



**Written Statement of Matthew Campbell
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For a Hearing on

**Voting in America: The Potential for Voter ID Laws, Proof-of-Citizenship Laws,
and Lack of Multi-Lingual Support To Interfere with Free and Fair Access to the
Ballot**

**Submitted to the Committee on House Administration,
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I. Introduction

Thank you Chairman Butterfield, Ranking Member Steil, and Members of the Committee for having me testify on the impacts voter identification laws and access to language assistance have in Indian country. My name is Matthew Campbell and I am an enrolled member of the Native Village of Gambell in Alaska. I am also staff attorney with the Native American Rights Fund (“NARF”).

NARF is a non-profit organization focusing on applying existing laws and treaties to ensure that states and the federal government fulfill their legal obligations. Since 1970, NARF has provided legal assistance to Indian tribes, organizations, and individuals nationwide who might otherwise have gone without adequate representation. NARF has successfully asserted and defended the most important rights of Native Americans¹ and tribes in hundreds of major cases in critical areas such as tribal sovereignty, treaty rights, natural resource protection, and Indian education.

NARF is headquartered in Boulder, Colorado, with offices in Washington, D.C., and Anchorage, Alaska. NARF is governed by a volunteer board of directors composed of thirteen American Indian and Alaska Native individuals with expertise in American Indian issues from different tribes throughout the country. A staff of eighteen attorneys handles over fifty major cases at any given time, which are accepted based on their breadth and potential importance in setting precedents and establishing important principles of Indian law.

II. Legal and Historical Background of Native American Disenfranchisement

Throughout history, states have actively resisted Native American participation in American democracy. For example, even after the passage of the Fifteenth Amendment, Minnesota’s Constitution prohibited Indians from voting unless they “adopted the language, customs and habits of civilization.”² South Dakota passed a law in 1903 that prevented Indians from voting while “maintaining tribal relations.”³ In North Dakota, the State Supreme Court in 1920 granted only those Indians who had assimilated the right to vote because they “live the same as white people . . . [and requiring] that they have severed their

¹ I use the term Native American and American Indian interchangeably throughout this statement.

² Minn. Const., art. VII, § 1(4) (1858).

³ S.D. Codified Laws § 26 (1903).

tribal relations.”⁴

Even after the passage of the Indian Citizenship Act in 1924, states and local jurisdictions prevented Native Americans from registering to vote and voting.⁵ In 1928, the Arizona Supreme Court held that American Indians, despite being United States citizens, were excluded from registering to vote because they were wards of the federal government.⁶ That decision equated Native Americans with incompetents and stood for twenty years. Montana excluded Native Americans from voting and holding office from its territorial establishment, and took measures to prevent Native Americans from voting.⁷ South Dakota had a law in effect until 1939 that prevented Native Americans from holding public office.⁸ And many states alleged that Native Americans living on reservations were not state citizens in an effort to prevent them from voting.

In 1948, Native Americans in New Mexico and Arizona successfully litigated their right to vote.⁹ Utah and North Dakota became the last states to afford on-reservation Native Americans the right to vote in 1957 and 1958, respectively.¹⁰ When the right to vote was finally secured, steps were then taken to prevent Native Americans from participating in elections and being elected to office.¹¹

Language barriers have also historically been exploited. Native Americans that were fluent only in their Native languages but unable to read or write in English have been disenfranchised by literacy tests designed to keep them from voting. An Arizona statute stipulated that only individuals who could read the

⁴ *Swift v. Leach*, 178 N.W. 437 (N.D. 1920).

⁵ For a detailed history of voting rights of Native Americans, see generally, Daniel McCool et al., *Native Vote: American Indians, the Voting Rights Act, and the Right to Vote* (2007).

⁶ *Porter v. Hall*, 271 P. 411, 417 (1928), overruled in part by *Harrison v. Laveen*, 196 P.2d 456 (1948).

⁷ Kaitlyn Schaeffer, *The Need for Federal Legislation to Address Native Voter Suppression*, 43 N.Y.U. Rev. L. & Soc. Change 712 (2019).

⁸ *Id.*

⁹ *Montoya v. Bollack*, 372 P.2d 387 (N.M. 1962); *Harrison v. Laveen*, 196 P.2d 456 (Ariz. 1948).

¹⁰ Jennifer L. Robinson & Stephen L. Nelson, *The Small but Powerful Voice in American Elections: A Discussion of Voting Rights Litigation on Behalf of American Indians*, 70 Baylor L. Rev. 91, 104 (2018); *Allan v. Merrell*, 305 P.2d 490 (Utah 1956), vacated 353 U.S. 932 (1957); Delilah Friedler, *The Rise of the Native American Electorate*, *Mother Jones* (Aug. 27, 2019), available at <https://www.motherjones.com/politics/2019/08/the-rise-of-the-nativeamerican-electorate/>.

¹¹ See generally, Patty Ferguson-Bohnee, *The History of Indian Voting Rights in Arizona: Overcoming Decades of Voter Suppression*, 47 ARIZ. ST. L.J. 1099 (2015).

U.S. Constitution in English could vote.¹² When Alaska became a state in 1959, the state's new constitution required that a voter "shall be able to read or speak the English language as prescribed by law."¹³

Exercising the right to vote only came with protections afforded by the Voting Rights Act and enforcement of those rights through litigation. However, the Supreme Court invalidated the preclearance formula in 2013, removing one of the most powerful tools to ensure equal access to the ballot for Native Americans, which included two jurisdictions in South Dakota, a jurisdiction in North Carolina, and the states of Alaska, and Arizona.¹⁴ Since that time, efforts to suppress the vote have increased. For Native Americans, these voter suppression efforts can have devastating impacts.

III. Obstacles to Voting for Native Americans

Native Americans face many obstacles to voting. Obstacles can include isolating conditions that reduce opportunities and participation, structural or institutional barriers that limit voter participation through the passage of laws or policies that reduce voter participation, and election administration issues.

Today, many Native American reservations are located in extremely rural areas, distant from the nearest off-reservation border town. This was by design – official government policies forcibly removed Native Americans and segregated them onto the most remote and undesirable land. As a result of these policies, travel to county seats for voting services can be an astounding hundreds of miles away. Services such as DMVs and post offices can also require hours of travel. As detailed extensively below, the impacts of discrimination are not only in the past. Due to ongoing discrimination and governmental neglect, many Native Americans live in overcrowded homes that do not have addresses, do not receive mail, and are located on dirt roads that become impassable with inclement weather. Lack of broadband internet, cell phone coverage, or the economic means for transportation to in-person assistance means there are Native Americans that cannot access basic government services.¹⁵

¹² Ariz. Rev. Stat. Ann. § 16-101(A)(4)-(5) (1956).

¹³ Alaska Const. art. V, § 1 (1959).

¹⁴ *Shelby County v. Holder*, 570 U.S. 529 (2013).

¹⁵ A summary of these barriers is provided in testimony previously submitted by Jacqueline De León on February 22, 2020, in support of the Native American Voting Rights Act before the House Committee on Administration Subcommittee on Elections, available here:

In 2015, NARF began the Native American Voting Rights Coalition (“NAVRC” or “Coalition”), a coalition of national and regional grassroots organizations, academics, and attorneys advocating for equal access to the political process for American Indians and Alaska Natives.¹⁶ The NAVRC was founded to facilitate collaboration on coordinated tactics to address the many barriers that Native voters face when registering to vote, casting their ballot, and asserting they have an equal voice in the political process.

To understand the obstacles Native people face to vote and participate in our democracy, in April 2018 the NAVRC completed a series of nine field hearings in seven states on the state of voting rights in Indian country. Approximately 125 witnesses from tribes around the country generated thousands of pages of transcripts with their testimony about the progress of American Indian and Alaska Native participation in non-tribal elections, and the work that remains.

The field hearings were conducted at the following locations:¹⁷ Bismarck, North Dakota; Milwaukee, Wisconsin; Phoenix, Arizona; Portland, Oregon; on the tribal lands of the Rincon Band of Luiseño Indians north of San Diego, California; Tulsa, Oklahoma; on the tribal lands of the Isleta Pueblo just outside of Albuquerque, New Mexico; Sacramento, California; and on the tribal lands of the Navajo Nation in Tuba City, Arizona. Field hearings were not conducted in Alaska because the Alaska Advisory Committee to the U.S. Commission on Civil Rights already had a similar effort underway. Coalition members were also familiar with Alaska’s barriers after several years of voting rights litigation there.

Witnesses included tribal leaders, community organizers, academics, politicians, and Native voters. They shared their experiences with voter registration and voting in federal, state, and local (non-tribal) elections. Unfortunately, the field hearings showed that the state of Native voting rights is critical.

The field hearings made clear that Native Americans face unjust barriers that prevent their access to the ballot box. Common factors we identified that discourage political participation include: geographical isolation; physical and

<https://www.congress.gov/116/meeting/house/110464/witnesses/HHRG-116-HA08-WstateDeLeonJ-20200211-U1.pdf>.

¹⁶ For more information about the NAVRC, see *About the Native American Voting Rights Coalition*, available at <https://www.narf.org/native-american-voting-rights-coalition/>

¹⁷ I will be citing to the transcripts from these field hearings throughout this statement.

natural barriers; poorly maintained or non-existent roads; distance and limited hours of government offices; technological barriers and the digital divide; low levels of educational attainment; depressed socio-economic conditions; homelessness and housing insecurity; non-traditional mailing addresses such as post office boxes; lack of funding for elections; and discrimination against Native people.

Additionally, language is “one of the closing gaps in the election process” for Native voters.¹⁸ Over a quarter of all single-race American Indian and Alaska Natives speak a language other than English at home.¹⁹ Section 203 of the Voting Rights Act (“VRA”) helps Limited-English Proficient (“LEP”) American Indian and Alaska Native voters overcome barriers to political participation by requiring 35 political subdivisions in nine states to provide bilingual written materials and oral language assistance.²⁰ Despite these broad protections, jurisdictions have often failed to provide the required translations, forcing Native voters to file costly lawsuits.

Even if Native voters can overcome these barriers and register, the field hearings showed that they then face another set of barriers to cast their ballot. Such barriers include: unequal funding for voting activities in Native communities; lack of pre-election information and outreach; cultural and political isolation; unequal access to in-person and early voting; barriers caused by vote-by-mail; state laws that create arbitrary population thresholds to establish polling places; the use of the Americans with Disabilities Act to deny polling places on reservation lands; and the lack of Native poll workers.

A more thorough discussion of these barriers to Native American voting can be found in NARF’s report, *Obstacles at Every Turn: Barriers to Political Participation Faced by Native American Voters*.²¹ We are currently updating the report with

¹⁸ Isleta Tr., Martin Aguilar, 146.

¹⁹ U.S. Census Bureau, Profile America Facts for Features: CBI6-FF.22, American Indian and Alaska Native statistics, available at <https://www.census.gov/newsroom/facts-for-features/2016/cb16-ff22.html> (Nov. 2, 2016).

²⁰ See 52 U.S.C. § 10503. Other permanent provisions likewise can be used to ensure that LEP voters receive assistance. Section 2, the VRA’s permanent non-discrimination provision, applies nationwide and has been used to secure language assistance for voters who are denied equal voting opportunities by English-only election procedures. See 52 U.S.C. 10301. See 52 U.S.C. § 10508.

²¹ Dr. James Thomas Tucker, et al., *Obstacles at Every Turn: Barriers to Political Participation Faced by Native American Voters*, Native American Rights Fund (2020), available at

litigation brought during the 2020 election cycle and the 2021 legislative session outcomes in states with significant Native populations. We will provide an updated report as soon as it is completed.

Today, I am going to focus on the unique problems that arise in Indian country when states enact voter identification laws that have a discriminatory effect on Native people, the impact of the North Dakota voter ID law as a case study, and the importance of maintaining language assistance for LEP Native voters.

IV. The Discriminatory Impact of Voter Identification Laws

“It turned out North Dakota started requiring ID and addresses to vote. I didn’t have an ID with an address on it. We’re homegrown people. We don’t need the residential ID. We know where everybody lives. Sometimes the homes on the reservation don’t have addresses. And sometimes people don’t have homes. I’ve been a homeless veteran so sometimes I don’t have an address. I don’t have a car. I can’t afford to get a new ID. I still think I deserve to vote.”²²

For most Americans, obtaining identification is a simple act of going to the local Department of Motor Vehicles (“DMV”). For many American Indian and Alaska Natives, however, the process is not so simple and in fact severely burdensome. As states increasingly move toward requiring identification to register or vote, Native voters are being excluded from the political process. Following implementation of voter ID laws, predominately Native areas have seen a “sharp decrease in voters”²³ and reports of hundreds of ballot rejections because of a lack of identification.²⁴

Obtaining a state issued ID is unreasonably difficult for many Native voters. First, DMVs are not present on reservation lands.²⁵ Consequently, many

https://vote.narf.org/wp-content/uploads/2020/06/obstacles_at_every_turn.pdf.

²² Testimony of Elvis Norquay, February 11, 2020, in support of the Native American Voting Rights Act before the House Committee on Administration Subcommittee on Elections, available here:

<https://docs.house.gov/meetings/HA/HA08/20200211/110464/HHRG-116-HA08-Wstate-NorquayE-20200211-U1.pdf>.

²³ Phoenix Tr., Steve Titla, 245.

²⁴ Phoenix Tr., Solveig Parson, 19.

²⁵ Milwaukee Tr., Paul DeMain, 72-73; *Brakebill v. Jaeger*, No. 1:16-CV-008, 2016 WL

must travel prohibitively far to these DMVs. For example, in Keshena, Wisconsin, tribal members must drive an hour and 20 minutes to the nearest DMV.²⁶ In North Dakota, tribal members must travel an average of an hour, with the average Standing Rock Sioux member having to travel over an hour and a half to reach the nearest site to obtain identification.²⁷

Even when a DMV may be located closer, tribal members may have to make a “60 to 80, 90-mile drive” to access a facility that is consistently open and provides full services.²⁸ One anecdote describes the burdens one voter faced trying to obtain an ID:

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

For impoverished Native Americans, the cost of identification is often prohibitively expensive. Even nominal fees can present a barrier.²⁹ Moreover, drivers’ licenses are often not required for everyday life on the reservation, so obtaining identification is not a priority. One tribal leader described how their members “don’t want to pay for an ID because ... why would they pay for . . . the other ID if they don’t have a reason for it.”³⁰

7118548, at *6 (D.N.D. Aug. 1, 2016) (“There are no [Drivers License Sites] on any of the reservations in North Dakota.”).

²⁶ Milwaukee Tr., Stephanie Thompson, 23.

²⁷ Professor Gerald Webster, *An Analysis of the Effects of North Dakota’s Voter Identification Law on Potential white and Native American Voters*, Appendix, 22.

²⁸ Milwaukee Tr., Paul DeMain, 72-73.

²⁹ Sacramento Tr., Alex Padilla, 109.

³⁰ Portland Tr., Norma Sanchez, 157-158.

To obtain a state ID, additional documentation is often required that Native voters do not have or what they do have is insufficient. One advocate described how she opposed obtaining a state ID because she saw “many elders struggling to get a birth certificate, to get a driver’s license.”³¹ For example, she detailed how a tribal elder’s birth certificate was insufficient because it did not have the elder’s name on it since “her birth certificate was [from] the day when they named her ‘Baby Girl.’”³² Simply, “the types of ID initially listed as accepted as terms of proof did not take into consideration the types of documents that are easily accessible to Native American voters.”³³ Thus, “Native American voters ha[ve] a very difficult time obtaining a photo identification.”³⁴

Tribal IDs are not automatically accepted for registration and voting purposes, despite how unreasonably difficult it is for American Indian and Alaska Natives to get a state ID. The Secretary of the Mille Lacs Band of the Ojibwe explained how, even though tribal IDs were now accepted in Minnesota, “there was a period where tribes had to fight the Secretary of State for their tribal ID cards to be valid for voting.”³⁵ Furthermore, previously recognizing tribal IDs as an acceptable form of ID is no guarantee a state will continue to accept tribal IDs. For example, one witness described the uncertainty faced by tribes:

[S]o they weren’t accepting tribal IDs or the enrollment paperwork up until two years ago, and then they began accepting them, but now they’re going back to thinking they won’t be accepting them because some of the ID requirements have changed on the federal level. So they’re now telling the tribe that they need to update their ID equipment, and we need to purchase this like machine that costs thousands of dollars in order for our tribal IDs to be valid and be able to be used in that way.³⁶

Even if a state accepts a tribal ID, it may also require the identification to contain certain information to be sufficient. For example, some tribal IDs do not

³¹ Isleta Tr., Andrea Weahkee, 197.

³² *Id.*

³³ Phoenix Tr., Steve Titla, 245.

³⁴ *Id.*

³⁵ Milwaukee, Caroline Beaulieu, 121.

³⁶ See State of Iowa, Iowa Secy. of State, Secretary Pate announces use of Tribal IDs as a valid form of identification for elections (Aug. 21, 2018), available at https://sos.iowa.gov/news/2018_08_21.html.

have expiration dates because, as one tribal leader explained, “we don’t quit being Indian at some particular point.”³⁷ Laws that require an expiration date on an ID would exclude otherwise qualifying IDs. Moreover, updating tribal IDs to contain specialized information or security features is expensive³⁸ and may be unattainable for impoverished tribes.

Finally, because of pervasive housing insecurity among Native communities and a lack of regular postal service, many Native individuals use Post Office boxes (“P.O. boxes”) to conduct their affairs; thus, their tribal IDs list a P.O. box instead of a residential address or omit an address completely.³⁹ The Governor of the Gila River Indian Community in Arizona described how the lack of addresses on the reservation and the identification requirement led to his community’s disenfranchisement:

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

³⁷ Milwaukee Tr., Paul DeMain, 78.

³⁸ Milwaukee Tr., Stephanie Thompson, 30-31; Tulsa Tr., Chuck Hoskin Jr., 128.

³⁹ Tulsa Tr., Chuck Hoskin Jr., 131; *Brakebill v. Jaeger*, No. 1:16-CV-008, 2016 WL 7118548, at *7 (D.N.D. Aug. 1, 2016) (“The record reveals that many homes on the reservations either do not have residential addresses (the Post Office delivers their mail to post office boxes), or there is no clear address, so tribal ID’s do not reflect any residential addresses.”).

addresses to be the service centers where they vote . . . and resulted in the voters again being denied a regular ballot.⁴⁰

As can be seen, voter identification laws can lead to the disenfranchisement of American Indians and Alaska Natives. Identification laws are seen as “a solution in search of a problem . . . imposed without a shred of real evidence that [t]here has been voter fraud.”⁴¹ Such laws have imposed a significant burden on Native voters.

V. North Dakota’s Voter ID Law

North Dakota provides a perfect case study on the disparate impact voter ID laws have on Native voters. In 2013, after Native Americans proved dispositive in the 2012 election, North Dakota passed one of the strictest voter ID laws in the nation that targeted Native voters. Integral to the new voter ID law was the requirement that an ID have a residential address, when the legislature was aware that many homes on reservations in North Dakota lacked residential addresses. Given the high levels of poverty for Native Americans in North Dakota, the lack of access to transportation, the cost of an ID, and the distance to travel to obtain a state ID, it was no wonder that the law had a discriminatory effect.

A. Historically, North Dakota had Voter-Friendly Election Laws

Until just recently, North Dakota used a system of small voting precincts, whereby election boards and poll workers generally knew who were and were not eligible voters in their precincts.⁴² If a poll clerk happened not to know a voter, they could have asked that voter to produce one of many forms of acceptable ID showing the voter’s residential address and birthday.⁴³ If one form of ID did not provide both pieces of information, a voter could use two pieces of ID that, in

⁴⁰ Phoenix Tr., Stephen Lewis, 130-31.

⁴¹ Tulsa Tr., Chuck Hoskin Jr., 128.

⁴² Secretary of State North Dakota, *North Dakota The Only State Without Voter Registration, What Should I Know About Voting in North Dakota* (July 2015), <https://vip.sos.nd.gov/pdfs/Portals/votereg.pdf>.

⁴³ Under the prior law, valid forms of ID included: a North Dakota driver’s license or non-driver’s ID card; a U.S. passport; an ID card from a federal agency; an out of state driver’s license or non-driver’s ID card; an ID card issued by a tribal government; a valid student ID; a military ID card; a utility bill dated 30 days before Election Day, including cell phone bills and student housing bills (online printouts were acceptable); and a change of address verification letter from the U.S. Postal Service.

combination, provided address and birth date information.⁴⁴

If a voter could not produce the requested ID, he or she could fall back on two “fail-safe” mechanisms to prove their voting eligibility. First, a member of the election board or a poll clerk simply could have vouched for the voter.⁴⁵ Second, the voter could have executed an affidavit swearing under penalty of perjury that he or she was a qualified elector in the precinct.⁴⁶ Under this system, “voter fraud in North Dakota [was] virtually non-existent.”⁴⁷

B. In 2011, The North Dakota Legislature Resoundingly Rejected a Strict Voter ID Law

In January 2011, the North Dakota Legislature debated House Bill 1447 (“HB 1447”). The sponsor of the bill, Rep. Kim Koppelman, brought the bill out of concern that under North Dakota’s existing voting system, a person could cast a fraudulent vote through a false affidavit.⁴⁸ An amendment would have imposed stricter voter ID requirements.⁴⁹ In addition, the amendment would have required any person who submitted an affidavit at the polling place to present an acceptable form of ID within a specified number of days.⁵⁰ If the voter failed to produce a valid ID, his or her ballot would not be counted.

At that time, legislators were highly skeptical of changing what had been a well working election system, given the absence of any fraud. For example, Sen. Dwight Cook (R) observed that the “whole voting process is the basic core of the democratic process and we certainly don’t want to see somebody win an election because of voter fraud but to what degree we have any of that I am not sure if we have a great degree.”⁵¹

⁴⁴ N.D. Cent. Code § 16.1-05-07(1), *amended by* H.B. 1332, 63rd Leg. Assemb., Reg. Sess. § 5 (2013).

⁴⁵ N.D. Cent. Code § 16.1-05-07(2), *amended by* H.B. 1332, 63rd Leg. Assemb., Reg. Sess. § 5 (2013).

⁴⁶ N.D. Cent. Code § 16.1-05-07(3), *amended by* H.B. 1332, 63rd Leg. Assemb., Reg. Sess. § 5 (2013).

⁴⁷ *Brakebill v. Jaeger*, No. 1:16-CV-008, 2016 WL 7118548, at *11 (D.N.D. Aug. 1, 2016).

⁴⁸ *See Hearing Minutes on H.B. 1447 Before H. Political Subdivisions Comm.*, 62nd Leg. Assemb. 1 (N.D. 2011) (Feb. 3, 2011 statement of Rep. Koppelman, H. Political Subdivisions Comm.) (“*HB 1447 Hearing Minutes*”).

⁴⁹ S. Journal, 62nd Leg. Assemb., 74d Sess. 1642 (N.D. 2011).

⁵⁰ *Id.* at 1644.

⁵¹ *HB 1447 Hearing Minutes* at 3 (Apr. 12, 2011 statement of Sen. Dwight Cook, H. Political Subdivisions Comm).

When testifying on HB 1447 in 2011, North Dakota’s Deputy Secretary of State Silrum stated that a portion of the electorate could not produce an ID bearing a residential address. More specifically, Silrum reported that Native Americans were less likely to possess an ID that contained a residential address. Silrum stated: “This is very much the case also in small town North Dakota where if you sent something to their street address the post office will return it because it needs to go to their post office box . . . a couple of our counties that have reservations in the state have not completed their 911 addressing. Even if they have the residence of those counties [they] don’t know what their 911 address is.”⁵²

Silrum vowed his office would “work[] with the colleges; utility companies . . . all the avenues that will help those people who don’t necessarily have ID’s show where they live.”⁵³ Thus, through the debate on HB 1447, North Dakota legislators knew that Native Americans disproportionately relied on P.O. box addresses, that they did not have or did not know their 911 addresses, and that they were less likely to have an ID containing a residential address.

In the end, the Legislature rejected HB 1447 on a bipartisan basis by a 38-8 vote.⁵⁴ The Legislature decided that warnings about the *possibility of hypothetical* abuse of the affidavit system was not enough to change North Dakota’s laws.

C. Following the 2012 Election in which Native Americans were pivotal, the Legislature Passed Restrictive Voter ID Laws

In 2012, North Dakotans elected Democrat Heidi Heitkamp to the U.S. Senate. She won by less than 3,000 votes.⁵⁵ Most Native Americans in North Dakota are Democrats and their votes were instrumental to Senator Heitkamp’s success.⁵⁶

⁵² *Id.* at 2-3 (Apr. 20, 2011 statement of Jim Silrum, H. Political Subdivisions Comm.).

⁵³ *Id.* at 3 (Apr. 18, 2011 statement of Jim Silrum, H. Political Subdivisions Comm.).

⁵⁴ S. Journal, 62nd Leg. Assemb., 75d Sess. 1659 (N.D. 2011).

⁵⁵ *Official Results General Election – November 6, 2012, ND Voices*, <http://results.sos.nd.gov/resultsSW.aspx?eid=35&text=Race&type=SW&map=CTY> (last updated Nov. 15, 2012).

⁵⁶ See Jim Fuglie, *United States Senator Mary Kathryn (Heidi) Heitkamp. How About That?*, (Nov. 9, 2012), <http://theprairieblog.areavoices.com/2012/11/09/united-states-senator-mary-kathryn-heidi-heitkamp-how-about-that/> (attributing Sen. Heitkamp’s success to Native Americans); Dr. AnnMaria De Mars, *Native Americans: Why Heidi Heitkamp Won & Nate Silver Was Wrong?* (Nov. 19, 2012) <http://www.thejuliagroup.com/blog/?p=2808>; Meteor Blades, *American Indian Voters and Indian Organizers Gave N.D. Senate Edge to Democrat Heidi Heitkamp* (Nov. 8, 2012),

Immediately after that election, the legislature enacted HB 1332 through a hodgepodge amendment. This process expedited the bill's passage and stifled debate. At the time, Rep. Mock (D) protested use of the procedure because the bill would "completely change the way we handle voters in our state" and would deny the public and agencies impacted by the bill from providing input.⁵⁷ Rep. Marie Strinden (D) also objected, stating: "I take a lot of pride in the fact that this committee thinks very long and hard about all of our bills . . . I can't be proud of a bill that we all know has problems because no other bill that we passed out of here have we done it with such stealth without addressing those problems."⁵⁸

The North Dakota legislature passed HB 1332 by a 30-16 mostly party-line vote on April 3, 2013 (only one Democrat voted in favor and three Republicans voted against).⁵⁹ Nineteen of the senators who were in the Senate during the 2011 legislative session and voted against HB 1447, now voted for restrictive voter ID.⁶⁰

Under HB 1332, qualified voters who showed up at the polls without a qualifying ID would not be allowed to vote.⁶¹ In addition, the law did not allow the use of P.O. boxes to verify a voter's residency, even though lawmakers knew that many Native Americans (as well as other citizens) relied upon P.O. boxes.⁶² During the next legislative session in 2015, the legislature made the state's voter ID requirements even more restrictive.⁶³

D. In 2016, the North Dakota District Court Concluded the Law Places an Undue Burden on Native American Voters

<https://www.dailykos.com/stories/2012/11/8/1158417/-American-Indian-voters-and-Indian-organizers-gave-N-D-Senate-edge-to-Democrat-Heidi-Heitkamp>.

⁵⁷ *House Floor Session: Hearing on H.B. 1332*, 63rd Leg. Assemb. (N.D. 2013) (Feb. 12, 2013 statement of Rep. Corey Mock) ("*HB 1332 Hearing*").

⁵⁸ *Hearing Minutes on H.B. 1332 Before H. Gov't and Veterans Affairs Comm.*, 63rd Leg. Assemb. (N.D. 2013) (Feb. 8, 2013 statement of Rep. Marie Strinden, H. Gov't and Veterans Affairs Comm.).

⁵⁹ *Senate Floor Session Hearing on H.B. 1332*, 63rd Leg. Assemb. (N.D. 2013).

⁶⁰ *Compare S. Journal*, 62nd Leg. Assemb., 75d Sess. 1660 (N.D. 2011) *with S. Journal*, 63rd Leg. Assemb., 59d Sess. 1062 (N.D. 2013).

⁶¹ N.D. Cent. Code § 16.1-01-04, *amended by* H.B. 1333, 64th Leg. Assemb. Reg. Sess. § 5 (2015).

⁶² *HB 1447 Hearing Minutes* (Apr. 20, 2011 statement of Jim Silrum, H. Political Subdivisions Comm.).

⁶³ HB 1333 removed the Secretary of State's discretion to allow other ID, and took away the option for students to use college identification certificates. N.D. Cent. Code § 16.1-01-04, *amended by* H.B. 1369, 65th Leg. Assemb. Reg. Sess. § 5 (2017).

In 2016, after six Native Americans that were turned away from voting because they only had their tribal ID or IDs without addresses on them filed suit, the federal district court in North Dakota concluded that North Dakota's voter ID laws were "arguably some of the most restrictive voter ID laws in the nation."⁶⁴

The laws also clearly disproportionately impacted Native American voters. The Court outlined in detail the burdens the laws imposed:

- 23.5% of Native Americans lacked valid voter ID, compared to only 12% of non-Native Americans.
- 15.4% of Native Americans who voted in 2012 lacked qualifying voter ID, compared to only 6.9% of non-Native Americans.
- Only 78.2% of Native Americans had a North Dakota driver's license, compared to 94.4% of non-Native Americans.
- 47.7% of Native Americans who did not have a qualifying voter ID lacked the underlying documents they needed to obtain an acceptable ID.
- Only 73.9% of Native Americans who lacked a qualifying voter ID owned or leased a car, compared to 88% of non-Native Americans; and 10.5% of Native Americans lacked any access to a motor vehicle, compared to only 4.8% of non-Native Americans.
- Native Americans, on average, had to travel twice as far as non-Native Americans to visit a Driver's License Site in North Dakota.
- 21.4% of Native Americans were not at all aware of the new voter ID laws, and only 20.8% had heard about the law.⁶⁵

North Dakota did not dispute any of these facts.⁶⁶ The Court then outlined the disproportionate and substantial difficulties Native Americans faced in obtaining a driver's license or non-driver's ID. These included the cost to directly pay for the ID, the disproportionately long distances Native people had to travel to a state office, and the very real issue that "many homes on the reservations either

⁶⁴ *Brakebill v. Jaeger*, No. 1:16-CV-008, 2016 WL 7118548, at *2 (D.N.D. Aug. 1, 2016).

⁶⁵ *Id.* at *4.

⁶⁶ *Id.*

do not have residential addresses (the Post Office delivers their mail to post office boxes), or there is no clear address.”⁶⁷ This was despite the fact that the voter ID law required a residential address to vote.⁶⁸

Accordingly, the Court ruled that North Dakota could not enforce the laws without providing a safety net for “those voters who cannot obtain a qualifying ID with reasonable effort.”⁶⁹ In its order, the Court found:

- Given “the disparities in living conditions, it is not surprising that North Dakota’s new voter ID laws are having and will continue to have a disproportionately negative impact on Native American voting-eligible citizens.”⁷⁰
- “It is undisputed that the more severe conditions in which Native Americans live translates to disproportionate burdens when it comes to complying with the new voter ID laws.”⁷¹
- “Native Americans face substantial and disproportionate burdens in obtaining each form of ID deemed acceptable. . . obtaining any one of the approved forms of ID almost always involves a fee or charge, and in nearly all cases requires travel.”⁷²
- To satisfy the laws’ strict ID requirements, it “helps to have a computer with Internet access, a credit card, a car, the ability to take time off work, and familiarity with the government and its bureaucracy, ” but “the typical Native American voter living in North Dakota who lacks qualifying ID simply does not have these assets.”⁷³
- “Although the majority of voters in North Dakota either possess a qualifying voter ID or can easily obtain one, it is clear that a safety net is needed for those voters who simply cannot obtain a qualifying voter ID

⁶⁷ *Id.* at *7.

⁶⁸ *Id.* at 2 (To be acceptable, any voter ID must provide the voter's residential address (post office box numbers are not sufficient) and his or her date of birth.).

⁶⁹ *Id.* at *9.

⁷⁰ *Id.* at *8.

⁷¹ *Id.* at *4.

⁷² *Id.* at *5.

⁷³ *Id.*

with reasonable effort.”⁷⁴

- This Court could not “envision a compelling reason or a governmental interest which supports not providing such an avenue of relief for potentially disenfranchised voters.”⁷⁵
- “The ill-advised repeal of all such ‘fail-safe’ provisions has resulted in an undue burden on Native American voters and others who attempt to exercise their right to vote. There are a multitude of easy remedies that most states have adopted in some form to alleviate this burden.”⁷⁶

Given these findings, the Court implemented a fail-safe mechanism that Native voters could use during the 2016 election.⁷⁷

E. Thousands of Native Americans Voted Via The “Fail-Safe” Affidavit in the 2016 General Election and Before

With the new strict ID requirements in place, and with many Native Americans unable to obtain qualifying ID without undue burden, thousands of Native Americans were only able to vote in 2016 by using the “fail-safe” affidavit adopted by the Court. Indeed, in North Dakota Native Americans were more likely than non-Natives to report having used a failsafe measure to vote in the past. Among those who lack a valid ID, 14.4 percent of Native Americans reported having signed an affidavit, compared to 7.3 of non-Natives, and 16.7 percent of Native Americans report that a poll worker vouched for them, compared to 6.4 percent of non-Natives for whom the same was true. Between 2012 and 2016, among the three counties with the highest percentage of Native American voters the number of affidavits used increased from 51 in 2012 to 390 in 2016. By comparison, in the three counties with the lowest percentage of Native American voters the number decreased by four affidavit ballots, from 38 to 34.⁷⁸

F. Despite the Lack of Fraud and Knowing the Impact to Native American Voters, North Dakota Adopted Strict Voter ID Laws again in 2017

On January 30, 2016, Rep. Marvin Nelson, whose district is majority Native

⁷⁴ *Id.* at *10.

⁷⁵ *Id.*

⁷⁶ *Id.* at *13.

⁷⁷ *Id.*

⁷⁸ *Brakebill v. Jaeger*, No. 1:16-CV-008, 2018 WL 1612190, at *3 (D.N.D. Apr. 3, 2018), *vacated and remanded on remedy grounds*, 932 F.3d 671 (8th Cir. 2019).

American, explained in an op-ed in the Grand Forks Herald that as a Legislator he was well aware of how “[i]t’s not a question of ID.⁷⁹ The reasons for this are “many” but most notably because there “are still rural residents who cannot count on their 911 address being correct. So a great many tribal IDs do not have a 911 address that can be counted.” *Id.*

During the debate on HB 1369, which was introduced in 2017, the Native American Rights Fund (“NARF”) provided testimony to both houses of the North Dakota legislature. NARF expressed its “deep[] concern[]” that the bill “d[id] not provide any fail-safe mechanisms” for voters that did not have a qualifying ID which was “one of the main reasons the federal court granted a preliminary injunction.” NARF testified to, and provided *extensive* evidence of, the “estimated 7,984 Native Americans, or 23.5 percent of the total voting-eligible Native American population” that did not have a qualifying ID and briefed the legislature about the hurdles faced by Native Americans to obtain qualifying ID. NARF explicitly warned the Legislature “to carefully consider the disproportionate burdens North Dakota’s voter ID requirements place on Native Americans.”

In a speech before the North Dakota House, Rep. Johnson (R) warned that HB 1369 did not contain an adequate “fail-safe” mechanism, stating, “Judge Hovland spent a whole bunch of time in his order enjoining the 2015 bill regarding the burden placed on Native Americans on obtaining what is a valid ID as *provided* in the bill. And there it is again. Despite that you provide a provisional ballot *you are still requiring the same valid ID and that is not truly a fail-safe option like an affidavit is . . .* . I would be remiss to substitute Judge Hovland’s opinion for mine but I don’t believe this will pass constitutional muster again”⁸⁰

In considering HB 1369, the legislature failed to study, in any way, the impact the law would have on Native Americans. It did not consult any tribal governments about whether its tribal members were negatively impacted by the bill or whether they supported or opposed the bill. Despite making allowances and provisions for elderly, military, and disabled voters, the legislature failed to consider the needs of Native American voters, even after being repeatedly warned

⁷⁹ *Tribal members have IDs, but they happen to be IDs that North Dakota decided weren’t good enough” since “tribal IDs in North Dakota do not . . . list the person’s address.”* Marvin Nelson, *Marvin Nelson: N.D.’s Voter ID Laws Hurt Minorities’ Voting Rights*, Grand Forks Herald (Jan. 30, 2016), <http://www.grandforksherald.com/opinion/columns/3936274-marvin-nelson-nds-voter-id-laws-hurt-minorities-voting-rights> (emphasis added).

⁸⁰ *House Floor Session: Hearing on H.B. 1369*, 65th Leg. Assemb. (N.D. 2017) (Apr. 17, 2017 statement of Rep. Mary C. Johnson) (emphasis added) (hereinafter “*HB 1369 Hearing*”).

of the disproportionately burdensome impact imposed by its ID requirements.

E. The North Dakota District Court Again Concluded the Laws Disproportionately Burden Native Americans

In 2018, the North Dakota District Court again concluded that “the new law passed by the Legislative Assembly (House Bill 1369) in April 2017, still requires voters to have one of the very same forms of a qualifying ID's in order to vote that was previously found to impose a discriminatory and burdensome impact on Native Americans.”⁸¹

The Court also identified several problems with the new law:

- At least 4,998 otherwise eligible Native Americans (and 64,618 non-Native voters) currently do not possess a qualifying voter ID under the new law. And 48.7% of Native Americans who lack a qualifying ID also lack the supplemental documentation needed – which means at least 2,305 Native Americans will not be able to vote in 2018 under the new law.
- The State has acknowledged that Native American communities often lack residential street addresses or do not have clear residential addresses. Nevertheless, under current State law an individual who does not have a “current residential street address” will never be qualified to vote. This is a clear “legal obstacle” inhibiting the opportunity to vote. The State can easily remedy this problem by simply eliminating the absolute need for a “current residential street address” and allowing for either a residential address, a mailing address (P.O. Box), or simply an address. Neither the National Registration Voting Act nor any other federal or state laws the Court is aware of require a “current residential street address” in order to be able to vote.
- The “set aside” ballot process the State proclaims as a “fail-safe” measure will not help any voter who lacks the means to obtain a qualifying ID to cast a vote. When the Court issued the preliminary injunction on August 1, 2016, the undisputed evidence revealed that 23.5% Native Americans did not have a state qualifying ID. Today, the updated and unrefuted statistical data reveals that 19% of Native Americans still lack qualifying ID's.
- And, although the theoretical possibility of voter fraud exists with every

⁸¹ *Brakebill v. Jaeger*, No. 1:16-CV-008, 2018 WL 1612190, at *2 (D.N.D. Apr. 3, 2018).

election nationwide, the record before the Court has revealed no evidence of voter fraud in the past, and no evidence of voter fraud in 2016.⁸²

Given the law had the same disproportionate impact on Native American voters that the previous laws had, the Court again enjoined the laws. The matter was appealed to the Eight Circuit Court of Appeals, which reversed the District Court based solely on the remedy the District Court provided. The Court of Appeals did not dispute or undermine any of the factual findings the District Court made about the severely disproportionate impact the laws had on Native American voters. Indeed, it could not because the state did not dispute any of the facts.

In the end, the parties settled the matter in a way that ensured Native voters would have equal access to the ballot. But, it was not without difficulty and overcoming the intentional and disproportionate burdens placed in front of Native American voters through the surgical use of strict voter ID.

VI. Language

“If you require language assistance to register or cast a ballot, whether it’s in English or another language, culturally competent and respectful assistance, for that matter, that too can be either a barrier or a discouragement from participating.”⁸³

Two-thirds of all speakers of American Indian or Alaska Native languages reside on a reservation or in a Native village, including many who are linguistically isolated, have limited English skills, or a high rate of illiteracy.⁸⁴ The lack of assistance or complete and accurate translations of voting information and materials for Limited-English Proficient (“LEP”) American Indian and Alaska Native voters can be a substantial barrier.

Section 203 of the Voting Rights Act (“VRA”) helps LEP voting-age U.S. citizens overcome language barriers to political participation by requiring covered

⁸² *Id.* at 4.

⁸³ Sacramento Tr., Alex Padilla, 108-09.

⁸⁴ See U.S. Census Bureau, Public Use Data File for the 2016 Determinations under Section 203 of the Voting Rights Act, *available at* https://www.census.gov/rdo/data/voting_rights_determination_file.html (Dec. 5, 2016).

jurisdictions to provide bilingual written materials and oral language assistance. Language assistance must be provided for voting activities in every type of public election conducted in a covered jurisdiction including primary, general, and special elections.⁸⁵ Section 203 is a critical resource for Native voters as 357,409 American Indians and Alaska Natives reside in a jurisdiction covered by Section 203 where assistance must be provided in a covered Native language.⁸⁶

Currently, thirty-five political divisions in nine states must provide bilingual written materials and oral language assistance.⁸⁷ However, jurisdictions have often failed to provide the required translations or have failed to provide any language assistance at all, forcing Native voters to file costly lawsuits. This is exactly what happened in Alaska leading to *Toyukak v. Treadwell*, the first Section 203 case fully tried through a decision in thirty-four years.⁸⁸

Section 203 provides that the state or political subdivision is only required to furnish oral instructions, assistance, and other voting information if the covered language is historically unwritten.⁸⁹ However, it does not mean written translations are never required for such languages.⁹⁰ In *Toyukak*, Alaska election officials denied Native voters language assistance despite the court's previous finding in *Nick v. Bethel* that all voting information provided in English must be provided orally even if written translations are not required.⁹¹ Drastically, in *Toyukak* the "public service announcements and translated materials [Alaska election officials] offered to Natives were 'only a limited subset of the election materials' and were not a 'substantial equivalent' of what the Division provided in English."⁹²

⁸⁵ See 28 C.F.R. § 55.10.

⁸⁶ U.S. Census Bureau, Press Release: Census Bureau Releases 2016 Determinations for Section 203 of the Voting Rights Act (Dec. 5, 2016), *available at* <https://www.census.gov/newsroom/press-releases/2016/cb16-205.html>.

⁸⁷ See 52 U.S.C. § 10503. Other permanent provisions likewise can be used to ensure that LEP voters receive assistance. Section 2, the VRA's permanent non-discrimination provision, applies nationwide and has been used to secure language assistance for voters who are denied equal voting opportunities by English-only election procedures. See 52 U.S.C. 10301. See 52 U.S.C. § 10508.

⁸⁸ See *Apache County v. United States*, Civil Action No. 77-1515, mem. op. (D.D.C. June 12, 1980) (three-judge court).

⁸⁹ See 52 U.S.C. § 10503(c).

⁹⁰ See Tucker, *supra* note 5, at 54.

⁹¹ *Id.*; See *Nick v. Bethel*, Case No. 3:07-cv-00098-TMB (D. Alaska 2007).

⁹² See James T. Tucker, Natalie A. Landreth & Erin Dougherty Lynch, "Why Should I Go Vote Without Understanding What I Am Going to Vote For?": *The Impact of First Generation*

The *Toyukak* court held Section 203 should be interpreted as merely changing the means by which voting information and materials is communicated to LEP American Indians and Alaska Natives, and Section 203 does not permit election officials to diminish the content and extent of information that must be provided.⁹³ The parties worked together to produce a joint stipulation that aimed to remedy Alaska's Section 203 violations and included strong relief such as federal observers to document compliance efforts.⁹⁴

Reports filed by federal observers in 2016 suggest that Alaska's efforts fell short of fully remedying the Section 203 violations and complying with the *Toyukak* Order. For example, during the 2016 Primary and General Elections, federal observers interviewed 120 poll workers and found that bilingual poll workers or interpreters were not trained on how to translate the ballot or procedural instructions in the covered Alaska Native languages.⁹⁵ During the 2016 primary, federal observers documented there were no voting materials available in the covered Alaska Native language in six villages, and the "I voted" sticker was the only material in a Native language in two other villages.⁹⁶ Alaska has made some improvements since *Toyukak* such as having bilingual poll workers available, but almost forty years of Section 203 violations cannot be remedied overnight and continued investment in language assistance for American Indian and Alaska Natives is crucial to ensuring Native voters have equal access to the election process.

Alaska is not the only jurisdiction to have failed Native voters on the language front. In San Juan County, Utah, language is a significant barrier as many Native voters need an interpreter to access government services.⁹⁷ In fact, San Juan County is covered for the Navajo language, but the County has failed Native voters by refusing to comply with Section 203. For example, when a Navajo voter asked a poll worker about some of the issues on the ballot he did not understand, they told him, "[w]ell, if you don't understand it, don't vote on it."⁹⁸

Voting Barriers on Alaska Natives, 22 Mich. J. Race & Law 327, 372 (2017).

⁹³ See *id.* at 363.

⁹⁴ See Stipulated Judgment and Order, *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska Sept. 30, 2015), docket no. 282.

⁹⁵ See Federal Observer Reports for 2016 Elections, *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG, docket no. 295, attachments 295-1 to 295-33 (D. Alaska filed Dec. 13, 2016).

⁹⁶ See Tucker, *supra* note 5, at 61.

⁹⁷ Isleta Tr., Wilfred Jones, 17.

⁹⁸ *Id.* at 25-27.

Even more pernicious, in 2014 the County removed all language assistance by switching to a vote-by-mail system, and no translated ballot information was provided to LEP Navajo voters.⁹⁹ As a result, many voters received an English ballot they could not read, so they simply did not vote.¹⁰⁰ The Navajo Nation Human Rights Commission sued San Juan County for violating Section 203 because vote-by-mail effectively denied Navajo voters an opportunity to vote because Navajo is an oral language.¹⁰¹ In 2018, the Human Rights Commission and the County reached a settlement restoring the closed polling places and mandating the County to provide the required language assistance under Section 203.¹⁰²

While states may no longer impose literacy tests that were impossible for Native voters to pass given their lack of fluency in English, Section 203's language protections remain critical to ensuring Native voters are not excluded from the ballot box.

VII. Conclusion

It is clear that voter ID laws can, and have, had a severely burdensome and discriminatory effect on Native American voters. When Native voters lack residential addresses, have higher rates of poverty, live farther away from governmental offices, lack access to transportation, and have to choose between food or an ID, the burden is very real and immense. Likewise, the use of language support is critically important for many Native communities and removing that support would have a discriminatory effect for those communities.

Equal access to the political process results in profound outcomes for American Indian and Alaska Native voters. Native voters are empowered to not only make their voices heard, but to “protect our sovereignty rights.”¹⁰³ Ultimately, Native voters are only asking for the opportunity to cast their votes like other American citizens. We are asking for no more, and no less, than an equal opportunity to vote for all American Indians and Alaska Natives. Thank you for the opportunity to testify before you on this critical issue, and I look forward to answering any questions you may have.

⁹⁹ Isleta Tr., Terry Whitehat, 10.

¹⁰⁰ Tuba City Tr., James Attakai 14.

¹⁰¹ See *Navajo Nation Human Rights Commission v. San Juan County*, No. 2:16-cv-00154-JNP (D. Utah Feb. 2018).

¹⁰² *Id.*

¹⁰³ Tulsa Tr., Christina Blackcloud, 35.