

**In The  
Supreme Court of the United States**

SHELBY COUNTY, ALABAMA,

*Petitioner,*

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL  
OF THE UNITED STATES OF AMERICA, ET AL.,

*Respondents.*

**On Writ Of Certiorari To The  
United States Court Of Appeals  
For The District Of Columbia Circuit**

**BRIEF OF AMICI CURIAE THE NAVAJO NATION,  
LEONARD GORMAN, ANTHONY WOUNDED  
HEAD, SR., AND OLIVER J. SEMANS, SR.,  
IN SUPPORT OF RESPONDENTS  
AND RESPONDENT-INTERVENORS**

JUDITH M. DWORKIN\*  
PATRICIA A. FERGUSON-BOHNEE  
SACKS TIERNEY P.A.  
4250 North Drinkwater Blvd.  
Fourth Floor  
Scottsdale, AZ 85284  
(480) 425-2600  
dworkin@sackstierney.com  
*Counsel for Amici Curiae*

D. HARRISON TSOSIE, Attorney General  
DANA BOBROFF, Deputy Attorney General  
NAVAJO NATION DEPARTMENT OF JUSTICE  
P. O. Box 2010  
Window Rock, AZ 86515  
(928) 871-2675  
*Counsel for Amicus Curiae Navajo Nation*

*\*Counsel of Record*

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## INTEREST OF THE *AMICI CURIAE*<sup>1</sup>

*Amicus* Navajo Nation is the largest federally recognized Indian tribe in the United States, comprising over 300,000 members and occupying approximately 25,000 square miles of trust lands within Arizona, New Mexico, and Utah.<sup>2</sup> The State and political subdivisions of the Arizona portion of the Navajo Nation are required to submit voting changes for preclearance under Section 5 of the Voting Rights Act. The Navajo Nation has been involved in a number of voting rights lawsuits to ensure that its members can participate in the electoral process. The Navajo Nation and its members sent letters to Congress in support of the reauthorization of the expiring provisions of the Voting Rights Act.

*Amicus* Leonard Gorman is an enrolled member of the Navajo Nation, a qualified elector in Arizona and a resident of Window Rock, Arizona, in Apache County. Mr. Gorman is the Director of the Navajo Nation Human Rights Commission. The Commission is charged with protecting and promoting the human

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<sup>1</sup> The parties have consented to the filing of this brief. Pursuant to Rule 37.6, *amici curiae* certify that no counsel for a party authored this brief in whole or part, and no persons or entity, other than *amici curiae* and their counsel, made a financial contribution for the preparation or submission of this brief.

<sup>2</sup> According to the 2010 U.S. Census, approximately 173,000 individuals live on the Navajo Reservation, approximately 97% of whom are American Indian. U.S. Census Bureau, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2010, Table 6 *available at* <http://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf>.

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rights of Navajo citizens. As part of this mission, the Commission is focused on ensuring that Navajo citizens are able to vote and to elect candidates of their choice. He has participated most recently in the Congressional and legislative redistricting for the states of Arizona, New Mexico and Utah. He testified before the Arizona Independent Redistricting Commission. Mr. Gorman was a plaintiff in *Navajo Nation v. Brewer*, challenging Arizona's voter identification law.<sup>3</sup>

*Amicus* Oliver J. Semans, Sr., is a member of the Rosebud Sioux Nation and lives on the Rosebud Sioux Reservation located in Todd County, South Dakota. Mr. Semans is the Executive Director of Four Directions, a non-partisan voting rights and voter protection organization. Mr. Semans has organized Get Out the Vote campaigns in South Dakota for tribal voters and has testified at a hearing in Rapid City, South Dakota in support of the reauthorization of the Voting Rights Act. Mr. Semans has testified extensively before South Dakota State Senate Committees on proposed laws that would adversely affect the voting rights of Indians and has continuously worked on increasing voter turnout.

*Amicus* Anthony Wounded Head, Sr. is a member of the Oglala Sioux Tribe of the Pine Ridge Indian Reservation and a former tribal council representative.

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<sup>3</sup> No. 06-1575 (D. Ariz.) (settled and dismissed on May 27, 2008).

The Pine Ridge Reservation is one of the poorest areas in the country.<sup>4</sup> Mr. Wounded Head lives in Shannon County, is a native language speaker and is supportive of language translations for American Indian language speakers. Mr. Wounded Head has witnessed the disenfranchisement that can be reversed through the protections of Section 5.

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### SUMMARY OF ARGUMENT

Indian people have endured a century of discrimination and overcome new obstacles each generation in order to exercise the right to vote in state and federal elections. Nowhere have these struggles been more prevalent than in the Section 5 covered jurisdictions of Apache, Navajo and Coconino Counties in Arizona the home of the Navajo Nation and Todd and Shannon Counties in South Dakota the home of the Rosebud and Oglala Sioux. The *amici curiae* file this brief to elucidate the importance that the Voting Rights Act and, in particular, Section 5 preclearance,

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<sup>4</sup> The Pine Ridge Reservation is located in Shannon and Jackson counties. Shannon County has the highest Indian population of any county in the United States at 94.2%, and is the "second-poorest county nationwide." The poorest county is Buffalo County, South Dakota and has an 81.6% Indian population. *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).

has had in overcoming the purposeful efforts to disenfranchise Indian voters.

While passage of the Voting Rights Act in 1965 ended certain means of discrimination, Indians continued to be denied the right to vote through a variety of new strategies. As part of the 2006 reauthorization process, Congress obtained evidence that Indians continued to be disenfranchised by voting schemes, polling place discrimination and ineffective language assistance. The 2006 reauthorization was a legitimate Congressional response to the disenfranchisement. Protected by the Section 5 preclearance, voter registration and turnout have increased, but new challenges have arisen that require continued vigilance. Section 5 preclearance remains a key component to protecting the fundamental right to vote. The minimal burden required of covered jurisdictions to comply with Section 5 is justified to protect Indian voters.

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## ARGUMENT

### **I. THE VOTING RIGHTS ACT AS ENACTED AND REAUTHORIZED PROTECTS INDIANS FROM PURPOSEFUL DISCRIMINATION THAT HAS DENIED THEIR RIGHT TO VOTE IN STATE AND FEDERAL ELECTIONS.**

#### **A. Voter Discrimination Prior to the Passage of the Voting Rights Act.**

American Indians “have experienced a long history of disenfranchisement as a matter of law and of

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practice.” It was not until Congress passed the Indian Citizenship Act of 1924 that all Indians were granted United States citizenship.<sup>5</sup> Prior to 1924, Indians were denied citizenship and the right to vote and could only become citizens through naturalization “by or under some treaty or statute.”<sup>6</sup> The 1924 Act ended the period in United States history in which obtaining United States citizenship required an Indian to sever tribal ties, renounce tribal citizenship and assimilate into the dominant culture.<sup>7</sup>

With the passage of the Indian Citizenship Act and by operation of the Fourteenth Amendment, an Indian who is a United States citizen is also a citizen of his or her state of residence.<sup>8</sup> Notwithstanding the passage of the Indian Citizenship Act, some states continued to deny Indians the right to vote in state and federal elections through the use of poll taxes, literacy tests, and intimidation.<sup>9</sup>

Even after 1924, Arizona Indians were prohibited from participating in elections. The Arizona Supreme

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<sup>5</sup> An Act of June 2, 1924, 43 Stat. 253, Pub. L. No. 175 (1924) (codified as amended at 8 U.S.C. § 1401(b)).

<sup>6</sup> *Elk v. Wilkins*, 112 U.S. 94, 103 (1884).

<sup>7</sup> COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, § 14.01[3], n. 42-44 (2012 Ed.).

<sup>8</sup> U.S. CONST. amend. XIV, § 1.

<sup>9</sup> *Continuing Need for Section 203’s Provisions for Limited English Proficient Voters: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 309 (2006) (letter from Joe Garcia, NCAI).

Court upheld the prohibition finding that Indians living on reservations could not vote because they were wards of the federal government and, as such were "persons under guardianship" and thereby prohibited from voting in Arizona.<sup>10</sup> Reservation Indians in Arizona did not achieve the right to vote in state elections until 1948 when the Arizona Supreme Court overturned the *Porter v. Hall* decision.<sup>11</sup>

Like Arizona, South Dakota has had a long history of discrimination against Indians. Todd and Shannon Counties have been the focus of much of the discrimination because the Rosebud Reservation is located in the former, and the Pine Ridge Reservation is in the latter.

The Sioux people of South Dakota have experienced a long struggle to attain full voting rights. The first territorial legislative assembly limited voting to whites. This provision was revoked after passage of the Civil Rights Amendments, but still limited voting to citizens, which excluded most Indians. The territorial civil code expressly prevented Indians from voting. The state's civil code, developed in 1903, specified that Indians could not vote or hold office

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<sup>10</sup> *Porter v. Hall*, 271 P. 411, 419 (Ariz. 1928).

<sup>11</sup> *Harrison v. Laveen*, 196 P.2d 456 (Ariz. 1948) (holding that Indians living on Indian reservations should in all respects be allowed the right to vote).

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while “maintaining tribal relations.”<sup>12</sup> The state applied a culture test to voting, requiring Indians to abandon their identity, their culture, their language, and their homeland in order to vote. This provision was not repealed until 1951.<sup>13</sup> The repeal of this provision did not automatically result in full voting rights for Indians living in Todd and Shannon Counties.

### **B. The Voting Rights Act of 1965 Provided Certain Protections to Indians.**

At the time of passage of the Voting Rights Act in August 1965, the State of Arizona required all voters to pass an English literacy test as a prerequisite to voting.<sup>14</sup> Only those Indians who could read the United States Constitution in English and write their names were eligible to vote in state elections. The enactment of the Voting Rights Act in 1965 included a temporary prohibition of literacy tests in covered jurisdictions.

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<sup>12</sup> DANIEL MCCOOL, SUSAN OLSON, AND JENNIFER ROBINSON, *NATIVE VOTE: AMERICAN INDIANS, THE VOTING RIGHTS ACT, AND THE RIGHT TO VOTE* 137-138 (Cambridge University Press 2007).

<sup>13</sup> *Id.* at 138.

<sup>14</sup> The English literacy test was not repealed until 1972. See ARIZ. REV. STAT. ANN. §§ 16-101.A4, 16-101.A5 (1956); *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. 1372 (2006) (appendix to the statement of Wade Henderson).

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Apache County, Arizona was included in the original list of jurisdictions covered by Section 5 of the Voting Rights Act.<sup>15</sup> On November 19, 1965, Navajo and Coconino Counties also became covered by Section 5.<sup>16</sup> As a result of this coverage, literacy tests were suspended in each of these three counties. However, in 1966, these three counties became the first jurisdictions to successfully bail out from coverage under Section 5 after the U.S. District Court for the District of Columbia held that Arizona's literacy test had not been discriminatorily applied against Indians in the preceding five years.<sup>17</sup>

**C. Continued Discrimination Subjected Counties in Arizona and South Dakota to Section 5.**

**1. Apache, Navajo and Coconino Counties in Arizona Discriminated against Indian Voters.**

When the Voting Rights Act was amended in 1970, it included a nationwide ban on literacy tests, which again preempted the operation of Arizona's

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<sup>15</sup> Determination of the Attorney General Pursuant to Section (4)(b)(1) of the Voting Rights Act of 1965, 30 Fed. Reg. 9,897 (Aug. 7, 1965).

<sup>16</sup> Determination of the Director Pursuant to Section 4(b)(2) of the Voting Rights Act of 1965, 30 Fed. Reg. 14,505 (Nov. 19, 1965).

<sup>17</sup> *Apache County v. United States*, 256 F. Supp. 903, 910-911 (D.D.C. 1966).

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literacy tests.<sup>18</sup> Arizona became one of the states to unsuccessfully challenge the ban on literacy tests. In upholding the ban and striking down literacy tests, the Supreme Court noted that Arizona had “a serious problem of deficient voter registration among Indians.”<sup>19</sup> The Court recognized that non-English speakers may make use of resources in their native languages in order to responsibly and knowledgeably cast a ballot.<sup>20</sup>

The Voting Rights Act amendments of 1970 included, as one of the measures of voting discrimination, registration and turnout in the 1968 presidential election. As a result, Apache, Coconino and Navajo Counties again became covered by Section 5 along with five other Arizona counties.<sup>21</sup>

Even after 1970, there were a number of challenges to Indians’ right to vote and right to hold office. Many of these cases challenged activities in Apache County, one of only a few counties within the United States in which the predominant languages spoken are Indian. Of these languages, the most commonly used is Navajo, a historically unwritten

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<sup>18</sup> The Voting Rights Act, 42 U.S.C. § 1973aa (1970) (current version at 42 U.S.C. § 1973b (2008)).

<sup>19</sup> *Oregon v. Mitchell*, 400 U.S. 112, 117, 132, 153 (1970).

<sup>20</sup> *Id.* at 146.

<sup>21</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. 1370 (2006) (appendix to the statement of Wade Henderson).

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language.<sup>22</sup> The Arizona Supreme Court quashed a permanent injunction by the lower court against the seating of Tom Shirley, a Navajo Indian living on the Navajo Reservation, who had been elected to the Apache County Board of Supervisors.<sup>23</sup> The Arizona Court reaffirmed the right of Indians to vote, vacated the injunction and directed the Apache County Board of Supervisors to certify Shirley as the elected supervisor from District 3.<sup>24</sup>

Apache County also discriminated against Indian voters by gerrymandering the districts for the three seats on the County's Board of Supervisors. In the early 1970's, 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. Several Indian voters challenged Apache County for violating the one-person, one-vote rule.<sup>25</sup> Apache County claimed that Indians are not citizens of the United States and the Indian Citizenship Act granting them citizenship

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<sup>22</sup> Considering the Navajo Reservation as a whole, including parts of the States of Arizona, New Mexico and Utah, over one-third of the voting age citizens on the Navajo Reservation are limited-English proficient and over one-quarter are illiterate. *Id.* at 1403-1404 (appendix to the statement of Wade Henderson).

<sup>23</sup> *Shirley v. Superior Court for Apache County*, 513 P.2d 939, 945 (Ariz. 1973).

<sup>24</sup> *Id.*

<sup>25</sup> *Goodluck v. Apache County*, 417 F. Supp. 13, 14 (D. Ariz. 1975), *aff'd*, 429 U.S. 876 (1976).

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was unconstitutional.<sup>26</sup> The three-judge federal court rejected the County's arguments, noted that the County must be redistricted in accordance with one-person, one-vote standards and granted plaintiffs' motion for summary judgment.<sup>27</sup>

In 1976, Apache County attempted to avoid integration of Indian students into the public schools by holding a special bond election to fund a new school in the almost entirely non-Indian southern part of the county. Although the special election affected Indian students who would be denied equal schooling, Indian turnout for the election was abnormally low. Investigation demonstrated that the low turnout was a result of the closing of nearly half of the polling places on the reservation, the total lack of language assistance, the absence of Navajo language informational meetings regarding the bond election and the use of English-only in the implementation of absentee voting procedures. This litigation ended in a Consent Decree in which Apache County agreed to a number of changes to the blatant discrimination in voting practices.<sup>28</sup>

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<sup>26</sup> *Id.* at 14.

<sup>27</sup> *Id.* at 16.

<sup>28</sup> *Apache County High School No. 90 v. United States*, No. 77-1815 (D.D.C. June 12, 1980).

## **2. Todd and Shannon Counties in South Dakota Discriminated against Indian Voters.**

After the passage of the Voting Rights Act, Indians living in Todd and Shannon Counties. South Dakota, home of the Pine Ridge and Rosebud Reservations, were prohibited from voting for county officials. This injustice was finally ended by the Eighth Circuit in 1975.<sup>29</sup>

In 1976, the counties of Todd and Shannon were placed under the provisions of Section 5 of the Voting Rights Act.<sup>30</sup> The Attorney General of South Dakota, William Janklow, directed the South Dakota Secretary of State to virtually ignore the Voting Rights Act provisions that were “plaguing” the state<sup>31</sup> and Indians from Todd and Shannon Counties were prohibited

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<sup>29</sup> *Little Thunder v. South Dakota*, 518 F.2d 1253, 1258 (8th Cir. 1975).

<sup>30</sup> Partial List of Determinations Pursuant to Voting Rights Act of 1965, as Amended, 41 Fed. Reg. 784 (Jan. 5, 1976); *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. 1990 (2006) (appendix to the statement of Wade Henderson).

<sup>31</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. 1990 (2006) (appendix to the statement of Wade Henderson).

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from holding office; that injustice was not struck down until 1980.<sup>32</sup>

The continuing racial animosities in South Dakota have resulted in a series of reports by the U.S. Commission on Civil Rights. In 1977, the Commission noted that the "voting problems of minorities" in South Dakota were part of the state's "unfinished business in the area of civil rights."<sup>33</sup> In 1981 the Commission again turned its attention to South Dakota to investigate the voting problems of Indians. Much of this report focused on Todd and Shannon Counties.

## **II. THE 2006 REAUTHORIZATION WAS A LEGITIMATE RESPONSE TO CONTINUED INTENTIONAL DISCRIMINATION AGAINST INDIAN VOTERS IN COVERED JURISDICTIONS.**

The expiring provisions of the Voting Rights Act include (i) Section 4(b)(4), (ii) Section 5 preclearance, (iii) Section 203 – bilingual elections for limited English proficient voters, (iv) Section 6 – federal election examiners, and (v) Section 8 – federal election observers. The Voting Rights Act, including the

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<sup>32</sup> *United States v. South Dakota*, 636 F.2d 241, 243 (8th Cir. 1980).

<sup>33</sup> U.S. COMM'N ON CIVIL RIGHTS, THE UNFINISHED BUSINESS: TWENTY YEARS LATER, A REPORT SUBMITTED TO THE U.S. COMMISSION ON CIVIL RIGHTS BY ITS FIFTY-ONE STATE ADVISORY COMMITTEE (1977).

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Section 5 preclearance requirement and the minority language provisions, provides necessary protections to Indian voters from ongoing discrimination. Congress implemented Section 203 of the Voting Rights Act in 1975 based on findings that American Indians, Alaska Natives and other language minorities were prohibited from fully participating in the democratic process.<sup>34</sup> However, even with the implementation of Section 5, and other protections, the provisions do not provide absolute protection for Indian voters. Congressional testimony and materials submitted in support of reauthorization of the expiring provisions of the Voting Rights Act demonstrate numerous instances where Indians have been subject to discrimination since 1982.

In support of reauthorization, the House of Representatives Committee to the Judiciary received testimony that revealed a need to extend Section 5 to protect racial and language minority citizens from discrimination.<sup>35</sup> Laughlin McDonald of the ACLU testified that “there is in fact, abundant modern-day evidence showing that section 5 is still needed in this country and that the right to vote is still in

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<sup>34</sup> *Voting Rights Act: Section 203 – Bilingual Election Requirements (Part II): Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 4 (2005) (testimony of Jacqueline Johnson, National Congress of American Indians).

<sup>35</sup> H.R. REP. NO. 109-478, at 56 (2006).

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jeopardy,”<sup>36</sup> because there is widespread, systematic voting discrimination against Indians.<sup>37</sup> The House Committee Report found that Section 5 enforcement authority was critical, because it allowed the Department of Justice and private citizens to monitor covered jurisdictions with a history of discrimination to ensure full compliance of the law.<sup>38</sup> The Committee ultimately found that “substantial discrimination continue[d] to exist in 2006.”<sup>39</sup>

The Congressional Record supports the Committee’s finding and the Congressional reauthorization. Because there is ongoing intentional discrimination against Native Americans in covered jurisdictions, there is “a congruence between the means used and the ends to be achieved” by extending Section 5’s protections.<sup>40</sup> The record demonstrates that the current need to prevent voter discrimination against Indians in Todd, Shannon, Coconino, Apache and Navajo

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<sup>36</sup> *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. 4 (2005) (testimony of Laughlin McDonald).

<sup>37</sup> *Id.* at 101 (appendix to the statement of Laughlin McDonald).

<sup>38</sup> H.R. REP. NO. 109-478, at 42 (2006).

<sup>39</sup> *Id.* at 25.

<sup>40</sup> *City of Boerne v. Flores*, 521 U.S. 507, 530 (1997).

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Counties justifies the reauthorization of Section 5 of the Voting Rights Act.<sup>41</sup>

**A. Indians Continue to Be Disenfranchised by Voting Schemes.**

Recent instances of voting discrimination in Indian Country documented in the Congressional Record indicate that Section 5 is still necessary to protect Indian voters. The House Committee Report included testimony of voting schemes that prevented Indians from gaining majority seats by dismantling minority districts.<sup>42</sup> The Committee Report also found that similar tactics kept Indians from registering and casting effective ballots.<sup>43</sup>

There is an extensive history of discrimination against Indian voters from the Navajo, Apache, and Hopi tribes included in the Congressional Record.<sup>44</sup> Since 1982, there have been two successful cases against Coconino, Navajo, and Apache Counties where the specific provisions of the Voting Rights Act were enforced on behalf of Indian voters.<sup>45</sup> In 1989,

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<sup>41</sup> See *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009).

<sup>42</sup> H.R. REP. NO. 109-478 at 45.

<sup>43</sup> *Id.*

<sup>44</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, 1411-1412 (2006) (appendix to the statement of Wade Henderson).

<sup>45</sup> *Id.*

the United States brought forth a claim against Arizona for “unlawfully deny[ing] or abridg[ing] the voting rights of Navajo citizens residing in defendant counties.”<sup>46</sup> The Arizona counties settled the claims by Consent Decree which required the establishment of the Navajo Language Election Information Program including the employment of outreach workers to assist in all aspects of voting by Indians.<sup>47</sup> In 1994, the Department of Justice brought an enforcement action to enjoin Navajo and Coconino Counties from having judicial elections for four new judicial divisions created without seeking preclearance under Section 5. The District Court held that the judgeships constituted a “covered change” and enjoined the judicial elections until preclearance was obtained.<sup>48</sup>

Indian voters in South Dakota also continue to encounter racial hostility, polarized voting, and resistance when participating in state and federal elections. Between 1982 and 2006, Indians in South

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<sup>46</sup> *United States v. Arizona*, No. 88-1989 (D. Ariz. May 22, 1989) (Consent Decree) (as amended Sept. 7 1993); *Voting Rights Act: Section 203 – Bilingual Election Requirements (Part I): Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 99 (2005) (appendix to the statement of Bradley J. Schlozman).

<sup>47</sup> *Id.* (appendix to the Statement of Bradley J. Schlozman).

<sup>48</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. (2006) (appendix to the statement of Wade Henderson); *United States v. Arizona*, No. 94-1845, 1994 U.S. Dist. LEXIS 17606 (D. Ariz. 1994).

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Dakota were subject to *de jure* and *de facto* discrimination, including having their voter registration cards systematically denied by the county registrar<sup>49</sup> and not being able to vote in elections because they were non-white land owners.<sup>50</sup> There have been nineteen Indian voting rights cases brought against South Dakota; out of those cases, eighteen were decided in favor of the Indian plaintiffs or were settled with the agreement of the Indian plaintiffs.<sup>51</sup> Continued discrimination in South Dakota necessitates federal oversight over Shannon and Todd counties through the preclearance protections and language minority provisions.

Indians in both Arizona and South Dakota have been subject to voting schemes that aim to dilute or pack the Indian vote. This Court has recognized that alternative methods have been employed to infringe on the rights of minority voters by “pour[ing] old poison into new bottles.”<sup>52</sup> Although this is not outright

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<sup>49</sup> *American Horse v. Kundert*, No. 84-5159 (D.S.D. Nov. 5, 1984).

<sup>50</sup> *United States v. Day County*, No. 85-3050 (D.S.D. Oct. 24, 1986); *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. 2000 (2006) (appendix to the statement of Wade Henderson).

<sup>51</sup> *Voting Rights Act: Section 203 – Bilingual Election Requirements (Part II): Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 264 (2006).

<sup>52</sup> *Reno v. Bossier Parish School Bd.*, 528 U.S. 320, 366 (2000) (Souter, J., concurring in part, dissenting in part).

vote denial, the methods employed have the same effect, to diminish the “minority community’s ability to fully participate in the electoral process and to elect their preferred candidates of choice.”<sup>53</sup>

In 1982, in *Goddard v. Babbitt*, the San Carlos Apache Tribe successfully objected to a proposed re-districting plan that aimed to split and dilute the Apache vote.<sup>54</sup> The Department of Justice objected to the plan on the grounds that the plan had a discriminatory effect. The District Court found the proposed plan had “the effect of diluting the San Carlos Apache Tribal voting strength and dividing the Apache community of interest.”<sup>55</sup>

In two South Dakota cases not covered by Section 5 preclearance protection, 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>56</sup> The county, the “poorest in the

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<sup>53</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.”).

<sup>54</sup> *Goddard v. Babbitt*, 536 F. Supp. 538, 541 (D. Ariz. 1982); *Voting Rights Act: Evidence of Continued Need*, Vol. III: *Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 3968 (2006) (materials submitted by the Honorable Steve Chabot).

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

<sup>56</sup> *Kirkie v. Buffalo County*, No. 03-3011 (D.S.D. Feb. 12, 2004) (Consent Decree); *Voting Rights Act: The Continuing Need* (Continued on following page)

country,”<sup>57</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 the other two districts and thus County government.<sup>58</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>59</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>60</sup> As recent as 2005, another South Dakota county was forced to redraw district lines for similar malapportionment of Indian voters.<sup>61</sup> Section

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*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>57</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>58</sup> *Kirkie v. Buffalo County*, 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>59</sup> *Id.*

<sup>60</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>61</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*  
(Continued on following page)

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5 protections could have prevented this type of *de facto* discrimination, because the changes would have needed preclearance approval prior to enactment.<sup>62</sup>

### **B. Polling Place Discrimination**

The Congressional Record demonstrates how Indian voters on reservations in the covered jurisdictions of South Dakota and Arizona have more limited access to polling places and voter registration resulting in lower Indian voter turnout. In Arizona, polling locations and voter registration sites on reservations are often located at substantially greater distances from voters, than sites located off reservation.<sup>63</sup> Further distances means a greater cost incurred to exercise one's vote.<sup>64</sup> Registering to vote is also an obstacle as a majority of counties bordering reservations limit registration locations to off-reservation towns.<sup>65</sup>

In South Dakota, one county failed to provide sufficient polling locations for a school district election.

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*H. Comm. on the Judiciary*, 109th Cong. 156 (2005) (appendix to the Statement of Laughlin McDonald).

<sup>62</sup> Charles Mix County is not covered by Section 5.

<sup>63</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. 1380, 1411-1412 (2006) (appendix to the statement of Wade Henderson).

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

<sup>65</sup> *Id.*

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Many Indians traveled up to 150 miles to vote.<sup>66</sup> Only after a federal district court entered a judgment against the County did the County provide additional reservation polling places.<sup>67</sup>

In South Dakota, a hearing in support of a bill to create more on-reservation polling places was scheduled 3 hours away from the reservation at 7:30 a.m., which made it difficult for tribal members to attend and testify.<sup>68</sup> The bill was subsequently defeated. In 2000, the U.S. Commission on Civil Rights noted that “Native Americans do not fully participate in local, state, and federal elections. This absence from the electoral process results in a lack of political representation at all levels of government and helps to ensure the continued neglect and inattention to issues of disparity and inequality” in South Dakota.<sup>69</sup>

The Congressional Record provides evidence that voter intimidation tactics are still employed at various polling places in order to deter language minority

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<sup>66</sup> *Black Bull v. Dupree School District*, No. 86-3012 (D.S.D. May, 14 1986); *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. 133 (2005) (appendix to the statement of Laughlin McDonald).

<sup>67</sup> *Black Bull v. Dupree School District*, No. 86-3012 (D.S.D. May 14, 1986).

<sup>68</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. 2027 (2006) (appendix to the statement of Wade Henderson).

<sup>69</sup> *Id.* at 1989.

voters. The Department of Justice reported instances where observers witnessed language minority voters being harassed and intimidated by polling officials.<sup>70</sup> Congressional testimony described the efforts to discourage the Indian vote by intimidating poll workers and voters at several polling locations on the Navajo Reservation in 2002.<sup>71</sup> In South Dakota, Indian voters have been intimidated by accusations of voter fraud by local officials – that in turn, created a racially hostile environment at the voter registration sites and voting polls.<sup>72</sup>

### **C. Ineffective Language Assistance Disenfranchises Indian Voters.**

Language has been a significant barrier to voting for Indians. The House Committee Report found that Indians continue to experience hardships when attempting to vote, because of their limited ability to speak English and inability to read the ballots.<sup>73</sup> Testimony highlighted the many Indians, especially

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<sup>70</sup> H.R. REP. NO. 109-478, at 45 (2006).

<sup>71</sup> *Voting Rights Act: Sections 6 and 8 – The Federal Examiner and Observer Program, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 16 (2005) (statement of Penny Pew).

<sup>72</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. 2007 (2006) (appendix to the statement of Wade Henderson).

<sup>73</sup> H.R. REP. NO. 109-478, at 45 (2006).

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elders, who “speak English only as a second language.”<sup>74</sup> The minority language protections require that covered jurisdictions provide assistance to Indian voters who may have little or no formal education and who may speak English only as a second language. Testimony revealed that there are numerous jurisdictions that require language translations so that the Indian population can function in the electoral process.<sup>75</sup> The right to language translations is important for Indians to have equal access to the ballot box.<sup>76</sup> In 2006, 88 jurisdictions in 17 states were covered for American Indian languages.<sup>77</sup> Nine Arizona counties are covered under Section 203 for American Indian languages: Apache, Coconino, Maricopa, Mohave, Navajo, Pima, Pinal, Yavapai, and Yuma and must provide all election materials, including assistance and ballots, in the language of the applicable language minority group. Of these counties four – Navajo, Apache, Coconino and Pinal – are

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<sup>74</sup> *Id.* at 46; *Continuing Need for Section 203’s Provisions for Limited English Proficient Voters: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 309 (2006) (letter by Joe Garcia, NCAI).

<sup>75</sup> *Voting Rights Act: Sections 6 and 8 – The Federal Examiner and Observer Program, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 35-37, 43-45 (2005) (statement of Benny Weinberg).

<sup>76</sup> *Continuing Need for Section 203’s Provisions for Limited English Proficient Voters: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 310 (2006) (letter by Joe Garcia, NCAI).

<sup>77</sup> *Id.* at 309.

covered under Section 5 and must have all materials and procedures precleared.<sup>78</sup>

Congress reauthorized the temporary, minority language provisions, because there are still language barriers that make it difficult or impossible for citizens to understand election ballots.<sup>79</sup> The Department of Justice identified situations in which ineffective language assistance was offered to Indian voters in Apache County, Arizona.<sup>80</sup> Navajo and Apache Counties agreed to establish minority language programs to better assist Indian voters pursuant to a Consent Decree.<sup>81</sup>

The House Committee found that “Section 203 is intended to remedy . . . unequal educational opportunities afforded [Indians], resulting in high illiteracy and low voting participation.”<sup>82</sup> Educational

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<sup>78</sup> See Voting Rights Act Amendments of 2006, Determinations under Section 203, 76 Fed. Reg. 63,602 (Oct. 13, 2011).

<sup>79</sup> H.R. REP. NO. 109-478, at 147 (2006).

<sup>80</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. 1367 (2006) (appendix to the statement of Wade Henderson).

<sup>81</sup> *United States v. Arizona*, No. 88-1989 (D. Ariz. May 22, 1989) (Consent Decree) (as amended Sept. 7 1993); *Voting Rights Act: Section 203 – Bilingual Election Requirements (Part I): Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 99 (2005) (appendix to the statement of Bradley J. Schlozman).

<sup>82</sup> H.R. REP. NO. 109-478, at 59 (2006); *Voting Rights Act: Evidence of Continued Need, Vol. I: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, (Continued on following page)

discrimination has been broad in scope. There are disparities in funding given to Indian students compared to other students.<sup>83</sup> Sixty percent of Latino and Indian students score below grade level in national testing.<sup>84</sup> There are insufficient adult English as a Second Language courses available in many covered jurisdictions.<sup>85</sup> The illiteracy rate for Arizona Indians is nineteen times the national illiteracy rate.<sup>86</sup> For South Dakota Indians, the illiteracy rate is similarly very high and “[s]ignificant numbers of Indians” require oral and written translation assistance in the Lakota and Dakota languages.<sup>87</sup>

The 2000 Census data reported that 21.4% of American Indians are limited English proficient. The import of the Census Data was included in the testimony of the National Congress of American

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109th Cong. 1380 (2006) (appendix to the statement of Wade Henderson).

<sup>83</sup> H.R. REP. NO. 109-478, at 51 (2006).

<sup>84</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. 1367 (2006) (appendix to the statement of Wade Henderson).

<sup>85</sup> Arizona has inadequate English as a Second Language and adult ELL courses to help bridge the language gap. *Id.* at 1367, 1379.

<sup>86</sup> *Id.*

<sup>87</sup> *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. 2020-2091 (2005) (appendix to the statement of Laughlin McDonald).

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Indians.<sup>88</sup> Many Indian languages are oral and are not written.<sup>89</sup> The Section 203 language minority provisions are necessary to ensure that Indians can effectively exercise their right to vote. Section 203 litigation regarding minority language assistance has led to Consent Decrees where Section 203 covered jurisdictions agree to provide bilingual voting materials and translators to assist at polling sites.<sup>90</sup> Between 2001 and 2006, the Department of Justice filed more minority language violation cases than in the previous twenty-one years.<sup>91</sup>

#### **D. Language Minority Provisions Have Had a Beneficial Impact on the Number of Indians Voters.**

The House Committee found evidence of increased participation by language minorities in Section 203

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<sup>88</sup> *Id.* (many American Indian and Alaska Natives continue to speak in their tribal language and many do not speak English well).

<sup>89</sup> *Continuing Need for Section 203's Provisions for Limited English Proficient Voters: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 498-499 (2006) (statement by Alfred Yazzie); see also, *United States v. McKinley County, New Mexico*, 941 F. Supp. 1062, 1066-1067 (D.N.M. 1996).

<sup>90</sup> H.R. REP. NO. 109-478, at 59 (2006).

<sup>91</sup> *Voting Rights Act: Section 203 – Bilingual Election Requirements (Part I): Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 10 (2006) (testimony of Bradley Schlozman).

covered jurisdictions<sup>92</sup> and that the minority language provisions were “instrumental in fostering progress among language minority citizens.”<sup>93</sup> Indian witnesses testified that voter participation had increased in some communities by as much as 50% to 150%.<sup>94</sup> The Department of Justice additionally noted that the gap in electoral participation had narrowed for some minority voters.<sup>95</sup> Furthermore, Indian witnesses testified that there has been some success in electing candidates of their choice.<sup>96</sup>

The temporary provisions of the Voting Rights Act have helped increase Indian voter turnout on reservations. Continuation of the protections provided by Section 5 and the language minority provisions are vital for maintaining and increasing Indian voter participation. The report on American Indian and Alaska Native progress concluded with the Committee stating, “[t]he Committee believes that these examples reflect the gains that Congress intended language minorities to make under Section 4(f) and 203, and

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<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 18 (2006).

<sup>94</sup> *Id.* at 20 (2006).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* (finding that there has been an increase in the number of Native Americans being elected to office; *Voting Rights Act: Section 203 – Bilingual Election Requirements (Part I): Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 10, 12 (2006) (testimony of Bradley Schlozman).

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concludes that all American citizens should have the opportunity to participate in the political process.”<sup>97</sup>

### III. SECTION 5 PRECLEARANCE IS A KEY COMPONENT TO PROTECTING THE FUNDAMENTAL RIGHTS OF INDIANS.

In *Thornburg v. Gingles*, this Court stated that “[b]oth this Court and other federal courts have recognized that political participation by minorities tends to be depressed where minority group members suffer effects of prior discrimination such as inferior education, poor employment opportunities, and low incomes.”<sup>98</sup> Indian voters continue to suffer from some of the highest poverty rates and unemployment rates in the country. Many Indian reservations are rural. In Shannon County, which includes the Pine Ridge Reservation, 52.3% of the families are below the poverty line, and in Todd County, which includes the Rosebud Sioux Reservation, 48.3% of the families live below the poverty line.<sup>99</sup> On Arizona tribal reservations, poverty rates are above 42% with Fort Yuma’s rate exceeding 94%.<sup>100</sup> The need for Section 5’s preclearance

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<sup>97</sup> *Id.*

<sup>98</sup> 478 U.S. 30, 69 (1986); *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. 2020 (2006) (appendix to the statement of Wade Henderson).

<sup>99</sup> *Id.*

<sup>100</sup> *Voting Rights Act: Evidence of Continued Need, Vol. I: Hearing Before the Subcomm. on the Constitution of the H.*  
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provisions in Indian Country is demonstrated by not only the historical impediments to suppress the Indian vote, but the continuing effects of past discrimination and continuing voter suppression efforts that disenfranchise Indian voters.

#### **A. Native American Voter Registration and Turnout Have Increased.**

Prior to Section 5 coverage, Indians in covered jurisdictions had little opportunity to vote.<sup>101</sup> The House Judiciary Committee found that the temporary provisions have protected minority voters and helped them to register to vote unchallenged, cast ballots unhindered, and cast meaningful votes. The Committee found “that increased participation levels are directly attributable to the effectiveness of the VRA’s expiring provisions.”<sup>102</sup> More Indian voters have registered to vote and turned out to vote since the implementation of Section 5.<sup>103</sup> The Voting Rights Act’s temporary provisions have resulted in increased participation by

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*Comm. on the Judiciary*, 109th Cong. 1383 (2006) (appendix to the statement of Wade Henderson).

<sup>101</sup> “Section 5 Covered Jurisdictions,” on the U.S. Dep’t of Justice Civil Rights Division website, *available at* [http://www.usdoj.gov/crt/voting/sec\\_5/covered.php](http://www.usdoj.gov/crt/voting/sec_5/covered.php) (seven counties are covered under Section 4(f)(4) for Indian languages and are subject to the preclearance requirements of Section 5 including four in Arizona, two in South Dakota, and one in North Carolina).

<sup>102</sup> H.R. REP. NO. 109-478, at 21.

<sup>103</sup> *Id.* at 20.

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Indian voters in the electoral process. Jurisdictions that comply with Section 203's language minority provisions have also improved registration and turnout rates.<sup>104</sup> Enforcement of voting rights through Consent Decrees and the federal observer programs have also increased Indian participation in voting.<sup>105</sup>

### **B. The Evidence Reveals that There Is a Continued Need for Section 5.**

Despite improvements, Indian voters still face obstacles in voting.<sup>106</sup> The need for the continuation of Section 5 was demonstrated by noncompliance, continuing discrimination, Consent Decrees entered in Arizona and South Dakota for covered jurisdictions as late as 1993 and 2005, and the number of voting cases in Indian Country. From 1999-2005, South Dakota was involved in seven cases regarding violations of Indian voting rights.<sup>107</sup>

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<sup>104</sup> *Id.*

<sup>105</sup> The Navajo Language Program precleared by Section 5 and required under a Consent Decree has resulted in more opportunities for Navajos to register to vote and vote on Election Day. See *Voting Rights Act: Sections 6 and 8 – The Federal Examiner and Observer Program, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109 Cong. 15 (2005) (statement of Penny Pew).

<sup>106</sup> H.R. REP. NO. 109-478, at 34, 35, 45, 52.

<sup>107</sup> *Voting Rights Act: Section 203 – Bilingual Election Requirements (Part II): Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 259-268 (2005) (materials submitted by Rep. Chabot).

Section 5 has improved the political landscape for tribal participation in elections, but it has not eroded animosity against Indian voters nor has it ended all discrimination in voting. In the Renew the Voting Rights Act Report for Arizona, experts found Arizona still needs to make improvements for Indian 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>108</sup>

The Indian voters in covered jurisdictions comprise a substantial percentage of the Voting Age Population in those counties. (Todd County 85.6%; Shannon County, 94.2%; Apache County, 76.88%; Navajo County, 47.74%; Coconino County, 28.51%; Jackson County, NC, 10.2%; Pinal County, 6.1%). Therefore, the Indian vote poses a significant threat to the non-Indian voters located in the same political

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<sup>108</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).

jurisdictions. For these reasons, efforts have been made to suppress the Indian vote.

In this century, Indian voters have been able to ensure the success of candidates in several prominent 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. In Arizona, reservation voters helped elect Governor Janet Napolitano in 2002.

Successes in Indian voting and threats of Indian voting strength have lead to attacks on Indian voting rights. Arizona and South Dakota passed voter identification laws requiring identification when voting at the polls, restricting Indian voting rights.<sup>109</sup> Individuals testified that the South Dakota voter identification law was passed in response to the Indian voter turnout in 2002, which helped to elect Senator Johnson.<sup>110</sup> The voter identification law in Arizona resulted in a significant decrease in the number of Native Americans who voted during the 2006 elections.

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<sup>109</sup> ARIZ. REV. STAT. ANN. § 16-579; S.D. CODIFIED LAWS § 12-18-6.1.

<sup>110</sup> *To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 707-710 (2005) (statement of O.J. Semans); *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. 2026 (2006) (appendix to the statement of Wade Henderson).

The Navajo Nation filed a section 2 lawsuit against the State of Arizona challenging the law, which suit was settled by expanding the types of documents that Indian voters can use for identification.<sup>111</sup>

Further attempts to disenfranchise Indian voters occurred during the 2008 Arizona election when the candidacy of Navajo candidates were challenged because the addresses on the signature petitions included post office boxes and not physical addresses, an impossible task for reservation residents who do not have physical addresses. To date, no Indian has been elected to a statewide office.

Despite Section 5's requirement that Todd and Shannon Counties submit election changes for pre-clearance, South Dakota ignored the requirement for a quarter of a century until tribal members from Todd and Shannon Counties filed a lawsuit to force compliance in 2002.<sup>112</sup> The lawsuit was resolved by Consent Decree. *Quiver* Plaintiffs returned to court in 2005 to enforce the consent order that had been violated by South Dakota's continued failure to comply with Section 5.<sup>113</sup>

Litigation to enforce voting rights is not a sufficient alternative to Section 5 coverage. Litigation is

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<sup>111</sup> *Navajo Nation v. Brewer*, No. 06-1575 (D. Ariz. May 27, 2008) (order approving settlement agreement and dismissal).

<sup>112</sup> *Quick Bear Quiver v. Nelson*, 387 F. Supp. 2d 1027, 1029 (D.S.D. 2005).

<sup>113</sup> *Id.* at 1030.

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not quick, easy, or cost-efficient. Tribes cannot afford to challenge every law that impacts Indian voting rights.<sup>114</sup>

### **C. Federal Observers Help to Increase Compliance with the Voting Rights Act in Covered Jurisdictions.**

The presence of federal observers at the polls has increased compliance with the Voting Rights Act. The Department of Justice has sent “several thousand Federal observers to participate in 622 election day coverages when it had reason to expect [voter disenfranchisement]. Not only did they sometimes report discrimination, their presence probably discouraged even more.”<sup>115</sup> Between 1982 and 2005, “there have been more than 1200 federal observers deployed to Apache, Navajo, and Yuma Counties, identifying substantial non-compliance in the availability and quality of language assistance to American Indian and Latino voting-age citizens.”<sup>116</sup>

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<sup>114</sup> *To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 715 (2005) (statement of O.J. Semans).

<sup>115</sup> *Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 6 (2006) (statement of Chandler Davidson).

<sup>116</sup> *Voting Rights Act: Evidence of Continued Need*, Vol. I: *Hearing Before the Subcomm. on the Constitution of the H.*  
(Continued on following page)

The presence of federal observers in polling places increases voter confidence and leads to increased participation in voting for Indian electors who are limited English proficient.<sup>117</sup> As part of the Consent Decree in Apache County for Navajo language compliance, federal observers serve as a check and balance to the Navajo Language Information Program. The Apache County Elections Director testified in support of the reauthorization of the federal observer program because of the program's success in Apache County.<sup>118</sup>

The federal observer program has helped to reveal deficiencies and problems complying with the minority language provisions.<sup>119</sup> A Department of Justice consultant testified how lack of language assistance precludes Indian voters from casting meaningful ballots. When federal observers are not present, officials fail to post the required notices at polls,

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*Comm. on the Judiciary*, 109th Cong. 1367 (2006) (appendix to the statement of Wade Henderson).

<sup>117</sup> *Continuing Need for Section 203's Provisions for Limited English Proficient Voters: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 414, 492, 500 (2006) (statement and response of Alfred Yazzie).

<sup>118</sup> *Voting Rights Act: Sections 6 and 8 – The Federal Examiner and Observer Program, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109 Cong. 12-17 (2005) (statement of Penny Pew).

<sup>119</sup> *Continuing Need for Section 203's Provisions for Limited English Proficient Voters: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 414, 492, 500 (2006) (statement of Alfred Yazzie).

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incorrectly translate ballots, rush voters who are casting ballots, and fail to make assistance available to voters.<sup>120</sup>

#### **D. Section 5 Preclearance Continues to Protect Indian Voters.**

Ongoing discrimination in voting demonstrates a need for the continuation of Section 5.<sup>121</sup> The House Report<sup>122</sup> included examples of on-going discrimination in Indian Country.<sup>123</sup> Because covered jurisdictions must submit proposed changes for approval prior to implementation, Section 5 is a deterrent to discrimination.<sup>124</sup> Covered states have noted the preventative benefits of Section 5.

As a result of Section 5, “minority voters have a greater involvement in decisions about election procedures as they are being

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<sup>120</sup> *Id.* at 500-501.

<sup>121</sup> *Id.*

<sup>122</sup> H.R. REP. NO. 109-478, at 43 (2006).

<sup>123</sup> *Continuing Need for Section 203's Provisions for Limited English Proficient Voters: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 500-501 (2006) (statement of Alfred Yazzie); *Voting Rights Act: Evidence of Continued Need*, Vol. I and Vol. II, *Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 1363-1453, 1986-2029 (2006) (appendix to the statement of Wade Henderson).

<sup>124</sup> *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. 6 (2005) (statement of Laughlin McDonald).

made.” In a covered jurisdiction, for example, election officials typically will consult with minority voters before moving a polling place. This dialog strengthens communities and helps ensure that “harmful effect[s] on minority voters are stopped.” Such consultations do not typically occur in non-covered jurisdictions, even though they should. In short, Section 5 “plays an important educative function in covered jurisdictions.” The communication that flows from a preclearance submission “facilitates public awareness and compliance with the law even short of the provision’s affirmative deterrence effects.”<sup>125</sup>

#### **E. Section 5’s Preclearance Requirements Are Not Onerous.**

In 2009, Arizona, along with other covered jurisdictions, submitted a brief urging this Court to uphold the constitutionality of Section 5.<sup>126</sup> Based on the record for reauthorization, Arizona noted that compliance with Section 5 is a minimal burden that does not intrude upon state sovereignty.

The *Amici* States urge his Court to uphold the constitutionality of the 2006 Reauthorization of the Voting Rights Act. Any assertion

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<sup>125</sup> Brief for the States of North Carolina, *et al.*, as *Amici Curiae* in Support of Eric H. Holder, Jr. *et al.*, *Northwest Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009).

<sup>126</sup> *Id.* at 14 (internal citations omitted).

that Section 5 constitutes an undue intrusion on state sovereignty does not withstand scrutiny. Section 5 does not place an onerous burden on States. States have been able to comply with Section 5 without undue costs or expense.<sup>127</sup>

The *Amici* States noted that the process did not impose any undue costs.

The preclearance requirements of Section 5 do not impose undue costs on covered jurisdictions. Administrative preclearance is expeditious and cost-effective. The process is neither difficult nor complicated. Rather, Section 5 preclearance is one of the most streamlined administrative processes within federal government.<sup>128</sup>

Further, the *Amici* States noted that the time required to comply is minimal.

As one state election law official explained to Congress, the average submission (excluding redistricting and annexations) requires less than one hour of personnel time to prepare. Some, though not all, submissions may be completed in a few minutes.<sup>129</sup>

Arizona now claims that it should not be required to submit election changes for preclearance

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<sup>127</sup> *Id.* at 1.

<sup>128</sup> *Id.* at 2.

<sup>129</sup> *Id.* at 8 (internal citations omitted).

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and provides the example of the closure of a Motor Vehicle Division office.<sup>130</sup> Arizona residents register to vote and obtain required voter identification at the Motor Vehicle Division offices and such closure is, therefore, subject to Section 5 preclearance. The request for preclearance does not seem burdensome as compared to the benefits of preclearance. It took the Department of Justice approximately one month to approve the request.<sup>131</sup> Furthermore, in the covered, rural Counties of Navajo, Apache and Coconino, the loss of a single Motor Vehicle Division office would result in additional travel and resultant expense for some citizens to register to vote and to obtain voter identification. Such increased expense should be required to undergo Department of Justice review to determine whether the change results in an unacceptable hardship for Indians residing on reservations. Preclearance of such closures are justified under Section 5 of the Voting Rights Act.

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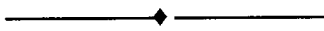
<sup>130</sup> Brief of Arizona, *et al.*, as *Amici Curiae* in Support of Petitioner, *Shelby County v. Holder* at 25, No. 12-96 (U.S. Dec. 31, 2012).

<sup>131</sup> Letter from T. Christian Herren, Jr., Chief *US DOJ Voting Section*, to Michele L. Forney, *Arizona Assistant Attorney General* (July 30, 2012).

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#### IV. REAUTHORIZATION IS SUPPORTED BY THE RECORD AND A VALID EXERCISE OF CONGRESSIONAL POWER.

The temporary provisions of the Voting Rights Act are a valid exercise of Congressional powers to enforce the Fourteenth and Fifteenth Amendments to the United States Constitution. In reauthorizing Section 5, Congress received evidence of ongoing discrimination. Congress was not willing to jeopardize forty years of progress especially in the face of the evidence of continued discrimination compiled by the record.<sup>132</sup> “With more and more Indian people participating in elections for the first time,”<sup>133</sup> Section 5 preclearance provisions play an important role in ensuring access to the ballot. This case should be resolved with a ruling in Respondents’ favor, because reauthorization is supported by the Congressional Record and is a valid exercise of Congressional enforcement powers.



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<sup>132</sup> See generally, S. REP. NO. 109-259 (2006).

<sup>133</sup> *Continuing Need for Section 203’s Provisions for Limited English Proficient Voters: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 310 (2006) (letter by Joe Garcia, NCAI).

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## CONCLUSION

For the foregoing reasons, the judgment of the Circuit Court should be affirmed.

Respectfully submitted,

JUDITH M. DWORKIN\*  
PATRICIA A. FERGUSON-BOHNEE  
SACKS TIERNEY P.A.  
4250 North Drinkwater Blvd.  
Fourth Floor  
Scottsdale, AZ 85284  
(480) 425-2600  
*Counsel for Amici Curiae*

D. HARRISON TSOSIE, Attorney General  
DANA BOBROFF, Deputy Attorney General  
NAVAJO NATION DEPARTMENT OF JUSTICE  
P. O. Box 2010  
Window Rock, AZ 86515  
(928) 871-2675  
*Counsel for Amicus Curiae Navajo Nation*  
*\*Counsel of Record*

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