

**TESTIMONY BEFORE THE HOUSE COMMITTEE ON ADMINISTRATION  
SUBCOMMITTEE ON ELECTIONS  
HEARING ON  
VOTING IN AMERICA: A NATIONAL PERSPECTIVE ON THE RIGHT TO VOTE,  
METHODS OF ELECTION, JURISDICTIONAL BOUNDARIES, AND REDISTRICTING**

**PATTY FERGUSON-BOHNEE  
DIRECTOR, INDIAN LEGAL CLINIC  
CLINICAL PROFESSOR OF LAW  
SANDRA DAY O'CONNOR COLLEGE OF LAW  
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## I. Introduction and History of Native American Voting Rights

Chairperson Butterfield, Ranking Member Steil, 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> The Indian Legal Clinic works with its partners to provide education to Arizona's tribal communities on election laws, voting, and redistricting. We also provide education to county and state officials about the barriers to voting experienced by Native American voters.

Securing the right to vote has been a struggle for Native Americans. This is especially true for states with large Native American populations and in jurisdictions where the Native vote could be decisive. 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 after statehood.<sup>3</sup> South Dakota law prevented Native Americans from holding public office until 1939.<sup>4</sup> Many states preventing Native Americans from voting claiming that Native Americans lacked state citizenship. 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, state and local officials took steps 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,

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<sup>1</sup> Many thanks to the Indian Legal Clinic 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> *Tapia v. Lucero*, 52 N.M. 200, 202, 195 P.2d 621, 621 (N.M. 1948); *Montoya v. Bolack*, 372 P.2d 387 (N.M. 1962) (holding that Navajo Indians residing on the reservation were eligible to vote); *Harrison v. Laveen*, 196 P.2d 456 (Ariz. 1948) (finding that federal guardianship could not be used to deprive the right to vote to Native Americans).

<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).

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 for Native American voters only came with protections afforded by the Voting Rights Act and enforcement of those rights has required decades of litigation. However, the Supreme Court invalidated the preclearance formula in 2013, removing one of the most powerful tools to ensure equal access to the ballot for Native Americans, which included two jurisdictions in South Dakota, a jurisdiction in North Carolina, and the states of Alaska, and Arizona.<sup>9</sup> Since that time, efforts to suppress the vote have increased and the tactics to suppress the Native American vote have diversified by “pour[ing] old poison into new bottles.”<sup>10</sup> For Native Americans, these voter suppression efforts can have devastating impacts.

Voting is not a simple or easy task for many Native Americans. In addition to well-documented access barriers, redistricting has been used as a tool to suppress Native American voting rights and depress Native American political power.<sup>11</sup> My testimony will focus on redistricting challenges faced by tribal citizens and barriers caused by geography and jurisdictional issues.

## II. Redistricting

Protecting the right to vote against voter suppression continues to be an uphill battle for Native Americans. Once Native Americans began voting, local and state jurisdictions used redistricting to diminish the “[Native American] community’s ability to fully participate in the electoral process and to elect their preferred candidates of choice.”<sup>12</sup> The threat of Native Americans electing candidates of their choice has resulted in states and local jurisdictions carving up reservations or packing Indian voters in redistricting plans in order to minimize the impact of the Native vote. During the past five decades, preclearance objections and litigation has been used to undo some of the redistricting efforts employed to reduce Native American voting strength.

### ***Preclearance***

In covered jurisdictions, preclearance was a powerful tool to counteract efforts to reduce voting strength through redistricting schemes. The Indian voters in covered jurisdictions comprised a substantial percentage of the Voting Age Population in those counties. (Todd County 86.8%;

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<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).

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

<sup>10</sup> *Reno v. Bossier Parish School Bd.*, 528 U.S. 320, 366 (2000) (Souter, J., concurring in part, dissenting in part).

<sup>11</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); JAMES TUCKER ET AL., OBSTACLES AT EVERY TURN (2020); Patty Ferguson-Bohnee, *How the Native American Vote Continues to be Suppressed*, ABA Human Rights Mag. Vol. 45-1 (2020); Patty Ferguson-Bohnee and James Tucker, *Voting During a Pandemic: Vote-by-Mail Challenges for Native Voters*, AZ Attorney 24-35 (July/Aug. 2020).

<sup>12</sup> See H.R. REP. NO. 109-478, at 6 (2006) (“Discrimination today is more subtle than the visible methods used in 1965. However, the effect and results are the same.”).

Shannon County, 95.5%; Apache County, 75%; Navajo County, 45.7%; Coconino County, 27.4%; Jackson County, NC, 9.1%; Pinal County, 6.6%).<sup>13</sup> Not surprisingly, the Indian vote posed a significant threat to the non-Indian voters located in the same political jurisdictions who took action to suppress or reduce the effectiveness of the Indian vote in order to maintain power and control.

Through the preclearance process, the Department of Justice objected to nine redistricting proposals due to the harmful impact the plans had on Native American voters. Five of those objections were for the state of Arizona and its political subdivisions. Section 5 improved the political landscape for tribal participation in elections, but it neither ended animosity against Indian voters nor has it eliminated all discrimination in voting. This will be the first decade that formerly covered jurisdictions engage in redistricting. In the Renew the Voting Rights Act Report for Arizona, experts noted the continuing need for voting access and improvements for Native American and Latino voters.

More than eighty percent of Arizona's twenty-two Section 5 objections have occurred for voting changes enacted since 1982. Four post-1982 objections have been for statewide redistricting plans, including one in the 1980s, two in the 1990s and one as recently as 2002. Since 1982, the Department of Justice has interposed objections to voting changes from nearly half of Arizona's 15 counties that have had the purpose or effect of discriminating against Latino or American Indian voters.<sup>14</sup>

### *Litigation*

The Department of Justice brought numerous redistricting cases to enforce voting rights of Native American voters between the 1970s and 2000.<sup>15</sup> Since that time, most redistricting litigation filed on behalf of Native American voters has been brought by Tribes and private parties.<sup>16</sup> Since 1996, there have been 22 federal cases brought on behalf of Indian Tribes or Native American voters challenging at-large election systems, redistricting lines, or malapportionment of Native American voters involving state legislative districts, school boards, counties, sanitation districts, and city councils. Of those 22 cases, the Department of Justice brought six of those cases.

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<sup>13</sup> Eight of the eleven census statistical areas in Alaska have an Alaska Native population over 65%.

<sup>14</sup> *Voting Rights Act: Evidence of Continued Need, Vol. I: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 1379 (2006) (appendix to the statement of Wade Henderson).

<sup>15</sup> See DANIEL MCCOOL ET AL., NATIVE VOTE: AMERICAN INDIANS, THE VOTING RIGHTS ACTS, AND THE RIGHT TO VOTE 48-67 tbl. 10 (2007).

<sup>16</sup> See *Id.*; JAMES TUCKER ET AL., OBSTACLES AT EVERY TURN 19-23.

STATISTICS OF FEDERAL CASES BROUGHT ON BEHALF OF NATIVE AMERICANS CHALLENGING  
REDISTRICTING, AT-LARGE VOTING SYSTEMS, AND MALAPPORTIONMENT SINCE 1996<sup>17</sup>

State	Total Number of Cases	Total Brought by DOJ	Total Brought by Private Parties	Challenging At-Large Elections	Redistricting	Malapportionment
Arizona	1	-	1	-	1	-
Montana	7	2	5	5	1	1
New Mexico	2	-	2	-	2	-
North Dakota	2	2	-	2	-	-
South Dakota	8	2	6	2	4	2
Utah	1	-	1	-	1	-
Wyoming	1	-	1	1	-	-
Total	22	6	16	10	9	3

***At Large Districts***

At-large districts have been used to deny Native Americans the opportunity to elect candidates of choice. In the last 25 years, Montana, North Dakota, South Dakota, and Wyoming have used such voting schemes to diminish the Native American vote. Montana has an extensive history of voting

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<sup>17</sup> See DANIEL MCCOOL ET AL at 48-67 tbl. 10; JAMES TUCKER ET AL. at 19-23.

discrimination against Native American voters,<sup>18</sup> and has had the most challenges to at-large districts in Indian Country. Four of these challenges were to at-large county commission districts. In 1999, the ACLU and the Indian Law Resource Center filed two lawsuits challenging at-large districts for electing the board of commissioners in Rosebud County and the school district in Lake County that diluted Native American voting strength under Section 2 of the Voting Rights Act and the U.S. Constitution.<sup>19</sup> The parties agreed to multi-member districts in the Lake County school district, one of which was majority-minority Native American. In Rosebud County, the court ordered single member districts, one of which was majority Native American. In *U.S. v. Blaine County*, the Native American population was 45.2% of the county with the majority, approximately 80%, living on the Fort Belknap Reservation. The Native American population was geographically compact and numerous “so that Native Americans would likely constitute a voting majority in one of the single member districts” if adopted.<sup>20</sup> In determining that Blaine County’s at-large voting system violated section 2, the court found that there was a history of racial discrimination against Native Americans, racially polarized voting, and there had never been a Native American elected to any of the three county commissioner seats.<sup>21</sup>

In Wyoming, Eastern Shoshone and Northern Arapaho Tribal members successfully challenged the at-large voting scheme for the Fremont County Commission. According to the Census, 19.68% of Fremont County’s population identify as Indian alone and 20.94% identify as Indian in some combination with another race. Between 1980 and 2000, the Indian population grew while the white population fell. Most of the Native American population lived on the Wind River Reservation. The county argued that “Indians simply do not care to participate in county and state elections and if there is any dilution of Indian voting strength, it is the result of Indian apathy.”<sup>22</sup> The court disagreed and found that the at-large voting scheme diluted Indian voting strength and are in violation of Section 2 of the Voting Rights Act.

### **Packing**

Packing Native Americans into one district to limit political representation has been used to limit change of power and control in local jurisdictions. Packing occurs when a voting bloc, disfavored by map-drawers, are intentionally placed in the smallest number of districts possible to limit their ability to choose multiple candidates. Examples of packing to reduce Native American voting strength can be found more recently in Utah and South Dakota.

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<sup>18</sup> *U.S. v. Blaine County*, 363 F.3d 897, 912 (9th Cir. 2004); *Old Person v. Cooney*, 230 F.3d 1113, 1129 (9th Cir. 2000).

<sup>19</sup> ACLU, ACLU and Indian Rights Group Seek to Secure Voting Rights for Montana’s Native Americans (July 7, 1999), available at <https://www.aclu.org/press-releases/aclu-and-indian-rights-group-secure-voting-rights-montanas-native-americans>; *Matt v. Ronan School District*, No. 99-94-M-DWM (D. Mont.); *Alden v. Bd. of Cmms of Rosebud County*, No. 99-148-BLG-DWM (D. Mont.).

<sup>20</sup> *U.S. v. Blaine County*, 157 F.Supp.2d 1145 (D. Mont. 2001).

<sup>21</sup> *U.S. v. Blaine County*, 363 F.3d 897 (9th Cir. 2004).

<sup>22</sup> *Large v. Fremont*, 708 F. Supp.2d 1176, 1230 (D. Wy. 2010); Jean Schroedel and Ryan Hart, *Vote Dilution and Suppression in Indian Country*, 29 *Studies in American Political Development* 40, 62 (April 2015).

The Department of Justice sued San Juan County, Utah in the 1980s arguing that the at-large election system violated Section 2 of the Voting Rights Act, resulting in consent decreet that created single member districts. The resulting District 3 had a Native American population of 88.77%. Despite changes in population, the district lines did not change during a twenty-five year period. Even though some changes were made to the other two districts in 2011, the boundaries of the Native American majority minority district remained the same. The Native American population in that district increased to 92.81%. The Navajo Nation challenged the redistricting efforts that packed Navajo voters into a single district of three. As a result of contentious, multi-year litigation, the counties voting districts were reconfigured and resulted in Native Americans electing two candidates of choice.<sup>23</sup>

In South Dakota, discrimination in redistricting led to prolonged litigation followed by consent decrees. In *Kirkie v. Buffalo County*, Buffalo County, South Dakota gerrymandered its three districts by packing 75% of the Indian population into one district.<sup>24</sup> The county, the “poorest in the country,”<sup>25</sup> was comprised of approximately 2,100 people, of which 83% were Indian. This redistricting had the purpose of diluting the Indian vote, as whites controlled both of the other two districts and thus County government.<sup>26</sup> The case was settled by a consent decree wherein the county admitted its plan was discriminatory and was forced to redraw the district lines.<sup>27</sup> In addition, the county agreed to subject itself to Section 3(c) of the Voting Rights Act, which requires the submission of voting changes for preclearance.<sup>28</sup> In 2005, another South Dakota county was forced to redraw district lines for similar malapportionment of Indian voters.<sup>29</sup> Preclearance may have prevented this type of *de facto* discrimination, because the changes would have needed preclearance approval prior to enactment.<sup>30</sup>

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<sup>23</sup> *Navajo Nation v. San Juan County*, 162 F.Supp.3d 1162, 1166 (D. Utah 2016), *aff'd* 929 F.3d 1270 (10th Cir. 2019).

<sup>24</sup> *Kirkie v. Buffalo County*, CIV No. 03-3011 (D.S.D. Feb. 12, 2004) (Consent Decree); *Voting Rights Act: The Continuing Need for Section 5: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 132-133 (2005) (appendix to the statement of Laughlin McDonald).

<sup>25</sup> *Voting Rights Act: Evidence of Continued Need, Vol. II: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*. 109th Cong. 2019 (2006) (appendix to the statement of Wade Henderson).

<sup>26</sup> *Kirkie v. Buffalo County*, CIV No. 03-3011 (D.S.D. Feb. 12, 2004) (Consent Decree); *Voting Rights Act: The Continuing Need for Section 5: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 132-133 (2005) (appendix to the statement of Laughlin McDonald).

<sup>27</sup> *Id.*

<sup>28</sup> *Voting Rights Act: Evidence of Continued Need, Vol. II: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*. 109th Cong. 2005 (2006) (appendix to the statement of Wade Henderson).

<sup>29</sup> *Blackmoon v. Charles Mix County*, 505 F.Supp.2d 585 (D.S.D. 2007); *Voting Rights Act: The Continuing Need for Section 5: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 156 (2005) (appendix to the Statement of Laughlin McDonald).

<sup>30</sup> Charles Mix County was not covered by Section 5.

## Arizona

Arizona has a history of minimizing Native American political representation through redistricting. Tribal voters challenged redistricting plans every cycle since the 1960s, except for the last decade following the 2010 Census. In the 1960s, the court rejected attempts to use the number of registered voters to determine apportionment.<sup>31</sup> The court noted that the Indians in Apache and Navajo counties would be underrepresented if voter registration was used as the basis for redistricting, thereby reducing Indian voter strength.<sup>32</sup> During the 1970s, the legislative reapportionment plan divided the Navajo Reservation into three separate state legislative districts reducing the ability of Navajo voters to elect candidates of their choice.<sup>33</sup> The court found that the legislative plan violated the Equal Protection Clause because it was done with the intent of “destroy[ing] the possibility that the Navajos, if kept within a single legislative district, might be successful in electing one or more of their own choices to the Legislature.”<sup>34</sup> During that time, the Navajo vote was also targeted on the local level along with voters from the White Mountain Apache Tribe. In Apache County, the board of supervisors created malapportioned districts to maintain a white majority. Apache County District 3 had a population of 26,700 of whom 23,600 were Indian, while District 1 had a population of 1,700 of whom only 70 were Indian and District 2 had a population of 3,900 of whom only 300 were Indian.<sup>35</sup> In response to Native American challengers, Apache County claimed that Indians are not citizens of the United States and the Indian Citizenship Act granting them citizenship was unconstitutional.<sup>36</sup> The three-judge federal court rejected the County’s arguments, held that the County must be redistricted in accordance with one-person, one-vote standards and granted plaintiffs’ motion for summary judgment.<sup>37</sup>

In the 1980s, the legislative redistricting plan split the San Carlos Apache Tribe into multiple districts, which the court found had the “the effect of diluting the San Carlos Apache Tribal voting strength and dividing the Apache community of interest.”<sup>38</sup> The Department of Justice objected to the plan on the grounds that the plan had a discriminatory effect. In the 1990s, the Arizona Legislature reached an impasse, and a three-judge panel was convened to draw a redistricting plan.<sup>39</sup> In adopting this plan, the Court noted recognized that Native American voters “should not be engulfed in a structure that minimizes their potential for meaningful access to the political process.” The court took judicial notice of the wide-spread practices of discrimination against Native Americans and adopted the Indian Compromise Plan.<sup>40</sup>

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<sup>31</sup> *Klahr v. Williams*, 303 F. Supp. 224, 225 (D. Ariz. 1969).

<sup>32</sup> *Id.* at 227 n. 6.

<sup>33</sup> *Klahr v. Williams*, 339 F. Supp. 922, 924, 927 (D. Ariz. 1972).

<sup>34</sup> *Id.* at 926-27 (D. Ariz. 1972).

<sup>35</sup> *Goodluck v. Apache County*, 417 F. Supp. 13, 14 (D. Ariz. 1975), *aff’d*, 429 U.S. 876 (1976).

<sup>36</sup> *Id.* at 14.

<sup>37</sup> *Id.* at 16.

<sup>38</sup> *Goddard v. Babbitt*, 536 F.Supp. 538, 541 (D. Ariz. 1982).

<sup>39</sup> *See Arizonans for Fair Representation v. Symington*, 828 F. Supp. 684, 687 (D. Ariz. 1992) *aff’d sub nom. Hispanic Chamber of Commerce v. Arizonans for Fair Representation*, 507 U.S. 981(1993).

<sup>40</sup> *Id.* at 690.



Until 2000, the redistricting process in Arizona was controlled by the Arizona Legislature and was highly politicized. In 2000, Arizona voters approved a citizen initiative that took redistricting out of the hands of the legislature and reassigned the redistricting responsibility to the Arizona Independent Redistricting Commission. This constitutional change also provided a procedural framework for the Commissioners to follow and established criteria for the redistricting process. During the last round of redistricting, the Arizona Independent Redistricting Commission, aware of the Section 5 requirements, adopted a legislative district to “strengthen the ability of Native Americans to elect their candidates of choice.”<sup>41</sup> This district includes nine tribes and has a Native American voting age population of 63.7%.<sup>42</sup> The Commission also created a congressional district with twelve tribes, who are 25% of the population. The last decade was the first time that Arizona’s maps were precleared on the first attempt. While the Commission must continue to apply the Voting Rights Act and other criteria, the retrogression standard required by Section 5 is no longer an option to protect the single Native American majority minority district.

### III. Geography

548 counties in the United States include Indian reservations and off-reservation trust land. Among those counties, there are 201 reservations/Tribal communities that are located in multiple counties and/or states. By virtue of these divisions, many Native American communities are inherently impacted by the variations in state law or in local election administration through precinct boundaries, county boundaries and other jurisdictional boundaries. These geographic barriers frustrate the ability of many Tribal communities to politically mobilize in support of one candidate for many federal, state, and local offices because a reservation may be split among multiple states, districts, or counties.

While 84% of the U.S. population lives in urban areas,<sup>43</sup> many Native Americans and Alaska Natives live in rural communities. The geography and demography of Indian Country creates certain challenges for redistricting. For example, Arizona’s urban population has only become more pronounced in the past 50 years. Arizona’s reservations total 27% of the landbase, and only 18% of the land is privately held.<sup>44</sup> The rural areas have remained sparsely populated while the metropolitan areas of Phoenix and Tucson have continued to experience rapid growth. The majority of Arizona’s Indian Country lies outside of the urban areas. Five of the ten most populated land-based Tribes in the United States are in Arizona. These include the Navajo Reservation, the largest Indian Reservation in both size and population, the Fort Apache Reservation, the Gila River Indian Reservation, the San Carlos Reservation, and the Tohono O’odham Reservation.

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<sup>41</sup> U.S. Department of Justice Submission under Section 5 of Voting Rights Act: IRC, State of Arizona Legislative Redistricting Plan at 2-3, 78 (Feb. 28, 2012).

<sup>42</sup> *Id.* at 41, 78.

<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> *Arizonans for Fair Representation v. Symington*, 828 F. Supp. at 687.

As noted by the court in *Klhar v. Williams*, the Navajo Reservation is the largest reservation in the country and is located within three states, Arizona, Utah, and New Mexico. The Arizona portion of the reservation “is larger in area than any of Arizona’s fourteen counties, excepting Coconino; and the portion of the Reservation within Arizona is 60 times larger in area than Phoenix, Arizona’s largest city.”<sup>45</sup>

### ***Dividing Reservations***

Ignoring Tribal boundaries and communities in the redistricting process dilutes the Native American vote. While dividing reservation boundaries may be required to meet equal population requirements and to enhance voter effectiveness, there are several examples of redistricting schemes that divide tribal communities to reduce voting strength. In recent years, redistricting bodies have divided Tribal communities into multiple districts in Wisconsin, Washington, Montana, and California.<sup>46</sup> In Washington, the redistricting maps split three separate reservations – the Lummi, Coleville, and Yakama Reservations.

### ***Precinct-Based Voting***

Ignoring Tribal boundaries also makes precinct-based voting more difficult, which has resulted in ballots cast by Indian voters discarded at disproportionate rates. Twenty-six states use a variation of a precinct-based voting system.<sup>47</sup> Within these states there are sizable Native American populations in Michigan, South Dakota, Arizona, Oklahoma, Montana, and Nevada. In each of these states, there are multiple Tribes with land bases that cross state and/or county lines.

In Arizona, county officials determine precinct boundaries; they also decide whether to offer precinct-based voting or vote centers. This decision point is critical to determining whether a ballot will be counted. At vote centers, any voter in the county can cast a ballot and have that ballot counted. Under Arizona’s precinct-based voting system, if a voter casts a ballot out of precinct, the whole ballot is discarded. The court found that the precinct-based voting system disproportionately impacts Native American, Hispanic, and African American voters in Arizona.<sup>48</sup>

Of the twenty reservations in Arizona, eight reservations are located in two or more counties. In the 2020 election, four of the fifteen counties in Arizona only offered precinct-based voting, five offered a combination of vote centers and precinct-based polling locations, and six used exclusively vote centers. However, not every Tribe in a hybrid or vote-center based county benefited from these locations. The San Carlos Apache Tribe’s Reservation, for example, is located in three counties, with residents living in Graham and Gila counties. Both Graham and Gila counties provided vote centers off-reservation, but only offered precinct-based voting on

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<sup>45</sup> *Klhar v. Williams*, 339 F. Supp. 922, 927 (D. Ariz. 1972).

<sup>46</sup> JAMES TUCKER ET AL., OBSTACLES AT EVERY TURN 115-116 (2020); *Gill v. Whitford*, 138 S.Ct. 1916 (2018).

<sup>47</sup> *Democratic Nat’l Comm. v. Hobbs*, 948 F.3d 989, 1064 (9th Cir.), cert. granted sub nom. *Arizona Republican Party v. Democratic Nat’l Comm.*, 141 S. Ct. 221 (2020), and cert. granted sub nom. *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 222 (2020).

<sup>48</sup> *Id.* at 1004.

reservations. Yuma and Yavapai counties use an entirely vote center model, but neither county placed a vote center on Tribal lands within their counties. The four counties that exclusively used precinct-based voting, the most stringent voting system, were Apache County, Mohave County, Pima County, and Pinal County. These counties include some of the largest Tribal areas in the state—the Navajo Nation, the White Mountain Apache Tribe, the Tohono O’odham Nation, the Gila River Indian Community, the Fort Mojave Indian Tribe, the Hualapai Tribe, and the Kaibab Paiute Tribe. All of those Tribes, excluding the Fort Mojave Indian Tribe, have reservation boundaries that cross county lines. For voters living on especially remote reservations, showing up at the wrong precinct can result in you having to drive long distances to the proper precinct or not voting altogether. This, coupled with the frequency at which voters are placed in the wrong precinct because of non-standard addresses, creates large scale confusion. As such, even minor changes in precinct boundaries can result in discarded ballots.

For the Navajo Nation, it is even more complicated because radio ads run across county and state lines. Within Arizona, one county is precinct-based, one is a hybrid, and the last uses vote centers. While voting precincts do not cross county lines, these artificial lines imposed on the reservation regularly result in the denial of the right to vote. Because Tribal members do not receive mail at home, a voter may not be placed in a precinct, or placed in the wrong precinct or the wrong county—resulting in the ballot being discarded. Publicly available polling location verification tools are not equipped to process non-standard addresses, so voters living on rural reservations struggle to check their polling place placements prior to casting a ballot.

### *Access to Polling Locations*

Many Tribal communities, when fighting to ensure that their members have an equal opportunity to vote, are at the mercy or the discretion of county level officials who choose where to locate the polls and the level of ballot access. While some elections administrators are amenable and work to increase access for Native Americans living on Tribal land, others refuse to provide equal access to voters on reservation even through costly litigation. In October 2020, the Native American Rights Fund and the American Civil Liberties Union of Montana filed a lawsuit against Pondera County election officials on behalf of the Blackfeet Nation for failing to provide a satellite voting location on the Blackfeet reservation, depriving Tribal members of the same access to voting as white voters.<sup>49</sup> Three days after the lawsuit was filed, the County agreed to place a satellite voting location on the reservation. In contrast, the Pascua Yaqui Tribe in Arizona filed a lawsuit to restore the in-person early voting location on the reservation.<sup>50</sup> While Pima County noted that the early voting location would have cost \$5,000 to operate, and the Secretary of State was willing to cover the costs, the County denied the Tribe an early voting location. Without an early voting location, on-reservation voters who lacked a vehicle were required to take a two-hour roundtrip bus ride to cast an early ballot. Instead of spending \$5,000 to offer Native voters’ equal access to in-person early voting, the Pima County Recorder’s Office spent \$180,705.39 on legal fees to defend its decision.<sup>51</sup>

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<sup>49</sup> *Blackfeet Nation v. Stapleton*, No. 4:20-CV-0095 (D. Mont. 2020).

<sup>50</sup> *Pascua Yaqui Tribe v. Rodriguez*, No. CV-20-00432-TUC-JAS, 2020 WL 6203523 (D. Ariz. Oct. 22, 2020).

<sup>51</sup> Memo to Pima County Board of Supervisors from F. Ann Rodriguez (Nov. 20, 2020).

Increasing accessibility to voting locations, early voting, and election day polling locations, is crucial to exercising Native American voting rights. 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>52</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>53</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>54</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>55</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>56</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.

#### IV. Conclusion

Redistricting ensures political representation for the next decade. But for discriminatory practices and dilution of Native American voices through redistricting and suppressive voting laws, Native Americans would have greater representation in local, state, and national decision-making that affects their lives. Despite barriers, Native Americans continue to fight to protect and exercise the right to vote. Tribal communities continue to organize to educate their members on the rapidly changing state laws and promote voting. In this century, Indian voters have been able to ensure

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<sup>52</sup> NATIVE AMERICAN VOTING RIGHTS COALITION, VOTING BARRIERS ENCOUNTERED BY NATIVE AMERICANS IN ARIZONA, NEW MEXICO, NEVADA AND SOUTH DAKOTA 6 (2018).

<sup>53</sup> *Sanchez v. Cegavske*, 214 F. Supp. 3d 961, 976 (D. Nev. 2016).

<sup>54</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>55</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>56</sup> ARIZONA STATE UNIVERSITY INDIAN LEGAL CLINIC, NATIVE VOTE – ELECTION PROTECTION PROJECT 2016 ELECTION REPORT 1, 21 (2016).

the success of candidates in several prominent elections in state-wide elections. Recent successes for Indian voters include the 2002 Senate election in South Dakota, in which there was a huge increase in reservation turnout, and Senator Tim Johnson barely won re-election with only 524 votes. Alaska Native voters are credited for Senator Lisa Murkowski's write-in success in her 2010 Alaska Senate race. In Arizona, reservation voters helped elect Governor Janet Napolitano in 2002 and President Joe Biden in 2020. However, despite the gains made, the nature of institutional disenfranchisement through redistricting and jurisdictional issues continues to stunt the full potential of the Native American vote.

It is untenable to expect Tribes and Tribal citizens to expend substantial resources to litigate voting rights violations. We know much more should be done to ensure voting rights and access for Tribal voters. We need robust voting rights legislation to mitigate the burden placed on Tribes to litigate Section 2 cases, and there should be more enforcement actions brought by the Department of Justice as part of the federal trust responsibility.