

ARIZONA SUPREME COURT

ARIZONA REPUBLICAN PARTY, a
recognized political party; and
YVONNE CAHILL, as officer and
member of the Arizona Republican
Party and Arizona voter and taxpayer.

Petitioners,

v.

KATIE HOBBS, in her official
capacity as Arizona Secretary of State;
and STATE OF ARIZONA, a body
politic,

Respondents.

No. CV-22-0048-SA

AMICUS BRIEF OF THE NAVAJO NATION

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Statement of Interest

Amicus curiae Navajo Nation is a federally recognized Indian tribe with a government-to-government relationship with the State of Arizona.¹ The Nation occupies some of the “most remote, challenging, and sparsely populated terrain in the country.” *Addressing the Urgent Needs of our Tribal Communities: Hearing Before the Comm. on Energy and Commerce*, 116th Cong. 1 (2020) (testimony of Jonathan Nez, Navajo Nation President). With over 27,000 square miles, the Nation is as large as, if not larger than, the state of West Virginia and nine other states. *Restoring the Voting Rights Act: Protecting the Native American and Alaska Native Vote: Hearing Before the Subcomm. on the Const. of the S. Comm. on the Judiciary*, 117th Cong. 1 (2021) (testimony of Jonathan Nez, Navajo Nation President) (Restoring the Voting Rights Act).

The Nation is located in Coconino, Navajo, and Apache Counties in Arizona, seven counties in New Mexico, and one county in Utah. There are 110 subunits of government, called Chapters, located throughout the Nation, 57 of which are located in Arizona. There are currently 403,927 enrolled Navajo citizens, with a majority of these Navajo citizens residing in Arizona. The Navajo Nation has a strong interest in ensuring its citizens and residents are able to exercise their right to vote.

¹ The government-to-government relationship is recognized by the Treaty of 1849 and Treaty of 1868.

Argument

I. Early voting, in-person and by mail, and drop boxes more nearly achieve Arizona’s basic Constitutional right to vote in free and equal elections, without interference by civil powers by enabling voters on the Navajo Nation to overcome unique obstacles to voting.

Arizona’s Constitutional Declaration of Rights provides: “All elections shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” Ariz. Const. art 2, § 21.

Arizona has not always lived up to its own ideals in delivering free and equal voting rights to its first residents. *See, e.g., Porter v. Hall*, 34 Ariz. 308, 271 P. 411 (1928) (tortuously construing the Arizona Constitution to hold tribal Indians are “persons under guardianship,” not entitled to vote), overruled by *Harrison v. Laveen*, 67 Ariz. 337, 342-344, 196 P.2d 456, 460 (1948) (recognizing “progress along these lines has been slow” and “[w]ith some of our more illiterate and backward tribes, such as the neglected Navajos, the government it would seem, has moved at a snail's pace”).

While we wish this Court, in 1948, had taken an extra step to dignify the traditional knowledge, forward leaning patriotism, and military service of our Navajo elders, we appreciate the Court’s acknowledgment that there are unique challenges in Indian country. In the span of 75 years and the wake of numerous

election-related lawsuits, consent decrees, and settlement agreements,² voting procedures have gradually improved on the Navajo Nation, but we do still have a long way to go.

If this court accepts the Petitioner's invitation to once again tortuously construe Arizona law to achieve a politically motivated result, it will undo many years of good work by lawmakers and state and county officials from both political parties. As discussed below, early voting and drop boxes play an important role in helping many voters cast their ballots on the Navajo Nation without undue interference by unique transportation and postal service obstacles.

A. Early voting, in-person and by mail, and drop boxes enable Arizona voters on the Navajo Nation to overcome interference in traveling to cast their votes.

Eliminating early voting in any form and prohibiting drop-boxes will drastically affect Navajo citizens' right to vote. Voting is not equally accessible for Navajo voters compared to other Arizona voters voting outside the Nation. Navajo voters do not have the same opportunity to vote because life on the Nation is much different than what is experienced by most Arizonans.

Traveling long distances is one of many obstacles that Navajo voters face when participating in the political process. The Nation's large land base and sparsely

² If the Court desires to see the lengthy catalogue of the Navajo Nation's election related lawsuits and related documents, counsel will gladly provide it.

populated terrain results in many Navajo citizens traveling long distances to cast their vote. For example, in the 2020 election, Navajo voters living near Pine Springs, Arizona traveled at a minimum 26 miles and 40 minutes round trip to the nearest election day voting location at Houck Chapter House.

This travel is exasperated by the fact that only a small percentage of roads on the Navajo Nation are paved. Additionally, many voters on the Navajo Nation do not have a vehicle of their own and rely on sharing a vehicle or hitchhiking to pick up and drop off their mail. Rideshare services and public transportation are largely unavailable or limited on the Nation, and these voters cannot simply call up an Uber or Lyft, or hop on a bus, if their ride falls through.

State and federal elections are held on the same day as Navajo Nation elections and Navajo voters typically participate in Navajo elections on the same day they participate in county, state, and federal elections. Chapter houses serve as polling locations for all Navajo elections, but a voter's designated Chapter can differ from their designated county polling location. In this instance, a voter must then travel to two different locations to participate in each election. For example, Black Mesa Chapter is split between Apache and Navajo County and Tolani Lake Chapter is split between Coconino and Navajo County. Black Mesa Chapter is a polling location for Navajo County and Tolani Lake Chapter is a polling location for Coconino County. If a resident from Black Mesa Chapter lives in Apache County,

the resident will have to drive at least 30 miles roundtrip to Rough Rock Chapter to vote in the state and federal elections. It is important to note that while a voter would only drive 30 miles roundtrip to vote at Rough Rock Chapter, it would actually take the voter an hour and half to travel on the difficult and unpaved roads between Black Mesa and Rough Rock Chapter. If a resident of Tolani Lake Chapter lives in Navajo County, the resident will need to drive at least 36 miles roundtrip to Winslow to vote in the state and federal elections.

To add to all this travel is the fact that Navajo voters do not have traditional street addresses. In order to register to vote, Navajo voters must describe the location of their residence on the voter registration application and draw a picture of its location. It is up to the County to place the voter in the proper precinct based on its' interpretation of the description and drawing. Because depictions of locations are subject to interpretation, it is common for a voter to be placed in the wrong precinct. However, this misplacement is often not discovered until the voter attempts to cast their ballot. At that time, the voter is informed that they are at the wrong precinct, cannot vote, and need to drive to vote at another precinct.

If a voter tries to vote at a precinct in which they are registered, the voter may cast a provisional ballot, but will need to provide documentation to the County before 7 p.m. on Election Day, requiring the voter to drive another 30 miles round trip to retrieve the necessary documentation. Many voters do not have cellular signal

at their residences and this in-person verification is the only way they can move their ballot out of its provisional status. If a Navajo voter in Apache County is required to travel to the county seat to clarify voting information, their travel distance could be up to 211 miles one-way from Teec Nos Pos to the county seat in St. Johns. Restoring the Voting Rights Act at 2. Vote by mail options enable such a voter to cast their ballot without the risk of voting in-person in the wrong precinct, and to more easily resolve the issue and cast their ballot in a single trip. But, eliminating early voting and prohibiting drop-boxes will drastically affect Navajo citizens' right to vote.

Socio-economic factors contribute to the unique challenges Navajo voters face traveling to polling locations. The rate of poverty on the Nation is thirty-eight percent, which is more than double the rate of other Arizonans. One-third of households on the Nation do not have access to reliable transportation and in some areas of the Nation, only one in ten families own a car. *Voting Rights and Election Administration in Arizona: Field Hearing Before the Subcomm. on Elections of the H. Comm. on Administration*, 116th Cong. 7 (2019) (testimony of Jonathan Nez, Navajo Nation President). An individual Navajo voter's options on when to cast their vote is limited to when they may, if at all, have access to reliable transportation.

By decreasing the opportunity for a Navajo voter to cast their ballot the more likely it is that they will not be able to find transportation to the polling location and have the necessary time to make the trip. Decreasing opportunities and ways a

Navajo voter can cast their ballot will in effect decrease the turnout of Navajo voters.³

In the case that early voting locations are eliminated, and the designated locations do not remain as Election Day voting centers, the likely result is reduced voter turnout. The voter would face the hurdles of increased distance to Election Day voting centers outside the Nation, and lack reliable transportation to travel to those sites. Because of their socio-economic status, a Navajo voter would be unable to bear these additional costs of voting. Limiting voting to primarily in-person on Election Day disenfranchises Navajo voters and effectively denies Navajo citizens the ability to freely exercise their right to vote.

B. Drop boxes enable Arizona voters on the Navajo Nation to overcome interference in utilizing mail services to cast their votes.

All voters located on the Navajo Nation rely on post office boxes to receive their mail, as there is not home mail delivery service on the Navajo Nation. *See, e.g., Democratic Nat'l Comm. v. Hobbs*, 948 F.3d 989, 1003 (9th Cir.) (“Navajo voters in Northern Apache County lack standard addresses, and their precinct assignments for state and county elections are based upon guesswork, leading to confusion about the voter's correct polling place.”).

³ Jean Schroedel, *et al.*, *Assessing the Efficacy of Early Voting Access on Indian Reservations: Evidence from a Natural Experiment in Nevada 2*, available at <http://research.cgu.edu/democratic-renewal/wp-content/uploads/sites/26/2018/10/AssessingEarlyVotingAccess.pdf>.

Post office boxes on the Navajo Nation are often located a great distance from the voter's residence, in rural areas, with limited hours of operation. The Navajo Nation has twenty-four post offices and fifteen postal providers (with only eleven post offices in Arizona). By comparison, the State of West Virginia, roughly the same size as the Navajo Nation, is reported to have 725 postal facilities. *See Isaiah Murtaugh, Mail voting doesn't work for Navajo Nation: Native Americans face steep election hurdles*, The Guardian (Oct. 9, 2020). The substandard postal service provided to the Navajo Nation led the Naabik'iyáti' Committee of the Navajo Nation Council to recently adopt a resolution requesting the United States Postal Service to provide the Council with an oral and written report regarding how it will upgrade and improve the delivery of postal services at each of the 110 chapters located throughout the Navajo Nation. Resolution NABIN-47-21 (Nov. 25, 2021), available at <http://dibb.nnols.org/publicreporting.aspx>.

Due to the transportation issues discussed above, voters must coordinate their ride at the right date and time to access postal services. This leaves many Navajo voters subject to the vagaries of another person's availability if they wish to utilize mail services other than an outdoor mail drop box, which for reasons discussed below, offer less certainty for voters than an election drop box provided by the County election official.

Rural mail is often delayed due to complicated mail routing. For example, in Apache County, a ballot from Window Rock, Arizona is routed to Gallup, New Mexico then Albuquerque, New Mexico then Phoenix, Arizona then to Show Low, Arizona and then to the county recorder in St. Johns, Arizona. (Navajo Nation teleconference with Samantha E. Lamb, AZ/NM Political Mail Coordinator, United States Postal Service (Sept. 29, 2020)). Due to these circuitous routes, voters that request a mail-in ballot receive their ballots later than voters in other parts of the State, and they must mail in their ballots earlier than other voters to increase the likelihood that their county recorder will receive it by Election Day. Because these mail routes are so complicated, there is no good estimate for how long a ballot will take to reach a county recorder's office. A voter on the Navajo Nation may mail a ballot a week in advance, and the ballot still may not make it to the County Recorder's office by Election Day.

Drop boxes are essential to enable Navajo voters (who receive their ballot later in the early voting process than urban voters) to return the ballot in a secure and timely manner to the County, to make sure the ballot is counted, rather than to risk the ballot getting to the County after Election Day. In sum, mail-in ballots are crucial for Navajo voters to overcome distance and transportation challenges on the Navajo Nation. Within the context of mail-in ballots, drop boxes are crucial for Navajo voters to overcome mail service challenges on the Navajo Nation.

Conclusion

There are many Navajos for whom casting their vote early due to the transportation and distance challenges discussed above ensures their votes are counted. Early voting gives Navajo voters a greater window of time to coordinate transportation to retrieve their ballots, study voter education materials, and deliver their completed ballots back to post office. Drop boxes are an even better option for many rural Navajo voters, adding confidence that their ballots will be retrieved by trained election officials and promptly delivered to the county recorder. Ballots placed in a drop box are not subject to the complex routing, handling, and risk of delay inherent in the rural mail service.

Article 2, Section 1 of the Arizona Constitution provides age old wisdom that “[a] frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government.” We appreciate this Court’s prerogative as a body and branch above partisan bluster, with a long view of legal consequences. Petitioners ask for constraints today that they will seek to overturn when political winds shift and their favored candidate succeeds tomorrow to the office so constrained. “It has ever been one of the great responsibilities of supreme courts to protect the civil rights of the American people, of whatever race or nationality, against encroachment.” *Harrison*, 67 Ariz. at 341, 196 P.2d at 458. We respectfully ask this Court to recognize early voting and drop boxes as legitimate

tools that enable legitimate voters to exercise the individual rights guaranteed by Article 2, Section 21 of the Arizona Constitution.

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