



**TESTIMONY BEFORE THE HOUSE COMMITTEE ON ADMINISTRATION
SUBCOMMITTEE ON ELECTIONS
HEARING ON
VOTING RIGHTS AND ELECTIONS ADMINISTRATION IN ARIZONA**

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

To put today's conversation into context, despite the Indian Citizenship Act in 1924 and an Arizona Supreme Court decision affirming the rights of Native Americans to vote in 1948 in *Harrison v. Laveen*, the Native American franchise was not secured until 1970 when the United States Supreme Court upheld the prohibition on using literacy tests as a voter qualification.¹ When that right to vote was finally secured, steps were taken to prevent Native Americans from participating in elections and being elected to office.² Today, that right continues to be challenged through the passage of new laws and practices that fail to even consider the potential disparities the changes could have on Native American voters.

In Arizona, roughly 27% of the land within the state is tribal land. There are twenty-two federally recognized tribes and twenty-one reservations.³ Five of the ten largest reservations in the United States are located in Arizona and roughly more than 5% of the state's total population is Native American. There are eight tribes in Arizona that have land located in two or more counties, meaning despite being one tribe or one reservation they are subject to two or more sets of election policies. Four reservations span three counties.

Barriers to Voting

In order to understand the challenges faced by Native American voters, one must recognize the vast differences in experiences, opportunities, and realities facing on-reservation voters as compared to off-reservation voters. Access to the polls and participation in the political process are impacted by isolating conditions such as language barriers, socioeconomic disparities, lack of access to transportation, lack of residential addresses, lack of access to mail, the digital divide, and distance.

¹ *Oregon v. Mitchell*, 400 U.S. 112 (1970).

² Patty Ferguson-Bohnee, *The History of Indian Voting Rights in Arizona: Overcoming Decades of Voter Suppression*, 47 *Ariz. St. L.J.* 1099 (2015).

³ *Forest Serv. Nat'l Res. Guide to Am. Indian and Alaska Native Rel.* App. D, FS-600 (Apr. 1997), <https://www.fs.fed.us/people/tribal/Tribexd.pdf>.

Socioeconomic Barriers

Many Native Americans in Arizona face obstacles in voting as a part of their socioeconomic reality. The poverty rate for Native Americans in Arizona is 35.7%.⁴ Compared to Native Americans, Non-Hispanic whites in Arizona experience poverty at a rate of 10.9%. Native Americans in Arizona are more likely to work multiple jobs, lack reliable transportation, and lack adequate childcare resources.⁵

An additional problem impacting many Native Americans is homelessness or near homelessness due to extreme poverty and lack of affordable housing on many reservations. A study by Housing and Urban Development found that between 42,000 and 85,000 people in tribal areas are couch surfers, staying with friends or relatives only because they had no place of their own.⁶ Some of the highest rates of near homelessness and overcrowding in Indian Country is found in Arizona. This lack of permanent housing impacts the ability of these tribal members to have a permanent physical address, yet this should not impede their ability to exercise their right to vote.

Nontraditional Addresses

Many Native American living on reservations lack traditional street addresses.⁷ Many roads on reservations are unimproved dirt or gravel roads, and “many miles of these roads are impassable after rain or snow. Because of the poor quality of the road systems on Indian reservations, many of the roads are unnamed and not serviced by the U.S. Postal Service. . . . A significant number of these reservation residents have no traditional street addresses.”⁸ In Arizona, only 18% of reservation voters outside of Maricopa and Pima Counties have physical addresses and receive mail at home.⁹

Due to the lack of traditional addresses, many Native American voters rely on post office boxes to receive their mail and may include a post office box on their state identification. “Most reservation residents do not receive mail at their homes and either pay to maintain a post office box in a nearby town or receive their mail by general delivery at a trading post or other location. Some reservation

⁴Nationally, national poverty rate for Native Americans is 26.8%. Poverty Rate, MAP AZ Dashboard (2019), <https://mapazdashboard.arizona.edu/health-social-well-being/poverty-rate/poverty-rate> (last visited Sep 27, 2019).

⁵*Democratic Nat'l Comm. v. Reagan*, 904 F.3d 686, 704 (9th Cir. 2018), *reh'g en banc granted*, 911 F.3d 942 (9th Cir. 2019)(Dissent, Thomas).

⁶ HUD, Housing Needs of American Indians and Alaska Natives in Tribal Areas: A Report from the Assessment of American Indian, Alaska Native and Native Hawaiian Housing Needs (Jan. 2017) at xx, 76, 82, 85, *available at* <https://www.huduser.gov/portal/sites/default/files/pdf/HNAIHousingNeeds.pdf>.

⁷ Native American Voting Rights Coalition, Voting Barriers Encountered by Native Americans in Arizona, New Mexico, Nevada, and South Dakota at 3, 5 (Jan. 2018).

⁸ *Crawford v. Marion County*, Nos. 7-21, 7-25 (Brief of *Amici Curiae* National Congress of American Indians *et al.*) at 11-12, https://sct.narf.org/documents/crawford/merits/amicus_ncai.pdf.

⁹ *Democratic Nat'l Comm. v. Reagan*, 329 F. Supp. 3d at 869-70.

residents have to travel up to seventy miles in one direction to receive mail.”¹⁰ “On the Navajo Reservation, most people live in remote communities, many communities have little to no vehicle access, only post office boxes, sometimes shared by multiple families.” The Navajo Nation does not have an addressing program.¹¹ Further, the Navajo Reservation has over 10,000 miles of road, 86% of which are unpaved. Half of the paved roads are in poor pavement condition. Similarly, “[t]here is no home delivery in the Tohono O’odham Nation, where there are 1,900 post office boxes and some cluster mail boxes. The postmaster for the Tohono O’odham Nation . . . observes residents come to the post office every two or three weeks to get their mail. Due to the lack of transportation, the condition of the roads, and health issues, some go to post office only once per month.”¹²

The lack of formal addresses in Indian Country makes it especially hard for voters to comply with address requirements to register to vote or to produce identification in order to vote on election day.¹³ Voters may be placed in the wrong precinct, their ID address may not match the voter rolls, and voters may not receive their election mail timely, if at all.

Voter Registration Access

Non-traditional addresses for reservation residents create additional registration problems. For example, in Arizona the lack of traditional addresses resulted in voters being placed on suspense list or their IDs being rejected at the polls.¹⁴

Native Americans do not have the same access to voter registration as off-reservation voters, and turnout for Native Americans is the lowest in the country, as compared to other groups.¹⁵ While a number of issues contribute to the low voter turnout, a study conducted by the Native American Voting Rights Coalition in Arizona found that low levels of trust in government, lack of information on how and where to register and to vote, long travel distances to register or to vote, low levels of access to the internet, hostility towards Native Americans, and intimidation are obstacles to Native American voter participation.¹⁶ In 2016, few counties offered voter registration services on the reservation, while voter registration services were available during the county’s normal working hours for off-reservation voters. In 2016, nine counties were covered for Native

¹⁰ *Crawford v. Marion County*, Nos. 7-21, 7-25 (Brief of *Amici Curiae* National Congress of American Indians at 11-12).

¹¹ Carrie Jung, Home Addresses on Navajo Nation are Rare (Oct 8, 2015), <https://kjzz.org/content/202564/home-addresses-navajo-nation-are-rare-officials-working-change>.

¹² *Id.*

¹³ Native American Voting Rights Coalition, Voting Barriers Encountered by Native Americans in Arizona, New Mexico, Nevada, and South Dakota at 5 (Jan. 2018).

¹⁴ Ferguson-Bohnee, The History of Indian Voting Rights in Arizona, 47 *Ariz. St. L.J.* at 1140-1141.

¹⁵ Tova Wang, Ensuring Access to the Ballot for American Indians & Alaska Natives: New Solutions to Strengthen American Democracy at 3, 6, <https://www.demos.org/sites/default/files/publications/IHS%20Report-Demos.pdf>.

¹⁶ Native American Voting Rights Coalition Study at 3, 5.

American languages under Section 203 of the Voting Rights Act. Only one provided translations of voter registration information in the covered language.¹⁷ Potential voters had to travel 95 miles one way to obtain in-person voter registration assistance.¹⁸

On-line voter registration is possible for off-reservation voters with broadband access. However, less than half of the homes on tribal lands have reliable broadband access.¹⁹ Even if a voter has access to broadband on the reservation, the State of Arizona does not allow tribal IDs to be used a form of ID to register to vote online, even though tribal enrollment is a valid form of proof of citizenship to register to vote.²⁰ Registering to vote online or driving somewhere to register to vote, or voting itself, can be logistically challenging if not economically infeasible.

Barriers to Early Voting

Arizona has two forms of early voting, in-person early voting and vote by mail. Each county in Arizona offers in-person early voting. If in-person early voting is offered to off-reservation residents, equal access should be provided to on-reservation residents. However, Native Americans do not have equal access to in-person early voting opportunities. While some counties offer in-person early voting, it is often for a few hours on one or two days. Ten reservations had in-person early voting locations on the reservation in 2016, and even fewer had in-person early voting in 2018. Tribal members with no in-person early voting options often had to travel long distances to participate in early voting. In 2016, voters on the Hualapai Reservation in Mohave County had to travel 47 miles to vote in person.²¹ In 2018, only 1.5% of off-reservation voters in Coconino County had to travel more than 20 miles to vote at an early voting location, while almost half of the voters on the Navajo Reservation had to travel more than 20 miles.

In 2018, Pima County refused to offer an in-person early voting location on the Pascua Yaqui Reservation, as it had done in previous years. Instead, it directed Pascua Yaqui tribal members to

¹⁷ Indian Legal Clinic, *Arizona Native Vote – Election Protection Project: 2016 Final Report* at 34.

¹⁸ *Id.* at 19.

¹⁹ Keerthi Vedantam, *Thin on broadband: Tribal areas still struggle with lagging technology* | Cronkite News - Arizona PBS Cronkite News - Arizona PBS (2019), <https://cronkitenews.azpbs.org/2019/05/08/tribal-lands-limited-broadband-internet/> (last visited Sep 28, 2019).

²⁰ The Arizona online voter registration is processed through Service Arizona, an authorized website operated by the Arizona Department of Transportation. Upon accessing the proper site to register online, an individual wishing to register is prompted with a list of questions to verify voter registration eligibility. Once voter registration eligibility is verified, the form requires the individual to provide an Arizona Driver License number. If the individual does not have an Arizona Driver License number, then they have two options: either obtaining “a State paper voter registration form” by downloading it from the site or selecting the site option “What if I don’t know my Driver License or Identification Card number?” If requesting the site to assist with identifying the Driver License number, the individual is then prompted with providing the “residential street address currently on file with the Motor Vehicle Division.” Most reservation voters will not have a residential street address on file.

²¹ ILC, 2016 Final Report at 11.

vote at the San Xavier polling location. Even though the Mission is only five miles from the Pascua Yaqui Reservation, the Pascua Yaqui voting coordinator reported that it took a voter over two hours to participate in early voting using public transportation.

Vote by Mail Barriers

Vote by mail is not a simple or easy task for Native American voters. Native Americans are less likely to have mail delivered to their homes, especially when living on tribal lands.²² Many on-reservation voters live in rural Arizona where it is common for mail to arrive late or not at all. Non-Hispanic whites are 350% more likely to have mail delivered to their homes than Native Americans in Arizona.²³ Reservation residents often rely on post office boxes that may be a 45 minutes to a 2 hour drive away.²⁴ The difficulties accessing mail make voting by mail difficult because traveling to the P.O. Box to pick up your ballot and then returning it can be an all-day task, without a car it may be impossible. Voting through early ballot by mail on-reservation is largely unreliable. Thus, vote by mail is not as accessible for Native Americans living on reservation as it is for off-reservation voters. In addition, many Native American voters require language assistance when voting, which cannot be done through the mail.

In 2018, the Navajo Nation filed a lawsuit when it learned that counties were curing mismatched signatures on early ballot envelopes, but not unsigned ballot envelopes. The Nation learned that Navajo voters were not provided instructions on how to complete an early ballot in the Navajo language, and were even told in at least one instance that no signature was needed. The failure to provide an opportunity for voters who did not sign their ballot an opportunity to cure but allowing voters who do sign an opportunity to cure is an equal protection issue. Failure to advise the voter of the issue and give the voter an opportunity to remedy it is a due process violation.

Voter Identification Barriers

In 2004, Arizona passed a voter ID law. As a natural consequence of the socioeconomic conditions already mentioned, Native Americans are less likely to have the forms of identification that satisfy state law. During the 2006 election, 428 Navajos voted provisional ballots that were never counted because they did not verify their identification. The Navajo Nation sued alleging that the voter ID law violated Section 2 of the Voting Rights Act; the case was eventually settled to expand the acceptable forms of identification to include certain forms of tribal ID.

Despite the settlement, valid forms of tribal identification are rejected in each election due to insufficient poll worker training or because of problems arising with non-standard reservation

²² *Id.*

²³ *DNC v. Reagan*, 329 F. Supp. 3d at 869-70.

²⁴ *Id.*

addresses.²⁵ It is unclear if counties train poll workers on the types of ID that qualify as tribal ID. Nontraditional addresses have also been a barrier to receiving a regular ballot. For example, in Pinal County, Gila River Indian Reservation voters were assigned residential addresses because the voter database would not accept the nonresidential addresses. This issue was resolved prior to the 2016 General Election. In 2018, Maricopa County introduced a new kiosk system. Although the system could not read tribal IDs, poll workers failed to advise tribal voters that they could still vote using their Tribal IDs, and some voters were turned away from the polls for lack of valid ID.

As of 2019, if an elector votes in person, the voter is required to bring a form of ID that satisfies the state's voter ID law, but, if you vote by mail you are not required to present ID when voting.²⁶ This sets up an equal protection problem because the State is treating early voters differently. In addition, this law potentially disproportionately impacts Native American voters who have less access to early voting than other Arizona voters.

Precinct-Based Voting Barriers

The precinct-based system is inherently a barrier to Native American voters. Counties that do not have vote centers require that voters be in the proper precinct in order for their ballot to be counted. However, poll workers sometimes give voters provisional ballots without telling voters it will not count if they are not in the correct precinct.

Out of Arizona's 15 counties, 6 counties have vote centers on *or* near tribal lands – most are in Navajo County. The others include Maricopa, Gila, Yavapai, Yuma, and Graham. The remaining 9 counties – Pima, Coconino, Apache, Pinal, Cochise, Santa Cruz, Greenlee, La Paz, and Mohave require voters to vote in their precinct in order for their vote to be counted. If a voting precinct is not open or functioning during an election, voters in closed-precinct counties may be denied the right to vote because they cannot vote at another location.

²⁵ In 2018, a vote center located in Guadalupe, Arizona (a Pascua Yaqui township) rejected valid tribal identification.

²⁶ A.R.S §16-411(B)(4).

ADA Compliance

A new threat facing Tribes is the use of the Americans with Disability Act to close or not offer polling locations on reservations. Kaibab Paiute requested a polling location on its reservation in Mohave County in 2016 and 2018. The County denied the request stating that the tribal building fails to meet ADA requirements. The polling location was moved over 40 miles to Colorado City. The Tribe noted the challenges for tribal members to get to Colorado City and the amount of time needed to go to the polling location on election day. Other Tribes also faced pushback from counties when requesting early voting or polling locations on their lands. Complying with the ADA is important, but in Indian Country, counties should be encouraged to use temporary measures. Further, Tribes should not be required or asked to spend limited resources to make facilities permanently compliant in exchange for a polling location.

Section 2 is Not a Viable Solution to Section 5

Prior to *Shelby County*, covered jurisdictions would have to consider whether a law would negatively impact minority voters. During the poll closures in the 2016 Presidential Preference Election, Maricopa County admitted that it did not consider the impact of the closures on minority communities. Requiring voter ID to vote in-person while other early voters are verified through signature verification is another change that should be evaluated as to whether it disproportionately impacts Native American voters, specifically Native American language speakers who can only vote using in-person early voting in order to obtain language assistance. In addition, efforts to change voting to all vote by mail would severely limit voter access for Native American voters.

The next round of redistricting will be challenging for Tribes. Tribes participated in the redistricting process and defended the single majority-minority Native American legislative district. The Commission consulted an expert to ensure that it did not retrogress, and it was the first time that Arizona's maps received preclearance on the first submission since it became a covered jurisdiction. The concern is that the Commission may not consider retrogression since the State is no longer a covered jurisdiction and tribal communities may lose its limited opportunity to elect candidates of choice in state government.

Section 2 cases to enforce the provisions of the Voting Rights Act are expensive and time consuming. Tribes have limited resources to bring voting litigation, and the federal government has not brought any cases on behalf of Arizona Tribes in the past two decades. When the Navajo Nation and the Inter Tribal Council challenged the voter ID law following its passage in 2004, the Court failed to grant relief leading up to the 2006 General Election. Courts are reluctant to grant relief close to an election due to the *Purcell* principle adopted in the voter ID case.

Conclusion

Legislation affecting voting often appears neutral with the stated goal of preventing voter fraud, although often lacking any record of voter fraud to warrant the change. The application of said legislation often has a disparate impact on minority voters. Without Section 5's protection, there is a concern that new voting laws and practices will continue to be adopted that suppress the Native American vote. These concerns include closure of polling locations, adopting all vote-by-mail elections, and the new Voter ID law required at early voting locations.

Potential solutions to consider:

- Provide funding to make tribal locations temporarily accessible under the ADA.
- Offer Same Day Voter Registration. Some counties are using provisional ballots as voter registration applications. The counties are already processing these forms so they could process them as same day voter registration applications.
- Ensure all Tribes have access to voter registration, in-person early voting, and polling locations on their reservations.
- Provide funding so that all counties can offer out-of-precinct voting.
- Provide equal options to be used for voter ID – if signature verification is sufficient ID for vote by mail, it should also be an option to process an in-person early ballot and a ballot cast on election day.
- Provide assessment as to whether jurisdictions are complying with Section 203 language requirements.
- Provide more resources to enforce Section 2 of the Voting Rights Act.
- Provide an updated coverage formula to help curb the ongoing voter suppression laws.
- Require jurisdictions to consult with Tribes regarding polling locations on their respecting reservation.
- Create an independent office that can evaluate Section 2 vote denial claims and bring actions on behalf of underrepresented groups.