



**“Restoring the Voting Rights Act:
Protecting the Native American and Alaska Native Vote”**

Hearing before the Senate Committee on the Judiciary, Subcommittee on the Constitution

October 20, 2021

September 13, 2022, RESPONSES BY JACQUELINE DE LEÓN
RE: QUESTIONS FROM SENATOR BLUMENTHAL

- 1. Statements at the hearing reflected that there continues to be a disparity in voter turnout and registration between Native American and Alaska Native voters compared to other groups.**
 - a. According to the National Congress of American Indians, Native Americans and Alaska Natives reported 34% not registered to vote rate as compared to 26.5% of not registered to vote non-Hispanic Whites. Is that consistent with your organization or Tribe’s experience? Please provide examples.**

Yes, that is consistent with NARF’s experience working with Native communities nationwide. Low voter registration among Native American and Alaska Native voters is a longstanding problem. Discrimination and government policies have resulted in numerous, unique factors that still make it more difficult for many Native Americans and Alaska Natives to register to vote, which are detailed in response to question (b). Listed here are a series of examples of how non-compliance with the National Voter Registration Act (NVRA) has resulted in rejection of Native American registrations, exacerbating low registration rates in Indian Country.

The NVRA expanded the accessibility of voter registration by requiring states to develop driver’s license application forms that simultaneously serve as voter registration applications.¹ While the typical non-native applicant may substantially benefit from this system, it does not necessarily help a Native American applicant, because it is already impractical for many Native Americans, particularly those living on remote reservations, to obtain driver’s licenses.² In North Dakota, the average distance that a voting-age Native American living on a reservation must travel to get to a

¹ 52 U.S.C. § 20504.

² James Thomas Tucker, Jacqueline De León & Daniel McCool, *Obstacles at Every Turn: Barriers to Political Participation Faced by Native American Voters* 65, NATIVE AM. RTS. FUND (2020), https://vote.narf.org/wp-content/uploads/2020/06/obstacles_at_every_turn.pdf (hereinafter “Obstacles”).

driver's license site is 34.15 miles, and the average travel time is 58 minutes.³ Furthermore, the rate of Native Americans in North Dakota with transportation access is half that of white North Dakotans,⁴ further deepening the divide in voter registration.

Recent litigation brought by the Native American Rights Fund and DEMOS on behalf of tribes and individual plaintiffs in South Dakota highlights several disturbing incidents of NVRA non-compliance by state officials.⁵ Fact development in that case uncovered:

- The number of people that South Dakota had reported registering through its public assistance agencies had declined sharply in recent years, from 7,000 in the 2004 election cycle to just 1,100 in the 2016 cycle, despite monthly food stamp participation *increasing* from 53,459 in 2004 to 95,983 in 2016. That means voter registration *declined* 84% between 2004 and 2016, despite a nearly 80% *increase* in food stamp distribution. In 2004, up to 13% of SNAP clients submitted a voter registration application through the Department of Social Services (DSS), whereas in 2016 a maximum of 1.1% of clients did so. The voter registration rate was 11.8 times lower in 2016 than in 2004.
- Many South Dakota voters--and especially Native voters--had attempted to register to vote through the Department of Motor Vehicles (DMV) or the DSS only to be turned away from the polls because the agencies never sent their applications to local elections officials. Many more were never offered the chance to register in the first place.
- In 2019, Plaintiff Kimberly Dillion, an eligible, unregistered Native voter, indicated that she wished to register to vote while applying for a state ID card at DPS and also completed a voter registration application at a DSS office. In neither case, however, did the agency fulfill its obligations under the NVRA to ensure that Ms. Dillon's voter registration was accepted, transmitted to the relevant election official, and/or processed. As a result, Ms. Dillon was subsequently turned away from the polls as unregistered in 2020.
- On October 11, 2019, Plaintiffs' field investigators encountered a person who had *walked approximately 30 miles* from Porcupine, SD to the Pine Ridge DSS field office in 12-degree Fahrenheit weather to submit a change of address request for his SNAP benefits. In violation of the NVRA, this DSS client was not offered a voter registration application during his change-of-address transaction. Following this transaction, the field investigators provided him with a voter registration application, assisted his completion of the application, and delivered his completed application to the Pine Ridge DSS field office.

A staff person at the DSS office threw the completed voter registration form in the trash and told the field investigator that she refused to accept the voter registration application

³ Gerald Webster, *An Evaluation of the Effects of Adding a Second Voter Registration/Polling Site in Three Montana Counties* (2012).

⁴ *Obstacles* at 65.

⁵ *Rosebud Sioux Tribe v. Barnett*, No. 5:20-cv-5058, 2022 WL 1689393 (D.S.D. Aug. 23, 2022)

because she was following orders from a DSS memorandum instructing DSS workers to refuse voter registration applications lacking a ‘9-1-1 address.’ The field investigator asked the Pine Ridge DSS worker to remove the voter registration form from the trash, showed the worker that the address in that application was sufficient for voter registration purposes, and asked the worker to mail in the completed application to the county auditor. The Pine Ridge field office did not respond to inquiries asking whether it had mailed in the voter registration application.

- In 2020, Plaintiff Hoksila White Mountain witnessed at least five Native people turned away from the polls who thought they were registered to vote, and later learned from the person in charge of the McLaughlin City Hall polling location that several people complained of being turned away. He and his wife have also been clients of both DSS and the DMV and have not received proper opportunities to register to vote while applying for benefits or a driver’s license or changing their address.
- In another instance, a DSS client in Rapid City incorrectly believed he could not vote due to a felony conviction. He was under the impression he could not register to vote despite having completed his sentence. No one at the office informed him that this was the case and he remained unregistered.
- At the Martin DSS office, a DSS client completed her sentence and was eligible to vote when she applied for SNAP, TANF, and Medicaid. The DSS case worker who assisted this client with her application skipped the voter preference question when reviewing the benefits application form because this client had once been convicted of a felony, even though she was now eligible to vote under South Dakota law.

On May 26, 2022, the District Court issued a decision holding that South Dakota had violated the NVRA in multiple respects.⁶ In August 2022, following substantial effort and resources, Plaintiffs and South Dakota reached a comprehensive settlement agreement requiring the State, over the next three years, to implement policies and practices to ensure that South Dakota fully complies with the NVRA.⁷ The settlement is not only a win for Indian Country but truly benefits all of South Dakota. Yet, the long hard road to the prospect of compliance demonstrates multiple instances where Native Americans have denied the opportunity to register. It is no wonder that Native Americans remained unregistered at disproportionately high rates.

⁶ *Rosebud Sioux Tribe et al. v. Barnett et al.*, Civ. No. 5:20-cv-05058-LLP (D.S.D. May 26, 2022) (“Memorandum and Order on Summary Judgment”).

⁷ *Rosebud Sioux Tribe et al. v. Barnett et al.*, Civ. No. 5:20-cv-05058-LLP (D.S.D. September 12, 2022) (“Order of Dismissal”).

b. What has contributed to or caused depressed Native American and Alaska Native voter registration?

As discussed, non-applicability and non-compliance with the NVRA has meant that the benefits of motor-voter have largely skipped Native Americans. Native Americans and Alaska Natives also face unique obstacles to successful voter registration including discrimination, language barriers, geographic isolation, and lack of resources. These obstacles compound to make registering to vote a burdensome process which, for some, is near impossible. Even when a tribal member surmounts the registration obstacle course, the sheer difficulty of the process sends the message that Native voices do not belong in the political process.

Year-round voter registration sites are often off reservation located at county seats that may require tribal members to travel significant distances, necessitating time and transportation many do not have. Voters surveyed from the Duck Valley, Pyramid Lake, Walker River, and Yerington Tribes in Nevada identified travel distances as “the single biggest obstacle to registering.”⁸ Among those not registered, “34 percent said that it would be difficult for them to travel to a place to register.”⁹ Travel time from the Duckwater Reservation to the Tonopah elections office is 140 miles each way.¹⁰ This travel time and distance becomes even greater when tribal members must travel even further distances to obtain basic government services, such as obtaining acceptable identification or a legal description of their residential address. For example, Native Americans living on the Rosebud Sioux Reservation in South Dakota must travel an average of 28 miles more than non-Natives to obtain a state identification card.¹¹ Locations where tribal members can obtain identification, such as the Department of Motor Vehicles, are often open only limited hours or for a few days out of the month. In North Dakota, there are 27 driver’s license sites in 53 counties and one for every 2,600 square miles. Only four locations are open five days a week, and twelve locations are open for less than six hours on one day per month.¹² If a tribal member is unable to navigate the site’s computer system, does not bring the correct documentation, or experiences delays in traveling to the site, they may lose their limited chance to register to vote.

As voter ID laws become more stringent and comprehensive, tribal members who lack the required identification have been left behind. In addition to the long distances necessary to obtain such identification, extreme poverty common on reservations can render the associated costs prohibitive. In Washington state, a driver’s license costs \$89, and each renewal costs \$54.¹³ In addition to these high prices, obtaining identification typically requires the applicant to present documents that a Native American may not have or that may not be accurate. For example, some tribal members do not have birth certificates, or their birth certificate does not list their given name.¹⁴ Finally, even when tribal members successfully obtain state identification, their ID cards

⁸ *Id.* at 33.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 34.

¹² *Id.*

¹³ *Driver Licensing Fees*, WASH. ST. DEP’T OF LICENSING, <https://www.dol.wa.gov/driverslicense/fees.html> (last visited Sept. 1, 2022).

¹⁴ *Obstacles* at 74.

are more likely to contain errors due to lack of familiarity with Native American names and addresses.¹⁵

Even when states accept tribal IDs as a valid form of identification, not all tribal members are successful in using them to register. Some poll officials are unfamiliar with tribal IDs and may reject them, or may even view tribal IDs as an inferior form of identification and insist on a state-issued identification.¹⁶ Additionally, state laws that require proof of residential address may render a tribal ID insufficient if it does not list an address recognized by the postal service, or the tribal member moves frequently.¹⁷ For example, Arizona's recently enacted voter ID law,¹⁸ which requires that voters provide documentary proof of residency upon registration, will disproportionately affect tribal voters, particularly those on the Gila River Indian Reservation who do not have traditional street addresses.¹⁹

Indeed, on-reservation homes are less likely to have a residential address recognized by the U.S. postal service.²⁰ Additionally, Native Americans and Alaska Natives experience disproportionately high levels of housing insecurity and homelessness, both on and off-reservations. In Seattle, Native Americans comprise 7% of the city's homeless population, but are only 1% of the city's total population.²¹ Homeless people are legally eligible to vote, but few understand the process of registering to vote and how to use their cross-streets or shelter's address to register.²² On many reservations, housing is scarce, and many tribal members frequently move addresses or live in intergenerational homes based on family dynamics that are unfamiliar to non-Natives. If a tribal member moves frequently, registering to vote can be difficult because they do not have a permanent physical address.²³ Tribal members who live in intergenerational homes are often unable to prove their physical address because the documents associated with the home, such as utility bills or the lease agreement, are typically in only one person or two people's names.²⁴ This can complicate the registration process and deter tribal members from trying, especially if they fear having to explain their living situation to a non-Native election administrator who may not understand.

Moreover, while online voter registration may give the appearance that registering is more convenient than ever, tribal members are being left behind due to unequal access to the internet.²⁵

¹⁵ *Id.*

¹⁶ *Id.* at 76.

¹⁷ *Id.*

¹⁸ H.B. 2492, 55th Legis., 2nd Reg. Sess. (Ariz. 2022) (codified at Ariz. Rev. Stat. § 16-123).

¹⁹ *Id.* at 76–77.

²⁰ Memorandum on Voting Access for Native Americans in Montana from the Montana Advisory Comm. to the U.S. Comm'n on Civ. Rts. to the U.S. Comm'n on Civ. Rts. 9 (June 8, 2021)

(<https://www.judiciary.senate.gov/imo/media/doc/De%20Leon%20Testimony1.pdf>).

²¹ *Id.* at 72.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 79.

In Montana, 90.7% of households have an internet subscription, compared to an average of 60.5% of households on Native American reservations. Nationally, 67% of Native American households have internet subscriptions, compared to 82% of non-Native households. 35% of reservation households do not have internet service, compared to 8% of the Nation as a whole. These disparities make it more difficult for Native Americans to access information on how and where to register to vote, reducing their options for registering.

Language barriers also affect Native Americans and Alaska Natives opportunities to register to vote. The Voting Rights Act requires election-related materials to be published in minority languages in covered jurisdictions, and, in the event that an American Indian or Alaska Native language is “historically unwritten,” that oral assistance be provided.²⁶ However, the provision has failed to be implemented to its full effect due to lack of enforcement, intentional non-compliance, lack of training for poll workers, translation challenges, and ignorance of the complexity of Native languages.²⁷ For example, in San Juan County, Utah, many Navajo voters require interpreters to access state and local government services, but the County does not employ a Navajo interpreter.²⁸ Navajo voters received no information about ballot initiatives written in Navajo prior to the election, and when a voter asked poll workers in English to explain the contents of the ballot, the workers responded, “Well, if you don’t understand it, don’t vote on it.”²⁹ This complete lack of services discourages, and even prohibits, Native voters from registering and sends the message that the Native vote is not important.

These are only a few examples that support the disparity between Native American and non-Native voter registration. These and other factors, such as low education levels, higher rates of crime and violence (leading to fears for safety as well as lack of access to voting due to previous convictions), and language barriers, all compound to create significant barriers to voter registration for Native voters.

c. To what extent would the John R. Lewis Voting Rights Advancement Act (VRAA) and Native American Voting Rights Act (NAVRA) help address any continued disparities in Native American and Alaska Native voter registration?

The VRAA, incorporating NAVRA, contains a comprehensive set of provisions that address the specific hindrances that result in continued disparities in Native American and Alaska Native voter registration.

Section 5 of NAVRA amends the National Voter Registration Act to require that states designate federal facilities that primarily provide services to Indian tribes as voter registration sites is a tremendous opportunity to bring voter registration services directly to Native people.³⁰ Facilities such as the Indian Health Services (IHS) would be required to provide registration services to wide

²⁶ 52 U.S.C. § 10503(c).

²⁷ *Obstacles* at 57–58.

²⁸ *Id.* at 62–63.

²⁹ *Id.* at 63.

³⁰ *Id.* § 5.

swaths of Native Americans who have never encountered registration opportunities. This provision will drastically reduce the burdensome time and transportation costs that result in lower rates of Native voter registration and will pair voter registration opportunities with transactions that individuals are interested in such as receiving commodities or health services. Providing these options will radically expand opportunities for Native American registration.

Section 4 of NAVRA provides for a federal grant to fund state Native American voting task forces to identify the unique hurdles to voter registration in that state and to collaborate with state and tribal stakeholder to address common issues like internet connectivity, navigating voter identification laws, and providing language assistance.³¹

Section 6 of NAVRA ensures that at least one polling site is available on Indian lands “make[s] voter registration available during the period the polling place is open to the maximum extent allowable under State law.”³²

Section 7 of NAVRA will ensure that increased registration access cannot be easily removed by requiring that states first obtain the consent of the tribe, the consent of the Attorney General of the United States, or a court order from the D.C. federal district court before eliminating a voter registration site or reducing voter accessibility.³³

Section 8 of NAVRA requires that states accept tribal identification documents—if they mandate voters present identification upon registration or casting a ballot. Additionally, if a state requires more than one form of identification, the state shall not require any tribal member to present more than one form of identification if the voter indicates they do not possess more than one.³⁴ This provision will greatly increase accessibility to voter registration for Native Americans by allowing tribal voters to use identification they already have and eliminating hurdles to obtaining subsequent identification. The NAVRA’s task forces would train and educate state and local election administrators to recognize tribal IDs and accept them as legal forms of identification.³⁵

Section 10 of NAVRA bolsters the Voting Rights Act’s language provisions to ensure equitable access to voter registration forms and government services.³⁶ Section 13 requires the Attorney General of the United States to consult with tribes annually to further identify issues related to voting in federal elections.³⁷

d. The turnout rate among Native American and Alaska Native voters is up to 10% lower than the rate of other racial and ethnic groups. Is that consistent with your organization or Tribe’s experience? Please provide examples.

³¹ Frank Harrison, Elizabeth Peratrovich, and Miguel Trujillo Native American Voting Rights Act, H.R. 5008, 117th Cong. § 4(b) (2021).

³² *Id.* § 6(a)(2)(F).

³³ *Id.* at § 7.

³⁴ *Id.* at § 8(a), (c).

³⁵ *Id.* at § 4(b)(5).

³⁶ H.R. 5008, 117th Cong. § 10 (2022).

³⁷ *Id.* § 13.

Yes. NARF has consistently found that Native American and Alaska Native voters have lower turnout rates than other voters. For example, in Owyhee, Nevada, where the Duck Valley Shoshone-Paiute Tribe is headquartered, Native voters had a turnout rate of 42.5% in the November 2014 General Election, compared to 55.6% of the county as a whole.³⁸ The county had designated Owyhee as an all-vote by mail location and set up no in-person voting locations, resulting in low turnout by Native voters.³⁹ Vote-by-mail is not accessible to many Native voters if they do not receive mail at their home, need language assistance, fear that their ballot will be lost or discarded, or do not understand the contents of the ballot.⁴⁰

In Montana, as the proportion of the Native American population in a county increases the voter turnout decreases. According to the 2020 Census, the five counties with the highest proportion of Native Americans are Big Horn County, Roosevelt County, Blaine County, Rosebud County, and Glacier County.⁴¹ In these counties, voter turnout in the 2020 General Election was 65%, 68%, 76%, 75%, and 69%, respectively.⁴² These were the lowest voter turnout rates in the state, with a peak of 90% turnout in four different counties.⁴³ There are several reasons for this disparity. Poor or nonexistent mail service makes voting by mail extremely burdensome and requires tribal members to use precious resources to obtain information on elections. Limited internet access disproportionately affects Native voters as voter registration and election information increasingly moves online. The long distances to polling locations, combined with a lack of transportation, disincentivizes tribal members on reservations from voting, and many do not have the resources to make the trip even if they wanted.

e. What has contributed to or caused depressed Native American and Alaska Native voter turnout?

In addition to the factors mentioned above, geographical isolation and poor infrastructure remain some of the most daunting hindrances to casting a ballot for Native voters. Many tribal members must travel far from the reservation to pre-dominantly non-Native county seats or communities, even if the population of Native Americans exceeds the population of non-Natives.⁴⁴ The closest polling location to the Kaibab Paiute Tribe of Arizona is 30 miles away.⁴⁵ Because the residents

³⁸ See State of Nevada, County of Elko, Canvas and Abstract of the Vote of the Elko County, State of Nevada 2014 General Election Held on November 4, 2014 (under Precinct 29 Ballots Cast and Turnout Percent).

³⁹ *Obstacles* at 103.

⁴⁰ *Id.* at 95–101.

⁴¹ Plaintiffs' Joint Proposed Findings of Fact, Conclusions of Law and Order, Montana Democratic Party v. Jacobsen, No. DV 21-0451 at 30 (2022).

⁴² *Official Voter Turnout Primary General Elections 1992 Present*, Montana Sec'y of State, <https://sosmt.gov/Portals/142/Elections/Documents/1920-Present-Voter-Turnout-History.xlsx> (last visited Sept. 2, 2022).

⁴³ *Id.*

⁴⁴ *Obstacles* at 90.

⁴⁵ *Id.*

are spread out across the reservation, some tribal members must travel up to 90 miles round trip just to vote in person.⁴⁶ To exacerbate the problem, many reservations have poor or non-existent roads that make travel off the reservation extremely difficult. Alaska Native villages are very geographically isolated and suffer from intense weather conditions that make travel and mail delivery unpredictable.⁴⁷

On the Hopi and Navajo reservations, road conditions can be extremely dangerous during the winter, exacerbating the poor maintenance and posing a risk to driver safety and vehicles.⁴⁸ Even if early voting allows tribal members more opportunities to cast their ballot, these locations are often still located very far from the reservation and open limited hours. For example, on the Navajo reservation, a voter living in Teec Nos Pos would have to travel 150 miles roundtrip to cast an early ballot in Chinle.⁴⁹ Early voting locations were placed on the White Mountain Apache and San Carlos Apache reservations, but they were open only one day for four hours.⁵⁰

Often, Native American and Alaska Native voters have to face ignorance, hostility, and racism from poll workers when voting. Many travel to polling locations in predominantly non-Native communities, where anti-Indian sentiment can be high. For example, the weekend before Election Day, in 2020, a man in a town bordering the Fort Peck reservation in Montana won a local costume contest dressed in Ku Klux Klan regalia.⁵¹ Acts of racism from border towns can strongly deter tribal members from voting on Election Day. Even if there is a polling location on the reservation, poll workers are often non-Native, which can lead to uncomfortable interactions in which the poll workers are unable to provide language assistance, to give instructions that the voter will understand, or to meet the needs of Native voters.⁵²

f. To what extent would the VRAA and NAVRA help address any continued disparities in Native American and Alaska Native voter turnout?

In addition to the provisions already mentioned, Section 6 of NAVRA comprehensively addresses the lack of polling locations and registration opportunities on tribal lands near where tribal members live. The bill directs states to provide a minimum of one polling place in each precinct where there are eligible voters who reside on tribal land, with the location to be chosen by the tribe and at no cost to the tribe.⁵³ It also streamlines the process for adding additional polling places to tribal lands by considering the unique needs of the tribe and the voters.⁵⁴ For locations that have mail-in voting, federal ballots sent to tribal members must have pre-paid postage and materials translated into the applicable language.⁵⁵ It increases the number of ballot drop boxes located on

⁴⁶ *Id.*

⁴⁷ *Id.* at 31–32.

⁴⁸ *Id.* at 32.

⁴⁹ *Id.* at 93.

⁵⁰ *Id.* at 92.

⁵¹ *Obstacles*, 2021 add. at 6.

⁵² *Id.*

⁵³ H.R. 5008, 117th Cong. § 6(a)(2) (2022).

⁵⁴ *Id.*

⁵⁵ *Id.* § 6(e).

tribal lands and allows for tribes to designate at least one ballot pickup and collection location.⁵⁶ In short, Section 6 provides multiple solutions to the structural problems and refusals to provide equitable services that result in turnout disparities in tribal voters. Every American should have reasonable access to election services. NAVRA brings parity in access to Native Americans and Alaska Natives living on Indian lands.

g. Given these disparities, does a high overall level of Native American and Alaska Native turnout demonstrate that there is no longer discrimination against these groups of voters?

No. Rather, a high overall level of Native American and Alaska Native turnout reflects the resilience of Native voters and the tireless activism by countless stakeholders to combat the rampant discrimination and disenfranchisement that persists against tribal communities. High turnout rate also does not account for the disproportionate number of Native eligible voters that remain unregistered. As for registered and active voters, Native voters are becoming increasingly aware of the discrimination against them and their power at the ballot box. For example, Allie Young, a Navajo activist in Arizona, led voters who lacked transportation on the reservation to the polls on horseback.⁵⁷ And consequently Native American voters in Arizona were credited with pushing President Biden to success in the 2020 Presidential Election.⁵⁸ Yet, tribes in Arizona, Montana, Minnesota, and Nevada filed lawsuits challenging discriminatory laws and practices in 2020 and 2021, fighting for accessible and equitable voting.⁵⁹

Higher rates of voter turnout should not fool us into believing that these problems are solved. If disparities exist in accessing the polls, Congress should act to eliminate the hurdles for Native voters to achieve equitable access racial and ethnic groups.

h. How does NAVRA address for the current lack of transparency and outreach to Native American communities in registration and voting?

One of the main purposes of establishing the Native American voting task force grant program is to increase voter outreach, education, registration, and turnout in Native American communities.⁶⁰ In addition, the increased accountability measures, such as conferring a private right of action on tribes and tribal members to enforce the Section 6 provisions and the increased opportunities for federal observers to be stationed at polling locations,⁶¹ will increase transparency in the registration and voting process to boost tribal members' confidence and trust in non-tribal elections. Finally,

⁵⁶ *Id.* at §§ 6(e)(2), 6(f).

⁵⁷ Sydney Page, *Getting to the Polls Can Be Hard in Navajo Nation. This Woman Is Leading Voters on Horseback.*, Wash. Post (Nov. 2, 2020, 6:00 a.m.), <https://www.washingtonpost.com/lifestyle/2020/11/02/navajo-nation-horse-vote-polls-election/>.

⁵⁸ Felicia Fonseca & Angeliki Kastanis, *Native American Votes Helped Secure Biden's Win in Arizona*, AP News (Nov. 19, 2020), <https://apnews.com/article/election-2020-joe-biden-flagstaff-arizona-voting-rights-fa452fbd546fa00535679d78ac40b890>.

⁵⁹ *Obstacles*, 2021 Add. at 4–5.

⁶⁰ H.R. 5008, 117th Cong. § 4(b)(1) (2022).

⁶¹ *Id.* §11(a)(3).

increased language services provided in Section 10 will allow tribal members to obtain a greater understanding of voter registration and casting a ballot.⁶²

2. At the hearing and in written testimony, Ms. Frankenstein and Mr. Buchanan suggested that NAVRA would unduly burden election administrators and constitute a federal takeover of local elections.

a. Why can't the barriers that Native American voters currently face simply be addressed by state or local government officials under the status quo?

First—as demonstrated by NARF's active litigation in this space—many state and local officials are unwilling to provide the services Native American voters are already entitled to under the status quo. Today, NARF is actively litigating to protect Native voting rights in Montana, South Dakota, and Alaska⁶³ and is currently negotiating with several resistant counties that are refusing to provide equitable on-reservation services despite repeated requests.

Second, even where state, local, or tribal officials are willing and able to offer additional voter services, they are often under resourced or lack clear directive that they can provide services to Native Americans. Increased monetary investments and clear guidance under the NAVRA will enable government officials to provide resources like culturally appropriate language assistance, additional voter registration and polling sites, drop boxes, and will clarify their obligations toward the Native communities they serve.

The current status quo for Native voters is untenable. Litigation is often slow, expensive, and is limited to specific geographic areas. NAVRA is an opportunity to make real improvements by investing to improve ballot access for Native voters and to make lasting policy changes that reduce the longstanding barriers Native voters face. States have failed in their obligation to provide equitable services to Native Americans. Minimum federal standards of access do not constitute a federal takeover. States are still free to dictate the time, place, and manner of elections. However, under NAVRA states would no longer be able to exclude Native American constituents from the services already enjoyed by the majority of their non-Native citizens.

b. What does successful litigation that has been brought against state or government officials responsible for administering elections in Indian Country demonstrate about their capabilities and how they have exercised their discretion?

NARF's successful litigation demonstrates that where state and local officials exercise discretion about where to provide voter services, they often will not provide those services to tribal

⁶² *Id.* § 13.

⁶³ Complaint for Declaratory & Injunctive Relief, *W. Native Voice v. Jacobsen*, No. DV 21-0560 (Mont. 13th Jud. Dist. Ct. May 17, 2021); Amended Complaint, *Rosebud Sioux Tribe v. Barnett*, No. 5:20-cv-5058, 2022 WL 1689393 (D.S.D. Aug. 23, 2022); Complaint for Declaratory & Injunctive Relief, *Arctic Vill. Council v. Fenumiai*, No. 3-AN-22-_____ CI (Alaska Sup. Ct. Aug. 23, 2022).

communities unless sued or required by a court. This remains true even when failure to provide services—like a polling place—will result in violating the Voting Rights Act. For example, in 2020, Pondera County elected to close its satellite voting locations for Blackfeet Nation allegedly because of concerns related to the coronavirus, while maintaining in-person voting for the town of Conrad which was over 90% non-Native. NARF had to sue the county to get the satellite voting locations reinstated.⁶⁴

Requesting state officials to exercise their discretion to aid Native voters is often futile. In August 2022, NARF and its partner organizations filed suit against the State of Alaska because state officials refused to remedy issues with ballot rejections during the recent special election.⁶⁵ Plaintiffs had previously sent a demand letter to Lt. Governor Kevin Meyer and the Director of the Division of Elections, Gail Fenumiai, asking them to implement a notice and cure process before the November general election. They denied responsibility for the issue and failed to provide a resolution.

We cannot leave fixing unequal access for Native voters up to state and county officials because even when required by federal law, State officials are often reticent to provide services to Native communities. In May 2022, a federal judge in South Dakota ruled that the State had committed numerous violations of the National Voter Registration Act by failing to provide voter registration services, particularly in Native communities. The court found that the state’s forms, services, and training were all inadequate to provide the minimum voter registration services required by law. In effect, by not offering these basic services, South Dakota has disenfranchised Native communities.⁶⁶

c. What are some examples of discrimination related to voting that have been established by Native voters against state and local governments through litigation?

Native Americans and Alaska Natives regularly face discriminatory policies and conduct when trying to exercise their right to vote. Proving discrimination, however, is an extremely high legal bar that requires a significant investment of resources. NARF often forgoes explicit discrimination claims in the interest of securing voting access for their clients. However, several cases are suggestive of discrimination.

In 2020, a Montana state Court found that restrictions on the number of ballots an individual could collect and return on behalf of other voters which were unreasonable, discriminatory, and not justified by any state interest.⁶⁷ These ballot collection efforts are often the only way Native Americans living on rural reservations in Montana can access the vote. The ban would have effectively ended this practice, disenfranchising significant numbers of Native American voters. Following the successful litigation establishing that Native voters’ right to vote through ballot

⁶⁴ <https://www.narf.org/montana-voting-sites/>

⁶⁵ <https://www.narf.org/alaska-ballot-cure/>

⁶⁶ <https://www.narf.org/sd-nvra/>

⁶⁷ <https://www.narf.org/montana-bipa/>

collection under the Montana Constitution, the Montana State legislature passed a nearly identical ballot collection ban. NARF, ACLU, and other plaintiff's groups just completed a second trial in Montana challenging these restrictions. In that case, a co-sponsor of the legislation admitted at trial that despite knowing about the opinion, he never read the opinion finding the previous ballot collection ban unconstitutional and admitted to doing nothing to understand whether the newest iteration of the ballot collection ban would disproportionately impact Native Americans.

In 2016, a federal court in North Dakota found that the state voter ID law violated the Fourteenth Amendment because it severely burdened the rights of Native American voters and served no significant state interest.⁶⁸ In that case, the voter ID law was passed immediately after Native voters in North Dakota were credited with the surprise win of Senator Heidi Heitkamp, a Democrat in a heavily Republican state. Prior to the passage of the ID law, the state legislature was informed that some homes on Native reservations in North Dakota lacked residential addresses, yet they required addresses on ID to vote, thereby disenfranchising Native American voters. Plaintiffs in that case alleged intentional discrimination.

Finally, while intentional discrimination may seem to be a relic of an archaic past, it unfortunately lives on near reservations, and tribal members are often discouraged from voting due to fears of harassment. Oral testimony at field hearings led by the Native American Rights Fund established multiple instances of discrimination. For example, testimony established that in 2014, a gun-toting sheriff was posted at a satellite polling location for the Pine Ridge Indian Reservation in South Dakota, intimidating potential voters.⁶⁹ In 2012, also in South Dakota, election administrators humiliated and dehumanized Native voters by forcing them to vote in a chicken coop covered in feathers with no bathroom facilities.⁷⁰ In extreme cases, discriminatory election workers have outright prevented Native Americans from participating in the political process. In 2018, the clerk for San Juan County, Utah fraudulently caused a Native American candidate for county commissioner to lose his spot on the ballot until the court ordered him back on.⁷¹ Also in 2018, an election worker in Montana refused to accept more than 45 voter registration cards completed by Native Americans, despite there being no legal limit to the number she could accept.⁷²

d. Is NAVRA difficult to administer? Why or why not?

No, NAVRA is not difficult to administer. Instead NAVRA makes administering elections easier because it clarifies requirements for county and state officials to offer election services on Native lands and reduces the burdens on local county offices by permitting tribes to assist with election administration. NAVRA also provides financial resources to facilitate its goals; lack of resources is a commonly cited justification local and state officials cite for being unable to provide Native communities with additional election assistance.

⁶⁸ *Brakebill v. Jaeger*, No. 1:16-CV008, 2016 WL 7118548, at *1 (D.N.D. Aug. 1, 2016).

⁶⁹ Brief for National Congress of American Indians as Amicus Curiae Supporting Respondents, *Merrill v. Milligan*, 142 S. Ct. 879 (2022) (Nos. 21A375 & 21A376).

⁷⁰ *Obstacles* at 87.

⁷¹ *Grayeyes v. Cox*, No. 4:18-CV-00041, 2018 WL 3830073, at *9 (D. Utah Aug. 9, 2018).

⁷² *Obstacles* at 45.

i. Would NAVRA require every single precinct to offer early or in-person absentee voting, even in jurisdictions where the state has not already provided early voting opportunities?

No, NAVRA would not require in-person absentee voting in states that do not provide early voting opportunities. Instead, NAVRA addresses the structural lack of residential mail delivery in Native communities by providing that a Tribe – *in a State that already permits absentee or mail in balloting under State law*⁷³ – can designate a building per precinct where ballots can be picked up and dropped off.⁷⁴

ii. Would NAVRA force private businesses to host polling places?

No, NAVRA provides the option for tribes to designate tribally chosen locations on Indian lands as polling locations. Logical places for polling sites include tribally owned facilities such as community centers, tribal headquarters, or numerous other tribally owned and operated facilities. Nothing in NAVRA mandates private businesses host polling places or suggests the takeover of unwilling private businesses spaces for that purpose.⁷⁵ Unreasonable or unconstitutional interpretations should not be read into legislation for the purposes of creating unfounded fears against tribal governments who are simply trying to ensure equitable voting access for their members. Arguing that tribal governments would force private businesses to host polling places without any justification for this unconstitutional interpretation of the legislation plays upon disturbing tropes that tribal governments cannot be trusted and are looking to “force” their will upon non-Natives. That is, of course, untrue, and not supported by NAVRA.

iii. Would NAVRA require that every federal building become a polling place? Do federal buildings face different requirements in providing voter registration as opposed to serving as a polling site?

No, NAVRA would not require that every federal building become a polling place. Section 5 of NAVRA is limited to designating facilities or federal funded facilities that are “primarily engaged in providing services to an Indian Tribe” to become voter registration providers under the National Voter Registration Act. Section 5 does not require every federal facility to become a polling site.

With regard to Section 6(d), designated federal polling sites are limited to the federal sites that meet the requirements as defined under Section 5, which are limited as discussed above, and are further restricted to “meets the requirements of Federal and State law as applied to other polling places within the State or political subdivision.” This is by no means all federal buildings writ large or even all federal buildings on Indian lands.

⁷³ Native American Voting Rights Act, H.R. 5008, 117th Cong. § 6(e).

⁷⁴ *Id.* § 6(e)(2).

⁷⁵ *Id.* § 6(2)(A).

iv. Why is it important to provide both in-person and mail-in voting opportunities for Native American voting access?

It is critically important to provide options for Native American voters because different voters and reservations face different challenges. In-person voting opportunities are crucial for Native voters whose first language is not English and who required not-written language assistance. Many Native voters also do not have mailing addresses or do not receive USPS services at their residences. For these voters, in-person voting is necessary. For those Native voters who do have access to P.O. Boxes, post office boxes, or mail delivery services, mail-in voting opportunities may be preferable to avoid long drive times to polling places. In Alaska, mail-in voting is a key option for voters who live in remote areas inaccessible except by plane. Mail-in voting is also critically important for thousands of Native voters who lack access to reliable transportation. Finally, mail-in voting is attractive for Native voters who wish to avoid interacting with poll workers and government officials who may seek to intimidate Native Americans and Alaska Natives.

v. How does the Task Force that NAVRA establishes bridge the gap in the disparity of resources that state and local governments allocate for Native voters compared to non-Native voters?

The Task Force was designed to specifically target the unique challenges Native voters face. State and local officials consistently cite lack of resources as a justification to avoid addressing these challenges. These federal grants will allow for teams in different jurisdictions to tailor their efforts to the specific needs in their area and thereby improve Native voter registration and polling place access.

e. Why are early voting sites so crucial for providing equal access to voting for Native American populations?

Early voting sites, much like for non-Native voters, provide Native voters flexibility when they go to vote. This flexibility can help to ameliorate access issues that are prevalent in specifically Native communities created by geographic isolation, poverty, and language access issues. For example, early voting may be necessary if severe weather limits Native voters' ability to travel to polling places on election as is common in Alaska and other geographically remote areas with poor roads. Such flexibility is also beneficial for Native voters who disproportionately lack reliable transportation, are unable to access regularly childcare, or may work in jobs with inflexible schedules.

3. At the hearing and in written testimony, Ms. Frankenstein suggested that NAVRA creates a two-tier system with drastically different rules for on-reservation and off-reservation voters. Is that true? Why or why not?

This statement by Ms. Frankenstein ignores that there is already a two-tier system with different levels of access for on-reservation and off-reservation voters. Under the status quo, Native voters often have significantly less access to the ballot than non-Native residents in their communities. As opposed to creating a two-tier system, NAVRA will mandate equitable access to the ballot by

requiring that states provide access to Native Americans who, despite being constituents, have been ignored or otherwise discriminated against.

Moreover, Section 6 contains several provisions that are deferential to state law. For example provisions under Section 6(a)(2)(E-G) specifically defer to state law requiring “at each polling place located on Indian lands, conduct the election using the same voting procedures that are used at other polling places in the State or political subdivision that are not located on Indian lands, or other voting procedures that provide greater access for voters”; “shall, at each polling place located on Indian lands and at no cost to the Indian Tribe, make voter registration available during the period the polling place is open to the maximum extent allowable under State law”; and “shall, at each polling place located on Indian lands, provide training, compensation, and other benefits to election officials and poll workers at no cost to the Indian Tribe and, at a minimum, to the same or greater extent that such training, compensation, and benefits are provided to election officials and poll workers at other polling places in the State or political subdivision that are not located on Indian lands.” Additionally, Section 6(e) provisions regarding vote by mail are applicable only where “States or political subdivisions that permit absentee or mail-in balloting.”

4. Why is NAVRA needed to provide Native American and Alaska Native voters with equal access to registration and voting opportunities that non-Native voters already have?

As hearing testimony and NARF’s lawsuits demonstrate there are numerous, significant barriers to registration and voting opportunities for Native voters including discrimination, geographic isolation, limited English-proficiency, homelessness and housing insecurity, limited infrastructure, and a lack of voter IDs. NAVRA directly addresses each of these obstacles in turn. It will increase the number of voter registration and polling sites on reservations thereby reducing the physical distances Native voters must travel to vote. It will require states accept tribal IDs. It increases support for language assistance. It would take NARF years, hundreds of lawsuits, and millions of dollars to affect the kind of systemic change the NAVRA would create immediately for Native voters. Native Americans deserve more than piecemeal relief. Federal legislation is appropriate to remedy the widespread discrimination and inequitable services currently facing Native Americans who try to exercise their fundamental right to vote.

5. At the hearing, Ms. Frankenstein and Mr. Buchanan suggested that NAVRA would create election integrity issues.

Ms. Frankenstein stated in the hearing, “In my state and in others with Indian tribes we already have difficulty enforcing state election integrity laws on the reservation. There’s an issue with who has jurisdiction on the reservation to enforce state laws. This compounds that problem. If we allow tribal law enforcement to determine basically who is eligible and who is not, by virtue of having the power of who gets to stay in the polling place and observe, we’ve got a recipe for the tribes

taking over who's eligible to vote rather than our elected and trained election administrators and our legislators of the state who enact those voting laws.”⁷⁶

Ms. Frankenstein failed to cite any specific instances or exactly what difficulties South Dakota supposedly faces when enforcing state election “integrity” laws on the reservation. This implication of integrity issues is especially concerning coming from a representative of South Dakota that has a disturbing history of false accusations of voter fraud against Native American communities. Following the close 2002 election of Tim Johnson – with Native American communities providing the final votes that put Tim Johnson over the top – accusations of voter fraud within Native communities began to proliferate.⁷⁷ Yet, officials who made those accusations had to walk back those comments when no evidence emerged to substantiate that false narrative.⁷⁸ Yet, this false narrative that Native communities are untrustworthy, full of voter fraud, or incapable of running free and fair elections persists through unsubstantiated comments like Ms. Frankenstein's. These comments should not be credited.

Indeed, South Dakota has an especially dark and extensive history of voter discrimination against Native Americans.⁷⁹ In 2004, a District Court issued a 144 page opinion with a 40-page overview of the racial discrimination faced by Native American voters in South Dakota.⁸⁰ And just this past year, NARF was forced to file suit against Lyman County which agreed that the County's at-large system for County Commissioners was in violation of the Voting Rights Act, yet refused to implement its single member districts for another two years.⁸¹ This litigation is in addition to the litigation related to the unacceptable incidents of NVRA non-compliance detailed in response to Question 1.

Ms. Frankenstein further incorrectly stated that NAVRA creates a recipe for “tribes taking over who's eligible to vote”. NAVRA does not such thing. NAVRA contains a provision that allows for tribal law enforcement to exercise their inherent right to remove individuals who are “intimidating, harassing, or otherwise impeding the ability of people to vote or of the State and its political subdivisions to conduct an election.”⁸² How Ms. Frankenstein extrapolates this to mean that Tribes are “taking over who's eligible to vote” is unclear. What is clear, is that such unfounded

⁷⁶ *Restoring the Voting Rights Act: Protecting the Native American and Alaska Native Vote*, 117th Cong. at 2:26:56 (2021) (statement of Sara Frankenstein, Witness), <https://www.judiciary.senate.gov/meetings/restoring-the-voting-rights-act-protecting-the-native-american-and-alaska-native-vote>.

⁷⁷ See e.g. 2002, John H. Fund, Voter Fraud Wanders Off the Reservation, Wall Street Journal, available at: <https://www.wsj.com/articles/SB1034729534912263436>

⁷⁸ See e.g., 2002, T.R. Reid, New Indian Voters Turned Race in S.D., Washington Post, available at: <https://www.washingtonpost.com/archive/politics/2002/11/08/new-indian-voters-turned-race-in-sd/2bc21f2d-a54b-491c-abac-d3fd9ce4c445/>

⁷⁹ Brief for National Congress of American Indians as Amicus Curiae Supporting Respondents, *Merrill v. Milligan*, 142 S. Ct. 879 (2022) (Nos. 21A375 & 21A376) pgs. 15-22.

⁸⁰ *Bone Shirt v. Hazeltine*, 387 F. Supp. 2d 1035, 1043 (D.S.D. Aug. 18, 2005), *aff'd*, 461 F.3d 1011 (8th. Cir. 2006).

⁸¹ *Lower Brule Sioux Tribe v. Lyman County*, Case No. 3:22-cv-3008 (D.S.D. May 18, 2022).

⁸² Native American Voting Rights Act, H.R. 5008, 117th Cong. § 12(a).

extrapolation and the rhetoric saying tribes are “taking over” should not be given credence. Native American communities are full of American citizens entitled to cast votes and who can be trusted with election administration. Any implication otherwise, especially when unfounded, should be disregarded.

a. Why are ballot drop boxes and ballot collection mechanisms for tribal members, particularly those that do not have individual mailing addresses, crucial to ensuring equal access to voting? Do they pose election integrity issues?

For many Native Americans and Alaska Natives, in-person voting is logistically challenging due to lack of transportation and geographic isolation. Those same voters often lack mailing addresses and receive no USPS delivery.⁸³ Ballot drop boxes can be located on areas of Indian reservations or in Alaska Native villages where there are no nearby polling places or USPS boxes and are often available 24/7. Drop boxes also do not experience mail delays—a problem exacerbated by the remoteness of many Native communities.

Native American and Alaska Natives often pool their mail pick-up and drop off. Similarly, many Native voters rely on family, friends, or neighbors to collect and return their ballots. Given the large extended families living closely together on reservations, it is not uncommon that a person may handle mail, including ballots, for more than six family members.⁸⁴ Ballot collection is an important option for Native voters to overcome their geographic and socioeconomic isolation—it ensures ballots go directly to drop boxes or election offices.

Drop boxes and ballot collection do not pose election integrity issues. In all of NARF’s litigation, there has been no evidence that ballot drop boxes or that ballot collection like the type done on Native American reservations have ever resulted in instances of fraud.

b. Are Post Office Boxes a sufficient alternative?

No, primarily because Post Office Boxes often do not exist in the places where Native voters live. In addition, ballot drop boxes ensure that ballots go directly to election officials and are more likely to be trusted, especially considering the consistent mail delays experienced throughout the U.S.

The COVID-19 pandemic has exemplified the disparate impact on Native voters posed by mail-only elections. For example, Nevada conducted its 2020 primary elections entirely by mail, which exacerbated issues such as significant distances from post offices, limited rural post office hours, lack of transportation options, and other socio-economic factors.⁸⁵ Only 35% of Nevada

⁸³ See, e.g. Complaint for Declaratory & Injunctive Relief, *W. Native Voice v. Jacobsen*, No. DV 21-0560 at 3-4 (Mont. 13th Jud. Dist. Ct. May 17, 2021).

⁸⁴ Motion to Intervene by Pyramid Lake Paiute & Walker River Paiute Tribes, *Donald J. Trump for President, Inc. v. Cegavske*, No. 2:20-cv-01445-JCM-VCF at 4 (D. Nev. Sept. 11, 2020).

⁸⁵ Motion to Intervene by Pyramid Lake Paiute & Walker River Paiute Tribes, *Donald J. Trump for President, Inc. v. Cegavske*, No. 2:20-cv-01445-JCM-VCF at 2 (D. Nev. Sept. 11, 2020).

reservations and colonies have home mail service.⁸⁶ The approximately 2,500 tribal members who live on the Walker River Paiute and Pyramid lake Paiute reservations have no residential mail service and must travel to a post office to receive mail, including election-related mail.⁸⁷ However, nine out of fourteen reservations in Nevada lack a post office within their jurisdictional boundaries, and no post office located on a reservation is open for more than six hours.⁸⁸ Post offices that are open for 7.5 hours or longer are located very far from the reservation, with residents of the Duck Valley Reservation traveling 194.4 miles round-trip to access a post office in Elko.⁸⁹

To make matters worse, 12.8% of Native Americans in Nevada lack vehicle access, with even more lacking money for gasoline or car insurance.⁹⁰ Often, a single working vehicle shared among 7–10 household members is used to commute to off-reservation employment and is unavailable to pick up and drop off mail during the workday—often the same time that post offices are open.⁹¹

Mail delivery to and from reservations is often very slow. A letter mailed from the Walker River Paiute Reservation must first travel 90 miles to Reno to be sorted before it is sent to its final destination, even if the delivery point is closer than Reno.⁹² The same issue applies to ballots sent by mail. County seats responsible for counting returned ballots are, on average, 66.75 miles away from reservations and colonies in Nevada.⁹³

Given these obstacles, in the 2020 Nevada primary election, the precinct where the Walker River Paiute Reservation votes had the lowest voter turnout rate at just 21.93%, despite being the largest precinct in the county.⁹⁴ In sum, P.O. Boxes do not adequately address the lack of residential mail delivery on Indian lands. Instead, NAVRA’s multiple provisions detailed above are needed to bring equitable voting access to Native American communities.

Thank you for this opportunity to answer questions.

⁸⁶ *Id.* at 3.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 4.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 5.