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 NATIONAL CONGRESS OF AMERICAN INDIANS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Does Arizona's out-of-precinct policy violate section 2 of the Voting Rights Act?

2. Does Arizona's ballot-collection law violate section 2 of the Voting Rights Act and the Fifteenth Amendment?

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INTERESTS OF AMICUS CURIAE[1]

Amicus curiae National Congress of American Indians ("NCAI") is the Nation's oldest and largest organization of American Indian and Alaska Native tribal governments and their members. Since 1944, NCAI has served to educate the public and tribal, federal, and state governments about tribal self-government, treaty rights, and policy issues affecting Indian tribes and their members, including voting rights. Amicus is a member of the Native American Voting Rights Coalition that produced a 2020 report, *Obstacles at Every Turn: Barriers to Political Participation Faced by Native American Voters*, based on nine field hearings and over 125 witnesses who documented widespread, present day discrimination and impediments to registration and voting faced by Native Americans. Dr. James Thomas Tucker, et al., *Obstacles at Every Turn: Barriers to Political Participation Faced by Native American Voters*, Native American Rights Fund (2020), https://vote.narf.org/wp-content/uploads/2020/06/obstacles_at_every_turn.pdf [hereinafter, "*Obstacles*"]. Amicus has a substantial interest in ensuring that section 2 of the Voting Rights Act, 52 U.S.C. § 10301 (formerly cited as 42 U.S.C. § 1973) ("VRA") provides

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[1] All parties have given consent to the filing of this brief. In accordance with Rule 37.6 of the Rules of the Supreme Court, amicus certifies that its counsel authored this brief; no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus, its members, or its counsel made a monetary contribution to its preparation or submission.

robust recourse for this discrimination that thwarts the rights of Native Americans to vote and participate in American democracy.

SUMMARY OF ARGUMENT

This brief provides this Court with an account of the many barriers Native American voters face and makes three points in response to Petitioners' opening briefs.

First, State Petitioners' proposal to link section 2 vote-denial claims to whether or not a plaintiff can affect the outcome of an election is contrary to the plain language of section 2 and would prevent some Native Americans from obtaining relief from voting procedures that discriminate against them. Sometimes the number of Native American votes may not be within the margin by which a race is decided. Nonetheless, every vote matters. Despite their relative population, Native Americans are entitled to full access to the political process. When they are denied full access, section 2 must continue to provide relief.

Second, both Private Petitioners and State Petitioners pose radical tests for evaluating section 2 vote-denial claims that are inconsistent with this Court's longstanding practice of considering how socioeconomic conditions and other factors can mask deliberate attempts to disenfranchise Native Americans and others.

Private Petitioners allege that if a time, place, and manner regulation is race-neutral then it cannot result in an unequal opportunity to vote even if it disenfranchises Native American voters. They allege that even if minority voters are impeded by a "host of other reasons," section 2 is not implicated. Priv. Pet. Br. 2. It is evident why Private Petitioners do not explain what they mean by a "host of other reasons" since these reasons are in fact daunting obstacles that are unreasonably hard for Native American voters to navigate.

Likewise, State Petitioners' measure of when an election procedure "causes" a disparate impact is impermissibly narrow – it does not allow courts to consider external factors, such as socioeconomic conditions, at all. Such a construct is inconsistent with this Court's longstanding precedent acknowledging how socioeconomic conditions and illiteracy are exploited to deny the right to vote. Like Private Petitioners, State Petitioners' rule would allow pervasive discrimination because Native Americans face barriers that, once implicated, make it unreasonably difficult or impossible to vote.

Native Americans across the United States live in conditions comparable to developing nations, unfathomable to most Americans. Despite the diversity of tribal nations in – size, geography, culture – there are nevertheless striking similarities in the poor living conditions that plague their communities. These systemic failures are rooted in devastating federal policies, historic and present day discrimination, and

ongoing disenfranchisement that undermines Native American political power to enact change.

Many Native American reservations are located in extremely rural areas, distant from the nearest off-reservation border town. This was by design, when Native Americans were forcibly removed and placed on the most remote and undesirable land. Today, this means travel to county seats for voting services can be an astounding hundreds of miles away. Services such as Drivers' License Sites ("DLS") and post offices also require hours of travel. Due to ongoing discrimination and governmental neglect, many Native Americans live in overcrowded homes that do not have addresses, do not receive mail, and are located on dirt roads that become impassable with inclement weather. Lack of broadband internet, cell phone coverage, or the economic means for transportation to in-person assistance means there are Native Americans that cannot access basic government services.

Voting in these communities is difficult and can even be impossible. As multiple courts have recognized, race-neutral election procedures that require voters to overcome overly burdensome external factors can hinder or obstruct the right to vote. Petitioners' proposals would permit such injustice. This Court cannot allow section 2 to be so emasculated.

Third, recent testimony at a series of Field Hearings investigating barriers to Native American political participation uncovered overt, present day, race-based discrimination by election officials against

Native Americans. Even in areas where successful litigation has occurred, new obstacles have been erected shortly thereafter, requiring repeated litigation. This evidence affirms this Nation has not yet freed itself from the shameful legacy of voter disenfranchisement in its many insidious forms. To protect Native Americans from discrimination the need for continued federal relief is clear and compelling. Section 2 of the VRA provides that relief and must be maintained.

HISTORICAL BACKGROUND

Throughout history, States have actively resisted Native American participation in American democracy. Even after the passage of the Fifteenth Amendment, the constitutions of Idaho, New Mexico, and Washington prohibited "Indians not taxed" from voting, *Obstacles, supra*, at 11, and Minnesota's Constitution prohibited Indians from voting unless they "adopted the language, customs and habits of civilization." Minn. Const., art. VII, § 1(4) (1858). South Dakota passed a law in 1903 that prevented Indians from voting while "maintaining tribal relations." S.D. Codified Laws § 26 (1903). In North Dakota, the State Supreme Court in 1920 granted only those Indians who had assimilated the right to vote because 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. . . ." *Swift v. Leach*, 178 N.W. 437 (N.D. 1920).

In 1928, the Arizona Supreme Court held that Indians, despite being United States citizens, were excluded from registering to vote because they were wards of the federal government. *Porter v. Hall*, 271 P. 411, 417 (1928), *overruled in part by, Harrison v. Laveen*, 196 P.2d 456 (1948). That decision equated Native Americans with incompetents, and denied them the vote, because of the trust relationship between the federal government and tribes; it stood for twenty years. *Obstacles*, *supra*, at 13.

It was not until 1948, that a New Mexico District Court, in *Trujillo v. Garley*, rejected the State of New Mexico's argument that Indians were not state residents and therefore had no right to vote. Civ. No. 1353 (D.N.M. filed August 11, 1948). *See* App. C to Pls.' Br. in *Allen v. Merrell*, No. No. 8589 (Utah Oct. 8, 1956) (Abstract of Unreported Op. in *Trujillo*), *available at* https://digitalcommons.law.byu.edu/cgi/viewcontent.cgi?article=3703&context=uofu_sc1. Eight years later, the Utah Supreme Court upheld that State's categorical prohibition on reservation Indians voting. *Allen v. Merrell*, 305 P.2d 490 (Utah 1956), *vacated as moot*, 353 U.S. 932 (1957).

Like African Americans, Native Americans who were fluent only in their Native languages but unable to read or write in English, were disenfranchised by literacy tests designed to keep them from voting. An Arizona statute stipulated that only individuals who could read the U.S. Constitution in English could vote. Ariz. Rev. Stat. Ann. § 16-101(A)(4)–(5) (1956). When Alaska became a state in 1959, the state's new constitution required that a voter "shall be able to read or

speak the English language as prescribed by law." Alaska Const. art. V, § 1 (1959).

Whether through state constitutional provisions, residency requirements, requirements to abandon tribal culture, taxation, guardianship, or literacy tests, "states and local jurisdictions with substantial Native populations have, like states in the South in the Jim Crow era, been quite creative in crafting various stratagems and legal devices that denied the right to vote to Native Americans." *Obstacles*, *supra*, at 14. It was not until the passage of the VRA that Native Americans were granted full legal access to the franchise.

Yet, full legal access has not translated to robust Native American participation in federal and state elections. Native American voter turnout rates are lower than other racial and ethnic groups and 34% of eligible Native Americans are not registered. National Congress of American Indians, *Fast Facts, Every Native Vote Counts* (2012), available at http://www.ncai.org/initiatives/campaigns/NCAI_NativeVoteInfographic.pdf.

In April 2018, the Native American Voting Rights Coalition (amicus is a member) completed a series of nine field hearings in seven states examining voting rights in Indian Country to better understand why Native American participation in federal and state elections is depressed (hereinafter "Field Hearings"). The testimony of approximately 125 witnesses from dozens of tribes in the continental United States generated thousands of pages of transcripts detailing the progress Native Americans have made in gaining access

to and participating in non-tribal elections, and the work that remains.[2] Witnesses included tribal leaders, community organizers, academics, politicians, and Native voters. They shared their experiences with voter registration and voting in federal, state, and local (non-tribal) elections. Topics included whether Native voters have equal access to voter registration and in-person voting sites, early voting, poll worker opportunities, treatment at the polls, and whether voter identification requirements, redistricting, language, or other barriers prevent them from being able to participate effectively in the political process. The resulting report, *Obstacles at Every Turn: Barriers to Political Participation Faced by Native American Voters*, concluded that "[a]lthough may other American voters share some of the same obstacles [to voting], no other racial or ethnic group faces the combined weight of these barriers to the same degree as Native voters in Indian Country." *Obstacles*, *supra*, at 3.

Given the widespread disenfranchisement among Native Americans, it is no surprise that Native plaintiffs have won or settled to their satisfaction 70 of 74 voting rights cases brought between 2008 and the publication of *Obstacles* in June 2020. *Obstacles*, *supra*, at 18. This record of success is, unfortunately, indicative

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[2] Field Hearings were conducted September 5, 2017, in Bismarck; October 16, 2017, in Milwaukee; January 11, 2018, in Phoenix; January 18, 2018, in Portland; February 5, 2018, on Rincon Band of Luiseño Indians lands north of San Diego; February 23, 2018, in Tulsa; March 18, 2018, on Isleta Pueblo lands outside Albuquerque; April 5, 2018, in Sacramento; and April 25, 2018, on Navajo Nation lands in Tuba City.

of a bleak landscape of vote-denial and persistent discrimination that continues to plague Native Americans' ability to vote and have their votes count. In Indian Country, the need for a robust section 2 of the VRA remains as important as ever.

ARGUMENT

I. IN VOTE-DENIAL CASES SECTION 2 DOES NOT AND CANNOT PREDICATE RELIEF ON THE ABILITY TO INFLUENCE ELECTIONS.

State Petitioners argue that "§2 makes vote-denial claims contingent on proof of diminished minority-group opportunity 'to participate in the political process *and* to elect representatives of their choice.'" State Pet. Br. 15 (quoting § 10301(b) emphasis added in State Petitioners' Brief). They argue for an independent evaluation of whether "a voting practice affects minority groups' opportunity to participate in the electoral process and to 'influence the outcome of an election.'" State Pet. Br. 22 (citation omitted).

State Petitioners' insistence on proof regarding both the opportunity to participate in the political process and the ability to elect representatives of their choice is perplexing. A single voter denied the ability to participate in the political process is denied the ability to elect the representative of their choice. The voter cannot vote for their candidate. Likewise, undermining a minority community's participation in elections

undermines the ability of that community to elect the representative of their choice. Thus, all successful vote-denial claims necessarily have shown the plaintiffs' opportunity to elect representatives of their choice was or will be denied or abridged.

Moreover, limiting section 2 to cases in which minority groups' voting power is diluted, runs contrary to the plain language of the VRA. The VRA makes clear section 2 applies broadly to any form of voting discrimination providing,

> No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.

52 U.S.C. § 10301(a). In 1982, Congress explained "Section 2 . . . could be effectively used to challenge voting discrimination anywhere that it might be proved to occur." S. Rep. No. 417, at 15 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 192. This means "the issue to be decided under the results test is whether the political processes are equally open to minority voters." *Id.* at 2, *reprinted in* 1982 U.S.C.C.A.N. at 179 (emphasis added). The language of the statute makes it clear Petitioners are wrong – no evaluation of the opportunity to elect is required for a successful vote-denial claim.

Finally, a requirement that a plaintiff must be able to influence the outcome of an election would

undermine the claims of some disenfranchised Native Americans whose population size is relatively small. By State Petitioners' logic, even if the entirety of Nevada's Native population – which constitutes just 1.7 percent of Nevada's population (*see* U. S. Census Bureau, *QuickFacts*, *available at* https://www.census.gov/quickfacts/fact/table/NV,US/RHI325219 (last visited Jan. 15, 2021) – were disenfranchised completely, the election procedure could not violate section 2 because the impact is not substantial relative to all voters. This outcome would betray this Court's directive that "all . . . are to have an equal vote – whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit." *Reynolds v. Sims*, 377 U.S. 533, 557-58 (1964). This Court should reject State Petitioners' erroneous and problematic interpretation of section 2.

II. PETITIONERS' INTERPRETATION OF SECTION 2 IS INCONSISTENT WITH THIS COURT'S PRECEDENT AND WOULD LEAVE VOTERS WITHOUT RECOURSE EVEN FOR INTENTIONAL DISCRIMINATION.

Both Private and State Petitioners would strip Native Americans from recourse under section 2 for procedures that disenfranchise them. Private Petitioners would prevent Native Americans from any relief as long as the election procedure took care not to mention race. Priv. Pet. Br. 19 ("Petitioners' position is simple: Race-neutral time, place, or manner regulations that

are equally applied and impose only the ordinary burdens of voting do not implicate § 2 – period") (emphasis removed).

State Petitioners' position is less overt, but equally problematic. State Petitioners recognize that even race-neutral laws can implicate section 2. State. Pet. Br. 34. Unremarkably, their test for section 2 claims requires plaintiffs to "establish a causal connection between the challenged regulation and the substantial disparate impact." *Id.* at 23 (internal citations omitted). However, State Petitioners' conception of causation is so limited that it would foreclose consideration of any external factors, including "socioeconomic conditions or a history of discrimination." *Id.* at 28 (internal citations omitted). This ignores section 2's requirement that courts evaluate the "totality of the circumstances" in order to understand how the challenged policy interacts with social and historical conditions. 52 U.S.C. § 10301(b). And, ironically, it would leave courts with nothing to consider except the policy and the disparity in question, contrary to Petitioners' objection to claims based on a "bare statistical showing." St. Pet. Br. 34.

Private Petitioners' "bright line rule" and State Petitioners' causal connection proposal leave Native Americans unacceptably vulnerable to disenfranchisement. Election procedures, much like insidious literacy tests of the past, can result in an "onerous" bar "which effectively handicap[s] exercise of the franchise although the abstract right to vote may remain unrestricted as to race." *Davis v. Schnell*, 81 F. Supp. 872, 880 (S.D. Ala.), *aff'd*, 336 U.S. 933 (1949). Section 2 has

long accounted for these barriers by requiring an "intensely local appraisal," *White v. Regester*, 412 U.S. 755, 769 (1973), of several factors measuring the extent to which the "political processes are . . . not equally open to participation" by minority voters. 52 U.S.C. § 10301(b). The Senate Report accompanying the 1982 VRA amendments outlined the "Senate Factors" relevant to a section 2 claim, which include "the extent to which members of the minority group . . . bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process." S. Rep. 97-417, at 29. This Court has recognized the relevance of examining the impact of poverty on voting access, *see generally Thornburg v. Gingles*, and has long acknowledged how other manifestations of socioeconomic barriers such as unequal educational opportunities can impair that access. 478 U.S. 30 (1986). *See Gaston Cty. v. United States*, 395 U.S. 285, 289-93 (1969).

Petitioners' attempts to shoehorn these factors out of section 2 must be rejected. As this brief shows, the vulnerabilities facing Native American communities are severe and must continue to be part of evaluating claims under section 2.

A. Geographic Isolation Leaves Native Americans Vulnerable to Disenfranchisement.

i. Native Americans Live Prohibitively Far from Border Towns and Government Services.

As a legacy of removal and segregation to reservations, approximately one-third of all Native American and Alaska Natives live in remote, rural areas. Leadership Conference Education Fund, *Table 1a: States Ranked by Number of American Indian/Alaska Natives (race alone or combination) living in Hard-to-Count (HTC) Census Tracts*, *available at* http://civilrightsdocs.info/pdf/census/2020/Table1a-States-Number-AIAN-HTC.pdf. The nearest town can be a significant distance away. Round trip travel between a Native community and the border town are regularly about 40 to 150 miles. *Obstacles*, *supra*, at 34; 73; 91; 93. Sometimes distances are even more extreme. For example, Navajos living on Navajo Mountain in San Juan County, Utah, have to drive 175 miles each way to reach government services in Blanding, Utah. *Id.* at 33. From the Duckwater Reservation in Nevada the closest elections office is in Tonopah, 140 miles away. *Id.* Throughout Indian Country, services such as election offices, post offices, and DLS can be unreasonably difficult to reach. Native Americans regularly have to travel hours to reach basic government services.

Too often, local election officials refuse to provide access to voting services on reservations, forcing Native Americans to spend significant time and money to

travel to vote. Under both Petitioners' proposed constructs of section 2, a race-neutral procedure that limited in-person voting to county seats would provide all voters an "equal opportunity to vote," even though a disproportionate share of Native voters would have to expend resources to travel distances that are too burdensome for them to overcome. To illustrate, this past 2020 election cycle, in Montana, Pondera County commissioners initially allowed in-person voting only at the county seat, requiring impoverished Blackfeet members to travel 120 miles round-trip, while the 95.1% of white voters in town had to travel 10-20 minutes. County officials agreed to provide voting access on the Blackfeet reservation only after section 2 litigation was filed. Complaint, *Blackfeet Nation v. Stapleton*, No. 4:20-cv-00095 (D. Mont. Oct. 9, 2020), ECF No. 1.

Within the last ten years, section 2 has offered redress against county officials unwilling to provide Native Americans with voting access and has routinely been interpreted by federal courts to reject Petitioners' arguments. In Nevada, a district court held early voting sites located 32 and 34 miles from the Pyramid Lake and Walker River reservations, respectively, and a 16-mile-away election day site from Pyramid Lake amounted to vote-denial and likely violated section 2. The court stressed that although 16 miles may not seem especially far, poverty and lack of access to transportation made travel unreasonably difficult. *Sanchez v. Cegavske*, 214 F. Supp. 3d 961 (D. Nev. 2016) (granting preliminary injunction

for early and election day in-person voting). In South Dakota, election officials refused to open a polling place on the Pine Ridge Reservation, requiring tribal members to travel 27 miles to a border town to vote. They only agreed to open an on-reservation polling place after a section 2 claim was brought. *Poor Bear v. Jackson Cty.*, No. 5:14-cv05059-KES, 2015 WL 1969760 (D.S.D. May 1, 2015); *see also Brooks v. Gant*, No. CIV. 12-5003-KES, 2013 WL 4017036, at *1 (D.S.D. Aug. 6, 2013) (county remedying Native voters forced to travel between 53 minutes and 2 hours and 45 minutes to reach the nearest early voting site after section 2 litigation filed); *Wandering Medicine v. McCulloch*, 906 F. Supp. 2d 1083 (D. Mont. 2012), *order vacated, appeal dismissed sub nom.*, *Wandering Medicine v. McCulloch*, 544 Fed. App'x 699 (9th Cir. 2013) (following section 2 litigation, settlement mandating on-reservation satellite polling access and late registration to three tribes). The US Department of Justice filed a statement of interest in the *Wandering Medicine* case highlighting Native American inequalities – 189%, 267%, and 322% – in the average travel distance to late registration and early voting sites than their white counterparts, a 400% disparity in poverty, and a vehicle access disparity of 200%. Statement of Interest of the United States at 7; *Wandering Medicine v. McCulloch*, Case No. 1:12-CV-135-RFC (Oct. 24, 2012), ECF No. 45.

Neither of Petitioners' section 2 tests would have provided relief because placing polling sites in county seats or border towns may be facially "race-neutral" and election officials did not cause tribal members' lack

of access to transportation or poverty. Section 2 should continue to provide relief for the Native Americans who, today, are unjustly and prohibitively far from their assigned polling location.

Additionally, voting requirements that necessitate going to a border town – such as requirement of identification obtained at a DLS – can disenfranchise Native Americans. In North Dakota, Native Americans travel an average of an hour each way to reach a DLS. The Standing Rock Sioux travel over 60 miles to reach the nearest DLS, over an hour and a half each way. *Obstacles*, *supra*, at 66. But distance is not the only obstacle. Often rural DLS are open limited hours. The state run license site in rural Minocqua, Wisconsin, is open four days a *year* – the first Tuesday in January, April, July, and October from, 9:30 a.m. to 3:30 p.m. One witness at the Field Hearings described how

> after four months of trying to get this woman to get her ID so she was able to register early, she ended up kind of throwing her hands in the air and . . . they had to take an entire day trip to get her to the nearest [DLS] which was open and available during the times that she had.

Id. at 74.

Under State Petitioners' proposed test for section 2, a State, either knowing or indifferent to the geographic isolation of its Native population, could require a voting procedure that takes advantage of that isolation, because the State could say it did not "cause"

it. For example, by exploiting distances and curtailed business hours of DLS located off-reservation, a seemingly race-neutral requirement of a state issued ID can place an insurmountable hurdle on Native Americans, rendering them unable to vote.

ii. Native Americans Face Racial Discrimination When Voting in Border Towns.

Travel is not the only burden Native American voters face. Often, racial tensions are high between Native communities and the neighboring border town, including its election officials, creating an additional burden on Native voters who have to travel there to vote. In Montana, a 2019 report from the United States Commission on Civil Rights ("USCCR") found evidence of "continued disparity and or discrimination in the areas of education, healthcare, *voting*, and the administration of justice." Montana Advisory Committee, *Bordertown Discrimination in Montana* 1 (May 2019), *available at* https://www.usccr.gov/pubs/2019/05-29-Bordertown-Discrimination-Montana.pdf (emphasis added) [hereinafter, "*Bordertown Discrimination*"]. Witnesses at the Field Hearings described voting in border towns and facing "hostile attitude[s]," "racist stereotypes" and being "too intimidated to get to the nearest polling" location because the town "may or may not be welcoming to Native Americans coming from a reservation community." *Obstacles*, *supra*, at 46. One man said that all he wanted was for poll workers to

"[t]reat me as a human being and be respectful to my elders, [and] respectful to my children." *Id.* at 46, 48.

This larger context of this ongoing racial tension makes Petitioners' proposed tests for section 2 even more dangerous because devious election officials need merely choose the correct phrasing – so an election procedure is seemingly race-neutral and/or only requires, but did not cause, the discriminatory burden – and they are free to discriminate against Native Americans. Section 2 must continue to protect Native American voters from these type of abuses.

B. Lack of Residential Mail Delivery Leaves Native Americans Vulnerable to Disenfranchisement.

i. Picking Up and Dropping Off Mail Is Harder in Native American Communities.

For most Americans, dropping off or picking up mail is a simple trip to the end of their driveway. Across Indian Country, however, Native American homes are not addressed or lack traditional addresses. Their homes do not receive mail delivered by the U.S. Postal Service. *See* U.S. Census Bureau, *2015 National Content Test Race and Ethnicity Analysis Report* 32, table 2 (Feb. 28, 2017), *available at* https://www2.census.gov/programs-surveys/decennial/2020/program-management/final-analysis-reports/2015nct-race-ethnicity-analysis.pdf. For example, there are 32,000 Native Americans living in Nevada, but just 35% of reservations and

colonies have residential mail service. Pyramid Lake Paiute Tribe Mot. to Intervene, *Donald J. Trump for President, Inc. v. Cegavske*, No. 2:20-cv-01445-JCM-VCF, 2020 WL 6497658 (D. Nev. Sept. 11, 2020).

Severe housing shortages further complicate matters. Many Native Americans are insecurely housed, living 7-10 to a home, and move frequently. This housing instability often limits regular mail access. *Id.*; *Obstacles*, *supra*, at 39-40.

Because of these limitations, Native Americans must rely on post offices and P.O. boxes to send and receive mail. While some post offices are located on reservations, others can be a significant distance away. Some Native Americans have to travel 100 miles or more to access their P.O. box. *Obstacles*, *supra*, at 40. P.O. boxes also require a fee and are limited in number and often shared; it is common for multiple families, including unrelated adults living in different households, to share a single box. *Id.* Additionally, post offices in rural areas commonly operate limited hours. For example, in Nevada, no post office located on a reservation is open more than 6 hours. *Donald J. Trump for President*, 2020 WL 6497658.

Consequently, for rural Native Americans, accessing mail is costly and difficult. Indeed, the same action where the Blackfeet Nation sued Pondera County for failure to provide a polling place on the reservation, vote by mail was offered up as an alternative voting option to justify the unreasonable distance to in person voting. Compl., *Blackfeet Nation*. But vote by mail is

not feasible for many Blackfeet tribal members because the Blackfeet reservation does not have residential mail delivery. *Id.* at 3. The sole post office on the Blackfeet reservation is open limited hours and is closed on Saturdays. The next closest post office open a full business day is in the same town where the polling site was located – 60 miles away. *Id.* Thus, despite multiple voting options, neither constituted reasonable access.

Attempts to shift to all vote-by-mail in tribal areas have been successfully thwarted by section 2 because of how inaccessible mail is on reservations. *See, e.g., Spirit Lake Tribe v. Benson Cty.*, No. 2:10-CV-095, 2010 WL 4226614, at *1, 4 (D.N.D. Oct. 21, 2010) (Plaintiffs likely to succeed on section 2 claim because it was "nearly impossible for them to vote as they have neither received a ballot application nor do they have adequate means to get to Minnewauken to vote."); *see also Navajo Nation Human Rights Comm'n v. San Juan Cty.*, 215 F. Supp. 3d 1201, 1206 (D. Utah 2016) (county added three additional in-person voting sites to replace all vote-by-mail system after section 2 claim filed). As with distance, lack of mail delivery can present a formidable barrier to voting. Section 2 should not allow Native Americans to be penalized for not receiving mail at their homes and must protect against exploitation of this vulnerability by indifferent or unscrupulous election officials.

ii. Native Americans Pick Up and Drop Off Ballots for Each Other in Order to Overcome the Burdens Associated with Mail Access.

Bans on ballot collection can disproportionately and severely impact Native communities. Because of high poverty rates, lack of access to transportation, and lack of mail delivery, Native Americans often pick up and drop off mail for each other. For example, this year a Montana court declared a ballot collection ban similar to Arizona's House Bill 2023 unconstitutional. H.B. 2023, 52nd Leg., 2d Sess. (Ariz. 2016). *W. Native Voice v. Stapleton*, DV-2020-377, slip op. at 1 (Mont. Dist. Ct. Sept. 25, 2020), *available at* https://narf.org/nill/documents/20200925mt-ballot-order.pdf. In Montana, four out of the five Native Nations that brought suit do not have residential mail service. The court found it compelling that poverty, lack of working vehicles, car insurance, and money for gas mean that tribal members often pick up and drop off mail, including ballots, for neighbors, friends, and acquaintances. Native people pool resources because, as the Chairwoman of the Confederate Salish and Kootenai Tribes testified, "[s]ometimes we have to make choices between buying a tank of gas, or you know, buying food for our family." *Id.* at 15. The court opined how "[t]he questions presented cannot be viewed through the lens of our own upbringing or own life experiences, but through the lens of the cold, hard data that was presented at trial about clear limitations Native American communities in Montana face." *Id*. at 1-2. Criminalizing dropping off a ballot for

others, while simultaneously limiting or eliminating in-person voting (such as when there is a worldwide pandemic), leaves Native Americans without options to cast their vote. Section 2 should protect the measures Native Americans use to overcome burdens like lack of mail delivery.

C. Lack of Fully Functioning Roads, Vehicles, Broadband Internet, and other Resources Leaves Native Americans Vulnerable to Disenfranchisement.

Geographic distance and lack of residential mail delivery are hardly the only impediments faced by Native voters. The roads throughout Indian Country are notoriously poor and often unpaved, making travelling significant distances even harder. In the election month of November winter roads may be impassible. *Obstacles*, *supra*, at 32.

Approximately 13.4 percent of all American Indian and Alaska Native households do not have access to a vehicle. *Id.* at 38. Many overcrowded households have one working vehicle that is shared. Often, the vehicle is used during the day by whomever is employed so there is no transportation available for the remaining household members. Hitchhiking is still common on roads in and around Native reservations. *Id.* Because of the lack of transportation, even modest distances can constitute a significant burden that prevents completion of essential tasks. For example, the USCCR report explained how "[m]ost Native

Americans living on reservations are low-income, lack reliable transportation, and live in rural areas. The probability of missing a court date, or parole meeting, urinalysis, or some other condition of the court is very high. There are Native Americans sitting in jail simply for failure to appear." *Bordertown Discrimination*, *supra*, at 1.

Technological advances cannot compensate for distance issues, because over 90% of reservations lack access to broadband internet on some or all of the reservation; and even where it is available, it often is more expensive than off reservation and is not affordable. N.D. Parkhurst et al., *The Digital Reality: E-Government and Access to Technology and Internet for American Indian and Alaska Native Populations* 3 (2015) (referring to an FTC study), *available at* https://pdfs.semanticscholar.org/4bb4/f5efcd1cf4ec342b5d45dd824bb10d9bb0f2.pdf; *Obstacles*, *supra*, at 36. An analysis conducted by the U.S. Government Accountability Office ("GAO") found that 35 percent of households on Indian reservations did not have broadband service, compared to 8 percent for the Nation as a whole. GAO, Rep. No. GAO-18-682, *Tribal Broadband: Few Partnerships Exist and the Rural Utilities Service Needs to Identify and Address Any Funding Barriers Tribes Face* (Sept. 2018), https://www.gao.gov/assets/700/694810.pdf.

Additionally, over 20 percent of Native Americans 25 years and older have less than a high school education. *Obstacles*, *supra*, at 37. In Alaska, in areas covered under section 203 of the VRA, 52 U.S.C. § 10503, for which Census data is available, the illiteracy rate among Limited English Proficient

Alaska Natives of voting age is 40 percent for Aleut-speakers, 28.4 percent for Athabascan-speakers, 15 percent for Yup'ik-speakers, and 8.2 percent for Inupiat-speakers. *Id.* This low educational attainment means some Native Americans may have trouble with complicated election procedures. As Chuck Hoskin, Jr., Principal Chief of the Cherokee Nation, explained at the Field Hearings "[w]hen you get a population that perhaps has some lower education attainment than the greater population, there's a challenge to accessing and understanding some of that information." *Id.*

Poverty compounds all of these systemic failures. Native people have the highest poverty rate of any population group in the United States, 26.6 percent, which is nearly double the poverty rate of the Nation as a whole. *Id.* at 38. The poverty rate was even higher on federally recognized Indian reservations and Alaska Native villages, at 38.3 percent. *Id.* The median household income of single-race American Indian and Alaska Native households in 2016 was $39,719, far below the national median household income of $57,617.196. *Id.*

This means that every tank of gas is a significant expenditure. It means every license fee must be weighed against whether there is food to eat. It means travelling over a hundred miles, or even 20 miles, on dirt roads, to cast a vote or drop off a ballot because there is no mail delivery, is not feasible. Section 2 must continue to consider the totality of these circumstances which are rooted in this governments' historic failures, neglect, and ongoing discrimination against Native

Americans and which continue to impede their access to the ballot box.

III. DISENFRANCHISEMENT OF NATIVE AMERICANS IS ONGOING AND TARGETED BASED ON RACE.

A. Time, Place, and Manner Rules Can Have a Substantial Impact on Voter Turnout.

According to Private Petitioners "ordinary rules that set the time, place, and manner of voting do not 'deny' or 'abridge' the right to vote. They simply define the process by which all voters must exercise that right." Priv. Pet. Br. 15. Yet, the aftermath of vote-denial litigation tells a different story. Because Native communities are so vulnerable to disenfranchisement, the "time, place, and manner" procedures chosen by election officials can in fact dramatically impact Native American voter access. Thus, the decisions made by election officials can determine whether it is feasible for Native Americans to vote.

For example, following *Sanchez* and the placement of polling location on the Walker River and Pyramid Lake reservations, voter turnout doubled. In contrast, turnout on reservations not party to the lawsuit stayed the same. Jean Schroedel et al., *Assessing The Efficacy Of Early Voting Access On Indian Reservations: Evidence From A Natural Experiment In Nevada*, Politcs, Groups, and Identities (2020), *available at* https://www.semanticscholar.org/paper/Assessing-the-efficacy-of-early-voting-access-on-a-Schroedel-Rogers/9037c8c6c

01b100e640c691254fff8001b880a3c#paper-header. Following the *Wandering Medicine* settlement, voter turnout increased from 39% in 2014 to 70% in 2018 at Fort Belknap, 29% to 57% at Crow, and 30% to 50% at Northern Cheyenne. *Driscoll v. Stapleton*, 473 P.3d 386, 390 (Mont. 2020).

This past year, Colorado implemented laws and regulations responsive to tribal needs: voting centers were placed on tribal lands, and Native Americans lacking an address accepted by the U.S. Postal Service were able to register to vote using their existing address, the tribal council headquarters address, or any other address approved by the tribal council. Tribal members could drop off their voter registration application to their tribal council, who forwarded it to the county clerk and recorder. As a result, voter turnout on Ute Mountain Ute tribal lands increased from 36% in 2016 to nearly 50% in 2020, and turnout at Southern Ute increased from 46% to 70%. News Release, Secretary of State Jena Griswold Highlights Increase in 2020 Voter Turnout on Tribal Lands, Colo. Sec'y of State (Dec. 10, 2020), https://www.sos.state.co.us/pubs/newsRoom/pressReleases/2020/PR20201210VoterTurnout.html.

These dramatic increases in voter turnout demonstrate the effectiveness "time, place, and manner" procedures can have on Native American access. Likewise, adopting the opposite procedures can and do disenfranchise voters. Section 2 is, and should remain, the remedy for "time, place, and manner" procedures that disenfranchise Native Americans.

B. Native Americans Face Present-Day Racism and Subterfuge from Election Officials.

Unfortunately, not all election officials can be trusted to act in a neutral manner. The same insidious racism that prompted the VRA remains pervasive throughout Indian Country.

In Utah, in 2018, a District Court adopted plans for the San Juan County Commission and school board districts to remedy vote dilution of the majority Navajo population. Just prior to the election for one of the newly drawn county commission seats, the San Juan County's clerk removed the Native candidate from the ballot after the clerk

> improperly . . . us[ed] the voter challenge statute to make a backdoor challenge to Plaintiff['s] . . . candidacy. [The clerk] overstepped his role by taking on a prosecutorial role; an investigative role; and directing [a state official] to complete a voter challenge. He also falsified the voter challenge once received. [He] gave notice of a voter challenge when there was none. He failed to specify a time for [Plaintiff's] response and decided the voter challenge issue before the actual deadline for a response.

Grayeyes v. Cox, No. 4:18-CV-00041, 2018 WL 3830073, at *9 (D. Utah Aug. 9, 2018). The District Court reinstated the Native candidate to the ballot and found the clerk likely violated the Native candidate's constitutional rights. This deception echoes a 1972 case of

discrimination in the very same county whereby a clerk misled two Navajo candidates about filing deadlines in order to undermine their candidacy. The Federal Courts were forced to order those candidates back on the ballot as well. *Yanito v. Barber*, 348 F. Supp. 587, 593 (D. Utah 1972).

In South Dakota, the approximately 1,500 Crow Creek Reservation residents comprise about 90 percent of Buffalo County's population. Nevertheless, to register to vote or run for office, tribal members have to drive 40 miles round trip to Gann Valley, which has a population of about 12, all non-Natives. *Obstacles*, *supra*, at 79. The sole early voting site is also in Gann Valley. *Id.* at 25. Witnesses at the Field Hearings testified that if Native American voters show up without identification, election workers tell them to return with ID rather than informing them that they can instead sign an affidavit. *Obstacles*, *supra*, at 91. Moreover, while Gann Valley's 12 residents had full voting access, Buffalo County's Auditor/Register of Deeds refused to provide an on-reservation early polling site to service the Crow Creek Reservation's substantially larger population, even after Help America Vote Act ("HAVA") funding was secured to cover the full cost of the voting site. *Obstacles*, *supra*, at fn. 270. Also in South Dakota, in Hughes County, election officials used a repurposed chicken coop as a voting site – humiliating Native voters who were forced to vote with feathers on the floor and no bathroom facilities. *Obstacles*, *supra*, at 45.

In Wisconsin, a member of the Lac du Flambeau Band of Chippewa Indians ran against an incumbent for town supervisor in what became a very competitive race. Ultimately, the incumbent prevailed by just six votes. However, prior to Election Day members of the Tribal Council that knew they would be travelling, requested absentee ballots. They never received them. Their numerous calls to the clerk went unreturned. The ballots never arrived in time for the election, and the Council was unable to vote. One member drove 4.5 hours from Madison to Lac du Flambeau just to cast his vote since his absentee ballot had not arrived. When he asked the clerk about why he never received his absentee ballot, she laughed. She also insisted he must have filled out the application incorrectly. When the election ended up being decided by such a slim margin, the Council went to the clerk in person. The clerk again insisted that all of the applications must have been filled out incorrectly. It was well known that the that the clerk had signed the nomination papers for the non-Native incumbent. *Obstacles*, *supra*, at 111.

The depth and breadth of these examples prove this Nation has not yet moved past the scourge of voting discrimination and election officials cannot be trusted to act in the best interest of all of their constituents. Election officials continue to adopt procedures or implement procedures unfairly in order to disenfranchise Native voters. Section 2 must continue to provide recourse for this discrimination.

C. Facially Race-Neutral Laws Are Used to Disenfranchise Native Americans.

Even seemingly race-neutral laws can disenfranchise Native Americans when they interact with existing barriers. An example from North Dakota illustrates this point.

In 2011, the North Dakota legislature considered enacting a new voter ID law that would have limited the valid forms of voter ID and eliminated fail safe mechanisms for those without ID. Throughout consideration of the bill, legislators on both sides of the aisle raised concerns about the impact on voters. In addition, the legislature was informed during these deliberations that there were Native Americans who lacked residential addresses and, even if they did have an address, that address may not be known to them because their houses were unmarked. The legislature ultimately decided, 38-8, not to enact the proposed changes to the voter ID laws. Hearing Minutes on H.B. 1447 Before H. Political Subdivision Comm., 62nd Leg. Assemb. 2 (N.D. Apr. 20, 2011); *Obstacles*, *supra*, at 77-78.

The next year, Democrat Heidi Heitkamp unexpectedly won the election for U.S. Senate by less than 3,000 votes. The Native American community was widely credited with securing her win. In the legislative session following the election, just two years after the bipartisan rejection of voter ID reform, the Republican-led legislature greatly restricted the acceptable forms of voter identification, continued to require

a residential address on IDs, and eliminated all fail safe mechanisms. *Id.*

The impact on the Native American vote in 2014 was severe. Eventually, litigation was filed on behalf of Turtle Mountain Band of Chippewa plaintiffs, several of whom did not have residential addresses on their IDs. *Brakebill v. Jaeger* ("*Jaeger I*"), No. 1:16-CV008, 2016 WL 7118548, at *1 (D.N.D. Aug. 1, 2016). Following four years of litigation, the case was settled. The State agreed to be bound by a consent decree that provides a method for voters without a residential address to vote. *Id.*; *see also* Maggie Astor, *North Dakota Tribes Score Key Voting Rights Victory*, The New York Times (Feb. 13, 2020), https://www.nytimes.com/2020/02/13/us/politics/north-dakota-voter-id.html?fbclid=IwAR2JjY8fwT4VbKbLXjSjzUO_Gp6BSe9z1Nd8llKnm_wZUrGo89z3pm05ytk.

Laws and election procedures that exploit the inequities faced by Native Americans on account of their race are a blight to this Nation's promise of equality and fairness. As this example from North Dakota shows, once an inequity that disproportionately affects a minority is identified a legislature can easily craft a law that implicates that inequity but does not mention race. The VRA must endure to prevent this abuse.

D. Disenfranchisement of Native Americans is Pervasive and Repeated.

In some parts of the country, voting discrimination is so pervasive that repeated litigation is required. For example, numerous lawsuits alleging voting rights

violations have been filed in South Dakota, including the only section 2 case brought on behalf of plaintiffs under the US Department of Justice during the Trump administration. *See* Settlement Agreement, *Janis v. Nelson*, Civ. 5:09-cv-05019-KES-LLP-RLW(D.S.D. May 25, 2010), ECF No. 143 (remedying compliance issues with HAVA); *Brooks v. Gant*, No. Civ-12-5003-KES, 2012 WL 871262 (D.S.D. Mar. 14, 2012) (settlement for closer early voting locations); *Poor Bear*, 2015 WL 1969760 (settlement for a satellite office on the reservation); Consent Decree, *United States v. Chamberlain Sch. Dist.*, Civ. Action No. 4:20-cv-4084 (D.S.D. June 18, 2020), ECF No. 4 (consent decree settling at-large method of election for the school board in district with substantial Native population); Compl., *Rosebud Sioux Tribe v. Barnett*, Case No. 20-cv-5058 (Sept. 16, 2020) (2020 complaint alleging violations of the National Voter Registration Act).

In Montana, the *Wandering Medicine* settlement only began to unearth voting rights violations. *Wandering Medicine v. McCulloch*, No. 1:12-cv-135 (D. Mont. Oct. 10, 2012) (defendants agreed to establish satellite offices on reservations); Consent Decree, *Jackson v. Bd. of Trs. of Wolf Point*, No. 4:13-cv-00065-BMM, (D. Mont. Apr. 9, 2014), ECF No. 70 (permanent injunction barring a -75.24% deviation from ideal population size in school board race); *W. Native Voice v. Stapleton*, DV-2020-377, slip op. (ballot collection ban declared unconstitutional); Ex. A to Voluntary Dismissal (Pondera Cty. Agreement), *Blackfeet Nation v. Pondera Cty.*, 4:20-cv-00095-DLC (D. Mont. Oct. 14, 2020), ECF No.

9-1 (county agreed to open satellite election offices and ballot drop boxes).

In Utah, San Juan County has had near constant, successful, voting rights litigation brought against it since the United States first brought suit on behalf of the Navajo in 1983. Consent Decree, *United States v. San Juan Cty*., No. 2:12-cv-00039-RJS (D. Utah Nov. 9, 2015), ECF No. 261-1; *Navajo Nation v. San Juan Cty*., 929 F.3d 1270, 1274 (10th Cir. 2019) (affirming the District Court's resolution of vote-dilution case filed in 2011); *Grayeyes*, 2018 WL 3830073 (injunctive relief granted for likely violation of candidates due process rights); Order re Stip. Settlement, *Navajo Nation Human Rights Comm'n v. San Juan Cty*., No. 2:16-cv-00154-JNP, (D. Utah Feb. 22, 2018), ECF No. 199 (county agreed to maintain polling places and provide language assistance).

It remains clear this Nation has not yet freed itself from the shameful legacy of voter disenfranchisement and its many insidious forms. The challenging living conditions faced by many Native Americans today continue to inhibit their access to the ballot box and must be considered when determining whether there has been a violation of section 2. The need for continued federal relief to protect Native Americans from discrimination is clear and compelling. Section 2 provides this relief. It has been key to protecting Americans from disenfranchisement in countless elections. It must stand and Petitioners' arguments must be rejected.

CONCLUSION

The decision of the Ninth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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