

**TESTIMONY BEFORE THE SENATE COMMITTEE ON INDIAN AFFAIRS
HEARING ON
VOTING MATTERS IN NATIVE COMMUNITIES**

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I. Introduction and History of Native American Voting Rights

My name is Patty Ferguson-Bohnee, and I am the Director of the Indian Legal Clinic at the Sandra Day O'Connor College of Law at Arizona State University. The Indian Legal Clinic coordinates the Native Vote Election Protection Project in Arizona, a non-partisan effort to protect Native American voting rights founded in 2008 in response to disparities in voting resulting from Arizona's voter identification law.¹ The Clinic works with its partners to educate Arizona's Tribal communities on election laws, voting, and redistricting.

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

When Congress passed the Indian Citizenship Act in 1924, states and local jurisdictions prevented Native Americans from registering to vote and voting.⁴ Little progress was made in the subsequent decades, and Congress failed to assure enfranchisement or promulgate instructions on how elections should be administered in Indian Country. Montana excluded Native Americans from voting and holding office since the establishment of its territorial government, and passed measures to exclude Native Americans from voting after statehood.⁵ South Dakota had a law in effect until 1939 that prevented Native Americans from holding public office.⁶ Many states alleged that Native Americans living on reservations were not state citizens in an effort to prevent them from voting. In 1948, Native Americans in New Mexico and Arizona successfully litigated their right to vote.⁷ Utah and North Dakota became the last states to afford on-reservation Native

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

² U.S. CONST. amend. XV, § 1.

³ Patty Ferguson-Bohnee, *The History of Indian Voting Rights in Arizona: Overcoming Decades of Voter Suppression*, 47 ARIZ. ST. L.J. 1099, 1102 (2015); see also *Elk v. Wilkins*, 112 U.S. 94, 103–04 (explaining tribal member who renounces tribal citizenship cannot become United States citizen via the Fourteenth Amendment's citizenship clause).

⁴ For a detailed history of voting rights of Native Americans, see generally, Daniel McCool *et al.*, *Native Vote: American Indians, the Voting Rights Act, and the Right to Vote* (2007).

⁵ Amicus Brief of American Civil Liberties Union, *Wandering Medicine, et. al. v. McCullough*, No. 1:12-cv-00135 (D. Mont. Dec. 4, 2012); Kaitlyn Schaeffer, *The Need for Federal Legislation to Address Native Voter Suppression*, 43 N.Y.U. REV. L. & SOC. CHANGE 707, 712 (2019).

⁶ Schaeffer at 712.

⁷ *Tapia v. Lucero*, 52 N.M. 200, 202, 195 P.2d 621, 621 (N.M. 1948); *Montoya v. Bollack*, 372 P.2d 387 (N.M. 1962) (holding that Navajo Indians residing on the reservation were eligible to vote); *Harrison v. Laveen*, 196 P.2d 456 (Ariz. 1948).

Americans the right to vote in 1957 and 1958, respectively.⁸ When the right to vote was finally secured, state and local officials took steps to prevent Native Americans from participating in elections and being elected to office.⁹ A common and effective tool for Native American disenfranchisement was the use of literacy tests because of the lower rates of English literacy in Tribal communities. In Arizona, for example, Native Americans could not fully participate in voting until 1970 when the United States Supreme Court upheld the ban against using literacy tests as a voter qualification.¹⁰

Exercising the right to vote for Native American voters only came with protections afforded by the Voting Rights Act and enforcement of those rights has required decades of litigation. However, the Supreme Court invalidated the preclearance formula in 2013, removing one of the most powerful tools to ensure equal access to the ballot for Native Americans, which included two jurisdictions in South Dakota, a jurisdiction in North Carolina, and the states of Alaska, and Arizona.¹¹ Since that time, efforts to suppress the vote have increased and the tactics to suppress the Native American vote have diversified by “pour[ing] old poison into new bottles.”¹² For Native Americans, these voter suppression efforts can have devastating impacts.

Today, only 66 percent of eligible Native American voters are registered to vote.¹³ “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.”¹⁴ Obstacles contributing to low voter turnout include geographic isolation, poorly maintained and unpaved roads, distance to polling locations, lack of election funding, discrimination, voter intimidation, lack of access to voter registration, and various technological barriers. Voter participation amongst Native Americans is further impacted by isolating conditions such as lack of access to transportation, lack of reliable mail delivery, and lack of traditional mailing addresses. Such obstacles are multiplied when combined with various election laws and procedures, such as identification requirements, limiting access to voting sites, lack of access to critical election information, inadequate language assistance, bans on ballot

⁸ Jennifer L. Robinson & Stephen L. Nelson, *The Small but Powerful Voice in American Elections: A Discussion of Voting Rights Litigation on Behalf of American Indians*, 70 BAYLOR L. REV. 91, 103–04 (2018); *Allan v. Merrell*, 305 P.2d 490 (Utah 1956), *vacated* 353 U.S. 932 (1957); Delilah Friedler, *The Rise of the Native American Electorate*, *Mother Jones* (Aug. 27, 2019), available at <https://www.motherjones.com/politics/2019/08/the-rise-of-the-native-american-electorate/>.

⁹ See generally, Patty Ferguson-Bohnee, *The History of Indian Voting Rights in Arizona: Overcoming Decades of Voter Suppression*, 47 ARIZ. ST. L.J. 1099 (2015).

¹⁰ The 1970 Amendments to the VRA suspended the use of literacy tests as a qualification for voting. Arizona had a literacy test for voter registration and unsuccessfully challenged the prohibition on using literacy tests. *Oregon v. Mitchell*, 400 U.S. 112 (1970).

¹¹ *Shelby County v. Holder*, 570 U.S. 529 (2013).

¹² *Reno v. Bossier Parish School Bd.*, 528 U.S. 320, 366 (2000) (Souter, J., concurring in part, dissenting in part).

¹³ DR. JAMES T. TUCKER ET AL., NATIVE AMERICAN RIGHTS FUND, OBSTACLES AT EVERY TURN: BARRIERS TO POLITICAL PARTICIPATION FACED BY NATIVE AMERICAN VOTERS 6 (2020), https://vote.narf.org/wp-content/uploads/2020/06/obstacles_at_every_turn.pdf.

¹⁴ *Id.*

assistance, and policies that needlessly discard ballots based on minor technicalities. These factors create a complicated maze that voters must navigate, with no guarantee that reaching the end of the maze means that your vote will be counted.

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

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

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

¹⁵ See generally *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021); see also *Shelby County v. Holder*, 133 S. Ct. 2612, 2621 (2013) (invalidating Section 5 preclearance formula).

¹⁶ See generally, Patty Ferguson-Bohnee, *The History of Indian Voting Rights in Arizona: Overcoming Decades of Voter Suppression*, 47 ARIZ. ST. L.J. 1099 (2015); JAMES TUCKER ET AL., OBSTACLES AT EVERY TURN (2020); Patty Ferguson-Bohnee, *How the Native American Vote Continues to be Suppressed*, ABA Human Rights Mag. Vol. 45-1 (2020); Patty Ferguson-Bohnee and James Tucker, *Voting During a Pandemic: Vote-by-Mail Challenges for Native Voters*, AZ Attorney 24-35 (July/Aug. 2020).

¹⁷ See generally Cohen's Handbook of Federal Indian Law § 5.04[3] (Nell Jessup Newton ed., 2012); *Seminole Nation v. United States*, 316 U.S. 286, 296–97 (1942).

¹⁸ *Cherokee Nation v. Georgia*, 30 U.S. 1, 10 (1831).

¹⁹ *United States v. Kagama*, 118 U.S. 375, 384 (1886).

II. Barriers that Impact Voting

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

A. Infrastructure

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

Other points of infrastructure such as electricity, running water, or broadband also impact voters on Tribal lands. For example, it is estimated that 30% of homes on the Navajo Nation lack electricity.²² Fifty-eight out of every 1,000 Native American households lack plumbing, compared to 3 out of every 1,000 white households in the country.²³

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

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

²⁰ FY2019 Navajo Nation Tribal Transportation Plan at 1, *available at* http://navajodot.org/uploads/files/Draft%20FY2019%20NNTTIP_08-20-18.pdf.

²¹ *Id.*

²² U.S. DEP'T ENERGY OFF. INDIAN ENERGY, STRENGTHENING TRIBAL COMMUNITIES, SUSTAINING FUTURE GENERATIONS (2017), https://www.energy.gov/sites/prod/files/2017/09/f36/DOE-IE-brochure_0917.pdf.

²³ *Many Native Americans Can't Get Clean Water, Report Finds*, NPR.ORG (Nov. 18, 2019 5:01 AM), <https://www.npr.org/2019/11/18/779821510/many-native-americans-cant-get-clean-water-report-finds>.

²⁴ AMERICAN INDIAN POLICY INSTITUTE, ARIZONA STATE UNIVERSITY, TRIBAL DIGITAL DIVIDE POLICY BRIEF AND RECOMMENDATIONS, https://aipi.asu.edu/sites/default/files/tribal_digital_divide_stimulus_bill_advocacy_04032020.pdf (last visited Oct. 24, 2021).

²⁵ MISSION CRITICAL PARTNERS, LLC, ARIZONA DEP'T ADMIN., ARIZONA STATEWIDE BROADBAND STRATEGIC PLAN (2018), https://azlibrary.gov/sites/default/files/erate_2018_az_broadbandstrategicplan_final.PDF.

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

B. Socioeconomic Barriers

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

Another challenge impacting many Native Americans is homelessness or near homelessness due to extreme poverty and lack of affordable housing on many reservations. A study by Housing and Urban Development found that between 42,000 and 85,000 people in tribal areas are couch surfers, staying with friends or relatives only because they had no place of their own.²⁹ Some of the highest rates of near homelessness, housing insecurity, and overcrowding in Indian Country are found in Arizona. These realities impact the ability of Native Americans to have permanent physical addresses, which is critical to determining where you can vote and your level of access to early voting and election day polling locations. This lack of permanent housing *should not* impede their ability to exercise their right to vote.

²⁶Nationally, the poverty rate for Native Americans is 26.8%. Poverty Rate, MAP AZ Dashboard (2019), available at <https://mapazdashboard.arizona.edu/health-social-well-being/poverty-rate/poverty-rate>; see also Natalie M & Brianna M, *Native American Poverty in Arizona: How does poverty on Arizona reservations affect its residents?* (Jan. 17, 2020), <https://storymaps.arcgis.com/stories/b7b09da92c664e0baa5fd375c045cc26>.

²⁷*Democratic Nat'l Comm. v. Reagan*, 904 F.3d 686, 704 (9th Cir. 2018), *reh'g en banc granted*, 911 F.3d 942 (9th Cir. 2019) (Thomas, S., dissenting).

²⁸ *Democratic Nat'l Comm. v. Reagan*, 904 F.3d 686, 704 (9th Cir. 2018), *reh'g en banc granted*, 911 F.3d 942 (9th Cir. 2019) (Dissent, Thomas).

²⁹ HUD, *Housing Needs of American Indians and Alaska Natives in Tribal Areas: A Report from the Assessment of American Indian, Alaska Native and Native Hawaiian Housing Needs* (Jan. 2017) at xx, 76, 82, 85, available at <https://www.huduser.gov/portal/sites/default/files/pdf/HNAIHousingNeeds.pdf>.

C. Non-Traditional Addresses

Many Native American living on Arizona’s Indian reservations lack traditional street addresses, and locations for homes are often identified in terms of landmarks, cross roads, and directions.³⁰ Most reservation roads are unimproved dirt or gravel roads, and “many miles of these roads are impassable after rain or snow. Because of the poor quality of the road systems on Indian reservations, many of the roads are unnamed and not serviced by the U.S. Postal Service. . . . A significant number of these reservation residents have no traditional street addresses.”³¹

Due to the lack of traditional addresses, many Native American voters rely on post office boxes to receive their mail and may include a post office box on their state identification. “Most reservation residents do not receive mail at their homes and either pay to maintain a post office box in a nearby town or receive their mail by general delivery at a trading post or other location. Some reservation residents have to travel up to seventy miles in one direction to receive mail.”³² In Arizona, only 18% of reservation voters outside of Maricopa and Pima Counties have physical addresses and receive mail at home.³³

The lack of formal addresses in Indian Country makes it especially hard for voters to comply with address requirements to register to vote or to produce identification in order to vote on election day.³⁴ Voters may be placed in the wrong precinct, their ID address may not match the voter rolls, and voters may not receive their election mail timely, if at all.

D. Vote-by-Mail

In Arizona, 89% of ballots cast in the 2020 general election were early ballots and the majority of them were cast by mail.³⁵ Although many off-reservation voters cast a ballot by mail, Native Americans do not have the same access or opportunity to vote by mail. This is because Native Americans do not have equitable, reliable, or easy access to mail services. Reservation residents in Arizona lack traditional mailing addresses resulting in lack of access to home mail delivery. Only 18% of Native Americans outside of Maricopa and Pima Counties receive mail at home.³⁶

³⁰ Native American Voting Rights Coalition, Voting Barriers Encountered by Native Americans in Arizona, New Mexico, Nevada, and South Dakota at 3, 5 (Jan. 2018).

³¹ Brief for National Congress of American Indians et al. as Amici Curiae Supporting Petitioners at 11–12, *Crawford v. Marion County*, 553 U.S. 181 (2008) (Nos. 7–21 & 7–25), available at https://sct.narf.org/documents/crawford/merits/amicus_ncai.pdf.

³² Brief of Amici Curiae NCAI at 12, *Crawford v. Marion County* (2008).

³³ *Democratic Nat’l Comm. v. Reagan*, 329 F. Supp. 3d at 869-70.

³⁴ Native American Voting Rights Coalition, Voting Barriers Encountered by Native Americans in Arizona, New Mexico, Nevada, and South Dakota at 5 (Jan. 2018).

³⁵ ARIZONA CLEAN ELECTIONS, *Vote By Mail*, <https://www.azcleanelections.gov/how-to-vote/early-voting/vote-by-mail> (last visited Oct. 24, 2021).

³⁶ *Democratic Nat’l Comm. v. Reagan*, 329 F. Supp. 3d 824, 869–70 (D. Ariz. 2018).

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

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

Postal delivery further inhibits vote-by-mail options for Native Americans. Access to mail is additionally inhibited due to delays in mail delivery between the voter and the county seat. Legally, ballots can begin being mailed to voters 27 days before the election.⁴⁰ For some voters on Tribal land it can take up to ten days to get from the county seat to the reservation and vice versa.⁴¹ When compared to the time it takes for mail to travel from Scottsdale to the Maricopa County seat of Phoenix Arizona, merely 18 hours, the difference is staggering.⁴² These delays are due in part to the USPS postal routes that take mail through a circuitous route before getting on reservations. For example, a ballot mailed from a voter in Window Rock, Arizona on the Navajo Nation, is routed to Gallup, New Mexico then Albuquerque, New Mexico then to Phoenix, Arizona, then to Show Low, Arizona, then to the Apache County seat in St. Johns, Arizona.⁴³ Because these routes are so complex, there is no good estimate for how long it will take for a ballot to reach the county recorder’s office.⁴⁴ If it takes 10 days for a ballot to get from the county seat to the voter living on the reservation, and ten days to get back, the voter only has a seven-day

³⁷ Carrie Jung, *Home Addresses on Navajo Nation are Rare* (Oct. 8, 2015), <https://kjzz.org/content/202564/homeaddresses-navajo-nation-are-rare-officials-working-change>.

³⁸ Brief for Navajo Nation as Amici Curiae Supporting Respondents at 13, *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321 (2021) (Nos. 19-1257 & 19-1258).

³⁹ *Id.*

⁴⁰ ARIZ. REV. STAT. § 16–544.

⁴¹ Complaint at 5, *Yazzie v. Hobbs*, No. 3:20-cv-08222-GMS (D. Ariz. Aug. 26, 2020).

⁴² *Id.*

⁴³ Brief for Navajo Nation as Amici Curiae Supporting Respondents at 15, *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321 (2021) (Nos. 19-1257 & 19-1258).

⁴⁴ *Id.*

window to receive the ballot, mark it, and return it to a post office in order for the ballot to arrive on time. Because Arizona does not accept postmarked ballots, voters that fall outside of this seven-day window may cast and return their ballot to USPS before election day but may nonetheless have their vote rejected if the ballot is not received by 7:00 PM on election day.⁴⁵ As a result of these realities, Native Americans do not experience the same level of access to receiving election information or the ability to participate in Arizona's early voting system.

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

E. Language Barriers

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

For the Navajo Nation, language barriers have widespread impact across the reservation. One third of the reservation's voting age population are limited-English proficient and over one quarter of the population are illiterate. In 2018, the Navajo Nation filed a lawsuit against the State of Arizona, Apache County, Coconino County, and Navajo County.⁵⁰ The Navajo Nation alleged that the state and counties failed to provide effective language assistance under Section 203 of the Voting Rights Act and failed to provide equal access to voter registration and in-person early voting.⁵¹ The counties also failed to provide instructions on how to complete an early ballot by mail in the Navajo language.⁵² The counties failed to provide translators to serve these voters at

⁴⁵ ARIZ. REV. STAT. § 16-547(C); ARIZ. REV. STAT. § 16-551(C).

⁴⁶ NATIVE AMERICAN VOTING RIGHTS COALITION, *Voting Barriers Encountered by Native Americans in Arizona, New Mexico, Nevada, and South Dakota* 1, 110 (Jan. 2018), available at <https://www.narf.org/wordpress/wp-content/uploads/2018/01/2017NAVRCsurvey-results.pdf>.

⁴⁷ *Id.*

⁴⁸ 28 C.F.R. § 55.12(c).

⁴⁹ 28 C.F.R. § 55.18.

⁵⁰ First Amended Verified Complaint for Injunctive and Declaratory Relief at 22, *Navajo Nation v. Reagan*, No. CV-18-08329-PCT-DWL (D. Ariz. Dec. 11, 2018), ECF No. 29.

⁵¹ *Id.*

⁵² *Id.*

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

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

III. Election Policies and Procedures

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

A. Polling Locations

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

The amount of access to in-person early voting was inadequate. Ten (10) of the fifteen (15) in-person early voting locations on Tribal lands or in Tribal communities were open for ten (10) hours

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 5.

⁵⁶ ARIZONA STATE UNIVERSITY INDIAN LEGAL CLINIC, NATIVE VOTE – ELECTION PROTECTION PROJECT 2016 ELECTION REPORT 1, 21 (2016).

⁵⁷ ARIZONA STATE UNIVERSITY INDIAN LEGAL CLINIC, NATIVE VOTE – ELECTION PROTECTION PROJECT 2018 ELECTION REPORT 1, 9 (forthcoming 2021).

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

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

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

B. Out of Precinct Policy

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

County lines that bisect and trisect reservations results in confusion and significant variances in levels of access across the reservations. While smaller reservations are often located in a single county, eight of Arizona's twenty reservations are located in two or more counties. For example, the Navajo Nation spans Apache County, Navajo County, and Coconino County. In Apache

⁵⁸ *Id.* at 12.

⁵⁹ *Id.*

⁶⁰ *Id.*

County, voters can only vote at their assigned polling place on election day. In Navajo County, voters can vote at any polling location in the county on election day, as long as you are a registered voter in that county. In Coconino County, voters can either vote at their assigned polling place or at a designated vote center which serves all voters in the county. Arizona's precinct policy is further complicated for the Navajo Nation because radio ads run across state and county lines.

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

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

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

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

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

C. Unequal Access to Voter Registration

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

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

In Arizona, in order to register to vote for state elections, voters must submit “documentary proof of citizenship.”⁶⁵ Voters that fail to produce documentary proof of citizenship are registered as a “federal-only” voter and only eligible to vote in races for federal offices: United States President, United States Senate, and for the United States House of Representatives.⁶⁶ Under Arizona law, documentary proof of citizenship includes Arizona Driver License or Non-Drive Identification

⁶¹ *Id.* at 6.

⁶² NAT’L CONF. STATE LEGISLATURES, *Online Voter Registration* (July 23, 2021), <https://www.ncsl.org/research/elections-and-campaigns/electronic-or-online-voter-registration.aspx>.

⁶³ NAT’L CONF. STATE LEGISLATURES, *Online Voter Registration* (Feb. 3, 2020), <https://www.ncsl.org/research/elections-and-campaigns/electronic-or-online-voter-registration.aspx>.

⁶⁴ NATIVE AMERICAN VOTING RIGHTS COALITION, *Voting Barriers Encountered by Native Americans in Arizona, New Mexico, Nevada, and South Dakota* 1, 5 (Jan. 2018).

⁶⁵ ELECTIONS SERVICES DIVISION, ARIZ. SEC’Y STATE’S OFF., *ARIZONA ELECTIONS PROCEDURES MANUAL 3* (2019), available at https://azsos.gov/sites/default/files/2019_ELECTIONS_PROCEDURES_MANUAL_APPROVED.pdf.

⁶⁶ *Id.*

Card, Out-of-State Driver License or Identification Card, Birth Certificate, U.S. Passport, Citizenship and Immigration Documents, and Tribal Identification Numbers and Documents.⁶⁷ Despite the inclusion of Tribal identification as an appropriate form of identification for registration, this form of ID is systemically excluded from Arizona’s online voter registration.

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

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

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

Because Native Americans face significant barriers to simply registering to vote, and do not have equal opportunities to register to vote, some Tribes remain drastically unregistered and drastically underrepresented in the electorate. For example, for the Tohono O’odham Nation, less than half

⁶⁷ *Id.* at 3–5.

⁶⁸ Press Release, Katie Hobbs, Ariz. Sec’y State, Secretary of State’s Office announces upgrade to ServiceArizona.com and new AZVoteSafe Guide for Native American voters (Sept. 21, 2020), <https://azsos.gov/about-office/media-center/press-releases/1223>.

⁶⁹ *Mi Familia Vota v. Hobbs*, No. CV-20-01903-PHX-SPL at 6 (D. Ariz. Oct. 5, 2020), ECF No. 35.

⁷⁰ *Id.* at 7.

⁷¹ *Democratic Nat’l Committee v. Hobbs*, 989, 1025 (9th Cir. 2020).

⁷² *Id.*

of their eligible voting age population is registered to vote. In the 2020 General Election, approximately 65% of registered voters on the Tohono O’odham Nation turned out to vote. However, when accounting for the low rate of voter registration, that results in a turnout of approximately 30.5% of the Tohono O’odham Nation’s voting age population.

D. Ongoing and Emerging Obstacles

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

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

In 2007, Arizona implemented a no-excuse early voting process known as the Permanent Early Voter List (“PEVL”).⁷³ Early ballots received via mail can be returned via mail or in person, either at a drop box location or in person at polling places or designated county sites.⁷⁴ In 2016, 80% of all ballots cast were early ballots⁷⁵ and in 2020 that number rose to 89%.⁷⁶ For Native Americans, third party ballot collection became an important get-out-the-vote (“GOTV”) tool to increase voter turnout and overcome barriers in access to mail. It was also a common method of assisting friends and fellow Tribal members in returning their ballots, especially those that face hurdles in returning their ballots related to socioeconomic conditions, difficulties in finding childcare, lack of access to transportation, disability, or work constraints.

Despite the fact that Arizona law already criminalized fraud involving wrongful possession or collection of another person’s ballot, H.B. 2023 was enacted to make it a felony to carry anyone’s ballot if they are not a family member, caregiver, household member, or a postal or election worker.⁷⁷ This bill added no security benefit because ballots undergo a signature verification process once received by the county, irrespective of who delivered the ballot. Only ballots with a matching signature will be counted. Forging ballots was already illegal and already prevented by

⁷³ *Democratic Nat’l Comm. v. Hobbs*, 948 F.3d 989, 1005 (9th Cir. 2020). Under S.B. 1485, the PEVL is now the active early voter list.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ ARIZONA CLEAN ELECTIONS, *Vote By Mail*, <https://www.azcleelections.gov/how-to-vote/early-voting/vote-by-mail> (last visited Oct. 24, 2021).

⁷⁷ ARIZ. REV. STAT. § 16–1005.

signature verification, thus the law has done nothing more than prohibit effective and good faith efforts to increase voter participation and criminalize everyday activities.

The original predecessor of the modern bill was introduced in S.B. 1412 was introduced when Arizona was subject to preclearance under the Voting Rights Act.⁷⁸ On May 18, 2011, Arizona submitted S.B. 1412 for the United States Department of Justice (“DOJ”) for preclearance.⁷⁹ Parts of the bill were cleared, except for the third party ballot collection.⁸⁰ DOJ sent a letter to Arizona concerning that provision, stating the information provided with the request was “insufficient to enable [DOJ] to determine that the proposed changes have neither the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group.”⁸¹ DOJ requested more information but the Attorney General pulled the request and the state legislature repealed the provision.⁸² Another ban on ballot collection was signed into law in 2013, but when voters organized to put that law on the ballot in the form of a referendum (a method to repeal law in Arizona and prohibit future laws that undercut the purpose of the referendum) the law was repealed.⁸³ Finally, the contemporary version of the law was introduced and passed in 2016 in the form of H.B. 2023.

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

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

On October 1, 2019, in a field hearing before the House Subcommittee on Election Administration in Phoenix, Arizona, the sponsor of the H.B. 2023, Senator Michelle Ugenti-Rita, was asked, “were you aware of Tribal opposition to your bill before today?” The bill sponsor responded, “Yes, sir.” When asked “Did you or any members of your staff invite Tribal participation at the hearing before

⁷⁸ *Democratic Nat’l Comm. v. Hobbs*, 948 F.3d 989, 1008 (9th Cir. 2020).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

the Elections Committee that you chaired on H.B. 2023? That is a yes or no question.” The bill sponsor responded “It is open to the public.”

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

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

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

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

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

In 2018, the Navajo Nation sued the state of Arizona and the three Arizona counties that spanned the reservation. One of the claims was rooted in the equal protection clause, due to unequal treatment between voters that signed the ballot but their signatures didn’t match, and voters that failed to sign their ballot. This followed settlement reached in a lawsuit filed by the Republican Party that allowed voters in the 2018 General Election to have five days post election to cure their ballots by affirming their signature so their ballot could be counted.⁸⁴ Navajo Nation’s lawsuit alleged that under the Equal Protection Clause of the 14th Amendment, unsigned ballots must be treated similarly. The Republican Party’s settlement agreement, the practice of curing mismatched signatures up until five business days after the election, was codified in Arizona law in 2019.⁸⁵

⁸⁴ Bob Christie & Nicholas Riccardi, *Settlement reached in tight Arizona Senate vote count* (Nov. 9, 2018), <https://apnews.com/article/north-america-lawsuits-ap-top-news-elections-az-state-wire-18679ae12bbe4b2d9dbe93fcdf00e757>.

⁸⁵ S.B. 1003, 55th Leg., Reg. Sess. (Ariz. 2021).

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

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

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

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

⁸⁶ Matthew Campbell, *Materials in Navajo Nation et al. v. Reagan – Voting Rights Litigation* (Nov. 27, 2019), <https://turtletalk.blog/2019/11/27/materials-in-navajo-nation-et-al-v-reagan-voting-rights-litigation/>.

⁸⁷ S.B. 1003, 55th Leg., Reg. Sess. (Ariz. 2021).

⁸⁸ *Id.*

⁸⁹ Arizona House Government & Elections Committee, 55th Leg. (Mar. 17, 2021) (statements of Michelle Ugenti-Rita), <https://www.azleg.gov/videooplayer/?eventID=2021031084>.

⁹⁰ Press Release, Navajo Nation, Office of the President and Vice President, Navajo Nation leaders urge Arizona Governor to veto voter suppression bill (Apr. 30, 2021), <https://www.navajonns.gov/News%20Releases/OPVP/2021/Apr/FOR%20IMMEDIATE%20RELEASE%20-%20Navajo%20Nation%20leaders%20urge%20Arizona%20Governor%20to%20veto%20voter%20suppression%20bill.pdf>.

their government.”⁹¹ Despite the Nation’s urging the Governor to veto the bill and honor the settlement agreements, the law went into effect.

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

In 2021, Arizona banned local governments that administer elections from using private funds to register voters or administer elections in Arizona. The bill’s sponsor, Representative Jake Hoffman, recognized that the state of Arizona does not provide funds for the administration of elections and that it falls on the local governments to fund their elections.⁹² In 2020, Arizona received \$11.5 million dollars in grant funding in 2020 to ensure that local election administrators could effectively respond to the public health crisis of COVID-19 and safely carry out the election.⁹³ Approximately \$10,854,120 of the \$11.5 million went to counties with that cover Tribal communities. Counties spent grants on training and paying poll workers, educating voters, renting venues that allowed social distancing, or cameras in order to comply with Arizona law requiring livestreaming of the tabulation center, providing additional early voting, and purchasing drop boxes.⁹⁴

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

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

⁹¹ *Id.*

⁹² Arizona House Government & Elections Committee, 55th Leg. (Feb. 18, 2021) (statement of Jake Hoffman), <https://www.azleg.gov/videoplayer/?eventID=2021021140>.

⁹³ Press Release, All Voting is Local, Arizona Counties Must Provide Rapid Response Election Funding (May 5, 2021), <https://allvotingislocal.org/press-releases/arizona-counties-must-provide-rapid-response-election-funding/>.

⁹⁴ *Private Donations Helped Pay For 2020 Elections. Arizona Republicans Say No More*, NPR.ORG (Mar. 11, 2021, 5:00 AM), <https://www.npr.org/2021/03/11/975746051/private-donations-helped-pay-for-2020-elections-arizona-republicans-say-no-more>.

⁹⁵ Julia Shumway, *Fact Check: Gosar correct on private land in Ariz.*, THE REPUBLIC (Apr. 13, 2015, 4:28 PM), <https://www.azcentral.com/story/news/politics/fact-check/2015/04/13/fact-check-gosar-correct-private-land-arizona/25740527/>.

⁹⁶ *Id.*

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

IV. The Voting Rights Act

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

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

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

Due to conditions on the Nation, many Navajos rely on others to help them pick up and drop off mail. Because...mail service is severely limited on the Nation, many Navajos rely on neighbors, friends, and clan members to pick up and deliver their mail. Navajos follow a kinship system that consists of more than 100 clans. Each Navajo belongs to four different clans. When a Navajo introduces himself or herself to another person who happens to share one or more of the same clans, they become related through clan. Clan relationships are similar to that of familial relationships such as brother, sister, mother, and father. [The ballot collection ban policy] excludes these traditional Navajo familial relationships by limiting familial relationships to someone related by blood, marriage, adoption, or legal guardianship. Arizona's ballot collection law criminalizes the way in which many Navajos have historically handled their mail-in ballots, and it increases the disparity

between off-reservation individuals and Navajo voters who do not have the same opportunity to vote by mail.⁹⁷

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

V. Election Protection Program

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

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

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

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

⁹⁷ Brief for Navajo Nation as Amici Curiae Supporting Respondents at 19–20, *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321 (2021) (Nos. 19-1257 & 19-1258).

⁹⁸ See *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321 (2021).

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

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

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

A. Dedman Candidate Challenge

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

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

⁹⁹ *Reynolds v. Dedman*, No. CV2020-0057 (Apache Cty. Sup. Ct. 2020).

¹⁰⁰ Amended Complaint at 2, *Reynolds v. Dedman*, No. CV2020-0057 (Apache Cty. Sup. Ct. 2020).

¹⁰¹ *Id.*

B. Pascua Yaqui Early Voting Case

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

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

VI. Conclusion

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

¹⁰² Memo to Pima County Board of Supervisors from F. Ann Rodriguez (Nov. 20, 2020).