

SUPREME COURT OF ARIZONA

ARIZONA REPUBLICAN PARTY, *et al.*,

Petitioners,

v.

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

Respondents.

Case No. CV-22-0048-SA

***AMICUS CURIAE* BRIEF OF INTER TRIBAL ASSOCIATION OF ARIZONA, INC.,
IN SUPPORT OF RESPONDENT ARIZONA SECRETARY OF STATE
FILED PURSUANT TO ARCAP 16(B)(1)(A) WITH CONSENT OF THE PARTIES**

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TABLE OF CONTENTS

INTRODUCTION	1
ARGUMENT	2
I. History of Native American Disenfranchisement.	2
II. Early Voting is Constitutional.	3
A. “At the Polls” does not mean Election Day Polling Location.	4
B. The Framers Gave the Legislature the Power to Mandate Early Voting.	5
III. All Early Voting Options are Needed to Address the Unique Barriers Experienced by Native American Voters.	6
A. Native Americans Experience Unique Barriers to Voting.	7
B. Nonstandard Addresses and Lack of Home Mail Delivery Are Obstacles to Early Voting.	9
C. Lack of Access to Mail Delivery Necessitates Dropboxes.	10
D. Arizonans Favor Early Voting, and Native Americans Increasingly Participate in Early Voting.	11
E. In-Person Early Voting is Necessary for Language Minority Assistance under Section 203 of the Voting Rights Act.	15
IV. Eliminating Dropboxes and In-Person Early Voting May Expose Arizona to Federal Litigation.	15
CONCLUSION	16

TABLE OF AUTHORITIES

	Pages
CASES	
<i>Atl. Cleaners & Dyers, Inc. v. United States</i> , 286 U.S. 427 (1932)	5
<i>Brnovich v. Democratic Nat’l Comm.</i> , 141 S. Ct. 2321 (2021).....	8, 11, 15
<i>Democratic Nat’l Comm. v. Reagan</i> , 329 F.Supp.3d 824 (D. Ariz. 2018)	8, 9, 10
<i>Harrison v. Laveen</i> , 67 Ariz. 337 (1948)	2
<i>Mi Familia Vota v. Hobbs</i> , 492 F. Supp. 3d 980 (D. Ariz. 2020).....	9
<i>Oregon v. Mitchell</i> , 400 U.S. 112 (1970)	3, 4, 6
<i>Pascua Yaqui v. Rodriguez</i> , No. CV-20-004432, 2020 WL 6203523 (D. Ariz. Oct. 22, 2020)	12, 13
<i>Porter v. Hall</i> , 34 Ariz. 308 (1928)	2
<i>Saban Rent-a-Car LLC v. Ariz. Dep’t of Revenue</i> , 246 Ariz. 89 (2019)	4
<i>Wittemyer v. City of Portland</i> , 402 P.3d 702 (2017)	4
<i>Yazzie v. Hobbs</i> , No. CV-20-08222, 2020 WL 5834757 (D. Ariz. Sept. 25, 2020).....	10
STATUTES	
52 U.S.C. §10503(c)	15

A.R.S. §16-541(A).....	3, 5
A.R.S. §16-101(A)(4)–(5).....	3
ARIZ. CONST. art. IV, §1.....	4
ARIZ. CONST. art. VII, § 1	3, 5

RULES

ARCAP 16(B)(1)(A).....	1
------------------------	---

OTHER AUTHORITIES

203 Determinations, 86 Fed. Reg. (Dec. 8, 2021)	15
Antonin Scalia & Bryan Garner, Reading Law: The Interpretation Of Legal Texts, 170 (2012)	7
Ben Zimmer, ‘Poll’: From Counting Cattle to Tallying the Vote, Wall St. J. (Oct. 29, 2020)	4
Center for American Progress, Arizona Report – 2020, Talk Poverty (2020)	10, 16, 17
Election Assistance Comm’n, Election Administration and Voting Survey 2020 Comprehensive Report 29 (2021).....	15
Indian Legal Clinic, Native Vote – Election Protection Project 2016 Election Report 16 (2018).....	18
Indian Legal Clinic, Native Vote – Election Protection Project 2018 Election Report 26 (2021).....	18
Indian Legal Clinic, Native Vote– Election Protection 2020 Election Report (forthcoming 2022)	13, 19
John S. Goff, The Record of The Arizona Constitutional Convention of 1910.....	6

Native American Rights Fund, Obstacles At Every Turn: Barriers To Political Participation Faced By Native American Voters (2020).....	9
---	---

<i>The History of Indian Voting Rights in Arizona: Overcoming Decades of Voter Suppression,</i> 47 ARIZ. ST. L.J. 1099 (2015).....	3
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LEGISLATION

John R. Lewis Voting Rights Advancement Act Of 2021, S.4 117th Cong. (2021)	19
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INTRODUCTION

Amicus curiae the Inter Tribal Association of Arizona, Inc. (“ITAA”) is a non-profit, inter tribal consortium of 21 federally recognized Indian Tribes with lands located across the State of Arizona, as well as California, New Mexico, and Utah. ITAA’s representatives are the highest elected officials from each Tribe, including chairpersons, governors, and presidents. Since 1952, ITAA’s Member Tribes have worked together to advocate for regional, state, and national issues affecting Tribes. A majority of reservation-based voters live in Arizona on an ITAA member reservation.

ITAA understands the historical and modern barriers Tribal members face when attempting to access the ballot and provides non-partisan support for Native American voter engagement and participation in state and federal elections. Since 1976, ITAA’s Member Tribes have dedicated time and resources to protect the right to vote. In addition to litigating voter access issues, ITAA also provides education on voting issues, coordinates Get Out the Vote activities for Arizona Tribes, hosts conversations between Counties and Tribes, hosts monthly Native Vote Strategy Sessions, and is a key partner on the Arizona Native Vote Election Protection Project. ITAA’s Member Tribes educate their members on the voting process and coordinate voter registration and voter engagement activities. Given ITAA’s long history of voting related efforts, ITAA understands that early voting

opportunities are critical to ensure that Native voters have meaningful ballot access.

ITAA has an interest in this case because of its potential harmful impact on Native voters' ability to cast a ballot. ITAA has read the relevant pleadings and joins in the Arizona Secretary of State's arguments (Parts IV and V) regarding the legality of the Election Procedures Manual and the constitutionality of early voting. ITAA submits this brief to explain: (1) the history of Native American disenfranchisement; (2) that early voting is constitutional; (3) that Native Americans experience unique barriers to voting; and (4) that Native American voter participation will suffer if early voting is eliminated.

ARGUMENT

I. History of Native American Disenfranchisement.

Arizona has a long history of suppressing Native American voter participation. When Native Americans became citizens in 1924, this Court evaluated whether they could vote under Arizona's Constitution. *Porter v. Hall*, 34 Ariz. 308 (1928). While initially determining that Native Americans did not qualify to vote, this Court overturned that determination two decades later. *Harrison v. Laveen*, 67 Ariz. 337 (1948). This Court held that "suffrage is the most basic civil right" and "[t]o deny the right to vote . . . is to do violence to the principles of freedom and equality." *Id.* at 342. Although this barrier was

removed, Arizona’s literacy requirements prevented Native Americans from registering to vote. A.R.S. §16-101(A)(4)–(5) (1956). Due to high illiteracy rates, most Native Americans were ineligible to vote until 1970 when the Supreme Court struck down literacy tests as a voter qualification. *Oregon v. Mitchell*, 400 U.S. 112 (1970). Native Americans have continued to experience voting barriers through challenges to their citizenship status and candidate eligibility, denial of on-reservation polling locations, attempts to create at-large voting systems that undermine Indian political power, and voter identification laws. Patty Ferguson-Bohnee, *The History of Indian Voting Rights in Arizona: Overcoming Decades of Voter Suppression*, 47 ARIZ. ST. L.J. 1099, 1115-1117 (2015). Petitioners’ effort to end early voting will suppress Native voter participation.

II. Early Voting is Constitutional.

As Secretary Hobbs explains, the Arizona Constitution reserves the methods of voting to the Legislature. ARIZ. CONST. art. VII, § 1. [Resp SOS 28-30] The Legislature has determined that, “[a]ny election called pursuant to the laws of this state shall provide for early voting. Any qualified elector may vote by early ballot.” A.R.S. §16-541(A). The relief Petitioners seek—to end early voting—can only be achieved through legislation or a ballot initiative. Upon review of Constitution and its historical background, Petitioners’ argument must fail.

A. “At the Polls” does not mean Election Day Polling Location.

The Constitution vests voters with the power to propose laws and amendments and “to enact or reject such laws and amendments at the polls.” ARIZ. CONST. art. IV, §1. Petitioners use “poll” and “polling place” interchangeably to erroneously argue that all voting must occur in person and ignore the relevant syntax and context. [Pet. 22, 24] Historical context does not support this reading. *See Saban Rent-a-Car LLC v. Ariz. Dep’t of Revenue*, 246 Ariz. 89, 95 ¶21 (2019).

The phrase “at the polls” means by direct election. [Resp SOS 42] “Poll” originates from a Middle English word for “head.” *Wittemyer v. City of Portland*, 402 P.3d 702, 707 (2017). Doing things “by poll” meant “by head” and became associated with counting the heads of livestock herds or counting per capita and became a term used in the context of counting votes. Ben Zimmer, *‘Poll’: From Counting Cattle to Tallying the Vote*, Wall St. J. (Oct. 29, 2020). In William Blackstone’s learned treatise, *Commentaries of the Law of England*, he explains that poll is not the “place” where the election is held but rather the process of tallying votes and is distinguishable from the phrase “place of election.” *Id.* at 171 (1st ed. 1765). When Arizona’s Constitution was adopted, “poll” and “polling place” were distinct terms.

This distinction is replete in Arizona’s territorial law. [Resp SOS App. 36, 56, 58] The clearest example being that “[n]o person shall take or remove any

ballot from the polling place before the close of the polls.” *Id.* at 58. The framers and their predecessors used the terms “polls” and “polling locations” as distinct terms, and this distinction should be read as intentional. *Id.* at 36, 56, 58; JOHN S. GOFF, *THE RECORD OF THE ARIZONA CONSTITUTIONAL CONVENTION OF 1910*, 767-777 [hereinafter *CONST. CONVENTION*]; *Atl. Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932); ANTONIN SCALIA & BRYAN GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS*, 170 (2012) (“[W]here the document has used one term in one place, and a materially different term in another, the presumption is that the different term denotes a different idea.”)

B. The Framers Gave the Legislature the Power to Mandate Early Voting.

The Constitution provides that elections “shall be by ballot, or by such other method as prescribed by law.” ARIZ. CONST. art. VII, §1. The Legislature prescribed early voting as one such method. A.R.S. §16-541(A). Petitioners urge this Court to reject early voting by construing the legislative authority narrowly. Doing so would prevent Arizona elections from evolving in accordance with the framers’ intent and Arizonans’ desires.

Petitioners argue that Arizona’s early voting system is facially unconstitutional, that voting must be in person on election day or through excused-absentee voting. [Pet. 29, n.17]. No prohibitions regarding the methods of voting were provided by the framers and, in contrast, the framers’ deliberately left the

development of methods of voting to the legislature. CONST. CONVENTION at 114, 116, 786. For example, when the delegation debated whether to add a constitutional timing requirement for publicity pamphlets, a member of the Committee on Suffrage and Elections explained that “[we should] provide for fundamental laws, [and] that we should leave all others to the people or to the legislature.” *Id.* at 148–150. Thus, the framers’ role was to determine the barest outline of elections, like an outline in a coloring book, set to be colored and brought to life by the people of Arizona through initiatives, referendums, and the legislature. The Court should reject Petitioners’ arguments and leave in place Arizona’s most popular voting method – early voting, in its various forms.

III. All Early Voting Options are Needed to Address the Unique Barriers Experienced by Native American Voters.

Native Americans experience barriers to voting that other Arizonans do not, but the options for early voting have improved Native American participation through increased education about early voting, dropboxes, and in-person early voting. Eliminating early voting and any of its methods will harm Native voters. As discussed below, Native Americans experience poverty and infrastructural barriers that complicate participation in elections.

Address and mail delivery issues limit vote-by-mail participation on the vast majority of ITAA Member Reservations, which are all designated as rural by the

U.S. Census. Exclusive vote-by-mail elections are problematic because of lack of access to mail, lack of transportation, and Tribal voters' need for language assistance, and ITAA has objected to such proposals. *See* NATIVE AMERICAN RIGHTS FUND, OBSTACLES AT EVERY TURN: BARRIERS TO POLITICAL PARTICIPATION Faced BY NATIVE AMERICAN VOTERS 93 (2020). When evaluating Petitioners' claims, this Court should consider the following: (1) Native Americans experience unique barriers to voting, (2) nonstandard address and mail issues inhibit Native American voter participation, (3) barriers in mail access necessitate on-reservation ballot dropboxes, (4) Native Americans increasingly participate in and rely on early voting, and (5) in person early voting is necessary for language minority assistance under federal law.

A. Native Americans Experience Unique Barriers to Voting.

Multiple methods of early voting are necessary to address unique barriers to voting and increase Native American participation. These barriers impact all aspects of Tribal life. Native voters are impacted by isolating conditions such as language barriers, socioeconomic disparities, lack of access to transportation, lack of residential addresses, lack of home mail delivery, lack of access to mail, the need for language assistance, lack of on-reservation polling locations, and the digital divide. Because of this, restricting voting to in-person on election day would further limit Native voter participation.

Native Americans have the highest poverty rate in Arizona at 28.6%, whereas the poverty rate for non-Hispanic whites is 9.1%. CENTER FOR AMERICAN PROGRESS, ARIZONA REPORT – 2020, TALK POVERTY (2020). This means that Native Americans are more likely to work multiple jobs, lack reliable transportation or a personal vehicle, and lack sufficient childcare resources. *Democratic Nat’l Comm. v. Reagan*, 329 F.Supp.3d 824, 848 (D. Ariz. 2018), *aff’d*, 904 F.3d 686 (9th Cir. 2018), *rev’d en banc*, 911 F.3d 942 (9th Cir. 2019), *rev’d sub nom., Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321 (2021). In Arizona, 40% of homes located on Tribal lands do not have running water. Charles L. Carlyle, *Native American reservations need basic infrastructure to be economically sustainable*, Phoenix Bus. J. (Oct. 18, 2016). For example, in some Hopi villages, most or all homes do not have tap water. Ian James, ‘*We need water to survive*’: Hopi Tribe pushes for solutions in long struggle for water, AZ Republic (Dec. 14, 2020). Some Hopi families without running water must travel sixteen miles every two days just to have water for bathing, cooking, and cleaning. *Id.* Often, Native voters are faced with choosing between securing their daily needs and exercising their fundamental right to vote.

In Arizona, 95% of people living on reservations have either unserved or underserved telecommunication infrastructure needs. ARIZONA DEP’T ADMIN., ARIZONA STATEWIDE BROADBAND STRATEGIC PLAN (2018). The digital divide

makes it more difficult to provide reservation voters with information regarding changes in election law, policy, and procedure, the movement of polling locations, the closing or consolidation of polling locations, and other critical information. Additionally, as digital tools are increasingly relied on to conduct voter registration and education campaigns, Native Americans are left behind. *See Mi Familia Vota v. Hobbs*, 492 F. Supp. 3d 980, 987 (D. Ariz. 2020) (recognizing registration disparities for those without internet access).

B. Nonstandard Addresses and Lack of Home Mail Delivery Are Obstacles to Early Voting.

Most reservations in Arizona lack traditional street addresses and home mail delivery. *See Reagan*, 329 F. Supp. 3d at 873 (explaining lack of standard addresses on reservations leads to precincts being assigned based on guesswork and voter confusion about their correct polling place). For example, only 18% of Native Americans outside of Maricopa and Pima Counties receive mail at home. *Id.* at 869–870. Dropboxes and in-person early voting locations are the principal methods of making vote by mail accessible for these voters.

Post Office boxes (“P.O. boxes”) are not a simple or inexpensive replacement for home mail delivery. Although Arizona’s Tribal land base exceeds 19.8 million acres (over 27% of Arizona’s total land base) and is home to more than 100,000 eligible voters, only 48 Post Offices and contracted postal units (“CPUs”) are located on Tribal lands. INDIAN LEGAL CLINIC, NATIVE VOTE–

ELECTION PROTECTION 2020 ELECTION REPORT (forthcoming 2022) [hereinafter ILC 2020 REPORT]. Distance to USPS Offices, reduced hours at USPS offices or CPUs, and the cost of maintaining a P.O. box further limit Native Americans' ability to receive mail regularly. "[R]esidents of sovereign nations often must travel 45 minutes to 2 hours just to get to a mailbox." *Reagan*, 904 F.Supp.3d 686, 751–52 (Thomas, C.J., dissenting). This effort can be an all-day task; without a vehicle, it may be impossible. At Tohono O'odham, the postmaster observed that residents only check their P.O. boxes every two to three weeks. *Id.* at 869. Mail delivery delays further impede vote-by-mail options for reservation residents, as it can take up to ten days for a ballot to get from the county seat to the reservation, and vice versa. *See Yazzie v. Hobbs*, No. CV-20-08222, 2020 WL 5834757, at *2 (D. Ariz. Sept. 25, 2020) (discussing mail delivery times from various reservation locations to county recorder offices). This makes timely ballot pick up and return by election day difficult. Therefore, providing alternative methods to return a ballot so that it arrives on time to be counted, such as dropboxes and in-person early voting locations, are crucial to the ability of Tribal members to exercise the right to vote.

C. Lack of Access to Mail Delivery Necessitates Dropboxes.

During the 2020 general election, Tribes and the Secretary of State encouraged early voting to prevent the spread of the coronavirus. Coronavirus

concerns resulted in increased participation in early voting. Tribes advocated for dropboxes and drive up drop off locations to assure timely delivery of a ballot by the close of the polls. Because of circuitous mail routes, and the lack of home mail delivery, dropboxes helped to increase voter participation in 2020. For Tribal voters, dropboxes were essential in ballots being received before the close of the polls. Even so, a reservation voter must find a ride to deliver the ballot to a designated county dropbox, drop-off, or polling location. The ballot collection law limits who can return a voter's ballot.

During the 2020 election cycle, counties provided 160 dropboxes across the state; 18% were on Tribal land. The Hopi Elections Office worked closely with Coconino County to provide a secure dropbox location at the Tribal Elections Office. Voters living on the Navajo, San Carlos, Fort Apache, and Salt River Pima Maricopa Reservations also had dropboxes. Tribes are advocating to increase dropboxes because they were so effective during the 2020 general election.

D. Arizonans Favor Early Voting, and Native Americans Increasingly Participate in Early Voting.

“Most Americans vote by mail. But many rural Native American voters lack access to mail service, to a degree hard for most of us to fathom.” *Brnovich*, 141 S. Ct. at 2370 (J. Kagan, dissenting). In 2016, 74% of Arizona voters voted by mail; and in 2020, 87% voted by mail. ELECTION ASSISTANCE COMM’N, ELECTION ADMINISTRATION AND VOTING SURVEY 2020 COMPREHENSIVE REPORT 29 (2021).

Native American early voting significantly lags behind other Arizonans. While Native American early voting has increased, it is dependent on whether reservation residents receive mail at home, the availability of dropboxes or drop-off locations, and the availability of in-person early voting.

Given the lack of access to reliable mail delivery services, reservation voters are less likely to register to vote by mail and less likely to vote by mail. In addition to access issues, Native Americans lack confidence in mail-in voting systems. The untimely and inconsistent nature of mail delivery means that dropboxes play a critical role in making vote by mail more accessible to Native Americans.

A more effective early voting methodology is in-person *early* voting for which ITAA, and its Member Tribes have advocated. *See Pascua Yaqui v. Rodriguez*, No. CV-20-004432, 2020 WL 6203523 (D. Ariz. Oct. 22, 2020). When in-person early voting is offered on reservations, voter participation increases. In addition to offering in-person early voting, voters can drop off a ballot at in-person polling locations. During 2020, counties operated 189 early voting locations across Arizona; 15% were on Tribal lands. ILC 2020 REPORT. While Navajo had the most reservation-based early voting locations (23), the Fort Apache (3), Hopi (1), Tohono O’odham (1), Salt River Pima Maricopa (1), and San Carlos Apache (1) Reservations also had early voting locations. *Id.*

Early voting has increased turnout for Tribes that have effective mail delivery, dropbox locations, and/or in-person early voting. Since Arizona implemented the Permanent Early Voter List (“PEVL”)¹, the State’s no-excuse early voting process, over 80% of Arizona voters have opted to participate in vote-by-mail. [Resp SOS 12] In comparison, only 24% of voters in reservation-based precincts are on the PEVL.² ILC 2020 REPORT. Tribal communities with higher rates of early voting and PEVL registration have access to some combination of mail delivery, dropboxes, or in-person early voting. For example, in 2020, the Salt River Pima Maricopa Indian Community had access to a drive through voting site, dropboxes, and an in-person early voting location. Approximately 41% of the on-reservation voters were on the PEVL that year. Unsurprisingly, 75% of Salt River residents voted early. *Id.* The Pascua Yaqui Tribe has access to home mail delivery, but no on-reservation early voting sites or dropboxes. Approximately 47% of reservation voters were on the PEVL in 2020, and 61% of voters voted early. *Id.* In comparison, the Blackwater precinct on the Gila River Indian Reservation had no in-person early voting, dropboxes, or mail services. Only 37% of votes cast were early votes; 27% were on the PEVL. *Id.*

Native American overall participation consistently lags behind the state average. In 2016, Arizona’s turnout rate was 74.71%, while half of reservations

¹ The PEVL has changed to the “active early voter list.”

² This percentage is based on all reservation-based precincts in 2020.

had a turnout rate below 50%. INDIAN LEGAL CLINIC, NATIVE VOTE – ELECTION PROTECTION PROJECT 2016 ELECTION REPORT 16 (2018). In 2018, Arizona’s turnout rate was 64.85% whereas the average reservation turnout rate was 44%—with some Tribal precincts having turnout as low as 22%. INDIAN LEGAL CLINIC, NATIVE VOTE – ELECTION PROTECTION PROJECT 2018 ELECTION REPORT 26 (2021). In 2020, the State’s turnout rate was 79.9%, and the average turnout rate on reservations was around 60%. ILC 2020 REPORT. To illustrate, less than half of the Tohono O’odham Nation’s voting age population (“VAP”) is registered to vote. In the 2020 General Election, approximately 65% of registered voters on the Tohono O’odham Reservation turned out to vote but this resulted in a turnout rate of only 30.5% of the Tohono O’odham Nation’s total VAP. ILC 2020 REPORT.

While numerous issues contribute to low voter turnout, including the barriers discussed above, low levels of trust in government, lack of information on how and where to register and to vote, long travel distances to register or to vote, hostility towards Native Americans, and intimidation are also obstacles to participation. John R. Lewis Voting Rights Advancement Act of 2021, S.4 117th Cong. (2021).

E. In-Person Early Voting is Necessary for Language Minority Assistance under Section 203 of the Voting Rights Act.

Arizona must provide language assistance to Tribal voters under the VRA language minority provisions.³ Section 203 of the VRA requires that covered jurisdictions must provide all materials relating to the election process, including ballots, in the applicable minority language. 52 U.S.C. §10503(c). Because Arizona Tribal languages are historically unwritten, language assistance must be provided orally. There is no effective way to provide oral language assistance by mail to Tribal voters; this can only be done in-person. In-person early voting allows for the needed time to provide assistance to Tribal language speakers, thus offering them an opportunity to vote early. If there is no in-person early voting, these Tribal voters would be deprived a meaningful opportunity to cast an early ballot.

IV. Eliminating Dropboxes and In-Person Early Voting May Expose Arizona to Federal Litigation.

Eliminating most forms of early voting would create unavoidable conflict with federal law. In *Brnovich*, the Court identified the multiple early voting options as mitigating factors when determining whether federal law was violated. *Brnovich*, 141 S. Ct. at 2348 n.21. Eliminating in-person early voting and

³ Five reservations are covered under Section 203: Kaibab Paiute, San Carlos Apache, Navajo, Hopi, and Zuni. Section 203 Determinations, 86 Fed. Reg. 233 (Dec. 8, 2021).

dropboxes would significantly reduce early voting opportunities for reservation voters, especially for those voters who lack adequate mail service and Tribal language speakers resulting in potential violations of Sections 2 and 203 of the VRA and the Equal Protection Clause of the Fourteenth Amendment.

CONCLUSION

Arizona citizens are legally entitled to vote by mail pursuant to the laws set forth by the Legislature. To eliminate all early voting, and specifically in-person early voting and dropboxes is unlawful and would do violence to the principles of freedom and equality.

DATED this 15th day of March, 2022.

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