

2021 CASE UPDATES

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



PUBLISHED BY: THE NATIVE AMERICAN RIGHTS FUND (NARF)

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CASE UPDATES

In 2020, the Native American Rights Fund (NARF) published the report *Obstacles at Every Turn: Barriers to Political Participation Faced by Native American Voters (Obstacles)*. That report included a list of Voting Rights Act (VRA) Section 2 cases with Native American plaintiffs. Since publication of *Obstacles*, additional Section 2 cases with Native American plaintiffs have been resolved. They are listed here. In keeping with the trend that Native plaintiffs prevail in the vast majority of actions that they bring, the majority of litigation listed here resulted in favorable outcomes for the Native American parties.

In 2021, the Supreme Court significantly curtailed Section 2 in *Brnovich v. DNC*, upholding two laws despite their discriminatory impact upon Native Americans. While pending, the *Brnovich* case also had a chilling effect on the filing of Section 2 claims in federal courts. Instead, some plaintiffs filed in state courts in the lead-up to the 2020 election and following the 2021 legislative sessions. Because of these trends, related Native voting rights cases are also included in the case update below.

Voter ID

Spirit Lake Tribe v. Jaeger, No. 1:18-CV-222, 2020 WL 625279 (D.N.D. Feb. 10, 2020).

Consent decree: After North Dakota district court denied its motions to dismiss in both cases, North Dakota agreed to settle two suits brought by the Spirit Lake Nation and Standing Rock Sioux Tribe challenging the state's restrictive 2013 voter ID law. The consent decree requires the state to accept Tribal IDs and IDs listing Tribally-designated street addresses as valid voter ID; to reimburse expenses incurred by the Tribes in producing voter IDs; and to coordinate pre-election visits by Department of Transportation to reservations to ensure Tribal members' access to necessary ID. The decree also provides alternatives for any Tribal member without a designated address, including the option of identifying his or her residence on a map, as provided by the implementing regulations of the National Voter Registration Act at 11 C.F.R. § 9428.4(a)(2).

Election Procedures

Corona et. al. v. Cegavske et. al., No. 20-OC-00064-1B (Nev. Dist. Ct. April 16, 2020).

Voluntary dismissal for mootness: Plaintiffs sought to overturn Nevada's ballot collection ban and some of Nevada's ballot rejection rules. Plaintiffs argued in part that the ballot collection ban violated Section 2 because it was especially detrimental to Native Americans in Nevada that lacked residential mail delivery. In light of the coronavirus pandemic the Nevada State legislature amended these election procedures through Assembly Bill 4, "A.B. 4," and the case was dismissed for mootness.

Donald J. Trump for President, Inc., Republican National Committee, and Nevada Republican Party v. Cegavske, 488 F. Supp. 3d 993 (D. Nev. 2020).

Dismissed for lack of standing: Plaintiffs Donald J. Trump for President, Republican National Committee, and Nevada Republican Party objected to A.B. 4 and sought to reinstate Nevada's ballot collection ban and some of Nevada's ballot rejection rules. The Walker River Tribe and Pyramid Lake Paiute Tribe moved to intervene. The

Court dismissed the case for lack of standing.

Blackfeet Nation v. Stapleton, No. 4:20-CV-95 (D. Mont. Oct. 9, 2020).

Settlement: The Blackfeet Nation sued to compel Pondera County, Montana to provide a satellite in-person voting office for registration and voting on the reservation. Pondera County had closed the satellite voting locations ostensibly because of the coronavirus even though it maintained in-person voting for the town of Conrad, which was over 90% non-Native. The only in-person voting available in Conrad was located some 60 to 80 miles away from many Blackfeet Tribal members. Plaintiffs brought claims under the Equal Protection Clause, Section 2 of the VRA, and the Montana state constitution. They asserted that the County's refusal to provide an on-reservation satellite office left Blackfeet voters to make a long and often impracticable trip to reach the existing off-reservation office, denied vote-by-mail as a viable alternative for many Blackfeet voters, and alleging that the County had no legitimate interests that could justify its refusal to provide the satellite office. Three days after the complaint was filed, the County agreed to establish a satellite election office and drop box in the reservation town of Heart Butte.

Pascua Yaqui Tribe v. Rodriguez, No. CV-20-00432-TUC-JAS, 2020 WL 6203523 (D. Ariz. Oct. 22, 2020).

Settlement: The Pascua Yaqui Tribe brought suit under Section 2 after the Pima County recorder removed an early voting location on the reservation. While a motion for preliminary judgment was denied prior to the 2020 election, the parties eventually settled. Pima County agreed to establish an early voting site on the Pascua Yaqui reservation before the 2022 midterm election, for every statewide primary and general election. The agreement sets a deadline of February 2022 for the Tribe and Pima County Recorder to identify an acceptable early voting location and requires that the County will fully staff a drop box location during the early voting period.

Yazzie v. Hobbs, 977 F.3d 964 (9th Cir. 2020).

Denial of preliminary injunction due to lack of standing: A District of Arizona judge denied a request by six citizens of Navajo Nation for a preliminary injunction suspending the requirement that a mail-in ballot be received

by the county recorder, relevant election official, or voter's polling place by 7:00 p.m. on the day of the election in order to be counted. The Navajo Nation alleged that this requirement violated Section 2 of the VRA. While the Ninth Circuit acknowledged the magnitude of the burden that the Arizona deadline imposed on citizens of Navajo Nation, it upheld the lower court's denial on the grounds that plaintiffs had not suffered an injury sufficient to establish standing.

Brnovich v. Democratic National Committee, 141 S. Ct. 1263, 594 U.S. ____ (2021).

Holding: The *Brnovich* Court held that neither of the two challenged Arizona laws violated Section 2 of the VRA. The first of these laws criminalized ballot collection; the second provided that any ballot cast outside of its voter's assigned precinct was to be discarded entirely. Plaintiffs relied on lower federal court precedent which had adapted the vote dilution test set forth in *Thornburg v. Gingles* to vote denial claims, arguing that these laws disproportionately burdened minority voters and resulted in unequal opportunities to participate in the electoral process in violation of Section 2. The *Brnovich* majority instead provided a novel set of five non-exclusive factors for lower courts to consider in Section 2 vote denial claims: the magnitude of the burden imposed on any individual voter; the degree to which the challenged rule deviates from voting systems in place in 1982; the proportion of voters or would-be voters in the minority group affected by the rule; the range of alternative methods of voting available to voters; and the strength of state interests purportedly advanced by the challenged voting rule.

State Law Claims

New Mexico ex rel. Riddle v. Oliver, No. S-1-SC-38228, 2021 WL 1807330 (N.M. Sup. Ct. May 6, 2021).

Holding: County clerks in New Mexico responsible for administering elections filed suit requesting that the New Mexico Supreme Court issue a writ directing the Secretary of State to (1) do away with in-person voting and use mail-in ballots only, (2) order polling places not to operate, (3) deliver ballots to voters in accordance with the procedures for special elections, and (4) operate alternate in-person polling places for voters that require

assistance. The Native Voters Alliance Education Project wrote an amicus brief on behalf of New Mexico tribes, arguing against the requested move to exclusively vote-by-mail. The court ordered the Secretary of State to mail to all registered voters an absentee ballot application, ordered in-person voting to proceed in accordance with local health and legal guidelines and denied all other relief requested.

Western Native Voice v. Stapleton, No. DV-2020-377 (D. Mont. Sept. 25, 2020).

Holding: The court permanently struck down the Montana Ballot Interference and Protection Act (BIPA), a law that imposed criminal penalties for individuals – excepting a few narrow categories which did not include GOTV volunteers and other community organizers – who collected more than six mail-in ballots. It found that BIPA disparately impacted Native Americans in Montana, many of whom live on remote reservations and thus rely heavily on ballot collections to cast their ballots at all. It also noted that this burden was exacerbated by the fact that, due to many Native communities' geographic isolation and high rates of poverty, Native voters were less able than other Montanans to use alternative methods of voting not impacted by BIPA's constraints. The court held that BIPA violated Native Americans' fundamental right to vote under Article II, Section 13 of the Montana Constitution. The challenge was brought by the Black-foot Nation, Confederate Salish and Kootenai Tribes of the Flathead Reservation, Fort Belknap Indian Co Native Vote.

***Western Native Voice v. Jacobsen*, No. DV-2021-0560 (D. Mont. May 17, 2021).**

Ongoing: In the final weeks of the 2021 legislative session, Montana legislators passed another ban on ballot collection that outlawed organizations from picking up and dropping off ballots, and a ban on Election Day registration. The Blackfeet Nation, Confederated Salish and Kootenai Tribes of the Flathead Reservation, Fort Belknap Indian Community, and the Northern Cheyenne Tribe and Western Native Vote and Montana Native Vote have challenged these laws under the Montana Constitution.

***DSCC v. Simon*, 950 N.W.2d 280 (Minn. 2020).**

Partial injunction, ballot collection ban upheld: Plaintiffs challenged two Minnesota voting laws and sought in Minnesota state court a temporary injunction against their enforcement. The first (Minn. Stat. § 204C.15) provided that no individual may “mark the ballots of more than three voters at one election” – limiting the number of blind, disabled, or illiterate voters he or she could assist in voting. The second (Minn. Stat. § 203B.08) provided that no individual may assist more than three voters in returning or mailing their absentee ballots. Plaintiffs alleged that these laws were preempted by Section 208 of the VRA and violated Minnesotans’ speech and association rights under both the federal and state constitutions. They also argued these laws disproportionately impacted Native Americans. While the Minnesota state trial court granted the requested injunction in full, the Minnesota Supreme

Court upheld only the portion which prevented enforcement of the limitation on ballot-marking assistance allowing the ballot collection restrictions to proceed prior to the 2020 election.

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

Holding: The Alaska Superior Court issued a preliminary injunction for the 2020 election, suspending Alaska’s requirement that any person voting by absentee ballot sign the ballot envelope in the presence of a witness and obtain the witness’s signature on the grounds that it impermissibly burdened Alaskans’ right to vote in light of the COVID-19 pandemic. The court specifically noted COVID-19’s disparate impact on Alaska Natives. It also underscored that the Alaska law at issue conflicted with the Arctic Council’s shelter-in-place order because it obligated the estimated one-in-three Alaska Natives living alone to access a non-household-member to witness their ballots. The Alaska Supreme Court ultimately required that Alaska count unsigned ballots as well as to conduct voter outreach to inform residents of the change in policy.

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