



COMMITTEE ON HOUSE ADMINISTRATION
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REPORT ON

Voting for Native Peoples: Barriers and Policy Solutions

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Note to the Reader

When this nation took its first steps onto the world stage, we did so with a defiant declaration that governments are “instituted” among citizens rather than kings, “deriving their just powers from the consent of the governed.” The wellspring of sovereignty stems from the people who grant their assent to the rule of law, who lend their faith to the collective efforts of their neighbors—this is an ever-enduring truth. This conception of liberty is infallible; many of those tasked with protecting, defending, and expanding that liberty have not been. Those who have governed have too often misunderstood or ignored their obligations to the people of this nation. This is why the United States—endowed with such promise—has so often struggled to live up to the majestic words of our founding documents, to fully earn the consent of the governed. Our history has been a constant struggle to repair these shortcomings.

This report details one such failing—the repeated refusals of successive state and federal governments to either respect the unfettered entitlements of national sovereignty or extend the full rights and privileges of United States citizenship—in particular the right to vote—for the Native peoples of North America.

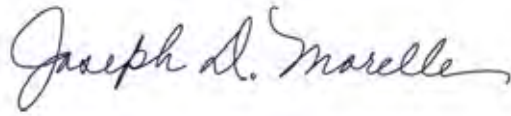
As the nation reflects on the centennial of the passage of the Indian Citizenship Act of 1924, the Democratic members and staff of the United States House Committee on House Administration publishes this report with the aim of achieving two purposes. First, this report sets out to establish a concrete record of the voting challenges that Native peoples have historically faced in this country, produced in recognition of the millions of Native peoples that Congress currently serves and in acknowledgment of the hundreds of millions that past Congresses failed so completely. Second, this report demonstrates that Native peoples still face tremendous barriers to their ability to cast a free, fair, and meaningful ballot in this country, despite the covenant of citizenship.

Significant work went into this report—in preparing this record, Committee members and staff visited reservations or other Tribal lands across six states. Committee members and staff also spoke to more than 125 individuals or groups dedicated to Tribal governance, organizing, advocacy, or civil rights, and pored over thousands of pages of historical documents, congressional records, legal treatises, judicial decisions, and countless other sources. While the report is not exhaustive—there is so much more relevant history, so many additional stories that could be included—it is my hope that this report represents a valuable perspective on the history and current reality of Native voting in this country.

Throughout our efforts on this report, we heard time and again how the federal government’s repeated breaches of trust and unfulfilled obligations have fractured our relationship with Tribal nations and led directly to many of the obstacles this report uncovered. Undeniably, the barriers Native peoples face to participating in federal, state, and local elections are both substantial and unique, with each one amplifying the next. It is my belief that a thorough understanding of this topic will compel any reader—and, hopefully, compel Congress—to understand the urgent need for strong action to protect Native voting rights and begin to

mend our relationship with Tribal nations and Native peoples. With clear eyes about both the distressing history of Native voting in this country and the mountainous challenges that remain for Native voters, this report makes clear that Congress owes bold, effective federal voting rights legislation to our Native constituents, most pressingly in the form of the *Native American Voting Rights Act*, the *Freedom to Vote Act*, and the *John R. Lewis Voting Rights Advancement Act*.

Only then can we hope to say in truth that the just power of the United States derives, finally, from the full consent of the governed.

A handwritten signature in black ink that reads "Joseph D. Morelle". The signature is written in a cursive style with a prominent initial "J" and a long, sweeping underline.

Joseph D. Morelle
Ranking Democratic Member
Committee on House Administration

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INTRODUCTION AND EXECUTIVE SUMMARY

One hundred years ago, the United States Congress passed the Indian Citizenship Act of 1924 (the “Snyder Act”), statutorily extending U.S. citizenship to Native peoples.¹

The path to U.S. citizenship for Native peoples is a complicated and troubling one. In the nearly 150 years between the United States’ founding and the passage of the Indian Citizenship Act, the United States persistently attacked the inherent sovereignty of Tribal nations and forcibly subjected them to increasing federal control.² As the fledgling nation sought to expand its territory, it used military force—sometimes supported by coerced treaties—to rid the land it sought to occupy of Native peoples in order free it for white settlement.³ To further the United States’ objectives, Congress and the executive branch carefully designed federal policies that would allow the federal government to encroach on the jurisdiction of Tribal nations and assert increasing authority over individual Tribal citizens.⁴

At the same time, Congress and federal courts repeatedly refused to recognize Native peoples as U.S. citizens and extend to them the rights that U.S. citizenship promises.⁵ Indeed, Native peoples did not become U.S. citizens even after the ratification of the Fourteenth Amendment, which guarantees U.S. citizenship to all persons born within and subject to the jurisdiction of the United States.⁶ Instead, throughout the nineteenth century, and into the early twentieth century, the federal government considered citizens of Tribal nations “subjects” of the federal government.⁷

When authorities finally extended U.S. citizenship to Native peoples, they granted it on a piecemeal basis and almost always wielded it as a weapon to undermine Tribal sovereignty and forcibly assimilate Native peoples into U.S. society.⁸ Indeed, before the passage of the Indian Citizenship Act, the most common way for a Native person to become a U.S. citizen was through allotment.⁹ This process, which forcibly turned land held in common by Tribal

1 Indian Citizenship Act of 1924, Pub. L. 68-175, 43 Stat. 253 (Jun. 2, 1924).

2 See *infra*, Chapter 1, Articles of Confederation (1777-1789)-Allotment and Assimilation Period (1887-1934).

3 See *infra*, Chapter 1, U.S. Constitution and Early Federal Law (1789-1820s)-Allotment and Assimilation Period (1887-1934).

4 See *id.*

5 See *infra*, Chapter 1, Talks of Citizenship-Allotment and Assimilation Period (1887-1934).

6 U.S. CONST. amend. XIV, § 1; *Elk v. Wilkins*, 112 U.S. 94 (1884) (holding that the Fourteenth Amendment’s guarantee of birthright citizenship to “all persons born or naturalized in the United States” does not extend to citizens of Tribal nations because they are not “subject to the jurisdiction” of the United States); see also *infra*, Chapter 1, Talks of Citizenship-Subjugation without Citizenship.

7 See *Relation of Indians to Citizenship*, 7 U.S. Op. Att’y Gen. 746, 749-56 (Jul. 5, 1856); *infra* Chapter 1, Subjugation without Citizenship.

8 See *infra*, Chapter 1, Allotment and Assimilation Period (1887-1934).

9 See *id.*

nations for the benefit of their citizens into private property, was a key component of the federal government’s strategy to deconstruct Tribal governments and turn Native peoples into Americans—whether they consented or not.¹⁰

Unlike the laws that preceded it, the Indian Citizenship Act of 1924 promised to convey protections of U.S citizenship to Native peoples, but crucially ensured “[t]hat the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property.”¹¹

Today, a century after the passage of the Indian Citizenship Act, the full guarantees of U.S. citizenship have yet to be fully realized. Indeed, Native peoples continue to face persistent and substantial barriers to the right to vote in federal, state, and local elections.¹² These barriers include:

- Having to travel extreme physical distances to access in-person voting locations and voter services, often on dirt or poorly maintained roads and without reliable transportation.¹³
- Lack of standard residential addresses on reservations and failures of states and localities to make voter registration and voting systems accessible to individuals using descriptive addresses.¹⁴
- Inadequate mail service by the United States Postal Service on reservations, including a lack of home mail delivery, slow mail times, and insufficient post office boxes.¹⁵
- Voter identification laws that disparately burden Native peoples, including laws that fail to expressly recognize Tribal ID as valid voter ID, as well as ones that require voters to present identification displaying a residential address or to obtain inaccessible underlying documentation.¹⁶
- Inadequate language assistance in Indigenous languages, including due to noncompliance with existing federal law.¹⁷
- Electoral systems, including at-large voting and district-based electoral maps, that dilute the voting strength of politically cohesive Native communities.¹⁸

10 *See id.*

11 Indian Citizenship Act of 1924, Pub. L. 68-175, 43 Stat. 253 (Jun. 2, 1924). Still, some Native nations and Tribal citizens opposed the unilateral conveyance of U.S. citizenship to Native peoples without their consent. *See infra*, Chapter 1, The Indian Citizenship Act of 1924.

12 *See infra*, Chapter 2, Present Barriers to Political Participation.

13 *See infra*, Chapter 2, Extreme Physical Distances to In-Person Voting and Voter Services.

14 *See infra*, Chapter 2, Lack of Standard Residential Addresses on Reservations.

15 *See infra*, Chapter 2, Inadequate USPS Services and Vote by Mail.

16 *See infra*, Chapter 2, Disparate Impact of Voter Identification Laws on Tribal Citizens.

17 *See infra*, Chapter 2, Inadequate Language Assistance.

18 *See infra*, Chapter 2, Vote Dilution and Racial Gerrymandering.

- Undercounts by the U.S. census and American Community Survey, which dilute voting strength when the population counts are used for redistricting and undermine federal laws that rely on the population counts for enforcement.¹⁹
- Outright hostility toward Native voters by state and local government officials, election workers, and fellow non-Native voters making it more burdensome for Native peoples to access the ballot and discouraging them from participating in federal, state, and local elections.²⁰
- A lack of trust of federal, state, and local governments due to persistent historic and contemporary discrimination, leading to depressed voter turnout.²¹
- Systemic barriers, which compound the direct barriers, including lower socioeconomic status, inadequate transportation, and poor physical infrastructure.²²

Chapter 1 of this report provides an overview of the history of the relationship between Tribal nations and the United States. Chapter 2 details present barriers to the right to vote for Native peoples. Chapter 3 provides an outlook for the future and describes legislation designed to remedy many of the voting barriers discussed in this report. This report concludes by calling on Congress to exercise its constitutional authority to enact meaningful legislation to protect the right to vote for Native people.

19 See *infra*, Chapter 2, U.S. Census; *id.*, Inadequate Language Assistance.

20 See *infra*, Chapter 2, Discrimination and Neglect: From Outright Hostility to Failure to Offer Robust Options for Participation by Tribal Members and Government-to-Government Consultation with Tribal Nations.

21 See *infra*, Chapter 2, Lack of Trust and Low Voter Education Leading to Depressed Engagement.

22 See *infra*, Chapter 2, Systemic Barriers Compounding the Direct Barriers.

CHAPTER 1

A History of the Relationship between Native Nations and the United States and the Path to U.S. Citizenship

This chapter provides a history of the relationship between Native peoples and the federal government and the ways in which that relationship influenced debates around U.S. citizenship. This history is important for its own sake, but it is also the foundation of the contemporary relationship between Tribal nations and the federal government. Many of the barriers to the ballot that Native peoples face today can be directly traced to the abuses inflicted by federal, state, and local government actors throughout history.

Colonial Period (1492-1777)

From the beginning of European contact, Native peoples of Turtle Island—a name used for North America that derives from various Indigenous creation stories about the origin of the continent²³—had complex and often formalized relationships with European settlers and colonial powers. Generally, however, during the Colonial Period (1492-1777), European nations properly understood Native nations as distinct sovereigns and recognized their inherent

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authority to govern their citizens and lands.²⁴ Native peoples and Europeans generally lived in “separate communities subject to different sovereigns.”²⁵ As distinct sovereigns, Native and European nations entered treaties, fought wars, maintained alliances, and engaged in trade with one another. Native peoples and Europeans were citizens of their respective nations.

23 See Urban Native Collective, *Turtle Island: A Testament to Sovereignty*, <https://urbannativecollective.org/turtle-island>.

24 See Matthew Fletcher, *Politics, Indian Law, and the Constitution*, 108 CAL. L. REV. 495, 505 (“Prior to the formation of the United States, the relationship was one between foreign nations.”).

25 FRANK POMMERSHEIM, *BROKEN LANDSCAPE: INDIANS, INDIAN TRIBES, AND THE CONSTITUTION* 17 (2012) [hereinafter “BROKEN LANDSCAPES”]. But see Gregory Ablavsky, “*With the Indian Tribes*: Race, Citizenship, and Original Constitutional Meanings,” 70 STAN. L. REV. 1025, 1056 (2018) [hereinafter Ablavsky, “*With the Indian Tribes*”]. At times Tribal nations sought protection from the King of England against other Tribal nations. *Id.* In these instances, “Indians were described as subjects too—by both British officials and Native peoples themselves.” *Id.* But Native peoples’ status as subjects of the King did not threaten their status as members of autonomous Native nations. *Id.*

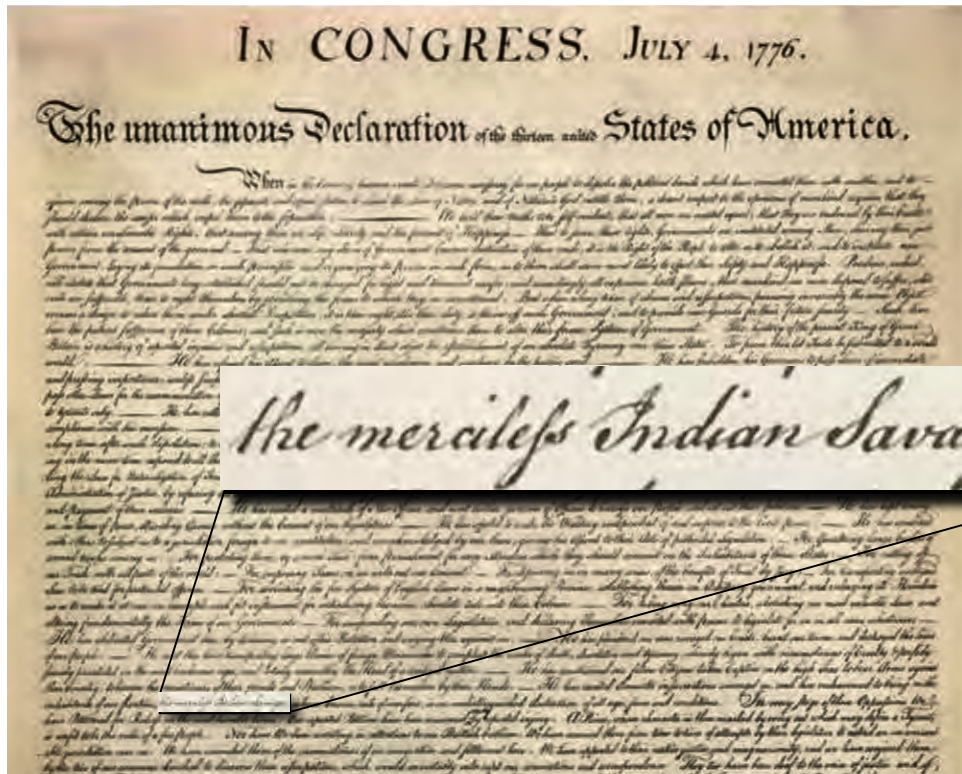


Figure 1. The Declaration of Independence referred to Native peoples as “merciless Indian Savages[.]”

After the Revolutionary War, little changed with respect to Native peoples’ citizenship. Despite the founding generation’s outright hostility toward Native peoples,²⁶ the nascent United States generally followed precedent for the nation-to-nation relations set during the Colonial Era.²⁷ In a 1789 letter to President George Washington, General Henry Knox, the first Secretary of War of the United States, advocated that “[t]he independent nations and tribes of indians [sic] ought to be considered as foreign nations, not as the subjects of any particular state[.]”²⁸ Similarly, Attorney General William Bradford, the second Attorney General of the United States, argued in a 1794 letter to Secretary of State James Madison that Tribal nations were not subject to federal jurisdiction on Tribal lands.²⁹ In line with these views, in the late 1700s and early 1800s, the United States negotiated distinct treaties with separate Tribal nations, regulated trade with Tribal nations similarly to the way in which it regulated trade with foreign nations, and

26 The Declaration of Independence, for example, refers to Native peoples as “the merciless Indian Savages, whose known rule of warfare, is an undistinguished destruction of all ages, sexes and conditions.” THE DECLARATION OF INDEPENDENCE, para. 2. See also James Duane’s Views on Indian Negotiations (1784), in 18 EARLY AMERICAN INDIAN DOCUMENTS: TREATIES AND LAWS, 1607-1789, at 299, 299-300 (Colin G. Calloway ed., 1994) (noting in reference to the Haudenosaunee Confederacy that he “would never suffer the word nations, or Six Nations . . . or any other Form which would revive or seem to confirm their former Ideas of Independence”).

27 See, e.g., POMMERSHEIM, *supra* note 25; Ablavsky, “With the Indian Tribes”, *supra* note 25 at 1055 (“Despite the new nation’s [the United States] repudiation of many British precedents, Anglo-Americans largely adopted prerevolutionary diplomatic practices, which regarded Native peoples not as an undifferentiated mass of “Indians” but as the polylingual, distinct polities they actually were.”).

28 Letter from Henry Knox to George Washington (July 7, 1789), in 3 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 134, 138 (Dorothy Twohig ed., 1989).

29 See Ablavsky, “With the Indian Tribes”, *supra* note 25 at 1038 (describing the letter).

appointed agents to act as ambassadors to Tribes, representing the interests of the United States.³⁰

Articles of Confederation (1777-1789)

The Articles of Confederation, the United States' first charter of government, solidified the structure of the nation-to-nation relationship, treating Native nations as separate—and potentially adversarial—sovereigns. Specifically, the Articles of Confederation (the “Articles”) prohibited states from waging war without the consent of the U.S. Congress “unless such State be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such State[.]”³¹ The Articles further gave the U.S. Congress “the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians, not members of any of the states; provided that the legislative right of any state, within its own limits, be not infringed or violated[.]”³²

Tribes would remain separate nations with whom the national government would regulate trade and other affairs and against whom the national government—and potentially the states—could wage war.

In other words, Tribes would remain separate nations with whom the national government would regulate trade and other affairs and against whom the national government—and potentially the states—could wage war.³³ Moreover, while the Articles primarily left decisions regarding citizenship and

30 Ablavsky, “*With the Indian Tribes*”, *supra* note 25 at 1055; *see also* Trade and Intercourse Act of June 23, 1790; Trade and Intercourse Act of March 1, 1793, Pub. L. No. 2-19, 1 Stat. 329; Philip J. Deloria, *American Master Narratives and the Problem of Indian Citizenship in the Gilded Age and Progressive Era*, 14 J. GILDED AGE & PROGRESSIVE ERA 3, 9 (2015) (“The political mode was nation to nation, and indeed, the very idea of Indian polities as sovereign nations (in the European sense) originates in these treaty relations. The United States made that clear through the Trade and Intercourse Act of 1790, which insisted that states and private entities could not negotiate treaties: those were legal and political acts that took place between nations.”).

31 Articles of Confederation of 1781, art. VI, para. 5.

32 Articles of Confederation of 1781, art. IX, para. 4.

33 While the Articles of Confederation formally gave the national government the sole authority to manage affairs with Tribal nations, relying on the Article IX’s prohibition on Congress “infring[ing] or violat[ing]” the legislative rights of the states, some states asserted their own perceived authority to entreat with Tribes. *See, e.g.*, W. Tanner Allread, *The Specter of Indian Removal: The Persistence of State Supremacy Arguments in Federal Indian Law*, 123 COLUM. L. REV. 1533, 1550 (2023) (“Congress and state officials constantly clashed over which government had the right to treat with Native nations, and these disputes were on full display at treaty negotiations with the Cherokee, Chickasaw, Choctaw, and Haudenosaunee in 1784 and 1785. In the South, North Carolina and Georgia openly flouted Congressional policy, pursuing coercive treaties with Native nations and illegally selling Native land.”); Gregory Ablavsky, *The Savage Constitution*, 63 DUKE L.J. 999, 1018-33 (2014).

naturalization to the states,³⁴ these provisions make clear that Native peoples were not a part of the national union.³⁵ Tribal nations were not members of the confederation of states, and individual Native people would not be extended citizenship in the new United States.³⁶

U.S. Constitution and Early Federal Law (1789-1820s)

In 1789, when the 13 inchoate states abandoned the Articles of Confederation in favor of the modern U.S. Constitution, the United States reconsidered its relationship with Native nations, choosing again to bar Native peoples from participation in the newly formed union. At its inception, the U.S. Constitution expressly mentioned Native peoples in two places. It first considered the political status of individual Native Americans, excluding Native peoples from the population for the purposes of apportionment of the U.S. House of Representatives. Article I, section 2, clause 3 of the U.S. Constitution provides:

Native Americans thus did not receive representation in the newly formed representative government.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and **excluding Indians not taxed**, three fifths of all other Persons.³⁷

Native Americans thus did not receive representation in the newly formed representative government.

34 See Torey Dolan, *Congress' Power to Affirm Indian Citizenship through Legislation Protecting Native American Voting Rights*, 59 *IDAHO L. REV.* 48, 52 (2023). In Federalist No. 42, James Madison cites the lack of uniformity in the citizenship and naturalization rules as one of the primary flaws of the Articles of Confederation:

The dissimilarity in the rules of naturalization has long been remarked as a fault in our system, and as laying a foundation for intricate and delicate questions.

...

The very improper power would still be retained by each State, of naturalizing aliens in every other State. In one State, residence for a short term confirms all the rights of citizenship: in another, qualifications of greater importance are required. An alien, therefore, legally incapacitated for certain rights in the latter, may, by previous residence only in the former, elude his incapacity; and thus the law of one State be preposterously rendered paramount to the law of another, within the jurisdiction of the other. We owe it to mere casualty, that very serious embarrassments on this subject have been hitherto escaped.

...

The new Constitution has accordingly, with great propriety, made provision against them, and all others proceeding from the defect of the Confederation on this head, by authorizing the general government to establish a uniform rule of naturalization throughout the United States.

THE FEDERALIST No. 42 (James Madison).

35 See Dolan, *supra* note 34 at 52; BROKEN LANDSCAPES, *supra* note 25 at 30.

36 BROKEN LANDSCAPES, *supra* note 25 at 30; Dolan, *supra* note 34 at 52 ("At the founding, Indians were in part defined by their status as noncitizens, owing their allegiance to another sovereign, mainly Indian polities... Being an Indian was contrary to being a citizen.")

37 U.S. CONST. art. I, § 2 (emphasis added). Notably, this is also the clause that counted Black citizens as only three fifths of one person. See, e.g., Juan F. Perea, *Race and Constitutional Law Casebooks: Recognizing the Proslavery Constitution*, 110 *MICH. L. REV.* 1123 (2012).

The Indian Commerce Clause recognized Tribal nations as sovereign entities, similar to states or foreign nations.

The second constitutional reference to Native peoples considers the regulation of commerce with Tribal nations, placing their economic status in relation to the federal government akin to foreign nations and the several states.³⁸ The Indian Commerce Clause, Article I, section 8, gives Congress the exclusive authority to “[t]o regulate Commerce with foreign Nations, and among the several States, and

with the Indian Tribes[.]”³⁹ This clause recognized Tribal nations as sovereign entities, similar to states or foreign nations, and “broadly authorized Congress to take the lead on legislative authority over all aspects of federal, state, and Tribal affairs.”⁴⁰

In addition to the U.S. Constitution’s express references to Tribal nations, the Treaty Power enshrined in Article II, section 2, which gives the President of the United States the “Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur[.]” permits the United States to enter into treaties with Tribal nations (as well as other foreign nations).⁴¹ Pursuant to this authority, the newly founded federal government continued the practice that had governed the relationship between Tribal nations and colonial powers, and later the Union under the Articles of Confederation, and began entering into treaties with Tribal nations immediately after the Constitution’s ratification. Between 1778 and the late 1800s, the federal government entered into hundreds of treaties with Tribal nations, affecting issues such as jurisdictional boundaries, peace and war, water rights, hunting and fishing, and even U.S. citizenship.⁴²

Professor Matthew Fletcher explains how the Treaty Power governed the United States’ understanding of Tribal nations and the relationships between the sovereigns:

The Treaty Power, and the Indian treaties that arose from the invocation of this power, further vested powers in the United States, as well as cemented tribal sovereignty in the new American constitutional system.⁴³

38 Subsequent caselaw has distinguished Congress’s authority to regulate interstate commerce from its authority to regulate commerce and affairs with Tribal nations, holding that the latter is far broader. In *Haaland v. Brackeen*, the Supreme Court recognized:

We have interpreted the Indian Commerce Clause to reach not only trade, but certain “Indian affairs” too. Notably, we have declined to treat the Indian Commerce Clause as interchangeable with the Interstate Commerce Clause. While under the Interstate Commerce Clause, States retain “some authority” over trade, we have explained that “virtually all authority over Indian commerce and Indian tribes” lies with the Federal Government.

U.S. 255, 273 (2023) (quoting *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 62 (1996)).

39 U.S. CONST. art. I, § 8.

40 See Matthew Fletcher, *States and Their American Indian Citizens*, 41 AM. INDIAN L. REV. 319, 323 (2017) [hereinafter, “Fletcher, *States and their American Indian Citizens*”].

41 U.S. CONST. art. II, § 2, cl. 2.

42 See Library of Congress, *American Indian Law: A Beginner’s Guide: Treaties*, <https://guides.loc.gov/american-indian-law/Treaties>.

43 See Fletcher, *States and Their American Indian Citizens*, *supra* note 40 at 323-24.

Thus, in the eyes of the newly formed U.S. government, Tribal nations would remain separate sovereigns with which the United States—and not the several states—would engage in trade and enter into treaties.⁴⁴

The U.S. Constitution and early federal law demonstrate the founders' understanding that Native peoples were not part of "We the People."⁴⁵ Rather, in the early years of the Republic, U.S. citizenship was only available to white Europeans and their descendants. The Naturalization Act of 1790, the first federal law providing a process for persons not born U.S. citizens to attain citizenship, exemplifies the early, race-based understanding of U.S. citizenship.⁴⁶ The law expressly restricted naturalization to "free white person[s] . . . of a good character[.]"⁴⁷ Native peoples, Black people (free or enslaved), Pacific Islanders, Asians, and indentured servants were ineligible to naturalize.

Tribal nations would remain separate sovereigns with which the United States—and not the several states—would engage in trade and enter into treaties.

Not incorporated into the United States, Native nations enjoyed a sovereign status as distinct political entities, akin to that of a foreign nation.⁴⁸ Likewise, Native peoples were not U.S. citizens, but instead citizens of separate sovereign nations who were often uninterested in becoming part of the United States polity.⁴⁹ During this period, the federal government operated primarily through a nation-to-nation relationship with Tribal nations.⁵⁰ Indeed, the fledgling United States even used its formalized relationships, including treaties, with Tribal nations to legitimize its standing on the world stage.

Native peoples were not part of "We the People."

Unfortunately, in the years that followed, the relationship between Native nations and the United States devolved rapidly and considerably. While the United States government formally interacted with Tribes through a nation-to-nation framework, some officials had already

44 See Fletcher, *Politics, Indian Law, and the Constitution*, *supra* note 24 at 505 (describing the relationship between the U.S. and Tribal nations at the U.S. founding as "a relationship between domestic nations when Indian tribes entered into treaties with the United States in which they each agreed to come under the protection of the federal government.").

45 U.S. CONST. pmbl.; see also Jean Schroedel and Ryan Hart, *Vote Dilution and Suppression in Indian Country*, 29 *STUD. AM. POL. DEV.* 1, 5 (2015) ("While these Constitutional provisions make it clear that the Founders did not consider most indigenous peoples to be under their political jurisdiction, the question . . . about under what circumstances they could become part of the polity is left unaddressed.").

46 Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103, 103 (repealed 1795).

47 *Id.*

48 See *Elk v. Wilkins*, 112 U.S. 94, 99 (1884) ("The Indian tribes, being within the territorial limits of the United States, were not, strictly speaking, foreign states; but they were alien nations, distinct political communities, with whom the United States might and habitually did deal, as they thought fit, either through treaties made by the president and senate, or through acts of congress in the ordinary forms of legislation. The members of those tribes owed immediate allegiance to their several tribes, and were not part of the people of the United States.").

49 See Ablavsky, "With the Indian Tribes", *supra* note 25 at 1061 ("[M]ost members of Native communities remained both nonwhite and noncitizens who had little interest in joining the U.S. polity."); Rebecca Tsosie, *The Politics of Inclusion: Indigenous Peoples and U.S. Citizenship*, 63 *UCLA L. REV.* 1692, 1707-08 (2016).

50 See, e.g., Allread, *supra* note 33 at 1551 ("In particular, the [Washington] Administration recognized Native nations as sovereigns, departing from states' claims that these nations were conquered peoples. President George Washington and Henry Knox, the Secretary of War, formulated a policy that focused on pursuing diplomatic relations—treaties—with the Native nations, protecting the nations' rights to land, and instituting 'civilization' programs that promoted the adoption of Euro-American forms of agriculture, education, and the market economy.").

begun to implement policies designed to “civilize” Native peoples in an ill-conceived effort to provide federal protection from state governments and white settlers, with the expectation that Native peoples would ultimately become assimilated into white American society.⁵¹ One of the primary early advocates of this strategy was Secretary of War Henry Knox. In a 1792 letter to Governor William Blount of the Southwest Territory, Knox argued:

The Indians have constantly had their jealousies and hatred excited by the attempts to obtain their lands—I hope in God that all such designs are suspended for a long period—We may therefore now speak to them with the confidence of men conscious of the fairest motives towards their happiness and interest in all respects—A little perseverance in such a system will teach the Indians to love and reverence the power which protects and cherishes them. The reproach which our country has sustained will be obliterated and the protection of the helpless ignorant Indians, while they demean themselves peaceably, will adorn the character of the United States.⁵²

As the U.S. population grew and its military strengthened, so did its desire for more land. As Professor Frank Pommersheim puts it, by the early 1800s, “[t]he opportunity for Indians and non-Indians to live parallel lives was rapidly evaporating into a historical mist that itself would soon be forgotten.”⁵³

Removal and Relocation Period (1820s-1887)

Stories of Removal

By the early-to-mid-nineteenth century, the federal government, led by President Andrew Jackson and with significant pressure from state officials, came to view Native nations and

51 See Ablavsky, “*With the Indian Tribes*”, *supra* note 25 at 1053 (“[F]ederal officials adopted a condescending paternalism that portrayed Indians as objects of pity rather than as equals.”); Allread, *supra* note 33 at 1551-52.

52 Letter from Henry Knox, U.S. Sec’y of War, to William Blount, Governor, Sw. Territory (Apr. 22, 1792); see also Letter from Henry Knox to George Washington, *supra* note 28. In the same 1789 letter that Knox advocated to President Washington for the treatment of Tribes as foreign nations, Knox opined:

How different would be the sensation of a philosophic mind to reflect that instead of exterminating a part of the human race by our modes of population that we had persevered through all difficulties and at last had imparted our Knowledge of cultivation, and the arts, to the Aborigines of the Country by which the source of future life and happiness had been preserved and extended. But it has been conceived to be impracticable to civilize the Indians of North America—This opinion is probably more convenient than Just.

That the civilization of the indians would be an operation of complicated difficulty. That it would require the highest knowledge of the human character, and a steady perseverance in a wise system for a series of years cannot be doubted—But to deny that under a course of favorable circumstances it could not be accomplished is to suppose the human character under the influence of such stubborn habits as to be incapable of melioration or change a supposition entirely contradicted by the progress of society from the barbarous ages to its present degree of perfection.

Id.

53 BROKEN LANDSCAPES, *supra* note 25 at 19.

Tribal citizens as the primary obstacle to the United States' territorial expansion.⁵⁴ The nation-to-nation relationship was no longer serving the interests of the federal government. Instead, to remedy what would come to be known as the “Indian problem,”⁵⁵ the federal government commenced a concerted effort to eradicate the eastern seaboard of Native peoples in order to free the land for white settlers.

The federal government viewed Native nations and Tribal citizens as the primary obstacle to the United States' territorial expansion.

From the 1820s through 1887—the “Removal and Relocation Period”—the federal government forced Tribal nations, militarily and through unfair and often coerced or misunderstood treaties, out of their ancestral homelands and onto reservations a fraction of the size. Thousands of Native peoples died during the Removal and Relocation Period as a direct result of federal policy, due to starvation, disease, and lack of shelter. The loss of life and homelands radically and permanently altered the relationship between Tribal nations and the federal government. This history continues to shape the contemporary relationships between Tribal nations and federal, state, and local governments.⁵⁶

In 1830, at the encouragement of President Andrew Jackson, Congress enacted the first federal law in furtherance of the removal policy, the Indian Removal Act of 1830. The act, which “provide[d] for an exchange of lands with the Indians residing in any of the states or territories, and for their removal west of the river Mississippi,”⁵⁷ created the legal authority for the federal government’s ethnic cleansing of the Native peoples living along the eastern seaboard whose homelands were highly sought after by white settlers. Once displaced, Native peoples would be forcibly relocated to lands west of the Mississippi River that would become known as “Indian Territory.” While the Indian Removal Act plainly subjected Native peoples to additional authority by the federal government, the law itself conveyed no additional rights to Native peoples nor did it grant them U.S. citizenship.⁵⁸

Once the law was enacted, Jackson and his administration quickly set about negotiating treaties with Tribal nations for their relocation to Indian Territory. Jackson’s disgust for the Native peoples his administration displaced is clear from the annual message he delivered to Congress on December 6, 1830:

54 See Office of the Historian, U.S. Dep’t of State, *Indian Treaties and the Removal Act of 1830*, <https://history.state.gov/milestones/1830-1860/indian-treaties> (“As the nineteenth century began, land-hungry Americans poured into the backcountry of the coastal South and began moving toward and into what would later become the states of Alabama and Mississippi. Since Indian tribes living there appeared to be the main obstacle to westward expansion, white settlers petitioned the federal government to remove them.”); Library of Congress, *Immigration and Relocation in U.S. History: Removing Native Americans from their Land*, <https://www.loc.gov/classroom-materials/immigration/native-american/removing-native-americans-from-their-land/>; Allread, *supra* note 33 at 1152.

55 See, e.g., *The Indian Problem*, NY TIMES (Mar. 2, 1879), <https://www.nytimes.com/1879/03/02/archives/the-indian-problem.html>; Ray A. Brown, *The Indian Problem and the Law*, 39 YALE L. J. 307 (1930).

56 See, e.g., Katie Smith and Courtney Parker, *Song about the Departure of Seminole Indians from Florida for Oklahoma* (1892), <https://www.loc.gov/item/flwpa000357/>.

57 Indian Removal Act of 1830, Pub L. 21-148, 4 Stat. 411 (1830).

58 See *id.*

It gives me pleasure to announce to Congress that the benevolent policy of the Government, steadily pursued for nearly thirty years, in relation to the removal of the Indians beyond the white settlements is approaching to a happy consummation.

...

The consequences of a speedy removal will be important to the United States, to individual States, and to the Indians themselves. . . **It will place a dense and civilized population in large tracts of country now occupied by a few savage hunters.** By opening the whole territory between Tennessee on the north and Louisiana on the south to the settlement of the whites it will incalculably strengthen the southwestern frontier and render the adjacent States strong enough to repel future invasions without remote aid. It will relieve the whole State of Mississippi and the western part of Alabama of Indian occupancy, and enable those States to advance rapidly in population, wealth, and power. It will separate the Indians from immediate contact with settlements of whites; free them from the power of the States; enable them to pursue happiness in their own way and under their own rude institutions; will retard the progress of decay, which is lessening their numbers, and perhaps cause them gradually, under the protection of the Government and through the influence of good counsels, to cast off their savage habits and become an interesting, civilized, and Christian community.

What good man would prefer a country covered with forests and ranged by a few thousand savages to our extensive Republic, studded with cities, towns, and prosperous farms embellished with all the improvements which art can devise or industry execute, occupied by more than 12,000,000 happy people, and filled with all the blessings of liberty, civilization and religion?⁵⁹

Despite a fierce resistance by many Tribal nations,⁶⁰ removal was remarkably successful in eradicating Native peoples from the southeastern United States. This is in part because when Native peoples did not leave their homelands willingly, Jackson sent troops to force their displacement, killing many along the way.⁶¹ For instance, when many Cherokee resisted their removal that was ordered in the 1836 Treaty of New Echota,⁶² Jackson sent Major General

59 Andrew Jackson, *Message to Congress on Indian Removal* (Dec. 6, 1830), <https://catalog.archives.gov/id/5682743>.

60 See Protest Petition from Cherokee Nation to the U.S. Government (1836), <https://americanindian.si.edu/nk360/removal-choerokee/resisting-removal.html>.

61 Library of Congress, *supra* note 54.

62 Treaty of New Echota, Dec. 29, 1835, 7 Stat. 478. The Treaty of New Echota also guaranteed the Cherokee Nation a delegate in the U.S. House of Representatives, an obligation Congress has never fulfilled. *Id.* Art. IX ("The Cherokee nation . . . should be offered to their people to improve their condition as well as to guard and secure in the most effectual manner the rights guaranteed to them in this treaty, and with a view to illustrate the liberal and enlarged policy of the Government of the United States towards the Indians in their removal beyond the territorial limits of the States, it is stipulated that they shall be entitled to a delegate in the House of Representatives of the United States whenever Congress shall make provision for the same."). In 2022, the House Committee on Rules held a hearing on the legal and procedural issues with sending a Cherokee delegate to Congress. See *Legal and Procedural Factors Related to Seating a Cherokee Nation Delegate in the U.S. House of Representatives*, Hearing Before Committee on Rules, 117th Cong. (Nov. 16, 2022).

Winfield Scott along with 3,000 federal troops and the authority to raise additional state militia and volunteer troops to eradicate Tribal members from Georgia, North Carolina, Tennessee, and Alabama. In 1838, the military “entered the [Cherokee] territory and forcibly relocated the Cherokees, some hunting, imprisoning, assaulting, and murdering Cherokees during the process.”⁶³ In the fall and winter of 1838 to 1839, on what is now known as the “Trail of Tears,” an estimated 16,000 Cherokee citizens who survived the onslaught were forced to walk more than 1,000 miles in harsh conditions to the lands that had been set aside for them in Indian Territory.⁶⁴ As many as 4,000 Cherokee people died along the way of starvation, exhaustion, and disease caused by the brutal conditions they were forced to travel in.⁶⁵

Other Tribal nations, including the Chickasaw, Choctaw, Creek, Seminoles, and Potawatomi, amongst others, were similarly forced out of their homelands through actions authorized under the Indian Removal Act. Tribal nations were also split up into bands as a result of the Indian Removal Act, with some families resisting removal and remaining in their homelands and others being relocated.⁶⁶ By the end of Jackson’s presidency, he had signed into law nearly 70 treaties under the Indian Removal Act, resulting in the forced relocation of nearly 50,000 people belonging to Tribal nations located along the East Coast.⁶⁷ The displaced Tribes lost an estimated 25 million acres of rich homelands that were quickly opened to white settlers.⁶⁸

In 1851, Congress further cemented the federal government’s forced relocation policy with the passage of the Indian Appropriations Act of 1851, which formalized the reservation system intended to further subdue Native nations.⁶⁹ The act appropriated funding for the federal government to relocate Tribes to small parcels of land, known as “reservations,” where they would, in theory, be left to self-govern with support from the federal government.⁷⁰ In practice, Native peoples were involuntarily confined to their reservations, which were often far from and almost always a fraction of the size of their ancestral homelands.⁷¹ On reservations, the traditional land and wildlife harvesting practices that Native peoples had used for sustenance and cultural and religious well-being since time immemorial were severely restricted.

By the 1860s, the forced removal policy had extended well into the West, with the U.S. Army and private militia acting on the Army’s orders perpetrating countless brutal attacks on Native

63 Office of the Historian, *supra* note 54.

64 *Id.*

65 *Id.*

66 Some Cherokee peoples remained hiding in North Carolina, evading removal. Likewise, some Potawatomi families successfully remained in the North while others were removed. This in part explains why some Tribes have numerous bands in distant parts of the United States.

67 Office of the Historian, *supra* note 54; National Archives, *President Andrew Jackson’s Message to Congress ‘On Indian Removal’ (1830)*, reviewed May 10, 2022, <https://www.archives.gov/milestone-documents/jacksons-message-to-congress-on-indian-removal>.

68 *Id.*

69 Indian Appropriations Act of 1851, Pub. L. 31-14 (1851).

70 *Id.*; see also Nat’l Inst. Health, Nat’l Lib. Med., *1851: Congress Creates Reservations to Manage Native Peoples*, <https://www.nlm.nih.gov/nativevoices/timeline/317.html#:~:text=The%20U.S.%20Congress%20passes%20twentiethe,and%20gather%20twentietheir%20traditional%20foods> (last accessed Apr. 21, 2024).

71 See Sarah K. Elliott, *How American Indian Reservations Came to Be*, PBS (May 25, 2015, updated Oct. 18, 2016), <https://www.pbs.org/wgbh/roadshow/stories/articles/2015/5/25/how-american-indian-reservations-came-be>.

peoples in an effort to drive them from their homelands. For example, in 1862, U.S. Army General James Carlton declared in orders to a militia leader, “All Indian men of that [Mescalero Apache] tribe are to be killed whenever and wherever you can find them.”⁷² In 1863, General Carlton shifted his focus to the Diné (Navajo), declaring “open season” on the Diné and setting off a campaign of destruction designed to open Diné bikéyah (Navajo lands) to white settlement and mining.⁷³ Carlton ordered Indian agent and U.S. army officer Christopher Houston (Kit) Carson to conduct a “scorched-earth” campaign to burn homes, break up families, slaughter livestock, destroy water sources, and starve Diné of their resources.⁷⁴ The next year, the U.S. Army drove more than 10,000 Diné, along with about 500 members of the Mescalero Apache Tribe, out of their homelands on a 450 mile walk to their forced internment on the Bosque Redondo Reservation.⁷⁵ As many as one in four Diné and Apache people were killed along the way, primarily due to starvation, dehydration, and exposure.⁷⁶ The survivors were interned on the Bosque Redondo Reservation in harsh conditions for the next five years, resulting in countless deaths as well as illness and starvation.⁷⁷

Nearby in Sand Creek, Colorado, in 1864, a Colorado volunteer army led by U.S. Army Colonel John Chivington opened fire on lodges of Cheyenne and Arapaho civilians, primarily women, children, and elderly persons, who had settled in an encampment in Sandy Creek at the direction and under the expected protection of the U.S. Military while awaiting relocation to Fort Lyon.⁷⁸ The soldiers brutally slaughtered more than 230 innocent civilians during the eight-hour massacre and afterward spent hours mutilating and committing other atrocities on the dead.⁷⁹

In the late 1800s, the federal government also waged a war against the Tribal nations of the Great Plains in an effort to take their lands after white settlers learned of gold deposits in the sacred Pahá Sápa (Black Hills). In the late 1860s and early 1870s, the federal government attempted to starve Native peoples of the Great Plains by encouraging mass killing of buffalo,

72 Frank D. Reeve, *The Federal Indian Policy in New Mexico, 1858-1880*, IV, 13:3 N.M. HIST. REV. 261 (1938).

73 DANIEL McCool, SUSAN M. OLSON & JENNIFER L. ROBINSON, NATIVE VOTE: AMERICAN INDIANS, THE VOTING RIGHTS ACT, AND THE RIGHT TO VOTE 92 (2007).

74 Nat'l Museum Am. Indian, *Native Knowledge 360: The Long Walk*, <https://americanindian.si.edu/nk360/navajo/long-walk/long-walk.cshtml> (last visited Apr. 21, 2024) [hereinafter “NMAI, *The Long Walk*”]; NAT'L PARK SERV., HUBBELL TRADING POST: THE LONG WALK, <http://nps.history.com/brochures/hutr/long-walk.pdf>.

75 See, e.g., Jennifer Davis, *Naaltsos Sání and the Long Walk Home*, LIBRARY OF CONGRESS (June 18, 2018), <https://blogs.loc.gov/law/2018/06/naaltsos-sn-and-the-long-walk-home/> (last visited Apr. 21, 2024); DINÉ OF THE EASTERN REGION OF THE NAVAJO RESERVATION, ORAL HISTORY STORIES OF THE LONG WALK: HWÉELDI BAA HANÉ (stories collected and recorded by Title VII Bilingual Staff Patty Chee, Milanda Yazzie, Judy Benally, Marie Etsitty, and Bessie C. Henderson; Lake Valley Navajo School pub., 1991) [hereinafter “ORAL HISTORIES OF THE LONG WALK”]; James Carleton to Thompson, September 19, 1863, in Navajo Roundup: Selected Correspondence of Kit Carson's Expedition against the Navajo, 1863-1865, ed. Lawrence C. Kelly (Boulder, CO: Pruett Publishing, 1970), 56-57; NMAI, *The Long Walk*, *supra* note 74.

76 Davis, *supra* note 75.

77 *Id.*

78 Nat'l Park Serv., *Sand Creek Massacre: History & Culture*, <https://www.nps.gov/sand/learn/historyculture/index.htm> (last visited Apr. 21, 2024); Nat'l Park Serv., *Sand Creek Massacre: The Life of Silas Soule*, <https://www.nps.gov/sand/learn/historyculture/the-life-of-silas-soule.htm> (last visited Apr. 21, 2024); Nat'l Park Serv., *Sand Creek Massacre: Joseph Cramer Biography*, <https://www.nps.gov/sand/learn/historyculture/joseph-cramer-biography.htm> (last visited Apr. 21, 2024).

79 See *id.*

their primary protein source.⁸⁰ In 1868, Major General Phillip Sheridan described the plan to General William Tecumseh Sherman: the U.S. Army would “make them poor by the destruction of their stock, and then settle them on the lands allotted to them.”⁸¹ General Grenville Mellen Dodge famously said of the plan, “Kill every buffalo you can! Every buffalo dead is an Indian gone[.]”⁸² That winter, General Sheridan led a campaign against the Cheyenne peoples. U.S. Army soldiers destroyed their food, shelter, and livestock with “overwhelming force.” In a dawn raid during a snowstorm in November 1868, Sheridan commanded U.S. Army Lieutenant Colonel George Armstrong Custer and his 700 troops to “destroy [Cheyenne] villages and ponies, to kill or hang all warriors, and to bring back all women and children.”⁸³ The U.S. Army killed at least 100 Cheyenne people during that attack.⁸⁴

In 1874, the federal government amplified its efforts to take control of the Black Hills when Custer led an expedition of 1,000 U.S. Army soldiers to confirm the presence of gold in the region.⁸⁵ Shortly after, white settlers, with the blessing of the U.S. government, flooded the lands of the Great Sioux Reservation that had been set aside in the Treaty of Fort Laramie⁸⁶ for the exclusive use of the Očhéthi Šakówiŋ (Sioux Nation).⁸⁷ By 1876, the federal government had begun a full scale assault on the Očhéthi Šakówiŋ peoples, attempting to force them onto much smaller reservations and treating those who refused as “hostiles.”⁸⁸ That August, Congress enacted legislation providing that the Očhéthi Šakówiŋ would receive no funding for subsistence unless they ceded the sacred Black Hills.⁸⁹ The following year, Congress abrogated the Treaty of Fort Laramie, formalizing the federal government’s cessation of the Black Hills, and establishing disconnected reservations a fraction of the size of the Great Sioux Reservation on which the nations of the Očhéthi Šakówiŋ would be confined.⁹⁰ In 1980, the United States Supreme Court recognized the federal government’s actions as a “taking of tribal property, property which had been set aside for the exclusive occupation of the Sioux by the Fort Laramie Treaty of 1868” that “implied an obligation on the part of the Government to make just compensation to the Sioux Nation[.]”⁹¹

80 See, e.g., J. Weston Phippen, ‘Kill Every Buffalo You Can! Every Buffalo Dead Is an Indian Gone’, ATLANTIC (May 13, 2016), <https://www.theatlantic.com/national/archive/2016/05/the-buffalo-killers/482349/>.

81 *Id.*

82 Native Philanthropy, *Investing in Native Communities: Annihilation of Buffalo by Military and Hunters*, <https://nativephilanthropy.candid.org/events/annihilation-of-buffalo-by-military-and-hunters/> (last accessed Apr. 21, 2024).

83 Gilbert King, *Where the Buffalo No Longer Roamed*, SMITHSONIAN MAGAZINE (Jul. 17, 2012), <https://www.smithsonianmag.com/history/where-the-buffalo-no-longer-roamed-3067904/>.

84 *Id.*

85 *United States v. Sioux Nation of Indians*, 448 U.S. 371, 377-79 (1980).

86 Fort Laramie Treaty of April 29, 1868, 15 Stat. 635.

87 *United States v. Sioux Nation of Indians*, 448 U.S. at 377-81; Nat’l Park Serv., *Theodore Roosevelt: The U.S. Army and the Sioux*, <https://www.nps.gov/thro/learn/historyculture/the-us-army-and-the-sioux-part-3.htm> (last visited Apr. 21, 2024). The Očhéthi Šakówiŋ is made up of the Lakota, Dakota, and Nakota peoples.

88 *United States v. Sioux Nation of Indians*, 448 U.S. at 379.

89 Act of Aug. 15, 1876, 19 Stat. 176, 192.

90 *United States v. Sioux Nation of Indians*, 448 U.S. at 381-83.

91 *United States v. Sioux Nation of Indians*, 448 U.S. at 424.

These stories of forced removal exemplify the federal government’s policy toward Native peoples in during the Removal and Relocation Period.

Talks of Citizenship

Throughout the nineteenth century, state citizenship for Native peoples and U.S. citizenship for Native peoples operated on separate tracks.⁹² Even when the Native peoples were largely excluded from U.S. citizenship, some states chose to convey *state* citizenship.⁹³ However, state citizenship was often highly entangled with race, or more specifically whiteness. To become a state citizen, a Native person generally needed to “prove that they were ‘civilized,’ or had ‘abandoned’ their tribal relations by declaring loyalty to the state or the United States, relinquishing their treaty rights, paying state taxes, adopting the habits and customs of white men, or some combination of all of these factors.”⁹⁴

The first formal grants of U.S. citizenship to Native peoples were made in treaties entered between Native nations and the United States.⁹⁵ While these treaties were the direct result of Tribal governments advocating for the civil rights of their citizens, they generally conveyed U.S. citizenship to Native peoples only in exchange for some concession of jurisdiction or lands by the Tribe to the federal government. For example, the 1848 Treaty with the Stockbridge Tribe linked U.S. citizenship with privatization of Tribal lands.⁹⁶ The 1855 Treaty with the Wyandot subjected the Tribe to the jurisdiction of the Kansas territory.⁹⁷ The 1862 Treaty with the Kickapoo was linked with railroad development through Tribal lands in the West.⁹⁸ Through these treaties, the federal government began its project of using U.S. citizenship as a tool of assimilating Native peoples into broader U.S. society, whether or not the individual citizen consented.

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By the late 1860s, the views of the Nation and the federal government on citizenship for nonwhite residents of the United States had begun to shift. During the post-Civil War Reconstruction Era, as Congress considered legislation and constitutional amendments to extend U.S. citizenship and the

92 See Fletcher, *States and their American Indian Citizens*, *supra* note 40 at 327.

93 See *id.*

94 *Id.* (citing *United States v. Elm*, 25 F. Cas. 1006, 1007 (N.D. N.Y. 1877) (“If defendant’s tribe continued to maintain its tribal integrity, and he continued to recognize his tribal relations, his status as a citizen would not be affected by the fourteenth amendment; but such is not his case. His tribe has ceased to maintain its tribal integrity, and he has abandoned his tribal relations, as will hereafter appear. . . .”); *Anderson v. Mathews*, 163 P. 902, 906 (Cal. 1917) (“Neither the members of the group nor, so far as known, the members of the tribe, were subject to, or owed allegiance to, any government, except that of the United States and the state of California, and, prior to 1848, that of Mexico.”); *Bd. of Comm’rs of Miami County v. Godfrey*, 60 N.E. 177, 180 (Ind. App. 1901) (“So long as he remained an Indian, he was under the control of the United States as an Indian. But he voluntarily does what the law says makes him a citizen. This change of his tribal condition into individual citizenship was primarily his own voluntary act. He cannot be both an Indian, properly so called, and a citizen.”)).

95 See Treaty with Stockbridge Tribe, art. IV, Stockbridge-U.S., Nov. 24, 1848, 9 Stat. 955; Treaty with the Wyandot, art. I, Wyandot-U.S., Jan. 31, 1855, 10 Stat. 1159; Treaty with the Kickapoo, Kickapoo-U.S. June 28, 1862; *Elk v. Wilkins*, 112 U.S. 94, 100 (1884).

96 Treaty with Stockbridge Tribe, art. IV, Stockbridge-U.S., Nov. 24, 1848, 9 Stat. 955.

97 Treaty with the Wyandot, art. I, Wyandot-U.S., Jan. 31, 1855, 10 Stat. 1159.

98 Treaty with the Kickapoo, Kickapoo-U.S. June 28, 1862.

right to vote to Black Americans, Congress was also forced to directly confront the question of whether to grant U.S. citizenship to Native Americans.

Congress first took up the issue of whether to convey U.S. citizenship to *all* Native peoples in the Civil Rights Act of 1866, which extended U.S. citizenship to “all persons born in the United States and not subject to any foreign power” except “Indians not taxed.”⁹⁹ While this restriction excluded most Native peoples, it would have extended U.S. citizenship to any Native peoples subject to state or federal taxation by, for example, privately owning land outside of a reservation.¹⁰⁰

Through these treaties, the federal government began its project of using U.S. citizenship as a tool of assimilating Native peoples into broader U.S. society, whether or not the individual citizen consented.

President Andrew Johnson quickly vetoed the bill because it would have extended U.S. citizenship to peoples he considered unfit, including some Native peoples.¹⁰¹ And while Congress successfully overrode the President’s veto and enacted the Civil Rights Act of 1866 into law, President Johnson’s veto message is exemplary of a widespread understanding at the time that U.S. citizenship should be reserved for white Americans. According to President Johnson:

This provision comprehends Indians subject to taxation [and other disfavored races, including Black Americans] . . . Every individual of these races born in the United States is by the bill made a citizen of the United States.

Johnson then questions whether it is “sound policy” for Congress to convey citizenship to those he considers unworthy because of their race and concludes:¹⁰²

[T]he policy of the Government from its origin to the present time seems to have been that persons who are strangers to and unfamiliar with our institutions and our laws should pass through a certain probation, at the end of which, before attaining the coveted prize, they must give evidence of their fitness to receive and to exercise the rights of citizens as contemplated by the Constitution of the United States.¹⁰³

Following some doubt by proponents of birthright citizenship that Congress had the authority to grant it through statute, an effort to extend birthright citizenship as a constitutional right commenced shortly after. In 1868, Congress and the states adopted the Fourteenth Amendment to the United States Constitution, which provides in relevant part:

99 Civil Rights Act of 1866.

100 *Id.*; Dolan *supra* note 34 at 34; Andrew Johnson, *Veto Message on Civil Rights Legislation to the United States Senate* (Mar. 27, 1866), <https://millercenter.org/the-presidency/presidential-speeches/march-27-1866-veto-message-civil-rights-legislation> [hereinafter “Johnson, *Veto Message*”]; Cong. Globe, 39th Congress, 1st Sess. 527 (1866).

101 See Johnson, *Veto Message*, *supra* note 100.

102 *Id.*

103 *Id.*

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.¹⁰⁴

Later, the Fourteenth Amendment excludes “Indians not taxed” from the population count for the purposes of apportioning seats in the U.S. House of Representatives.¹⁰⁵

While Congress likely intended to exclude Native peoples from the Fourteenth Amendment’s grant of birthright citizenship, there was little consensus about the clause’s true meaning at the time of its passage. Some members of the 39th and 40th congresses believed the requirement that a recipient of birthright citizenship must be “subject to the jurisdiction” of the United States would prevent citizenship from being extended to Native peoples,¹⁰⁶ while others sought to add additional restrictions to ensure Native Americans would not be granted citizenship through the amendment.¹⁰⁷ Opponents of birthright citizenship for Native peoples fell into several categories. Some supporters of Tribal nations believed that U.S. citizenship was contrary to Tribal sovereignty and would erode the nation-to-nation relationship with the federal government.¹⁰⁸ Others expressed the racist sentiment that Native peoples were “uncivilized” and therefore unworthy of U.S. citizenship.¹⁰⁹

Senator James Doolittle of Wisconsin, who sought to add language barring “Indians not taxed” from becoming U.S. citizens by birthright, exemplifies the latter camp:

I moved this amendment because it seems to me very clear that there is a large mass of the Indian population who are clearly subject to the jurisdiction of the United States who ought not to be included as citizens of the United States. All the Indians upon reservations within the several States are most clearly subject to our jurisdiction, both civil and military.

...

Go into the State of Kansas, and you find there are any number or reservation, Indians in all stages, from the wild Indian of the plains, who lives on nothing but the meat of the buffalo, to those Indians who are partially civilized and have partially adopted the habits of civilized life. So it is in other States. In my own State there are Chippewas, the remnants of the Winnebagoes, and the Pottawatomies [*sic*]. There are tribes in the State of Minnesota and other States of the Union. Are these persons to be regarded as citizens of the United States,

104 U.S. CONST. amend XIV, § 1.

105 U.S. CONST. amend. XIV, § 2.

106 CONG. GLOBE, 39th Cong., 1st Sess. 2893 (1866) (Senator Trumbull noting, “It cannot be said of any Indian who owes allegiance, partial allegiance if you please, to some other Government that he is ‘subject to the jurisdiction of the United States.’”).

107 CONG. GLOBE, 39th Cong., 1st Sess. 2892-93 (1866) (Senator Doolittle).

108 See Bethany Berger, *Birthright Citizenship on Trial: Elk v. Wilkins and United States v. Wong Kim Ark*, 37 CARDOZO L. REV. 1185 (2016).

109 See Dolan, *supra* note 34 at 34.

and by a constitutional amendment declared to be such, because they are born within the United States and subject to our jurisdiction?

Mr. President, the word “citizen,” if applied to them, would bring in all the Digger Indians of California. Perhaps they have mostly disappeared; the people of California, perhaps, have put them out of the way; but there are the Indians of Oregon and the Indians of the Territories. Take Colorado; there are more Indian citizens of Colorado than there are white citizens this moment if you admit it as a state. **And yet by a constitutional amendment you propose to declare the Utes, the Tabahuaches, and all those wild Indians to be citizens of the United States, the great Republic of the world, whose citizenship should be a title as proud as that of a king, and whose danger is that you may degrade that citizenship.**¹¹⁰

Some reporting suggests that this choice was made out of respect for the sovereignty of Native nations as separate from the United States,¹¹¹ but the actions of the federal government at the time tell a different story. At the same time Congress was blocking Native Americans from becoming U.S. citizens through the Fourteenth Amendment, the federal government, through its relocation and removal policies, was actively trying to strip away the ability of Native nations to exist as sovereigns and provide for their citizens. Indeed, even lawmakers advocating on behalf of Native nations often failed to fully appreciate their sovereignty.¹¹²

Elk v. Wilkins

In 1884, the United States Supreme Court directly confronted the issue of whether the Fourteenth Amendment’s promise of citizenship to “all persons born or naturalized in the United States” would extend to Native peoples.¹¹³ The Plaintiff John Elk, a member of the

110 CONG. GLOBE, 39th Cong., 1st Sess. 2892-93 (1866). The opponents to granting the right to vote to Native peoples under the Fifteenth Amendment were similarly vitriolic. During the debate in the U.S. House of Representatives, Congressman Charles A. Eldredge of Wisconsin expressed his staunch opposition to the Fifteenth Amendment because of its application to people of color:

If the . . . the wild Indian [and other disfavored races] are to become a ruling element in this country, then call your ministers from abroad, bring your missionaries home, tear down your school-houses, convert your churches into dens and brothels, wherein our young may receive fatal lessons to end in rotting bones, decaying and putrid flesh, poisoned blood, leprous bodies, and leprous souls.

CONG. GLOBE, 41st Cong., 2nd Sess. 756 (1870).

111 See Berger, *supra* note 108.

112 See 6 Cong. Rec. 551-53 (1887). In a debate about whether to extend U.S. citizenship to Native peoples in 1877, Senator Allen G. Thurman of Ohio, who purported to be advocating on behalf of Native peoples’ interests opined:

I do not say the time may not come [to extend U.S. citizenship to Native peoples], I do not say that it is not desirable that it should come, when what shall be left of the Indians shall be civilized enough to become citizens of the United States and be absorbed in the great body of our population. As to most of them I have no such hope. They stand a savage race, the most energetic and remorseless race that ever knew civilization; and history teaches us but one lesson in such a condition of things, and that is that the savage race becomes extinct. Extinction is just as certain in reference of this race as the revolution of this globe on its axis. It is only a question of time. But I grant that while they do exist we are bound by every principle of honor and philanthropy and common mercy to treat them with as much kindness as we possibly can; and I do think that above all things we are bound to keep our solemn treaties with them so long as they deserve to be kept.

Id.

113 Elk v. Wilkins, 112 U.S. 94 (1884).

Winnebago Tribe, born in Iowa and living in Nebraska,¹¹⁴ attempted to register to vote in Omaha, Nebraska.¹¹⁵ Despite being “in every way qualified, under the laws of the state of Nebraska and of the city of Omaha, to be registered as a voter, and to cast a vote at said election,” Mr. Elk’s voter registration and ballot were rejected because he was Native American and therefore, according to the registrar, not a U.S. citizen.¹¹⁶ Mr. Elk challenged the denial. He argued because he was a resident of Nebraska, who had severed his relations to his Tribe and “fully and completely surrendered himself to the jurisdiction of the United States,” he should be considered a U.S. citizen under the Fourteenth Amendment.¹¹⁷

The court held that Native people were not made U.S. citizens by the Fourteenth Amendment. It noted that the Constitution “contemplates two sources of citizenship: birth and naturalization.”¹¹⁸ Moreover, “[p]ersons not thus subject to the jurisdiction of the United States at the time of birth cannot become so afterwards, except by being naturalized, either individually, as by proceedings under the naturalization acts; or collectively, as by the force of a treaty by which a foreign territory is acquired.”¹¹⁹ Because Mr. Elk had not become naturalized by treaty or a naturalization statute passed by Congress, the only way he could be considered a citizen would be by birth. The Court reasoned that the Fourteenth Amendment only grants citizenship to individuals who at the time of their birth are “completely subject to [the United States’] political jurisdiction and owing them direct and immediate allegiance.”¹²⁰ The court further opined:

Indians born within the territorial limits of the United States, members of, and owing immediate allegiance to, one of the Indian tribes, (an alien though dependent power,) although in a geographical sense born in the United States, are no more ‘born in the United States and subject to the jurisdiction thereof,’ within the meaning of the first section of the fourteenth amendment than the children of subjects of any foreign government born within the domain of that government, or the children born within the United States, of ambassadors or other public ministers of foreign nations. This view is confirmed by the second section of the fourteenth amendment, which provides that ‘representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed.’¹²¹

Though the majority purports to engage in a textualist reading of the Fourteenth Amendment, the Court’s ruminations later in the opinion reveal the same racist undertones that drove many of the contemporaneous objections to U.S. citizenship for Native peoples. In the eyes of the

114 Bethany Berger, *Birtheright Citizenship on Trial: Elk v. Wilkins and United States v. Wong Kim Ark*, 37 *CARDOZO L. REV.* 1185, 1215 (2016).

115 *Elk*, 12 U.S. at 95-96.

116 *Id.*

117 *Elk*, 112 U.S. at 98.

118 *Id.* at 101.

119 *Id.* at 102.

120 *Id.* at 102.

121 *Id.*

majority, it was yet to be seen whether Native peoples had proven themselves worthy of U.S. citizenship:

The national legislation has tended more and more towards the education and civilization of the Indians, and fitting them to be citizens. **But the question whether any Indian tribes, or any members thereof, have become so far advanced in civilization that they should be let out of the state of pupilage, and admitted to the privileges and responsibilities of citizenship, is a question to be decided by the nation whose wards they are and whose citizens they seek to become,** and not by each Indian for himself.¹²²

In a convincing dissent, Justice John Marshall Harlan¹²³ demonstrates the majority's poor attention to the meaning of the Fourteenth Amendment. As Justice Harlan points out, "it was distinctly announced by the friends of the amendment that they intended to include in the grant of national citizenship Indians who were within the jurisdiction of the states, and subject to their laws, because such Indians would be completely under the jurisdiction of the United States."¹²⁴ Based on the legislative history of the Fourteenth Amendment as well as the rights guaranteed by the contemporaneous Civil Rights Act of 1866, Harlan reasons that this would include any Native peoples who no longer lived on Tribal lands or had connections with their Tribes, including those subject to taxes.¹²⁵

Justice Harlan also points out the decision's inconsistency with prior Supreme Court precedent. Just over 50 years before it decided *Elk*, the Supreme Court held in *Cherokee Nation v. Georgia* that Tribes should be considered "domestic dependent nations" subject (with or without their consent) to the authority and purported protection of the United States.¹²⁶ In Harlan's view, had the Court followed *Cherokee Nation v. Georgia*'s reasoning, it should have reached the conclusion that Mr. Elk was indeed subject to the jurisdiction of the United States because:

[T]he tribe of which the parents of plaintiff were members was not "a foreign state, in the sense of the constitution," but a domestic dependent people, "in a state of pupilage," and "so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connection with them, would be considered an invasion of our territory and an act of hostility."¹²⁷

122 *Id.* at 106-07.

123 Justice Harlan is perhaps better known for authoring the lone dissent in *Plessy v. Ferguson*, the case in which the Supreme Court announced the infamous rule permitting public establishments to require people of color to use separate accommodations from white customers. Justice Harlan forcefully argued, "in view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens . . . In respect of civil rights, all citizens are equal before the law." *Plessy v. Ferguson*, 163 U.S. 537, 559, (1896), *overruled* by *Brown v. Bd. of Ed. of Topeka, Shawnee Cnty., Kan.*, 347 U.S. 483 (1954) (Harlan, J. dissenting).

124 *Elk*, 112 U.S. at 117 (Harlan, J. dissenting).

125 *Id.* at 112-21 (Harlan, J. dissenting).

126 *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

127 *Elk*, 112 U.S. at 121-22 (Harlan, J. dissenting) (quoting *Cherokee Nation*, 30 U.S. at 17-18).

The Court’s hypocrisy meant that Native peoples would be subjected to the authority of the United States when it would allow the federal government to exercise greater authority over Tribal nations and within Indian Country. But Native Americans would not be considered “subject to the jurisdiction” of the United States when that jurisdiction came with the promise of civil rights.¹²⁸

To Justice Harlan, the deleterious effect of the decision was clear:

Born, therefore, in the territory, under the dominion and within the jurisdictional limits of the United States, plaintiff has acquired, as was his undoubted right, a residence in one of the states, with her consent, and is subject to taxation and to all other burdens imposed by her upon residents of every race. If he did not acquire national citizenship on abandoning his tribe and becoming, by residence in one of the states, subject to the complete jurisdiction of the United States, then the fourteenth amendment has wholly failed to accomplish, in respect of the Indian race, what, we think, was intended by it; and **there is still in this country a despised and rejected class of persons** with no nationality whatever, who, born in our territory, owing no allegiance to any foreign power, and subject, as residents of the states, to all the burdens of government, are

yet not members of any political community, nor entitled to any of the rights, privileges, or immunities of citizens of the United States.¹²⁹

In the time following *Elk v. Wilkins*, the federal government wielded U.S. citizenship as a weapon in its quest to dismantle Native nations, destroy Tribal sovereignty, and assimilate Tribal citizens into European culture.

The Court’s hypocrisy meant that Native peoples would be subjected to the authority of the United States when it would allow the federal government to exercise greater authority over Tribal nations and within Indian Country. But Native Americans would not be considered “subject to the jurisdiction” of the United States when that jurisdiction came with the promise of civil rights.

Subjugation without Citizenship

The Removal and Relocation Period marks a clear shift away from the federal government’s treatment of Tribal nations as separate sovereigns with the inherent authority to govern peoples and lands. Indeed, in 1849, the federal government formally transferred the Bureau of Indian Affairs from the Department of War to the Department of the Interior¹³⁰ and in 1871, the

128 See Dolan *supra* note 34 at 56 (“Part of what Harlan found compelling was that the Court was eager to find Indian Tribes under the jurisdiction of the United States in *Cherokee Nation v. Georgia*; there the pupillage and ward status subjected Cherokee Nation to the sovereignty of the United States, but the Court declined to find Indian people under the jurisdiction of the United States sufficient to confer citizenship under the Fourteenth Amendment.”).

129 *Elk*, 112 U.S. at 122-23 (Harlan, J. dissenting). Notably, “[d]espite the analysis of jurisdiction and wardship, Harlan still took the view that Indians must abandon Tribal relations, and Tribal jurisdiction in order to achieve citizenship under the Fourteenth Amendment[.]” Dolan, *supra* note 34 at 56.

130 U.S. Dep’t of Interior, Indian Affairs, *What’s the BIA’s History?* (Jan. 12, 2021), <https://www.bia.gov/faqs/what-bias-history>.

United States Congress expressed the view that it would no longer consider future agreements negotiated between Tribal nations and the executive branch as treaties.¹³¹ However, even as the U.S. government exercised increasing control over Tribal nations, Native peoples did not become a part of the United States' political community as U.S. citizens. Rather, the political status of Native peoples was "similar to that of a people in an occupied land under the control of a foreign power."¹³²

Prior to the adoption of the Fourteenth Amendment—and for decades thereafter for Native peoples—U.S. citizenship was intimately intertwined with race, or more specifically whiteness. Indeed, from the founding until the late 1800s, the only people eligible for U.S. citizenship were whites born to U.S. citizen parents or white European immigrants.¹³³ At the time, in the view of the federal government, Native peoples were "subjects" of the United States, considered unworthy of U.S. citizenship.¹³⁴

Prior to the adoption of the Fourteenth Amendment—and for decades thereafter for Native peoples—U.S. citizenship was intimately intertwined with race, or more specifically whiteness.

In an 1856 formal opinion from the U.S. Department of Justice, Attorney General Caleb Cushing used highly racialized and dehumanizing language to describe this relationship:

The fact, therefore, that Indians are born in the country does not make them citizens of the United States.

The simple truth is plain, that the Indians are the *subjects* of the United States, and therefore are not, in mere right of home-birth, citizens of the United States. The two conditions are incompatible. The moment it comes to be seen that the Indians are domestic subjects of this Government, that moment it is clear to the perception that they are not the sovereign constituent ingredients of the Government.

Native peoples were "*subjects*" of the United States, considered unworthy of U.S. citizenship.

...

In fine, no person of the *race* of Indians is a citizen of the United States by right of local birth. **It is an incapacity of his race.**

But may not that natural incapacity cease? May not the members of a family of Indians, by continual crossing of blood, cease to be Indians? Undoubtedly.

131 See Indian Appropriations Act of 1871, Pub. L. 41-120 (1871).

132 NATIVE VOTE *supra* note 73 at 2.

133 See, Dred Scott v. Sandford, 60 U.S. 393, 404 (1857), superseded (1868).

134 See, e.g., Relation of Indians to Citizenship, 7 U.S. Op. Att'y Gen. 746, 749-56 (Jul. 5, 1856); Right of Expatriation, 8 U.S. Op. Att'y Gen. 139, 142 (Oct. 31, 1856); Dred Scott v. Sandford, 60 U.S. 393, 404 (1857), superseded (1868).

...

[Instead of laying down a general rule] as to the stage at which, by admixture of blood, the political incapacity of Indians will cease; it seems to me to be more desirable to confine my conclusion to the very case presented, without going a step beyond it,—that is, to express the opinion that **a person of mixed blood, retaining tribal relations, cannot also enjoy at the same time the rights of a citizen of the United States.**

[It is] reasonable and just that a half-blood Indian, who still “belongs” to a tribe, and who claims and takes the benefits of such tribal membership, shall not be allowed at the same time to claim benefits which are only attached by law to **persons not Indians.**¹³⁵

The Attorney General reaffirmed that view in a subsequent opinion later in 1856, making it clear that in his view, Native peoples fell into an entirely separate class from white citizens and did not enjoy the same rights:

In truth, we must divide the people of the United States into two classes: those in the full enjoyment of all the rights of citizenship, and those deprived of some or all of those rights; and then we must distinguish between such of the inhabitants of the country as are citizens, and such as are subjects only, and whether capable or not of becoming citizens, yet not so at the present time. **I allude, in the latter case, to the Indians who, in some of the States, are the subjects of the State in which they exist, but who are in general subjects of the United States;** and to the Africans, or persons of African descent, who, being mostly of servile condition, are of course not citizens but subjects, in reference as well to the respective States in which they reside as to the United States.¹³⁶

The judiciary branch took a similar stance. In *Dred Scott v. Sanford*, the odious 1857 case holding that enslaved and formerly enslaved Black Americans were not U.S. citizens, the U.S. Supreme Court opined that Native peoples were subjects of the predominantly white federal government:

It is true that the course of events has brought the Indian tribes within the limits

135 Relation of Indians to Citizenship, 7 U.S. Op. Att’y Gen. 746, 749-56 (Jul. 5, 1856); see also *id.* at 747, 752, 755 (referring to individuals who are both white and Native as “half-breeds”); *id.* at 749 (noting that Native peoples cannot become citizens through the naturalization acts because they are not foreigners and because “those acts only apply to ‘white’ men”).

136 Right of Expatriation, 8 U.S. Op. Att’y Gen. 139, 142 (Oct. 31, 1856). Cushing famously believed that white people were superior to all other races, even going so far as to argue that people of color were incapable of self-government. In 1859, he told the Massachusetts Assembly:

Mr. Speaker, I,—you,—we,—gentlemen of the House of Representatives belong to that excellent white race, the consummate impersonation of intellect in man and loveliness in woman, whose power and whose privilege it is, wherever they may go, and wherever they may remain, to Christianize and to civilize, to command and to be obeyed, to conquer and to reign. I admit to an equality with me, sir, the *white man*,—my blood and race, whether he be the Saxon of England, or the Celtic of Ireland. But I do not admit as my equals either the red man of America, or the yellow man of Asia, or the black man of Africa.

CLAUDE M. FUESS, *THE LIFE OF CALEB CUSHING*, VOL. 11 230-31 (1923); see also Schroedel and Hart, *supra* note 45 at 6.

of the United States under subjection to the white race; and it has been found necessary, for their sake as well as our own, to regard them as in a state of pupilage, and to legislate to a certain extent over them and the territory they occupy.¹³⁷

But, at the same time, the Supreme Court suggested that in the same way Congress can pass legislation making foreign nationals U.S. citizens, it had the authority to make Native peoples U.S. citizens.¹³⁸

Allotment and Assimilation Period (1887-1934)

Allotment Policy

In the late 1800s, the federal government again shifted its stance toward Tribal nations. From 1887 through 1934, the Allotment and Assimilation Period, the federal government sought to handle the “Indian problem” by attempting to destroy Tribal sovereignty and forcibly assimilate individual Native peoples into Anglo-European culture and society. U.S. citizenship was central to this project.

The primary tool used by the federal government to further this goal in the late nineteenth and early twentieth centuries was allotment—yet another a weapon wielded by the federal government to dispossess Tribal nations of their homelands.¹³⁹ Allotment was authorized by a series of laws passed by Congress between 1887 and 1906, and carried out by the Secretary of the Interior on behalf of the President.¹⁴⁰ Under the allotment acts, reservation land, which had been promised to Tribal nations as a place where they could self-govern and had previously been held communally by Tribal governments, was divided without the consent of the Tribe into much smaller, privately owned parcels.¹⁴¹ The parcels were divided amongst Tribal member families to be held in trust by the federal government for a period of 25 years and to become private property after the trust period.¹⁴² Importantly, rather than dividing the land into a number of parcels equal to the number of Tribal member recipients, the allotment acts set the size of the parcels and it remained constant, no matter the size of the reservation

137 *Dred Scott v. Sandford*, 60 U.S. 393, 404 (1857), superseded (1868).

138 *Dred Scott*, 60 U.S. at 404 (“But they may, without doubt, like the subjects of any other foreign Government, be naturalized by the authority of Congress, and become citizens of a State, and of the United States; and if an individual should leave his nation or tribe, and take up his abode among the white population, he would be entitled to all the rights and privileges which would belong to an emigrant from any other foreign people.”).

139 See, e.g., Kaitlyn Schaeffer, Note, *The Need for Federal Legislation to Address Native Voter Suppression*, 43 N.Y.U. REV. OF L. & SOC. CHANGE 707, 710.

140 See, e.g., Indian General Allotment Act (Dawes Act), Pub. L. 49-105, 24 Stat. 388 (1887); Dawes Act Amendments of 1891, 26 Stat. 794 (1891); Curtis Act of 1898, Pub. L. 55-517, 30 Stat. 495 (1898); Burke Act, Pub. L. 59-149, 34 Stat. 182 (1906).

141 The size of the parcels was set by the act under which the land was allotted. For example, under the Dawes Act, each family that accepted an allotment would be entitled to either 160 acres of farmland or 320 acres of grazing land. National Park Service, *History and Culture in the Badlands: The Dawes Act*, <https://www.nps.gov/articles/000/dawes-act.htm#:~:text=If%20they%20accepted%20allotment,differences%20between%20two%20acts.> Importantly, while some of the land was promised as land for farming, it was often unsuitable for this purpose. *Id.*

142 Specifically, for a period of 25 years, the land would be owned by the federal government and set aside for the use and benefit of the individual or family (the “trustee”). After 25 years, the land would be owned by the former trustee in “fee simple”—the way in which most homeowners today own their land. See Dawes Act Amendments of 1891, 26 Stat. 794 (1891).

or number of Tribal members.¹⁴³ This meant that in most cases, once the parcels had been allotted to Tribal citizens, there were surplus parcels. Under the allotment acts, any land not allotted to Tribal members was taken from the Tribe and sold for next to nothing to white settlers for development as private land.¹⁴⁴ To further the goal of forcibly assimilating Native peoples, individual Tribal citizens who received private land through allotment were also made U.S. citizens by the acts.¹⁴⁵

The allotment acts were enacted with the express purpose of breaking up Tribal lands, weakening Tribal nations, and “assimilating” Native peoples into white U.S. society.¹⁴⁶ By forcibly turning communally-held land into private property, they caused the total area of Tribal lands—the land set aside for use by Tribal nations and over which Tribal governments can exercise their inherent authority to govern as sovereigns—throughout the United States

The allotment acts were enacted with the express purpose of breaking up Tribal lands, weakening Tribal nations, and “assimilating” Native peoples into white U.S. society.

to decrease from about 138 million acres to only 48 million acres.¹⁴⁷ Because the allotment acts transferred Tribal land to individual Tribal members, and later to non-Native white settlers, they had the effect of reducing Tribal jurisdiction, and consequently undermining Tribal sovereignty.¹⁴⁸

Allotment’s devastating effect on the sovereignty of Native nations and wellbeing of individual Native people was no accident. The Department of the Interior’s degrading citizenship “ritual” in which individual Tribal citizens who became U.S. citizens via allotment were made to participate demonstrates the policy’s assimilationist purpose.¹⁴⁹ In the early-1900s, Secretary of the Interior Franklin Lane and Major James McLaughlin, a traveling inspector for the Commissioner on Indian Affairs, created the so-called ritual to represent what they hoped would mark Tribal members’ transition away from their Native identity.¹⁵⁰

143 See, Indian General Allotment Act (Dawes Act), Pub. L. 49-105, 24 Stat. 388 (1887).

144 See *id.*

145 See *id.*

146 National Park Service, *History and Culture in the Badlands: The Dawes Act*, <https://www.nps.gov/articles/000/dawes-act.htm#:~:text=If%20they%20accepted%20the%20allotment,differences%20between%20the%20two%20acts.>

147 See Native Governance Center, *Legacies of Allotment and Indigenous Resistance*, <https://nativegov.org/resources/allotment-legacies-guide/>.

148 See *id.*; Roundtable on Voting Barriers and Election Administration for Citizens of the Confederated Salish and Kootenai Tribes (Apr. 30, 2024) (explaining the devastating effect of allotment on Tribal lands for the Confederated Salish and Kootenai Tribes and their members).

149 See State Historical Society of North Dakota, Lesson 1: Changing Landscapes, Topic 4: Reservation Boundaries, Section 9: Citizenship, <https://www.ndstudies.gov/gr8/content/unit-iii-waves-development-1861-1920/lesson-1-changing-landscapes/topic-4-reservation-boundaries/section-9-citizenship>; Nicole Montclair-Donaghy, *The New Assimilated American*, *Issuu*, https://issuu.com/humanitiesnd/docs/240994_ost_spg16_new-americans/s/11759842.

150 See State Historical Society of North Dakota, *supra* note 149; U.S. Dep’t of Interior, *Ritual on Admission of Indians to Full American Citizenship*, in State Historical Society of North Dakota, *McLaughlin Papers, MSS10313*, Roll 6, available at <https://www.ndstudies.gov/gr8/content/unit-iii-waves-development-1861-1920/lesson-1-changing-landscapes/topic-4-reservation-boundaries/section-9-citizenship>.

At the beginning of the ritual, the Tribal member becoming a U.S. citizen was asked to give their “white name” and then their “Indian name.”¹⁵¹ Men were then handed a bow and arrow and asked to shoot it.¹⁵² After shooting the arrow, the Department of the Interior representative would call then Native person by their “Indian name” and tell them:

You have shot your last arrow. That means you are no longer to live the life of an Indian. You are from this day forward to live the life of a white man. But you may keep that arrow, it will be to you a symbol of your noble race and of the pride you feel that you come from the first of all Americans.¹⁵³

The men were then called by their “white name,” asked to put their hands onto a plow, and told:

This act means that you have chosen to live the life of the white man—and the white man lives by work, From the earth we must get our living and the earth will not yield unless man pours upon it the sweat of his brow. Only by work do we gain a right to the land or to the enjoyment of life.¹⁵⁴

Similarly, women were called by their “white name” and asked to take a work bag and purse.¹⁵⁵ They were then told:

This means that you have chosen the life of the white woman—and the white woman loves her home. The family and the home are the foundation of our civilization. Upon the character and industry of the mother and home maker largely depends the future of our Nation.¹⁵⁶

In addition to receiving citizenship through allotment, some individual Native American women also received citizenship upon marrying non-Native men.¹⁵⁷ Other became U.S. citizens a result of a statute that allowed Native American WWI veterans who received an honorable discharge to apply for and be granted citizenship.¹⁵⁸

151 *Id.*

152 *See id.*

153 *Id.*

154 *Id.*

155 *Id.*

156 *Id.*

157 25 U.S.C. § 182 (2012). The Act, passed in 1888, provided:

Every Indian woman, member of any such tribe of Indians, who may be married after August 9, 1888, to any citizen of the United States, is hereby declared to become by such marriage a citizen of the United States, with all the rights, privileges, and immunities of any such citizen, being a married woman[.]

Id.

158 An Act Granting Citizenship to Certain Indians, ch. 19, 41 Stat. 350 (1919). The Act provided:

That every American Indian who served in the Military or Naval establishments of the United States during the war against the Imperial Government [World War I], and who has received or who shall hereafter receive an honorable discharge, if not now a citizen and if he so desires, shall, on proof of such discharge and after proper identification before a court of competent jurisdiction, and without other examination except as prescribed by said court, be granted full citizenship with all the privileges pertaining thereto, without in any manner impairing or otherwise affecting the property rights, individual or tribal, of any such Indian or his interest in tribal or other Indian property.

Id.

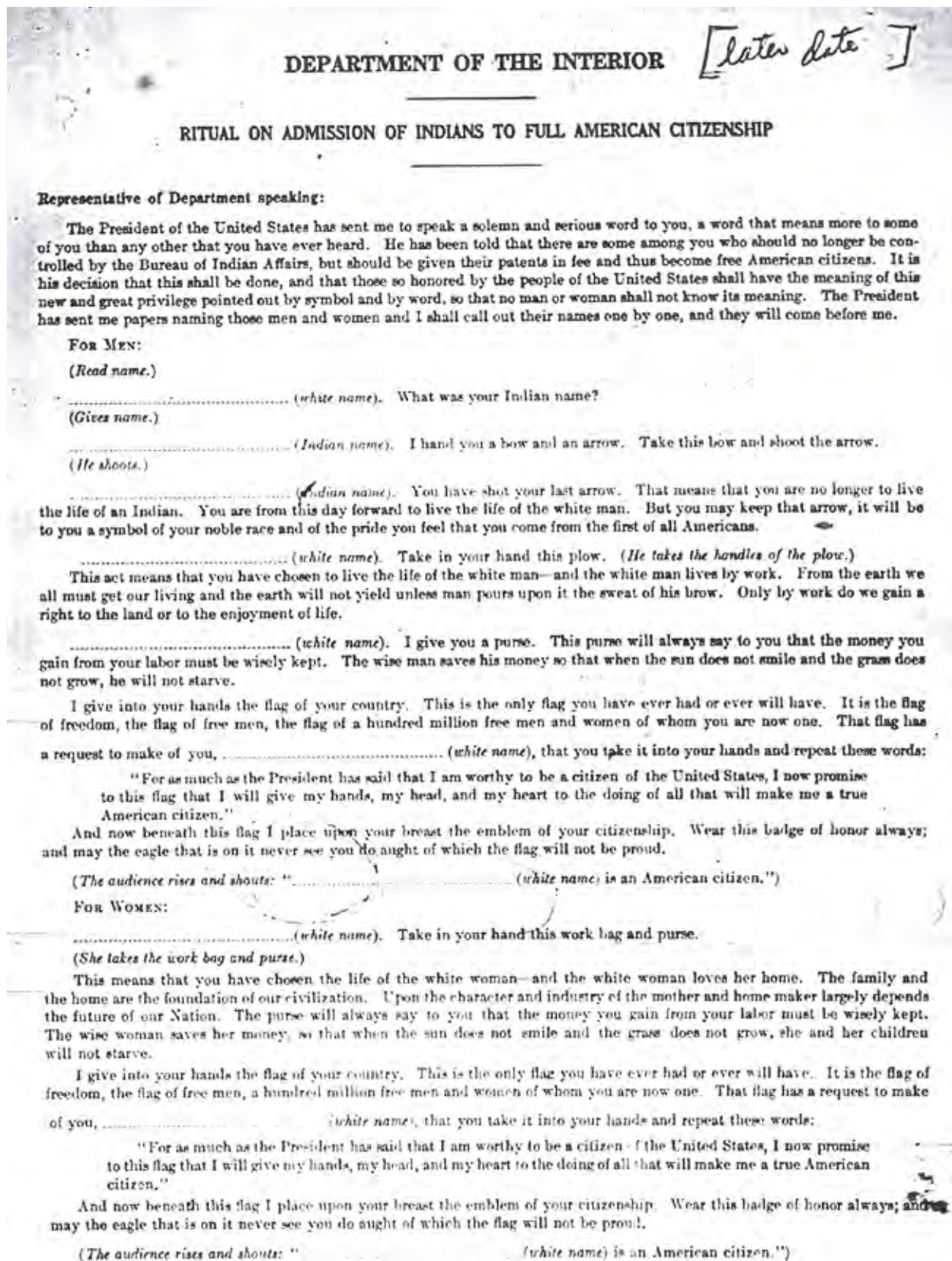


Figure 2. Early 20th century U.S. citizenship “ritual” for Native peoples receiving U.S. citizenship through allotment. Source: State Historical Society of North Dakota, McLaughlin Papers, MSS10313, Roll 6.

During this period, the federal government also ramped up its other assimilationist policies, including efforts to remove Native children from their homes—almost always without the free and informed consent of the child’s parents—and send them to federally approved boarding schools.¹⁵⁹ There, children were prohibited from speaking their Indigenous languages, engaging in cultural practices, and practicing Indigenous religions.¹⁶⁰ At these boarding schools, children were often physically or sexually abused and neglected.¹⁶¹ Some died and were buried at the schools without families being notified.¹⁶²

The Indian Citizenship Act of 1924

The project of U.S. citizenship for Native peoples culminated in 1924 with the Indian Citizenship Act, or the “Snyder Act”, known for its primary sponsor U.S. Representative Homer P. Snyder of New York.¹⁶³ The Indian Citizenship Act of 1924 statutorily granted citizenship and its privileges to Native Americans, though by the time U.S. citizenship was granted through federal statute, nearly two-thirds of Native peoples had already become U.S. citizens, either through treaty, allotment, or by another statute.¹⁶⁴

The act provides:

That all non-citizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States: *Provided*, That the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property.¹⁶⁵

Tribal nations and individual Native Americans had mixed views on becoming U.S. citizens.¹⁶⁶ Some Tribal nations and Native peoples rejected the idea that Tribal members should become U.S. citizens for fear that U.S. citizenship was incompatible with Tribal citizenship and governance and concerns that extending U.S. citizenship to Native peoples would undermine Tribal sovereignty. By contrast, other Native peoples were pushing for U.S. citizenship because they viewed it as a tool to secure civil rights and prevent forced

Tribal nations and individual Native Americans had mixed views on becoming U.S. citizens.

159 See NATIONAL NATIVE AMERICAN BOARDING SCHOOL HEALING COALITION, HEALING VOICES VOLUME 1: A PRIMER ON AMERICAN INDIAN AND ALASKA NATIVE BOARDING SCHOOLS IN THE U.S. (Jun. 2020), <https://boardingschoolhealing.org/wp-content/uploads/2021/09/NABS-Newsletter-2020-7-1-spreads.pdf>; BRYAN NEWLAND, BUREAU OF INDIAN AFFAIRS, FEDERAL INDIAN BOARDING SCHOOL INITIATIVE INVESTIGATIVE REPORT (May 2022), https://www.bia.gov/sites/default/files/dup/inline-files/bsi_investigative_report_may_2022_508.pdf.

160 See *supra* note 159 (listing sources).

161 See *id.*

162 See *id.*

163 Indian Citizenship Act of 1924, Pub. L. 68-175, 43 Stat. 253 (1924).

164 See *id.*; LAUGHLIN McDONALD, AMERICAN INDIANS AND THE FIGHT FOR EQUAL VOTING RIGHTS 18 (2010).

165 Indian Citizenship Act of 1924, Pub. L. 68-175, 43 Stat. 253 (1924).

166 See PHILIP J. DELORIA, *AMERICAN MASTER NARRATIVES and the Problem of Indian Citizenship in the Gilded Age and the Progressive Era*, 14 J. of the Gilded Age and Progressive Era 3, 5 (2015) (“The passage of the Indian Citizenship Act . . . would produce mixed reactions among individuals and tribes: some embraced American citizenship, others doubled down on the concept of tribal citizen, and some did both.”); McDONALD, *supra* note 164 at 18-19.

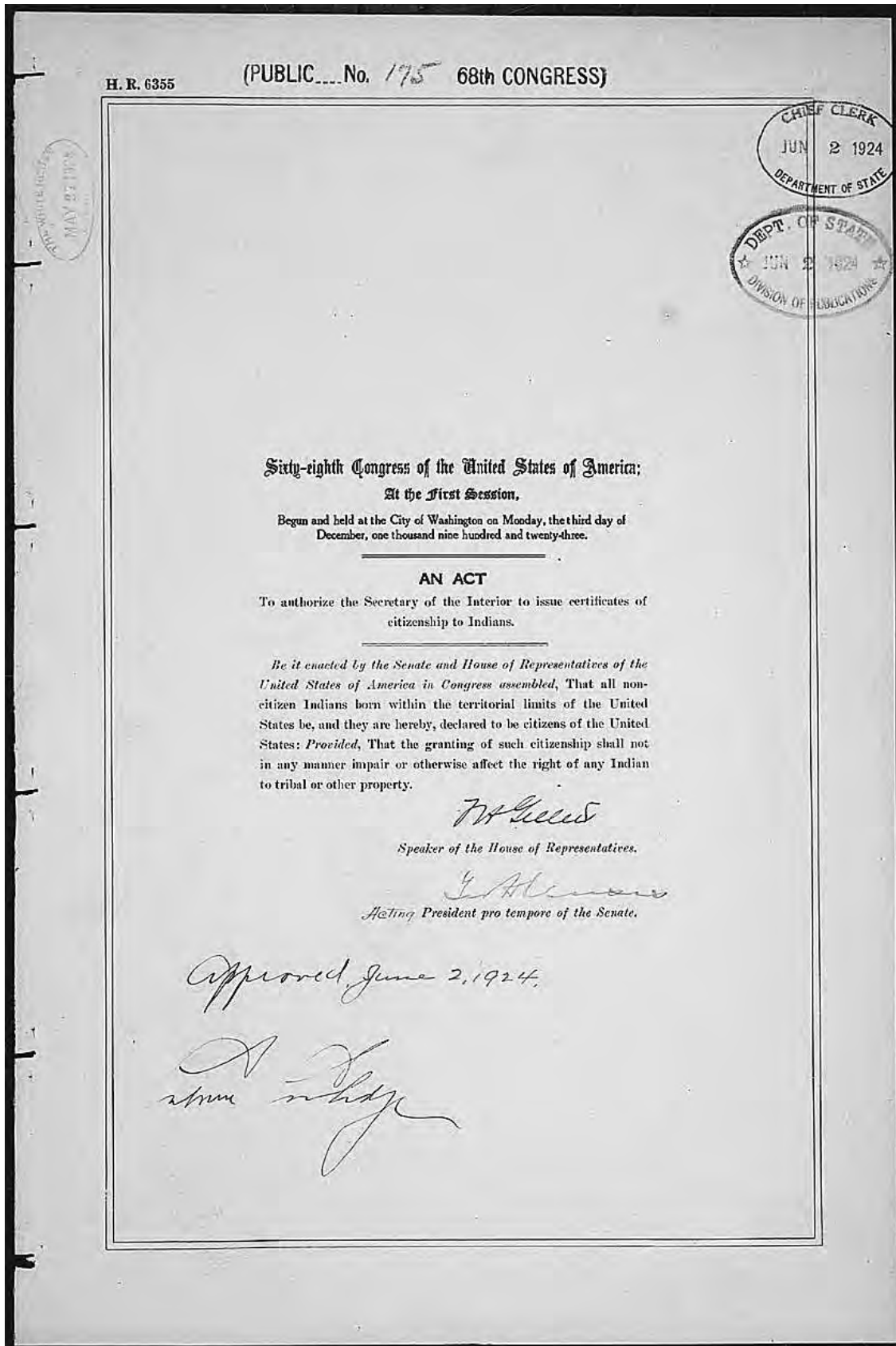


Figure 3. The Indian Citizenship Act of 1924. Source: National Archives.

removal and relocation.¹⁶⁷ Indeed, there was a tension between the use of U.S. citizenship as a tool of assimilation and the growing view that citizenship had become a necessary way to secure the most basic rights.¹⁶⁸

By and large, Tribal citizens advocating in support of U.S. citizenship for Native peoples in the late nineteenth and early twentieth centuries viewed it as primarily a creative way to secure better living conditions during the brutal Reservation and Relocation Era when the traditional tools had been inadequate.¹⁶⁹ As Phillip J. Deloria recounts, “[f]aced with individualizing practices of domination and land taking, Indian people contemplated citizenship as one strategy, not for joining the nation-state, but combating it. Insisting on the continuing legitimacy of negotiated treaties, Indian tribes struggled to maintain collective political rights.”¹⁷⁰ One of the best-known Native organizations advocating for U.S. citizenship for Native peoples in the early 1900s was the Society of American Indians (SAI). In the view of the SAI, “Personal freedom and personal advancement are dependent upon racial rights and racial advancement.”¹⁷¹ As one of the organization’s founders explained, “Give citizenship to all Indians with equal rights (to go into the courts) with any other race or people here in the United States.”¹⁷²

By contrast, some Tribal nations vehemently opposed the Indian Citizenship Act.¹⁷³ Immediately after the passage of the Snyder Act, leaders of the Onondaga Nation sent a letter to President Calvin Coolidge asking for citizenship not to be extended to their members.¹⁷⁴ To this day, the Onondaga Nation and Haudenosaunee continue to reject the authority of the federal government to unilaterally grant U.S. citizenship to Six Nations citizens.¹⁷⁵

167 See, e.g., Dolan, *supra* note 34 at 34; Ablavsky, “*With the Indian Tribes*”, *supra* note 25 at 1061-62, 1064 (noting that “Native peoples turned to the promises of citizenship to avoid removal”).

168 Dolan *supra* note 34 at 65 (“History demonstrates some of the complex sentiments and positions among American Indians at the time.”); Philip J. Deloria, *American Master Narratives and the Problems of Indian Citizenship in the Gilded Age and Progressive Era*, 14 J. GILDED AGE & PROGRESSIVE ERA 3 (2015); Cristina Stanciu, *Americanization on Native Terms: The Society of American Indians, Citizenship Debates, and Tropes of “Racial Difference”*, 6 NATIVE AM. & INDIGENOUS STUD. 111 (2019).

169 Deloria *supra* note 168 at 10 (“Citizenship, for many members of the [Society of American Indians] (and many of the 4,000 people receiving invitations) seemed to hold out the possibility that it might serve as kind of a legal and political tool.”); *id.* (“[C]itizenship, at this particular moment, was not an enterprise designed to bring [Native peoples] into the structures of the nation-state. Rather, it was a tool to strengthen their claim against the nation and its agents, to preserve individual land in order to remain collectively outside the structures of American society.”).

170 Deloria *supra* note 168 at 10; see also *id.* at 9-10 (“In 1871, Congress ended the practice of treaty making with Indian people (though they continued to negotiate “agreements”). But the nation-to-nation relationship had been thoroughly understood (and embraced) by most Indian groups, and it left behind a powerful legal residue: one that could draw upon Article Six of the U.S. Constitution (concerning the superiority of international treaties) to make a claim to collective rights—not simply to reserved land but also to hunting and fishing rights or to education or to annuities and other kinds of resources. Indian people have based a century of political activism on this principle. In the moment of allotment, however—when individual landholding was being threatened in ways that involved all levels of American government—Indians also looked for a second kind of legal base, a way to make similar kinds of claims to rights at the level of the individual rather than the collective.”).

171 Society of American Indians, Report of the Executive Council on the Proceedings of the First Annual Conference of the Society of American Indians 17 (1912). Deloria, *supra* note 168 at 2.

172 Letter from Carlos Montezuma to Jane Gordon, quoted in Cristina Stanciu, *Americanization on Native Terms: The Society of American Indians, Citizenship Debates, and Tropes of “Racial Difference”*, 6:1 NATIVE AM. & INDIGENOUS STUDIES 111, 140, n. 11 (2019).

173 See McDONALD, *supra* note 164 at 18-19.

174 See Letter from Onondaga Nation Tribal Leaders to U.S. President Calvin Coolidge (Dec. 30, 1924), <https://www.onondagation.org/news/2018/the-citizenship-act-of-1924/>.

175 See *id.*

Yet, while all Native Americans have been formally entitled to U.S. citizenship since 1924, individual Native Americans still do not equally enjoy its full privileges because of states' refusals to respect their rights that U.S. citizenship should guarantee.

Citizenship Without Its Privileges

Many Americans' reaction to Native peoples becoming U.S. citizens was far from positive and as a result, U.S. citizenship for Native Americans unfortunately did not guarantee its privileges. Indeed, despite the Fifteenth Amendment's promise that the right to vote in U.S. elections would extend all voting age U.S. citizens—which now included Native peoples—regardless of race, equal access to the franchise was far from realized for quite some time after U.S. citizenship was officially granted. Instead, states and localities employed a variety of strategies to prevent Native peoples from enjoying equal political participation in federal, state, and local elections.¹⁷⁶

Edith Ranco, a Penobscot citizen living on Penobscot Tribal lands near Old Town, Maine, describes the opposition to Native peoples' participation in the nontribal political process¹⁷⁷ in her community:

U.S. citizenship for Native Americans unfortunately did not guarantee its privileges.

[T]he Indians aren't allowed to have a voice in state affairs because they aren't voters. All they have to do out there is to look out for the interests of the Indians. Just why the Indians shouldn't vote is something I can't understand. One of the Indians went over to Old Town once to see some official in the city hall about voting. I don't know just what position that official had over there, but he said to the Indian, **"We don't want you people over here. You have your own elections over on the island, and if you want to vote, go over there."**¹⁷⁸

In 1938, perhaps recognizing the conflict between Native peoples' status as U.S. citizens and the widespread prohibitions on their ability to vote in federal, state, and local elections, the Solicitor of the Department of the Interior issued a formal opinion, concluding that the U.S. Constitution requires states to permit Native peoples to vote where non-Natives would be allowed to vote under the same circumstances.¹⁷⁹ Specifically, the Solicitor concluded:

[T]he Fifteenth Amendment clearly prohibits any denial of the right to vote to

176 See McCool, et al., *NATIVE VOTE*, *supra* note 73.

177 The "nontribal political process" or "nontribal elections" refer to elections for federal, state, and local offices.

178 Robert Grady, *The Life of Henry Mitchell*, in U.S. WORK PROJECTS ADMINISTRATION, FEDERAL WRITERS' PROJECT, FOLKLORE PROJECT, LIFE HISTORIES, 1936-39 (1938-39). This interview was conducted as a part of the Federal Writers' Project, an initiative of the New Deal Works Progress Administration ("WPA," later known as the "Work Projects Administration."). *Id.* Edith Ranco is referenced as "Mrs. Henry Mitchell" in the cited transcript. Ms. Ranco's name was obtained from the Department of Cultural and Historic Preservation of the Penobscot Nation. See also Siobhan Senier, *Employing the Local: A Penobscot Modern in the Federal Writers' Project*, 75 *NEW ENGLAND QUARTERLY* 355 (Sep. 2002) (noting that Mr. Mitchell is a Penobscot citizen).

179 See Op. Solic. Interior Dep't, M-29596 (Jan. 26, 1938).

Indians under circumstances in which non-Indians would be permitted to vote. The laws of Idaho, New Mexico and Washington which would exclude Indians not taxed from voting, in effect exclude citizens of one race from voting on grounds which are not applied to citizens of other races. For this reason, such laws are unconstitutional under the Fifteenth Amendment.¹⁸⁰

Even so, states and localities employed a variety of tactics to prevent Native peoples from political participation well into the twentieth century.

Most brazenly, at least five states expressly barred Native Americans from registering to vote or casting a ballot, while others argued Native peoples could not meet certain voter qualifications. Idaho,¹⁸¹ Maine,¹⁸² Mississippi,¹⁸³ New Mexico,¹⁸⁴ and Washington¹⁸⁵ explicitly denied the right to vote to “Indians not taxed” well after the passage of the Snyder Act.¹⁸⁶ Importantly, the requirement that one pay taxes in order to be an eligible voter only applied to Native peoples—white residents who did not pay taxes were permitted to cast a ballot without the same restriction.¹⁸⁷

Idaho, Maine, Mississippi, New Mexico, and Washington explicitly denied the right to vote to “Indians not taxed” well after the passage of the Snyder Act.

New Mexico’s constitutional provision prohibiting “Indians not taxed” barred Native peoples from casting a ballot in the state’s elections until a 1948 decision by the Supreme Court of New Mexico.¹⁸⁸ The case arose when Miguel Trujillo, a member of the Isleta Pueblo, Marine Corps veteran who served in World War II, and schoolteacher, attempted to register to vote.¹⁸⁹

180 *Id.*

181 See IDAHO CONST. art. VI, § 3 (1890, amended 1950).

182 MCCOOL, ET AL., NATIVE VOTE, *supra* note 73 at 12 (citing a 1940 Council of State Governments finding that Maine barred “Indians not taxed” from voting in state elections).

183 See MISS. CONST. art. 12, § 241 (1890, amended 1968).

184 See N.M. CONST. art. XII, § 1.

185 See WASH. CONST. art. VI, § 1.

186 See Jeanette Wolfley, *Jim Crow Indian Style: The Disenfranchisement of Native Americans*, 16 AM. INDIAN L. REV. 167, 185 (1991) (noting that these five states barred “Indians not taxed” from voting until at least 1940); *Securing Indian Voting Rights*, 129 HARV. L. REV. 1731, 1734 (2016); McDONALD, *supra* note 164 at 19; MCCOOL, ET AL., NATIVE VOTE, *supra* note 73 at 12. Minnesota also denied the franchise to “Indians not taxed” at least until the passage of the Indian Citizenship Act. See *Opsahl v. Johnson*, 138 Minn. 42, 48-49, 163 N.W. 988, 990 (1917). The Minnesota Supreme Court opined:

The exercise of the elective franchise is a participation in government and in the making of the laws to which all the inhabitants of a nation, state, or municipality must yield obedience. It cannot for a moment be considered that the framers of the Constitution intended to grant the right of suffrage to person who were under no obligation to obey the laws enacted as a result of such grant. Or, in other words, that those who do not come within the operation of the laws of the state, nevertheless shall have the power to make and impose laws upon others. The idea is repugnant to our form of government. No one should participate in the making of laws which he need not obey. As truly said by contestant: ‘The tribal Indian contributes nothing to the state. His property is not subject to taxation, or to the process of its courts. He bears none of the burdens of civilization, and performs none of the duties of the citizens.’

Id. It is unclear when, after the passage of the Indian Citizenship Act, the state extended the franchise to Native peoples.

187 See Wolfley, *supra* note 185 at 185.

188 See *id.* at 185-86.

189 See MCCOOL, ET AL., NATIVE VOTE, *supra* note 73 at 13; Sarah Rounsville, *Trujillo v. Garley: The Struggle for Native American Voting Rights*, INTERMOUNTAIN HISTORIES (updated May 16, 2023), <https://www.intermountainhistories.org/items/show/251>.

The county registrar denied Trujillo’s registration because he was an “Indian not taxed” and therefore ineligible under the state constitution.¹⁹⁰ The New Mexico Supreme Court concluded:

[The constitution of New Mexico] says that “Indians not taxed” may not vote, although they possess every other qualification. We are unable to escape the conclusion that, under the Fourteenth and Fifteenth Amendments, that constitutes a discrimination on the ground of race. Any other citizen, regardless of race, in the State of New Mexico who has not paid one cent of tax of any kind or character, if he possesses the other qualification, may vote.¹⁹¹

Other states used residency as a tool for disenfranchisement.¹⁹² Their argument was essentially that because of states’ limited (and historically nonexistent) jurisdiction within Indian Country, despite being U.S. citizens, Tribal citizens living on reservations were not citizens of the state in which the reservation was located.¹⁹³ Consequently, Tribal members living within reservation boundaries lacked the requisite residency status to qualify to vote under state law.¹⁹⁴

Tribal members living within reservation boundaries lacked the requisite residency status to qualify to vote under state law.

A Utah statute expressly defined individuals living on reservations as nonresidents for the purpose of voter qualification.¹⁹⁵ In 1956, Preston Allen, a Ute Tribal member living on the Uintah Reservation and U.S. Army veteran who served in World War II, attempted to vote in Duchesne County and the county clerk turned him away.¹⁹⁶ The clerk cited the Utah statute making Allen ineligible to vote because he was a Tribal member who lived on Tribal

lands.¹⁹⁷ Allen challenged the statute and the state Supreme Court upheld its constitutionality, concluding “it is obvious that reservation Indians, as a class, occupy a distinctly different status in their relationship to government than do other citizens.”¹⁹⁸ Though the Utah Supreme Court ostensibly based its decision on Tribal sovereignty and the lack of state jurisdiction in

190 See McCool, et al., *supra* note 73 at 13. Notably this provision was applied to Trujillo even though he did pay *some* taxes, including federal income tax, gasoline tax, and sales tax, just not property taxes. *Id.*

191 *Id.* (quoting the unpublished opinion in *Trujillo v. Garley* at 6-7).

192 See *id.* at 11, 95-97.

193 See *id.* at 96.

194 See McCool, et al., *NATIVE VOTE*, *supra* note 73 at 12, 95-97. Utah prohibited Native Americans living on reservations from voting in the state’s elections until the mid-twentieth century. *Id.* This requirement survived a legal challenge in Utah state court by Tribal members living within reservations who wished to vote in Utah elections and went through several iterations of attorney general interpretations—including one that temporarily allowed Native peoples to vote in state elections before reversing course—before the legislature ultimately repealed the law in 1957. *Id.* at 95-97.

195 See *Allen v. Merrell*, 6 Utah 2d 32, 34 (1956), vacated, 353 U.S. 932 (1957) (quoting Par. 11, Sec. 20-2-14, U.C.A. 1953, which provided “Any person living upon any Indian or military reservation shall not be deemed a resident of Utah within the meaning of this chapter, unless such person had acquired a residence in some county in Utah prior to taking up his residence upon such Indian or military reservation.”).

196 See Willard Hughes Rollings, *Citizenship and Suffrage: The Native American Struggle for Civil Rights in the American West, 1830-1965*, 5 NEV. L. J. 126, 138 (2004).

197 See *id.*

198 See *Allen v. Merrell*, 6 Utah at 39-40.

Indian Country, an underlying sentiment that Native peoples were somehow less deserving of participation in state government than white citizens shone through.¹⁹⁹ The court reasoned:

It is not subject to dispute that Indians living on reservations are extremely limited in their contact with state government and its units and, for this reason also, have much less interest in or concern with it than do other citizens. It is a matter of common knowledge that all except a minimal percentage of reservations Indians live, not in communities, but in individual dwellings or hogans remotely isolated from others and from contact with the outside world. Though such a state is certainly not without its favorable aspects, they have practically no access to newspapers, telephones, radio or television; a very high percentage of them are illiterate; and they do not speak English but in their dealings with others and even in their tribal courts, use only their native Indian languages. Under such conditions it is but natural that they are neither acquainted with the processes of government, nor conversant with activities of the outside world generally. Inasmuch as most governmental services are furnished them, it is patent that they would not have much concern with services and regulations pertaining to sanitation, business, licensing, school facilities, law enforcement and other functions carried on by the county and state governments. This is more especially so because they are not obliged to pay most of the taxes which support such governmental functions.

It is thus plain to be seen that in a county where the Indian population would amount to a substantial proportion of the citizenry, or may even outnumber the other inhabitants, allowing them to vote might place substantial control of the county government and the expenditures of its funds in a group of citizens who, as a class, had an extremely limited interest in its functions and very little responsibility in providing the financial support thereof.²⁰⁰

The issue of whether Native peoples living on Tribal lands met the state's voting residency requirement also arose at least twice in New Mexico. In *Trujillo v. Garley*, the state unsuccessfully argued that the clause of the New Mexico Constitution barring "Indians not taxed" from voting in state elections did not violate the 15th Amendment in part because Native peoples on reservations were not residents of the state.²⁰¹ Later in 1962—14 years after Native peoples gained the right to vote in New Mexico—a losing candidate for the state's lieutenant governor challenged the outcome of the election he lost, arguing that the Navajo citizens who voted for his opponent did not meet the residency requirement for voter eligibility.²⁰²

199 See *id.* ("This conclusion is based upon their remaining tribal sovereignty; the influence and control, actual and potential, of the Federal Government over them; the fact that they enjoy the benefits of governmental services without bearing commensurate tax burden, and are not as conversant with nor as interested in government as other citizens.").

200 *Id.* at 38-39.

201 See McCool, ET AL., NATIVE VOTE, *supra* note 73 at 12.

202 See *Montoya v. Bolack*, 70 N.M. 196 (1962); McCool, ET AL., *supra* note 73 at 12.

Perhaps more perniciously, other states seized on the racially charged and paternalistic language in *Cherokee Nation v. Georgia*,²⁰³ maintaining that statutory prohibitions making individuals “under guardianship” ineligible to vote applied to Native peoples.²⁰⁴ In *Cherokee Nation v. Georgia*, the Supreme Court held:

[Native peoples] are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.

They look to [the United States] government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father. They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connexion with them, would be considered by all as an invasion of our territory, and an act of hostility.

...

In considering this subject, the habits and usages of the Indians, in their intercourse with their white neighbours, ought not to be entirely disregarded. At the time the constitution was framed, the idea of appealing to an American court of justice for an assertion of right or a redress of wrong, had perhaps never entered the mind of an Indian or of his tribe. Their appeal was to the tomahawk, or to the government. This was well understood by the statesmen who framed the constitution of the United States[.]²⁰⁵

Based on this language, numerous states, including Arizona, sought to disenfranchise Tribal citizens under state laws barring individuals “under guardianship” from registering to vote or casting a ballot.²⁰⁶

In 1928—four years after Native peoples became U.S. citizens under the Snyder Act—the Arizona Supreme Court determined Tribal members were ineligible to vote in the state’s elections pursuant to a guardianship restriction.²⁰⁷ Peter Porter and Rudolph Johnson, Akimel O’odham Tribal members living on the Gila River Indian Reservation, attempted to register to vote in Pinal County, Arizona, but the County Recorder rejected their registrations.²⁰⁸ The Recorder claimed that Porter and Johnson were ineligible to vote because, as Tribal citizens living on a reservation, they could not meet the residency requirements for voter eligibility and were disqualified under the state constitutional provision that prohibits persons under

203 *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).

204 See McCool, et al., *NATIVE VOTE*, *supra* note 73 at 14-18.

205 *Cherokee Nation v. Georgia*, 30 U.S. at 17-18.

206 See McCool, et al., *NATIVE VOTE*, *supra* note 73 at 11-12.

207 See *Porter v. Hall*, 34 Ariz. at 315; see also Patty Ferguson-Bohnee, *The History of Indian Voting Rights in Arizona: Overcoming Decades of Voter Suppression*, 47 ARIZ. ST. L. J. 1099, 1108-09 (2016).

208 See *Porter v. Hall*, 34 Ariz. at 313.

guardianship from voting.²⁰⁹ While the court rejected the residency argument, it held that Native peoples, “notwithstanding their citizenship,” were ineligible to vote in Arizona because of their alleged guardianship status.²¹⁰

The Arizona Supreme Court’s decision rests on a racist view of Native peoples as inherently less capable than white Americans of political participation. In 1928, when the case was decided, the Arizona Constitution provided in relevant part:

No person under guardianship, non compos mentis, or insane, shall be qualified to vote at any election[.]²¹¹

The Arizona Supreme Court defined “guardianship” largely based on the perceived intelligence or mental capacity of the person alleged to be under guardianship, rather than their legal status:

Broadly speaking, persons under guardianship may be defined as those who, because of some peculiarity of status, defect of age, understanding, or self-control, are considered incapable of managing their own affairs, and who therefore have some other person lawfully invested with the power and charged with the duty of taking care of their persons or managing their property, or both. . . . The person falling within any of the classes is to some extent and for some reason considered by the law as **incapable of managing his own affairs as a normal person, and needing some special care from the state.** . . . The man who for any reason is exempt from responsibility to the law for his acts, who **cannot be trusted to manage his own person or property, certainly as a matter of common sense cannot be trusted to make laws for the government of others,** and placing him under the guardianship of another conclusively establishes that incapacity. We hold, therefore, that any person who, by reason of personal inherent status, age, mental deficiency, or education, or lack of self-control, is deemed by the law to be incapable of handling his own affairs in the ordinary manner, and is therefore placed by that law under the control of a person or agency which has the right to regulate his actions or relations towards others in a manner differing from that by which the actions and relations of the ordinary citizen may be regulated, is a ‘person under guardianship,’ within the meaning of section 2, article 7, of the [Arizona] Constitution.²¹²

The Arizona Supreme Court held that it was “undisputed” that Native peoples “fall within this category[.]”²¹³

Numerous states, including Arizona, sought to disenfranchise Tribal citizens under state laws barring individuals “under guardianship” from registering to vote or casting a ballot.

209 See *id.* at 315.

210 See *id.* at 331-32.

211 *Id.* at 315 (quoting ARIZ. CONST. art. VII, § 2).

212 *Id.* at 323-24.

213 *Id.* at 324.

Finally, some states granted the right to vote to Native Americans only if they severed all affiliations with their Tribe and gave up their cultural identities.²¹⁴ How exactly a Tribal citizen was expected to sever Tribal relations was unclear. In practice, however, it meant that a Native person's eligibility to vote in federal, state, and local elections depended on whether state officials determined that "the perceived differences between Indians and whites" had essentially been "erased[.]"²¹⁵ In North Dakota, for instance, a Tribal member could meet the test by showing they:

live the same as white people; they are law-abiding; do not live in tribes under chiefs; that they marry under the civil laws of the state the same as whites, and that they are Christians; that they have severed their tribal relations and adopted civilized life for a period dating back at least 20 years.²¹⁶

In Minnesota, Native peoples were to be considered to "have adopted the habits and customs of civilization" when:

[T]hey live in separate dwellings, constructed and furnished after the manner of the surrounding white settlers[,] . . . can understand and speak English, and even write their names, are members of Christian churches, and make a living much the same way as people in the vicinity of the reservation.²¹⁷

Some states granted the right to vote to Native Americans only if they severed all affiliations with their Tribe and gave up their cultural identities

Native peoples also faced barriers that applied more broadly to communities of color or language minorities in general, including those faced by Black Americans during the Jim Crow era.²¹⁸ Some of the barriers included poll taxes or literacy tests.²¹⁹ These devices were facially neutral but were employed in a manner that had both the intent and effect of

disenfranchising voters of color, and did so with alarming success.²²⁰ Finally, Native voters who could actually cast a ballot often had their voting strength minimized through vote dilution through strategic malapportionment.²²¹

The Voting Rights Act of 1965 (VRA)²²² and its 1975 amendments protecting language minorities,²²³ which extended protections to Native peoples, has been an extremely important

214 McCool, ET AL., NATIVE VOTE, *supra* note 73 at 11-12.

215 *Id.* at 12.

216 *Swift v. Leach*, 45 N.D. 437, 178 N.W. 437, 439 (1920).

217 *Opsahl v. Johnson*, 138 Minn. 42, 44-45, 163 N.W. 988, 988 (1917).

218 *E.g.*, *Securing Indian Voting Rights*, 129 HARV. L. REV. 1731, (2016).

219 *See, e.g.*, *Securing Indian Voting Rights*, *supra* note 217 at 1734; Danna R. Jackson, *Eighty Years of Indian Voting: A Call to Protect Indian Voting Rights*, 65 MONT. L. REV. 269, 272-74 (2004); McCool, ET AL., NATIVE VOTE, *supra* note 73 at 18-19.

220 *See id.*

221 *See id.* at 48-68.

222 *See* Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 437 (Aug. 6, 1965).

223 *See* Pub. L. 94-73, 89 Stat. 400 (Aug. 6, 1975).

tool in securing equal access to the political process for Native peoples.²²⁴ Today, there have been more than one hundred legal actions, including lawsuits and pre-lawsuit enforcement actions, brought under the VRA by or on behalf of Tribal members.²²⁵ While these lawsuits represent hard fought victories for Tribal nations and their citizens, there is substantial work to be done to guarantee that all Native peoples have equal access to the nontribal political process. The remainder of this report details those barriers.

The Voting Rights Act of 1965 (VRA) and its 1975 amendments protecting language minorities, which extended protections to Native peoples, has been an extremely important tool in securing equal access to the political process for Native peoples.

224 See generally McCool, et al., *NATIVE VOTE*, *supra* note 73.

225 See *id.* at 48-68 (listing cases); NATIVE AMERICAN RIGHTS FUND, JAMES THOMAS TUCKER, JACQUELINE DE LEÓN, DAN MCCOOL, *OBSTACLES AT EVERY TURN: BARRIERS TO POLITICAL PARTICIPATION FACED BY NATIVE AMERICAN VOTERS 19-23* (Jun. 2020), https://vote.narf.org/wp-content/uploads/2020/06/obstacles_at_every_turn.pdf (listing cases); NATIVE AMERICAN RIGHTS FUND, *2021 CASE UPDATES TO OBSTACLES AT EVERY TURN: BARRIERS TO POLITICAL PARTICIPATION FACED BY NATIVE AMERICANS*, <https://vote.narf.org/wp-content/uploads/2021/10/obstacles-2021cases.pdf> (listing cases) [hereinafter “OBSTACLES 2021 CASE UPDATES”].

CHAPTER 2

Present Barriers to Political Participation

Extreme Physical Distances to In-Person Voting and Voter Services

Native Americans face substantial barriers to accessing in person voting and voter services, including voter registration and ballot drop boxes, due to extreme physical distances. These barriers are compounded by limited vehicle access and poor road conditions, especially in the winter.²²⁶ It is not uncommon for Native voters who reside on Tribal lands to live an hour or more from the nearest polling place, voter registration location, or other county service²²⁷ Some voters who live on the Navajo Nation must travel up to 95 miles to access their nearest

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polling location, while others have to make long trips on exclusively dirt roads.²²⁸ In Nevada, some Native voters have to travel up to 100 miles roundtrip in counties that do not provide satellite voting locations on reservations.²²⁹ In elections where counties have not provided satellite voting locations on reservations

in Montana, some voters have had to travel hours to reach their nearest polling place.²³⁰ In Minnesota, Mille Lacs Band of the Ojibwe Tribal members commonly have to travel up to 40 miles roundtrip to access in-person voting.²³¹ Often, Tribal members who live the farthest from polling places and other county services are the same ones who have the fewest resources to overcome the barriers created by extreme distances, including elders.²³²

One of the most effective ways to reduce travel burdens and encourage voters living on Tribal lands to participate in federal, state, and local elections is for counties to offer early

226 Roundtable on Voting Barriers and Election Administration on the Navajo Nation, Part III: Navajo Nation Council (Feb. 19, 2024), Testimony of Hon. Crystalyne Curley, Speaker, Navajo Nation Council; *id.*, Testimony of Hon. Curtis Yanito, Navajo Nation Council; Roundtable on Voting Barriers and Election Administration on the Tohono O'odham Nation (Feb. 21, 2024), Testimony of Chairman Verlon Jose; Roundtable on Voting Barriers and Election Administration for Tribal Citizens in Arizona (Feb. 22, 2024), Testimony of President Harvier, Salt River Pima Maricopa Indian Community; Interview with Peri Pourier, Citizen of the Oglala Lakota Nation, Member of the South Dakota House of Representatives for the 27th District, in Rapid City, S.D. (Apr. 16, 2024).

227 See OBSTACLES AT EVERY TURN, *supra* note 225.

228 See Roundtable on Voting Barriers and Election Administration on the Navajo Nation, Part III: Navajo Nation Council (Feb. 19, 2024), Testimony of Hon. Crystalyne Curley, Speaker, Navajo Nation Council.

229 See OBSTACLES AT EVERY TURN, *supra* note 225 at 91.

230 See Roundtable on Voting Barriers and Election Administration for Citizens of the Confederated Salish and Kootenai Tribes (Apr. 30, 2024), Testimony of Hon. James Steele, Jr., Treasurer, Confederated Salish and Kootenai Tribes.

231 See OBSTACLES AT EVERY TURN, *supra* note 225 at 91.

232 See Roundtable on Voting Barriers and Election Administration on the Navajo Nation, Part III: Navajo Nation Council (Feb. 19, 2024), Testimony of Hon. Crystalyne Curley, Speaker, Navajo Nation Council.

and Election Day voting locations on reservations.²³³ But despite the distances Tribal members must travel to cast a ballot in the absence of on-reservation voting locations, Tribal nations often face pushback from local officials when they request a polling location be opened on Tribal lands. Some county officials claim to have insufficient staffing to provide robust on-reservation voting opportunities, while others simply ignore the requests altogether.²³⁴

Refusals to Provide In-Person Voting On-Reservations

For example, in an attempt to avoid opening a polling place for the 2022 general election on the Yomba Shoshone Reservation,²³⁵ the Nye County, Nevada clerk ignored a state law requiring counties to open polling places on Tribal lands upon request by a Tribal nation.²³⁶ Without the on-reservation polling location, Yomba Shoshone Tribal members would have to travel up to two hours on poorly maintained dirt roads just to cast a ballot.²³⁷ To ensure Tribal members had access to the ballot box, Yomba Shoshone Tribal Chairman Wayne Dyer in July 2022 requested a polling place for the November general election, pursuant to the process laid out by state law.²³⁸ Even though the County Auditor confirmed receipt of the request in August, on October 20—just over three weeks before the election—the Nye County Clerk informed the Yomba Shoshone Tribe that the County would not be opening a polling location on the Tribe’s reservation, claiming that the request had been lost in the shuffle when the County’s new clerk took office.²³⁹ While Nye County ultimately agreed to open the on-reservation polling location, it only did so on the Friday before the election, meaning that the Yomba Shoshone Tribe lost weeks of valuable time to inform voters about where they could cast a ballot.²⁴⁰ Making matters worse, there was a three-day internet outage on the reservation lasting throughout the weekend before the election, which further hampered the Tribe’s efforts to inform voters about the on-reservation polling place.²⁴¹

The Nye County, Nevada clerk ignored a state law requiring counties to open polling places on Tribal lands upon request by a Tribal nation.

233 See Roundtable on Voting Barriers and Election Administration for Native Peoples in Urban South Dakota (Apr. 19, 2024), Testimony of Dew Bad Warrior-Ganje (describing a successful campaign to have early voting implemented for two weeks in Eagle Butte on the Cheyenne River Sioux Tribe’s reservation).

234 See Jeniffer Solis, *Nye County Chaos Cut into Yomba Shoshone Voting Access*, NEVADA CURRENT (Nov. 23, 2022), <https://nevadacurrent.com/2022/11/23/nye-county-chaos-cut-into-yomba-shoshone-voting-access/> (describing a fight by two Tribes against two counties in Nevada to have on-reservation polling places, early voting locations, and ballot drop boxes).

235 See Solis, *supra* note 234; Gustavo Sagrero, *Nye County Is Denying the Yomba Shoshone Tribe an On-site Polling Location During Election Day*, KNUR (Nov. 3, 2022), <https://www.kunr.org/politics-and-policy/2022-11-03/2022-election-nevada-nye-county-denying-yomba-shoshone-tribe-polling-location>; Nicole Hansen, *Polling Location Opened on the Yomba Shoshone Resrvaiton*, CAMPAIGN LEGAL CENTER (Nov. 7, 2022), <https://campaignlegal.org/update/polling-location-opened-yomba-shoshone-reservation>.

236 See N.R.S. § 293.2733.

237 See Solis, *supra* note 234

238 See *id.*

239 See *id.*

240 See *id.*

241 See *id.*

In Minnesota, for years, Tribal citizens from the Red Lake Nation living on the reservation had to travel more than 35 miles to the county seat in Bemidji to cast a ballot in person.²⁴² But in 2014, after community advocacy and an offer by the Tribe to provide funding, Beltrami County agreed to open an early voting location on the reservation at the Red Lake Tribal Office.²⁴³ In recent years, however, the Red Lake Nation has not been able to provide funding for the satellite office. Rather than continue to operate the satellite office, Beltrami County has shut down the early voting location on the Red Lake Reservation, despite numerous requests by the Red Lake Nation to keep it open. Today, voters from the Red Lake Nation once again face severe and disparate burdens to accessing the ballot box. Rather than being able to cast their ballots in a nearby government office like residents in the county seat of Bemidji, Red Lake Tribal members are forced to travel up to an hour to their nearest early voting location at the Office of the Beltrami County Auditor—a trip that can be prohibitively expensive in a place like the Red Lake Reservation, where more than a quarter of all residents (25.7 percent) live below the poverty line.²⁴⁴

Limited Hours for In-Person Voting on Reservations

When counties do provide polling places on reservations, they often have limited hours, making them less accessible than polling places outside of Tribal lands, especially for voters who work during the day.

When counties do provide polling places on reservations, they often have limited hours, making them less accessible than polling places outside of Tribal lands, especially for voters who work during the day.²⁴⁵ On the Rosebud Reservation, during the 2022 election, the satellite early voting location for Todd County, South Dakota was only open two

days, from 10:00 a.m. to 3:00 p.m.—hours that make it almost impossible for many voters to cast an in-person early ballot—and is located in Mission, which is more accessible to poll workers travelling from the county seat than Tribal members living on the reservation, rather than in Rosebud where the population center is.²⁴⁶ The county clerk of Elko County, Nevada initially planned to offer voters from the Shoshone-Paiute Tribes on the Duck Valley Indian Reservation a mere eight hours of early voting on the reservation and only agreed to increase access after a lawsuit by the Tribe.²⁴⁷ This would have been a paltry amount compared to the robust 108 hours of early voting, 12 hours of election day voting, and Election Day drop box available to voters elsewhere in the County.²⁴⁸

242 See Four Directions, *2014: Minnesota Adds Early Voting on Indian Reservations*, <https://www.fourdirectionsvote.com/engagement/2014-minnesota-adds-early-voting-on-indian-reservations/>.

243 See *id.*

244 See Michael Meuers, *Successful Voter Registration Drive at Red Lake*, RED LAKE NATION NEWS (Oct. 26, 2020), <https://www.redlakenationnews.com/story/2020/10/26/opinion/successful-voter-registration-drive-at-red-lake/93281.html>; U.S. Census Bureau, *2022 American Community Survey 5-Year Estimates, Poverty Status in the Past 12 Months*, S1701.

245 See Interview with Louis “Wayne” Boyd, Treasurer, Rosebud Sioux Tribe, in Rosebud, S.D. (Apr. 17, 2024).

246 See *id.*; Interview with Troy Heinert, Citizen of the Rosebud Sioux Tribe, Former Minority Leader of the South Dakota Senate and Senator for District 26, in Rosebud, S.D. (Apr. 17, 2024).

247 Solis, *supra* note 234.

248 See *id.*

Insufficient Ballot Drop Boxes on Reservations

Some Tribal nations have sought to have ballot drop boxes placed on reservations in order to mitigate the difficulty of accessing in-person voting, but often Tribal members still have to travel significant distances to access a drop box.²⁴⁹ For instance, on the Hopi Reservation, which covers 2,532 square miles and shares geography with two Arizona counties, there is only a single ballot drop box location; this single drop box is available only to voters from one of the two counties.²⁵⁰ And as is the case with in-person voting locations, county officials can often be reluctant to provide drop boxes on reservations. The Shoshone-Paiute Tribes of the Duck Valley Indian Reservation only secured an on-reservation ballot drop box for voters in Elko County, Nevada in the 2022 election after a lawsuit by the Tribe.²⁵¹ However, even after the County promised to place a ballot drop box on the reservation, the Elko County Sheriff's Office refused to deliver the drop box, forcing state officials to intervene and assist with the delivery to ensure voters on the Duck Valley Reservation could cast a ballot.²⁵²

Compounding Barriers to Voting in Person

The extreme distances that Native voters frequently must travel to cast a ballot are often compounded by poor infrastructure on or around reservations, many Native voters' limited access to reliable transportation, and the all-too-often minimal resources that people in Tribal communities have to afford gas.²⁵³ Many Tribal lands are primarily served by dirt roads.²⁵⁴ On the Navajo Nation, for example, 86 percent of roads are unpaved.²⁵⁵ These roads can become impassable during rain and winter

The extreme distances that Native voters frequently must travel to cast a ballot are often compounded by poor infrastructure on or around reservations, many Native voters' limited access to reliable transportation, and the all-too-often minimal resources that people in Tribal communities have to afford gas.

249 See *id.*; Roundtable on Voting Barriers and Election Administration for Tribal Citizens in Arizona (Feb. 22, 2024), Testimony of Alfred Lomaquahu, Registrar, Hopi Tribe.

250 See *id.*; COCONINO COUNTY RECORDER, VOTER SERVICES DIVISION, COCONINO COUNTY BALLOT DROP BOX LOCATIONS, MARCH 19, 2024 PRESIDENTIAL PREFERENCE ELECTION, <https://www.coconino.az.gov/DocumentCenter/View/61915/Coconino-County-Ballot-Drop-Box-Locations---2024-PPE>; NAVAJO COUNTY RECORDER, EARLY BALLOT DROP BOX LOCATIONS, <https://www.navajocountyaz.gov/DocumentCenter/View/2021/EARLY-BALLOT-DROP-BOX-LOCATIONS>.

251 See Solis, *supra* note 233.

252 See Interview with Bret Healy, Counsel, Four Directions, in Washington, D.C. (Mar. 22, 2024).

253 See e.g., Roundtable on Voting Barriers and Election Administration on the Navajo Nation, Part I: Sheep Springs Chapter House (Feb. 19, 2024); Roundtable on Voting Barriers and Election Administration on the Navajo Nation, Part III: Navajo Nation Council (Feb. 19, 2024); Roundtable on Voting Barriers and Election Administration on the Tohono O'odham Nation (Feb. 21, 2024); Roundtable on Voting Barriers and Election Administration for Tribal Citizens in Arizona (Feb. 22, 2024); Interview with Peri Pourier, Citizen of the Oglala Lakota Nation, Member of the South Dakota House of Representatives for the 27th District, in Rapid City, S.D. (Apr. 16, 2024); Roundtable on Voting Barriers and Election Administration for Tribal Citizens in Montana (Apr. 29, 2024); Interview with Louis "Wayne" Boyd, Treasurer, Rosebud Sioux Tribe, in Rosebud, S.D. (Apr. 17, 2024); OBSTACLES AT EVERY TURN, *supra* note 224 at 31.

254 See Roundtable on Voting Barriers and Election Administration on the Tohono O'odham Nation (Feb. 21, 2024), Testimony of Chairman Verlon Jose; Roundtable on Voting Barriers and Election Administration on the Navajo Nation, Part III: Navajo Nation Council (Feb. 19, 2024), Testimony of Hon. Crystalyne Curley, Speaker, Navajo Nation Council.

255 See Roundtable on Voting Barriers and Election Administration on the Navajo Nation, Part III: Navajo Nation Council (Feb. 19, 2024), Testimony of Hon. Crystalyne Curley, Speaker, Navajo Nation Council.

storms that are particularly common in November when most general elections take place.²⁵⁶ On top of poor infrastructure, many Tribal members who live on reservations lack access to reliable transportation and public transit rarely reaches rural parts of reservations.²⁵⁷ Together, these factors can make it nearly impossible for many Tribal members to make the trip to cast a ballot.²⁵⁸

256 See Interview with Louis “Wayne” Boyd, Treasurer, Rosebud Sioux Tribe, in Rosebud, S.D. (Apr. 17, 2024).

257 See Roundtable on Voting Barriers and Election Administration on the Navajo Nation, Part III: Navajo Nation Council (Feb. 19, 2024); Roundtable on Voting Barriers and Election Administration for Citizens of the Confederated Salish and Kootenai Tribes (Apr. 30, 2024); Roundtable on Voting Barriers and Election Administration for Native Peoples in Urban South Dakota (Apr. 19, 2024), Testimony of Dew Bad Warrior-Ganje (describing a successful campaign to have early voting implemented for two weeks in Eagle Butte on the Cheyenne River Sioux Tribe’s reservation); Interview with Louis “Wayne” Boyd, Treasurer, Rosebud Sioux Tribe, in Rosebud, S.D. (Apr. 17, 2024).

258 See Roundtable on Voting Barriers and Election Administration on the Navajo Nation, Part I: Sheep Springs Chapter House (Feb. 19, 2024); Roundtable on Voting Barriers and Election Administration on the Navajo Nation, Part III: Navajo Nation Council (Feb. 19, 2024); Roundtable on Voting Barriers and Election Administration on the Tohono O’odham Nation (Feb. 21, 2024); Roundtable on Voting Barriers and Election Administration for Tribal Citizens in Arizona (Feb. 22, 2024); Interview with Peri Pourier, Citizen of the Oglala Lakota Nation, Member of the South Dakota House of Representatives for the 27th District, in Rapid City, S.D. (Apr. 16, 2024); Roundtable on Voting Barriers and Election Administration for Tribal Citizens in Montana (Apr. 29, 2024); Interview with Louis “Wayne” Boyd, Treasurer, Rosebud Sioux Tribe, in Rosebud, S.D. (Apr. 17, 2024); OBSTACLES AT EVERY TURN, *supra* note 225 at 31.

Lack of Standard Residential Street Addresses and Sufficient USPS Mail Services

Lack of Standard Residential Addresses on Reservations

Laws that require voters or voter registration applicants to provide a standard residential address as a condition of registering or voting—or that rely solely on numbered street addresses to register or locate voters’ homes—severely hamper the ability of Native peoples to cast a ballot because many homes on reservations do not have standard addresses.²⁵⁹ Indeed, on many reservations, homes and other buildings are not addressed at all.²⁶⁰ Rather than using a numbered street address,²⁶¹ Tribal members commonly use descriptive addresses, specifying where they live using highway or Bureau of Indian Affairs route numbers, mile markers, and other landmarks.²⁶² These directions might sound something like “turn off U.S. Highway 55 between mile markers 4 and 5. It’s a red house with a brown roof.”²⁶³ Because descriptive addresses generally cannot be used on official documents, Tribal members often use their post office box (P.O. box) address instead for things like driver’s licenses and other identification cards, bank and credit card statements, utility bills, and other documentation.²⁶⁴

Tribal members who rely primarily on descriptive addresses often face substantial obstacles when attempting to register to vote and cast a ballot. Most troublingly, in some instances, Tribal members have been completely barred from the political process or certain methods of voter registration when they attempt to use a descriptive address.²⁶⁵ In Rosebud County, Montana, which shares geography with the Northern Cheyenne Tribe, local officials have rejected voter registration applications that use descriptive

On many reservations, homes and other buildings are not addressed at all.

259 See OBSTACLES AT EVERY TURN, *supra* note 224 at 95; Roundtable on Voting Barriers and Election Administration on the Navajo Nation, Part I: Sheep Springs Chapter House (Feb. 19, 2024); Roundtable on Voting Barriers and Election Administration on the Navajo Nation, Part III: Navajo Nation Council (Feb. 19, 2024); Interview with Hopi Tribal Council Members, in Second Mesa, Ariz (Feb. 20, 2024); Roundtable on Voting Barriers and Election Administration on the Tohono O’odham Nation (Feb. 21, 2024); Roundtable on Voting Barriers and Election Administration for Tribal Citizens in Arizona (Feb. 22, 2024); Interview with Peri Pourier, Citizen of the Oglala Lakota Nation, Member of the South Dakota House of Representatives for the 27th District, in Rapid City, S.D. (Apr. 16, 2024); Interview with Louis “Wayne” Boyd, Treasurer, Rosebud Sioux Tribe, in Rosebud, S.D. (Apr. 17, 2024); Interview with Oliver “O.J.” Semans, Citizen of the Sicangu Oyate (Rosebud Sioux Tribe), Co-Founder and Co-Executive Director, Four Directions, in Rosebud, S.D. (Apr. 17, 2024); Interview with Troy Heinert, Citizen of the Rosebud Sioux Tribe, Former Minority Leader of the South Dakota Senate and Senator for District 26, in Rosebud, S.D. (Apr. 17, 2024); Roundtable on Voting Barriers and Election Administration for Native Peoples in Urban South Dakota (Apr. 19, 2024); Roundtable on Voting Barriers and Election Administration for Tribal Citizens in Montana (Apr. 29, 2024); Roundtable on Voting Barriers and Election Administration for Citizens of the Confederated Salish and Kootenai Tribes (Apr. 30, 2024); Telephone Interview with Marvin Weatherwax, Jr., Member of the Blackfeet Tribal Council, Member of the Montana House of Representatives for the 15th District (May 1, 2024); Telephone Interview with Anjali Bhasin, Civic Engagement Director, Wisconsin Conservation Voters (May 13, 2024).

260 See *supra* note 259 (listing sources).

261 This refers to an address that includes a building number followed by a street name, city, state, and zip code (i.e., 1600 Pennsylvania Avenue NW, Washington, DC 20500).

262 See *supra* note 259 (listing sources).

263 This example is taken from a real descriptive address, but details have been changed to protect privacy.

264 See *supra* note 259 (listing sources).

265 See Telephone Interview with Anjali Bhasin, Civic Engagement Director, Wisconsin Conservation Voters (May 13, 2024); Roundtable on Voting Barriers and Election Administration for Tribal Citizens in Montana (Apr. 29, 2024).

addresses.²⁶⁶ To justify the rejections, local officials incorrectly claimed that Montana’s voter registration database requires voters with nonstandard addresses to provide either geographic coordinates (i.e., latitude and longitude) or the address assigned to them for emergency services — both of which are unfamiliar to most voters living on reservations in the county.²⁶⁷

In Wisconsin, the voter registration application requires applicants to list a physical address, provide documentary proof of that address, and does not permit applicants to use a P.O. box.²⁶⁸ Certain voter registration applicants, including unhoused applicants, may use a descriptive address or draw where they live, but they must still provide documentary proof of the location of their residence.²⁶⁹ This creates substantial barriers for Tribal members who rely primarily on descriptive addresses and P.O. boxes.²⁷⁰ Indeed, while Tribal members living on reservations are often assigned addresses to use for emergency services, many do not memorize that address

In some instances, Tribal members have been completely barred from the political process or certain methods of voter registration when they attempt to use a descriptive address.

or use it on official documents — largely because they cannot use their home address for reliable mail delivery — and instead list their P.O. box on all official documents.²⁷¹ As a result, providing proof of residence in order to register to vote is prohibitive for many Tribal members living on reservations in Wisconsin.²⁷²

In other cases, nontribal governments have attempted to make accommodations for voters and voter registration applicants who use descriptive addresses, to varying degrees of success. While some states and the National Mail Voter Registration Form (the “Federal Form”) permit voter registration applicants to draw where they live on the voter registration application, the instructions can be extremely confusing for voters when the form does not use the nomenclature used by Tribal members to describe where they live.²⁷³

Pima County, Arizona Recorder Gabriella Cázares-Kelly, who is a citizen of the Tohono O’odham Nation, explained that many voter registration applicants who live on the Tohono O’odham Reservation are unfamiliar with which county they live in and where they should register

266 *See id.*

267 *See id.* Indeed, the Secretary of State confirmed to advocates that the state’s voter registration system does not require applicants to provide a standard street address. *See id.*

268 *See* Telephone Interview with Anjali Bhasin, Civic Engagement Director, Wisconsin Conservation Voters (May 13, 2024); WISCONSIN ELECTIONS COMM’N, WISCONSIN VOTER REGISTRATION APPLICATION, EL-131 (revised Jun. 2020), https://elections.wi.gov/sites/default/files/legacy/2020-06/EL-131%2520Voter%2520Registration%2520App_Fillable-%2520%2528REV%25202020-06%2529_0.pdf; Wisconsin Elections Comm’n, *Voter Registration and Proof of Residence*, <https://elections.wi.gov/Register#230548828-2065974417>.

269 *See supra* note 268 (listing sources).

270 *See* Telephone Interview with Anjali Bhasin, Civic Engagement Director, Wisconsin Conservation Voters (May 13, 2024).

271 *See id.*

272 *See id.*

273 *See* U.S. ELECTION ASSISTANCE COMM’N, NATIONAL MAIL VOTER REGISTRATION FORM, <https://www.eac.gov/voters/national-mail-voter-registration-form>; ARIZ. SEC’Y OF STATE, ARIZONA VOTER REGISTRATION FORM, https://azsos.gov/sites/default/files/2023-11/voter_registration_form_092222-standard.pdf; Roundtable on Voting Barriers and Election Administration on the Tohono O’odham Nation (Feb. 21, 2024), Testimony of Gabriella Cázares-Kelly, Pima County Recorder, Citizen of the Tohono O’odham Nation (noting that the voter registration form would be more accessible for citizens of the Tohono O’odham Nation if it asked the applicant which village they reside in).

to vote.²⁷⁴ This is because the dividing marker between Pima County and Pinal County on the Tohono O’odham Reservation is an unmarked wash²⁷⁵ and Tohono O’odham citizens generally rely on Tribal services that do not distinguish between the two counties.²⁷⁶ Recorder Cázares-Kelly recalls another conversation with an elder who needed assistance completing Arizona’s voter registration application because the elder did not know how detailed the drawing of her residence needed to be in order to properly identify her home.²⁷⁷

There can also be issues processing voter registration forms from applicants using descriptive addresses when officials are not properly trained.²⁷⁸ Indeed, it is not uncommon for a voter who registers using a descriptive address to be placed in the wrong precinct by county officials.²⁷⁹ Importantly, if the mistake is not caught before Election Day and the voter shows up to the polling place to which they should be assigned based on the actual location of their home, they will not appear on the list of eligible voters in the precinct and are likely to be turned away by poll workers or made to cast a provisional, rather than a regular, ballot.²⁸⁰

This is particularly problematic on reservations that share geography with more than one county, like the Tohono O’odham Reservation, which primarily shares geography with Pima County and Pinal County, but which also has a single precinct in Maricopa County.²⁸¹ For some time, officials in Maricopa County were unfamiliar with the Tohono O’odham precinct in the County and would automatically forward voter registration applications from the reservation to Pima County, believing they were received in error, causing undue delays in registration.²⁸²

On some reservations, Tribal nations and the states or localities with which they share geography have begun to designate home addresses, often in order to make 9-1-1 services more functional and accessible.²⁸³ And while the efforts have generally been welcomed, there have

274 See *id.*

275 This is a topographic term that refers to “a shallow channel that follows the contours of the land and allows water to flow — or wash — from higher elevations to lower.” See Clay Thompson, *What Is the Difference Between Arroyo, Gulch and Wash?*, AZ CENTRAL (Jul. 20, 2015), <https://www.azcentral.com/story/travel/local/history/2015/07/20/difference-arroyo-gulch-wash-terminology/30410531/#>.

276 See Roundtable on Voting Barriers and Election Administration on the Tohono O’odham Nation (Feb. 21, 2024), Testimony of Gabriella Cázares-Kelly, Pima County Recorder, Citizen of the Tohono O’odham Nation.

277 See *id.*

278 See *id.*; Interview with Louis “Wayne” Boyd, Treasurer, Rosebud Sioux Tribe, in Rosebud, S.D. (Apr. 17, 2024); First Amended Complaint, ECF No. 43, Spirit Lake Tribe v. Jaeger, No. 1:18-cv-00222 (Feb. 28, 2019).

279 See *supra* note 278 (listing sources).

280 See *id.*

281 See Roundtable on Voting Barriers and Election Administration on the Tohono O’odham Nation (Feb. 21, 2024), Testimony of Gabriella Cázares-Kelly, Pima County Recorder, Citizen of the Tohono O’odham Nation.

282 See *id.*

283 See Interview with Peri Pourier, Citizen of the Oglala Lakota Nation, Member of the South Dakota House of Representatives for the 27th District, in Rapid City, S.D. (Apr. 16, 2024); Interview with Louis “Wayne” Boyd, Treasurer, Rosebud Sioux Tribe, in Rosebud, S.D. (Apr. 17, 2024); Interview with Oliver “O.J.” Semans, Citizen of the Sicangu Oyate (Rosebud Sioux Tribe), Co-Founder and Co-Executive Director, Four Directions, in Rosebud, S.D. (Apr. 17, 2024); Interview with Troy Heinert, Citizen of the Rosebud Sioux Tribe, Former Minority Leader of the South Dakota Senate and Senator for District 26, in Rosebud, S.D. (Apr. 17, 2024); Roundtable on Voting Barriers and Election Administration for Native Peoples in Urban South Dakota (Apr. 19, 2024); Roundtable on Voting Barriers and Election Administration for Tribal Citizens in Montana (Apr. 29, 2024); Telephone Interview with Marvin Weatherwax, Jr., Member of the Blackfeet Tribal Council, Member of the Montana House of Representatives for the 15th District (May 1, 2024); Telephone Interview with Anjali Bhasin, Civic Engagement Director, Wisconsin Conservation Voters (May 13, 2024).

been serious issues with implementation, including when voters or county officials attempt to use the 9-1-1 addresses for the purposes of voter registration.²⁸⁴ In some instances, where states or counties have driven the 9-1-1 addressing programs, it has been inconsistent from jurisdiction to jurisdiction, with 9-1-1 addresses commonly showing individuals residing miles from their actual residence and sometimes even in a different county when input into a GPS locator.²⁸⁵ As a result, important systems, including voter registration databases, that nontribal governments rely on in order to provide services do not properly recognize these addresses—either because the database shows the voter in the wrong location based on their 9-1-1 address or because the requisite underlying data has not been programmed into the databases.²⁸⁶ In the context of voting, this has resulted in counties assigning voters to incorrect precincts without the voters’ knowledge, resulting in voters being turned away from the polling place on Election Day.²⁸⁷ In some instances, this has even included voters who were previously registered in the correct precinct that corresponds to their actual residence, but were incorrectly relocated in county databases and moved to a different precinct without their knowledge after officials made internal changes.²⁸⁸ In other cases, systems designed to make voting or voter registration more accessible, like online voter registration and online polling place lookup tools, are not compatible with 9-1-1 addresses because officials have not updated them with the necessary underlying data or because they rely on geolocation software that does not recognize the 9-1-1 addresses.²⁸⁹

Inadequate USPS Services and Vote by Mail

Tribal lands are also severely underserved by the United States Postal Service (USPS), making mail voting and other election services delivered via mail—including important communications and notices of inactivity—inaccessible for many Native voters.²⁹⁰ Indeed, most

284 See *supra* note 283 (listing sources).

285 See, e.g., Roundtable on Voting Barriers and Election Administration for Tribal Citizens in Montana (Apr. 29, 2024); Telephone Interview with Marvin Weatherwax, Jr., Member of the Blackfeet Tribal Council, Member of the Montana House of Representatives for the 15th District (May 1, 2024); First Amended Complaint, ECF No. 43, Spirit Lake Tribe v. Jaeger, No. 1:18-cv-00222 (Feb. 28, 2019).

286 See *supra* note 285 (listing sources).

287 See, e.g., Interview with Louis “Wayne” Boyd, Treasurer, Rosebud Sioux Tribe, in Rosebud, S.D. (Apr. 17, 2024); Phone Interview with Nicole Donaghy, Hunkpapa Lakota, Executive Director, North Dakota Native Vote (Jun. 17, 2024).

288 See *supra* note 287 (listing sources).

289 See Telephone Interview with Anjali Bhasin, Civic Engagement Director, Wisconsin Conservation Voters (May 13, 2024).

290 See OBSTACLES AT EVERY TURN, *supra* note 225 at 95-96; WHITE HOUSE, REPORT OF THE INTERAGENCY STEERING GROUP ON NATIVE AMERICAN VOTING RIGHTS 24-25 (Mar. 2022), <https://www.whitehouse.gov/wp-content/uploads/2022/03/Tribal-Voting-Report-FINAL.pdf> [hereinafter, “WHITE HOUSE REPORT”]; Jean Reith Schroedel, Kara Mazareas, Joseph Dietrich, and Jamaica Bacus-Crawford, *Yazzie v. Hobbs, The 2020 Election and Voting by Mail On- and Off-reservation in Arizona* 44 U. ARK. LITTLE ROCK L. REV. 193 (2020) [hereinafter, “Schroedel, et al., 2020 Election and VBM”]; Jean Schroedel, Melissa Rogers, and Joseph Dietrich, *Structural Racism, the USPS, and Voting by Mail On- and Off-Reservation in Arizona*, 37 STUD. IN AM. POL. DEVELOPMENT 111 (2023) [hereinafter, “Schroedel, et al., Structural Racism, the USPS, and VBM”] (describing how today’s inequities in USPS services on Tribal lands is the direct result of choices made in the nineteenth and twentieth centuries to serve the federal government’s military and settler colonial interests).

Tribal lands have no home mail delivery by the USPS.²⁹¹ Instead, Tribal members living on Tribal lands often rely on P.O. boxes to receive their mail.²⁹² But on many reservations, post offices are sparsely located and have limited hours.²⁹³ Some Tribal citizens have to travel significant physical distances to access their mail and as a result check their mailboxes infrequently, sometimes missing important documents including communications from election officials.²⁹⁴

Most Tribal lands have no home mail delivery by the USPS.

Professor Jean Schroedel²⁹⁵ explains how Native peoples living on Tribal lands commonly receive their mail:

Without residential mail delivery, people living on the reservation must travel to post offices and postal provider sites that are located some distance from their homes, and these places offer fewer services, shorter hours, and a limited number of post office boxes. Postal provider sites are staffed by non-USPS contractors, located in places such as mini-marts and gas stations, and provide very limited hours and services.²⁹⁶

Notably, Native peoples living on reservations have less access to postal services than other Americans, even when compared to individuals living in rural areas outside of reservations.²⁹⁷ This is caused by fewer post office and mailbox locations, shorter post office hours, and, perhaps most remarkably, substantially longer delivery times for services on-reservation, when compared to off-reservation services.²⁹⁸ In recent years, these disparities have been worsened by closures of on-reservation post offices and off-reservation distribution centers

291 See Roundtable on Voting Barriers and Election Administration on the Navajo Nation, Part I: Sheep Springs Chapter House (Feb. 19, 2024); Roundtable on Voting Barriers and Election Administration on the Navajo Nation, Part III: Navajo Nation Council (Feb. 19, 2024); Interview with Hopi Tribal Council Members, in Second Mesa, Ariz (Feb. 20, 2024); Roundtable on Voting Barriers and Election Administration on the Tohono O’odham Nation (Feb. 21, 2024); Roundtable on Voting Barriers and Election Administration for Tribal Citizens in Arizona (Feb. 22, 2024); Roundtable on Voting Barriers and Election Administration for Tribal Citizens in Oregon and Washington (Mar. 9, 2024); Interview with Brittany Bryson, Executive Assistant to the Council, Quinalt Nation, and Pearl Capoeaman-Baller, Former President, Quinalt Nation Business Council, in Seabrook, Wash. (Mar. 11, 2024); Interview with Peri Pourier, Citizen of the Oglala Lakota Nation, Member of the South Dakota House of Representatives for the 27th District, in Rapid City, S.D. (Apr. 16, 2024); Interview with Louis “Wayne” Boyd, Treasurer, Rosebud Sioux Tribe, in Rosebud, S.D. (Apr. 17, 2024); Interview with Oliver “O.J.” Semans, Citizen of the Sicangu Oyate (Rosebud Sioux Tribe), Co-Founder and Co-Executive Director, Four Directions, in Rosebud, S.D. (Apr. 17, 2024); Interview with Troy Heinert, Citizen of the Rosebud Sioux Tribe, Former Minority Leader of the South Dakota Senate and Senator for District 26, in Rosebud, S.D. (Apr. 17, 2024); Roundtable on Voting Barriers and Election Administration for Native Peoples in Urban South Dakota (Apr. 19, 2024); Roundtable on Voting Barriers and Election Administration for Tribal Citizens in Montana (Apr. 29, 2024); Roundtable on Voting Barriers and Election Administration for Citizens of the Confederated Salish and Kootenai Tribes (Apr. 30, 2024); Telephone Interview with Marvin Weatherwax, Jr., Member of the Blackfeet Tribal Council, Member of the Montana House of Representatives for the 15th District (May 1, 2024); Telephone Interview with Anjali Bhasin, Civic Engagement Director, Wisconsin Conservation Voters (May 13, 2024).

292 See *supra* note 291 (listing sources).

293 See *id.*

294 See Phone Interview with Anthony Aronica, Staff Attorney, Yakama Nation Office of Legal Counsel, and Willow Howard, Governmental Affairs Liaison, Yakama Nation (Mar. 22, 2024); OBSTACLES AT EVERY TURN, *supra* note 224 at 95-96 (finding that some voters go months without access to their mail).

295 Dr. Jean Schroedel, Ph.D, is a professor emerita of political science at the Claremont Graduate University.

296 Schroedel, et al., *2020 Election and VBM*, *supra* note 290 at 198.

297 See Schroedel, et al., *Structural Racism, the USPS, and VBM*, *supra* note 289 at 121-25.

298 See *id.*

Native peoples living on reservations have less access to postal services than other Americans, even when compared to individuals living in rural areas outside of reservations.

that serve Tribal lands, further reducing the number of P.O. boxes and making mail routes longer, resulting in further delayed delivery times.²⁹⁹

Given their scarcity, many post offices on reservations are overtaxed and it is common for post offices to operate far fewer P.O. boxes than what is needed to fully serve the community.³⁰⁰ Consequently, many Tribal members must share P.O. boxes with relatives, with upwards of ten people using the same box in some instances.³⁰¹ Further illustrating the shortage, it is common in families that have secured a P.O. box to pass them from generation to generation, with the issue of who will inherit the

P.O. box becoming a discussion when the holder passes away.³⁰² Under these circumstances, important mail may be lost, brought home by the wrong recipient, or misplaced for long periods of time.³⁰³ Worse yet, Tribal members have had issues with USPS officials prohibiting them from sharing P.O. boxes, even when there are no additional boxes available.³⁰⁴ On the Quinault Nation, which shares geography with Washington State, the post office most Tribal citizens use recently hired a new postmaster who has begun to reject mail addressed to any recipient other than the named holder of the P.O. box, despite being aware that there are no available P.O. boxes and Tribal members share because it is their only option for personal mail delivery.³⁰⁵

299 See Roundtable on Voting Barriers and Election Administration on the Navajo Nation, Part III: Navajo Nation Council (Feb. 19, 2024); Roundtable on Voting Barriers and Election Administration for Tribal Citizens in Montana (Apr. 29, 2024); Roundtable on Voting Barriers and Election Administration for Citizens of the Confederated Salish and Kootenai Tribes (Apr. 30, 2024).

300 See Roundtable on Voting Barriers and Election Administration on the Navajo Nation, Part I: Sheep Springs Chapter House (Feb. 19, 2024); Roundtable on Voting Barriers and Election Administration on the Navajo Nation, Part III: Navajo Nation Council (Feb. 19, 2024); Interview with Hopi Tribal Council Members, in Second Mesa, Ariz (Feb. 20, 2024); Roundtable on Voting Barriers and Election Administration on the Tohono O’odham Nation (Feb. 21, 2024); Roundtable on Voting Barriers and Election Administration for Tribal Citizens in Arizona (Feb. 22, 2024); Roundtable on Voting Barriers and Election Administration for Tribal Citizens in Oregon and Washington (Mar. 9, 2024); Interview with Brittany Bryson, Executive Assistant to the Council, Quinault Nation, and Pearl Capoeman-Baller, Former President, Quinault Nation Business Council, in Seabrook, Wash. (Mar. 11, 2024); Interview with Peri Pourier, Citizen of the Oglala Lakota Nation, Member of the South Dakota House of Representatives for the 27th District, in Rapid City, S.D. (Apr. 16, 2024); Interview with Louis “Wayne” Boyd, Treasurer, Rosebud Sioux Tribe, in Rosebud, S.D. (Apr. 17, 2024); Interview with Oliver “O.J.” Semans, Citizen of the Sicangu Oyate (Rosebud Sioux Tribe), Co-Founder and Co-Executive Director, Four Directions, in Rosebud, S.D. (Apr. 17, 2024); Interview with Troy Heinert, Citizen of the Rosebud Sioux Tribe, Former Minority Leader of the South Dakota Senate and Senator for District 26, in Rosebud, S.D. (Apr. 17, 2024); Roundtable on Voting Barriers and Election Administration for Native Peoples in Urban South Dakota (Apr. 19, 2024); Roundtable on Voting Barriers and Election Administration for Tribal Citizens in Montana (Apr. 29, 2024); Roundtable on Voting Barriers and Election Administration for Citizens of the Confederated Salish and Kootenai Tribes (Apr. 30, 2024); Telephone Interview with Marvin Weatherwax, Jr., Member of the Blackfeet Tribal Council, Member of the Montana House of Representatives for the 15th District (May 1, 2024); Telephone Interview with Anjali Bhasin, Civic Engagement Director, Wisconsin Conservation Voters (May 13, 2024).

301 See *supra* note 300 (listing sources).

302 See Roundtable on Voting Barriers and Election Administration on the Navajo Nation, Part I: Sheep Springs Chapter House (Feb. 19, 2024); Interview with Peri Pourier, Citizen of the Oglala Lakota Nation, Member of the South Dakota House of Representatives for the 27th District, in Rapid City, S.D. (Apr. 16, 2024).

303 *Id.*

304 See Interview with Brittany Bryson, Executive Assistant to the Council, Quinault Nation, and Pearl Capoeman-Baller, Former President, Quinault Nation Business Council, in Seabrook, Wash. (Mar. 11, 2024).

305 See *id.*

Some Tribal members simply do not have a P.O. box:

If people do not have a post office box, whether due to cost or the limited number of boxes available, they will need to rely upon “general delivery” to obtain their mail. This means the post office or postal provider holds the letter for thirty days. If it is not picked up within that time, the mail is returned to the sender or thrown out.³⁰⁶

Perplexingly, these barriers exist even when the reservation is fully addressed.³⁰⁷ On the Quinault Nation, for example, almost all homes have a standard numbered street address that Tribal members can use in interactions with Tribal and nontribal government services, including emergency responders.³⁰⁸ Even so, the USPS does not deliver mail to reservation homes.³⁰⁹ This can complicate voting in a state like Washington where elections are conducted primarily by mail because voters on the Quinault Nation must travel to the post office to access their unvoted ballot or have access to a printer to print a replacement, rather than simply picking it up in their mailbox.³¹⁰ The lack of home delivery on addressed reservations is particularly troubling because home mail delivery makes voting services more accessible while providing well-paying and secure jobs in the community.

Bans on community ballot collection compound each of these barriers for Native voters. Because mail services are inaccessible for many individuals living on Tribal lands, Tribal members commonly ask their relatives or other trusted community members to pick up and deliver their mail for them.³¹¹ This community ballot collection includes assistance with mail ballots.³¹² However, numerous states, including several with large Native populations, have placed restrictions on who can collect or return a mail ballot and how many mail ballots each designee is permitted to handle.³¹³ In Montana, for example, the state legislature has repeatedly attempted to severely restrict community ballot collection, but courts have prevented these efforts due to the disproportionate harm the restrictions would inflict on Native communities that rely heavily on community ballot collection to exercise their right to vote.³¹⁴

Bans on community ballot collection compound each of these barriers for Native voters.

306 Schroedel, et al., *2020 Election and VBM*, *supra* note 289 at 198.

307 *See supra* note 300 (listing sources).

308 *See* Interview with Brittany Bryson, Executive Assistant to the Council, Quinault Nation, and Pearl Capoeman-Baller, Former President, Quinault Nation Business Council, in Seabrook, Wash. (Mar. 11, 2024).

309 *See id.*

310 *See id.*

311 *See* Roundtable on Voting Barriers and Election Administration for Tribal Citizens in Montana (Apr. 29, 2024); Roundtable on Voting Barriers and Election Administration for Citizens of the Confederated Salish and Kootenai Tribes (Apr. 30, 2024).

312 *See id.*

313 *See* Nat’l Conf. State Leg., *Ballot Collection Laws*, <https://www.ncsl.org/elections-and-campaigns/table-10-ballot-collection-laws>.

314 *See* Native American Rights Fund, *2021 Laws that Limit Native Voter Participation* (Western Native Voice v. Jacobsen), <https://narf.org/cases/2021-montana-voter-laws/>.

Striking down Montana’s ban on community ballot collection, a trial court found that such bans, combined with the high costs of voting for Native Americans, create severe burdens on the right to vote:

[A] panoply of socioeconomic factors—the result of centuries of discrimination against Native Americans—make it more difficult for Native Americans living on reservations to register and vote. These include higher poverty and unemployment rates, worse health outcomes, worse educational outcomes, including much lower high school and college graduation rates, less internet access, lack of home mail delivery, less stable housing, higher homelessness rates, and overrepresentation in the criminal justice system.

Native Americans living on reservation live, on average, farther away from the post office, DMV office, and county seats as compared to the general Montana population. Native Americans are also less likely to have access to working vehicles or money for gas to travel those distances. And Native Americans are disproportionately less likely to have home mail delivery.

Because Native American voters already face these high costs to voting— both in person and by mail—they rely more heavily on organizations to collect and convey their ballots than the general population. Consequently, restricting ballot collection “disproportionately harms . . . Native Americans in rural tribal communities” because “Native Americans living on reservations rely heavily on ballot collection efforts in order to vote in elections,” in large part “due to lack of traditional mailing addresses, irregular mail services, and the geographic isolation and poverty that makes travel difficult” for these Native American voters.³¹⁵

315 Western Native Voice v. Jacobsen, No. DV 21-0451 at 179-80 ¶ 597-99 (Sept. 30, 2022) (available at <https://www.narf.org/nill/documents/20220930wnv-v-jacobsen-order.pdf>) (quoting Western Native Voice v. Stapleton, No. DV 20-0377, at 48, ¶ 20 (Mont. Dist. Ct. Sept. 25, 2020)). The Montana Supreme Court has also found that bans on community ballot collection have a “disproportionate impact on Native American voters.” *Driscoll v. Stapleton*, 2020 MT 247, ¶ 22, 401 Mont. 405, 416, 473 P.3d 386, 393.

Given the frequent inaccessibility of mail services to Native voters, Tribal leaders stress the importance of accessible alternatives for receiving and returning ballots by mail.³¹⁶ These alternatives include robust in-person voting options on Tribal lands, both on Election Day and during an early voting period leading up to Election Day, conveniently-placed ballot drop boxes, and laws that allow relatives and trusted designees to pick up and return mail ballots for voters who have trouble doing so themselves.³¹⁷

316 See Roundtable on Voting Barriers and Election Administration on the Navajo Nation, Part I: Sheep Springs Chapter House (Feb. 19, 2024); Roundtable on Voting Barriers and Election Administration on the Navajo Nation, Part III: Navajo Nation Council (Feb. 19, 2024); Interview with Hopi Tribal Council Members, in Second Mesa, Ariz (Feb. 20, 2024); Roundtable on Voting Barriers and Election Administration on the Tohono O’odham Nation (Feb. 21, 2024); Roundtable on Voting Barriers and Election Administration for Tribal Citizens in Arizona (Feb. 22, 2024); Roundtable on Voting Barriers and Election Administration for Tribal Citizens in Oregon and Washington (Mar. 9, 2024); Interview with Brittany Bryson, Executive Assistant to the Council, Quinault Nation, and Pearl Capoeman-Baller, Former President, Quinault Nation Business Council, in Seabrook, Wash. (Mar. 11, 2024); Interview with Peri Pourier, Citizen of the Oglala Lakota Nation, Member of the South Dakota House of Representatives for the 27th District, in Rapid City, S.D. (Apr. 16, 2024); Interview with Louis “Wayne” Boyd, Treasurer, Rosebud Sioux Tribe, in Rosebud, S.D. (Apr. 17, 2024); Interview with Oliver “O.J.” Semans, Citizen of the Sicangu Oyate (Rosebud Sioux Tribe), Co-Founder and Co-Executive Director, Four Directions, in Rosebud, S.D. (Apr. 17, 2024); Interview with Troy Heinert, Citizen of the Rosebud Sioux Tribe, Former Minority Leader of the South Dakota Senate and Senator for District 26, in Rosebud, S.D. (Apr. 17, 2024); Roundtable on Voting Barriers and Election Administration for Native Peoples in Urban South Dakota (Apr. 19, 2024); Roundtable on Voting Barriers and Election Administration for Tribal Citizens in Montana (Apr. 29, 2024); Roundtable on Voting Barriers and Election Administration for Citizens of the Confederated Salish and Kootenai Tribes (Apr. 30, 2024); Telephone Interview with Marvin Weatherwax, Jr., Member of the Blackfeet Tribal Council, Member of the Montana House of Representatives for the 15th District (May 1, 2024); Telephone Interview with Anjali Bhasin, Civic Engagement Director, Wisconsin Conservation Voters (May 13, 2024).

317 See *supra* note 316 (listing sources).

Disparate Impact of Voter Identification Laws on Tribal Citizens

Throughout the past decade, several states have enacted, implemented, or enforced voter identification laws, including documentation requirements to register to vote and to cast a ballot in person or by mail, that abridge the right of Native peoples to participate fully and equally in the nontribal political process.³¹⁸ While all 50 states and Washington, D.C. use at least one method to confirm voters' identities, in 36 states voters are asked to show identification at the polling place before casting a ballot.³¹⁹ In 12 states, the identification requirement is a "strict" one, meaning that "[v]oters without acceptable identification must vote on a provisional ballot and also take additional steps after Election Day for it to be counted."³²⁰ And in nine of the states with strict ID requirements, the ID must also contain a photo of the voter.³²¹

Often, when a state implements a voter identification law, Tribal ID is not automatically included among the types of qualifying identification.³²² Indeed, Tribal ID is only formally recognized as an acceptable form of voter ID in 16—or less than half—of the 36 states with voter ID laws.³²³

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Some states expressly preclude Tribal ID from the forms of valid identification, mandating that voter ID be issued by the U.S. or state government.³²⁴ Perversely, numerous states that either prohibit or do not expressly recognize Tribal ID *do* explicitly permit voters to use concealed carry and hunting licenses as valid voter identification.³²⁵

Even more states refuse to recognize Tribal IDs that are issued by a Tribal nation located outside of the state where the Tribe is located.³²⁶ In Wisconsin, for example, voters may use Tribal ID, but only if it is "issued by a federally recognized Indian tribe in Wisconsin."³²⁷ This can be particularly problematic for voters who are descendants of one Tribal nation and live

318 See OBSTACLES AT EVERY TURN, *supra* note 225 at 73-78; WHITE HOUSE REPORT, *supra* note 290 at 21-22; *Native American Voting Rights: Exploring Barriers and Solutions, Hearing Before the H. Comm. on House Administration*, 116th Cong. (Feb. 11, 2020) (written statement of Jacqueline De León at 8-12); *id.* (written statement of Patty Ferguson Bohnee at 11-12); Roundtable on Voting Barriers and Election Administration on the Navajo Nation, Part III: Navajo Nation Council (Feb. 19, 2024); Roundtable on Voting Barriers and Election Administration for Tribal Citizens in Arizona (Feb. 22, 2024); Roundtable on Voting Barriers and Election Administration for Tribal Citizens in Montana (Apr. 29, 2024); Phone Interview with Nicole Donaghy, Hunkpapa Lakota, Executive Director, North Dakota Native Vote (Jun. 17, 2024).

319 See Nat'l Cong. State Leg., *Voter ID Laws* (updated Feb. 2, 2024), <https://www.ncsl.org/elections-and-campaigns/voter-id#toggleContent-15991> [hereinafter "NCSL, *Voter ID*"].

320 *Id.*

321 *See id.*

322 See OBSTACLES AT EVERY TURN, *supra* note 225 at 75-76; *Native American Voting Rights: Exploring Barriers and Solutions, Hearing Before the H. Comm. on House Administration*, 116th Cong. (Feb. 11, 2020) (written statement of Jacqueline De León at 8-12); *id.* (written statement of Patty Ferguson Bohnee at 11-12).

323 See NCSL, *Voter ID*, *supra* note 319 (listing requirements imposed by state voter ID laws).

324 *See id.*

325 *See id.*

326 See OBSTACLES AT EVERY TURN, *supra* note 225 at 75.

327 WISC. ELECTIONS COMM'N, ACCEPTABLE PHOTO IDs, <https://myvote.wi.gov/Portals/0/Documents/AcceptablePhotoIDspdf?ver=vS9TnMVULII9Yi0mGe-P0g%3D%3D>.

on that Tribal nation’s lands in the state where they are a qualified voter, but are citizens of different Tribal nation outside of the state.

Some states also impose, or have attempted to impose, burdensome requirements for the contents of a valid voter ID, precluding any Tribal ID from qualifying, even if a state formally lists Tribal ID among the valid types of identification.³²⁸ These include requirements that identification list the address of the voter or voter registration applicant’s residence, despite the fact that many Tribal citizens living on Tribal lands do not have a standard address at their home.³²⁹ Instead, many Tribal IDs either list the holder’s P.O. box or list no address at all.³³⁰

For example, in 2022, Arizona passed House Bill 2492, a bill that, among other discriminatory requirements, required voter registration applicants to provide documentary proof of location of residence (DPOR) before becoming registered to vote.³³¹ Advocates who challenged the law in court feared that the law would effectively bar eligible voters whose homes do not have standard numbered street addresses—that is, most Tribal citizens living on reservations in Arizona—from registering to vote because no documents would list their (nonexistent) residential address.³³² Lawmakers disregarded the impact such a requirement could have on Native voters when they passed House Bill 2492—in 2006, the Inter Tribal Council of Arizona and several Tribal nations successfully challenged the state’s voter ID law that mirrored House Bill 2492’s requirements, resulting in the Secretary of State of Arizona adopting procedures that would allow Tribal citizens to vote with a Tribal ID that does not contain a standard residential street address.³³³ In a 2023 lawsuit brought by Tribal nations, the U.S. Department of Justice, and nonprofit organizations, a federal district court decided—following a motion by plaintiffs and Arizona’s Governor and Secretary of State—that under Arizona’s law, as written,

328 See OBSTACLES AT EVERY TURN, *supra* note 225 at 77.

329 See *supra* Part III, Lack of Standard Residential Street Addresses and Sufficient USPS Mail Services.

330 See Roundtable on Voting Barriers and Election Administration on the Navajo Nation, Part I: Sheep Springs Chapter House (Feb. 19, 2024); Roundtable on Voting Barriers and Election Administration on the Navajo Nation, Part III: Navajo Nation Council (Feb. 19, 2024); Interview with Hopi Tribal Council Members, in Second Mesa, Ariz (Feb. 20, 2024); Roundtable on Voting Barriers and Election Administration on the Tohono O’odham Nation (Feb. 21, 2024); Roundtable on Voting Barriers and Election Administration for Tribal Citizens in Arizona (Feb. 22, 2024); Roundtable on Voting Barriers and Election Administration for Tribal Citizens in Oregon and Washington (Mar. 9, 2024); Interview with Brittany Bryson, Executive Assistant to the Council, Quinault Nation, and Pearl Capoeman-Baller, Former President, Quinault Nation Business Council, in Seabrook, Wash. (Mar. 11, 2024); Phone Interview with Anthony Aronica, Staff Attorney, Yakama Nation Office of Legal Counsel, and Willow Howard, Governmental Affairs Liaison, Yakama Nation (Mar. 22, 2024); Interview with Peri Pourier, Citizen of the Oglala Lakota Nation, Member of the South Dakota House of Representatives for the 27th District, in Rapid City, S.D. (Apr. 16, 2024); Interview with Louis “Wayne” Boyd, Treasurer, Rosebud Sioux Tribe, in Rosebud, S.D. (Apr. 17, 2024); Interview with Oliver “O.J.” Semans, Citizen of the Sicangu Oyate (Rosebud Sioux Tribe), Co-Founder and Co-Executive Director, Four Directions, in Rosebud, S.D. (Apr. 17, 2024); Interview with Troy Heinert, Citizen of the Rosebud Sioux Tribe, Former Minority Leader of the South Dakota Senate and Senator for District 26, in Rosebud, S.D. (Apr. 17, 2024); Roundtable on Voting Barriers and Election Administration for Native Peoples in Urban South Dakota (Apr. 19, 2024); Roundtable on Voting Barriers and Election Administration for Tribal Citizens in Montana (Apr. 29, 2024); Roundtable on Voting Barriers and Election Administration for Citizens of the Confederated Salish and Kootenai Tribes (Apr. 30, 2024); Telephone Interview with Marvin Weatherwax, Jr., Member of the Blackfeet Tribal Council, Member of the Montana House of Representatives for the 15th District (May 1, 2024); Telephone Interview with Anjali Bhasin, Civic Engagement Director, Wisconsin Conservation Voters (May 13, 2024).

331 See A.R.S. § 16-123.

332 See Amended Complaint, Living United for Change in Arizona v. Hobbs, ECF No. 67, No. 2:22-cv-000509 (D. Ariz. Jul. 18, 2022).

333 See Joint Stipulation, ECF No. 749, Gonzales v. Arizona, No. CV 06-1268-PHX-ROS (D. Ariz. Apr. 18, 2008).

Tribal ID satisfied the DPOR requirement, regardless of whether it included a street address.³³⁴ While Native voters in Arizona are now able to register to vote under the Court’s interpretation of House Bill 2492, the victory took more than a year of resource-intensive litigation by Tribal nations.

North Dakota passed a voter ID law in 2013, and again amended it in 2017, imposing similar burdens, requiring voters to present an ID at the polling place that included the voter’s current street address.³³⁵ North Dakota lawmakers passed the bill even though most reservations sharing geography with the state were not addressed and voters whose homes did have addresses commonly did not know what their address was because of the state and counties’ haphazard 9-1-1 addressing program.³³⁶ Only after years of litigation did the state agree to permit voters to use Tribal ID and supplementary documentation from Tribal governments designating a voter’s place of residence within the Tribal nation’s jurisdiction when casting a ballot.³³⁷

Finally, even where state law permits Tribal ID as a valid form of voter identification, outright discrimination by poll workers and other election officials—or deficiencies in poll worker training—can mean that Native voters attempting to use Tribal ID are improperly turned away

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at the polling place.³³⁸ In Roosevelt County, Montana, local officials have persistently refused to accept Tribal ID from voters from the Fort Peck Tribes after the nation changed the design of its identification card.³³⁹ And this is not because the County is unfamiliar with Fort Peck’s new Tribal ID—County officials continue to turn away Fort Peck citizens even after the Tribal nation shared examples of valid Fort Peck ID with the County.³⁴⁰

In North Dakota, even after the state reached a settlement agreement in the challenge to its voter ID law, purportedly requiring election officials to accept Tribal IDs at polling places regardless of whether the ID includes a standard address, voters on the Spirit Lake Nation continue to be barred from the ballot box when they attempt to vote with Tribal ID.³⁴¹ In Wisconsin, there have been reports of “many Native people . . . being turned away,” with

334 See *Mi Familia Vota v. Fontes*, __ F.3d __, No. CV-22-00509-PHX-SRB, 2023 WL 8181307, at *18 (D. Ariz. Sept. 14, 2023); *Mi Familia Vota v. Fontes*, __ F.3d __, No. CV-22-00509-PHX-SRB, 2024 WL 862406 (D. Ariz. Feb. 29, 2024).

335 See Campaign Legal Center, *Cases and Actions: Spirit Lake Tribe, et al. v. Jaeger* (updated Apr. 13, 2021), <https://campaignlegal.org/cases-actions/spirit-lake-tribe-et-al-v-jaeger>.

336 *Id.*

337 See *id.*; Consent Decree, *Brakebill v. Jaeger*, No. 1:18-cv-00222 (D.N.D. Apr. 27, 2022).

338 See OBSTACLES AT EVERY TURN, *supra* note 225 at 76.

339 See Roundtable on Voting Barriers and Election Administration for Tribal Citizens in Montana (Apr. 29, 2024).

340 See *id.*

341 See Consent Decree, *Brakebill v. Jaeger*, No. 1:18-cv-00222 (D.N.D. Apr. 27, 2022); Phone Interview with Nicole Donaghy, Hunkpapa Lakota, Executive Director, North Dakota Native Vote (Jun. 17, 2024); *c.f.*, Expert Rep. of Daniel McCool, Ex. 18, Intervenor Defs. Mot. for Summ. J., ECF No. 108, *Walen v. Burgum*, No. 1:22-cv-00031 (D.N.D. Feb. 28, 2022).

poll workers telling prospective voters that their Tribal IDs were invalid.³⁴² Not only does this treatment violate Native voters' rights under state and federal law, it also discourages them from participating in the future³⁴³—perhaps the very purpose of such treatment by the state.

States' and localities' refusals to accept Tribal ID as a valid form of voter identification makes voting unduly burdensome for many eligible Native voters.³⁴⁴ Indeed, identification issued by a state government can be “unreasonably difficult for Native Americans to obtain.”³⁴⁵ For some Tribal members, the price of a state-issued identification is prohibitively expensive.³⁴⁶ Others, like elders and unhoused Tribal members, lack the requisite documentation needed to obtain nontribal identification, such as a birth certificate.³⁴⁷ Moreover, state agencies where Native voters can apply for a state ID, such as the Department of Motor Vehicles (DMV), are often located far from Tribal lands.³⁴⁸

Some Tribal members report having to travel up to 90 miles to reach the nearest consistently open DMV—a trip that can be prohibitively expensive for individuals with low incomes and those living below the poverty line.³⁴⁹ Moreover, when Native peoples access services at nontribal governmental agencies, they often face outright hostility from workers, further heightening the burden of obtaining identification.³⁵⁰ Finally, states' refusals to recognize Tribal ID as valid identification can also cause voter confusion, especially for voters from Tribal nations that share geography with or have communities in more than one state, leading to a confusing situation wherein Tribal members on one side of a state line can use their Tribal ID to vote while those from the same community on the other side of state line cannot.³⁵¹

342 OBSTACLES AT EVERY TURN, *supra* note 225 at 76.

343 See Interview with Peri Pourier, Citizen of the Oglala Lakota Nation, Member of the South Dakota House of Representatives for the 27th District, in Rapid City, S.D. (Apr. 16, 2024); Roundtable on Voting Barriers and Election Administration for Tribal Citizens in Montana (Apr. 29, 2024); Roundtable on Voting Barriers and Election Administration for Citizens of the Confederated Salish and Kootenai Tribes (Apr. 30, 2024).

344 See OBSTACLES AT EVERY TURN, *supra* note 225 at 73-75.

345 *Id.* at 73.

346 *Id.* at 74.

347 *Id.*

348 *Id.* at 73.

349 *Id.*

350 See Interview with Peri Pourier, Citizen of the Oglala Lakota Nation, Member of the South Dakota House of Representatives for the 27th District, in Rapid City, S.D. (Apr. 16, 2024); Interview with Louis “Wayne” Boyd, Treasurer, Rosebud Sioux Tribe, in Rosebud, S.D. (Apr. 17, 2024); Roundtable on Voting Barriers and Election Administration for Citizens of the Confederated Salish and Kootenai Tribes (Apr. 30, 2024); Telephone Interview with Marvin Weatherwax, Jr., Member of the Blackfeet Tribal Council, Member of the Montana House of Representatives for the 15th District (May 1, 2024).

351 See Roundtable on Voting Barriers and Election Administration on the Navajo Nation, Part I: Sheep Springs Chapter House (Feb. 19, 2024) (describing voter confusion when Tribal citizens living in different states must comply with different voting laws).

Inadequate Language Assistance

The failure of states and localities to provide accessible voting and voter education materials in Indigenous languages hampers the ability of Native peoples to register to vote, understand the issues and candidates they are voting on, access the polls, and cast a meaningful ballot.³⁵² More than a quarter (27.8 percent) of Native Americans aged five or older speak a language other than English in their home.³⁵³ Of those who speak another language at home, 17.8 percent

Having voter education materials, voter registration forms, ballots, and oral assistance in their Indigenous language can be crucial to understanding how to register to vote and cast a meaningful ballot.

(or 5.0 percent of the total Native American population aged five or older) speak English less than “very well.”³⁵⁴ For these eligible voters, having voter education materials, voter registration forms, ballots, and oral assistance in their Indigenous language can be crucial to understanding how to register to vote and cast a meaningful ballot, especially when it comes to confusing voter requirements or lengthy state or local ballot initiatives.³⁵⁵ Moreover, while many Tribal members who speak an Indigenous language as their primary language

can speak and comprehend English, these eligible voters often understand concepts more completely in their primary language, making them more likely to fully participate in the political process when materials are available to them in their primary language. Unfortunately, few states and localities offer robust assistance in Indigenous languages, sometimes in violation of federal law.

Existing Federal Protections

Federal law provides important, but inadequate, protections for Indigenous languages.³⁵⁶ This is in part because existing federal protections only extend to larger populations whose primary language is not English.³⁵⁷ Section 203 of the Voting Rights Act of 1965 (VRA) is the primary existing federal law protection for voters whose primary language is not English. Section 203 mandates that certain jurisdictions with significant non-English speaking populations provide

352 See Roundtable on Voting Barriers and Election Administration on the Navajo Nation, Part III: Navajo Nation Council (Feb. 19, 2024); Interview with Hopi Tribal Council Members, in Second Mesa, Ariz (Feb. 20, 2024); Roundtable on Voting Barriers and Election Administration on the Tohono O’odham Nation (Feb. 21, 2024); Roundtable on Voting Barriers and Election Administration for Tribal Citizens in Arizona (Feb. 22, 2024); Roundtable on Voting Barriers and Election Administration for Native Peoples in Urban South Dakota (Apr. 19, 2024); Roundtable on Voting Barriers and Election Administration for Tribal Citizens in Montana (Apr. 29, 2024); OBSTACLES AT EVERY TURN, *supra* note 224 at 49-63; WHITE HOUSE REPORT, *supra* note 289 at 14-15.

353 U.S. Census Bureau, 2022 American Community Survey 5-Year Estimates: Nativity by Language Spoken at Home by Ability to Speak English for the Population 5 Years and Over (American Indian and Alaska Native Alone), B16005C. This estimate is for the population that self-reported their race as “American Indian or Alaska Native Alone” and reported being born in the United States. Because this report primarily concerns the relationship between the federal government and federally recognized Tribal nations, the authors have excluded the respondents categorized as “Foreign Born” to ensure the statistics do not capture Indigenous respondents from nations outside the United States.

354 *Id.*

355 See *supra* note 352 (listing sources).

356 OBSTACLES AT EVERY TURN, *supra* note 225 at 50-53 (discussing decreasing language coverage under the Voting Rights Act).

357 See 52 U.S.C. § 10503(b)(2)(A) (formula).

all voting materials that are provided in English—including voter education materials,³⁵⁸ forms, notices, and ballots—in specific non-English languages.³⁵⁹

Pursuant to Section 203, a state or political subdivision must provide voting materials in other languages (i.e., is “covered” by Section 203) if, based on data from the Census Bureau’s American Community Survey (ACS), the illiteracy³⁶⁰ rate of a population in that jurisdiction whose primary language is one other than English is greater than the national illiteracy rate and the jurisdiction meets one of the following: (1) greater than 5 percent of the voting age citizens³⁶¹ of that state or political subdivision consider that same language other than English their primary language and have limited English proficiency;³⁶² (2) greater than 10,000 voting age citizens in that political subdivision consider that same language other than English their primary language and have limited English proficiency;³⁶³ or (3) in a political subdivision that shares geography with a reservation, greater than 5 percent of the Native voting age population of that reservation consider that same language other than English their primary language and have limited English proficiency.³⁶⁴ Importantly, Section 203 provides an exception for Indigenous languages that are “historically unwritten,” permitting states or political subdivisions to forgo written assistance and materials, and only “furnish oral instructions, assistance, or other information relating to registration and voting.”³⁶⁵ The Census Bureau publishes these coverage determinations every five years.³⁶⁶

Section 208 of the VRA further requires states and localities to permit “[a]ny voter who requires assistance by reason of blindness, disability, or inability to read or write” to be “given assistance by a person of the voter’s choice.”³⁶⁷ This provision protects the right of voters with limited English proficiency to bring along an assistant of their choice, including trusted relatives or friends.

Unmet Needs Under Federal Law

While Section 203 of the VRA provides important protections for minority language speakers, its coverage for Indigenous languages often falls below what is needed to guarantee the right to effectively participate in federal elections for Native peoples for several reasons.³⁶⁸ Importantly, many Indigenous language speakers are left without protections when the

358 Section 203 defines “voting materials” as “registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots[.]” 52 U.S.C. § 10503(b)(3)(A).

359 See 52 U.S.C. § 10503(c).

360 Section 203 defines “illiteracy” as “the failure to complete the 5th primary grade.” 52 U.S.C. § 10503(b)(3)(E).

361 Voting age citizens are U.S. citizens who are 18 years or older (i.e., old enough to vote in federal elections).

362 See 52 U.S.C. § 10503(b)(2)(A). Section 203 defines “limited-English proficient” as being “unable to speak or understand English adequately enough to participate in the electoral process[.]” 52 U.S.C. § 10503(b)(3)(B).

363 See 52 U.S.C. § 10503(b)(2)(A). This provision mandates coverage only for political subdivisions. States cannot be subjected to coverage based on the 10,000-citizen threshold. *Id.*

364 See *id.*

365 See 52 U.S.C. § 10503(c).

366 See 52 U.S.C. § 10503(b)(2)(A).

367 52 U.S.C. § 10508.

368 See OBSTACLES AT EVERY TURN, *supra* note 225 at 49-53; WHITE HOUSE REPORT, *supra* note 290 at 14-15.

state or locality in which they vote or the language they speak is not covered by Section 203 because the population estimates (sometimes erroneously) show that the community of Indigenous language speakers with limited English proficiency is too small to meet the law's requirements.³⁶⁹ While some local jurisdictions became newly covered by Section 203 following the Census Bureau's 2021 determinations, the overall trend since 2002 has been one of decreasing coverage.³⁷⁰

Sometimes, the lack of Section 203 coverage is simply caused by the population of Indigenous language speakers with limited English proficiency being smaller than what would be covered under Section 203.³⁷¹ However, even when the Indigenous language speaking population is small, the provision of Indigenous language assistance by states or localities is a critical factor in ensuring the political process is equally accessible to all eligible voters.³⁷² Often, Tribal members who have limited English proficiency come from the same communities that face multiple other obstacles to accessing the ballot, including through geographic isolation and barriers related to socioeconomic conditions.³⁷³ Moreover, providing materials in Indigenous languages also helps make voters who speak an Indigenous language as their primary language but who speak and understand English better understand what they are voting for and feel more welcome at the polling place.³⁷⁴ This makes Indigenous language assistance a critical tool in improving voter turnout for Native peoples.³⁷⁵

Importantly, because of its history of Indigenous language suppression,³⁷⁶ the federal government has a duty to work vigorously to ensure Native peoples receive sufficient language assistance. Indeed, while many Tribal nations now operate robust language protection and revitalization programs, today's numerically smaller populations of Indigenous language

369 See OBSTACLES AT EVERY TURN, *supra* note 225 at 50-53. For coverage determinations, see Voting Rights Act Determinations of 2006, Determinations Under Section 203, 86 Fed. Reg. 69611 (Dec. 8, 2021); Voting Rights Act Determinations of 2006, Determinations Under Section 203, 81 Fed. Reg. 87532 (Dec. 5, 2016); Voting Rights Act Determinations of 2006, Determinations Under Section 203, 76 Fed. Reg. 63602 (Oct. 13, 2011); Voting Rights Act Determinations of 1992, Determinations Under Section 203, 67 Fed. Reg. 48871 (Jul. 26, 2002).

370 See U.S. Census Bureau, *Section 203 Comparison Tables: Covered Jurisdiction Count by State*, https://www2.census.gov/programs-surveys/decennial/rdo/datasets/2021/2021_Section203-Determinations/Sec203_comparisons_2021_revised.pdf. Since 2002, entire languages have fallen out of coverage, while various jurisdictions have oscillated between being covered and not being covered depending on the year. See *id.*

371 See OBSTACLES AT EVERY TURN, *supra* note 225 at 50 ("Some of the coverage loss may have also been attributable to the declining number of tribal elders who are LEP, which appears to have played a significant factor in decreased American Indian coverage in some of the earlier Section 203 determinations.").

372 See OBSTACLES AT EVERY TURN, *supra* note 225 at 52-53.

373 See Roundtable on Voting Barriers and Election Administration on the Navajo Nation, Part III: Navajo Nation Council (Feb. 19, 2024); Phone Interview with Anthony Aronica, Staff Attorney, Yakama Nation Office of Legal Counsel, and Willow Howard, Governmental Affairs Liaison, Yakama Nation (Mar. 22, 2024).

374 See Roundtable on Voting Barriers and Election Administration on the Navajo Nation, Part I: Sheep Springs Chapter House (Feb. 19, 2024); Roundtable on Voting Barriers and Election Administration on the Navajo Nation, Part III: Navajo Nation Council (Feb. 19, 2024); Interview with Hopi Tribal Council Members, in Second Mesa, Ariz (Feb. 20, 2024); Roundtable on Voting Barriers and Election Administration on the Tohono O'odham Nation (Feb. 21, 2024); Phone Interview with Anthony Aronica, Staff Attorney, Yakama Nation Office of Legal Counsel, and Willow Howard, Governmental Affairs Liaison, Yakama Nation (Mar. 22, 2024); Roundtable on Voting Barriers and Election Administration for Tribal Citizens in Montana (Apr. 29, 2024).

375 See Roundtable on Voting Barriers and Election Administration on the Tohono O'odham Nation (Feb. 21, 2024), Testimony of Gabriella Cásarez-Kelly, Pima County Recorder, Citizen of the Tohono O'odham Nation.

376 See *supra* Part I, A History of the Relationship between Native Nations and the United States and the Path to U.S. Citizenship.

speakers can be directly attributed to concerted federal and state government efforts in the late-nineteenth through mid-twentieth centuries to forcibly assimilate Native peoples into non-Native culture and society.³⁷⁷ The United States owes every effort to Tribal nations and Native peoples to rectify, to the extent possible, the federal government’s destructive attempts to eradicate Indigenous languages.

The United States owes every effort to Tribal nations and Native peoples to rectify, to the extent possible, the federal government’s destructive attempts to eradicate Indigenous languages.

In many areas, communities of Indigenous language speakers might be sufficiently populous to trigger coverage in a local jurisdiction but the ACS—which is based on samples, rather than the total population like the census—simply does not capture them.³⁷⁸ According to a report by the Native American Rights Fund (NARF), “census undercounts and [errors resulting from] statistical sampling . . . can have a disproportionate impact on very small American Indian and Alaska Native voting-age populations.”³⁷⁹ This can be due to the sampling error that is inherent in surveys of small populations as well as non-sampling error, like lack of coverage and low response rates.³⁸⁰ The disproportionate impact can be especially severe for “voters [with limited English proficiency] who reside on more sparsely populated and geographically isolated reservations,” and who are more difficult for the Census Bureau to reach.³⁸¹

For example, a lack of language protections creates a substantial barrier for citizens of the Apsáalooke (Crow) Nation,³⁸² which shares geography with the State of Montana and Big Horn

377 See BRYAN NEWLAND, BUREAU OF INDIAN AFFAIRS, FEDERAL INDIAN BOARDING SCHOOL INITIATIVE INVESTIGATIVE REPORT 7, 39-40, 51, 54 (May 2022), https://www.bia.gov/sites/default/files/dup/inline-files/bsi_investigative_report_may_2022_508.pdf. In a 2022 in-depth investigation into the harms caused by boarding schools for Native children, the Bureau of Indian Affairs found:

The Federal Indian boarding school system deployed systematic militarized and identity-alteration methodologies to attempt to assimilate American Indian, Alaska Native, and Native Hawaiian children through education, including but not limited to the following: (1) renaming Indian children from Indian to English names; (2) cutting hair of Indian children; (3) discouraging or preventing the use of American Indian, Alaska Native, and Native Hawaiian languages, religions, and cultural practices; and (4) organizing Native Hawaiian children into units to perform military drills.

Id. See also Rebecca Nagle, *The U.S. Has Spent More Money Erasing Native Languages than Saving Them*, HIGH COUNTRY NEWS (Nov. 15, 2019), <https://www.hcn.org/issues/51-21-22/indigenous-affairs-the-u-s-has-spent-more-money-erasing-native-languages-than-saving-them/>.

378 See OBSTACLES AT EVERY TURN, *supra* note 225 at 50-51; ARIZONA STATE UNIVERSITY, SANDRA DAY O’CONNOR COLLEGE OF LAW, INDIAN LEGAL CLINIC, ARIZONA NATIVE VOTE ELECTION PROTECTION PROJECT: 2018 ELECTION REPORT 9 (Dec. 15, 2021), <https://law.asu.edu/sites/default/files/2022-08/2018%20Election%20Report.pdf> [hereinafter “ASU 2018 Election Report”].

379 *Id.* at 50; see also U.S. CENSUS BUREAU, UNDERSTANDING AND USING AMERICAN COMMUNITY SURVEY DATA: WHAT USERS OF DATA FOR AMERICAN INDIANS AND ALASKA NATIVES NEED TO KNOW (Apr. 2019), https://www.census.gov/content/dam/Census/library/publications/2019/acs/acs_aian_handbook_2019.pdf [hereinafter “AIAN Data User Handbook”]; CAROLINA FRANCO AND ERIC SLUD, CENTER FOR STATISTICAL RESEARCH & METHODOLOGY AND METHODOLOGY DIRECTORATE, U.S. CENSUS BUREAU, EXECUTIVE SUMMARY: STATISTICAL METHODS FOR 2021 COVERAGE DETERMINATIONS UNDER VOTING RIGHTS ACT SECTION 203(b) (Oct. 25, 2021), https://www2.census.gov/programs-surveys/decennial/rdo/about/voting-rights-determination/2021_Section203/Sec203_ExecSummary2021_v3.pdf.

380 See AIAN DATA USER HANDBOOK, *supra* note 379 at 46-52, 69-71.

381 OBSTACLES AT EVERY TURN, *supra* note 225 at 50; see also Deborah Stempowski, U.S. Census Bureau, *Counting Every Voice: Understanding Hard-to-Count and Historically Undercounted Populations* (Nov. 7, 2023), <https://www.census.gov/newsroom/blogs/random-samplings/2023/10/understanding-undercounted-populations.html#:~:text=Hard%2Dto%2DCount%20Populations,to%20adapt%20to%20count%20everyone.>

382 The Apsáalooke Nation is federally recognized as the Crow Tribe of Montana. See 89 Fed. Reg. 944 (Jan. 8, 2024).

County, Treasure County, and Yellowstone County.³⁸³ Many citizens of the Apsáalooke Nation speak Apsáalooke as their first and primary language.³⁸⁴ However, neither Montana nor the relevant counties are required under Section 203 to provide voting materials in the Apsáalooke language.³⁸⁵ This means that in order to vote, or even register, Apsáalooke speakers often must seek assistance from relatives or other trusted persons, foregoing a private ballot.³⁸⁶ Elders, who commonly face additional barriers including limited mobility and access to transportation, are often the most impacted by the failure to provide language assistance.³⁸⁷

Noncompliance with Federal Law

Some Section 203 covered localities have knowingly refused to provide Indigenous language assistance in voting, despite being required by federal law to do so.

Even where local jurisdictions are required by the VRA to provide voting materials in Indigenous languages, what is actually offered is often insufficient.³⁸⁸ Since the passage of the language assistance provisions of the VRA in 1975, there has been widespread and persistent noncompliance with the requirements of Sections 203 and 208.³⁸⁹ Remarkably, some Section 203 covered localities have knowingly refused to provide Indigenous language assistance in voting, despite being required by federal law to do so.³⁹⁰

Language-based barriers to the ballot are particularly stark for citizens of the Navajo Nation.³⁹¹ Numerous counties that share geography with the Navajo Nation are covered under Section 203, but Navajo citizens, and especially elders, face persistent barriers to accessing language assistance.³⁹² This is particularly true for materials related to ballot initiatives, which often have a confusing language structure and unfamiliar terminology.³⁹³ As a result, the Navajo Nation must often expend its own resources to provide voter education to its citizens

383 See Roundtable on Voting Barriers and Election Administration for Tribal Citizens in Montana (Apr. 29, 2024).

384 See *id.*

385 See Voting Rights Act Amendments of 2006, Determinations Under Section 203, 86 Fed. Reg. 69611 (Dec. 8, 2021).

386 See Roundtable on Voting Barriers and Election Administration for Tribal Citizens in Montana (Apr. 29, 2024).

387 See *id.*

388 See Roundtable on Voting Barriers and Election Administration on the Navajo Nation, Part III: Navajo Nation Council (Feb. 19, 2024); OBSTACLES AT EVERY TURN, *supra* note 225 at 53-63.

389 See OBSTACLES AT EVERY TURN, *supra* note 225 at 57 (describing denials of Section 208-required assistance in Alaska, Washington, and Arizona); *id.* at 58-63 (describing Section 203 noncompliance in Alaska, Arizona, New Mexico, and San Juan County, Utah); NATIVE VOTE - ELECTION PROTECTION PROJECT: 2016 ELECTION REPORT, INDIAN LEGAL CLINIC, SANDRA DAY O'CONNOR COLLEGE OF LAW, ARIZONA STATE UNIVERSITY 34-47 (Mar. 6, 2018), <https://law.asu.edu/sites/default/files/2022-08/2016%20Election%20Report.pdf> [hereinafter "ASU 2016 ELECTION REPORT"] (describing noncompliance with Section 203 throughout Arizona); McCool, et al., NATIVE VOTE, *supra* note 73.

390 See ASU 2016 ELECTION REPORT, *supra* note 389 at 47.

391 See Roundtable on Voting Barriers and Election Administration on the Navajo Nation, Part III: Navajo Nation Council (Feb. 19, 2024).

392 See *id.*

393 See *id.*; OBSTACLES AT EVERY TURN, *supra* note 225 at 62-63 (reporting that "Navajo voters in San Juan County[, Utah] have never received any information in Navajo about ballot questions before the election.").

in Navajo because the materials provided by nontribal governments are either inadequate or nonexistent.³⁹⁴

In 2016, the Navajo Nation Human Rights Commission sued San Juan County, Utah to force local officials to comply with Section 203 after years of persistent failures to comply with federal law and offer materials and translators in Navajo.³⁹⁵ After two years of litigation, the county agreed to a consent decree.³⁹⁶ Elsewhere on Navajo Nation, in 2018, Arizona and numerous counties covered by Section 203 made “no effort” to provide a Navajo translation for a signature requirement on mail ballots, giving Navajo language speakers less of an opportunity to vote by mail and have their vote counted than English speakers.³⁹⁷ Navajo language materials remain inaccessible to many Navajo citizens throughout Navajo Nation to this day.³⁹⁸

Some jurisdictions also improperly rely on Section 203’s exception for “historically unwritten” Indigenous languages in an attempt to evade the provision’s requirements.³⁹⁹ This exception, however, is not intended to justify the provision of incomplete assistance.⁴⁰⁰ Rather, as a federal court observed:

Compliance with the VRA’s bilingual provisions is measured by an “effectiveness” standard. The critical question is whether materials are provided in a such a way that voters from applicable language groups are “effectively informed of and participate effectively in voting-connected activities” and whether a covered jurisdiction has taken “all reasonable steps to achieve that goal.”⁴⁰¹

394 *Id.*

395 See Complaint, Navajo Nation Human Rights Commission v. San Juan County, Utah, ECF No. 2, No. 2:16-cv-00154 (D. Utah Feb. 25, 2016); Consent Decree, Navajo Nation Human Rights Commission v. San Juan County, Utah, ECF No. 199, No. 2:16-cv-00154 (D. Utah Feb. 22, 2018); Roundtable on Voting Barriers and Election Administration on the Navajo Nation, Part I: Sheep Springs Chapter House (Feb. 19, 2024), Testimony of Angelo Baca (Navajo and Hopi), Cultural Resources Coordinator, Utah Diné Bikéyah.

396 See Consent Decree, Navajo Nation Human Rights Commission v. San Juan County, Utah, ECF No. 199, No. 2:16-cv-00154.

397 ASU 2018 ELECTION REPORT, *supra* note 389 at 24.

398 See Roundtable on Voting Barriers and Election Administration on the Navajo Nation, Part III: Navajo Nation Council (Feb. 19, 2024).

399 See 52 U.S.C. § 10503(c); OBSTACLES AT EVERY TURN, *supra* note 225 at 53-55 (describing Alaska’s attempts to flout Section 203 by erroneously claiming that Alaska Native languages are “historically unwritten”).

400 In *Nick v. Bethel*, a federal district court determined that there is no blanket exception to providing Indigenous language materials in a written form. See *Nick v. Bethel*, No. 3:07-CV-0098 TMB, 2008 WL 11429390, at *3 (D. Alaska July 23, 2008). Instead:

the portion of the text regarding Alaska Native languages is conditional; the exemption applies only “. . . if the predominant language is historically unwritten. . .” If Congress had intended to carve out an exception for all Alaska Native and American Indian language, there would have been no reason to include the clause beginning with “if.” Therefore, the plain language of the statute precludes a finding of any blanket exemption from the written assistance requirements of the VRA for all Alaska Native languages. To do so would violate the rule against reading statutory language in a way that renders words or phrases superfluous. As a result, the Court finds that the exemption from the VRA’s written assistance requirement must be applied on a language-by-language basis. In other words, a language is only exempt if found to be “historically unwritten,” whatever that term may mean in the context of the VRA.

Id.

401 *Nick v. Bethel*, No. 3:07-CV-0098 TMB, 2008 WL 11456134, at *4 (D. Alaska July 30, 2008) (quoting 28 C.F.R. § 55.2).

At times, this might even require the provision of written materials in languages deemed “historically unwritten.”⁴⁰² A report by NARF explains that written materials are important because “the absence of materials written in American Indian and Alaska Native Languages makes it much more difficult to provide complete, accurate, and uniform translations of English-language voting materials.”⁴⁰³ In particular, authorities forcing voters to rely on recorded oral translations is especially problematic because recordings are often lengthy and can be inaccessible to voters who lack the necessary technology to play them, leading some voters to avoid using the translations altogether.⁴⁰⁴

For decades, Alaska has failed to provide language assistance materials to Native voters even though several in-state jurisdictions were covered by the VRA in multiple Native languages.⁴⁰⁵ Despite numerous federal court determinations that the state is required to provide language assistance in Alaska Native languages in Section 203 covered jurisdictions, Alaska continues to flout the VRA’s requirements.⁴⁰⁶ Fred Augustine of the Village of Alakanuk, a plaintiff in one of the challenges, explained through a translator to NARF why language assistance is so important:

Sometimes I wonder if my votes count. Poll workers speak to me in English, but I don’t understand. I didn’t understand any of the ballots but I still voted. We go to vote and vote, but we don’t know what to do and how to vote.⁴⁰⁷

Currently, Alaska is subject to a court-mandated settlement agreement requiring the state to offer meaningful translation services, translated assistance, and Yup’ik language assistance in the Dillingham and Kusilvak census areas.⁴⁰⁸

402 See OBSTACLES AT EVERY TURN, *supra* note 225 at 53-55.

403 *Id.* at 55.

404 *Id.*

405 See *id.* at 53-55, 58-61. While Alaska was not covered statewide, the state operates all elections and was therefore subjected to the requirements.

406 *Id.* at 54-55.

407 Native American Rights Fund, *Native Voting Rights and Language Access* (Toyukak v. Dahlstrom), <https://narf.org/cases/toyukak-v-treadwell/>.

408 *Id.*

Vote Dilution and Racial Gerrymandering

Even where Native voters can cast a ballot, their vote often does not count equally to the votes of other voters due to dilutive and discriminatory districting schemes or at-large voting methods of election that violate the U.S. Constitution, federal, or state law.

Existing Federal Protections

The U.S. Constitution and federal law bars states and localities from implementing electoral systems, including district-based maps and at-large electoral schemes, that are designed with the intent or have the effect of diluting the voting power of Native peoples. Specifically, in an electoral system where representatives are elected from districts, including congressional⁴⁰⁹ state legislative,⁴¹⁰ and local seats,⁴¹¹ Article I, Section 2 and the Fourteenth Amendment of the U.S. Constitution mandates that lawmakers must design districts with roughly equal population sizes.⁴¹²

The Fourteenth Amendment, Fifteenth Amendment, and Section 2 of the Voting Rights Act prohibit map drawers from intentionally diluting the electoral power of communities of color, including through district-based and at-large electoral systems.⁴¹³ The Fourteenth Amendment further prohibits lawmakers from adopting a district-based map where race, rather than other traditional redistricting criteria like the protection of communities of interest,

409 See U.S. CONST. art. I, sec. 2; *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964) (“[T]he command of Art. I, § 2, that Representatives be chosen ‘by the People of the several States’ means that as nearly as is practicable one man’s vote in a congressional election is to be worth as much as another’s.”) (quoting U.S. CONST. art. I, sec. 2); *id.* at 18 (“While it may not be possible to draw congressional districts with mathematical precision, that is no excuse for ignoring our Constitution’s plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives. That is the high standard of justice and common sense which the Founders set for us.”); *Karcher v. Daggett*, 462 U.S. 725, 727 (1983) (declaring a state’s congressional maps unconstitutional “because the population deviations among districts, although small, were not the result of a good-faith effort to achieve population equality.”).

410 See U.S. CONST. amend. XIV, § 2; *Baker v. Carr*, 369 U.S. 186, 237 (1962) (holding that challenges to state legislative districts based on unequal population size are justiciable under the Fourteenth Amendment); *Reynolds v. Sims*, 377 U.S. 533, 560-61 (1964) (“[T]he fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State.”); *id.* at 568 (“[A]s a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis. Simply stated, an individual’s right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living on other parts of the State.”); *Evenwel v. Abbott*, 578 U.S. 54, 64 (2016) (“As history, precedent, and practice demonstrate, it is plainly permissible for jurisdictions to measure equalization by the total population of state and local legislative districts.”).

411 See U.S. CONST. amend. XIV, § 2; *Avery v. Midland Cnty., Tex.*, 390 U.S. 474, 485-86 (1968) (“[T]he Constitution imposes one ground rule for the development of arrangements of local government: a requirement that units with general governmental powers over an entire geographic area not be apportioned among single-member districts of substantially unequal population.”).

412 See U.S. CONST. art. I, § 2; *id.* amend. XIV, § 2. The requirement to generally equalize population across electoral districts is generally rereferred to as the “one person, one vote” principal. See Cornell Law School, Legal Information Institute, *One-Person, One-Vote Rule*, https://www.law.cornell.edu/wex/one-person_one-vote_rule. See also *Reynolds v. Sims*, 377 U.S. 533 (1964) (requiring principle of one-person, one-vote); *tennant v. Jefferson Cnty. Comm’n*, 567 U.S. 758 (2012) (requiring congressional districts to have substantially equalized population).

413 See U.S. CONST. amend. XIV, § 2; 52 U.S.C. § 10301; *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) Claims brought pursuant the Fourteenth and Fifteenth Amendment and Section 2’s protections against intentional discrimination are commonly referred to as “intentional vote dilution” or “intentional discrimination” claims. These are distinct from “racial gerrymandering” claims, focusing primarily on the nefarious subjective intent of map drawers.

was the predominate criteria driving map drawers’ decisions.⁴¹⁴ Finally, and perhaps most importantly, Section 2 of the VRA prohibits states and localities from adopting district maps or at-large electoral schemes that have the effect of diluting the voting power of communities of color, irrespective of the map drawer’s intent.⁴¹⁵ In addition to federal protections, several states have enacted state law protections against discriminatory electoral systems.⁴¹⁶

414 See *Bethune-Hill v. Virginia State Bd. of Elections*, 580 U.S. 178, 187 (2017); *Cooper v. Harris*, 581 U.S. 285, 291-93 (2017). On May 23, 2024, the U.S. Supreme Court released its decision in *Alexander v. South Carolina State Conference of the NAACP*, a racial gerrymandering challenge to South Carolina’s congressional map. See *Alexander v. South Carolina State Conference of the NAACP*, 602 U.S. __ (2024). Though its effects have yet to play out in federal court, Justice Samuel Alito’s decision ignored well-established Supreme Court precedent outlining the racial gerrymandering test and sought to create a novel evidentiary standard that it unique to plaintiffs of color in these particular types of cases.

415 *Allen v. Milligan*, 599 U.S. ___, 143 S.Ct. 1487, 1507 (2023) (“Section 2 prohibits States from imposing any ‘standard, practice, or procedure . . . in a manner which results in a denial or abridgement of the right of any citizen . . . to vote on account of race or color.’ What that means, § 2 goes on to explain, is that the political processes in the State must be ‘equally open,’ such that minority voters do not ‘have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.’”). In *Thornburg v. Gingles*, the Supreme Court laid out the test to establish a violation of Section 2 when a district-based map or at-large redistricting scheme dilutes the political power of a community of color and reaffirmed that test in 2023. See *Thornburg v. Gingles*, 478 U.S. 30 (1986); *Milligan*, 143 S.Ct. at 1507.

To establish a violation of Section 2, a plaintiff must first establish the three *Gingles* preconditions:

First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a [legislative] district. . . . Second, the minority group must be able to show that it is politically cohesive. . . . Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed—usually to defeat the minority’s preferred candidate.

Gingles, 478 U.S. at 50-51 (internal citations omitted). See also *Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1018 (8th Cir. 2006) (A plaintiff can establish the *Gingles* factors by showing “(1) [T]he racial group is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) the racial group is politically cohesive; and (3) the majority votes sufficiently as a bloc to enable it usually to defeat the minority’s preferred candidate.”).

Once plaintiffs have satisfied the three *Gingles* preconditions, a court then considers the “Senate Factors” to determine whether, under a totality of the circumstances, the electoral system dilutes the voting strength of a community of color. The Senate Factors include:

- [1.] the history of voting-related discrimination in the State or political subdivision;
- [2.] the extent to which voting in the elections of the State or political subdivision is racially polarized;
- [3.] the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority vote requirements, and prohibitions against bullet voting;
- [4.] the exclusion of members of the minority group from candidate slating processes;
- [5.] the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process;
- [6.] the use of overt or subtle racial appeals in political campaigns;
- ...
- [7.] the extent to which members of the minority group have been elected to public office in the jurisdiction.
- ...
- [8.] evidence demonstrating that elected officials are unresponsive to the particularized needs of the members of the minority group[;] and
- [9.] that the policy underlying the State’s or the political subdivision’s use of the contested practice or structure is tenuous may have probative value.

Id. at 44-45.

416 Lata Nott, *Protecting the Freedom to Vote Through State Voting Rights Acts* (Jan. 4, 2024), <https://campaignlegal.org/update/protecting-freedom-vote-through-state-voting-rights-acts>; Movement Advancement Project, *State Level Voting Rights Acts* (last visited May 30, 2024), https://www.lgbtmap.org/democracy-maps/state_level_voting_rights_acts.

U.S. Census

One of the most basic ways in which Tribal citizens' votes are diluted is through insufficient and inaccurate population data, which serves as the basis for congressional reapportionment and congressional, state, and local redistricting.⁴¹⁷ According to the Census Bureau, people of color and people whose primary language is not English are some of the most difficult for the census to count and Native Americans living on reservations are "persistently undercounted."⁴¹⁸ Indeed, the American Indian and Alaska Native⁴¹⁹ population living on reservations has been "definitive[ly]" undercounted in at least every census since 1990.⁴²⁰ In 2020, despite substantial efforts by Tribal nations to work with the Census Bureau to assist citizens with their responses, like in years past, the census undercounted Native Americans living on reservations at higher rate than any other racial or ethnic group that the Census Bureau tracks.⁴²¹ The Census Bureau estimates that the census undercounted American Indian and Alaska Native populations on reservations at a rate of 5.64 percent.⁴²² This is compared to an *overcount* of white respondents at a rate of 1.64 percent.⁴²³

There are several compounding reasons for the significant undercount on Tribal lands. First, many of the same barriers that make casting a ballot burdensome for Native peoples also complicate census response, leading to substantially lower self-response rates on Tribal lands than outside of Tribal lands.⁴²⁴ The Census Bureau relies primarily on internet, mail, and phone for self-response, but Native peoples living on reservations disproportionately lack access to reliable at-home broadband and timely, convenient USPS mail services, making it

417 See SARAH ANDRE, ANJA JOLIN, ANDY LORENZO-SALINAS, DAN VICUÑA, COMMON CAUSE OREGON, TRIBAL DEMOCRACY PROJECT, NATIONAL CONGRESS OF AMERICAN INDIANS, STRONGER TOGETHER: NATIVE AMERICANS' FIGHT FOR FAIR REDISTRICTING 4-5 (2024), https://www.commoncause.org/oregon/wp-content/uploads/sites/24/2024/05/OR_StrongerTogether4.pdf [hereinafter "STRONGER TOGETHER REDISTRICTING"].

418 See Deborah Stempowski, U.S. Census Bureau, *Counting Every Voice: Understanding Hard-to-Count and Historically Undercounted Populations* (Nov. 7, 2023), <https://www.census.gov/newsroom/blogs/random-samplings/2023/10/understanding-undercounted-populations.html#:~:text=Hard%2Dto%2DCount%20Populations,to%20adapt%20to%20count%20everyone> (noting that the Census Bureau considers racial and ethnic minorities and people who speak languages other than English, amongst others, "hard-to-count populations" and that American Indian and Alaska Native populations living on reservations are "historically undercounted").

419 We use this terminology to mirror the language used by the Census Bureau on the decennial census, American Community Survey, and in its data. Census and American Community Survey (ACS) data on Native peoples is based on self-identification rather than enrollment. See U.S. CENSUS BUREAU, UNDERSTANDING AND USING AMERICAN COMMUNITY SURVEY DATA: WHAT USERS OF DATA FOR AMERICAN INDIANS AND ALASKA NATIVE NEED TO KNOW 6 (2019), https://www.census.gov/content/dam/Census/library/publications/2019/acs/acs_aian_handbook_2019_ch01.pdf.

420 Stempowski, *supra* note 418; see also Making Indian Country Count: Native Americans and the 2020 Census: Hearing Before the S. Comm. on Indian Affs., 115th Cong. (2018).

421 SHADIE KHUBBA, KRISTA HEIM, AND JINHEE HONG, U.S. CENSUS BUREAU, NATIONAL CENSUS COVERAGE ESTIMATES FOR PEOPLE IN THE UNITED STATES BY DEMOGRAPHIC CHARACTERISTICS: 2020 POST-ENUMERATION SURVEY ESTIMATION REPORT 7 (Mar. 2022), <https://www2.census.gov/programs-surveys/decennial/covrage-measurement/pes/national-census-coverage-estimates-by-demographic-characteristics.pdf>.

422 *Id.* The census also undercounted Native peoples living outside of Tribal lands, but at a lower rate of 0.86 percent. *Id.*

423 *Id.*

424 See Interview with Troy Heinert, Citizen of the Rosebud Sioux Tribe, Former Minority Leader of the South Dakota Senate and Senator for District 26, in Rosebud, S.D. (Apr. 17, 2024).

harder for them to avail themselves of self-response.⁴²⁵ In 2020, some Tribal members who did receive their census invitation by mail and attempted to answer the questionnaire online had difficulties completing the form because it requested the respondent’s address in a standardized format that is nonexistent on many reservations.⁴²⁶

Unsurprisingly, the disparities in self-response rates between respondents living on Tribal lands and the nation at large are striking, with self-response rates on nearly all Tribal lands throughout the United States falling well below the national self-response rate. In South Dakota, every single Tribal nation had a self-response rate from citizens living on the reservation below both the national self-response rate of 67.0 percent and state self-response rate of 67.5 percent.⁴²⁷ All but one Tribal nation’s self-response rate fell more than 20 percentage points below the national and state rates—and a majority were well under half.⁴²⁸

The same is true in Montana, where the only Tribal lands with a self-response rate within 20 percentage points of the national rate was Flathead Reservation, where the Confederated Salish and Kootenai Tribes are located.⁴²⁹ Notably, this reservation has a majority non-Native population due to allotment.⁴³⁰ In Arizona, most Tribal lands had response rates well below the statewide rate. Fourteen Tribal nations had self-response rates less than half the national self-response rate, and only one Tribal nation had a self-response rate at or above the national

425 See U.S. Census Bureau, *How the 2020 Census Will Invite Everyone to Respond* (Apr. 16, 2020) (noting that almost 95 percent of households receive their census invitation in the mail and most will be asked to respond online); *supra* Part III, Inadequate USPS Services and Vote by Mail; *id.* Transportation and Physical Infrastructure (describing the disparate internet and USPS service rates on reservations, when compared to areas outside of Tribal lands).

426 See Interview with Troy Heinert, Citizen of the Rosebud Sioux Tribe, Former Minority Leader of the South Dakota Senate and Senator for District 26, in Rosebud, S.D. (Apr. 17, 2024); *supra* Part III, Lack of Standard Residential Street Addresses and Sufficient USPS Mail Services (finding that many homes on Tribal lands lack a standard numbered street address, with residents instead using a descriptive address for their physical location and a P.O. Box for mail).

427 See U.S. Census Bureau, *2020 Census: Tracking Self-Response Rates Map* (Jan. 28, 2021), <https://www.census.gov/library/visualizations/interactive/2020-census-self-response-rates-map.html> [hereinafter “2020 Census: Self Response Rates Map”].

428 See *id.* The self-response rates for the Tribal nations sharing geography with South Dakota are: Cheyenne River Sioux Tribe (29.8 percent), Crow Creek Sioux Tribe (29.7 percent), Flandreau Santee Sioux Tribe (56.0 percent), Kul Wicasa Oyate (Lower Brule Sioux Tribe) (28.2 percent), Oglala Lakota Nation (23.0 percent), Rosebud Sioux Tribe (24.9 percent), Sisseton Wahpeton Oyate (42.8 percent), Standing Rock Sioux Tribe (36.5 percent), and Yankton Sioux Tribe (44.6 percent). *Id.* This is compared to a nationwide self-response rate of 67.0 percent and 67.5 percent in the state. *Id.*

429 See *id.* The self-response rates for the Tribal nations sharing geography with Montana are: Blackfeet Nation (29.4 percent), Chippewa Cree Tribe of the Rocky Boy Reservation (34.8 percent), Confederated Salish and Kootenai Tribes (47.4 percent), Crow Nation (20.6 percent), Fort Belknap Indian Community (32.7 percent), and the Northern Cheyenne Tribe (17.6 percent). *Id.* This is compared to a statewide self-response rate of 60.4 percent. *Id.* Note that the self-response rate for the Little Shell Chippewa is not reported because the federal government has not recognized a land base for the Tribe and consequently the census does not report response rates.

430 See U.S. Census Bureau, 2022 American Community Survey, 5-Year Estimates, B02014, B03002. Of the estimated 31,690 people living on the Flathead Reservation, where the Confederated Salish and Kootenai Tribes are located, approximately 61.9 percent are white, while only 33.2 percent are Native American. See also Roundtable on Voting Barriers and Election Administration for Citizens of the Confederated Salish and Kootenai Tribes (Apr. 30, 2024) (describing the immense land loss for the Confederated Salish and Kootenai Tribes caused by allotment).

average.⁴³¹ Most strikingly, not a single citizen of the Havasupai Nation living on the Tribe's reservation—located at the base of the Grand Canyon—responded via self-response.⁴³²

While Minnesota led the nation in self-response, with an overwhelming 75.1 percent of respondents returning their questionnaire statewide, self-response on Tribal lands that share geography with the state fell well below the national rate.⁴³³ Alaska, where 15.7 percent of the population is American Indian or Alaska Native, had the lowest self-response rate of the 50 states and the District of Columbia, with just over half (54.7 percent) of households returning the census questionnaire.

When households do not return the census questionnaire, the Census Bureau attempts to count them first through administrative records and then in person through home enumeration as a part its Nonresponse Followup (NRFU) Program.⁴³⁴ Importantly, where self-response rates are low, substantially more resources are required for the NRFU process than in areas with higher self-response rates, necessitating longer follow up periods and leading to greater chances of missing individuals or even entire households. While the Census Bureau has improved its capacity to enumerate Native peoples living on Tribal lands, this community has historically been one of the hardest for the Census Bureau to accurately count through its NRFU efforts.⁴³⁵

Several factors made NRFU less successful on Tribal lands in 2020 than in other areas.⁴³⁶ First, on some reservations, the Census Bureau failed to employ enumerators who lived in the

431 See *2020 Census: Self Response Rates Map*, *supra* note 427. The Tribal nations with self-response rates less than half the national rate (i.e., 33.5 percent and below) the Cocopah Indian Tribe (20.9 percent self-response), Colorado River Indian Tribes (25.5 percent), Fort Yuma Quechan Indian Tribe (29.6 percent), Gila River Indian Community (13.1 percent), Havasupai Tribe (0.0 percent), Hopi Tribe (19.3 percent), Hualapai Tribe (30.9 percent), Kaibab Paiute Tribe (11.1 percent), Navajo Nation (22.7 percent), San Carlos Apache Tribe (18.9 percent), Tohono O'odham Nation (19.3 percent), Tonto Apache Tribe (25.4 percent), White Mountain Apache Tribe, located on the Fort Apache Reservation (26.5 percent), and the Yavapai-Apache Nation (31.9 percent). *Id.* This is compared to a statewide self-response rate of 64.1 percent. The only Tribal nation sharing geography with Arizona that had a self-response rate at or higher than the national self-response rate was the Ak-Chin Indian Community, which is located in a more urban area, with 69.6 percent of respondents returning a questionnaire. *Id.* See also Arizona State University, American Indian Policy Institute, *Census Response Tracker for Indian Country (Arizona)*, <https://aipi.asu.edu/blog/2020/06/census-response-tracker-indian-country-arizona>.

432 See *2020 Census: Self Response Rates Map*, *supra* note 427.

433 See *2020 Census: Self Response Rates Map*, *supra* note 427. The self-response rates for the Bois Forte Band of Chippewa (38.4 percent), Fond Du Lac Band of Lake Superior Chippewa (62.7 percent), Gichi-Onigaming (Grand Portage Band of Lake Superior Chippewa) (36.7 percent), Leech Lake Band of Ojibwe (34.4 percent), Mille Lacs Band of Ojibwe (41.2 percent), Prairie Island Indian Community (55.2 percent), Red Lake Nation (13.8 percent), Shakopee Mdewakanton Dakota Community (59.7 percent), Upper Sioux Community Pezihutazizi Oyate (57.4 percent), and White Earth Nation (35.6 percent) fell below the national response rate (67.0 percent) and well below the state response rate (75.1 percent).

434 See CONGRESSIONAL RESEARCH SERVICE, *THE 2020 DECENNIAL CENSUS: OVERVIEW AND ISSUES* (Apr. 22, 2019), <https://crsreports.congress.gov/product/pdf/IF/IF11015>; U.S. Census Bureau, *2020 Census: Nonresponse Followup* (last visited May 14, 2024), <https://www.census.gov/newsroom/press-kits/2020/nonresponse-followup.html>; U.S. CENSUS BUREAU, *TRIBAL CONSULTATION HANDBOOK: BACKGROUND MATERIALS FOR TRIBAL CONSULTATIONS ON THE 2020 CENSUS* (Fall 2015), https://www.census.gov/content/dam/Census/library/publications/2015/dec/2020_tribal_consultation_handbook.pdf.

435 See WHITE HOUSE REPORT *supra* note 290.

436 See Isaiah Murtaugh, *Why Native Americans Don't Share the Government's Optimism About the Census*, U.S. NEWS (Oct. 30, 2020), <https://www.usnews.com/news/healthiest-communities/articles/2020-10-30/native-americans-fear-census-undercount-despite-government-optimism>.

community, were trusted by community members, and understood where people live.⁴³⁷ This was in part the result of the Census Bureau's decision to shift its job applications to a primarily online format, despite substantial disparities in broadband access on Tribal lands.⁴³⁸

Troy Heinert, who is Sicangu Lakota,⁴³⁹ served as the Minority Leader of the South Dakota Senate from 2019 to 2023. Leader Heinert worked as a field enumerator on the Rosebud Sioux Reservation for the 2020 Census, and explained how the Census Bureau's failure to hire enumerators who lived on Tribal lands impacted NRFU.⁴⁴⁰ According to Heinert, the officials directing the NRFU program were unfamiliar with the reservation, and therefore designed a NRFU response effort without understanding the makeup and particularities of the communities on the reservation.⁴⁴¹ While Heinert lives on and is familiar with the community on one side of the Rosebud Sioux Reservation, he was assigned enumeration on the other side of the reservation.⁴⁴² The Census Bureau assigned another enumerator, who lives in the area where Heinert was assigned to enumerate, to Heinert's community.⁴⁴³ This lack of familiarity made NRFU more time-consuming and caused the Census Bureau to undercount households and members of large or multigenerational households on the Rosebud Sioux Reservation.⁴⁴⁴

Having census enumerators from the community can make Tribal members more comfortable and encourage participation.

Enumerators' familiarity, or lack thereof, with reservation populations is important for several reasons.⁴⁴⁵ First, Tribal citizens have high levels of distrust in relation to federal government

437 See Interview with Troy Heinert, Citizen of the Rosebud Sioux Tribe, Former Minority Leader of the South Dakota Senate and Senator for District 26, in Rosebud, S.D. (Apr. 17, 2024); Interview with Oliver "O.J." Semans, Citizen of the Sicangu Oyate (Rosebud Sioux Tribe), Co-Founder and Co-Executive Director, Four Directions, in Rosebud, S.D. (Apr. 17, 2024); Abigail Weinberg, *Native Americans Are Regularly Undercounted in the Census. COVID-19 Will Make It Worse*, HIGH COUNTRY NEWS (Jul. 3, 2020), <https://www.hcn.org/articles/climate-desk-native-americans-are-regularly-undercounted-in-the-census-covid-19-will-make-it-worse/>.

438 See *id.* ("Another way to engage Native communities would be to hire more Native enumerators. But in 2020, the census shifted its job applications mostly online, making it difficult for people without internet access to find work with the Bureau."); *supra* Part III, Transportation and Physical Infrastructure (describing barriers in access to broadband on Tribal lands).

439 The Sicangu Lakota are federally recognized as the Rosebud Sioux Tribe of the Rosebud Indian Reservation, South Dakota. See 89 Fed. Reg. 944 (Jan. 8, 2024).

440 See Interview with Troy Heinert, Citizen of the Rosebud Sioux Tribe, Former Minority Leader of the South Dakota Senate and Senator for District 26, in Rosebud, S.D. (Apr. 17, 2024).

441 See *id.*

442 See *id.*

443 See *id.*

444 See *id.*

445 See *id.*

officials.⁴⁴⁶ When unfamiliar enumerators working for a federal government agency show up to the home of a Tribal citizen home requesting personal information, Tribal citizens are often hesitant to provide the information necessary to complete the enumeration.⁴⁴⁷ Having census enumerators from the community can make Tribal members more comfortable and encourage participation.⁴⁴⁸

Kevin Allis, a citizen of the Forest County Potawatomi Community and the Chief Executive Officer of the National Congress of American Indians, describes how distrust of the federal government can impact census participation on Tribal lands:

There still exists on many reservations a distrust for government people come around asking you for all kinds of personal information . . . [An accurate count] requires having folks that are employed by Census that had access to these communities, understood these communities, and, more importantly, would be recognized by these communities as reliable people to provide information.⁴⁴⁹

In addition to fostering trust, hiring census workers who live on the Tribal lands they are assigned to enumerate means that enumerators are more likely to be familiar with where community members live.⁴⁵⁰ This is particularly important on rural reservations where homes often do not have standard street addresses and are difficult to navigate using internet-based GPS.⁴⁵¹

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- 446 See Roundtable on Voting Barriers and Election Administration on the Navajo Nation, Part I: Sheep Springs Chapter House (Feb. 19, 2024); Roundtable on Voting Barriers and Election Administration on the Navajo Nation, Part III: Navajo Nation Council (Feb. 19, 2024); Interview with Hopi Tribal Council Members, in Second Mesa, Ariz (Feb. 20, 2024); Roundtable on Voting Barriers and Election Administration on the Tohono O’odham Nation (Feb. 21, 2024); Roundtable on Voting Barriers and Election Administration for Tribal Citizens in Arizona (Feb. 22, 2024); Roundtable on Voting Barriers and Election Administration for Tribal Citizens in Oregon and Washington (Mar. 9, 2024); Interview with Brittany Bryson, Executive Assistant to the Council, Quinault Nation, and Pearl Capoeman-Baller, Former President, Quinault Nation Business Council, in Seabrook, Wash. (Mar. 11, 2024); Interview with Peri Pourier, Citizen of the Oglala Lakota Nation, Member of the South Dakota House of Representatives for the 27th District, in Rapid City, S.D. (Apr. 16, 2024); Interview with Louis “Wayne” Boyd, Treasurer, Rosebud Sioux Tribe, in Rosebud, S.D. (Apr. 17, 2024); Interview with Oliver “O.J.” Semans, Citizen of the Sicangu Oyate (Rosebud Sioux Tribe), Co-Founder and Co-Executive Director, Four Directions, in Rosebud, S.D. (Apr. 17, 2024); Interview with Troy Heinert, Citizen of the Rosebud Sioux Tribe, Former Minority Leader of the South Dakota Senate and Senator for District 26, in Rosebud, S.D. (Apr. 17, 2024); Roundtable on Voting Barriers and Election Administration for Native Peoples in Urban South Dakota (Apr. 19, 2024); Roundtable on Voting Barriers and Election Administration for Tribal Citizens in Montana (Apr. 29, 2024); Roundtable on Voting Barriers and Election Administration for Citizens of the Confederated Salish and Kootenai Tribes (Apr. 30, 2024); Telephone Interview with Marvin Weatherwax, Jr., Member of the Blackfeet Tribal Council, Member of the Montana House of Representatives for the 15th District (May 1, 2024); Telephone Interview with Anjali Bhasin, Civic Engagement Director, Wisconsin Conservation Voters (May 13, 2024) (reporting high levels of mistrust of federal, state, and local government officials amongst Tribal members); Jean Schroedel, Aaron Berg, Joseph Dietrich, Javier M. Rodriguez, *Political Trust and Native American Electoral Participation*, 101 Soc. Sci. Q. 1885 (2020) [hereinafter, “Schroedel, *et al.*, *Political Trust*”]; Weinberg, *supra* note 437; OBSTACLES AT EVERY TURN, *supra* note 225 at 43-44.
- 447 See *id.*; Interview with Troy Heinert, Citizen of the Rosebud Sioux Tribe, Former Minority Leader of the South Dakota Senate and Senator for District 26, in Rosebud, S.D. (Apr. 17, 2024).
- 448 See *id.*; Roundtable on Voting Barriers and Election Administration for Native Peoples in Urban South Dakota (Apr. 19, 2024), Testimony of Dew Bad Warrior-Ganje; Roundtable on Voting Barriers and Election Administration for Tribal Citizens in Montana (Apr. 29, 2024); Risa Johnson, *Overcoming Barriers for Native American Voters*, PBS AMERICAN EXPERIENCE (June 25, 2020), <https://www.pbs.org/wgbh/americanexperience/features/vote-overcoming-barriers-for-native-american-voters/>.
- 449 Weinberg, *supra* note 437.
- 450 See Interview with Troy Heinert, Citizen of the Rosebud Sioux Tribe, Former Minority Leader of the South Dakota Senate and Senator for District 26, in Rosebud, S.D. (Apr. 17, 2024).
- 451 See *id.*

In 2020, the Census Bureau did not offer the questionnaire in a single Native language.

Another factor undermining the success of NRFUs on Tribal lands was the 2020 Census's woefully inadequate support for Indigenous language speakers.⁴⁵² In 2020, the Census Bureau did not offer the questionnaire in a single Native language.⁴⁵³ The only Native language in which the Census Bureau provided any language support, including

print and video language guides to assist with completion of the English questionnaire, bilingual census takers, and keyword translation glossaries, was Navajo.⁴⁵⁴ Despite urging by Tribal leaders, Members of Congress, and other advocates, for additional Native language assistance, no other Native language was supported by the 2020 Census.⁴⁵⁵ The Census Bureau's failure to offer adequate Indigenous language assistance made participation less accessible for both Indigenous language speakers who have limited English proficiency as well as those who understand English but feel more comfortable reading and speaking their Native language and would be more likely to trust and fully understand materials provided in that language.⁴⁵⁶

The COVID-19 pandemic compounded the already complicated NRFU efforts on Tribal lands.⁴⁵⁷ Because of existing socioeconomic, health, and housing conditions that predispose Native communities to worse health outcomes, Tribal nations and Native communities were hit particularly hard by the COVID-19 pandemic.⁴⁵⁸ At the height of the pandemic, Native Americans were far more likely than white Americans to catch COVID-19 and, once infected, significantly more likely than white Americans to experience severe symptoms,

452 Weinberg, *supra* note 437.

453 See U.S. CENSUS BUREAU, 2020 CENSUS SUPPORT FOR LANGUAGES, <https://www.census.gov/content/dam/Census/library/factsheets/2020/dec/2020-support-languages.pdf>.

454 *Id.*

455 See, e.g., *Making Indian Country Count: Native Americans and the 2020 Census: Hearing Before the S. Comm. on Indian Affs.*, 115th Cong. (2018); Letter from Members of the Congressional Asian Pacific American Caucus to Jennifer Kim, Assistant Division Chief, Decennial Census Management Division, U.S. Census Bureau (Dec. 20, 2018), <https://capac-chu.house.gov/press-release/capac-members-send-bicameral-letter-us-census-bureau-urging-adequate-language-support>; Weinberg, *supra* note 436.

456 *Id.*

457 See, e.g., Colleen Connolly, *Covid 19 Adds a New Snag to the 2020 Census Count of Native Americans* (June 23, 2020), <https://www.smithsonianmag.com/history/covid-19-adds-new-snag-to-2020-census-count-native-americans-180975150/>; Weinberg, *supra* note 437 (quoting OJ Semans (Rosebud Sioux) of Four Directions calling 2020 the "worst case scenario on doing a census count in any state in Indian Country"); Justine Anderson, *Pandemic Protocols Portend Census Undercount on Tribal Lands*, NATIVE SUN NEWS TODAY (June 3, 2020), <https://www.nativesunnews.today/articles/pandemic-protocols-portend-census-undercount-on-tribal-lands-2/>; Interview with Troy Heinert, Citizen of the Rosebud Sioux Tribe, Former Minority Leader of the South Dakota Senate and Senator for District 26, in Rosebud, S.D. (Apr. 17, 2024).

458 Ivy Hurwitz, Alexandra V Yingling, Teah Amirkabirian, Amber Castillo, Jehanzaeb J Khan, Alexandra Do, Dominic K Lundquist, October Barnes, Christophe G Lambert, Annabeth Fieck, Gregory Mertz, Clinton Onyango, Samuel B Anyona, J Pedro Teixeira, Michelle Harkins, Mark Unruh, Qiuying Cheng, Shuguang Leng, Philip Seidenberg, Anthony Worsham, Jens O Langsjoen, Kristan A Schneider, and Douglas J Perkins, *Disproportionate Impact of COVID-19 Severity and Mortality on Hospitalized American Indian/Alaska Native Patients*, 2:8 PNAS NEXUS 1 (2023); Katherine Leggat-Barr, Fumiya Uchikoshi, and Noreen Goldman, *COVID-19 Risk Factors and Mortality Among Native Americans*, 45 DEMOGRAPHIC RSCH. 1185 (2021); Nat'l Indian Health Board, *Follow the Evidence: Data Shows that American Indians and Alaska Natives Are Disproportionately Impacted by COVID-19* (Jul. 28, 2020), <https://nihb.org/covid-19/partner-blog/follow-the-evidence-data-shows-that-american-indians-and-alaska-natives-are-disproportionately-impacted-by-covid-19/>.

become hospitalized, and die due to complications of the disease.⁴⁵⁹ In an effort to protect the health and welfare of Tribal members, many Tribal governments implemented strict isolation procedures on reservations that were often far more restrictive than those in place on neighboring nontribal lands.⁴⁶⁰ Some Tribal nations closed their borders, prohibiting nonresidents from entering their reservations.⁴⁶¹ These restrictions significantly hampered the ability of census takers to count populations on Tribal lands during their field operations.⁴⁶²

Even where a home is successfully captured, either through self-response, administrative records, or NRFU, the census often fails to account for the household's total number of residents due to overcrowding and temporary living arrangements.⁴⁶³ Many homes on Tribal lands are overcrowded,⁴⁶⁴ meaning that more people are living in the home than the number it was constructed to house.⁴⁶⁵ According to an analysis by the United States Department of Housing and Urban Development (HUD), an estimated 15.9 percent of homes on Tribal lands are overcrowded, compared to only 2.2 percent of houses nationwide.⁴⁶⁶

When homes on Tribal lands are overcrowded, it is often extreme—according to HUD, about six percent of homes are “severely” overcrowded.⁴⁶⁷ On the Rosebud Indian Reservation, for example, overcrowded homes might have up to three times the number of residents the home is intended to hold.⁴⁶⁸ Commonly, overcrowding is either the result of multiple generations living in a home or because relatives are providing temporary shelter to an individual that

459 Hurwitz, et al., *supra* note 458 at 4, 7 (finding that Native Americans were approximately 3 times as likely to develop severe COVID-19 as white COVID patients and more likely to die once infected); NAT'L COUNCIL URB. INDIAN HEALTH, AMERICAN INDIAN AND ALASKA NATIVE DATA ON COVID-19, https://ncuih.org/wp-content/uploads/COVID-AI-AN-Info-doc_NCUIH_D072_V4.pdf (noting that Native peoples were 3.5 times more likely than white Americans to test positive for COVID-19, 3.2 times more likely to be hospitalized, and 2.2 times more likely to die). Between 2019 and 2021 alone, the Native Americans' life expectancy dropped by a shocking 6.6 years. See German Lopez and Ashley Wu, *Covid's Toll on Native Americans*, NY TIMES (Sept. 8, 2022), <https://www.nytimes.com/2022/09/08/briefing/covid-death-toll-native-americans.html>.

460 Justine Anderson, *Pandemic Protocols Portend Census Undercount on Tribal Lands*, NATIVE SUN NEWS (Jun. 3, 2020), <https://www.nativesunnews.today/articles/pandemic-protocols-portend-census-undercount-on-tribal-lands-2/>; Weinberg, *supra* note 437.

461 Anderson, *supra* note 460; Weinberg, *supra* note 437.

462 Anderson, *supra* note 460; Weinberg, *supra* note 437.

463 See Interview with Troy Heinert, Citizen of the Rosebud Sioux Tribe, Former Minority Leader of the South Dakota Senate and Senator for District 26, in Rosebud, S.D. (Apr. 17, 2024).

464 The Department of Housing and Urban Development (HUD) defines overcrowding as a home sheltering more than one person per room. See NANCY PINDUS, G. THOMAS KINGSLEY, JENNIFER BIESS, DIANE LEVY, JASMINE SIMINGTON, CHRISTOPHER HAYES, AND URBAN INSTITUTE, U.S. DEP'T OF HOUSING AND URBAN DEVELOPMENT, 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 at 74 (Jan. 2017), <https://www.huduser.gov/portal/sites/default/files/pdf/HNAIHousingNeeds.pdf> [hereinafter “HUD, AIAN HOUSING REPORT”].

465 HUD, AIAN HOUSING REPORT, *supra* note 464 at xxi, 73-76; Overcrowded Housing and the Impacts on American Indians and Alaska Natives: Field Hearing Before the S. Comm. On Indian Affs., 115th Cong. (2018), <https://www.govinfo.gov/content/pkg/CHRG-115shrg33406/pdf/CHRG-115shrg33406.pdf>.

466 See HUD, AIAN HOUSING REPORT, *supra* note 464 at xxi, 73-76. This metric climbs to a shocking 19 percent of households when overcrowding is defined as homes that include more residents than “can live in the unit comfortably.” *Id.* at 82.

467 *Id.* at 81. The Department of Housing and Urban Development defines “severe” overcrowding as a home having more than 1.5 persons per room. *Id.*

468 See Interview with Troy Heinert, Citizen of the Rosebud Sioux Tribe, Former Minority Leader of the South Dakota Senate and Senator for District 26, in Rosebud, S.D. (Apr. 17, 2024).

would otherwise be unhoused.⁴⁶⁹ Indeed, an estimated 17 percent of households on Tribal lands include a member that is only staying at the home because they have no other place to stay.⁴⁷⁰

Native Americans and Alaska Natives living on Tribal lands were the most undercounted racial or ethnic group the Census Bureau tracks.

This can have a detrimental impact on census results. When more people are living in a home than are intended to live there, census respondents sometimes underreport the number of residents in their home out of fear or distrust of government authorities.⁴⁷¹ Temporary residents are often not identified on formal documentation associated

with the home and are therefore unlikely to be captured by administrative records. Likewise, temporary residents might not be reported to enumerators because the respondent does not consider them a permanent part of the residence. Together, these factors exacerbate the undercount on Tribal lands.⁴⁷²

The 2020 Census’s final population counts on Tribal lands reflect the significant barriers noted here. Native Americans and Alaska Natives living on Tribal lands were the most undercounted racial or ethnic group the Census Bureau tracks, with estimates suggesting that the 2020 undercount may have surpassed the already-high 2010 undercount.⁴⁷³ On some reservations, enrollment records show that the population of Tribal citizens living on Tribal lands is as large as twice the population captured by the 2020 Census.⁴⁷⁴

Impact of a Census Undercount on Redistricting

Because census data is used to determine relative district populations for the purpose of redistricting, an undercount of Native peoples in the census has a direct impact on the political representation Native peoples have in federal, state, and local legislatures.⁴⁷⁵ When map drawers create electoral districts using data that artificially deflates the size of the Native

469 See HUD, AIAN HOUSING REPORT, *supra* note 464 at 77, 81. According to the Department of Housing and Urban Development (HUD), “although AIAN households most commonly include members of the core family (for example spouse and children), AIAN households also include other members, particularly grandchildren with some regularity.” *Id.* at 77. HUD estimates that 39 percent of households on Tribal lands include extended family (i.e., related family members beyond the adult respondent and their spouse or partner and minor children). *Id.* About 28 percent of those extended households are overcrowded under HUD’s definition (i.e., more than one person per room). *Id.* at 81.

470 *Id.* at 85.

471 See Interview with Troy Heinert, Citizen of the Rosebud Sioux Tribe, Former Minority Leader of the South Dakota Senate and Senator for District 26, in Rosebud, S.D. (Apr. 17, 2024).

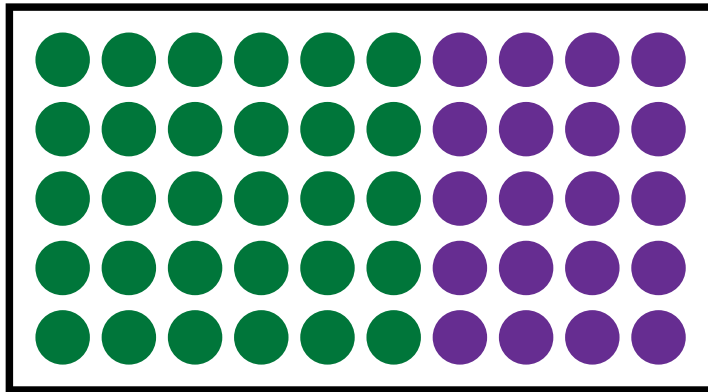
472 See Interview with Troy Heinert, Citizen of the Rosebud Sioux Tribe, Former Minority Leader of the South Dakota Senate and Senator for District 26, in Rosebud, S.D. (Apr. 17, 2024).

473 See Stempowski, *supra* note 418.

474 See Interview with Peri Pourier, Citizen of the Oglala Lakota Nation, Member of the South Dakota House of Representatives for the 27th District, in Rapid City, S.D. (Apr. 16, 2024); Interview with Louis “Wayne” Boyd, Treasurer, Rosebud Sioux Tribe, in Rosebud, S.D. (Apr. 17, 2024); Interview with Oliver “O.J.” Semans, Citizen of the Sicangu Oyate (Rosebud Sioux Tribe), Co-Founder and Co-Executive Director, Four Directions, in Rosebud, S.D. (Apr. 17, 2024); Interview with Troy Heinert, Citizen of the Rosebud Sioux Tribe, Former Minority Leader of the South Dakota Senate and Senator for District 26, in Rosebud, S.D. (Apr. 17, 2024); Roundtable on Voting Barriers and Election Administration for Tribal Citizens in Montana (Apr. 29, 2024).

475 Shondiin Silversmith, *Large Census Undercount of Indigenous People on Tribal Lands Means Fewer Resources, Political Power*, AZ MIRROR (Apr. 7, 2022), <https://azmirror.com/2022/04/07/large-census-undercount-of-indigenous-people-on-tribal-lands-means-fewer-resources-political-power/>.

MAP A: Accurate Census Count

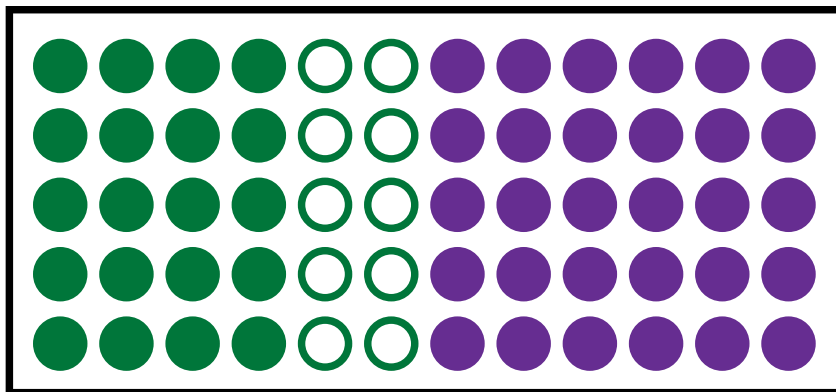


Ideal District Size = 50

MAP A

Total Population = 50
 Native Population = 30
 Non-Native Population = 20

MAP B: Undercounted Native Population



MAP B

Total Population = 60
 Counted Population = 50
 Native Population = 30
 Counted Native Population = 20
 Non-Native Population = 30

- Native, Counted
- Native, Uncounted
- Non-Native, Counted

Figure 4. Example maps demonstrating the impact of a census undercount on Native representation.

population, the resulting districts dilute the Native vote by overcrowding Native voters into fewer districts than are justified by the real size of the Native population. Simultaneously, because the data shows fewer Native peoples populating the district than actually live there, map drawers can pack additional white voters into the district, overpopulating it, while still enacting districts with equal population sizes according to the inaccurate census count.⁴⁷⁶

Figure 4 above shows how a census undercount can impact Native representation. In Map A, there is an accurate census count, and the district is correctly populated at the ideal district size. In that district, Native voters comprise a numerical majority and will likely be able to elect a candidate of choice. Map B represents an undercount of Native residents. While in reality, the district in Map B is overpopulated—with 10 more than the ideal district size—the population data shows that the district has only 50 residents. Of the district’s 30 Native residents, 10 were not counted by the census and are therefore not reflected

An undercount of Native peoples in the census has a direct impact on the political representation Native peoples have in federal, state, and local legislatures.

⁴⁷⁶ See Interview with Troy Heinert, Citizen of the Rosebud Sioux Tribe, Former Minority Leader of the South Dakota Senate and Senator for District 26, in Rosebud, S.D. (Apr. 17, 2024).

in the total population count for the purposes of redistricting. This allowed map drawers to add 10 additional non-Native residents, malapportioning the district without the data showing as much. With an equal number of Native and non-Native voters, the district will be highly competitive, with non-Native voters likely blocking Native voters from electing a candidate of choice due to lower overall turnout rates in Native communities.

Vote Dilution through Discriminatory Districts and Electoral Systems

States and localities also disenfranchise Native voters through the district-based and at-large electoral schemes that dilute the power of their vote, including ones that violate

States and localities also disenfranchise Native voters through the district-based and at-large electoral schemes that dilute the power of their vote, including ones that violate federal law or voters' constitutionally protected rights.

federal law or voters' constitutionally protected rights.⁴⁷⁷ Commonly, states do this by: (1) using at-large electoral systems in jurisdictions where the Native peoples comprise a numerical minority of the population; (2) cracking politically cohesive Native communities between two or more electoral districts; (3) packing Native communities into single districts where they comprise a supermajority, despite being large enough to constitute a majority

in more than one district; (4) overpopulating districts with large concentrations of Native voters and under populating white majority districts in order to reduce the weight of votes from Native Americans; or (5) racially gerrymandering district lines by intentionally placing voters inside or outside of a particular district primarily because of their race, without a compelling justification for doing so.

As a result of redistricting conducted in 2021, Tribal nations and their citizens have already brought at least five successful lawsuits challenging discriminatory maps.

As a result of redistricting conducted nationwide in 2021, Tribal nations and their citizens have already brought at least five successful lawsuits challenging discriminatory maps.⁴⁷⁸ One Tribal nation was forced to defend a North Dakota state legislative subdistrict drawn around its reservation to comply with the Voting Rights Act against a challenge by white plaintiffs.⁴⁷⁹ Too often,

477 See McCool, et al., *NATIVE VOTE*, *supra* note 73 at 48-67 (listing federal voting rights cases brought by Tribal nations or on behalf of Tribal citizens from 1965 through 2006); *OBSTACLES AT EVERY TURN*, *supra* note 225 at 19-20, 115-23 (describing redistricting litigation brought by Tribal nations or on behalf of Tribal citizens from 2007 through 2020); *WHITE HOUSE REPORT*, *supra* note 290 at 21-22; Julia Kirschenbaum & Michael Li, Brennan Center for Justice, *Gerrymandering Explained* (June 9, 2023), <https://www.brennancenter.org/our-work/research-reports/gerrymandering-explained> (explaining the various ways in which lawmakers dilute the voting strength of communities of color).

478 See, e.g., *Lower Brule Sioux Tribe v. Lyman Cnty.*, 625 F. Supp. 3d 891, 923 (D.S.D. 2022); *Turtle Mountain Band of Chippewa Indians v. Howe*, No. 3:22-CV-22, 2023 WL 8004576, at *17 (D.N.D. Nov. 17, 2023); *Order, Consent Decree, and Judgement, Spirit Lake Tribe v. Benson County*, ECF No. 37, 3:22-cv-00161 (D.N.D. Apr. 24, 2023); *Order, Consent Decree, and Judgement, Winnebago Tribe v. Thurston County*, No. 8:23-cv-00020 (D. Neb. Jan. 26, 2024); Nick Diaz, *Voting Rights Win in New Mexico: Navajo Community Gains Equal Opportunity to Elect Preferred Candidates in Second San Juan County Commission District*, *LAWYERS COMMITTEE FOR CIVIL RIGHTS UNDER LAW* (Mar. 25, 2024), <https://www.lawyerscommittee.org/voting-rights-win-in-new-mexico-navajo-community-gains-equal-opportunity-to-elect-preferred-candidates-in-second-san-juan-county-commission-district/>.

479 See *Walen v. Burgum*, __ F.Supp.3d __, No. 1:22-CV-31, 2023 WL 7216070, at *10 (D.N.D. Nov. 2, 2023) (three judge panel; U.S. S. Ct. appeal docketed Mar. 6, 2024).

discriminatory map drawers are repeat offenders, forcing the same Tribal nations to expend limited resources in one redistricting cycle after the next to ensure state and local officials adopt electoral systems that comply with federal and state law and give Native citizens an equal opportunity to participate effectively in the political system.⁴⁸⁰

Blocking Native-Preferred Candidates Through At-Large Electoral Systems

The most common way map drawers dilute the voting strength of Native peoples is through the use of at-large electoral systems in jurisdictions where Native Americans comprise a minority of the eligible voter population.⁴⁸¹ When Native peoples make up less than half of a jurisdiction's population, non-Native voters may be able to block Tribal members' ability to elect even a single candidate of choice to the political body. Indeed, there have been at least 26 successful legal actions challenging at-large voting schemes that dilute the Native vote.⁴⁸² At-large electoral systems are most commonly used to dilute Native American voting strength at the local level.⁴⁸³ However, some states utilize multi-member districts in the lower houses of their state legislatures with subdistricts permitted at the discretion of legislators. This threatens to dilute the voting strength of Native Americans if legislators elect not to utilize subdistricts in areas where Native peoples constitute a substantial minority of the voting age population.⁴⁸⁴

At-large electoral systems are most commonly used to dilute Native American voting strength at the local level.

Benson County, North Dakota. Benson County, North Dakota is the quintessential example of a locality that, for years, has undermined the electoral power of Native voters through an at-large system. Since 2000, Benson County, North Dakota, which shares geography with the Spirit Lake Nation, has been bound by a consent decree that required the County to adopt a district-based electoral system for its County Commission because its previous “at-large method of electing the Benson County Commissioners, operating in the totality of the circumstances in Benson County, dilute[d] Native American voting strength in violation of Section 2 of the Voting Rights Act.”⁴⁸⁵ Indeed, prior to 2000, not a single Native candidate had ever been elected to the Benson County Commission.⁴⁸⁶

480 See *infra* notes 485-494 and accompanying text (discussing repeated Voting Rights Act violations in Benson County, North Dakota); notes 548-556 and accompanying text (discussing repeated vote dilution attempts using an at-large system in San Juan County, New Mexico); notes 557-561 and accompanying text (discussing persistent vote dilution in Thurston County, Nebraska).

481 See, e.g., Order, Consent Decree, and Judgement, Spirit Lake Tribe v. Benson County, ECF No. 37, 3:22-cv-00161 (D.N.D. Apr. 24, 2023); Lower Brule Sioux Tribe v. Lyman Cnty., 625 F. Supp. 3d 891, 922 (D.S.D. 2022); United States v. Chamberlain Sch. Dist., No. 4:20-CV-4084, 2020 WL 6866809, at *1 (D.S.D. June 18, 2020); McCool, ET AL., NATIVE VOTE, *supra* note 73 at 48-67 (collecting cases); OBSTACLES AT EVERY TURN, *supra* note 225 at 19-20 (collecting cases).

482 See *supra* note 481 (listing sources).

483 See *id.*

484 See N.D. CONST. art. IV, § 2; S.D. CONST. art. III, § 5.

485 Consent Decree at 5 ¶ 2, U.S. v. Benson County, No. A2-00-30 (D.N.D. Mar. 10, 2000), available at <https://www.justice.gov/crt/case-document/file/1180491/dl>.

486 *Id.* at 4 ¶ 13.

When it adopted the at-large system, the Benson County Commission knew that a federal court had invalidated a nearly identical plan as a violation of the Voting Rights Act because it discriminated against Native voters.

The court permanently enjoined the County from using its at-large election method, requiring the County to institute “five single-member districts” including “two majority-Native American voting districts.”⁴⁸⁷ Unfortunately, the win was short-lived. In 2004—just four years after the consent decree took effect—the Benson County Board of Commissioners called a special session where Commissioners reviewed the documentation related to the consent decree and then voted to revert to an at-large system of voting, despite the consent decree’s express ban on doing so.⁴⁸⁸

In 2021, despite the clear and binding consent decree that remained in effect, Benson County once again adopted an electoral system where candidates for the County Commission would be elected at-large, undermining the electoral strength of citizens of the Spirit Lake Nation and other Native voters in the County.⁴⁸⁹ Under the at-large system, Native voters likely would have been unable to elect a single candidate of choice, despite making up 44.3 percent of the County’s voting age population.⁴⁹⁰

When it adopted the at-large system, the Benson County Commission knew that a federal court had invalidated a nearly identical plan as a violation of the Voting Rights Act because it discriminated against Native voters.⁴⁹¹ Before adopting the 2021 plan, the Commission even received testimony objecting to the at-large system and reminding Commissioners of the consent decree.⁴⁹² Not only did the plan violate the consent decree, but it also likely violated North Dakota law, which prohibits counties from using at-large electoral systems, except in specific circumstances that did not apply to Benson County.⁴⁹³ Following a lawsuit by Spirit Lake Nation and Spirit Lake citizens, the County agreed to adopt district-based elections because the at-large system was inconsistent with both the 2000 consent decree and Section 2 of the Voting Rights Act.⁴⁹⁴

Lyman County, South Dakota. More than 40 percent of voters in Lyman County, South Dakota live on the Lower Brule Reservation. Until 2023, however, Native voters were almost completely

487 *Id.* at 7 ¶ 6.

488 See Complaint at 10, ECF No. 1, *Spirit Lake Tribe v. Benson County*, 3:22-cv-00161 (D.N.D. Oct. 7, 2022).

489 See Consent Decree at 3 ¶ 9, ECF No. 37, *Spirit Lake Tribe v. Benson County*, 3:22-cv-00161 (D.N.D. Apr. 24, 2023); Complaint, *Spirit Lake Tribe v. Benson County*, ECF No. 1, 3:22-cv-00161 (D.N.D. Oct. 7, 2022); Specifically, the electoral system required County Commission candidates to reside in the electoral district in which they were running but permitted all voters in the county to vote for all five seats. See Consent Decree at 3 ¶ 12, ECF No. 37, *Spirit Lake Tribe*, 3:22-cv-00161.

490 See Consent Decree at 3 ¶ 11, ECF No. 37, *Spirit Lake Tribe*, 3:22-cv-00161.

491 See Consent Decree, *U.S. v. Benson County*, No. A2-00-30; see also Native American Rights Fund, *Benson County (ND)* (*Spirit Lake Tribe v. Benson County*), <https://narf.org/cases/benson-county-nd-redistricting/> (quoting plaintiff and citizen of the Spirit Lake Nation Collette Brown, who believes, “Benson County officials knew for a fact that adopting the at-large election system would illegally dilute the Native vote because the court had already prevented them from this form of voter suppression.”).

492 See Complaint at 11, ECF No. 1, *Spirit Lake Tribe v. Benson County*, 3:22-cv-00161 (D.N.D. Oct. 7, 2022).

493 See N.D.C.C. § 11-11-02.

494 See Consent Decree at 4-5 ¶ 2, 4 ¶¶ 16-17, ECF No. 37, *Spirit Lake Tribe*, 3:22-cv-00161.

unable to elect their preferred candidates to the Lyman County Board of Commissioners because of the County’s at-large electoral system.⁴⁹⁵ During the 2020 redistricting process, Kul Wicasa Oyate⁴⁹⁶ (“Lower Brule Sioux Tribe” or “Lower Brule”) Tribal leaders and citizens informed the Board of Commissioners that its failure to adopt a district-based electoral system, rather than at-large elections, would violate Section 2 of the Voting Rights Act.⁴⁹⁷ While the Board of Commissioners agreed with the Tribe that federal law required it to draw two majority Native districts, “[r]ather than adopt the Tribe’s preferred plan, the County went to the state legislature to amend South Dakota law to allow implementation of a novel hybrid redistricting plan, causing a delay [until 2026] for when tribal members would likely be able to elect their preferred commissioners.”⁴⁹⁸

Because of the County’s unwarranted delays, Lower Brule sued the Board of Commissioners to enforce the rights of its citizens to fair representation.⁴⁹⁹ Stephanie Bolman-Altamirano, a Lower Brule citizen, plaintiff, and then-member of the Lower Brule Tribal Council explains why the delay was so harmful:

Each and every day people who do not represent us make decisions that affect my community. Their decisions over the past three decades have created great disparities across various systems, which continue to have devastating effects on people I care about.⁵⁰⁰

The South Dakota federal district court found the at-large plan likely violated Section 2 of the VRA, reasoning that, “[s]ince 1992 . . . the effect of a single county-wide district has been to create a system where the County’s white majority can and largely has blocked election of Native-preferred candidates.”⁵⁰¹ Ultimately, the case was resolved with a consent decree that accelerated the timeline for Lyman County Native voters to achieve fair representation.⁵⁰²

Chamberlain School District, South Dakota. From 2007 until 2020, only one Native person was elected to the seven-member Chamberlain School Board despite Native Americans, primarily from Lower Brule and the Crow Creek Sioux Tribe (“Crow Creek”), comprising

495 See *Lower Brule Sioux Tribe v. Lyman Cnty.*, 625 F. Supp. 3d 891, 923 (D.S.D. 2022) (“[A]t-large commission elections have effectively squelched the chances of electing a Native-American-preferred candidate to the Commission with the exception of defendant/independent candidate Schelske, who received majority support from Native Americans and won a seat on the Commission.”); Roundtable on Voting Barriers and Election Administration for Citizens of the Lower Brule Sioux Tribe (Apr. 17, 2024).

496 The Kul Wicasa Oyate are federally recognized as the Lower Brule Sioux Tribe of the Lower Brule Sioux Reservation, South Dakota. 89 Fed. Reg. 944.

497 Native American Rights Fund, *Lyman County (SD) Redistricting* (Lower Brule Sioux Tribe v. Lyman County), <https://narf.org/cases/lower-brule-sioux-tribe-lyman-county-redistricting/> (last visited May 17, 2024) [hereinafter “NARF, *Lyman County Redistricting*”]; Roundtable on Voting Barriers and Election Administration for Citizens of the Lower Brule Sioux Tribe (Apr. 17, 2024).

498 *Lower Brule Sioux Tribe*, 625 F. Supp. 3d at 923; see also Roundtable on Voting Barriers and Election Administration for Citizens of the Lower Brule Sioux Tribe (Apr. 17, 2024); NARF, *Lyman County Redistricting*, *supra* note 497.

499 See Roundtable on Voting Barriers and Election Administration for Citizens of the Lower Brule Sioux Tribe (Apr. 17, 2024); NARF, *Lyman County Redistricting*, *supra* note 497.

500 *Id.* (statement of Stephanie Bolman).

501 *Lower Brule Sioux Tribe*, 625 F. Supp. 3d at 923-24.

502 See Consent Decree, ECF No. 125, *Lower Brule Sioux Tribe v. Lyman County*, 3:22-cv-03008 (D.S.D. Dec. 15, 2022).

The Chamberlain School District exemplifies the importance of ensuring fair representation of Native peoples in their local governing bodies.

29.0 percent of the school district’s voting age population.⁵⁰³ This is because the district employed an at-large electoral system, allowing the white majority to out-vote Native voters in nearly every contest.⁵⁰⁴ In 2020, the U.S. Department of Justice sued the Chamberlain School District because the School Board’s at-large system diluted the voting

strength of Native voters in the Chamberlain.⁵⁰⁵ The parties quickly reached a consent decree, requiring School Board elections to shift to a hybrid system that gives Native voters a better opportunity to elect a candidate of choice.⁵⁰⁶ It is worth noting that Chamberlain School District’s electoral system was such an egregious violation of federal law that this lawsuit was one of only two Section 2 enforcement actions brought by the U.S. Department of Justice under the Trump Administration.⁵⁰⁷

The Chamberlain School District exemplifies the importance of ensuring fair representation of Native peoples in their local governing bodies. Chamberlain is a predominately white township, located near the Crow Creek and Lower Brule Reservations—the type of locality commonly referred to as a “border town.” While the city does not share geography with any Tribal nations, many Crow Creek and Lower Brule Tribal citizens living in the town or on the nearby reservations send their children to school in the Chamberlain School District.⁵⁰⁸ There is a well-documented history of discrimination and abuses against Native peoples in Chamberlain schools by Chamberlain officials as well as individuals acting on behalf of the federal government within Chamberlain schools.

In 1898, the Bureau of Indian Affairs opened the Chamberlain Indian School, a federal government-run boarding school designed to forcibly assimilate Native children into U.S. culture and society.⁵⁰⁹ When the school was later sold to the Catholic Church and reopened as the St. Joseph’s Indian School, it became the site of horrific abuses of Native children, including widespread sexual abuse—crimes that lasted well into the twentieth century.⁵¹⁰ At the same time, Chamberlain’s own officials expressed distain for Native peoples. In 1954, when the Bureau of Indian Affairs was considering transferring an agency to Chamberlain, Mayor

503 Complaint at 3 ¶ 15, ECF No. 1, U.S. v. Chamberlain School District, 4:20-cv-04084 (D.S.D. May 27, 2020); Consent Decree at 2 ¶¶ iv-v, ECF No. 4, U.S. v. Chamberlain School District, 4:20-cv-04084 (D.S.D. Jun. 18, 2020).

504 See *id.* ¶¶ iv-vi.

505 See Complaint at 3 ¶ 15, ECF No. 1, U.S. v. Chamberlain School District, 4:20-cv-04084 (D.S.D. May 27, 2020).

506 See Consent Decree at 2 ¶¶ iv-v, ECF No. 4, U.S. v. Chamberlain School District, 4:20-cv-04084 (D.S.D. Jun. 18, 2020).

507 See Civil Rights Division, U.S. Dep’t of Justice, Cases Raising Claims Under Section 2 Of The Voting Rights Act (updated May 25, 2022), <https://www.justice.gov/crt/cases-raising-claims-under-section-2-voting-rights-act-0>.

508 See Interview with Donita Loudner, Buffalo County Commissioner, Citizen of the Crow Creek Sioux Tribe, in Fort Thompson, S.D. (Apr. 17, 2024).

509 Bryan Newland, Bureau of Indian Affairs, FEDERAL INDIAN BOARDING SCHOOL INITIATIVE INVESTIGATIVE REPORT, Appendix B (May 2022), <https://www.bia.gov/service/federal-indian-boarding-school-initiative>.

510 Patrick Anderson, *Native American Victims of Sex Abuse at Catholic Boarding Schools Fight for Justice*, ARGUS LEADER (May 17, 2019), <https://www.argusleader.com/story/news/2019/05/16/native-american-sex-abuse-victims-catholic-boarding-schools-south-dakota/1158590001/>; Nick Estes, *My relatives went to a Catholic school for Native children. It was a place of horrors*, GUARDIAN (Jun. 30, 2021), <https://www.theguardian.com/commentisfree/2021/jun/30/my-relatives-went-to-a-catholic-school-for-native-children-it-was-a-place-of-horrors>.

Herschel V. Melcher expressed his strong opposition to “having Indians in [Chamberlain’s] schools or living in unsanitary conditions about the city.”⁵¹¹ Melcher continued, “[w]e have no intention of making an Indian comfortable around here, especially an official.”⁵¹²

Almost 60 years after Chamberlain’s mayor told the federal government that Native children were not welcome in the city’s schools, the Chamberlain School Board—which had been elected under an at-large system—repeatedly refused to allow Tribal citizens to perform an honor song for graduating seniors, prompting a civil rights investigation by the U.S. Department of Education.⁵¹³ Referencing the request, one school board member remarked, “I can’t see how it honors everybody when it’s not in our language, and when I say our language, I mean English . . . I look at the Pledge of Allegiance and it covers everything.”⁵¹⁴ Rather than participate in the graduation ceremony, honor song performers were forced to perform the song outside and across the street from the school.⁵¹⁵ Without fair representation for Native voters in Chamberlain, the interests of Native students, parents, and teachers in the city will continue to be disregarded and disrespected.

North Dakota State Legislature. In North Dakota, two members of the State House of Representatives are elected from each State Senate district, either at-large or from equal-population subdistricts.⁵¹⁶ During the 2021 redistricting cycle, it became clear that the population of the Mandan, Hidatsa and Arikara Nation (MHA Nation)⁵¹⁷ residing on the Fort Berthold Reservation had become sufficiently large that the North Dakota Legislative Assembly would be required to draw a subdistrict following the reservation’s political boundaries in order to comply with Section 2 of the Voting Rights Act.⁵¹⁸ After hearing testimony from Chairman Mark Fox of the MHA Nation requesting a State House subdistrict and performing a careful analysis of what the VRA required, the Legislative Assembly elected

511 Christina Rose, *Is Racism Behind Banning of Honor Song from Graduation Ceremonies?*, INDIAN COUNTRY TODAY (Dec. 13, 2013), <https://ictnews.org/archive/is-racism-behind-banning-of-honor-song-from-graduation-ceremonies>; see also, U.S. Dep’t of Indian Affairs, *Crow Creek Agency Will Move to Pierre, South Dakota* (Sept. 20, 1954), <https://www.bia.gov/as-ia/opa/online-press-release/crow-creek-indian-agency-will-move-pierre-south-dakota>.

512 Rose, *supra* note 511.

513 See Interview with Donita Loudner, Buffalo County Commissioner, Citizen of the Crow Creek Sioux Tribe, in Fort Thompson, S.D. (Apr. 17, 2024); Jonathan Ellis, *Chamberlain Honor Song Complaint Prompts Investigation*, ARGUS LEADER (Sept. 17, 2014), <https://www.argusleader.com/story/news/2014/09/16/chamberlain-honor-song-complaint/15736899/>; Rose, *supra* note 510; Lakota Times, *Chamberlain School Board Rejects Honor Song Request for Native American Students*, LAKOTA TIMES (May 15, 2013), <https://www.lakotatimes.com/articles/chamberlain-school-board-rejects-honor-song-request-for-native-american-students/>; Tally Monteau-Colombe, *Chamberlain School Board Denies Singing of a Lakota/Dakota Honor Song*, INDIAN COUNTRY TODAY (May 21, 2013), <https://ictnews.org/archive/chamberlain-school-board-denies-singing-of-a-lakotadakota-honor-song> (describing the Chamberlain School Board’s refusal to allow a Lakota/Dakota honor song and a prior incident where non-Native students wore shirts reading “White Pride Worldwide” to a Chamberlain school).

514 Lakota Times, *supra* note 513.

515 See Interview with Donita Loudner, Buffalo County Commissioner, Citizen of the Crow Creek Sioux Tribe, in Fort Thompson, S.D. (Apr. 17, 2024).

516 See N.D. CONST. art. IV, §§ 1-2.

517 The Mandan, Hidatsa and Arikara Nation is federally recognized as the “Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota”. See 89 Fed. Reg. 944 (Jan. 8, 2024).

518 See *Walen v. Burgum*, No. 1:22-CV-31, 2023 WL 7216070, at *8-10 (D.N.D. Nov. 2, 2023); *Sept. 23, 2021 Hearing Before the Joint Redistricting Committee*, 67th Leg., Reg. Sess. (N.D. 2021) (Testimony of Mark N. Fox, Chairman, Mandan, Hidatsa and Arikara Nation), https://ndlegis.gov/files/committees/67-2021/23_5062_03000appendixe.pdf [hereinafter “Fox Testimony”].

to draw a subdistrict that mirrors the political boundaries of the Fort Berthold Reservation.⁵¹⁹ The majority of the voting age population of the subdistrict is Native American, giving Native voters the opportunity to elect a candidate of their choice to the State House.⁵²⁰

After the legislature enacted the Native majority subdistrict, white voters challenged the map in federal court, arguing that the state house subdistrict was an unconstitutional racial gerrymander.⁵²¹ This forced the MHA Nation to expend resources to defend the district and ensure its citizens would have fair representation in North Dakota’s Legislative Assembly.⁵²² In November 2023, a federal court determined that the Legislative Assembly had “good reasons and strong evidence to believe” that the subdistrict was required by Section 2 of the VRA and upheld the constitutionality of the district.⁵²³

North Dakota Secretary of State Michael Howe and North Dakota Governor Doug Burgum, who are the primary defendants in the case, had been defending the map against the constitutional challenge, even moving to have the case resolved before trial in favor of MHA Nation’s position.⁵²⁴ Alarming, in May 2024, the North Dakota Governor and Secretary of State inexplicably reversed course, abandoning their defense of the subdistrict and MHA Nation citizens’ right to fair representation in the Legislative Assembly.⁵²⁵

As a part of an appeal to the U.S. Supreme Court by the non-Native plaintiffs, the Governor and Secretary of State requested that the Court vacate the win the state itself had secured.⁵²⁶ In its brief, the state asked the Court to ignore decades of precedent and decide that compliance with Section 2 of the VRA cannot be a compelling justification for the consideration of race in drawing district boundaries.⁵²⁷ North Dakota’s actions have left voters in limbo and the MHA Nation on its own, in opposition to the State of North Dakota and non-Native plaintiffs, to defend the rights of its citizens before the U.S. Supreme Court.⁵²⁸

519 See *Walen*, 2023 WL 7216070, at *8-10; Fox Testimony, *supra* note 517.

520 See N.D. LEGISLATURE, REDISTRICTING COMMITTEE, PROPOSED STATEWIDE PLAN (Sept. 29, 2021), https://ndlegis.gov/files/committees/67-2021/map_for_consideration_092921.pdf.

521 See Complaint, ECF No. 1, *Walen v. Burgum*, No. 1:22-cv-00031 (Feb. 16, 2022).

522 See Mot. to Intervene, ECF No. 16, *Walen v. Burgum*, No. 1:22-cv-00031 (Mar. 30, 2022).

523 See *Walen*, 2023 WL 7216070, at *10.

524 See Mem. in Supp. of Mot. for Summ. J., ECF No. 102, *Walen v. Burgum*, No. 1:22-cv-00031 (Feb. 28, 2023) (moving for summary judgement because “the undisputed evidence shows race was not a predominant factor in legislative decision making, and even if it were the predominant factor, the Legislature had good reasons to believe a failure to subdistrict would be a violation of the Voting Rights Act”); Mem. in Resp. to Intervenor Defs. Mot. for Summ. J., ECF No. 112, *Walen v. Burgum*, No. 1:22-cv-00031 (Mar. 21, 2023) (joining MHA Nation’s legal arguments in favor of summary judgement).

525 See Mem. in Resp. to Jurisdictional Statement, *Walen v. Burgum*, No. 23-969 (U.S. May 6, 2024).

526 *Id.*

527 See *id.* at 2-3.

528 See Native American Rights Fund, *Defending a Majority Native-Voter Subdistrict in North Dakota* (*Walen v. Burgum*), <https://narf.org/cases/majority-native-voter-subdistrict/> (noting that “[t]he abrupt change left the MHA Nation and individual voters on their own to defend North Dakota’s legislative actions and Native voters’ rights before the Supreme Court” and quoting MHA Nation Chairman Fox calling the change of position “unconscionable”).

Cracking Tribal Lands and Other Politically Cohesive Native Communities

States and localities persistently dilute the political power of Native voters by enacting districting plans that split (or “crack”) Tribal lands and other politically cohesive Native communities between two or more electoral districts.⁵²⁹ Map drawers can crack Native communities in a variety of ways: Native voters are prevented from participating equally in the nontribal political process—that is, the political structures of local, state, and federal governments—when map drawers split politically cohesive communities of Native peoples that are sufficiently large and geographically compact enough to make up the majority in an electoral district, often in violation of Section 2 of the VRA.⁵³⁰

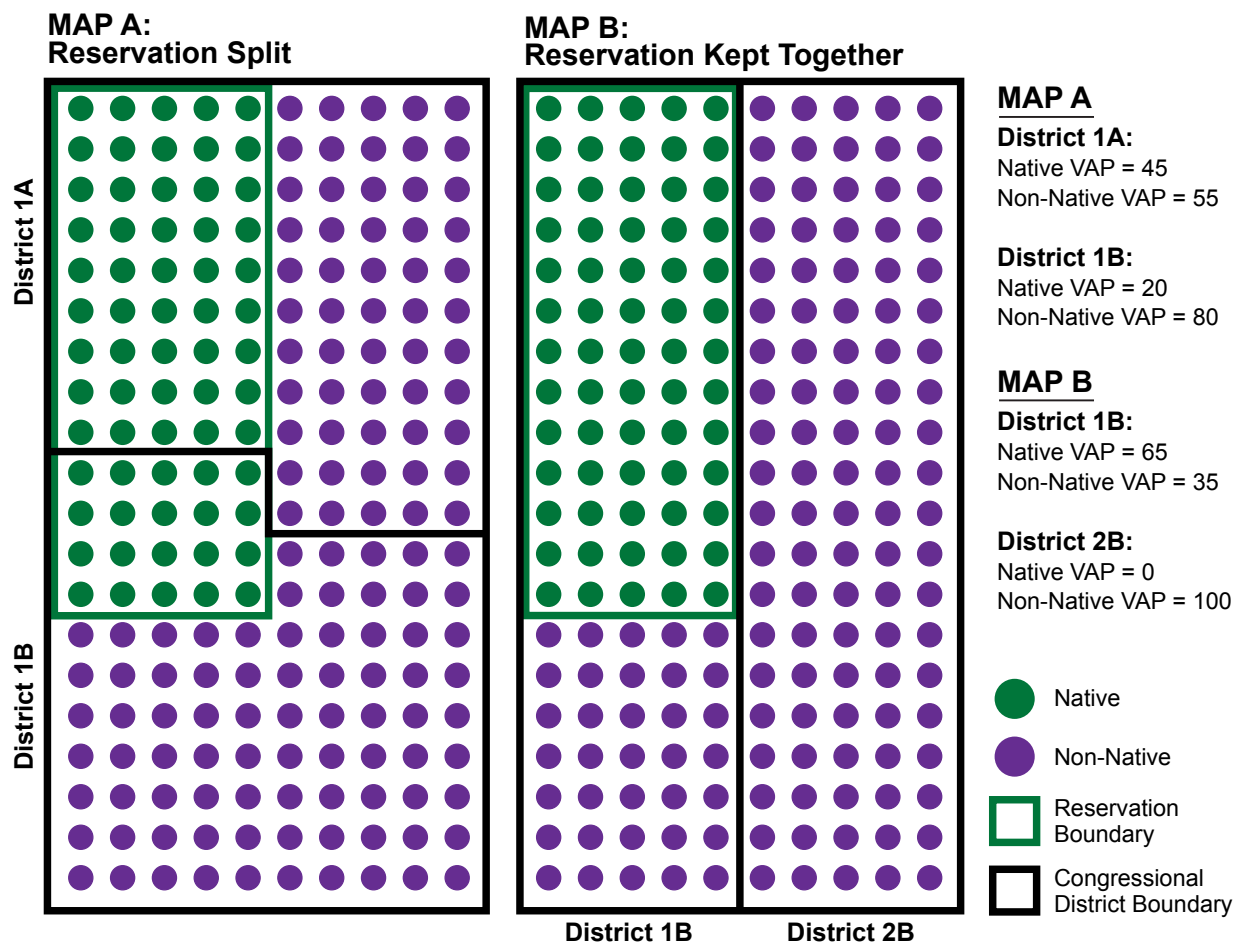


Figure 5. Example maps showing the impact on Native representation when Tribal lands are cracked between districts.

529 See, e.g., *Turtle Mountain Band of Chippewa Indians v. Howe*, No. 3:22-CV-22, 2023 WL 8004576, at *17 (D.N.D. Nov. 17, 2023) [hereinafter *Turtle Mountain*]; McCool, et al., *NATIVE VOTE*, *supra* note 73 at 64 (describing *Jepsen v. Vigil-Giron*, a challenge to New Mexico’s 2000 district plan for the State Legislature where a state court had to redraw court-drawn maps because they diluted the Native vote); U.S. Dep’t of Justice, *New South Dakota Sanitary District Established to Include Native Americans Under Agreement with Justice Department* (Jun. 26, 2000), <https://www.justice.gov/archive/opa/pr/2000/June/363cr.htm> (describing a consent decree requiring the locality to enact an additional sanitary district because the prior plan had diluted the voting strength of Native residents); *Old Person v. Cooney*, 230 F.3d 1113, 1130 (9th Cir. 2000); *Stabler v. Thurston County*, 129 F.3d 1015 (8th Cir. 1997); *Goddard v. Babbitt*, 536 F. Supp. 538 (D. Ariz. 1982); *Klahr v. Williams*, 339 F. Supp. 922 (D. Ariz. 1972).

530 See, e.g., *Turtle Mountain*, 2023 WL 8004576, at *17.

Even where the population of Native voters living on a reservation or other Tribal lands is too small to make up the majority in an electoral district, their voting strength can be diluted when map drawers split the community between two or more districts.⁵³¹ Splitting communities in this way undermines Native voters' ability to exert cohesive political influence, reducing the likelihood that an elected representative in their district will be responsive to their needs. Furthermore, Native people's ability to effectively have their voices heard in the nontribal political process can be undermined when map drawers fail to include nearby communities of Tribal citizens living on a Tribal nation's ancestral homelands but outside the formal reservation boundaries in the same district as the reservation.⁵³²

The burden on Native voters when their communities are improperly split between districts is compounding. Most obviously, it prevents Tribal citizens, who might otherwise make up the majority in an electoral district, from voting as a bloc in a single district to elect a candidate

The burden on Native voters when their communities are improperly split between districts is compounding.

of their choice or, at a minimum, exercise cohesive political power.⁵³³ Beyond the immediate impact on voters, splitting Tribal lands and Native communities between districts also hampers the ability of Tribal leaders to effectively advocate for their citizens.⁵³⁴ Specifically, when reservations and other Tribal

communities are cracked between districts where Tribal citizens make up less than a majority, Tribal leaders are forced to split their advocacy between multiple elected officials who may be less responsive than a single elected official that represents the Tribal leaders' entire constituency, and with whom Tribal leaders have developed a strong working relationship.⁵³⁵

531 See, *Sept. 15, 2021 Hearing Before the Joint Redistricting Committee*, 67th Leg., Reg. Sess. (N.D. 2021) (statement of Nicole Donaghy, Executive Director, North Dakota Native Vote), https://ndlegis.gov/files/committees/67-2021/23_5061_03000appendix.pdf (recommending treating reservations and other Tribal communities as communities of interest because “[s]plitting the reservation or [Native] communities into multiple districts would dilute the ability of tribal members to elect the representative of their choice”).

532 See Roundtable on Voting Barriers and Election Administration for Tribal Citizens in Oregon and Washington (Mar. 9, 2024); Phone Interview with Anthony Aronica, Staff Attorney, Yakama Nation Office of Legal Counsel, and Willow Howard, Governmental Affairs Liaison, Yakama Nation (Mar. 22, 2024).

533 See, e.g., *Turtle Mountain Band of Chippewa Indians v. Howe*, No. 3:22-CV-22, 2023 WL 8004576, at *17 (D.N.D. Nov. 17, 2023).

534 See, e.g., Roundtable on Voting Barriers and Election Administration for Tribal Citizens in Oregon and Washington (Mar. 9, 2024); Phone Interview with Anthony Aronica, Staff Attorney, Yakama Nation Office of Legal Counsel, and Willow Howard, Governmental Affairs Liaison, Yakama Nation (Mar. 22, 2024); Roundtable on Voting Barriers and Election Administration for Tribal Citizens in Montana (Apr. 29, 2024).

535 See, e.g., Roundtable on Voting Barriers and Election Administration for Tribal Citizens in Oregon and Washington (Mar. 9, 2024) (explaining the importance of including ancestral homelands where communities of Tribal citizens traditionally and presently live in the same district as the reservation or seat of the Tribal government); Phone Interview with Anthony Aronica, Staff Attorney, Yakama Nation Office of Legal Counsel, and Willow Howard, Governmental Affairs Liaison, Yakama Nation (Mar. 22, 2024) (explaining that many citizens of the Yakama Nation live on the Tribe's ceded lands outside the Reservation and those same citizens are often the most underserved by nontribal governments making the Tribe's advocacy on their behalf particularly important).

North Dakota State Legislature. In the 2021 redistricting cycle, the North Dakota Legislative Assembly deployed State House subdistricts⁵³⁶ (where they were neither requested nor required) in order to dilute the voting strength of citizens of the Turtle Mountain Band of Chippewa Indians (the “Turtle Mountain Band”) and Spirit Lake Nation, “unlawfully packing [a single state legislative subdistrict] with a supermajority of Native Americans and cracking the remaining Native American voters in the region into other districts[.]”⁵³⁷ Specifically, the Legislative Assembly split the Turtle Mountain Reservation from nearby Turtle Mountain Trust Lands where Tribal members also live and which had previously been included in the same legislative district as the reservation.⁵³⁸ This placed a supermajority of Native voters the subdistrict containing the reservation and left the subdistrict containing Tribal trust lands with too few Native voters to elect a candidate of choice.⁵³⁹

The Legislative Assembly further cracked the Native community in northern North Dakota by breaking the Spirit Lake Reservation into another state legislative district where Native voters were also a minority and unable to elect any candidate of choice to the State House or State Senate.⁵⁴⁰ The Legislative Assembly enacted this map despite express notice that the plan would violate the Voting Rights Act and a formal request from Turtle Mountain Chairman Jamie Azure and then-Chairman of the Spirit Lake Nation Doug Yankton to create a single legislative district that would unify the Tribal lands.⁵⁴¹

A federal district court in North Dakota determined that the plan violated Section 2 of the VRA because it “prevent[ed] Native American voters from having an equal opportunity to elect candidates of their choice[.]”⁵⁴² While Section 2 required map drawers to enact a plan that would have allowed Native voters to elect one candidate of choice to the State Senate and two candidates of choice to the State House, the challenged plan reduced that representation to a single State House Representative.⁵⁴³ Notably, in the 2022 election held under the challenged

536 In North Dakota, three members of the Legislative Assembly are elected from each state legislative district: one state senator and two representatives in the State House. See N.D. CONST. art. IV, §§ 1-2. In each legislative district, the entire population votes for the single member of the State Senate, while the two representatives in the State House can be elected either at-large or from two subdistricts, each consisting of equal populations. *Id.* During the 2021 redistricting process, the Legislative Assembly elected to draw subdistricts in just two of the state’s 47 legislative districts. See N.D. LEGISLATURE, REDISTRICTING COMMITTEE, PROPOSED STATEWIDE PLAN (Sept. 29, 2021), https://ndlegis.gov/files/committees/67-2021/map_for_consideration_092921.pdf. One State House subdistrict mirrors the boundaries of the Fort Berthold Reservation where the Mandan, Hidatsa and Arikara Nation is located, as required by Section 2 of the Voting Rights Act, while the other is the subdistrict at issue in *Turtle Mountain*. See *Walen v. Burgum*, __ F.Supp.3d. __, No. 1:22-CV-31, 2023 WL 7216070, at *10 (D.N.D. Nov. 2, 2023); *Turtle Mountain*, 2023 WL 8004576.

537 *Turtle Mountain Band of Chippewa Indians v. Howe*, No. 3:22-CV-22, 2023 WL 8004576, at *1 (D.N.D. Nov. 17, 2023) [hereinafter “*Turtle Mountain*”].

538 *Id.* at *10-15.

539 See *id.* at *10-15.

540 See *id.*

541 Nov. 1, 2021, Letter from Turtle Mountain Chairman Jamie Azure and Spirit Lake Nation Chairman Douglas Yankton, Sr., to the North Dakota Legislative Redistricting Committee and Governor Doug Burgum, ECF No. 1-2, Ex. 1, *Turtle Mountain*, No. 3:22-CV-22, 2023 (D.N.D. Feb. 7, 2022), available at https://campaignlegal.org/sites/default/files/2022-02/ND%20Letter%20%28Exhibit%20%29_FILED.pdf.

542 See *Turtle Mountain*, 2023 WL 8004576 at *17.

543 See *id.*

map, North Dakota lost its single state senator from a North Dakota Tribal nation, leaving the 94-member State Senate without a single Native member for the first time since 2006.⁵⁴⁴

Chairman Jamie Azure of the Turtle Mountain Band of Chippewa Indians explains the importance of Tribal citizens being able to engage in the nontribal political process:

Working together, tribes can accomplish anything. This decision shows the impact tribal nations can make when they unite to stop the cycle of exclusion and underrepresentation that has for generations prevented too many Native people from having a say in state-level decision-making.⁵⁴⁵

The case is currently pending an appeal in the Eighth Circuit Court of Appeals, where the Secretary of State of North Dakota has challenged the plaintiffs' authority to bring suit under Section 2 of the VRA and argued that the remedial action to comply with the VRA was an unconstitutional racial gerrymander.⁵⁴⁶ If the state wins its appeal, a new map could undo altogether the progress made in North Dakota and undermine the ability of future plaintiffs to bring lawsuits under Section 2 of the Voting Rights Act throughout the Eighth Circuit.

Packing Supermajorities of Native Voters into a Single Electoral District

Lawmakers further dilute Tribal citizens' voting strength by packing supermajorities of Native voters into single electoral districts, even where the community is large enough to constitute a majority and elect candidates of choice in more than one district.⁵⁴⁷ Strikingly, in the 2021 redistricting cycle, at least two counties with large Native populations adopted electoral schemes that undermined Native voting strength by packing Native voters into dilutive districts, despite federal courts having previously forced those same counties to redesign their electoral systems because they prevented Tribal citizens from participating equally in local elections.

San Juan County, New Mexico. Native voters—primarily from the Navajo Nation—account for nearly half the population in San Juan County, New Mexico. Despite this, Native voters have been persistently excluded from equal participation in elections for the County Commission due to the County's discriminatory electoral system. Until 1980, voters in San Juan County

544 Prior to the 2022 election, the district containing the Turtle Mountain Reservation and Turtle Mountain Trust Lands had been represented by Senator Richard Marcellais, a citizen of the Turtle Mountain Band of Chippewa Indians. See N.D. Legislative Branch, *Richard Marcellais* (last visited May 15, 2024), <https://ndlegis.gov/biography/richard-marcellais>.

545 Native American Rights Fund, *North Dakota Redistricting* (Turtle Mountain Band of Chippewa Indians v. Michael Howe), <https://narf.org/cases/north-dakota-redistricting-map/>.

546 See Brief of Defendant-Appellant, *Turtle Mountain Band of Chippewa Indians v. Michael Howe*, No. 23-3655 (8th Cir. Jan. 30, 2024).

547 See Order, Consent Decree, and Judgement, *Winnebago Tribe v. Thurston County*, No. 8:23-cv-00020 (D. Neb. Jan. 26, 2024); Complaint, *Navajo Nation v. San Juan County*, 1:22-cv-00095 (D.N.M. Mar. 27, 2024) (challenging County Commission districts in San Juan County, New Mexico because they packed a supermajority of Native voters into a single district); Austin Fisher, *San Juan County Scraps Gerrymandered Voting Maps*, SOURCE NM (Mar. 27, 2024), <https://sourcennm.com/2024/03/27/san-juan-county-scraps-gerrymandered-voting-map/> (describing allegations and outcome in *Navajo Nation v. San Juan County*, which was dismissed with stipulations favorable to plaintiffs, requiring map drawers to enact a new map with an additional Native majority district); *Turtle Mountain*, 2023 WL 8004576; *Bone Shirt v. Hazeltine*, 461 F.3d 1011 (8th Cir. 2006) (finding that South Dakota's state legislative map violated Section 2 of the Voting Rights Act because it packed a supermajority of Native voters into a single legislative district, hampering their ability to elect a candidate of choice in a second district).

elected their County Commissioners at-large.⁵⁴⁸ This electoral system prevented Native voters from electing a single candidate of choice to the County Commission. As a result, the U.S. Department of Justice sued the County, forcing it to enter a stipulation and adopt a district-based system that would provide Native voters a fairer chance to elect a candidate of choice to the County Commission.⁵⁴⁹

Unfortunately, even after being sued by the U.S. Department of Justice, San Juan County continued to dilute the Native vote through a discriminatory district-based scheme. In the following decades, Native voters were packed into just one of the county's five County Commission districts.⁵⁵⁰ By 2020, Native peoples made up 41.1 percent of the San Juan County population, but elected just a single candidate of choice to the County Commission.⁵⁵¹ By contrast, non-Hispanic white residents were only 35.8 percent of the population, but could elect candidates of choice in the remaining four districts.⁵⁵² Because a supermajority of Native voters were packed into the district with a functioning Native majority, they were unable to achieve representation even close to proportional.⁵⁵³

In 2021, Navajo Nation and the Navajo Nation Human Rights Commission challenged the County Commission districts under Section 2 of the Voting Rights Act.⁵⁵⁴ The plaintiffs argued that by packing a supermajority of Native voters into a single district and cracking the remaining Native voters across the four other districts, the electoral plan gave Native Americans less opportunity to participate in the political process and elect candidates of their choice to the County Commission than their white neighbors.⁵⁵⁵ After more than two years of costly litigation, the County agreed to adopt a second functioning majority Native district, but it will only take effect beginning in 2026, meaning that Native voters in San Juan County will live under illegal and racially discriminatory County Commission districts for another two years before receiving a remedy.⁵⁵⁶

Thurston County, Nebraska. In 2021, another repeat offender, Thurston County, Nebraska for the third time adopted an electoral system for its Board of Supervisors that diminished

In the 2021 redistricting cycle, at least two counties with large Native populations adopted electoral schemes that undermined Native voting strength by packing Native voters into dilutive districts, despite federal courts having previously forced those same counties to redesign their electoral systems.

548 See McCool, *ET AL.*, NATIVE VOTE, *supra* note 73 at 51 (describing *U.S. v. San Juan County*).

549 *Id.*

550 See Fisher, *supra* note 547.

551 See Fisher, *supra* note 547; U.S. Census Bureau, 2020 Decennial Census, P1, P8.

552 See Fisher, *supra* note 547; U.S. Census Bureau, 2020 Decennial Census, P1, P8.

553 See Complaint at 18, 22-24, ECF No. 1, *Navajo Nation v. San Juan County*, No. 1:22-cv-00095 (D.N.M. Feb. 10, 2022). Native Americans comprise the numerical majority (52.3 percent) of the voting age population in a second electoral district, but due to differential turnout rates between white and Native residents, it would be almost impossible for Native voters to elect a candidate of choice in that district. See *id.*

554 *Id.*

555 *Id.* at 24-30.

556 See Fisher, *supra* note 547.

the voting strength of citizens of the Winnebago Tribe of Nebraska and the Omaha Tribe of Nebraska.⁵⁵⁷ Although Native people comprise nearly 60 percent of Thurston County, the map only gave Native voters the opportunity to elect candidates of their choice in three of the seven Supervisor districts.⁵⁵⁸ Worse yet, the County adopted the 2021 map despite having been informed by Tribal leaders and Native voters that the map would fail to provide citizens of the Winnebago Tribe of Nebraska and the Omaha Tribe of Nebraska an equal opportunity to participate in the political process.⁵⁵⁹ Vice Chairman Brian Chamberlain of the Winnebago Tribe of Nebraska said of the map:

Not only did the Thurston County Board of Supervisors reject the VRA-compliant map shared by the Winnebago Tribe and the Omaha Tribe, but once the Tribes made their concerns known, the Board decided to make its bad map even worse, by reducing the number of Native Americans in [two of the districts that might have allowed Native voters to elect a candidate of choice]. This is a slap in the face to the Tribes and tribal members in the county, and shows another example of discrimination on the part of the county against tribal members.⁵⁶⁰

Remarkably, this was not the first, or even the second, time Thurston County's electoral system prevented Native voters from achieving fair representation in the County. In two prior redistricting cycles the county was forced—once by the U.S. Department of Justice in a consent decree and later by a federal court in a suit by private plaintiffs—to redraw its electoral map because it diluted the Native vote.⁵⁶¹

557 See Order, Consent Decree, and Judgement, *Winnebago Tribe v. Thurston County*, No. 8:23-cv-00020 (D. Neb. Jan. 26, 2024); Native American Rights Fund, *Tribes and Voters Sue Nebraska County to Secure Equal Representation* (Jan. 19, 2023), <https://narf.org/thurston-nebraska-redistricting/>.

558 Complaint at 2, ECF No. 1, *Winnebago Tribe v. Thurston County*, No. 8:23-cv-00020 (D. Neb. Jan. 19, 2023).

559 *Id.* at 3-4.

560 Native American Rights Fund, *Tribes and Voters Sue Nebraska County to Secure Equal Representation*, *supra* note 557.

561 See *id.*; McCool, NATIVE VOTE, *supra* note 73 at 51 (describing consent decree in *U.S. v. Thurston County*, where Thurston County agree to move from at-large elections for its Board of Supervisors to district-based elections); *Stabler v. Thurston County*, 129 F.3d 1015 (8th Cir. 1997) (upholding the district court's order requiring Thurston County to create a third majority-minority district for its Board of Supervisors that would allow citizens of the Winnebago Tribe of Nebraska and Omaha Tribe of Nebraska to elect a candidate of choice).

Systemic Barriers Compounding the Direct Barriers

Housing and Socioeconomic Conditions

The federal government’s removal, reservation, assimilation, and termination policies of the nineteenth and twentieth centuries created systemic obstacles that compound the barriers Tribal citizens face to full and equal participation in the nontribal political process — that is, the political structures of local, state, and federal governments.⁵⁶² These obstacles extend from reduced socioeconomic opportunities and negative health outcomes for Tribal citizens to poor infrastructure and insufficient housing on Tribal lands. These conditions make it more difficult for Native voters to access voter education materials, register to vote, cast a ballot, and even have their vote count equally.⁵⁶³

Native communities have persistently lower incomes and higher rates of poverty than non-Natives. This is especially true for Native people who live on reservations. The median household income for Native Americans (\$55,925) is almost \$20,000 less than the median household income nationwide (\$75,149) and nearly \$25,000 less than the median household income in white households (\$81,423).⁵⁶⁴ Similarly, Native Americans have the highest poverty rate (22.6 percent) of any racial or ethnic group the Census Bureau tracks, with a rate more than double that of white Americans (9.2 percent) and more than 10 percentage points higher than the national rate (12.5 percent).⁵⁶⁵

Native communities have persistently lower incomes and higher rates of poverty than non-Natives.

562 See Adam Crepelle, *Federal Policies Trap Tribes in Poverty*, AMERICAN BAR ASSOCIATION (Jan. 6, 2023), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/wealth-disparities-in-civil-rights/federal-policies-trap-tribes-in-poverty/.

563 See OBSTACLES AT EVERY TURN, *supra* note 224 at 34-39; WHITE HOUSE REPORT, *supra* note 289 at 18-19; Roundtable on Voting Barriers and Election Administration on the Navajo Nation, Part I: Sheep Springs Chapter House (Feb. 19, 2024); Roundtable on Voting Barriers and Election Administration on the Navajo Nation, Part III: Navajo Nation Council (Feb. 19, 2024); Interview with Hopi Tribal Council Members, in Second Mesa, Ariz (Feb. 20, 2024); Roundtable on Voting Barriers and Election Administration on the Tohono O’odham Nation (Feb. 21, 2024); Roundtable on Voting Barriers and Election Administration for Tribal Citizens in Arizona (Feb. 22, 2024); Roundtable on Voting Barriers and Election Administration for Tribal Citizens in Oregon and Washington (Mar. 9, 2024); Interview with Brittany Bryson, Executive Assistant to the Council, Quinault Nation, and Pearl Capoeman-Baller, Former President, Quinault Nation Business Council, in Seabrook, Wash. (Mar. 11, 2024); Phone Interview with Anthony Aronica, Staff Attorney, Yakama Nation Office of Legal Counsel, and Willow Howard, Governmental Affairs Liaison, Yakama Nation (Mar. 22, 2024); Interview with Peri Pourier, Citizen of the Oglala Lakota Nation, Member of the South Dakota House of Representatives for the 27th District, in Rapid City, S.D. (Apr. 16, 2024); Interview with Louis “Wayne” Boyd, Treasurer, Rosebud Sioux Tribe, in Rosebud, S.D. (Apr. 17, 2024); Interview with Oliver “O.J.” Semans, Citizen of the Sicangu Oyate (Rosebud Sioux Tribe), Co-Founder and Co-Executive Director, Four Directions, in Rosebud, S.D. (Apr. 17, 2024); Interview with Troy Heinert, Citizen of the Rosebud Sioux Tribe, Former Minority Leader of the South Dakota Senate and Senator for District 26, in Rosebud, S.D. (Apr. 17, 2024); Roundtable on Voting Barriers and Election Administration for Citizens of the Lower Brule Sioux Tribe (Apr. 17, 2024); Interview with Donita Loudner, Buffalo County Commissioner, Citizen of the Crow Creek Sioux Tribe, in Fort Thompson, S.D. (Apr. 17, 2024); Roundtable on Voting Barriers and Election Administration for Native Peoples in Urban South Dakota (Apr. 19, 2024); Roundtable on Voting Barriers and Election Administration for Tribal Citizens in Montana (Apr. 29, 2024); Roundtable on Voting Barriers and Election Administration for Citizens of the Confederated Salish and Kootenai Tribes (Apr. 30, 2024); Telephone Interview with Marvin Weatherwax, Jr., Member of the Blackfeet Tribal Council, Member of the Montana House of Representatives for the 15th District (May 1, 2024); Telephone Interview with Anjali Bhasin, Civic Engagement Director, Wisconsin Conservation Voters (May 13, 2024).

564 See U.S. Census Bureau, 2022 American Community Survey 5-Year Estimates, Median Income in the Past 12 Months (in 2022 Inflation Adjusted Dollars), S1903. The reported statistics are for households where the householder reported their race as American Indian or Alaska Native (AIAN) alone and non-Hispanic white alone.

565 See U.S. Census Bureau, 2022 American Community Survey 5-Year Estimates, Poverty Status in the Past 12 Months, S1701. The reported statistics are for the population reporting AIAN alone and non-Hispanic white alone as their race.

Native peoples living on Tribal lands are also substantially more likely to be unhoused or have inconsistent housing than Americans living outside of Tribal lands.

On many reservations, the disparities are even worse. On the Rosebud Indian Reservation, for example, the median household income is just \$30,284 and more than half the population (54.0 percent), including 62.4 percent of all children, live below the poverty line.⁵⁶⁶ On the Pine Ridge Reservation, where the Oglala Lakota Nation is located and the median household income is only \$34,567, half of all people (50.2 percent) and 56.2 percent of children live below the poverty line.⁵⁶⁷ On the Tohono O'odham Reservation, more than half of all children (51.3 percent) and 40.0 percent of the total population live below the poverty line.⁵⁶⁸ On the Navajo Nation, the median household income is \$32,579 and 36.7

percent of the population and nearly half of all children (46.5 percent) live below the poverty line.⁵⁶⁹ On the Ho-Chunk Reservation, more than half of all children (50.4 percent) and 35.4 percent of the total population live below the poverty line. On the Spirit Lake Reservation, more than a third of the population (33.9 percent and 39.5 percent of children) lives below the poverty line.⁵⁷⁰ On the Fort Peck Reservation, 34.3 percent of the population and 40.0 percent of children live below the poverty line.⁵⁷¹ On the Blackfeet Reservation, an estimated 30.9 percent of the population and 34.7 percent of children live below the poverty line.⁵⁷² On the Red Lake Reservation, 30.6 percent of the population and a third of all children live below the poverty line.⁵⁷³

Native peoples living on Tribal lands are also substantially more likely to be unhoused or have inconsistent housing than Americans living outside of Tribal lands.⁵⁷⁴ Native Americans are overrepresented in the unhoused population, accounting for an estimate 1.5 times their population share.⁵⁷⁵ By contrast, white Americans are underrepresented in the unhoused

566 See U.S. Census Bureau, 2022 American Community Survey 5-Year Estimates, Median Income in the Past 12 Months (in 2022 Inflation Adjusted Dollars), S1903; U.S. Census Bureau, 2022 American Community Survey 5-Year Estimates, Poverty Status in the Past 12 Months, S1701.

567 See *id.*; U.S. Census Bureau, 2022 American Community Survey 5-Year Estimates, Median Income in the Past 12 Months (in 2022 Inflation Adjusted Dollars), S1903.

568 See U.S. Census Bureau, 2022 American Community Survey 5-Year Estimates, Poverty Status in the Past 12 Months, S1701.

569 U.S. Census Bureau, 2022 American Community Survey 5-Year Estimates, Median Income in the Past 12 Months (in 2022 Inflation Adjusted Dollars), S1903; U.S. Census Bureau, 2022 American Community Survey 5-Year Estimates, Poverty Status in the Past 12 Months, S1701.

570 See *id.*

571 See *id.*

572 See *id.*

573 See *id.*

574 U.S. DEP'T OF HOUSING AND URBAN DEVELOPMENT: OFFICE OF COMMUNITY PLANNING AND DEVELOPMENT, THE 2023 ANNUAL HOMELESS ASSESSMENT REPORT (AHAR) TO CONGRESS: PART 1: POINT-IN-TIME ESTIMATES OF HOMELESSNESS 2 (Dec. 2023), <https://www.huduser.gov/portal/sites/default/files/pdf/2023-AHAR-Part-1.pdf> [hereinafter "HUD, 2023 AHAR"] ("[I]ndigenous people (including Native Americans and Pacific Islanders) continue to be overrepresented among the population experiencing homelessness."); U.S. DEP'T OF HOUSING AND URBAN DEVELOPMENT, 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 3 (Jan. 2017), <https://www.huduser.gov/portal/sites/default/files/pdf/HNAIHousingNeeds.pdf> [hereinafter "HUD, AIAN HOUSING REPORT"].

575 See HUD, 2023 AHAR *supra* note 574; U.S. Census Bureau, 2022 American Community Survey 5-Year Estimates, ACS Demographics and Housing Estimates, DPO5 (reporting AIAN alone or in combination with some other race). While Native peoples make up an estimated 2 percent of the population, they account for an estimated 3.5 percent of the unhoused population. *id.*; HUD, AIAN HOUSING REPORT, *supra* note 573 at 13.

population when compared to their overall population share.⁵⁷⁶ And the disparities are getting worse. Between 2022 and 2023, the number of Native Americans who were unhoused increased at a rate (18 percent increase) nearly double that of the nation as a whole (11 percent increase).⁵⁷⁷ Even more Native peoples live in overcrowded homes or only have temporary living arrangements. An estimated 15.9 percent of homes on Tribal lands are overcrowded, compared to only 2.2 percent of houses nationwide, with about six percent of homes being “severely”⁵⁷⁸ overcrowded.⁵⁷⁹ There are also many Tribal citizens who live temporarily with relatives or friends, frequently moving between homes to avoid becoming unsheltered, with an estimated 16.6 percent of households on Tribal lands sheltering an individual who has no other place to live.⁵⁸⁰

For individuals who are unhoused or have temporary or overcrowded living arrangements, each step in the voting process can become more burdensome.⁵⁸¹ When eligible voters are unhoused or move frequently, they are more likely to lack the requisite documentation needed to register to vote and cast a ballot, especially if such documentation becomes lost or if the individual elects to store it in a more permanent location away from where they are staying. It can also be more difficult for voters with overcrowded or temporary living arrangements to obtain the requisite documentation because they are not listed on any official documents associated with the house where they are staying.⁵⁸² Voters without permanent housing are also more likely to not be registered at the correct residence on Election Day and may be turned away without casting a ballot as a result. These socioeconomic factors, in concert with

576 See HUD, 2023 AHAR, *supra* note 574; U.S. Census Bureau, 2022 American Community Survey 5-Year Estimates, ACS Demographics and Housing Estimates, DPO5 (reporting non-Hispanic white alone). While white Americans make up an estimated 58.9 percent of the population, they account for an estimated 49.7 percent of the unhoused population. *Id.*; HUD, AIAN HOUSING REPORT, *supra* note 574 at 13.

577 HUD, 2023 AHAR, *supra* note 574 at 15, 26, 29.

578 *Id.* at 81. The Department of Housing and Urban Development defines “severe” overcrowding as a home having more than 1.5 persons per room. *Id.*

579 See HUD, AIAN HOUSING REPORT, *supra* note 574 at xxi, 73-76, 81. This metric climbs to a shocking 19 percent of households when overcrowding is defined as homes that include more residents than “can live in the unit comfortably.” *Id.* at 82.

580 See *id.* at 75, 79-81. One survey respondent reported that on the Pine Ridge Reservation, “People go from one family member’s home to another; everyone’s homeless around here—but, they just stay with family members and extended families until they get kicked out—it’s not good—they are not living in the street, but it’s still not good.” *Id.* at 80.

581 See OBSTACLES AT EVERY TURN, *supra* note 225 at 38-40.

582 See Interview with Scott Herman, President, Rosebud Sioux Tribe, in Rosebud, S.D. (Apr. 17, 2024); Interview with Troy Heinert, Citizen of the Rosebud Sioux Tribe, Former Minority Leader of the South Dakota Senate and Senator for District 26, in Rosebud, S.D. (Apr. 17, 2024); Roundtable on Voting Barriers and Election Administration for Native Peoples in Urban South Dakota (Apr. 19, 2024).

more direct voting barriers, make it substantially more difficult for Native peoples than non-Natives to participate equally in the nontribal political process.⁵⁸³

Transportation and Physical Infrastructure

On top of the persistent poverty, there is insufficient transportation and physical infrastructure on many reservations. Some Tribal citizens living on reservations lack even basic access to electricity and running water.⁵⁸⁴ According to the U.S. Water Alliance, “Native Americans are more likely to face water issues than any other group.”⁵⁸⁵ An estimated “58 out of every 1,000 Native American households lack complete plumbing” compared to only three in 1,000 white households.⁵⁸⁶ Put differently, households belonging to Native residents are 19 times more likely than white households to lack indoor plumbing.⁵⁸⁷ On the Navajo Nation the problem is markedly more severe, with an estimated 30 percent of families living without running water.⁵⁸⁸

Homes on Tribal lands are also disproportionately “un electrified.”⁵⁸⁹ The U.S. Department of Energy estimates that approximately “17,000 Tribal homes are un electrified impacting more than 54,000 people.”⁵⁹⁰ The communities with the highest rates of un electrified homes are

583 See Roundtable on Voting Barriers and Election Administration on the Navajo Nation, Part I: Sheep Springs Chapter House (Feb. 19, 2024); Roundtable on Voting Barriers and Election Administration on the Navajo Nation, Part III: Navajo Nation Council (Feb. 19, 2024); Interview with Hopi Tribal Council Members, in Second Mesa, Ariz (Feb. 20, 2024); Roundtable on Voting Barriers and Election Administration on the Tohono O’odham Nation (Feb. 21, 2024); Roundtable on Voting Barriers and Election Administration for Tribal Citizens in Arizona (Feb. 22, 2024); Roundtable on Voting Barriers and Election Administration for Tribal Citizens in Oregon and Washington (Mar. 9, 2024); Interview with Brittany Bryson, Executive Assistant to the Council, Quinault Nation, and Pearl Capoeman-Baller, Former President, Quinault Nation Business Council, in Seabrook, Wash. (Mar. 11, 2024); Phone Interview with Anthony Aronica, Staff Attorney, Yakama Nation Office of Legal Counsel, and Willow Howard, Governmental Affairs Liaison, Yakama Nation (Mar. 22, 2024); Interview with Peri Pourier, Citizen of the Oglala Lakota Nation, Member of the South Dakota House of Representatives for the 27th District, in Rapid City, S.D. (Apr. 16, 2024); Interview with Louis “Wayne” Boyd, Treasurer, Rosebud Sioux Tribe, in Rosebud, S.D. (Apr. 17, 2024); Interview with Oliver “O.J.” Semans, Citizen of the Sicangu Oyate (Rosebud Sioux Tribe), Co-Founder and Co-Executive Director, Four Directions, in Rosebud, S.D. (Apr. 17, 2024); Interview with Troy Heinert, Citizen of the Rosebud Sioux Tribe, Former Minority Leader of the South Dakota Senate and Senator for District 26, in Rosebud, S.D. (Apr. 17, 2024); Roundtable on Voting Barriers and Election Administration for Citizens of the Lower Brule Sioux Tribe (Apr. 17, 2024); Interview with Donita Loudner, Buffalo County Commissioner, Citizen of the Crow Creek Sioux Tribe, in Fort Thompson, S.D. (Apr. 17, 2024); Roundtable on Voting Barriers and Election Administration for Native Peoples in Urban South Dakota (Apr. 19, 2024); Roundtable on Voting Barriers and Election Administration for Tribal Citizens in Montana (Apr. 29, 2024); Roundtable on Voting Barriers and Election Administration for Citizens of the Confederated Salish and Kootenai Tribes (Apr. 30, 2024); Telephone Interview with Marvin Weatherwax, Jr., Member of the Blackfeet Tribal Council, Member of the Montana House of Representatives for the 15th District (May 1, 2024); Telephone Interview with Anjali Bhasin, Civic Engagement Director, Wisconsin Conservation Voters (May 13, 2024).

584 See Interview with Louis “Wayne” Boyd, Treasurer, Rosebud Sioux Tribe, in Rosebud, S.D. (Apr. 17, 2024); Roundtable on Voting Barriers and Election Administration on the Navajo Nation, Part III: Navajo Nation Council (Feb. 19, 2024).

585 DIG DEEP, U.S. WATER ALLIANCE, CLOSING THE WATER ACCESS GAP IN THE UNITED STATES: A NATIONAL ACCESS PLAN 22 (2019), https://uswateralliance.org/wp-content/uploads/2023/09/Closing-the-Water-Access-Gap-in-the-United-States_DIGITAL.pdf.

586 *Id.*

587 *Id.*

588 *Water as a Trust Resource: Examining Access in Native Communities: Hearing Before the S. Comm. on Indian Affs.*, 118th Cong. 18 (2023) (statement of Hon. Crystalayne Curley, Speaker, Navajo Nation Council), <https://www.indian.senate.gov/wp-content/uploads/CHRG-118shrg54473.pdf>.

589 U.S. DEP’T OF ENERGY, TRIBAL ELECTRICITY ACCESS AND RELIABILITY: REPORT TO CONGRESS (Aug. 2023), <https://www.energy.gov/sites/default/files/2024-01/EXEC-2023-000952%20-%20Tribal%20Electricity%20Access%20Reliability%20Report%20to%20Congress%20%28Final%20Draft%20-%20Clean%29-signed%20by%20S1.pdf> [hereinafter “DOE, TRIBAL ELECTRICITY”].

590 *Id.* at 52.

the Hopi Tribe, where an estimated 35 percent of homes are unelectrified, and the Navajo Nation, where an estimated 21 percent of homes are unelectrified.⁵⁹¹ Agreements with utility companies that were reached in the mid-twentieth century without Tribal consultation can also mean exorbitant electricity and broadband prices that can become prohibitive for Tribal members living at or near the poverty line.⁵⁹² Indeed, Tribal communities “[g]enerally pay a higher-than-average rate for their electricity” and “use a higher-than-average proportion of their income toward energy costs.”⁵⁹³ For citizens of the Rosebud Sioux Tribe living on the reservation, electric bills alone can cost upwards of \$500 per month—almost one fifth of the median household income on the reservation.⁵⁹⁴

Given the high poverty rates, many Tribal members living on reservations also lack access to reliable private transportation.⁵⁹⁵ Instead, many families share cars and individuals rely on friends and relatives for rides.⁵⁹⁶ When individuals do have cars, gas can be prohibitively expensive, meaning that individuals often try to combine as many errands as possible into a single trip in order to save money.⁵⁹⁷ When it comes time to register to vote or cast a ballot, Tribal members often struggle to find transportation to the polls.⁵⁹⁸ If they do have transportation, they often attempt to add their trip to the polling place to another errand in order to avoid expending additional limited resources on gas.⁵⁹⁹

There are also systemic disparities in broadband access for Native peoples living on Tribal lands, making it more difficult or even impossible for eligible voters to use online voter information and voter access tools, including online voter registration and

Native Americans have the lowest rates of internet access of any racial or ethnic group that the Census Bureau tracks.

591 *Id.* at 51.

592 See Interview with Louis “Wayne” Boyd, Treasurer, Rosebud Sioux Tribe, in Rosebud, S.D. (Apr. 17, 2024); c.f. Interview with Hopi Tribal Council Members, in Second Mesa, Ariz (Feb. 20, 2024).

593 See DOE, TRIBAL ELECTRICITY, *supra* note 589 at iv.

594 Interview with Louis “Wayne” Boyd, Treasurer, Rosebud Sioux Tribe, in Rosebud, S.D. (Apr. 17, 2024).

595 See Roundtable on Voting Barriers and Election Administration on the Navajo Nation, Part I: Sheep Springs Chapter House (Feb. 19, 2024); Roundtable on Voting Barriers and Election Administration for Tribal Citizens in Arizona (Feb. 22, 2024); Interview with Troy Heinert, Citizen of the Rosebud Sioux Tribe, Former Minority Leader of the South Dakota Senate and Senator for District 26, in Rosebud, S.D. (Apr. 17, 2024); Roundtable on Voting Barriers and Election Administration for Tribal Citizens in Montana (Apr. 29, 2024); Roundtable on Voting Barriers and Election Administration for Citizens of the Confederated Salish and Kootenai Tribes (Apr. 30, 2024).

596 See *supra* note 595 (listing sources).

597 See Roundtable on Voting Barriers and Election Administration on the Navajo Nation, Part I: Sheep Springs Chapter House (Feb. 19, 2024); Interview with Troy Heinert, Citizen of the Rosebud Sioux Tribe, Former Minority Leader of the South Dakota Senate and Senator for District 26, in Rosebud, S.D. (Apr. 17, 2024).

598 See Roundtable on Voting Barriers and Election Administration on the Navajo Nation, Part I: Sheep Springs Chapter House (Feb. 19, 2024); Roundtable on Voting Barriers and Election Administration for Citizens of the Confederated Salish and Kootenai Tribes (Apr. 30, 2024).

599 See Roundtable on Voting Barriers and Election Administration on the Navajo Nation, Part I: Sheep Springs Chapter House (Feb. 19, 2024).

polling place lookup systems.⁶⁰⁰ Nationally, Native Americans have the lowest rates of internet access of any racial or ethnic group that the Census Bureau tracks.⁶⁰¹ An estimated 91.0 percent of households nationwide have a computer with a broadband internet subscription, compared to only 82.2 percent of households nationwide where the householder is Native American.⁶⁰² On Tribal lands, the gap is even higher.

According to the Federal Communications Commission, only approximately 79.1 percent of Americans on Tribal lands have access to internet coverage at speeds considered adequate for use, compared to an impressive 98.8 percent of Americans in urban areas, 95.6 percent of the United States as a whole, and 82.7 percent of Americans in other rural areas.⁶⁰³ And on some reservations, there is far less access. On the Hopi Reservation and the Navajo Nation, only one third of all households (37.4 percent and 37.9 percent, respectively) have a broadband internet subscription.⁶⁰⁴ On the Pine Ridge Reservation, where the Oglala Lakota Nation is located, and Rosebud Indian Reservation, where the Rosebud Sioux Tribe is located, just over half (59.3 percent and 59.3 percent, respectively) of all households have a broadband internet subscription.⁶⁰⁵ Worse yet, numerous Tribal members report having internet at their home that is too slow to use for important tasks like voter registration, meaning these statistics may overestimate coverage rates.⁶⁰⁶

600 See Roundtable on Voting Barriers and Election Administration on the Navajo Nation, Part I: Sheep Springs Chapter House (Feb. 19, 2024); Roundtable on Voting Barriers and Election Administration on the Navajo Nation, Part III: Navajo Nation Council (Feb. 19, 2024); Interview with Hopi Tribal Council Members, in Second Mesa, Ariz (Feb. 20, 2024); Roundtable on Voting Barriers and Election Administration on the Tohono O’odham Nation (Feb. 21, 2024); Roundtable on Voting Barriers and Election Administration for Tribal Citizens in Arizona (Feb. 22, 2024); Roundtable on Voting Barriers and Election Administration for Tribal Citizens in Oregon and Washington (Mar. 9, 2024); Interview with Brittany Bryson, Executive Assistant to the Council, Quinault Nation, and Pearl Capoeman-Baller, Former President, Quinault Nation Business Council, in Seabrook, Wash. (Mar. 11, 2024); Phone Interview with Anthony Aronica, Staff Attorney, Yakama Nation Office of Legal Counsel, and Willow Howard, Governmental Affairs Liaison, Yakama Nation (Mar. 22, 2024); Interview with Peri Pourier, Citizen of the Oglala Lakota Nation, Member of the South Dakota House of Representatives for the 27th District, in Rapid City, S.D. (Apr. 16, 2024); Interview with Louis “Wayne” Boyd, Treasurer, Rosebud Sioux Tribe, in Rosebud, S.D. (Apr. 17, 2024); Interview with Oliver “O.J.” Semans, Citizen of the Sicangu Oyate (Rosebud Sioux Tribe), Co-Founder and Co-Executive Director, Four Directions, in Rosebud, S.D. (Apr. 17, 2024); Interview with Troy Heinert, Citizen of the Rosebud Sioux Tribe, Former Minority Leader of the South Dakota Senate and Senator for District 26, in Rosebud, S.D. (Apr. 17, 2024); Roundtable on Voting Barriers and Election Administration for Citizens of the Lower Brule Sioux Tribe (Apr. 17, 2024); Interview with Donita Loudner, Buffalo County Commissioner, Citizen of the Crow Creek Sioux Tribe, in Fort Thompson, S.D. (Apr. 17, 2024); Roundtable on Voting Barriers and Election Administration for Native Peoples in Urban South Dakota (Apr. 19, 2024); Roundtable on Voting Barriers and Election Administration for Tribal Citizens in Montana (Apr. 29, 2024); Roundtable on Voting Barriers and Election Administration for Citizens of the Confederated Salish and Kootenai Tribes (Apr. 30, 2024); Telephone Interview with Marvin Weatherwax, Jr., Member of the Blackfeet Tribal Council, Member of the Montana House of Representatives for the 15th District (May 1, 2024); Telephone Interview with Anjali Bhasin, Civic Engagement Director, Wisconsin Conservation Voters (May 13, 2024); STRONGER TOGETHER REDISTRICTING, *supra* note 417 at 10.

601 See U.S. Census Bureau, 2022 American Community Survey 5-Year Estimates, Types of Internet Subscriptions by Selected Characteristics, S2802.

602 See *id.*

603 See FEDERAL COMMUNICATIONS COMMISSION, FOURTEENTH BROADBAND DEPLOYMENT REPORT, FCC 21-18, 20, Fig. 1 (Jan. 19, 2021), <https://docs.fcc.gov/public/attachments/FCC-21-18A1.pdf>.

604 See U.S. Census Bureau, 2022 American Community Survey 5-Year Estimates, Types of Internet Subscriptions by Selected Characteristics, S2802.

605 See *id.*

606 See Interview with Hopi Tribal Council Members, in Second Mesa, Ariz (Feb. 20, 2024); Interview with Brittany Bryson, Executive Assistant to the Council, Quinault Nation, and Pearl Capoeman-Baller, Former President, Quinault Nation Business Council, in Seabrook, Wash. (Mar. 11, 2024).

Lack of broadband access makes it more difficult for voters to access important information, like changes to polling locations, election dates, or the documentation necessary to bring to a polling place. Lack of access also hampers the ability of Tribal governments and grassroots organizations to assist voters with voter registration and education.⁶⁰⁷

607 See Roundtable on Voting Barriers and Election Administration on the Navajo Nation, Part III: Navajo Nation Council (Feb. 19, 2024); Interview with Brittany Bryson, Executive Assistant to the Council, Quinault Nation, and Pearl Capoeman-Baller, Former President, Quinault Nation Business Council, in Seabrook, Wash. (Mar. 11, 2024).

Discrimination and Neglect: From Outright Hostility to Failure to Offer Robust Options for Participation by Tribal Members and Government-to-Government Consultation with Tribal Nations

One of the primary barriers to equal participation for Native peoples in the nontribal political process is express racial discrimination. This includes discrimination by state and local officials as well as by fellow voters. The impact of this discrimination is multifold. Initially, discrimination has the obvious effect of hampering Native peoples' ability to register to vote,

The impact of this discrimination is multifold.

cast a ballot, or have their vote equally counted. But once Native voters overcome the explicit barriers—often through litigation, advocacy, and grassroots organizing—the impact of the persistent need to combat voter suppression and the significant energy Native peoples must expend to exercise their basic and fundamental right to vote has the long-lasting effect of discouraging civic participation.⁶⁰⁸

Officials Interfering with Voting and Voter Registration Opportunities

One of the most common ways in which state and local officials nationwide inhibit Native Americans' ability to participate in the nontribal political process is by interfering with their ability to register to vote and remain registered.⁶⁰⁹ Officials do this by failing to provide the voter registration services that are required by law, harassing nonpartisan Native organizations and interfering with their voter registration efforts, and by improperly removing Native voters from voter rolls.⁶¹⁰

Targeting voter registration activities and assistance is particularly harmful to Native peoples.

Targeting voter registration activities and assistance is particularly harmful to Native peoples. Because of the numerous hurdles Native peoples face when attempting to register to vote, nonpartisan voter assistance from community members and local officials is critical to ensuring access to the ballot.⁶¹¹ Removing Native voters from the voter rolls and improperly rejecting their voter registration applications likewise has a compounding effect. If the voter who faces disqualification is not notified of their alleged ineligibility in time, they

will likely be unable to cast a ballot. In addition, for the many Native voters who are already hesitant to participate in nontribal elections, being turned away at the polling place can seriously discourage them from participating in future elections.⁶¹²

608 Roundtable on Voting Barriers and Election Administration on the Tohono O'odham Nation (Feb. 21, 2024), Testimony of April Ignacio.

609 See *infra* note 612-661 and accompanying text.

610 See *id.*

611 See *supra* Chapter 2, Inadequate USPS Services and Vote by Mail, Transportation and Physical Infrastructure.

612 See Interview with Louis "Wayne" Boyd, Treasurer, Rosebud Sioux Tribe, in Rosebud, S.D. (Apr. 17, 2024); Telephone Interview with Anjali Bhasin, Civic Engagement Director, Wisconsin Conservation Voters (May 13, 2024).

Failure to Offer Legally-Required Voter Registration Opportunities

The National Voter Registration Act of 1993 (NVRA) requires states to provide eligible voters with an opportunity to register to vote and assistance with that registration any time they access certain services at the Department of Motor Vehicles (DMV), public assistance agencies, and agencies that provide services to persons with disabilities.⁶¹³ Over the course of several years, South Dakota systematically neglected its duty to provide the required voter assistance services at DMVs and public assistance agencies, especially in locations that primarily serve Tribal citizens.⁶¹⁴ State officials persistently failed to offer voter registration applications to recipients of state services, improperly claimed that sites operated by government contractors that primarily serve Tribal citizens and others living in rural areas need not offer voter registration services at all, and even lost or failed to process countless completed voter registration forms, among other derelictions.⁶¹⁵ As a result, South Dakota saw a substantial drop in voter registration services through public assistance agencies—down from providing voter registration services to 7,000 citizens in 2004 to a mere 1,100 registrations in 2016.⁶¹⁶ This is especially harmful for eligible Native voters who commonly struggle to access other opportunities for voter registration.⁶¹⁷

Over the course of several years, South Dakota systematically neglected its duty to provide the required voter assistance services at DMVs and public assistance agencies, especially in locations that primarily serve Tribal citizens.

Kimberly Dillon, a member of the Rosebud Sioux Tribe, who attempted to register to vote at a South Dakota state agency, explains the impact of the state’s deficient registration system:

I was denied the opportunity to cast a vote in the 2020 presidential election because the state didn’t process my voter registration. How many other people faced this violation of our basic freedom to vote? We cannot allow voter suppression to continue in South Dakota or anywhere in Native America.⁶¹⁸

In May 2022, following a lawsuit by the Rosebud Sioux Tribe, the Oglala Lakota Nation, and several Tribal members, a federal court determined that South Dakota systematically failed to offer voter registration and assistance services and trainings at its Department of Public Services (the agency that provides driver’s licenses) and its Department of Social Services in violation of the NVRA.⁶¹⁹ Several months later, South Dakota agreed to a settlement requiring

613 See 52 U.S.C. §§ 20504 (DMV registration), 20506 (public assistance agencies and services for persons with disabilities).

614 See Native American Rights Fund, *South Dakota Voter Registration* (Rosebud Sioux Tribe v. Barnett), <https://narf.org/cases/south-dakota-voter-registration/> [hereinafter “NARF, *South Dakota Voter Registration*”]; Letter from the Rosebud Sioux Tribe, Oglala Sioux Tribe, and Four Directions to Steve Barnett, Secretary of State of South Dakota regarding Notice of Noncompliance with Sections 5 and 7 of the National Voter Registration Act (May 20, 2020), available at <https://narf.org/nill/documents/20200520NVRA-SD-ltr.pdf>.

615 See *supra* note 614 (listing sources).

616 See NARF, *South Dakota Voter Registration*, *supra* note 614.

617 See *supra* Chapter 2, Inadequate USPS Services and Vote by Mail; Part III, Systemic Barriers Compounding the Direct Barriers.

618 See NARF, *South Dakota Voter Registration*, *supra* note 614.

619 See *Rosebud Sioux Tribe v. Barnett*, 603 F.Supp.3d 783 (D.S.D. 2022).

it to provide equal access to voter registration services along with improved training and accountability measures for state officials.⁶²⁰

Obstructing Voter Registration Drives

In the lead up to the November 2020 election, Beltrami County and Cass County interfered with an unprecedented and nonpartisan effort to register thousands of eligible Native Americans to vote throughout Minnesota.⁶²¹ Over the course of eight days, in compliance with Minnesota law,⁶²² Tribal members collected an estimated 8,000 completed voter registration applications

Beltrami County and Cass County interfered with an unprecedented and nonpartisan effort to register thousands of eligible Native Americans to vote throughout Minnesota.

from eligible voters living on Tribal lands—with about 5,500 coming from the Red Lake Nation⁶²³ and the remaining primarily from the Leech Lake Band of Ojibwe⁶²⁴ and the White Earth Nation⁶²⁵—and timely returned the forms to county auditors.⁶²⁶ On the final day of the regular voter registration period, Beltrami County and Cass County attempted to reject numerous voter registration applications from Tribal members—possibly in violation of state law.⁶²⁷

In Beltrami County, staff in the County Auditor’s office claimed that some Tribal members’ voter registration forms were illegible while others were incomplete because a box requesting the applicant’s state identification number or the last four digits of their Social Security Number was left blank.⁶²⁸ Notably, this question is one that Native applicants who live on Tribal lands are more likely than others to have trouble completing. Indeed, Native peoples disproportionately lack state-issued identification and those without state-issued ID would

620 See Settlement Agreement and Stipulated Order of Dismissal, *Rosebud Sioux Tribe v. Barnett*, ECF No. 129-1, No. 5:20-cv-05058 (D.S.D. Aug. 23, 2022).

621 See Letter from Steven D. Sandven on Behalf of Four Directions Native Vote to Steve Simon, Minnesota Secretary of State (Oct. 16, 2020) [hereinafter “Oct. 16, 2020, Four Directions Letter”]; Letter from O.J. Semans, Sr., Co-Executive Director, Four Directions Native Vote to Steve Simon, Minnesota Secretary of State (Jul. 20, 2022) [hereinafter “Jul. 20, 2022, Four Directions Letter”].

622 For information about voter registration drives by nonprofits in Minnesota, see Office of the Minnesota Secretary of State Steve Simon, *Voter Registration Drives*, <https://www.sos.state.mn.us/elections-voting/get-involved/voter-registration-drives/>.

623 The Red Lake Nation is federally recognized as the Red Lake Band of Chippewa Indians, Minnesota. See 89 Fed. Reg. 944 (Jan. 8, 2024).

624 The Leech Lake Band of Ojibwe is federally recognized as a band of the Minnesota Chippewa Tribe. See *id.*

625 The White Earth Nation is federally recognized as a band of the Minnesota Chippewa Tribe. See *id.*

626 See Hannah Olson, *Unprecedented Push for Indigenous Voter Participation Could Shake Up Election*, BEMIDJI PIONEER (Oct. 30, 2020), <https://www.bemidjipioneer.com/news/unprecedented-push-for-indigenous-voter-participation-could-shake-up-election/>; Oct. 16, 2020, Four Directions Letter, *supra* note 620; Jul. 20, 2022, Four Directions Letter, *supra* note 620.

627 See Oct. 16, 2020, Four Directions Letter, *supra* note 621; Jul. 20, 2022, Four Directions Letter, *supra* note 621.

628 See Oct. 16, 2020, Four Directions Letter, *supra* note 621; Jul. 20, 2022, Four Directions Letter, *supra* note 621. Specifically, County Auditor staff claimed some forms were incomplete because Box 7 on those forms, which requests a Minnesota-issued driver’s license or identification card number, the last four digits of their Social Security Number, or directs them to certify that they “do not have a MN-issued ID card, or a Social Security Number[,]” was left unchecked. See MINNESOTA SECRETARY OF STATE, MINNESOTA VOTER REGISTRATION APPLICATION, <https://www.sos.state.mn.us/media/1587/minnesota-voter-registration-application.pdf> [hereinafter “MINNESOTA VOTER REGISTRATION APPLICATION”].

need to remember the last four digits of their Social Security Number to complete the form.⁶²⁹ Rather than accept and process the forms as timely submitted, following up with the applicants as-needed to obtain the missing or hard-to-read information as Minnesota law requires,⁶³⁰ Beltrami County informed Four Directions Native Vote that it would reject any application with missing or illegible information and make no further attempts to allow applicants to cure their applications.⁶³¹ Moreover, because Beltrami County waited until the last day of the regular voter registration period to inform Four Directions Native Vote of its astonishing decision to disregard state law, the organizers of the registration drive were left with no time to attempt to contact the applicants themselves prior to the registration deadline.⁶³² As a result, numerous Native voters in Beltrami County, including many who registered for the first time to vote in nontribal elections, likely had their voter registration applications rejected.⁶³³

In May 2022—more than a year and a half after the voter registration drive, but just a few months before the 2022 election in which Beltrami County officials faced re-election—the Beltrami County Sheriff’s Office opened a criminal investigation into the voter registration drive at the request of the Beltrami County Auditor and State’s Attorney.⁶³⁴ While the investigation was later abandoned, organizers believe it was “designed to suppress Native American voter participation in Beltrami County in the upcoming 2022 election[.]”⁶³⁵

Cass County also attempted to improperly reject more than one hundred voter registration applications from Tribal members that were collected by organizers as a part of their get out the vote efforts.⁶³⁶ On the final day of the registration period, staff at the Cass County Auditor’s office performed a “cursory review” of more than 700 voter registration applications submitted by Native organizers.⁶³⁷ The office quickly rejected 176 forms, claiming they would not accept applications from residents of other counties, even though Minnesota law allows

629 See *supra*, Chapter 2, Disparate Impact of Voter Identification Laws on Tribal Citizens. While the Minnesota voter registration application permits applicants to complete the form without providing their Minnesota-issued driver’s license or identification number or the last four digits of their social security number, in doing so, they must certify subject to a felony punishable by 5 years in prison and a \$10,000 penalty that they “do not have a MN-issued driver’s license, a MN-issued ID card, or a Social Security Number.” See MINNESOTA VOTER REGISTRATION APPLICATION, *supra* note 628. If a Tribal member without a Minnesota-issued identification had a social security number, but simply did not remember it during the voter registration drive, they could not truthfully check this box. When informed about the disparities in access to state-issued identification for Tribal members, the County Auditor suggested that applicants without state-ID could simply use their Tribal ID number. See Oct. 16, 2020, Four Directions Letter, *supra* note 621; Jul. 20, 2022, Four Directions Letter, *supra* note 621. But the Minnesota voter registration form specifically asks for a *Minnesota*-issued identification number and provides no space to write a *Tribal* identification number. See MINNESOTA VOTER REGISTRATION APPLICATION, *supra* note 628.

630 See Minn. Stat. § 201.071 (“The election judges shall request an individual to correct a voter registration application if it is deficient or illegible.”); *id.* § 201.061.

631 See Oct. 16, 2020, Four Directions Letter, *supra* note 621; Jul. 20, 2022, Four Directions Letter, *supra* note 621.

632 See Oct. 16, 2020, Four Directions Letter, *supra* note 621; Jul. 20, 2022, Four Directions Letter, *supra* note 621.

633 See Oct. 16, 2020, Four Directions Letter, *supra* note 621; Jul. 20, 2022, Four Directions Letter, *supra* note 621. Minnesota does allow same day registration, but applicants who use that option are required to present additional documents that a voter who pre-registered would not need to bring. See Minn. Stat. § 201.054; Office of the Minnesota Secretary of State Steve Simon, *Elections and Voting: Register on Election Day*, <https://www.sos.state.mn.us/elections-voting/register-to-vote/register-on-election-day/>. This means voters who believed they were pre-registered but had their application rejected would likely have to return home to get additional documents in order to cast a ballot on Election Day.

634 See *id.*

635 *Id.*

636 See Oct. 16, 2020, Four Directions Letter, *supra* note 621; Jul. 20, 2022, Four Directions Letter, *supra* note 621.

637 See *id.*

for “voters to submit their voter registration applications to any county auditor[.]”⁶³⁸ Worse yet, when organizers reviewed the rejected applications, they discovered that 155 of the 176 rejected applications were in fact completed by Tribal members living in Cass County.⁶³⁹ Staff in the Cass County Auditor’s office ultimately accepted the 155 previously rejected forms from Beltrami County residents on the day after the regular voter registration deadline.⁶⁴⁰ However, they refused to accept the remaining 21 forms to be passed along to the correct officials in other counties as timely submitted, even though Minnesota law permits a voter registration form to be returned to “any county auditor.”⁶⁴¹ Instead, staff called law enforcement in an attempt to force organizers to leave the premises.⁶⁴²

Harassment of Nonpartisan Native Organizers

In Cascade County, Montana, election officials have harassed Native organizers who provide important voter education and registration assistance to Native residents.⁶⁴³ On one occasion, when organizers from the nonpartisan nonprofit Western Native Voice—who were Tribal members themselves—attempted to return the completed voter registration applications they collected from eligible Native voters residing in Cascade County, they were met with skepticism and harassment by the staff member at the Cascade County Clerk’s office who was supposed to assist them.⁶⁴⁴ The staff member questioned the organizers and suggested that

The staff member even demanded that the organizers provide a handwriting sample to prove that they had not filled out the applications themselves.

the forms they were returning had somehow been faked.⁶⁴⁵ The staff member even demanded that the organizers provide a handwriting sample to prove that they had not filled out the applications themselves.⁶⁴⁶ This demand was particularly pernicious given that no Montana law or regulation requires such a sample, nor would Montana law even permit a county clerk to reject a voter registration application on the basis of a makeshift handwriting comparison.⁶⁴⁷

Western Native Voice Executive Director Ronnie Jo Horse, who is a citizen of the Oglala Lakota Nation and a descendant of the Northern Cheyenne Nation, explains that this type of harassment, especially when

638 See Minn. Stat. § 201.022; Oct. 16, 2020, Four Directions Letter, *supra* note 621; Jul. 20, 2022, Four Directions Letter, *supra* note 621.

639 See Oct. 16, 2020, Four Directions Letter, *supra* note 621; Jul. 20, 2022, Four Directions Letter, *supra* note 621.

640 See Oct. 16, 2020, Four Directions Letter, *supra* note 621; Jul. 20, 2022, Four Directions Letter, *supra* note 621.

641 See Minn. Stat. § 201.022; Oct. 16, 2020, Four Directions Letter, *supra* note 621; Jul. 20, 2022, Four Directions Letter, *supra* note 621.

642 See Oct. 16, 2020, Four Directions Letter, *supra* note 621; Jul. 20, 2022, Four Directions Letter, *supra* note 621.

643 See Roundtable on Voting Barriers and Election Administration for Tribal Citizens in Montana (Apr. 29, 2024), Testimony of Ronnie Jo Horse, Executive Director, Western Native Voice.

644 See *id.*

645 See *id.*

646 See *id.*

647 See Mt. Stat. § 13-2-110 (“Each application for voter registration must be accepted and processed as provided in rules adopted [by the Secretary of State concerning sufficiency and verification of voter registration information.]”); *id.* § 13-2-109 (authorizing the Secretary of State to adopt rules related to voter registration); A.R.M. 44.3.2001-.2016.

perpetrated by government officials, “dims [the organizers’] light,” discouraging them from participating in future voter registration efforts.⁶⁴⁸ And it can have a compounding effect on Native peoples’ ability to access the ballot: Tribal members in Montana face numerous barriers to accessing voter registration, including insufficient mail and broadband service at home and hostility when accessing county services, so voter registration efforts hosted and staffed by community members play a critical role in ensuring they can exercise their right to vote.⁶⁴⁹

Leaving Native Voters Off a Makeshift Voter Registration List

During an important school board referendum in 2022 in Menominee County, Wisconsin, where 79.5 percent of the population is Native American, the non-Native County Clerk publicly apologized for using a makeshift voter registration list that inexplicably left off swaths of registered voters.⁶⁵⁰ Relying on a list she made herself that apparently inadvertently excluded certain names, the clerk told numerous voters, who were almost entirely Native, that they were no longer registered in the county and would have to re-register.⁶⁵¹ The Clerk’s carelessness caused significant voter confusion and sowed mistrust of county officials by Tribal members—a community that is already hesitant to interact with nontribal government.⁶⁵²

Outright Refusal to Provide On-Reservation Voting Locations

Numerous localities have refused to provide equal in-person voting opportunities for Native voters, even when required by law. In 2020, in response to the COVID-19 pandemic, Montana switched to a primarily mail system for its elections.⁶⁵³ However, Pondera County, which shares geography with parts of Blackfeet Reservation, elected to maintain an in-person voting location at their majority-white county seat.⁶⁵⁴ This ensured that the predominately white residents would have nearby access to the in-person voting, while forcing Blackfeet citizens to travel 120 miles round trip just to cast their ballot.⁶⁵⁵ And importantly, mail voting was not a reasonable alternative for Blackfeet Tribal members due to poor mail service on the reservation.⁶⁵⁶ Despite knowing how far Blackfeet citizens would be forced to travel to vote, Pondera County officials refused to open an in-person voting location on the

It was not until a federal court ordered the county to provide on-reservation access to in person voting that Pondera County finally did so.

648 *Id.*

649 *See id.*

650 *See* Telephone Interview with Anjali Bhasin, Civic Engagement Director, Wisconsin Conservation Voters (May 13, 2024).

651 *See id.*

652 *See id.*

653 *See Oversight of the Voting Rights Act: The Evolving Landscape of Discrimination, Hearing Before the H. Comm. on the Judiciary, Subcommittee on the Constitution, Civil Rights, and Civil Liberties*, 117th Cong. (2022) (Written Statement of Jacqueline de Léon at 4), available at <https://docs.house.gov/meetings/JU/JU10/20210422/112481/HMTG-117-JU10-Wstate-DeLeonJ-20210422.pdf>.

654 *See id.*

655 *See id.*

656 *See id.*; *supra* chapter 2, Inadequate USPS Services and Vote by Mail.

reservation.⁶⁵⁷ It was not until a federal court ordered the county to provide on-reservation access to in person voting that Pondera County finally did so.⁶⁵⁸

In 2022, two counties in Nevada refused to provide equal opportunities to voters on reservations. Nye County refused to provide an in-person voting location to voters on the Yomba Shoshone Reservation, as required by state law.⁶⁵⁹ Elko County refused to place a ballot drop box on the Duck Valley Reservation, even after being ordered to do so by a court, forcing state officials to step in to ensure delivery of the drop box.⁶⁶⁰ The County further attempted to offer on-reservation voting for only a third of the time that in-person voting would be available in the county seat.⁶⁶¹

Lack of Opportunity for Government Consultation

States and localities persistently fail to offer opportunities for Tribal nations to engage in robust government-to-government consultations on policies that affect Tribal nations and their citizens. This type of consultation is important because it honors the inherent authority of Tribal nations to govern and provide for the health, safety, and welfare of their citizens.⁶⁶² Providing a formal venue for consultation can also help to encourage political participation even where the climate might otherwise be hostile toward Native peoples.⁶⁶³

A lack of robust opportunities for consultation was abundant during the 2021 redistricting process. In Washington and South Dakota, for instance, Tribal leaders could deliver testimony

Consultation is important because it honors the inherent authority of Tribal nations to govern and provide for the health, safety, and welfare of their citizens.

like other citizens, but the state offered no opportunity for direct consultation.⁶⁶⁴ In Arizona, there was initially outreach to Tribal leaders but at the last minute, the Arizona Independent Redistricting Commission canceled the meeting that had been billed as a Tribal consultation.⁶⁶⁵ In North Dakota, the Redistricting Committee of the State Legislature refused to hold a single hearing on Tribal lands, despite requests from Tribal leaders to do

so in order to make participation more accessible for Tribal members with limited access

657 See *See Oversight of the Voting Rights Act: The Evolving Landscape of Discrimination, Hearing Before the H. Comm. on the Judiciary, Subcommittee on the Constitution, Civil Rights, and Civil Liberties*, 117th Cong. (2022) (Written Statement of Jacqueline de Léon at 4).

658 See *id.*; *Blackfeet Nation v. Pondera County*, 4:20-cv-00095 (D. Mont. Oct. 14, 2020), ECF No. 9-1.

659 See *supra* Extreme Physical Distances to In-Person Voting and Voter Services.

660 See *id.*

661 See *id.*

662 See G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples, art. XIX (Sept. 13, 2007) (“States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.”).

663 See STRONGER TOGETHER REDISTRICTING, *supra* note 417.

664 See Roundtable on Voting Barriers and Election Administration for Tribal Citizens in Oregon and Washington (Mar. 9, 2024); Interview with Troy Heinert, Citizen of the Rosebud Sioux Tribe, Former Minority Leader of the South Dakota Senate and Senator for District 26, in Rosebud, S.D. (Apr. 17, 2024).

665 See STRONGER TOGETHER REDISTRICTING, *supra* note 417 at 8.

to transportation.⁶⁶⁶ Worse yet, when Tribal leaders reached out to state officials to make a formal request regarding district boundaries, the request was ignored.⁶⁶⁷ Instead, legislators suggested they understood the needs of Tribal members better than the Tribal leaders.⁶⁶⁸

The lack of opportunity for formal consultation is compounded when Tribal nations share geography with more than one state or locality, which is extremely common.⁶⁶⁹ Indeed, a supermajority of Tribal lands cross at least two counties—and often more—with numerous Tribal nations traversing state boundaries as well.⁶⁷⁰ The Navajo Nation, for instance, shares geography with three states and 13 counties. This can make government consultation complicated because Tribal leaders have to work with different officials at the same level of government across multiple jurisdictions whose actions affect Tribal nations and their citizens, rather than simply consulting with officials from a single jurisdiction at each level.⁶⁷¹ Tribal nations often report having a positive working relationship with one county that shares geography with the reservation, while other counties are more difficult to work with.⁶⁷² It further complicates their efforts to advocate for their citizens when the counties or states employ different rules.⁶⁷³

666 *See id.* at 9.

667 *See id.*; Letter from Jamie Azure, Chairman, Turtle Mountain Band of Chippewa Indians, and Douglas Yankton, Sr., Chairman, Spirit Lake Nation, to Doug Burgum, Governor, State of North Dakota, Kim Koppleman, Speaker, North Dakota House of Representatives, Chet Pollert, Majority Leader, North Dakota House of Representatives, Joshua Boschee, Minority Leader, North Dakota House of Representatives, Rich Wardner, Majority Leader, North Dakota State Senate, and Joan Heckaman, Minority Leader, North Dakota State Senate (Nov. 1, 2021), https://campaignlegal.org/sites/default/files/2022-02/ND%20Letter%20%28Exhibit%201%29_FILED.pdf.

668 *See id.*

669 *See, e.g.*, Roundtable on Voting Barriers and Election Administration on the Navajo Nation, Part I: Sheep Springs Chapter House (Feb. 19, 2024); Roundtable on Voting Barriers and Election Administration on the Navajo Nation, Part III: Navajo Nation Council (Feb. 19, 2024); Roundtable on Voting Barriers and Election Administration on the Tohono O’odham Nation (Feb. 21, 2024); Torey Dolan, *County Lines/State Lines/Tribal Lands Map* (last accessed Jun. 11, 2024), <https://asu.maps.arcgis.com/apps/instant/basic/index.html?appid=435ee0fd01a94b6aaf5f54a0229cc9c2&locale=en%3Dus>.

670 *See id.*

671 *See* Roundtable on Voting Barriers and Election Administration on the Navajo Nation, Part I: Sheep Springs Chapter House (Feb. 19, 2024); Roundtable on Voting Barriers and Election Administration on the Navajo Nation, Part III: Navajo Nation Council (Feb. 19, 2024); Interview with Brittany Bryson, Executive Assistant to the Council, Quinault Nation, and Pearl Capoeman-Baller, Former President, Quinault Nation Business Council, in Seabrook, Wash. (Mar. 11, 2024); Telephone Interview with Marvin Weatherwax, Jr., Member of the Blackfeet Tribal Council, Member of the Montana House of Representatives for the 15th District (May 1, 2024).

672 *See supra* note 671 (listing sources).

673 *See* Roundtable on Voting Barriers and Election Administration on the Navajo Nation, Part I: Sheep Springs Chapter House (Feb. 19, 2024); Roundtable on Voting Barriers and Election Administration on the Navajo Nation, Part III: Navajo Nation Council (Feb. 19, 2024).

Hostility in Border Towns, at the Polling Place, and from Government Officials

Hostility at and Around Border Town Polling Places

Native voters throughout the United States report incidents of voter intimidation at or immediately outside of polling places, especially when polling places are located outside of Tribal lands in nearby towns—commonly referred to as “border towns”—and staffed by non-Native poll workers.⁶⁷⁴ Native voters commonly report non-Natives poll workers harassing them or treating them differently than white voters.⁶⁷⁵ Moreover, some Native voters have been forced to cast their ballots in locations that felt designed to intimidate them.⁶⁷⁶ And even where voter intimidation occurs in other communities, hearing about it can have a deleterious effect on Native voters’ willingness to go to the polling place or engage with the nontribal electoral process.⁶⁷⁷

It is quite common for Native voters to experience outright hostility and worse service than their non-Native fellow voters at the polling place.⁶⁷⁸ Numerous Native voters report attempting to vote with their Tribal ID in states that require voter identification and being either turned away or made to feel like it was a burden for poll workers to confirm their identity based on Tribal ID.⁶⁷⁹ This is the case even where Tribal ID is expressly recognized as a valid form of identification under state law.⁶⁸⁰ Sometimes, poll workers’ hesitancy to allow Tribal ID might be due to a lack of training, but numerous Native voters report having their Tribal ID rejected even when Tribal nations have worked directly with state and local officials to ensure that they have examples of Tribal ID for

It is quite common for Native voters to experience outright hostility and worse service than their non-Native fellow voters at the polling place.

674 See OBSTACLES AT EVERY TURN, *supra* note 225 at 44-46; WHITE HOUSE REPORT, *supra* note 290 at 16-17; U.S. COMM’N ON CIVIL RIGHTS, DISCRIMINATION AGAINST NATIVE AMERICANS IN BORDER TOWNS: A BRIEFING BEFORE THE UNITED STATES COMMISSION ON CIVIL RIGHTS HELD IN WASHINGTON, D.C. (Mar. 10, 2011), <https://www.usccr.gov/reports/2011/discrimination-against-native-americans-border-towns>.

675 See, e.g., Roundtable on Voting Barriers and Election Administration for Tribal Citizens in Arizona (Feb. 22, 2024); Interview with Louis “Wayne” Boyd, Treasurer, Rosebud Sioux Tribe, in Rosebud, S.D. (Apr. 17, 2024); Roundtable on Voting Barriers and Election Administration for Citizens of the Confederated Salish and Kootenai Tribes (Apr. 30, 2024).

676 See Interview with Peri Pourier, Citizen of the Oglala Lakota Nation, Member of the South Dakota House of Representatives for the 27th District, in Rapid City, S.D. (Apr. 16, 2024); Interview with Donita Loudner, Buffalo County Commissioner, Citizen of the Crow Creek Sioux Tribe, in Fort Thompson, S.D. (Apr. 17, 2024); Roundtable on Voting Barriers and Election Administration for Native Peoples in Urban South Dakota (Apr. 19, 2024), Testimony of Candi Brings Plenty.

677 See Roundtable on Voting Barriers and Election Administration on the Navajo Nation, Part III: Navajo Nation Council (Feb. 19, 2024); Roundtable on Voting Barriers and Election Administration for Tribal Citizens in Arizona (Feb. 22, 2024); Roundtable on Voting Barriers and Election Administration for Tribal Citizens in Montana (Apr. 29, 2024).

678 See, e.g., Roundtable on Voting Barriers and Election Administration for Tribal Citizens in Arizona (Feb. 22, 2024); Interview with Louis “Wayne” Boyd, Treasurer, Rosebud Sioux Tribe, in Rosebud, S.D. (Apr. 17, 2024); Roundtable on Voting Barriers and Election Administration for Tribal Citizens in Montana (Apr. 29, 2024); Roundtable on Voting Barriers and Election Administration for Citizens of the Confederated Salish and Kootenai Tribes (Apr. 30, 2024).

679 See Roundtable on Voting Barriers and Election Administration on the Tohono O’odham Nation (Feb. 21, 2024); Roundtable on Voting Barriers and Election Administration for Tribal Citizens in Arizona (Feb. 22, 2024); Roundtable on Voting Barriers and Election Administration for Citizens of the Lower Brule Sioux Tribe (Apr. 17, 2024); Roundtable on Voting Barriers and Election Administration for Tribal Citizens in Montana (Apr. 29, 2024); *supra* Part III, Disparate Impact of Voter Identification Laws on Tribal Citizens.

680 See *supra* note 679 (listing sources).

comparison.⁶⁸¹ For instance, Councilmember Mikah Carlos from the Salt River Pima Maricopa Indian Community reported numerous issues with her attempt to use Tribal ID to vote in Arizona.⁶⁸² In 2016, she was directly informed by poll workers that she could not use her Tribal ID to vote.⁶⁸³ In 2022, when Councilmember Carlos presented her Tribal ID at her polling place, a poll worker accepted it, but told her that it was an “inconvenience” to do so.⁶⁸⁴

When poll workers improperly tell a voter they cannot use their valid Tribal ID as voter identification, the effect is two-fold: Most obviously, it makes casting a ballot more burdensome for voters in the moment.⁶⁸⁵ Beyond the immediate effect, this type of hostility toward voters using Tribal ID intimidates Tribal members and discourages them from participating in future federal, state, and local elections.⁶⁸⁶

Other times, Native voters experience hostility just for attempting to cast a ballot. This is the case on the Rosebud Reservation, even when polling places are located on the reservation but staffed by non-Native poll workers.⁶⁸⁷ Rosebud Sioux Tribe Treasurer Louis “Wayne” Boyd remarked that “it feels as if the people who run the polls are afraid of our people.”⁶⁸⁸ Boyd witnessed one incident in particular that stands out: In 2022, an elder needed to fill out a ballot outside of a Rosebud Reservation polling place due to mobility issues.⁶⁸⁹ When a non-Native poll worker saw what was happening, the poll worker became extremely hostile and ultimately called the police, accusing the elder of fraud.⁶⁹⁰ Boyd emphasizes that, while having the police called on voters is scary anywhere, it is particularly frightening on a reservation.⁶⁹¹ Because Tribal nations and the federal government are the primary authorities that exercise criminal jurisdiction on Tribal lands, responding police are often federal officials—not the local sheriff—and any resulting criminal charges could be serious federal ones.⁶⁹² The gravity of potential charges, along with federal officials’ historic abuses of Native peoples, can make the situation feel far more serious than it would be outside of a reservation where the responding authority is more likely to be a local police officer.⁶⁹³ Experiencing, or even seeing, an incident like this makes Tribal members extremely hesitant to return to vote in the future.⁶⁹⁴

681 *See id.*; Phone Interview with Nicole Donaghy, Hunkpapa Lakota, Executive Director, North Dakota Native Vote (Jun. 17, 2024).

682 *See* Roundtable on Voting Barriers and Election Administration for Tribal Citizens in Arizona (Feb. 22, 2024).

683 *See id.*

684 *See id.*

685 *See id.*; Phone Interview with Nicole Donaghy, Hunkpapa Lakota, Executive Director, North Dakota Native Vote (Jun. 17, 2024).

686 *See supra* note 685 (listing sources).

687 *See* Interview with Louis “Wayne” Boyd, Treasurer, Rosebud Sioux Tribe, in Rosebud, S.D. (Apr. 17, 2024).

688 *See id.*

689 *See id.*

690 *See id.*

691 *See id.*

692 *See id.*

693 *See id.*

694 *See id.*

Councilwoman Jennifer Finley from the Confederated Salish and Kootenai Tribes described an incident that inspired her to become a poll worker.⁶⁹⁵ Several years ago, when Councilwoman Finley voted at a polling place in the predominately white county seat, she was the only Native person in the room—staff and voters alike.⁶⁹⁶ While the poll workers were friendly to the white voters checking in before her, they became standoffish when she reached the front of the line.⁶⁹⁷ After voting, when Councilwoman Finley returned her ballot to the same poll worker, that poll worker looked at her selections—something poll workers are not permitted to do—undermining Finley’s right to vote a secret ballot, and leading her to wonder whether the official properly processed her ballot.⁶⁹⁸ According to Councilwoman Finley, experiences like these are why it is critical to ensure that polling places are located on Tribal lands in buildings where Native voters feel comfortable and are staffed by trusted members of the community who will make Native voters feel welcomed.⁶⁹⁹

Tribal members also consistently report being forced to cast their ballots in places that are dehumanizing or felt intended to make them uncomfortable. Perhaps most egregiously, voters in one Hyde County South Dakota town were once forced to cast their ballots in a chicken coop.⁷⁰⁰ In Rapid City, South Dakota, where there is a substantial urban Native population, there has been a concerted effort by local officials to relocate polling places to churches,

Tribal members also consistently report being forced to cast their ballots in places that are dehumanizing or felt intended to make them uncomfortable.

which has made Tribal members, who themselves and whose relatives suffered horrific abuses committed by Catholic Church officials at boarding schools, feel extremely uncomfortable voting in person.⁷⁰¹ One Oglala Lakota Tribal member reported that their mother, who is a survivor of boarding school abuse, no longer votes after her polling place was relocated to a Catholic church.⁷⁰² Nearby, a polling place that serves voters from the Oglala Lakota

Nation is located right next to a bar named the “TK Saloon,” which is commonly referred to as the “Triple K Saloon” because of the widespread understanding amongst Native peoples in the community that the building is a sanctuary for white supremacy.⁷⁰³ Likewise, during the 2020 election, a sign was put up across from a polling place on the Flathead Reservation, where the Confederated Salish and Kootenai Tribes are located, that expressed an anti-Native

695 See Roundtable on Voting Barriers and Election Administration for Citizens of the Confederated Salish and Kootenai Tribes (Apr. 30, 2024).

696 See *id.*

697 See *id.*

698 See *id.*

699 See *id.*

700 See Interview with Donita Loudner, Buffalo County Commissioner, Citizen of the Crow Creek Sioux Tribe, in Fort Thompson, S.D. (Apr. 17, 2024).

701 See Roundtable on Voting Barriers and Election Administration for Native Peoples in Urban South Dakota (Apr. 19, 2024), Testimony of Candi Brings Plenty.

702 See *id.*

703 See Interview with Peri Pourier, Citizen of the Oglala Lakota Nation, Member of the South Dakota House of Representatives for the 27th District, in Rapid City, S.D. (Apr. 16, 2024).

sentiment.⁷⁰⁴ Having polling places near locations that are known for being anti-Native can make some Tribal members fearful to vote in person because they are fearful of who they will encounter and how they might be treated.⁷⁰⁵

Hearing of voter intimidation at polling places or election facility nearby a reservation or other Native communities also has a negative effect on Native voters' willingness to vote in person.⁷⁰⁶ During the 2022 election in Arizona, for example, there was widespread reporting of militias showing up to ballot drop box locations with guns and in tactical gear to harass voters; these actions were eventually halted by a federal court.⁷⁰⁷ On Navajo Nation, many voters heard news of the militias and are now afraid to vote in person.⁷⁰⁸ Similarly, in Cascade County, Montana, where Little Shell Chippewa Tribe is located and where there is a large population of Native voters belonging to Tribal nations that are located throughout the state, armed residents dressed in military fatigues showed up to the County Clerk's office in an effort to disrupt the certification of the 2022 midterm election.⁷⁰⁹ Seeing this type of voter intimidation has a particularly harmful effect on Native voters, who are often already hesitant to participate in nontribal elections and who have personal experiences of hostility from non-Natives, including government officials.⁷¹⁰

Border Town Hostility Away from the Polling Place

Even when it happens outside of the polling place, discrimination in border towns can make Native peoples less comfortable engaging in the nontribal political process, especially when the discrimination happens in localities where voting barriers are common, is related to elections or candidates, or is carried out by government officials. And unfortunately, the acts of discrimination against Native peoples in border towns are enduring. In the leadup to the 2020 election, for example, a sign marking the Red Lake Nation was defaced with swastika and the words "Trump 2020."⁷¹¹ In 2024 in Farmington, New Mexico—a county that only months earlier

The acts of discrimination against Native peoples in border towns are enduring.

704 See Roundtable on Voting Barriers and Election Administration for Tribal Citizens in Montana (Apr. 29, 2024).

705 See *id.*

706 See, e.g., Roundtable on Voting Barriers and Election Administration on the Navajo Nation, Part III: Navajo Nation Council (Feb. 19, 2024), Testimony of Hon. Crystalyne Curley, Speaker, Navajo Nation Council; Roundtable on Voting Barriers and Election Administration for Tribal Citizens in Montana (Apr. 29, 2024).

707 See Rachel Leingang, "We're Watching You": Incidents of Voter Intimidation Rise as Midterm Elections Near, *GUARDIAN* (Nov. 4, 2022), <https://www.theguardian.com/us-news/2022/nov/04/voter-intimidation-midterm-elections-arizona>; Yvonne Wingett Sanchez, *Alleged voter intimidation at Arizona drop box puts officials on watch*, *WASHINGTON POST* (Oct. 20, 2022), <https://www.washingtonpost.com/politics/2022/10/20/arizona-ballot-drop-boxes/>; Temporary Restraining Order, ECF No. 51, Arizona Alliance for Retired Americans v. Clean Elections USA, No. Case 2:22-cv-01823 (Nov. 1, 2022).

708 See Roundtable on Voting Barriers and Election Administration on the Navajo Nation, Part III: Navajo Nation Council (Feb. 19, 2024), Testimony of Hon. Crystalyne Curley, Speaker, Navajo Nation Council.

709 See Roundtable on Voting Barriers and Election Administration for Tribal Citizens in Montana (Apr. 29, 2024), Testimony of Rina Moore.

710 See Roundtable on Voting Barriers and Election Administration on the Navajo Nation, Part III: Navajo Nation Council (Feb. 19, 2024), Testimony of Hon. Crystalyne Curley, Speaker, Navajo Nation Council; Roundtable on Voting Barriers and Election Administration for Tribal Citizens in Montana (Apr. 29, 2024), Testimony of Rina Moore.

711 See Darren Thompson, *Red Lake Welcome Sign Defaced with Nazi Swastika and Trump 2020 Vandalism*, *NATIVE NEWS ONLINE* (Oct. 15, 2020), <https://nativenewsonline.net/currents/red-lake-welcome-sign-defaced-with-nazi-swastika-and-trump-2020-vandalism>.

settled a legal dispute regarding its discriminatory County Commission districts—a graduating Native high school student was forced to remove a traditionally beaded graduation cap *during the graduation ceremony* as the Star Spangled Banner began to play.⁷¹²

Government officials often participate directly in the harassment of Tribal members. On the Pine Ridge Reservation, mail delivery coordinated by the post office is extremely delayed; it sometimes takes months for a P.O. holder to access a package.⁷¹³ When customers speak up, employees often get upset and withhold mail in retaliation.⁷¹⁴ In Pondera County, Montana, which shares geography with parts of the Blackfeet Nation, County officials regularly refuse to provide service to county residents living on the reservation.⁷¹⁵ Pondera County emergency services and the coroner will not take calls for homes on the Blackfeet Reservation, forcing residents to instead seek services from neighboring Glacier County, which serves the remaining parts of the reservation.⁷¹⁶ And this sentiment goes all the way to top officials in Pondera County.⁷¹⁷ For example, on numerous occasions when Blackfeet Tribal Council members have attempted to engage with the Pondera County Commissioners, they have been shunned, with one county commissioner even refusing to shake hands with Tribal leaders.⁷¹⁸

Making It More Difficult to Find and Access Polling Places

Another way in which state and local officials prevent Native voters from casting their ballots, either intentionally or through often willful ignorance, is by making it more difficult for voters on Tribal lands and in other Native communities to find their polling place. Throughout South Dakota, Tribal members report that polling locations constantly change without notice to the voters.⁷¹⁹ In 2022, on the Pine Ridge Reservation, where the Oglala Lakota Nation is located, a polling place was moved by County officials during the early voting period and with very little publicity.⁷²⁰ The only Election Day sign telling voters where the new polling place was located was a mile away at an intersection, confusing voters.⁷²¹ When one Tribal member had basic signs made directing voters where to go and placed them in locations where voters would see

712 Arlyssa D. Becenti, *New Mexico School Confiscates a Native Student's Beaded Graduation Cap, Sparking Protests*, AZ CENTRAL (May 20, 2024), <https://www.azcentral.com/story/news/local/arizona-education/2024/05/20/new-mexico-school-wont-let-native-student-wear-graduation-reagalia/73770639007/>.

713 See Interview with Peri Pourier, Citizen of the Oglala Lakota Nation, Member of the South Dakota House of Representatives for the 27th District, in Rapid City, S.D. (Apr. 16, 2024).

714 See *id.*

715 See Telephone Interview with Marvin Weatherwax, Jr., Member of the Blackfeet Tribal Council, Member of the Montana House of Representatives for the 15th District (May 1, 2024).

716 See *id.*

717 See *id.*

718 See *id.*

719 See Interview with Peri Pourier, Citizen of the Oglala Lakota Nation, Member of the South Dakota House of Representatives for the 27th District, in Rapid City, S.D. (Apr. 16, 2024); Interview with Louis “Wayne” Boyd, Treasurer, Rosebud Sioux Tribe, in Rosebud, S.D. (Apr. 17, 2024); Roundtable on Voting Barriers and Election Administration for Native Peoples in Urban South Dakota (Apr. 19, 2024).

720 See Interview with Peri Pourier, Citizen of the Oglala Lakota Nation, Member of the South Dakota House of Representatives for the 27th District, in Rapid City, S.D. (Apr. 16, 2024).

721 See *id.*

them, the County forced her to take them down.⁷²² Last minute polling place shifts like this are common on the Oglala Lakota Nation, so people often end up going to the wrong polling place.⁷²³

Making matters worse, poll workers are often unhelpful or hostile when Native voters show up to a polling place and are not on the rolls. One year, Rosebud Sioux Tribe Treasurer Louis “Wayne” Boyd attempted to vote at his normal polling place and was told that he was not on the voter rolls.⁷²⁴ After half an hour of arguing with the poll worker, an official finally informed him that he needed to go to a different polling place.⁷²⁵ Inexplicably, however, Boyd’s wife, who lived in and was registered to vote at the same home as him, was still on the voter rolls at the original polling place they had gone to.⁷²⁶ While Boyd had the resources to cast his ballot elsewhere, for many low income Native voters and those who are already hesitant to interact with nontribal government officials, this type of interaction can discourage them from ever attempting to vote in the future.⁷²⁷

Legislative Backlash to Increased Political Power

Racial discrimination against Native voters, especially by state legislatures, is often a direct response to gains in Native peoples’ political power.⁷²⁸ In 2020, largely due to creative and persistent get out the vote efforts by Tribal nations and Native organizers, Native peoples turned out at higher rates than ever before and proved to be a key voting bloc in numerous states in the presidential election, as well as elections for state and local offices.⁷²⁹ The backlash in places with large Native populations was swift: following the 2020 election, states with large Native populations, including Arizona, Kansas, and Montana, enacted new restrictive laws that disproportionately burden Native peoples and make it more difficult for them to cast a ballot.⁷³⁰

Racial discrimination, especially by state legislatures, against Native voters is often a direct response to gains in Native peoples’ political power

In Arizona, where the number of Native voters exceeded tight margins in numerous important races in both the 2018 and 2020 elections, the state legislature passed a law in 2021 that

722 See *id.*

723 See *id.*

724 See Interview with Louis “Wayne” Boyd, Treasurer, Rosebud Sioux Tribe, in Rosebud, S.D. (Apr. 17, 2024).

725 See *id.*

726 See *id.*

727 See *id.*

728 See, e.g., Cecily Hilleary, *Despite Gains, Native Americans Still Face Voting Barriers*, VOA NEWS (Jun. 15, 2024), <https://www.voanews.com/a/despite-gains-native-americans-still-face-voting-barriers/7657323.html>, Sue Halpern, *The Political Attack on the Native American Vote*, NEW YORKER (Nov. 4, 2022), <https://www.newyorker.com/news/dispatch/the-political-attack-on-the-native-american-vote>; Paul Blumenthal, *Native American Voting Rights Are Under Attack in Republican-Run States*, HUFFPOST (Aug. 16, 2021), https://www.huffpost.com/entry/native-american-voting-rights_n_6116d0f7e4b07c140314ed7a.

729 See, e.g., Felicia Fonseca and Angeliki Kastanis, *Native American Votes Helped Secure Biden’s Win in Arizona*, AP (Nov. 19, 2020), <https://apnews.com/native-american-votes-helped-secure-bidens-win-in-arizona-fa452fbd546fa00535679d78ac40b890>; Anna V. Smith, *How Indigenous Voters Swung the 2020 Election*, HIGH COUNTRY NEWS (Nov. 6, 2020), <https://www.hcn.org/articles/indigenous-affairs-how-indigenous-voters-swung-the-2020-election/>.

730 See Blumenthal, *supra* note 728.

threatened to prevent almost all eligible voters living on Tribal lands from registering to vote or changing their voter registration by requiring voter registration applicants to provide documentary proof of the location of their residence—something that most Native peoples living on Tribal lands in Arizona do not have.⁷³¹ The state also passed a law shortening the time period in which absentee or mail voters must correct errors, requiring voters who return an unsigned ballot to cure it by 7:00 p.m. on election night.⁷³²

In Montana, as a backlash to gains in Native political power in the 2000s, the state legislature has repeatedly sought to suppress the Native vote through discriminatory legislation.⁷³³ Because of the significant distances many Native voters must travel to access in-person voting locations and post offices, many Native voters rely on relatives or other trusted community members to deliver their mail ballot to them and return it to election officials.⁷³⁴ With the knowledge that community ballot collection is a crucial tool for Native voters, the state legislature has passed or introduced numerous iterations of bans or restrictions on the practice, even after state courts have found that such bans violate the state constitution's protections for the fundamental right to vote.⁷³⁵ The state legislature also enacted laws ending same-day voter registration and imposing new voter identification requirements.⁷³⁶

The North Dakota State Legislature similarly reacted to increased voter turnout amongst Native Americans by enacting strict voter identification requirements, including a requirement that voter identification include a residential address—something that most Tribal IDs in North Dakota do not have.⁷³⁷ Then in the 2021 redistricting cycle, the state legislature enacted a state legislative map that illegally diluted Native voting strength and undermined representation in the North Dakota State House and State Senate.⁷³⁸

Hostility Toward Native Elected Officials

When Tribal members run for or are elected to nontribal office, they face extreme hostility from the public and other candidates throughout their campaigns. Once elected, the hostility often continues within the bodies on which they serve. This hostility compounds the barriers Native candidates already face to running for office, including insufficient resources for campaigns that have become “prohibitively expensive,” making them less likely to run for office and leading to elected bodies that lack Native representation.⁷³⁹

731 See *id.*; *supra* Part III, Lack of Standard Residential Addresses on Reservations; *supra* Part II, Disparate Impact of Voter Identification Laws on Tribal Citizens.

732 See Blumenthal, *supra* note 728.

733 See *id.*; MONTANA ADVISORY COMMITTEE TO THE U.S. COMMISSION ON CIVIL RIGHTS, VOTING ACCESS FOR NATIVE AMERICANS IN MONTANA (Jun. 2021), <https://www.usccr.gov/files/2021/07-15-Native-American-Voting-Rights-Advisory-Memo.pdf> [hereinafter “USCCR, VOTING ACCESS FOR NATIVE AMERICANS IN MONTANA”].

734 See *id.* at 12-13; *supra* Part III, Extreme Physical Distances to In-Person Voting and Voter Services.

735 See USCCR, VOTING ACCESS FOR NATIVE AMERICANS IN MONTANA, *supra* note 733 at 13.

736 See Blumenthal, *supra* note 728.

737 See Hilleary, *supra* note 727; *supra* Part III, Disparate Impact of Voter Identification Laws on Tribal Citizens.

738 See *supra* Part III, Vote Dilution through Discriminatory Districts and Electoral Systems; Hilleary, *supra* note 728.

739 OBSTACLES AT EVERY TURN, *supra* note 225 at 121; see also BRENNAN CENTER FOR JUSTICE, BREAKING DOWN BARRIERS: THE FACES OF SMALL DONOR PUBLIC FINANCING (2016), https://www.brennancenter.org/sites/default/files/publications/Faces_of_Public_Financing.pdf.

When Representative Peri Pourier, a citizen of the Oglala Lakota Nation and a member of the South Dakota House of Representatives, first ran for state office in 2018, she and another Tribal member running for the State Senate seat in her district were subjected to vicious attacks by the public and their opponents.⁷⁴⁰ One radio station suggested that she and her Lakota running mate were “plants” who could not possibly be from the Oglala Lakota Nation because of their education and how they spoke.⁷⁴¹ Political operatives invaded her privacy by pulling records on her and calling her husband on his personal phone number during her campaign.⁷⁴² State officials threatened to open an investigation into her once she was elected.⁷⁴³

Former South Dakota Senate Minority Leader Troy Heinert, who is Sicangu Lakota, had similar experiences to Representative Pourier’s while serving in the South Dakota State Legislature.⁷⁴⁴ According to Leader Heinert, there is a complete lack of knowledge in the Legislature about issues affecting Native peoples.⁷⁴⁵ Once Native peoples are elected to the legislature, white legislators’ expectations of them are often very low and they get no second chances with their colleagues.⁷⁴⁶ In one particularly egregious interaction, another legislator once told Leader Heinert that he “speak[s] very well for an Indian.”⁷⁴⁷

Councilman Marvin Weatherwax, who is a citizen of the Blackfeet Nation and now serves on the Tribal Council, was a member of the Montana State House of Representatives from 2019 through 2024.⁷⁴⁸ Councilman Weatherwax remarked that the 2023-24 session demonstrates the building hostility toward Native legislators in Montana: “[It was] the most outright racist session that I’ve ever had—that I’ve ever gone through in my entire life.” Every bill brought by Native legislators faced staunch opposition, and often it felt like Councilman Weatherwax’s colleagues were opposing the bills “just because they could.”

In 2019, Natalie Stites Means, a citizen of the Cheyenne River Sioux Tribe, ran a campaign for mayor along with four other Lakota candidates for the city council.⁷⁴⁹ During her campaign, she was swatted, with police showing up to Stites Means’ home in full tactical gear, with one even

When Native candidates are harassed or shunned when they join governing bodies, they can be deterred from running for office in the future, which can have downstream impacts on Native voters’ willingness to participate in the nontribal political process.

740 See Interview with Peri Pourier, Citizen of the Oglala Lakota Nation, Member of the South Dakota House of Representatives for the 27th District, in Rapid City, S.D. (Apr. 16, 2024).

741 See *id.*

742 See *id.*

743 See *id.*

744 See Interview with Troy Heinert, Citizen of the Rosebud Sioux Tribe, Former Minority Leader of the South Dakota Senate and Senator for District 26, in Rosebud, S.D. (Apr. 17, 2024).

745 See *id.*

746 See *id.*

747 See *id.*

748 See Telephone Interview with Marvin Weatherwax, Jr., Member of the Blackfeet Tribal Council, Member of the Montana House of Representatives for the 15th District (May 1, 2024).

749 See Roundtable on Voting Barriers and Election Administration for Native Peoples in Urban South Dakota (Apr. 19, 2024).

carrying a riot shield. Police, which included Pennington County sheriff deputies and a U.S. Marshall, claimed they were acting on a tip from a neighbor and looking for Stites Means' stepson who had an outstanding warrant for a felony offense, but whom she had not seen in weeks. Stites Means recalls of the police call: "I was skeptical of their motivations. I was skeptical of the tips. I was skeptical of the timing and I was skeptical of whether or not they intended to create a media incident that would have been harmful to my campaign."⁷⁵⁰ Just a few days later, police showed up to Stites Means' home a second time, claiming they had received a tip that a stolen iPhone had been traced to her home. After her unsuccessful run, she and the other Native candidates were investigated and accused, without evidence, of organizing double votes.⁷⁵¹

These types of attacks on Native legislators and candidates harm both the candidates themselves and the broader population of Native voters. When Native candidates are harassed or shunned when they join governing bodies, they can be deterred from running for office in the future, which can have downstream impacts on Native voters' willingness to participate in the nontribal political process. Nationwide, Tribal leaders report that their citizens are more likely to participate in federal, state, and local elections when the candidates look like them and understand their communities.⁷⁵²

Lack of Trust and Low Voter Education Leading to Depressed Engagement

The relationship between Tribal members and nontribal governments, including local, state, and federal governments, is built on a foundation of abuse and abandonment that continues to foster mistrust.

Compounding, and in part driven by, the substantial barriers that Native voters face is significant mistrust that many Native peoples have of nontribal government officials, which can lead to low levels of voter education and depressed civic

750 Frank Hopper, *Former Rapid City Mayoral Candidate Recounts Possible Racial Profiling Incidents*, INDIAN COUNTRY TODAY (Jul. 9, 2019), <https://ictnews.org/news/former-rapid-city-mayoral-candidate-recounts-possible-racial-profiling-incidents>.

751 See Roundtable on Voting Barriers and Election Administration for Native Peoples in Urban South Dakota (Apr. 19, 2024).

752 See, e.g., Roundtable on Voting Barriers and Election Administration on the Tohono O'odham Nation (Feb. 21, 2024); Interview with Peri Pourier, Citizen of the Oglala Lakota Nation, Member of the South Dakota House of Representatives for the 27th District, in Rapid City, S.D. (Apr. 16, 2024); Interview with Troy Heinert, Citizen of the Rosebud Sioux Tribe, Former Minority Leader of the South Dakota Senate and Senator for District 26, in Rosebud, S.D. (Apr. 17, 2024); Roundtable on Voting Barriers and Election Administration for Citizens of the Confederated Salish and Kootenai Tribes (Apr. 30, 2024).

engagement.⁷⁵³ Councilmember and Treasurer of the Confederated Salish and Kootenai Tribes James Steele, Jr. explains:

Indian people have been pushed aside so much out of the American process that [they wonder], “Why do I vote anyway?”⁷⁵⁴

Councilman Steele’s remarks summarize the sentiment felt by many Native peoples throughout the United States. The relationship between Tribal members and nontribal governments, including local, state, and federal governments, is built on a foundation of abuse and abandonment that continues to foster mistrust.⁷⁵⁵ While some government actors have worked to build trust within Tribal communities, there is still significant progress to be made, especially as some federal, state, and local officials nationwide continue to support or enact policies that are designed to, or have the effect of, making it harder for Native peoples to participate in the nontribal political process.⁷⁵⁶

In Native communities, past and present discriminatory policies often have intensifying impacts on voter engagement.⁷⁵⁷ Most obviously, discrimination makes it harder for voters to register or cast a ballot. But in the long term, having to constantly fight voter suppression and discrimination inflicted by state and local officials

In Native communities, past and present discriminatory policies often have intensifying impacts on voter engagement.

- 753 See, e.g., Roundtable on Voting Barriers and Election Administration on the Navajo Nation, Part I: Sheep Springs Chapter House (Feb. 19, 2024); Roundtable on Voting Barriers and Election Administration on the Navajo Nation, Part III: Navajo Nation Council (Feb. 19, 2024); Interview with Hopi Tribal Council Members, in Second Mesa, Ariz (Feb. 20, 2024); Roundtable on Voting Barriers and Election Administration on the Tohono O’odham Nation (Feb. 21, 2024); Roundtable on Voting Barriers and Election Administration for Tribal Citizens in Arizona (Feb. 22, 2024); Roundtable on Voting Barriers and Election Administration for Tribal Citizens in Oregon and Washington (Mar. 9, 2024); Interview with Brittany Bryson, Executive Assistant to the Council, Quinault Nation, and Pearl Capoman-Baller, Former President, Quinault Nation Business Council, in Seabrook, Wash. (Mar. 11, 2024); Phone Interview with Anthony Aronica, Staff Attorney, Yakama Nation Office of Legal Counsel, and Willow Howard, Governmental Affairs Liaison, Yakama Nation (Mar. 22, 2024); Interview with Peri Pourier, Citizen of the Oglala Lakota Nation, Member of the South Dakota House of Representatives for the 27th District, in Rapid City, S.D. (Apr. 16, 2024); Interview with Louis “Wayne” Boyd, Treasurer, Rosebud Sioux Tribe, in Rosebud, S.D. (Apr. 17, 2024); Interview with Scott Herman, President, Rosebud Sioux Tribe, in Rosebud, S.D. (Apr. 17, 2024); Interview with Oliver “O.J.” Semans, Citizen of the Sicangu Oyate (Rosebud Sioux Tribe), Co-Founder and Co-Executive Director, Four Directions, in Rosebud, S.D. (Apr. 17, 2024); Interview with Troy Heinert, Citizen of the Rosebud Sioux Tribe, Former Minority Leader of the South Dakota Senate and Senator for District 26, in Rosebud, S.D. (Apr. 17, 2024); Roundtable on Voting Barriers and Election Administration for Citizens of the Lower Brule Sioux Tribe (Apr. 17, 2024); Interview with Donita Loudner, Buffalo County Commissioner, Citizen of the Crow Creek Sioux Tribe, in Fort Thompson, S.D. (Apr. 17, 2024); Roundtable on Voting Barriers and Election Administration for Native Peoples in Urban South Dakota (Apr. 19, 2024); Roundtable on Voting Barriers and Election Administration for Tribal Citizens in Montana (Apr. 29, 2024); Roundtable on Voting Barriers and Election Administration for Citizens of the Confederated Salish and Kootenai Tribes (Apr. 30, 2024); Telephone Interview with Marvin Weatherwax, Jr., Member of the Blackfeet Tribal Council, Member of the Montana House of Representatives for the 15th District (May 1, 2024); Telephone Interview with Anjali Bhasin, Civic Engagement Director, Wisconsin Conservation Voters (May 13, 2024); Schroedel, *et al.*, *Political Trust*, *supra* note 446; OBSTACLES AT EVERY TURN, *supra* note 225 at 43-44.
- 754 Roundtable on Voting Barriers and Election Administration for Citizens of the Confederated Salish and Kootenai Tribes (Apr. 30, 2024), Testimony of Hon. James Steele, Jr., Treasurer, Confederated Salish and Kootenai Tribes of the Flathead Reservation.
- 755 See *supra*, Chapter 1, A History of the Relationship between Native Nations and the United States and the Path to U.S. Citizenship.
- 756 See *supra*, Chapter 2, Discrimination and Neglect: From Outright Hostility to Failure to Offer Robust Options for Participation by Tribal Members and Government-to-Government Consultation with Tribal Nations.
- 757 See Roundtable on Voting Barriers and Election Administration on the Tohono O’odham Nation (Feb. 21, 2024), Testimony of April Ignacio, Citizen of the Tohono O’odham Nation, Co-Founder, Indivisible Tohono.

has the effect of discouraging Native peoples from participating in elections at all levels of nontribal government.⁷⁵⁸ Tribal leaders and other advocates of equal rights for Native peoples explain that when Tribal members, who are already hesitant to participate in nontribal elections, show up to the polling place and are turned away—for example, because a poll worker does not recognize their Tribal ID as valid voter identification—it makes them far less likely to attempt to vote in the future.⁷⁵⁹ an unacceptable outcome in a nation that is—or should be—defined by its identity as an inclusive democracy. Depleted turnout is exacerbated by insufficient voter outreach and a lack of responsiveness by many elected officials.⁷⁶⁰

In addition to being discouraged by discriminatory practices, Tribal members commonly face barriers to accessing robust voter and civic education.⁷⁶¹ Often times, information regarding elections is distributed either online or via mail—two methods of communication to which Native communities disproportionately lack access⁷⁶²—making it more difficult for Native voters to learn about important issues, including candidates’ platforms, voter qualifications, election dates, and polling place changes, among others.⁷⁶³ Moreover, there are many young

people in Native communities who do not understand the intricacies of Tribal or nontribal governments, and are therefore less likely to participate as adults.⁷⁶⁴

To combat these barriers, it is incumbent on federal, state, and local officials to work collaboratively with Tribal nations to build trust and improve their relationships with Native peoples.

To combat these barriers, it is incumbent on federal, state, and local officials to work collaboratively with Tribal nations to build trust and improve their relationships with Native peoples. State and local officials should conduct robust outreach and education programs on platforms that are accessible to Native peoples, including those living on Tribal

758 *See id.*

759 *See, e.g.,* Roundtable on Voting Barriers and Election Administration on the Tohono O’odham Nation (Feb. 21, 2024); Roundtable on Voting Barriers and Election Administration for Tribal Citizens in Oregon and Washington (Mar. 9, 2024); Interview with Peri Pourier, Citizen of the Oglala Lakota Nation, Member of the South Dakota House of Representatives for the 27th District, in Rapid City, S.D. (Apr. 16, 2024); Interview with Louis “Wayne” Boyd, Treasurer, Rosebud Sioux Tribe, in Rosebud, S.D. (Apr. 17, 2024); Roundtable on Voting Barriers and Election Administration for Citizens of the Confederated Salish and Kootenai Tribes (Apr. 30, 2024).

760 *See, e.g.,* Interview with Louis “Wayne” Boyd, Treasurer, Rosebud Sioux Tribe, in Rosebud, S.D. (Apr. 17, 2024); Roundtable on Voting Barriers and Election Administration for Citizens of the Lower Brule Sioux Tribe (Apr. 17, 2024) (remarking that many Tribal members elect not to vote in Lyman County elections because they feel unheard by county officials).

761 *See* Interview with Brittany Bryson, Executive Assistant to the Council, Quinault Nation, and Pearl Capoeman-Baller, Former President, Quinault Nation Business Council, in Seabrook, Wash. (Mar. 11, 2024); Roundtable on Voting Barriers and Election Administration for Native Peoples in Urban South Dakota (Apr. 19, 2024); Roundtable on Voting Barriers and Election Administration for Citizens of the Confederated Salish and Kootenai Tribes (Apr. 30, 2024); WHITE HOUSE REPORT, *supra* note 289 at 20-21.

762 *See supra* Chapter 2, Inadequate USPS Services and Vote by Mail; Chapter 2, Transportation and Physical Infrastructure.

763 *See supra* Chapter 2, Systemic Barriers Compounding the Direct Barriers; Roundtable on Voting Barriers and Election Administration on the Navajo Nation, Part III: Navajo Nation Council (Feb. 19, 2024), Testimony of Hon. Curtis Yanito, Navajo Nation Council.

764 *See* Roundtable on Voting Barriers and Election Administration for Tribal Citizens in Oregon and Washington (Mar. 9, 2024); Interview with Donita Loudner, Buffalo County Commissioner, Citizen of the Crow Creek Sioux Tribe, in Fort Thompson, S.D. (Apr. 17, 2024); Roundtable on Voting Barriers and Election Administration for Citizens of the Confederated Salish and Kootenai Tribes (Apr. 30, 2024).

lands.⁷⁶⁵ For example, the Pima County, Arizona Recorder’s Office has taken steps to build trust with and be more accessible to voters from the Tohono O’odham Nation, including unveiling a new trilingual Early Voting Sticker, with “I voted” in English, “A:ñi ‘ant wodalt” in O’odham, and “Yo Voté” in Spanish.⁷⁶⁶ Future legislation should also address civic education for Native youth, including by providing funding for Tribal nations to develop youth engagement programs.⁷⁶⁷

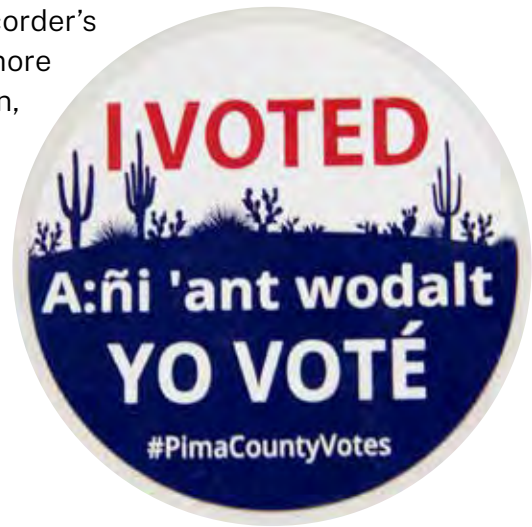


Figure 6. “I Voted” sticker from Pima County, Arizona, displaying the phrase in English, O’odham, and Spanish.

765 See Roundtable on Voting Barriers and Election Administration for Native Peoples in Urban South Dakota (Apr. 19, 2024) (describing radio as an effective form of communication to Tribal members living on reservations).

766 Gabriella Cázares-Kelly, *Pima County Recorder, unveils new ‘I Voted’ sticker*, Pima Cnty. Recorder, available at <https://www.recorder.pima.gov/IVotedSticker>. The public announcement noted that while “[m]ost Pima County voters will be unfamiliar with the Tohono O’odham language . . . It was included to acknowledge that Pima County’s boundaries sit within the ancestral homelands of the Tohono O’odham Nation. Nearly 42% of Pima County’s land mass is designated as Tribal Lands and includes the Tohono O’odham Nation and the Pascua Yaqui Tribe.” The announcement continued: “Tohono O’odham language has had a significant impact in Pima County and throughout the state. ‘Pima’ is an O’odham word for another Tribe, and ‘Arizona’ is derived from the O’odham word ‘Alʂon,’ which means ‘place of little springs.’ ‘Tucson’ is based on the O’odham phrase ‘S-cuk ʂon,’ meaning ‘base of the black mountain.’ Members of the Tohono O’odham Nation live throughout Pima County, with concentrations living in Ajo, Three Points, South Tucson and Tucson.” *Id.*

767 See Roundtable on Voting Barriers and Election Administration for Tribal Citizens in Oregon and Washington (Mar. 9, 2024); Interview with Brittany Bryson, Executive Assistant to the Council, Quinault Nation, and Pearl Capoeman-Baller, Former President, Quinault Nation Business Council, in Seabrook, Wash. (Mar. 11, 2024); Roundtable on Voting Barriers and Election Administration for Citizens of the Confederated Salish and Kootenai Tribes (Apr. 30, 2024).

CHAPTER 3

A Way Forward

One hundred years ago, the federal government unilaterally conferred citizenship on Native peoples after more than a century of exclusion and brutality. As this report outlines, the full promise of citizenship and participation in the democratic process remains unfulfilled. Many of the voting barriers Native peoples face today can be directly traced to the legacy of abuses inflicted by federal, state, and local government actors.

As detailed in this report, the barriers Native peoples face to full and equal participation in the nontribal political process are substantial and unique. Native peoples living on Tribal lands must often travel extreme physical distances—often without access to adequate transportation—to cast a ballot.⁷⁶⁸ These distances are intensified by unreliable or nonexistent residential mail services and nonstandard addresses on Tribal lands, making alternatives such as mail voting unavailable for many.⁷⁶⁹ In places where government-issued identification is required to register to vote or cast a ballot, Tribal citizens often face considerable obstacles to providing sufficient identification, either because Tribal ID is not recognized as a valid form of identification, the qualifications on what valid ID must contain effectively bar Tribal ID, or because poll workers simply refuse to accept it.⁷⁷⁰ Moreover, numerous jurisdictions fail to provide adequate language assistance, sometimes in violation of federal law.⁷⁷¹ And even where Native voters successfully register to vote and cast a ballot, their voting strength is often undermined by dilutive electoral district maps or at-large districting schemes.⁷⁷²

Structural conditions that are directly linked to the federal government's historic removal, assimilation, and termination policies with respect to Tribal nations compound the express barriers and act to further undermine Native people's ability to participate equally in the nontribal political process.⁷⁷³ On many reservations, there are alarmingly high rates of poverty, overcrowded housing, and homelessness and a lack of access to adequate infrastructure, including affordable and reliable broadband service that make it harder for Tribal citizens to access the basic resources necessary to register to vote and make it to the polling place.⁷⁷⁴ Making matters worse, state and local officials, including poll workers, as

768 See *supra* Chapter 2, Extreme Physical Distances to In-Person Voting and Voter Services.

769 See *supra* Chapter 2, Lack of Standard Residential Street Addresses and Sufficient USPS Mail Services.

770 See *supra* Chapter 2, Disparate Impact of Voter Identification Laws on Tribal Citizens.

771 See *supra* Chapter 2, Inadequate Language Assistance.

772 See *supra* Chapter 2, Vote Dilution and Racial Gerrymandering.

773 See *supra* Chapter 1, A History of the Relationship between Native Nations and the United States and the Path to U.S. Citizenship.

774 See *supra* Chapter 2, Systemic Barriers Compounding the Direct Barriers.

well as non-Native fellow voters sometimes exhibit outright hostility toward Native voters, further inhibiting their ability to safely vote.⁷⁷⁵ Together, these factors lead to a deeply rooted mistrust of federal, state, and local governments, making some Tribal citizens fearful of or unwilling to participate in nontribal elections.

While federal law provides important protections, it has been insufficient to tackle the widespread suppression of the Native vote. Native Americans have been particularly impacted by the Supreme Court’s 2013 decision in *Shelby County v. Holder*, gutting enforcement of the preclearance provisions under Section 5 of the Voting Rights Act.⁷⁷⁶ Because of their history of widespread discrimination against Native voters and other voters of color, numerous jurisdictions with substantial Native populations, including Alaska, Arizona, Oglala Lakota County⁷⁷⁷ and Todd County in South Dakota, and Robeson County, North Carolina were subjected to the preclearance provisions of the Voting Rights Act prior to *Shelby County*.⁷⁷⁸ Those jurisdictions were required to verify (or “preclear”) any changes to their voting policies or practices with federal authorities before enforcement to ensure that those changes would not make it harder for people of color to cast a meaningful ballot. In other words, Section 5 acted as a shield against discriminatory laws and discriminatory policies before they could be implemented.

Without preclearance, Tribal nations and their citizens are left to bring affirmative litigation challenging discriminatory laws only after they have already been enacted. Section 2 of the VRA and the U.S. Constitution are powerful tools to protect the right to vote. Indeed, Native Americans have won the overwhelming majority of voting rights cases they have brought.⁷⁷⁹ But as the multitudes of hurdles and abuses discussed in this report illustrate, existing legislation on its own is insufficient to undo decades of voter suppression efforts perpetrated against Native peoples.

Enacting affirmative legislation to protect Native peoples’ right to vote in federal elections is not just the right thing to do: The federal government has a treaty-based responsibility to Tribal nations and their citizens to ensure the full realization of the right to vote in nontribal elections and free, fair, and equitable access to the ballot—to say nothing of the moral responsibility our

775 See *supra* Chapter 2 Discrimination and Neglect: From Outright Hostility to Failure to Offer Robust Options for Participation by Tribal Members and Government-to-Government Consultation with Tribal Nations.

776 See *Shelby County v. Holder*, 570 U.S. 529 (2013) (ruling Section 4(b) of the VRA unconstitutional); 52 U.S.C. §§ 10303, 10304. For an explainer on how Section 5 of the VRA operated to protect the right of voters of color to equal participation in the political process, see *About Section 5 of the Voting Rights Act*, U.S. Dep’t of Justice, available at <https://www.justice.gov/crt/about-section-5-voting-rights-act> (updated Nov. 17, 2023) (“Section 5 was enacted to freeze changes in election practices or procedures in covered jurisdictions until the new procedures have been determined, either after administrative review by the Attorney General, or after a lawsuit before the United States District Court for the District of Columbia, to have neither discriminatory purpose or effect. Section 5 was designed to ensure that voting changes in covered jurisdictions could not be implemented used until a favorable determination has been obtained.”); STRONGER TOGETHER REDISTRICTING, *supra* note 417 at 6-8.

777 Oglala Lakota County was known as Shannon County until May 2015 (including the time period during which the County was covered under the Voting Rights Act’s preclearance provisions) after more than 80 percent of the County’s residents voted to change the name. See David Montgomery, *Shannon County No More: Voters Approve Name Change* (Nov. 5, 2014), <https://www.argusleader.com/story/davidmontgomery/2014/11/05/shannon-county-name-change/18534269/>.

778 See Civil Rights Division, U.S. Dep’t of Justice, *Jurisdictions Previously Covered by Section 5*, <https://www.justice.gov/crt/jurisdictions-previously-covered-section-5>.

779 See McCool, ET AL., NATIVE VOTE, *supra* note 73 at 48-68 (listing cases); OBSTACLES AT EVERY TURN, *supra* note 225 at 19-23 (listing cases); OBSTACLES 2021 CASE UPDATES, *supra* note 225.

government owes to every American. This also includes fully enforcing existing protections such as those provided by the NVRA and the Help America Vote Act of 2002 (HAVA), as well as the language access and assistance rights afforded under Sections 203⁷⁸⁰ and 208⁷⁸¹ of the VRA, and the nationwide prohibitions on voting practices and procedures that are discriminatory or dilute the voting power of Native communities found in Section 2⁷⁸² of the VRA. Moreover, Congress has sweeping authority over elections to undergird such reform, particularly through the Elections Clause and the enforcement clauses of the Fourteenth and Fifteenth Amendments.⁷⁸³

Federal legislation to address these barriers include the bipartisan *Frank Harrison, Elizabeth Peratrovich, and Miguel Trujillo Native American Voting Rights Act*, the *Freedom to Vote Act*, and the *John R. Lewis Voting Rights Advancement Act*.

Frank Harrison, Elizabeth Peratrovich, and Miguel Trujillo Native American Voting Rights Act

The ***Frank Harrison, Elizabeth Peratrovich, and Miguel Trujillo Native American Voting Rights Act (NAVRA)***⁷⁸⁴ would address many of the barriers discussed in this report by establishing baseline, consistent standards for voting throughout Indian Country, ensuring that Native Americans no longer bear the burden of lengthy, costly litigation to defend and enforce their right to vote. Key provisions of NAVRA include:

- Establishing a grant program administered by the U.S. Election Assistance Commission to establish state-level Native American Voting Rights Task Forces for the purposes of addressing the barriers to voting in Indian Country.
- Ensuring federal or federally-funded facilities providing services to Tribal nations offer voter registration services to Tribal members.
- Improving access to voter registration, polling places, and drop boxes on Tribal lands, including through meaningful Tribal consultation.
- Streamlining the process for adding polling locations on Tribal lands.
- Providing uniformity for voting on Tribal lands.
- Requiring the acceptance of Tribally - or federally-issued ID if an ID is required to vote in federal elections.
- Ensuring culturally appropriate and effective language assistance, such as requiring language access to be provided orally even if written translation is not culturally permitted.

780 52 U.S.C. § 10503.

781 52 U.S.C. § 10508.

782 52 U.S.C. § 10301.

783 U.S. CONST. art. I, § 4; U.S. CONST. amend. XIV, § 5; U.S. CONST. amend. XV, § 2; see also Nicholas O. Stephanopoulos, *The Sweep of Electoral Power*, 36 CONST. COMMENTARY 1 (2021).

784 H.R. 5008 - Frank Harrison, Elizabeth Peratrovich, and Miguel Trujillo Native American Voting Rights Act of 2021, Rep. Davids (D-KS), 117th Cong. (2021), <https://www.congress.gov/bill/117th-congress/house-bill/5008/text?s=1&r=11>.

- Allowing Tribal nations to designate buildings to be used as a person's address for the purposes of registering to vote and picking up and dropping off a ballot.
- Requiring states to provide a reason when rejecting a provisional ballot.
- Allowing extended family, caregivers, Tribal assistance providers, and household members to deliver voter registration, absentee ballots, absentee applications, or a sealed ballot of a voter residing on Tribal lands at a designated location, so long as the person is not receiving any compensation based on the number of ballots returned.
- Requiring prior consent from either the affected Tribe or the U.S. Attorney General, or an order from the D.C. federal district court before a state can reduce the voter accessibility outlined in these provisions.
- Allowing a Tribal nation to make a request to the U.S. Attorney General for federal election observers and requiring the U.S. Department of Justice to consult annually with Tribal nations on issues related to voting.

NAVRA specifically addresses the distinct and most significant barriers faced by Native voters, improving access nationwide.

Freedom to Vote Act

The **Freedom to Vote Act (FTVA)**⁷⁸⁵ improves access to the ballot for all Americans, setting baseline standards of access nationwide. The FTVA ensures every American, including those living on Tribal lands, has access to a minimum number of days of early voting and ballot drop boxes. The bill would require no-excuse, mail-in voting nationwide, and improved delivery of election mail. The FTVA protects access for Native voters—and all voters—by setting uniform standards of which forms of ID states must accept, including Tribal ID, for states that do require ID to vote, and strengthening voter list maintenance standards to prevent the removal of eligible voters. Furthermore, the FTVA ensures every citizen can exercise their fundamental right to vote in federal elections by restoring the franchise for people who have served their time for felony convictions and are no longer incarcerated.

Additionally, the FTVA improves access to voter registration, requiring nationwide implementation of automatic voter registration, online voter registration, and same day voter registration. Same day voter registration, in particular, would significantly improve access for Native voters. If a voter does not interact with a state or federal agency, or lacks access to reliable broadband, they may not be captured by automatic or online registration. However, same day voter registration allows individuals to go to the polls during early voting or on election day, register, and vote all in one trip.

The FTVA also ends partisan gerrymandering and establishes specific criteria for congressional redistricting to ensure nonpartisan redistricting.

785 H.R. 11 - Freedom to Vote Act, 118th Cong. (2023), <https://www.congress.gov/bill/118th-congress/house-bill/11/text?s=1&r=8>.

John R. Lewis Voting Rights Advancement Act

The **John R. Lewis Voting Rights Advancement Act (VRAA)**,⁷⁸⁶ restores important provisions of the VRA that have been severely curtailed by the U.S. Supreme Court and other federal courts over the past two decades.⁷⁸⁷ First, it creates a new geographic coverage formula for determining which states and localities must preclear election changes with the U.S. Department of Justice or a federal district court in Washington, D.C., tailoring the regime to present-day attacks on the right to vote. The VRAA would also implement a “known practice coverage” preclearance regime that requires states and localities that meet certain criteria to preclear seven covered voting practices prior to any implementation. Through evidence gathered by the Committee on House Administration and others, Congress recognizes the discriminatory impact these seven practices can have on voters. The covered practices include: (1) changes to the method of election; (2) changes to jurisdictional boundaries; (3) changes through redistricting; (4) changes in documentation or qualifications to vote (such as voter identification or documentary proof of citizenship); (5) changes to multilingual voting materials; (6) changes that reduce, consolidate, or relocate voting locations, or reduce voting opportunities (including early, absentee, and election day voting locations and Sunday early voting opportunities); and (7) new voter list maintenance processes.

The VRAA also strengthens Section 2 of the Voting Rights Act—a key pillar that allows plaintiffs, including Tribal nations and individual voters, to bring claims for vote denial and vote dilution. In *Brnovich v. Democratic National Committee*, the Court set out to rewrite the law for vote denial claims, laying out novel factors never before considered by Congress or federal courts. The decision, which was a thinly-veiled attempt to erode Section 2, flew in the face of precedent and the Congressional record, ignoring protections explicitly written into the statute in 1982.⁷⁸⁸ The VRAA would correct the Supreme Court’s error in *Brnovich*, reinvigorating a critical tool used by Tribal nations and Native voters to protect and enforce their right to vote.

Further Action

Rather than embracing and encouraging increased voter participation, states have instead enacted laws that roll back access and aim to erect roadblocks to the ballot box. In 2023, at least 14 states enacted 17 restrictive voting laws, and in only six months between January 1, 2024 and the publication of this report, at least six states enacted another seven restrictive voting laws.⁷⁸⁹ Individually, NAVRA, the FTVA, and the VRAA will protect and expand access

786 H.R. 14 - John R. Lewis Voting Rights Advancement Act of 2023, Rep. Terri Sewell (D-AL), 118th Cong. (2023), <https://www.congress.gov/bill/118th-congress/house-bill/14/text?s=3&r=5>.

787 See *Brnovich v. Democratic National Committee*, 594 U.S. ___, 141 S.Ct. 2321 (2021); *Shelby County v. Holder*, 570 U.S. 529 (2013); *Arkansas State Conf. NAACP v. Arkansas Bd. of Apportionment*, 86 F.4th 1204 (8th Cir. 2023).

788 See *Brnovich*, 141 S.Ct.

789 See Brennan Center for Justice, *2023 in Review* (Jan. 18, 2024), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-2023-review>; Brennan Center for Justice, *Voting Laws Roundup May 2024* (May 17, 2024), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-may-2024>.

to the franchise for all Native people. Combined, they take significant steps to safeguard and expand the rights of voters and ensure equal and equitable access to the ballot.

While Congress must enact these bills, there are steps states and localities can take now to improve access to the ballot for Native people. States and local entities must conduct meaningful, fulsome consultation with Tribal leaders well in advance of elections. Tribal leaders must be consulted on issues such as where the best placement of polling places and satellite offices to ensure Tribal members can meaningfully access them. The USPS and local postmasters, along with states and localities, must invest resources into improving mail service for people living on Tribal lands and consult with Tribal leaders well in advance of an election to address any postal service issues for mail-in ballots.

State and local officials should conduct substantive trainings on election laws and procedures and cultural sensitivities for election workers, poll workers, and volunteers to ensure no eligible voter is turned away from the polls, all voters receive the assistance they need, and to prevent instances of voter intimidation.

The federal government also has a critical role to play. The Department of the Interior and other agencies that provide services on Tribal lands must work with Tribal nations and state governments to fully implement President Biden's Executive Order Promoting Access to Voting⁷⁹⁰ and improve voter registration opportunities and voter education programs, in coordination with Tribal governments. The Department of the Interior should also work with other federal agencies and Tribal governments to improve data collection on Native American voters' registration and participation rates.

These steps, and more, would go a long way to improving access to the ballot for Native peoples living on and off Tribal lands.

790 Exec. Order No. 14019, 86 Fed. Reg. 13623 (Mar. 7, 2021).

CONCLUSION

The evidence compiled in this report illustrates that discrimination in voting is alive and well, and has a significant impact on Native people. We are at an inflection point in protecting our democracy and ensuring it is accessible for every American. The full realization of citizenship promised 100 years ago remains unfulfilled.

Congress must exercise its constitutional authority to protect the fundamental right to vote for every American, and for the federal government to fulfill its treaty-based responsibilities to Tribal nations and Native peoples. It is unacceptable that 100 years after the Indian Citizenship Act, the promise of full democratic participation remains elusive and purposefully subverted at many turns.

As Chief Justice Earl Warren wrote in 1964, the “right to vote freely for the candidate of one’s choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of the representative government.”⁷⁹¹ Voting and equal, equitable access to the ballot are cornerstones of creating a true democracy: “No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.”⁷⁹²

To truly fulfill the United States’ treaty responsibilities to Tribal nations and Native peoples, Congress must ensure equal access to representation for every Native person.

791 Reynolds v. Sims, 377 U.S. 533, 555 (1964).

792 Wesberry v. Sanders, 376 U.S. 1, 17 (1964).

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