

**TESTIMONY BEFORE THE HOUSE COMMITTEE ON ADMINISTRATION  
SUBCOMMITTEE ON ELECTIONS  
HEARING ON  
NATIVE AMERICAN VOTING RIGHTS:  
EXPLORING BARRIERS AND SOLUTIONS**

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## I. Introduction and History of Native American Voting Rights

Chairwoman Fudge, Ranking Member Davis, and members of the committee, thank you for inviting me to testify today. My name is Patty Ferguson-Bohnee, and I am the Director of the Indian Legal Clinic at the Sandra Day O'Connor College of Law at Arizona State University. The Indian Legal Clinic coordinates the Native Vote – Election Protection Project in Arizona, a non-partisan effort to protect Native American voting rights founded in 2008 in response to disparities in voting resulting from Arizona's voter identification law.<sup>1</sup>

Securing the right to vote has been an uphill battle for Native Americans. This is especially true for states with large Native American populations. Even after the passage of the Indian Citizenship Act in 1924, states and local jurisdictions prevented Native Americans from registering to vote and voting.<sup>2</sup> Montana excluded Native Americans from voting and holding office since the establishment of its territorial government, and passed measures to exclude Native Americans from voting once it obtained statehood.<sup>3</sup> South Dakota had a law in effect until 1939 that prevented Native Americans from holding public office.<sup>4</sup> 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.<sup>5</sup> Utah and North Dakota became the last states to afford on-reservation Native Americans the right to vote in 1957 and 1958, respectively.<sup>6</sup> When the right to vote was finally secured, steps were taken to prevent Native Americans from participating in elections and being elected to office.<sup>7</sup> A common and effective tool for Native American disenfranchisement was the use of literacy tests because of the lower rates of English literacy in Tribal communities. In Arizona, for example, Native Americans could not fully participate in voting until 1970 when the United States Supreme Court upheld the ban against using literacy tests as a voter qualification.<sup>8</sup>

Exercising the right to vote only came with protections afforded by the Voting Rights Act and enforcement of those rights through litigation. However, the Supreme Court invalidated the

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<sup>1</sup> Many thanks to Indian Legal Clinic students Kris Beecher, Jasmine Blackwater-Nygren, Blair Tarman, and Leah Tsinajinnie and Native Vote Fellow Torey Dolan who assisted in preparing this testimony.

<sup>2</sup> 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).

<sup>3</sup> Amicus Brief of American Civil Liberties Union, *Wandering Medicine, et. al. v. McCullough*, No. 1:12-cv-00135 (D. Mont. Dec. 4, 2012); Kaitlyn Schaeffer, *The Need for Federal Legislation to Address Native Voter Suppression*, 43 N.Y.U. REV. L. & SOC. CHANGE 707, 712 (2019).

<sup>4</sup> Schaeffer at 712.

<sup>5</sup> *Montoya v. Bollack*, 372 P.2d 387 (N.M. 1962); *Harrison v. Laveen*, 196 P.2d 456 (Ariz. 1948).

<sup>6</sup> Jennifer L. Robinson & Stephen L. Nelson, *The Small but Powerful Voice in American Elections: A Discussion of Voting Rights Litigation on Behalf of American Indians*, 70 BAYLOR L. REV. 91, 103–04 (2018); *Allan v. Merrell*, 305 P.2d 490 (Utah 1956), *vacated* 353 U.S. 932 (1957); Delilah Friedler, *The Rise of the Native American Electorate, Mother Jones* (Aug. 27, 2019), available at <https://www.motherjones.com/politics/2019/08/the-rise-of-the-native-american-electorate/>.

<sup>7</sup> *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).

<sup>8</sup> The 1970 Amendments to the VRA suspended the use of literacy tests as a qualification for voting. Arizona had a literacy test for voter registration and unsuccessfully challenged the prohibition on using literacy tests. *Oregon v. Mitchell*, 400 U.S. 112 (1970).

preclearance formula in 2013, removing one of the most powerful tools to ensure equal access to the ballot for Native Americans, which included two jurisdictions in South Dakota, a jurisdiction in North Carolina, and the states of Alaska, and Arizona.<sup>9</sup> Since that time, efforts to suppress the vote have increased. For Native Americans, these voter suppression efforts can have devastating impacts.

In order to understand the challenges faced by Native American voters, one must recognize the vast differences in experiences, opportunities, and realities facing on-reservation voters as compared to off-reservation voters. Turnout for Native Americans is the lowest in the country, as compared to other groups.<sup>10</sup> While a number of issues contribute to the low voter turnout, a study conducted by the Native American Voting Rights Coalition found that low levels of trust in government, lack of information on how and where to register and to vote, long travel distances to register or to vote, low levels of access to the internet, hostility towards Native Americans, and intimidation are obstacles to Native American voter participation.<sup>11</sup> Further, access to the polls and participation in the political process are impacted by isolating conditions such as language barriers, socioeconomic disparities, lack of access to transportation, lack of residential addresses, lack of access to mail, and the digital divide. Changes to voting processes interact with these isolating conditions to limit Native American voter participation.

Today, the right to vote continues to be challenged through the passage of new laws and practices that either intentionally target or fail to consider the potential disparities the changes could have on Native American voters. It is Congress' duty to fulfill its trust obligation to Native American voters to assure that Indian Country has equal access to voting on federal lands.

## II. The Federal Government's Trust Responsibility

The federal government has a trust responsibility to Tribes. The United States' trust responsibility is a well-established legal obligation that originates from the unique, historical relationship between the United States and Indian Tribes. Article I, Section 8 of the Constitution states that "Congress shall have the power to regulate Commerce with foreign nations and among the several states, and with the Indian tribes," recognizing that Indian Tribes are distinct from the federal government, the states, and foreign nations. Through the Indian Commerce Clause, the United States has authorized Congress to enact laws governing Indian affairs.<sup>12</sup>

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<sup>9</sup> *Shelby County v. Holder*, 570 U.S. 529 (2013).

<sup>10</sup> Tova Wang, *Ensuring Access to the Ballot for American Indians & Alaska Natives: New Solutions to Strengthen American Democracy* at 3, 6, available at <https://www.demos.org/sites/default/files/publications/IHS%20Report-Demos.pdf>.

<sup>11</sup> Native American Voting Rights Coalition, *Voting Barriers Encountered by Native Americans in Arizona, New Mexico, Nevada, and South Dakota* at 3, 5 (Jan. 2018) (hereinafter "NAVRC Study").

<sup>12</sup> Daniel Rey-Bear & Matthew Fletcher, *We Need Protection from our Protectors: The Nature, Issue, and Future of the Federal Trust Responsibility to Indians*, MICH. J. OF ENV'T'L & ADMIN. LAW, Vol VI: 2, 401 (2017), available at <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1063&context=mjeal>.

The Supreme Court recognized the trust relationship through a series of cases known as the Marshall trilogy – three cases that still define federal Indian law and the relationship between tribes and the federal government, while also recognizing the inherent sovereignty of tribes.<sup>13</sup> The trust relationship has been defined as the highest moral obligations that the United States must meet to ensure the protection of tribal and individual Indian lands, assets, resources, and treaty and similarly recognized rights.<sup>14</sup>

Further, Congress has plenary power over Indian affairs.<sup>15</sup> Congress has exclusive authority when legislating matters involving Indian Tribes and may regulate pursuant to its Constitutional powers, which are recognized as plenary. Congress has exercised such plenary authority over matters implicating Indian Tribes since the founding of the United States, and is recognized as a political one, not subject even to judicial control.<sup>16</sup> Thus, Congress has the ultimate right to pass legislation governing Native Americans, even when that legislation conflicts with or abrogates Indian treaties.

The Supreme Court examined the breadth and scope of Congress’s plenary power over matters concerning Indian Tribes in *United States v. Kagama*.<sup>17</sup> In upholding the power of Congress to pass legislation governing relations with Indian tribes, the Court explained such authority is implied not only by the general principles of the Constitution, but also by the nature of the federal government’s relationship with Indian Tribes, with the federal government acting as a protectorate. The relationship between the Tribes and the federal government “is perhaps unlike that of any other two people in existence,” with the federal government assuming the role of fulfilling unique, specific, and continuing obligations towards Indian Tribes.<sup>18</sup> By undertaking this responsibility, the federal government has charged itself with “obligations of the highest responsibility and trust.”<sup>19</sup> Such obligations are moral, as well as legally enforceable fiduciary obligations that require the federal government to ensure mandates of federal law are properly executed with respect to Tribes. The need for this trust responsibility included the need to protect Tribes from the states. The Supreme Court noted in *Kagama* “[b]ecause of the local ill feeling, the people of the states where they are found are often their deadliest enemies.”<sup>20</sup>

As Indian law scholars and practitioners Dan Ray-Bear and Matthew Fletcher have observed, despite half a century of the Self-Determination era, Native Americans continue to have

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<sup>13</sup> *Johnson v. M’Intosh*, 21 U.S. 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. 1, 16 (1831); *Worcester v. Georgia*, 31 U.S. 515 (1832).

<sup>14</sup> See generally Cohen’s Handbook of Federal Indian Law § 5.04[3] (Nell Jessup Newton ed., 2012); *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942).

<sup>15</sup> *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903); see generally Angela R. Riley, *The Apex of Congress’ Plenary Power over Indian Affairs: The Story of Lone Wolf v. Hitchcock*, in *Indian Law Stories* 189 (Carole Goldberg et al. eds., 2011).

<sup>16</sup> *Lone Wolf v. Hitchcock*, 187 U.S. at 555.

<sup>17</sup> *United States v. Kagama*, 118 U.S. 375, 384–85 (1886).

<sup>18</sup> *Cherokee Nation v. Georgia*, 30 U.S. at 10.

<sup>19</sup> *Id.*

<sup>20</sup> *Kagama*, 118 U.S. at 384.

“disproportionately poor levels of health, education, and employment.”<sup>21</sup> The trust responsibility requires a duty of good faith, loyalty, and protection.<sup>22</sup> To meet this obligation, they assert that

Congress should reassert its authority to protect and empower Indians in order to better fulfill the federal trust responsibility and lay a foundation for future efforts to improve the status of Indians. This should be done through federal legislation that reaffirms the basic nature and scope of the trust responsibility; recognizes greater tribal sovereignty; integrates, elevates, and provides ongoing oversight for Indian affairs; and provides sufficient funding to accomplish those goals.<sup>23</sup>

This includes in the area of voting. Given the breadth and scope of Congress’s plenary power to legislate on issues pertaining to Indian Tribes, the explicit and implicit powers under the Indian Commerce Clause and Elections Clause, and the duties imposed by the trust responsibility, Congress has the authority and the obligation to provide a legislative solution to the crisis continuously plaguing Native voters.

### III. Voting Barriers

Barriers to voting 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. Isolating conditions such as language barriers, socioeconomic disparities, lack of access to transportation, lack of residential addresses, lack of access to mail, and the digital divide limit Native American political participation. These isolating conditions limit the ability of Native Americans to participate in elections and run for office. Today, states and counties either fail to consider these realities or intentionally exploit them in ways that gives rise to the modern forms of voter suppression we see in Indian Country. These include closing and moving polling locations out of reservation communities where transportation is limited, limiting access to voting in Indian Country based on a lack of permanently Americans with Disabilities Act compliant buildings on Tribal lands, adopting strict voter ID laws, and the push towards vote by mail, among others.

#### **Poverty**

Native Americans face obstacles in voting as a part of their socioeconomic reality. The poverty rate for Native Americans in the US is 26.2%,<sup>24</sup> while the national poverty rate is 14.0%.<sup>25</sup> Native Americans in Arizona are impoverished at an astonishingly high rate of 35.7%.<sup>26</sup> Native Americans are also more likely to be unemployed and have the highest unemployment rate of any

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<sup>21</sup> Daniel Rey-Bear & Matthew Fletcher, *We Need Protection from our Protectors: The Nature, Issue, and Future of the Federal Trust Responsibility to Indians*, MICH. J. OF ENV'T'L & ADMIN. LAW, Vol VI: 2, 398 (2017).

<sup>22</sup> *Id.* at 399.

<sup>23</sup> *Id.* at 400.

<sup>24</sup> U.S. CENSUS BUREAU, 2016 AMERICAN CMTY. SURVEY 1-YEAR ESTIMATES (2016), [https://factfinder.census.gov/bkmk/table/1.0/en/ACS/16\\_1YR/S0201//popgroup~001|006](https://factfinder.census.gov/bkmk/table/1.0/en/ACS/16_1YR/S0201//popgroup~001|006)

<sup>25</sup> *Id.*

<sup>26</sup> Poverty Rate, MAP AZ Dashboard (2019), available at <https://mapazdashboard.arizona.edu/health-social-well-being/poverty-rate/poverty-rate> (last visited Sep 20, 2019).

race at 7.8%, compared to the national average of 4.4%.<sup>27</sup> Additionally, Native Americans have the lowest labor force participation rate.<sup>28</sup>

### *Language Barriers*

Many Native Americans also face language barriers when it comes to voting. Some Native Americans have limited English proficiency and require language assistance. There are over 370,000 Native American language speakers.<sup>29</sup> Of these, about 84,000 Native Americans report speaking English “less than very well.”<sup>30</sup> Only a handful of Native languages are written and not every speaker can read their native language. Without adequate translations, both oral and written, Native language speakers are at a disadvantage when trying to participate in the electoral process.

Section 203 of the Voting Rights Act requires language assistance to be effective. Specifically, Section 203 mandates “[w]henver any State or political subdivision [covered by the section] provides registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, it shall provide them in the language of the applicable minority group as well as in the English language.”<sup>31</sup> As of 2016, jurisdictions in ten states must provide language assistance to Native American and Alaska Native voters under Section 203.<sup>32</sup>

However, not all jurisdictions provide adequate language assistance. Despite the lack of compliance, the Department of Justice has only brought one case to enforce Section 203 in the last ten years.<sup>33</sup> However, during the same period, several tribes brought litigation to enforce the provisions of Section 203, and several jurisdictions admitted to doing nothing to comply with Section 203.<sup>34</sup> In 2014, San Juan County, Utah, moved to an all vote-by-mail system that did not account for translations for Navajo language speakers. Navajo voters who needed language assistance were required to travel several hours round trip to the sole in-person voting location to

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<sup>27</sup> U.S. BUREAU OF LABOR STATISTICS, Report 1076, LABOR FORCE CHARACTERISTICS BY RACE AND ETHNICITY, 2017 (Aug. 2018), available at <https://www.bls.gov/opub/reports/race-and-ethnicity/2017/home.htm>

<sup>28</sup> *Id.*

<sup>29</sup> JULIE SIEBENS & TIFFANY JULIAN, U.S. CENSUS BUREAU, REPORT NO. ACSBR/10-10, NATIVE NORTH AMERICAN LANGUAGES SPOKEN AT HOME IN THE US AND IN PUERTO RICO: 2006-2010 1, 2 (2011) available at <https://www.census.gov/library/publications/2011/acs/acsbr10-10.html>.

<sup>30</sup> U.S. CENSUS BUREAU, 2013-2017 AMERICAN CMTY. SURVEY 5-YEAR ESTIMATES, available at [https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS\\_17\\_5YR\\_B16005C&prodType=table](https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_17_5YR_B16005C&prodType=table).

<sup>31</sup> 52 U.S.C. § 10503(c) (2012) (Westlaw through Pub. L. No. 115-90).

<sup>32</sup> U.S. CENSUS BUREAU, Determinations under Section 203 of the Voting Rights Act, 81 Fed. Reg. 87532 (Dec. 5, 2016).

<sup>33</sup> For a list of the Department of Justice’s voting litigation, please visit their website at <https://www.justice.gov/crt/voting-section-litigation>; Memorandum of Agreement, *U.S. v. Shannon County*, (April 23, 2010), available at [https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/shannon\\_moa.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/shannon_moa.pdf).

<sup>34</sup> ARIZONA STATE UNIVERSITY INDIAN LEGAL CLINIC, NATIVE VOTE – ELECTION PROTECTION PROJECT 2016 ELECTION REPORT 1, 34 (2016).

obtain assistance. In Alaska, two separate lawsuits were filed to secure language assistance for Yu'pik language speakers under Section 203.<sup>35</sup> After a lawsuit, the state of Alaska agreed via a settlement to comply with Section 203 for the purposes of providing language assistance to Native American language speakers. Even though Yu'pik is a written language, state officials were refusing to provide both written and oral materials in the Yu'pik language.

### ***Infrastructure***

As a part of their unique reality, many Tribal communities do not have the same infrastructure and access to information as other Americans. Some of these limitations in infrastructure include lack of paved roads and the digital divide, including the lack of broadband, telephone services, and electricity generally.

The lack of paved roads on reservation lands hinders access to voting locations, including early voting locations, polling locations and voter registration sites. During inclement weather, unpaved roads may become impassable and further impede voters. The Indian Reservation Roads (IRR) program has reported that they take care of more than 144,000 miles of roads and over 60% of those roads are unpaved.<sup>36</sup> According to the BIA, approximately 17,130 miles of existing roads in the National Tribal Transportation Facility Inventory are unimproved and earth surface roads.<sup>37</sup> When considering only BIA and tribal roads, the percent of unpaved roads increases to 80%.<sup>38</sup> In addition, 27% of all the bridges in the IRR system are deficient.<sup>39</sup> In Arizona, the Navajo Reservation has over 10,000 miles of road, 86% of which are unpaved.<sup>40</sup>

Another unique barrier Native Americans face is the lack of broadband available on reservations. Only 58.3% of all Tribal lands have the option to connect to high-speed broadband, while 97.3% of urban areas in the United States have access to high-speed broadband.<sup>41</sup> Without internet, Native Americans cannot easily access online voter registration or polling locations, ballot or even

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<sup>35</sup> *Nick v. Bethel*, No. 3:07-cv-00098, 2010 WL 11639983, at \*1–2 (D. Alaska Jan. 20, 2010); Stipulated Judgment and Order, *Toyokak v. Mallott*, No. 3:13-cv-00137-SLG-LCL (D. Alaska 2014) available at [https://www.narf.org/nill/documents/20150910\\_alaska\\_voting\\_settlement.pdf](https://www.narf.org/nill/documents/20150910_alaska_voting_settlement.pdf).

<sup>36</sup> TRIBAL TRANSPORTATION: PAVING THE WAY FOR JOBS, INFRASTRUCTURE AND SAFETY IN NATIVE COMMUNITIES: HEARING BEFORE THE S. COMM. ON INDIAN AFFAIRS, 112th Cong. 112-424 (2011) (statement of John R. Baxter, Assoc. Adm'r for Fed. Lands, Fed. Highway Adm'r).

<sup>37</sup> ENHANCING TRIBAL SELF-GOVERNANCE AND SAFETY OF INDIAN ROADS: HEARING BEFORE THE S. COMM. ON INDIAN AFFAIRS, 116th Cong. (2019) (statement of Leroy Gishi, Chief of the Div. of Trans., BIA, DOI).

<sup>38</sup> TRIBAL TRANSPORTATION: PAVING THE WAY FOR JOBS, INFRASTRUCTURE AND SAFETY IN NATIVE COMMUNITIES: HEARING BEFORE THE S. COMM. ON INDIAN AFFAIRS, 112th Cong. 112-424 (2011) (statement of John R. Baxter, Assoc. Adm'r for Fed. Lands, Fed. Highway Adm'r).

<sup>39</sup> *Id.*

<sup>40</sup> FY2019 Navajo Nation Tribal Transportation Plan at 1, available at [http://navajodot.org/uploads/files/Draft%20FY2019%20NNTTIP\\_08-20-18.pdf](http://navajodot.org/uploads/files/Draft%20FY2019%20NNTTIP_08-20-18.pdf).

<sup>41</sup> FED. COMM'N COMM'N, FCC RELEASES 2018 BROADBAND DEPLOYMENT REPORT CONCERNING 2018 BROADBAND DEVELOPMENT REPORT (2018), available at <https://www.fcc.gov/document/fcc-releases-2018-broadband-deployment-report>.

candidate information. Many states mandate polling locations have electricity, which can be problematic for tribes because 14% of homes on reservations have no access to electricity, compared to the national rate of 1.4%.<sup>42</sup> Accordingly, elections administrators may not provide a polling location on reservations in areas lacking electricity or election officials may be forced to rely on generators to sustain the polling location for long periods of time. This creates an added difficulty because the Help America Vote Act (HAVA) statutorily mandates accessible voting machines at every polling location.

### ***Nontraditional Addresses and Home Mail Delivery***

While 84% of the U.S. population lives in urban areas,<sup>43</sup> many Native Americans and Alaska Natives live in rural communities. These communities lack traditional street addresses,<sup>44</sup> and locations for homes are usually described in terms of landmarks, cross roads, and directions. Numerous roads on reservations are unimproved dirt or gravel roads, and “many miles of these roads are impassable after rain or snow. Because of the poor quality of the road systems on Indian reservations, many of the roads are unnamed and not serviced by the U.S. Postal Service. . . . A significant number of these reservation residents have no traditional street addresses.”<sup>45</sup>

Due to the lack of traditional addresses, “[m]ost reservation residents do not receive mail at their homes and either pay to maintain a post office box in a nearby town or receive their mail by general delivery at a trading post or other location. Some reservation residents have to travel up to seventy miles in one direction to receive mail.”<sup>46</sup> In Arizona, for example, only 18% of reservation voters outside of Maricopa and Pima Counties have physical addresses and receive mail at home.<sup>47</sup> The Navajo Nation, the largest reservation in the United States—the size of West Virginia, does not have an addressing program, and most people live in remote communities.<sup>48</sup> Residents have “little to no vehicle access, only post office boxes, sometimes shared by multiple families.”<sup>49</sup> Similarly, “[t]here is no home delivery in the Tohono O’odham Nation, where there are 1,900 post office boxes and some cluster mail boxes. . . . Residents come to the post office every two or three weeks

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<sup>42</sup> GLOBAL ENERGY NETWORK INST., Renewable Energy on Tribal Lands 19, available at <http://www.geni.org/globalenergy/research/renewable-energy-on-tribal-lands/Renewable-Energy-on-Tribal-Lands.pdf>.

<sup>43</sup> UNIV. MICH. CTR. FOR SUSTAINABLE SYSTEMS, US Cities Fact Sheet, available at <http://css.umich.edu/factsheets/us-cities-factsheet>.

<sup>44</sup> NAVRC Study at 3, 5.

<sup>45</sup> Brief for National Congress of American Indians et al. as Amici Curiae supporting Petitioners, *Crawford v. Marion County* at 11-12 (2008), available at [https://sct.narf.org/documents/crawford/merits/amicus\\_ncai.pdf](https://sct.narf.org/documents/crawford/merits/amicus_ncai.pdf).

<sup>46</sup> *Id.* at 12.

<sup>47</sup> *Democratic Nat'l Comm. v. Reagan*, 329 F. Supp. 3d 824, 869-870 (D. Ariz.), *rev'd sub nom DNC v. Hobbs*, No. 18-15845 (9th Cir. Jan. 27, 2020) (en banc).

<sup>48</sup> Carrie Jung, *Home Addresses on Navajo Nation are Rare* (Oct. 8, 2015), available at <https://kjzz.org/content/202564/home-addresses-navajo-nation-are-rare-officials-working-change>.

<sup>49</sup> *DNC v. Reagan*, 329 F. Supp. 3d at 869.



to get their mail. Due to the lack of transportation, the condition of the roads, and health issues, some go to post office only once per month.”<sup>50</sup>

The lack of traditional addresses can create barriers related to voter registration, voter ID requirements, and the implementation of voting by mail.<sup>51</sup> Native American voters should not face these barriers just because they lack traditional street address or the ability to receive home mail delivery. However, the lack of formal addresses in Indian Country makes it especially hard for voters to comply with address requirements to register to vote or to produce identification in order to vote on election day.<sup>52</sup> Voters may be placed in the wrong precinct, their ID address may not match the voter rolls, and voters may not receive their election mail timely, if at all. Further, voters may not receive election mail because they may only check their mailbox once a month due to the distance they must travel to pick up their mail.

### ***Housing***

Intertwined with many aspects of the inherent barriers that Native Americans face in voting is the nationwide housing crisis affecting many tribal communities.<sup>53</sup> In a 2017 report, HUD notes that housing availability on reservations and in other tribal communities are considered “extreme by any standard.”<sup>54</sup> Homelessness among Native Americans has largely taken the form of overcrowding. Homeless Native Americans living on Tribal lands depend upon couch surfing as their primary source of shelter. HUD found that between 42,000 and 85,000 people in Tribal areas are couch surfers, staying with friends or relatives because they had no place of their own.<sup>55</sup> As a result, nearly 16% of Tribal households experience overcrowding compared to the national rate of 2%.<sup>56</sup>

The lack of housing in tribal communities directly affects the ability of Native Americans to register and to vote. In particular, state and local governments structure many of their voting procedures and policies to require that voters prove a physical address. This becomes problematic when registering to vote, complying with voter ID laws, receiving official election mail, and verifying voter registration addresses against the voter roll at the polls.

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<sup>50</sup> *DNC v. Reagan*, 329 F. Supp. 3d at 869.

<sup>51</sup> NAVRC Study at 6. .

<sup>52</sup> *Id.* at 5.

<sup>53</sup> Les B. Whitbeck, et al., *Correlates of Homeless Episodes Among Indigenous People*, 49 AM. J. CMTY. PSYCHOLOGY 156 (2011).

<sup>54</sup> NANCY PINDUS, ET AL., U.S. DEP’T OF HOUSING AND URBAN DEVELOPMENT, HOUSING NEEDS OF AMERICAN INDIANS AND ALASKA NATIVES IN TRIBAL AREAS: A REPORT FROM THE ASSESSMENT OF AMERICAN INDIAN, ALASKA NATIVE AND NATIVE HAWAIIAN HOUSING NEEDS 1, 76, 82, 58 (Jan. 2017), available at <https://www.huduser.gov/portal/sites/default/files/pdf/HNAIHousingNeeds.pdf>.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

### ***Access to Polling Locations***

Increasing accessibility to voting locations, early voting and election day polling locations, is crucial to the protection of Native American voting rights.<sup>57</sup> In a 2018 survey conducted by the Native American Voting Rights Coalition, 10% of respondents in New Mexico, 15% in Arizona, 27% in Nevada, and 29% in South Dakota identified distance from polling locations as one of the many problems associated with in-person voting.<sup>58</sup> Early voting opportunities located hours away effectively amount to no access to in-person early voting in light of the practical effects of requiring voters to travel such distances. The federal district court in Nevada acknowledged the reality that these distances impede voting when it found that a polling location 16 miles away from the Pyramid Lake Paiute Reservation constituted an unburden on voters.<sup>59</sup> This undue burden is not unique to voters living on the Pyramid Lake Paiute Reservation. The federal district court in South Dakota found that Pine Ridge Reservation residents “must travel, on average, twice as far as white residents to take advantage of the voter registration and in-person absentee voting services.”<sup>60</sup>

But there are also more extreme examples. In 2016, Native American voters in Nevada and Utah had to travel over 100 miles to their nearest polling locations.<sup>61</sup> In Mohave County, Arizona, the county established three in-person early voting locations. Most residents of the County lived near one of these locations; however, for the Kaibab-Paiute Tribe the closest of the three locations was located 285 miles away, and required on-reservation voters to travel for over five hours if they wanted to vote early in person.<sup>62</sup> In Navajo County, off-reservation voters had access to more than 100 hours of in-person early voting. Members of the Hopi Tribe living on-reservation in Navajo County had access to only six hours of in person early voting. These distances are compounded by the socioeconomic difficulties Native American voters face because of decreased access to public transportation, personal transportation, or requisite funds to travel such distances simply to vote.

### ***Vote by Mail***

Vote by mail is not a simple or easy task for Native American voters. Native Americans are less likely to have mail delivered to their homes, especially when living on tribal lands.<sup>63</sup> Many on-reservation voters live in rural areas where it is common for mail to arrive late or not at all. Reservation residents often rely on post office boxes that may be 45 minutes to a 2-hour drive away.<sup>64</sup> The difficulties accessing mail make voting by mail difficult because traveling to the P.O.

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<sup>57</sup> NAVRC Study at 41.

<sup>58</sup> *Id.* at 6.

<sup>59</sup> *Sanchez v. Cegavske*, 214 F. Supp. 3d 961, 976 (D. Nev. 2016).

<sup>60</sup> *Poor Bear v. Cty. of Jackson*, No. 5:14-CV-5059-KES, 2015 WL 1969760, at \*2 (D.S.D. May 1, 2015) (denying defendants’ Motion to Dismiss).

<sup>61</sup> Natalie Landreth, *Why Should Some Native Americans have to drive 163 miles to vote?*, THE GUARDIAN (June 10, 2015), available at <https://www.theguardian.com/commentisfree/2015/jun/10/native-americans-voting-rights>

<sup>62</sup> ARIZONA STATE UNIVERSITY INDIAN LEGAL CLINIC, NATIVE VOTE – ELECTION PROTECTION PROJECT 2016 ELECTION REPORT 1, 21 (2016).

<sup>63</sup> *Id.* at App. IV at 7.

<sup>64</sup> *Id.*

Box to pick up your ballot and then returning it can be an all-day task; without a car, it may be impossible. Voting early by mail on-reservation is largely unreliable. Thus, vote by mail is not as accessible for Native Americans living on reservation as it is for off-reservation voters.

Vote by mail can effectively eliminate voting opportunities for some Native American and Alaska Native communities if no polling locations are available within the tribal communities. In 2008, the Alaskan government eliminated polling locations for Alaska Native villages as part of a “district realignment” that resulted in voters having to travel by plane in order to vote.<sup>65</sup> Alaska contemplated moving to a vote-by-mail system and Alaskan Native voters responded with extreme concerns. Because mail is delivered via plane, Alaska Natives already have to wait two to three weeks to receive mail, and even longer if service is delayed by weather conditions. With federal elections taking place in October and November, delays caused by inclement weather render mail-in elections impracticable in Alaska. In 2016, the Pyramid Lake and Walker River Paiute Tribes in Nevada filed a lawsuit prior to the 2016 general election in order to get polling locations on the reservation.<sup>66</sup> In 2016, San Juan County, Utah switched a mail-only voting system and offered in-person early voting only in the majority white part of the County; the Navajo Nation sued to ensure in-person locations and compliance with the language assistance requirements under Section 203 of the Voting Rights Act. In North Dakota, closure of polling locations on the Mandan Hidatsa Reservation resulted in voters having to travel 80-100 miles in order to cast a ballot. For the Kaibab Paiute Tribe in Arizona, voters had to travel 280 miles one way in 2016 and 2018 in order to vote early in person. When Pima County closed early voting on the Pascua Yaqui Reservation in 2018, Pascua Yaqui voters reported that it took over two hours to participate in early voting using public transportation.

Moving to vote by mail will reduce or eliminate voting access for Native Americans and Alaska Natives living in communities with unreliable mail delivery systems. Native Americans in many states, including Arizona, New Mexico, Nevada, and South Dakota, do not trust mail-in voting systems. Mail in tribal communities is untimely and inconsistent, creating a preference for Native American and Alaskan Native voters to vote in person. For example, 70% of members of the Gila River Indian community voted in person in 2018.

### ***Voter Identification Barriers***

As a natural consequence of the socioeconomic conditions already mentioned, Native Americans are less likely to have the forms of identification that satisfy state law. Thirty-six states have laws

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<sup>65</sup> Natalie Landreth, *Why Should Some Native Americans Have to Drive 163 Miles to Vote?*, THE GUARDIAN (June 10, 2015), available at <https://www.theguardian.com/commentisfree/2015/jun/10/native-americans-voting-rights> (“[I]magine if you had to take a plane flight to the nearest polling place because you cannot get to it by road, which was the case for several Native communities in 2008, when the state of Alaska attempted a “district realignment” to eliminate polling places in their villages. And that’s just half the trip”).

<sup>66</sup> Jennifer Solis, *Tribes get their own polling places, some for the first time*, NEVADA CURRENT (Oct. 31, 2018).

requiring voters to show some form of identification (“ID”) at the polls.<sup>67</sup> Of these thirty-six states, only nine (Alabama, Arizona, Idaho, Michigan, North Carolina, South Dakota, Utah, Virginia and Washington) explicitly allow tribal IDs as a form of identification.<sup>68</sup> Of the nine states that allow tribal IDs, four explicitly require tribal IDs to have photos.<sup>69</sup>

Although many Tribes issue IDs, not all Tribes do, and even if they do, they may lack a residential address or a photo. A voter ID law requiring a residential address went into effect in North Dakota right before the 2018 midterm elections.<sup>70</sup> This law expressly excluded the use of P.O. Boxes as residential addresses. Over 5,000 Native Americans lacked the requisite form of ID to participate in North Dakota elections, and none of the six reservations have residential addresses.<sup>71</sup> While Tribes took actions to try to issue free Tribal IDs meeting the new requirements, they often expended resources they did not have.

During the 2006 election, 428 Navajos in Arizona voted provisional ballots that were never counted because they did not present ID at the polls. The Navajo Nation and the Inter Tribal Council of Arizona sued alleging that the voter ID law violated Section 2 of the Voting Rights Act; the parties settled expanding the acceptable forms of ID to include certain forms of tribal ID. Despite the settlement, poll workers continue to reject acceptable tribal IDs in each election due to insufficient poll worker training or because of problems arising with non-traditional reservation addresses.

### ***Lack of Access to Voter Registration***

Online voter registration is a tool that states continue to adopt and currently thirty-nine states and Washington D.C. employ this new technology.<sup>72</sup> If a Native American voter living on Tribal lands has access to the Internet, many states offering online registration require that a state-issued ID be utilized in the process thereby excluding on-reservation voters who lack state ID.<sup>73</sup> In Arizona, the online form does not allow for nontraditional addresses to be used for voter registration online, excluding most reservation voters from this option.

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<sup>67</sup> NATIONAL CONFERENCE OF STATE LEGISLATURES, *Voter Identification Requirements: Voter ID Laws* (Jan. 1, 2020), available at <https://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx>

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> Maggie Astor, *A Look at Where North Dakota’s Voter ID Controversy Stands*, N.Y. TIMES (Oct. 19, 2018), available at <https://www.nytimes.com/2018/10/19/us/politics/north-dakota-voter-identification-registration.html?module=inline>.

<sup>71</sup> *Id.*

<sup>72</sup> NATIONAL CONFERENCE OF STATE LEGISLATURES, *Online Voter Registration* (Feb. 3, 2020), available at <https://www.ncsl.org/research/elections-and-campaigns/electronic-or-online-voter-registration.aspx>

<sup>73</sup> *Id.*; see also AZ STATE ADVISORY COMM. OF THE USCCR, *Voting Rights in Arizona: An Advisory Memorandum of the Arizona Advisory Committee to the USCCR* at 7 (July 2018), available at <https://www.usccr.gov/pubs/2018/07-25-AZ-Voting-Rights.pdf>.

In several areas throughout the United States, Native Americans report lower awareness of how and where to register to vote and in general, report lower levels of activity by third party groups to conduct registration drives.<sup>74</sup> In a recent survey, 10% of unregistered Native Americans in New Mexico, 14% in Arizona, 26% in Nevada, and 32% in South Dakota cited long distance travel as a factor in their decisions to not register to vote.<sup>75</sup>

### ***Discrimination***

In some areas of the country, Native Americans face discrimination in voting. In San Juan County, nonIndians called Navajo voters “savage,” and made other racist comments when they secured an additional representative on the county board of supervisors. In a recent survey conducted by NPR and the Robert Wood Johnson Foundation, the survey found that “[o]ne in ten Native Americans say they have been personally discriminated against because they are native when trying to vote or participate in politics.”<sup>76</sup> In this survey, 15% of Native Americans reported that they observed discrimination when Native Americans tried to vote.<sup>77</sup>

A recent decision by the Ninth Circuit Court of Appeals found that specific election laws, one discarding ballots cast out of precinct and one prohibiting ballot collection drives, had a discriminatory impact on Native Americans.<sup>78</sup> Furthermore, the court found that the ban on ballot collection was specifically passed with discriminatory intent to eliminate voting efforts utilized by minority communities, including Native Americans. The Ninth Circuit found that the ballot collection law disenfranchised Native Americans and held that it violated Section 2 of the Voting Rights Act and the 15th Amendment.

### IV. Conclusion

More must be done to address the voting disparities in Indian Country and to ensure that Native Americans can exercise their rights to register to vote, vote, and have access to language translations. U.S. Supreme Court Justice Hugo Black said, “Great nations, like great men, should keep their word.”<sup>79</sup> It has been 96 years since the Indian Citizenship Act, and the promise of the Native American franchise has yet to be kept. However, Congress has the power and the duty to keep that promise.

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<sup>74</sup> NAVRC Study at 41.

<sup>75</sup> *Id.*

<sup>76</sup> Discrimination in America: Experiences and Views of Native Americans (Nov. 2017), available at [https://www.rwjf.org/content/dam/farm/reports/surveys\\_and\\_polls/2017/rwjf441678/](https://www.rwjf.org/content/dam/farm/reports/surveys_and_polls/2017/rwjf441678/)

<sup>77</sup> *Id.*

<sup>78</sup> *DNC v. Hobbs*, No. 18-15845 (9th Cir. Jan. 27, 2020).

<sup>79</sup> *Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (Black, dissenting).