



**Written Statement of Jacqueline De León
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For a Hearing On

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

**Submitted to the Senate Judiciary Committee,
Subcommittee on The Constitution
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I. Introduction

Thank you Chairman Blumenthal, Ranking Member Cruz, and Members of the Subcommittee for having me testify today. My name is Jacqueline De León, I am a member of the Isleta Pueblo in New Mexico, and I am a staff attorney with the Native American Rights Fund (“NARF”). Thank you for having me testify on the state of Native American voting rights and the pressing need for federal action to fully restore the Voting Rights Act through the John Lewis Voting Rights Advancement Act, including incorporation of the Native American Voting Rights Act.

Since 1970, NARF has provided legal assistance to tribes, organizations, and individuals nationwide who might otherwise have gone without adequate representation. NARF has successfully asserted and defended the most important rights of Native Americans¹ and tribes in hundreds of major cases, and has achieved significant results in such critical areas as tribal sovereignty, treaty rights, natural resource protection, Indian education, and voting rights. NARF is a non-profit 501(c)(3) organization that focuses on applying existing laws and treaties to ensure that the federal and state governments live up to their legal obligations to tribes and Native Americans.

NARF is headquartered in Boulder, Colorado, with branch offices in Washington, D.C., and Anchorage, Alaska. NARF is governed by a volunteer board of directors composed of thirteen Native Americans from different tribes throughout the country with a variety of expertise in Native American matters. A staff of seventeen attorneys handle over fifty major cases at any given time, with most of the cases taking several years to resolve. Cases are accepted on the basis of their breadth and potential importance in setting legal precedents and establishing important principles of Indian law. Voting rights cases fall under NARF’s priority area of promoting Native American human rights. Unfortunately, there remains much work to be done.

II. Legal and Historical Background of Native American Disenfranchisement

Throughout history, states have actively resisted Native American participation in American democracy. Even after the passage of the Fifteenth Amendment, Minnesota’s Constitution prohibited Native Americans from voting unless they “adopted the language, customs and habits of civilization.”² South Dakota passed a law in 1903 that prevented Native Americans from voting while “maintaining tribal relations.”³ In North Dakota, the State Supreme Court in 1920 granted only those Native Americans who had

¹ I use the term Native American, American Indian, and Indian interchangeably throughout this statement. These terms include Alaska Natives.

² Minn. Const., art. VII, § 1(4) (1858).

³ S.D. Codified Laws § 26 (1903).

assimilated the right to vote because they “live the same as white people . . . [and required] that they have severed their tribal relations.”⁴

Even after the passage of the Indian Citizenship Act in 1924, states and local jurisdictions prevented Native Americans from registering to vote and voting.⁵ In 1928, the Arizona Supreme Court held that Native Americans, despite being United States citizens, were excluded from registering to vote because they were wards of the federal government.⁶ That decision equated Native Americans with incompetents and stood for twenty years. Montana excluded Native Americans from voting and holding office from its territorial establishment, and took measures to prevent Native Americans from voting.⁷ South Dakota had a law in effect until 1939 that prevented Native Americans from holding public office.⁸ And 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.⁹ Utah and North Dakota became the last states to afford on-reservation Native Americans the right to vote in 1957 and 1958, respectively.¹⁰ When the right to vote was finally secured, steps were then taken to prevent Native Americans from participating in elections and being elected to office.¹¹

Language barriers have also historically been exploited to deny the right to vote. Like African Americans, Native Americans who were fluent only in their Native languages and unable to read or write in English because they were denied equal

⁴ *Swift v. Leach*, 178 N.W. 437 (N.D. 1920).

⁵ 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).

⁶ *Porter v. Hall*, 271 P. 411, 417 (Ariz. 1928), *overruled in part by Harrison v. Laveen*, 196 P.2d 456 (Ariz. 1948)

⁷ Kaitlyn Schaeffer, *The Need for Federal Legislation to Address Native Voter Suppression*, 43 N.Y.U. REV. L. & SOC. CHANGE 712 (2019).

⁸ *Id.*

⁹ *Montoya v. Bollack*, 372 P.2d 387 (N.M. 1962); *Harrison v. Laveen*, 196 P.2d 456 (Ariz. 1948).

¹⁰ 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, 104 (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-nativeamerican-electorate/>.

¹¹ 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).

educational opportunities, were disenfranchised by literacy tests designed to keep them from voting. An Arizona statute stipulated that only individuals who could read the United States Constitution in English could vote.¹² When Alaska became a state in 1959, the state's new constitution required that a voter "shall be able to read or speak the English language as prescribed by law."¹³

Whether through state constitutional provisions, residency requirements, requirements to abandon tribal culture, taxation, guardianship, or literacy tests, states and local jurisdictions with substantial Native populations have, like states in the South in the Jim Crow era, been creative in crafting various stratagems and legal devices that denied the right to vote to Native Americans. It was not until the passage of the Voting Rights Act ("VRA") that Native Americans were promised full legal access to the franchise. However, that promise has not yet been realized for Native Americans.

III. Obstacles to Voting for Native Americans

Native Americans face many obstacles to voting. Obstacles can include isolating conditions that reduce opportunities and participation, structural or institutional barriers that limit voter participation through the passage of laws or policies that reduce voter participation, and election administration issues.

Today, many Native American reservations are located in extremely rural areas, distant from the nearest off-reservation border town. This was by design, as official government policies forcibly removed Native Americans and segregated them onto the most remote and undesirable land. As a result of these policies, travel to county seats for voting services can astoundingly be hundreds of miles away. Services such as DMVs and post offices can also require hours of travel. As detailed extensively below, the impacts of discrimination are not only in the past. Due to ongoing discrimination and governmental neglect, many Native Americans live in overcrowded homes that do not have addresses, do not receive mail, and are located on dirt roads that become impassable with inclement weather. Lack of broadband internet, cell phone coverage, or the economic means for transportation to in-person assistance means there are Native Americans that cannot access basic government services.¹⁴

¹² Ariz. Rev. Stat. Ann. § 16-101(A)(4)-(5) (1956)

¹³ Alaska Const. art. V, § 1 (1959)

¹⁴ A summary of these barriers is provided in testimony I previously submitted on February 22, 2020, in support of the Native American Voting Rights Act before the House Committee on Administration Subcommittee on Elections, available here: <https://www.congress.gov/116/meeting/house/110464/witnesses/HHRG-116-HA08-Wstate-DeLeonJ-20200211-U1.pdf>

Too often, these vulnerabilities are exploited by state laws and county rules that undermine the ability for Native Americans to cast their ballot. As a result, voting in Native communities is difficult and can even be impossible. The exploitation of these vulnerabilities is at times intentional and the result of overt racist discrimination. Federal action is needed to protect Native Americans from this abuse. Passage of the Native American Voting Rights Act would help overcome the structural deficiencies present in Native American communities that too often make voting unreasonably difficult. A fully functioning and restored Voting Rights Act would provide a backstop against discrimination.

Field Hearings

To better understand the barriers preventing Native American access to the ballot, in 2015, NARF founded the Native American Voting Rights Coalition (“NAVRC”), a coalition of national and regional grassroots organizations, academics, and attorneys advocating for Native Americans’ equal access to the political process. NAVRC was founded to facilitate collaboration between its members on coordinated approaches to the many barriers that Native Americans face in registering to vote, casting their ballot, and having an equal voice in elections. Led by NARF, in April 2018, NAVRC completed a series of nine field hearings in seven states on the state of voting rights in Indian Country. I, along with former NARF pro bono counsel, Dr. James Tucker, Ph.D., had the honor of attending all of these hearings. We heard from approximately 125 witnesses from dozens of tribes around the country, generated thousands of pages of transcripts with their testimony about the progress of Native Americans in non-tribal elections, and documented the work that remains to be done.

The field hearings were conducted at the following locations: Bismarck, North Dakota, on September 5, 2017; Milwaukee, Wisconsin, on October 16, 2017; Phoenix, Arizona, on January 11, 2018; Portland, Oregon, on January 23, 2018; on the tribal lands of the Rincon Band of Luiseño Indians north of San Diego, California, on February 5, 2018; Tulsa, Oklahoma, on February 23, 2018; on the tribal lands of the Isleta Pueblo just outside of Albuquerque, New Mexico, on March 8, 2018; Sacramento, California, on April 5, 2018; and on the tribal lands of the Navajo Nation in Tuba City, Arizona, on April 25, 2018. Field hearings were not conducted in Alaska because the Alaska Advisory Committee to the U.S. Commission on Civil Rights already had a similar effort underway. Coalition members also were familiar with Alaska’s barriers after several years of voting rights litigation there.

Witnesses included tribal leaders, community organizers, academics, politicians, and Native voters. They shared their experiences in voter registration and voting in federal, state, and local (non-tribal) elections. I am humbled to be carrying their stories with me here today.

The field hearings made clear that across this country Native Americans face unjust barriers that prevent them from having equal access to the ballot box. We were able to identify common factors discouraging political participation, including: (1) geographical isolation; (2) physical and natural barriers; (3) poorly maintained or non-existent roads; (4) distance and limited hours of government offices; (5) technological barriers and the digital divide; (6) low levels of educational attainment; (7) depressed socio-economic conditions; (8) homelessness and housing insecurity; (9) non-traditional mailing addresses such as post office boxes; (10) lack of funding for elections; and (11) overt and intentional racial discrimination against Native Americans.

In addition to this daunting list of factors, language access also remains an obstacle for some Native American voters. Under the 2011 determinations of jurisdictions that required language assistance, Native American languages were the second most common language group after Spanish. Section 203 of the Voting Rights Act helps Limited-English Proficient (“LEP”) American Indian and Alaska Native voters overcome barriers to political participation by requiring 35 political subdivisions in nine states to provide bilingual written materials and oral language assistance.¹⁵ Despite these broad protections, jurisdictions have often failed to provide the required translations, forcing Native voters to file costly lawsuits.

Even if Native American voters can overcome these barriers and register to vote, the field hearings showed that they face an additional set of barriers to cast their ballot. Such barriers include: (1) unequal funding for voting activities in Native communities; (2) lack of pre-election information and outreach; (3) cultural and political isolation; (4) unequal access to in-person and early voting; (5) barriers caused by vote-by-mail; (5) state laws that create arbitrary population thresholds to establish polling places; (6) the use of the Americans with Disabilities Act to deny polling places on reservation lands; and (7) the lack of Native American poll workers.

These barriers are extensively documented in a report that I co-authored with Dr. Tucker and Professor Daniel McCool, released in June of 2020, *Obstacles at Every Turn: Barriers to Political Participation Faced by Native American Voters*.¹⁶ We have added an

¹⁵ See 52 U.S.C. § 10503. Other permanent provisions likewise can be used to ensure that LEP voters receive assistance. Section 2, the VRA’s permanent non-discrimination provision, applies nationwide and has been used to secure language assistance for voters who are denied equal voting opportunities by English-only election procedures. See 52 U.S.C. §§ 10301, 10508.

¹⁶ James Thomas Tucker, Jacqueline De León, Daniel McCool, *Obstacles at Every Turn: Barriers to Political Participation Faced by Native American Voters*, NATIVE AM. RIGHTS FUND (2020), https://vote.narf.org/wp-content/uploads/2020/06/obstacles_at_every_turn.pdf.

addendum to that report reflecting on the 2020 election cycle and the outcome of the 2021 legislative session, which I have submitted to this Committee.

While additional evidence is found in the *Obstacles* report, here is a sampling of some of the physical barriers faced by Native voters:

- Voters surveyed from the Duck Valley, Pyramid Lake, Walker River, and Yerington Tribes in Nevada identified travel distance as “the single biggest obstacle to registering. Among those who were registered to vote, 10 percent stated that it was difficult for them to travel to register. Among [those] . . . not registered, a whopping 34 percent said that it would be difficult for them to travel to a place to register. . . . But travel distance was also identified by the respondents as a major factor that inhibited voting”¹⁷
- In Nye County, Nevada, the combined effects of geographical isolation and mountainous terrain results in lengthy travel times to get to either of the County’s two election offices. The closest elections office is in Tonopah, 140 miles each way by road from the Duckwater Reservation. The Pahrump elections office is 303 miles away each way by road. Travel time is at least five or ten hours, respectively, if the weather conditions permit.
- Navajos in San Juan County, Utah, living on tribal lands have to drive to Blanding or Monticello for any government services. From Navajo Mountain, Utah, which is near Lake Powell, it is about 200 miles (a four or five-hour drive) each way, weather conditions permitting. It requires driving south into northern Arizona on U.S. Highway 98 to U.S. Highway 160 in Navajo County, Arizona, to U.S. Highway 191 north back into Utah.⁵
- In Arizona, the nearest polling place for some tribes is off reservation.¹⁰ The closest polling station to the Kaibab Paiute Tribe is about 30 miles away. One community is located on the east side of the reservation 15 miles farther away, which means they must travel about 90 miles roundtrip to vote at their polling place.¹¹
- The Goshute voters in Utah have to drive over an hour each way to get to their polling place. Citizens of the Ute Nation must drive about 45 minutes each way to their polling place. Many lack access to transportation, and no public transportation is available.²²

These distances are not only objectively unreasonable, but the burden imposed by them is compounded by the extreme poverty, poor roads, and lack of access to transportation faced by Native Americans. Vote by mail is often no solution, since across

¹⁷ Field Hearing Transcripts, Bismarck Tr., Gerald Webster, 250-52.

Indian Country many Native communities do not have residential mail delivery and homes are unaddressed.¹⁸ As a result, across Indian Country, it is simply too costly to vote.

What these distances and conditions communicate to Native Americans is that the American electoral system is not designed for their lives, and, by extension, is not for them. The federal trust responsibility between the federal government and tribes compels Congress to act to ensure Native Americans enjoy the same rights, benefits, and privileges as all Americans. This does not mean a diminishment of tribal sovereignty. Rather, in the federalist system, there is room for robust federal, state, and tribal governments. Native Americans are Americans. We deserve a fair opportunity to participate in all levels of America's electoral system, to make choices, and to vote and advocate for representatives and policies that are responsive to our needs and that shape American society.

The Native American Voting Rights Act faces these structural deficiencies head on by mandating on reservation election services and making accommodations for the lack of residential addressing and mail delivery. Congress must act expeditiously to remedy these structural deficiencies that continue to unjustly hinder Native American participation in American political life.

Litigation

Besides leading the NAVRC, NARF has also successfully brought a number of seminal Native American voting rights lawsuits in the last four years, including challenges to North Dakota's voter ID law,¹⁹ a challenge to Montana's absentee ballot collection ban,²⁰ a challenge to Alaska's witness signature requirement during the COVID-19 pandemic,²¹ and a lawsuit challenging the refusal of Pondera County,

¹⁸ *Vote By Mail*, NATIVE AM. RIGHTS FUND, <https://www.narf.org/vote-by-mail/>.

¹⁹ *Brakebill v. Jaeger*, No. 1:16-cv-008, 2016 WL 7118548, at *1 (D.N.D. Aug. 1, 2016); *Spirit Lake Tribe v. Jaeger*, No. 1:18-cv-00222 (D.N.D.) (Complaint filed Oct. 30, 2018). My colleague, Matthew Campbell, testified to the potential for voter ID laws, including North Dakota's voter ID law, to interfere with free and fair access to the ballot. Committee on House Administration, Subcommittee on Elections, *Voting In America: The Potential For Voter ID Laws, Proof-Of-Citizenship Laws, And Lack Of Multi-Lingual Support To Interfere With Free And Fair Access To The Ballot*, May 24, 2021, available at <https://docs.house.gov/meetings/HA/HA08/20210524/112670/HHRG-117-HA08-Wstate-CampbellM-20210524.pdf>.

²⁰ *W. Native Voice v. Stapleton*, DV-2020-377 (Mont. Dist. Ct. Sept. 25, 2020).

²¹ *Arctic Vill. Council v. Meyer*, No. 3AN-20-7858 CI (Alaska Super. Ct., Oct. 5, 2020), *aff'd sub nom. Alaska v. Arctic Vill. Council*, ___ P.3d ___, 2021 WL 4234997 (Alaska Sept. 17, 2021).

Montana, to open an in person polling location on the Blackfeet Reservation for the 2020 General Election.²²

This recent successful litigation aligns with the longstanding trend of successful outcomes in Native American voting rights cases. Relying upon the Fourteenth and Fifteenth Amendments, and various sections of the VRA, Native American voters have filed nearly a hundred lawsuits in an effort to gain equal access to election procedures and to have an equal opportunity to elect candidates of their choice. Prior to the last election cycle, out of the known 94 Native American voting rights cases, there have been victories or successful settlements in 86 cases, and partial victories in two others. That is a success rate of over 90 percent.²³ These cases have been litigated in front of judges appointed by Republican and Democratic Presidents, and yet the overwhelming factual patterns established in Native American voting rights cases compel relief. In short, the facts are so bad that Native Americans nearly always win.

It is worth pausing to reflect on the egregious facts underlying the refusal to provide a polling place in Pondera County, Montana, this past election. In Montana, in response to the global pandemic, county officials were given the option of conducting their elections by mail. Yet, Pondera County chose to maintain its in-person polling location at its county seat, ensuring access for the over 90 percent White residents. Blackfeet tribal members requested in-person access as well. After all, the homes on the Blackfeet Reservation do not receive residential mail delivery and so Native Americans are forced to travel to their rural post office a significant distance away and that is only open limited hours to get their mail and ballots. County officials refused, instead insisting that Blackfeet tribal members travel 120 miles round trip to the county office in Conrad, Montana, to vote. NARF was forced to bring a suit on behalf of the Blackfeet in federal court alleging violations of the Constitution and VRA. Only after suit was filed did Pondera County agree to provide on-reservation access.

Bringing a lawsuit alleging discrimination is an arduous process that NARF does not undertake lightly. Indeed, in the lead up to the 2020 General Election in Montana, NARF negotiated with two other counties that refused to provide on-reservation access, despite providing access to their majority non-Native communities, ultimately reaching a resolution without the need for litigation. Indeed, despite widespread voter suppression and discrimination in Indian Country, NARF does not have the resources to bring every case. Litigation is costly and time consuming, and voters are often disenfranchised while litigation is pending.

²²*Blackfeet Nation v. Pondera Cty.*, No. 4:20-cv-00095-DLC (D. Mont. Oct. 14, 2020) (ECF No. 9-1).

²³ *Obstacles*, at 39.

For example, the effort and resources necessary to mount a legal challenge to North Dakota's voter ID law were significant. In North Dakota, the state required IDs with addresses on them despite knowing that Native Americans throughout North Dakota lacked addresses at their homes.²⁴ This led to widespread disenfranchisement of Native Americans. This discrimination was deeply felt. As our Plaintiff, United States Marine Corp. veteran Elvis Norquay, explained in his testimony before the House Administration Subcommittee on Elections last year, "In November of 2014 I went to the KC hall to vote but was turned away. I voted many times for years before being turned away. I was always happy to go vote. Being turned away brought me down."²⁵

The federal court found that the state violated the Fourteenth Amendment, holding that "it is clear that a safety net is needed for those voters who simply cannot obtain a qualifying ID with reasonable effort."²⁶ The total sought for Plaintiffs' attorneys' fees and litigation expenses was \$1,132,459.41. This sum represents \$832,977 in attorneys' fees and \$299,482.41 in litigation expenses, including expert reports. Thousands of attorney hours over almost two years were expended in order to build a legal record and respond to numerous motions filed by the state in defense of the law. After the successful outcome in that case, the North Dakota legislature *again* enacted a voter ID law that had the same disenfranchising effects. NARF was again forced to bring litigation. Eventually, NARF waived its attorney fee motion for the second half of the case in order to help secure a successful settlement.

This whack-a-mole pattern of repeated violations of Native American voting rights is common across Indian Country. For example, numerous lawsuits alleging voting rights violations have been filed in South Dakota, including the only Section 2 case brought on behalf of plaintiffs under the U.S. Department of Justice during the Trump Administration.²⁷ In Montana, repeated successful litigation has challenged the

²⁴ On April 16, 2019, I testified before the House Administration Subcommittee on Elections as to the details of North Dakota's voter ID law, available at: https://cha.house.gov/sites/democrats.cha.house.gov/files/documents/Jacqueline_De_Leon_Testimony.pdf.

²⁵ February 22, 2020, Testimony of Elvis Norquay, House Administration Subcommittee on Elections, available at: [HHRG-116-HA08-Wstate-NorquayE-20200211-U1.pdf](https://www.congress.gov/hrg/116-116/wstate-norquay-e-20200211-u1/pdf) ([congress.gov](https://www.congress.gov)).

²⁶ *Brakebill v. Jaeger*, No. 1:16-cv-008, 2016 WL 7118548, at *10 (D.N.D. Aug. 1, 2016) (order granting preliminary injunction)

²⁷ See Settlement Agreement, *Janis v. Nelson*, Civ. 5:09-cv-05019-KES-LLP-RLW(D.S.D. May 25, 2010) (ECF No. 143) (remediating compliance issues with HAVA); *Brooks v. Gant*, No. Civ-12-5003-KES, 2012 WL 871262 (D.S.D. Mar. 14, 2012) (settlement for closer early voting locations); *Poor Bear v. Jackson*, 2015 WL 1969760 (D.S.D. May 1, 2015) (settlement for a satellite office on the reservation); Consent Decree, *United States v. Chamberlain Sch.*

disenfranchisement of Native Americans.²⁸ In Utah, San Juan County has had near constant, successful, voting rights litigation brought against it since the United States first brought suit on behalf of the Navajo in 1983.²⁹

Given this influx of contemporary discrimination and disparate impacts necessitating relief, a robust Voting Rights Act is even more critical. Restoration of Section 2 is especially important to Indian Country.

Brnovich and Shelby County

The Supreme Court's recent decision in *Brnovich v. DNC*, was especially devastating to Native American voters. The decision was notable not only because the decision upheld two voting restrictions while disregarding the disparate impacts on thousands of Native Americans, but also because it undermined Section 2 in the wake of the Supreme Court's suspension of Section 5.

The suspension of Section 5 following the invalidation of the coverage formula in *Shelby County v. Holder*³⁰ negatively impacted Indian Country. Arizona and Alaska, both with substantial Native American populations, were previously covered under Section 5, resulting in protection for those groups.

Dist., No. 4:20-cv-4084 (D.S.D. June 18, 2020) (ECF No. 4) (consent decree settling at-large method of election for the school board in district with substantial Native population); Compl., *Rosebud Sioux Tribe v. Barnett*, No. 20-cv-5058 (D.S.D. Sept. 16, 2020) (2020 complaint alleging violations of the National Voter Registration Act).

²⁸ *Wandering Medicine v. McCulloch*, No. 1:12-cv-135 (D. Mont. Oct. 10, 2012) (defendants agreed to establish satellite offices on reservations); Consent Decree, *Jackson v. Bd. of Trs. of Wolf Point*, No. 4:13-cv-00065-BMM (D. Mont. Apr. 9, 2014) (ECF No. 70) (permanent injunction barring a -75.24% deviation from ideal population size in school board race); *W. Native Voice v. Stapleton*, DV-2020-377 (Mont. Dist. Ct. 2020) (ballot collection ban declared unconstitutional); *Blackfeet Nation v. Pondera Cty.*, 4:20-cv-00095-DLC (D. Mont. Oct. 14, 2020) (ECF No. 9-1) (county agreed to open satellite election offices and ballot drop boxes).

²⁹ Consent Decree, *United States v. San Juan Cty.*, No. 2:12-cv-00039-RJS (D. Utah Nov. 9, 2015) (ECF No. 261-1); *Navajo Nation v. San Juan Cty.*, 929 F.3d 1270, 1274 (10th Cir. 2019) (affirming the District Court's resolution of vote-dilution case filed in 2011); *Grayeyes v. Cox*, No. 4:18-CV-00041, 2018 WL 3830073, at *9 (D. Utah Aug. 9, 2018) (injunctive relief granted for likely violation of candidates due process rights); Order re Stip. Settlement, *Navajo Nation Human Rights Comm'n v. San Juan Cty.*, No. 2:16-cv-00154-JNP (D. Utah Feb. 22, 2018) (ECF No. 199) (county agreed to maintain polling places and provide language assistance).

³⁰ *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013)

In 2008, Alaska attempted to eliminate polling locations in the Alaska Native communities of Tatitlek, Pedro Bay, and Levelock and force Native voters to travel to predominately white communities to cast their ballots. These non-Native communities were not only a significant distance but also can only be accessed by boat or plane during fair weather. Under Section 5, the United States responded to Alaska with several detailed More Information Requests about the impact the move would have on Native American voters. In response, Alaska withdrew its discriminatory proposals.³¹

When Section 5 was still in effect in 2011, Arizona attempted to preclear restrictive ballot collection regulations that were eventually at issue in *Brnovich*. Bans on ballot collection, also disparagingly referred to as “ballot harvesting,” can disproportionately and severely impact Native communities. Because of high poverty rates, lack of access to transportation, and lack of mail delivery, Native Americans often pick up and drop off mail for each other. When the DOJ requested more information on the impact of a ballot collection ban on minorities in Arizona, the legislature withdrew its request. Immediately post-*Shelby*, the ballot collection ban went into effect. Distressingly, the Supreme Court has since upheld the ballot collection ban despite the clearly documented disparate impact on Native Americans. The Court also upheld a ban on out of precinct voting that also disproportionately impacts Native Americans whose lack of residential addresses results in them being placed in the wrong precinct through no fault of their own. When these Native Americans show up to vote, they are in the wrong precinct according to the state records and no part of their ballot will be counted.

The very upholding of these discriminatory laws demonstrates that the reasoning employed by the Supreme Court was flawed. However, three of the Court’s new *Brnovich* factors are particularly worrisome for Native American litigants. First, the *Brnovich* decision abrogated Section 2’s promise of “equal opportunity” for all voters under its Factor #3 by instructing lower courts that, in evaluating whether a voting rule violated the VRA, “the size of any disparities in a rule’s impact on members of different racial or ethnic groups is also an important factor to consider.”³² The Court thus upheld the challenged out-of-precinct policy despite the District Court’s finding that 1% of Native voters, compared to just 0.5% of white voters voted in the wrong precinct. It reasoned that – in either case – 99% or more of voters in each racial category were unaffected by the rule.³³

³¹ Brief for the Alaska Federation of Natives, Alaska Native Voters and Tribes as Amicus Curiae 35, *Shelby County v. Holder*, 570 U.S. 529 (2013), available at:

https://narf.org/bloglinks/shelby_county_brief.pdf.

³² *Brnovich*, 594 U.S. at *18.

³³ *Id.* at *28.

The Supreme Court’s cramped understanding of disparate impact under the VRA led it to uphold a law flatly inconsistent with the statute’s purpose: to ensure all voters have an equal opportunity to participate in elections regardless of their race.³⁴ The Ninth Circuit panel below, reviewing *en banc* the district court’s findings of fact concerning rates of out-of-precinct voting by white and minority voters, found a violation of Section 2 based in part on the evidence that minority voters voted out of precinct at “twice the rate of whites.”³⁵ This method of analyzing the quantitative data by focusing on whether and how minority voters are affected *differently* than their white counterparts comports with the VRA’s text and purpose. The Supreme Court’s analysis focuses instead on the proportion of *unaffected* voters and thus misses the point entirely.

Furthermore, this reading of Section 2 led it to uphold a law that concededly disenfranchises a full percent of a state’s Native voters. Such a rule has deeply troubling implications for many Tribes. Many of Arizona’s nearly 320,000 Native American people³⁶ live on remote reservations each comprising far less than 1% of the state’s total Native population. And a law that disenfranchises a percentage of Native voters translates to thousands of disenfranchised voters. A voting rule or policy which prevents every eligible Native voter living on the Kaibab Paiute reservation (along the remote Arizona Strip) or Havasupai reservation (in the Grand Canyon) from voting could be permitted under this test.³⁷ So too could a law disenfranchising all Native Americans living on Moapa River Indian Reservation, Duckwater Reservation, or Carson Colony in

³⁴ NCAI Brief at 10, citing S. Rep. No. 417, at 2 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 179 (“the issue to be decided under the results test is whether the political processes are equally open to minority voters.”); *see also* Navajo Nation Brief at 21, citing Chisom v. Roemer, 501 U.S. 380, 408 (1991) (Scalia, J., dissenting) (“if ‘a county permitted voter registration for only three hours one day a week, and that made it more difficult for blacks to register than whites . . . [Section] 2 would therefore be violated – even if the number of potential black voters was. . . small.’”).

³⁵ Democratic National Committee v. Hobbs, 948 F.3d 989, 1005 (9th Cir. 2020).

³⁶ United States Census Bureau, Race and Ethnicity in the United States: 2010 Census and 2020 Census (Aug. 12, 2021), <https://www.census.gov/library/visualizations/interactive/race-and-ethnicity-in-the-united-state-2010-and-2020-census.html>.

³⁷ United States Census Bureau, My Tribal Area: Kaibab Indian Reservation, <https://www.census.gov/tribal/?aianihh=1720> (listing 206 residents as Native American or Alaska Native); Inter-Tribal Council of Arizona, Member Tribes: Havasupai Tribe, <https://itcaonline.com/member-tribes/havasupai-tribe/> (listing a population of about 639).

Nevada.³⁸ Such a perverse outcome demonstrates the urgent need for legislative action to address the Court’s hollowing of Section 2.

Second, *Brnovich* Factor #4 Court declares that, “[w]here a State provides multiple ways to vote, any burden imposed on voters who choose one of the available options cannot be evaluated without also taking into account the other available means.”³⁹ This novel limitation on Section 2 vote denial claims invites state legislatures to provide voters with more options, regardless of whether the quantity of options actually resonates with the communities that find it difficult to vote.

The structural deficiencies found in reservations – poor roads, lack of vehicles, distant polling places, lack of residential mail delivery, lack of addressing, high homeless rates, for example – make it more difficult for Native Americans to take advantage of the myriad of voting options that may or may not be available. In a 2020 lawsuit brought by Native plaintiffs seeking to invalidate a ballot collection law similar to Arizona’s ballot collection ban, a Montana district court determined that “Montana’s elections overall are very accessible” and outlined the various options voters had to register and cast their ballots.⁴⁰ Nevertheless, it struck down the ballot collection limitation because it found that “while the majority of Montanans can easily access the vote by mail process by either mailing in their ballots or dropping their ballots off at election offices, Native Americans living on reservations rely heavily on ballot collection efforts in order to vote in elections.”⁴¹ Were that case brought in federal courts today, the court may have felt compelled to uphold a demonstrably burdensome voting rule. Section 2 should not be so weakened.

Finally, *Brnovich* factor #5 that the “strong and entirely legitimate state interest [in] the prevention of fraud” is an “important factor that must be taken into account” in evaluating whether a rule violates Section 2⁴² is especially concerning in Native

³⁸ United States Census Bureau, *supra* note 18 (43,932 Nevadans identify as American Indian or Alaska Native alone); United States Census Bureau, My Tribal Area: Nevada, <https://www.census.gov/tribal/?st=32&aianihh=0975>. Moapa Indian Reservation lists [258 residents as Native American or Alaska Native](#); Duckwater Indian Reservation [lists 270](#); Carson Colony lists 303.

³⁹ *Brnovich*, 594 U.S. at *18.

⁴⁰ *Western Native Voice v. Stapleton*, No. DV 20-0377 (Mont. 2020) at 3, ¶¶ 5-9, available at <https://narf.org/nill/documents/20200925mt-ballot-order.pdf>.

⁴¹ *Id.* at 48 ¶19; see also 47-48, ¶14-21. Although the court’s decision in this case was based primarily on state law, it expressly noted that federal voting rights law would dictate the same result. *Id.* at 47 ¶19.

⁴² *Brnovich*, 594 U.S. at *19.

American communities.⁴³ Invoking the fear of fraud without requiring the contested voting procedure to demonstrably prevent fraud that is actually occurring or likely to occur provides an unjustified blanket cover for laws that have discriminatory effects. For example, in this past election, the state of Alaska asserted that it needed signatures on ballots to be witnessed to prevent fraud. During the pandemic this would have meant that elders and single mothers that do not live with another eligible adult would have had to break quarantine in order to get their ballot witnessed. Yet, the state was unable to provide any instance in which a witness signature prevented fraud. And the state admitted that it does not even use the witness signatures when it is conducting fraud investigations. Consequently, the Alaska Supreme Court upheld an injunction against the witness signature requirement prior to the 2020 election.⁴⁴ Federal courts should likewise be required to evaluate whether the voting rule at issue in fact prevents fraud that is in fact a problem.

Even more concerning, Native voters, tribes, and Native voting rights organizations have been targets of exaggerated, if not outright fabricated, accusations of voter fraud. These charges are directed at Native voters after Native Americans assert their political power. For example, in 2002, unusually high turnout on South Dakota's Indian reservations led to a narrow victory for a Democratic Congressional candidate.⁴⁵ Opponents responded with repeated accusations that the win was due to rampant voter fraud on reservations and fifty affidavits were submitted to that effect; the state attorney general's office performed a thorough review and found only one alleged case that \$10 was paid to Native voters that even merited further investigation.⁴⁶ The backlash to these exaggerated and false claims subjected Native voters to racist abuse and spurred opinion pieces such as "Don't Let Illiterate Indians Vote."⁴⁷ These false allegations of voter fraud among Native Americans carried over into the 2004 elections, when the New York Times

⁴³ Milan Kumar, *American Indians and the Right to Vote: Why the Courts Are Not Enough*, 61 B.C.L. REV. 1111, 1115 (2020), <https://lawdigitalcommons.bc.edu/bclr/vol61/iss3/6> ("While policies that negatively affect American Indian voters are usually adopted with the said goal of combatting voter fraud, reported cases of voter fraud have typically been very low.").

⁴⁴ *Arctic Village Council et al vs. Meyer, Kevin, et al*, DRC 3AN-20-7858CI (Alaska Super. Ct., October 5, 2020).

⁴⁵ T.R. Reid, *New Indian Voters Turned Race in S.D.*, Washington Post (Nov. 8, 2002).

⁴⁶ <https://www.indianz.com/News/show.asp?ID=2002/12/10/sdvote>

⁴⁷ <https://www.indianz.com/News/show.asp?ID=2002/10/23/boulet>.

reported another “wave of false voter fraud charges that have been made against [tribal members in South Dakota].”⁴⁸

In 2006, an organization called the Citizens’ Equal Rights Alliance (CERA) filed a lawsuit “contending that widespread ‘election fraud and/or voting rights abuses’ took place on the Crow Indian Reservation in Big Horn County, Montana” during that year’s November election, without evidence. One of the “remedies” CERA sought was that “polling places for federal, state, county, and local district elections cannot be located within [the exterior boundaries of any particular Indian reservation].”⁴⁹ This attack coincided with Native American votes being attributed with the close election of Senator John Tester in 2006.

Congress should not allow Section 2 of the VRA to be so tarnished. Instead, Section 2 must stand as a beacon against discrimination that can be wielded to fend off unjust attacks when Native Americans flex their political power.

Legislation

The need for federal action is urgent and compelling. This year, legislators in states across the country have targeted vulnerable Native American voters. NARF monitored bills introduced in states with sizeable Native American populations. In just 14 states – Alaska, Arizona, California, Michigan, Minnesota, Montana, Nevada, New Mexico, North Carolina, North Dakota, Oklahoma, South Dakota, Washington, and Wisconsin – legislators introduced over 100 bills that would make it more difficult for Native Americans to vote.⁵⁰

Notably, in Montana, the state legislature passed HB 530 on the very last day of its legislative session without debate. HB 530 prohibits organizations from picking up and dropping off ballots. This law was implemented after a Montana court blocked a similar law, the Ballot Interference Protection Act (“BIPA”), which was challenged by the Assiniboine & Sioux Tribes of Fort Peck, Blackfeet Nation, Confederate Salish and

⁴⁸ *Opinion: Bad New Days for Voting Rights*, NEW YORK TIMES (April 18, 2004), <https://www.nytimes.com/2004/04/18/opinion/bad-new-days-for-voting-rights.html> (“Jo Colombe, a Rosebud Sioux tribal council member, said that when she worked as a poll watcher in a recent election she was accused of fraud simply for taking a bathroom break. When she returned, she said, white poll watchers charged her with copying the names of Indians who had not yet voted, and taking them out to Indians waiting in the parking lot.”).

⁴⁹ AMERICAN CIVIL LIBERTIES UNION, VOTING RIGHTS IN INDIAN COUNTRY 51 (2009).

⁵⁰ State Voting Bills Tracker 2021, Brennan Center for Justice, available at: <https://www.brennancenter.org/our-work/research-reports/state-voting-bills-tracker-2021>.

Kootenai Tribes of the Flathead Reservation, Crow Tribe, and the Fort Belknap Indian Community as well as GOTV organization Western Native Voice. Represented by NARF and the ACLU, BIPA was successfully challenged under Montana’s Constitutional right to vote provision. In September 2020, the court struck down BIPA, finding “the questions presented cannot be viewed through the lens of our own upbringings or own life experiences, but through the lens of the cold, hard data that was presented at trial about the clear limitations Native American communities in Montana face, and how the costs associated with . . . (BIPA) are simply too high and too burdensome to remain the law of the State of Montana.”⁵¹

Remarkably, despite this finding, the State legislature passed another ballot collection ban in the 2021 legislative session. That law also faced an immediate legal challenge by tribes and Native get-out-the-vote organizations, again brought by NARF and the ACLU,⁵² which is ongoing.⁵³ The Montana Advisory Committee to the U.S. Commission on Civil Rights described how “[t]he passage of a bill that imposes the same burdens is intentional discrimination and will increase barriers to voting for Native Americans on reservations in Montana.”⁵⁴

The Arizona legislature likewise passed discriminatory laws in the 2021 legislative session.⁵⁵ In this session, the state legislature overturned a settlement agreement reached by the Secretary of State with the Navajo Nation.⁵⁶ Because of confusion around Native American names and difficulty reaching Native Americans due to their housing insecurity, the Secretary had agreed to allow seven days to cure a mismatched signature ballot. However, the Arizona State Legislature, through SB 1003, now requires signatures to be cured by 7:00 PM on Election Day. This law took effect on May 7, 2021.⁵⁷

Additionally, through HB 2569, the Arizona legislature, despite chronic underfunding of elections, banned private entities from donating funds to assist with administration of elections. Native American communities in Arizona are often told that providing services is impracticable because doing so would be too costly. And in the 2020 election, nine counties used grants to educate people how to safely vote during the

⁵¹ *W. Native Voice v. Stapleton*, No. DV-2020-0377 (D. Mont. Sept. 25, 2020).

⁵² *W. Native Voice v. Jacobsen*, No. DV-2021-0560 (D. Mont. May 17, 2021).

⁵³ *W. Native Voice v. Jacobsen*, No. DV-2021-0560 (D. Mont. May 17, 2021).

⁵⁴ [07-15-Native-American-Voting-Rights-Advisory-Memo.pdf \(usccr.gov\)](https://www.usccr.gov/07-15-Native-American-Voting-Rights-Advisory-Memo.pdf)

⁵⁵ [With new Arizona voting laws, Native Americans brace for more challenges to casting ballots \[IN DEPTH\] - Rose Law Group Reporter.](#)

⁵⁶ [https://turtletalk.files.wordpress.com/2019/11/order-and-secretary-of-state-settlement.pdf.](https://turtletalk.files.wordpress.com/2019/11/order-and-secretary-of-state-settlement.pdf)

⁵⁷ [https://legiscan.com/AZ/supplement/SB1003/id/135006.](https://legiscan.com/AZ/supplement/SB1003/id/135006)

pandemic.⁵⁸ The majority of the counties that relied on grants include substantial Native communities. These counties include Apache, Navajo, Coconino, Graham, Pinal, and Pima Counties. The legislature removed the ability of underserved communities to rectify these inequities.

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

Overt Racial Discrimination

Finally, in case there is any doubt that Native Americans face overt discrimination on the basis of race, NARF has collected extensive evidence of the racism faced by Native voters. Native Americans continue to experience overt discrimination in their everyday lives and when they attempt to vote.

This past election, the weekend before Election Day, a man visited several bars in Glasgow, Montana, roughly ten miles from the western border of the Fort Peck Indian Reservation, in full KKK attire. None of the other bar patrons were phased, and many even supported him. Indeed, the “costume” was the winner at a local Halloween costume contest.⁵⁹ Though mostly associated with the Deep South, the KKK has been prominent since at least the 1920s in Glasgow, Plentywood, and Bainville, Montana – all locations that border the Fort Peck Reservation. A primary goal of the KKK in Glasgow was to undermine Native American voting rights.⁶⁰ As the General Counsel to the Fort Peck Assiniboine and Sioux Tribes relayed to me following the incident, “This is why satellite voting sites are so important for our tribal members. Not everyone is comfortable going into places in Glasgow, and not everyone in Glasgow is going to make our tribal members feel welcome.”

In Arizona, racial tensions are so fraught between the Kaibab Band of Paiute Indians and the border town that the pipes sending water to the reservation are regularly blocked by border town residents.⁶¹ In Utah, a Field Hearing witness’s Native grandson

⁵⁸ <https://apnews.com/article/legislature-arizona-phoenix-legislation-elections-7f0b8661f5d7b673a3927bf7b4995586>.

⁵⁹ <https://www.greatfalls Tribune.com/story/news/2020/11/02/montana-r-man-kkk-costume-reportedly-wins-glasgow-bar-contest/6130962002/>.

⁶⁰ “Official Circular” (6 December 1924), Ku Klux Klan collection, MS 131, Box 2, Folder 163 Eastern Washington State Historical Society, Spokane, Washington, available at: <https://www.northwestmuseum.org/collections/research-archives/>.

⁶¹ *Obstacles*, at 108

attempted to play baseball and was accosted by a non-Native woman who “started screaming at him, ‘Who in the hell do you think you are? You think you're that good? You damn welfare people are starting to take over.’”⁶²

These racist attitudes do not stop at residents. Voting officials also discriminate against Native Americans. For example, the registration offices and polling places that primarily service Native American communities can be hostile. All of these incidents took place within the last 10 years:

- In South Dakota, Native American voters were forced to vote in a repurposed chicken coop with no bathroom facilities and feathers on the floor.⁶³
- In Wisconsin, Native American voters were forced to vote where a sheriff's office was located.⁶⁴
- In South Dakota, Native American voters were forced to walk past a sheriff deputy who kept his hand on his gun while standing in the entrance to the only polling place on a reservation (see image).

⁶² *Obstacles*, at 44

⁶³ *Obstacles*, at 87 (quoting Donita Loudner's testimony, "You go take them in there to vote, and it was a chicken coop. It was an old chicken coop. It still had dirt on the floor. You go in there, and it had enough for one desk. And you had three people sitting around there, and you could barely come in. There was no place to vote. You had to take it outside to vote. You could see the -- where the chickens used to lay: You know, those little boxes. They would still have those around outside. And no bathroom facilities. . . So I went in front of the county commission in Hughes County, our county seat or our county capital. And I got on the agenda, and I asked them, "Whatever happened with, you know, these funds that they set down for us? You guys got a chicken coop.")

⁶⁴ *Obstacles*, at 45



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

- In South Dakota, the approximately 1,500 Crow Creek Reservation residents comprise about 90 percent of Buffalo County’s population. Nevertheless, to register to vote or run for office, tribal members have to drive 40 miles round trip to Gann Valley, which has a population of about 12, all non-Natives. While Gann Valley’s 12 residents had full voting access, Buffalo County’s Auditor/Register of Deeds refused to provide an on-reservation early polling site to service the Crow Creek Reservation’s substantially larger population, even after Help America Vote Act (“HAVA”) funding was secured to cover the full cost of the voting site.⁶⁵

And, too often, modern day experiences echo past instances of discrimination. In 1986, in a VRA case having to do with an unfair at-large voting system in Montana, the court also uncovered evidence that voter registration was intentionally withheld from Native American voters. The Court recounted how “[an] Indian testified that he was given only a few voter registration cards and when he asked for more was told that the county was running low. Having driven a long way to get the cards, he asked his wife, who is white, to go into the county building and request some cards. She did and was given about 50 more cards than he was.”⁶⁶ We heard remarkably similar testimony at the

⁶⁵ *Obstacles*, at fn. 270

⁶⁶ *Windy Boy v. County of Big Horn*, 647 F. Supp. 1002, 1008 (D. Montana 1986).

2018 Field Hearing. A Native community activist from Montana testified how when she went to return voter registration cards the clerk would complain and hassle her for the number of voter registration cards returned. There was no law, but the clerk stated that only 70 registration cards could be returned at one time and in 2016 dropped that number to 40.

In Utah, in 2018, the San Juan County clerk committed fraud in an attempt to kick the Native American candidate off of the ballot. The District Court reinstated the Native candidate to the ballot and found the clerk likely violated the Native candidate's constitutional rights.⁶⁷ Yet, no charges were brought against the clerk. Even more frustratingly, this deception echoes a 1972 case of discrimination in the very same county where a clerk misled two Navajo candidates about filing deadlines in order to undermine their candidacy. The Federal Courts were forced to order those candidates back on the ballot as well.⁶⁸

It is no surprise that experiences like these have provoked a widespread distrust of the state and federal government by Native Americans. In the fall of 2016 and spring of 2017, NAVRC oversaw one of the most comprehensive in-person surveys ever conducted in Indian Country about barriers faced by Native voters. A total of 2,800 Native voters in four states completed the in-person survey.⁶⁹ In all four states, Native voters expressed the greatest trust in their tribal governments. Although the federal government was identified by respondents as the most trusted of non-tribal governments (federal, state, local), the level of trust ranged from a high of just 28 percent in Nevada to a low of only 16.3 percent in South Dakota.⁷⁰ Trust of local government in South Dakota was notably bad with only 5.02% of respondents indicating they most trusted the local government, which is especially significant considering that local governments are most often responsible for the administration of elections.

IV. Conclusion

Today, I place my trust in this Committee to provide the protections Native Americans need and deserve so they may vote safely and free from racist discrimination. I urge this committee to do the necessary work of investigating and recording these injustices, and to restore the Voting Rights Act.

Thank you for inviting me here today. I am prepared to answer any questions.

⁶⁷ *Grayeyes v. Cox*, No. 4:18-CV-00041, 2018 WL 3830073, at *9 (D. Utah Aug. 9, 2018).

⁶⁸ *Yanito v. Barber*, 348 F. Supp. 587, 593 (D. Utah 1972).