



Written Statement of Jacqueline De León

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Thank you Chairman Fudge, Ranking Member Davis, and Members of the Subcommittee for having me testify today and for coming to Indian Country. My name is Jacqueline De León, and I am a staff attorney with the Native American Rights Fund (“NARF”). Since 1970, NARF has provided legal assistance to Indian tribes, organizations, and individuals nationwide who might otherwise have gone without adequate representation. NARF has successfully asserted and defended the most important rights of Indians and tribes in hundreds of major cases, and has achieved significant results in such critical areas as tribal sovereignty, treaty rights, natural resource protection, and Indian education. NARF is a non-profit 501(c)(3) organization that focuses on applying existing laws and treaties to guarantee that national and state governments live up to their legal obligations.

NARF is headquartered in Boulder, Colorado, with branch offices in Washington, D.C., and Anchorage, Alaska. NARF is governed by a volunteer board of directors composed of thirteen Native Americans from different tribes throughout the country with a variety of expertise in Indian matters. A staff of seventeen attorneys handles over fifty major cases at any given time, with most of the cases taking several years to resolve. Cases are accepted on the basis of their breadth and potential importance in setting precedents and establishing important principles of Indian law.

In 2014, NARF received a request for assistance regarding Native Americans in North Dakota that were being turned away from the polls. NARF began its investigation and was appalled to learn that veterans, school teachers, elders, and other life-long voters were being rejected by poll workers that had known these individuals their entire lives. Voters described the hurt and humiliation they felt when they were unable to vote because they lacked sufficient ID, and NARF decided that this case was worth investing our limited resources.

The burden of proof in Voting Rights Act and Constitutional cases alleging voter discrimination is high. In *Crawford v. Marion County Election Board*, the Supreme Court rejected a challenge to a voter ID law in large part because of an insufficient record.¹ Thus, in order to withstand judicial scrutiny, NARF began building a record that included engagement of experts to quantify the number of Native voters that lacked ID; to show the burdensome distances to North Dakota Driver's license sites; to explain the current strained racial dynamics within the state of North Dakota (including a history of discrimination); and to prove a correlation between Native Americans in North Dakota and their political affiliation.

During the course of our investigation, we came to learn that one of the Legislature's impetuses for passing the voter ID law was to suppress the Native American vote because of the unexpected victory of Democrat Heidi Heitkamp in the 2012 election. Senator Heitkamp narrowly won a Senate seat in 2012 by less than 3,000 votes.² The local and national media credited her success to the votes of the Native American community.³

North Dakota has had voter ID laws in place since 2004.⁴ Prior to the change in 2013, North Dakota's voter ID law was likely the most voter friendly in the nation. It required voters to present identification, but had fail-safe mechanisms that allowed a voter to cast their ballot if a poll worker could vouch for their identity or the voter signed an affidavit, under penalty of perjury, that he or she was qualified to vote.⁵ Indeed, the affidavit fail-safe was in place for nearly a century in North Dakota.

In 2011, the North Dakota legislature considered enacting a new voter ID law that would have limited the valid forms of voter ID to a state issued driver's license, a tribal ID card, and other forms of identification prescribed by the Secretary of State.⁶ Eventually, after deliberation, the bill also would have eliminated the fail-safe affidavit system and only contained a limited

¹ 553 U.S. 181, 189 (2008) ("we are . . . persuaded that the District Court and the Court of Appeals correctly concluded that the evidence in the record is not sufficient.").

² *Id.* at ¶ 40-43.

³ See Jim Fuglie, *United States Senator Mary Kathryn (Heidi) Heitkamp. How About That?*, The Prairie Blog (Nov. 9, 2012), <http://theprairieblog.areavoices.com/2012/11/09/united-states-senator-mary-kathrynheidi-heitkamp-how-about-that/>; AnnMaria De Mars, *Native Americans: Why Heidi Heitkamp Won & Nate Silver Was Wrong?*, AnnMaria's Blog (Nov. 19, 2012), <http://www.thejuliagroup.com/blog/?p=2808>; *American Indian Voters and Indian Organizers Gave N.D. Senate Edge to Democrat Heidi Heitkamp* (Nov. 8, 2012), <https://www.dailykos.com/stories/2012/11/8/1158417/-American-Indian-votersand-Indian-organizers-gave-N-D-Senate-edge-to-Democrat-Heidi-Heitkamp>.

⁴ *North Dakota Again Passes Discriminatory Voter ID Law*, NATIVE AMERICAN RIGHTS FUND (May 9, 2017), <https://www.narf.org/north-dakota-voter-id-law/>.

⁵ *Id.*

⁶ *Brakebill* First Amend. Compl. ¶ 24, ECF No. 77.

form of the voucher system.⁷ Throughout consideration of the bill, legislators on both sides of the aisle raised concerns about disenfranchisement. Senator Sorvaag noted that “[w]e don’t want people voting if they are not suppose [sic] to vote but we don’t want to disenfranchise people either by making the process to [sic] cumbersome.”⁸ Additionally, the legislature was informed during these deliberations that there were Native Americans that lacked residential addresses and even if they did have an address, that address may not be known to them.⁹ The legislature ultimately decided, 38-8, not to enact the proposed changes to the voter ID laws given the concerns about disenfranchisement.¹⁰

After Senator Heitkamp’s win, however, the legislature quickly changed course. In the legislative session immediately following Senator Heitkamp’s victory, the North Dakota legislature passed the most restrictive voter ID and address requirements in the nation. The new law greatly restricted the acceptable forms of voter identification, required a residential address on IDs, and eliminated the two fail-safe mechanisms – vouchers and affidavits.¹¹

Despite the concerns about disenfranchisement raised the immediately preceding legislative session, and a lack of instances of voter fraud in the 2012 election, the legislature passed the new restrictive requirements.¹² The legislature never analyzed whether the Native American voters it was told lacked addresses in 2011 still lacked addresses— indeed, those Native American voters continue to lack addresses to this day. Further emphasizing the expedited and non-deliberative nature of the 2013 Voter ID law, the legislature utilized a “hoghouse” amendment, replacing the entire text of an unrelated bill with the new voter ID text, in order to pass the bill without debate.¹³ Hoghouse amendments are not subject to public hearings and are therefore disfavored.¹⁴ Democratic Senator Corey Mock strongly objected the use of the hoghouse amendment because it would “completely change the way we handle voters” and using a hoghouse would circumvent input from the public and agencies impacted by the bill.¹⁵

⁷ *Id.* at 1-2.

⁸ *Hearing Minutes on H.B. 1447 Before H. Political Subdivision Comm.*, 62nd Leg. Assemb. 1 (N.D. Apr. 12, 2011) (statement of Sen. Ronald Sorvaag, S. Comm. On Political Sub.).

⁹ *Hearing Minutes on H.B. 1447 Before H. Political Subdivision Comm.*, 62nd Leg. Assemb. 2 (N.D. Apr. 20, 2011) (statement of Rep. Zaiser, H. Political Subdivisions Comm.); *See Brakebill Compl.* ¶ 35-36, ECF No. 1.

¹⁰ *Brakebill First Amend. Compl.* ¶ 37, ECF No. 77.

¹¹ *Brakebill First Amend. Compl.* ¶ 49, ECF No. 77

¹² *Id.* at ¶ 50-52.

¹³ *Id.* at ¶ 54.

¹⁴ *See Legislative Branch Function and Process*, North Dakota Legislative Branch, <http://www.legis.nd.gov/research-center/library/legislative-branch-function-and-process> (last visited Nov. 30, 2017).

¹⁵ *House Floor Session: Hearing on H.B. 1332*, 63rd Leg. Assemb. (N.D. Feb. 12, 2013) (statement of Rep. Corey Mock).

Voters were required to present a residential address on one of the following acceptable forms of ID: a North Dakota Driver's License or non-identification card, a tribal government ID, or an alternative form of identification prescribed by the Secretary of State, which included a student identification certificate or a long-term care identification certificate.¹⁶ As expected, the impact on the Native American vote in 2014 was severe.

In the following legislative session North Dakota amended voter ID laws even further, restricting the forms of acceptable ID.¹⁷ Following these amendments, the Secretary of State could no longer prescribe other forms of qualifying ID, leaving voters with only four forms of qualifying ID.¹⁸

Following NARF's investigation, in 2016, NARF filed suit on behalf of seven Turtle Mountain plaintiffs that were disenfranchised by the laws. NARF showed that the law disenfranchised Native American voters and violated both the U.S. and North Dakota Constitutions as well as the Voting Rights Act.¹⁹ The U.S. District Court in North Dakota agreed, granting an injunction in favor of the Native American plaintiffs.²⁰ The Court found that the law violated the U.S. Constitution and required that North Dakota provide a fail-safe mechanism for the 2016 general election.²¹ In his decision, Judge Hovland stated, "it is clear that a safety net is needed for those voters who simply cannot obtain a qualifying ID with reasonable effort."²² The injunction required that the state provide an affidavit fail safe, allowing voters without proper ID to sign an affidavit swearing to their qualifications, similar to the law in place for nearly a century.²³

The effort and resources necessary to mount this legal challenge were significant. The total sought for Plaintiffs' attorneys' fees and litigation expenses was \$1,132,459.41. This sum represents \$832,977 in attorneys' fees and \$299,482.41 in litigation expenses, including expert reports. Thousands of attorney hours over almost two years were expended in order to build a legal record and respond to numerous motions filed by the State in defense of the law.

In 2017, in response to the decision from the District Court, the North Dakota legislature amended the voter ID law.²⁴ However, instead of providing an affidavit option, as ordered by the

¹⁶ See N.D. Cent. Code § 16.1-05-07.

¹⁷ *Brakebill* First Amend. Compl. ¶ 87-89, ECF No. 77.

¹⁸ *Id.* at ¶ 90-91.

¹⁹ *Brakebill* Compl. ¶ 2, ECF No. 1.

²⁰ *Brakebill v. Jaeger*, No. 1:16-cv-008, 2016 WL 7118548 (D.N.D. Aug. 1, 2016) (order granting preliminary injunction).

²¹ *Id.* at *13.

²² *Id.* at *10.

²³ *Id.* at *13.

²⁴ See N.D. CENT. CODE § 16.1-05-07 (2017); See H.B. 1369, 65th Leg. Assemb., Reg. Sess. (N.D. 2017).

District Court, the legislature chose to allow for a provisional ballot.²⁵ The provisional ballot, or “set-aside” ballot, would be permitted for voters without proper ID. However, the ballot would ultimately be thrown out unless the voter could return with a qualifying ID within six days of the election.²⁶ This amendment also provided that voters could supplement an unqualified ID with a utility bill, bank statement, check or governmental issued document.²⁷ While this amendment may have addressed the issues for voters who simply left their IDs at home, it ultimately failed to address the concern for those who, although qualified to vote, could not reasonably obtain a qualifying ID or who had no residential address to place on the ID.²⁸

When the North Dakota legislature chose to amend the voter ID law in 2017 they were well informed of the discriminatory impact such a restrictive law would have on the Native American community. Given the extensive litigation that had taken place, Senators raised concerns that this new law did little to change the discriminatory impacts of the law.²⁹ Yet, the legislature chose to move forward with the amendment knowing that it would still have a disproportionate effect on Native American voters.

Again, in December of 2017, following the newest amendment to the law, NARF assisted Native Americans disenfranchised by amending their complaint against the state of North Dakota to reflect the changes in the voter ID law.³⁰ As a result, on April 3, 2018, the Native American plaintiffs were granted another injunction barring the State from enforcing the newest version of the voter ID law.³¹ Instead of implementing the affidavit option again, the order required the State to permit P.O. Boxes – utilized significantly by the Native American community due to their lack of addresses – to prove residency.³² The order also expanded the types of acceptable ID to include documents, letters, enrollment cards, or other forms of tribal identification issued by the tribes until the final resolution of the litigation could be reached.³³

Following the order in April of 2018, the State filed an appeal to the Eighth Circuit seeking an order to stay the District Court’s injunction.³⁴ This would allow the State to continue enforcing the voter ID law, as is, until the case reached its conclusion.³⁵

²⁵ N.D. CENT. CODE § 16.1-01-04.1 (2017).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Brakebill* First Amend. Compl. ¶ 156-157, ECF No. 77.

²⁹ *Brakebill* First Amend. Compl. ¶ 72, ECF No. 77.

³⁰ *Id.* at ¶ 2.

³¹ *Brakebill v. Jaeger*, No. 1:16-cv-008, 2018 WL 1612190 (D.N.D. April 3, 2018) (order granting second preliminary injunction).

³² *Id.* at *7.

³³ *Id.*

³⁴ *Brakebill v. Jaeger*, 905 F.3d 553 (8th Cir. 2018).

³⁵ *Id.* at 555-556.

On September 10, 2018, the Eighth Circuit held a special session to decide if the current voter ID law would be allowed to continue or if the District Court’s injunction would be upheld.³⁶ The Eighth Circuit subsequently granted the State’s request to stay the part of the District Court order requiring the State to accept P.O. Boxes on IDs.³⁷ In making its decision the Court stated “even assuming that some communities lack residential street addresses, that fact does not justify a statewide injunction that prevents the Secretary from requiring a form of identification with a residential street address from the vast majority of residents who have residential street addresses.”³⁸

In response to this decision, on September 27, 2018, the plaintiffs filed an emergency appeal to the United States Supreme Court.³⁹ The appeal requested that the court reverse the Eighth Circuit decision allowing North Dakota to impose the restrictive voter ID law in the 2018 election.⁴⁰ On October 9, 2018, the Supreme Court denied the emergency appeal.⁴¹ However, a dissenting opinion from Justice Ginsburg and Kagan notes that there was a significant risk of disfranchisement should the State be permitted to enforce the ID requirements.⁴²

After appeal to the Supreme Court was denied, and shortly before the election, significant media attention descended upon North Dakota. Senator Heidi Heitkamp was running for re-election and it was feared that the effects of the discriminatory voter ID law would unfairly impact the outcome of the race. NARF then took two actions. First, it worked with tribal leaders and local community activists to marshal resources to ensure every Native voter could vote. I personally was inspired by the decisive leadership the tribal leaders here today took. All of the Tribes quickly moved to administer free IDs to their members, and worked day and night to respond to the outrage felt by its members when the full intent and impact of the voter ID law became clear. Community activists such as Prairie Rose, Danielle Finn, OJ Semans Sr. and Barbara Semans, Nicole Donaghy, and notably, the high school Native American Youth Council on the Turtle Mountain Reservation mounted a tremendous get out the vote effort. The on the ground efforts extended door to door to get Native Americans proper identification and addresses, traversed hundreds of miles to provide members with the resources necessary for them to get ID, informed members of their rights, and provided assistance to the polls. I thank these individuals for their heroic efforts and commend them on a job well done.

Second, NARF teamed with local counsel Tim Purdon, and the Campaign Legal Center to file an emergency Temporary Restraining Order on behalf of the Spirit Lake Tribe and six

³⁶ *Id.*

³⁷ *Id.* at 561.

³⁸ *Brakebill*, No 18-1725, Slip. Op. at 7.

³⁹ *Brakebill v. Jaeger*, 139 S.Ct. 10, 10 202 L.Ed. 2d 212, 212 (2018) (denying application to vacate stay).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

individual plaintiffs.⁴³ With the election less than a week away, on November 1, 2018, District Court Judge Hovland denied the plaintiffs request for relief out of fear that another decision so close to the election would only create further confusion.⁴⁴ The Standing Rock Sioux Tribe has since joined this suit, which is ongoing.

As of today, the North Dakota voter ID law still stands.⁴⁵ Voters are still required to present a qualifying ID and list a residential address in order to vote.⁴⁶ Yet, Native Americans across North Dakota still disproportionately lack residential addresses and the resources necessary to obtain qualifying ID. There remains a housing crisis across the North Dakota reservations and individuals must move from home to home to keep a roof over their head. Unfortunately, the IDs issued in this last election will quickly become obsolete and Tribes cannot continue to issue IDs for free indefinitely. As the cameras move on from North Dakota, so do the resources that made the herculean response to the ID law in this last election possible. NARF remains committed to fighting this law until all qualified North Dakotans have equal access to the ballot box.

Indeed, NARF is committed to expanding access to the ballot box for all Native Americans. Research by the National Congress of American Indians indicates the turnout rate of American Indian and Alaska Native registered voters is 5 to 14 percentage points lower than the rate of many other racial and ethnic groups.⁴⁷ Of American Indians and Alaska Natives eligible to vote, only 66% are registered, compared to 74% of eligible non-Hispanic Whites. 34% of the total Native population over 18 — or 1,000,000 eligible voters — is not registered to vote.⁴⁸

In January 2015, NARF proposed a new project to start to address these discrepancies, the Native American Voting Rights Coalition (NAVRC). NAVRC is a non-partisan alliance of national and grassroots organizations, scholars, and activists advocating for equal access for Native Americans to the political process. To begin its work, NAVRC needed a more complete understanding of the types of barriers that Native Americans face in trying to access the ballot box. In 2016, the Kellogg Foundation funded a multi-state study of the challenges facing Native American voters.⁴⁹ The results of that study were startling. For example, Native Americans

⁴³ See Spirit Lake Tribe Compl. ¶ 1, ECF No. 1.

⁴⁴ *Spirit Lake Tribe v. Jaeger*, No. 1:18-cv-222, 2018 WL 5722665, at *1 (D.N.D. Nov. 1, 2018) (order denied temporary restraining order).

⁴⁵ N.D. Cent. Code Ann. § 16.1-01-04.1 (2017).

⁴⁶ *Id.*

⁴⁷ National Congress of American Indians, *Top 10 States with the Highest Populations of Voting-Age Natives*, Native Vote (2018), http://www.ncai.org/initiatives/campaigns/NCAI_NativeVoteInfographic.pdf

⁴⁸ *Id.*

⁴⁹ Native American Voting Rights Coalition, *Voting Barriers Encountered by Native Americans in Arizona, New Mexico, Nevada and South Dakota*, January 2018, <https://vote.narf.org/wp-content/uploads/2018/10/2017NAVRCsurvey-summary.pdf>.

reported prohibitively long distances to polling places, lack of understanding of how to register to vote (including never seeing a voter registration drive within their communities), and, most alarmingly, huge levels of distrust of local, state, and federal governments.⁵⁰ In South Dakota, 95% of respondents said they did not trust the local governments that are responsible for the administration of elections.⁵¹

NAVRC's second initiative was to conduct a series of field hearings across Indian Country to ask directly why it is that Native Americans are not making it to the polls. For the past two years, I have co-lead these hearings to document the unique needs and challenges faced by Native voters and identify successes to replicate. The report of the hearings' findings will be released in the next month and will be made available to this Committee. The report concludes that in significant part failure to address isolating conditions, unequal division of resources, and overt racism and discrimination keep Native Americans from the ballot box.

Native Americans, despite their continued disenfranchisement, have the potential to be a potent political force. According to research by the National Congress of American Indians, for example, the margin for the 2016 Presidential Election in Michigan was 0.3%. With more than 100,000 Native people age 18 and older in Michigan, the Native people eligible to vote was 4 times more than the margin of victory in that state. While the Native population in the United States is relatively small at about 1.5% of the general population, in many states and districts, Native voters make up a sizable portion of eligible voters. Some states where Native American potential for political influence is high include Alaska (where the Native eligible voter population is over 17%), New Mexico (more than 10%), Montana (7%), and Arizona (more than 5%), among others.⁵²

Unfortunately, the story of discrimination and disenfranchisement in North Dakota is not an isolated one. Across the country Native Americans are being denied fair access to the ballot box. Given the tremendous cost of litigating voting cases NARF cannot address every injustice. Federal action is needed to prevent the continued disenfranchisement of Native Americans. I thank you for coming to hear these stories and for shedding a much needed light on these issues.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² National Congress of American Indians, *2018 Native Vote: An Update for Tribal Leaders*, Native Vote (2018), <http://www.nativevote.org/wp-content/uploads/2018/02/Native-Vote-2018-Analysis-WEB-VERSION-FINAL.pdf>