

# THE HISTORY OF INDIAN VOTING RIGHTS IN ARIZONA: Overcoming Decades of Voter Suppression

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## I. INTRODUCTION

In 2006, Navajo elder Agnes Laughter attempted to vote as she had for over thirty years. Not only was she turned away from the polls, she was berated for not having identification (“ID”) as required by Arizona’s new voter ID law. Ms. Laughter was discouraged and distraught. She did not have a photo ID nor did she have any documents to satisfy Arizona’s new voter ID law. She attempted several times to obtain a state ID from the Arizona Department of Transportation, but she was denied because she was born in a hogan and lacked an Arizona birth certificate. While Arizona law allows voters to present two forms of nonphoto ID, Ms. Laughter also lacked documents to satisfy the alternative—she did not drive, she did not own a vehicle, her home lacked electricity, and since she lives on the Navajo Reservation, she did not owe property taxes. Arizona’s new ID law did not make exceptions for voters like Ms. Laughter.

Ms. Laughter’s experience is just one example of the voter obstacles faced by Native American<sup>1</sup> voters in Arizona. Native Americans “have experienced a long history of disenfranchisement as a matter of law and of practice.”<sup>2</sup> This

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1. Native American, Indian, and American Indian are used interchangeably throughout this article.

2. *Continuing Need for Section 203’s Provisions for Limited English Proficient Voters: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 309 (2006) (letter from Joe Garcia, Nat’l Cong. of Am. Indians).

comes from a complicated and contradictory history of laws and policy that has recognized tribes as separate sovereigns, reduced tribal status to that of domestic dependent nations, sought to remove, relocate, or assimilate tribal citizens, terminated numerous indigenous nations, and has now moved to a policy of tribal self-government. Unfortunately, the right to vote for Arizona's first people has only recently been achieved, and there are continuing threats to the electoral franchise. In my work as a voting rights attorney, I have viewed firsthand the threats to Native American voting rights and the need for vigilant protection of the right to vote.

Voter suppression has been used to discourage or prevent Indian people from voting in Arizona. Voter qualifications such as literacy tests were used to prevent Indians from participating in elections for approximately fifty years.<sup>3</sup> Once Native Americans started voting, redistricting and vote dilution were used to reduce the effectiveness of the Native vote.<sup>4</sup>

This article will review the history of Indian voting rights in Arizona. I begin by reviewing the history of Native American voting rights and the history of voting discrimination against Native Americans in Arizona. The Voting Rights Act turned the corner for Native people to participate in the state and federal election processes. I will then discuss the current challenges faced by Native American voters and specifically discuss the voter ID law passed in 2004. The voter ID law is a roadblock that impedes full participation by all Arizona Indians. The last part of the article focuses on strategies to protect Indian voting rights. Notwithstanding the Supreme Court's invalidation of the Section 5 coverage formula in *Shelby County*,<sup>5</sup> tribes should consider proactive measures to ensure that tribal citizens can participate in elections.

## II. HISTORY

This section reviews the history of Indians as citizens, the impact of citizenship on suffrage rights for reservation Indians in Arizona, and the obstacles to the ballot box once the right to vote was recognized.

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3. *Id.* The Indian Citizenship Act was passed in 1924, but Arizona Indians were unable to exercise the right to vote until approximately fifty years later.

4. *Id.*

5. *Shelby County v. Holder*, 133 S. Ct. 2612, 2631 (2013) (invalidating the coverage formula for Section 5 preclearance).

*A. Native Americans as Citizens*

Although Native Americans are the first Americans,<sup>6</sup> tribes are separate sovereigns and therefore Indians are citizens of their respective nations, and were not citizens of the United States.<sup>7</sup> The United States Constitution recognized this sovereignty and considered tribes to be extrajurisdictional.<sup>8</sup> In 1831, the United States Supreme Court distinguished tribal nations from foreign sovereigns and deemed them to be domestic dependent nations.<sup>9</sup> As domestic dependent nations, it was clear that tribes still occupied a separate status. In an 1856 Opinion, Attorney General Caleb Cushing explained why domestic subjects cannot be made citizens absent a treaty or specific act of Congress.<sup>10</sup>

The simple truth is plain, that the Indians are the *subjects* of the United States, and therefore are not, in mere right of home-birth, citizens of the United States. The two conditions are incompatible. The moment it comes to be seen that the Indians are domestic subjects of this Government, that moment it is clear to the perception that they are not the sovereign constituent ingredients of the Government.<sup>11</sup>

Cushing further explained that the general statutes of naturalization do not apply to Indians because “Indians are not foreigners,” subject to another’s allegiance since they are in “our allegiance, without being citizens of the United States.”<sup>12</sup>

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6. The earliest use of the term “American” referred to the native inhabitants of the New World. The 1828 Edition of Webster’s Dictionary defines American as “[a] native of America; originally applied to the aboriginals, or copper-colored races, found here by the Europeans.” 1 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828). The Oxford English Dictionary defines American as “[a]n indigenous inhabitant of (any part of) the Americas; an American Indian.” J. A. SIMPSON & E. S. C. WEINER, THE OXFORD ENGLISH DICTIONARY (2d ed. 1989).

7. Tribal sovereignty has been recognized through treaties, the U.S. Constitution, American common law, and international law. See Robert Odawi Porter, *The Inapplicability of American Law to the Indian Nations*, 89 IOWA L. REV. 1595, 1600–04 (2004).

8. Article I, Section 2 of the Constitution excludes “Indians not taxed from apportionment.” U.S. CONST. art. I, § 2. Article I, Section 8, gives Congress the power to “regulate commerce with foreign nations . . . and with the Indian tribes.” U.S. CONST. art. I, § 8.

9. *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831).

10. *Relation of Indians to Citizenship*, 7 Op. Att’y Gen. 746, 749–50 (1856).

11. *Id.* at 749.

12. *Id.*

Prior to the end of the Civil War, voting was primarily restricted to white males.<sup>13</sup> With the end of the Civil War in 1865, Congress passed a series of laws and constitutional amendments to extend the rights and privileges of citizenship to emancipated slaves, including the right to vote.<sup>14</sup>

The Reconstruction Amendments and implementing legislation excluded Indians because as members of tribal nations, Indians were not American citizens, and therefore, not eligible to vote in elections.<sup>15</sup> Section 1 of the Fourteenth Amendment establishes that “[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”<sup>16</sup> One might assume that this language bestows citizenship on Indians.<sup>17</sup> Senators engaged in a robust debate about whether Section 1 of the Fourteenth Amendment should be more explicit in excluding Indians.<sup>18</sup> In some areas of the country, including Arizona, Indian citizenship would change the power structure.<sup>19</sup> However, as Attorney General Cushing noted in 1856, because Native Americans were “subjects of” the United States and not “subject to” United States jurisdiction, it was not necessary to clarify that Indians were not made citizens pursuant to the Fourteenth Amendment.<sup>20</sup> The Senate believed that excluding the phrase “Indians not taxed” from Section 1 did not affect the status of Indians, and the phrase was specifically included in Section 2.<sup>21</sup> Section 2 of the

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13. See DANIEL MCCOOL ET AL., *NATIVE VOTE: AMERICAN INDIANS, THE VOTING RIGHTS ACT, AND THE RIGHT TO VOTE* ix (2007). For a discussion of white male suffrage, see DANIEL HAYES LOWENSTEIN ET AL., *ELECTION LAW* 28–30 (4th ed. 2008). The Constitution does not explicitly guarantee the franchise. See *Minor v. Happersett*, 88 U.S. 162, 177–78 (1875) (overturned by U.S. CONST. amend XIX). “Although the Constitution was promulgated in the name of ‘We, the people of the United States,’ the individual states retained the power to define just who ‘the people’ were.” ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 24 (2000). Therefore, the states decided who could vote. As Keyssar explains, citizenship did not equal voting rights. *Id.*

14. The Reconstruction Amendments sought to end slavery and provide the right to vote to former male slaves. U.S. CONST. amend. XIII (abolishing slavery); U.S. CONST. amend. XIV (extending citizenship to former slaves); U.S. CONST. amend. XV (banning race-based voter qualifications).

15. See MCCOOL ET AL., *supra* note 13, at 1–9.

16. U.S. CONST. amend. XIV, § 1.

17. See N. D. Houghton, *The Legal Status of Indian Suffrage in the United States*, 19 CALIF. L. REV. 507, 510 (1931).

18. See MCCOOL ET AL., *supra* note 13, at 3–5.

19. See, e.g., *id.* at 3. In 1920, Arizona had the second highest population of Indians in the United States. *Original Americans First Vote*, LITERARY DIGEST, Sept. 22, 1928, at 17. (“[p]ractically solid voting by Indians [in Arizona] would be influential in determining the outcome”).

20. *Relation of Indians to Citizenship*, 7 Op. Att’y Gen. 746, 749 (1856).

21. See MCCOOL ET AL., *supra* note 13, at 4–5.

Fourteenth Amendment excludes “Indians not taxed” in congressional apportionment.<sup>22</sup> Similarly, the Civil Rights Act of 1866 specifically excluded Indians as citizens.<sup>23</sup> The Civil Rights Act provides that “all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States.”<sup>24</sup> Tribal citizens are subjects of the United States, but were not subject to the jurisdiction of the United States, and therefore, not citizens.<sup>25</sup>

Notwithstanding the exclusions, several Indians unsuccessfully attempted to become citizens.<sup>26</sup> The Supreme Court confirmed that Indians could not become citizens through naturalization or birth.<sup>27</sup> A positive reading of the Court’s interpretation is that tribes have maintained their separate political status and have been continuously treated as sovereigns throughout United States history.

It was not until Congress passed the Indian Citizenship Act of 1924 that all Indians were declared United States citizens.<sup>28</sup> Prior to 1924, Indians were denied citizenship and the right to vote based on the underlying trust relationship between the federal government and the tribes and their status as tribal citizens. Indians could only become citizens through naturalization “by or under some treaty or statute.”<sup>29</sup> The 1924 Indian Citizenship Act ended the

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22. “Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.” U.S. CONST. amend. XIV, § 2.

23. *Elk v. Wilkins*, 112 U.S. 94, 103–04 (1884).

24. Civil Rights Act of 1866, 14 Stat. 27 (1866).

25. *Relation of Indians to Citizenship*, 7 Op. Att’y Gen. 746, 749 (1856).

26. *Elk*, 112 U.S. at 103–04 (tribal member who renounces tribal citizenship cannot become citizen of the United States through the citizenship clause of the Fourteenth Amendment); *McKay v. Campbell*, 16 F. Cas. 161, 166 (D. Oregon 1871) (holding that Indians are not subject to the jurisdiction of the United States and that tribes “have always been held to be distinct independent political communities, retaining the right of self-government, though subject to the protecting power of the United States.”).

27. *Elk*, 112 U.S. at 103–04.

28. Pub. L. No. 68-175, 43 Stat. 253 (1924) (codified as amended at 8 U.S.C. § 1401(b)). The Act provided that “all non citizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States: *Provided*, That the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property.” *Id.* Following World War I, Congress declared that all Indians who served in World War I were eligible for citizenship. *See* Pub. L. No. 66-75, 41 Stat. 350 (1919).

29. *Elk*, 112 U.S. at 103. Shortly after *Elk v. Wilkins*, Congress passed the Act of February 8, 1887, Pub. L. No. 106-462, 24 Stat. 388 (amended by the Act of May 8, 1906, Pub. L. No. 59-149, 34 Stat. 182). The Act of 1887, also referred to as the Dawes Act or the General Allotment Act, provides that “every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians

period in United States history in which obtaining United States citizenship required an Indian to sever tribal ties, renounce tribal citizenship and assimilate into the dominant culture.<sup>30</sup>

With the passage of the Indian Citizenship Act and by operation of the Fourteenth Amendment, an Indian who is a United States citizen is also a citizen of his or her state of residence.<sup>31</sup> Notwithstanding the passage of the Indian Citizenship Act, some states, including Arizona, continued to deny Indians the right to vote in state and federal elections through the use of poll taxes, literacy tests, and intimidation.<sup>32</sup>

### B. *Obstacles to the Ballot Box*

At the time of Arizona's statehood in 1912,<sup>33</sup> Native Americans comprised a significant portion of the population in certain counties. Based on the 1910 Census, Native Americans were a substantial portion of the population in Pinal County (3,139 out of 9,045), Apache County (6,131 out of 9,196), Navajo County (5,752 out of 11,471) and Coconino County (2,788 out of 8,130).<sup>34</sup> Native Americans comprised 14.3% of the total population.<sup>35</sup> No doubt, the participation of Native Americans at the polls could have had an impact on elections. However, in 1912, most of Arizona's Native Americans were not citizens.

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therein, and has adopted the habits of civilized life, is a citizen of the United States." *Id.* This law was in effect prior to Arizona's statehood.

30. FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 153 (1945).

31. U.S. CONST. amend. XIV, § 1. By 1924, approximately two-thirds of Indians in the United States had become citizens, but since Arizona did not become a state until 1912, it is unclear how many Arizona Indians, if any, had obtained citizenship. *See* COHEN, HANDBOOK OF FEDERAL INDIAN LAW 153; IV KAPPLER'S INDIAN AFFAIRS: LAWS AND TREATIES 1165 (Charles Kappler ed., 1927).

32. *Continuing Need for Section 203's Provision for Limited English Proficient Voters*, *supra* note 2, at 309 (letter from Joe Garcia, Nat'l Cong. of Am. Indians). In *Harrison v. Laveen*, the court notes that the President's Commission on Civil Rights found that Arizona and New Mexico continued to deny Native Americans the right to vote. 196 P.2d 456, 458 (Ariz. 1948) (citing PRESIDENT'S COMM. ON CIVIL RIGHTS, TO SECURE THESE RIGHTS 40 (1947) ("The constitution of New Mexico withholds suffrage from 'Indians not taxed.' In Arizona the state constitution has been interpreted to deny the vote to Indians as being 'persons under guardianship.'")).

33. A Proclamation, 37 Stat. 1728, 1728-29 (1912).

34. U.S. CENSUS BUREAU, SUPPLEMENT FOR ARIZONA: POPULATION, AGRICULTURE, MANUFACTURES, MINES AND QUARRIES 573 tbl.1, 582 tbl.12 (1913), <http://www2.census.gov/prod2/decennial/documents/41033935v1-8ch2.pdf>.

35. *Id.* at 576.

After passage of the Indian Citizenship Act of 1924, Indians should have been afforded the electoral franchise in accordance with the Fourteenth and Fifteenth Amendments if they met the state's voter qualifications.<sup>36</sup> Arizona's Attorney General John W. Murphy agreed and recommended that the counties extend precinct boundaries to include Indian reservation residents. Mindful of jurisdictional concerns, the Attorney General suggested that polling places remain located off-reservation until such time as Congress waives exclusive jurisdiction over Indian territory.<sup>37</sup>

Attorney General Murphy asked each county attorney for his opinion on the following two questions:

- (a) As to whether the state has such jurisdiction over an Indian reservation, or any part thereof, as to permit the state to include such reservation or part thereof in a voting precinct.
- (b) As to whether residence on an Indian reservation is such a residential disqualification as is contemplated in [state law].<sup>38</sup>

The responses varied.<sup>39</sup> The first question seems to conflate two separate issues—whether the reservation can be part of a voting precinct, which the Attorney General had already decided in the affirmative, versus whether the state has jurisdiction in Indian Country to establish polling precincts on Indian reservations. Recognizing that the state lacks jurisdiction in Indian Country, some county attorneys objected to establishing polling locations on Indian reservations.<sup>40</sup> The Office of Indian Affairs noted that the state had previously established polling places for non-Indians living on Indian reservations and encouraged the Attorney General to provide polling places

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36. Paragraph 2879 of the Arizona Civil Code set forth voter qualifications. These included that the individual be at least 21 years of age, literate, a resident, and not be under guardianship. *Lawrence v. State*, 240 P. 863, 865 (Ariz. 1925). N. D. Houghton notes that Yaqui Indians from Mexico were not made citizens pursuant to the Indian Citizenship Act but that they could become citizens through naturalization or birth. N. D. Houghton, "Wards of the United States"—*Arizona Applications: A Study of the Legal Status of Indians*, 16 U. ARIZ. BULL. 1, 18 (1945).

37. John W. Murphy, Ariz. Attorney Gen., & A.R. Lynch, Assistant Attorney Gen. (June 30, 1924) (on file with the Arizona State Library); *Native Born Indians Enfranchised By New Bill, Says Attorney General Ruling*, ARIZ. REPUBLICAN, July 2, 1924.

38. Letter from John W. Murphy, Ariz. Attorney Gen., to H. H. Baker, Yuma Cty. Attorney (July 25, 1924) (on file with the Arizona State Library).

39. See generally Box 2, Off. Att'y Gen., RG 4, Arizona State Library.

40. *Id.*; Letter from E.P. Patterson, Pinal Cty. Attorney, to John W. Murphy, Ariz. Attorney Gen. (Aug. 5, 1924) (on file with the Arizona State Library); Letter from J. Andrew West, Yavapai Deputy Cty. Attorney, to John W. Murphy, Ariz. Attorney Gen. (July 30, 1924) (on file with the Arizona State Library); Letter from Ross H. Blakely, Mohave Cty. Attorney, to John W. Murphy, Ariz. Attorney Gen. (Aug. 2, 1924) (on file with the Arizona State Library).

for reservation Indians.<sup>41</sup> This requires “cooperat[ing] with the Superintendents in charge of Indian Reservations as to the selection, maintenance, and conduct of polling places.” Apache County already had five established polling locations on Indian reservations, some of which had been in existence for thirty years.<sup>42</sup>

Apache County—the county with the highest proportion of Indian voters and therefore, the greatest potential impact if Indians could vote—appeared to be more accommodating than the rest.<sup>43</sup> Apache County attorney Levi Udall thought the answers were relatively simple and did not think the questions were “really serious.”<sup>44</sup> Mr. Udall cautioned that interpreting state law to find that reservation Indians lack state citizenship would nullify the Indian Citizenship Act.<sup>45</sup> Only one other county agreed.<sup>46</sup>

Other counties disagreed. A number of county attorneys believed that reservation Indians lacked the requisite qualifications because they did not meet the state residency requirement as inhabitants of a federal reservation and/or lacked the mental competency requirement as wards of the government.<sup>47</sup> The Maricopa County attorney’s opinion was that “Indians

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41. Letter from Charles H. Burke, Indian Affairs Comm’r, to Carl Hayden, U.S. Representative (July 30, 1924) (on file with the Arizona State Library).

42. Letter from Levi S. Udall, Apache Cty. Attorney, to John W. Murphy, Ariz. Attorney Gen. (Aug. 13, 1924) (on file with the Arizona State Library); Letter from George Carney to John W. Murphy, Ariz. Attorney Gen. (July 31, 1924) (on file with the Arizona State Library).

43. Letter from Levi S. Udall, Apache Cty. Attorney, to John W. Murphy, Ariz. Attorney Gen. (Aug. 13, 1924) (on file with the Arizona State Library).

44. *Id.*

45. *Id.*

46. *Id.*; Letter from Ross H. Blakely, Mohave Cty. Attorney, to John W. Murphy, Ariz. Attorney Gen. (Aug. 2, 1924) (on file with the Arizona State Library).

47. Maricopa, Pinal, and Yavapai County attorneys did not think that reservation Indians met Arizona’s residency requirement. Maricopa, Navajo, and Graham County attorneys thought that the federal guardianship relationship disqualified reservation Indians under the guardianship requirement. Letter from Ross H. Blakely, Mohave Cty. Attorney, to John W. Murphy, Ariz. Attorney Gen. (Aug. 2, 1924) (on file with the Arizona State Library); Letter from Chas Cason, Jr., Maricopa Cty. Deputy Attorney, to W.H. Linville, Maricopa Cty. Recorder (May 24, 1928) (on file with the Arizona State Library); Letter from E.P. Patterson, Pinal Cty. Attorney, to John W. Murphy, Ariz. Attorney Gen. (Aug. 5, 1924) (on file with the Arizona State Library); Letter from J. Andrew West, Yavapai Deputy Cty. Attorney, to John W. Murphy, Ariz. Attorney Gen. (July 30, 1924) (on file with the Arizona State Library); Letter from Thorwald Larson, Navajo Cty. Attorney, to John W. Murphy, Ariz. Attorney Gen. (Aug. 6, 1924) (on file with the Arizona State Library); Letter from E.L. Spriggo, Graham Cty. Attorney, to John W. Murphy, Ariz. Attorney Gen. (Aug. 5, 1924) (on file with the Arizona State Library).



residing on reservations are not entitled to vote at state elections.”<sup>48</sup> The Pinal County attorney advised the recorder to reject voter registration of Indians.<sup>49</sup>

The issue was not settled, and questions of voter qualifications continued to be an issue for reservation Indians. Governor Hunt, concerned about a potential challenger in his 1928 reelection campaign, sought an opinion to limit Indian suffrage.<sup>50</sup> The Governor was advised by both the Attorney General and the state’s first civil code commissioner that Indians could not be discriminated against without violating federal law.<sup>51</sup> He was further advised that the “guardianship” provision of the Arizona code could not apply to the guardian-ward relationship existing between the federal government and Indian Tribes.

In the first place, the act of the Arizona legislature was long before the bestowal of citizenship upon the Indians, and its meaning is to be determined and the legislative purpose in using the expression it did, by conditions as they then existed, and at that time the language of the statute obviously referred to ordinary guardianship which, as applied to adults means those person who are under guardianship in the sense of a court having jurisdiction having appointed a guardian of the person or property of such a citizen on account of incompetency or inability to manage his own affairs, or any of the other grounds provided in the statutes relating to that subject.<sup>52</sup>

The Governor was particularly concerned that the Republican Party would try to register approximately 1,500 Navajos.<sup>53</sup> Since there seemed to be no

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48. Letter from Chas Cason, Jr., Maricopa Cty Deputy Attorney, to W.H. Linville, Maricopa Cty. Recorder (May 24, 1928) (on file with the Arizona State Library).

49. Letter from E.P. Patterson, Pinal Cty. Attorney, to John W. Murphy, Ariz. Attorney Gen. (Aug. 5, 1924) (on file with the Arizona State Library) (“Anticipating an opinion from your office on this subject, I have advised the recorder to hold the registrations and not place them on the great register.”).

50. Letter from George W.P. Hunt, Ariz. Governor, to Dodd L. Greer (July 21, 1928) (on file with the Arizona State Library); Letter from Dodd L. Greer to George W.P. Hunt, Ariz. Governor (July 21, 1928) (on file with the Arizona State Library).

51. Letter from George W.P. Hunt, Ariz. Governor, to Dodd L. Greer (July 21, 1928) (on file with the Arizona State Library); Letter from Dodd L. Greer to George W.P. Hunt, Ariz. Governor (July 21, 1928) (on file with the Arizona State Library); Letter from John W. Murphy, Ariz. Attorney Gen., to Earl Anderson (July 27, 1928) (on file with the Arizona State Library); Letter to Earl Anderson from John W. Murphy, Ariz. Attorney General (July 27, 1928) (on file with the Arizona State Library); Letter from Samuel L. Pattee to George W.P. Hunt, Ariz. Governor (Sept. 22, 1928) (on file with the Arizona State Library).

52. Letter from Samuel L. Pattee to George W.P. Hunt, Ariz. Governor (Sept. 22, 1928) (on file with the Arizona State Library).

53. Letter from George W.P. Hunt, Ariz. Governor, to Dodd L. Greer (July 21, 1928) (on file with the Arizona State Library); Letter from Dodd L. Greer to George W.P. Hunt, Ariz.

remedy to exclude reservation voters as a class, Governor Hunt was advised to “adopt a systematic course of challenging Indians at the time of election, which course, if persisted in, would probably result in limiting the numbers seeking to vote.”<sup>54</sup> The Republican Party reported that challenges had been filed against the voter registration of Indian voters in Apache County.<sup>55</sup>

The first challenge to a county’s rejection of reservation Indians’ voter registration occurred in 1928, the first presidential election following the passage of the Indian Citizenship Act. Peter Porter and Rudolph Johnson, Pima Indians from the Gila River Indian Reservation, attempted to register to vote in Pinal County.<sup>56</sup> The Pinal County recorder’s office rejected the registration forms.<sup>57</sup> Porter and Johnson filed a petition for writ of mandamus with the Arizona Supreme Court, directing the Pinal County recorder to enter their names on the voting register.<sup>58</sup>

The Pinal County recorder cited two reasons that Indians do not qualify to vote under the Arizona Constitution based on residency and ward status.<sup>59</sup> First, the County argued that Indians were not allowed to register to vote because they lived on Indian reservations, are not subject to the laws of the state, and consequently did not reside in the State of Arizona.<sup>60</sup> The Court rejected the argument and held that “all Indian reservations in Arizona are within the political and governmental, as well as geographical, boundaries of the state.”<sup>61</sup> Therefore, Indians are residents of the state of Arizona.<sup>62</sup>

Second, the County argued that Indians as wards of the United States are individuals under guardianship, and therefore not eligible to vote.<sup>63</sup> The Arizona Constitution prevented those who were “under guardianship, *non compos mentis*, or insane” from voting.<sup>64</sup> Relying on *Cherokee Nation v.*

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Governor (July 21, 1928) (on file with the Arizona State Library); Letter from John W. Murphy, Ariz. Attorney Gen., to Earl Anderson (July 27, 1928) (on file with the Arizona State Library).

54. Letter from Samuel L. Pattee to George W.P. Hunt, Ariz. Governor (Sept. 22, 1928) (on file with the Arizona State Library).

55. *Id.*; Letter from Hiram S. Corbett, Republican Nat’l Comm. Member, to John W. Murphy, Ariz. Attorney Gen. (July 23, 1928) (on file with the Arizona State Library).

56. *Porter v. Hall*, 271 P. 411, 413 (Ariz. 1928); *Indians Can Vote—Court Decision*, CASA GRANDE VALLEY DISPATCH, Sept. 21, 1928.

57. *Porter*, 271 P. at 412.

58. *Id.*

59. *Id.* at 412–13.

60. *Id.*

61. *Id.* at 415.

62. *Id.*

63. *Id.* at 412–13.

64. *Id.* at 414 (citing ARIZ. CONST., art. VII, § 2). Article Seven of the Arizona Constitution was amended in 2004. Article Seven, Section Two, Subsection C now reads that an individual

Georgia, the Court found that that federal guardianship relationship existed because Indians were not capable of managing their own affairs.<sup>65</sup> In making this determination, the Court pointed to the state's lack of jurisdiction over reservation Indians.<sup>66</sup>

[S]o long as the federal government insists that, notwithstanding their citizenship, their responsibility under our law differs from that of the ordinary citizen, and that they are, or may be, regulated by that government, by virtue of its guardianship, in any manner different from that which may be used in the regulation of white citizens, they are, within the meaning of our constitutional provision, "persons under guardianship," and not entitled to vote.<sup>67</sup>

For two more decades, reservation Indians were denied the right to vote in Arizona based on this misapplication of the federal trust relationship.<sup>68</sup>

In 1940, Congress passed the Nationality Act of 1940, reaffirming the citizenship of Native Americans.<sup>69</sup> Native Americans registered for the draft for the first time following this Act. Ten percent of the Native American population served in World War II, a larger proportion than any other population.<sup>70</sup> Many Native Americans in Arizona joined the armed services. Navajo and Hopi Code Talkers were used in military campaigns to send coded messages that could not be broken by adversaries.<sup>71</sup> Navajo Code

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must be adjudicated incapacitated to be considered unqualified to vote. ARIZ. CONST., art. VII, § 2, cl. C.

65. *Porter*, 271 P. at 417; *Cherokee Nation v. Georgia*, 30 U.S. 1, 2 (1831) (finding that the relationship between Indians and the federal government is that of "a ward to his guardian").

66. *Porter*, 271 P. at 418.

67. *Id.* at 419.

68. It is important to note that most Native Americans in Arizona lived on an Indian reservation during this time period. *See supra* note 34 and accompanying text.

69. Congress revised and codified the nationality laws of the United States. Section 201(b) of the Nationality Act of 1940 affirmed that "[a] person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe . . . shall be nationals and citizens of the United States at birth." Nationality Act of 1940, Pub. L. No. 76-853, § 201(b), 54 Stat. 1137, 1138.

70. More than 25,000 reservation Indians participated. "The combined figure of 44,500 was more than ten percent of the Native American population during the war years. This represented one-third of all able-bodied Indian men from 18 to 50 years of age. In some tribes, the percentage of men in the military reached as high as 70 percent. Also, several hundred Indian women served in the WACS, WAVES, and Army Nurse Corps." Thomas D. Morgan, *Native Americans in World War II*, ARMY HIST., Fall 2005, at 22, 23, <http://www.history.army.mil/armyhistory/AH35newOCR.pdf>.

71. Only recently were Hopis recognized for their service in World War II as code talkers. Joel Quebec, *Inaugural Hopi Code Talkers Recognition Day Held*, U.S. ARMY (Apr. 26, 2012), [http://www.army.mil/article/78728/Inaugural\\_Hopi\\_Code\\_Talkers\\_Recognition\\_Day\\_held/](http://www.army.mil/article/78728/Inaugural_Hopi_Code_Talkers_Recognition_Day_held/). My husband's uncle, Rex Pooyouma, was a Hopi Code Talker during World War II. *Hopi Code*

Talkers were instrumental to the military victory at Iwo Jima.<sup>72</sup> Another Arizona Indian, Ira Hayes, a Pima from the Gila River Indian Community, participated in the flag raising at Iwo Jima.<sup>73</sup> Unfortunately, Arizona's Indian veterans returning from the war discovered that while they fought for freedoms abroad, they were still limited in their freedoms at home. One of these freedoms was the right to vote.<sup>74</sup>

Native American veterans returning from war were denied the right to vote. Arizona's Secretary of State requested an opinion from the State Attorney General as to whether Indian veterans who lived off the reservation could register to vote.

A number of Indians who are discharged veterans of the military forces and who are now working and do not intend to return to their reservations wish to register and vote in this state. The question has been raised as to whether or not such Indians are eligible to register and vote in this state.<sup>75</sup>

These Indians served in the United States military, lived off the reservation and were employed off of the reservation. The Attorney General found that the federal guardianship relationship discussed in *Porter v. Hall* continued to prevent Indians from voting. He believed that the right to vote must be determined on a case-by-case basis vote depending on whether the individual satisfied the voter eligibility requirements and was released from

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*Talker Rex Pooyouma Passes Away*, NAVAJO-HOPI OBSERVER (Oct. 27, 2010), <http://nhonews.com/main.asp?SectionID=1&SubsectionID=1&ArticleID=12971>.

72. KENNETH WILLIAM TOWNSEND, *WORLD WAR II AND THE AMERICAN INDIAN* 148 (2000).

73. DONALD L. FIXICO, *TERMINATION AND RELOCATION: FEDERAL INDIAN POLICY, 1945–1960* 3 (1986); TOWNSEND, *supra* note 72, at 131; Anne T. Denogean, *Denogean: 60 Years Ago in Arizona, Indians Won Right to Vote*, TUCSON CITIZEN (July 25, 2008), <http://tucsoncitizen.com/morgue/2008/07/25/91886-denogean-60-years-ago-in-arizona-indians-won-right-to-vote/>; Letter from George Sidney P. Osborn, Ariz. Governor, to W.J. Cummings (Sept. 13, 1945) (on file with the Arizona State Library).

74. C.J. Calvert, a Hopi Indian, petitioned the Governor of Arizona for the right to vote for Indian veterans. Letter from C.J. Calvert to Sidney P. Osborn, Ariz. Governor (May 10, 1946) (on file with the Arizona State Library).

75. *Id.*; Letter from John L. Sullivan, Ariz. Attorney Gen., & John W. Rood, Assistant Attorney Gen., to Dan E. Carvey, Ariz. Secretary of State (April 4, 1946) (on file with the Arizona State Library).

guardianship.<sup>76</sup> Thus, even Indians who moved off of the reservation were not deemed eligible to vote.<sup>77</sup>

According to the 1940 Census, Native Americans continued to be the largest minority in the state of Arizona, totaling 11.5% of the state's population.<sup>78</sup> One-sixth of all Indians in the country lived in Arizona.<sup>79</sup> Thus, Arizona's policies on Indian voting resulted in the disenfranchisement of thousands of Native Americans. Frank Harrison, a World War II Veteran, and Harry Austin, both members and residents of the Fort McDowell Yavapai Nation, filed suit to reverse the 1928 Arizona Supreme Court decision which denied Native Americans the right to vote.<sup>80</sup> On July 15, 1948, the Court overturned the *Porter v. Hall* decision, recognizing the Native American right to vote in state elections.<sup>81</sup> The Court noted that a report by the President's Committee on Civil Rights described the *Porter* case as being discriminatory.

In past years, American Indians have also been denied the right to vote and other political rights in a number of states. Most of these restrictions have been abandoned, but in two states, New Mexico and Arizona, Indians continue to be disfranchised. The constitution of New Mexico withholds suffrage from Indians not taxed. In Arizona the state constitution has been interpreted to deny the vote to Indians as being persons under guardianship. Protest against these legal bans on Indian suffrage in the Southwest have gained force with the return of Indian veterans to those states.<sup>82</sup>

In *Harrison*, the Court sought to reverse the past discrimination and held that "person under guardianship" in the Arizona Constitution meant judicially established guardianship and "has no application to the plaintiffs or to the Federal status of Indians in Arizona as a class."<sup>83</sup>

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76. Letter from John L. Sullivan, Ariz. Attorney Gen., & John W. Rood, Assistant Attorney Gen., to Dan E. Carvey, Ariz. Secretary of State (April 4, 1946) (on file with the Arizona State Library).

77. According to Arizona Attorney General Joe Conway, the *Porter* ruling applied to all Indians, even those Indians who moved off of the reservation. Houghton, *supra* note 36, at 19.

78. In 1940, Indians comprised "11.5% of State's population of whom 24,317 are over twenty-one years of age." *Harrison v. Laveen*, 196 P.2d 456, 458 (1948) (internal citation and parentheses omitted).

79. *Id.* at 460.

80. *Id.* at 457.

81. *Id.* at 463.

82. *Id.* at 458 (quoting PRESIDENT'S COMM. ON CIVIL RIGHTS, *supra* note 32, at 40).

83. *Id.* at 463 (holding that Indians living on Indian reservations should in all respects be allowed the right to vote).

C. *The Voting Rights Act Ushers Change for Arizona Indians*

Notwithstanding the victory in *Harrison v. Laveen*, Arizona Indians were denied access to the ballot for the next two decades.<sup>84</sup> A congressional survey noted that many Indians in Arizona did not vote because they were illiterate, could not speak English, not trained for citizenship, and feared that if they registered to vote, they would have to pay taxes.<sup>85</sup> The biggest obstacle preventing Indians from voting was the imposition of English literacy tests.<sup>86</sup> Arizona imposed English literacy tests, limiting registration to those who could read the United States Constitution in English and write his name.<sup>87</sup> Thus, only Native Americans literate in the English language were eligible to vote. In 1948, illiteracy rates for Native Americans were estimated at eighty to ninety percent.<sup>88</sup> Schools for Native Americans were not sufficient to educate the school age population.<sup>89</sup> Thus, most Arizona Indians still could not vote due to the literacy requirement. Arizona defended the use of the literacy test as a voter requirement and fought federal attempts to eliminate it. It was only in the 1970s, after federal law prohibited the use of the tests, that Arizona Indians finally achieved voting rights.

In 1965, Congress passed the Voting Rights Act to ensure that all Americans have the right to vote.<sup>90</sup> While many provisions of the Act are permanent, several key provisions have expirations, including language assistance, preclearance, and the use of federal poll observers. Section 2 of the Voting Rights Act is permanent and prohibits voting practices or procedures that results in a denial or abridgment on the right to vote on

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84. Access to the ballot box was directly impacted by literacy requirements. *Oregon v. Mitchell*, 400 U.S. 112, 153, 234 (1970); James Tucker et al., *Voting Rights in Arizona: 1982–2006*, 17 S. CAL. REV. L. & SOC. JUST. 283, 283–85 (2008).

85. HOUSE COMM. ON INTERIOR AND INSULAR AFFAIRS, 85TH CONG., PRESENT RELATIONS OF THE FED. GOV'T TO THE AM. INDIAN 169–72 (Comm. Print 1958).

86. For a discussion of the history of the English literacy test, see Tucker et al., *supra* note 84, at 283–85.

87. See *Mitchell*, 400 U.S. at 153; *Harrison v. Laveen*, 196 P.2d 456, 463 (1948); Op. Ariz. Att'y Gen. 60-6 (Dec. 10, 1959).

88. Tucker et al., *supra* note 84, at 285 (citing DVD: The History of Indian Voting In Arizona (Inter Tribal Council of Arizona, Inc. 2004)). In the 1960s, about half of the Navajo voting age population could not pass a literacy test. See MCCOOL ET AL., *supra* note 13, at 19.

89. In the mid 1940s, school facilities could only accommodate approximately one quarter of Navajo school age children. *Unless We Are Educated: Deplorable Condition of Navajo Schooling*, Box 32, Off. Governor, RG 1, Arizona State Library; *Navajo Tribe See Progress with Program*, HOLBROOK TRIBUNE-NEWS, Jan. 24, 1946.

90. The Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 52 U.S.C. §§ 10301–10314, 10501–10508, 10701–10702. For a detailed history of the events leading to the passage of the Voting Rights Act, see generally BRIAN K. LANDSBERG, *FREE AT LAST TO VOTE: THE ALABAMA ORIGINS OF THE 1965 VOTING RIGHTS ACT* (2007).

account of race or membership in a language minority group.<sup>91</sup> The Voting Rights Act has been amended and extended several times, most recently in 2006.<sup>92</sup> Section 5 preclearance requires covered jurisdictions to preclear any changes in voter practices or procedures and demonstrate that they do not have a discriminatory effect. Section 5 preclearance requires states with a documented history of discriminatory voting practices, such as Arizona, to obtain approval from federal officials before they change election laws. Section 5 jurisdictions included those that used a test or device for voting and had low voter participation.

The 2006 amendments included Section 203, which requires that election materials are translated for citizens with limited English proficiency, and extended the Attorney General's authority to send federal observers to monitor elections in order to prevent efforts to intimidate minority voters at the polls.<sup>93</sup> The 2006 amendments restored the original intent of the Section 5 preclearance provisions, which was weakened by the Supreme Court's decisions in *Georgia v. Ashcroft*<sup>94</sup> and *Reno v. Bossier Parish School Board*.<sup>95</sup>

The State of Arizona and Apache County were included in the original list of jurisdictions covered by Section 5 of the Voting Rights Act.<sup>96</sup> Navajo and Coconino Counties were added to the list shortly thereafter due to their

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91. 52 U.S.C. § 10302.

92. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577. Arizona Congressman J.D. Hayworth initially opposed the reauthorization of the language minority provisions of the Voting Rights Act explaining that "learning English is essential to being full-fledged participants in pursuing the American dream," and the language minority provisions "encourage the linguistic division of our nation and contradict the 'Melting Pot' ideal that has made us the most successful multi-ethnic nation on [E]arth." Letter from Peter King et al., to James Sensenbrenner, Jr., Chairman, House Judiciary Comm. (Feb. 3, 2006), <http://www.eagleforum.org/column/2006/mar06/ballots56signers2306.pdf> (signed by Congressman J.D. Hayworth). The focus of the opposition was on the need for immigrants to learn English. *Id.* However, the focus on non-English speaking immigrants directly impacts and conflicts with the maintenance and preservation of Native American languages. Despite this initial opposition, the Voting Rights Act was reauthorized and supported by the Arizona Congressional delegation. Pub. L. No. 109-246.

93. Pub. L. No. 109-246. The 2006 renewal of the Voting Rights Act did not reauthorize federal examiners, but it maintains observers. *Id.* It also includes a provision for expert fees and other reasonable litigation expenses. *Id.*

94. 539 U.S. 461 (2003).

95. 528 U.S. 320 (2000).

96. Jurisdictions Covered Under Section 4(b) of the Voting Rights Act, as Amended, 28 C.F.R. § 51 app. (2011). The enactment of the Voting Rights Act in 1965 included a temporary prohibition of literacy tests in covered jurisdictions. *See Apache Cty. v. United States*, 256 F. Supp. 903, 906 (D.D.C. 1966).

low registration among Native Americans.<sup>97</sup> As a result of this coverage, the Arizona literacy tests were suspended in the heavily Native American populated counties of Apache, Coconino, and Navajo Counties.<sup>98</sup> Within months after the coverage determinations were made, the State and these three counties filed an action in the District Court for the District of Columbia seeking to bail out of Section 5 coverage. In *Apache County v. United States*, the State of Arizona and the three counties successfully obtained a declaratory judgment to reinstate the literacy test claiming that it was an evenhanded state voter qualification and that it had not 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.<sup>99</sup> The U.S. Attorney General's Office consented to the declaratory judgment, but the Navajo Nation and thirty-one of its members moved to dismiss the action and requested an investigation.<sup>100</sup> Not surprisingly, the three counties supplied "affidavits and letters of voting officials . . . stating that they have not applied the literacy test in a discriminatory matter [sic]"<sup>101</sup> Although the purpose of the literacy tests was to exclude minorities from voting,<sup>102</sup> the Court found that "[i]t is not material evidence that the test has been used to accomplish discrimination."<sup>103</sup> The basis for this decision is that the actual use of literacy tests were lawful at the time, so the inquiry focused on whether the tests were applied in a discriminatory manner, not whether the tests resulted in discrimination.<sup>104</sup>

After the counties successfully bailed out of Section 5, the State of Arizona continued to discriminate against Indian voters through its imposition of English literacy tests.<sup>105</sup> These tests were not repealed until 1972, after a battle that led to the U.S. Supreme Court.<sup>106</sup> In 1970, Congress adopted a nationwide prohibition on literacy tests for a five-year period,

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97. 28 C.F.R. § 51 app. (2011).

98. Tucker et al., *supra* note 84, at 286.

99. *Apache Cty.*, 256 F. Supp. at 905, 913.

100. The court denied the Navajo request for intervention finding that the Navajo Nation and its members were adequately represented by the Attorney General. *Id.* at 906.

101. *Id.* at 908.

102. See Tucker et al., *supra* note 84, at 286.

103. *Apache Cty.*, 256 F. Supp. at 911.

104. "The constitutionality of literacy tests as such is clear." *Id.* at 910 (citing *Lassiter v. Northampton Cty. Bd. of Elections*, 360 U.S. 45, 79 (1959)).

105. See ARIZ. REV. STAT. ANN. § 16-101(A)(4)-(5) (1956).

106. See *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).



which again preempted the use of Arizona's literacy tests.<sup>107</sup> The State of Arizona and other states challenged the constitutionality of the literacy test ban. 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."<sup>108</sup> The Supreme Court noted that "Arizona also has a serious problem of deficient voter registration among Indians."<sup>109</sup> The Court recognized that non-English speakers may make use of resources in their native languages in order to responsibly and knowledgeably cast a ballot.<sup>110</sup>

The 1970 coverage formula included, as one of the measures of voting discrimination, registration and turnout in the 1968 presidential election. As a result, Apache, Coconino, and Navajo Counties again became covered by Section 5 along with five other Arizona counties.<sup>111</sup> In 1975, the prohibition against literacy tests was made a permanent part of the Voting Rights Act.<sup>112</sup>

#### D. *Obstacles to Exercising the Right to Vote*

With the removal of literacy tests as a prerequisite to voting, Native Americans began to participate in state and federal elections. This participation directly impacted the outcome of elections.<sup>113</sup> The non-Indian majority was threatened by Indian participation, and there were a number of challenges to Indians' right to vote and to hold office. Many of these challenges occurred in Apache County, one of only a few counties within the United States in which the predominant languages spoken are American Indian. Of these languages, the most commonly used is Navajo, a historically unwritten language.<sup>114</sup>

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107. Voting Rights Act of 1965, 52 U.S.C. § 10501 (2015).

108. 400 U.S. 112, 117 (1970) (because "literacy tests have been used to discriminate against voters on account of their color, the Act enforces the Fourteenth and Fifteenth Amendments by barring the use of such tests in all elections, state and national, for a five-year period").

109. *Id.* at 132.

110. *Id.* at 146 (quoting *Katzenbach v. Morgan*, 384 U.S. 641, 655 (1966)).

111. *Voting Rights Act: Evidence of Continued Need*, *supra* note 106, at 1370 (appendix to the statement of Wade Henderson); Tucker et al., *supra* note 84, at 286.

112. Tucker et al., *supra* note 84, at 286–87.

113. State Attorney General Bruce Babbitt credited his victory to the Indian vote in the mid-70s. MCCOOLET AL., *supra* note 13, at 20. Native American voters turned out in record numbers in 1976 and are credited with helping to elect a new Democratic senator and congressman. *Id.*

114. Considering the Navajo Reservation as a whole, including parts of the States of Arizona, New Mexico and Utah, over one-third of the voting age citizens on the Navajo Nation

In one of the first elections after literacy tests were banned, Tom Shirley, a Navajo candidate residing on the Navajo Reservation in Apache County, obtained an overwhelming majority of votes for the office of Supervisor in Supervisorial District Number 3 of the Apache County Board of Supervisors.<sup>115</sup> The unsuccessful non-Indian candidate obtained a preliminary injunction to prevent the Board of Supervisors from certifying Shirley as the successful candidate, prohibiting Shirley from taking office.<sup>116</sup> The disgruntled opponent challenged the ability of Navajos living on the Reservation from holding office because reservation Indians do not own real property subject to taxation and alleged that reservation Indians are immune from service of process.<sup>117</sup> The Arizona Supreme Court quashed the preliminary injunction and directed that Shirley be certified by the Apache County Board of Supervisors as the duly elected Supervisor.<sup>118</sup> The Court reaffirmed the right of Indians to vote, and their eligibility to seek office.<sup>119</sup>

After the Arizona Supreme Court's decision in *Shirley*, non-Indians in Apache County feared that Navajos would be elected to the County supervisor positions. In an effort to prevent Navajo candidates from success in Board of Supervisor elections, Apache County restructured the supervisor districts.<sup>120</sup> The Board of Supervisors drew three unequal supervisor districts, packing Indians into one district: District 1 had a population of 1,700, of whom 70 were Indian; District 2 had a population of 3,900, of whom 300 were Indian; and District 3 had a population of 26,700, of whom 23,600 were Indian.<sup>121</sup> Indian voters challenged the revised districts for violating the one-person, one-vote principle, the Fourteenth Amendment, the Voting Rights Act, and the Civil Rights Act.<sup>122</sup> Apache County claimed that the Indians are not citizens of the United States and that the Indian Citizenship Act granting Indians citizenship was unconstitutional.<sup>123</sup> A three-judge federal court found that the districts were malapportioned and rejected Apache County's arguments regarding the right of Native Americans to vote.<sup>124</sup>

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Reservation are limited-English proficient and over one-quarter are illiterate. Tucker et al., *supra* note 84, at 321.

115. Shirley v. Apache Cty., 513 P.2d 939, 941 (Ariz. 1973).

116. *Id.*

117. *Id.*

118. *Id.* at 945.

119. *Id.*

120. Goodluck v. Apache Cty., 417 F. Supp. 13, 14 (D. Ariz. 1975), *aff'd*, 429 U.S. 876 (1976).

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 16.

Efforts to thwart Native Americans from voting continued in Apache County.<sup>125</sup> In the mid-1970s, white citizens in Apache County sought to avoid integration of Indian students into the public schools by holding a special bond election to fund a new school in the almost entirely non-Indian southern part of the county.<sup>126</sup> Indian turnout for the election was abnormally low. An investigation uncovered that the low turnout resulted from the closure of nearly half of the polling places on the reservation requiring Indians to travel greater distances to vote, the total lack of language assistance for Navajo voters, the absence of Navajo language informational meetings regarding the bond election, and the use of English-only in the implementation of absentee voting procedures.<sup>127</sup> This litigation ended in a Consent Decree in which Apache County agreed to a number of changes to the blatant discrimination in voting practices.<sup>128</sup>

Discrimination continued against Indian voters from the Navajo, Apache, and Hopi Tribes.<sup>129</sup> Because of the voting impediments for Indian voters, Consent Decrees have been entered into between the State of Arizona and the federal government to ensure that election practices and procedures provide Native Americans with an equal opportunity to participate in the electoral process. In 1989, the United States filed suit against the State of Arizona for “unlawfully deny[ing] or abridg[ing] the voting rights of Navajo citizens” residing in Navajo, Apache, and Coconino Counties in violation of the Voting Rights Act.<sup>130</sup> The Arizona counties settled the claims pursuant to a Consent Decree which required the establishment of the Navajo Language Election Information Program including the employment of outreach workers to assist in all aspects of voting by Indians.<sup>131</sup> This program has resulted in more opportunities for Navajos to register to vote and vote on Election Day.<sup>132</sup>

In 1994, the Department of Justice brought an enforcement action to enjoin Navajo and Coconino Counties from holding judicial elections for four new judicial divisions created without seeking preclearance under Section

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125. See *Apache Cty. High Sch. Dist. No. 90 v. United States*, No. 77-1815 (D.D.C. June 12, 1980).

126. Tucker et al., *supra* note 84, at 324.

127. *Id.* at 325.

128. *Id.* at 326.

129. Tucker et al., *supra* note 84, at 326–28.

130. *United States v. Arizona*, No. 88-1989 (D. Ariz. May 22, 1989) (consent decree) (as amended Sept. 7, 1993).

131. *Id.*

132. See *2006 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. 33–47 (2005) (statement of Penny Pew).

5.<sup>133</sup> The district court held that the judgeships constituted a “covered change” and enjoined the judicial elections until preclearance was obtained.<sup>134</sup>

However, the right to include Indians in the judiciary continued. In 2003, the Honorable James Weiers, then Speaker of the House for the Arizona State Legislature, questioned whether a Navajo tribal member may serve as a member of the Commission on Appellate Court Appointments.<sup>135</sup> The specific request questioned “the ability of a member of a sovereign nation to participate ‘in the selection process of judges to courts that this individual may not be subject to as a result of his tribe’s status.’”<sup>136</sup> The Attorney General affirmed the ability of Native Americans to participate in all aspects of democracy, including serving on court commissions.<sup>137</sup>

### E. Redistricting

Efforts to reduce Indian participation, voting strength and the ability to elect candidates of their choice through redistricting have been challenged every cycle since the Voting Rights Act was enacted. In the 1960s, the court rejected attempts to base apportionment on the number of registered voters to reduce Indian voter strength.<sup>138</sup> In the 1970s, the Chairman McDonald of the Navajo Nation intervened in the challenge of a legislative reapportionment plan that divided the Navajo Reservation into three separate state legislative districts reducing the ability of Navajo voters to elect candidates of their choice.<sup>139</sup> The initial plan in *Klahr v. Williams* maintained the Navajo Reservation in one single legislative district.<sup>140</sup> An incumbent from this district successfully amended the plan to divide the Navajo Reservation among three districts.<sup>141</sup> No doubt his intent was to create a district to ensure

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133. *United States v. Arizona*, No. 94-1845, 1994 U.S. Dist. LEXIS 17606, at \*1 (D. Ariz. Oct. 17, 1994).

134. *Id.* at \*18.

135. ARIZ. OFFICE OF THE ATT’Y GEN., NO. I03-007, TRIBAL MEMBER ELIGIBILITY TO SERVE ON COMMISSION ON APPELLATE COURT APPOINTMENTS 1 (2003).

136. *Id.* at 3 n.3.

137. *Id.* at 3.

138. “Chapter 1 provides, further, that the number of legislators apportioned to each election district shall be apportioned among its legislative districts on the basis of voter registration.” *Klahr v. Williams*, 303 F. Supp. 224, 225 (D. Ariz. 1969) (finding that state statute allowing a deviation of 16% failed to meet the constitutional requirement of equal population). The court noted that the Indians in Apache and Navajo counties would be underrepresented if voter registration is used as the basis for redistricting. *Id.* at 226 n.6.

139. *Klahr v. Williams*, 339 F. Supp. 922, 924 (D. Ariz. 1972).

140. *Id.* at 927.

141. *Id.*

his reelection with a larger non-Indian population. The court found that the legislative plan violated the Equal Protection Clause because it was done with the intent of “destroy[ing] 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.”<sup>142</sup> The court adopted Chairman McDonald’s proposed redistricting plan.<sup>143</sup> In the 1980s, the San Carlos Apache Tribe successfully objected to a proposed redistricting plan that aimed to split and dilute the Apache vote.<sup>144</sup> The Department of Justice objected to the plan on the grounds that the plan had a discriminatory effect.<sup>145</sup> The District Court found the proposed plan had “the effect of diluting the San Carlos Apache Tribal voting strength and dividing the Apache community of interest.”<sup>146</sup> In the 1990s, the Arizona legislature reached an impasse, and a three-judge panel was convened to draw a redistricting plan. Indian tribes intervened, and the court adopted the “Indian Compromise Plan.”<sup>147</sup> In adopting this plan, the Court noted that

Although there has been no proof that the Native Americans are entitled to a reapportionment plan designed to maximize their political advantage, they should not be engulfed in a structure that minimizes their potential for meaningful access to the political process. The Indian Intervenors proved that there have been widespread practices of discrimination against Native Americans. The court also took judicial notice of that fact. The results achieved through the court’s plan will meet the goals of the Indian Intervenors.<sup>148</sup>

Arizona’s geography and demography create certain challenges for redistricting. In *Klahr v. Williams*, the court recognized the immense size of the Navajo Reservation. The Navajo Nation is the largest tribe in the United States, comprising over 300,000 members and occupying approximately 25,000 square miles of trust lands within Arizona, New Mexico, and Utah.<sup>149</sup>

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142. *Id.*

143. *Id.* at 928.

144. *Goddard v. Babbitt*, 536 F. Supp. 538, 539 (D. Ariz. 1982).

145. *Id.* at 541.

146. *Id.*

147. *See* *Arizonans for Fair Representation v. Symington*, 828 F. Supp. 684, 689 (D. Ariz. 1992) *aff’d sub nom.* *Hispanic Chamber of Commerce v. Arizonans for Fair Representation*, 507 U.S. 981 (1993).

148. *Id.* at 690.

149. *Klahr v. Williams*, 339 F. Supp. 922, 927 (D. Ariz. 1972); Bill Donovan, *Census: Navajo Enrollment Tops 300,000*, NAVAJO TIMES (July 7, 2011), [http://navajotimes.com/news/2011/0711/070711census.php#.VjEvS9D-\\_FI](http://navajotimes.com/news/2011/0711/070711census.php#.VjEvS9D-_FI). According to the 2010 U.S. Census, approximately 173,000 individuals live on the Navajo Reservation,

The Arizona portion of the reservation “is larger in area than any of Arizona’s fourteen counties, excepting Coconino; and the portion of the Reservation within Arizona is 60 times larger in area than Phoenix, Arizona’s largest city.”<sup>150</sup> Home to twenty-two Indian Tribes, a balance must be struck to satisfy one-person one-vote while protecting Native American voters in the redistricting process.

Arizona is unique. Approximately 27 percent of Arizona’s land is located on Indian reservations, far and away the highest percentage in the United States. Other large portions of the state are devoted to National Parks and Forests. These factors, in part, account for the fact that Arizona is sparsely populated.

Arizona’s urban areas [metropolitan Phoenix and Tucson] contain the overwhelming bulk of the state’s population.<sup>151</sup>

Since the 1960s, Arizona’s population distribution has only become more pronounced. The rural areas have remained sparsely populated while the metropolitan areas of Phoenix and Tucson have continued to experience rapid growth, resulting in a change from six Congressional districts after the 1990 census, to eight Congressional districts after the 2000 census, and nine Congressional districts after the 2010 census.

Until the 1990s, the redistricting process in Arizona was controlled by the Arizona legislature and was highly politicized. In 2000, Arizona voters approved Proposition 106, a citizen initiative that took redistricting out of the hands of the legislature and assigned responsibility to the Arizona Independent Redistricting Commission.<sup>152</sup> This constitutional change also provided a procedural framework for the Commissioners to follow and established criteria for the redistricting process.

The Arizona Constitution mandates four phases that the Commission must follow: (i) developing the initial grid, (ii) adjusting the grid, (iii) holding a public comment period, and (iv) finalizing the maps.<sup>153</sup> Until 2013, the Commission was required to submit these maps for preclearance. In addition

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approximately 97% of whom are American Indian. TINA NORRIS ET AL., U.S. CENSUS BUREAU, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2010 14 tbl.6 (2012), <http://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf>.

150. *Klahr*, 339 F. Supp. at 927.

151. *Arizonans for Fair Representation*, 828 F. Supp. at 687.

152. *2000 Ballot Propositions: Proposition 106*, ARIZ. SEC’Y OF STATE (Nov. 7, 2000), <http://apps.azsos.gov/election/2000/Info/pubpamphlet/english/prop106.pdf>; Mark Joseph Stern, *Power to the Partisans*, SLATE (Mar. 3, 2015), [http://www.slate.com/articles/news\\_and\\_politics/supreme\\_court\\_dispatches/2015/03/arizona\\_state\\_legislature\\_and\\_redistricting\\_commission\\_arguments\\_supreme.html](http://www.slate.com/articles/news_and_politics/supreme_court_dispatches/2015/03/arizona_state_legislature_and_redistricting_commission_arguments_supreme.html).

153. ARIZ. CONST. art. IV, pt. 2, § 1.

to meeting the requirements of the United States Constitution, equal population, and the Voting Rights Act, redistricting must follow four neutral criteria to the extent practicable: (i) district boundaries shall respect communities of interest; (ii) districts shall be compact and contiguous; (iii) district lines shall use visible geographic features, city, town and country boundaries and undivided census tracts; and (iv) competitive districts should be favored as long as they do not cause detriment to the other goals.<sup>154</sup>

The Navajo Nation, the San Carlos Apache Tribe, and the Hopi Tribe were involved in litigation regarding the neutral redistricting criteria after the 2001 maps were created.<sup>155</sup> In order to satisfy the request of the Hopi Tribe to be in a separate district from the Navajo Nation, the Commission carved a 103-mile serpentine corridor through the unnavigable Colorado River.<sup>156</sup> This created two non-compact districts, separated forty-two Navajos from their community of interest, and split a census tract.<sup>157</sup> The Navajo Nation unsuccessfully challenged the congressional maps arguing that the Commission failed to create compact and contiguous districts. The court upheld the decision stating that it has flexibility in applying the neutral criteria.<sup>158</sup> The court stated that so long as there is a basis for a Commission's decisions, the final maps will be upheld.<sup>159</sup>

Tribes actively participated in the most recent redistricting process.<sup>160</sup> The Commission was aware of the Section 5 requirements, and adopted a district to "strengthen the ability of Native Americans to elect their candidates of choice."<sup>161</sup> This district includes the Navajo Nation, Hopi, Havasupai, Hualapai, Kaibab-Paiute, San Carlos Apache, White Mountain Apache, and Zuni Reservations.<sup>162</sup> It has a Native American voting age population of 63.7%.<sup>163</sup>

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154. *Id.*

155. *See* Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n, 121 P.3d 843, 847 (Ariz. Ct. App. 2005).

156. *Id.* at 849.

157. *Id.* at 869. Congressional District 2 was included in the Top Ten Most Gerrymandered Congressional Districts in the United States. *The Top Ten Most Gerrymandered Congressional Districts in the United States*, PJ MEDIA (Nov. 11, 2010), <http://pjmedia.com/zombie/2010/11/11/the-top-ten-most-gerrymandered-congressional-districts-in-the-united-states/>.

158. Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n, Ruling on Matter Taken Under Advisement 3, No. 2002-004380 (Nov. 6, 2003).

159. Ariz. Minority Coal. for Fair Redistricting, 121 P.3d at 870.

160. Ariz. Indep. Redistricting Comm'n., U.S. Dep't of Justice Submission under Section 5 of Voting Rights Act: IRC, State of Arizona Legislative Redistricting Plan 2-3 (Feb. 28, 2012).

161. *Id.* at 78.

162. *Id.* at 41.

163. *Id.* at 78.

## III. CURRENT CHALLENGES

In 2002, Arizona Indians turned out in record numbers, securing passage of a voter initiative to expand Indian gaming and contributing to the victory of Governor Janet Napolitano.<sup>164</sup> Governor Napolitano credited the Indian vote with her victory.<sup>165</sup> Proposition 202, the Indian Gaming Preservation and Self-Reliance initiative, was a ballot proposition initiated by seventeen of the twenty-two tribes in the State of Arizona.<sup>166</sup> The Arizona Indian Gaming Association and member tribes engaged in vigorous get-out-the-vote campaigns.

With the wave of Proposition 202 and the election of a tribal friendly governor, tribes and tribal citizens were actively participating in the election process. For example, in 2000, Native Americans successfully elected three representatives and one senator to the state legislature.<sup>167</sup> Similarly, in 2002, Native Americans elected candidates of choice for all of the state legislature positions in the only Native American majority-minority district.<sup>168</sup> No one seemed to be concerned about any threat to voter qualification changes or challenges to Native voting strength.

Things began to change in 2004, and voters began to experience setbacks at the polls. After the decennial redistricting, efforts were made to ensure that Flagstaff had non-Indian representation in the only Native American majority-minority district in the state. Voters in Flagstaff were encouraged to single shot vote for their candidate.<sup>169</sup> As a result, Native Americans were not able to elect their candidates of choice. Navajo incumbent Sylvia Laughter

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164. David Pittman, *80+% Support by Indians in Pima Boosted Napolitano*, TUCSON CITIZEN (Nov. 21, 2002), <http://tucsoncitizen.com/morgue2/2002/11/21/154133-80-support-by-indians-in-pima-boosted-napolitano/>; Tucker et al., *supra* note 84, at 292 (citing FIRST AMS. EDUC. PROJECT, NATIVE VOTE 2004: A NATIONAL SURVEY AND ANALYSIS OF EFFORTS TO INCREASE THE NATIVE VOTE IN 2004 AND THE RESULTS ACHIEVED 13, 19 (2005)); see ARIZ. SEC'Y OF STATE, STATE OF ARIZONA OFFICIAL CANVAS: 2002 GENERAL ELECTION 2, 14, <http://apps.azsos.gov/election/2002/General/Canvass2002GE.pdf>.

165. Daniel Kraker, *Tribes Turn Out to Vote*, HIGH COUNTRY NEWS (Aug. 16, 2004), <https://www.hcn.org/issues/280/14932>; ARIZ. SEC'Y OF STATE, *supra* note 164.

166. *Indian Gaming Proposition 202 Narrowly Wins Approval*, AZ DAILY SUN (Nov. 7, 2002), [http://azdailysun.com/indian-gaming-proposition-narrowly-wins-approval/article\\_46955cde-7fbd-5128-aa02-0e9a62e68348.html](http://azdailysun.com/indian-gaming-proposition-narrowly-wins-approval/article_46955cde-7fbd-5128-aa02-0e9a62e68348.html).

167. Debra Norris was elected to Legislative District 11, which represents the Tohono O'odham Nation. ARIZ. SEC'Y OF STATE, *supra* note 164, at 9. Albert Tom, Sylvia Laughter, and Jack Jackson were elected in Legislative District 3, the sole Native American majority-minority district. *Id.* at 4, 8.

168. *Id.* at 2, 6.

169. Seth Muller, *Kirkpatrick Claims Win for State House Seat*, AZ DAILY SUN (Nov. 3, 2004), [http://azdailysun.com/kirkpatrick-claims-win-for-state-house-seat/article\\_256c4cea-91e6-59c0-b271-3fbf7a9583a6.html](http://azdailysun.com/kirkpatrick-claims-win-for-state-house-seat/article_256c4cea-91e6-59c0-b271-3fbf7a9583a6.html).



was the candidate of choice on the Navajo Reservation, but she lost to Ann Kirkpatrick.<sup>170</sup> Further attempts to disenfranchise Indian voters occurred during the 2008 Arizona election when the candidacy of Navajo candidates were challenged because the addresses on the signature petitions included post office boxes and not physical addresses, an impossible task for reservation residents who do not have physical addresses. To date, no Indian has been elected to a statewide office.

Access to the polls began to be limited in other ways. These problems have been documented by the Arizona Native Vote Election Protection Project organized by the Indian Legal Clinic at the Sandra Day O'Connor College of Law.<sup>171</sup> Issues include problems with voter registration, voter ID, provisional balloting, voters being turned away at the polls, and voter intimidation. The biggest challenge for Indian voters in the past decade has been the voter ID law.

The unknown challenge is the impact the Supreme Court's decision in *Shelby County v. Holder* will have on voters in Arizona. In *Shelby County*, the Plaintiff filed suit in the District of Columbia seeking declaratory relief that Section 4(b) and Section 5 of the Voting Rights Act (VRA) are unconstitutional and sought to enjoin the enforcement of these sections of the VRA.<sup>172</sup> The Court expressly upheld the constitutionality of Section 5 under the 15th Amendment.<sup>173</sup> The Supreme Court did however find that the coverage formula needs to be updated. In finding Section 4b unconstitutional, the Court stated that "[t]he formula in that section *can no longer be used* as a basis for subjecting jurisdictions to preclearance."<sup>174</sup>

Section 5 has made a difference in Arizona.<sup>175</sup> Indian voters continue to suffer from some of the highest poverty rates and unemployment rates in the country. Testimony before Congress supporting reauthorization of Section 5 revealed that on Arizona tribal reservations, poverty rates are above 42% with Fort Yuma's rate exceeding 94%.<sup>176</sup> Tribal advocates provided evidence to

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170. *Id.*; see ARIZ. SEC'Y OF STATE, STATE OF ARIZONA OFFICIAL CANVAS: 2004 GENERAL ELECTION 7, <http://apps.azsos.gov/election/2004/General/Canvass2004General.pdf>.

171. Indian Legal Clinic, 2012 Arizona Native Vote—Election Protection Final Report (2013) (unpublished report) (on file with author) [hereinafter Indian Legal Clinic, 2012 Arizona Native Vote]; Indian Legal Clinic, 2014 Arizona Native Vote—Election Protection Final Report (2015) (unpublished report) (on file with author) [hereinafter Indian Legal Clinic, 2014 Arizona Native Vote].

172. 133 S. Ct. 2612, 2615 (2013).

173. *Id.* at 2629.

174. *Id.* (emphasis added).

175. Tucker et al., *supra* note 84, at 334–35.

176. *Voting Rights Act: Evidence of Continued Need*, *supra* note 106, at 1383 (appendix to the statement of Wade Henderson).

Congress for the need for Section 5's preclearance provisions in Arizona. This was demonstrated by not only the historical impediments to suppress the Indian vote, but the continuing effects of past discrimination and continuing voter suppression efforts that disenfranchise Indian voters.<sup>177</sup> As a result of the Court's holding in *Shelby County*, Arizona and other jurisdictions listed under the 2006 Section 4(b) coverage formula are no longer subject to Section 5's preclearance obligation.<sup>178</sup> To date, the coverage formula has not been updated.

#### A. Voter ID—A Step Backwards for Indian Voters

In 2004, Arizona voters approved Proposition 200, the “Arizona Taxpayer and Citizen Protection Act.”<sup>179</sup> Unlike other states that have enacted voter ID laws for the purported reason of combating voter fraud, Proposition 200 was enacted in order to “discourage illegal immigration.”<sup>180</sup>

Proposition 200 changed the in-person voting procedures to require all in-person voters to produce certain identification prior to receiving a regular ballot.<sup>181</sup> Proposition 200 amends the procedures for obtaining a ballot by an elector, by requiring an elector voting in person to “present one form of identification that bears the name, address and photograph of the elector or two different forms of identification that bear the name and address of the

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177. *Id.*

178. *Shelby County v. Holder*, 133 S. Ct. 2612, 2621 (2013) (invalidating the coverage formula for Section 5 preclearance).

179. Under Arizona law, ten percent of electors can propose statutory measures, and fifteen percent of electors can propose constitutional amendments through the Initiative process. ARIZ. CONST. art. IV, pt. 1, § 1(2). The legislature can also propose constitutional amendments to be referred to the ballot. *Id.* art. XXI, § 1. An initiative measure becomes law upon approval by a majority of the votes cast and upon proclamation of the Governor. *Id.* art. IV, pt. 1, § 1(5). The Governor has no veto power over initiative measures. *Id.* art. IV, pt. 1, § 1(6). Further, initiative measures can only be changed by (1) a court decision declaring the law invalid; or (2) a subsequent ballot measure. The Arizona Legislature has limited power to amend initiative measures and the legislature has no power to repeal initiative measures. *Id.* The Legislature can amend an initiative measure if the amendment furthers the purpose of the original measure upon three-fourths vote of the members of each house. *Id.*

180. *2004 Ballot Propositions: Proposition 200*, ARIZ. SEC'Y OF STATE (Sept. 2004), [http://apps.azsos.gov/election/2004/info/PubPamphlet/Sun\\_Sounds/english/prop200.htm](http://apps.azsos.gov/election/2004/info/PubPamphlet/Sun_Sounds/english/prop200.htm).

181. Proposition 200 also changed the voter registration requirements to require proof of citizenship. *Id.* Since tribal citizens can use their tribal enrollment numbers to establish citizenship using the state form, voter registration is not an issue for Arizona tribal members. *But see Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2252 (2013).

elector.”<sup>182</sup> Proposition 200 did not define “identification” nor did it limit the types of identification that can be used to obtain a ballot.

Then Secretary of State Jan Brewer developed a list of acceptable forms of identification found in the “Procedure for Proof of Identification at the Polls” (“Procedures”) for the stated purpose of implementing the new voter ID law. The Procedures limit the type of identification that can be presented by electors before receiving a ballot at the polls on Election Day. Arizona is less strict than other states in that voters can cast a ballot if they can produce either (1) a government-issued photo identification<sup>183</sup> with the elector’s name and registration address or (2) two of the following forms of identification with the voter’s name and registration address: current utility bill, bank or credit union statement, Indian census card, property tax statement, tribal enrollment card, tribal identification, vehicle insurance card, or a recorder’s certificate.<sup>184</sup> The name and address on these two documents must “reasonably” appear to be the same. The Procedures allow counties some discretion to accept other types of ID that meet the statutory requirements.<sup>185</sup> The Secretary of State did include a special provision entitled “Identification Requirement for Native American Electors” to obtain a provisional ballot if the voter presents a tribal ID with only the voter’s name.<sup>186</sup>

When the voter ID law was enacted, the Navajo Nation did not issue tribal IDs to its members. After Arizona developed voter ID requirements, the Navajo Nation considered creating a tribal ID program and requested monetary assistance from the Arizona legislature to develop such a system, but it received no offer of assistance. Navajo citizens do not need identification to obtain services on the Navajo Reservation or to vote in tribal elections. Under the Navajo belief system, identity is confirmed through the

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182. ARIZ. REV. STAT. ANN. § 16-579 (2006).

183. The Procedures allow voters to use the following forms of photo ID: a valid Arizona driver license, valid Arizona nonoperating identification license, tribal enrollment card or other form of tribal identification, or valid United States federal, state, or local government issued identification. Jan Brewer, Ariz. Sec’y of State, Proof of Identification at the Polls (Sept. 6, 2005) (on file with the author).

184. The Arizona Secretary of State adopted a list of documents acceptable under the statute, limiting the types of documents allowable under the new voter identification requirements. *Id.*

185. The Procedures also provide that “[o]ther forms of identification not on this list must be deemed acceptable by the county election official in charge of elections and must establish the identity of the elector in accordance with the requirements of A.R.S. § 16-579(A).” *Voters Need the Proper ID at the Polls*, DOUGLAS DISPATCH (Oct. 27, 2010), [http://www.douglasdispatch.com/news/voters-need-the-proper-id-at-the-polls/article\\_b22e0614-ed9c-5988-a124-f298ad087bd3.html](http://www.douglasdispatch.com/news/voters-need-the-proper-id-at-the-polls/article_b22e0614-ed9c-5988-a124-f298ad087bd3.html).

186. Brewer, *supra* note 183, at 4.

traditional kinship system, which is used in the everyday life of Navajos.<sup>187</sup> While the Navajo Nation has recently begun issuing identification cards, these are limited to individuals who can pay the \$17 fee and travel to Window Rock.<sup>188</sup> To create a tribal ID card that is available to all of its citizens, the Navajo Nation would be required to create an office and allocate operating funds in at least each of the five agencies located on the Navajo Reservation serving the Nation's 110 chapters.

Prior to the enactment of Proposition 200 in 2004, Navajo elder Agnes Laughter voted in nearly all tribal, state, and federal elections since this Court enjoined Arizona's literacy test in *Oregon v. Mitchell*, clearing the way for Navajos like Ms. Laughter to exercise their right to vote.<sup>189</sup> On September 12, 2006, Ms. Laughter went to vote at her usual polling location, the Chilchibeto Chapter House.<sup>190</sup> Two poll officials greeted her immediately before she entered the poll and asked if she had identification. She did not. They told her to wait outside while they went inside the Chapter House to speak with someone. Five minutes later, they emerged and invited her into the polling station.<sup>191</sup> Inside, Mary Yazzie, a poll worker, recognized Ms. Laughter and greeted her in the Navajo language. Ms. Yazzie acknowledged Ms. Laughter as her older sister through their maternal clan Red-Running-into-the-Water.<sup>192</sup> When she advised the precinct officials that she did not have identification and could not return within the statutory three days, she was asked to leave and was not given the opportunity to cast a provisional

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187. *Gonzalez v. Arizona*, No. 06-1268, 2006 WL 3627297, at \*58, \*60–63 (D. Ariz. Sept. 11, 2006) (testimony of Leonard Gorman), <http://moritzlaw.osu.edu/electionlaw/litigation/documents/ExhibitEx120.pdf>.

188. *Navajo Nation ID Cards Now on Sale*, ALBUQUERQUE J. (May 22, 2012, 6:32 AM), <http://www.abqjournal.com/108147/abqnewsseeker/navajo-nation-id-cards-now-on-sale.html>; Press Release, Navajo Nation, President Shelly Announces Distribution of Navajo Nation I.D. Card (May 21, 2012), [http://www.navajonnsn.gov/News%20Releases/OPVP/2012/May12/52112\\_PresidentShellyAnnouncesDistributionOfNavajoNationI.D.Card.pdf](http://www.navajonnsn.gov/News%20Releases/OPVP/2012/May12/52112_PresidentShellyAnnouncesDistributionOfNavajoNationI.D.Card.pdf).

189. At the time, the Court observed that “Arizona has a serious problem of deficient voter registration among Indians.” *Oregon v. Mitchell*, 400 U.S. 112, 132 (1970).

190. Aff. of Agnes Laughter ¶3, Agnes Laughter Election Grievance Form, ARIZ. SEC’Y OF STATE (2006). Chilchibeto is located north of the Navajo-Hopi partitioned lands, in the middle of the Navajo Reservation. According to the 2000 Census, Chilchibeto had a population of 1,325. Trib Choudhary, Navajo Nation Dep’t of Econ. Dev., NAVAJO NATION DATA FROM US CENSUS 2000, tbl.5. The population declined in 2010 to 1,165. U.S. CENSUS BUREAU (2010), <http://chilchibeto.navajochapters.org/us-census-2010-total-population-cch.pdf>.

191. Aff. of Agnes Laughter ¶4, Agnes Laughter Election Grievance Form, ARIZ. SEC’Y OF STATE (2006).

192. *Id.* ¶5.

ballot as required by the newly implemented Help America Vote Act.<sup>193</sup> The voter ID requirements denied Ms. Laughter an opportunity to cast a ballot in the Primary Election.<sup>194</sup>

Although Ms. Laughter and her family are well known in the community and the poll workers knew her, she was not permitted to vote.<sup>195</sup> The election officials, conscientious of their duties, had no choice under the Arizona statute but to deny her a regular ballot because she did not have ID.<sup>196</sup>

Agnes Laughter's lack of qualifying identification is representative of Navajos, who like Ms. Laughter, have no form of photo ID whatsoever.<sup>197</sup> Ms. Laughter was born at home, in a Hogan, and does not have a birth certificate.<sup>198</sup> She had never before needed a photo ID and uses her thumbprint as her signature.<sup>199</sup> Her tribe, the Navajo Nation, did not issue photo IDs to its members.<sup>200</sup> Because of this, she did not have a form of photo ID to meet the first requirement of the new voter ID law.<sup>201</sup>

Although she was only asked for photo ID, she also lacked two alternative forms of ID in order to obtain a ballot. Ms. Laughter's home lacked electricity; she did not have a phone, a property tax statement, a vehicle, or vehicle insurance.<sup>202</sup> She only had a certificate of Indian blood and a census coin. The certificate lacked an address, and the census coin only contained a number.<sup>203</sup> She lacked any of the required identification.

Because of the rural nature of most reservations in Arizona and the realities of life on the reservations, Native Americans like Ms. Laughter are

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193. *Id.* ¶¶5–6. Arizona has three types of ballots for in-person voting: regular ballot, provisional ballot, and conditional provisional ballot. If an elector does not provide proper identification, the elector will receive a conditional provisional ballot. The individual has until 5:00 P.M. on the fifth business day following a “general election that includes an election for a federal office” or three business days for any other election to present proof of identification to the county recorder's office. *See* Brewer, *supra* note 183.

194. *See* Second Aff. of Leila Help-Tulley, M.S.W. *Gonzalez v. Arizona*, No. 06-1268, 2006 WL 3627297 (D. Ariz. Aug. 30, 2006).

195. Brief for Nat'l Cong. of Am. Indians et al. as Amici Curiae Supporting Petitioners at 6, *Crawford v. Marion Cty Election Board*, 553 U.S. 181 (2008) (Nos. 07-21, 07-25), 2007 WL 3440943.

196. *Gonzalez v. Arizona*, No. 06-1268, 2006 WL 3627297, at \*17–21 (D. Ariz. Oct. 19, 2006) (deposition of Agnes Laughter).

197. Brief for Nat'l Cong. of Am. Indians et al. as Amici Curiae Supporting Petitioners at 7, *Crawford v. Marion Cty Election Board*, 553 U.S. 181 (2008) (Nos. 07-21, 07-25), 2007 WL 3440943.

198. *Id.* at 10, 14.

199. *Id.*

200. *Id.* at 3–4.

201. *Id.* at 7.

202. *Id.* at 14.

203. Complaint at 12, *Navajo Nation v. Brewer*, No. 06-1575 (D. Ariz. Jun. 6, 2006).

less likely than other electors to have the other forms of identification listed in the Procedures.<sup>204</sup> First, Native Americans living on the reservation do not receive property tax statements.<sup>205</sup> Property tax statements are not issued to tribal members living on Indian reservations. Second, Native Americans are less likely to have utility bills than other Arizona electors.<sup>206</sup> According to the 2000 Census, 33% of the housing units on the Navajo Reservation lack complete plumbing, 62% lack telephone service, over 56% of Navajo households are heated by wood, and traditional Navajos living in hogans do not have electricity and do not receive utility bills.<sup>207</sup> Even if a household has a utility bill, that bill will be issued in only one person's name. Third, Native Americans are less likely than other Arizona residents to have a vehicle insurance card or an Arizona vehicle registration card.<sup>208</sup> Fourth, Native Americans with bank accounts are unlikely to use their private banking information as a form of identification.<sup>209</sup> Fifth, most Navajos do not have tribal identification cards or census cards that contain an individual's name and address.<sup>210</sup> The Navajo Nation did not issue tribal identification cards.<sup>211</sup> Tribal and federal Certificates of Indian Blood contain only the individual's name and census number.<sup>212</sup> Some census numbers are provided only on coins and do not include an individual's name.<sup>213</sup>

In 2006, the Navajo Nation and Agnes Laughter filed a lawsuit seeking to enjoin the voter ID law, claiming that the law violated Section 2 of the Voting Rights Act, the Civil Rights Act, and denied Navajo voters equal

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204. *Id.* at 23.

205. Supplemental Brief of Petitioner at 4, *Gonzalez v. Arizona*, No. 06-1268, 2006 WL 3627297 (D. Ariz. Sept. 11, 2006), <http://moritzlaw.osu.edu/electionlaw/litigation/documents/MOTIONtoSupplementBriefRegardingVotingRightsActandCivilRightsActbyAgnesLaughter.pdf>.

206. *Id.*

207. *Id.*; Choudhary, *supra* note 190, at tbl.12.

208. Supplemental Brief of Petitioner at 4, *Gonzalez v. Arizona*, No. 06-1268, 2006 WL 3627297 (D. Ariz. Sept. 11, 2006), <http://moritzlaw.osu.edu/electionlaw/litigation/documents/MOTIONtoSupplementBriefRegardingVotingRightsActandCivilRightsActbyAgnesLaughter.pdf>.

209. *Id.*

210. *Id.*

211. *Id.* at 3; *Gonzalez v. Arizona*, No. 06-1268, 2006 WL 3627297, at \*17–21 (D. Ariz. Oct. 19, 2006) (deposition of Agnes Laughter).

212. Supplemental Brief of Petitioner at 4, *Gonzalez v. Arizona*, No. 06-1268, 2006 WL 3627297 (D. Ariz. Sept. 11, 2006), <http://moritzlaw.osu.edu/electionlaw/litigation/documents/MOTIONtoSupplementBriefRegardingVotingRightsActandCivilRightsActbyAgnesLaughter.pdf>.

213. *Id.*

protection.<sup>214</sup> The Inter Tribal Council of Arizona, comprised of 19 tribal nations, and other parties also filed a lawsuit to enjoin the voter ID law and the voter registration law implemented pursuant to Proposition 200. The court consolidated the actions.<sup>215</sup> Tribes were concerned with the disproportionate impact the new voter ID law has on reservation voters, specifically elderly limited English proficient voters. One day prior to the 2006 Primary Election, the court denied the motions for preliminary injunction based on equal protection violations, and voter ID requirements were imposed during the 2006 mid-term elections.<sup>216</sup> The court ordered a supplemental hearing in February 2007 on the Navajo Nation and Agnes Laughter's Voting Rights Act and Civil Rights Act claims as part of their motion for preliminary injunction.

The Arizona voter ID requirements disenfranchises Native American voters who, by their culture and circumstances, are less likely than other voters to have identification deemed acceptable by the State. Requiring Native American voters to provide voter identification is a continuation of Arizona's discriminatory practices. The voter ID law in Arizona resulted in a significant decrease in the number of Native Americans who voted during the 2006 elections.<sup>217</sup> During the 2006 election cycle, individuals were turned away from the polls if they did not have voter ID, not even allowed to cast a conditional provisional as required by law.<sup>218</sup> During the 2006 mid-term election, 428 Navajos living on the Navajo Reservation in Arizona completed conditional provisional ballots that were never verified with one of the statutory forms of ID, and, therefore, were never counted.<sup>219</sup> This means that at least 428 Navajos lacked ID to vote in the polls on Election Day. This number does not include individuals who did not fill out a provisional ballot because they knew they would not be able to return and produce the required identification or those who stayed home because they knew they could not meet the requirement.<sup>220</sup> Some Navajo elders reported that they would not be

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214. Complaint at 24, *Navajo Nation v. Brewer*, No. 06-1575 (D. Ariz. Jun. 6, 2006).

215. The consolidated case was *Gonzalez v. Arizona*, No. 06-1268, 2006 WL 3627297 (D. Ariz. Sept. 11, 2006).

216. Order Denying Preliminary Injunction at 8, *Gonzalez v. Arizona*, No. 08-17094 (9th Cir. Nov. 11, 2010), <http://moritzlaw.osu.edu/electionlaw/litigation/documents/Gonzalez-Order-11-11-10.pdf>.

217. Brief for the Navajo Nation et al. as Amici Curiae Supporting Respondents & Respondent-Intervenors at 33, *Shelby Cty. v. Holder*, 133 S.Ct. 2612 (2013) (No. 12-96) 2013 WL 432965.

218. See Agnes Laughter Grievance Election Form (Oct. 2, 2006).

219. Brief for Nat'l Cong. of Am. Indians et al. as Amici Curiae Supporting Petitioners at 8, *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008) (Nos. 07-21, 07-25).

220. *Id.* at 8 n.12.

voting in elections due to the voter ID requirements, and Election Day technicians in Coconino County, Arizona observed individuals who entered the polling place and walked out without voting during the 2006 Arizona Primary Election.<sup>221</sup>

The timing to ensure that Indian voters who lacked the required ID could participate in the upcoming 2008 presidential election was limited. In May 2007, the court denied the Navajo Nation's motion for a preliminary injunction based on violations under the Voting Rights Act and Civil Rights Act, and the trial on the merits would not be held until July 2008, only a few months before the 2008 primary and presidential elections. It was unlikely that the judge would issue a ruling prior to the November General Election, and the State had already held its presidential primary.

The Supreme Court ruled in April 2008 that Indiana's voter ID requirement was permissible. In *Marion County v. Crawford*, the Supreme Court found that rational restrictions on the right to vote are invidious if they are unrelated to voter qualifications.<sup>222</sup> It was debatable whether Arizona's voter ID law would suffer a similar fate. *Marion County* was a facial challenge to Indiana's election law requiring in-person voters to present government-issued photo ID. Unlike Arizona, no witnesses had yet been produced that would be impacted by the new law. The Supreme Court left open the possibility of an as-applied challenge. Further, the purpose of Arizona's law was not to protect voter integrity or to reduce fraud, it was to combat illegal immigration. Since non-citizens are not entitled to vote in Arizona, requiring ID to vote on Election Day does not seem to be a rational measure to combat illegal immigration. Since there was no evidence of voter fraud and the law was not proposed for that purpose, the State of Arizona could not claim that the voter ID law was an "evenhanded restriction[] that protect[s] the integrity and reliability of the electoral process itself" as announced in *Anderson v. Celebrezze*.<sup>223</sup>

While it was possible that the voter ID claims might succeed, it was not likely that the Judge would rule prior to the 2008 presidential election. In May 2008, the Indian plaintiffs settled the voter ID lawsuit by expanding the types of documents that Indian voters can use for identification in advance of the presidential election.<sup>224</sup> The revised Procedures for Proof of identification at the Polls expand the types of Tribal ID that can be used at the polls to include, but is not limited to:

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221. *Id.*

222. 553 U.S. 181, 189–90 (2008).

223. 460 U.S. 780, 788 n.9 (1983).

224. *Navajo Nation v. Brewer*, No. 06-1575 (D. Ariz. May 27, 2008) (order approving settlement agreement and dismissal).



- a tribal identification or enrollment card issued under the authority of a federally recognized Indian tribe, nation, community, or band (“tribe”), a tribal subdivision or the Bureau of Indian Affairs; or
- a Certificate of Indian Blood issued to a tribal member under the authority of a tribe or by the Bureau of Indian Affairs; or
- a voter registration card for tribal elections issued under the authority of a tribe; or
- a home site assignment lease, permit or allotment issued under the authority of a tribe, tribal subdivision, or by the Bureau of Indian Affairs; or
- a grazing permit or allotment issued to a tribal member under the authority of a tribe, tribal subdivision, or by the Bureau of Indian Affairs.<sup>225</sup>

The revised procedures should make voting easier for tribal voters on Election Day so long as election administrators follow the law and train poll workers on the revised procedures. It also allows for tribes or local tribal subdivisions to issue ID on Election Day. Many counties and the Secretary of State fail to adequately advertise that there is a special Native American provisional and that there is an expansive list of Tribal IDs.<sup>226</sup> In recent elections, voters were confused about the type of identification that they could use to vote on Election Day and did not know about the acceptable forms of Tribal ID. Further, many poll workers seemed unfamiliar with the types of ID allowable for Indian voters.<sup>227</sup> There are still some voters who fail to meet the voter ID requirements.<sup>228</sup> This can be either due to poorly trained poll workers, lack of information provided to voters about the ID requirements, or that voters simply do not have ID.

### B. Language Access Issues

The language minority requirements of the Voting Rights Act are included in Section 203 and Section (4)(f)(4) of the Voting Rights Act. Native Americans are a protected class, and Native languages are also considered

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225. *Id.* at 1–2.

226. The Secretary of State does not even list the special Native American provisional or the types of Tribal ID that voters can use on its website. *Voting in this Election*, ARIZ. SEC’Y OF STATE, <http://www.azsos.gov/elections/voting-election> (last visited Jan. 28, 2016).

227. LAWYERS’ COMM. FOR CIVIL RIGHTS UNDER LAW, THE 2014 ELECTION PROTECTION REPORT x (2015), <http://www.866ourvote.org/newsroom/publications/body/2014-Election-Protection-Report-Executive-Summary.pdf>; Indian Legal Clinic, 2014 Arizona Native Vote, *supra* note 171, at 7.

228. Indian Legal Clinic, 2012 Arizona Native Vote, *supra* note 171, at 24–31.

minority languages under the Voting Rights Act. Language minority provisions were adopted in 1975, and extended in 1982, 1992, and 2006. Congress adopted the language minority provisions because:

through the use of various practices and procedures, citizens of language minorities have been effectively excluded from participation in the electoral process. Among other factors, the denial of the right to vote of such minority group citizens is ordinarily directly related to the unequal educational opportunities afforded them resulting in high illiteracy and low voting participation. The Congress declares that, in order to enforce the guarantees of the fourteenth and fifteenth amendments to the United States Constitution, it is necessary to eliminate such discrimination by prohibiting these practices, and by prescribing other remedial devices.<sup>229</sup>

The illiteracy rate for Arizona Indians is nineteen times the national illiteracy rate.<sup>230</sup> The 2000 Census data reported that 21.4% of American Indians are limited English proficient.<sup>231</sup> Because many Indian languages in Arizona are oral and are not written,<sup>232</sup> the language minority provisions are necessary to ensure that Indians can effectively exercise their right to vote.<sup>233</sup> Over one-third, 11,377 persons, of the Native American voting age population in Apache County was limited-English proficient.<sup>234</sup> Under the language minority provisions, election officials in Arizona must provide “any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots” in the language of the applicable language minority group as well as in

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229. 52 U.S.C. § 10503(a) (2006).

230. Arizona has inadequate English as a Second Language and adult ELL courses to help bridge the language gap. *Voting Rights Act: Evidence of Continued Need*, *supra* note 106, at 1367, 1379 (appendix to the statement of Wade Henderson).

231. *Id.* (many American Indian and Alaska Natives continue to speak in their tribal language and many do not speak English well).

232. *United States v. McKinley Cnty.*, 941 F. Supp. 1062, 1064 (D. N.M. 1996); *see also Continuing Need for Section 203’s Provision for Limited English Proficient Voters*, *supra* note 2, at 498–99 (2006) (statement by Alfred Yazzie).

233. *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. 10 (2006) (testimony of Bradley Schlozman).

234. *2006 Voting Rights Act: Sections 6 and 8—The Federal Examiner and Observer Program*, *supra* note 132, at 14 (statement of Penny Pew).

English.<sup>235</sup> Arizona must provide election materials in both English and Spanish statewide.

Attempts to limit government business to English-only is a threat to Indian voters' participation in the political process. In 1998, the Arizona Supreme Court struck down an amendment to the Arizona Constitution, Article XXVIII, enacted by the Arizona voters in November 1988 requiring that all government business be conducted in "English and no other language."<sup>236</sup> This would have impeded the ability of Navajo elected officials to meet and discuss issues with their non-English speaking constituents.

A legislative report prepared in support of renewing the language provisions of the Voting Rights Act found that Native language speakers experience hardships when attempting to vote, because of their limited ability to speak English and inability to read the ballots.<sup>237</sup> Congressional testimony highlighted the many Indians, especially elders, who "speak English only as a second language."<sup>238</sup> The minority language protections require that covered jurisdictions provide assistance to Indian voters who may have little or no formal education and who may speak English only as a second language. The right to language translations is important for Indians to have equal access to the ballot box.<sup>239</sup>

Nine Arizona counties are covered under Section 203 for American Indian languages: Apache, Coconino, Maricopa, Mohave, Navajo, Pima, Pinal, Yavapai, and Yuma and must provide all election materials, including assistance and ballots, in the language of the applicable language minority group. Of these counties, four—Navajo, Apache, Coconino and Pinal—were covered under Section 5 and were required to have all materials and procedures precleared.<sup>240</sup> Pursuant to Section 203 of the Voting Rights Act,

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235. Covered jurisdictions are determined after each census based upon a formula established in the Voting Rights Act. 52 U.S.C. § 10503(c) (2006).

236. Ruiz v. Hull, 957 P.2d 984, 996 (Ariz. 1998); see also Yniguez v. Mofford, 730 F. Supp. 309, 314 (D. Ariz. 1990) *aff'd in part, rev'd in part*, 939 F.2d 727 (9th Cir. 1991), *vacated and remanded by* Arizonans for Official English et al. v. Arizona, 520 U.S. 43 (1997) (under the constitutional amendment, Native American state legislators would be violating "their sworn oaths to obey the state constitution, and thereby subject themselves to potential sanctions and private suits," if they spoke to their constituents in their native languages).

237. H.R. REP. NO. 109-478, at 45–46 (2006).

238. *Id.* at 49; *Continuing Need for Section 203's Provision for Limited English Proficient Voters*, *supra* note 2, at 309 (letter by Joe Garcia, Nat'l Cong. of Am. Indians).

239. *Continuing Need for Section 203's Provision for Limited English Proficient Voters*, *supra* note 2, at 310 (letter by Joe Garcia, Nat'l Cong. of Am. Indians).

240. See Voting Rights Act Amendments of 2006, Determinations under Section 203, 76 Fed. Reg. 63602, 63603 (Oct. 13, 2011), [http://www.justice.gov/sites/default/files/crt/legacy/2011/10/13/2011\\_notice.pdf](http://www.justice.gov/sites/default/files/crt/legacy/2011/10/13/2011_notice.pdf).

language assistance must be provided in tribal languages in the following jurisdictions:<sup>241</sup>

Apache County*	Apache, Navajo, Zuni
Coconino County*	Havasupai, Hopi, Navajo
Gila County	Apache
Graham County	Apache
Maricopa County	Pima, Yavapai
Navajo County*	Apache, Hopi, Navajo
Pima County	Pima
Pinal County*	Apache, Pima
Yuma County	Delta River Yuma, Yuma

Unlike Spanish, many Native languages in Arizona are unwritten/oral languages. Oral assistance must be provided to those voters who lack English proficiency.

Language minority provisions have increased opportunities for Indian voters, when the law is followed. Even though Navajo and Apache Counties agreed to establish minority language programs to better assist Indian voters pursuant to consent decrees,<sup>242</sup> the Department of Justice identified situations in which ineffective language assistance was offered to Indian voters in Apache County, Arizona.<sup>243</sup> A Department of Justice consultant testified before Congress about how lack of language assistance precludes Indian voters from casting meaningful ballots.<sup>244</sup> The federal observer program helped to reveal deficiencies and problems complying with the minority language provisions.<sup>245</sup> When federal observers are not present, officials fail

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241. \*Counties with an asterisk were also covered under Section 4(f) of the Voting Rights Act which subjected the jurisdiction to the Preclearance Provisions of Section 5 of the Voting Rights Act.

242. *United States v. Arizona*, No. 88-1989 (D. Ariz. May 22, 1989, amended Sept. 7, 1993) (consent decree); *Voting Rights Act: Section 203—Bilingual Election Requirements (Part I)*, *supra* note 233, at 99 (appendix to the statement of Bradley J. Schlozman).

243. *Voting Rights Act: Evidence of Continued Need*, *supra* note 106, at 1367 (appendix to the statement of Wade Henderson).

244. Brief for Nat'l Cong. of Am. Indians et al. as Amici Curiae Supporting Petitioners at 36, *Crawford v. Marion Cty Election Board*, 553 U.S. 181 (2008) (Nos. 07-21, 07-25), 2007 WL 3440943.

245. *Continuing Need for Section 203's Provision for Limited English Proficient Voters*, *supra* note 2, at 414, 492, 500 (statement of Alfred Yazzie).

to post the required notices at polls, incorrectly translate ballots, rush voters who are casting ballots, and fail to make assistance available to voters.<sup>246</sup>

The Navajo Nation Election Administration reviews and approves all Navajo language translations used by Apache, Coconino, and Navajo Counties for use on reservation precincts. The translations include radio and print announcements, ballots, audio tapes, other election material, and poll working training materials. However, many times this material is not completed in time for early voting. Further, since many Indian voters do not speak the English language, access for Indian voters is limited to in-person voting. Because of the practical realities of life on the reservation, most Native American speakers do not have the same access to early voting, subjecting them to the heightened ID requirements.

### C. *Early Voting Opportunities*

The Arizona voter ID requirement applies only to electors voting in person on Election Day. No similar voter ID procedures are required by electors voting by mail. Proposition 200 did not amend the process for voters to obtain an early ballot or to cast an early ballot. To obtain an early ballot, the elector must make a verbal or signed request to the county recorder or other officer in charge for an official early ballot.<sup>247</sup> The elector shall provide his/her name, address, date of birth, county or state of birth, or other information to confirm the elector's identity. The elector must sign an affidavit on the ballot envelope swearing that he/she is the individual casting the ballot.<sup>248</sup> Early votes are counted pursuant to signature verification.<sup>249</sup>

Arizona Indian voters do not participate in early voting at high levels, and reservation voters have less opportunities than off-reservation voters to cast an early ballot. While the task of downloading a registration form from the internet, printing it out, completing it, and mailing it to the county recorder is simple for the majority of Arizona citizens, this is not the case for Indians, many of who do not even have access to internet.<sup>250</sup> Indian Country lacks the basic infrastructure necessary to make early voting by

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246. *Id.* at 500–01.

247. ARIZ. REV. STAT. ANN. § 16-542 (2015).

248. *Id.* § 16-547 (2011).

249. *Id.* § 16-550 (2007).

250. Not only are Indian tribes physically isolated, they are technologically isolated as well. The Federal Communication Center's National Broadband Plan includes some key findings regarding telecommunications services on tribal lands. *See Native Nations*, NATIONAL BROADBAND MAP (June 30, 2014), <http://www.broadbandmap.gov/summarize/native-nations>.

mail work for Indian voters. Voters like Ms. Laughter lack internet, phone, and do not receive mail at their home. Further, elders such as Ms. Laughter need and have a right to language assistance to request and complete the ballot. Coconino County illustrates the major differences in on and off reservation voters. In the 2004 General Election, 64% of the electors living in non-reservation precincts voted at the polls, while 91% of electors living in reservation precincts voted at the polls.<sup>251</sup> This means that only 9% of reservation voters participated in early voting, while 46% of off-reservation voters cast an early ballot.

While voters can also complete an early ballot in person, most early voting locations are located off-reservation, requiring a great distance to travel, as well as transportation.<sup>252</sup> Polling locations and voter registration sites on reservations are often located at substantially greater distances from voters, than sites located off reservation.<sup>253</sup> Further distances means a greater cost incurred to exercise one's vote.<sup>254</sup> Registering to vote is also an obstacle as a majority of counties bordering reservations limit registration locations to off-reservation towns.<sup>255</sup> The ability to travel assumes that tribal members have access to cars or public transportation, which is not always the case. The census indicates that American Indians are twice as likely to have no vehicle available to them and there are not public transportation systems available to most Indians.<sup>256</sup> Making early voting available at the county seat, while not providing Indians living on the reservation with the same access to early voting sites, has the practical effect of providing more voting resources to one community than another, or—more specifically—valuing the non-Indian vote over the Indian vote.

Indian voters are not afforded the same opportunity to vote by early ballot as non-Indian voters. While the discriminatory impact may be unintentional, non-Indian voters have a greater opportunity to avail themselves of the less

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251. *Voting Rights Act: Evidence of Continued Need*, *supra* note 106, at 1380, 1411–12 (appendix to the statement of Wade Henderson).

252. The lack of transportation compounds the problem and results in less opportunity for Native Americans to participate in early voting. *See* Tucker et al., *supra* note 84, at 293.

253. *Voting Rights Act: Evidence of Continued Need*, *supra* note 106, at 1411–12 (appendix to the statement of Wade Henderson).

254. *Id.*

255. *Id.*

256. “The 2000 [C]ensus indicates that American Indians are twice as likely to have no vehicle available to them—14%, compared with 7% in the general population—and only about 6% of tribes have a public transportation system.” Brief for Nat’l Cong. of Am. Indians as Amicus Curiae, *Wandering Medicine v. McCulloch*, 2013 WL 1452761, at \*11 (9th Cir. 2013) (citing BUREAU OF INDIAN AFFAIRS, TRANSPORTATION SERVING NATIVE AMERICAN LANDS: TEA-21 REAUTHORIZATION RESOURCE PAPER (2003)).

burdensome early voting process. To create heightened requirements for those voters who vote in person on Election Day than for those voters who participate in early voting in and of itself is a discriminatory practice. A federal court in Louisiana found absentee ballot practices discriminatory when African Americans were not provided the same opportunities to vote by early ballot as white individuals.<sup>257</sup> In *Brown*, the court held that making absentee ballots available to white individuals in their private residences without extending the same opportunity to African American residents constituted unlawful discrimination, however unintentionally this result may have come about.<sup>258</sup>

#### IV. STRATEGIES TO PROTECT THE INDIAN VOTE

The United States Supreme Court has recognized that “[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live.”<sup>259</sup> A review of the history of Native American voting rights in Arizona, coupled with the continued changes in voting practices which hinder the opportunity of Native American voters to effectively participate in federal and state elections, enables us to understand the importance of taking proactive measures to protect Native American voting rights in Arizona. Recent legislation to require identification at the polls significantly undermines the advances achieved by Native Americans to secure the right to vote. With the removal of Section 5 preclearance, tribes need to be vigilant to protect the Indian vote. However, litigation to enforce voting rights is not a sufficient alternative to Section 5 coverage. Litigation is not quick, easy, or cost-efficient. Tribes cannot afford to challenge every law that impacts Indian voting rights.<sup>260</sup> Therefore, nonlitigation strategies should be developed to protect the Indian vote. One successful strategy recently occurred when Arizona tribes participated in the 2010 redistricting process, creating a robust Native American majority-minority legislative district that includes eight Indian reservations and has a Native American population of 66.9%.<sup>261</sup>

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257. *Brown v. Post*, 279 F. Supp. 60, 64 (W.D. La. 1968).

258. *Id.*

259. *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

260. *To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 715 (2005) (statement of O.J. Semans).

261. See ARIZ. INDEP. REDISTRICTING COMM., *State of Arizona Legislative Redistricting Plan* 41 (Feb. 28, 2012), <https://web.law.asu.edu/Portals/30/Files/2012-02-28%20State%20of%20Arizona%20Legislative%20Redistricting%20Plan%20Submission.PDF>.

The goal of ensuring Indian voter participation requires a multi-layered approach. This section will discuss two strategies—election protection and early voting. The key to success using either strategy is coordination with county and state officials. First, there needs to be more resources dedicated to election protection so that Indian voters' rights are protected. There also needs to be recognition of the problems that exist and a willingness by county and state officials to address them. Second, counties should provide more access to early voting. Further, when voter inequities are identified, tribal leadership should meet with county, state and federal officials to address concerns. While litigation is costly, Tribes should request DOJ to intervene and evaluate potential litigation if tribal rights are violated.

#### *A. Arizona Native Vote Election Protection Project*

This subsection will focus on the use of the Native Vote Election Protection Project to help document and address Indian voting issues, and other recommendations from data obtained through the project. One of the most important tools for voters is having a voice when they are denied the opportunity to vote. Filing a complaint after the election under the Help America Vote Act, does not provide a remedy to the voter the day of the election. The Arizona Native Vote Election Protection Project seeks to protect voter rights in real time during elections.

The Arizona Native Vote Election Protection Project was developed in 2008 after a meeting between the Inter Tribal Council of Arizona, the Arizona Indian Gaming Association, and the Indian Legal Clinic at the Arizona State University Sandra Day O'Connor College of Law to discuss voter disparities in Indian Country as a result of the 2004 voter identification law. Past attempts at voter protection efforts were uncoordinated, and national election protection organizations and state political parties had not and were not planning on providing assistance to Arizona's reservation voters. The group decided that Arizona tribes would be better served by a coordinated effort with a specific hotline for Arizona Indian voters as opposed to using a national hotline. The Indian Legal Clinic drafted a voter protection plan based on those discussions. The plan included stationing trained volunteers at polls where voting irregularities previously had been reported, having in-house tribal counsel serve as on-call volunteers, and creating or hosting a hotline staffed by knowledgeable attorneys to answer on-the-spot challenges to individuals trying to vote. The Clinic recruited Arizona State University

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The Indian Legal Clinic at the Sandra Day O'Connor College of Law created a redistricting guide for tribes and tribes participated in most, if not all, commission hearings.



Indian Legal Program alumni, students, and members of the Native American Bar Association of Arizona to serve as pro bono legal advisors in order to respond to Election Day disputes.

The objective of the Election Protection Project is to reduce the number of tribal members turned away from polling sites because of improper identification, language barriers, misinformation regarding voting laws, and voter intimidation tactics.<sup>262</sup> The Native Vote Election Protection Project was developed to ensure access to the polls and to prevent voter disenfranchisement. The project has three primary goals:

- Identify and address potential voter issues prior to Election Day.
- Train and maintain a dedicated and reliable network of volunteers to respond to voting incidents on Election Day in order to protect Native Americans from voter intimidation and disenfranchisement.
- Collect data illustrating voting obstacles.<sup>263</sup>

Since 2008, the Election Protection Project has documented incidents that have limited Indian voters' access to the ballot box. These incidents can be described in the following categories: registration, questionable poll judge behavior, blatant intimidation by police, misapplication of voter ID laws and procedures, long lines, and voting machine incidents. Based on the documentation of voter intimidation by the Native Vote Election Protection Project at the Guadalupe polling location in 2008 and 2010, the Department of Justice decided to monitor the Guadalupe polling location.<sup>264</sup> The Project has assisted hundreds of voters to resolve voting issues on Election Day.

One of the issues documented by Native Vote is how address issues for reservation Indians have been used as an obstacle to voting. Prior to the 2004 voter ID law, voters were not required to show ID to vote, and poll workers were prohibited from asking for ID.<sup>265</sup> On most Indian reservations in Arizona, an individual's "address" on a reservation is not specifically described by a street number, rural route number, lot and block or metes and bounds. Addresses typically describe the location of a residence by distance from a landmark, such as a Chapter House or mile post marker. The same

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262. See *Arizona Native Vote Election Protection Project*, SANDRA DAY O'CONNOR COLLEGE OF LAW, <https://web.law.asu.edu/ilc/Admin/NativeVoteArizona.aspx> (last visited Jan. 28, 2016); *Election Protection*, NATIVE VOTE (2014), <http://www.nativevote.org/page/election-protection>.

263. Indian Legal Clinic, 2014 Arizona Native Vote, *supra* note 171, at 2.

264. Megan Cassidy, *DOJ to Monitor Primary Elections in Guadalupe*, ARIZ. REPUBLIC (Aug. 1 2014), <http://www.azcentral.com/story/news/local/tempe/2014/08/01/departement-of-justice-guadalupe-arpaio-abrk/13481557/?from=global&sessionKey=&autologin=>.

265. Ian Urbina, *Voter ID Battle Shifts to Proof of Citizenship*, N.Y. TIMES (May 12, 2008), [http://www.nytimes.com/2008/05/12/us/politics/12vote.html?pagewanted=1&\\_r=0](http://www.nytimes.com/2008/05/12/us/politics/12vote.html?pagewanted=1&_r=0).

address can appear in several different formats that may make comparison difficult. Because of the rural nature of the most reservations, mail is not delivered to an individual's home address but to a post office box or trading post. If the individual cancels or does not renew his/her post office box, then the individual will not receive election mail sent by the counties. In the State of Arizona, a number of residents lack a driver's license; and even though a Native American may have an Arizona driver's license or operating card, the address may not be correct. If an individual seeks to change his/her address with the Department of Motor Vehicles, an individual must pay a fee in order to obtain a new card. While the identification documents acceptable at the polls may be commonly held by non-Indian voters, Native Americans do not commonly have these alternative documents.

In 2012, voters were turned away at the polls because of address issues. Two specific examples uncovered by Native Vote demonstrate the disenfranchisement of validly qualified and registered voters. First, in Apache County, Native Vote learned that over 500 registered voters were placed on a "suspense list" because the County was not sure which precinct to assign them.<sup>266</sup> Native Vote provided education on this issue to Indian voters, including public service announcements on KTNN, the Navajo Nation radio station. Election protection volunteers also encouraged voters to have poll workers check the suspense list if they were denied a ballot. Poll workers should be trained on these issues, and efforts should be made by Apache County to work with Navajo Nation officials to ensure that voters are placed in the correct polling precinct so that they are not removed from the voter rolls.

Second, in Pinal County, reservation voters were assigned the address of their voting precinct on the voting roster—the tribal district service center, further compounding the voter ID problem.<sup>267</sup> According to Arizona law, the signature roster must include both the physical and mailing addresses if they are different.<sup>268</sup> The residence address is required to place voters in a polling

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266. Aura Bogado, *Democracy in "Suspense": Why Arizona's Native Voters are in Peril*, THE NATION (Oct. 18, 2012), <http://www.thenation.com/article/democracy-suspense-why-arizonas-native-voters-are-peril/>.

267. Letter from Michelle Forney, Elections Director, Pinal County, to Maria Peralta (Sept. 1, 2015) (on file with author); Correspondence from Rachel Silvas Chief Registrar, Pinal County, to author (Oct. 30, 2014) (on file with author).

268. When a person registers to vote, the applicant must include the residence address and a mailing address, if different from the residence address, including a post office address, city or town, zip code or other designation used by the registrant for receiving mail. ARIZ. REV. STAT. ANN. § 16-152(A) (2011). This information is used to create the signature rosters. ARIZ. REV. STAT. ANN. § 16-168(B) (2012). According to the Secretary of State's Election Manual, both the

precinct, and the mailing address is used to send official election mail. However, when the mailing address and residence address are different, both should be included on the signature roster. This is especially important in Arizona Indian Country because many reservations do not receive mail at home but may have the residence address on the driver's license or identification. Despite voters who submitted a residential address or residential address description when registering to vote, Pinal County replaced this address with the tribal district service center.<sup>269</sup> No voters would list the district service center as their residential address on any ID. In 2012, this resulted in qualified voters being turned away or required to vote provisional ballots in Pinal County.<sup>270</sup>

Address issues result in voters either not voting, or filing provisional ballots. During a recent field hearing held by the National Commission on Voting Rights, Gregory Mendoza, former Governor of the Gila River Indian Community testified about the overuse of or confusion about when to offer provisional ballots and the address challenges for tribal members.<sup>271</sup>

County officials have discretion to train poll workers to either disenfranchise or empower voters through address acceptance or manipulation. In Coconino County, for example, at least one-third of voters lack situs descriptions. Notwithstanding, the county trains pollworkers to accept any ID that reasonably matches the voter rolls.<sup>272</sup> Similarly, other counties should not deny tribal voters a regular ballot because the county replaced the voter's residential address with the district service center address. Counties should be required to review their voter rolls and correct the inaccuracies. Further, poll workers need to be trained to not turn voters away, because all voters are entitled to at least a provisional ballot under the

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mailing address and residence address should be on the signature roster. ARIZ. SEC'Y OF STATE, ELECTION PROCEDURES MANUAL 153 (2014), [https://www.azsos.gov/sites/azsos.gov/files/election\\_procedure\\_manual\\_2014.pdf](https://www.azsos.gov/sites/azsos.gov/files/election_procedure_manual_2014.pdf).

269. In 2014, the author reviewed the VAN and noted that all voters in Gila River Indian Community Reservation Precincts were listed as having the relevant district service center as their residential address.

270. Indian Legal Clinic, 2012 Arizona Native Vote, *supra* note 171, at 7–8; Indian Legal Clinic, 2014 Arizona Native Vote, *supra* note 171, at 4–5.

271. Tova Wang & Maria Peralta, *Improving Elections in the United States: Voices from the Field*, NAT'L COMMISSION ON VOTING RIGHTS 36, 66 (Sept. 22, 2015), <http://votingrightstoday.org/ncvr/resources/electionadmin>.

272. Conversation between Coconino County Recorder and author (Dec. 10, 2015) (notes on file with author); *see* ARIZ. SEC'Y OF STATE, *supra* note 268, at 153.

Help America Vote Act.<sup>273</sup> The Arizona Native Vote Election Protection Project has developed a plan and is working with its partners to resolve the address disparity issue prior to the 2016 General Election.

One option to consider for voters who face address issues is same-day voter registration. Same-day voter registration would alleviate address and voter registration issues.<sup>274</sup> Same-day voter registration in Arizona would allow those who have moved or whose addresses do not match the voting rosters to be able to re-register on Election Day and vote that same day.

Election Protection has helped to uncover problems faced by Indian voters. To improve Election Protection, Arizona law should be changed to allow for nonpartisan volunteers to be stationed inside the polls. Currently, Arizona law limits access inside the polls to political observers/challengers for partisan elections.<sup>275</sup> Election Protection could be improved by allowing nonpartisan election protection volunteers to be located inside the polls in order to fully document and identify voting issues.

### B. *Equal Access to Early Voting*

Another strategy to improve access to the ballot box for Native Americans is to provide equal access to early voting for reservation voters. With voter ID requirements in place for in-person voting, electors without ID or only one form of tribal ID must complete a provisional or conditional provision ballot. An elector without the required ID may cast a conditional provisional ballot, but that ballot will not be counted unless the elector returns within three or five days with identification. Returning to the County Recorder to provide identification is not possible for many Indian voters who lack transportation, resources, and identification.<sup>276</sup> This process denies the voting rights of Native American electors.<sup>277</sup> Given the social and historical conditions faced by Indian voters, and the impact of voter ID on Indian voters, there are certain

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273. Under the Help America Vote Act, a person who affirms that he is a registered voter and is eligible to vote in the election, must be given a provisional ballot. H.R. 3295, 107th Cong. § 302(a) (2002).

274. According to the National Conference of State Legislatures, eleven states have implemented same-day registration, and another three have enacted legislation. *Same Day Voter Registration*, NAT'L CONF. ST. LEGISLATURES (June 2, 2015), <http://www.ncsl.org/research/elections-and-campaigns/same-day-registration.aspx>.

275. ARIZ. REV. STAT. ANN. § 16-590 (1996).

276. Testimony of Leonard Gorman, Prel. Inj. Tr. 56, 66–68, *Gonzalez v. Arizona*, No. 06-1268, 2006 WL 3627297 (D. Ariz. Aug. 30, 2006); Second Aff. of Leila Help-Tulley, M.S.W., *Gonzalez v. Arizona*, No. 06-1268, 2006 WL 3627297 (D. Ariz. Aug. 30, 2006).

277. See *Thompson v. Willson*, 155 S.E.2d 401, 404 (Ga. 1967) (“A refusal to count [an elector’s] vote completely ignores it and is tantamount to a refusal to allow him to cast it.”).

strategies that could assist in ensuring that Indian voters continue to participate in voting and that their ballots are counted.<sup>278</sup>

One option to overcome the voter ID obstacle is to request counties to establish early voting locations on Indian reservations so that Indian voters have equal access to the polls. Arizona law allows counties to establish on-site early voting locations if “deemed necessary or appropriate.”<sup>279</sup> Persons who can and do participate in early voting are not required to present ID, only their signature. Persons voting at the polls, must provide a signature and either one form of identification or two forms of identification in order to vote. Native American voters directly impacted by the voter ID law do not currently have the same access to early voting as their off-reservation neighbors. Early voting would be a step forward in providing equal access to the polls. Tribes could work with local county officials to provide early voting locations for this purpose.

The problem with the voter ID law is that it places greater burdens on certain types of voters. Early voters only have to provide their signature. Another option to overcome the voter ID obstacle is to remove the inequity of signature verification by allowing voters who lack ID on Election Day to have their ballots processed through signature match. Counties can easily verify ballots of voters who lack ID through a signature match, the same way in which early ballots are verified. If the goal of Proposition 200 is to reduce illegal immigration, verifying a person’s signature would not thwart the intent of Proposition 200. If the goal of Proposition 200, however, is to prevent qualified voters from casting a ballot, enforcing the voter ID law through the use of conditional provisional ballots will achieve that result.

If counties do not provide sufficient access to early voting or some other alternative means of voting, and Native Americans continue to be disproportionately impacted by the application of voter ID laws, Indian voters may consider filing a vote denial claim under Section 2 of the Voting Rights Act. Tribal citizens could claim that the lack of early voting opportunities “interacts with surrounding racial discrimination in a meaningful way” to disproportionately impact Native American voters.<sup>280</sup>

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278. *Farrakhan v. Washington*, 338 F.3d 1009, 1018 (9th Cir. 2003); *Ortiz v. City of Philadelphia*, 28 F.3d 306, 310–16 (3d Cir. 1994) (recognizing that Section 2 violations occur when challenged voting practices interact with social and historical conditions to deny minorities equal access to the political process).

279. ARIZ. REV. STAT. ANN. § 16-246 (2011).

280. See Brief for Nat’l Cong. of Am. Indians as Amicus Curiae, *Wandering Medicine v. McCulloch*, 2013 WL 1452761, at \*16-19 (9th Cir. 2013); *Farrakhan*, 338 F. 3d at 1016.

## V. CONCLUSION

Although Arizona's indigenous people have a right to maintain their separate governance systems, they also have a right to fully participate in the electorate of the state and federal governments. Arizona Indians have fought not only for the rights to maintain and protect their respective cultures and traditions, they have also fought to protect the freedoms embodied through our representative democracy. Despite their sacrifices, Arizona Indians were denied the right to vote for half a century after they received citizenship. The road to full participation in the electoral process has been long, with roadblocks, detours, and speedbumps. There is still work to be done to ensure equal access for Indian voters.

The Native American vote does make a difference. Without a vote, Native people lack a voice in local, state, and federal politics. These policies impact tribal life. History teaches us that tribes and tribal advocacy groups need to stay vigilant so that Indian voters are protected. This includes educating tribal citizens on voting changes and voting laws and being proactive. Tribes should continue to work together to combat the processes that may impede the right of Native Americans to participate effectively in the electoral process. This includes assigning tribal attorneys to participate in the Native Vote Election Protection Project. Election Protection has been an effective tool in uncovering problems faced by Indian voters. Election Protection data and reports should continue to be used to resolve voting issues in between major elections.

Tribes and tribal advocacy groups should work with officials to advocate for changes to the law and processes that will improve voting not only for Indians, but for all Arizonans. If tribes are unsuccessful in convincing local, state, and federal authorities to provide equal access to the polls and to protect Indian voting rights, litigation is still an option. While Section 2 is not an optimal route given the expense and time, without Section 5 protections, it may be required. This is all the more reason why tribes need to keep a watchful eye to ensure that voting changes are not made that will impede the right to vote.