

## SUPREME COURT OF ARIZONA

**ADRIAN FONTES**, in his official  
capacity as Arizona Secretary of State,

Appellant,

v.

**KEVIN CAVANAUGH**, in his official  
capacity as Pinal County Supervisor;  
**MIKE GOODMAN**, in his official capacity  
as Pinal County Supervisor; **STEPHEN  
MILLER**, in his official capacity as Pinal  
County Supervisor; **JEFFREY MCCLURE**,  
in his official capacity as Pinal County  
Supervisor; **JEFF SERDY**, in his official  
capacity as Pinal County Supervisor; and  
**DANA LEWIS**, in her official capacity as  
Pinal County Recorder,

Appellees.

Arizona Supreme Court  
No. CV-24-0251-T/AP

Court of Appeals – Division II  
No. 2 CA-CV 2024-0309  
No. 2 CA-CV 2024-0310 Cons.

Pinal County Superior Court  
No. S1100-CV2024-02541

**THE GILA RIVER INDIAN COMMUNITY’S *AMICUS CURIAE* BRIEF  
IN SUPPORT OF APPELLANT ARIZONA SECRETARY OF STATE  
FILED PURSUANT TO ARCAP 16(B)(1)(A) WITH CONSENT OF THE PARTIES**

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## INTEREST OF AMICUS CURIAE

*Amicus Curiae* Gila River Indian Community (the “Community”) is a sovereign Indian nation and federally-recognized Indian tribe in Arizona comprised of two peoples—the Akimel O’odham and Pee-Posh—who have lived and farmed along the Gila River since time immemorial. The Community has more than 23,000 enrolled members. Approximately 14,000 Community members live on the Gila River Indian Reservation (Reservation), which was established in 1859, and comprises over 370,000 acres in southern Arizona and borders the Phoenix metropolitan area. The Community has seven political subdivisions, five are in Pinal County and two are in Maricopa County.

The Community has a strong interest in ensuring its citizens have an equal opportunity with other citizens to participate in elections, and that each person registered to vote in state and federal elections can cast a ballot and have their ballot count. The Community conducts voter registration drives, holds voter education events, hosts candidate forums, develops voter guides, and works to ensure that Tribal members can cast their vote in state and federal elections. The Community is concerned that denying Tribal members who happen to appear at the wrong precinct, often through no fault of their own, the same opportunity to cast a provisional ballot for their correct precinct will impede the voting rights of Tribal members.

Tribal voters have suffered a long history of discrimination. Many state laws and policies have made it more difficult for Tribal voters to register to vote and cast a ballot. These laws often ignore or dismiss the unique challenges faced by Tribal voters, who already have less access than others to cast a ballot in state and federal elections. The out of precinct provisions (OOP) in the Election Procedures Manual (EPM) seek to “achieve and maintain the maximum degree of...uniformity and efficiency for early voting and voting,” A.R.S. § 16-452(A), so that all voters, including Tribal voters, have the same access to cast their ballot and have it counted. Pinal County rejects offering this equal opportunity to all voters. Failure to enforce the EPM will unnecessarily result in the rejection of Tribal voter’s ballots in Pinal County.

## **ARGUMENT**

### **I. History of Native American Disenfranchisement**

Approximately 100 years ago, all Native Americans became United States citizens. Indian Citizenship Act, 43 Stat. 253 (1924). Despite the passage of the Indian Citizenship Act, Arizona has a long history of suppressing Native American voter participation. After Native Americans became citizens, Rudolph Johnson and Peter Porter, Pima Indians from the Gila River Reservation, were denied the right to register to vote by the Pinal County Recorder. They challenged the decision, and

this Court found that Indians were ineligible to vote due to their guardianship status under the federal trust relationship. *Porter v. Hall*, 34 Ariz. 308, 313, 331-332 (1928). It took this Court two decades to overturn the *Porter v. Hall* decision. *Harrison v. Laveen*, 67 Ariz. 337 (1948). In *Harrison*, this Court held that

In a democracy suffrage is the most basic civil right, since its exercise is the chief means whereby other rights may be safeguarded. To deny the right to vote, where one is legally entitled to do so, is to do violence to the principles of freedom and equality.

67 Ariz. at 342. It took over two more decades to secure the right to vote for Native Americans because Arizona's English literacy requirements prevented Native Americans from registering to vote. A.R.S. §16-101(A)(4)–(5) (1956). *Oregon v. Mitchell*, 400 U.S. 112 (1970) (upholding the ban on literacy tests). Tribal voters in Arizona continued to face voting challenges and had a serious problem of deficient voter registration. *Id.* at 132; Patty Ferguson-Bohnee, *The History of Indian Voting Rights in Arizona: Overcoming Decades of Voter Suppression*, 47 ARIZ. ST. L.J. 1099, 1115-1117 (2015).

Despite improvements made through the enforcement of the Voting Rights Act, Tribal voters continue to face barriers in exercising their fundamental right to vote. Joseph D. Morelle, *Report on: Voting for Native Peoples: Barriers and Policy Solutions*, 118th Cong., 2d Sess. at 104-14 (2024). Arizona's voter ID law, which



passed in 2004, resulted in a significant decrease in the number of Native American voters in 2006. Following the passage of the voter ID law, Reservation voters have been turned away from the polls because voters do not have IDs that match the addresses on the voter registration rolls due to their nontraditional addresses. INDIAN LEGAL CLINIC, NATIVE VOTE – ELECTION PROTECTION PROJECT, 2016 ELECTION REPORT, SANDRA DAY O’CONNOR COLLEGE OF LAW, ARIZONA STATE UNIVERSITY 7-8 (2018). Reservation voters continue to face barriers in exercising their fundamental right to vote.

## **II. Tribal Voters Face Unique Voting Barriers**

Reservation voters living in Pinal County experience unique barriers that impact their fundamental right to cast a ballot in state and federal elections. The Gila River Reservation has a population density of 20 people per square mile, compared to 415 people per square mile in Maricopa County, 287 people per square mile in Pinal County, and 56 people per square mile in the State of Arizona. Native American Voting Rights Coalition, *Desert Southwest Voting Rights Hearing*, 127, Beus Center for Law and Society (Jan. 11, 2018) (testimony of Governor Stephen Roe Lewis). Forty-eight percent of Gila River Reservation residents live below the poverty level, compared to fifteen percent in Arizona. *Id.* There is no public transportation system on the Reservation, and county offices are far from the

Reservation. While the majority of the Reservation's residents are Gila River Indian Community Tribal members, Native Americans from other Tribes also live on the Reservation.

Most Native Americans living on Arizona's Indian reservations lack traditional street addresses, and physical locations are often identified in terms of landmarks, crossroads, and directions. *Voting Matters in Native Communities: Hearing Before the Comm. on Indian Affairs*, 117th Cong. 7 (Oct. 27, 2021) (testimony of Patty Ferguson-Bohnee). Only 18% of reservation voters outside of Maricopa and Pima Counties have physical addresses and receive mail at home. *Democratic Nat'l Comm. v. Reagan*, 329 F. Supp. 3d 824, 869-70 (D. Ariz. 2018). Voters on the Pinal County portion of the Gila River Reservation do not have standard addresses and do not receive mail at home. Native American Voting Rights Coalition, *Desert Southwest Voting Rights Hearing*, Beus Center for Law and Society (Jan. 11, 2018) (testimony of Governor Stephen Roe Lewis). This means that they can only obtain mail if they obtain a post office box. "Post Office hours on the reservation are limited to working hours during the week and for several hours on Saturday morning." *Id.* at 130. Some voters obtain post office boxes off reservation. The lack of residential addresses on reservations in Arizona impacts voter registration and voter placement in precincts. Pinal County will assign a tribal

government building address as a Reservation voter's address for voter registration purposes. This has caused ongoing problems for Reservation voters on Election Day because the voters' ID address will not match the physical address on the voter roster. INDIAN LEGAL CLINIC NATIVE VOTE – ELECTION PROTECTION PROJECT, 2018 ELECTION REPORT, SANDRA DAY O'CONNOR COLLEGE OF LAW, ARIZONA STATE UNIVERSITY 20, 29 (2021).

**A. The Lack of Residential Addresses Results in Voter Confusion and Ballot Rejection**

A recent congressional report found that “it is not uncommon for a voter who registers using a descriptive address to be placed in the wrong precinct by county officials.” Joseph D. Morelle, *Report on: Voting for Native Peoples: Barriers and Policy Solutions*, 118th Cong., 2d Sess. at 47 (2024). This misplacement can result in voters being bounced around from poll to poll on Election Day or result in them being denied a right to vote in their precinct either due to lack of poll worker training or fear that the ballot will be rejected due to OOP policies. Through no fault of the voter, the lack of a residential address can result in the political subdivision placing the voter in the wrong precinct, the voter's ID address not matching the voter rolls, and/or the voter not receiving election mail timely, if at all. Patty Ferguson-Bohnee, *How the Native American Vote Continues to be Suppressed*, 45 A.B.A. HUM. RIGHTS 1 (Feb. 2020).

Voters at Gila River continue to face problems because they are placed in the wrong precinct due to nontraditional address issues. *Voting Rights and Election Administration in Arizona: Hearing Before the Subcomm. on Elections, Comm. on Administration*, 116<sup>th</sup> Cong. (Oct. 1, 2019) (testimony of Governor Stephen Roe Lewis); Native American Voting Rights Coalition, *Desert Southwest Voting Rights Hearing* 131 (Jan. 11, 2018) (testimony of Governor Stephen Roe Lewis); DR. JAMES T. TUCKER ET AL., NATIVE AMERICAN RIGHTS FUND, OBSTACLES AT EVERY TURN: BARRIERS TO POLITICAL PARTICIPATION FACED BY NATIVE AMERICAN VOTERS 76-77 (2020); INDIAN LEGAL CLINIC, NATIVE VOTE – ELECTION PROTECTION PROJECT, 2012 ELECTION REPORT, SANDRA DAY O’CONNOR COLLEGE OF LAW, ARIZONA STATE UNIVERSITY 9-12, 30 (2012); INDIAN LEGAL CLINIC, NATIVE VOTE – ELECTION PROTECTION PROJECT, 2018 ELECTION REPORT, SANDRA DAY O’CONNOR COLLEGE OF LAW, ARIZONA STATE UNIVERSITY at 20, 29-30, 36 (Dec. 15, 2021). Sometimes voters are registered and show up in the precinct where they live, but they are not offered a provisional ballot to correct the address issue. *Id* at 20. Because of nontraditional addresses, voters on the Gila River Reservation who live in the same house have been placed in different precincts. Dianna Nández, *As Election Nears, Volunteers Work to Protect Native American Voting Rights*, ARIZ. REPUBLIC, Nov. 4, 2016. In recent elections, Gila River Reservation voters who have

attempted to vote in the precinct where they live have been turned away with being provided an opportunity to update their address because they were placed in a different precinct. These voters were not offered a provisional ballot to update their address as allowed by A.R.S § 16-584(C), but were redirected to the precinct where the county placed them. Some voters chose not to travel to the other precinct. Native Vote Incident Reports 2022 (on file with the Indian Legal Clinic). Voters placed in the wrong precinct should be able to correct this issue without traveling to another precinct where they do not live. However, the fear of having the ballot rejected can result in unnecessary travel, voters leaving without casting a ballot, or casting a provisional ballot that is rejected. Each election cycle, reservation residents have ballots rejected for voting in the wrong precinct. INDIAN LEGAL CLINIC, NATIVE VOTE – ELECTION PROTECTION PROJECT, 2016 ELECTION REPORT, SANDRA DAY O’CONNOR COLLEGE OF LAW, ARIZONA STATE UNIVERSITY at 13 (2018); INDIAN LEGAL CLINIC, NATIVE VOTE – ELECTION PROTECTION PROJECT, 2018 ELECTION REPORT, SANDRA DAY O’CONNOR COLLEGE OF LAW, ARIZONA STATE UNIVERSITY at 20, 29-30, 36 (2021).

#### **B. Early Voters are not subject to OOP Rejection**

Tribal voters are more likely to have their ballots rejected due to OOP policies than other voters. “The most frequent reasons that provisional ballots are rejected

in Arizona is because they are cast OOP.” *Democratic Nat’l Comm. v. Reagan*, 329 F. Supp. 3d 824, 856 (D. Ariz. 2018). However, voters who cast their ballots early – either by mail or in-person will not have their ballot rejected for being cast OOP. Thus, OOP only applies to in-person voters on Election Day. *Id.* While most voters in Arizona vote early and therefore are not subject to the OOP policy, reservation voters vote in person at higher numbers than off-reservation voters. Some of this is due to the lack of trust in government. But Tribal voters do not have the same opportunities to vote early due to the lack of home mail delivery, access to post office boxes, and in-person voting opportunities. Voting by mail can be unreliable in rural areas. Without reliable transportation and limited post office hours, traveling to pick up mail can be an all-day task. Patty Ferguson-Bohnee, *How the Native American Vote Continues to be Suppressed*, 45 A.B.A. HUM. RIGHTS 1 (2020). Pinal County chose not to offer any in-person early voting opportunities or drop boxes on or near the Gila River Indian Reservation. Pinal County, Early Voting Information, available at <https://www.pinal.gov/273/Early-Voting-Information>, (last accessed Oct. 24, 2024).

### **III. Pinal County Should Follow the EPM so that All Voters Participate in Elections on an Equal Basis**

Voting is a fundamental right. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). Arizona law recognizes voters have a fundamental right to vote. “The fundamental

right to vote guarantees voters will ‘participate in state elections on an equal basis with other qualified voters’” *State ex rel. Brnovich v. City of Tucson*, 251 Ariz. 45 (Apr. 14, 2021)(internal citations omitted).

Arizona’s Constitution provides that: “All elections shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” ARIZ. CONST. art 2, §21. To vote and to have that vote discarded interferes with the right of suffrage. Similarly situated voters may not be treated differently. *See* ARIZ. CONST. art 2, §13; *Bush v. Gore*, 531 U.S. 98, 104–105 (2000) (“Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person’s vote over that of another.”). Here, Pinal County voters are being treated differently than every other voter in the State and are at risk of having their ballots discarded for casting ballots OOP.

Election Day issues and poor poll worker training can result in voters being denied the right to vote or having their ballot discarded. Pinal County will be the only county that fails to follow the OOP voting provision and will instead require that voters be in the proper precinct for their ballot to be counted. However, sometimes errors occur through no fault of the voter. Poll workers sometimes give voters provisional ballots without telling voters it will not count if they are not in the

correct precinct. Allowing OOP voting would reduce the disparities and help to prevent this confusion while still allowing voters to update their addresses. *Voting Rights and Election Administration in Arizona: Hearing Before the Subcomm. on Elections, Comm. on Administration, 116th Cong. 5* (Oct. 1, 2019) (testimony of Governor Stephen Roe Lewis).

During the 2022 Primary Election, the Hidden Valley Precinct located at the Pinal County Public Works in Maricopa failed to open for the first four hours of voting. Approximately forty voters left without voting and were not informed by the County of any other option to cast a ballot. Pinal County was contacted about the closure but opposed extending polling location hours for those voters who missed four hours of voting as required by statute. *Arizona Democracy Resource Center and Rural Arizona Engagement v. Pinal County Board of Supervisors*, S1100CV202201362 (Aug. 8, 2022). If the county had options in place for out of precinct voting, these voters could have easily gone to any other polling location in the county and cast a ballot.

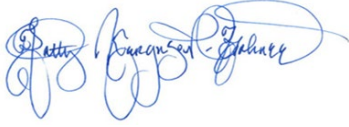
### CONCLUSION

This Court should require the County to comply with its non-discretionary duty to follow the requirement to allow OOP voting in every polling location in the county. Doing so will ensure that Tribal voters' ballots have the same opportunity



to be cast and counted as other voters throughout the state of Arizona. Failure to follow the EPM's OOP policy will result in the denial of the right to vote for Community and other Tribal voters.

RESPECTFULLY SUBMITTED this 24th day of October, 2024.

By: \_\_\_\_\_

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