

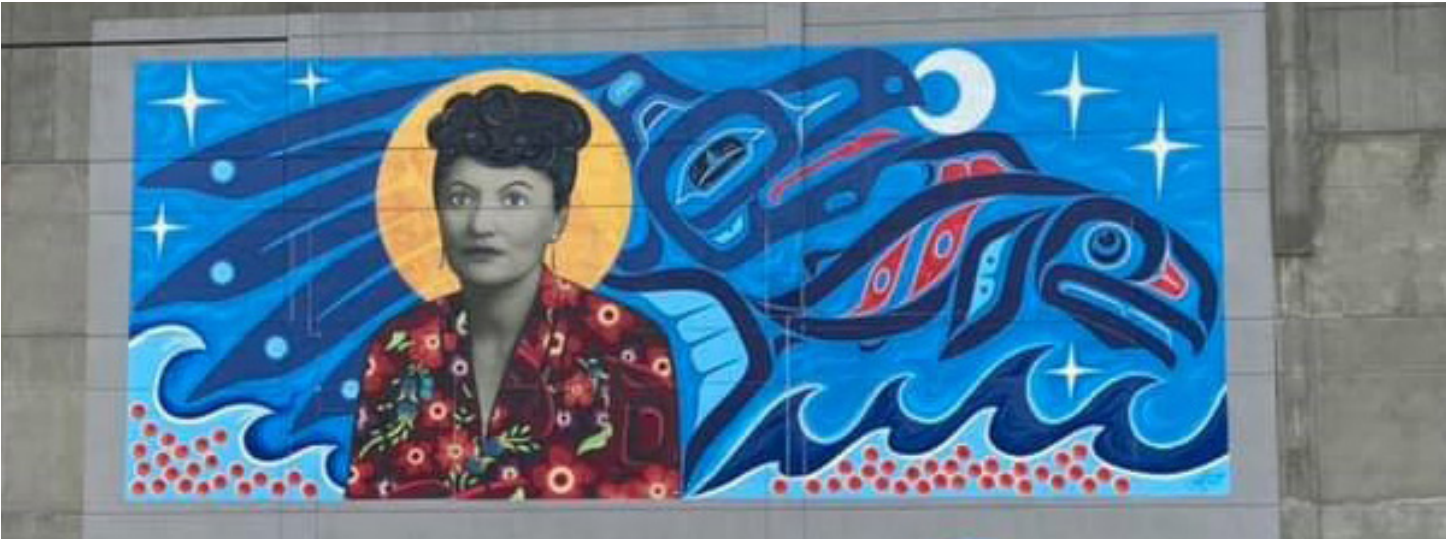
2021 ADDENDUM

TO OBSTACLES AT EVERY TURN:
BARRIERS TO POLITICAL PARTICIPATION FACED BY NATIVE AMERICANS



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Tlingit Voting Rights Advocate Elizabeth Petratovich Mural by Tlingit and Athabascan Artist Crystal Kaakeeyáa Worl. Completed September 2, 2021, in Juneau, Alaska

Addendum to *Obstacles at Every Turn: Barriers to Political Participation Faced By Native Americans*

Following two years of investigation, nine field hearings in seven states, and over 120 witnesses sharing their stories, *Obstacles at Every Turn: Barriers to Political Participation Faced by Native Americans* was published by The Native American Rights Fund (NARF) in June of 2020¹. The comprehensive report was covered by hundreds of news outlets that highlighted the report's extensive findings outlining structural barriers and intentional discrimination hindering access of Native Americans to voter registration and the ballot box. In the intervening year since publication, the run-up to the 2020 presidential election and the novel coronavirus (or COVID-19) resulted in an eventful year. There was a flurry of litigation, state legislatures passed new restrictive measures intended to suppress the Native American vote, and the Supreme Court curtailed Section 2 of the Voting Rights Act through a narrow reading of the provision in *Brnovich v. DNC*.² Now, more than ever, federal action is needed to restore the Voting Rights Act to protect Native Americans from voter discrimination and to remedy the structural barriers that lead to intentional or unintentional disenfranchisement of the Native electorate.

The 2020 Presidential Election

According to the National Congress of American Indians, the AI/AN voting age population percentage in seven states was larger than the voting margin percentage, or the difference between candidates that determined the winner in the 2020 presidential election³. The actual turnout, however, could not be calculated due to the difficulty of measuring turnout in Native communities. That margin included five of the seven key battleground states that decided the outcome of the presidential election: Arizona, Georgia, Nevada, North Carolina, and Wisconsin. In these states, the AI/AN voting age population percentage was larger than the difference in the voting margin between the two presidential contenders.

This potential was realized in Arizona and the Native vote was credited for pushing President Biden to victory in the 2020 election.⁴ Yet, in this same election, Native youth protested the harsh voting conditions in Arizona on Native lands, including one woman who led voters on horseback to the nearest polling site.⁵ Indeed, far from showing parity between Native and non-Native voters, the decisive role that the Native vote played is attributable to extraordinary steps taken by Native American advocates to combat obstacles intended to suppress their participation. Successful litigation challenging discriminatory laws and voting procedures was brought by NARF, tribal governments, and individual Native voters. National and regional organizations and tribes engaged in unprecedented campaigns to educate Native voters about their rights in registering to vote and casting their ballot to overcome efforts to bar their participation.⁶ Extensive grassroots efforts were undertaken to provide self-help by driving Native voters to registration and voting sites, picking up ballots from voters and delivering them to election offices and drop boxes, offering assistance for voters facing language or literacy barriers, and combatting widespread misinformation schemes targeting Native voters. Extraordinary resources led to the high Native turnout in the 2020 election in spite of discrimination that denied Native voters the equal opportunities to participate that non-Native voters enjoyed.

Shut downs due to the coronavirus pandemic complicated get out the vote efforts throughout Indian Country. Due to the lack of residential mail delivery, many Native Americans could not vote from the safety of their own

homes. At the same time, the coronavirus was especially deadly on Native American reservations. For example, in Montana, Native Americans had quadruple the death rate of those of non-Native Montanans. According to the Center for Infectious Disease Research and Policy the reasons for these disparities may include “more shared or intergenerational housing, difficulties accessing health-care and transportation, lower household incomes, and a more frontline or in-person jobs. Native Americans in Montana also have a higher prevalence of COVID-19 risk factors such as heart disease, type 2 diabetes, and cigarette smoking.”⁷ In the Navajo Nation the coronavirus likewise spread rapidly, and by May of 2020 Navajo had the highest per capita rate of coronavirus cases than even any US state.⁸ Many tribes imposed lockdowns on their reservations, and some implemented tribal checkpoints on highways passing through the reservation due to the due to high mortality rates and fear of increased spread.⁹

However, many Native communities were still highly motivated to vote in the Presidential Election and tribes pushed for more accessible polling options, recognizing that voting is an essential activity – and one for which many Native voters, especially Elders, require in-person assistance. Tribes provided exceptions to their lockdowns to allow citizens to cast their ballots.¹⁰ Unfortunately, however, Native Americans faced county officials unresponsive and at times hostile to their needs. Understandably, the coronavirus presented a stressful and frightening situation for many county officials. However, at times county officials proposed limiting voting services so severely it would have left some Native Americans disenfranchised.

For example, in New Mexico, tribal advocates — recognizing that many Native Americans do not have mail delivered to their homes¹¹ — successfully pushed back against an attempt by New Mexico county clerks to move the election entirely to mail.¹² And in other cases, county officials were willing to provide service to their non-Native constituents that they were unwilling to provide to their Native American constituents.

In Montana, numerous counties attempted to move entirely to vote by mail in Native American communities despite the lack of residential mail delivery on reservations there. NARF negotiated with four counties — Big Horn County, Rosebud County, Roosevelt County, and Pondera County to keep in-person options. Big Horn county, whose county commissioners include Crow Nation tribal members, was responsive to requests and provided additional in-person voting options twice a week in the month running up to the election. However, even with a responsive county commission, Native Americans were not provided on-reservation polling places in Big Horn County. The other counties resisted and insisted on keeping in person voting opportunities at their county seats — where the majority of non-Native residents live — but denied polling opportunities on reservations that were located significant distance from these in person opportunities and where tribal members did not receive residential mail delivery. The Northern Cheyenne, the Assiniboine & Sioux Tribes of Fort Peck, and the Blackfeet Nation had to negotiate with counties and pressure them with threats of Section 2 litigation to provide polling places on reservations on equal terms that they provided off reservations. Ultimately, Rosebud County and Roosevelt agreed to open reservation satellite offices for a handful of days but refused an

Election Day polling place. Pondera County refused to negotiate at all and the Blackfeet Nation was forced to file a Section 2 lawsuit. In that case, County officials insisted it was reasonable that tribal members be forced to travel a total of 120 miles to cast a ballot in person in the 90 percent non-Native town of Conrad, Montana. The Blackfeet reservation does not receive residential mail delivery and there are high rates of poverty on the Blackfeet Nation. County officials only agreed to limited satellite voting days after the suit was filed.¹³

In another disturbing case out of Montana, the Blackfeet Tribe learned that the Glacier County Clerk and Recorder/Election Administrator, or “EA,” refused to comply with a directive from the County Commissioners to provide ballot drop boxes at East Glacier, Babb, or Browning — all towns on the Blackfeet reservation. Glacier County also decided to eliminate its drop box in Cut Bank, the County seat and home to many Blackfeet tribal members. With COVID-19 surging on the reservation at that time, a place of deposit was the safest and most secure way for Blackfeet tribal members to return their ballots when it was too late for ballots returned by mail to be delivered on time. Although the drop boxes were officially approved by the County Commissioners in May, the EA unilaterally decided to eliminate them at the last minute because she claimed they were requested by Democrats and not by Republicans. She believed that opening ballot drop boxes would “advantage one-side” since she believed only Democrats were asking for the boxes to be open. She equated all Blackfeet tribal members with Democrats and denied them access. When the County Commissioners informed the EA that they had additional funds of nearly \$200,000 to pay for her to hire workers to man the drop boxes, she refused to commit to hiring workers. The Tribe turned to public pressure to try and get the EA to provide services and tribal members began contacting the EA to tell her to provide the drop boxes. The EA finally acquiesced, three business days before the election, setting up two ballot drop boxes in East Glacier and Browning. Because of the EA’s refusal, an independent GOTV organization was forced to take over Glacier County’s duties in Babb.

The EA’s withholding of equitable voting services for this extended period of time resulted in many tribal members’ ballots not being returned. The Tribe conduct-

ed a last minute collection effort of ballots and found 200 ballots that tribal members had been unable to return.

In Arizona, the Pima County Recorder removed the early voting location from the Pascua Yaqui Tribal Reservation. The Arizona Secretary of State offered funds to cover the polling site and the County would have only been responsible for providing the voting materials and an election official to run the site, but the County continued to refuse. The Tribe was forced to file a Section 2 lawsuit. The County subsequently spent over \$180,000 in legal fees in order to avoid opening the polling site. Unfortunately, the request for preliminary injunction was denied and the Pascua Yaqui did not have a polling location the reservation for the 2020 election. Upon retirement of the County Recorder and election of a new Recorder in the 2020 election, Pima County agreed to settle the case on August 16, 2021. The settlement established an early voting site on the Pascua Yaqui reservation.

The 2020 election highlighted how Native Americans continued to be denied equal access to the political process under the guise of discretionary decisions by mostly non-Native officials that limit voting opportunities on reservations. Because on reservation access is not federally mandated, tribes continue to be at the mercy of county officials who may or may not prioritize election service to them or may be hostile to services to them. In Montana, county officials forced tribes to negotiate for voting access that was much less than what was received by non-Native voters. The clerk that unfairly denied drop boxes to Blackfeet members still has faced no consequences. In Arizona, one recorder fought to prevent access that another recorder easily provided. Voting access should not entirely depend on the discretion of county officials. Native Americans deserve federal protections that establish a baseline of services equal to that of non-Native voters, so tribes are not forced to beg and plead for basic equitable services or to engage in self-help at their own cost. And if they are still denied services, Native Americans deserve a Voting Rights Act that can be utilized to protect them from this abuse.

Ballot Collection Bans

Across Indian Country, Native Americans pick up and drop off mail for each other. As detailed in *Obstacles*, many homes do not receive residential mail delivery. Roads often are not paved. Post offices can be miles away. Many impoverished Native Americans simply lack access to a working vehicle. Picking up and dropping off mail is the most logical way to pool resources to overcome these logistical difficulties.¹⁴ During election season, family, friends, and community members conduct mail runs that may include ballots. And third party ballot organizations with access to reliable vehicles and money to cover gas collect ballots from reservation communities and drop them off. During the coronavirus pandemic, when people could not catch rides together to the polls or to the post office since being in an enclosed car was dangerous, ballot collection was an especially important tool for reservation members who otherwise could not vote. As discussed above, when the Blackfeet tribe instituted a last minute ballot collection drive to combat an election official's refusal to provide services, they collected 200 lawful ballots that otherwise would not have been cast.

State legislatures keen on suppressing the Native vote have exploited these vulnerabilities in Native American communities by banning ballot collection. In Arizona, prior to *Shelby County v. Holder*, Arizona was subject to preclearance under Section 5 of the VRA. When the legislature attempted to pass a ballot collection ban, the DOJ requested more information because the state's submission showed the law had a discriminatory purpose or effect, and the legislature withdrew its request. But immediately following *Shelby* and the removal of preclearance the legislature passed a ballot collection ban. This ban on ballot collection was ultimately upheld this year by the Supreme Court in *Brnovich v. DNC*. Native Americans living in the Village of Ventana, Arizona on the Tohono O'odham reservation that live 100 miles roundtrip to the nearest post office now risk prosecution if they pick up and drop off ballots for their neighbors.

Montana also attempted to ban ballot collection through the Ballot Interference Protection Act or BIPA. In March of 2020, the Assiniboine & Sioux Tribes of Fort Peck, Blackfeet Nation, Confederate Salish and

Kootenai Tribes of the Flathead Reservation, Crow Tribe, and the Fort Belknap Indian Community as well as GOTV organization Western Native Voice challenged the law under Montana’s constitutional right to vote provision alleging the ballot collection ban made it unreasonably difficult for Native Americans to vote. In September 2020, the court agreed, finding “the questions presented cannot be viewed through the lens of our own upbringings or own life experiences, but through the lens of the cold, hard data that was presented at trial about the clear limitations Native American communities in Montana face, and how the costs associated with ... (BIPA) are simply too high and too burdensome to remain the law of the State of Montana.”¹⁵ A separate case, brought by the Democratic National Committee challenging BIPA, was also successful.

Remarkably, despite this finding, the state legislature passed another ballot collection ban in the 2021 legislative session, discussed in more detail below. That law also faced immediate legal challenge by tribes and Native get out the vote organizations brought by NARF and the ACLU¹⁶ as well as a separate challenge by the Democratic National Committee. Those cases are ongoing.¹⁷

In Minnesota, Plaintiffs challenged a law that outlawed individuals from assisting more than three voters in returning or mailing their absentee ballots in part because it disproportionately impacted Native Americans. While the Minnesota state trial court granted the requested injunction in full, the Minnesota Supreme Court allowed the ballot collection restrictions to proceed prior to the 2020 election.¹⁸

Finally, prior to the 2020 election, a longstanding but largely unknown ballot collection ban in Nevada was challenged in the lead-up to the 2020 election. Due to the increasing notoriety around ballot collection, Native advocates feared the practice of picking up and dropping off mail in Native communities would come under scrutiny. The Democratic National Committee brought suit challenging Nevada’s ballot collection ban (as well as other election procedures). The ballot collection ban was brought under Section 2 of the Voting Rights Act because of the impact on Native Americans. The DNC case

was mooted because the Nevada State legislature passed a law in light of the coronavirus pandemic, Assembly Bill 4 (AB 4), which legalized ballot collection. Donald J. Trump for President, Inc., the Republican National Committee, and the Nevada Republican party challenged AB 4 and sought to reinstate the ballot collection ban.¹⁹ The Walker River Tribe and Pyramid Lake Paiute Tribe moved to intervene due to their interests in protecting their members from prosecution under a ballot collection ban. The case was dismissed for lack of standing and AB 4 remained in effect for the 2021 election.

Now that the Supreme Court has upheld Arizona’s ballot collection ban despite acknowledging its discriminatory impacts, state legislatures may be emboldened to pass similar laws that discriminate against Native Americans. State courts or state constitutions may not provide an adequate avenue for relief. Federal law strengthening Section 2 and legalizing ballot collection would thwart efforts to disenfranchise Native Americans by exploiting the deficiencies – such as lack of adequate mail service, roads, and working vehicles – that lead Native Americans to need ballot collection in the first place.

2021 Legislative Session

State legislatures throughout the country, motivated by unfounded accusations of voter fraud in the 2020 election, moved to implement laws that make it harder to vote.²⁰ In Montana and Arizona, legislatures were successful in passing laws that specifically targeted Native Americans.

Montana

In Montana, the state legislature was well aware of the challenges facing Native American communities. Not only had BIPA been overturned due to the burdens placed on Native American voters, but members of the Native American caucus in Montana’s legislature proposed a Native American Voting Rights Act (HB 613). HB 613 would have mandated equitable on reservation voting and registration access. Discussion of HB 613 highlighted the ongoing discrepancies around voter access in Montana including access to registration and polling sites. Instead of advancing HB 613, which failed

to pass, the legislature forged ahead debating bills that were opposed by tribal leadership including another ballot collection ban, HB 530. When tribes expressed their concerns they were told that if they did not agree they ought to prepare for litigation.²¹ In the final day of session the legislature passed HB 530 that prohibits organizations from picking up and dropping off ballots. The Montana Advisory Committee to the U.S. Commission on Civil Rights conducted an investigation into Voting Access for Native Americans in Montana released in July of 2021. That report documented extensive instances of discrimination and found that with regard to HB 530 specifically “[t]he passage of a bill that imposes the same burdens is intentional discrimination and will increase barriers to voting for Native Americans on reservations in Montana.”²²

Additionally, the legislature passed a ban on Election Day registration, placing another hurdle in front of Native Americans that already face substantial burdens to register. Native Americans that only receive a few days of on-reservation registration access a year and who otherwise have to travel over one hundred miles to register are disproportionately impacted by a law banning Election Day registration. The Montana legislature exploited the lack of federal mandate of on-reservation registration access to discriminate against Native Americans. Legal challenges to HB 530 and HB 176 are pending.²³

This relentless discrimination on behalf of the state legislature of Montana and county officials demands federal action. These attitudes are part of a larger culture of racism directed toward Native Americans in Montana. For example, the weekend before Election Day 2020, a man in a town bordering the Fort Peck reservation won the local costume contest. He was dressed in full KKK regalia.²⁴ On the Flathead reservation this past year a tribal monument was defaced with a Nazi symbol. Native Americans face present and overt discrimination at all levels of personal and public life in Montana.

Arizona

The Arizona legislature, emboldened by the upholding of its discriminatory policies in *Brnovich*, likewise passed discriminatory laws in the 2021 legislative ses-

sion.²⁵ This session the state legislature overturned a settlement agreement reached by the Secretary of State with the Navajo Nation.²⁶ Because of confusion around Native American names and difficulty reaching Native Americans due to their housing insecurity, the Secretary agreed to allow seven days to cure a mismatched signature ballot. The Arizona State Legislature, through SB 1003, now requires signatures to be cured by 7:00 PM on Election Day. This law took effect on May 7, 2021.²⁷

Additionally, through HB 2569, the state legislature, despite chronic underfunding of elections, banned private entities from donating funds to assist with administration of elections. Native American communities in Arizona are often told that providing services is impracticable because doing so would be too costly.

And in the 2020 election nine counties used grants to educate people how to safely vote during the pandemic.²⁸ The majority of the counties that relied on grants include substantial Native communities. These counties include Apache, Navajo, Coconino, Graham, Pinal, and Pima Counties. The legislature removed the ability of underserved communities to rectify these inequities.

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

Conclusion

This past year, Native Americans faced discrimination at the county and state level when attempting to access equitable voting services. This discrimination follows a long pattern of racism and discrimination documented in the *Obstacles* report and elsewhere. Federal relief is needed to prevent this abuse.

Endnotes

- 1 Available online at: <https://vote.narf.org>
- 2 141 S. Ct. 2321 (2021).
- 3 Native Vote Report: 2020 Election Results ([NCAI Policy Research Center](#)).
- 4 Native American votes helped secure Biden's win in Arizona | [AP News \(apnews.com\)](#).
- 5 Getting to the polls can be hard in Navajo Nation. This woman is leading voters on horseback. | [MSN News \(msn.com\)](#).
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- 7 Reports detail high COVID-19 burden in Native Americans | [CIDRAP \(umn.edu\)](#).
- 8 Navajo Nation reports more coronavirus cases per capita than any US state | [TheHill \(thehill.com\)](#).
- 9 Blackfeet Tribe imposes 14-day lockdown as COVID cases surge | [State & Regional \(helenair.com\)](#); See Also: Virus spread forces lockdown on another tribal reservation | [ABC News \(abcnews.go.com\)](#); See Also: What actually happens at a tribal checkpoint? | [West River Eagle \(westrivereagle.com\)](#).
- 10 Native Voters | [Talking Feather \(talking-feather.com\)](#); See also: Voting information | [Blackfeet Nation \(blackfeetnation.com\)](#)
- 11 *Obstacles*, at 93.
- 12 *New Mexico ex rel. Riddle v. Oliver*, No. S-1-SC-38228, 2021 WL 1807330 (N.M. May 6, 2021).
- 13 *Blackfeet Nation v. Stapleton*, No. 4:20-cv-0095 (D. Mont. Oct. 13, 2020).
- 14 Native Americans Depend on Ballot Collection ([vote.narf.org](#)).
- 15 *Western Native Voice v. Stapleton*, No. DV-2020-0377 (D. Mont. Sept. 25, 2020).
- 16 *Western Native Voice v. Jacobsen*, No. DV-2021-0560 (D. Mont. May 17, 2021).
- 17 *Western Native Voice v. Jacobsen*, No. DV-2021-0560 (D. Mont. May 17, 2021).
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- 24 Montana man reportedly dressed as KKK wins contest in Glasgow bar | [Great Falls Tribune \(greatfallstribune.com\)](#).
- 25 With new Arizona voting laws, Native Americans brace for more challenges to casting ballots [IN DEPTH] | [Rose Law Group Reporter \(roselawgroupreporter.com\)](#).
- 26 Order dismissing Plaintiffs' claims (Sept. 3, 2019), *Navajo Nation v. Reagan* [Case No. CV-18-08329-PCT (DWL)]. <https://turtletalk.files.wordpress.com/2019/11/order-and-secretary-of-state-settlement.pdf>
- 27 Arizona State Senate Fact Sheet for SB 1003. | <https://legiscan.com/AZ/supplement/SB1003/id/135006>
- 28 Arizona governor signs bill banning private election grants | [AP News \(apnews.com\)](#).

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