polling locations temporarily accessible for the disabled. The federal Voting Accessibility for the Elderly and Handicapped Act provides an exception for communities in which “all potential polling places have been surveyed and no such accessible place is available, nor is the political subdivision able to make one temporarily accessible, in the area involved.”⁸⁵⁵ A location that is not ADA-compliant may be used as a polling place if the chief elections officer of the

State “assures that any handicapped or elderly voter assigned to an inaccessible polling place, upon advance request of such voter (pursuant to procedures established by the chief election officer of the State) ... will be provided with an alternative means for casting a ballot on the day of the election.”⁸⁵⁶

Most commonly, jurisdictions provide curbside voting as an alternative. The voters can simply honk the horn of their car to alert election workers inside of the polling place that they are outside. The poll worker then brings a ballot out to the voter to complete in their vehicle. The voters do not have to struggle with getting a scooter or walker out of their vehicle or expend any energy entering the polling place. Admittedly, as the NADLC has pointed out, this is an imperfect solution that does not allow a disabled voter to enter the polling place and participate in the very important communal aspects of voting.⁸⁵⁷ As witnesses explained in their opposition to all vote-by-mail systems, a common cultural approach of tribal members is to personally interact with others in their community in the voting process and to create a festive environment that celebrates their participation. That obviously is not provided when voters are unable to leave their vehicles.

Fourth, and what is most concerning, is that election officials will use the ADA as a pretext to close existing polling places or to deny new ones for tribes currently lacking in-person voting on tribal lands.

Coconino County officials are taking steps to address ADA issues raised by the Justice Department without closing any polling places on tribal lands.⁸⁵⁸ But not every state or local official will do so. In 2018, Randolph County, Georgia proposed to close seven polling places located in predominately black communities, purportedly because they “had disability compliance issues.” The plan was widely seen as an effort to suppress the minority vote. It ultimately was defeated by a 2-0 vote of the County’s Board of Elections.⁸⁵⁹

This abusive reliance on the ADA is doubly pernicious. It is a deliberate effort to use one civil rights statute (the ADA) to deprive minority voters of their

fundamental right to vote under other federal civil rights laws (the Fourteenth and Fifteenth Amendments and the Voting Rights Act). In the process, it can be used as a vehicle to disenfranchise an entire community of voters, without exploring other cost-effective options that would make the voting process fully accessible for everyone.

9. Impact of Same Day Voting for Tribal and Non-Tribal Elections

Voter turnout for tribal elections tends to be higher than participation in local, state, and federal elections.⁸⁶⁰ Some tribes have sought to increase turnout in non-tribal elections by aligning the dates and locations for tribal elections and non-tribal elections. Whether this approach in fact increases turnout depends on the specific makeup of the tribal community.

For example, the Lummi Nation purposely aligned its non-tribal elections with the tribal elections with great success. Not only has this alignment increased participation it has also “helped a few of our tribal members get elected to off-reservation positions.” It also provided the Lummi the practical opportunity to “help members to vote if they are not sure . . . print off their ballot if it has been lost in the mail, update their addresses with the Whatcom County Auditor’s Office . . . collect the ballots in the drop box to make sure their votes counted.” The Lummi also use this opportunity to educate voters on non-tribal issues.⁸⁶¹

However, for some communities, such as the Navajo Nation, holding tribal elections on the same day as non-tribal elections could lead to the widespread disenfranchisement of Native voters since the county lines do not intersect with their tribal chapter houses where they vote for their tribal elections.⁸⁶² This disconnect would force a tribal member to choose between participation in their tribal elections and participation in the non-tribal election. Additionally, tribal members may live off the reservation in pursuit of work or education. Travel back to vote in their chapter house would require hours of travel. Such a voter would not be able to conceivably make both elections.⁸⁶³ Ultimately, whether tribal

and non-tribal elections should be aligned is a highly fact-specific inquiry that should be left to the discretion of the tribe.

10. Discriminatory Impact of Lack of Native American Full-time Election Workers and Part-Time Poll Workers

When Native Americans go to vote, they are often voting at polling locations where poll workers are non-Native.⁸⁶⁴ When “you have folks showing up to the poll and the poll workers don’t look like them, it can be a very intimidating thing.”⁸⁶⁵ A voter in Arizona reported feeling “poll workers were being racist toward him” because they “were not very helpful” and “were very very short, very curt.”⁸⁶⁶ A Native voter described how “I went to the poll workers, and when you talk about racism, it’s not so much so blatant, but sometimes it’s just real condescending. They talk down to the voter. And, you know, some of our people who are shy, they don’t really want to say anything, they just, for whatever reason, wouldn’t go to district 7 to vote.”⁸⁶⁷ Another advocate described how when there are non-Native workers “There’s a kind of a sense of unease when Native Americans walk into a polling place, and what typically looks like kind of a tribunal of you’re going to prove that you are registered, you know, you got to prove it to us.” He contrasted those experiences with “what I saw down in the 2016 election, which is more of a welcoming attitude, because they had community members there.”⁸⁶⁸

Even when polling locations are located within Native territories, non-Natives may be the ones running elections. For example, in the Menominee territory of Keshena, which is majority Native, “the only non-Native landowners” were “all of the poll workers up until recently.” These non-Natives have a long history of discrimination toward the Native people which made Native American voters’ encounters with poll workers feel like “they don’t want us here, we’re a burden to them type of feeling.”⁸⁶⁹ Furthermore, non-Native poll workers can be especially discouraging because they may be from outside

of the community and entirely unfamiliar with the people and the geography. One advocate explained how when new districts were formed and voters were turning up to vote in their old districts the poll workers “didn’t know how to get” to the new polling location and “being a non-member they didn’t know” to direct voters to the new polling locations.⁸⁷⁰

Often, Native Americans are forced to leave their communities and vote in places that are hostile and have long histories of discrimination. Interactions with non-Native poll workers in these communities are tense. The former Chairman of the Kaibab Paiute Tribe describes how the relations with the neighboring town is especially fraught – “the community has a long history of stuffing things into the delivery pipe, so as to impede the one-third water that comes to the reservation” and “almost every single household, has one or two wells drilled into this aquifer, which basically negates the [water] agreement” between the tribe and the town. Given the “impunity” with which the neighboring community acts “[i]t makes it difficult for our people to go in there and trust the workers that are there, to, you know, go in and to vote. And those are the colonial aspects and continued history of the United States on a small scale.”⁸⁷¹ The Vice Chairman of the Tohono O’odham Nation described how when members go to the polls in cities like Phoenix “they get treated very racist, very differently” and that its “discouraging.”⁸⁷² He eloquently surmised:

When you have a right to vote, you have a right to vote and to feel safe and secure in order to exercise that right. Not to go there and be discriminated by the poll workers or people that are there, or the fellow American citizens that are standing there to vote, to treat you in those ways, because your skin color is that way, or you don’t speak very good English. Those are the things that Native Americans face. Those are the things that Tohono O’odham members face living down in Tucson, in Phoenix, and everywhere else.⁸⁷³

Clerks in charge of staffing poll workers are not always receptive to attempts to place Native Americans in election positions. Advocates describe how clerks tell them they have their “poll workers kind of set . . . we’re not training anybody new.”⁸⁷⁴ Additionally, the process for requesting clerks can be “tricky” and “has to be done far in advance”⁸⁷⁵ with advocates not knowing how poll workers are recruited.⁸⁷⁶ Finally, clerks themselves may not be conducting outreach to tribal communities to recruit poll workers.⁸⁷⁷

However, some counties are looking to recruit Native poll workers. The Maricopa County Recorder’s Office recently established a community relations team to attempt to “diversify” since, as one representative explained “the average age of our polling workers is 72, and, of course, the majority are white.”⁸⁷⁸ Yet, simply having one or two Native poll workers may not be sufficient to defeat discrimination. In one instance new poll watchers that had recently retired to Native territories were “appalled seeing how many Native people were turned away. And from their perspective a lot of times it wasn’t with reason.” These poll watchers mobilized a lawyer to “set things straight with the town clerk” which led to the hiring of one Native poll worker. However, this Native poll worker reports that “when she’s not present, when she has to step away to go to the bathroom or something, there is a lot of borderline racial, racist talk going on between other poll workers about the tribal people that are coming in, comments about their appearance, kind of nitpicking the things that they do or really looking over these things” which is “very intimidating for tribal people to see that.”⁸⁷⁹

Given this discriminatory treatment, tribal members advocate “for tribal voting centers that are housed on the reservations and tribal communities and staffed with Native people from our communities.”⁸⁸⁰ Community activists likewise urge to “have Native [poll workers] there at the particular locations on reservations”⁸⁸¹ and that instead of “cultural sensitivity training . . . the best way to remedy a situation like that is to encourage tribal members to volunteer to be poll workers on election day.”⁸⁸² And, indeed, Native involvement should not only extend to tempor-

ary poll worker positions. “It is extremely important . . . for county election offices to have full time Native American outreach staff members so that trust and communication between the county and tribal officials and our native voters is strong.”⁸⁸³



"It is extremely important...for county election offices to have full time Native American outreach staff members so that trust and communication between the county and tribal officials and our native voters is strong."

PART 7

COUNTING BALLOTS

Barriers To Having The Ballot Counted

1. Lack of Ballot Canvassing Opportunities

Because Native Americans are underrepresented in permanent (e.g. county clerk positions) as well as temporary election positions (e.g. poll workers) Native Americans are often locked out of observing the inner-workings of elections. This reliance on non-Native election workers breeds distrust. For example, Stephanie Thompson, a member of the Lac du Flambeau Band of Chippewa Indians described how her town supervisors were entirely comprised of non-Native males. She ran against an incumbent in what became a very competitive race. Ultimately, the incumbent prevailed by the slim margin of six votes. However, prior to the Election Day members of the Native community insisted that they had not received their requested absentee ballots. Twelve members of the Tribal Council knew they were going to be out of town on Election Day and so had requested their ballots in advance. Their numerous calls to the clerk went unreturned. When the ballots never arrived in time for the election, the Council was unable to vote. One member drove 4.5 hours from Madison to Lac du Flambeau just to cast his

vote since his absentee ballot had not arrived. When he asked the clerk about why he never received his ballot she laughed. She also insisted he must have filled out the application wrong. When the election ended up being decided by such a slim margin, the Council went to the clerk in person. The clerk again insisted that all of the applications must have been filled out wrong. Ms. Thompson also explained that the clerk had signed the nomination papers for the non-Native incumbent, which Ms. Thompson described as “discouraging” because it “really doesn’t feel like your vote matters or is even wanted.”⁸⁸⁴ Without a mechanism to review the absentee ballot requests, the Native voters had to rely on the word of the clerk who was an open supporter of the non-Native candidate. Instead of the positive experience of a Native candidate running competitively in a race, the election served to increase suspicion and cynicism about political participation.

2. Failure to Count Ballots Cast Out-of-Precinct

Native Americans are “highly mobile, due to moving around to seek employment or due to being housing insecure.”⁸⁸⁵ In search of economic opportunity Natives may work outside of their reservations even for extended periods of time, yet many still consider home to be their traditional homes. As one tribal member explained “People work maybe in Kayenta, but they still vote, you know, where they live.”⁸⁸⁶ However, the practicalities of working off of the reservation may make it difficult for voters to return to their homes to vote, causing Native voters to vote out of precinct where they are registered.

Even more confounding, state precincts may not be aligned with equivalent tribal precincts such as traditional chapter houses. For example, “the Shonto Chapter House is located in Navajo County, which poses problems for Navajo voters living in Coconino County and for whom that Chapter House is the closest one to where they reside.”⁸⁸⁷ Tribal members may be confused about where to vote if their tribal election location is different than that of the elections run by the counties or state. “In a lot of communities up in the Navajo Nation, it’s a very frequent

thing to vote at the local chapter house. If the chapter house isn't your polling location for that particular election, then we see a lot of voters with high rates of confusion."⁸⁸⁸ Even worse, some members will refuse to go to a polling location that is not located in their chapter house, especially if a precinct divides the chapter in half.⁸⁸⁹

In these instances, at least in Arizona, "state law does not allow election officials to locate polling places in different counties or states, even if the closest Navajo Chapter House to voters in their county is outside the county."⁸⁹⁰ And Coconino County Recorder testified how "Coconino County has ongoing problems between Bodaway and Cameron in trying to coordinate Chapter House districts to follow county lines."⁸⁹¹ Therefore, when Native voters turn up at a polling location they are not registered for, a poll worker will often furnish them with a provisional ballot. However, in Arizona, that ballot ultimately will be thrown out in its entirety.

State systems differ about whether they accept provisional ballots cast out of precinct. In Maine, out of precinct ballot are fully counted. In other states, just part of the ballot will be accepted – for example, federal or statewide offices will be counted, but the rest of the ballot is rejected. In some states, the entire ballot is rejected.

In Arizona, not allowing out of precinct voting disproportionately affects Native communities:

in the 2016 general election Native American voters were twice as likely to cast an out of precinct provisional ballot than a Anglo voter was. The rates in Maricopa County specifically were 73 percent higher for Native Americans verse an Anglo voter. 74 percent in Pima County. We see that fairly consistently. This one I thought was sort of shocking. In Apache County rates of out-of-precinct voting were 138 percent higher for Native Americans than for Anglo voters in 2016.⁸⁹²

Additionally, some poll workers may not inform the voter that the reason they are voting provisionally is that they are voting out of precinct. One advocate explained how she talked to voters who describe going into a polling location and being told they are not on the rolls but "[s]omebody will work it on the back end. It will be fine." However, those voters end up having their ballots rejected because they were in the wrong place. She reports how the voters were not given an opportunity to cure, but if they had been, "many of them say: I could have gone over to the other location. I could have."⁸⁹³ Informing vot-

FULL COUNT	Maine**
PARTIAL COUNT	Alaska, Arizona, Arkansas, California, Colorado District of Columbia, Georgia, Kansas, Louisiana*, Maryland, Massachusetts, New Jersey, New Mexico, New York, Ohio***, Oregon, Rhode Island*, Utah, Washington, West Virginia
DOES NOT COUNT	Alabama, Connecticut, Delaware, Florida, Hawaii, Illinois, Indiana, Iowa, Kentucky, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, North Carolina, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Vermont, Virginia, Wisconsin, Wyoming

Figure 20. Chart of State Handling of Provisional Ballots Cast in the Wrong Precinct. Compiled by National Conference of State Legislatures

*Only Federal races
** Validity is only reviewed if the number of provisional ballots cast is a large enough number to affect the results of the election
*** See Ohio Code § 3505.183

ers that they are voting out of precinct and allowing “[o]ut-of-precinct voting ... would alleviate a lot of problems in terms of voters getting turned away or having to go to an additional location, which a lot of times causes them to just not vote at all because they have to go back to work or have some other obligation, or it is just taking too long.”⁸⁹⁴

3. Ballot Collection Bans

The loss of preclearance means that previously covered jurisdictions freely implemented discriminatory changes as soon as they could. Take for example Arizona. While preclearance was in effect, the State submitted HB 2023, commonly called the Ballot Harvesting law, that makes it a felony to possess anyone else’s early ballot, whether voted or not. This was subject to a lot of controversy from the start, and the Department of Justice made a “more information request” or MIR that usually signaled to a jurisdiction that the change might not be approved. It was withdrawn.

Right after the *Shelby County* decision, Arizona immediately implemented this controversial change and there was ample testimony describing in detail the negative impact it would have on Native voters in particular.⁸⁹⁵ Outside of Pima and Maricopa counties, only 18 percent of Native Americans have home mail delivery.⁸⁹⁶ They rely on post office boxes that are often very far from their homes so families commonly “pool” their mail, meaning one person who is going to town would collect it for everyone else to drop it off at the post office.⁸⁹⁷ A number of people also cannot afford their own post office boxes, so will have their mail sent to someone who does have one.⁸⁹⁸ If that mail contained early ballots, that good neighbor helping you with your mail would suddenly be a felon. The end result was, as one witness succinctly put it, “I wasn’t going to touch them ... [be] criminalized for getting a ballot, for helping a senior.”⁸⁹⁹

This has had a disproportionate impact on Native voters in particular because of the distance from polling places, also known as the “tyranny of distance,” mentioned elsewhere in this report. This somewhat unique challenge means that there are “voters who

have a preference for vote-by-mail. Perhaps a disability makes them house-bound and unlikely to be able to travel to the nearest polling place, distance, these sort of factors. So it is a –it’s something that really has affected the ability of organizers, communities, and lay voters to help each other vote and to make sure their ballot gets returned in time.”⁹⁰⁰ When combined with the facts, also as described elsewhere in this report, that many Native voters may not have access to transportation to get to a polling place or whether in the past their ballots had been rejected for being voted at the wrong precinct, the reliance on mail means the ballot harvesting ban has a peculiarly strong impact on rural Native communities.⁹⁰¹

4. Lack of Information about Ballot Status and Inability to Correct Errors

It does little good for a voter to cast a ballot if their vote is not counted. It is even worse when a voter is not timely informed of errors in their ballot and given an opportunity to correct them. It renders the fundamental right to vote into little more than a formalistic exercise in which a ballot is completed, but the choices of the voter completing it will never be heard. Unfortunately, far too often, that continues to be the story of Native American political participation.

In some cases, Native voters are turned away from voting due to “simple things.”⁹⁰² During the check-in process, poll workers may not find their name, even if they regularly vote at the same location. If poll workers subjectively determine that the voter’s signature does not match, they will not allow the voter to receive a ballot.⁹⁰³ As a result of their experiences trying to check in, many potential voters will not return because they are disenfranchised from voting, especially if they have to return with a new registration card.⁹⁰⁴

Errors also occur in the polling place that are beyond Native voters’ control, but result in their vote being rejected. For example, in the 2018 primary election in Arizona, the Native Vote hotline received a com-

plaint from a Native voter whose mail-in ballot was invalidated because of reported machine malfunctions. The voter received a notice in the mail informing her that her ballot was rejected, but she had no way to fix it. She voted provisionally.⁹⁰⁵ In San Juan County, Utah, a voter was never informed whether his ballot counted after a voting machine malfunctioned.⁹⁰⁶

Similar disenfranchisement occurs when poll workers do not provide Native voters with the information they need to complete their ballot. In the 2018 primary election, Navajo County poll workers failed to tell voters that a ballot had two sides. That caused Native voters to only vote on one side of their ballot, unaware that they were not being given the opportunity to make a decision on several offices and issues on the other side.⁹⁰⁷

The increased movement of state and local jurisdictions to alternatives to in-person voting, such as the use of mail-in ballots or VBM, also has created additional barriers to casting a ballot that is counted.

In Arizona, Native voters have been targeted by outside groups that send them completed forms that change their method of casting a ballot to VBM.⁹⁰⁸ That leads to disenfranchisement when voters show up to cast their ballots in-person. Overall, 770 voters in Arizona were required to vote provisionally in the 2016 election after they were told that they had voted early already. This data shows “that voters do not know whether or not the ballots were counted,” so they came to vote in-person on Election Day.⁹⁰⁹

At the Hondah polling place on the Gila River Reservation in Arizona, out of 236 ballots cast in the 2016 General Election, 51 were provisional ballots. “The main reason provisional ballots were given out was because they had already received a PEVL. Permanent Early Voting List ballot had already gone out in the mail for them...” The large number of provisional ballots “within that small of a community” raises “serious issues.”⁹¹⁰

When Native voters return their ballots by mail, they have no confidence that their votes were count-

ed. VBM enhances the chances that minor errors will result in a ballot being tossed out.⁹¹¹ Again, if an election official subjectively determines that voters did not sign their name the same way as they did when they registered, their mailed-in ballots are rejected.⁹¹² If Native voters in Utah do not complete the envelope containing their ballots properly, their ballots get invalidated.⁹¹³

Native voters also have no way of finding out what actual or perceived errors may have resulted in their VBM ballots being disallowed. In Arizona, Native voters are only informed that their ballots were rejected, but in most cases the voters are not told why their ballots were rejected.⁹¹⁴ During the 2016 election in Arizona, several Native voters called the Native Vote hotline inquiring whether the State received their early voting ballots that they returned by mail.⁹¹⁵

The lack of the most basic information about a Native voter’s ballot, such as whether it was tabulated, the reason it was not, and how any actual or perceived errors can be corrected, result in vote denial. It contributes to the lack of confidence that Native voters have in the political process.⁹¹⁶ It also makes it more likely that Native voters will not attempt to participate in the future, believing that it would simply be a hollow exercise in which their voices will not be heard.

PART 8

BARRIERS TO REPRESENTATION

Barriers To Electing Candidates Of Choice And Securing Non-Discriminatory Representation

When Congress reauthorized the expiring provisions of the Voting Rights Act in 2006, it found that “[s]ignificant progress has been made in eliminating first generation barriers experienced by minority voters.”⁹¹⁷ While it is certainly true that there has been some progress since the VRA first was enacted in 1965, first generation barriers are far from a thing of the past. Rather, as this report has shown, barriers to registering to vote, casting a ballot, and having that ballot counted remain the dominant theme in Indian Country.

Congress also recognized that “vestiges of discrimination in voting continue to exist as demonstrated by second generation barriers”⁹¹⁸ constructed to prevent minority voters from fully participating in the electoral process.”⁹¹⁹ That is certainly true for Native voters. Frequently, jurisdictions have layered second generation barriers on top of first generation barriers to limit the ability of Native voters to vote. The

combined effect of first and second generation barriers denies Native Americans any opportunity to obtain representation even in communities where they comprise a majority of the population.

“States, and especially western jurisdictions, have been quite clever and ingenious in trying to come up with ways to keep Indian people from having an equal right to vote, either outright denial of the right to vote, or some kind of an abridgment or dilution of the right to vote.” Among the more than 90 voting rights cases that have been brought by Native voters, they have won more than 90 percent of the time. That “indicates serious widespread prolonged problems with fairness in voting for Native Americans... It’s a dismal record of how voting jurisdictions treat Native voters.”⁹²⁰

The impact of efforts to suppress Native voting and their ability to elect their chosen candidates is profound. Native Americans are dramatically under-represented at every level of non-tribal government. Although they comprise more than two percent of the population nationally, they constitute only .2 percent of all elected officials. In California, to achieve parity for federal, state and county offices, Native Americans would need to elect at least 40 additional officials.⁹²¹

This section explores second generation barriers, particularly how methods of election such as malapportioned and unequally drawn districts and at-large elections are combined with basic access barriers to deny American Indian and Alaska Natives equal access to the political process.

1. Cracking

There are several ways that districts can be used to disenfranchise Native voters, even in places where they comprise a majority of the eligible voting-age population. “Cracking is where you divide [Native voters] up into various different districts so they can’t have a majority in any of those.”⁹²² The purpose of cracking is to “maximiz[e] the number of wasted votes.” It does that by taking a compact and cohesive group of voters, such as American Indians and

Alaska Natives, and splitting then “into a number of districts” in which non-Native voters “will predominate.”⁹²³

Cracking occurs throughout Indian Country, and is particularly prevalent in statewide redistricting plans. In Wisconsin, the state legislative redistricting plan has been attacked for using cracking as one of the techniques to dilute Democratic voting strength.⁹²⁴ To achieve that result, families living in homes next to each other have been placed into different voting districts. Native voters living in urban centers such as Milwaukee, as well as those living on reservations in the more rural areas of the state, have been split between districts to prevent them from electing their chosen candidates.⁹²⁵

In Washington State, the state’s constitution and redistricting statutes provide that the legislative districts “should be drawn to coincide with the boundaries of local, political subdivisions and areas recognized as communities of interest. The number of counties and municipalities divided among more than one district should be as small as possible.”⁹²⁶ Native reservations and tribal communities are “communities of interest” under the state’s criteria, but they are not treated that way. Instead, there are several examples of cohesive tribal communities being cracked and placed into multiple districts.⁹²⁷

Members of the Lummi Nation, located in western Whatcom County about 20 miles south of the Canadian border, are split across two districts, the 40th and 42nd districts. Half of the tribal members living on the reservation could not vote for a candidate for Congress who is a tribal member because the district was split during redistricting. If the Lummi Nation was not cracked, Native candidates would have a better chance of being elected to the Washington Legislature.⁹²⁸

Two of the other large reservations in Washington, the Colville Indian Reservation and the Confederated Tribes and Bands of the Yakama Nation, likewise were split between districts. The districts were drawn using the highway, so that individuals who lived west of Highway 97 were in the 14th Legislative

District and those who lived east in the 15th District. However, the districts should have been drawn using the Yakima River, which is the natural boundary for the reservation. “So basically this redistricting commission cracked the reservation, the Yakama reservation.” The Yakama citizens did not understand that they were not part of the same district and cast votes for representatives from the other district. They did the same thing for the Colville reservation, splitting it.⁹²⁹

Montana also has used cracking, although it has been subtler than in some of the other states. When District 21 in Montana was redistricted, “swaths of votes” were lost by peeling away a higher percentage of American Indians actually eligible to vote.⁹³⁰ Although Senator Sharon Stewart-Peregoy, a member of the Crow Tribe, continues to represent the district, the reduction in Native voting strength has made it difficult to compete in the district. That is largely reflected in the District’s demographics, in which American Indians below eighteen years of age comprise a large percentage of the District’s Native population, leaving the District with a bare majority of 54.7 percent American Indians.⁹³¹ That percentage has continued to drop due to the increasingly younger population of communities such as Crow Agency, where 2017 ACS estimates indicate that residents under 18 years of age comprise 39.2 percent of the total population compared to 30.5 percent in 2000.⁹³² Redistricting is a way to suppress voter turnout, and tribal leaders need to be more active in resisting efforts to use it to dilute Native voting strength.⁹³³

Cracking also is used at the local level to limit Native voting strength. In Siskiyou County, California, Native voters are split between districts used to elect the county board of supervisors. They are sufficiently numerous and compact, especially with Native voters in Yreka, to be able to elect a candidate of their choice if they were not split.⁹³⁴

2. Packing

“Packing” is another common tactic used to reduce Native voting strength. It involves placing Native voters “into one or only a few districts so that the

remaining districts are easier for [non-Natives] to control.”⁹³⁵ Packing often results from the use of malapportioned districts that violate equal population requirements to give non-Native voters disproportionate voting strength.⁹³⁶ In other words, “if you have a lot of Native American voters, you pack them all into one district so they can’t elect two people” in a three-member county commission plan.⁹³⁷ Two examples illustrate this point.

Buffalo County, South Dakota has a three-member county commission. According to the 2000 Census, 81.6 percent of the County’s slightly more than two thousand residents were American Indian or Alaska Native persons of a single race,⁹³⁸ most of whom were members of the Crow Creek Sioux Tribe. The three commission districts had not been redistricted in decades, packing nearly the entire Native American population – “some 1500 people” – into one district. Non-Natives, who comprised “only 17% of the population, controlled the remaining two districts, and thus the county government.”⁹³⁹ The case was settled after Buffalo County admitted the plan discriminated against Native voters and agreed to be temporarily bailed-into Section 5 coverage under Section 3(c) of the Voting Rights Act.⁹⁴⁰

More recently, San Juan County, Utah did the same thing with its three-member county commission plan. The County packed all of the Navajo voters into a single district to limit their voting power and prevent them from having an equal opportunity to elect their candidates in other districts.⁹⁴¹ The county deliberately avoided redistricting after being required to implement a remedial plan in the mid-1980s as a means to preserve political hegemony by the non-Native minority. The discriminatory plan remained in effect until a federal court ordered a new plan with two majority-Navajo districts to be put into effect for the 2018 elections.⁹⁴²

As Buffalo County Commissioner and Crow Creek Tribal Member Donita Loudner explained, non-Natives use redistricting “trying to put us in these pots” in which Native voters are packed together.⁹⁴³ That has been true in statewide redistricting as well as local redistricting. For example, in 2001, the South Da-

kota Legislature adopted a state legislative plan that a federal court found violated Section 2 of the Voting Rights Act by packing members of the Cheyenne River Indian Reservation into District 27 with a 90 percent supermajority of Indians.⁹⁴⁴ Native voters in Arizona also have been confronted with packed Native districts that dilute their voting strength under statewide plans.⁹⁴⁵

3. Violation of One Person, One Vote

Unequally populated districts are commonly used to prevent Native voters from having controlling shares of governing bodies, even when they comprise a supermajority of the jurisdiction.

One of the most egregious examples comes from Apache County, Arizona. According to the 1970 Census, American Indians constituted a little over 74 percent of the county’s population of 32,300. The three districts for the county’s board of supervisors had the following populations: District 1 had 1,700 people of whom 70 were Indians; District 2 had 3,900 people of whom 300 were Indians; and District 3 had 26,700 people of whom 23,600 were Indians.⁹⁴⁶ The ideally populated district should have had approximately 10,767 people.⁹⁴⁷ By packing most of the Native voters into District 3, the redistricting plan had a total deviation of 232 percent.⁹⁴⁸ The court rejected the county’s arguments that Native voters were “Indians not taxed” and not citizens of the United States, requiring that their numbers be excluded under equal population requirements.⁹⁴⁹

Similar dilution of Native voting power has persisted. In 2005, a federal court struck down commission districts in Charles Mix County, South Dakota that reduced Native voting strength through a plan with a total population deviation of a little over 19 percent.⁹⁵⁰ In late 2013, a federal court in Montana entered a consent decree striking down malapportioned school board districts that unconstitutionally reduced Native votes to enhance non-Native voting power.⁹⁵¹

San Juan County, Utah provides a recent example of how equal population violations are used to deny

districts is “a true swing district,” requiring sufficiently high Native voter turnout to win those seats. The plans kept the county seat of Monticello whole, and only split the town of Blanding and the Navajo Nation tribal lands between two districts.⁹⁵²

Equal population barriers are not confined to matters resolved through litigation, but also include legislation. In Arizona, Senate Concurrent Resolution 1034 would increase the maximum population deviation for statewide legislative plans from the current eight percent up to ten percent. That change “could be detrimental to the Native American majority minority districts.”⁹⁵³ It could be used to increase the deviation between Native and non-Native districts, permitting more packing of tribal communities.

A final equal population barrier was raised relating to private, non-governmental elections. Central Electric, which provides electricity in South Dakota, allows individuals to have multiple votes. “[Y]ou’ve got a farmer over there, that rancher over there, who has a security well or one of his water wells in the son’s name; and the other one’s in his wife’s name; and the house is in somebody else’s name. That guy got three, four votes.”⁹⁵⁴ This type of election can pose a significant barrier to Native voters. However, federal courts typically subject private or quasi-government elections that base voting power on property ownership to very deferential review.⁹⁵⁵ The best recourse would be to resolve these forms of unequal population elections by changing applicable state law governing those elections.

4. At-Large Elections

Use of at-large elections continues to be a vehicle for denying Native voters an equal opportunity to elect their chosen candidates. Native voters can have their votes diluted through “at-large districts. A number of the cases ... have at-large districts for everything from sanitary districts to county commissions. And if you are a minority in that county, even if you’re 47 percent, you never elect a county commissioner.”⁹⁵⁶

Many of the leading voting rights cases from Indian Country have successfully challenged the use of at-large elections in county governments, such as the

*Windy Boy*⁹⁵⁷ and *Blaine County*⁹⁵⁸ decisions out of Montana and *Large v. Fremont County* in Wyoming.⁹⁵⁹ Buffalo County, South Dakota had at-large elections until they were eliminated following a 2003 lawsuit, allowing the Native majority to elect a county commissioner for the first time.⁹⁶⁰

The San Juan County litigation had its genesis in at-large elections that diluted Native voting strength.⁹⁶¹ Prior to 1984, there were no districts in San Juan County, with all seats elected at-large. “So [a] non-Native American would run and they held all the political offices, including the county commissioner, very important seats.” Districts were created only after the Navajo Nation sued, resulting in the election of the first Navajo county commissioner, Mark Maryboy.⁹⁶² In Washington State, Yakama voters were unable to elect their candidates to county government due to at-large elections rather than smaller districts.⁹⁶³ Even after at-large barriers are eliminated, it can be difficult to recruit Native candidates to run for office because their opportunities to elect have been suppressed for so long. As another tribal member from Washington explained, once districts are adopted, Native voters need to be educated to understand that they have a voice in non-tribal elections, and that voice can make a difference in improving their access to critical government services.⁹⁶⁴

The Sault Tribe of Chippewa Indians, sometimes referred to as the “Soo Tribe,” has its Tribal headquarters in Sault Ste. Marie, in Michigan’s Upper Peninsula. The Tribe has about 40,000 enrolled members, with America Indians of one or more races comprising about 19.1 percent of the city’s population (2,644 persons out of 13,798 persons according to 2017 ACS estimates).⁹⁶⁵ Sault Ste. Marie has a six-member city commission and a mayor, all of whom are elected at-large through staggered elections with three commissioners elected in every odd-numbered year. If more than six candidates file declarations of candidacy for the three seats, a primary election is held so that only the top six candidates advance to the general election.⁹⁶⁶

Members of the Chippewa Tribe have been unable to get elected to the city commission because of the at-

large method of elections and the primary election process, despite comprising one-fifth of the city's population. If a candidate runs and is perceived to be an Indian candidate, the non-Native voters turn out and vote against that person and "will target them during the election."⁹⁶⁷ Aaron Payment, who is the Tribal Chairperson and is the First Vice President of the National Congress of American Indians explained how overt racism comes into play in city elections:

I helped somebody run for city commission, a friend of mine, and very talented, and she's my cousin but she's light skinned so I thought okay, let's try this. And we tried really hard. And when she ran, she became the focal point of all the racist issues. If you're on the city commission, are you going to protect our land, the Indians from taking back all of our land? Those were the things that were said. Even the mayor candidate who was running unopposed was running in opposition to us taking our land into trust. And she came dead last in the process, too. She was [an] educated, brilliant person, light skinned. I thought that might do it, but we failed on that.⁹⁶⁸

Because the Soo Tribe is geographically compact and politically cohesive, Native voters would be able to elect their candidates of choice if the city commissioners were elected from fairly drawn single-member districts. Instead, the use of at-large elections with a primary that winnows down the number of candidates, denied the Chippewa voters of any meaningful opportunity to participate in the city elections.

5. Other Efforts to Prevent Native American Representation

Even after Native Americans succeed in eliminating discriminatory methods of election, that does not end their struggle to secure equal access to the political process. Instead, it shifts the focus to electing candidates of their choice. Jurisdictions frequently

respond through efforts to deny those candidates the right to run for office and assume that office if elected. That discrimination comes in several forms.

In the 1970s in Apache County, Arizona, non-Natives including the county attorney claimed that Tom Shirley, a Navajo tribal member who was elected to the board of supervisors, was not eligible to hold office for three reasons. First, "he lives on the Rez." Second, they claimed he did not pay taxes. Third, "if he comes into the county building and he steals some money, we can't catch him if he goes back to the Rez."⁹⁶⁹ Shirley sued and won the right to get on the ballot.⁹⁷⁰ A common tactic is for election administrators to simply not provide Native candidates with accurate information and the requisite forms to file their petition to run for an elected office. San Juan County, Utah has long used this tactic to block tribal members from running for county and school board offices. In 1972, two Navajo residents who filed to run for the three-member county commission "were disqualified because the county clerk knowingly failed to inform them of the requirements."⁹⁷¹

Those tactics persist even today. When Navajo Nation member Terry Whitehat decided to run for a county commission seat in San Juan County, Utah he filed for office. He asked if his application was correct because it is about a four to five hour drive each way from Navajo Mountain to the county seat in Monticello. Two weeks later, a county official contacted him and told him that he was given the wrong information on how to file. This is an example of how non-Natives attempt to hinder Native candidates from running for office.⁹⁷²

When those efforts are unsuccessful, Native American candidates are challenged for arbitrary reasons to remove them from the ballot. In 2018, two Navajo candidates ran for two different San Juan County Commission seats; Willie Greyeyes from Navajo Mountain for District 2, and Kenneth Maryboy from Mexican Water for District 3 from Mexican Water.⁹⁷³ Non-Native Republicans challenged Willie Grayeyes by claiming he was not a Utah resident.⁹⁷⁴ Grayeyes responded by filing a federal lawsuit seeking a preliminary injunction.

tion to include his name on the county's ballot.

The facts were undisputed. Grayeyes was certified to run for a Commission seat in 2012 by the clerk/auditor, who took no action after confirming his residential address. The clerk/auditor approved Grayeyes' application to renew his voter registration in 2016.⁹⁷⁵

Nevertheless, on March 20, 2018, eleven days after Grayeyes filed his declaration of candidacy, Wendy Black, a non-Native, e-mailed John Nielson, the non-Native county clerk/auditor, challenging Grayeyes' candidacy. She alleged, without any evidence, "It has been brought to my attention that he may live outside of the county and state of Utah." The next day, Nielson e-mailed the county sheriff, requesting that he send someone to investigate Grayeyes' residence. On March 22, 2018, the clerk/auditor for the first time raised the statute governing voter registration challenges. On March 28, 2018, he mailed a letter to Grayeyes telling him about the challenge, which Grayeyes did not receive until April 20, 2018.⁹⁷⁶

On April 13, 2018, the clerk/auditor e-mailed Black, asking her to fill out a voter registration challenge form to challenge Grayeyes' residency and eligibility to vote and run for office. She responded she would do it "for the county." At the clerk/auditor's request, Black backdated the challenge to March 20, 2018 and the clerk/auditor signed it, affirming that it was sworn before him on March 20, 2018. The county subsequently issued a press release saying that Grayeyes was under investigation and might face criminal charges. In the interim, the County delayed and only sent partial responses to Grayeyes' requests for public records about the challenge. On May 9, 2018, the clerk/auditor sent Grayeyes a letter saying he was not eligible to register to vote because he did not have a "principal place of residence" in the county, and the next day sent him a letter revoking his declaration of candidacy.⁹⁷⁷

The federal court granted Grayeyes a preliminary injunction that reinstated him to the ballot. The court found that the clerk/auditor committed several violations of Utah law in removing Grayeyes from the ballot. He failed to resolve the challenge within 48

hours of Black filing her challenge, choosing to notify him of his untimely decision by mail instead of using an e-mail address he had used previously. His March 28, 2018 letter "intentionally misled" Grayeyes about the complaint made against him, the clerk/auditor's review process, and the absence of a valid voter challenge. He denied Grayeyes due process by not notifying him of the statutory period for responding, not fully informing him of the basis of the charge, and issuing his decision before Grayeyes' time for responding had expired. The court concluded that the clerk/auditor "ceased to be a neutral actor and combined the roles of investigator and prosecutor depriving ... Grayeyes of due process."⁹⁷⁸ Following his victory in court, Grayeyes won at the ballot box by defeating non-Native candidate Kelly Laws with 54.5 percent of the vote.⁹⁷⁹

Efforts at backdating documents by non-Native officials are not limited to challenges to candidacy petitions. Yvette Isburg, a member of the Crow Creek Sioux Tribe, filed to run for Buffalo County, South Dakota Auditor/Register of Deeds, the elected office responsible for administering the county's elections. No one timely filed candidacy for office to oppose her. Four Directions reported that after the filing deadline, the outgoing non-Native auditor/register of deeds "found" a candidacy form that allegedly was filed by non-Native candidate Dulcy Sinkie. Despite those efforts, and extremely racially polarized voting that saw Sinkie get 97 percent of the votes in a

*Native Americans
are dramatically
underrepresented at
every level of non-
tribal government.*

non-Native voting precinct, Isburg won with 56 percent of the vote.⁹⁸⁰

When Native candidates are elected to office that is not the end of the story. In Buffalo County, South Dakota in an earlier election, a Native American was elected sheriff. Ultimately, he was prevented from being sworn into the position because of an issue raised with “the tribal system.”⁹⁸¹

Another means of disenfranchising Native voters can come after candidates running as Native Americans are sworn into office. In Chippewa County, Michigan, a candidate running for state representative ran as a tribal member. After he was elected, an issue arose in the state legislature about treaty rights. The representative responded by disenrolling and denying that he was ever a tribal member.⁹⁸²

6. Unequal Access to Resources for Native American Candidates

Native Americans are underrepresented in all levels of federal, state, and local governments.⁹⁸³ One reason Native Americans are less likely to run for office is that campaigns are prohibitively expensive. For example, Congresswoman Debra Haaland, who at the time of her testimony was running for her party’s primary, explained how her fundraising goals were based on the last primary election in her district which raised \$1.2 million.⁹⁸⁴ She observed “we need more opportunities for Native folks to get involved” which means “we need more investments by individual campaigns in Indian Country.”⁹⁸⁵ Additionally, the expenses common to campaigns may not even translate to votes within Native communities. For example, “the biggest expense is media, getting on television. You have to be able to reach your voters, and when you think about that in Indian Country – and I’ve traveled all over Indian country, eight miles into the desert where there’s not electricity and no running water, and people live in a Hogan, and how do those people – they’re not going to be watching TV at night and seeing, you know, candidates’ commercials.”⁹⁸⁶

Second, running for office is complicated and many Native Americans do not know how to participate. As the director of the Utah League of Native American Voters explained “there is inadequate training for our Native people to run for office in part because there is complexity in navigating a different set of policies, regulations, and rules governing state and federal electoral systems.”⁹⁸⁷ Another Native person described working on a campaign as “[i]t was tough because, to me, with all the state reporting requirements regarding campaign contributions and finding individuals to help us with the campaign that were experienced in state elections, it was one of the most difficult things that I did.”⁹⁸⁸ “Activists call for “educating Native people who are ready to step into that realm . . . something that could turn into some kind of nonpartisan institute to train people on how to run for office.”⁹⁸⁹

Third, Native candidates face disproportionately far distances to fill out their candidacy paperwork making running for office more complicated and expensive. For example, in order to become part of the electric company commission’s election in South Dakota one Native American candidate described how she “was forced to drive 90 miles, pick up a petition, get 15 signatures on it, and go back 90 miles to return the petition.”⁹⁹⁰ Terry Whitehat described how when he attempted to run for office he had to travel 4-5 hours “in hopes that I’d get that information I needed to file as a candidate/I was not provided that information.”⁹⁹¹

Finally, Native Americans may not connect running for office with their everyday lives. As one advocate explained “We need to educate and create the interest and somehow show the Natives how important it is to have a voice. I think a lot of the tribal people look at the issues that are discussed at those level[s], and they don’t look at them as being—as important, as, say the issues on their reservation and they don’t realize how [they are] actually tied.”⁹⁹²

7. Denial of Equal Access to Representation and Government Services

The ability to exercise the right to vote unencumbered by barriers that exclude American Indians and Alaska Natives matters. It means power. The power to have their voice heard. The power to open up dialogues with non-Native elected officials about issues that matter to Native voters. The power to be affirmed as citizens of the United States without sacrificing the Nation-to-Nation status of their Tribes. The power to protect and preserve their communities and the unique cultures and histories that they represent. The power to secure equal access to government services.

When Native voters are perceived to lack political power and representation, a tribal member from Washington State said elected officials ignore them.⁹⁹³ A similar narrative emerged from throughout the country, regardless of where the Native voters were located.

In Arizona, when members of the Gila River Indian Community were “fighting for our water rights back, we were at a very definite disadvantage” because we didn’t have the right to vote...⁹⁹⁴ That has continued in recent years. State legislators would not consider a bill sponsored by a Native American Senator that would replace Columbus Day with a Native American Day. The lack of responsiveness illustrates the importance of Native voters having a say in the legislative process. “[W]e should be able to walk into the Legislature, and have our non-Native American legislators and representatives hearing us, looking at us, and not closing their ears, not rolling their eyes, not falling asleep. Because without the votes, the numbers of our people behind us, being our armor, being our tools of power, we are powerless as leaders to speak on behalf of our people. Because simply it comes down to numbers.”⁹⁹⁵

California tribes have had similar experiences. In rural counties such as Del Norte and Medocino Counties in northern California, the Native voter turnout

is not high enough to afford Native candidates with viable opportunities to be elected to countywide offices. Racial issues are widespread, and discrimination against tribal members is common. County officials do not want to work with tribal governments.⁹⁹⁶

In urban areas, non-Native elected officials are equally overt in their disdain for issues that matter to Native voters. A focus group in Los Angeles found that public officials were not worried about being responsive to Native voters. “[O]ne of the elected officials ... said, ‘I don’t have to worry about Native American voters because they don’t vote. I don’t have to worry about Native issues because they don’t vote, and ... I don’t see them as my constituency.’”⁹⁹⁷ An elected official in Orange County, California, openly mocked Native American voters. When they complained about it and asked to meet with her, she refused. The official responded, “The Native vote in Orange County is powerless. We have no fear of you ... So you can do whatever you want, but we’re not going to meet with you.”⁹⁹⁸

In many cases, deliberate exclusion of Native voters relies upon an argument that they are “Indians not taxed” and should turn to their tribal governments for all essential services. When Navajo voters have demanded equal access to non-tribal services, “the response that they get is that the Navajo Nation has their own government, they take care of their own people having to do with roads, with whatever concerns they have, they have their own government that takes care of them. Why do we have to?” That is a false narrative intended to suppress Native voting. As the Tribal member explained, “I found out that there’s more tax coming [into the County] from the Navajo Nation than from the county.”⁹⁹⁹ In New Mexico, non-Natives are “also benefiting from tribal dollars for roadways, for gross receipts tax, everything that we have done, casinos. You know, we’ve contributed to the state severance tax \$130 million in the past ten years.”¹⁰⁰⁰

Where Native voters are ignored by elected officials, they are denied government services or equal access to schools and jobs. San Juan County offers a compelling case study of how Native voters and their

communities suffer under the tyranny of unfettered majority rule. As James Attakai explained, “[P]olitics is about the allocation and distribution of resources and power.” Prior to their efforts to secure equal access to the political process, Navajo residents of San Juan County were denied those resources.¹⁰⁰¹

The impact of decades of exclusion of Native Americans in San Juan County has been profound. “[N]ative communities provide millions in tax dollars to San Juan County. Yet [those communities] only receive a fraction of the service dollars and county jobs that they provide,” such as “basic amenities necessary for a strong and safe community regardless of ethnicity or background.”¹⁰⁰² Several examples illustrate the denial of basic services:

Funding was allocated to build a highway from Oljato to Navajo Mountain to improve access of those living on Navajo Nation lands to educational facilities, public safety, and to promote economic development. A non-Native county commissioner reprogrammed the funding to other projects without telling Navajo voters.¹⁰⁰³

Montezuma Creek is located about a one-hour drive from Monticello. Navajo residents requested that San Juan County provide ambulance services to transport critically ill or injured patients from their community. The county commissioners responded, “No. You don’t pay taxes. We cannot help you. You don’t pay any property tax or nothing.” They had to purchase their own ambulances despite being county residents who were supposed to be served by the county.¹⁰⁰⁴


The elderly mother of Terry Whitehat, a Navajo plaintiff in the lawsuit against San Juan County, has been denied services from a non-Native social worker who will not travel to his home. His father has renal failure, and the county

tells him to go to an Indian Health Services facility even when his condition is dire and he needs more immediate services from the county. Efforts to establish a hospice facility on tribal lands also were denied by the county.¹⁰⁰⁵

In the 1980s, there were a number of Navajos employed as social workers in San Juan County. Today there are none left, even though Native Americans comprise a majority of the population. The county has not hired people “of the same culture” to help Native Americans, other than one interpreter.¹⁰⁰⁶

Suppressing the votes of the Navajo majority also resulted in the non-Native county commission advocating for the removal of the Bears Ears Monument. By gerrymandering the districts and depressing Navajo participation, non-Natives were able to prevent Native voters from maintaining protections for the Monument.¹⁰⁰⁷

The ultimate affront resulting from vote denial is that non-Natives impose new methods of voting to make voting even more difficult for Native Americans. That is the sad legacy demonstrated by the voting rights litigation in San Juan County.¹⁰⁰⁸ That is a common tactic wherever Native voters reside. On the Ojibwe reservation in Wisconsin, in-person voter registration is unavailable. When the Lac Courte Oreilles Chippewa Ojibwe community requested a voting site at the Tribal office, the request was rejected as “cost prohibitive.”¹⁰⁰⁹ With these restrictions and barriers, Native voting and the opportunity to secure access to representation and the government services that flow from it becomes even harder.



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CONCLUSION

If the barriers to securing representation are eliminated, whether it is through collaboration with non-tribal election officials, legislation, litigation, or some combination of those methods, it makes a significant difference. It opens up doors that were formerly closed. It builds bridges between Native and non-Native communities to start a dialogue.¹⁰¹⁰

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.”¹⁰¹¹

Before Native Americans were elected to the Arizona state legislature, the non-Native legislators would meet with Native leaders about bills they wanted to move forward but nothing ever happened. After more Natives were elected, non-Native legislators were more receptive. They proposed legislation and asked for input from the Native leaders. “[W]e’re able now to do something concrete.”¹⁰¹²

While Native candidates are opening up the lines of communication with non-Native officials, they also help to empower and awaken Native voters. According to Norma Sanchez, “Voting us into council doesn’t make us find money for you. We still have to vote on the outside, and one voice does make a difference.”¹⁰¹³ Former Navajo Nation Attorney General Ethel Branch eloquently captured the importance of political empowerment to Native voters:

So we need to ensure that those dollars from those governments are flowing here, just like they are anywhere else, and the way we can ensure that is by showing up at the polls and voting, holding our elected leaders accountable.... But if we show up and we vote, then that gives them incentives to focus resources on us, and as our population continues to grow and we as a political force grow as a nation and as a people, that will help ensure that these minimum standards are met in Indian Country, Navajo Indian Country.¹⁰¹⁴

In other words, voting can help Native voters improve their lives and socio-economic status. Community organizers have emphasized to Native voters, “Do you make a living wage? Probably not, but if you vote for a candidate that supports living wage, this is one way you can make a difference.”¹⁰¹⁵

When equal access to representation occurs, the results are profound. Token representation¹⁰¹⁶ is replaced with meaningful opportunities to govern. Indian self-determination began to take hold “when Indian people started exercising their right to vote.”¹⁰¹⁷ Native voters are empowered to not only have their voices heard, but to “protect our sovereignty rights.”¹⁰¹⁸ Native candidates of choice elected to non-tribal offices are able to influence policy on land and trust issues, health care, and water rights.¹⁰¹⁹ Laurie Weahkee described how a campaign to register Native voters and get them to turn out successfully protected tribal lands in New Mexico. “In an effort to protect the petroglyphs, we found ourselves

losing vote after vote. We would lose city council votes. We would lose public-information-type votes. And so it became important for us to begin to figure out which candidates, which people were going to really support Native American people.” Without Native participation, it was common for legislation to omit Native American projects. Native organizers changed that through their voter empowerment work, which began when they worked to oppose defeating an effort to use federal funds for a highway through the sacred lands of the Petroglyph National Monument.¹⁰²⁰

Representation plays an important role of securing gatekeepers for the next generation of Native candidates. “They see somebody who looks like them running for a U.S. Senate seat, winning the U.S. Senate seat, winning the governor seat, winning a congressional seat. Then it’s something that probably seemed impossible all of the sudden seems a lot more possible.”¹⁰²¹ That is the true legacy of the 2018 elections that saw the first Native American women elected to Congress, Debra Haaland and Sharice Davids, as well as the groundbreaking campaigns of others like Paulette Jordan, the first Native American to be a major party nominee for Governor in Idaho. They will inspire other Native Americans to run for office at every level of government and create change in their communities.

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Acknowledgments for each location are provided below, along with the witnesses who testified at each hearing. The depth and breadth of this report could not have occurred without the testimony of the witnesses, who have played an invaluable role in identifying the many barriers that exist to Native voters.

1. Bismarck, North Dakota (September 5, 2017):

The hearing was held at the Bismarck Event Center in Bismarck, North Dakota, thanks to the support of the United Tribes Technical College in Bismarck and its President, Leander McDonald. Jacqueline De León and Dr. James Thomas Tucker served as questioners. OJ Semans, Sr., Executive Director of Four Directions, served as hearing Chair.

Witnesses included, in order of their testimony (an asterisk indicates a community member offering a public comment): Hon. Donita Laudner, Buffalo County, South Dakota County Commissioner; Gerald Stiffarm; Hon. Sharon Stewart-Peregoy, Representative, Montana State Legislature; Erica Shelby; Matt Campbell; Carol Davis; Lynn Davis; Patrick Yawakie; Hon. Roman Marcellais, Acting Chairman,

Turtle Mountain Band of Chippewa Indians; Professor Gerald Webster, University of Wyoming Department of Geography; Hon. Gary Collins, Former Chairman of the Arapaho Tribe; and Hon. Timothy Purdon, Former U.S. Attorney for the District of North Dakota.

2. Milwaukee, Wisconsin (October 16, 2017):

The hearing was held at the National Congress of American Indians (NCAI)'s 74th Annual Convention and Marketplace in the Wisconsin Center, in Milwaukee, Wisconsin, thanks to the support of NCAI and its Executive Director, Jackie Johnson Pata. We are grateful for the assistance of Amber Ebarb, Whitney Sawney, and Concetta Tsosie de Haro of NCAI. Jacqueline De León and Dr. James Thomas Tucker served as questioners. OJ Semans, Sr., Executive Director of Four Directions, served as hearing Chair.

Witnesses included, in order of their testimony (an asterisk indicates a community member offering a public comment): Matt Dannenberg; Stephanie Thompson; Tony Brown; Paul Demain; Hon. Fred Kessler, Representative, Wisconsin State Legislature; Burton Warrington; Carolyn Beaulieu; Hon. Regina Gasco-Bentley, Chairwoman, Little Traverse Bay Bands of Odawa Indians; Hon. Vinton Hawley, Chairman, Pyramid Lake Paiute Tribe; Linea Sundstrom*; Hon. Aaron Payment, Chairman, Sault St. Marie Tribe of Chippewa Indians; Hon. Debra Haaland, Congresswoman, New Mexico's First Congressional District; and Joseph Ray.*

3. Phoenix, Arizona (January 11, 2018):

The hearing was held at the Beus Center for Law and Society at Arizona State University's Sandra Day O'Connor College of Law, thanks to the support of Dean Douglas Sylvester, Professor Patty Ferguson-Bohnee, Jennifer Williams, Danielle Williams, Kate Rosier and the Indian Law Program (ILP).

Thanks to the State Bar of Arizona's Indian Law Section and the ILP for sponsoring a reception the evening before the field hearing and to Ernesto Lopez of Ernie's Catering for lunch on the day of the hearing. We thank Arvis Dosela and the Aravaipa Apache Crown Dancers for their inspirational performance during the field hearing.

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Witnesses included, in order of their testimony (an asterisk indicates a community member offering a public comment): Solveig Parson; Brian Curley-Chambers; Rani Williams; Professor Dan McCool, Professor Emeritus, University of Utah Department of Political Science; Edison Wauneka; Travis Lane; Hon. Verlon Jose, Vice Chairman, Tohono O'odham Nation; Hon. Roland Maldonado, Chairman, Kaibab Band of Paiute Indians; Hon. Stephen Roe Lewis, Governor, Gila River Indian Community; Angela Salazar-Willeford; Joyce Lopez; Claude Jackson; Natalie Landreth; Sarah Gonski; Hon. Steve M. Titla, Commissioner, Arizona Citizens Clean Elections Commission; Norm Deweaver; Dr. James Thomas Tucker; Jamescita Peshlakai*; Sarah Crawford*; Kris Beecher*; Kenosha Skinner*; Allyson Van Seggern*; Devon Saurez*; and Desirae Deschine.*

4. Portland, Oregon (January 24, 2018):

The hearing was held at the Affiliated Tribes of Northwest Indians (ATNI) Winter Convention at the Hilton Double Tree Lloyd's Center, thanks to the support of ATNI's President, the Hon. Leonard Forsman, Chairman of the Suquamish Tribe. The hearing would not have been possible without the substantial assistance of Julie Johnson, Matthew Tomaskin, and Theresa Sheldon, who coordinate ATNI's Native

Vote efforts and took the lead on identifying and recruiting witnesses. Thanks also to John Dossett of NCAI, who served as a questioner, and to Marci McLean and Alissa Snow of Western Native Voice. Jacqueline De León and Dr. James Thomas Tucker served as hearing co-chairs.

Witnesses included, in order of their testimony (an asterisk indicates a community member offering a public comment): Hon. Henry Cagey, Chairman, Lummi Nation and Lummi Indian Business Council; Hon. Teresa Taylor, Councilwoman, City of Ferndale, Washington; Barbara Lewis; Rhonda Medcalf*; Patricia (Patsy) Whitefoot; Julie Johnson; Mathew Tomaskin; Hon. Jim Thomas,* Chairman of the TANF Committee for Affiliated Tribes; Hon. Brian Cladoosby, Chairman, Snohomish Tribe; Hon. Joe Pakootas, Former Chairman, Colville Tribes; Hon. Norma Sanchez, Councilwoman, Colville Tribes; Hon. Theresa Sheldon,* Councilwoman, Tulip Tribe; Valdez Bravo; Mike Tulee; Hon. Carina Miller, Councilwoman, Confederate Tribes of Warm Springs; and Hon. Carol Evans, Chairwoman, Spokane Tribal Business Council.

5. San Diego, California (February 5, 2018):

The hearing was held at the California Nations Indian Gaming Association (CNIGA)'s 23rd Annual Western Indian Gaming Conference at the Harrah's Resort Southern California on tribal lands of the Rincon Band of Luiseño Indians, thanks to the support of Susan Jensen, Executive Director and Ambar Mohammed of CNIGA. Several others contributed to the planning for the field hearing, including Alva Johnson and Deron Marquez of San Manuel Band of Mission Indians, Connie Reitman-Solas of the Inter Tribal Council of California, and Tracy Stanhoff of the American Indian Chamber of Commerce of California. Chrissie Castro, Executive Director of the California Native Vote Project, and Monique Castro worked closely with the planning team to identify witnesses. A special thanks to Professor Jean Schroedel and her colleague, Professor Melissa Rogers of the Claremont Graduate University, as well as Steve Reyes, Chief Counsel to the Secretary of State

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Witnesses included, in order of their testimony (an asterisk indicates a community member offering a public comment): Professor Jean Schroedel, Claremont Graduate University, School of Social Science, Policy & Evaluation; Melissa Rogers, Claremont Graduate University, School of Social Science, Policy & Evaluation; Amy Nantkes*; Terria Smith; Kenny Ramos; Robin Thundershield; Lupe Lopez-Donahey; and Monique Castro.

6. Tulsa, Oklahoma (February 23, 2018):

The hearing was held at the University of Tulsa College of Law, Native American Law Center, in Tulsa, Oklahoma, thanks to the generous support of Dean Lyn Entzeroth, Professor Vicki Limas, Professor Judith Royster, and Barbette Veit. Professor Dan McCool, Dan Lewerenz, and Four Directions assisted in witness recruitment. Jacqueline De León and Dr. James Thomas Tucker served as hearing co-chairs.

Witnesses included, in order of their testimony (an asterisk indicates a community member offering a public comment): Christina Blackcloud; Mike Keahan; Bobbie Saupitty; Brian Jones; Anna Langthorn; Kevin Barnett*; and Hon. Chuck Hoskin, Jr., Secretary of State, Cherokee Nation.

7. Isleta Pueblo, New Mexico (March 9, 2018):

The hearing was held at the University of New Mexico School of Law's "50 Years of the Indian Civil Rights Act Symposium" on tribal lands at the Isleta Resort & Casino, in the Isleta Pueblo, New Mexico, thanks to the support of the University of New Mexico School of Law and Professor Barbara Creel, Director of the law school's Southwest Indian Law Clinic. Martin Aguilar, Native American Elections Information Program Liaison in the New Mexico Secretary of State's Office, offered substantial assistance. NAVRC members Arusha Gordon from the

Lawyers' Committee for Civil Rights Under Law and Maya Kane participated as questioners. Jacqueline De León and Dr. James Thomas Tucker served as hearing co-chairs.

Special thanks to the Honorable Maggie Toulouse Oliver, Secretary of State of New Mexico, who generously provided her time and staff assistance through her Native American Voting Task Force in recruiting witnesses for the hearing. We also appreciate assistance of Theresa Romero for facilitating the Coalition's work with Secretary Oliver.

Witnesses included, in order of their testimony (an asterisk indicates a community member offering a public comment): Terry Whitehat; Wilfred Jones; Helen Padilla; Hon. Leon Reval, Councilman, Jicarilla Apache Nation; Hon. Max Zuni, Lieutenant Governor, Isleta Pueblo; Shirlee Smith; Joseph Ray*; Hon. Maggie Toulouse Oliver, Secretary of State, State of New Mexico; Pamela Mahooty*; Surete Shi-je*; Martin Aguilar; Hon. Everett Chavez, Governor, Santo Domingo Pueblo; Linda Yardley; Hon. Debra Haaland, Congresswoman, New Mexico's First Congressional District; Laurie Weahkee; and Amber Carillo.

8. Sacramento, California (April 5, 2018):

The hearing was held at the 2019 California Tribal Water Summit at the McClellan Conference Center in Sacramento, California, thanks to the support of Anecita Agustinez, Tribal Policy Advisor, California Department of Water Resources and the California Department of Water Resources. California Native Vote Project, Connie Reitman-Solas of the Inter Tribal Council of California, and Four Directions each assisted with logistics and witness recruitment for the hearing. Jacqueline De León, Natalie Landreth, and Dr. James Thomas Tucker served as hearing co-chairs.

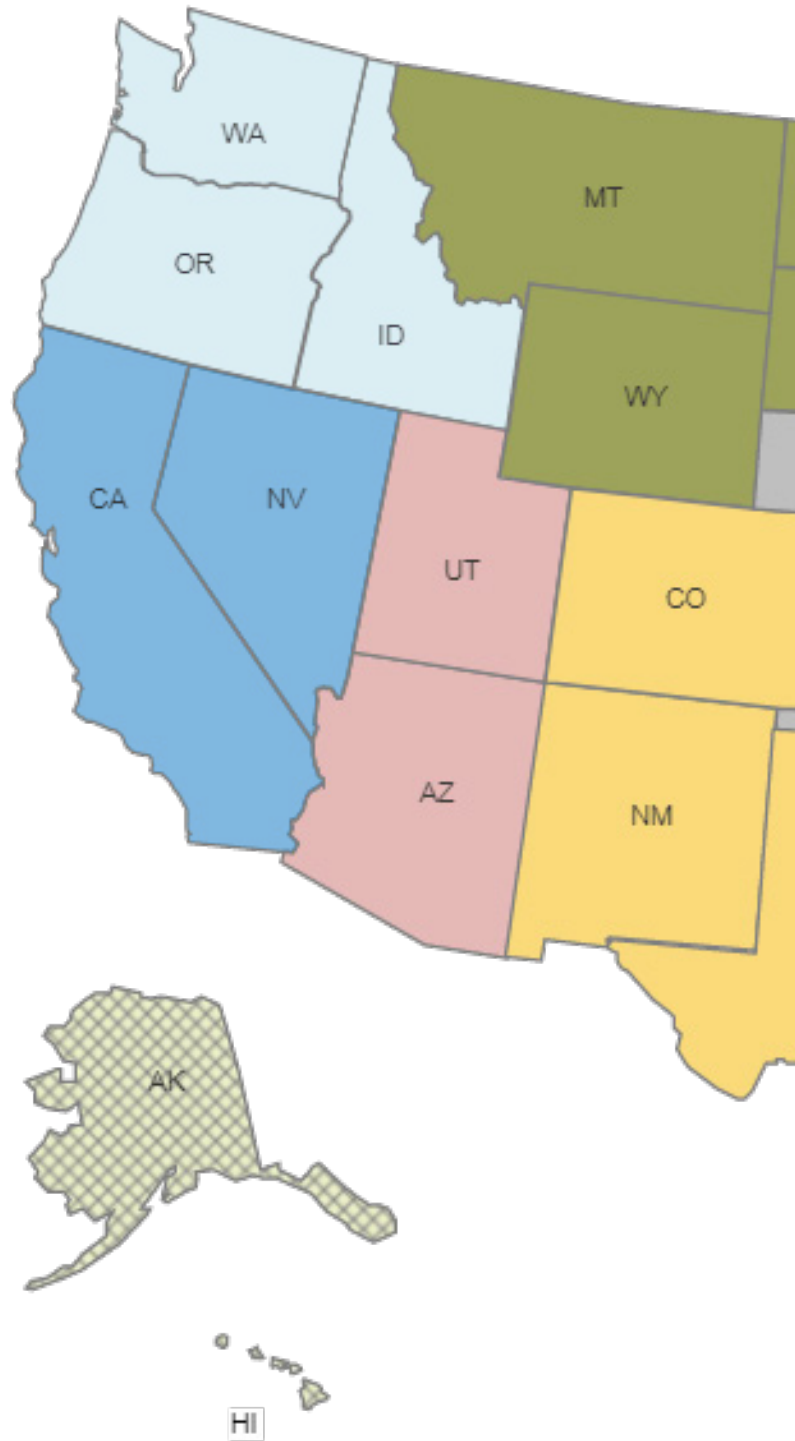
Special thanks to the Honorable Alex Padilla, Secretary of State of California, who generously provided his time, and his Chief Counsel, Steve Reyes, for their efforts to make the hearing a success.

Witnesses included, in order of their testimony (an asterisk indicates a community member offering a public comment): Beverly Harry; Thomas Eugene; Hon. Carlos Negrete, Councilman, Middletown Rancheria of Pomo Indians; Hon. Buster Attebery, Chairman, Karuk Tribe; Fatima Abbas; Dr. Joseph Dietrich; Dr. Joseph Lake; Hon. Alex Padilla, Secretary of State, State of California Ruthie Maloney; Michael Fresques; Erik Rydberg; Chrissie Castro; and Robin Thundershield.

9. Tuba City, Arizona (April 25, 2018):

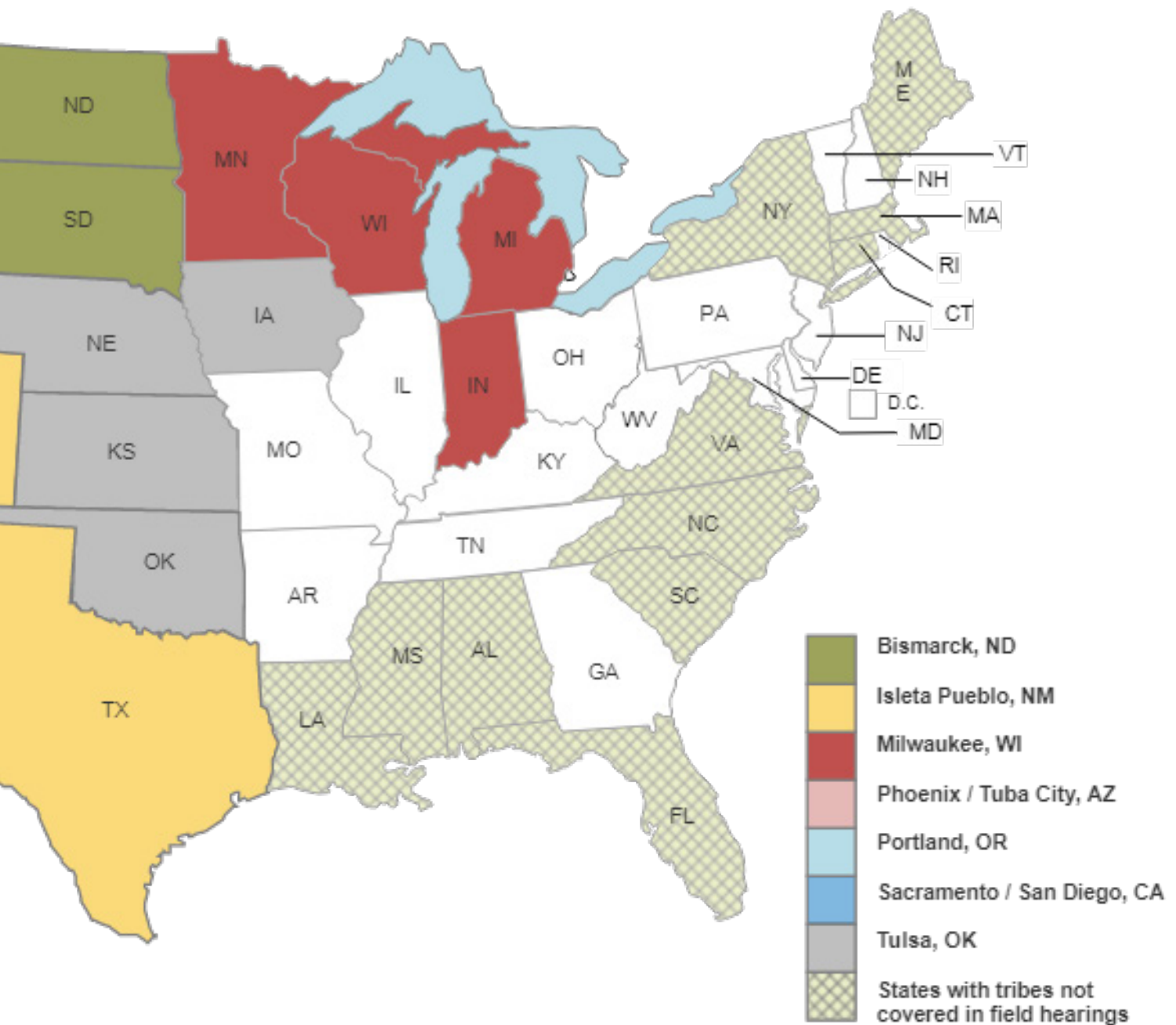
This hearing was held at the Tonaneesdizi Chapter House on tribal lands of the Navajo Nation in Tuba City, Arizona, thanks to the support of Hon. Ethel Branch, Attorney General of the Navajo Nation, and Katherine Belzowski of the Navajo Nation Department of Justice. Theresa Hatathlie, served as Moderator. Derrick Beetso, Jacqueline De León, Patty Ferguson Bohnie, and Dr. James Thomas Tucker served as questioners. Attorney General Branch served as Chair.

Witnesses included, in order of their testimony (an asterisk indicates a community member offering a public comment): James Atakai; Moroni Benally; Hon. Patty Hansen, Recorder, Coconino County, Arizona; Alta Edison; Darrell Marks; Hon. Edbert Little, General Director, Navajo Election Administration; Angelo Baca; Shirlee Smith*; and Brian Curley-Chambers.



Thank you to Robert Tanenbaum for allowing NARF to use his painting as cover art for this report.

Native American Voting Rights Coalition Field Hearing Regions



ENDNOTES

- 1 For more information about the NAVRC, see *About the Native American Voting Rights Coalition*, available at <https://vote.narf.org>
- 2 The W.K. Kellogg Foundation (WKKF), founded in 1930 as an independent, private foundation by breakfast cereal pioneer Will Keith Kellogg, is among the largest philanthropic foundations in the United States. Guided by the belief that all children should have an equal opportunity to thrive, WKKF works with communities to create conditions for vulnerable children so they can realize their full potential in school, work and life.
- 3 Indian Entities Recognized by and Eligible To Receive Services From the United States Bureau of Indian Affairs, 84 Fed. Reg. 1,200-05 (Feb. 1, 2019) (listing federally recognized tribes and Alaska Native villages), an additional tribe the Little Shell Tribe of Chippewa Indians received federal recognition in December 2019 see <https://www.narf.org/little-shell-recognition/>.
- 4 Norm DeWeaver, *American Survey Data on the American Indian/Alaska Native Population: A Look behind the Numbers* (Feb. 18, 2013), available at http://www.ncai.org/policy-research-center/initiatives/ACS_data_on_the_AIAN_Population_paper_by_Norm_DeWeaver.pdf.
- 5 U.S. Census Bureau, *Annual Estimates of the Resident Population by Sex, Single Year of Age, Race Alone or in Combination, and Hispanic Origin for the United States: April 1, 2010 to July 1, 2017*, available at hyperlink through <https://www.census.gov/newsroom/facts-for-features/2018/aian.html>.
- 6 *Id.*
- 7 National Congress of American Indians, *2018 Native Vote: An Update for Tribal Leaders, Every Native Vote Counts* (2018), available at <http://www.nativevote.org/wp-content/uploads/2018/02/Native-Vote-2018-Analysis-WEB-VERSION-FINAL.pdf>.
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- 9 National Congress of American Indians, *Fast Facts, Every Native Vote Counts* (2012), available at <http://www.ncai.org/initiatives/campaigns/NCAI-NativeVoteInfographic.pdf> (“Native Vote Infographic”).
- 10 *Id.*
- 11 *Id.*
- 12 Mark Dennison, *News Analysis: How Tester Won Montana’s U.S. Senate Race*, Missoulian (Nov. 11, 2012), available at https://missoulian.com/news/local/news-analysis-how-tester-won-montana-s-u-s-senate/article_550a66e8-2bbf-11e2-ae5c-001a4bcf887a.html.
- 13 Nebraska Democratic Party, *Nebraska’s Tribes Make Historic Joint Endorsement of Democratic Candidates*, (Oct. 17, 2018), available at <https://nebraskademocrats.org/press-releases/nebraskas-tribes-make-historic-joint-endorsement-of-democratic-candidates/>.
- 14 Native Vote Infographic, *supra* note 11.
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- 17 ²⁰ Jeff Barnard, *When Did People First Come to North America?* (Sept. 22, 2008), available at http://www.nbcnews.com/id/26819601/ns/technology_and-science-science/t/when-did-people-first-come-north-america/#.W5AaVRSmv7Y
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- 24 Frank McNitt, *Navaho Expedition: Journal of a Military Reconnaissance from Santa Fe, New Mexico, to the Navaho Country, Made in 1849 by Lieutenant James H. Simpson* 429 (1964).
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- 31 Paul Hutton, *Phil Sheridan and His Army* 33-35 (1985).
- 32 Heather Cox Richardson, *Wounded Knee: Party Politics and the Road to an American Massacre* (2010).
- 33 Kathryn Fort, *The Vanishing Indian Returns: Tribes, Popular Originalism, and the Supreme Court*, 57 *St. Louis L.J.* 297, 297-38 (2013).
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- 38 David Wallace Adams, *Education for Extinction: American Indians and the Boarding School Experience, 1875-1928* (1995).
- 39 *See, e.g.*, Matthew Fletcher, *American Indian Education: Counternarratives in Racism, Struggle, and the Law* (Routledge 2008); Jon Reynor & Jeanne Eder, *American Indian Education: A History* (Univ. of Okla. Press, 2d ed. 2017).
- 40 *See, e.g.*, Donna Deyhle, *Reflections in Place: Connected Lives of Navajo Women* (2009).
- 41 Russell Thornton, *Population History of Native North Americas* 9-50 (Michael Haines et al. eds., Cambridge Univ. Press 2000); *see also* Thomas Mann, 1491: *New Revelations of the Americas Before Columbus* (2006); David Stannard, *American Holocaust: The Conquest of the New World* (1993).
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- 47 *Allen v. Merrell*, 305 P.2d 490 (Utah 1956), *vacated as moot*, 353 U.S. 932 (1957).
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- 50 *In re Liquor Election in Beltrami Cty.*, 163 N.W. 988, 138 Minn. 42 (Minn. 1917). For an excellent survey of laws preventing Native people from voting in the late 1920s (after the Indian Citizenship Law had passed), *see* Neil Houghton, *The Legal Status of Indian Suffrage in the United States*, 19 *Cal. L. Rev.* 507 (1931).
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- 53 *Shirley v. Super. Ct.*, 109 Ariz. 510 (Ariz. 1973).
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- 55 *Porter v. Hall*, 34 Ariz. 308 (Ariz. 1928), *overruled in part*, *Harrison v. Laveen*, 67 Ariz. 337 (Ariz. 1948); *see also* *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831).
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- 61 Gordon Harrison, *Alaska's Constitution: A Citizen's Guide* (4th ed. Alaska Legislative Affairs Agency Apr. 2018), available at http://w3.legis.state.ak.us/docs/pdf/citizens_guide.pdf.
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- 64 Michael C. Walch, *Terminating the Indian Termination Policy*, 35 Stan. L. Rev. 1181 (1983).
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- 71 *Williams v. Lee*, 358 U. S. 217 (1959); *Winters v. United States*, 207 U.S. 564 (1908); *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975).
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- 74 See Fred Hoxie, *This Indian Country: American Indian Activists and the Place They Made* (2012); Charles Wilkinson, *Blood Struggle: The Rise of Modern Indian Nations* (2006).
- 75 See Alison Bernstein, *American Indians and World War II* (1991).
- 76 See National Congress of American Indians, *About NCAI*, available at <http://www.ncai.org/about-ncai>.
- 77 For a perspective on that era from an activist who participated in it, see Vine Deloria, *Custer Died for Your Sins: An Indian Manifesto* (Univ. of Okla. Press 2d ed. 1988).
- 78 See Native American Rts. Fund, *About Us*, available at <https://www.narf.org/about-us/>.
- 79 See Native Vote, *Every Native Vote Counts*, available at <http://www.nativevote.org>.
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- 84 See Native Vote, *supra* note 49 at 48-67, Table 3.1.
- 85 ACLU, *Settlement Agreement with the State of Alaska*, available at <https://www.aclu.org/legal-document/nick-et-al-v-bethel-et-al-settlement-agreement-state-alaska>.
- 86 Stipulated Judgment and Order, *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG, (D. Alaska Sept. 30, 2015) available at <https://www.narf.org>.
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- 91 ACLU of Mont., *Wandering Medicine v. Montana Secretary of State*, available at <https://www.aclumontana.org/en/cases/wandering-medicine-v-montana-secretary-state>.
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- 100 U.S. Census Bureau, Population Division, *Annual Estimates of the Resident Population by Sex, Age, Race Alone or in Combination, and Hispanic Origin for the United States and States: April 1, 2010 to July 1, 2016* (June 2017) (“2016 AIAN Estimates”). The 21 states were Alaska, Arizona, California, Colorado, Florida, Georgia, Illinois, Michigan, Minnesota, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, Virginia, Washington and Wisconsin. See *id.*
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- 104 *Id.*
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- 106 As California Secretary of State Alex Padilla explained, “The systemic challenges that impede access to the voting booth, not just for Native Americans but others, are very familiar... They’re the same that attempt to repress turnout and registration for Latinos and others. Namely, these factors include education attainment levels, the digital divide, access to transportation, poverty rates, or just frankly less experience in civic participation within the family.” Sacramento Tr., Alex Padilla, 108.
- 107 Sacramento Tr., Alex Padilla, 103-04.
- 108 Isleta Tr., Maggie Toulouse Oliver, 134.
- 109 Isleta Tr., Maggie Toulouse Oliver, 130-31.
- 110 San Diego Tr., Jean Schroedel, 13.
- 111 See The Leadership Conference Education Fund, Table 1a: States Ranked by Number of American Indian/Alaska Natives (race alone or combination) living in Hard-to-Count (HTC) Census Tracts, available at <http://civilrightsdocs.info/pdf/census/2020/Table1a-States-Number-AIAN-HTC.pdf>.
- 112 *Id.*
- 113 See The Leadership Conference Education Fund, Table 1b: States Ranked by Percent of American Indian/Alaska Natives (race alone or combination) living in Hard-to-Count (HTC) Census Tracts, available at <http://civilrightsdocs.info/pdf/census/2020/Table1b-States-Percent-AIAN-HTC.pdf>.
- 114 U.S. Census Bureau, *QuickFacts: Bethel Census Area, Alaska* (“BCA QuickFacts”), available at <https://www.census.gov/quickfacts/fact/table/bethelcensusareaalaska/PST045216>.
- 115 See U.S. Census Bureau, *QuickFacts: Tennessee* (“Tennessee QuickFacts”), available at <https://www.census.gov/quickfacts/TN>.
- 116 See BCA QuickFacts, *supra* note 117. That compares to a population density of 153.9 persons per square mile in Tennessee. See Tennessee QuickFacts, *supra* note 118.
- 117 Tuba City Tr., Patty Hansen, 96-97; see also Phoenix Tr., Rani Williams, 25.
- 118 Phoenix Tr., Roland Maldonado, 119.
- 119 Phoenix Tr., Roland Maldonado, 120.
- 120 Portland Tr., Norma Sanchez, 119-120.

- 121 San Diego Tr., Monique Castro, 135-37.
- 122 Sacramento Tr., Chrissie Castro, 160-61. Urban Native voters “really want to be in a space,” such as an Indian Center, where they can meet to discuss what is on the ballot. Voter guides and one-on-one discussions can help, but having a central location tends to be the most effective means of outreach. *Id.* at 168-70.
- 123 Sacramento Tr., Chrissie Castro, 165-66; *see also* San Diego Tr., Monique Castro, 119.
- 124 San Diego Tr., Robin Thundershield, 98.
- 125 Portland Tr., Matthew Tomaskin, 92-94.
- 126 Sacramento Tr., Beverly Harry, 16-17.
- 127 San Diego Tr., Monique Castro, 116.
- 128 Sacramento Tr., Carlos Negrete, 43.
- 129 Sacramento Tr., Buster Attebery, 55-56; Sacramento Tr., Fatima Abbas, 61.
- 130 Rosanda Suetopka, *Wet Weather Wreaks Havoc on Rez Bus Routes*, Navajo-Hopi Observer (Dec. 16, 2014), available at <https://www.nhnews.com/news/2014/dec/16/wet-weather-wreaks-havoc-on-rez-bus-routes/>.
- 131 Isleta Tr., Wilfred Jones, 17.
- 132 Sacramento Tr., Buster Attebery, 56.
- 133 Isleta Tr., Laurie Weahkee, 195, 221.
- 134 Isleta Tr., Terry Whitehat, 19.
- 135 Bismarck Tr., Gerald Webster, 250-52.
- 136 San Diego Tr., Jean Schroedel, 17-18.
- 137 San Diego Tr., Jean Schroedel, 21-22; San Diego Tr., Amy Nantkes, 47-48, 50-51.
- 138 Isleta Tr., Terry Whitehat, 11-18.
- 139 Isleta Tr., Wilfred Jones, 16.
- 140 Bismarck Tr., Stewart – Peregoy, 103 (Crow, Northern Cheyenne); Bismarck Tr., Erica Shelby, 140, 157 (Flathead).
- 141 Bismarck Tr., Gerry Webster, 270 (Standing Rock).
- 142 Bismarck Tr., Gerry Webster, 257.
- 143 Bismarck Tr., Matt Campbell, 167; *see also* Bismarck Tr., Gerry Webster, 269-70.
- 144 Bismarck Tr., Gerry Webster, 257.
- 145 Bismarck Tr., Gerry Webster, 269.
- 146 Portland Tr., Patsy Whitefoot Test., 77.
- 147 Milwaukee Tr., Paul Demain, 69-78, 79-86, 94, 96, 110-13.
- 148 Parkhurst et al., *The Digital Reality: E-Government and Access to Technology and Internet for American Indian and Alaska Native Populations* 3 (referring to an FTC study), available at <https://pdfs.semanticscholar.org/4bb4/f5efed1cf4ec342b5d45dd824bbrod9bb0f2.pdf>.
- 149 Brad Smith, President of Microsoft, *A rural broadband strategy: connecting rural America to new opportunities* (July 10, 2017), available at <https://blogs.microsoft.com/on-the-issues/2017/07/10/rural-broadband-strategy-connecting-rural-america-new-opportunities/>.
- 150 Sacramento Tr., Beverly Harry, 20-21; *see also* San Diego Tr., Jean Schroedel, 34.
- 151 Portland Tr., Barbara Lewis, 51; *see also* Portland Tr., Matt Tomaskin, 92-94; Portland Tr., Carol Evans, 205.
- 152 Portland Tr., Rhonda Medcalf, 52.
- 153 Isleta Tr., Maggie Toulouse Oliver, 137-38; Isleta Tr., Everett Chavez, 158.
- 154 GAO, *BROADBAND INTERNET-FCC’s Data Overstate Access on Tribal Lands*, United States Government Accountability Office, 1 (September 2018), available at <https://www.gao.gov/assets/700/694386.pdf>.
- 155 *Id.* at 14, 25.
- 156 *See* Gerry Smith, *On Tribal Lands, Digital Divide Brings New Form of Isolation*, Huffpost, Apr. 23, 2012, available at https://www.huffingtonpost.com/2012/04/20/digital-divide-tribal-lands_n_1403046.html.
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- 158 *Id.* at 21.
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- 160 BROADBAND INTERNET-FCC's Data Overstate Access on Tribal Lands, United States Government Accountability Office, at 22 (September 2018), <https://www.gao.gov/assets/700/694386.pdf>.
- 161 *Id.* at 22 n.41.
- 162 *Id.* at 24-25.
- 163 San Diego Tr., Jean Schroedel, 34.
- 164 See Isleta Tr., Shirlee Smith, 92; Tuba City Tr., Ethel Branch, 8.
- 165 U.S. Census Bureau, 2020 Census Operational Plan: A New Design for the 21st Century 8 (version 3.0) (Sept. 2017), available at <https://www2.census.gov/programs-surveys/decennial/2020/program-management/planning-docs/2020-oper-plan3.pdf>.
- 166 See Mapping Hard to Count (HTC) Communities for a Fair and Accurate 2020 Census, available at <http://www.censushardtcountmaps2020.us/>.
- 167 See U.S. Census Bureau, Office of Congressional and Intergovernmental Affairs, PowerPoint Presentation, Briefing on American Indian Alaska Natives 2020 Tribal Consultation Meetings 10 (May 26, 2016) ("Tribal Consultations"), available at <https://www2.census.gov/cac/nac/meetings/2016-05/2016-alexander.pdf>.
- 168 *Id.*
- 169 Tuba City Tr., Ethel Branch, 8.
- 170 Portland Tr., Carol Evans, 205.
- 171 Sacramento Tr., Thomas Eugene, 37.
- 172 Sacramento Tr., Beverly Harry, 21.
- 173 Tribal Consultations, at 10.
- 174 Isleta Tr., Maggie Toulouse Oliver, 118, 137.
- 175 Isleta Tr., Laurie Weahkee, 196.
- 176 Phoenix Tr., Joyce Lopez, 173-74.
- 177 Isleta Tr., Laurie Weahkee, 194-95.
- 178 See U.S. Census Bureau, 2016 American Community Survey 1-Year Estimates, Selected Population Profile in the United States: American Indian and Alaska Native alone (300, A01-Z99) ("2016 AIAN Profile"), available at <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk>.
- 179 Nancy Pindus et al., U.S. Dep't of Housing and Urban Development, Housing Needs of American Indians and Alaska Natives in Tribal Areas (U.S. Dep't of Hous. and Urb. Dev. 29 (2017)).
- 180 See U.S. Census Bureau, Flowchart of How the Law Prescribes the Determination of Covered Areas under the Language Minority Provisions of Section 203 of the Voting Rights Act 2 (Dec. 5, 2016), available at https://www.census.gov/rdo/pdf/2_PrescribedFlowFor203Determinations.pdf. "Illiteracy" is defined as including those persons who "have less than a 5th grade education." *Id.*
- 181 See U.S. Census Bureau, Voting Rights Determination File: Section 203 Determinations (Dec. 5, 2016), Public Use Data File and Technical Documentation (Excel spreadsheet of "Determined Areas Only") ("Section 203 Determination File"), available at https://www.census.gov/rdo/data/voting_rights_determination_file.html. In Alaska, the illiteracy rate among LEP voting-age citizens in covered areas compares to the national illiteracy rate of 1.31 percent as follows: 30.5 times higher for Aleut-speakers; 21.7 times higher for Athabaskan-speakers; 11.4 times higher for Yup'ik-speakers; and 6.3 times higher for Inupiat-speakers. *See id.*
- 182 See Section 203 Determination File, *supra* note 184. In Arizona, the illiteracy rate among LEP voting-age citizens in covered areas compares to the national illiteracy rate of 1.31 percent as follows: 19.1 times higher for Navajo-speakers; and 5.2 times higher for Apache-speakers. *See id.*
- 183 See Section 203 Determination File, *supra* note 184. In Mississippi, the illiteracy rate among LEP voting-age citizens in covered areas compares to the national illiteracy rate of 1.31 percent as follows: 25.9 times higher for Choctaw-speakers. *See id.*
- 184 See Section 203 Determination File, *supra* note 184. In New Mexico, the illiteracy rate among LEP voting-age citizens in covered areas compares to the national illiteracy rate of 1.31 percent as follows: 14.6 times higher for Navajo-speakers; and 6.7 times higher for Apache-speakers. *See id.*
- 185 Portland Tr., Henry Cagey, 16.
- 186 Sacramento Tr., Ruthie Maloney, 133.
- 187 Tulsa Tr., Chuck Hoskin, Jr., 141.
- 188 Portland Tr., Cagey Test., 17.
- 189 Tulsa Tr., Chuck Hoskin, Jr., 124.

- 190 San Diego Tr., Jean Schroedel, 13.
- 191 Tuba City Tr., Ethel Branch, 8.
- 192 Sacramento Tr., Ruthie Maloney, 130-31.
- 193 *Id.*; Tuba City Tr., Ethel Branch, 8; Isleta Tr., Debra Haaland, 209-10.
- 194 U.S. Census Bureau, Profile America Facts for Features: CB16-FF.22, American Indian and Alaska Native statistics, available at <https://www.census.gov/newsroom/facts-for-features/2016/cb16-ff22.html> (Nov. 2, 2016) (“2016 AIAN FFF”).
- 195 U.S. Census Bureau, Table B17001C: Selected Population Profile in the United States: 2015 American Community Survey 1-Year Estimates (last visited on Feb. 7, 2018), available at https://factfinder.census.gov/bkmk/table/1.0/en/ACS/15_1YR/B17001C/0100000US0100089US.
- 196 2017 AIAN Summary, *supra* note 104, at 19.
- 197 Phoenix Tr., Stephen Lewis, 127; Phoenix Tr., Steve Titla, 241.
- 198 Sacramento Tr., Carlos Negrete, 42.
- 199 San Diego Tr., Jean Schroedel, 13.
- 200 Portland Tr., Norma Sanchez, 119-120.
- 201 Bismarck Tr., Webster Test., 255-256.
- 202 Bismarck Tr., Carol Davis, 210.
- 203 Portland Tr., Mike Tulee, 179.
- 204 *Id.* 2017 AIAN Summary, *supra* note 104, at 19.
- 205 *See* Tuba City Tr., Ethel Branch, 8; Sacramento Tr., Buster Attebery, 57; Portland Tr., Norma Sanchez, 148-149.
- 206 *Id.* 2017 AIAN Summary, *supra* note 104, at 19; *see also* Sacramento Tr., Beverly Harry, 17-18.
- 207 *Id.* 2017 AIAN Summary, *supra* note 104, at 19.
- 208 Sacramento Tr., Alex Padilla, 108.
- 209 Tulsa Tr., Christina Blackcloud, 9-10 (Meskwaki Settlement in Iowa); Bismarck Tr., Matt Campbell, 167 (North Dakota); Phoenix Tr., Verlon Jose, 104-05 (Tohono O’odham in Arizona); Phoenix Tr., Rani Williams, 27, Phoenix Tr., Solveig Parson, 30, Phoenix Tr., Joyce Lopez, 175, 202, Phoenix Tr., Claude Jackson, 203 (Arizona tribal members living on the reservation); Isleta Tr., Maxi Zuni, 101-02 (Isleta Pueblo in New Mexico); Isleta Tr., Wilfred Jones, 17 (Navajo voters in San Juan County, Utah); Sacramento Tr., Thomas Eugene, 36 (Tule River in California).
- 210 Milwaukee Tr., Regina Gasco-Bentley, 130-38.
- 211 Tuba City Tr., James Attakai, 27.
- 212 Isleta Tr., Wilfred Jones, 17; Phoenix Tr., Verlon Jose, 104-05.
- 213 Bismarck Tr., Webster Test., 264.
- 214 Nancy Pindus et al., Housing Needs of American Indians and Alaska Natives in Tribal Areas 84 (U.S. Dep’t of Hous. and Urb. Dev. 2017).
- 215 *See* 2017 AIAN Summary, *supra* note 104.
- 216 Pindus, *supra* note 217, at 76-77.
- 217 *Id.* at 79.
- 218 *Id.* at 82.
- 219 *Id.* at 84.
- 220 Substance Abuse and Mental Health Services Administration (SAMHSA), Expert Panel on Homelessness among American Indians, Alaska Natives, and Native Hawaiians 5 (2012), available at https://www.usich.gov/resources/uploads/asset_library/Expert_Panel_on_Homelessness_among_American_Indians%2C_Alaska_Natives%2C_and_Native_Hawaiians.pdf.
- 221 *Id.* at 8 (citing HUD & VA, Veteran Homelessness: A Supplemental Report to the 2010 Annual Homeless Assessment Report to Congress).
- 222 Pindus, *supra* note 217, at 85.
- 223 *Id.*
- 224 *Id.*
- 225 *Id.* at 74

- 226 *Id.*
- 227 *Id.*
- 228 *Id.* at 58
- 229 *Id.*
- 230 *Id.* at 76
- 231 *Id.*
- 232 Phoenix Tr., Sarah Gonski, 232.
- 233 Portland Tr., Henry Cagey, 21.
- 234 See U.S. Census Bureau, 2015 National Content Test Race and Ethnicity Analysis Report 32, table 2 (Feb. 28, 2017).
- 235 U.S. Census Bureau, 2020 Census Local Update of Census Addresses Program Improvement Project Recommendations 2 (Apr. 13, 2015), available at https://www2.census.gov/geo/pdfs/partnerships/2020_luca_recommendation.pdf.
- 236 Sacramento Tr., Thomas Eugene, 34.
- 237 Sacramento Tr., Beverly Harry, 16 (Pyramid Lake in Nevada); Sacramento Tr., Thomas Eugene, 34 (Tule River in California).
- 238 Tuba City Tr., Alta Edison, 63.
- 239 Phoenix Tr., Natalie Landreth, 225; Phoenix Tr., Sarah Gonski, 231-32; Phoenix Tr., Steve Titla, 261; Tuba City Tr., Darrell Marks, 140-41.
- 240 Phoenix Tr., Rani Williams, 24-25; see also Tuba City Tr., Patty Hansen, 48; Tuba City Tr., Darrell Marks, 141-42.
- 241 Phoenix Tr., Stephen Lewis, 130-33.
- 242 Tuba City Tr., James Attakai, 20-21, 25-26; see also Tuba City Tr., Moroni Benally, 35-36.
- 243 Tuba City Tr., James Attakai, 20-21.
- 244 Phoenix Tr., Rani Williams, 40-41; Phoenix Tr., Edison Wauneka, 95-96; Tuba City Tr., Alta Edison, 84-85; Tuba City Tr., Darrell Marks, 117; Sacramento Tr., Ruthie Maloney, 134.
- 245 Phoenix Tr., Verlon Jose, 101, 103-04.
- 246 Tuba City Tr., Darrell Marks, 137-39.
- 247 Tuba City Tr., Brian Curley-Chambers, 223.
- 248 San Diego Tr., Kenny Ramos, 88.
- 249 Tuba City Tr., Darrell Marks, 113-16.
- 250 Heather K. Gerken, *The Democracy Index: Why Our Election System Is Failing and How to Fix It* 1 (2009).
- 251 NCSL, *Election Costs: Who Pays and with Which Funds*, available at <http://www.ncsl.org/research/elections-and-campaigns/election-costs-who-pays-and-with-which-funds.aspx> (last visited July 3, 2019) (“NCSL Who Pays”).
- 252 *Id.*
- 253 Gerken, *supra* note 253, at 20.
- 254 *Id.*
- 255 *Id.*
- 256 NCSL Who Pays, *supra* note 254.
- 257 *Id.*
- 258 *Id.*
- 259 NCSL, *Election Costs: What States Pay*, available at <http://www.ncsl.org/research/elections-and-campaigns/election-costs.aspx> (last visited July 3, 2019) (“NCSL What States Pay”).
- 260 *Id.*
- 261 NCSL Who Pays, *supra* note 254.
- 262 Gerken, *supra* note 253, at 101.
- 263 *Id.*

- 264 NCSL Who Pays, *supra* note 254.
- 265 *Id.*
- 266 Michael D. Hernandez, *Worlds Apart: Urban and Rural Voting*, The Canvass: States and Election Reform (Oct. 2014), available at http://www.ncsl.org/Documents/legismgt/elect/Canvass_Oct_2014_No_52.pdf.
- 267 NCSL What States Pay, *supra* note 262.
- 268 *Id.*
- 269 NCSL Who Pays, *supra* note 254.
- 270 See NAVRC Report, *supra* note 5, at 11 (“Direct pressure should also be applied to Buffalo County, which has continued to deny equal opportunity to vote and register to vote for members of the Crow Creek Sioux Tribe even with the availability of HAVA funds. Buffalo County’s county courthouse is in a community of less than 12 people and the County Auditor refuses to open a satellite for more than a few hours each election in Fort Thompson, a community of more than 1,400 Native Americans more than 55 miles round-trip from the county courthouse.”)
- 271 See NAVRC Report, *supra* note 5. The survey respondents included 644 Native voters in Arizona, 1,052 in Nevada, 602 in New Mexico, and 502 in South Dakota. NAVRC Report, *supra*, at 8, 38, 67.
- 272 See NAVRC Report, *supra* note 5, at 15, 45, 77, 111. Respondents were asked, “Which government do you trust most to protect your rights?” *Id.* at 15, 45, 76-77. Among respondents in the other two states, 22.1 percent identified the federal government in Arizona and 27.4 percent identified the federal government in New Mexico. See *id.* at 77, 111.
- 273 See *supra* Part II, Historical Denial of Indian Voting.
- 274 Cohen, *supra* note 45 at 157.
- 275 1858 Minn. Const., Art. 7, § 1(4), available at <http://www.mnhs.org/library/constitution/transcriptpages/dt.php>.
- 276 *Trujillo v. Garley*, Civ. No. 1353 (D.N.M. 1948); *Allen v. Merrell*, 305 P.2d 490, 6 Utah 32 (Utah 1956), *vacated as moot*, 353 U.S. 932 (1957).
- 277 Harrison, *supra* note 64; Glenn Phelps, *Representation Without Taxation: Citizenship and Suffrage in Indian Country*, 9 Am. Indian Q. 136 (1985).
- 278 *Porter v. Hall*, 34 Ariz. 308 (Ariz. 1928).
- 279 Portland Tr., Matthew Tomaskin, 95-96.
- 280 Phoenix Tr., Travis Lane, 94.
- 281 San Diego Tr., Robin Thundershield, 98 (this is also the source of the quote for the title of this report).
- 282 Isleta Tr., Shirlee Smith, 85.
- 283 Portland Tr., Patricia Whitefoot, 70.
- 284 Isleta Tr., Wilfred Jones, 28.
- 285 Sacramento Tr., Carlos Negrete, 42.
- 286 Portland Tr., Carol Evans, 193.
- 287 Phoenix Tr., Roland Maldonado, 156.
- 288 Isleta Tr., Wilfred Jones, 33-34.
- 289 Portland Tr., Barbara Lewis, 42.
- 290 Bismarck Tr., Donita Loudner, 51.
- 291 Phoenix Tr., Stephanie Thompson, 27.
- 292 Phoenix Tr., Ally Von Seggern, 212-13.
- 293 Bismarck Tr., Donita Loudner, 33.
- 294 Bismarck Tr., Erica Shelby, 140.
- 295 Bismarck Tr., Donita Loudner, 23-24.
- 296 Phoenix Tr., Lewis, 135.
- 297 Portland Tr., Lewis, 139-41.
- 298 San Diego, Nantkes, 51.
- 299 Portland Tr., Miller, 175.

- 300 Phoenix Tr., Claude Jackson, 186.
- 301 Isleta Tr., Martin Aguilar, 146.
- 302 2016 AIAN FFF, *supra* note 197 (27 percent).
- 303 See U.S. Census Bureau, Native American Languages Spoken at Home in the United States and Puerto Rico: 2006-2010 at 2 (Dec. 2011).
- 304 See U.S. Census Bureau, Public Use Data File for the 2016 Determinations under Section 203 of the Voting Rights Act, available at https://www.census.gov/rdo/data/voting_rights_determination_file.html (Dec. 5, 2016).
- 305 Sacramento Tr., Alex Padilla, 108-09.
- 306 See 52 U.S.C. § 10503. Other permanent provisions likewise can be used to ensure that LEP voters receive assistance. Section 2, the VRA's permanent non-discrimination provision, applies nationwide and has been used to secure language assistance for voters who are denied equal voting opportunities by English-only election procedures. See 52 U.S.C. 10301; Tucker, *supra* note 72, at 43-45. Section 208 supplements the language assistance provisions by protecting the right of any voter, including language minority citizens, who needs assistance at the polls, to receive that assistance from the person of their choice. See 52 U.S.C. § 10508.
- 307 See 52 U.S.C. § 10503(e).
- 308 See 28 C.F.R. § 55.10.
- 309 See *id.*
- 310 See 52 U.S.C. § 10503(b)(1). An extended discussion of what jurisdictions must do to comply with Section 203 is provided in Tucker, *supra* note 72, at 90-105, 261-89.
- 311 Phoenix Tr., Brian Curley-Chambers, 20.
- 312 See 52 U.S.C. § 10503(c); 28 C.F.R. §§ 55.15, 55.18.
- 313 See 52 U.S.C. § 10503(c). Notably, there is no actual definition for the term “historically unwritten,” which is found nowhere else in law. It appears to have been invented for Section 203.
- 314 *Id.*
- 315 See Tucker, *supra* note 72, at 284-86 (summarizing rulings in *Nick v. City of Bethel*, case no. 3:07-cv-0098-TMB (D. Alaska filed June 2007); *Apache County v. United States*, Civil Action No. 77-1515, mem. op. (D.D.C. June 12, 1980) (three-judge court).
- 316 See generally 52 U.S.C. § 10503(b)(3)(A) (defining “voting materials” as including “assistance”).
- 317 28 C.F.R. § 55.20(a).
- 318 *Id.* at § 55.20(b).
- 319 *Id.* at § 55.20(c).
- 320 See U.S. Comm’n on Civil Rts., A Citizen’s Guide to Understanding the Voting Rights Act 16 (1984). The jurisdiction also should take appropriate steps to confirm that “bilingual” poll workers actually are bilingual in English and the covered minority language, and also are able to read and write in both languages, if applicable. See *id.* For more discussion, see Tucker, *supra* note 72, at 102-05.
- 321 42 U.S.C. § 1973.
- 322 See *Harris v. Graddick*, 593 F. Supp. 128 (M.D. Ala. 1984). The absence of minority language poll officials may discourage language minority citizens from voting because they do not feel welcome at polling places, particularly if they have been mistreated at the polls in the past or no language assistance is available for them in the present. See *id.* at 131-32; U.S. Comm’n on Civil Rts., The Voting Rights Act: Unfulfilled Goals 79-80 (1981).
- 323 “A person is in the voting age population if that person is at least 18 years old . . . That is measured by the American Community Survey as well as the 2010 Census.” U.S. Census Bureau, *Statistical Modeling Methodology for the Voting Rights Act Section 203 Language Assistance Determinations 7* (Dec. 2011) [hereinafter “Statistical Modeling”], available at http://www.census.gov/rdo/data/voting_rights_determination_file.html (click on the link marked “Download the October 13th, 2011 public use data” then open “StatisticalModelingMethodology.pdf”). “A person’s U.S. citizenship is measured by the American Community Survey.” *Id.*
- 324 A single language group does “not permit subgroups of languages to be aggregated together to trigger coverage for the entire language group. For example, Chinese, Korean, and Vietnamese could not be aggregated together to meet the 5 percent trigger for Asian American language coverage.” Tucker, *supra* note 72, at 82. Instead, each language within the Asian language group, such as Chinese, must “meet the trigger individually.” *Id.*
- 325 See 52 U.S.C. § 10503(b)(2)(A)(i); see also Statistical Modeling, *supra* note 326, at 10-11 (describing the statistical formulas used for political subdivisions of states and American Indian Area & Alaska Native Area Level Coverage).
- 326 See 52 U.S.C. § 10503(b)(2)(A)(i)(II)-(III); Tucker, *supra* note 72, at 78; see also Statistical Modeling, *supra* note 326, at 8, 10 (describing the statistical formula used for statewide coverage using the Five Percent Trigger).
- 327 52 U.S.C. § 10503(b)(3)(B).

- 328 See 52 U.S.C. § 10503(b)(2)(A)(ii).
- 329 52 U.S.C. § 10503(b)(3)(E). See also Statistical Modeling, *supra* note 326, at 8 (“A person is said to be illiterate if the person has less than a fifth grade education, i.e., that the person has only completed the fourth grade or lower. That is measured by the American Community Survey.”).
- 330 See 121 Cong. Rec. H4719 (daily ed. June 2, 1975) (statement of Rep. Edwards).
- 331 See U.S. Census Bureau, *How the Law Prescribes the Determination of Covered Areas under the Language Minority Provisions of Section 203 of the Voting Rights Act* (Dec. 2016) (flowchart), available at https://www2.census.gov/programs-surveys/decennial/rdo/about/voting-rights-determination/2_PrescribedFlowFor203Determinations.pdf; Statistical Modeling, *supra* note 326, at 35.
- 332 See Department of Commerce, Voting Rights Act Amendments of 2006, Determinations Under Section 203, 76 Fed. Reg. 63,602 to 63,607 (Oct. 13, 2011) (2011 Determinations).
- 333 See Department of Commerce, Voting Rights Act Amendments of 1992, Determinations Under Section 203, 67 Fed. Reg. 48,871 to 48,877 (July 26, 2002) (2002 Determinations).
- 334 Compare 2011 Determinations, *supra* note 335, with 2002 Determinations, *supra* note 336.
- 335 Compare 2011 Determinations, *supra* note 335, with 2002 Determinations, *supra* note 336 (illustrating how jurisdictions in New Mexico that were covered for Zuni under the 2002 Determinations now are covered for Pueblo languages). The Pueblo group also includes the Havasupai, Keres, Tiwa, and Towa Indian languages, which the Census Bureau identified separately in the Section 203 determinations it issued in 1992. See Tucker, *supra* note 72, at 117, 331-32.
- 336 For example, Oklahoma had 23 counties covered for an American Indian language in the first Section 203 determinations made between 1975 and 1977. See *id.* at 342. As a result of the addition of the Nickles Amendment in the 1982 Amendments to the VRA, which added the “limited-English proficient” requirement to the coverage formulas, only one county was covered for an American Indian language in Oklahoma following the 1984 coverage determinations. See *id.* Even after Congress amended the VRA to add the Reservation Trigger to remove the discriminatory impact of the Nickles Amendment, only one county remained covered in Oklahoma after the 1992 coverage determinations. See *id.* That is likely because there were not enough LEP tribal elders alive who spoke Cherokee (the predominant American Indian language covered in Oklahoma) to trigger coverage by 1992. See *id.*
- 337 Statistical Modeling, *supra* note 326, at 12.
- 338 See U.S. Census Bureau, *Memorandum Regarding the 2011 Determinations 6* (Dec. 2011), available at <http://www.census.gov/rdo/data/voting-rights-determination-file.html> (click on the link marked “Download the October 13th, 2011 public use data” then open “02_RecommendationMemo.pdf”).
- 339 *Id.*
- 340 Compare 2011 Determinations, *supra* note 335, with 2002 Determinations, *supra* note 336.
- 341 Compare 2011 Determinations, *supra* note 335, with Department of Commerce, Voting Rights Act Amendments of 2006, Determinations Under Section 203, 81 Fed. Reg. 87,532 to 87,538 (Dec. 5, 2016) (2016 Determinations).
- 342 Phoenix Tr., Brian Curley-Chambers, 23.
- 343 Phoenix Tr., Brian Curley-Chambers, 38.
- 344 Phoenix Tr., Verlon Jose, 114, 116.
- 345 See Tucker, *supra* note 72, at 342.
- 346 Tulsa Tr., Chuck Hoskin, Jr., 135-37.
- 347 Milwaukee Tr., Regina Gasco-Bentley, 130-38.
- 348 Tuba City Tr., Patty Hansen, 52-53.
- 349 Phoenix Tr., Brian Curley-Chambers, 23; Tuba City Tr., Brian Curley-Chambers, 229.
- 350 U.S. Census Bureau, Press Release: Census Bureau Releases 2016 Determinations for Section 203 of the Voting Rights Act (Dec. 5, 2016), available at <https://www.census.gov/newsroom/press-releases/2016/cb16-205.html>.
- 351 Phoenix Tr., Verlon Jose, 137-38.
- 352 See 52 U.S.C. § 10503(c).
- 353 See Tucker, *supra* note 72, at 94-98.
- 354 *Id.* at 284-85.
- 355 See James T. Tucker, Natalie A. Landreth & Erin Dougherty Lynch, “Why Should I Go Vote Without Understanding What I Am Going to Vote For??: The Impact of First Generation Voting Barriers on Alaska Natives, 22 Mich. J. Race & Law 327, 360-61 (2017).
- 356 See *id.* at 361-62.
- 357 *Id.* at 362.
- 358 *Id.*

- 359 *Id.*
- 360 *Id.* at 363.
- 361 *Id.*
- 362 *Id.* at 364-77.
- 363 Phoenix Tr., Brian Curley-Chambers, 20.
- 364 See Tucker, *supra* note 72, at 282-83.
- 365 Isleta Tr., Shirlee Smith, 88.
- 366 Tuba City Tr., Edgar Little, 168-69; Tuba City Tr., Shirlee Smith 206.
- 367 Tuba City Tr., Patty Hansen, 102-03 (observing that written translations in Navajo makes it easier for bilingual poll workers to ensure that election terms are being uniformly translated the same way).
- 368 Isleta Tr., Shirlee Smith, 87.
- 369 Phoenix Tr., Brian Curley-Chambers, 20.
- 370 Tuba City Tr., Patty Hansen, 104-05; Tuba City Tr., Alta Edison, 104-05.
- 371 Phoenix Tr., Verlon Jose, 115.
- 372 Isleta Tr., Shirlee Smith, 88.
- 373 Isleta Tr., Shirlee Smith, 82-84.
- 374 Isleta Tr., Shirlee Smith, 93-94; Tuba City Tr., Shirlee Smith 217-18.
- 375 Sacramento Tr., Chrissie Castro, 169.
- 376 See Tucker, *supra* note 72, at 270-71.
- 377 *Id.* at 274-75.
- 378 San Diego Tr., Monique Castro, 123-24.
- 379 Portland Tr., Julie Johnson, 248-49.
- 380 Portland Tr., Carol Evans 249.
- 381 Tuba City Tr., Angelo Baca, 179.
- 382 Isleta Tr., Shirlee Smith, 89.
- 383 Isleta Tr., Linda Yardley, 167.
- 384 Tuba City Tr., Alta Edison, 67.
- 385 Isleta Tr., Maggie Toulouse Oliver, 122-23; see also Isleta Tr., Surete Shije, 140.
- 386 Tucker, Landreth & Dougherty Lynch, *supra* note 358, at 376.
- 387 Isleta Tr., Shirlee Smith, 87, 104; Tuba City Tr., Shirlee Smith 207.
- 388 Isleta Tr., Shirlee Smith, 104-05.
- 389 Isleta Tr., Shirlee Smith, 87.
- 390 Isleta Tr., Martin Aguilar, 147.
- 391 Isleta Tr., Martin Aguilar, 146-47.
- 392 Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 5, 96 Stat. 131, 134-35 (codified as Section 208 of the VRA at 52 U.S.C. § 10508).
- 393 S. REP. NO. 97-417, at 62 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 240.
- 394 See S. REP. NO. 97-417 at 63 (1982), reprinted in 1982 U.S.C.C.A.N. 241.
- 395 Tucker, *supra* note 72, at 151.
- 396 *Id.* at 276-66.

- 397 See *Nick v. City of Bethel*, case no. 3:07-cv-0098-TMB, docket 327 at 9-10 (D. Alaska filed July 30, 2008).
- 398 Oregon Tr., Cagey Test., 17-18.
- 399 Phoenix Tr., Joyce Lopez, 208-09.
- 400 Phoenix Tr., Ally Von Seggern, 213-14.
- 401 Isleta Tr., Shirlee Smith, 79-80, 84-85.
- 402 The text on Alaska that follows is drawn from Tucker, Landreth & Dougherty Lynch, *supra* note 358, at 358-59, 372-74, 376-79.
- 403 Trial Tr. 881:15-884:2, *Toyukak v. Treadwell*, No. 3:13-cv-00137 (D. Alaska June 26, 2014) (quoting Exhibit 330).
- 404 *Id.* at 883 (referencing Exhibit 330).
- 405 *Id.* at 661 (referencing Exhibit 321).
- 406 See ALASKA STAT. §§ 15.58.010 (2014), 15.58.080 (2000).
- 407 See, e.g., Official Election Pamphlets, available at <http://www.elections.alaska.gov/Core/publications.php>.
- 408 See ALASKA STAT. § 15.58.020 (2014).
- 409 See Complaint at ¶ 38, *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska July 22, 2013), docket No. 1.
- 410 See *Apache County v. United States*, Civil Action No. 77-1515, mem. op. (D.D.C. June 12, 1980) (three-judge court).
- 411 Tr. of Decision of the Court, *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska Sept. 3, 2014).
- 412 See Stipulated Judgment and Order, *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska Sept. 30, 2015), docket no. 282.
- 413 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).
- 414 Phoenix Tr., Edison Wauneka, 78.
- 415 See *Apache County v. United States*, Civil Action No. 77-1515, mem. op. (D.D.C. June 12, 1980) (three-judge court).
- 416 Phoenix Tr., Brian Curley-Chambers, 20-21.
- 417 Tuba City Tr., Brian Curley-Chambers, 227.
- 418 Phoenix Tr., Brian Curley-Chambers, 21-22.
- 419 Tuba City Tr., Brian Curley-Chambers, 227.
- 420 Phoenix Tr., Brian Curley-Chambers, 22-23.
- 421 Phoenix Tr., Brian Curley-Chambers, 43-44.
- 422 Isleta Tr., Maggie Toulouse Oliver, 124-25.
- 423 Isleta Tr., Martin Aguilar, 149.
- 424 Isleta Tr., Maggie Toulouse Oliver, 122, 127-28.
- 425 Isleta Tr., Maxi Zuni, 100.
- 426 Isleta Tr., Helen Padilla, 42-44, 57, 59.
- 427 Isleta Tr., Laurie Weahkee, 215-16.
- 428 Isleta Tr., Wilfred Jones, 17.
- 429 Tuba City Tr., Moroni Benally 38.
- 430 Tuba City Tr., Moroni Benally, 40-41.
- 431 Isleta Tr., Wilfred Jones, 25-27.
- 432 Isleta Tr., Wilfred Jones, 27-28.
- 433 Isleta Tr., Wilfred Jones, 27-28.
- 434 Isleta Tr., Terry Whitehat, 10.
- 435 Tuba City Tr., James Attakai 14.

- 436 Tuba City Tr., James Attakai 14.
- 437 Tuba City Tr., Moroni Benally, 44-45.
- 438 *See Navajo Nation Human Rights Commission v. San Juan County*, No. 2:16-cv-00154-JNP (D. Utah Feb. 2018).
- 439 52 U.S.C. §§ 20501–20511.
- 440 139 Cong. Rec. E17-03 (daily ed. Jan. 5, 1993) (statement of Sen. Swift).
- 441 52 U.S.C. § 20501.
- 442 52 U.S.C. § 20503(b). The states that are not covered at Idaho, Minnesota, New Hampshire, North Dakota, Wisconsin, and Wyoming. The NVRA also does not cover US territories. *See* U.S. Dep’t of Justice, *National Voter Registration Act of 1993 (NVRA) Questions and Answers*, available at <https://www.justice.gov/crt/national-voter-registration-act-1993-nvra> (last updated Aug. 7, 2017) (“NVRA Q&A”).
- 443 52 U.S.C. § 20503(a).
- 444 52 U.S.C. § 20504(a)(1).
- 445 52 U.S.C. § 20504(d).
- 446 Professor Gerald Webster, *An Analysis of the Effects of North Dakota’s Voter Identification Law on Potential white and Native American Voters*, Appendix, 11.
- 447 Portland Tr., Rhonda Medcalf, 52.
- 448 Phoenix Tr., Devon Suarez, 217.
- 449 [United States v. Cibola County, No. 93-1134-LH/LFG \(D.N.M. 2007\)](#).
- 450 *Id.*
- 451 *Id.*
- 452 [United States v. Cibola County, No. 1:93-v-01134-LH-LFG \(D.N.M. 2007\)](#).
- 453 *Id.* at 6.
- 454 52 U.S.C. § 20505(a). The EAC’s form is available at U.S. Election Assist. Comm’n, *Register to Vote in Your State by Using this Postcard Form and Guide*, available at https://www.eac.gov/assets/1/6/Federal_Voter_Registration_ENG.pdf (last visited Feb. 12, 2019).
- 455 52 U.S.C. § 20508(b).
- 456 52 U.S.C. § 20505(b).
- 457 52 U.S.C. § 20506.
- 458 52 U.S.C. § 20506(a)(2)(A). These include, but are not limited to, offices that provided any of the following federal assistance programs: the Supplemental Nutrition Assistance Program, the Special Supplemental Nutrition Program for Women, Infants and Children, the Temporary Assistance for Needy Families program, Medicaid, and the State Children’s Health Insurance Program. *See* NVRA Q&A, *supra* note 445.
- 459 52 U.S.C. § 20506(a)(2). These state-funded programs are usually those that offer vocational rehabilitation, transportation, job training, education counseling, rehabilitation, or independent-living services for people with disabilities. *See* NVRA Q&A, *supra* note 445.
- 460 52 U.S.C. § 20506(a)(3).
- 461 52 U.S.C. § 20506(a)(3)(B). The statute is unclear how many additional offices the state has to designate as registration agencies, so the first NVRA study after the passage of the Act found that only twenty-one of the forty-three responding states designated more than one such agency, whereas four did not designate any additional agencies. Fed. Election Comm’n, *The Impact of the National Voter Registration Act of 1993 on the Administration of Federal Elections* (1997), available at <https://www.fec.gov/about/reports-about-fec/agency-operations/impact-national-voter-registration-act-1993-administration-federal-elections-html/>.
- 462 *See* USDA Food & Nutrition Serv., U.S. Department of Agriculture, *Food Distribution Program on Indian Reservations*, available at <https://www.fns.usda.gov/fdpir/food-distribution-program-indian-reservations>.
- 463 *See generally* NVRA Q&A, *supra* note 445 (“For example, some general programs involve a State undertaking a uniform mailing of a voter registration card, sample ballot, or other election mailing to all voters in a jurisdiction, and then using information obtained from returned non-deliverable mail as the basis for correcting voter registration records . . . or for initiating the notice process.”).
- 464 In furtherance of this provision, the United States Attorney General is required to inform each state’s chief election official when a state citizen has been criminally convicted in federal court. *See* 52 U.S.C. § 20507(g)(1)–(2). In turn, the chief election official is required to notify registration officials in that individual’s local jurisdiction. 52 U.S.C. § 20507(g)(5).
- 465 EAC, *supra* note 458, at 46.
- 466 52 U.S.C. § 20507(d)(2).
- 467 52 U.S.C. § 20507(d)(2).

- 468 See EAC, *supra* note 458.
- 469 Help America Vote Act, 52 U.S.C. §§ 20901–21145 (2012); Herbert E. Cihak, *The Help America Vote Act: Unmet Expectations?*, 29 U. Ark. Little Rock L. Rev. 679, 680–81 (2007).
- 470 148 Cong. Rec. S709-03 (daily ed. Feb. 13, 2002) (statement of Sen. Dodd).
- 471 *Id.*
- 472 *Id.*
- 473 U.S. Election Assist. Comm’n, Help America Vote Act (“EAC HAVA”), available at <https://www.eac.gov/about/help-america-vote-act/>.
- 474 See generally 52 U.S.C. § 21085 (“The specific choices on the methods of complying with the requirements of this subchapter shall be left to the discretion of the State.”); see also *id.* at § 21084 (stating that the Act only provides for minimum requirements and states can choose to establish stricter election technology and administration requirements if they so choose).
- 475 Order Re: Plaintiffs’ Motion for a Preliminary Injunction Against the State Defendants, *Nick v. Bethel*, No. 3:07-cv-00098-TMB, docket no. 327 at 8 (D. Alaska July 30, 2008).
- 476 U.S. Census Bureau, QuickFacts, Wasilla City, Alaska, Population estimates as of April 1, 2010, available at <https://www.census.gov/quickfacts/fact/table/wasillacityalaska/LND110210> (population in 2010 was 7,816, of whom over 80 percent were White alone).
- 477 52 U.S.C. § 21082(a).
- 478 *Id.* at § 21083(a)(1)(A). This provision also governs the maintenance of these lists and requires that they are adequately safeguarded. *Id.* at § 21083(a)(2)–(3).
- 479 *Janis v. Nelson*, Civ. 09-5019 (D.S.D. May 25, 2010).
- 480 *Poor Bear v. Jackson County*, No. 5:14-CV-5059-KES, 10 (D.S.D. 2015).
- 481 *Id.*
- 482 See Lawyers’ Committee for Civil Rts. Under Law, Press Statement, available at <https://lawyerscommittee.org/satellite-early-voting-office-to-open-in-wanblee-south-dakota-after-civil-rights-complaint/>.
- 483 See *Elk v. Wilkins*, 112 U.S. 94, 103 (1884) (finding that the right to vote “cannot apply to a denial of the elective franchise to Indians not taxed, who form not part of the people entitled to representation.”).
- 484 43 Stat. 253 (1924) (codified as amended at 8 U.S.C. § 1401(b) (2006)).
- 485 See also Ryan D. Dreveskracht, *Enfranchising Native Americans After Shelby County v. Holder: Congress’s Duty to Act*, 10 Nat. Lawyers Guild Rev. 193, 194 (2013).
- 486 See Jeanette Wolfley, *Jim Crow, Indian Style*, 16 Amer. Indian L. Rev., 167, 193 (1991).
- 487 U.S. Dep’t of Just., *History of Federal Voting Rights Laws* (July 28, 2017), available at <https://www.justice.gov/crt/history-federal-voting-rights-laws>.
- 488 *Id.*
- 489 52 U.S.C. § 10301(a); Pub. L. 97-205, § 3, 96 Stat. 131.
- 490 Voting Rights Act of 1965 § 2, Pub. L. 98-110, 79 Stat. 437; see *Mobile v. Bolden*, 446 U.S. 55 (1980) (holding that plaintiffs bringing a claim under § 2 had to show that there was a discriminatory purpose behind the challenged standard, practice, or procedure).
- 491 52 U.S.C. § 10301(b); Pub. L. 97-205, § 3, June 29, 1982, 96 Stat. 134.
- 492 *Id.*
- 493 See 52 U.S.C. § 10301(b).
- 494 Ellen D. Katz, *Section 2 After Section 5: Voting Rights and the Race to the Bottom*, 59 Wm. & Mary L. Rev. 1961, 1969 (2018).
- 495 S. Rep. No. 97-417, at 28-29 (1982).

1. The extent of any history or official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
2. The extent to which voting in the elections of the state or political subdivision is racially polarized;
3. The extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
4. If there is a candidate slating process, whether the members of the minority group have been denied access to that process;
5. The extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. Whether political campaigns have been characterized by overt or subtle racial appeals;
7. The extent to which members of the minority group have been elected to public office in the jurisdiction;
8. Whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group; and
9. Whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

496

Voting rights cases may also include a Fifteenth Amendment claim but proving these claims requires a showing of discriminatory intent. *City of Mobile v. Bolden*, 446 U.S. 55 (1980). Rather than reaching whether Plaintiffs have succeeded showing this higher burden courts will often find violations of the Equal Protection clause or the VRA before reaching any Fifteenth Amendment claims.

497 *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).

498 *Id.* at 788; *Burdick v. Takushi*, 504 U.S. 428, 433 (1992).

499 *Id.* at 434.

500 *Brakebill v. Jaeger (Phase I)*, No. 1:16-cv-008, 2016 WL 7118548 (D.N.D. Aug. 1, 2016) sought attorneys' fees and litigation costs of \$1,132,459.41.

501 San Diego Tr., Terria Smith, 55, 89-90.

502 Portland Tr., Norma Sanchez T, 122.

503 Bismarck Tr., Gerald Stiffarm, 79.

504 Mont. Stat. § 13-2-208(1).

505 Mont. Stat. § 13-2-207. Federal law may permit the use of nonforwardable mail in processing voter registration applications, subject to the certain qualifications. See 52 U.S.C. § 20505(d).

506 See 52 U.S.C. § 20507(b)(1).

507 Tuba City Tr., James Attakai, 25-26.

508 Tuba City Tr., Patty Hansen, 62.

509 Bismarck Tr., O.J. Semans, Sr., 221-22.

510 Bismarck Tr., Sharon Stewart-Peregoy, 109.

511 Bismarck Tr., Matt Campbell, 184.

512 Portland Tr., Henry Cagey, 22; see also Tulsa Tr., Christina Blackcloud, 13 (describing the highly transitory nature of families in the Meskwaki Settlement in Iowa due to a housing shortage).

513 San Diego Tr., Terria Smith 89.

514 Sacramento Tr., Buster Attebery, 57; Sacramento Tr., Fatima Abbas, 60-65.

515 Portland Tr., Mike Tulee, 210.

516 San Diego Tr. Robin Thundershield, 132-33.

517 San Diego Tr., Terria Smith, 87-88.

518 Portland Tr., Norma Sanchez, 122-23.

519 Phoenix Tr., Sarah Gonski, 238-39.

520 Bismarck Tr., Donita Loudner, 32.

521 Bismarck Tr., Sharon Stewart-Peregoy, 92.

522 Portland Tr., Norma Sanchez, 122-123.

523 Sacramento Tr. Fatima Abbas, 60.

524 Portland Tr., Mike Tulee, 210.

525 San Diego Tr., Robin Thundershield, 132-33.

526 San Diego Tr., Terria Smith, 87-88.

527 Portland Tr. Henry Cagey, 20-21.

- 528 San Diego Tr. Terria Smith, 88.
- 529 San Diego Tr., Kenneth Marks, 89.
- 530 *Id.*
- 531 Milwaukee Tr., Stephanie Thompson, 19.
- 532 Tuba City Tr., Darrell Marks, 123-125.
- 533 Milwaukee Tr., Stephanie Thompson, 46-47.
- 534 Phoenix Tr., Steve Titla, 245.
- 535 Phoenix Tr., Solveig Parson, 19.
- 536 Milwaukee Tr., Paul DeMain, 72-73.
- 537 Milwaukee Tr., Stephanie Thompson, 23-24.
- 538 Milwaukee Tr., Stephanie Thompson, 23.
- 539 Professor Gerald Webster, An Analysis of the Effects of North Dakota's Voter Identification Law on Potential white and Native American Voters, Appendix, 22
- 540 Milwaukee Tr., Paul DeMain, 72-73.
- 541 Milwaukee Tr. Stephanie Thompson, 23-24.
- 542 Milwaukee Tr. Stephanie Thompson, 26-27.
- 543 Sacramento Tr., Alex Padilla, 109.
- 544 Portland Tr., Norma Sanchez, 124.
- 545 Portland Tr., Norma Sanchez, 157-158.
- 546 Isleta Tr., Andrea Weahkee, 197.
- 547 Phoenix Tr., Steve Titla, 245.
- 548 *Id.*
- 549 Phoenix Tr., Solveig Parsons, 13.
- 550 Phoenix Tr., Kris Beecher, 53.
- 551 Portland Tr., Carol Evans, 192.
- 552 Tulsa Tr., Chuck Hoskin Jr., 128-129.
- 553 Isleta Tr., Amber Carrillo, 233.
- 554 Milwaukee, Caroline Beaulieu, 121.
- 555 Tulsa Tr., Christina Blackcloud, 9.
- 556 See State of Iowa, Iowa Secty. of State, Secretary Pate announces use of Tribal IDs as a valid form of identification for elections (Aug. 21, 2018), available at https://sos.iowa.gov/news/2018_08_21.html.
- 557 Milwaukee Tr., Stephanie Thompson, 30-31.
- 558 Milwaukee Tr., Vinton Hawley, 147.
- 559 Milwaukee Tr., Paul DeMain, 78.
- 560 Milwaukee Tr., Stephanie Thompson, 30-31; Tulsa Tr., Chuck Hoskin Jr., 128.
- 561 San Diego Tr., Kenneth Ramos, 63.
- 562 Isleta Tr., Laurie Weahkee, 213; Phoenix Tr., Angela Willeford, 164; Milwaukee Tr., Stephanie Thompson, 17; Phoenix Tr., Steve Titla, 246.
- 563 Phoenix Tr., Angela Willeford, 164.
- 564 Isleta Tr., Laurie Weahkee, 213.
- 565 Milwaukee Tr., Stephanie Thompson, 17.

- 566 San Diego Tr., Terria Smith, 84.
- 567 Phoenix Tr., Travis Lane, 87.
- 568 Portland Tr., Joe Pakootas, 191.
- 569 Bismarck Tr., Donita Loudner, 32.
- 570 Tulsa Tr., Chuck Hoskin Jr., 131.
- 571 Phoenix Tr., Verlon Jose, 154; Phoenix Tr., Stephen Lewis, 130-31; Bismarck Tr., Donita Loudner, 32.
- 572 Phoenix Tr., Stephen Lewis, 130-31.
- 573 Tulsa Tr., Chuck Hoskin Jr., 128.
- 574 Bismarck Tr., Donita Loudner, 32.
- 575 Phoenix Tr., Kris Beecher, 54-55.
- 576 Native Am. Rts. Fund, *North Dakota Again Passes Discriminatory Voter ID Law* (May 9, 2017), available at <https://www.narf.org/north-dakota-voter-id-law/>.
- 577 *Id.*
- 578 *Hearing Minutes on H.B. 1447 Before H. Political Subdivision Comm.*, 62nd Leg. Assemb. 1 (N.D. Apr. 12, 2011).
- 579 *Hearing Minutes on H.B. 1447 Before H. Political Subdivision Comm.*, 62nd Leg. Assemb. 1 (N.D. Apr. 12, 2011) (statement of Sen. Ronald Sorvaag, S. Comm. On Political Sub[w]e don't want people voting if they are not suppose [sic] to vote but we don't want to disenfranchise people either by making the process to [sic] cumbersome.”).
- 580 *Hearing Minutes on H.B. 1447 Before H. Political Subdivision Comm.*, 62nd Leg. Assemb. 2 (N.D. Apr. 20, 2011) (statement of Jim Silrum “We are also going to need to work with the tribal governments to make sure because a couple of our counties that have reservations in the state have not completed their 911 addressing. Even if they have the residence of those counties don't know what their 911 address is.).
- 581 *Brakebill First Amend. Compl.* ¶ 37, ECF No. 77.
- 582 See Jim Fuglie, *United States Senator Mary Kathryn (Heidi) Heitkamp. How About That?*, The Prairie Blog (Nov. 9, 2012), available at <http://theprairieblog.areavoices.com/2012/11/09/united-states-senator-mary-kathrynheidi-heitkamp-how-about-that/>; AnnMaria De Mars, *Native Americans: Why Heidi Heitkamp Won & Nate Silver Was Wrong?*, AnnMaria's Blog (Nov. 19, 2012), available at <http://www.thejuliagroup.com/blog/?p=2808>; American Indian Voters and Indian Organizers Gave N.D. Senate Edge to Democrat Heidi Heitkamp (Nov. 8, 2012), available at <https://www.dailykos.com/stories/2012/11/8/1158417/-American-Indian-votersand-Indian-organizers-gave-N-D-Senate-edge-to-Democrat-Heidi-Heitkamp>.
- 583 *Id.*
- 584 See N.D. Cent. Code § 16.1-05-07.
- 585 *Brakebill First Amend. Compl.* ¶ 50-52, ECF No. 77.
- 586 See N.D. Cent. Code § 16.1-05-07.
- 587 *Brakebill First Amend. Compl.* ¶ 87-89, ECF No. 77.
- 588 *Brakebill v. Jaeger*, No. 1:16-cv-008, 2016 WL 7118548, at *13 (D.N.D. Aug. 1, 2016) (order granting preliminary injunction).
- 589 *Id.* at *10.
- 590 *Brakebill v. Jaeger*, No. 1:16-cv-008, 2018 WL 1612190 (D.N.D. April 3, 2018) (order granting second preliminary injunction).
- 591 *Brakebill v. Jaeger*, 905 F.3d 553 (8th Cir. 2018).
- 592 *Id.*
- 593 *Id.*
- 594 *Spirit Lake Tribe v. Jaeger*, No. 1:18-cv-222, 2018 WL 5722665, at *1 (D.N.D. Nov. 1, 2018) (order denied temporary restraining order).
- 595 See NARE, Secretary of State Agrees to Settle Voter ID Lawsuits by Entering Into Consent Decree with North Dakota Tribes, available at <https://www.narf.org/nd-voting-rights/>; See also Maggie Astor, *North Dakota Tribes Score Key Voting Rights Victory*, The New York Times (February 13, 2020) available at https://www.nytimes.com/2020/02/13/us/politics/north-dakota-voter-id.html?fbclid=IwAR2JjY8fwT4VbKbLXjSjzUO_Gp6BSe9zrNd8llKnm_wZUrGo89z3pmo5ytk
- 596 National Conference of State Legislatures, *Online Voter Registration Overview* (Oct. 10, 2018), available at <http://www.ncsl.org/research/elections-and-campaigns/electronic-or-online-voter-registration.aspx>.
- 597 *Id.*
- 598 San Diego Tr., Melissa Rogers, 37.

- 599 Sacramento Tr., Alex Padilla, 108.
- 600 Phoenix Tr., Natalie Landreth, 224.
- 601 Isleta Tr., Debra Haaland, 190-91.
- 602 See *supra* notes 113-50 and accompanying text.
- 603 Tulsa Tr., Christina Blackcloud, 11.
- 604 Milwaukee Tr., Aaron Payment, 163.
- 605 Bismarck Tr., Donita Loudner, 23, 43.
- 606 Phoenix Tr., Edison Wauneka, 93.
- 607 Portland Tr., Valdez Bravo, 202.
- 608 Portland Tr. Norma Sanchez, 228.
- 609 Portland Tr. Valdez Bravo, 202.
- 610 NAVRC Report, *supra* note 5, at 5.
- 611 Isleta Tr., Helen Padilla, 46.
- 612 Isleta Tr., Maggie Toulouse Oliver, 122.
- 613 Isleta Tr. Linda Yardley, 166.
- 614 Tuba City Tr., James Attakai, 28.
- 615 336 F. Supp.2d 976, 1025-26, 1036 (D.S.D. 2004).
- 616 647 F. Supp. 1002, 1008 (D. Mont. 1986).
- 617 Bismarck Tr., Erica Shelby, 140, 145.
- 618 United States Sentencing Commission Tribal Issues Advisory Group, Report of the Tribal Issues Advisory Group, p. 17, May 16, 2016, available at <https://www.wsj.com/articles/federal-panel-reviewing-native-american-sentencing-1429608601>.
- 619 Phoenix Tr., Claude Jackson, 203-204.
- 620 San Diego Tr. Terria Smith, 55-56.
- 621 Dan Frosch, *Federal Panel Reviewing Native American Sentencing*, Wall St. J. (Apr. 21, 2015), available at <https://www.wsj.com/articles/federal-panel-reviewing-native-american-sentencing-1429608601>.
- 622 U.S. Sentencing Comm'n Tribal Issues Advisory Group, Report of the Tribal Issues Advisory Group 15 (May 16, 2016), available at <https://www.wsj.com/articles/federal-panel-reviewing-native-american-sentencing-1429608601>.
- 623 Lawrence Greenfield & Steven K Smith, Bureau of Justice Statistics American Indians and Crime (Feb. 1999), available at <https://bjs.gov/content/pub/pdf/aic.pdf>.
- 624 U.S. Sentencing Comm'n, Quick Facts Native Americans in the Federal Offender Population, 2013, available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Native_American_Offenders.pdf.
- 625 San Diego Tr., Terria Smith 56.
- 626 Sacramento Tr., Thomas Eugene, 40.
- 627 San Diego Tr., Terria Smith, 56.
- 628 Phoenix Tr., Claude Jackson, 206-207.
- 629 *Id.*
- 630 Milwaukee Tr., Stephanie Thompson, 23.
- 631 Portland Tr., Mike Tulee, 209.
- 632 Phoenix Tr., Claude Jackson, 183.
- 633 See *supra* notes 235-52, 505-24 and accompanying text (discussing barriers that non-traditional mailing addresses pose to Native voting).
- 634 See *supra* notes 536-98 and accompanying text (discussing barriers that voter identification requirements pose to Native voting).
- 635 See Mont. Stat. § 13-2-208(1).
- 636 52 U.S.C. § 20507(a)(2).

- 637 Bismarck Tr., Erica Shelby, 150-151.
- 638 See, e.g., *Valdez v. Squier*, 676 F.3d 935 (10th Cir. 2012) (New Mexico); *National Council of La Raza v. Cegavske*, 2017 WL 2683683 (D. Nev. June 21, 2017) (approving attorneys' fees award following settlement of case brought against the State of Nevada).
- 639 52 U.S.C. § 20504(e).
- 640 Portland Tr., Rhonda Medcalf, 52.
- 641 See Demos & Project Vote, Notice Letter Regarding "Nevada's Non-Compliance with Section 5 of the National Voter Registration Act" at 6 (Mar. 7, 2016), available at <http://www.projectvote.org/wp-content/uploads/2016/03/Notice-Letter-on-Nevadas-NVRA-Sec-5-Violations-3.7.16.pdf>
- 642 See Execution Copy, Memorandum of Understand (Mar. 9, 2017), available at <http://www.projectvote.org/wp-content/uploads/MOU-NV-DMV-3.13.17.pdf>
- 643 Tuba City Tr., James Attakai, 20-21, 25-26.
- 644 Tuba City Tr., Moroni Benally, 33-34.
- 645 Bismarck Tr., Donita Loudner, 54-55.
- 646 *Dunn v. Blumstein*, 405 U.S. 330 (1972).
- 647 *Id.* at 348-49.
- 648 *Id.*
- 649 *Marston v. Lewis*, 410 U.S. 679 (1973).
- 650 *Id.*
- 651 See EAC HAVA, *supra* note 477.
- 652 *Id.*
- 653 *Id.*
- 654 *Id.*
- 655 *Id.*
- 656 *Id.*
- 657 NCSL, Same Day Voter Registration, available at <http://www.ncsl.org/research/elections-and-campaigns/same-day-raegistration.aspx>.
- 658 *Id.*
- 659 Phoenix Tr., Solveig Parsons, 31.
- 660 Tuba City Tr. Patty Hansen, 111.
- 661 Portland Tr., Valdez Bravo, 204.
- 662 Jay M. Mitzer, *Validity of Statute Limiting Time Period for Voter Registration*, 56 A.L.R. 6th 523. (2010).
- 663 Phoenix Tr., Sarah Crawford, 51.
- 664 Bismarck Tr., Donita Loudner, 33-34
- 665 Tuba City Tr., Edgar Little, 150-151.
- 666 Tuba City Tr., Patty Hansen, 55-56.
- 667 *Id.*
- 668 Tuba City Tr., James Attakai, 14.
- 669 Tuba City Tr., Brian Curley-Chambers, 222.
- 670 Portland Tr., Matthew Tomaskin, 93.
- 671 Portland Tr., Brian Cladoosby, 161.
- 672 Isleta Tr., Laurie Weahkee, 215-216.
- 673 *Id.*
- 674 Portland Tr., Matthew Tomaskin, 243.

- 675 Portland Tr. Matthew Tomaskin, 91-92.
- 676 *United States v. Metropolitan Dade County, Fla.*, 815 F. Supp. 1475, 1478 (S.D. Fla. 1993) (holding that a voter information pamphlet with that information was a “voting material” that had to be translated under Section 203 of the VRA).
- 677 *United States v. Berks Cty., Pa.*, 250 F. Supp. 2d 525, 527 (E.D. Pa. 2003) (requiring translations of pre-election voting information into Spanish under Section 4(e) of the VRA).
- 678 See Milwaukee Tr., Aaron Payment, 152-73.
- 679 Tulsa Tr., Chuck Hoskin, Jr., 123.
- 680 Bismarck Tr., Sharon Stewart-Peregoy, 110-11.
- 681 Bismarck Tr., Donita Loudner, 48.
- 682 Milwaukee Tr., Debra Haaland, 173-90.
- 683 Portland Tr., Carol Evans, 225.
- 684 Bismarck Tr., Carol Davis, 195-96.
- 685 Portland Tr., Teresa Taylor, 48.
- 686 Bismarck Tr., Gerald Stiffarm, 80.
- 687 Portland Tr., Teresa Taylor, 26.
- 688 Bismarck Tr., Donita Loudner, 55.
- 689 Bismarck Tr., Sharon Stewart-Peregoy, 104.
- 690 Portland Tr., Carol Evans 224.
- 691 Bismarck Tr., Sharon Stewart-Peregoy, 112.
- 692 Portland Tr., Carol Evans, 192.
- 693 Portland Tr., Norma Sanchez, 231-32.
- 694 Milwaukee Tr., Aaron Payment, 154.
- 695 Bismarck Tr., Patrick Yawakie, 233.
- 696 Bismarck Tr., Patrick Yawakie, 236.
- 697 See National Inst. of Health, Native Voices, 1953: Congress Seeks to Abolish Tribes, Relocate American Indians, available at <https://www.nlm.nih.gov/nativevoices/timeline/488.html>.
- 698 San Diego Tr., Lupe Lopez-Donaghey, 107.
- 699 San Diego Tr., Lupe Lopez-Donaghey, 107-08.
- 700 San Diego Tr., Brighid Pulskamp, 108-09.
- 701 San Diego Tr., Robin Thundershield, 102-03.
- 702 Sand Diego Tr., Monique Castro, 120.
- 703 See *infra* notes 827-37 and accompanying text.
- 704 Phoenix Tr., Solveig Parson, 16.
- 705 Phoenix Tr., Roland Maldonado, 120-21.
- 706 Sacramento Tr., Buster Attebery, 66.
- 707 Sacramento Tr., Thomas Eugene, 29.
- 708 Milwaukee Tr., Aaron Payment, 159.
- 709 Milwaukee Tr., Carolyn Beaulieu, 119-29.
- 710 Bismarck Tr., Erica Shelby, 128; Bismarck Tr., Gerald Stiffarm, 128.
- 711 Bismarck Tr., Gerald Stiffarm, 75.
- 712 Bismarck Tr., Gerald Webster, 257.

- 713 Bismarck Tr., Patrick Yawakie, 202.
- 714 Sacramento Tr., Beverly Harry, 4-5.
- 715 San Diego Tr., Amy Nantkes, 47-48.
- 716 *Id.* 47-48, 50-51.
- 717 *Id.*
- 718 Isleta Tr., Maggie Toulouse Oliver, 118.
- 719 Bismarck Tr., Donita Loudner, 20.
- 720 Isleta Tr., Terry Whitehat, 37; Tuba City Tr., James Attakai, 14.
- 721 Tuba City Tr., Moroni Benally, 32, 37-38, 42.
- 722 Phoenix Tr. Verlon Jose, 113.
- 723 Tuba City Tr., Darrell Marks Test, 116.
- 724 Albuquerque Tr., Martin Aguilar, 149.
- 725 Isleta Tr., Martin Aguilar, 148.
- 726 Albuquerque Tr., Leon Reval, 50.
- 727 Tuba City Tr., Shirlee Smith, 212.
- 728 Tuba City Tr., Brian Curley-Chambers, 230-31, 241.
- 729 Phoenix Tr., Rani Williams, 26.
- 730 Phoenix Tr., Rani Williams, 27.
- 731 Tuba City Tr., Brian Curley-Chambers, 241-42.
- 732 Phoenix Tr., Edison Wauneka, 98.
- 733 San Diego Tr., Jean Schroedel, 11.
- 734 Tulsa Tr., Anna Langthorn, 105-06.
- 735 Sacramento Tr., Joseph Dietrich, 76-78.
- 736 NCSL, Dylan Lynch, All-Mail Elections (aka Vote-By-Mail), Introduction (June 27, 2019) ("All-Mail Elections"), available at <http://www.ncsl.org/research/elections-and-campaigns/all-mail-elections.aspx>.
- 737 *See generally id.* at "Possible Disadvantages."
- 738 Milwaukee Tr., Paul Demain, 69-78, 79-86, 94, 96, 110-111, 112-113.
- 739 Tulsa Tr., Anna Langthorn, 105-06.
- 740 Bismarck Tr., Sharon Stewart-Peregoy, 105.
- 741 Phoenix Tr., Travis Lane, 87-88.
- 742 Isleta Tr., Laurie Weahkee, 196.
- 743 *See supra* notes 274-303 and accompanying text.
- 744 Phoenix Tr., Kris Beecher, 56.
- 745 Isleta Tr., Max Zuni, 102 (Isleta Pueblo in New Mexico).
- 746 Sacramento Tr., Chrissie Castro, 166.
- 747 Isleta Tr., Max Zuni, 102.
- 748 San Diego Tr., Jean Schroedel, 19-20.
- 749 Phoenix Tr., Natalie Landreth, 225.
- 750 Phoenix Tr., Solveig Parson, 13.
- 751 Sacramento Tr., Thomas Eugene, 34.

- 752 Isleta Tr., Max Zuni, 102.
- 753 Sacramento Tr., Joseph Dietrich, 89-90.
- 754 See generally James Thomas Tucker, *Affirmative Action and [Mis]representation: Part I – Reclaiming the Civil Rights Vision of the Right to Vote*, 43 How. L.J. 343, 345-46 (2000) (summarizing evidence of how efforts by black voters to register subjected them to discrimination including “losing their job or their business, hav[ing] loans denied to them, see[ing] their rent increase, be evicted from their home, or have basic government services taken away after local newspapers printed their name so that everyone in the community would know what they had done”).
- 755 Sacramento Tr., Joseph Dietrich, 93.
- 756 Sacramento Tr., Joseph Dietrich, 87.
- 757 Bismarck Tr., Gerald Webster, 250-52.
- 758 Sacramento Tr., Joseph Dietrich, 78.
- 759 Sacramento Tr., Joseph Dietrich, 78-79.
- 760 Sacramento Tr., Joseph Dietrich, 79-80.
- 761 Portland Tr., Norma Sanchez, 154-55.
- 762 Sacramento Tr., Joseph Lake, 91.
- 763 Sacramento Tr., Joseph Dietrich, 90-91.
- 764 Tuba City Tr., Patty Hansen, 56.
- 765 Tuba City Tr., Patty Hansen, 60-61.
- 766 See *supra* notes 249-52, 745, 765-67 and accompanying text; *infra* notes 769-70, 778-79, 795-98, 899-903 and accompanying text.
- 767 See All-Mail Elections, *supra* note 741, at “Possible Disadvantages.”
- 768 Phoenix Tr., Stephen Lewis, 130.
- 769 Portland Tr., Norma Sanchez, 122.
- 770 Phoenix Tr., Rani Williams, 24-25.
- 771 Portland Tr., Brian Cladoosby, 133.
- 772 Tuba City Tr., Moroni Benally, 32.
- 773 See U.S. Census Bureau, 2016 American Community Survey 1-Year Estimates, Selected Population Profile in the United States: American Indian and Alaska Native alone (300, A01-Z99) (“2016 AIAN Profile”), available at <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=blkmk>.
- 774 See *supra* note 771.
- 775 Oregon Tr., Teresa Taylor, 25.
- 776 San Diego Tr., Jean Schroedel, 33.
- 777 Sacramento Tr., Thomas Eugene, 34-35.
- 778 Phoenix Tr., Rani Williams, 24.
- 779 San Diego Tr., Melissa Rogers, 38.
- 780 Sacramento Tr., Joseph Dietrich, 96.
- 781 San Diego Tr., Robin Thundershield, 102.
- 782 Tuba City Tr., Alta Edison, 59.
- 783 Portland Tr., Carol Evans, 191.
- 784 Phoenix Tr., Verlon Jose, 153.
- 785 San Diego Tr., Melissa Rogers, 38.
- 786 Portland Tr., Mike Tulee 187-88, 220.
- 787 Portland Tr., Carol Evans, 220-21.
- 788 Portland Tr., Teresa Taylor, 25.

- 789 Ryan Blethen, *Ballots are on the way for Washington state voters, who won't have to dig for stamps anymore*, Seattle Times (July 19, 2018), available at <https://www.seattletimes.com/seattle-news/politics/ballots-are-on-the-way-for-washington-state-voters-who-wont-have-to-dig-for-stamps-anymore/>.
- 790 Sarah Zimmerman, *Oregon to cover mail-in ballot postage*, Mail Trib. (Aug. 2, 2019), available at <https://mailtribune.com/news/happening-now/oregon-to-cover-mail-in-ballot-postage>.
- 791 San Diego Tr., Jean Schroedel, 14-15.
- 792 Phoenix Tr., Stephen Lewis, 130.
- 793 Portland Tr., Norma Sanchez, 162-63.
- 794 Tuba City Tr., Alta Edison, 63-64.
- 795 See All-Mail Elections, *supra* note 741, at “Possible Advantages.”
- 796 Portland Tr., Carol Evans, 191.
- 797 Portland Tr., Norma Sanchez, 154-55.
- 798 Portland Tr., Norma Sanchez, 123-24.
- 799 Portland Tr., Theresa Shelden, 163-64.
- 800 Portland Tr., Brian Cladoosby, 129.
- 801 Tuba City Tr., Moroni Benally, 32.
- 802 San Diego Tr., Melissa Rogers, 43-44; see also Phoenix Tr., Steve Titla, 245 (“Native Americans vote at the polls in higher numbers than off reservation do because of language translation, socio-economic issues and cultural reasons.”).
- 803 San Diego Tr., Jean Schroedel, 36.
- 804 Tuba City Tr., Patty Hansen, 50-51.
- 805 Tuba City Tr., Patty Hansen, 47-49.
- 806 Isleta Tr., Shirlee Smith, 93-94; Tuba City Tr., Shirlee Smith 217-18.
- 807 Tuba City Tr., Patty Hansen, 51-52.
- 808 Phoenix Tr., Angela Willeford, 162.
- 809 Tuba City Tr., James Attakai 14; Tuba City Tr., Moroni Benally, 32.
- 810 Sacramento Tr., Joseph Dietrich, 81.
- 811 San Diego Tr., Jean Schroedel, 14; see also Sacramento Tr., Joseph Dietrich, 82 (same).
- 812 Sacramento Tr., Joseph Dietrich, 81.
- 813 San Diego Tr., Jean Schroedel, 15.
- 814 Sacramento Tr., Joseph Dietrich, 82.
- 815 Sacramento Tr., Joseph Dietrich, 92.
- 816 Sacramento Tr., Joseph Dietrich, 84.
- 817 Sacramento Tr., Joseph Dietrich, 84-85.
- 818 Sacramento Tr., Joseph Dietrich, 95-96.
- 819 Sacramento Tr., Joseph Lake, 85-86.
- 820 Sacramento Tr., Joseph Lake, 87-90.
- 821 Sacramento Tr., Joseph Dietrich, 91.
- 822 Sacramento Tr., Joseph Dietrich, 101.
- 823 See U.S. Census Bureau, American FactFinder, ACS Demographic and Housing Estimates: 2013-2017 American Community Survey 5-Year Estimates, Owyhee Census Data Place, Nevada, available at <https://factfinder/census.gov>.
- 824 See State of Nevada, County of Elko, Canvas and Abstract of the Vote of the Elko County, State of Nevada 2014 General Election Held on November 4, 2014 (under Precinct 29 Registration).
- 825 See U.S. Census Bureau, American FactFinder, Profile of General Population and Housing Characteristics: 2010 Demographic Profile Data, Owyhee Census Data Place, Nevada, available at <https://factfinder/census.gov>.

- 826 See State of Nevada, County of Elko, Canvas and Abstract of the Vote of the Elko County, State of Nevada 2014 General Election Held on November 4, 2014 (under Precinct 29 Ballots Cast and Turnout Percent).
- 827 See *id.*
- 828 See *id.*
- 829 Sacramento Tr., Beverly Harry, 15.
- 830 *Sanchez v. Cegavske*, 214 F. Supp.3d 961 (D. Nev. 2016).
- 831 Sacramento Tr., Carlos Negrete, 44, 47.
- 832 Isleta Tr., Everett Chavez, 154-55.
- 833 Sacramento Tr., Thomas Eugene, 29-31.
- 834 Isleta Tr., Joseph Ray, 109.
- 835 Milwaukee Tr., Joseph Ray, 191-93.
- 836 Sacramento Tr., Thomas Eugene, 31.
- 837 Milwaukee Tr., Joseph Ray, 191-93.
- 838 Phoenix Tr., Solveig Parson, 14-15; Phoenix Tr., Devon Suarez, 216-17.
- 839 Phoenix Tr., Joyce Lopez, 208.
- 840 Tuba City Tr., Brian Curley-Chambers, 222-24.
- 841 Native American Disability Law Center, The Fundamental Principal of a Participatory Democracy: Equal Access for Navajos with Disabilities 2 (May 2013) (“Equal Access”).
- 842 *Id.* at 1.
- 843 Equal Access, *supra* note 846, at 1-4.
- 844 *Id.* at 5.
- 845 *Id.* at 11-13.
- 846 See *id.*
- 847 Tuba City Tr., Patty Hansen, 54-55.
- 848 Tuba City Tr., Patty Hansen, 94-95.
- 849 Tuba City Tr., Patty Hansen, 55.
- 850 Tuba City Tr., Patty Hansen, 94.
- 851 See Settlement Agreement Between the United States of America and Coconino County Regarding the Accessibility of Polling Places, DJ # 204-49-91, available at <https://www.ada.gov>.
- 852 *Id.* at 3.
- 853 See U.S. Department of Justice, Press Release, Justice Department Reaches Agreement with McKinley County, New Mexico, to Ensure Accessible Voting (June 6, 2019), available at <https://www.justice.gov/opa/pr/justice-department-reaches-agreement-mckinley-county-new-mexico-ensure-accessible-voting>.
- 854 See U.S. Department of Justice, Press Release, Justice Department Reaches Agreement with Sandoval County, New Mexico, to Ensure Accessible Voting (July 12, 2019), available at <https://www.justice.gov/opa/pr/justice-department-reaches-agreement-sandoval-county-new-mexico-ensure-accessible-voting>.
- 855 52 U.S.C. § 20102(b)(2)(A).
- 856 52 U.S.C. § 20102(b)(2)(B)(ii).
- 857 Equal Access, *supra* note 846, at 1.
- 858 See Tuba City Tr., Patty Hansen, 54-55, 94-95.
- 859 Richard Fausset, *Georgia County Rejects Plan to Close 7 Polling Places in Majority-Black Area*, N.Y. Times (Aug. 23, 2018), available at <https://www.nytimes.com/2018/08/23/us/anderson-county-georgia-voting.html>.
- 860 San Diego Tr., Jean Schroedel, 52; San Diego Tr., Terria Smith, 57 (“You know people will drive three hours to come vote for their cousin or whoever, you know, that is running for tribal council, but you know, they won’t go 1 – minutes up the road to vote in the general election.”)

- 861 Portland Tr., Teresa Taylor, 26.
- 862 Tuba City Tr., Ethel Branch, 80-81.; Tuba City Tr., Patty Hansen, 82.
- 863 Tuba City Tr., Darrell Marks, 114.
- 864 Milwaukee Tr. Stephanie Thompson, 17, 26; Tulsa Tr., Christine Blackcloud, 7; Tulsa Tr., Bobbity Saupitty, 76; Phoenix Tr., Sarah Crawford, 50-51.
- 865 Milwaukee Tr., Matt Dannenburg, 12.
- 866 Phoenix Tr., Sarah Crawford, 50-51.
- 867 Phoenix Tr., Joyce Lopez, 171-72.
- 868 Phoenix Tr., Kris Beecher, 55-56.
- 869 Milwaukee Tr., Stephanie Thompson, 25.
- 870 Phoenix Tr., Joyce Lopez, 197-98.
- 871 Phoenix Tr., Roland Maldonado, 156.
- 872 Phoenix Tr., Verlon Jose, 142-43.
- 873 *Id.*
- 874 Milwaukee Tr., Matt Dannenburg, 12.
- 875 Milwaukee Tr., Linea Sundstrom, 66.
- 876 Phoenix Tr., Angela Willeford, 195.
- 877 Milwaukee Tr., Regina Gasco-Bentley, 137-38.
- 878 Phoenix Tr., Kenosha Skinner, 62.
- 879 Milwaukee Tr., Stephanie Thompson, 18.
- 880 Portland Tr., Patricia Whitefoot, 80.
- 881 Phoenix Tr., Kris Beecher, 54.
- 882 Phoenix Tr., Rani Williams, 35.
- 883 Tuba City Tr., Patty Hansen, 46.
- 884 Milwaukee Tr., Stephanie Thompson, 20-22.
- 885 Portland Tr., Valdez Bravo, 204.
- 886 Tuba City Tr., James Attakai, 20.
- 887 Tuba City Tr., Ethel Branch, 80-81.
- 888 Phoenix Tr., Sarah Gonski, 238.
- 889 Tuba City Tr., Edbert Little, 166.
- 890 Tuba City Tr., Patty Hansen, 81-82.
- 891 Tuba City Tr., Patty Hansen, 82.
- 892 Phoenix Tr., Sarah Gonski, 237.
- 893 Phoenix Tr., Sarah Gonski, 236.
- 894 Tuba City Tr., Brian Curley-Chambers, 232-33.
- 895 Phoenix Tr., Sarah Gonski, 231-32.
- 896 Phoenix Tr., Sarah Gonski, 232.
- 897 Phoenix Tr., Sarah Gonski 231-32.
- 898 Phoenix Tr., Steven Titla, 261.
- 899 Phoenix Tr., Angela Willeford, 166.

- 900 Phoenix Tr., Sarah Gonski, 232-33.
- 901 Phoenix Tr., Sarah Gonski, 237-38.
- 902 Bismarck Tr., Shelby Test., 155.
- 903 Portland Tr., Norma Sanchez Test., 149.
- 904 Bismarck Tr., Shelby Test., 155.
- 905 Tuba City Tr., Brian Curley-Chambers, 223.
- 906 Isleta Tr., Terry Whitehat, 35-36.
- 907 Tuba City Tr., Brian Curley-Chambers, 223.
- 908 *See supra* notes 811-12 and accompanying text.
- 909 Phoenix Tr., Solveig Parson, 19.
- 910 Phoenix Tr., Kris Beecher, 51-52, 59.
- 911 *See supra* notes 814-18 and accompanying text.
- 912 Portland Tr., Norma Sanchez Test., 149.
- 913 Tuba City Tr., Moroni Benally, 44.
- 914 Tuba City Tr., Brian Curley-Chambers, 235.
- 915 Phoenix Tr., Solveig Parson, 13.
- 916 *See supra* notes 747-60 (describing how those issues impede voter confidence in VBM).
- 917 H.R. Rep. No. 109-478, at 2 (2006), reprinted in 2006 U.S.C.C.A.N. 618.
- 918 “Second generation” voting claims are most commonly associated with redistricting or other features of the method of election system itself that result in the votes of minorities being diluted. *See* Pamela S. Karlan, *The Impact of the Voting Rights Act on African-Americans: Second – and Third-Generation Issues*, in *Voting Rights and Redistricting in the United States* 121, 121-40 (Mark E. Rush ed. 1998).
- 919 *Id.*
- 920 Phoenix Tr., Dan McCool, 70-71.
- 921 Sacramento Tr., Chrissie Castro, 163-64.
- 922 Phoenix Tr., Dan McCool, 90.
- 923 Adam Cox, *Partisan Fairness and Redistricting Politics*, 79 N.Y.U. L. Rev. 751, 768 (2004).
- 924 *See Gill v. Whitford*, 138 S.Ct. 1916 (2018) (staying judgment for plaintiffs challenging the plan as an unconstitutional partisan gerrymander and remanding for a determination of whether the plaintiffs can prove concrete and particularized injuries sufficient to give them standing to bring their claims).
- 925 Milwaukee Tr., Paul Demain, 69-78, 79-86, 94, 96, 110-11, 112-13.
- 926 Portland Tr., Barbara Lewis, 33-35; *see generally* Wash. Const. art. II, § 43(5) (“To the extent reasonable, each district shall contain contiguous territory, shall be compact and convenient, and shall be separated from adjoining districts by natural geographic barriers, artificial barriers, or political subdivision boundaries...”); Rev. Code Wash. § 44.05.090(2)(a) (“District lines should be drawn so as to coincide with the boundaries of local political subdivisions and areas recognized as communities of interest. The number of counties and municipalities divided among more than one district should be as small as possible.”).
- 927 Portland Tr., Barbara Lewis, 33-35.
- 928 Portland Tr., Barbara Lewis, 48-49; Portland Tr., Julie Johnson, 83.
- 929 Portland Tr., Matthew Tomaskin, 58-60.
- 930 Bismarck Tr., Sharon Stewart-Peregoy, 111.
- 931 *See generally* State of Montana, Legislative Snapshot: Senate District 21, available at https://mslservices.mt.gov/Legislative_Snapshot/SenateDistrictDetail.aspx?senate=21#DistrictDetails (American Indians and Alaska Natives comprise 7,195 out of the 13,161 persons of voting age living in District 21).
- 932 *See* U.S. Census Bureau, American FactFinder, Comparison of 2017 and 2010 ACS estimates for Crow Agency CDP, Montana, available at <https://factfinder.census.gov>.
- 933 Bismarck Tr., Stewart – Peregoy, 111.

- 934 Sacramento Tr., Buster Attebery, 70-72; Sacramento Tr., Fatima Abbas, 70-72.
- 935 Pamela S. Karlan, *Lightning in The Hand: Indians and Voting Rights*, 120 Yale L.J. 1420, 1440 (2011) (reviewing Laughlin McDonald, *American Indians and the Fight for Equal Voting Rights* (2010)).
- 936 See *infra* notes 950-71 and accompanying text (providing examples of successful cases brought by Native voters challenging the use of malapportioned districts to dilute their voting strength).
- 937 Phoenix Tr., Dan McCool, 90.
- 938 See CensusViewer, Population of Buffalo County, South Dakota: Census 2010 and 2000 Interactive Map, Demographics, Statistics, Graphs, *Quick Facts*, available at <http://censusviewer.com/country/SD/Bufalo>.
- 939 Laughlin McDonald, Janine Pease, & Richard Guest, *Voting Rights in South Dakota: 1982-2006*, 17 S. Cal. Rev. L. & Soc. Just. 195, 214 (2007).
- 940 *Id.*
- 941 Phoenix Tr., Dan McCool, 69.
- 942 See *infra* note 968 and accompanying text.
- 943 Bismarck Tr., Loudner Test., 22.
- 944 See *Bone Shirt v. Hazeltine*, 336 F. Supp.2d 976 (D.S.D. 2004).
- 945 See Glenn A. Phelps, *Mr. Gerry Goes to Arizona: Electoral Geography and Voting Rights in Navajo Country*, 15 Am. Indian Culture & Res. J. 63, 77-79 (1991) (describing how Navajo voters have been packed under statewide plans to minimize their voting strength).
- 946 See *Goodluck v. Apache County*, 417 F. Supp. 13, 14 (D. Ariz. 1975) (three-judge court).
- 947 The ideal population for a district is calculated by dividing the total population, in this case 32,300, by the number of seats in the elected body, which is three in this example.
- 948 A redistricting plan's total deviation is calculated by first determining the difference in population between the least and most populated districts, in this case District 1 and District 3, which yields a difference of 25,000 (or 26,700 minus 1,700 persons). That difference is then divided by the ideally populated district, which in this case is 25,000 divided by 10,767, which equals about 232 percent.
- 949 *Goodluck*, 417 F. Supp. at 14-16.
- 950 See *Blackmoon v. Charles Mix Cty.*, 2005 WL 2738954 (D.S.D. Oct. 24, 2005).
- 951 See *Jackson v. Board of Trustees of Wolf Point, MT*, 2014 WL 1794551, at *3 (D. Mont. Apr. 21, 2014) (attorneys' fees order).
- 952 *Id.* at 1290-92.
- 953 Tuba City Tr., Brian Curley-Chambers, 233.
- 954 Bismarck Tr., Donita Loudner, 44.
- 955 See, e.g., *Ball v. James*, 451 U.S. 355 (1981); *Salter Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973).
- 956 Phoenix Tr., Dan McCool, 89-90.
- 957 *Windy Boy v. County of Big Horn*, 647 F. Supp. 1002 (D. Mont. 1986).
- 958 *United States v. Blaine Cty.*, 363 F.3d 897 (9th Cir. 2004).
- 959 709 F. Supp.2d 1176 (D. Wyo. 2010).
- 960 See *supra* notes 942-44 and accompanying text.
- 961 See *supra* notes 945-46 and accompanying text.
- 962 Tuba City Tr., James Attakai, 12; see also Tuba City Tr., Ethel Branch, 5 (describing the impact of at-large elections in denying Navajo voters with vital government services).
- 963 Portland Tr., Matthew Tomaskin, 107-09.
- 964 Portland Tr., Carol Evans, 211.
- 965 See U.S. Census Bureau, American FactFinder Community Facts for Sault Ste. Marie city, Michigan, available at <https://factfinder.census.gov>; see also *id.* at Table B02010 (American Indian and Alaska Native Alone or in Combination for One or More Other Races for Sault Ste. Marie).
- 966 See Scott Brand, *City Commission Candidates Trigger Primary*, The Sault News (Apr. 24, 2019), available at <https://www.sooeveningnews.com/news/20190424/city-commission-candidates-trigger-primary>.
- 967 Milwaukee Tr., Aaron Payment, 172-73.

- 968 Milwaukee Tr., Aaron Payment, 170.
- 969 Tuba City Tr., James Attakai, 18.
- 970 See *Shirley v. Superior Ct. in and for Apache Cty.*, 513 P.2d 939 (Ariz. 1973).
- 971 Rachel Appel, *Voting Rights Matter in San Juan County*, The Salt Lake Trib. (July 27, 2019), available at <https://www.sltrib.com/opinion/commentary/2019/07/28/rachel-appel-voting/>.
- 972 Isleta Tr., Terry Whitehat, 14-16.
- 973 Tuba City Tr., James Attakai, 17-18.
- 974 Tuba City Tr., James Attakai, 24.
- 975 *Grayeyes v. Cox*, 2018 WL 3830073 at *2 (D. Utah Aug. 9, 2018).
- 976 *Id.* at **2-3.
- 977 *Id.* at **3-5.
- 978 *Id.* at **6-10.
- 979 State of Utah, Elections, Preliminary Election Results for San Juan County, November 6, 2018 General Election (final on Nov. 20, 2018), available at <https://electionresults.utah.gov/elections/country/sanjuan>.
- 980 South Dakota Secretary of State, Unofficial Results for November 6, 2018 General Election in Buffalo County, available at <http://electionresults.sd.gov/resultsSW.aspx?type=CTY&map=CTY&cty=14&name=Buffalo>.
- 981 Bismarck Tr., Loudner Test., 24.
- 982 Milwaukee Tr., Aaron Payment, 152-73.
- 983 Trahant, Mark, Indian Country remains underrepresented in every government office, May 13, 2019, available at: <https://www.indianz.com/News/2019/05/13/mark-trahant-indian-country-remains-unde.asp>
- 984 Isleta Tr., Debra Haaland, 209-210.
- 985 Isleta Tr., Debra Haaland, 190.
- 986 Isleta Tr. Debra Haaland, 209-210
- 987 Tuba City Tr., Moroni Benally, 36.
- 988 Isleta Tr., Helen Padilla, 71.
- 989 Isleta Tr., Linda Yardley, 180.
- 990 Bismarck Tr., Donita Loudner, 43.
- 991 Isleta Tr., Terry Whitehat, 15-16.
- 992 Portland Tr., Carol Evans, 21.
- 993 Portland Tr., Patsy Whitefoot, 97-98.
- 994 Phoenix Tr., Stephen Lewis, 140.
- 995 Phoenix Tr., Jamescita Peshlakai, 47-48.
- 996 Sacramento Tr., Ruthie Maloney, 138-39.
- 997 Sacramento Tr., Chrissie Castro, 162-63.
- 998 San Diego Tr., Lupe Lopez-Donaghey, 111.
- 999 Phoenix Tr., Edison Wauneka, 76-77.
- 1000 Isleta Tr., Leon Reval, 54-55.
- 1001 Tuba City Tr., James Attakai, 12-14.
- 1002 Tuba City Tr., Angelo Baca, 175.
- 1003 Tuba City Tr., James Attakai, 13; see also Isleta Tr., Terry Whitehat, 18-19.
- 1004 Isleta Tr., Wilfred Jones, 30-31.
- 1005 Isleta Tr., Terry Whitehat, 20-21; Wilfred Jones, 24.

- 1006 Isleta Tr., Terry Whitehat, 22; Isleta Tr., Wilfred Jones, 23-24.
- 1007 Phoenix Tr., Natalie Landreth, 227-28.
- 1008 *See supra* notes 945-46, 957-68, 977-78 (describing successful voting rights cases brought by Native voters against San Juan County).
- 1009 Milwaukee Tr., Paul Demain, 69-78, 79-86, 94, 96, 110-111, 112-113.
- 1010 Portland Tr., Carol Evans, 194.
- 1011 Isleta Tr., Helen Padilla, 64.
- 1012 Phoenix Tr., Steve Titla, 255-56.
- 1013 Portland Tr., Norma Sanchez, 231.
- 1014 Tuba City Tr., Ethel Branch, 9.
- 1015 Isleta Tr., Linda Yardley, 165-66; *see also* Isleta Tr., Amber Carrillo, 216-17.
- 1016 *See generally* Tulsa Tr., Bobbie Saupitty, 63 (describing how the Comanche County, Oklahoma County Commission adopted an Indigenous People's Day to "pacify" members of the Comanche Nation but did not replace Columbus Day, instead designating it to coincide with another holiday).
- 1017 Isleta Tr., Linda Yardley, 163.
- 1018 Tulsa Tr., Christina Blackcloud, 35.
- 1019 Sacramento Tr., Buster Attebery, 59; Portland Tr., Carol Evans, 214.
- 1020 Isleta Tr., Laurie Weahkee, 191-92.
- 1021 Tulsa Tr., Brian Jones, 114-15.
- 1022 Professor Gerald R. Webster, *An Evaluation of the Effects of Adding a Second Voter Registration/Polling Site in Three Montana Counties*, 2012.
- 1023 Brennan Ctr. for Just., *Criminal Disenfranchisement Laws Across the United States* (updated May 31, 2019), available at https://www.brennancenter.org/sites/default/files/legal-work/2019.5.31_Criminal_Disenfranchisement_Map.pdf.

The depth and breadth of this report could not have occurred without the testimony of the witnesses, who have played an invaluable role in identifying the many barriers that exist to Native voters.





OBSTACLES AT EVERY TURN

BARRIERS TO POLITICAL PARTICIPATION FACED BY NATIVE AMERICAN VOTERS

In 2017-2018, the Native American Voting Rights Coalition held nine public hearings to better understand how Native Americans are systemically and culturally kept from fully exercising their right to vote. More than 120 witnesses testified from dozens of tribes across the Midwest, Southwest, West Coast, and Alaska. This report is the product of those hearings and provides detailed evidence that Native people face obstacles at every turn in the electoral process: from registering to vote, to casting votes, to having votes counted.

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