



**Written Statement of Jacqueline De León**

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**Before the Subcommittee on Elections Committee on Administration**

**United States House of Representatives**

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Thank you Chairwoman Lofgren and Ranking Member Davis, Chairwoman Fudge, and Members of the Subcommittee, for having me testify today. Thank you Congressman Luján for introducing the Native American Voting Rights Act. I'm here to testify in support of this important bill. My name is Jacqueline De León, I am a member of the Isleta Pueblo, 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 2015, NARF began the Native American Voting Rights Coalition, or NAVRC, a coalition of national and regional grassroots organizations, academics, and attorneys advocating

for the equal access of Native Americans to the political process.<sup>1</sup> It was founded to facilitate collaboration between its members on coordinated approaches to the many barriers that Native Americans face in registering to vote, casting their ballot, and having an equal voice in elections.

Led by NARF, in April 2018 the NAVRC completed a series of nine field hearings in seven states on the state of voting rights in Indian Country. I, along with my colleague, NARF's pro bono counsel, Dr. James Tucker, had the honor of attending all of these hearings. Approximately 125 witnesses from dozens of tribes in the Continental United States generated thousands of pages of transcripts with their testimony about the progress of the Native Americans in non-tribal elections, and the work that remains to be done.

The field hearings were conducted at the following locations: Bismarck, North Dakota on September 5, 2017; Milwaukee, Wisconsin on October 16, 2017; Phoenix, Arizona on January 11, 2018; Portland, Oregon, on January 23, 2018; on the tribal lands of the Rincon Band of Luiseño Indians north of San Diego, California, on February 5, 2018; Tulsa, Oklahoma on February 23, 2018; on the tribal lands of the Isleta Pueblo just outside of Albuquerque, New Mexico on March 8, 2018; Sacramento, California on April 5, 2018; and on the tribal lands of the Navajo Nation in Tuba City, Arizona on April 25, 2018. Field hearings were not conducted in Alaska because the Alaska Advisory Committee to the U.S. Commission on Civil Rights already had a similar effort underway. Coalition members also were familiar with Alaska's barriers after several years of voting rights litigation there.

Witnesses included tribal leaders, community organizers, academics, politicians, and Native voters. They shared their experiences in voter registration and voting in federal, state, and local (non-tribal) elections. I am carrying their stories with me here today. Unfortunately, I come with dire news. Native Americans are faced with unjust barriers that prevent their access to the ballot box.

We were able to identify common factors discouraging political participation, including: (1) geographical isolation; (2) physical and natural barriers; (3) poorly maintained or non-existent roads; (4) distance and limited hours of government offices; (5) technological barriers and the digital divide; (6) low levels of educational attainment; (7) depressed socio-economic conditions; (8) homelessness and housing insecurity; (9) non-traditional mailing addresses such as post office boxes; (10) lack of funding for elections; (11) and discrimination against Native Americans.

In addition to this daunting list of factors, language is "one of the closing gaps in the election process" for Native American voters. Under the 2011 determinations of jurisdictions that required language assistance, Native American languages were the second most common language group after Spanish. Section 203 language assistance protections were required in 33 political subdivisions in five states. This rose to 35 jurisdictions in nine states in the 2016 determinations.

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<sup>1</sup> For more information about the NAVRC, see *About the Native American Voting Rights Coalition*, available at <https://www.narf.org/native-american-voting-rights-coalition/>.

Despite these broad protections, jurisdictions have often failed to provide the required translations, forcing Native American voters to file lawsuits in Alaska, Arizona, New Mexico, and Utah.

The field hearings revealed that Native American voters faced significant hurdles at the very first step to voting: registration. Despite the protections offered by the National Voter Registration Act (NVRA), the Help America Vote Act (HAVA), and the VRA, the field hearings revealed that there were many barriers to registration: (1) lack of traditional mailing addresses, (2) homeless and housing instability, (3) voter identification requirements (which can be hard for many Native Americans to obtain), (4) unequal access to online registration, (5) unequal access to in-person voter registration, (6) restrictions on access to voter registration forms, (7) denial of voter registration opportunities due to previous convictions, (8) rejection of voter registration applications, (9) voter purges, and (10) failure to offer registration opportunities at polling places on Election Day.

Even if Native Americans are able to register, the field hearings showed that they then face another set of barriers to actually casting a ballot. These include: (1) unequal funding for voting activities in Indian communities; (2) lack of pre-election information and outreach; (3) cultural and political isolation; (4) unequal access to in-person voting; (5) unequal access to early voting; (6) barriers *caused* by vote-by-mail, which are numerous; (6) barriers posed by state laws that create arbitrary population thresholds in order to establish polling places; (7) the use of the ADA to deny polling places on reservation lands; and (8) the lack of Native American election workers.

The field hearings revealed yet another set of hurdles in the form of barriers to having their ballots counted. Assuming a Native American can register and then vote, they then faced additional barriers including: (1) lack of ballot canvassing opportunities; (2) failure to count ballots cast out-of-precinct; (3) ballot harvesting bans and similar laws; and (4) lack of information about ballot status (whether it was counted) and the inability to correct errors.

A much more thorough review of these factors is found in our Field Hearing Report, which is in production and will be submitted to this committee in support of this hearing.

Today, I am going to focus on the unjust geographical distance many tribal members must travel to reach a registration site and/or polling place and the hardships that arise from that distance, identification requirements to vote and the unique problems that arise in Indian Country, and the importance of flexible language provisions. Finally, I will provide the Committee with a few instances of overt racism which highlight the need for federal reform.

### *The Tyranny of Distance*

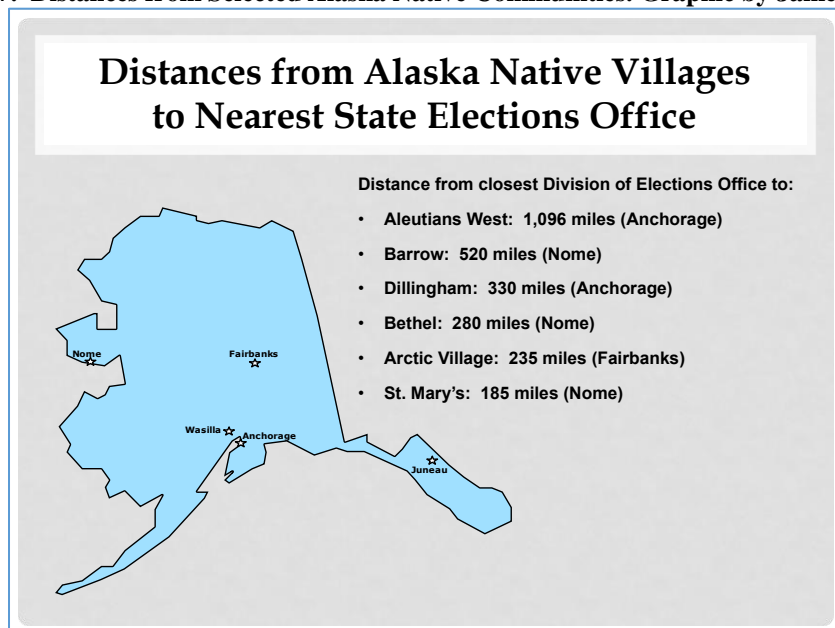
#### *Distances to Register to Vote*

Native Americans have to travel vast distances to get to the off-reservation communities that provide them with critical services such as driver's licenses their local election offices to register to vote. "Time is the principal cost of voting: Time to register; to discover what parties are running; to deliberate; to go to the polls; to mark the ballot. Since time is a scarce resource,

voting is inherently costly.” That means that the greater the distance to register or to actually vote, the less likely someone is to cast a ballot,” or what is referred to as “the tyranny of distance.”<sup>2</sup>

Nowhere are distances and travel times greater than they are for Alaska Natives living in remote communities spread throughout Alaska and its Aleutian Islands chain. Those distances generally require using jet service that can cost hundreds, and in some cases even thousands, of dollars to some of the most economically disadvantaged populations in the United States.

**Figure 7. Distances from Selected Alaska Native Communities. Graphic by James Tucker**



Although the distances and travel times are less extreme than those faced by many Alaska Native villages, they can still prevent tribal members in other areas of the United States from accessing government services including voter registration.

Voters surveyed from the Duck Valley, Pyramid Lake, Walker River and Yerington Tribes in Nevada identified travel distance as “the single biggest obstacle to registering. Among those who were registered to vote, 10 percent stated that it was difficult for them to travel to register. Among [those] ... not registered, a whopping 34 percent said that it would be difficult for them to travel to a place to register... But travel distance was also identified by the respondents as a major factor that inhibited voting...”<sup>3</sup>

In Nye County, Nevada, the combined effect of geographical isolation and mountainous terrain results in lengthy travel times to get to either of the County’s two election offices. The closest elections office is in Tonopah, 140 miles each way by road from the Duckwater Reservation. The Pahrump elections office is 303 miles each way by road. Travel time is at least five hours or ten hours, respectively, if the weather conditions permit.

<sup>2</sup> Bismarck Tr., Gerald Webster, 250-52.

<sup>3</sup> San Diego Tr., Jean Schroedel, 17-18.

**Figure 8. Travel times from the Duckwater Reservation to Nye County, Nevada elections offices. Map by James Tucker**



Travel time for many other Nevada tribes is several hours to reach county seats and non-tribal elections offices. Voters on the Pyramid Lake Reservation have as much as a 100-mile round-trip drive to get to the elections office in Reno. Voters on the Walker River Reservation have a 70-mile round-trip drive to get to the county office in Schurz.<sup>4</sup>

Southwestern tribes face similar barriers. Navajos in San Juan County, Utah living on tribal lands have to drive to Blanding or Monticello for any government services. From Navajo Mountain, Utah, which is near Lake Powell, it is about 200 miles (a four or five-hour drive) each way, weather conditions permitting. It requires driving south into northern Arizona on U.S. highway 98 to U.S. highway 160 in Navajo County, Arizona to U.S. highway 191 north back into Utah.<sup>5</sup>

Montezuma Creek is the closest Navajo community to Monticello, which is a 75 mile drive each way. “So in order for people to do business ... like vehicle registration, any healthcare issues, as well as voting issues,” it is necessary to travel great distances. “That’s a burden to our people.” It poses difficulties in giving Native voters “more say in the decision-making at the county level.”<sup>6</sup>

<sup>4</sup> San Diego Tr., Jean Schroedel, 21-22; San Diego Tr., Amy Nantkes, 47-48, 50-51.

<sup>5</sup> Isleta Tr., Terry Whitehat, 11-18.

<sup>6</sup> Isleta Tr., Wilfred Jones, 16.

Northern Plains tribal members also have to travel great distances to reach their county government offices. In Montana, some members of the Northern Cheyenne Tribe have to drive as much as 120 miles roundtrip. Many tribal members of the Confederated Salish and Kootenai Tribes of the Flathead Nation have roundtrip drives of up to 140 miles, and those on the Crow Indian Reservation have as much as a 150-mile roundtrip drive.<sup>7</sup> For a potential Native voter on the Standing Rock Reservation, the mean distance to a driver's license site is nearly 61 miles. From the Fort Berthold Reservation to a driver's license office is nearly 50 miles.<sup>8</sup>

In Wisconsin, Native Americans face significant barriers registering to vote because the Department of Motor Vehicles is only open sometimes and in some places in Northern Wisconsin, where many tribal members live, only one day out of the month. Tribal members may have to drive up to 90 miles because of the limited locations where voter registration is available. Currently, the only in-person registration locations are through the township clerk, county clerk, and Department of Motor Vehicles.<sup>9</sup>

The provisions of the Native American Voting Rights Act extending National Voter Registration Act protections to federal programs servicing Native people is a practical way of increasing registration opportunities to Native communities.

#### *Polling Place Distance*

Additionally, Native voters generally must travel greater distances to get to their polling places than non-Native voters living in the same counties. Often, polling places are located in predominately non-Native county seats or non-Native communities. In Arizona, the nearest polling place for some tribes is off reservation.<sup>10</sup> The closest polling station to the Kaibab Paiute Tribe is about 30 miles away. One community is located on the east side of the reservation 15 miles farther away, which means they must travel about 90 miles roundtrip to vote at their polling place.<sup>11</sup>

Tribes in California face similar issues. Distance poses a barrier to getting to polling places for many members of the Karuk Tribe. People living in communities like Seiad or Horse Creek have to travel 40 to 50 miles roundtrip to a polling place in Happy Camp.<sup>12</sup> Prior to 2018, when the Thule River Reservation was finally able to get a polling place, voters had to drive about 50 miles roundtrip to vote, despite having 700 members of voting age.<sup>13</sup>

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<sup>7</sup> Bismarck Tr., Stewart- Peregoy, 103 (Crow, Northern Cheyenne); Bismarck Tr., Erica Shelby, 140, 157 (Flathead).

<sup>8</sup> Bismarck Tr., Gerry Webster, 270 (Standing Rock).

<sup>9</sup> Milwaukee Tr., Paul Demain, 69-78, 79-86, 94, 96, 110-13.

<sup>10</sup> Phoenix Tr., Solveig Parson, 16.

<sup>11</sup> Phoenix Tr., Roland Maldonado, 120-21.

<sup>12</sup> Sacramento Tr., Buster Attebery, 66.

<sup>13</sup> Sacramento Tr., Thomas Eugene, 29.

In Minnesota, a member of the Mille Lacs Band of the Ojibwe explained that distances pose a significant barrier to many members of the state's eleven tribes. They commonly must travel 40 miles roundtrip to vote.<sup>14</sup> Similar barriers are present for tribes throughout Montana. On the Flathead Reservation, which comprises two-thirds of the land mass of Lake County and is about 1.2 million acres, tribal members requested that the County open two satellite voting offices. County officials chose to place them in two remote locations far from the larger tribal communities. The satellite offices are located just four miles apart, with one accessible to 200 Native voters and the other to 40 Native voters. Hundreds of other Native voters had to travel vast distances to reach those offices.<sup>15</sup>

In Blaine County, Montana, when the Lodge Pole precinct was merged with the Hays precinct, Native voters were forced to travel up to 114 miles roundtrip to their new polling location.<sup>16</sup> In Big Horn County, the distances are not as great, but Native voters nonetheless must travel twice as far to reach their polling places as non-Natives, 44 miles round-trip for Natives compared to 23.2 miles for non-Natives.<sup>17</sup> Native voters who live in Hot Springs, Montana, must drive 94 miles roundtrip to reach their polling place in Thompson Falls.<sup>18</sup>

Distance also is an issue for Native voters in Nevada because of the isolated location of several reservations, many of which lack polling places. Native voters often have to drive 80 to 100 miles roundtrip to cast a ballot.<sup>19</sup> On the Pyramid Lake Reservation in Nevada, 99-year old Flora Green, a tribal member, had never cast a ballot in a non-tribal election. She explained, "I have never had the opportunity to vote here on my reservation." When a polling place was opened on the reservation for the first time in 2016 as a result of the *Sanchez* decision, Ms. Green was able to vote for the first time.<sup>20, 21</sup>

The Goshute voters in Utah have to drive over an hour each way to get to their polling place. Citizens of the Ute Nation must drive about 45 minutes each way to their polling place. Many lack access to transportation, and no public transportation is available.<sup>22</sup>

These are just some examples of the distances that must be traversed in order for Native Americans to cast a ballot. But the distance is just part of the story. Travelling distance is costly because it takes a significant amount of time, missed work, and necessitates childcare, but also because it requires a vehicle and gas money, which many impoverished Native Americans simply

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<sup>14</sup> Milwaukee Tr., Carolyn Beaulieu, 119-29.

<sup>15</sup> Bismarck Tr., Erica Shelby, 128; Bismarck Tr., Gerald Stiffarm, 128.

<sup>16</sup> Bismarck Tr., Gerald Stiffarm, 75.

<sup>17</sup> Bismarck Tr., Gerald Webster, 257.

<sup>18</sup> Bismarck Tr., Patrick Yawakie, 202.

<sup>19</sup> Sacramento Tr., Beverly Harry, 4-5.

<sup>20</sup> San Diego Tr., Amy Nantkes, 47-48.

<sup>21</sup> Isleta Tr., Terry Whitehat, 37; Tuba City Tr., James Attakai, 14.

<sup>22</sup> Tuba City Tr., Moroni Benally, 32, 37-38, 42.

lack. This is to say nothing of the fact that traversing these distances on dirt and gravel roads may be all but impossible in the winter month of November. But even more damaging, is the message that remote polling places convey to voting tribal members: your vote does not matter; this system is not for you. Mandating polling places on tribal lands, and allowing tribes to designate buildings for every precinct within their lands where tribal members can vote that makes sense to them, will dramatically decrease travel time for thousands of Native Americans across the country. This is a much needed reform.

### *Identification*

*[W]e were the first here, and we were the last to get the right to vote. We were here for thousands of years. My tribe never moved. . . . I live a stone's throw away from where my great grandfather was born in a wigwam. . . . this is my community. And to have these things thrown at us . . . nitpicking of these IDs and all this kind of thing, it's like we have to prove that we're able to vote in a system that's being pressed on us.*"<sup>23</sup>

For most Americans, obtaining an identification is a rite of passage. Getting a driver's license is a simple act of going to the local Department of Motor Vehicles (DMV), the complicated part is passing the driver's test. But for many Native Americans, this rite of passage does not exist. There are numerous reasons why some Native Americans do not have or need identification. As states increasingly move toward requiring identification to register or vote, however, Native Americans are being excluded from accessing the ballot box. Following implementation of voter ID laws, heavily Native American areas have seen a "sharp decrease in voters"<sup>24</sup> and reports of hundreds of ballot rejections because of a lack of identification.<sup>25</sup>

Obtaining a state issued ID is unreasonably difficult for many Native American voters. State run DLS or DMVs are not present on reservation lands.<sup>26</sup> Consequently, Native Americans have to travel off the reservation in order to obtain a state issued ID. The distances to many of these DMVs is prohibitively far, with tribal members describing traveling over an hour to get a state issued ID.<sup>27</sup> For example, in Keshena, Wisconsin, tribal members describe having to drive an hour and 20 minutes to the nearest DMV.<sup>28</sup> In North Dakota, tribal members must travel an average

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<sup>23</sup> Milwaukee Tr., Stephanie Thompson, 46-47.

<sup>24</sup> Phoenix Tr., Steve Titla, 245.

<sup>25</sup> Phoenix Tr., Solveig Parson, 19.

<sup>26</sup> Milwaukee Tr., Paul DeMain, 72-73.

<sup>27</sup> Milwaukee Tr., Stephanie Thompson, 23-24.

<sup>28</sup> Milwaukee Tr., Stephanie Thompson, 23.



of an hour to reach the nearest DLS, with the average Standing Rock Sioux member having to travel over an hour and a half to reach the nearest site.<sup>29</sup>

Even when a DMV may be located closer, tribal members describe having to make a “60 to 80, 90 mile drive” to access DMVs that are open on a consistent basis that provide full services.<sup>30</sup> One anecdote describes the burdens one voter had to face to try and get obtain an ID:

... for four months she was taking a woman because there is a DMV that’s in the next town over, it’s open one day a week. And so you kind of – you have to make that one day trip over, about 20 miles away, in order for you to go there the one day a week, otherwise you miss your opportunity and then you have to drive a substantial amount away in order to get to the next DMV that’s open more regularly. So she had been taking this woman for four months, taking this woman down to this DMV office [located in Minocqua, Wisconsin] that’s open one day a week. They continuously were having computer issues. So after four months of trying to get this woman to get her ID so she was able to register early, she ended up kind of throwing her hands in the air and took this woman – like they had to take an entire day trip to get her to the nearest DMV which was open and available during the times that she had. There’s a lot of stories like that that I keep running into.<sup>31</sup>

For impoverished Native Americans, the cost of an identification is often prohibitively expensive. Even nominal fees for an identification can present a barrier.<sup>32</sup> Moreover, drivers’ licenses are not required for every day life, so expenditure on an identification is not a priority. One tribal leader described how their members “don’t want to pay for an ID because a lot of them don’t even have a bank account. We have our own bank system, so with their Tribal ID, they can cash any check that they’re given through our social system with that. So why would they pay for other thing—the other ID if they don’t have a reason for it.”<sup>33</sup>

Obtaining a state ID usually requires underlying documentation. One advocate described how “we really oppose ID” because “[w]e see many elders struggling to get a birth certificate, to get a driver’s license” She detailed how an elderly tribal member’s birth certificate was not usable because it did not have her name on it since “her birth certificate was in the day when they named her ‘Baby Girl’”<sup>34</sup> Simply put, “the types of ID initially listed as accepted as terms of proof did not take into consideration the types off documents that are easily accessible to Native American

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<sup>29</sup> Professor Gerald Webster, *An Analysis of the Effects of North Dakota’s Voter Identification Law on Potential white and Native American Voters*, Appendix, 22

<sup>30</sup> Milwaukee Tr., Paul DeMain, 72-73.

<sup>31</sup> Milwaukee Tr. Stephanie Thompson, 23-24.

<sup>32</sup> Sacramento Tr., Alex Padilla, 109.

<sup>33</sup> Portland Tr., Norma Sanchez, 157-158.

<sup>34</sup> Isleta Tr., Andrea Weahkee, 197.

voters.”<sup>35</sup> As a consequence “Native American voters had a very difficult time obtaining a photo identification.”<sup>36</sup>

Yet, despite how unreasonably difficult it is for Native American to get a state ID, tribal IDs are not automatically accepted for registration and voting purposes. Not all states include tribal IDs when crafting their ID laws. Just last week South Dakota’s House rejected allowing tribal IDs to register to vote.<sup>37</sup> The Secretary Treasurer of the Mille Lacs Band of the Ojibwe explained how, even though tribal IDs were now accepted in Minnesota, “there was a period where tribes had to fight the Secretary of State for their tribal ID cards to be valid for voting.”<sup>38</sup> At the time of the field hearings, Iowa was not accepting tribal IDs.<sup>39</sup> Following advocacy by tribal members, there was a legislative fix and Iowa began accepting tribal IDs.<sup>40</sup> Furthermore, previously having a tribal ID be recognized as an acceptable form of ID is no guarantee a state will continue to accept tribal IDs. For example, one witness described the uncertainty faced by tribes:

so they weren’t accepting tribal IDs or the enrollment paperwork up until two years ago, and then they began accepting them, but now they’re going back to thinking they won’t be accepting them because some of the ID requirements have changed on the federal level. So they’re now telling the tribe that they need to update their ID equipment, and we need to purchase this like machine that costs thousands of dollars in order for our tribal IDs to be valid and be able to be used in that way.<sup>41</sup>

Even if a state accepts a tribal ID, states may also require the identification to contain certain information in order to be deemed valid. Some tribal IDs do not contain expiration dates since “we don’t quit being Indian at some particular point” and laws that require an expiration date on an ID would exclude otherwise qualifying IDs.<sup>42</sup> Updating tribal IDs to contain specialized information or security features is expensive<sup>43</sup> and may be unattainable to impoverished tribes.

Finally, as one witness bluntly assessed, requiring an address on an identification “screws everything up.”<sup>44</sup> As discussed by Professor Ferguson-Bohnee in her testimony before the committee today, Native Americans often lack an address for a variety of reasons such as homelessness, near homelessness, or an unaddressed home. Given the housing insecurity and lack

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<sup>35</sup> Phoenix Tr., Steve Titla, 245.

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

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<sup>38</sup> Milwaukee, Caroline Beaulieu, 121.

<sup>39</sup> Tulsa Tr., Christina Blackcloud, 9.

<sup>40</sup> See State of Iowa, Iowa Secty. of State, Secretary Pate announces use of Tribal IDs as a valid form of identification for elections (Aug. 21, 2018), available at [https://sos.iowa.gov/news/2018\\_08\\_21.html](https://sos.iowa.gov/news/2018_08_21.html).

<sup>41</sup> Milwaukee Tr., Stephanie Thompson, 30-31.

<sup>42</sup> Milwaukee Tr., Paul DeMain, 78.

<sup>43</sup> Milwaukee Tr., Stephanie Thompson, 30-31; Tulsa Tr., Chuck Hoskin Jr., 128.

<sup>44</sup> Bismarck Tr., Donita Loudner, 32.

of regular postal service many Native Americans use PO Boxes to conduct their affairs and their tribal IDs will contain no address or PO Box instead of a residential address.<sup>45</sup> If a current residential address is required on the identification the ID may become quickly out of date since Native Americans “move around quite a bit and sometimes we’ll forget to update our information they try to go vote and then they have those challenges.”<sup>46</sup>

The Governor of the Gila River Indian Community located in Arizona described in detail how the lack of address on the reservation in concert with the requirement of an identification led to the disenfranchisement of his community:

The first issue with the voter ID law that the community finds is that our Tribal IDs do not include an address. The second issue is that individuals living on the Pinal County portion of the reservation do not have standard street addresses as well. Tribal members do not receive mail at their homes, but must pay for and obtain a Post Office box. Tribal members can either use their Post Office box or non standard address on their Arizona Identification. The third issue is that individuals may change mailing addresses or move between elections, which can impact the addresses on a person’s ID. In 2012 the voter ID law was strictly enforced on the Pinal County portion of the registration. Many Gila River voters were turned away from the polls when the voter’s were turned away from the polls when the voter’s address did not match the voter roles... The community subsequently learned that since our Tribal Citizens of Pinal County lacked traditional addresses, the addresses used by Tribal members are not compatible with the voter registration system used by the county. Thus, the County reassigned all our voter’s physical addresses to be the service centers where they vote . . . and resulted in the voters again being denied a regular ballot.<sup>47</sup>

Not only were tribal members who did not have traditional addresses tasked with having IDs with addresses on them, the addresses that they did use were incompatible with the state’s voter registration system. There was no conceivable way for these tribal members to comply with registration prior to the election.

Given the multitude of ways voter ID laws can lead to the disenfranchisement of Native Americans, it is no surprise that not one witness spoke in favor of voter identification laws. Rather, identification laws are seen as “a solution in search of a problem . . . imposed without a shred of real evidence that here has been voter fraud.”<sup>48</sup> Identification laws pose a significant burden on

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<sup>45</sup> Tulsa Tr., Chuck Hoskin Jr., 131.

<sup>46</sup> Phoenix Tr., Verlon Jose, 154; Phoenix Tr., Stephen Lewis, 130-31; Bismarck Tr., Donita Loudner, 32.

<sup>47</sup> Phoneix Tr., Stephen Lewis, 130-31.

<sup>48</sup> Tulsa Tr., Chuck Hoskin Jr., 128.

Native American voters, and are viewed as “hard and intimidating.”<sup>49</sup> Mandating tribal IDs be accepted when a state requires IDs to vote makes tribal communities less dependant on state issued IDs that are difficult or impossible to obtain. Requiring acceptance of those IDs regardless of whether there is an address or expiration date likewise ensures that the tribal ID will be accepted.

### *Language*

Language is “one of the closing gaps in the election process” for Native voters.<sup>50</sup> Over a quarter of all single-race American Indian and Alaska Natives speak a language other than English at home.<sup>51</sup> Two-thirds of all speakers of American Indian or Alaska Native languages reside on a reservation or in a Native village,<sup>52</sup> including many who are linguistically isolated, have limited English skills, or a high rate of illiteracy.<sup>53</sup>

The lack of assistance or complete and accurate translations of voting information and materials for Limited-English Proficient (LEP) American Indian and Alaska Native voters can be a substantial barrier. “If you require language assistance to register or cast a ballot, whether it’s in English or another language, culturally competent and respectful assistance, for that matter, that too can be either a barrier or a discouragement from participating.”<sup>54</sup>

Section 203 of the Voting Rights Act (VRA) helps LEP voting-age U.S. citizens overcome language barriers to political participation by requiring covered jurisdictions to provide bilingual written materials and oral language assistance.<sup>55</sup> The requirements apply to four language groups: Alaska Natives; American Indians; Asian-Americans; and persons of Spanish Heritage, as well as the distinct languages and dialects within those groups.<sup>56</sup>

Language assistance must be provided for voting activities in every type of public election conducted in a covered jurisdiction and its political subdivisions, including primary, general, and special elections.<sup>57</sup> Section 203 applies regardless of whether a public election is to fill an office,

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<sup>49</sup> Bismarck Tr., Donita Loudner, 32.

<sup>50</sup> Isleta Tr., Martin Aguilar, 146.

<sup>51</sup> 2016 AIAN FFF, *supra* note 197 (27 percent).

<sup>52</sup> See U.S. Census Bureau, Native American Languages Spoken at Home in the United States and Puerto Rico: 2006-2010 at 2 (Dec. 2011).

<sup>53</sup> See U.S. Census Bureau, Public Use Data File for the 2016 Determinations under Section 203 of the Voting Rights Act, available at [https://www.census.gov/rdo/data/voting\\_rights\\_determination\\_file.html](https://www.census.gov/rdo/data/voting_rights_determination_file.html) (Dec. 5, 2016).

<sup>54</sup> Sacramento Tr., Alex Padilla, 108-09.

<sup>55</sup> See 52 U.S.C. § 10503. Other permanent provisions likewise can be used to ensure that LEP voters receive assistance. Section 2, the VRA’s permanent non-discrimination provision, applies nationwide and has been used to secure language assistance for voters who are denied equal voting opportunities by English-only election procedures. See 52 U.S.C. 10301; TUCKER, *supra* note 72, at 43-45. Section 208 supplements the language assistance provisions by protecting the right of any voter, including language minority citizens, who needs assistance at the polls, to receive that assistance from the person of their choice. See 52 U.S.C. § 10508.

<sup>56</sup> See 52 U.S.C. § 10503(e).

<sup>57</sup> See 28 C.F.R. § 55.10.

to remove an elected official, or to vote on a bond issue, ballot question, or referendum.<sup>58</sup> Section 203 is a critical resource for Native American tribes but it also does not go far enough. Language relief must also include translations for Native languages that are unwritten. Section 203's protections are meaningless if the translations are not in a format – i.e. oral – that Native voters can understand. NAVRA would bridge this critical gap so that non-English speaking Natives of an unwritten language are not excluded from the ballot box.

### *Overt Discrimination*

In the fall of 2016 and spring of 2017, NAVRC oversaw one of the most comprehensive in-person surveys ever conducted in Indian Country about barriers faced by Native voters. A total of 2,800 Native voters in four states completed the in-person survey.<sup>59</sup> In all four states, Native voters expressed the greatest trust in their tribal governments.

Although the federal government was identified by respondents as the most trusted of non-tribal governments (federal, state, local), the level of trust ranged from a high of just 28 percent in Nevada to a low of only 16.3 percent in South Dakota.<sup>60</sup> Trust of local government in South Dakota was notably bad with only 5.02% of respondents indicating they most trusted the local government, which is especially significant considering it is the local governments that are most often responsible for the administration of elections.

Native Americans have faced sustained assaults against their sovereignty and their right to vote. States ratified Constitutions that specifically excluded Native people from voting,<sup>61</sup> established cultural purity tests to determine if Native people had sufficiently assimilated before granting them the right to vote,<sup>62</sup> and argued Native self-governance was incompatible with participation in state run elections.<sup>63</sup> This legacy of equating voting with an abandonment of cultural and political sovereignty has resulted in a continued skepticism toward voting within Native communities.

Furthermore, states often made the experience of voting embarrassing for Native voters. Not only would states demand that Native vote disavow and prove they were no longer culturally

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<sup>58</sup> *See id.*

<sup>59</sup> *See* NAVRC Report, *supra* note 5. The survey respondents included 644 Native voters in Arizona, 1,052 in Nevada, 602 in New Mexico, and 502 in South Dakota. NAVRC Report, *supra*, at 8, 38, 67.

<sup>60</sup> *See* NAVRC Report, *supra* note 5, at 15, 45, 77, 111. Respondents were asked, “Which government do you trust most to protect your rights?” *Id.* at 15, 45, 76-77. Among respondents in the other two states, 22.1 percent identified the federal government in Arizona and 27.4 percent identified the federal government in New Mexico. *See id.* at 77, 111.

<sup>61</sup> COHEN, *supra* note 45 at 157.

<sup>62</sup> 1858 MINN. CONST., Art. 7, § 1(4), available at <http://www.mnhs.org/library/constitution/transcriptpages/dt.php>.

<sup>63</sup> *Trujillo v. Garley*, Civ. No. 1353 (D.N.M. 1948); *Allen v. Merrell*, 305 P.2d 490, 6 Utah 32 (Utah 1956), *vacated as moot*, 353 U.S. 932 (1957).

Native American, states would also impose literacy tests that were impossible for Native voters to pass given their lack of fluency in English.<sup>64</sup>

Clerks also turned away Native voters alleging they were incompetent to vote because of the federal trust responsibility over tribes which was referred to in legalese as a “guardianship.” The Arizona Supreme Court accepted this reasoning – that Native Americans were incompetent to vote – in a case that stood for twenty years.<sup>65</sup>

To this day, some elders that can recall humiliating voter experiences discourage younger generations from voting out of disregard for federal and state systems that were cruel to them and a lingering fear that participation in these systems will undermine tribal sovereignty. As one community member explained “People are still apprehensive because it’s been taught we can participate in our elections but that’s not our election. So if there is a county election or a state election or a federal election, elders tell their children and it’s still true today they don’t participate in voting because they feel it’s an infringement on our sovereignty”<sup>66</sup>

Consequently, distrust between Native Americans and local, state, and federal governments abounds and was testified to throughout the field hearings. A sampling of these sentiments:

- *And I think in general, just a lack of, distrust, of government. Years of discrimination and injustice support that American Indians don’t trust government and don’t want to participate in this government process.*<sup>67</sup>
- *Why it’s so hard for Native Americans to vote in local elections in Los Angeles is . . . just issues between the United States government and Native Americans and how every promise that was made to us has always been broken. So the amount of distrust among Native Americans and the government is not really good.*<sup>68</sup>
- *Isolating, keeping isolated, because a lot of it was no trust was really in between from the federal, the state, and county side.*<sup>69</sup>

Not only do many Native Americans not trust the local, state, and federal governments, they also do not feel supported by these institutions.

As one community member recounted, “[O]ur lives have been severely compromised by the racists and discriminatory impact of boarding schools, public education, and the harmful federal and state policies that go towards Indian families. Colonization for us meant the control of

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<sup>64</sup> Harrison, *supra* note 64; Glenn Phelps, *Representation Without Taxation: Citizenship and Suffrage in Indian Country*, 9 AM. INDIAN Q. 136 (1985).

<sup>65</sup> *Porter v. Hall*, 34 Ariz. 308 (Ariz. 1928).

<sup>66</sup> *Portland Tr.*, Matthew Tomaskin, 95-96.

<sup>67</sup> *Phoenix Tr.*, Travis Lane, 94.

<sup>68</sup> *San Diego Tr.*, Robin Thundershield, 98 (this is also the source of the quote for the title of this report).

<sup>69</sup> *Isleta Tr.*, Shirlee Smith, 85.

tribal people by the appropriation of our lands. State and federal jurisdictions over our children and the suppression of our tribal traditions and culture.”<sup>70</sup>

As these injustices continue to manifest themselves in present day inequities – poverty, lack of housing, inadequate roads and infrastructure, to name a few – voters disengage from the political process and become apathetic, firm in the belief that nothing will ever change. One witness described how his parents would tell him “We don’t get no help from the county. Why should I vote? . . . Leave them alone. Don’t bother. That’s their system, don’t bother.”<sup>71</sup>

A tribal councilman explained how “we are from a very rural area, the poorest county in California. We, like most poor communities, have an issue with people wanting to vote. It’s not the access to vote. It is the desire to vote. There’s no passion their vote sometimes.”<sup>72</sup> A tribal member reflected how “[y]ou know, alcoholism, high unemployment and things like that that just affect our ability to feel good about ourselves and really want to voice our opinions and vote.”<sup>73</sup>

But discrimination is not just a relic of the past or the effects of past wrongs. Native Americans continue to experience overt discrimination in their everyday lives and when they attempt to vote. In Arizona, racial tensions are so fraught between the Kaibab Band of Paiute Indians and the border town that the pipes sending water to the reservation are regularly blocked by border town residents.<sup>74</sup> In Utah, a witness’ Native grandson attempted to play baseball and was accosted by a non-Native woman who “started screaming at him, ‘Who in the hell do you think you are? You think you’re that good? You damn welfare people are starting to take over’”<sup>75</sup> Paternalistic racist attitudes are also prevalent. A Native high-schooler was denied a place on the school volleyball A team because, although she was better than girls on the A team, “the coach said he thought she would feel more comfortable on the B team. And she was so angry . . . she ended up quitting.”<sup>76</sup>

These racist attitudes did not stop at residents. Voting officials also displayed racist attitudes, whether intentionally or not. In South Dakota, a poll worker described as a “[n]ice little old lady” was concerned about where she would be sitting while servicing a Native American community and asked field organizers where’s a place “that’s going to be safe? We don’t want to be around people who are drinking. We don’t want to be around, you know people who are going to harass us.”<sup>77</sup>

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<sup>70</sup> Portland Tr., Patricia Whitefoot, 70.

<sup>71</sup> Isleta Tr., Wilfred Jones, 28.

<sup>72</sup> Sacramento Tr., Carlos Negrete, 42.

<sup>73</sup> Portland Tr., Carol Evans, 193.

<sup>74</sup> Phoenix Tr., Roland Maldonado, 156.

<sup>75</sup> Isleta Tr., Wilfred Jones, 33-34.

<sup>76</sup> Portland Tr., Barbara Lewis, 42.

<sup>77</sup> Bismarck Tr., Donita Loudner, 51.

Racist attitudes tangibly effect the ability for Native Americans to vote, forcing voters to register and cast their ballots in substandard facilities and hostile conditions. For example:

- In South Dakota, voters were forced to vote in a repurposed chicken coop<sup>78</sup>
- In Montana, the number of registration cards accepted by county officials from Native community organizations was arbitrarily limited to 70 after community organizers were hassled and given “dirty looks” for bringing in too many at a time.<sup>79</sup>
- In South Dakota, the Buffalo County Seat was located Gann Valley which had a population of 12 and was the smallest county seat in the nation. As county seat, the residents of Gann Valley were provided a fully funded polling place that offers early voting and registration opportunities in line with the rest of the state. Twenty-five miles away on the Crow Creek reservation, however, Fort Thompson’s 1,200 residents had no early voting location in 2014 and only one satellite voting site open on 2014 Election Day. Despite calls from activists to provide a polling location in Fort Thompson and despite HAVA funding being available to open a polling location in Fort Thompson, the county auditor refused to open a polling location and instead decided to forgo usage of the funds.<sup>80</sup>
- Voters are regularly forced to travel to border towns to cast a vote where there are “issues” and “hostile attitude[s]”<sup>81</sup> and “racist stereotypes”<sup>82</sup> where community members describe being “too intimidated to get the nearest polling” location<sup>83</sup> since the county seat “may or may not be welcoming to Native Americans coming from a reservation community.”<sup>84</sup>

These negative experiences are exacerbated and reinforced today when Native Americans are denied equal opportunities to register to vote and to cast ballots that are counted. An on-reservation polling place would mean Native Americans would not need to interact with communities and county officials who are hostile toward them. It would also mean tribal officials would not need to rely on the goodwill of a county official in order to secure equal access to the ballot box for their tribal members. Indeed, it is these local discriminatory actions that call out for federal relief.

Not only would federal relief prevent some of the intentional and unintentional barriers to the ballot box facing Native Americans today, federal action would also result in significant savings. Today, discrimination is only addressed on an ad hoc basis, usually through litigation. Native activists have a stunning record of success. Indeed, this success is only partly attributable to the skill of their lawyers. Most often, however, it is the dismal facts and stark injustices – which

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<sup>78</sup> Bismarck Tr., Donita Loudner, 33.

<sup>79</sup> Bismarck Tr., Erica Shelby, 140.

<sup>80</sup> Bismarck Tr., Donita Loudner, 23-24.

<sup>81</sup> Phoenix Tr., Lewis, 135.

<sup>82</sup> Portland Tr., Lewis, 139-41.

<sup>83</sup> San Diego, Nantkes, 51.

<sup>84</sup> Portland Tr., Miller, 175.



judges who hail from all geographic and political backgrounds – have been unable to ignore. In the past 12 years there have been 18 cases involving Indian voting rights. Of these eighteen cases, the Native plaintiffs either won or settled to their satisfaction all but one or two.<sup>85</sup> When combined with the cases prior to 2008, the total number of cases is 92 at the time of the printing of our Field Hearing Report, with victories or successful settlements in 85 cases and partial victories in two cases. That is a success rate of 92 percent. As a result, states and local budgets often face not only the cost of ensuring equal access to the ballot box for their Native constituents, but also hefty attorneys’ fees when a case is proved. Federal action would clarify responsibilities toward Native constituents and save resources.

In sum, as one tribal member explained “[s]o, yes, I would like you, person at the poll, to respect me as a Native American, respect my culture. But if you can’t do that, because if you’re going to tell me, say: Well I’m going to have to learn about African-Americans, Hispanics, Mexicans, or whatever they’re calling us, then do this. Treat me as a human being and be respectful to my elders, respectful to my children.”<sup>86</sup> Likewise, we ask for no more, and no less, than an equal opportunity to vote for all Native Americans.

Thank you for having me today. I am happy to answer any questions you may have.

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<sup>85</sup> Just last week there was an additional victory *DNC v. Hobbs*, No. 18-15845 (9th Cir. Jan. 27, 2019) where the Ninth Circuit en banc reversed the district court and held that Arizona’s out of precinct policy that prevented even the partial counting of ballots filed out of precinct had a discriminatory impact on Native American, Hispanic, and African American Voters in violation of Section 2 of the Voting Rights Act. The Court also held that the criminalization of the collection of another person’s ballot had a discriminatory impact on minority voters and violated the “intent” test of Section 2 of the Voting Rights Act and the Fifteenth Amendment. The Court did not rule on the First or Fourteenth Amendment claims. The State of Arizona has announced that it will file a petition for cert. <http://cdn.ca9.uscourts.gov/datastore/opinions/2020/01/27/18-15845.pdf>

<sup>86</sup> *Phoenix Tr.*, Claude Jackson, 186.