

Nos. 19-1257 & 19-1258

**In The
Supreme Court of the United States**

MARK BRNOVICH, IN HIS OFFICIAL CAPACITY
AS ARIZONA ATTORNEY GENERAL, et al.,

Petitioners,

v.

DEMOCRATIC NATIONAL COMMITTEE, et al.,

Respondents.

ARIZONA REPUBLICAN PARTY, et al.,

Petitioners,

v.

DEMOCRATIC NATIONAL COMMITTEE, et al.,

Respondents.

**On Writs Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

**BRIEF OF *AMICUS CURIAE*
NAVAJO NATION
IN SUPPORT OF RESPONDENTS**

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INTEREST OF AMICUS CURIAE¹

Amicus Curiae Navajo Nation (“Nation”) is a federally recognized Indian Tribe.² The Nation encompasses parts of Arizona, New Mexico, and Utah and covers an area of 27,425 square miles, making it approximately the size of West Virginia. It has a total population of over 300,000 citizens. The largest and most populated portion of the Nation is in Arizona. According to the 2010 census, there were 173,667 Navajos living on the Nation, with 101,835 Navajos living on the Arizona portion of the Nation. Arizona Rural Policy Institute, *Demographic Analysis of the Navajo Nation Using 2010 Census and 2010 American Community Survey Estimates* 25, Table 10, available at https://gotr.azgovernor.gov/sites/default/files/navajo_nation_0.pdf. (Ariz. Rural Policy Inst.).

The Nation is divided into 110 subordinate governmental units referred to as “Chapters,” 57 of which are in whole or in part located in Arizona. Chapters often serve as polling locations for tribal, state, and federal elections. The Arizona portion of the Nation is within the three Counties of Apache, Coconino, and Navajo. Combined, these three counties

¹ All parties have consented to the filing of this brief and have filed blanket consents with the Clerk. Pursuant to Rule 37, no party or its counsel authored this brief in whole or in part; amicus alone funded its preparation and submission.

² The government-to-government relationship is recognized by the Treaty of 1849 and the Treaty of 1868.

have the largest proportion of Indian federal trust land of any counties in the United States.

The Nation is a racial and language minority under Section 2 of the Voting Rights Act and is covered for language assistance under Section 203 of the Voting Rights Act. Voting Rights Act of 1965, 52 U.S.C. §§10301 *et seq.* (“VRA”). The Nation has a strong interest in ensuring that its citizens have an equal opportunity with other citizens to participate in elections, and that each citizen registered to vote in state and federal elections is able to cast a ballot and have that ballot count. Navajo voters have suffered a long history of discrimination. The Nation has fought repeated efforts by the State, and its political subdivisions, to dilute and deny the votes of the Nation’s citizens. Still, Navajo voters continue to be negatively impacted by state voting laws and policy decisions that impede access to the polls. These laws and policies either ignore or dismiss the unique challenges faced by Navajo voters.



SUMMARY OF THE ARGUMENT

A violation of Section 2 of the VRA occurs, if, based on the totality of the circumstances, the evidence establishes that the electoral standard, practice, or procedure being challenged had the result of denying a racial or language minority an equal opportunity to participate in the political process. 52 U.S.C. §10301. Navajos are considered both a racial and language minority under Section 2. Arizona’s ballot collection law

and out-of-precinct policy deny the Nation's citizens an equal opportunity to participate in the electoral process. This disparate impact is not merely a product of chance, but rather is a result of social and historical discrimination against Native American voters in Arizona. In comparison to Arizona's non-Native American voters, Navajo voters lack an equal opportunity to participate in the political process due to non-standard addresses, irregular or unreliable postal services, lack of residential mail delivery, lack of transportation, physical isolation, extreme poverty, and excessive distances to post offices and/or other postal service providers.

Arizona's ballot collection law criminalizes ways in which Navajos historically participated in early voting by mail. Due to the remoteness of the Nation and lack of transportation, it is not uncommon for Navajos to ask their neighbors or clan members to deliver their mail. Navajo voters should be able to use their traditional networks of neighbors and clan members to perform this function.

Arizona's out-of-precinct policy leads to a higher rejection of Navajo ballots than non-Navajo voters, and it is more difficult for Navajos to discover their correct polling location than those with standard street addresses. Throughout the Nation, homes are unmarked and lack street addresses. The lack of street addresses often results in Navajos being placed in the wrong precinct by their county. To make matters more confusing for some voters, county precincts do not match tribal precincts. Being assigned to the wrong precinct or having to vote in a precinct that is different

from the tribal precinct may result in a voter having to drive an additional 50 plus miles roundtrip to vote in the assigned precinct. With one-third of the Nation living in poverty, many Navajos lack readily available transportation. Ariz. Rural Policy Inst. at 34.

Arizona's time, place, and manner restrictions on ballot collection and in-person voting at out-of-precinct locations may appear to be neutral and ordinary to non-Native Americans, but such restrictions impose severe burdens on Navajo voters living on the Nation. Allowing out-of-precinct votes to be counted as well as allowing third-party ballot collection is a necessity that would provide Navajo voters an equal opportunity to participate in the political process.

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ARGUMENT

I. ARIZONA HAS A LONG HISTORY OF VOTER DISCRIMINATION AGAINST AND DISENFRANCHISEMENT OF NATIVE AMERICANS.

A. State-level discrimination against Navajos and other Native Americans.

The current challenges Navajo voters face are necessarily a consequence of Arizona's long history of denying Native Americans the right to vote "as a matter of law and of practice." *Continuing Need for Section 203's Provision for Limited English Proficient Voters: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 309 (2006) (letter from Joe Garcia, NCAI). Despite passage of the Indian Citizenship Act of 1924,

which granted citizenship to all Native Americans born in the United States, Arizona denied Native Americans the right to vote for decades. Soon after passage of the Act, Arizona moved quickly to devise legal justifications as to why Native Americans should be denied the right to vote. Patty Ferguson-Bohnee, *The History of Indian Voting Rights in Arizona: Overcoming Decades of Voter Suppression*, 47 ARIZ. ST. L.J. 1099, 1105-1109 (2015) (Ferguson-Bohnee). In 1928, the Arizona Supreme Court held that Native Americans living on reservations lacked the qualifications to vote because, as wards of the federal government, the Arizona Constitution prevented “persons under guardianship, *non compos mentis*, or *insane*” from voting. *Porter v. Hall*, 271 P. 411, 419 (Ariz. 1928) (internal quotation marks omitted). Two decades later, in 1948, the Arizona Supreme Court finally overturned this interpretation of the Arizona Constitution, paving the way for Native Americans to register to vote. *See Harrison v. Laveen*, 196 P.2d 456, 458 (Ariz. 1948) (holding that Native Americans living on reservations should in all respects be allowed the right to vote).

Despite overcoming the “guardianship” barrier, Arizona’s English literacy requirement effectively prevented most Arizona Native Americans from voting until the 1970s. Arizona required voters to pass an English literacy test as a prerequisite to voter registration. *See* ARIZ. REV. STAT. §16-101(A)(4)-(5) (1956); *Voting Rights Act: Evidence of Continued Need, Vol. I: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 1372 (2006)

(appendix to the statement of Wade Henderson). It is estimated that 80-90% of Arizona Native Americans were illiterate in 1948. Ferguson-Bohnee at 1112. In the 1960s, at least “half of the voting-age population on the [Navajo] reservation could not vote because of the literacy test.” DANIEL MCCOOL ET AL., NATIVE VOTE: AMERICAN INDIANS, THE VOTING RIGHTS ACT, AND THE RIGHT TO VOTE 19 (2007).

When Congress passed the Voting Rights Act of 1965 (“VRA”), it included a temporary prohibition on literacy tests in covered jurisdictions. This prohibition applied in areas with less than 50% voter registration. Although the three counties, which overlap the Nation’s territory—Apache, Navajo, and Coconino—became covered by Section 5 in 1965, the State of Arizona circumvented its application by arguing that the focus should be on whether the tests were applied in a discriminatory manner, not whether the tests resulted in discrimination. *Apache Cty. v. United States*, 256 F. Supp. 903, 906 (D.D.C. 1966) (citing *Lassiter v. Northampton Cty. Bd. of Elections*, 360 U.S. 45, 79 (1959)); see also Determination of the Attorney General Pursuant to Section (4)(b) of the Voting Rights Act of 1965, 30 Fed. Reg. 9897 (Aug. 7, 1965) (literacy tests were not a test or device that had been used in the previous “five years for the purpose or with the effect of denying or abridging the right to vote on account of race or color”).

When Congress amended the VRA in 1970, it extended the temporary prohibition on literacy tests, which again preempted the operation of Arizona’s literacy test. 42 U.S.C. §1973aa (1970). Arizona, along

with others, unsuccessfully challenged the constitutionality of banning literacy tests. *Oregon v. Mitchell*, 400 U.S. 112 (1970); James Tucker *et al.*, *Voting Rights in Arizona: 1982–2006*, 17 S. CAL. REV. L. & SOC. JUST. 283, 283–85 (2008) (Tucker *et al.*). In *Oregon v. Mitchell*, the Supreme Court upheld the prohibition against literacy test requirements because “literacy tests have been used to discriminate against voters on account of their color.” 400 U.S. at 117. The Court noted that Arizona also had a serious problem of deficient voter registration among Native Americans. *Id.* at 132. In the 1975 VRA reauthorization, Congress permanently banned literacy tests. Tucker *et al.* at 286–87.

In 2004, Arizona enacted a voter identification law which was burdensome for some Navajos who were born at home and did not have birth certificates. ARIZ. REV. STAT. §16-579; Brief for Nat’l Cong. of Am. Indians *et al.* as *Amici Curiae* Supporting Petitioners at 7, *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008). The voter identification law resulted in a significant decrease in the number of Native Americans who voted in the 2006 elections. The Nation filed a Section 2 lawsuit against the State of Arizona challenging the law. The suit was settled by expanding the types of documents that Native American voters can use for identification. *Navajo Nation v. Brewer*, No. 06-1575 (D. Ariz. May 27, 2008) (order approving settlement agreement and dismissal).

B. County-level discrimination against Navajos.

Protecting the right to vote and ensuring the right to vote of Navajo voters have required decades of litigation following the VRA. After literacy tests were banned, numerous efforts to dilute the Navajo vote and to prevent Navajos from participating in state and federal elections evolved. In 1971, the Arizona Legislature divided the Nation into three separate state legislative districts “in order to destroy the possibility that the Navajos, if kept within a single legislative district, might be successful in electing one or more of their own choices to the Legislature.” *Klahr v. Williams*, 339 F. Supp. 922, 927 (D. Ariz. 1972). A three-judge panel held that this scheme violated the equal protection clause of the Fourteenth Amendment. *Id.*

In 1973, the Arizona Supreme Court quashed a permanent injunction of a lower court barring the seating of Tom Shirley, a Navajo living on the Nation, who had been elected to the Apache County Board of Supervisors. *Shirley v. Superior Court for Apache Cty.*, 513 P.2d 939, 945 (Ariz. 1973). The Arizona Court reaffirmed the right of Native Americans to vote, vacated the injunction, and directed the Apache County Board of Supervisors to certify Shirley as the elected supervisor. *Id.* In response, Apache County realigned the County Board of Supervisor districts, overpopulating one district with Navajos in order to dilute the Navajo vote. When Navajo voters challenged the reapportionment, Apache County challenged the constitutionality of the Indian Citizenship Act and claimed that Native

Americans were not citizens of the United States. *Goodluck v. Apache Cty.*, 417 F. Supp. 13, 14 (D. Ariz. 1975), *aff'd per curiam*, 429 U.S. 876 (1976). A three-judge federal court rejected these arguments and found that the county supervisor districts must be reapportioned according to population. *Id.* at 16.

That same year, in 1976, Apache County attempted to avoid the integration of Native American students into public schools by holding a special bond election to fund a new school in the almost entirely non-Native American southern part of the county. *Apache Cty. High School No. 90 v. United States*, No. 77-1815 (D.D.C. June 12, 1980). Native American turnout for the election was abnormally low. Investigations demonstrated that low turnout was a result of closing nearly half of the polling places on the Nation, failure to provide language assistance, the absence of Navajo informational meetings regarding the bond election, and the use of English-only in the implementation of absentee voting procedures. This litigation resulted in a consent decree in which Apache County agreed to a number of changes to put an end to these blatantly discriminatory practices. *Id.*

In 1988, the United States sued Arizona for “unlawfully deny[ing] or abridg[ing] the voting rights of Navajo citizens residing in defendant counties” in violation of Section 4(f)(4) and Section 2 of the VRA. *United States v. Arizona*, No. 99-1989 (D. Ariz. May 22, 1989) (Consent Decree) (as amended Sept. 7, 1993); *Voting Rights Act: Section 203—Bilingual Election requirements (Part I): Hearing before the Subcomm. on*

the Constitution of the H. Comm. on the Judiciary, 109th Cong. 99 (2005) (appendix to the statement of Bradley J. Schlozman). The parties agreed to a consent decree, which remained in effect until 1995. *Id.* As part of the consent decree, Arizona agreed to create the Navajo Election Information Program, and the counties agreed to employ outreach workers.

In 1994, the U.S. Department of Justice brought an enforcement action to enjoin Navajo and Coconino Counties from having judicial elections for four new judicial divisions created without seeking preclearance under Section 5 of the VRA. The district court held that the judgeships constituted a “covered change” and enjoined the judicial elections until preclearance was obtained. *United States v. Arizona*, No. 94-1845 (D. Ariz. 1994).

Further attempts to disenfranchise Native American voters occurred during the 2008 Arizona election when the candidacy of Navajo candidates was challenged because the addresses on the signature petitions included post office boxes and not physical addresses, an impossible task for the Nation’s residents who do not have physical addresses. Ferguson-Bohnee at 1123. Challenges by non-Native Americans to Navajo citizen candidate petitions continue to this day. In 2020, a non-Native American candidate for office challenged the candidacy of a Navajo running for sheriff in Apache County for including post office boxes on the candidate petition. *Reynolds v. Dedman*, No. CV2020-0057 (Apache Cty. Sup. Ct. 2020).

In 2018, the Nation sued Apache, Navajo, and Coconino Counties for violations of the VRA and the U.S. Constitution for discarding unsigned early ballots, denying equal access to in-person early voting, and failing to provide adequate Navajo language translations. *See Navajo Nation v. Hobbs*, No. CV-18-08329, 2018 U.S. Dist. LEXIS 198402 (D. Ariz. Nov. 21, 2018). The Arizona Secretary of State and the counties entered into settlement agreements with the Nation to address language assistance, outreach and advertising, curing of early ballots, voter registration, and in-person early voting.

In addition to these documented instances of voter suppression, Navajos have also dealt with voter intimidation. The Department of Justice has reported instances of harassment and voter intimidation by polling officials. H.R. Rep. No. 109-478 at 45 (2006). Congressional testimony also describes how intimidation efforts have been used to discourage the Navajo vote. *Voting Rights Act: Sections 6 and 8—The Federal Examiner and Observer Program, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 16 (2005) (statement of Penny Pew).

II. NAVAJO VOTERS DO NOT HAVE THE SAME OPPORTUNITIES TO PARTICIPATE IN COUNTY, STATE, AND FEDERAL ELECTIONS AS OTHER ARIZONA ELECTORS.

Life on the Nation is much different than that experienced by most Arizonans. The Nation occupies some of the “most remote, challenging, and sparsely populated terrain in the country.” *Addressing the Urgent Needs of our Tribal Communities: Hearing Before the Comm. on Energy and Commerce*, 116th Cong. (2020) (testimony of Jonathan Nez, Navajo Nation President). In contrast to a majority of Arizonans, Navajos live in extremely rural conditions. The population density on the Nation is 6.3 per square mile, as compared to the statewide density of 56.3. Navajo Div. of Health, Navajo Epidemiology Ctr., Navajo Population Profile 2010 U.S. Census 21 (Dec. 2013), available at <https://www.nec.navajo-nsn.gov/Portals/0/Reports/NN2010PopulationProfile.pdf>; U.S. Census Bureau, Quick Facts Arizona, available at <https://www.census.gov/quickfacts/AZ>. For Navajo voters, the physical vastness and rural settings of the Nation create unique challenges for Navajo citizens in casting their ballots in state and federal elections. This physical isolation coupled with extreme poverty and language barriers makes voting an arduous task for many Navajo citizens.

A. Navajo voters lack at-home mail delivery.

Navajo voters face significant barriers to vote-by-mail including the lack of home mail delivery service. Navajo voters living on the Nation do not receive mail

at their homes. Instead, they must rely on post office boxes to receive their mail. Post office boxes on the Nation are limited in number and are often shared by multiple individuals. The Arizona portion of the Nation has eleven post offices and fifteen postal providers. These offices are responsible for delivering coverage to 18,000 square miles of Nation land. Post office boxes can be located a great distance from the voter's rural residence. Individuals may have to travel 45 miles to reach the closest post office box. *See Democratic Nat'l Comm. v. Hobbs (Hobbs)*, 948 F.3d 989, 1006 (9th Cir. 2020). Renting a post office box is also a burden because it can cost a considerable amount. For example, the fee for renting a post office box in Arizona is \$136.00 for one year. If the fee is not paid by a certain time, it may lead to the box being closed.

Each post office has a limited number of post office boxes available at each location. *Voting Rights and Election Administration in Arizona: Field Hearing Before the Subcomm. on Elections of the H. Comm. on Administration*, 116th Cong. 2 (2019) (testimony of Jonathan Nez, Navajo Nation President). The post office also limits the number of people that can be listed on a post office box. *Id.* This means that individuals who share post office boxes with their family can be removed from the box if too many individuals try to use it as their mailing address. *Id.* Moreover, if an individual's name is not listed on a post office box, the person might not receive a ballot at all. If an individual is not able to secure a post office box, or is removed from their family box, the voter may have to travel an additional

30 to 40 miles to attempt to secure a box at the next nearest post office. *Id.*

In almost all cases, individuals on the Nation need access to some form of transportation in order to check their mail. However, “[t]here is no public transportation that allows for the pick-up of individual citizens at their place of residence. This severely limits the transportation options for elderly and disabled citizens. People are reliant on relatives or friends for rides, especially in the more rural areas. In some parts of the Nation, only one in ten families own a vehicle which further limits transportation options.” *Id.* at 5. Therefore, individuals who do not have a vehicle of their own must rely on sharing a vehicle or getting rides from friends and neighbors. Poor roads only increase the burden. There are over 10,000 miles of roads on the Nation and eighty-six percent of those roads are unpaved dirt roads. Of the 1,500 miles of paved roads, over fifty percent are in poor pavement condition. Navajo Div. of Transp., *FY2019 Navajo Nation Tribal Transportation Plan 1* (2018), available at http://navajodot.org/uploads/files/Draft%20FY2019%20NNTTIP_08-20-18.pdf. All of these factors result in Navajo voters not being able to check their mail on a regular basis. Some check their mail as little as once a month.

B. Mail routes result in delays in receiving and returning mail.

Even if a Navajo citizen manages to receive a ballot and drops it back off at the post office, the ballot

could go through a routing maze that adds days to its delivery time, thus running a high risk of a ballot going uncounted. For example, in Apache County, a ballot from Window Rock is routed to Gallup, Albuquerque, Phoenix, Show Low, then to the county recorder in St. Johns. Navajo Nation Teleconference with Samantha E. Lamb, AZ/NM Political Mail Coordinator, United States Postal Service (Sept. 29, 2020). These circuitous routes make mail delivery less reliable and increase the time for a ballot to make it to the county recorder's office to be counted. Additionally, because these routes are so complicated, there is no good estimation for how long a ballot will take to reach the county recorder's office. A voter could mail a ballot a week ahead of time, but it still may not make it to the county recorder's office by election day.

C. Navajo Chapter boundaries do not coincide with county precinct boundaries.

The Nation has 110 chapters that each serve as tribal precincts in Navajo elections. Navajo government boundaries do not regularly coincide with county precinct boundaries or county boundaries themselves. *Voting Rights and Election Administration in Arizona: Field Hearing Before the Subcomm. on Elections of the H. Comm. on Administration*, 116th Cong. 6 (2019) (testimony of Jonathan Nez, Navajo Nation President). Navajo elections often occur on the same day as county, state, and federal elections, with Chapter houses serving as polling locations for all elections. *Id.* at 5. This creates added confusion among Navajo voters. *Id.* at 6.

Depending on where the voter lives, his or her designated Chapter may be different from the voter's designated county polling place for his/her precinct. *Id.* When this happens, the Navajo voter will have to vote in two separate locations on election day. *Id.* at 5. This could result in the voter having to travel more than 120 miles round trip to vote. *See id.* at 4. Additional confusion results from counties having inconsistent policies across the Nation.

D. Socio-economic factors create challenges for Navajo voters.

The Nation's citizens face disparities in education, housing, employment, and health services. These disparities hinder the ability of the Nation's citizens to participate effectively in the political process. Only four percent of the Nation's membership has obtained a college degree. Ariz. Rural Policy Inst. at 57. The poverty rate on the Nation is thirty-eight percent, which is more than twice the poverty rate in the State of Arizona. *Id.*

Housing presents a logistical challenge to registering and obtaining a ballot. Throughout the Nation, homes are unmarked and lack traditional street addresses. Consequently, Navajos lack verifiable physical addresses. When Navajos register to vote, they must draw a map indicating where they reside. The map drawing area on Arizona's voter registration form is very small and rarely allows sufficient space for individuals to provide an accurate location of their residence.

County officials must make their best estimate of the physical location of a residence. This can result in an individual being placed in the wrong precinct. Additionally, there is a drastic housing shortage on the Nation and houses are often crowded—it is not uncommon for fifteen people to share a home. Individuals may move from house to house “couch-surfing” so that they are not a prolonged burden on family and friends. This lack of a permanent residency makes it challenging for these eligible citizens to register to vote because they do not have a reliable residential address, even if they are consistently residing within one precinct.

E. Navajo voters face language barriers in voting.

Navajos also consist of a language minority group under Section 203 of the VRA. Over seventy percent of households on the Nation speak a language other than English. The Nation is a covered jurisdiction under Section 203 and Section 4(f)(4) of the VRA. If trained translators are not provided during the voting process, the ability of Navajo language speakers to participate effectively in the political process is reduced. Since Navajo is traditionally an oral language, Navajo voters need in-person language assistance to cast a ballot.

III. BALLOT COLLECTION LIMITATIONS IMPOSE UNDUE BURDENS ON NAVAJO VOTERS.

Arizona provides voters two options to vote early, in-person at an early voting location or by mail. Neither option is equally accessible to Navajo voters compared to off-reservation voters. Over eighty percent of Arizona's voters choose to vote by mail and can deposit their ballot in a mailbox at or near their home. Citizens Clean Election Commission, *Vote by Mail*, available at <https://www.azcleelections.gov/how-to-vote/early-voting/vote-by-mail>. However, Navajo voters lack the same opportunity to receive and return their ballot by mail, let alone have that ballot counted.

In 2016, the Arizona Legislature passed House Bill 2023. ARIZ. REV. STAT. §16-1005 (H-I) (HB 2023). HB 2023 criminalizes ballot collection by making it illegal for someone who is not a relative, caregiver, or household member to pick up or return another's ballot.³ Arizona's ballot collection restriction is more than a mere inconvenience; it denies Navajo voters equal access to voting options. This Court has recognized that burdens are severe if they go beyond mere inconvenience. *Crawford*, 553 U.S. at 205. For many Navajos, limiting ballot collection greatly increases the

³ While state criminal laws such as this one do not apply to Navajos within the Nation, Navajos delivering such ballots to county election offices outside the Nation are potentially subject to prosecution. This law has a chilling effect, nonetheless. Further, non-Indian friends or family delivering such ballots would be subject to prosecution, even within the Nation.

already burdensome process of retuning a ballot issued by mail. These burdens include a lack of access to transportation, long distances for mail travel, and the financial burden of maintaining a post office box to vote. As Justice Souter recognized in *Crawford* the burden of traveling is significant for poor, elderly, and disabled voters. *Id.* at 213–14 (Souter, J., dissenting). Arizona’s ballot collection law makes these hurdles less surmountable.

Due to conditions on the Nation, many Navajos rely on others to help them pick up and drop off mail. Because, as discussed above, mail service is severely limited on the Nation, many Navajos rely on neighbors, friends, and clan members to pick up and deliver their mail. Navajos follow a kinship system that consists of more than 100 clans. *See* SAAD AHAH SINIL: DUAL LANGUAGE NAVAJO-ENGLISH DICTIONARY 3-8 (Martha A. Austin et al. eds., 1974). Each Navajo belongs to four different clans. When a Navajo introduces himself or herself to another person who happens to share one or more of the same clans, they become related through clan. Clan relationships are similar to that of familial relationships such as brother, sister, mother, and father. HB 2023 excludes these traditional Navajo familial relationships by limiting familial relationships to “someone related by blood, marriage, adoption or legal guardianship.” ARIZ. REV. STAT. §16-1005 (I)(2)(c). Arizona’s ballot collection law criminalizes the way in which many Navajos have historically handled their mail-in ballots, and it increases the disparity between off-reservation individuals and Navajo voters who do

not have the same opportunity to vote by mail. Ballot collection by someone other than a household member or family member may be the only way a Navajo voter can cast their ballot. Making it criminal to assist voters in this way imposes more than an inconvenience. It could result in a ballot not being returned or being returned late; thereby denying the voter the right to vote in the same manner as other Arizona citizens.

The application of the ballot collection law in light of the social and historical conditions on the Nation causes a severe burden on Navajo voters, resulting in a disparate impact under Section 2 of the VRA. The need for third-party ballot collection on the Nation must be viewed in conjunction with practical realities—such as poverty and the remoteness of the Nation.

IV. ARIZONA'S OUT-OF-PRECINCT POLICY MAKES IT OVERLY BURDENSOME FOR NAVAJO VOTERS TO VOTE.

Arizona counties must decide whether to operate precinct-based polling places, vote centers, or both for an election cycle. ARIZ. REV. STAT. §16-411. In counties that use a vote-center system or allow out-of-precinct voting, registered voters may vote at any polling location in the county. In counties using the precinct-based system, registered voters may vote only at the designated polling place in their precinct. This means that a ballot rejected due to being cast out-of-precinct in a county with precinct-based voting

requirement would have been counted in a county that offered out-of-precinct voting or vote centers. This electoral system combined with social and historical factors disproportionately impacts Navajo voters because their ballots are discarded at higher rates than non-Navajo voters.

A. The inconsistent use of precinct voting throughout Arizona creates a disparate impact on Navajo voters.

Time, place, and manner restrictions—such as restrictions on out-of-precinct voting—can violate Section 2. Justice Scalia stated, if “a county permitted voter registration for only three hours one day a week, and that made it more difficult for blacks to register than whites . . . [Section] 2 would therefore be violated—even if the number of potential black voters was . . . small.” *Chisom v. Roemer*, 501 U.S. 380, 408 (1991) (Scalia, J., dissenting). Arizona’s out-of-precinct voting law is not applied equally and therefore, the electoral system is not equally open because it does not give all voters equal opportunity to participate. That is, some voters have the opportunity to vote out-of-precinct and some do not, all depending on the county’s policies where they reside. In the 2020 General Election, for example, counties overwhelmingly chose not to offer vote centers at many of the reservation polling locations. The largest county in the state, Maricopa, selected a vote center model for the 2020 cycle, along with seven other counties. However, Apache County,

with the largest Navajo population in the state, only offered precinct voting.

The county-by-county determination results in different voting models being utilized throughout the Nation. For example, on the Navajo Reservation during the 2020 General Election, each county provided different voting options. In Apache County, a voter had to vote at the polling location assigned for his/her precinct for the ballot to count. However, Navajo County, the next county over on the Nation, offered vote centers allowing a voter to cast a ballot at any polling location in the county. Coconino County offered a hybrid model, providing one vote center on the Nation while the other tribal polling locations were precinct-based. This inconsistent treatment between counties of precinct voting leads to confusion among Navajo voters. Counties that choose not to offer vote centers to all of their citizens deny voters the same opportunity to participate and cast a ballot as other Arizona voters.

B. The lack of traditional addresses on the Nation results in a disproportionately high number of Navajo voters being placed in the wrong precinct.

Out-of-precinct voting restrictions are also problematic due to the lack of street addresses on the Nation because it causes issues relating to voter registration. When Arizona Navajos with non-traditional street addresses register to vote, they must draw a map of the location of their residence in order to be placed in the

proper precinct. The space provided on the registration form, however, does not allow for much detail because the box is quite small. *See* Arizona Voter Registration Form, Box 23, available at https://azsos.gov/sites/default/files/voter_registration_form.pdf. This often results in voters being assigned to the wrong precincts because registrars are unable to decipher a proper residential location based on the map. For the first time, in 2020, Arizona citizens with non-traditional street addresses were able to register to vote online through the use of google plus codes. However, this option still did not resolve the registration barriers for the many Navajos who have virtually no access to computers or the internet.

Voters with non-traditional addresses can be placed in the wrong precinct or not assigned a precinct at all. When voters placed in the wrong precinct attempt to vote on election day, they are either given a provisional ballot or told by poll workers to vote in their assigned precinct. If the individuals want to vote in their assigned precinct, they may have to drive an additional 100 miles round trip to cast a ballot on election day. When voters are not assigned to a precinct, voters are sometimes told they are not registered or confused as to where they can cast a ballot.

During the 2014 and 2016 general elections in Apache, Navajo, and Coconino counties, the vast majority of [out-of-precinct] ballots were in areas that were almost entirely American Indian.” *Hobbs*, 948 F.3d at 1004. In the 2020 General Election, over 2,000 voters were placed on the suspense list in Apache

County, primarily due to questions surrounding their residency that prohibited the county from placing them in the correct precinct. These voters did not show up on the voting roster when they went to vote on election day. Voters on the suspense list, must provide the correct information to the County Recorder by 7 PM on election day in order to perfect the registration. Arizona Secretary of State, Election Procedures Manual 18-19 (2019).

While an individual can try to call the county recorder's office on election day, it can be extremely hard to get through to speak to someone. During the 2020 General Election, Apache County did not have individuals answering its phone in real time, but rather required voters to leave messages. If the office did attempt to return an individual's call, several issues could have arisen—the individual could have returned to the voter's residence without reliable cell service, left the polling location without voting, or if the voter was a Navajo speaker, the voter could have lost the use of the translator.

Voters are often unaware in advance of the election that they need to update the residential address on their voter registration. Most Navajo voters do not have the ability to provide updated residence information to the county recorder in person due to the extreme distances between county seats and the Nation. For example, in Apache County, if a voter resides in Tec Nos Pos in the northern part of the county, the voter would need to drive 211 miles one way to visit the county recorder's office. This is in contrast to the

non-Navajo voters who live in Alpine in the southern part of the county, whose travel distance to the county seat is 55 miles. The long distance, lack of transportation options and financial means makes these types of trips practically impossible for a majority of Navajo voters and creates a disparate impact between Navajo voters on the Nation and off-reservation non-Navajo voters.

A burden on voting may be established if a state “implement[ed] . . . a system in a manner that makes it more difficult for a significant number of members of a protected group to discover the correct precinct in order to cast a ballot.” *Democratic Nat’l Comm. v. Reagan*, 904 F.3d 686, 731 (9th Cir. 2018). In this case, the ability and means for a Navajo voter to identify and assess the correct precinct is a much greater burden than for off-Nation voters. Neither the state nor any county provided options for Navajo voters to determine their precinct. The online tools that were available were limited to those with traditional street address. Further, non-Navajo voters do not have to deal with the confusion created by conflicting boundaries between the counties and the Chapters, whereas it is often the case that Navajos are unable to determine their correct precinct because they have been placed in the wrong precinct by the county, or because their correct polling location is different than their Chapter.

C. Out-of-precinct policy has historically resulted in Navajo votes being rejected at a much higher rate than their non-Navajo counterparts.

Arizona “rejects a higher percentage of provisional ballots than any other State,” frequently because they are cast out-of-precinct. *Hobbs* at 1112. Between 2008 to 2016, Arizona discarded 38,335 out-of-precinct ballots cast by registered voters. *Id.* In the 2012 election, Apache, Navajo, and Coconino Counties experienced the highest rate of rejected provisional ballots for all counties in the state of Arizona. Brandon Quester, *Rejected ballots document continued problems in Arizona’s elections*, Arizona Center for Investigative Reporting, available at <https://azcir.org/rejected-ballots-document-continued-problems-in-arizonas-elections/>. During the 2014 and 2016 general elections in Apache, Navajo, and Coconino counties, the vast majority of [out-of-precinct] ballots were in areas that were almost entirely American Indian.” *Hobbs* at 1004. In the 2016 general election, 3,970 out of 2,661,497 total votes, or 0.15 percent, in the state of Arizona were not cast in the correct precinct. *Id.* at 1051. The district court in this case found this number to be minimal and thus not an abridgment to minority opportunity. *Reagan*, 904 F.3d at 729. However, it did find that it disproportionately impacted minority voters. But, as the Fourth Circuit has articulated, “one disenfranchised voter—let alone several thousand—is too many.” *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 244 (4th Cir. 2014). “[W]hat matters for purposes of Section 2 is not

how many minority voters are being denied equal electoral opportunities but simply that ‘*any*’ minority voter is being denied. . . .” *Id.* (emphasis added). The number of Navajo votes rejected due to unequal out-of-precinct voting restrictions is too high.

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CONCLUSION

With one-third of the Nation living in rural poverty, and with all the disadvantages described herein, Arizona’s time, place, and manner restrictions on ballot collection and in-person voting violate Section 2 of the VRA. As the Ninth Circuit found, these laws disparately impact Native Americans’ ability to exercise their right to vote.

Respectfully submitted,

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