

Written Testimony of Navajo Nation Attorney General Doreen McPaul

I. Introduction

The Navajo Nation is one of the largest Indian Nations in the country with a population of over 300,000 citizens. It is incredibly vast, extending over 27,000 square miles and across three states: Arizona, New Mexico, and Utah. While the Navajo Nation's capital is located in Window Rock, Arizona, there are 110 subunits of government, called Chapters, located throughout the Nation. The Navajo language is widely spoken by Navajo voters and enjoys coverage under Section 203 of the Voting Rights Act. The poverty rate on the Navajo Nation (38%) is more than twice as high as the poverty rate in the State of Arizona (15%). The physical vastness of the Navajo Nation, and its rural nature, create unique challenges for Navajo citizens in casting their ballots in state and federal elections. When this physical isolation is coupled with extreme poverty and language barriers, it can result in voting being an arduous task for many Navajo citizens. Since the 1970s the Navajo Nation has been forced to bring lawsuits, in multiple states, to protect the rights of its citizens to cast ballots in state in federal elections. When viewed together, these lawsuits illustrate the issues many Navajo citizens face when voting in state and federal elections on the Nation.

II. Legal Background

The U.S. Supreme Court has recognized that “voting is of the most fundamental significance under our constitutional structure” and the right to an effective vote is protected by the Equal Protection Clause of the Fourteenth Amendment.¹ Indeed, the right to vote is the

¹ See *Burdick v. Takushi*, 504 U.S. 428, 433-44 (1992).

“fundamental political right . . . preservative of all rights.”² The Navajo Nation has relied heavily on several key legal theories to protect the voting rights of its citizens.

First, the Equal Protection Clause of the United States Constitution provides that “[n]o...State shall...deny to any person within its jurisdiction the equal protection of the law.”³ The Supreme Court has held that “[h]aving once granted the right to vote on equal terms, the State may not, by later arbitrary and separate treatment, value one person’s vote over that of another.”⁴ Second, the Due Process Clause of the United States Constitution prohibits states from depriving “any person of...liberty...without due process of law.”⁵ Procedural due process includes “the right to notice and right to be heard...at a meaningful time and in a meaningful manner.”⁶ Third, Section 2 of the VRA “prohibits all forms of voting discrimination’ that lessen opportunity for minority voters.”⁷ As amended in 1982, Section 2 of the VRA provides:

- (a) No voting qualifications or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b).⁸

A violation of subsection (a) is established when the political process in a State or political subdivision are not equally open to participation, by members of a class of citizens, resulting in these members having less of an opportunity to participate in the political process and to elect

² *Reynolds v. Sims*, 377 U.S. 533, 562 (1964).

³ U.S. Const., 14th Amend., Sec. 1.

⁴ *Bush v. Gore*, 531 U.S. 98, 105 (2000).

⁵ U.S. Const., 14th Amend. Sec. 1.

⁶ *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972).

⁷ *League of Women Voters of N.C. v. North Carolina*, 769 F. 3d 224, 238 (4th Cir. 2014).

⁸ 52 U.S.C. § 10301(a).

representatives of their choice.⁹ This is called the results test, and it applies to both vote dilution and vote denial claims.

Lastly, Section 203 of the Voting Rights Act requires that covered jurisdictions must provide language assistance to all aspects of the voting process to limited English proficient voters. The entire Navajo Nation is a covered jurisdiction under Section 203. Section 203's coverage of all aspects of the voting process include voter registration and early voting.

Over the years the Navajo Nation has fought efforts by the states, and their political subdivisions, to dilute and deny the votes of its citizens residing on the Navajo Nation. The Nation has alleged violations of the Fourteenth Amendment of the Constitution, as well as Sections 2 and 203 of the VRA. Despite some progress, recent examples illustrate ongoing barriers that limit participation of Navajo voters in state and federal elections.

III. Recent Navajo Voting Cases

1) *Navajo Nation v. San Juan County*

The portion of the Navajo Nation located in Utah, 1.3 million acres, is entirely within Utah's San Juan County. Over 7,000 Navajo citizens reside in San Juan County, and approximately 52% of the county's population is Native American. Even though Native Americans make up a majority of the County's population, before 2018 Native Americans never held a majority of the seats on the county commission or school board. This is because most of the Navajo voters were packed into a single district of three to prevent them from electing two candidates of choice.¹⁰

⁹ 52 USC 10301(b).

¹⁰ This is not the first time the Navajo Nation has challenged malapportioned districts. In the early 1970s in an effort to prevent Navajo candidates from being elected to the Board of Supervisor, Apache County restructured the districts into three unequal districts. *Goodluck v. Apache Cty.*, 417 F. Supp. 13, 14 (D. Ariz. 1975), *aff'd*, 429 U.S. 876 (1976). District 1 had a

Utah, and San Juan County in particular, has a long history of violating Native American's right to vote. Utah was the last state in the Union, in 1957, to recognize the right of Native Americans to vote. In 1983, the United States Department of Justice filed a case against San Juan County alleging its' County Commission at-large elections violated the Constitution and Section 2 of the VRA because it denied Native American residents an equal opportunity to participate in the county's political process and to elect candidates of their choice. The county entered into a consent decree with the United States. The district court's settlement order acknowledged that the county's at-large system failed to comply fully with the requirements of Section 2 of the VRA. As part of the consent decree, the county agreed to adopt single-member districts.

The county established three single-member county-commission districts, Districts 1, 2, and 3. When District 3 was established, it was intentionally heavily packed with Navajo voters. Appeals Court Decision at 4. After the districts were established, the county never redrew them. By 2011, District 3, which was over 92% Native American, had an inordinately large population of Native Americans. Court of Appeals Decision. Based on this disproportionate amount of Native Americans in District 3, the Navajo Nation asked the county to redraw the county commission districts in response to the 2010 census. The county declined to change District 3's boundaries, and made only a few small changes to District 1 and 2 to equalize the population of those districts.

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. 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. Apache County claimed that the Indians are not citizens of the United States and that the Indian Citizenship Act granting Indians citizenship was unconstitutional. 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.

In 2012 the Navajo Nation and several of its individual tribal members brought suit against San Juan County in federal district court alleging voting-related violations of the Equal Protection Clause of the Fourteenth Amendment, Fifteenth Amendment, and Section 2 of the VRA.¹¹ Specifically, that the boundaries of District 3, were unconstitutional based on race in violation of the Equal Protection Clause, and that the high population deviations in the school board districts resulted in vote dilution of the Equal Protection Clause’s guarantee of one person, one vote.¹² The Navajo Nation further alleged that the county-commission and school board districts diluted the voting power of Native Americans in violation of § 2 of the VRA.

The district court found that both the school board and the county commission districts violated the Equal Protection Clause and were therefore unconstitutional. The district court then ordered the county to develop a remedial redistricting plan. It stated that it would adopt the county’s proposed remedial plan if the plan cured the identified violations and was otherwise legally sound. After the county submitted its proposed remedial redistricting plan, the district court found that the remedial plan was also unconstitutional. Specifically, it found that some districts in the remedial plan were based on race and did not survive strict scrutiny. So the district court rejected the county’s plan and appointed a special master. After the special master created several proposed redistricting plans, the district court conducted two public hearings and accepted input from the parties. The special master then drafted a final plan, and the district court ordered the county to adopt it. The district court further ordered the county to hold special elections utilizing the new districts in November 2018. The county appealed the district court’s

¹¹ *Navajo Nation v. San Juan Cty.*, 162 F. Supp. 3d 1162, 1165 (D. Utah 2016), *aff’d*, 929 F.3d 1270 (10th Cir. 2019).

¹² *See Avery v. Midland Cty.*, 390 U.S. 474, 478 (1968) (explaining that right to vote “is infringed when legislators are elected from districts of substantially unequal population”)

decision and in July 2019, the 10th Circuit upheld the district court's ruling. The 2018 elections were the first elections in San Juan County under the newly established districts. As a result of the new districts, two Navajo individuals were elected to the county commission. For the first time in San Juan County's history, Native Americans make up a majority of the county commissioners.

2) *Navajo Nation Human Rights Commission v. San Juan County*

In 2014, San Juan County, Utah closed all of its polling locations and switched to an all vote by mail system. If a voter wanted to vote in-person, she would have to go to the county seat in Blanding, Utah to cast her ballot. Although San Juan County is a covered jurisdiction under Section 203 of the VRA and must provide all election materials in Navajo and English, no provisions were made to comply with the law. The Navajo Nation Human Rights Commission sued the County for violations of the Voting Rights Act and the Fourteenth Amendment.

Because Navajo is an oral language, switching to vote-by-mail effectively denies Navajo language speakers an opportunity to vote. Navajo voters who do not speak English are forced to find an individual who will assist them in translating the ballot and explain what the different provisions mean. This is a violation of Section 203 of the VRA.

It is also difficult for most Navajo voters to vote by mail because most Navajo voters lack access to mail or have unreliable mail service. At the time of this case, most Navajos residing on the Utah portion of the Nation did not have addresses. Instead, voters relied on P.O. Boxes to receive mail, including their ballots. Depending on the location of their residence, some Navajo voters who reside in Utah actually receive their mail at their P.O. Box in Arizona. Members of the communities of Navajo Mountain Chapter and Red Mesa Chapter in Utah may have their

residence in the state of Utah but their physical P.O. Boxes are located in Arizona. If a P.O. Box is located in Arizona, it can result in the mailing being routed to Phoenix before it is delivered. This results in an individual having less time to fill out their ballot than individuals with physical mailing addresses, as it takes their ballot longer to travel each way.

Because of the uncertainty about whether a mailed ballots will be received in time, many individuals prefer to vote in person. This ensures that their vote is timely and counted. However, after San Juan County closed all its polling locations, the ability of Navajos in the southern part of the county to cast their ballots in-person became extremely difficult. Blanding is located in the northern part of the county, close to the non-Native population. Due to the size of the county, and lack of roads connecting all parts of the county to each other, some Navajo voters have to drive into Arizona and then back to Utah in order to get to Blanding. This trip is approximately 180 miles one way, and up to nine hours round trip.

The Human Rights Commission was able to settle the case with the county, ensuring in the settlement agreement that physical polling locations were reopened on the Nation, and that Navajo speakers would be present at the locations to assist voters in explaining the ballot. Although the County had one in-person polling location, it was located in the county seat. Some Navajo voters have to travel 9 hours round trip in order to vote in person.

3) *Navajo Nation v. Hobbs*

For the 2018 general election, most early voting locations in Apache, Coconino, and Navajo County were located off-Nation, requiring Navajo voters to travel a great distance if they wanted to cast their early vote ballot in-person. Polling locations and voter registration sites on the Nation are often located at substantially greater distances from voters, than sites located

off-Nation. Further distances means a greater cost incurred to exercise one's vote. Making early voting available at the county seat, while not providing Navajo voters living on the Nation with the same access to early voting sites, has the practical effect of providing more voting resources to one community than another. Non-Indian voters have a greater opportunity to avail themselves of the less burdensome early voting process. Prior to the 2018 Election, the Navajo Nation asked Apache, Coconino, and Navajo Counties for additional voter registration and early voting locations on the Navajo Reservation. The Counties denied these requests. This resulted in Navajo voters having unequal access to voter registration and early opportunities as compared to off-reservation voters. Some voters, for example, had to travel over 100 miles roundtrip to participate in early voting.

In the November 2018 General Election, over 100 votes cast by citizens of the Navajo Nation residing in Arizona's Apache, Navajo, and Coconino counties were not counted, because the voter either did not sign the envelope containing their early ballot, or because the signature on the envelope did not match the voter's signature stored by the county.

Arizona requires a voter to provide identification when voting in-person.¹³ When a voter votes via an early ballot, her signature on the ballot affidavit is considered her identification. If an early voter fails to sign the ballot affidavit she does not have the ability to cure the defect, unless the county which she votes in provides her that opportunity. The Arizona Election Manual in effect during the 2018 election was silent on how a county should handle an unsigned ballot affidavit. Apache, Navajo, and Coconino county did not allow voters to cure their unsigned ballot affidavit.

¹³ A.R.S. § 16-579(A).

This lack of ability to cure a ballot identification defect is unique to early ballots missing affidavit signatures. The Arizona Election Manual in effect during the 2018 election specifically gave county officials discretion to allow curing of mismatched signatures on a ballot. For mismatched ballots, a county official could contact the voter and verify the signature. Both Apache and Coconino county allowed voters with mismatched signatures an opportunity to cure their ballots. Additionally, if a voter fails to present identification when voting in-person on election day, she has five business days, after the election, to return with her identification and have her ballot counted.

Voters who participate in early voting, and fail to sign their ballot affidavit, do not have the same opportunity to cure their identification deficiencies as those vote early but have mismatched signatures, or as those who vote in-person on election day but forget their identification.

This disparate treatment between voters led the Navajo Nation to file suit against the counties and the Secretary of State of Arizona in 2018.¹⁴ The Navajo Nation filed suit in federal district court claiming that these inconsistencies in treatment impacted Navajo citizen's right to vote in the 2018 General Election. The Nation alleged that Navajo early voters who failed to sign their ballot affidavit were denied equal protection under the Equal Protection and Due Process Clause of the Constitution, since they were not provided notice of the defect nor were they provided the opportunity to cure the defect.

¹⁴ *The Navajo Nation v. Reagan*, 2018 WL 9392919 (D.Ariz.).

The Navajo Nation was able to settle its case against the counties and the state by entering into settlement agreement with all the defendants. Under the terms of the agreement, the Secretary of State would propose the following language for inclusion in the Elections Manual:

If a voter fails to sign an early ballot affidavit, the County Recorder or other officer in charge of elections shall make reasonable efforts to contact the voter, advise the voter of the missing signature, and allow the voter to cure the deficiency. The County Recorder or other officer in charge of elections shall allow signatures to be corrected not later than the fifth business day after a primary, general, or special election that includes a federal office or the third business day after any other election.

The counties agreed to provide curing if the state included the provision in the Elections Manual. The Attorney General objected to the language. The Secretary of State and the Attorney General reached a compromise to allow curing until 7 pm on Election Day. Limiting curing to 7 pm on election day fails to afford due process to those voters who turn in their ballots at a polling location on election day. It also fails to afford these voters equal protection because early voters with mismatched signatures, and voters who fail to provide identification on election day are both afforded five days post-election to cure the deficiencies. Attorney General McPaul informed Attorney General Brnovich, that excluding this agreed upon language from the Election Manual would be teeing up additional litigation, creating a situation in which some counties would allow voters to “cure” their votes and some would not.

Despite the limits in the Election Manual, during the 2020 Arizona Legislative Session State Senator Ugenti-Rita proposed bill SB 1032 to eliminate any opportunity to cure unsigned early ballots by including in law that a ballot shall not be counted if it is not signed by 7 pm on election day. However, there are no provisions in the bill to provide due process to the voter. This legislation seeks to undermine the settlement negotiated in good faith between the parties.

The litigation also addressed language assistance, voter registration, and early voting. To resolve the litigation, the counties also agreed to (1) open additional in-person early voting polling places, (2) develop a voter registration plan to maximize voter registration, (3) provide timely radio advertisements and election information in the Navajo language, and (4) provide Navajo translators at each polling place. The Department of Justice has also brought cases to enforce voting rights of Navajo citizens, specifically to enforce the language minority provisions of Section 203.

4) *Democratic Nat'l Comm. (DNC) v. Hobbs*

While the Navajo Nation did not participate directly in *DNC v. Hobbs*,¹⁵ a number of its citizens were involved in the case and the decision has a direct impact on Navajo citizens being able to exercise their right to vote. As opposed to the San Juan County and Reagan case, the decision by the 9th Circuit in *Hobbs* focused exclusively on the application of Section 2 of VRA to laws passed by the Arizona legislature.

a. Out of Precinct Voting

Arizona allows its counties to choose a vote-center or a precinct-based system for in-person voting.¹⁶ In counties that use vote-center system, registered voters may vote at any polling location in the county.¹⁷ In counties using the precinct-based system, registered voters may vote only at the designated polling place in their precinct. Approximately 90 percent of Arizona's population lives in counties using the precinct-based system.¹⁸

¹⁵ No. 18-15845, 2020 WL 414448 (9th Cir. Jan. 27, 2020).

¹⁶ *Democratic Nat'l Comm. v. Reagan*, 329 F. Supp. 3d 824, 840 (D. Ariz. 2018)

¹⁷ *Id.*

¹⁸ *DNC* at 10.

On the Navajo Nation, Apache and Coconino county use a precinct-based system and Navajo county uses a vote-center system. If a Navajo voter tries to vote in Apache or Coconino county, she must vote at her precinct voting location in order for her vote to be counted. If she attempts to vote at a polling location outside of her precinct on election day, she can only cast a provisional ballot.¹⁹ After election day, if election officials determine the voter voted outside of her precinct, prior to the Hobbs decision, they would discard the provisional ballot in its entirety.

Provisional ballots are commonly used by voters in Arizona. In the 2012 general election, more than 22 percent of all in-person ballots cast were provisional ballots.²⁰ Arizona is at the top of the list of States that cast provisional ballots.²¹ Arizona is also the State that rejects the highest percentage of provisional ballots.²² One of the most frequent reasons for rejecting provisional ballots in Arizona is that they are cast out-of-precinct.²³

Native Americans are over-represented among out-of-precinct voters by a ratio of 2 to 1, with 1 in every 100 Native American casting a provisional ballot.²⁴ During the 2014 and 2016 general elections in Apache, Navajo, and Coconino counties, the vast majority of out-of-precinct ballots were in areas that were almost entirely Native American.²⁵

Minority voters often vote out-of-precinct ballots due to their high mobility, fluidity in residential locations, and frequent changes to the precinct and polling place schemes.²⁶ In addition, a majority of Navajo citizens residing on the reservation do not have traditional street

¹⁹ Ariz. Rev. Stat. §§16-122, -135, -584.

²⁰ *DNC* at 12.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *DNC* at 20 and 42.

²⁵ *DNC* at 19.

²⁶ *DNC* at 14.

addresses. Of the Navajo Nation's 110 chapters, about 70 of them do not have street names or numbered addresses, which adds up to at least 50,000 unmarked properties. Navajo voters' lack of standard addresses can cause their precinct assignment to be based on guesswork.²⁷ While state registration forms allow a space for an individual to draw a map location of their resident, these maps often do not allow for sufficient detail to properly locate the residence. In 2012, Apache County, Arizona purged 500 Navajo voters because their addresses were deemed "too obscure."

If the location of a voter's residence is unclear, it can result in counties assigning voters to the wrong precincts. If a voter is placed in the wrong precinct, it can lead to confusion about the voter's correct polling place, longer travel times for the voter to find her correct polling place, and to the county ultimately rejecting the ballot if it determines the voter cast her ballot in the wrong precinct.

Another reason Navajo voters may vote out of precinct is that their precinct polling location is different than their Navajo elections polling location for. For Navajo elections, Navajo voters must vote at the chapter house where they are registered. For example, if a Navajo voter is registered with Fort Defiance Chapter her polling location for all Navajo elections will be at the Fort Defiance chapter house. However, even though the Fort Defiance chapter house is a precinct polling location for Apache County, the individual may actually have to go to another precinct polling location because her residence is not in Apache County's Fort Defiance precinct.

²⁷ *DNC* at 18.

In the 2018 general election, a voter casted her ballot at the Fort Defiance Chapter House for the Navajo elections. She then attempted to cast her ballot in the state elections but was told by the poll workers that she was not registered to vote at that precinct. The poll worker did not inform the voter of her correct precinct polling location. Instead, the voter had to retrieve the information from a volunteer outside of the polling location. The volunteer informed the voter that her precinct polling location was at the Navajo Nation Museum in Window Rock, 6.3 miles away. If the volunteer had not been present it is unclear how the voter would have learned about her polling location.

The difference in tribal and state polling locations causes confusion, and results in voters casting ballots in the wrong precinct. It also results in voters having to drive to multiple locations to vote in tribal and state elections. Another example is the Coal Mine Mesa Chapter in Coconino County. Coal Mine Mesa Chapter is divided among several county voting precincts. A member of the Coal Mine Mesa Chapter may reside in the Cameron precinct or the Coal Mine Mesa precinct depending on the location of their residence. If this individual wants to vote in both the tribal and state election on election day, she would first have to cast her ballot at the Coal Mine Mesa Chapter house. She would then have to drive 43 miles one way to the Cameron Chapter house to vote in the state election.

For all of these reasons, Navajo voters are more likely than their white counterparts to vote out-of-precinct and cast a provisional ballot. Arizona's policy of rejecting a provisional ballot, cast out of precinct, in its entirety has a disparate impact on Navajo voters. The 9th Circuit's decision found that Arizona's policy of entirely discarding out-of-precinct ballots

results in disparate burden on minority voters causing in a substantially higher percentage of minority votes than white voters being discarded.²⁸

b. Criminalization of Ballot Collection Assistance

Prior to Arizona's criminalization of ballot collection, it was common for Navajo voters to provide their ballots to third parties. As the 9th Circuit stated, the criminalization of ballot collection has a pronounced effect in rural counties with significant Native American populations who disproportionately lack reliable mail and transportation services.²⁹

Many Navajo individuals live far off main roads, on dirt roads that are not easily accessible. There is no public transportation that allows for the pick-up of citizens at their place of residence.³⁰ Therefore, if an individual did want to take public transport, she would need to first get from her residence to a pick up site. This severely limits the transportation options for elderly and disabled citizens, who are reliant on relatives or friends for rides. In some parts of the Nation, only one in ten families own a vehicle which further limits transportation options.

In addition, Navajos do not have access to reliable mail service. Due to the remote location and lack of traditional addresses on the Nation, many Navajo citizens must utilize P.O. Boxes to receive their mail. Because the Nation spans three states, three counties in Arizona, one county in Utah, and four counties in New Mexico, an individual's P.O. Box location may be in a different state or county than the individual's residence. A person may reside in Arizona but their

²⁸ *DNC* at 47.

²⁹ *DNC* at 88.

³⁰ 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. 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).

P.O. Box and Chapter House is in New Mexico (i.e. Red Lake Chapter and Crystal Chapter) or reside in Utah and their P.O. Box in Arizona (Navajo Mountain Chapter). Some individuals reside in Navajo County but their P.O. Box and local Chapter House is in Coconino County. (i.e. Birdsprings Chapter).

P.O. Boxes are usually shared by multiple family members. Multiple family members will utilize one box because some family members may not be able to afford their own P.O. Box. The sharing of P.O. Boxes by multiple individuals can lead to lost or delayed ballots and voter notifications, as one family may not provide the other individuals on the P.O. Box with their mail in a timely manner, if at all. Even with multiple family members on one P.O. Box, there are not enough P.O. Boxes to serve the community; there are only a limited number of P.O. Boxes available at each location. The post office limits the number of people that can be listed on a P.O. Box, causing individuals who do share P.O. Boxes with their family to be removed from the box. If an individual is not able to secure a P.O. Box, or is removed from their family box, they may have to travel 30 to 40 miles to the next closest post office. At times this can be in addition to the 30 miles they traveled to reach their local post office. Long travel times to P.O. Boxes make checking the mail a hardship for individuals who are elderly or disabled. It also results in individuals checking their mail less frequently. Some citizens are only able to check their P.O. box once a week or even as little as once every three to four weeks.

For all these reasons many individuals rely on others to help them pick up and drop off mail. These individuals may be related by blood to the voter, or they may be a clan relation. They may also be a non-relation community member who happens to assist the individual at their house. The limitations placed on who can transport a ballot under Arizona law places the

burden on low-income, isolated, elderly voters, who may not speak English as a first language, to find a way to get their ballot to a mail-box possibly as far as 30 miles away, in a timely manner.

5) *Harris v. Arizona Independent Redistricting Commission*

In 2012, the Arizona Independent Redistricting Commission approved legislative and congressional maps that complied with the state constitutional requirements. The Commission hired an outside consultant to ensure that it followed the requirements of the Voting Rights Act in developing the maps. With this focus, the US Department of Justice precleared both maps on the first attempt—a first in Arizona’s history. The Commission created one Native American majority minority district, LD7, comprising of nine tribes with a Native American voting age population of 63.7%. This district is the largest geographic district in the state, with the smallest population. It also has the smallest population density, with fewer than ten people per square mile throughout most of the district. The difference between the largest and smallest populated districts is 18,709, or an 8.8% maximum deviation.

In 2012, following the development of the congressional and legislative districts, there were numerous lawsuits challenging the maps drawn by the Arizona Independent Redistricting Commission. One of these challenges was *Harris v. Arizona Independent Redistricting Commission*³¹. In *Harris*, plaintiffs claimed that the Arizona legislative districts violated the one-person, one-vote principle of the Fourteenth Amendment and argued that the deviations were motivated by partisan influences. The Commission’s rationale for under populating districts was to comply with the Voting Rights Act. The Navajo Nation participated as amicus curiae in a number of these challenges to protect the sole Native American majority-minority

³¹ 136 S. Ct. 1301, 1304, 194 L. Ed. 2d 497 (2016).

district – LD 7. At trial, the challengers' own expert confirmed that there was no partisan motive in drawing. LD7 was developed to ensure that Native Americans could elect a candidate of their choice, but also considered and granted requests of Non-Indians who did not want to be in a Native American majority-minority district. Underpopulating a district also takes into account the extreme undercount in Native American communities, identified by the Census as hard-to-count populations.

A unanimous Supreme Court in *Harris v. Arizona Independent Redistricting Commission*, No. 14-232, upheld the deviations finding that deviations under 10% are generally acceptable, and will be only be overturned in rare cases. The Court said that factors other than partisanship explained the disparities, specifically the neutral redistricting criteria of compactness, contiguity, communities of interest, local boundaries, political competitiveness and compliance with the VRA.

A resolution has been introduced this legislative session to reduce the maximum deviation from the Supreme Court standard of 10% to 5,000 people. This would reduce the likelihood of maintaining a strong Native American majority-minority district. Arizona courts have recognized that Arizona's geography and demography create certain challenges in redistricting. Only 18.2% of the land in Arizona is held privately, and 27% of the land is located on Indian Reservations. Rural areas have remained sparsely populated while the urban areas continue to experience rapid growth. The majority of Arizona's Indian Country are located outside of urban areas. Five of the ten most populated reservations in the United States are located in Arizona, including the Navajo Nation, the largest reservation in both size and population. The Nation Nation is concerned that this is an ongoing effort that will result in the

inability of Navajo voters to elect candidates of choice in violation of Section 2 of the Voting Rights Act.

IV. Conclusion

Navajo voting rights are constantly under attack. Although positive strides have been made, more must be done to ensure that Navajos and other Native Americans have equal access to the ballot box. For this to occur, we must have voter registration and polling locations in our communities, voting districts should be created to ensure that we have an equal opportunity to elect candidates of choice, and our Navajo voters must be provided effective language assistance. For these reasons, the Navajo Nation supports the Native American Voting Rights Act.