

**The Legacy of Voting Discrimination  
and the Continued Need for the Voting  
Rights Act in Arizona**

September 27, 2021

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## Acknowledgements

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## I. Introduction

Throughout its history, Arizona has “repeatedly targeted its American Indian, Hispanic, and African American citizens, limiting or eliminating their ability to vote and to participate in the political process.”<sup>1</sup> The Voting Rights Act has been instrumental in abating this discrimination, especially since the 1975 amendments expanded existing protections for language minorities. The legacy of discrimination persists, however, in Arizona politics. In the early 2000s, anti-immigrant rhetoric led to the enactment of Proposition 200, which purported to require, among other things, that all Arizona voters provide proof of their citizenship in registering to vote. This anti-immigrant rhetoric has continued to the present. Most recently, it has been prevalent in white supremacist rhetoric that helped fuel the January 6 insurrection. In 2021, racial appeals among “Stop the Steal” supporters about non-existent voter fraud have increased voter suppression and voter intimidation efforts in Arizona. The Voting Rights Act remains a vital tool for combatting efforts to disfranchise minority voters.

Arizona’s history of racial discrimination, in voting and in other areas, is deeply embedded. In the 19<sup>th</sup> century, as the white Anglo population of Arizona grew, sentiment “became more outspokenly hostile and exclusionary . . . toward minorities.”<sup>2</sup> Both before and after the Civil War, Arizona attracted a substantial number of settlers from the American South, and their views on race and ethnicity had profound impacts on Arizona’s development.<sup>3</sup> The federal government established the Arizona Territory in 1863, after some residents of the New Mexico Territory had

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<sup>1</sup> *Democratic Nat’l Comm. v. Hobbs*, 948 F.3d 989, 998 (9th Cir. 2020), rev’d and remanded on other grounds sub nom. *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321 (2021).

<sup>2</sup> Expert Report of Dr. David R. Berman at 4, *Democratic Nat’l Comm. v. Reagan*, 329 F. Supp. 3d 824, No. 2:16-cv-01065-DLR, ECF No. 101-1 (D. Ariz. June 10, 2016) [hereinafter “Berman Report”]. The district court found Dr. Berman to be credible and afforded “great weight” to his opinions. *Reagan*, 329 F. Supp. 3d at 834 (D. Ariz. 2018), rev’d and remanded on other grounds sub nom. *Democratic Nat’l Comm. v. Hobbs*, 948 F.3d 989 (9th Cir. 2020).

<sup>3</sup> Berman Report, *supra* note 2, at 8–9; *see also* John D. Leshy, *The Making of the Arizona Constitution*, 20 ARIZ. ST. L. J. 1, 49 (1988).

purported to secede in 1861, and the Confederacy had briefly captured the territory.<sup>4</sup> White Arizonans engaged in brutal and, at times, genocidal campaigns against Apache civilians, including the Camp Grant Massacre of 1871, in which “vigilantes” slaughtered more than 90 women and children while Apache men were out hunting.<sup>5</sup>

An 1863 law restricted the franchise to “white male citizens.”<sup>6</sup> Although the Treaty of Guadalupe Hidalgo nominally required that white Mexican-born Arizonans enjoy the rights of citizenship, Arizonans embarked on a campaign to classify many Mexicans as Indian in order to deny them the vote.<sup>7</sup> Arizona persisted in denying Native Americans the right to vote as a matter of law until 1948.

In 1865, Arizona amended its anti-miscegenation law to define the concept of whiteness, one of the first such laws to do so.<sup>8</sup> In 1906, as Arizona and New Mexico approached statehood, Arizona voters rejected reuniting with New Mexico after a campaign by Arizona politicians “warn[ing] that the Spanish-speaking population of New Mexico would dominate the new state” and that such a reunion with New Mexico threatened to mix “a pure American strain.”<sup>9</sup>

Arizona became a state in 1912. Arizona’s 1910 constitutional convention included only one Latino, considerably fewer than in New Mexico and California.<sup>10</sup> Attempting to appease Congress, delegates at the convention temporarily did away with Arizona’s literacy test for the ratification vote on Arizona’s Constitution. They did so only after Congress, perceiving that the

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<sup>4</sup> See Kristina M. Campbell, *Rising Arizona: The Legacy of the Jim Crow Southwest on Immigration Law and Policy After 100 Years of Statehood*, 24 BERKELEY LA RAZA L.J. 1, 4–5 (2014).

<sup>5</sup> *Id.* at 8; Berman Report, *supra* note 2, at 4–5.

<sup>6</sup> Campbell, *supra* note 4, at 6, n. 37.

<sup>7</sup> *Id.*

<sup>8</sup> See *id.* at 10.

<sup>9</sup> Berman Report, *supra* note 2, at 6.

<sup>10</sup> *Id.* at 7.

test was intended to disfranchise Spanish-speaking voters, required that it be eliminated.<sup>11</sup> After admission to the Union in 1912, however, Arizona promptly reinstated the literacy test and fought bitterly to preserve it until after Congress banned literacy tests nationwide in the 1970 amendments to the Voting Rights Act.

Both in territorial times and under statehood, Arizona's Anglo-white majority adopted numerous laws intended to limit the ability of Latinos, Native Americans, and other racial minorities to compete economically, socially, and politically on the same playing field as the majority. Congress had been correct in 1910—as it later was in 1970 and 1975—about the purpose of Arizona's literacy test. As historian David Berman concluded, Arizona's territorial legislature adopted the literacy test in order to target the “ignorant Mexican vote.”<sup>12</sup> And “[a]s recently as the 1960s, registrars applied the test to reduce the ability of blacks, Indians, and Hispanics to register to vote.”<sup>13</sup> Arizona politicians assembled teams of challengers and intimidators to “challenge[] minorities at the polls[, asking] them to read and explain ‘literacy’ cards. Intimidators hoped to discourage minorities from standing in line to vote.”<sup>14</sup> Threats of intimidation under color of law continue to this day against Arizona's minority communities.<sup>15</sup>

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<sup>11</sup> *Id.* at 10-12.

<sup>12</sup> *Id.* at 12 (quoting the correspondence of a prominent newspaper editor and Democratic leader).

<sup>13</sup> DAVID R. BERMAN, *ARIZONA POLITICS AND GOVERNMENT: THE QUEST FOR AUTONOMY, DEMOCRACY, AND DEVELOPMENT* 75 (1998); see generally Chandler Davidson et. al., *Vote Caging As A Republican Ballot Security Technique*, 34 WM. MITCHELL L. REV. 533, 542–59 (2008) (describing Arizona's challenger campaigns in the 1950s and 1960s as models for voter caging efforts nationally).

<sup>14</sup> Berman, *supra* note 13, at 76.

<sup>15</sup> For example, in 2012, Maricopa County Recorder Helen Purcell was caught trying to scare voters into thinking third-party ballot collection was a crime, referring to the practice as “ballot harvesting.” Evan Wyloge, *Activists call foul on Maricopa County officials' early ballot warning*, ARIZONA CAPITOL TIMES (Oct. 22, 2012). Purcell later claimed that she was misquoted, but her sentiments were echoed in a robocall campaign orchestrated by notorious Maricopa sheriff Joe Arpaio. Evan Wyloge, *Maricopa County Sheriff Joe Arpaio campaign uses erroneous early ballot warning in robocall*, ARIZONA CAPITOL TIMES (Oct. 22, 2012).

In 1909, municipalities were allowed to adopt segregated schools if they had “more than eight” African-American school-age children.<sup>16</sup> Local ordinances targeted Chinese-owned businesses, and local “district codes” excluded Chinese and Latino workers from employment in local mines.<sup>17</sup> Where racial minorities were allowed to compete for the same jobs, their pay was often lower.<sup>18</sup> The town of Winslow had segregated swimming pools until 1955, with the pool open to white Anglos on some days of the week and minorities on others.<sup>19</sup> Statewide, Arizona prohibited marriages between persons of “Caucasian blood” with “Negroes, Hindus, Mongolians, members of the Malay race, or Indians, and their descendants” until 1962.<sup>20</sup> In 1942, the Supreme Court of Arizona affirmed the murder conviction of a Native American, finding his marriage to “a person of unmixed Caucasian blood” was null and void under the statute, and his wife could therefore be forced to testify against him.<sup>21</sup>

Arizona schools were permitted to be segregated on the basis of Spanish surname until at least 1951, and on the basis of race for African-American children until at least 1953.<sup>22</sup> The Phoenix Indian School, which was originally designed to “assimilate” Native American children by removing them from their families and teaching them a watered-down, vocational curriculum

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<sup>16</sup> Campbell, *supra* note 4, at 22.

<sup>17</sup> *Id.* at 14–15

<sup>18</sup> Berman Report, *supra* note 2, at 5; *see also* Campbell at 15 (noting one example of an advertisement offering \$2.25 a day for whites and \$1.50 a day for Mexicans).

<sup>19</sup> James Thomas Tucker et. al., *Voting Rights in Arizona: 1982-2006*, 17 S. CAL. REV. L. & SOC. JUST. 283, 283 (2008) (citing litigation over the policy that ended in a consent agreement).

<sup>20</sup> Ariz. Rev. Stat. Ann. § 25-101(A) (1956); *see* TERRY GODDARD, ARIZ. ATTORNEY GEN., THE PROMISE OF BROWN V. BOARD OF EDUCATION: A MONOGRAPH 6–7 (Mar. 2005), available at <https://azmemory.azlibrary.gov/digital/collection/statepubs/id/21093/>.

<sup>21</sup> *State v. Pass*, 15 Ariz. 16, 20 (1942). Approximately two months after the Arizona Supreme Court’s decision in *Pass*, Native Americans were retroactively removed from the statute as an emergency measure to “preserve the public peace, health and safety.” 1943 Ariz. Sess. Laws 465.

<sup>22</sup> *See* Goddard, *supra* note 20, at 1–5.

to prepare them for low-paying menial labor, only closed in 1990.<sup>23</sup> Inequality in education persisted long after the end of *de jure* segregation. It continues today: in Tucson, nearly five decades of federal court oversight of the Tucson Unified School District stemming from the District’s discriminatory racial and ethnic segregation are only now coming to an end.<sup>24</sup> The Department of Justice continues to oversee Arizona’s compliance with a federal consent decree relating to its English Language Learning (“ELL”) programs for students in predominately Latino communities.<sup>25</sup> Schools in minority districts and on Native American reservations remain underfunded.<sup>26</sup>

The Voting Rights Act of 1965 (“VRA” or the Act) was enacted to make registration and voting accessible for all Americans. Although the Fifteenth Amendment prohibited voting discrimination on the basis of race, color or previous condition of servitude,<sup>27</sup> Congress determined that some jurisdictions had found facially race-neutral ways of limiting minority voting rights and political participation. Even if an individual or the federal government could challenge a jurisdiction’s discriminatory practices successfully, the litigation process was expensive and would take years and the local jurisdiction often simply ignored a federal court ruling or enacted

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<sup>23</sup> Campbell, *supra* note 4, at 22–26.

<sup>24</sup> *Court Oversight in Tucson Desegregation Case to End*, ARIZ. CAPITOL TIMES, Apr. 26, 2021, <https://azcapitoltimes.com/news/2021/04/26/court-oversight-in-tucson-desegregation-case-to-end/>; Roy, No. CV-74-00090-TUC-DCB, 2021 WL 1526455 (D. Ariz. Apr. 19, 2021), *appeal dismissed sub nom. Fisher v. Tucson Unified Sch. Dist.*, No. 20-16485, 2021 WL 3416869 (9th Cir. July 13, 2021).

<sup>25</sup> Title VI: Identifying ELL Students: Arizona Department of Education (AZ) OCR Complaint No. 08-06-4006, U.S. Dep’t of Education (Aug. 31, 2012), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/08064006.html>.

<sup>26</sup> *See, e.g.*, Jim Small, *Arizona Should Be Ashamed that Heavily Minority Districts are Being Shorted \$129M*, ARIZ. MIRROR (Feb. 28, 2019), <https://www.azmirror.com/2019/02/28/arizona-should-be-ashamed-that-heavily-minority-districts-are-being-shorted-129m/>; Alden Woods, *The Federal Government Gives Native Students an Inadequate Education, and Gets Away With It*, PROPUBLICA and THE ARIZONA REPUBLIC (Aug. 6, 2020), <https://www.propublica.org/article/the-federal-government-gives-native-students-an-inadequate-education-and-gets-away-with-it>; Nadine Groenig, *Arizona Lawmakers Are Failing Native American Students*, ARIZ. MIRROR (Mar. 6, 2020), <https://www.azmirror.com/2020/03/06/arizona-lawmakers-are-failing-native-american-students/>.

<sup>27</sup> *See* U.S. CONST. amend. XV, § 1.

new discriminatory laws. Many jurisdictions proved adept at making subtle changes to their discriminatory practices or enacting laws with a plausibly legitimate but pretextual basis, often voter fraud, and starting the process all over again.<sup>28</sup>

Key to the Voting Rights Act, therefore, was Section 5, which applied to certain jurisdictions with a repeated pattern of voting discrimination. These “covered” jurisdictions were required to submit any proposed changes to “any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting” for preclearance to the Department of Justice or to institute an action in the United States District Court for the District of Columbia for a declaratory judgment that the proposed change “does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color . . . .”<sup>29</sup> Covered jurisdictions also were prohibited from using a literacy test as a voter registration requirement.<sup>30</sup>

For jurisdictions not covered by Section 5, relief could be obtained under Section 2 of the Act, which is a permanent provision that applies nationally. That provision initially was construed as codifying the right of affected individuals to bring private actions as they enjoyed under the Fifteenth Amendment. As a result of the 1982 amendments to the VRA, Section 2 has become the Act’s general non-discrimination provision. It provides for relief in any jurisdiction in which a voting procedure “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 language minority status.<sup>31</sup> A Section 2 violation likewise may be established if “it is shown that the political processes leading to nomination or election in

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<sup>28</sup> See *Shelby Cty., Ala. v. Holder*, 570 U.S. 529, 560–62 (2013) (Ginsburg, J., dissenting) (explaining that early attempts to combat racial discrimination in voting through litigation “resembled battling the Hydra”); *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2354 (2021) (Kagan, J., dissenting) (adopting the “less cultured reference” of a “game of whack-a-mole”).

<sup>29</sup> Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439 (1965).

<sup>30</sup> *Id.* § 4, 79 Stat. at 438.

<sup>31</sup> 52 U.S.C. § 10301(a).

the State or political subdivision are not equally open to participation” by voters on account of race, color or language minority status “in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.”<sup>32</sup>

#### **A. Arizona’s Literacy Test**

Because of their histories of discrimination, certain jurisdictions within Arizona were among the first to be affected by the Act. On August 7, 1965, Apache County, Arizona was included in the original list of jurisdictions covered by Section 5 of the Voting Rights Act.<sup>33</sup> On November 19, 1965, Navajo and Coconino Counties also became covered by Section 5.<sup>34</sup> The Act permitted covered jurisdictions to “bail out” of coverage upon proving to the District Court of the District of Columbia that they satisfied certain criteria tending to show the absence of voting discrimination in the preceding ten years.<sup>35</sup> In 1966, these three Arizona counties became among the first jurisdictions to successfully bail out.<sup>36</sup> Because literacy tests had been held to be constitutional, the District Court interpreted the VRA to authorize bailout if the covered jurisdiction could establish that it had not used a literacy test or similar device in a discriminatory manner. The court found that the counties had not done so and were entitled to be bailed out.<sup>37</sup>

Notably, the court rejected strenuous efforts by the Navajo Nation to intervene and oppose the termination of coverage, or, in the alternative, to require that the Attorney General “make a

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<sup>32</sup> 52 U.S.C. § 10301(b).

<sup>33</sup> 30 Fed. Reg. 9897 (Aug. 7, 1965).

<sup>34</sup> 30 Fed. Reg. 14505 (Nov. 19, 1965).

<sup>35</sup> See 52 U.S.C. § 10303(a).

<sup>36</sup> *Apache County v. United States*, 256 F. Supp. 903 (D.D.C. 1966).

<sup>37</sup> See *id.* at 910–11.

‘full, impartial and complete’ investigation into the use of the literacy test in the three counties.”<sup>38</sup> The literacy test was adopted before Native Americans obtained the right to vote in Arizona, and was initially intended to limit Latino voting. But once Native Americans secured the right to vote in Arizona, the literacy test had proven effective at restricting the Native American vote as well. In 1948, the overwhelming majority of Native Americans in Arizona were illiterate.<sup>39</sup> In the 1960s, “about half” of the Navajo voting age population could not pass a literacy test.<sup>40</sup>

The Navajo Nation’s arguments about the use of literacy tests in Arizona did not sway the District Court. Nevertheless, Congress soon came to recognize the need to prohibit literacy tests, regardless of how they were applied. In the 1970 renewal of the VRA, Congress banned the use of literacy tests nationwide, in both covered and non-covered jurisdictions, for a period of five years.<sup>41</sup> Congress specifically cited Arizona’s disparate levels of Latino and Native American voter participation in doing so.<sup>42</sup> It also amended the coverage formula, with the result that eight Arizona counties, including the three that had bailed out of coverage in 1966, were covered by Section 5 of the Act.<sup>43</sup>

Arizona, keen to preserve the literacy test it designed to reduce the political participation of minority voters since the territorial era,<sup>44</sup> immediately sued to challenge the amendments. In 1970, the U.S. Supreme Court unanimously upheld the nationwide ban on literacy tests.<sup>45</sup>

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<sup>38</sup> *Id.* at 906.

<sup>39</sup> Patty Ferguson-Bohnee, *The History of Indian Voting Rights in Arizona: Overcoming Decades of Voter Suppression*, 47 ARIZ. ST. L.J. 1099, 1112 (2015).

<sup>40</sup> *Id.* at n.88.

<sup>41</sup> See *Oregon v. Mitchell*, 400 U.S. 112, 117 (1970).

<sup>42</sup> *Id.* at 132.

<sup>43</sup> Tucker, *supra* note 19, at 286.

<sup>44</sup> Berman, *supra* note 13, at 75.

<sup>45</sup> *Oregon v. Mitchell*, 400 U.S. 112 (1970).

“Overwhelming evidence” had shown the impact of the ban on minority registration, and voter registration and participation were “consistently greater” in states without literacy tests.<sup>46</sup> Moreover, in an age of radio and television, literacy was not a prerequisite for voters to be informed of the issues.<sup>47</sup> Even after the Supreme Court’s ruling upheld the authority of Congress to enact the ban under its broad enforcement powers under Section 2 of the Fifteenth Amendment, it took two years for Arizona to repeal its literacy test.<sup>48</sup>

### **B. The 1975 Renewal—Statewide Coverage and Expanded Language Minority Protections**

Congress was well aware of the intransigence of Arizona and other states that fought to maintain their discriminatory literacy tests. In addition, like many of those states, Arizona printed ballots only in the English language until it became clear that Congress was going to prohibit English-only elections in certain jurisdictions where those elections disfranchised voters with a first language other than English.<sup>49</sup>

Congress amended the coverage formula in 1975 to include states, like Arizona, that printed ballots only in English as of November 1, 1972 and failed to meet certain other voter participation metrics.<sup>50</sup> Specifically, Arizona became covered under the 1975 Amendments to the Voting Rights Act based upon the determination that:

- more than five percent of the voting-age citizens (persons 18 years and older) on November 1, 1972 were members of a single language minority group (Spanish); and

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<sup>46</sup> *Id.* at 133; *see also id.* at 147 (Douglas, J., concurring in relevant part) (noting that “most States do not have literacy tests”).

<sup>47</sup> *Id.*

<sup>48</sup> Tucker, *supra* note 19, at 288.

<sup>49</sup> JAMES THOMAS TUCKER, THE BATTLE OVER BILINGUAL BALLOTS: LANGUAGE MINORITIES AND POLITICAL ACCESS UNDER THE VOTING RIGHTS ACT 55-57 (2009).

<sup>50</sup> *See, e.g., Arizona v. Holder*, 839 F. Supp. 2d 36, 37 (D.D.C. 2012) (reciting Arizona’s complaint in that litigation that it was covered under the VRA for having failed to implement bilingual balloting by 1972).

- the U.S. Attorney General found that election materials were provided in English only on November 1, 1972 (as a result of Arizona’s English literacy requirement in Ariz. Rev. Stat. Ann. §§ 16-101.A.4, 16-101.A.5 (1956)); and
- the Director of the Census determined that fewer than fifty percent of voting-age citizens were registered to vote on November 1, 1972 or that fewer than fifty percent voted in the November 1972 presidential election.<sup>51</sup>

Congress specifically noted educational discrimination in Alaska, Arizona, and California in enacting the 1975 coverage formula.<sup>52</sup> Arizona remained covered statewide until the Supreme Court’s decision in *Shelby County*.

The 1975 Act required certain jurisdictions to provide affirmative assistance for voters with limited English proficiency (“LEP” voters). Section 4(e) of the original 1965 Act had provided that no person who demonstrates they have successfully completed a sixth grade education in a school in the United States “in which the predominant classroom language was other than English, shall be denied the right to vote in any Federal, State, or local election because of his inability to read, write, understand, or interpret any matter in the English language . . . .”<sup>53</sup> This bilingual election requirement was enacted in response to New York’s English literacy requirement, which prevented tens of thousands of American citizens schooled in Puerto Rico from voting.<sup>54</sup> In addition, Section 2 of the 1965 Act<sup>55</sup> has been interpreted to prohibit election officials from using English-only voting materials where doing so would prevent a significant number of non-English speaking or literate voters from being able to register to vote or cast a ballot.<sup>56</sup>

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<sup>51</sup> See Voting Rights Act of 1975, Pub. L. No. 94-73, 89 Stat. 400; 40 Fed. Reg. 43746 (Sept. 23, 1976).

<sup>52</sup> TUCKER, *supra* note 49, at 57.

<sup>53</sup> 52 U.S.C. § 10303(e)(2).

<sup>54</sup> See, e.g., Tucker *supra* note 49, at 27-42; Juan Cartagena, *Latinos and Section 5 of the Voting Rights Act: Beyond Black and White*, 18 NAT’L BLACK L.J. 201 (2005).

<sup>55</sup> 52 U.S.C. § 10301.

<sup>56</sup> See Tucker, *supra* note 49, at 43-45 (collecting cases).

Neither these measures, nor the 1970 nationwide abolition of literacy tests proved sufficient to the task, however. The 1975 renewal, in view of continuing disparate voter registration levels among LEP communities, expanded the VRA’s protections to require that covered jurisdictions undertake certain forms of assistance for language minority voters.<sup>57</sup>

Specifically, the 1975 amendments to the Voting Rights Act added two temporary bilingual election provisions to the Act’s existing protections and provided coverage formulas to determine which jurisdictions must comply with these requirements. “Title III of the 1975 amendments, codified in section 203 of the VRA, is ‘specifically directed to the problems of language minority groups.’”<sup>58</sup> Those groups were disfranchised by English literacy requirements because of “‘the failure of state and local officials to afford equal educational opportunities’ and from the lack of adequate bilingual assistance at the polls.”<sup>59</sup> “Title II of the 1975 amendments expanded the triggering formula under Section 4 of the Act to apply to ‘those jurisdictions with the more serious problems’ of voting discrimination against language minorities.”<sup>60</sup> Those provisions were codified in Section 4(f)(4) of the Act,<sup>61</sup> which requires that covered jurisdictions comply with the bilingual election requirements in Section 203 of the Act, as well as the preclearance provisions for voting changes under Section 5 of the Act.<sup>62</sup>

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<sup>57</sup> *See id.* at 55–57.

<sup>58</sup> James Thomas Tucker, *Enfranchising Language Minority Citizens: The Bilingual Election Provisions of the Voting Rights Act*, 10 N.Y.U. J. OF LEGIS. & PUB. POL’Y 195, 214 (2006-2007) (internal citation omitted).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 207–08 (internal citation omitted).

<sup>61</sup> 52 U.S.C. § 10303(f)(4).

<sup>62</sup> Tucker, *supra* note 58, at 207–12.

Once a jurisdiction is covered by one of the language assistance provisions, all “voting materials” it provides in English generally must be provided in the language of all groups or sub-groups that trigger coverage. Voting materials include the following:

- Voter registration materials
- Voting notices (including information about opportunities to register, registration deadlines, time/places/locations of polling places, and absentee voting)
- Voting materials provided by mail
- All election forms
- Polling place activities and materials
- Instructions
- Publicity
- Ballots
- Other materials or information relating to the electoral process
- Assistance<sup>63</sup>

Written materials do not have to be provided to certain Native American voters if their languages are “historically unwritten.”<sup>64</sup> Determination of whether a language is “historically unwritten” depends upon whether the written form of the language is commonly used, such that it would be helpful to voters.<sup>65</sup> However, even when federal courts have determined that a Native American language is “historically unwritten,” they nevertheless have required covered

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<sup>63</sup> 52 U.S.C. § 10503; 28 C.F.R. §§ 55.15, 55.18.

<sup>64</sup> 52 U.S.C. § 10503(c).

<sup>65</sup> See TUCKER, *supra* note 49, at 93–98 (providing an extended discussion of the legislative history of the provision and Justice Department guidance limiting the exclusion of written materials to those American Indian and Alaska Native languages in which a written form is not commonly used). Notably, the proposed Native American Voting Rights Act, or NAVRA, would eliminate the confusion over this provision by amending it to allow tribal governments to decide whether written materials are needed in the American Indian or Alaska Native language for which they are covered.

jurisdictions to provide written translations of voting materials into the Native American language to facilitate providing effective oral language assistance.<sup>66</sup>

In all covered jurisdictions, “oral instructions, assistance, or other information” in the covered language must be available for members of covered LEP groups at every stage of the electoral process.<sup>67</sup> The covered jurisdiction is responsible for determining what is required to provide effective assistance to members of the covered minority language groups.<sup>68</sup> The minority language assistance provisions apply to all stages of the electoral process for “any type of election, whether it is a primary, general or special election.”<sup>69</sup> This includes not only elections of officers, but also elections on such matters as bond issues, constitutional amendments and referendums. Federal, state, and local elections are covered, as well as special district elections, such as school districts and water districts.<sup>70</sup>

Such language minority protections have particular relevance for Arizona, which, since territorial times has had a comparatively large population of speakers of Spanish and various Native American languages. Until the Supreme Court’s decision in *Shelby County*, Arizona was one of just three states covered statewide under Section 4(f)(4) of the Act for Spanish Heritage.<sup>71</sup> As a result of this statewide coverage, all political subdivisions in Arizona (including counties, cities, and special districts) also fell under Section 4(f)(4) coverage and were required to provide

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<sup>66</sup> For a recent example in which written translations were required, *see generally* Stipulation and Order in *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska Sept. 30, 2015). Written materials provided in response to the Order are available at <https://www.elections.alaska.gov/Core/languageassistance.php>.

<sup>67</sup> *See* 52 U.S.C. § 10503(c).

<sup>68</sup> 28 C.F.R. § 55.2(c).

<sup>69</sup> 28 C.F.R. § 55.10.

<sup>70</sup> *Id.*

<sup>71</sup> *See* TUCKER, *supra* note 49, at 76, figure 3.1 (depicting coverage under Section 4(f)(4) of the Act). In addition to Arizona, two other states were covered statewide under Section 4(f)(4): Alaska for Alaskan Natives and Texas for Spanish Heritage. *See id.*

all election materials, including assistance and ballots, in the language of the applicable language minority group.<sup>72</sup>

By finding that the coverage formula in Section 4 was unconstitutional, the Supreme Court’s decision in *Shelby County* has been interpreted by the Department of Justice as eliminating all coverage under Section 4(f)(4).<sup>73</sup> As a result, Arizona, which previously was covered statewide for Spanish-language assistance under Section 4(f)(4), is no longer covered on a statewide basis. Coverage under Section 203 of the Act, which applies to some Arizona jurisdictions for Spanish and to others for certain Native American languages, was not affected by the Supreme Court’s decision in *Shelby County*. The most recent coverage determinations under Section 203 were made in December 2016 and are discussed below in the section on Arizona’s political demography.<sup>74</sup>

### **C. The Supreme Court’s Decisions in *Shelby County* and *Brnovich***

Throughout the VRA’s history, activists have sought to challenge the law in the courts. In 2009, the Supreme Court’s *Northwest Austin* decision provided these activists an opening. In that case, the Supreme Court reversed a three-judge district court’s refusal to bail out a covered jurisdiction in which there had been no evidence of racial discrimination.<sup>75</sup> In so ruling, the Court left the door open as to “[w]hether conditions continue to justify” the VRA’s coverage formula—that is, the formula for determining which jurisdictions were covered under the Act—which it

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<sup>72</sup> See 28 C.F.R. § 55.8.

<sup>73</sup> See U.S. Dep’t of Just., *About Section 5 of the Voting Rights Act*, available at <https://www.justice.gov/crt/about-section-5-voting-rights-act> (last updated Sept. 11, 2020).

<sup>74</sup> See *infra* Section II.

<sup>75</sup> *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009).

described as “a difficult constitutional question.”<sup>76</sup> The Court also invited political subdivisions to “seek relief from [the VRA’s] preclearance requirements.”<sup>77</sup>

Those opposed to the VRA did just that, and Arizona was among them. In 2011, conceding that it did not qualify for bailout under the statute, even under the liberalized bailout standard of the 1982 renewal, Arizona sued for equivalent relief before a three-judge panel. After the D.C. district court ruled that the suit was not referable to a three-judge court, Arizona voluntarily dismissed the suit in 2012.<sup>78</sup>

One year later, in the now-infamous *Shelby County* decision, however, a 5-4 majority of the Supreme Court declared that the VRA’s entire coverage formula unconstitutionally “differentiate[d] between the States.”<sup>79</sup> Instead of permitting jurisdiction-by-jurisdiction litigation, the Supreme Court rendered Section 5 ineffective as a whole by removing coverage from all jurisdictions, until such time as Congress might adopt a new coverage formula. At the time, the four dissenting justices in *Shelby County* warned that the majority was substituting its judgment for that of Congress.<sup>80</sup>

Since *Shelby County*, private litigants have sought to protect minority voting rights through the right of action afforded under Section 2 of the Voting Rights Act, which applies nationwide and was not affected by the Supreme Court’s decision in *Shelby County*. Earlier this year, though, the Supreme Court’s decision in *Brnovich v. Democratic Nat’l Committee* substantially weakened

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<sup>76</sup> *Id.* at 211.

<sup>77</sup> *See id.*

<sup>78</sup> *See Arizona v. Holder*, 839 F. Supp. 2d 36 (D.D.C. 2012).

<sup>79</sup> *See Shelby Cty., Ala. v. Holder*, 570 U.S. 529 (2013).

<sup>80</sup> *Id.* at 570 (Ginsburg, J., dissenting).

Section 2 as a tool for private litigants to challenge discriminatory voting practices.<sup>81</sup> The case involved a challenge to two Arizona election policies. The first, Arizona’s out-of-precinct voting policy, requires that an entire provisional ballot be discarded if it is cast in the wrong precinct. The second, H.B. 2023, limits those to whom a voter may entrust delivery of their mail-in ballot. Both policies disproportionately impact minority voters.<sup>82</sup> The latter policy was also adopted notwithstanding concerns expressed by the Justice Department in a written request for more information as part of the preclearance process. The request led Arizona legislators to withdraw an earlier version of the bill before *Shelby County*.<sup>83</sup>

The Supreme Court’s decision in *Brnovich* misconstrues congressional intent and reflects a substantial setback for Section 2 plaintiffs. They experienced a similar setback in 1980, when the Supreme Court narrowly interpreted the previous version of Section 2, ruling that it merely provided the same protections as the Fifteenth Amendment had before the VRA was enacted.<sup>84</sup> Under this standard, an election measure could only be struck down under Section 2 if it was motivated by a racially discriminatory intent or purpose.<sup>85</sup>

Congress clarified that the Supreme Court misapplied its legislative intent in the 1982 amendments to the VRA. The Supreme Court recognized congressional authority to clarify the

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<sup>81</sup> See *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2330–50; see also *id.* at 2350 (Gorsuch, J., concurring) (questioning whether Section 2 even affords a private right of action).

<sup>82</sup> See *Democratic Nat’l Comm. v. Hobbs*, 948 F.3d 989, 1004, 1005–07, 1014–16, 1032–33 (9th Cir.) *rev’d and remanded sub nom. Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321 (2021). The Court in *Brnovich* reversed the Ninth Circuit’s determination that H.B. 2023 was enacted with discriminatory intent, holding that the district court’s factual findings should be deferred to under a clear-error standard. See *Brnovich*, 141 S. Ct. at 2348–50.

<sup>83</sup> *Hobbs*, 948 F.3d at 1007–9; see generally 28 C.F.R. § 51.37 (explaining the procedure for the Justice Department to issue requests for more information). For an analysis of the deterrent effect of such requests in the preclearance process, see Luis Ricardo Fraga & Maria Lizet Ocampo, *More Information Requests and the Deterrent Effect of Section 5 of the Voting Rights Act*, in VOTING RIGHTS ACT REAUTHORIZATION OF 2006: PERSPECTIVES ON DEMOCRACY, PARTICIPATION, AND POWER (Ana Henderson ed., 2007), available at [https://www.law.berkeley.edu/files/ch\\_3\\_fraga\\_ocampo\\_3-9-07.pdf](https://www.law.berkeley.edu/files/ch_3_fraga_ocampo_3-9-07.pdf).

<sup>84</sup> *Mobile v. Bolden*, 446 U.S. 55 (1980).

<sup>85</sup> See *id.*

protections in the VRA in *Thornburg v. Gingles*, a vote-dilution case brought under Section 2.<sup>86</sup> The *Thornburg* court held that Congress sought to make clear that a Section 2 “violation could be proved by showing discriminatory effect alone and to establish as the relevant legal standard the ‘results test.’”<sup>87</sup>

In *Brnovich*, a 6-3 majority of the Supreme Court ruled that this standard only applied to vote-dilution cases brought under Section 2, and articulated a new standard for vote-denial cases—that is, challenges to time, place, or manner voting regulations—such as the Arizona policies at issue in *Brnovich*.<sup>88</sup> Even though the text of Section 2 provides no basis for distinguishing between the two types of claims,<sup>89</sup> the Supreme Court inferred a new standard for vote-denial cases from the phrase “totality of circumstances” in the statute.<sup>90</sup> Under this new standard, the Supreme Court held that, even though the two challenged policies did have disparate impacts on minority voters, the disparity was small “in absolute terms” and did not violate Section 2.<sup>91</sup> The Supreme Court also ruled that the district court’s findings as to the discriminatory intent of H.B. 2023 were not in “clear error” and therefore should not have been reversed by the Ninth Circuit.<sup>92</sup>

#### **D. The Ongoing Need to Protect Minority Voting Rights in Arizona**

Congress should strengthen Section 2 of the Voting Rights Act in response to the *Brnovich* decision, just as it did in 1982 in response to *City of Mobile*. As to Section 5, the *Shelby County*

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<sup>86</sup> 478 U.S. 30 (1986).

<sup>87</sup> *Thornburg*, 478 U.S. at 35.

<sup>88</sup> *See Brnovich*, 141 S. Ct. at 2337.

<sup>89</sup> *See id.* at 2357–58 (Kagan, J., dissenting) (analyzing the broad scope of Section 2).

<sup>90</sup> *See id.* at 2338–40; *but see id.* at 2351, 2362 (Kagan, J., dissenting) (arguing that “the majority writes its own set of rules” and that the majority’s factors are “mostly made-up” limitations on Section 2 that they “would have liked Congress to enact”).

<sup>91</sup> *Id.* at 2344–48

<sup>92</sup> *Id.* at 2348–50.

dissenters warned that “[t]hrowing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.”<sup>93</sup> This has proven true in Arizona, where Arizona legislators have enacted—or in some cases renewed—voting changes with either the purpose or effect of being retrogressive for minority voters by making it more difficult for them to register to vote, cast a ballot, and have that ballot counted. As discussed below, these efforts have increased with the rise of anti-immigration politics in Arizona and nationally since 2015.

The remainder of this report traces the current state of Arizona’s political demography and the challenges minority voters face since the VRA’s 2006 renewal. Although there has been improvement since 2006, minority voters in Arizona have faced new challenges in the wake of increased efforts to make it harder for them to vote. Efforts to suppress and intimidate minority voters in Arizona have been steadily increasing in recent years. The report concludes by cataloging recent lawsuits and other legal developments relevant to the Voting Rights Act in Arizona.

## **II. Arizona’s Political Demography**

### **A. Racial and Ethnic Composition of Arizona**

Even though Arizona grew more slowly between 2010 and 2020 than it has in previous years, Arizona remains one of the fastest-growing states in the country. Arizona’s population grew by 11.9% in the last 10 years, compared to 7.4% for the U.S. as a whole.<sup>94</sup> Phoenix is the fifth largest city and the fastest-growing large city in the country.<sup>95</sup>

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<sup>93</sup> *Shelby Cty., Ala. v. Holder*, 570 U.S. 529, 590 (2013) (Ginsburg, J., dissenting).

<sup>94</sup> Valorie Rice, *Census 2020: Arizona Among Top-Growing States but Does Not Match Growth of Previous Decades*, ARIZONA’S ECONOMY (Apr. 26, 2021), <https://www.azecconomy.org/2021/04/demographics-census/census-2020-arizona-among-top-growing-states-but-does-not-match-growth-of-previous-decades/>.

<sup>95</sup> *Census: Phoenix, Goodyear, Buckeye Among Fastest Growing*, U.S. NEWS & WORLD REPORT (Aug. 13, 2021), <https://www.usnews.com/news/best-states/arizona/articles/2021-08-12/census-phoenix-goodyear-buckeye-among-fastest-growing>.

Latinos are Arizona’s largest minority group, constituting approximately 30.7% of Arizona’s residents and 27% of the State’s citizens. Arizona’s African-American and Native American communities, both at approximately 4% of Arizona’s population and 4% of its citizenry, are the next largest minority groups. Arizona also has a substantial Asian-American population, about 4%. Table 1 below shows Arizona’s racial and ethnic composition, as reported by the 2020 Census. Table 2 shows the same data among Arizona citizens, using 2015 estimates from the American Community Survey.

*Table 1— Arizona Population Characteristics*

| Subject                                    | All ages |         | 18 years and over |         |
|--|----------|---------|-------------------|---------|
|  | Number   | Percent | Number            | Percent |
| Total Population                           | 7151502  | 100.0%  | 5541976           | 100.0%  |
| Hispanic or Latino (of any race)           | 2192253  | 30.7%   | 1489617           | 26.9%   |
| Not Hispanic or Latino                     | 4959249  | 69.3%   | 4052359           | 73.1%   |
| One race                                   | 4692409  | 67.7%   | 3878116           | 70.0%   |
| White                                      | 3816547  | 65.6%   | 3218094           | 58.1%   |
| Black or African American                  | 317161   | 4.4%    | 236894            | 4.3%    |
| American Indian or Alaskan Native          | 263930   | 3.8%    | 189473            | 3.4%    |
| Asian                                      | 248837   | 3.5%    | 199796            | 3.6%    |
| Native Hawaiian and Other Pacific Islander | 14323    | 0.2%    | 10590             | 0.2%    |
| Some other race                            | 31611    | 0.4%    | 23269             | 0.4%    |
| Two or more races                          | 266840   | 3.7%    | 174243            | 3.1%    |

**Source: 2020 Census, P.L. 94-171 Data File**

*Table 2 — Arizona Citizen Population Characteristics*

|                                  | Citizens - all ages |         | Voting-age citizens |         |
|----------------------------------|---------------------|---------|---------------------|---------|
|                                  | Number              | Percent | Number              | Percent |
| Total Population                 | 6100105             | 100.0%  | 4526594             | 100.0%  |
| Hispanic or Latino (of any race) | 1622885             | 26.6%   | 951915              | 21.0%   |
| Not Hispanic or Latino           | 4477220             | 73.4%   | 3574679             | 79.0%   |
| One race                         | 4349271             | 71.3%   | 3507682             | 77.5%   |
| White                            | 3682540             | 60.4%   | 3028151             | 66.9%   |

|  |        |      |        |      |
|--|--------|------|--------|------|
| Black or African American                  | 250048 | 4.1% | 183483 | 4.1% |
| American Indian or Alaskan Native          | 264589 | 4.3% | 183658 | 4.1% |
| Asian                                      | 135797 | 2.2% | 101174 | 2.2% |
| Native Hawaiian and Other Pacific Islander | 10209  | 0.2% | 7214   | 0.2% |
| Some other race                            | 6088   | 0.1% | 4002   | 0.1% |
| Two or more races                          | 127949 | 2.1% | 66997  | 1.5% |

**Source: Selected Data, Census Bureau American Communities Survey, TableID B05003, 2015: ACS 5-Year Estimates**

Arizona’s minority communities continue to lag behind white communities in terms of “socioeconomic standing, income, employment, education, health, housing, transportation, criminal justice, and electoral representation.”<sup>96</sup>

### **B. Voter Participation in Arizona**

Arizona’s Latino population has made great strides in voter registration and participation.<sup>97</sup> According to Pew Research, the Latino share of the Arizona electorate has increased by about 8% between 2000 and 2018.<sup>98</sup> Census Bureau data confirms that Latinos currently trail non-Hispanic white voters by about 5% in terms of voter registration. *See* Table 3 below. In recent election years, minority registration rates have generally lagged behind the total population most in non-presidential years. In the presidential election years of 2016 and 2020, registration rates among African-Americans exceeded those of the total Arizona population. Similar trends are apparent in Census Bureau data on voter participation from 2014 to 2020. *See* Table 4.

<sup>96</sup> *Democratic Nat’l Comm. v. Reagan*, 329 F. Supp. 3d 824, 876 (D. Ariz.), *rev’d and remanded sub nom. Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321 (2021).

<sup>97</sup> *See, e.g.*, Grant Smith and Júlia Ledur, *Tipping Scales*, REUTERS GRAPHICS (Nov. 1, 2019), <https://graphics.reuters.com/USA-ELECTION-DECIDERS-ARIZONA/0100B2M420S/index.html>.

<sup>98</sup> Ruth Igielnik and Abby Budiman, *The Changing Racial and Ethnic Composition of the U.S. Electorate*, PEW RESEARCH CENTER (Sept. 23, 2020), <https://www.pewresearch.org/2020/09/23/the-changing-racial-and-ethnic-composition-of-the-u-s-electorate/>.

*Table 3 — Percentage of Citizen Population Registered to Vote, by Race or Ethnicity, 2014 to 2020*

| Race or Ethnicity             | 2014  | 2016  | 2018  | 2020  |
|-------------------------------|-------|-------|-------|-------|
| Total                         | 62.3% | 68.6% | 68.6% | 76.4% |
| White alone                   | 63.8% | 70.2% | 71.2% | 76.3% |
| White non-Hispanic alone      | 65.2% | 74.6% | 74.1% | 80.1% |
| Black alone                   | 60.3% | 69.8% | 51.5% | 79.2% |
| Asian alone                   | 39.3% | 63.3% | 59.8% | 70.2% |
| Hispanic (of any race)        | 60.0% | 57.1% | 62.8% | 66.8% |
| White alone or in combination | 63.4% | 69.5% | 71.1% | 76.5% |
| Black alone or in combination | 52.4% | 65.0% | 55.0% | 82.2% |
| Asian alone or in combination | 41.7% | 66.1% | 60.8% | 73.5% |

**Source: Selected Data, Census Bureau, Table 4b, Voting and Registration in the Elections of November 2014, 2016, 2018, and 2020.<sup>99</sup>**

*Table 4 — Percentage of Citizen Population That Reported Voting, by Race or Ethnicity, 2014 to 2020*

| Race or Ethnicity | 2014 | 2016 | 2018 | 2020 |
|-------------------|------|------|------|------|
|                   |      |      |      |      |

<sup>99</sup> Available at <https://www.census.gov/topics/public-sector/voting/data/tables.html>.

|                               |       |       |       |       |
|-------------------------------|-------|-------|-------|-------|
| Total                         | 40.6% | 60.4% | 58.9% | 71.9% |
| White alone                   | 42.3% | 62.8% | 60.8% | 72.2% |
| White non-Hispanic alone      | 46.4% | 68.3% | 65.3% | 77.0% |
| Black alone                   | 33.1% | 50.9% | 47.0% | 69.1% |
| Asian alone                   | 20.3% | 51.6% | 56.1% | 67.9% |
| Hispanic (of any race)        | 31.8% | 47.4% | 48.8% | 60.8% |
| White alone or in combination | 42.2% | 62.2% | 60.8% | 72.5% |
| Black alone or in combination | 28.8% | 49.1% | 50.9% | 72.7% |
| Asian alone or in combination | 21.5% | 47.7% | 57.4% | 71.5% |

**Source: Selected Data, Census Bureau, Table 4b, Voting and Registration in the Elections of November 2014, 2016, 2018, and 2020.<sup>100</sup>**

Although the data in Tables 3 and 4 is not reported for Native Americans, data available elsewhere indicates that the voter participation gap is closing for Native Americans in Arizona as well. Despite pervasive barriers to voting,<sup>101</sup> Native Americans in Arizona are strongly motivated to participate in the electoral process. A recent review concluded that “[t]he historical turnout gap ... has largely closed,” and “Native Americans tend to vote in midterm congressional years at relatively high rates.”<sup>102</sup>

Voting in Arizona remains racially polarized. As the district court in the *Brnovich* litigation found, “Arizona has a history of racially polarized voting, which continues today.”<sup>103</sup> The district court credited expert testimony that white Arizonans voted for Republican candidates between 2004 and 2014 at a rate of approximately 59%, while the same rate among Latino voters was

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<sup>100</sup> *Id.*

<sup>101</sup> See generally *Obstacles at Every Turn: Barriers to Political Participation Faced by Native American Voters*, THE NATIVE AMERICAN RIGHTS FUND (June 3, 2020), <https://vote.narf.org/wp-content/uploads/2020/06/obstacles-at-every-turn.pdf>.

<sup>102</sup> Laura E. Evans *et al.*, *Native American Voters and Candidates in Election 2018*, POLITICAL SCIENCE NOW (Jan. 3, 2019), <https://politicalsciencenow.com/2018-election-reflection-series-native-american-voters-and-candidates-in-election-2018/>.

<sup>103</sup> *Democratic Nat'l Comm. v. Reagan*, 329 F. Supp. 3d 824, 876 (D. Ariz.), *rev'd and remanded sub nom. Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021).

approximately 35%.<sup>104</sup> The district court also concluded that “Arizona’s racially polarized voting has resulted in racial appeals,” including in the debate over H.B. 2023, the ballot collection legislation at issue in that case.<sup>105</sup>

An Election Eve Survey conducted by Latino Decisions confirms that voting remains racially polarized in the recent 2020 elections. Although President Biden won the state overall by a margin of only 0.3%, the survey reported that both Latinos and Native Americans voted for Democrats in federal races at a rate of approximately 67 to 71% for Latinos and 71 to 72% for Native Americans.<sup>106</sup>

### **C. Officeholding**

Arizona has also made strides in recent years toward minority officeholding, though, like minority voting, officeholding remains racially polarized. Latino officeholding is reported by the National Association of Latino Elected and Appointed Officials (NALEO) Educational Fund in a regularly published directory. As of 2019, nearly a quarter of Arizona’s state legislature is Latino, of which more than 90% are Democrats. *See* Table 5 below.

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<sup>104</sup> *See Democratic Nat’l Comm. v. Hobbs*, 948 F.3d 989, 1026–27 (9th Cir.) *rev’d and remanded sub nom. Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321 (2021) (summarizing the data relied on by the district court).

<sup>105</sup> *Reagan*, 329 F. Supp. 3d at 876–77.

<sup>106</sup> *Native American Voters Help Biden Take the State of Arizona*, LATINO DECISIONS, Nov. 10, 2020, <https://latinodecisions.com/blog/native-american-voters-help-biden-take-the-state-of-arizona/>; data available at <https://electioneve2020.com/poll/#/en/demographics/native-american/az>.

Table 5 — Latino Elected Officials in Arizona

| Total HEOs: 381            |      |      |       |     |    |     |   |     |     |     |   |     |    | Total HEOs at Federal and State Level: 26 |  |  |  |
|----------------------------|------|------|-------|-----|----|-----|---|-----|-----|-----|---|-----|----|---|--|--|--|
| Level of Office            | Male | Fem. | TOTAL | DEM |    | GOP |   | *   |     | IND |   | N/P |    |   |  |  |  |
|                            |      |      |       | M   | F  | M   | F | M   | F   | M   | F | M   | F  |   |  |  |  |
| U.S. Representatives       | 2    | -    | 2     | 2   | -  | -   | - | -   | -   | -   | - | -   | -  |   |  |  |  |
| State Officials            | -    | 1    | 1     | -   | -  | -   | 1 | -   | -   | -   | - | -   | -  |   |  |  |  |
| State Senators             | 4    | 3    | 7     | 4   | 3  | -   | - | -   | -   | -   | - | -   | -  |   |  |  |  |
| State Representatives      | 10   | 6    | 16    | 8   | 6  | 2   | - | -   | -   | -   | - | -   | -  |   |  |  |  |
| County Officials           | 12   | 7    | 19    | 7   | 5  | -   | - | 5   | 2   | -   | - | -   | -  |   |  |  |  |
| Municipal Officials        | 76   | 41   | 117   | 5   | 5  | -   | - | 60  | 32  | -   | - | 11  | 4  |   |  |  |  |
| Judicial/Law Enforcem.     | 22   | 15   | 37    | 11  | 6  | 2   | 1 | 9   | 8   | -   | - | -   | -  |   |  |  |  |
| Education/School Board     | 85   | 91   | 176   | 12  | 8  | 2   | - | 65  | 77  | -   | - | 6   | 6  |   |  |  |  |
| Special District Officials | 3    | 3    | 6     | -   | -  | -   | - | 3   | 3   | -   | - | -   | -  |   |  |  |  |
| <b>Sub-Totals</b>          | 214  | 167  | 381   | 49  | 33 | 6   | 2 | 142 | 122 | -   | - | 17  | 10 |   |  |  |  |
| <b>TOTALS</b>              | 381  |      |       | 82  |    | 8   |   | 264 |     | -   |   | 27  |    |   |  |  |  |

Source: NALEO EDUCATIONAL FUND, National Directory of Latino Elected Officials (2019).<sup>107</sup>

Less data is available with respect to Arizona’s other racial and ethnic minorities. Eight Native Americans ran for the Arizona state legislature in 2020, and six were elected from majority-Native districts.<sup>108</sup> All six are Democrats.<sup>109</sup> Native American officeholding was less

<sup>107</sup> Available at [https://naleo.org/wp-content/uploads/2019/12/2019\\_National\\_Directory\\_of\\_Latino\\_Elected\\_Officials.pdf](https://naleo.org/wp-content/uploads/2019/12/2019_National_Directory_of_Latino_Elected_Officials.pdf).

<sup>108</sup> Shondiin Silversmith, “Representation Matters”: 14 Native American Candidates Ran for Office in Arizona; 11 Won, THE ARIZONA REPUBLIC (Dec. 3, 2020), <https://www.azcentral.com/story/news/politics/elections/2020/12/03/11-native-american-candidates-won-election-arizona-2020/6353281002/>.

<sup>109</sup> Erin Granillo-Walker, *AIPI Policy Article: Indigenous Legislators Elected in 2020 to Serve in the 117<sup>th</sup> Congress & 55<sup>th</sup> Arizona Legislature* 3–5, ARIZONA STATE UNIVERSITY AMERICAN INDIAN POLICY INSTITUTE, [https://aipi.asu.edu/sites/default/files/11.23.2020\\_aipi\\_newly\\_elected\\_tribal\\_legislator\\_profiles.pdf](https://aipi.asu.edu/sites/default/files/11.23.2020_aipi_newly_elected_tribal_legislator_profiles.pdf).

common for other elected offices, both higher and lower. Only three Native American candidates ran for seats on county boards of supervisors, of whom two were elected.<sup>110</sup> No Native Americans have been elected to statewide office in Arizona, and although the rest of the nation sent six Native Americans to the House of Representatives in 2020, Arizona has never sent one.<sup>111</sup> Only three African-Americans served in the Arizona legislature in 2020, two Democrats and one Republican.<sup>112</sup> Tempe, Arizona elected its first African-American mayor in 2020.<sup>113</sup>

#### **D. Section 203 Language Coverage**

Section 203 of the Voting Rights Act applies to four language groups: Alaska Natives, American Indians, Asian Americans, and persons of Spanish Heritage,<sup>114</sup> “as well as the distinct languages and dialects within each of those groups.”<sup>115</sup> A jurisdiction is covered under Section 203 if the Director of the Census determines two criteria are met, using “American Community Survey data in 5-year increments, or comparable census data.”<sup>116</sup>

First, a population threshold, or “trigger,” must be met. Within a political subdivision of a state, limited-English proficient (“LEP”) voting age citizens in a single language group must either: (a) number more than 10,000 (“10,000 Person Trigger” or “N” in Tables 6 and 7 below); (b) comprise more than five percent of all voting age citizens (“Five Percent Trigger” or “P” in

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<sup>110</sup> Silversmith, *supra* note 108.

<sup>111</sup> Granillo-Walker, *supra* note 109.

<sup>112</sup> Helena Wagner, *Arizona Elected 2 Black Lawmakers to the Legislature 70 Years Ago. Today, There Are 3*, THE ARIZONA REPUBLIC (Feb. 29, 2020), <https://www.azcentral.com/story/news/politics/arizona/2020/02/29/hayzel-daniels-and-carl-sims-were-first-black-members-legislature-arizona/4873979002/>.

<sup>113</sup> Erin Galindo, *Tempe Mayor Corey Woods Talks Police, Construction in His First State of the City*, THE STATE PRESS (Nov. 1, 2020), <https://www.statepress.com/article/2020/11/spolitics-tempe-mayor-state-of-the-city-address-2020>.

<sup>114</sup> 52 U.S.C. §§ 10503(c)(3), 10503(e).

<sup>115</sup> James Thomas Tucker, *The Census Bureau’s 2011 Determinations of Coverage under Section 203 of the Voting Rights Act Mandating Bilingual Voting Assistance*, 19 ASIAN AM. L. J. 171 (2012).

<sup>116</sup> 52 U.S.C. § 10503(b)(2)(A).

Tables 6 and 7 below); or (c) comprise more than five percent of all American Indians or Alaskan Native voting age citizens of a single language group residing on an Indian reservation (“Reservation Trigger” or “RP” in Tables 6 and 7 below).<sup>117</sup> A state may only be covered for a language using the Five Percent Trigger.<sup>118</sup> A person is LEP if he or she is “unable to speak or understand English adequately enough to participate in the electoral process.”<sup>119</sup>

Second, the illiteracy rate of the language minority voting age citizens meeting the population threshold must exceed the national illiteracy rate.<sup>120</sup> “Illiteracy” means “the failure to complete the 5th primary grade,”<sup>121</sup> and was adopted to conform to the Census definition of that term.<sup>122</sup>

As a result of the determinations issued by the Census Bureau in 2016, currently ten of Arizona’s fifteen counties are separately covered by Section 203 of the Voting Rights Act.<sup>123</sup> Four counties are covered for Spanish: Maricopa, Pima, Santa Cruz, and Yuma.<sup>124</sup> Six counties are covered for Native American languages: Apache, Coconino, Gila, Graham, Navajo, and Pinal.<sup>125</sup> See Tables 6 and 7 below. The next coverage determinations are expected to be made in December 2021, as required by Section 203(b)(2) of the Voting Rights Act.<sup>126</sup>

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<sup>117</sup> 52 U.S.C. § 10503(b)(2)(A)(i).

<sup>118</sup> See 52 U.S.C. § 10503(b)(2)(A)(i)(II)-(III).

<sup>119</sup> 52 U.S.C. § 10503(b)(3)(B).

<sup>120</sup> See 52 U.S.C. § 10503(b)(2)(A)(ii).

<sup>121</sup> 52 U.S.C. § 10503(b)(3)(E).

<sup>122</sup> See 121 CONG. REC. H4719 (daily ed. June 2, 1975) (statement of Rep. Edwards).

<sup>123</sup> See 81 Fed. Reg. 85732, 87533 (Dec. 5, 2016).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> Compare generally *id.* (current coverage determinations issued on December 5, 2016) with 52 U.S.C. § 10503(b)(2)(A) (requiring the coverage determinations to be updated every five years).

*Table 6 — 2016 Census Bureau Determinations under Section 203 for Spanish Heritage in Arizona*

| Jurisdiction      | Number LEP (N) | Percent LEP (P) | Illiteracy Rate | Coverage Basis |
|-------------------|----------------|-----------------|-----------------|----------------|
| Maricopa County   | 70440          | 2.7133          | 12.8904         | N              |
| Pima County       | 24710          | 3.4885          | 11.5136         | N              |
| Santa Cruz County | 5990           | 22.6123         | 7.2621          | P              |
| Yuma County       | 14150          | 12.0708         | 16.3958         | N, P           |

**Source: Section 203 Language Determinations, December 5, 2016.**<sup>127</sup>

Even though only four counties in Arizona meet the Spanish-language assistance coverage requirements of Section 203, there is a great need for language assistance among Latino voting-age citizens in Arizona. Statewide, 14.5 percent (132,905) of Arizona’s 913,715 Spanish-speaking voting-age citizens speak English “less than very well” and need language assistance to vote.<sup>128</sup> Excluding the four covered counties, 12 percent of Spanish-speaking voting-age citizens need language assistance to vote.<sup>129</sup> The statewide illiteracy rate for Arizona Spanish speakers is more than nine times the national rate.<sup>130</sup>

*Table 7 — 2016 Census Bureau Determinations under Section 203 for Native American Languages in Arizona*

| Covered Jurisdiction | Covered Language | Number LEP (N) | Percent LEP (P) | Illiteracy Rate | Coverage Basis |
|----------------------|------------------|----------------|-----------------|-----------------|----------------|
| Apache               | Navajo           | 6620           | 13.39           | 27.4169         | P, RP          |
| Coconino             | Navajo           | 5165           | 5.1319          | 23.4269         | P, RP          |
| Gila                 | Apache           | 390            | 0.9472          | 2.5641          | RP             |
| Graham               | Apache           | 195            | 0.7617          | 2.0513          | RP             |
| Navajo               | Navajo           | 5510           | 7.3257          | 23.5027         | P, RP          |
| Pinal                | Apache           | 4              | 0.0015          | 100             | RP             |

<sup>127</sup> See Census Bureau, *Section 203 Language Determinations*, May 5, 2017, <https://www.census.gov/programs-surveys/decennial-census/about/voting-rights/voting-rights-determination-file.html>. (describing Section 203 and publishing, inter alia, the data underlying the most recent calculations).

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

|  |        |       |         |         |    |
|--|--------|-------|---------|---------|----|
|  |        |       |         |         |    |
| Navajo Nation Reservation and Off-Reservation Trust Land | Navajo | 22895 | 19.8707 | 26.5342 | RP |
| San Carlos Reservation                                   | Apache | 465   | 7.381   | 2.1505  | RP |

**Source: Section 203 Language Determinations, December 5, 2016.**<sup>131</sup>

Nearly 20 percent of voting-age citizens living on the Navajo Nation reservation require language assistance to vote.<sup>132</sup> There is also a need for language assistance outside of the covered jurisdictions. Some Arizona jurisdictions have recognized this need and continue to provide some level of language assistance voluntarily.<sup>133</sup> Language issues remain a common complaint in terms of Native American access to the polls. A 2016 analysis concluded that only three of the nine counties then covered under Section 203 for Native American languages actually complied with their obligations under the VRA.<sup>134</sup> In 2018, inadequate language access resulted in a substantial number of Navajo voters’ mail-in ballots being rejected for failure to comply with the instructions.<sup>135</sup> Successful enforcement actions under Section 203 have been prevalent in Arizona’s counties, particularly in Apache, Coconino and Navajo Counties for Native American languages.

### **III. Pre-2006 Voting Discrimination**

#### **A. History of Discrimination in Voting and Political Participation**

The history of voting-related discrimination in Arizona is summarized well in the Ninth Circuit’s decision in *Democratic National Committee v. Hobbs*, the expert reports submitted in

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<sup>131</sup> See *id.* Gila, Graham, and Pinal Counties are covered under the Reservation Trigger for Apache, because they intersect with the San Carlos Reservation. Apache, Coconino, and Navajo Counties are covered under the Reservation Trigger for Navajo, because they intersect with the Navajo Nation Reservation. They are also covered the Five Percent Trigger.

<sup>132</sup> *Id.*

<sup>133</sup> Obstacles at Every Turn, *supra* note 101, at 53 (noting that there are “a few” such examples).

<sup>134</sup> See *id.* at 61–62.

<sup>135</sup> See *infra* Section V(A)(6) (discussing *Navajo Nation v. Reagan*, No. 3:18-cv-08329-DWL, (D. Ariz. Oct. 10, 2019)).

that litigation, and a series of recent scholarly studies.<sup>136</sup> What follows is a recitation of the highlights of that history through 2006, when the VRA was last renewed.

At the time of Arizona’s founding, Anglos were most concerned with the territory’s “Indian Problem.”<sup>137</sup> Much of Arizona’s history of voting discrimination, both in territorial and statehood times, concerns its Native American population, which remains one of the largest in the country.

Even before the 1848 Treaty of Guadalupe Hidalgo conferred citizenship on approximately 100,000 Mexican-Americans living in Arizona, Latinos have been part of Arizona’s culture. In Arizona’s early territorial period, white Latinos enjoyed relative parity in social and political affairs with white Anglos. With American migration westward, though, they were soon dwarfed by an Anglo-American majority. “While a small group of Hispanics continued to prosper, . . . most Hispanics toiled as laborers who made less than Anglos even though they performed the same work.”<sup>138</sup> Discrimination was more pronounced against non-white Latinos.<sup>139</sup>

#### 1. Discrimination against Native Americans

U.S. law historically considered Native Americans to be citizens of their respective tribes, and not of the United States. Several Native Americans tried to claim U.S. citizenship, but these efforts were rejected by the courts, both before and after the Reconstruction Amendments to the U.S. Constitution.<sup>140</sup> Generally, Native Americans could only become U.S. citizens by operation

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<sup>136</sup> See, e.g., *Democratic Nat’l Comm. v. Hobbs*, 948 F.3d 989, 1017–26 (9th Cir.) *rev’d and remanded sub nom. Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321 (2021); Berman Report, *supra* note 2; Tucker, *supra* note 19, Ferguson-Bohnee, *supra* note 39.

<sup>137</sup> Berman Report, *supra* note 2, at 4.

<sup>138</sup> *Id.* at 5.

<sup>139</sup> See *id.* at 5–6.

<sup>140</sup> See Ferguson-Bohnee, *supra* note 39, at 1101–04.

of a treaty or through naturalization. In 1924, Congress passed the Indian Citizenship Act, which extended citizenship to Native Americans from birth who had not yet been made U.S. citizens.<sup>141</sup>

Compared with other states, Native Americans constituted a large percentage of Arizona's population. They were especially numerous in particular counties. According to the 1910 census, Native Americans were approximately one-third of Pinal and Coconino Counties, one-half of Navajo County, and two-thirds of Apache County.<sup>142</sup> Despite their numbers—or perhaps because of them—Arizona politicians sought to prevent them from exercising the political power that had just been granted them by the Indian Citizenship Act.

From 1924 to 1928, Governor Hunt and other Democrats embarked on a campaign to limit the Native American vote. This included sending challengers to systematically challenge Native American voters in Apache County and simply rebuffing Native American attempts to register in Pinal County.<sup>143</sup> The latter resulted in a court contest, and in 1928, Arizona's Supreme Court ruled that, notwithstanding federal law designed in part to extend them the vote, Native Americans were not eligible to vote in Arizona.<sup>144</sup> The reasoning was that because the federal trust responsibility for Native Americans arose out of their "condition of tutelage or dependency," they were ineligible to vote.<sup>145</sup> Congress reaffirmed Native American citizenship in 1940, but the Arizona Supreme Court did not reverse its 1928 ruling in *Porter v. Hall* until 1948, when the Court held in *Harrison v. Laveen* that Native Americans were entitled to vote.<sup>146</sup> In *Harrison*, two Mohave men—one of whom had just returned from service in World War II—were told they were incompetent because

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<sup>141</sup> *Id.* at 1103–04.

<sup>142</sup> *Id.* at 1104.

<sup>143</sup> *Id.* at 1107–08.

<sup>144</sup> *Porter v. Hall*, 34 Ariz. 308, 331–32 (Ariz. 1928).

<sup>145</sup> *Id.* at 329–332.

<sup>146</sup> *Harrison v. Laveen*, 67 Ariz 337 (Ariz. 1948); see Ferguson-Bohnee, *supra* note 39, at 1109–11.

they were Native American and turned away from registering to vote by the Maricopa county clerk.<sup>147</sup> “Ten percent of the Native American population served in World War II, a larger proportion than any other population,” and Navajo and Hopi Code Talkers were essential to the war effort, including the victory at Iwo Jima.<sup>148</sup> The *Harrison* court cited some of these contributions in reversing its 1928 decision and ruling that plaintiffs were eligible to register.<sup>149</sup>

Despite their *de jure* eligibility to vote, Arizona’s English-language literacy test continued to disfranchise large portions of the Native American community. In 1948, the overwhelming majority of Native Americans in Arizona—as much as 80 to 90 percent—were illiterate in the English language and came from an oral language tradition.<sup>150</sup> As noted above, Arizona fought to retain its literacy test even after the Voting Rights Act banned such tests or devices nationwide in 1970. Arizona repealed its literacy test only in 1972. In addition, Arizona, like other Western states, used poll taxes, literacy and English language tests, and the placement of polling places far from Native American reservations to make it harder for Native Americans to vote.<sup>151</sup>

The VRA has been invaluable but slow to help repair the damage done by more than a century of discrimination against Native Americans. The nationwide ban on literacy tests had a palpable and positive impact on Native American political participation and power in the early 1970s.<sup>152</sup> But the “non-Indian majority was threatened by Indian participation, and there were a number of challenges to Indians’ right to vote and to hold offices. Many of these challenges

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<sup>147</sup> *Harrison*, 67 Ariz. at 340; see also *Obstacles at Every Turn*, *supra* note 101, at 13.

<sup>148</sup> Ferguson-Bohnee, *supra* note 39, at 1109–10.

<sup>149</sup> *Harrison*, 67 Ariz. at 343. The court declined to condition its decision on Mr. Harrison’s war service. *Id.* at 341.

<sup>150</sup> Ferguson-Bohnee, *supra* note 39, at 1112.

<sup>151</sup> Willard Hughes Rollings, *Citizenship and Suffrage: The American Indian Struggle for Civil Rights in the American West, 1830–1965*, 5 NEV. L.J. 126, 135 (2004).

<sup>152</sup> Berman Report, *supra* note 2, at 15–16.

occurred in Apache County.”<sup>153</sup> In 1965, Apache County was one of the jurisdictions scheduled for coverage in the first VRA.<sup>154</sup> The county’s voting-age population was majority Native American, but Arizona’s literacy test effectively excluded Native American participation until 1970.<sup>155</sup>

In November 1972, Tom Shirley, a Navajo Nation member residing on the Navajo Nation reservation within Apache County, won an election for the Apache County Board of Supervisors by a vote of 3,169 votes to 1,105 against a non-Native American candidate.<sup>156</sup> He was to be the first Navajo member of the county board, prompting extraordinary efforts to prevent him from being seated. The unsuccessful candidate, Thomas Minyard, found a favorable local court to secure a preliminary injunction against the Apache Board of Supervisors preventing the board from issuing a Certificate of Election to Shirley.<sup>157</sup> The stated bases were that as a member of the reservation, Shirley was immune from service of process, Shirley did not own any property in Apache County and Shirley was a trustee for the Apache School District at the time he was elected.<sup>158</sup> Even though Arizona had no property requirement for holding office, it was not until September 1973, and after extensive litigation, that Shirley was able to have the Arizona Supreme Court quash the injunction and be seated in the office he had won handily.<sup>159</sup>

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<sup>153</sup> Ferguson-Bohnee, *supra* note 39, at 1115.

<sup>154</sup> 30 Fed. Reg. 9897 (Aug. 7, 1965).

<sup>155</sup> Ferguson-Bohnee, *supra* note 39, at 1115; *see also id.* at 1117 (noting the results of an investigation into low Native turnout in Apache County in the mid-1970s).

<sup>156</sup> *Shirley v. Superior Ct. In & For Apache Cty.*, 109 Ariz. 510, 512 (Ariz. 1973); Ferguson-Bohnee, *supra* note 39, at 1116.

<sup>157</sup> *See Shirley*, 109 Ariz. at 512; Cindy Yurth, *A Leader with Backbone: 35 Years Later, Apache County’s First Elected Diné Supervisor Speaks Out*, NAVAJO TIMES, Sept. 3, 2009, <https://navajotimes.com/politics/2009/0909/090309supe.php>.

<sup>158</sup> *Shirley*, 109 Ariz. at 512.

<sup>159</sup> *Id.* at 516; Yurth, *supra* note 157.

Non-Native politicians promptly retaliated by restructuring the districts for the Board of Supervisors, packing almost all of the county's Native American voters into one district that had nearly ten times the population of the two other districts' average.<sup>160</sup> Specifically, District 1 had a population of 1,700, of whom 70 were Native American; District 2 had a population of 3,900, of whom 300 were Native American; and District 3 had a population of 26,700, of whom 23,600 were Native American.<sup>161</sup> When the restructuring was challenged under the Voting Rights Act, a three-judge district court rejected the county officials' primary argument that the Indian Citizenship Act of 1924 was unconstitutional and held that the restructuring was plainly a malapportionment.<sup>162</sup> The Supreme Court summarily affirmed.<sup>163</sup>

Undeterred, in 1976, white citizens in Apache County held a special bond election to fund a new school in a non-Native American part of the county.<sup>164</sup> The purpose of the new school, and the election, was to avoid the integration of white and Native American students.<sup>165</sup> In order to ensure that Native American turnout would be low in the election, local authorities closed half of the polling places on the reservation, provided no language assistance for Navajo voters, and offered English-only absentee ballots.<sup>166</sup> The poll closings were disproportionately in Navajo areas, and had the effect of forcing most Navajo voters without transportation to travel at least 12

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<sup>160</sup> See Tucker, *supra* note 17, at 323.

<sup>161</sup> *Goodluck v. Apache Cty.*, 417 F. Supp. 13, 14 (D. Ariz. 1975), *aff'd sub nom. Apache Cty. v. United States*, 429 U.S. 876 (1976).

<sup>162</sup> *Id.* at 16.

<sup>163</sup> 429 U.S. 876.

<sup>164</sup> Tucker, *supra* note 19, at 324.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 325-326.

more miles to vote.<sup>167</sup> These blatant violations of the VRA were only remedied in 1980, when the county entered into a consent decree with the Justice Department.<sup>168</sup>

The issues in the 1976 bond election only came to the Justice Department's attention after an investigation into the results of that election and a prolonged negotiation between DOJ and local officials in the form of objections under Section 5 of the VRA.<sup>169</sup> In the 1980s and 1990s, the Justice Department was more proactive in addressing discriminatory voting practices in Apache County and elsewhere in Arizona.<sup>170</sup> In 1985, the DOJ objected to an attempt to close the last polling place on the Fort Apache Reservation.<sup>171</sup>

In addition to poll closings, county officials continued to lag in their language assistance obligations under the VRA.<sup>172</sup> As of 1987, 55% of the Native American population in Apache County could not speak or read English, but local officials persisted in providing only limited English-only assistance to reservation voters.<sup>173</sup> The Department of Justice objected to Apache County's submitted guidelines for language assistance as inadequate.<sup>174</sup> Two years later, the United States sued Navajo, Apache, and Coconino Counties under the Voting Rights Act.<sup>175</sup> The

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<sup>167</sup> *Id.* at 325.

<sup>168</sup> See Ferguson-Bohnee, *supra* note 39, at 1117; Consent Decree, *Apache County High School District No. 90 v. United States* (D.D.C. June 12, 1980) (No. 77-1815).

<sup>169</sup> Ferguson-Bohnee, *supra* note 39, at 1117; Tucker, *supra* note 19, at 324–26.

<sup>170</sup> Tucker, *supra* note 19, at 334-35.

<sup>171</sup> *Id.* at 326–27; Letter from William Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Robert C. Bates, Snell & Wilmer (Aug. 16, 1985), available at <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/AZ-1070.pdf>.

<sup>172</sup> Tucker, *supra* note 19, at 327.

<sup>173</sup> *Id.*

<sup>174</sup> Letter from James P. Turner, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Russell H. Burdick, Jr., Chief Deputy County Attorney (July 17, 1987), available at <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/AZ-1090.pdf>; Letter from William Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., Dep't of Justice, to Russell H. Burdick, Jr., Chief Deputy County Attorney (Feb. 10, 1988), available at <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/AZ-1100.pdf>.

<sup>175</sup> Tucker, *supra* note 19 at 328-30; Ferguson-Bohnee, *supra* note 39, at 1117.

counties settled the claims after four years of litigation in 1993, adopting a Navajo Language Election Information Program.<sup>176</sup> The consent decree imposed robust requirements, including voter outreach and education in the Navajo language, training of a minimum number of bilingual election workers, and ensuring the staffing of polling places in Navajo districts.<sup>177</sup> Despite these efforts, numerous language barriers have persisted in these counties. In 2002, the DOJ documented several complaints of inadequate training for poll workers.<sup>178</sup> As discussed below, the need for language assistance for Native American voters remains to the present day.

As the 1970s litigation over the reorganization of the Apache County Board of Supervisors exemplifies, Arizona’s white Anglo majority has repeatedly tried to structure political processes to reduce Native American electoral power. “Efforts to reduce Indian participation, voting strength and the ability to elect candidates of their choice through redistricting have been challenged every cycle since the Voting Rights Act was enacted.”<sup>179</sup> In 1969, an Arizona federal court blocked an attempt to base apportionment on the number of registered voters, noting that Native Americans in Apache and Navajo Counties would be underrepresented under such a system.<sup>180</sup> Three years later, in litigation between the same parties over redistricting issues stemming from the 1970 census, the Navajo Tribal Council intervened to address an attempt to dilute Navajo voting power, and the court adopted the Council’s proposed plan.<sup>181</sup> Following each of the 1980, 1990, and 2000

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<sup>176</sup> Consent Decree, *United States v. Arizona*, No. 88-1989 (D. Ariz. May 22, 1989) (amended Sept. 27, 1993).

<sup>177</sup> Tucker, *supra* note 19, at 328-30.

<sup>178</sup> *Id.* at 330-31; U.S. Gov’t Accountability Office, Department of Justice’s Activities to Address Past Election-Related Voting Irregularities 91-92 (2004), available at <http://www.gao.gov/new.items/d041041r.pdf>.

<sup>179</sup> Ferguson-Bohnee, *supra* note 39, at 1118.

<sup>180</sup> *Klahr v. Williams*, 303 F. Supp. 224 (D. Ariz. 1969).

<sup>181</sup> *Klahr v. Williams*, 339 F. Supp. 922, 928 (D. Ariz. 1972). The challenged plan had been designed by a non-Native American incumbent in the district to ensure that Native American voters would be a minority in his district, which included portions of the Navajo Reservation. *Id.* at 927.

redistricting cycles, the Department of Justice objected to Arizona's attempts to reduce Native American and Latino voting power through the reapportionment process.<sup>182</sup> In 2000, Arizona voters approved the creation of an Independent Redistricting Commission.<sup>183</sup> Even after the creation of this commission, Arizona politicians have continued to seek to use the redistricting process in order to reduce minority voting rights in Arizona, by challenging the commission's existence and its reapportionment plans in the 2010 cycle, and by waging a political campaign against the commission's legitimacy and trying to stack its membership in an attempt to undermine its independence.<sup>184</sup>

Arizona has also sought to structure the judiciary in a way to exclude Native Americans. In 1994, Coconino County and Navajo County tried to create new divisions in their superior courts without preclearing the change pursuant to Section 5.<sup>185</sup> The Justice Department learned of the proposed changes and issued objections, which the counties proceeded to ignore.<sup>186</sup> The DOJ brought suit under the Voting Rights Act and successfully enjoined the creation of the districts.<sup>187</sup>

In 2003, State Senator and immediately preceding Speaker of the Arizona House James Weiers sought a legal opinion from the Attorney General to exclude a Navajo Nation member from serving on the state's Commission on Appellate Court Appointments.<sup>188</sup> The Commission plays an important role in appointing members to Arizona's Independent Redistricting Commission,

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<sup>182</sup> Tucker, *supra* note 19, at 334.

<sup>183</sup> Ferguson-Bohnee, *supra* note 39, at 1120.

<sup>184</sup> *See infra* Section IV(G).

<sup>185</sup> Ferguson-Bohnee, *supra* note 39, at 1117–18; Tucker, *supra* note 19, at 332–33; *U.S. v. Arizona*, No. CIV-94-1845-PHX-EHC, 1994 U.S. Dist. LEXIS 17606, \*39, \*2-6 (D. Ariz. Oct. 17, 1994).

<sup>186</sup> Tucker, *supra* note 19, at 332.

<sup>187</sup> *U.S. v. Arizona*, No. CIV-94-1845-PHX-EHC, 1994 U.S. Dist. LEXIS 17606, \*39, \*28 (D. Ariz. Oct. 17, 1994).

<sup>188</sup> Ferguson-Bohnee, *supra* note 39, at 1118; Ariz. Office of the Att'y Gen., No. I03-007, Tribal Member Eligibility to Serve on Commission on Appellate Court Appointments 1 (2003).

which had been established by a ballot initiative only three years earlier.<sup>189</sup> The Attorney General confirmed that there was no basis in Arizona law for the exclusion of Native Americans from the commission.<sup>190</sup>

In the 2004 general election, Arizona voters approved Proposition 200 in a ballot initiative.<sup>191</sup> The measure purported to require, among other things, that all Arizona voters provide proof of their citizenship in registering to vote.<sup>192</sup> Although instigated and promoted through a campaign of racially-charged misinformation targeted at Latino voters, and officially proposed to “discourage illegal immigration,” Proposition 200 has also had a disproportionate impact on Native American citizens.<sup>193</sup>

#### 1. Discrimination against Latinos

Hostility to Arizona’s Latino population runs throughout the state’s history, including territorial times. In the early 20<sup>th</sup> century, Congress proposed reuniting Arizona with New Mexico before admitting them to the union.<sup>194</sup> The proposal “obsessed” Arizonans. Arizonan leaders worried that, with its larger population, and large number of Latinos and Republicans, New Mexico’s Spanish-speaking population would “dominate” the new state.<sup>195</sup> They campaigned against a 1906 vote on joint statehood on the basis of racist appeals against Spanish “greasers,” and 84% of Arizona voters rejected the proposed reunion.<sup>196</sup>

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<sup>189</sup> See *infra* Section IV(G).

<sup>190</sup> Ariz. Office of the Att’y Gen., No. I03-007, Tribal Member Eligibility to Serve on Commission on Appellate Court Appointments 1 (2003).

<sup>191</sup> Ferguson-Bohnee, *supra* note 39, at 1124.

<sup>192</sup> Tucker, *supra* note 19, at 354.

<sup>193</sup> Ferguson-Bohnee, *supra* note 39, at 1124 (quoting the language of the proposition); see generally *id.* at 1124–31.

<sup>194</sup> Berman Report, *supra* note 2, at 6.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

In 1909, the territorial legislature adopted an English language literacy test aimed at Arizona’s Mexican population, which the Democrats who controlled the Arizona legislature assumed would vote Republican.<sup>197</sup> Arizona’s 1910 Constitutional convention included only one Latino delegate, markedly fewer than Texas, New Mexico, or California.<sup>198</sup> The delegates debated including this literacy test in the soon-to-be state constitution, but decided against it, for fear of antagonizing Congress.<sup>199</sup> Arizona Republicans charged that Democrats in power intended to reinstate the provision by legislation after statehood was granted, and in 1912 they were proven correct.<sup>200</sup> By contrast, California’s 1849 Constitution required that all state laws be published in Spanish, and New Mexico provided for the funding of teachers able to teach in Spanish in its own 1910 constitutional convention.<sup>201</sup>

Arizona’s literacy test was structured to give discretion to local officials in evaluating registrants, and local registrars “used that discretion to excuse white citizens from the literacy requirement altogether, to give white citizens easier versions of the test, and to help white citizens pass the test . . . . Hispanic citizens were often required to pass more difficult versions of the test, without assistance and without error.”<sup>202</sup> Just as for southern states with similar tests designed to limit African-American voting, the result was a drop in Latino registration following the test’s

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<sup>197</sup> *Id.* at 10.

<sup>198</sup> *Id.* at 7.

<sup>199</sup> *Id.* at 11.

<sup>200</sup> *Id.* at 11.

<sup>201</sup> *Id.* at 7.

<sup>202</sup> *Democratic Nat’l Comm. v. Hobbs*, 948 F.3d 989, 1019 (9th Cir.) *rev’d and remanded sub nom. Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321 (2021) (citing Berman Report, *supra* note 2, at 12).

adoption.<sup>203</sup> In 1912, “nearly half of the precincts [in Cochise and Pima Counties] lacked enough voters to justify holding primary elections.”<sup>204</sup>

Even among those minority voters who were able to navigate the literacy test, white Arizonans organized campaigns of voter intimidation, which before the Voting Rights Act was a “fact of life” in Arizona.<sup>205</sup> A common form of intimidation was the use of “challengers” who appeared at minority-district polling places in Arizona and disproportionately challenged minority voters who appeared to vote.<sup>206</sup>

Governor Hunt organized challengers as early as 1928 against Native Americans,<sup>207</sup> and their modern use in Arizona dates back as far as 1954, mostly in African-American and Latino districts.<sup>208</sup> On election day, challengers were provided with lists of voters compiled from the opposite party’s voters, which they would use to challenge voters at the polls.<sup>209</sup> These challenges were made nominally on the basis of residency or literacy, but they were often made without any basis for thinking the voter was ineligible.<sup>210</sup> The (usually unstated) goal was to intimidate voters into doubting their eligibility or to slow down the line at a polling place.<sup>211</sup> Some challengers would take photographs of voters in order to intimidate them.<sup>212</sup>

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<sup>203</sup> *Id.*

<sup>204</sup> Berman Report, *supra* note 2, at 12.

<sup>205</sup> *Id.* at 14.

<sup>206</sup> *Id.*

<sup>207</sup> Ferguson-Bohnee, *supra* note 39, at 1107–08. The challenge campaign, prompted by concern that the federal Indian Citizenship Act of 1924 would allow Native Americans to vote, proved unnecessary when the Arizona Supreme Court ruled that Native Americans were not eligible to vote. *Porter v. Hall*, 34 Ariz. 308 (Ariz. 1928).

<sup>208</sup> Davidson, *supra* note 13, at 548–50.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> Berman Report, *supra* note 2, at 14.

<sup>212</sup> Davidson, *supra* note 13, at 552.

As Superior Court Judge Charles L. Hardy testified before Congress regarding a challenge campaign in 1962, “this type of challenging was a deliberate effort to slow down the voting so as to cause people awaiting their turn to vote to grow tired of waiting and leave without voting.”<sup>213</sup> An Arizona participant in Operation Eagle Eye of 1964, a nationwide challenge campaign in support of Arizona Senator Barry Goldwater’s campaign, admitted that this was in fact the campaign’s purpose.<sup>214</sup> Judge Hardy also noted “well organized campaign[s] of outright harassment and intimidation” in “black and brown areas.”<sup>215</sup> South Phoenix was targeted as part of one such campaign in 1962, with future Chief Justice William Rehnquist alleged by several witnesses to have been involved in challenge efforts there.<sup>216</sup>

Over the next several decades new iterations of these tactics were developed, always under color of law, with a stated desire to promote “ballot security,” “anti-fraud” measures, or, most perversely, “voter protection.”<sup>217</sup> For example, in 1970, Democrat Raul Castro, who would later become Arizona’s first (and so far only) Latino Governor, narrowly lost an election due to Republican efforts to “cleanse” the voter rolls.<sup>218</sup> Such voter purges typically target voters who have not voted in recent elections or have been reported dead or guilty of a felony and have been shown to have a disproportionate impact on minority voters, who are lower-propensity voters and

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<sup>213</sup> *Id.*

<sup>214</sup> Berman Report, *supra* note 2, at 14 (citing Tova Andrea Wang, The Politics of Voter Suppression, 44-45 (Cornell University Press, 2012)).

<sup>215</sup> Davidson, *supra* note 13, at 552.

<sup>216</sup> *Id.* at 550–54. The allegations were renewed during Chief Justice Rehnquist’s confirmation hearing for the position of Chief Justice, during which he denied personally engaging in challenges.

<sup>217</sup> Berman Report, *supra* note 2, at 14 (internal quotation marks omitted); *see also* Davidson, *supra* note 13, at 559–61 (explaining how the experience of Arizona campaigns in the 1950s and 1960s was a precursor to voter caging campaigns nationally since then).

<sup>218</sup> Berman Report, *supra* note 2, at 16–17.

have names that are often common within their communities.<sup>219</sup> Federal observers and monitors under the Voting Rights Act have lessened the impact of these kinds of tactics, but they have continued throughout Arizona politics and have seen an uptick in recent years.<sup>220</sup> The absence of federal observers caused by the loss of Arizona’s certification for observers following *Shelby County* has increased the threat of voting discrimination and voter intimidation.

### **B. Proposition 203 and English-Language Only Education**

In its 1975 renewal of the Voting Rights Act, Congress recognized the recent history of this kind of intimidation and the discriminatory use of language and education barriers to prevent minority voting participation. This recognition is not just in the law’s legislative history but enshrined in its text:

The Congress finds that voting discrimination against citizens of language minorities is pervasive and national in scope. Such minority citizens are from environments in which the dominant language is other than English. In addition they have been denied equal educational opportunities by State and local governments, resulting in severe disabilities and continuing illiteracy in the English language. The Congress further finds that, where State and local officials conduct elections only in English, language minority citizens are excluded from participating in the electoral process. In many areas of the country, *this exclusion is aggravated by acts of physical, economic, and political intimidation.* The Congress declares that, in order to enforce the guarantees of the fourteenth and fifteenth amendments to the United States Constitution, it is necessary to eliminate such discrimination by prohibiting English-only elections, and by prescribing other remedial devices.<sup>221</sup>

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<sup>219</sup> See generally *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1863–65 (2018) (Sotomayor, J., dissenting) (citing analyses showing that purge programs and “cleaning mechanisms” have a disproportionate impact on minority, low-income, disabled, and veteran voters).

<sup>220</sup> Tucker, *supra* note 19, at 333–34.

<sup>221</sup> 52 U.S.C. § 10303(f)(1) (emphasis added), formerly codified as 42 U.S.C. § 1973b(f)(1).

Notably, Congress recognized the need for educated voters not just so that they would be informed about the issues of the day but also so that they would be able to inform themselves about potential attempts to take away their vote through intimidation.

Thus, education would be essential to the success of the Voting Rights Act, but racial disparities in education have a long history in Arizona.<sup>222</sup> In 1909, Arizona’s territorial legislature adopted the Hampton Education Qualification Bill, which permitted, but did not require, school boards to create segregated schools.<sup>223</sup> After statehood in 1912, the first state legislature made segregation mandatory.<sup>224</sup>

With segregation blessed by the Arizona Supreme Court in 1912,<sup>225</sup> Arizona created separate schools for African-American, Latino, and Native American students.<sup>226</sup> “Spanish-speaking Latino students were specifically targeted for segregation on the basis of their language.”<sup>227</sup> Arizona schools only began to be desegregated in Arizona in the 1950s,<sup>228</sup> and the process remains ongoing today.<sup>229</sup> Even as Arizona’s schools began to be desegregated, however, Arizona’s requirements of English-only instruction resulted in continued decreased registration among Latino voters.<sup>230</sup> “In districts with large numbers of English as a Second Language (ESL)

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<sup>222</sup> See Campbell, *supra* note 4, at 22-26.

<sup>223</sup> Berman Report, *supra* note 2, at 7.

<sup>224</sup> *Id.*

<sup>225</sup> *Dameron v. Bayless*, 14 Ariz. 180 (Ariz. 1912).

<sup>226</sup> See generally Goddard, *supra* note 20, at 1–5; Campbell, *supra* note 4, at 22–26; Tucker, *supra* note 19, at 284.

<sup>227</sup> Tucker, *supra* note 19, at 284 (citing Laura K. Muñoz, Separate But Equal? A Case Study of Romo v. Laird and Mexican American Education, *Org. Am. Historians Mag. of Hist.*, Winter 2001, at 28).

<sup>228</sup> See *Ortiz v. Jack*, No. Civ-1723 (D. Ariz. 1955) (agreeing to discontinue the segregation and discrimination of Mexican school children); *Gonzales v. Sheely*, 96 F. Supp. 1004, 1008-09 (D. Ariz. 1951) (enjoining the segregation of Mexican school children in public schools).

<sup>229</sup> See *Fisher v. Tucson Unified Sch. Dist.*, No. CV-74-00090-TUC-DCB, 2021 WL 1526455 (D. Ariz. Apr. 19, 2021).

<sup>230</sup> Tucker, *supra* note 19, at 284.

and English Language Learner (ELL) students, students received English lessons ‘in a low-level, simplified curriculum.’”<sup>231</sup>

These “IC courses,” as they were known, remained the only option for ESL and ELL students until 1965, when some bilingual programs were introduced.<sup>232</sup> However, a limit was placed on the number of programs that were permitted, and English-only curricula flourished.<sup>233</sup> Limitations on bilingual education had the effect of denying Latinos access to voting once they were eligible, particularly due to Arizona’s English literacy test.<sup>234</sup>

As the Supreme Court observed in rejecting Arizona’s attempts to preserve that literacy test, Congress had been aware of the legacy of Arizona’s education system in passing the ban on literacy tests.

In Arizona, for example, only two counties out of eight with Spanish surname populations in excess of 15% showed a voter registration equal to the state-wide average. Arizona also has a serious problem of deficient voter registration among Indians. Congressional concern over the use of a literacy test to disfranchise Puerto Ricans in New York State is already a matter of record in this Court. ... And as to the Nation as a whole, Congress had before it statistics which demonstrate that voter registration and voter participation are consistently greater in States without literacy tests.<sup>235</sup>

As Arizona’s Latino population grew, Arizona whites have used language as a wedge issue.<sup>236</sup> In 1988, a group titled Arizonans for Official English sponsored a successful ballot initiative to

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<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> *See id.* (citing Kellie Rolstad et al., Weighing the Evidence: A Meta-Analysis of Bilingual Education in Arizona, 29 *Bilingual Res. J.* 43, 48 (2005)).

<sup>234</sup> *Id.*

<sup>235</sup> *Oregon v. Mitchell*, 400 U.S. at 132–33 (internal citations omitted).

<sup>236</sup> *See Tucker, supra* note 19, at 335-343.

amend Arizona’s constitution to provide for English as the state’s official language, and to require the “State and all political subdivisions of [the] State [to] act in English and no other language.”<sup>237</sup>

Litigation immediately followed but took considerable time. In 1997, the U.S. Supreme Court declared one case moot, because the state government employee who had brought suit had resigned from her position after a district court agreed with her that the English-only requirement was unconstitutional but declined to issue an injunction.<sup>238</sup> After nine years of litigation, the Supreme Court ruled that the Ninth Circuit should not have entertained her appeal, and vacated the district court’s ruling for mootness, while “express[ing] no view on the correct interpretation of Article XXVIII [of the Arizona Constitution] or on the measure’s constitutionality.”<sup>239</sup>

The following year, the Arizona Supreme Court heard a parallel challenge to the law and found that the measure violated the First and Fourteenth Amendments of the U.S. Constitution.<sup>240</sup> The court emphasized that Arizona’s English-only measure was particularly stringent compared to other states. Although most states’ provisions were “primarily symbolic,” Arizona’s was aptly described by commentators as “so far the most restrictive Official English measure.”<sup>241</sup> The Court illustrated this breadth by noting that it would prevent a bilingual teacher from telling a student’s Spanish-only parents about their child’s progress.<sup>242</sup>

The Court also emphasized the impact on voting rights and political participation:

Citizens of limited English proficiency, such as many of the named legislator's constituents, often face obstacles in petitioning their government for redress and in accessing the political system. Legislators and other elected officials attempting to serve limited-English-proficient constituents

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<sup>237</sup> *See id.* at 335.

<sup>238</sup> *Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 48–49 (1997)

<sup>239</sup> *Id.*

<sup>240</sup> *Ruiz v. Hull*, 191 Ariz. 441 (Ariz. 1998).

<sup>241</sup> *Id.* at 451–52.

<sup>242</sup> *See id.* at 453.

face a difficult task in helping provide those constituents with government services and in assisting those constituents in both understanding and accessing government. The Amendment makes the use of non-English communication to accomplish that task illegal. . . . A substantial number of Arizona's Native Americans, Spanish-speaking citizens, and other citizens for whom English is not a primary language, either do not speak English at all or do not speak English well enough to be able to express their political beliefs, opinions, or needs to their elected officials. Under the Amendment, with few exceptions, no elected official can speak with his or her constituents except in English, even though such a requirement renders the speaking useless. While certainly not dispositive, it is also worth noting that in everyday experience, even among persons fluent in English as a second language, it is often more effective to communicate complex ideas in a person's primary language because some words, such as idioms and colloquialisms, do not translate well, if at all. In many cases, though, it is clear that the Amendment jeopardizes or prevents meaningful communication between constituents and their elected representatives, and thus contravenes core principles and values undergirding the First Amendment.<sup>243</sup>

While this litigation over the 1988 English-only measure was pending, Spanish-speaking students were engaged in separate litigation over the gross inadequacy of the state's education offerings for LEP students.<sup>244</sup> In 1974, the Supreme Court had ruled in *Lau v. Nichols* that the San Francisco school system's failure to provide English instruction to limited-English Chinese students denied them "a meaningful opportunity to participate in" public education.<sup>245</sup> The *Lau* decision was heavily relied upon by Congress in adding the language access provisions to the Voting Rights Act during the 1975 renewal.<sup>246</sup> In August 1992, Miriam Flores invoked this precedent when she filed a class action on behalf of her child, alleging the inadequacy of Arizona's education system for students from LEP communities.<sup>247</sup> The litigation revealed that Arizona was

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<sup>243</sup> *Id.* at 455.

<sup>244</sup> See Tucker, *supra* note 19, at 343.

<sup>245</sup> 414 U.S. 563, 568 (1974).

<sup>246</sup> See Tucker, *supra* note 19, at 344 n.338.

<sup>247</sup> *Flores v. Arizona*, 48 F. Supp. 2d 937, 939 (D. Ariz. 1999).

funding English Language Learner (ELL) education at one-third the rate that the law required, and later estimates put the figure as low as one-tenth.<sup>248</sup>

Arizona authorities, unwilling to provide the funding necessary to comply with the law, engaged in protracted and repeated attempts to avoid their obligations to ELL students.<sup>249</sup> In December 2005, frustrated with the state's refusal to comply with past orders, the district court overseeing the litigation cited defendants for contempt and ordered them to pay a \$500,000 fine toward ELL education for each day they continued to fail to comply with court orders.<sup>250</sup> Although the Supreme Court ultimately reversed much of the district court's rulings in 2009,<sup>251</sup> the litigation illustrated the lengths to which Arizona authorities would go to deny educational opportunities to ELL students. In addition, the *Flores* litigation brought the issue to the attention of the Department of Justice, which has entered into a series of consent decrees with Arizona education officials to address some of the inadequacies of Arizona's ELL programs.<sup>252</sup>

Two years after the Arizona Supreme Court declared the English-only constitutional amendment violative of the federal Constitution, and eight years into Ms. Flores's litigation,

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<sup>248</sup> See Tucker, *supra* note 19, at 344–45 (describing judicial findings that Arizona spent \$150 per ELL student when it should spend \$450); *id.* at 347 (describing later legislative findings that Arizona should spend \$1,500 per ELL student).

<sup>249</sup> See *id.* at 347-348.

<sup>250</sup> *Flores v. Arizona*, 405 F. Supp. 2d 1112, 1120 (D. Ariz. 2005), *vacated sub nom. Flores v. Rzeslawski*, 204 Fed. App'x 580 (9th Cir. 2006).

<sup>251</sup> *Horne v. Flores*, 557 U.S. 433 (2009).

<sup>252</sup> See Press Release, Dep't. of Justice, Departments of Justice and Education Reach Settlement with Arizona Department of Education to Ensure That Potential ELL Students Are Properly Identified (Mar. 25, 2011), <https://www.justice.gov/opa/pr/departments-justice-and-education-reach-settlement-arizona-department-education-ensure>; Press Release, Dep't. of Justice, Departments of Justice and Education Reach Settlement with Arizona Department of Education to Ensure That ELL Students Are Properly Identified and Not Prematurely Exited (Aug. 31, 2012), <https://www.justice.gov/opa/pr/departments-justice-and-education-reach-settlement-arizona-department-education-ensure-ell>; Press Release, Dep't. of Justice, Departments of Justice and Education Reach Settlement with Arizona Department of Education to Meet the Needs of English Language Learner Students (May 3, 2016), <https://www.justice.gov/opa/pr/departments-justice-and-education-reach-settlement-arizona-department-education-meet-needs>.

Arizonans voted on Proposition 203.<sup>253</sup> Inspired by a California measure two years earlier, Arizona became the second state in the country to pass a ballot initiative banning bilingual education and requiring schools to use mostly English immersion programs.<sup>254</sup> Although the *Flores* litigation had illustrated the need for improved educational opportunities for LEP students, and California's approach had already proved ineffective, Arizona's political leadership waged a campaign to end local flexibility in ELL programs and to stymie efforts like those of Ms. Flores to provide a better education for limited-English students.<sup>255</sup> The campaign over Proposition 203 was marked by racial appeals. An editorial for the *Arizona Daily Star* summed up the motivations behind the ballot initiative in noting that "For Hispanics, this proposition definitely has a punitive feel to it."<sup>256</sup>

While targeted at Latinos, Proposition 203 also had a direct impact on efforts to preserve Native American languages in non-BIA schools. Even on reservations, many students attend private or charter schools, which remain subject to state law.<sup>257</sup>

### **C. Redistricting**

As the 1970s litigation over the reorganization of the Apache County Board of Supervisors exemplifies, Arizona's white Anglo majority has repeatedly tried to structure political processes to reduce minority electoral power. Such attempts make up a large percentage of the Justice Department's objections to Arizona voting changes under the Voting Rights Act prior to *Shelby*.<sup>258</sup>

On the county level, Cochise County presents a clear example of a jurisdiction that sought to flout the preclearance process. The DOJ objected to a Cochise County redistricting plan in 1975

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<sup>253</sup> Tucker, *supra* note 19, at 337.

<sup>254</sup> *See id.*

<sup>255</sup> *Id.* at 337–38.

<sup>256</sup> Berman Report, *supra* note 2, at 18 (quoting *No on Prop. 203*, *The Arizona Daily Star*, Oct. 24, 2000).

<sup>257</sup> Tucker, *supra* note 19 at 341–42.

<sup>258</sup> *See* Tucker, *supra* note 19, at 334–35.

because of the County’s refusal to provide information requested for the Justice Department’s review. The Attorney General’s objection expressed concern about a district having been drawn so as to “siphon[] off what appears to be a significant concentration of Spanish surname persons located in the county’s southern extremity.”<sup>259</sup> In response, Cochise County adopted a new redistricting plan between 1975 and 1980 but failed to ever submit the plan for preclearance.<sup>260</sup> In 1982, the county submitted another redistricting plan for preclearance, but the submission confirmed that it was made pursuant to a change in state law that itself had not been precleared. Once it was, the county submitted a new redistricting plan in 1983 but refused to provide the population data requested by DOJ in order to review the plan. Accordingly, the Attorney General objected to the redistricting plan.<sup>261</sup>

The City of Douglas is located within Cochise County. In 1983, the Department objected in part to changes designed to replace ward-level districts in the City of Douglas with city-wide at-large elections. Noting the city’s pattern of racially polarized voting in city elections, the Attorney General objected to at-large elections because they risked reducing Mexican-American representation on the City Council, which had previously elected representatives from three predominantly Mexican-American wards.<sup>262</sup> The objection was later withdrawn in June 1998.

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<sup>259</sup> Letter from J. Stanley Pottinger, Assistant Attorney Gen., Civil Rights Div., Dep’t. of Justice, to Richard J. Riley, Cochise County Attorney (Feb. 8, 1975), *available at* <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/AZ-1010.pdf>.

<sup>260</sup> Letter from William Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., Dep’t. of Justice, to Sherry Marcell, Elections Officer, Cochise County Board of Supervisors (Nov. 3, 1986), *available at* <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/AZ-1080.pdf>.

<sup>261</sup> *Id.*

<sup>262</sup> Letter from William Bradford Reynolds, Assistant Attorney Gen., Civil Rights Div., Dep’t. of Justice, to James K. Kerley, Esq., (Dec. 5, 1983), *available at* <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/AZ-1050.pdf>.

Four of the Department of Justice’s objections in Arizona have been for statewide redistricting plans: one in the 1980s, two in the 1990s, and one in 2002.<sup>263</sup> Both of the 1990s objections reflect state legislators’ attempts to minimize Latino voting power and to avoid the creation of a majority-Latino district.<sup>264</sup>

In 2000, Arizona voters approved the creation of an Independent Redistricting Commission. As discussed below, even after the creation of this commission, Arizona politicians have continued to seek to use the redistricting process in order to reduce minority voting rights in Arizona, by challenging the commission’s existence and its reapportionment plans in the 2010 cycle, and by waging a political campaign against the commission’s legitimacy and trying to stack its membership in the 2020 redistricting cycle.<sup>265</sup>

#### **D. Proposition 200 and Voter ID**

In November 2004, the “Protect Arizona Now” committee promoted and successfully passed Proposition 200 with 56% of the vote, in large part by campaigning against the use of public services by undocumented immigrants. It purported to require individuals to provide proof of citizenship in one of an enumerated list of formats before either receiving public benefits or registering to vote. The campaign for Proposition 200 was rife with racial appeals about

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<sup>263</sup> Department of Justice, Voting Determination Letters for Arizona, <https://www.justice.gov/crt/voting-determination-letters-arizona>.

<sup>264</sup> See Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., Dep’t. of Justice, to Lisa T. Hauser, Esq., Assistant Attorney Gen., Arizona (June 10, 1992), *available at* <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/AZ-1120.pdf>; Letter from John R. Dunne, Assistant Attorney Gen., Civil Rights Div., Dep’t. of Justice, to Lisa T. Hauser, Esq., Assistant Attorney Gen., Arizona (Aug. 12, 1992), *available at* <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/AZ-1140.pdf>.

<sup>265</sup> See *infra* Section IV(G).

non-citizens voting, despite virtually no evidence for such claims.<sup>266</sup> Opponents of the law challenged it as racist, xenophobic, and inhumane.<sup>267</sup>

Litigation followed almost immediately after Proposition 200 passed, and that litigation, which has resulted in structural changes to Arizona's election system, is discussed more fully below, as most of it occurred after the 2006 renewal of the VRA.

#### **IV. Voting Discrimination since 2006: the Continued Need for the VRA's Protections**

##### **A. Unequal Access to In-Person Voting**

Arizona election officials have long afforded polling places in minority precincts that were fewer in number and more spread out than polling places in majority-white precincts. The problem has been more pronounced since *Shelby County* marked the end of preclearance in Arizona. For example, Maricopa County used 70 percent fewer polling places for the presidential primary in 2016 than in 2012.<sup>268</sup> Statewide, Arizona closed at least 320 polling places between 2014 and 2018.<sup>269</sup> The result of such changes is often long lines, which can have the effect of discouraging or even disfranchising voters. In the 2016 presidential primary, for example, there were reports of long lines in districts and precincts with large minority populations.<sup>270</sup>

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<sup>266</sup> See *Voting in America: The Potential for Voter ID Laws, Proof-of-Citizenship Laws, and Lack of Access to Multi-Lingual Voting Materials to Interfere with Free and Fair Access to the Ballot*: Hearing Before the Subcomm. on Elections, 117th Cong. (2021), written testimony of Andrea Senteno at 3, available at <https://docs.house.gov/meetings/HA/HA08/20210524/112670/HHRG-117-HA08-Wstate-SentenoA-20210524.pdf>.

<sup>267</sup> See Tucker, *supra* note 19, at 294–95.

<sup>268</sup> Berman Report, *supra* note 2, at 20.

<sup>269</sup> Evidence of Current and Ongoing Voting Discrimination: Hearing Before the Subcommittee on the Constitution, Civil Rights, and Civil Liberties of the Committee on the Judiciary, 116<sup>th</sup> Cong. 12–15 (2019) (statement of Vanita Gupta, President and CEO, Leadership Conference on Civil and Human Rights).

<sup>270</sup> See Berman Report, *supra* note 2, at 20.

Polling places in minority districts are also more likely to be far away from a population center or inaccessible by public transportation.<sup>271</sup> The issue affects both urban and rural minorities. In 2020, for example, election officials in Pima County removed the last remaining polling place located on the Pascua Yaqui tribal reservation.<sup>272</sup> Despite the Arizona Secretary of State's willingness to provide most of the funding to operate the on-reservation site, Pima County spent county funds to fight the Pascua Yaqui Tribe's attempt to gain on-reservation voting access instead of accepting funds from the Secretary of State.<sup>273</sup>

## **B. Unequal Access to Voting by Mail**

Arizona has permitted voters to vote early by mail without an excuse since 1992.<sup>274</sup> In order to do so, a voter must either request an early ballot or register for the permanent early voter list ("PEVL").<sup>275</sup> The early ballot must be returned to the county recorder or another election official, or deposited at a polling place.<sup>276</sup> The ballot may be returned by mail or by hand. Some Arizona jurisdictions have adopted drop boxes in which Arizona voters can place their ballots.<sup>277</sup>

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<sup>271</sup> *Democratic Nat'l Comm. v. Hobbs*, 948 F.3d 989, 1002–03 (9th Cir.) *rev'd and remanded sub nom. Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021).

<sup>272</sup> *Tribe v. Rodriguez*, No. CV-20-00432-TUC-JAS, 2020 WL 6203523 (D. Ariz. Oct. 22, 2020).

<sup>273</sup> See Complaint, *Tribe v. Rodriguez*, No. CV-20-00432-TUC-JAS (D. Ariz. Oct. 12, 2020) ¶ 3. The litigation was settled after the 2020 election. An early voting site will be reinstated, at least through 2024. See Emma Gibson, *Pascua Yaqui Tribe to Receive Early Voting Site Till 2024*, Ariz. Public Media (Aug. 13, 2021), <https://news.azpm.org/p/news-splash/2021/8/13/198822-pascua-yaqui-tribe-to-receive-early-voting-site-till-2024/>; *Pascua Yaqui Tribe Scores Reservation Voting Rights Victory*, Native News Online (Aug. 17, 2021), <https://nativenewsonline.net/currents/pascua-yaqui-tribe-scores-reservation-voting-rights-victory>.

<sup>274</sup> *Hobbs*, 948 F.3d at 1042.

<sup>275</sup> See *id.* But see Meg Cunningham, *Arizona Gov. Doug Ducey Signs Law to Purge Voters from Permanent Early Voting List*, ABC NEWS (May 11, 2021), <https://abcnews.go.com/Politics/arizona-gov-doug-ducey-signs-law-purge-voters/story?id=77606533> (describing a recent attempt to remove voters from the list).

<sup>276</sup> Ariz. Rev. Stat. § 16-548.

<sup>277</sup> See AZ Procedures Manual, Ch. 2, I; *id.* at (C)(3), available at [https://azsos.gov/sites/default/files/2019\\_ELECTIONS\\_PROCEDURES\\_MANUAL\\_APPROVED.pdf](https://azsos.gov/sites/default/files/2019_ELECTIONS_PROCEDURES_MANUAL_APPROVED.pdf)

The popularity of early voting and mail voting has increased in recent years, as decreased funding has led to fewer polling places and resulted in longer lines at the polling places that remain available. During the COVID-19 pandemic in 2020, approximately 90% of Arizona voters in 2020 used a ballot they received in the mail.<sup>278</sup>

Traditionally, a voter was also able to entrust the return delivery of a mailed ballot to a third party. That person could, per state law, be a neighbor, or an extended relative, or a campaign worker. This method of voting early has been popular among minority voters, who may not have home access to outgoing mail in urban areas or may live quite far from any kind of mail service in more rural areas such as Native American reservations.<sup>279</sup> Knowing that some voters lack outgoing mail service—some because they live in urban areas where mail can be delivered to residential addresses but not picked up from them—many political campaigns targeting these voters offer to collect these ballots and deliver them.<sup>280</sup>

In more rural areas, such as Native American reservations, there may not be any mail service, and communities often pool resources whereby one person picks up and drops off mail for relatives, friends, or friends of friends after collecting the mail at a distant post office.<sup>281</sup> As Justice Kagan observed in her *Brnovich* dissent, “many rural Native American voters lack access to mail service, to a degree hard for most of us to fathom.”<sup>282</sup>

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<sup>278</sup> See Jonathan J. Cooper, *Arizona Initiative Would Require ID with Mail Ballots*, ASSOCIATED PRESS (Aug. 17, 2021), <https://apnews.com/article/arizona-voting-rights-election-2020-90ca3ef5cc08f46068d36a8214a2edab>; see also *Voting By Mail Likely Will Play Big Role in Arizona Election*, KTAR NEWS (July 8, 2020) (discussing Arizona’s primary), <https://ktar.com/story/3373445/voting-by-mail-likely-will-play-big-role-in-arizona-election/>.

<sup>279</sup> *Hobbs*, 948 F.3d at 1005–07.

<sup>280</sup> *Id.* at 1006.

<sup>281</sup> *Id.* at 1006.

<sup>282</sup> *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2370 (2021).

For example, about 1,900 members of the Tohono O’odham Nation cannot receive home mail delivery. Those voters who are able to check their own mail only do so about once per week or every other week. There is no mass transit or taxi service on the reservation, and many of these voters therefore rely on neighbors or friends to return their ballots.<sup>283</sup> Up to 2,500 members of the Cocopah (Kwapa) Indian Tribe face similar issues, as do residents of San Luis, Arizona, where there is no home delivery.<sup>284</sup> The Navajo Nation also does not receive residential mail delivery through large swaths of the reservation.<sup>285</sup>

Additionally, mail in rural Native American communities can be exceedingly slow and unreliable, making it imperative that the long trek to the post office be done as early as possible, making Native American voters more likely to pass along a ballot to a trusted person to be dropped off. In 2020, six individual Navajo Nation citizens sued to extend the deadline to count submitted ballots from some reservations because of the slow mail service to receive and return ballots.<sup>286</sup> While ultimately their claim was rejected due to lack of standing, evidence in that case suggested that because of mail delays voters in urban areas had on average 25 days to consider their ballots while voters in parts of Native American communities had approximately 7 days to consider their ballots.<sup>287</sup>

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<sup>283</sup> Decl. of Rep. Charlene Fernandez, *Democratic Nat’l Comm. v. Reagan*, 329 F. Supp. 3d 824, No. 2:16-cv-01065-DLR, ECF No. 95 ¶ 15 (D. Ariz. June 3, 2016).

<sup>284</sup> *Id.* at ¶ 17.

<sup>285</sup> See, e.g., <https://docs.house.gov/meetings/HA/HA08/20200211/110464/HHRG-116-HA08-Wstate-McPaulD-20200211-U1.pdf> at 6; see also *Obstacles at Every Turn*, *supra* note 101, at 76 (similar for Gila River Indian Community).

<sup>286</sup> *Yazzie v. Hobbs*, 977 F.3d 964 (9th Cir. 2020).

<sup>287</sup> Jacques Billeaud, *Court Rejects Bid to Extend Ballot Counting on Navajo Nation*, ASSOCIATED PRESS (Oct. 16, 2020), <https://apnews.com/article/election-2020-arizona-elections-courts-voting-2020-57804bf790e99ff158c635d3d6b9eaeed>.

Because the communities in which voters lack outgoing mail service are disproportionately composed of language and racial minority voters, and because Arizona continues to suffer from racially polarized voting, these votes tend to be disproportionately for Democratic Party candidates.<sup>288</sup> Accordingly, Republican Party candidates, backed by racial and language majority communities, have sought to limit this method of voting.

In 2011, Arizona Republicans proposed a bill to limit ballot collection and to criminalize certain forms of it. Because Arizona was at the time covered statewide under the Voting Rights Act, the provision was submitted to the Department of Justice. The DOJ declined to preclear the law, requesting more information.<sup>289</sup> Instead of providing the requested information, however, Arizona Republicans withdrew the bill from preclearance and repealed the part of the bill as to which DOJ had requested more information.<sup>290</sup> After the *Shelby County* decision removed the VRA's preclearance requirement, Arizona's Attorney General was asked to provide an opinion whether legislation that had been passed, but not precleared, was in effect. In relevant part, he determined that the unrepealed portions of the 2011 bill were valid law.<sup>291</sup>

Less than one week before the Supreme Court's decision in *Shelby County*, Governor Jan Brewer had signed into law a new law targeting ballot collection efforts, H.B. 2305. The bill "was passed along nearly straight party lines in the waning hours of the legislative session."<sup>292</sup> Citizen groups immediately began organizing to defeat the law at the ballot box via referendum, and

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<sup>288</sup> See, e.g., Decl. of Steve Gallardo, *Democratic Nat'l Comm. v. Reagan*, 329 F. Supp. 3d 824, No. 2:16-cv-01065-DLR, ECF No. 86 ¶ 18 (D. Ariz. June 9, 2016); Decl. of Sheila Healy, *Democratic Nat'l Comm. v. Reagan*, 329 F. Supp. 3d 824, No. 2:16-cv-01065-DLR, ECF No. 100 ¶¶ 20–21 (D. Ariz. June 9, 2016).

<sup>289</sup> *Democratic Nat'l Comm. v. Hobbs*, 948 F.3d 989, 1034 (9th Cir.) *rev'd and remanded sub nom. Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021).

<sup>290</sup> *Id.*

<sup>291</sup> Ariz. Op. Att'y Gen. No. I13-008 (Aug. 29, 2013)

<sup>292</sup> *Democratic Nat'l Comm. v. Reagan*, 329 F. Supp. 3d 824, 881 (D. Ariz.), *rev'd and remanded sub nom. Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021)..

organized 140,000 signatures in a short amount of time. Under Arizona law, if their referendum efforts were successful—as they appeared to be—Republicans would require a supermajority in order to pass any future bills targeting ballot collection efforts. Perhaps knowing that restrictions on voting would be unpopular with voters, Arizona Republicans repealed H.B. 2305 in the following legislative session.<sup>293</sup>

Republican efforts to pass a similar bill failed in 2014 but succeeded in 2016.<sup>294</sup> Passed in March 2016, H.B. 2023 criminalized third-party ballot collection, providing exceptions only for a narrow class of caregivers, family members, and household members. By repealing H.B. 2305 and replacing it with H.B. 2023 in an election year, Republicans effectively removed the ability of voters to decide this issue and placed that power with the courts. Their bet paid off when the Supreme Court ruled in the *Brnovich* decision this year that Arizona legislators’ stated concerns regarding voter fraud were entitled to deference, despite strong evidence that they were pretextual.<sup>295</sup>

Ballot fraud is rare and already illegal, and there were no known cases of such fraud that would have been prevented by the proposed bill. Indeed, “no fraud involving ballot collection has ever come to light” in Arizona.<sup>296</sup> As the testimony of Representative Ken Clark in the *Brnovich* litigation makes clear, the repeated attempts to criminalize as many forms of ballot collection as possible are a “solution to a problem that does not exist.”<sup>297</sup> When pressed as to why they were proposing these bills, the sponsors of such legislation cited the issue of ballot fraud, but were

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<sup>293</sup> *Hobbs*, 948 F.3d at 1008–09.

<sup>294</sup> *Id.* at 1009.

<sup>295</sup> See *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2370–72 (2021) (Kagan, J., dissenting).

<sup>296</sup> *Id.* at 2370.

<sup>297</sup> Decl. of Rep. Ken Clark, *Democratic Nat’l Comm. v. Reagan*, 329 F. Supp. 3d 824, No. 2:16-cv-01065-DLR, ECF No. 98 ¶ 15 (D. Ariz. May 10, 2016).

unable to present any instances of fraud that had occurred or that their legislation would prevent. When presented with ways to narrow the legislation to their stated concern, these legislators refused. Indeed, voted ballots collected in violation of the law would still be counted; only the person who collected them would be prosecuted.<sup>298</sup>

There was strong evidence of racial animosity in the promotion of H.B. 2023. During the debate over the bill, its proponents argued that the new law was necessary to prevent Latino advocacy organizations from “hir[ing] illegals” to “harvest ballots.”<sup>299</sup> This kind of rhetoric was typical of both floor debate and public campaigning.<sup>300</sup> One of the bills prominent backers, Maricopa County Republican Chair A.J. LaFaro promoted the measure widely with a video that emphasized racially charged tropes against Latinos.<sup>301</sup>

### **C. Inadequate Language Education and Assistance**

In the 2012 General Election, Maricopa County Recorder Helen Purcell’s office, which suffered no shortage of Spanish speakers or proofreaders, mailed out a Spanish-language leaflet incorrectly stating that the November 6 election would be held on November 8.<sup>302</sup> The incident is just one example illustrating why the VRA’s language assistance measures are necessary.

Arizona has a long history of providing unequal educational opportunities to ELL students and failing to provide adequate language assistance to LEP voters. The Tucson Unified School

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<sup>298</sup> See *Feldman v. Arizona Sec’y of State’s Off.*, 843 F.3d 366, 368 (9th Cir. 2016).

<sup>299</sup> Decl. of Steve Gallardo, *Democratic Nat’l Comm. v. Reagan*, 329 F. Supp. 3d 824, No. 2:16-cv-01065-DLR, ECF No. 86 ¶ 19 (D. Ariz. June 9, 2016).

<sup>300</sup> See *Hobbs*, 948 F.3d at 1009–10.

<sup>301</sup> See *id.* (noting the relevance of the “LaFaro video” to the public campaign for H.B. 2023).

<sup>302</sup> Berman Report, *supra* note 2, at 20.

District entered into a consent decree for the desegregation of the district in 2013, and it was released from court supervision this year.<sup>303</sup>

Statewide, Arizona’s compliance with its obligations to provide ELL programs for students with limited English proficiency has lagged, both because of inadequate funding, and because of English-only measures such as Proposition 200.<sup>304</sup> Arizona has gone to great lengths to avoid funding its ELL programs in a way that would comply with its obligations under federal law.<sup>305</sup> In a 2009 5-4 decision, the Supreme Court released Arizona from sanctions imposed by a district court in class action litigation. But Arizona succumbed to federal pressure in a series of consent decrees regarding similar allegations, the most recent of which was in 2016.<sup>306</sup>

Efforts to reduce the inequities in education funding for minority communities have been repeatedly stymied. A 1980 state constitutional amendment limited the amount that local jurisdictions could spend on education and required districts to spend only “local revenues” in providing for their education needs. In August of this year, the Arizona Supreme Court ruled that the 1980 constitutional amendment barred enforcement of Proposition 208, intended to raise funds statewide for educational grants, and affirmed a lower court’s stay of implementation of the law, which the voters passed in the 2020 election.<sup>307</sup> Arizona’s governor—who appointed five of the seven justices on the Arizona Supreme Court—and legislature have campaigned vociferously

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<sup>303</sup> *Hobbs*, 948 F.3d at 1027; *Court Oversight in Tucson Desegregation Case to End*, ARIZ. CAPITOL TIMES (Apr. 26, 2021), <https://azcapitoltimes.com/news/2021/04/26/court-oversight-in-tucson-desegregation-case-to-end/>; *Fisher v. Tucson Unified Sch. Dist.*, No. CV-74-00090-TUC-DCB, 2021 WL 1526455 (D. Ariz. Apr. 19, 2021).

<sup>304</sup> *See Hobbs*, 948 F.3d at 1027 (quoting findings by the district court).

<sup>305</sup> Tucker, *supra* note 19, at 343–51.

<sup>306</sup> *See supra* note 252.

<sup>307</sup> *Fann v. Arizona*, No. CV-21-0058-T/AP, 2021 WL 3673232 (Ariz. Aug. 19, 2021).

against Proposition 208, even after its passage, arguing that the spending caps enacted by ballot initiative in 1980 cannot be undone by a ballot initiative in 2020.<sup>308</sup>

#### **D. Voter ID and Dual Track Registration**

In November 2004, the “Protect Arizona Now” committee promoted and successfully passed Proposition 200 with 56% of the vote, in large part by campaigning against the use of public services by undocumented immigrants. The campaign for Proposition 200 was rife with allegations of non-citizens voting, despite virtually no evidence for such claims.<sup>309</sup>

Among other things, Proposition 200 required that voters provide proof of U.S. citizenship in order to register to vote. This conflicted, inter alia, with the National Voter Registration Act (“NVRA”), which prescribed a specific form for voter registration. After protracted litigation, the Supreme Court ruled in 2013 that Proposition 200’s proof-of-citizenship requirement violates federal law.<sup>310</sup> In order to accommodate the Supreme Court’s ruling, Arizona has promulgated a two-track voter registration system. Voters may register for “federal elections only” on the federal form prescribed by the NVRA, but in order to vote in state and local elections, voters must present proof of citizenship in one of an enumerated list of forms.<sup>311</sup> This two-track voter registration system unnecessarily complicates election administration and confuses prospective Arizona voters.

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<sup>308</sup> Dennis Welch, *Ducey Outlines Approach to Sink Voter-Passed Prop. 208 Which Funds Education*, CBS 5 (Mar. 23, 2021), [https://www.azfamily.com/news/politics/arizona\\_politics/ducey-outlines-approach-to-sink-voter-passed-prop-208-which-funds-education/article\\_501aa808-8c3e-11eb-828a-67f95f370731.html](https://www.azfamily.com/news/politics/arizona_politics/ducey-outlines-approach-to-sink-voter-passed-prop-208-which-funds-education/article_501aa808-8c3e-11eb-828a-67f95f370731.html); Jeremy Duda and Jim Small, *Arizona Supreme Court Sets the Stage to Overturn Prop 208 Tax Increase for School Funding*, ARIZ. MIRROR (Aug. 19, 2021), <https://www.azmirror.com/2021/08/19/arizona-supreme-court-wont-block-prop-208-tax-increase-for-school-funding/>.

<sup>309</sup> Berman Report, *supra* note 2, at 19; Tucker, *supra* note 19, at 294.

<sup>310</sup> *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1 (2013).

<sup>311</sup> *See* Ariz. Op. Att’y Gen. No. I13-011 (Oct. 7, 2013) (determining that voters who do not provide sufficient information may vote in federal, but not state or local, races).

Until April 2020, Arizona was one of only two states to have such a dual-track voter registration system, the other being Kansas. In April 2020, the United States Circuit Court of Appeals for the Tenth Circuit ruled that Kansas’s law requiring proof of citizenship was unconstitutional, leaving Arizona as the only state with such a requirement.<sup>312</sup> Arizona, however, has “doubled down” on its efforts to make it harder for federal-only voters to vote by allowing election officials to remove federal-only voters from the rolls.<sup>313</sup>

In addition to the confusion caused by this system, the disparate impact of photo ID requirements on racial and language minorities is well documented. African-American and Latino voters are less likely to drive and therefore have a driver’s license and to face more difficulties in obtaining other forms of ID.<sup>314</sup> For example, voting-age African-American citizens are more than three times as likely not to have a driver’s license as white voting-age citizens.<sup>315</sup>

Native Americans also face difficulties in meeting the law’s ID requirements. In 2006, Agnes Laughter, a Navajo elder and voter of more than three decades, was turned away from the polls because she did not have a photo ID as required by Proposition 200. Like many Navajo citizens, especially of her generation, she did not have an ID, nor could she obtain one. Because she was born in a hogan—a traditional Navajo dwelling—she had no birth certificate. She did not drive, so she had no driver’s license. Her home lacked electricity, so she had no electric bill. And

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<sup>312</sup> See Roxana Hegeman, *Court: Kansas Can’t Require Voters to Show Citizenship Proof*, ABC NEWS (Apr. 29, 2020), <https://abcnews.go.com/Politics/wireStory/court-proof-citizenship-voter-registration-unlawful-70406760>; *Fish v. Schwab*, 957 F.3d 1105 (10th Cir.), *cert. denied*, 141 S. Ct. 965 (2020).

<sup>313</sup> See Mary Jo Pitzl, *State, National Democrats Warn New Arizona Election Law Is Unconstitutional*, THE ARIZ. REPUBLIC (Aug. 13, 2021), <https://www.azcentral.com/story/news/politics/arizona/2021/08/13/democrats-threaten-lawsuit-over-new-arizona-election-law/8128275002/>.

<sup>314</sup> *Field Hearing on Voting Rights and Election Administration in Arizona* Before the House Subcommittee on Elections Administration (Oct. 1, 2019) (written testimony of Darrel L. Hill, Policy Director, ACLU of Arizona), available at <https://www.congress.gov/116/meeting/house/110040/witnesses/HHRG-116-HA08-Wstate-HillD-20191001-U1.pdf>.

<sup>315</sup> See *id.*

because she lived on the Navajo Reservation, she did not have any property tax bills.<sup>316</sup> Laughter's situation is commonplace. In the 2006 midterm elections, at least 428 Navajos completed conditional provisional ballots that were not counted for lack of ID satisfying Proposition 200.<sup>317</sup>

Laughter and the Navajo Nation sued in 2006, challenging the law under the Voting Rights Act. They settled the litigation in 2008 by expanding Arizona law to allow other forms of ID that are easier for Native Americans to obtain, including a new tribal ID that the Navajo Nation adopted—without funding support from the State—to address this problem.<sup>318</sup>

### **E. Ex-Felon Disfranchisement**

There is growing recognition of the need for laws and policies to assist ex-felons in reentering society. There is likewise growing recognition of how overpolicing in minority communities and disparate sentencing outcomes can render ex-felon disfranchisement policies discriminatory even if they appear facially race-neutral. In recent years, there has been a renewed push to allow ex-felons to restore their voting rights upon reentry into society.

Arizona has allowed some ex-felons to vote since at least 1978,<sup>319</sup> but it has in recent history had one of the “most complicated restoration processes in the country making it difficult for citizens to get their right to vote back.”<sup>320</sup> From 2010 to 2015, only 31 Arizonans successfully

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<sup>316</sup> See Ferguson-Bohnee, *supra* note 39, at 1099.

<sup>317</sup> *Id.* at 1129.

<sup>318</sup> Order, *Navajo Nation v. Brewer*, No. 06-1575, ECF No. 27, (D. Ariz. May 27, 2008) (approving settlement agreement and dismissal); Ferguson-Bohnee, *supra* note 39, at 1125 (Arizona legislature did not respond to Navajo Nation's request for monetary assistance to develop a tribal ID).

<sup>319</sup> Arizona Laws 1977, Ch. 142, § 49, eff. Oct. 1, 1978 (adding § 13-812)

<sup>320</sup> *Felony Disfranchisement in Arizona*, ACLU Arizona, available at <https://www.acluaz.org/en/felony-disfranchisement-arizona> (last accessed Aug. 23, 2021); see also *Field Hearing on Voting Rights*, *supra* note 314, at 7–8.

navigated the process to restore their voting rights.<sup>321</sup> As many as 200,000 Arizonans are disfranchised under the scheme.<sup>322</sup>

The impact of Arizona’s system has been plainly discriminatory. For example, African-Americans are 4% of Arizona’s voting-age population but nearly 12% of the state’s disfranchised ex-felons.<sup>323</sup> Data on Latino disfranchisement is less regularly collected, resulting in likely undercounting, but a 2020 analysis determined that Latinos in Arizona are also disfranchised at a higher rate than the rest of the population.<sup>324</sup> Such disparities may be the result of well-documented disparities in Latino policing. In 2007, Maricopa County Sheriff Joe Arpaio attracted national attention when his discriminatory policing resulted in a class action for illegal stops and detentions of Latinos.<sup>325</sup> In 2012, persuaded that Arpaio’s department was violating federal civil rights laws, the Department of Justice also filed suit.<sup>326</sup> In 2015, DOJ partially settled the claims in its own suit and intervened on behalf of the plaintiffs in the 2007 class action.<sup>327</sup> Arpaio was eventually held

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<sup>321</sup> Christopher Uggen et al., *6 Million Lost Voters: State-Level Estimates of Felony Disenfranchisement, 2016*, THE SENTENCING PROJECT Table 2 (Oct. 6, 2016), <https://www.sentencingproject.org/publications/6-million-lost-voters-state-level-estimates-felony-disenfranchisement-2016/>.

<sup>322</sup> Brian Saylor, *It’s Nearly Impossible for an Ex-Felon to Vote in Arizona. That Needs to Change*, THE ARIZ. REPUBLIC (July 6, 2020), <https://www.azcentral.com/story/opinion/op-ed/2020/07/06/arizona-ex-felons-face-harshes-voting-restrictions/3269304001/>.

<sup>323</sup> *Felony Disfranchisement in Arizona*, *supra* note 320.

<sup>324</sup> Chris Uggen et al., *Locked Out 2020: Estimates of People Denied Voting Rights Due to a Felony Conviction*, THE SENTENCING PROJECT (Oct. 30, 2020), <https://www.sentencingproject.org/publications/locked-out-2020-estimates-of-people-denied-voting-rights-due-to-a-felony-conviction/>; see also *Field Hearing on “Voting Rights and Elections Administration in Arizona” before the U.S. House of Representatives, Subcommittee on Elections of the Committee on House Administration* (Oct. 1, 2019) (statement of Lorena Chávez Van Assche, Chair, Arizona State Advisory Committee to the U.S. Commission on Civil Rights), available at <https://www.congress.gov/116/meeting/house/110040/witnesses/HHRG-116-HA08-Wstate-VanAsscheL-20191001-U1.pdf>.

<sup>325</sup> Berman Report, *supra* note 2, at 18–19.

<sup>326</sup> Press Release, Dep’t. of Justice, Department of Justice Files Lawsuit in Arizona Against Maricopa County, Maricopa County Sheriff’s Office, and Sheriff Joe Arpaio (May 10, 2012), <https://www.justice.gov/opa/pr/departement-justice-files-lawsuit-arizona-against-maricopa-county-maricopa-county-sheriff-s>.

<sup>327</sup> Press Release, Dep’t. of Justice, Justice Department Reaches Settlement in Civil Rights Lawsuit Against Maricopa County, Arizona, and Maricopa County Sheriff (July 17, 2015), <https://www.justice.gov/opa/pr/justice-department-reaches-settlement-civil-rights-lawsuit-against-maricopa-county-arizona>; Press Release, Dep’t. of Justice, Justice Department Intervenes in Private Discriminatory Policing Lawsuit Against Maricopa County, Arizona, Sheriff Joe

in criminal contempt for his refusal to comply with the consent decree he had entered into in 2015 with the Justice Department.<sup>328</sup>

A 2019 amendment altered Arizona’s statutory scheme to make it easier for Arizonans who had been convicted of felonies to restore their voting rights.<sup>329</sup> The amendment removes the requirement to pay all criminal fines imposed but leaves the requirement to pay any victim restitution.<sup>330</sup> The amendment also makes it easier for Arizonans with two or more felony convictions to have their rights restored.<sup>331</sup>

#### **F. Out-of-Precinct (“OOP”) Policy**

Arizona law requires in-person voters to visit the correct precinct to cast their ballot. If a voter shows up at the wrong precinct, they will be given a provisional ballot pursuant to the Help America Vote Act, but their provisional ballot will not count, even for races common to both precincts.<sup>332</sup> This policy has been in effect in Arizona since at least 1970.<sup>333</sup> Arizona rejects a higher percentage of provisional ballots than any other State, and one of the most common reasons for rejecting provisional ballots in Arizona is because they are cast in the wrong precinct.<sup>334</sup> As the Ninth Circuit observed, the policy has been shown to have a disproportionate impact on

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Arpaio (Aug. 13, 2015), <https://www.justice.gov/opa/pr/justice-department-intervenes-private-discriminatory-policing-lawsuit-against-maricopa-county>.

<sup>328</sup> *United States v. Arpaio*, No. CR1601012001PHXSRB, 2017 WL 3268180, (D. Ariz. July 31, 2017). Arpaio was pardoned by President Trump approximately one month later. See *United States v. Arpaio*, No. CR1601012001PHXSRB, 2017 WL 3773012 (D. Ariz. Aug. 29, 2017).

<sup>329</sup> AZ House Bill 2080, Laws 2019, Ch. 149 (Apr. 30, 2019).

<sup>330</sup> *Id.* at § 7.

<sup>331</sup> *Id.* at § 9 (amending Ariz. Rev. Stat. § 13-908).

<sup>332</sup> *Democratic Nat'l Comm. v. Hobbs*, 948 F.3d 989, 999 (9th Cir.) *rev'd and remanded sub nom. Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021) (citing Ariz. Rev. Stat. §§ 16-122, 16-135, 16-584).

<sup>333</sup> *Hobbs*, 948 F.3d at 1045.

<sup>334</sup> *Id.* at 1000 (citing factual findings by the district court).

minority voters.<sup>335</sup> “Three key factors leading to OOP ballots are frequent changes in polling locations; confusing placement of polling locations; and high rates of residential mobility. These factors disproportionately affect minority voters.”<sup>336</sup>

Frequent changes in polling places are particularly acute in denser areas, like Maricopa County. Between 2006 and 2008, at least 43 percent of polling places changed.<sup>337</sup> Between 2010 and 2012, approximately 40 percent of polling place locations changed.<sup>338</sup> In the 2016 presidential primary, Maricopa County experimented with a limited number of vote centers but reverted to precinct-based voting for the general election.<sup>339</sup> The result was confusion: out-of-precinct voting was substantially higher for voters whose polling places had changed.<sup>340</sup> Moreover, even within Maricopa County, minority voters are more likely to be affected by a change in polling places.<sup>341</sup>

In 2011, Arizona adopted legislation permitting counties to choose between holding precinct-based elections and using a “vote center” system.<sup>342</sup> Under the latter system, each voting location is able to print ballots for any precinct in the county, thus allowing any voter to vote at any polling place within the correct county.<sup>343</sup> Until recently, Graham, Greenlee, Cochise, Navajo, Yavapai, and Yuma counties have adopted this new system, alleviating confusion among Navajo voters over the distinction between tribal and non-tribal elections. Though not without its own

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<sup>335</sup> *Id.* at 1001.

<sup>336</sup> *Id.*

<sup>337</sup> *Id.* at 1002.

<sup>338</sup> *Id.*

<sup>339</sup> *Id.*

<sup>340</sup> *Id.*

<sup>341</sup> *See id.* at 1001–02.

<sup>342</sup> 2011 Ariz. Legis. Serv. Ch. 331 (Apr. 29, 2011) (amending A.R.S. § 16-411).

<sup>343</sup> *Id.*

problems,<sup>344</sup> the adoption of vote centers in these counties has alleviated the discriminatory impact of Arizona’s OOP policy in these rural counties.

These counties, however, comprise only about 10% of Arizona’s population.<sup>345</sup> In 2020, Maricopa County, which contains approximately 60% of Arizona’s population, opted into the vote center system as well.<sup>346</sup> Maricopa’s decision reduces some of the impact of Arizona’s OOP policy on minority voters. The factors cited in *Democratic National Committee v. Hobbs* leading to the disproportionate impact of the policy on minority voters still remain, however, with respect to African-American and Latino voters in Tucson and Native American voters in rural parts of Pima County or other counties that still use the precinct model. Although the vote-center model can mitigate the voter harm caused by a lack of polling places or frequent changes to their locations, it also reduces the number of in-person voting opportunities—requiring voters to travel greater distances to vote in-person.

### **G. Redistricting**

In 2000, Arizona voters adopted Proposition 106, which called for a state constitutional amendment ending gerrymandering and creating an independent redistricting commission.<sup>347</sup> In 2002, the Department of Justice declined to preclear the redistricting maps proposed by the

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<sup>344</sup> For example, in the 2016 general elections, polling places in Yuma County lost access to electronic pollbooks for extended periods during early voting, resulting in an inability to print ballots or accept voters. *See* Letter from Daniel Clark, Reg’l Sales Manager, Election Sys. & Software, to Paul Melcher (Feb. 1, 2017), [https://destinyhosted.com/yumadocs/2017/BOSREG/20170306\\_1031/7416\\_Yuma County - February 1 2017.pdf](https://destinyhosted.com/yumadocs/2017/BOSREG/20170306_1031/7416_Yuma County - February 1 2017.pdf); *see also* Joe Ferguson, *2 Cochise County cities run out of ballots; some voters see long waits also*, ARIZ. DAILY STAR (Nov. 8, 2016), [https://tucson.com/news/local/2-cochise-county-cities-run-out-of-ballots-some-voters-see-long-waits/article\\_61458e78-a60a-11e6-b2bf-db775ae49c6b.html](https://tucson.com/news/local/2-cochise-county-cities-run-out-of-ballots-some-voters-see-long-waits/article_61458e78-a60a-11e6-b2bf-db775ae49c6b.html) (“Douglas and Huachuca City ran out of ballots Tuesday, and voters at some Cochise County sites faced long lines, elections officials confirmed.”)

<sup>345</sup> *Democratic Nat’l Comm. v. Hobbs*, 948 F.3d 989, 999 (9th Cir.) *rev’d and remanded sub nom. Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321 (2021).

<sup>346</sup> Nicole Valdes, *An inside look at Maricopa County’s vote centers, opening Oct. 7<sup>th</sup>*, ABC15 ARIZ. (Sept. 25, 2020), <https://www.abc15.com/news/election-2020/an-inside-look-at-maricopa-countys-vote-centers-opening-oct-7th>.

<sup>347</sup> *See* Arizona Minority Coal. for Fair Redistricting v. Arizona Indep. Redistricting Comm’n., 220 Ariz. 587, 591 (Ariz. 2009) (en banc).

commission.<sup>348</sup> Despite Latino population growth, the proposed maps would have resulted in a net decrease of three ability-to-elect districts for Arizona’s Latino population. The commission redrew the maps, and in 2009, the Arizona Supreme Court ruled that the commission’s 2000-cycle redistricting maps were constitutional.<sup>349</sup>

Seeking to obtain preclearance in the 2010 cycle, Arizona’s independent commission reapportioned districts so as to preserve the same number of Latino ability-to-elect districts, at the expense of slightly increasing the maximum population deviation between districts.<sup>350</sup> Because of racially polarized voting, Latino ability-to-elect districts in Arizona often elect Democrats, and certain Republican groups were disappointed with the new maps.<sup>351</sup> Even though Supreme Court precedent clearly established that a maximum deviation of up to 10% was minor, and the independent commission had only allowed a maximum deviation of 8.8%, Republican groups challenged the commission’s attempts to comply with the Voting Rights Act.<sup>352</sup> A three-judge federal district court upheld the maps, finding them a good-faith attempt to comply with the law, and the Supreme Court affirmed.<sup>353</sup>

Unable to convince the courts to diminish minority voting rights, Arizona Republicans took their case to the voters. They engaged in a campaign to delegitimize the Independent Commission by accusing its Commissioners of “substantial neglect of duty and gross misconduct in office.”<sup>354</sup>

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<sup>348</sup> *See id.* at 592–93.

<sup>349</sup> *See id.* at 600.

<sup>350</sup> *Harris v. Arizona Indep. Redistricting Comm’n*, 136 S. Ct. 1301, 1308–9 (2016).

<sup>351</sup> *See id.* at 1309.

<sup>352</sup> *See id.* at 1307–09.

<sup>353</sup> *See id.* at 1306.

<sup>354</sup> *See, e.g.*, Jeremy Duda, *Brewer Takes First Step in Removal of Redistricting Commissioners*, ARIZ. CAPITOL TIMES (Oct. 26, 2011), <https://azcapitoltimes.com/news/2011/10/26/brewer-takes-first-step-in-removal-of-redistricting-commissioners/>.

When these efforts only partially succeeded, Arizona Republicans tried to add seats to the Commission.<sup>355</sup> In the run-up to the 2020 redistricting cycle, Governor Ducey has sought to fill those seats by stacking the Commission on Appellate Court Appointments, the body that in turn appoints the members of the Independent Redistricting Commission.<sup>356</sup> These efforts risk compromising the independence of the Commission.

## V. Legal Landscape Since 2006

### A. Litigation under the Voting Rights Act

#### 1. *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021)

The Plaintiffs challenged two Arizona policies under Section 2 of the Voting Rights Act: Arizona's out-of-precinct policy, under which an entire provisional ballot is discarded if it is cast in the wrong precinct, instead of counting the ballot toward those races for which it is still applicable, and H.B. 2023, which prohibits certain forms of third-party ballot collection.<sup>357</sup> The case raised three issues: (1) whether plaintiffs had standing to challenge the out-of-precinct policy;<sup>358</sup> (2) whether the standard established for vote-dilution cases brought under Section 2 of the Voting Rights Act also applies to challenges to time, place, or manner voting rules and, if not, what standard should apply to such challenges;<sup>359</sup> and (3) whether the ballot-collection law was

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<sup>355</sup> *Arizona Senate Approves GOP Plan to Revamp Redistricting Panel*, Associated Press, THE ARIZ. REPUBLIC (Mar. 2, 2018), <https://www.azcentral.com/story/news/politics/legislature/2018/03/02/arizona-senate-approves-gop-plan-revamp-redistricting-panel/386239002/>. An amended version of the bill passed the Arizona House of Representatives on party lines, but the legislature adjourned without reconciling the differences between the two partisan bills. See Dustin Gardiner, *Revamp of Arizona Panel That Guards Against Gerrymandering Is One Step from Ballot*, THE ARIZ. REPUBLIC (May 2, 2018), <https://www.azcentral.com/story/news/politics/arizona/2018/05/02/arizona-house-passes-republican-plan-overhaul-redistricting-commission/574421002/>; *The Latest: Arizona Legislature Adjourns 2018 Session*, ASSOCIATED PRESS (May 4, 2018), <https://apnews.com/article/cea349c6c7c24a628f280d06acbfac7>.

<sup>356</sup> Jeremy Duda, *Ducey Appoints New Members, Including Dems, to Key Nominating Commission*, THE ARIZ. MIRROR (July 17, 2020), <https://www.azmirror.com/2020/07/17/ducey-appoints-new-members-including-dems-to-key-nominating-commission/>.

<sup>357</sup> *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. at 2333–34.

<sup>358</sup> *Id.* at 2336.

<sup>359</sup> *Id.*

enacted with discriminatory intent, offering an alternate basis on which to challenge it under Section 2 of the Voting Rights Act.<sup>360</sup>

The district court held that, although the policies had a disparate impact, it was not a “meaningfully disparate impact” and therefore did not violate Section 2 of the Voting Rights Act.<sup>361</sup> The district court acknowledged that some proponents of the ballot-collection measure “were motivated in part by partisan interests” and recognized that “racially polarized voting can sometimes blur the lines” between partisan and racial motivations, but held that the “majority” of the measure’s proponents were “sincere in their belief” that ballot collection increased the risk of voter fraud and therefore upheld the measure.<sup>362</sup>

A divided panel of the Ninth Circuit affirmed. The Ninth Circuit reheard the case *en banc* and reversed.<sup>363</sup> The Ninth Circuit noted that, while many states had out-of-precinct policies, Arizona’s was applied in a manner that resulted in a greater proportion of provisional ballots being rejected than any other state, and by a wide margin. This was partially the result of racial disparities in polling places changes.<sup>364</sup> Likewise, the Ninth Circuit found that Arizona’s ballot-collection measure, H.B. 2023, was aimed directly at Latino and Native American voters, who have lower levels of access to mail services than majority voters and disproportionately rely on third-party ballot collection to vote by mail.<sup>365</sup> The court also noted that an earlier version of H.B. 2023 had been withdrawn by its proponents after the Department of Justice raised questions about its

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<sup>360</sup> *Id.*

<sup>361</sup> *Id.* at 2334–35 (citing *Reagan*, 329 F. Supp. 3d at 871–72).

<sup>362</sup> *Id.* at 2335 (citing *Reagan*, 329 F. Supp. 3d at 879, 882).

<sup>363</sup> *Democratic Nat’l Comm. v. Hobbs*, 948 F.3d 989, 998 (9th Cir. 2020), rev’d and remanded on other grounds sub nom. *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321 (2021).

<sup>364</sup> *Id.* at 999–1005.

<sup>365</sup> *Id.* at 1005–07

discriminatory impact before the Supreme Court’s decision in *Shelby County*, and the evidence in the record made it clear error for the trial court to conclude that the measure was not adopted after *Shelby County* with discriminatory intent.<sup>366</sup>

Justice Alito delivered the opinion of the Court, in which Chief Justice Roberts and Justices Thomas, Gorsuch, Kavanaugh, and Barrett joined. Justice Gorsuch filed a concurring opinion, in which Justice Thomas joined. The Supreme Court majority held that the Ninth Circuit inappropriately applied the standard of vote-dilution cases under its Section 2 jurisprudence to the two measures, and that the same standard was not applicable to time, place, or manner restrictions.<sup>367</sup> Among other things, some of the factors in *Thornburg v. Gingles*, 478 U.S. 30 (1986), were plainly inapposite in non-vote-dilution cases.<sup>368</sup> Moreover, the majority held that any racial disparity in the measures was small in absolute terms and, under the totality of the circumstances, not actionable under Section 2.<sup>369</sup> With respect to discriminatory intent underlying the ballot-collection measure, the Supreme Court held that the trial court’s ruling was not clear error, as a reasonable fact-finder could plausibly come to the same conclusion.<sup>370</sup>

Justice Kagan filed a dissenting opinion, in which Justices Breyer and Sotomayor joined. The dissent disagreed with this analysis, noting that small disparities in absolute terms can still add up to more substantial disparities and, in any event, even small disparities can be enough to swing an election in a state like Arizona.<sup>371</sup> Moreover, the dissent found no basis in the text, which applies quite broadly, for the factors that the majority considered. Section 2 had been amended

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<sup>366</sup> *Id.* at 1007–10.

<sup>367</sup> *Brnovich*, 141 S. Ct. at 2335.

<sup>368</sup> *Id.* at 2340.

<sup>369</sup> *Id.* at 2344–45.

<sup>370</sup> *Id.* at 2348–50.

<sup>371</sup> *Id.* at 2367–68.

specifically in order to reject an earlier Supreme Court decision restricting its scope to cases where discriminatory intent could be proven, and nothing in the text made that amendment applicable only in vote-dilution cases.<sup>372</sup> As to discriminatory intent, the dissent emphasized that Arizona had enacted the measure with full knowledge of its discriminatory impact but declined to rule on whether the measure was adopted with discriminatory intent.<sup>373</sup>

2. *Harris v. Arizona Indep. Redistricting Comm’n*, 136 S. Ct. 1301 (2016)

Individual citizens sued the Arizona Independent Redistricting Commission, alleging that the plan approved by the commission following the 2010 census and precleared by the Department of Justice under the VRA violated the Fourteenth Amendment because it created districts that were not equal in size.<sup>374</sup> The plaintiffs alleged that the deviations in the apportionment plan “reflect[ed] the Commission’s political efforts to help the Democratic Party.”<sup>375</sup> The case raised two issues: (1) whether deviations from equality were justified by “legitimate considerations,” and (2) who faced the burden of proof on that issue.<sup>376</sup>

A three-judge district court ruled that the commission’s deviations from population equality, including a maximum population deviation of 8.8%, were justified by the commission’s good-faith attempt to comply with the Voting Rights Act.<sup>377</sup> Justice Breyer delivered the opinion of the Supreme Court, which unanimously affirmed, relying on its past precedent that “‘minor deviations from mathematical equality’ do not, by themselves, ‘make out a prima facie case’” of

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<sup>372</sup> *Id.* at 2356–61.

<sup>373</sup> *Id.* at 2370–71; *id.* at 2366 n.10.

<sup>374</sup> *Harris v. Arizona Indep. Redistricting Comm’n*, 136 S. Ct. 1301, 1305 (2016).

<sup>375</sup> *Id.* at 1307.

<sup>376</sup> *Id.* at 1304.

<sup>377</sup> *Id.* at 1309.

discrimination requiring justification.<sup>378</sup> “Minor deviations” include apportionment plans with a maximum population of deviation of up to 10%.<sup>379</sup> Nor did the plaintiffs set forth sufficient evidence that inappropriate factors were part of the commission’s consideration, and the record supported the district court’s “conclusion that the deviations predominantly reflected Commission efforts to achieve compliance with the Voting Rights Act.”<sup>380</sup>

3. *Yazzie v. Hobbs*, 977 F. 3d 964 (9th Cir. 2020)

Six members of the Navajo Nation filed suit, claiming that Arizona’s requirement that mail ballots be received by Election Day violated their rights under the Voting Rights Act and the Constitution, since it imposed an unequal burden on Navajo Nation members, since they lack equal access to mailing facilities.<sup>381</sup> Plaintiffs sought a preliminary injunction requiring that all mail ballots sent to Navajo Nation members living on reservation be counted if postmarked by Election Day and received on or before November 13, 2020. The case raised the issues of whether the plaintiffs had standing and whether they were entitled to preliminary injunctive relief.

The district court denied the Yazzie plaintiffs’ motion for a preliminary injunction. While their proffered evidence did establish that Navajo Nation members face more difficulties compared to urban voters in complying with the deadline for mail ballots, they did not establish the same with respect to non-Native American rural voters.<sup>382</sup> Nor did they establish that the difficulties resulted in a disparate number of Native American mail ballots not being returned.<sup>383</sup>

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<sup>378</sup> *Id.* at 1307.

<sup>379</sup> *Id.*

<sup>380</sup> *Id.*

<sup>381</sup> *Yazzie v. Hobbs*, 977 F. 3d 964, 965 (9th Cir. 2020).

<sup>382</sup> *Yazzie v. Hobbs*, No. CV-20-08222-PCT-GMS, 2020 WL 5834757, at \*2–3 (D. Ariz. Sept. 25, 2020).

<sup>383</sup> *Id.*

On appeal, a three-judge panel consisting of Circuit Judges McKeown and Nguyen, and District Judge Whaley sitting by designation issued a *per curiam* opinion. The Ninth Circuit did not reach the merits of the plaintiffs' claims, because it found that they lacked standing.<sup>384</sup> The suit was brought on behalf of six individuals, not as a class action, and not on behalf of the Navajo Nation. Because the plaintiffs did not allege that they themselves would be injured by the deadline, they lacked standing to challenge the deadline.<sup>385</sup>

On remand, the district court subsequently granted plaintiffs' opposed motion for leave to dismiss the complaint without prejudice.<sup>386</sup>

4. *Tribe v. Rodriguez*, No. CV-20-00432-TUC-JAS, 2020 WL 6203523 (D. Ariz. Oct. 22, 2020)

The Pascua Yaqui Tribe sued under Section 2 of the Voting Rights Act to require the Pima County Recorder to open an in-person early voting site within the boundaries of the tribe's reservation for the 2020 general election.<sup>387</sup> Pima County had refused assistance from the Secretary of State's office with respect to funding the site.<sup>388</sup> District Judge Soto considered the standard four-factor test applicable to preliminary injunctions: (1) the likelihood of success on the merits; (2) the likelihood of irreparable harm; (3) the balance of equities; and (4) the public interest considerations of an injunction.<sup>389</sup> The court also considered the timeliness of the litigation in light of the Supreme Court's decision in *Purcell v. Gonzalez*, 549 U.S. 1 (2006).<sup>390</sup>

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<sup>384</sup> *Yazzie*, 977 F. 3d at 968–69.

<sup>385</sup> *Id.*

<sup>386</sup> Order, *Yazzie v. Hobbs*, No. CV-20-08222-PCT-GMS, ECF No. 75 (D. Ariz. Jan. 6, 2021).

<sup>387</sup> *Tribe v. Rodriguez*, No. CV-20-00432-TUC-JAS, 2020 WL 6203523, at \*1 (D. Ariz. Oct. 22, 2020).

<sup>388</sup> Complaint, *Tribe v. Rodriguez*, No. CV-20-00432-TUC-JAS, ECF No. 1 at ¶ 3 (D. Ariz. Oct. 12, 2020).

<sup>389</sup> *Tribe v. Rodriguez*, 2020 WL 6203523, at \*3.

<sup>390</sup> *Id.*

Without opining on the plaintiffs' likelihood of success on the merits given the expedited nature of the proceedings, the court focused on factors 2, 3, and 4 of the preliminary injunction standard.<sup>391</sup> The court was unconvinced that plaintiffs' potential harm was irreparable.<sup>392</sup> Early voting by mail was available, many of the Tribe's members were on the Permanent Early Voting List, and the nearest off-reservation in-person early voting site was approximately 8 miles from where the 2016 on-reservation early voting site was located.<sup>393</sup> As to the balance of equities and the public interest, the court was reluctant to shift election administration resources so close to election day.<sup>394</sup> The tribe had had notice that the on-reservation polling site would not be there in the 2020 General Election as early as July 2018 and no later than December 2019 but did not file suit until October 2020.<sup>395</sup>

The litigation was settled after the 2020 election. Under the terms of the settlement agreement, the Pascua Yaqui Tribe's early voting site will be reinstated until at least the end of 2024.<sup>396</sup>

5. *Voto Latino Foundation v. Hobbs*, No. 2:19-cv-05685, (D. Ariz. June 18, 2020)

A group of plaintiffs alleged that Arizona's Election Day receipt deadline for mail-in ballots violated the First and Fourteenth Amendments, and Section 2 of the Voting Rights Act in its disproportionate impact on Latino and Native American voters, among others. The suit was

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<sup>391</sup> *Id.* at \*4.

<sup>392</sup> *Id.* at \*5.

<sup>393</sup> *Id.*

<sup>394</sup> *Id.* at \*8–9.

<sup>395</sup> *Id.* at \*3–4.

<sup>396</sup> Laura Gómez, *Pima County Settles Lawsuit, Will Reinstate Early Voting Site on Pascua Yaqui Tribe*, THE ARIZ. MIRROR (Aug. 16, 2021), <https://www.azmirror.com/blog/pima-county-settles-lawsuit-will-reinstate-early-voting-site-on-pascua-yaqui-tribe/>.

filed in November 2019 and settled in June 2020. The case raised three issues: (1) whether the requirement that mail-in ballots be received by 7:00 p.m. on Election Day resulted in an undue burden on the right to vote; (2) whether the deadline violates Arizona voters' procedural due process rights; (3) whether the deadline disparately impacted minority voters, in violation of Section 2 of the Voting Rights Act.<sup>397</sup>

The parties settled the litigation in June 2020.<sup>398</sup> Under the terms of the settlement, Arizona's Secretary of State agreed to engage in voter outreach efforts in the Spanish, Navajo, and Apache languages about the deadline for receiving mail-in ballots, to allocate additional funding to expand early voting opportunities in Latino, Native American, and rural communities, and to undertake certain other measures.<sup>399</sup>

6. *Navajo Nation v. Hobbs*, No. 3:18-cv-08329-DWL (D. Ariz. Oct. 10, 2019)

The Navajo Nation and a group of members of the Navajo Nation alleged that their votes in the November 2018 election were not counted because they did not sign the envelope containing their early ballots or because the signature on the envelope did not match.<sup>400</sup> No translators were provided to these individuals, resulting in their inability to read and understand the instructions for casting an early ballot.<sup>401</sup> Plaintiffs also alleged that the provision of early voting and in-person registration opportunities was insufficient. Suit was filed in November 2018.<sup>402</sup> The case raised three issues: (1) whether the failure to provide translators and provide more early voting assistance

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<sup>397</sup> Complaint, *Voto Latino Foundation v. Hobbs*, No. 2:19-cv-05685, ECF No. 1 at ¶ 10 (D. Ariz. Nov. 26, 2019).

<sup>398</sup> Notice of Settlement, *Voto Latino Foundation v. Hobbs*, No. 2:19-cv-05685, ECF No. 57 (D. Ariz. June 18, 2020).

<sup>399</sup> *Id.* at Exhibit A (Settlement Agreement).

<sup>400</sup> Complaint, *Navajo Nation v. Hobbs*, No. 3:18-cv-08329-DWL, ECF No. 1 (D. Ariz. Nov. 20, 2018).

<sup>401</sup> *Id.* at ¶ 2.

<sup>402</sup> *Id.* at ¶¶ 2–3.

violated the First or Fourteenth Amendments to the Constitution; (2) whether these failures violated the Arizona Constitution; (3) whether these failures violated Section 2 of the Voting Rights Act.

The case was settled as to the Secretary of State in August 2019 and as to the remaining defendants—various county recorders—in September and October 2019.<sup>403</sup> The terms of the settlement require additional early voting opportunities in certain locations, additional language assistance, and the development of voter registration plans targeting Navajo Nation voters.<sup>404</sup> The court retains jurisdiction for a period of three years to enforce some of the terms of some of the settlement agreements.<sup>405</sup>

7. *Arizona Democratic Party v. Arizona Republican Party*, No. CV-16-03752-PHX-JJT, 2016 WL 8669978 (D. Ariz. Nov. 4, 2016)

Eight days before the 2016 general election, the Arizona Democratic Party sued the Trump for President campaign, the Arizona Republican Party, Roger Stone, and Roger Stone’s organization Stop the Steal, Inc.<sup>406</sup> The Arizona Democratic Party moved for a preliminary injunction against what it alleged was a conspiracy to intimidate and harass voters in urban districts on Election Day. The Arizona Democratic Party asserted claims under the Ku Klux Klan Act of

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<sup>403</sup> Notice of Settlement, *Navajo Nation v. Hobbs*, No. 3:18-cv-08329-DWL, ECF No. 45 (D. Ariz. Aug. 13, 2019); Notice of Settlement, *Navajo Nation v. Hobbs*, No. 3:18-cv-08329-DWL (D. Ariz. Oct. 10, 2019), ECF No. 55 (D. Ariz. Sept. 11, 2019) (Coconino County Defendants); Notice of Settlement, *Navajo Nation v. Hobbs*, No. 3:18-cv-08329-DWL, ECF No. 58 (D. Ariz. Sept. 12, 2019) (Apache County Defendants); Notice of Settlement, *Navajo Nation v. Hobbs*, No. 3:18-cv-08329-DWL, ECF No. 63 (D. Ariz. Oct. 10, 2019) (Navajo County Defendants).

<sup>404</sup> See, e.g., Notice of Settlement, *Navajo Nation v. Hobbs*, No. 3:18-cv-08329-DWL, Exhibit to ECF No. 63 (D. Ariz. Oct. 10, 2019).

<sup>405</sup> See, e.g., Order, *Navajo Nation v. Hobbs*, No. 3:18-cv-08329-DWL, ECF No. 51 (D. Ariz. Sept. 3, 2019) (retaining jurisdiction in settlement agreement with Secretary of State as to one issue); Order, *Navajo Nation v. Hobbs*, No. 3:18-cv-08329-DWL, ECF No. 64 (D. Ariz. Oct. 11, 2019) (retaining jurisdiction as to settlement agreement with Navajo County Defendants).

<sup>406</sup> *Arizona Democratic Party v. Arizona Republican Party*, No. CV-16-03752-PHX-JJT, 2016 WL 8669978, at \*1 (D. Ariz. Nov. 4, 2016).

1871, 42 U.S.C. § 1985(3), as well as Section 11(b) of the Voting Rights Act, 52 U.S.C. § 10307(b).<sup>407</sup> The case raised three issues: (1) whether the Arizona Democratic Party had standing to assert its claims; (2) whether the Court had jurisdiction over Roger Stone; and (3) whether the Arizona Democratic Party had demonstrated entitlement to a preliminary injunction.

The case was assigned to District Judge Tuchi, who held that the Arizona Democratic Party did have standing to assert its claims on behalf of both itself and its members.<sup>408</sup> The court also rejected Roger Stone’s challenge to the court’s jurisdiction.<sup>409</sup> The court found insufficient evidence of an alleged conspiracy required under the Ku Klux Klan Act of 1871.<sup>410</sup> And the court found the Arizona Democratic Party’s evidentiary proffer insufficient to warrant the extraordinary relief of a preliminary injunction.<sup>411</sup> The defendants’ numerous statements could plausibly be interpreted as urgings to report fraudulent voting, and there had been no documented instances of intimidation or frivolous voter challenges during early voting that was already underway. *Daschle v. Thune*, No. 04-CV-4177 (D.S.D. Nov. 2, 2004) was therefore distinguishable.<sup>412</sup> The court stressed, however, that the “parties may continue to raise issues to this Court through Election Day if they receive additional, material evidence.”<sup>413</sup> The Arizona Democratic Party voluntarily dismissed the case after Election Day.<sup>414</sup>

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<sup>407</sup> *Id.*

<sup>408</sup> *Id.* at \*1–2.

<sup>409</sup> *Id.* at \*2–4.

<sup>410</sup> *Id.* at \*4–11.

<sup>411</sup> *Id.* at \*9.

<sup>412</sup> *Id.* at \*10.

<sup>413</sup> *Id.* at \*13.

<sup>414</sup> Notice of Voluntary Dismissal, *Arizona Democratic Party v. Arizona Republican Party*, No. CV-16-03752-PHX-JJT, ECF No. 32 (D. Ariz. Nov. 9, 2016).

8. *Arizona v. Holder*, 839 F. Supp. 2d 36 (D.D.C. 2012)

Arizona claimed that its coverage under the Voting Rights Act was unconstitutional. In the alternative, Arizona sought to “bail out” of Section 5 coverage.<sup>415</sup> The case raised two issues: (1) whether Arizona’s constitutional claims were to be heard by a three-judge court under the VRA, and (2) whether Arizona’s alternative request to be bailed out of VRA coverage was to be heard by a three-judge court under the VRA’s bailout provisions.

The case was assigned to District Judge Bates, who ruled that Arizona’s constitutional challenges were identical to those that the court in *Laroque v. Holder*, No. 10-561, 2010 WL 3719928 (D.D.C. May 12, 2010), had determined were not referable to a three-judge panel.<sup>416</sup> Arizona’s alternative request to be bailed out of Section 5 coverage was not properly heard by a three-judge court, since it was not brought pursuant to the statute but rather as a challenge to the statute.<sup>417</sup> Arizona conceded that it did not meet the statutory criteria for a bailout.<sup>418</sup>

The case was not referred to a three-judge court. Arizona voluntarily dismissed the suit a few months later, in April 2012.<sup>419</sup> In 2013, the Supreme Court’s decision in *Shelby County* rendered the issue moot.

9. *Vallejo v. City of Tucson*, No. CV 08-500 TUC DCB, 2009 WL 1835115 (D. Ariz. June 26, 2009)

Frank Vallejo was turned away from the polls at a Tucson city-wide general election in Tucson for lack of sufficient identification, even though he had presented a military identification

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<sup>415</sup> *Arizona v. Holder*, 839 F. Supp. 2d 36 (D.D.C. 2012).

<sup>416</sup> *Id.* at 39.

<sup>417</sup> *Id.* at 39–40.

<sup>418</sup> *Id.* at 39.

<sup>419</sup> Stipulation of Dismissal without Prejudice, *Arizona v. Holder*, 839 F. Supp. 2d 36, No. 1:11-cv-01559-JDB, ECF No. 41 (D.D.C. Apr. 10, 2012).

card and an Arizona driver's license.<sup>420</sup> He sued for damages and equitable relief under 42 U.S.C. § 1983 and under the Voting Rights Act. The claims raised two issues: (1) whether Mr. Vallejo had stated a claim to relief under § 1983 either on a Fourteenth Amendment due process claim or on his equal protection claim, and (2) whether he had stated a claim under the VRA.

The case was assigned to District Judge Bury, who ruled that Mr. Vallejo's § 1983 claims required him to challenge a "voting qualification, prerequisite, standard practice, or procedure imposed by the defendant," but the pleadings asserted only an "inadvertent error" in refusing to grant him a ballot.<sup>421</sup> The defendant admitted that Mr. Vallejo should have received a provisional ballot, but the court considered the failure to provide one a "garden variety election irregularity," as to which no relief was available under Section 1983.<sup>422</sup> As to Mr. Vallejo's claim under the Voting Rights Act, the district court dismissed the claim because Mr. Vallejo had not alleged that the voting process was not equally open to participation by members of a minority.<sup>423</sup>

10. *Navajo Nation v. Brewer*, No. 06-1575 (D. Ariz.)

The Navajo Nation sued to enjoin the implementation of Proposition 200 against members of the Navajo Nation, arguing that the law violated the Voting Rights Act and the Fourteenth and Fifteenth Amendments of the Constitution.<sup>424</sup>

The lawsuit was consolidated before District Judge Silver with the *Gonzalez* litigation, which ultimately resulted in the Supreme Court's decision in *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1 (2013), addressed below.<sup>425</sup> In 2008, the Navajo plaintiffs settled their

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<sup>420</sup> *Vallejo v. City of Tucson*, No. CV 08-500 TUC DCB, 2009 WL 1835115, at \*1 (D. Ariz. June 26, 2009).

<sup>421</sup> *Id.* at \*3.

<sup>422</sup> *Id.* at \*1, \*2.

<sup>423</sup> *Id.* at \*3-4.

<sup>424</sup> Complaint, *Navajo Nation v. Brewer*, No. 06-1575, ECF No. 1 (D. Ariz. June 20, 2006).

<sup>425</sup> Opinion and Order, *Navajo Nation v. Brewer*, No. 06-1575, ECF No. 25 (D. Ariz. Aug. 4, 2006).

claims with the State of Arizona.<sup>426</sup> Under the terms of the settlement, voters who identify themselves as a member of a federally recognized Native American tribe may vote a regular provisional ballot upon the presentation of an expanded list of acceptable forms of tribal identification.<sup>427</sup>

## **B. Select non-VRA voting rights litigation**

1. *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787 (2015)

The Arizona legislature challenged apportionment maps drawn by the Arizona Independent Redistricting Commission on the basis that the referendum creating the commission violated both the Constitution and the federal redistricting statutes.<sup>428</sup> The case raised three issues: (1) whether the Arizona legislature had standing to bring a claim against the commission, (2) whether the Commission complied with federal statutes, and (3) whether the creation of the Commission violated the Elections Clause of the U.S. Constitution, which provides that the “Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations . . . .”

Justice Ginsburg delivered the opinion of the Court, in which Justices Kennedy, Breyer, Sotomayor, and Kagan joined. The Court ruled that as the redistricting authority body that had been displaced by the Arizona referendum, the Arizona legislature had standing to assert the unconstitutionality of the process.<sup>429</sup> The Court nonetheless held that both 2 U.S.C. § 2a(c) and the

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<sup>426</sup> Order, *Navajo Nation v. Brewer*, No. 06-1575, ECF No. 27 (D. Ariz. May 27, 2008).

<sup>427</sup> *Id.*

<sup>428</sup> *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 792–93 (2015).

<sup>429</sup> *Id.* at 799–804.

Elections Clause permitted the creation of the redistricting commission.<sup>430</sup> Chief Justice Roberts and Justices Scalia, Thomas, and Alito dissented.

2. *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1 (2013)

Voters challenged Proposition 200's ID requirements under a variety of theories. After protracted litigation, the claim before the Supreme Court was that it violated the National Voter Registration Act's rules specifying a federal form to be used for voter registration.<sup>431</sup> The case raised the issue whether Arizona's requirement that voters registering to vote by mail provide proof of citizenship in one of an enumerated list of forms of identification violated the NVRA. Specifically, the Court ruled that the case turned on a question of statutory interpretation: whether the NVRA's mandate that States "accept and use" the federal form prohibited the imposition of requirements beyond those in the federal form.<sup>432</sup>

Justice Scalia delivered the opinion of the Court, in which Chief Justice Roberts, and Justices Ginsburg, Breyer, Sotomayor, and Kagan joined. Justice Kennedy concurred in the judgment. The Court ruled that Arizona's requirement that state officials reject voter registration applications without the information required by Proposition 200 conflicted with the NVRA's requirement that states "accept and use" the federal form for voter registration, and the Supremacy Clause required that the federal form be accepted for federal elections.<sup>433</sup> The ruling has led to the use of a dual-track system in Arizona, where voters who register without providing the

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<sup>430</sup> *Id.* at 804–24.

<sup>431</sup> *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, 6–7 (2013).

<sup>432</sup> *Id.* at 4–5.

<sup>433</sup> *Id.* at 15.

identification required by Proposition 200 are classified as federal-only voters, and may not vote in certain local elections.<sup>434</sup> Justices Thomas and Alito dissented.

3. *Purcell v. Gonzalez*, 549 U.S. 1 (2006)

Voters challenged Proposition 200's ID requirements and sought a preliminary injunction against them in advance of the 2006 elections.<sup>435</sup> The case raised two issues: (1) what deference was owed to a district court decision for which no written opinion was yet available, and (2) the correct standard for pre-election injunctions.

Proposition 200 passed in November 2004, and the Attorney General had precleared the measure in May 2005.<sup>436</sup> Plaintiffs brought suit in May 2006.<sup>437</sup> The district court denied their request for a preliminary injunction on September 11, 2006 but did not issue findings of fact or conclusions of law at the time.<sup>438</sup> On October 5, a two-judge motions panel of the Ninth Circuit granted an injunction pending appeal on written submissions from the parties but without oral argument or any written opinion from the district court.<sup>439</sup> On October 9, the court denied a motion for reconsideration.<sup>440</sup> Neither the October 5 nor the October 9 orders included a written opinion, only a four-sentence order regarding the scope of the injunction.<sup>441</sup> On October 12, the district court issued its findings of fact and conclusions of law.<sup>442</sup> The district court found that plaintiffs

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<sup>434</sup> See Ariz. Op. Att'y Gen. No. I13-011 (Oct. 7, 2013) (determining that voters who do not provide sufficient information may vote in federal, but not state or local, races).

<sup>435</sup> *Purcell v. Gonzalez*, 549 U.S. 1, 3 (2006)

<sup>436</sup> *Id.*

<sup>437</sup> *Id.*

<sup>438</sup> *Id.*

<sup>439</sup> *Id.*

<sup>440</sup> *Id.*

<sup>441</sup> *Id.*

<sup>442</sup> *Id.* at 3–4.

had demonstrated a possibility of success but was reluctant on the record before it to say that they had shown a strong likelihood of success.<sup>443</sup>

The Court ruled *per curiam*. It declined to opine on the underlying merits of the dispute but set forth certain considerations for pre-election injunctions.<sup>444</sup> The Court recognized that “the possibility that qualified voters might be turned away from the polls would caution any district judge to give careful consideration to the plaintiffs' challenges.”<sup>445</sup> The Court also noted, however, that “[c]ourt orders affecting elections especially conflicting orders, can themselves result in voter confusion and consequent incentive [sic] to remain away from the polls. As an election draws closer, that risk will increase.”<sup>446</sup> The Court expressed sympathy for the Court of Appeals’ predicament in having to decide the motion before the district court had issued findings of fact and conclusions of law, but also assigned error to the Ninth Circuit’s failure to issue an opinion in support of its own ruling.<sup>447</sup>

The precedential implications and relevance of *Purcell* have been hotly contested in subsequent lower-court litigation, with defendants frequently invoking it to argue against any injunction close to an election.

#### 4. *Harvey v. Brewer*, 605 F.3d 1067 (9th Cir. 2010)

In two separate suits consolidated on appeal, groups of ex-felons challenged Arizona’s disfranchisement of ex-felons. The cases raised two issues: (1) whether the Section 2 permits disfranchisement for statutory felons or only for acts that were felonies at common law, and (2)

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<sup>443</sup> *Id.*

<sup>444</sup> *Id.* at 4–6.

<sup>445</sup> *Id.* at 4.

<sup>446</sup> *Id.* at 4–5.

<sup>447</sup> *Id.* at 4–5.

whether the Twenty-Fourth Amendment's bar against poll taxes prohibited conditioning restoration of voting rights upon the payment of all outstanding criminal fines.<sup>448</sup>

Justice O'Connor, sitting by designation wrote the Court's opinion, in which Chief Circuit Judge Kozinski and Circuit Judge Ikuta joined. The Ninth Circuit affirmed the district court dismissal of both sets of claims. As to the first set of claims, plaintiffs argued that Section 2 of the Fourteenth Amendment allowed abridgement of the right to vote "for participation in rebellion, or other crime," and that at the time of the amendment's drafting and ratification "crime" meant "felony at common law."<sup>449</sup> The court rejected this argument but noted that even if it were limited to some level of serious crimes, it was reasonable to read the language as permitting abridgement of the right to vote on the basis of any crime considered in the modern day to be comparably serious, and a modern-day felony met such a standard.<sup>450</sup>

As to the second set of claims, the court held that because Arizona did not have to permit restoration of voting rights for ex-felons, it could condition that restoration on the payment of criminal fines, which were not "transform[ed]" into poll taxes by Arizona's permissive statutory scheme.<sup>451</sup> The court also rejected claims under the Arizona Constitution, holding that Arizona's privileges and immunities clause did not extend further than the Fourteenth Amendment, and that Arizona's Free and Equal Elections Clause should not be read to apply to disfranchised felons.<sup>452</sup>

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<sup>448</sup> *Harvey v. Brewer*, 605 F.3d 1067, 1071 (9th Cir. 2010).

<sup>449</sup> *Id.* at 1072–78.

<sup>450</sup> *Id.* at 1074–75.

<sup>451</sup> *Id.* at 1080.

<sup>452</sup> *Id.* at 1080–81.

### C. VRA Objections and Consent Decrees

Pre-*Shelby County*, when a jurisdiction covered under the VRA submitted a proposed change to the Justice Department, the department had sixty days in which to object or preclear the proposed change.<sup>453</sup> The Department could also request more information from the covered jurisdiction, in which case the department had sixty days from the date that the information was provided to render its decision.<sup>454</sup> A jurisdiction could request expedited consideration if it believed that the proposed changes needed to be implemented within the sixty-day period following submission.<sup>455</sup>

The Justice Department does publish certain summary information on its website about the submissions it has received under Section 5.<sup>456</sup> Since 2003, however, the Justice Department has not issued a formal objection to any preclearance submissions out of Arizona.<sup>457</sup> The Justice Department does not publish data about which of these submissions are withdrawn, precleared, or precleared with voluntary modifications.

Even though the Justice Department does not publish such data, some information about submissions to the Justice Department is available from related public filings. These filings suggest that at least in some instances, Arizona election officials have avoided formal objections from the Justice Department not because their proposed changes would not violate the VRA, but because

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<sup>453</sup> 28 C.F.R. § 51.9 (2010).

<sup>454</sup> *Id.* § 51.37 (2010).

<sup>455</sup> *Id.* § 51.34 (2010).

<sup>456</sup> See *Notices of Section 5 Activity Under the Voting Rights Act of 1965, As Amended*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/crt/notices-section-5-activity-under-voting-rights-act-1965-amended> (last updated Aug. 6, 2015).

<sup>457</sup> *Voting Determination Letters for Arizona*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/crt/voting-determination-letters-arizona> (last updated Aug. 7, 2015).

state officials withdrew those portions of their preclearance submissions that drew comment from the DOJ.<sup>458</sup>

As the Court observed in *Democratic National Committee v. Hobbs*, this was the case with the 2011 ballot collection law that was a precursor to H.B. 2023.<sup>459</sup> Because the objectionable portion of the law was withdrawn, no formal objection from the Department of Justice resulted, even though Arizona leaders intended to adopt these discriminatory measures.<sup>460</sup>

Likewise, in 2009, H.B. 2101 sought, in relevant part, to expand the Board of Supervisors for Pinal County.<sup>461</sup> One section of the law was challenged in state superior court as unconstitutional.<sup>462</sup> After the DOJ requested more information before preclearing this section of the law, the Pinal County defendants declined to defend the preclearance submission and instead entered into a consent decree declaring this part of the law void, because it had not been precleared under the VRA. Only after the litigation was settled was the preclearance submission withdrawn.<sup>463</sup> Through this tactic, the Pinal County Board of Supervisors and the Arizona Attorney General avoided drawing an objection from the Department of Justice.

#### **D. Other Federal Government Voting Rights Actions Against Arizona**

The Justice Department's enforcement activities include voting rights litigation or consent decrees under statutes other than the VRA. In May 2018, the Justice Department reached a consent

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<sup>458</sup> Cf. Fraga *supra* note 83, at 47. Fraga and Ocampo argue that the preclearance process, including the Justice Department's requests for more information from covered jurisdictions, had a deterrent effect. *Id.* at 50. Therefore, evaluating the effectiveness of Section 5 through the lens of objections or litigation alone is insufficient.

<sup>459</sup> *Democratic Nat'l Comm. v. Hobbs*, 948 F.3d 989, 1007–10 (9th Cir.) *rev'd and remanded sub nom. Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021).

<sup>460</sup> *See id.*

<sup>461</sup> *See* Ariz. Op. Att'y Gen. No. I13-008 (Aug. 29, 2013).

<sup>462</sup> *Id.*

<sup>463</sup> *See id.*

decree with Coconino County, Arizona to improve the accessibility of polling places for individuals with mobility and vision impairments under the Americans with Disabilities Act.<sup>464</sup> The County has 61 polling places, of which more than twelve are located on Native American reservations. The County includes parts of the Navajo, Hualapai, Hopi, Havasupai, and Kaibab reservations. The Justice Department sought to close some of these polling places based on the Americans with Disabilities Act's requirements concerning voter access. Given the rural nature of these precincts and the lack of more accessible options, Native American voting rights activists have criticized the Justice Department's efforts in this regard.<sup>465</sup> The parties reached a consent decree in May 2018.

In February 2018, the Justice Department reached a consent decree with Arizona election officials regarding the processing of certain uniformed and overseas ballots ("UOCAVA ballots") in advance of 2018 special elections to fill a vacancy in Arizona's 8<sup>th</sup> Congressional District.<sup>466</sup> The Uniformed and Overseas Citizens Absentee Voting Act requires that certain voters living abroad be given sufficient time to request and return mail ballots.<sup>467</sup> Under the terms of the consent decree, UOCAVA ballots sent back by mail were accepted for an additional 10 days.<sup>468</sup>

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<sup>464</sup> *Justice Department Reaches Agreement with Coconino County, Arizona to Ensure Accessible Voting*, U.S. DEP'T OF JUSTICE (May 7, 2018), <https://www.justice.gov/opa/pr/justice-department-reaches-agreement-coconino-county-arizona-ensure-accessible-voting>.

<sup>465</sup> See *Obstacles at Every Turn*, *supra* note 101, at 106–07.

<sup>466</sup> Press Release, Dep't. of Justice, *Justice Department Reaches Agreement with Arizona Election Officials to Protect the Rights of Military and Overseas Voters in Arizona Special Election* (Feb. 20, 2018), <https://www.justice.gov/opa/pr/justice-department-reaches-agreement-arizona-election-officials-protect-rights-military-and-; United States v. Arizona>, Consent Decree, ECF No. 8, 2:18-cv-00505-DLR (D. Ariz. Feb. 15, 2018).

<sup>467</sup> 52 U.S.C. § 20301 *et seq.*

<sup>468</sup> See *supra* note 466.

### E. Federal Observers and Monitors

Since 2006, the Department of Justice has sent election observers or monitors to one or more Arizona counties in every general election and in several municipal and primary elections. See Table 8 below. As a result of the Supreme Court’s decision in *Shelby County*, the Justice Department has been limited primarily to its use of monitors, which are much more restricted in what they can do during elections.<sup>469</sup> Unlike federal observers, monitors are not authorized by the VRA and therefore do not have a right to attend poll worker training, to enter polling places or to watch voters receiving assistance or casting their ballots on Election Day.<sup>470</sup> Monitors are not typically able to produce the kinds of accounts that observers do, which reports have been instrumental in documenting voting rights violations in the federal courts.<sup>471</sup> Until a new coverage formula applies Section 5 to Arizona or its county-level political subdivisions, federal observers may be authorized only by a federal court under Section 3(a) of the Act. The use of monitors is a poor substitute for federal observers, who have an established history over five decades of serving as the eyes and ears for the Department of Justice, federal courts and private litigants.

*Table 8 — Arizona Elections Under Observation Since 2006*

| Date      | Type    | Jurisdiction                                    | Press Release   |
|-----------|---------|---|---|
| 9/12/2006 | Primary | Cochise   | <a href="https://www.justice.gov/archive/opa/pr/2006/September/06_crt_607.html">https://www.justice.gov/archive/opa/pr/2006/September/06_crt_607.html</a> |
| 11/7/2006 | General | Apache<br>Cochise<br>Maricopa<br>Navajo<br>Pima | <a href="https://www.justice.gov/archive/opa/pr/2006/November/06-crt-752.html">https://www.justice.gov/archive/opa/pr/2006/November/06-crt-752.html</a>   |

<sup>469</sup> See U.S. Dep’t. of Just., *About Federal Observers and Election Monitoring*, available at <https://www.justice.gov/crt/about-federal-observers-and-election-monitoring> (last updated Sept. 11, 2020).

<sup>470</sup> See *Failure to Observe: The Federal Observer Program After Shelby County*, CAMPAIGN LEGAL CTR. (July 21, 2016), <https://campaignlegal.org/update/failure-observe-federal-observer-program-after-shelby-county>.

<sup>471</sup> See generally James Thomas Tucker, *The Power of Observation: The Role of Federal Observers Under the Voting Rights Act*, 13 MICH. J. RACE & L. 227 (2007).

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|-----------|-----------|--------------------------------|---|
| 9/2/2008  | Primary   | Apache Navajo                  | <a href="https://www.justice.gov/archive/opa/pr/2008/August/08-crt-761.html">https://www.justice.gov/archive/opa/pr/2008/August/08-crt-761.html</a>   |
| 11/4/2008 | General   | Apache Cochise Navajo          | <a href="https://www.justice.gov/archive/opa/pr/2008/October/08-crt-973.html">https://www.justice.gov/archive/opa/pr/2008/October/08-crt-973.html</a>   |
| 8/24/2010 | Primary   | Apache Navajo                  | <a href="https://www.justice.gov/opa/pr/justice-department-monitor-elections-apache-and-navajo-counties-arizona">https://www.justice.gov/opa/pr/justice-department-monitor-elections-apache-and-navajo-counties-arizona</a>                               |
| 3/8/2011  | Municipal | Maricopa                       | <a href="https://www.justice.gov/opa/pr/justice-department-monitor-election-maricopa-county-arizona">https://www.justice.gov/opa/pr/justice-department-monitor-election-maricopa-county-arizona</a>   |
| 8/28/2012 | Primary   | Maricopa                       | <a href="https://www.justice.gov/opa/pr/justice-department-monitor-elections-alabama-and-arizona">https://www.justice.gov/opa/pr/justice-department-monitor-elections-alabama-and-arizona</a>   |
| 3/12/2013 | Municipal | Guadalupe                      | <a href="https://www.justice.gov/opa/pr/justice-department-monitor-election-maricopa-county-arizona-0">https://www.justice.gov/opa/pr/justice-department-monitor-election-maricopa-county-arizona-0</a>   |
| 11/4/2014 | General   | Maricopa                       | <a href="https://www.justice.gov/opa/pr/justice-department-announces-ground-monitoring-polling-places-18-states-election-day-0">https://www.justice.gov/opa/pr/justice-department-announces-ground-monitoring-polling-places-18-states-election-day-0</a> |
| 11/8/2016 | General   | Maricopa Navajo                | <a href="https://www.justice.gov/opa/pr/justice-department-monitor-polls-28-states-election-day">https://www.justice.gov/opa/pr/justice-department-monitor-polls-28-states-election-day</a>   |
| 11/6/2018 | General   | Apache Cochise Maricopa Navajo | <a href="https://www.justice.gov/opa/pr/justice-department-monitor-compliance-federal-voting-rights-laws-election-day">https://www.justice.gov/opa/pr/justice-department-monitor-compliance-federal-voting-rights-laws-election-day</a>                   |
| 11/3/2020 | General   | Coconino Maricopa Navajo       | <a href="https://www.justice.gov/opa/pr/justice-department-again-monitor-compliance-federal-voting-rights-laws-election-day">https://www.justice.gov/opa/pr/justice-department-again-monitor-compliance-federal-voting-rights-laws-election-day</a>       |

#### Sources Stated in Table

#### F. The CyberNinjas' Post-Election Review and 2021 Voter Suppression Laws

Since 2015, Arizona has seen a marked increase in anti-immigrant and anti-Latino rhetoric.<sup>472</sup> In the wake of the 2020 presidential election, politicians supportive of former President Trump's false allegations of widespread voter fraud have prompted a national campaign of voter

<sup>472</sup> See *Voting Rights and Elections Administration in Arizona: Hearing on Voting Rights and Elections Administration in Arizona Before the H. Subcomm. on Elections*, 116th Cong. 63 (2019) (statement of Ms. Montserrat Arredondo); Julie Erfle, *AZ Republicans Take a Giant Step Backwards on Immigration and Race*, THE ARIZ. MIRROR (Aug. 14, 2019), <https://www.azmirror.com/2019/08/14/az-republicans-take-a-giant-step-backwards-on-immigration-and-race/>.

suppression laws with racist undertones.<sup>473</sup> The mob that assembled on the Capitol on January 6, including unknown numbers of Arizonans, hurled racial abuse on Capitol police officers as they sought to “Stop the Steal.” They were heralded by Arizona Representative Paul Gosar as “peaceful patriots.”<sup>474</sup> Gosar and two other congressional representatives from Arizona—Andy Biggs and Debbie Lesko—were documented to have played key roles in instigating the insurrection on social media, both in Arizona and nationally, and the special House committee examining the riots has subpoenaed the phone records of, among others, Representatives Biggs and Gosar.<sup>475</sup>

The “Big Lie”—that the 2020 election was “stolen” with votes by “unqualified” voters in cities like Detroit and Philadelphia and Phoenix, cities with large minority populations—has motivated swaths of the electorate, instigated by politicians like Rep. Gosar, to clamor for a wave of laws making it harder to vote.<sup>476</sup> Often dressed in the language of preventing fraud, just as the polling place challenges of the 1960s were, these laws are designed to make it harder for minorities

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<sup>473</sup> See, e.g., Marianna Spring, “*Stop the Steal*”: The Deep Roots of Trump’s “Voter Fraud” Strategy, BBC NEWS (Nov. 23, 2020), <https://www.bbc.com/news/blogs-trending-55009950>; Tom McCarthy, *How Republicans Are Trying to Prevent People from Voting After “Stop the Steal”*, THE GUARDIAN (Apr. 7, 2021), <https://www.theguardian.com/us-news/2021/apr/07/republican-voter-suppression-policy-stop-the-steal> (policies behind “stop the steal” are “aggressive voter suppression, targeting people of color, urbanites, low-income communities and other groups whose full participation is seen . . . as a threat.”); Jane Mayer, *The Big Money Behind the Big Lie*, THE NEW YORKER (Aug. 2, 2021), <https://www.newyorker.com/magazine/2021/08/09/the-big-money-behind-the-big-lie> (describing the Bradley Foundation’s funding of groups promulgating the “falsehood that election fraud is widespread in America, particularly in minority communities . . .”).

<sup>474</sup> Meena Venkataramanan, *Gosar calls Jan. 6 US Capitol attackers “peaceful patriots,” says slain rioter “executed”*, THE ARIZ. REPUBLIC (May 12, 2021), <https://www.azcentral.com/story/news/politics/arizona/2021/05/12/rep-paul-gosar-calls-jan-6-us-capitol-attackers-peaceful-patriots/5063404001/>.

<sup>475</sup> See Ronald J. Hansen, *Report: Biggs, Gosar and Lesko Produced More Troubling Post-Election Social Media Than Any Other Delegation*, THE ARIZ. REPUBLIC (last updated Mar. 5, 2021), <https://www.azcentral.com/story/news/politics/arizona/2021/03/05/report-biggs-gosar-posted-troubling-post-election-social-media/4595583001/>; Ronald J. Hansen, *Phone Records Sought for Reps. Andy Biggs, Paul Gosar, Others in Jan. 6 Probe, Report Says*, THE ARIZ. REPUBLIC (last updated Aug. 30, 2021), <https://www.azcentral.com/story/news/politics/arizona/2021/08/30/house-jan-6-us-capitol-riot-panel-wants-arizona-andy-biggs-paul-gosar-phone-records-report-says/5652204001/>.

<sup>476</sup> See Max Burns, “*Stop the Steal*” Isn’t Dead, It’s Just Moving to State Houses, THE DAILY BEAST (Feb. 18, 2021), <https://www.thedailybeast.com/stop-the-steal-isnt-dead-its-just-moving-to-state-houses>.

to vote, and to intimidate minority voters.<sup>477</sup> These movements have been particularly influential in Arizona, where a series of voter suppression measures that either target or disproportionately burden minority voters have been proposed or enacted in 2021 alone.<sup>478</sup>

A partisan, performative, and largely private post-election review of the 2020 election results—after they have already been verified more closely than any other election in history—has threatened to intimidate voters.<sup>479</sup> To reinforce the pretense of an anti-fraud measure and the narrative of the Big Lie, the proponents of this review have dubbed it an “audit.” It is not one. Where local election officials have objected to being co-opted into this spectacle, seeking to protect their voters from intimidation, Arizona’s Attorney General has threatened to withhold funding and to strip local officials of their power in order to coerce them.<sup>480</sup>

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<sup>477</sup> See *Voting Laws Roundup: July 2021*, BRENNAN CTR. FOR JUSTICE (July 22, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-july-2021>; *Block the Vote: How Politicians are Trying to Block Voters from the Ballot Box*, ACLU (last updated Aug. 18, 2021) <https://www.aclu.org/news/civil-liberties/block-the-vote-voter-suppression-in-2020/>.

<sup>478</sup> See Marian K. Schneider, *Arizona’s Voter Suppression Bills Are Dangerously Close to Becoming Law*, BRENNAN CTR. FOR JUSTICE (Apr. 28, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/arizonas-voter-suppression-bills-are-dangerously-close-becoming-law>; Jennifer Medina, *Arizona G.O.P. Passes Law to Limit Distribution of Mail Ballots*, N.Y. TIMES (May 11, 2021), <https://www.nytimes.com/2021/05/11/us/politics/arizona-voting-bill.html>; Jane C. Timm, *Arizona Gov. Ducey signs new law that will purge infrequent mail voters from state’s ballot list*, NBC NEWS (May 11, 2021), <https://www.nbcnews.com/politics/elections/arizona-legislature-passes-law-purge-infrequent-mail-voters-n1267025>; Jane C. Timm, *Arizona Republicans push new laws to limit mail voting*, NBC NEWS (Mar. 20, 2021), <https://www.nbcnews.com/politics/elections/arizona-republicans-push-new-laws-limit-mail-voting-n1261328>; Bud Foster, *23 voter suppression bills in Arizona legislature*, KOLD NEWS 13 (last updated Apr. 1, 2021), <https://www.kold.com/2021/04/02/voter-suppression-bills-arizona-legislature/>.

<sup>479</sup> See Demand Letter and Preservation Notice Regarding the Maricopa County Audit (May 21, 2021), <https://protectdemocracy.org/resource-library/document/demand-letter-maricopa-county-audit/>; Ben Giles, *Justice Department: Arizona Senate Audit, Recount May Violate Federal Law*, NPR (last updated May 6, 2021), <https://www.npr.org/2021/05/06/994246426/justice-department-shares-concerns-with-arizona-senate-audit-recount>.

<sup>480</sup> See Colleen Sikora, *Attorney General: Maricopa County Must Comply with Subpoena or Risk State Funding*, KPNX (last updated Aug. 26, 2021), <https://www.12news.com/article/news/politics/attorney-general-maricopa-county-must-comply-with-subpoena-or-risk-state-funding/75-6f2d89d4-58a9-4d63-a53b-9f6828cd202c>; Ben Giles, *Arizona Republicans Strip Some Election Power from Democratic Secretary of State*, NPR (June 30, 2021), <https://www.npr.org/2021/06/30/1011154122/arizona-republicans-strip-some-election-power-from-democratic-secretary-of-state>.

From the outset, this partisan review raised concerns that it would be used both to intimidate voters and to serve as the basis for additional measures to restrict voting in Arizona.<sup>481</sup> On May 5, Principal Deputy Assistant U.S. Attorney General Pamela S. Karlan wrote to Arizona Senate President Karen Fann about concerns that (1) ballots were not kept under the control of and safeguarded by election officials as required by federal law and (2) Cyber Ninjas’ statement of work entails “knocking on doors” of registered voters that could result in intimidation of voters that is prohibited by federal law.<sup>482</sup> In response to the DOJ’s May letter, officials associated with the Cyber Ninjas review asserted that plans to talk to voters had already been “indefinitely defer[red]” as a component of the review.<sup>483</sup>

In June, voters in Yavapai County reported home visits by persons falsely claiming to be elections officials trying to verify the names of those living at home.<sup>484</sup> In late August, additional attempts to intimidate voters were reported to canvass homes in and around Maricopa County as part of a post-election “Voter Integrity Project.” When these efforts were reported in the press, a spokesperson and liaison for the review denied any affiliation with Cyber Ninjas’ work.<sup>485</sup>

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<sup>481</sup> See BARRY C. BURDEN & TREY GRAYSON, STATES UNITED DEMOCRACY CTR., REPORT ON THE CYBER NINJAS REVIEW OF THE 2020 PRESIDENTIAL AND U.S. SENATORIAL ELECTIONS IN MARICOPA COUNTY, Arizona (June 22, 2021), available at <https://statesuniteddemocracy.org/wp-content/uploads/2021/06/6.22.21-SUDC-Report-re-Cyber-Ninjas-Review-FINAL.pdf>.

<sup>482</sup> Letter from Pamela S. Karlan, Principal Deputy Assistant Attorney General, U.S. Dep’t of Justice, to Hon. Karen Fann, President, Arizona State Senate (May 5, 2021), available at <https://www.justice.gov/crt/case-document/file/1424586/download>.

<sup>483</sup> See Ben Giles, *In Response to Justice Dept., Arizona Senate Says Plan to Canvass Voters Is On Hold*, NPR (May 7, 2021), <https://www.npr.org/2021/05/07/994945179/in-response-to-justice-dept-arizona-senate-says-plan-to-canvass-voters-is-on-hol>; Letter from Hon. Karen Fann, President, Arizona State Senate, to Pamela S. Karlan, Principal Deputy Assistant Attorney General, U.S. Dep’t of Justice (May 7, 2021), available at <https://s3.documentcloud.org/documents/20700735/fann-response-to-doj-5-7-21.pdf>.

<sup>484</sup> See Andrew Oxford, *People impersonating election officials are knocking on doors in Yavapai County, sheriff warns*, ARIZ. REPUBLIC (last updated June 15, 2021), <https://www.azcentral.com/story/news/politics/elections/2021/06/14/yavapai-county-sheriff-warns-imposters-asking-voting-history/7693805002/>.

<sup>485</sup> See Ray Stern, *Inside Effort to Canvass Maricopa County Voters: Organizers Deny Audit Ties as Questions Remain*, ARIZ. REPUBLIC (Aug. 30, 2021),

A leaked draft of the final report by Cyber Ninjas, however, acknowledges that many of the “volunteers” who participated in these efforts “as part of their own grass roots group” had in fact been associated with the Cyber Ninjas review.<sup>486</sup> Choosing to call them a “grassroots selection of individuals,” the draft report admitted that their results were “integrated ... for the completeness of our report.”<sup>487</sup> These admissions were scrubbed from the final, published version of the report.<sup>488</sup>

Nor has the publication of Cyber Ninjas’ final report heralded the end of efforts to restrict the franchise. Even though the review did not document a single instance of voter fraud, Arizona politicians immediately invoked the report as a pretense for additional measures to restrict the franchise.<sup>489</sup> As with the other measures that have been introduced in the wake of the “Stop the Steal” campaign, these measures are likely to disproportionately target racial and language minorities in Arizona.

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<https://www.azcentral.com/story/news/politics/arizona/2021/08/30/arizona-audit-inside-unofficial-canvass-maricopa-county-voters/5642734001/>.

<sup>486</sup> See Brahm Resnik (@brahmresnik), Twitter (Sept. 24, 2021 1:01 a.m.), <https://twitter.com/brahmresnik/status/1441266533339070473>; Brahm Resnik, *Arizona Republicans’ Ballot Recount Confirms Joe Biden Still Winner of 2020 Election, Draft Report Says*, 12NEWS (last updated Sept. 23, 2021 10:09 p.m. MST), <https://www.12news.com/article/news/politics/arizona-republicans-ballot-recount-confirms-joe-biden-still-winner-of-2020-election-draft-report-says/75-093d6717-d0a5-4ebe-a148-9767753c25f5>.

<sup>487</sup> See Brahm Resnik (@brahmresnik), Twitter (Sept. 24, 2021 1:01 a.m.), <https://twitter.com/brahmresnik/status/1441266533339070473> (excerpting draft report).

<sup>488</sup> *Cyber Ninjas Report*, ARIZ. STATE S. REPUBLICAN CAUCUS, <https://www.azsenaterepublicans.com/cyber-ninjas-report> (last accessed Sept. 27, 2021).

<sup>489</sup> See Brahm Resnik, “Audit” Won’t End It: Arizona Republicans Plan More Hearings, AG Will Investigate and Cyber Ninjas Faces More Questions, 12News (last updated Sept. 27, 2021 10:00 a.m. MST), <https://www.12news.com/article/news/politics/arizona-audit-maricopa-county-recount-republicans-attorney-general-cyber-ninjas/75-b672b46f-27c7-4d2d-95a8-8567a6c7ee2c>; Jen Fifield, “Irresponsible and Dangerous”: Maricopa County Responds to Questions Raised in Arizona Audit, THE ARIZ. REPUBLIC (Sept. 25, 2021), <https://www.azcentral.com/story/news/politics/elections/2021/09/25/maricopa-county-calls-arizona-election-audit-irresponsible-dangerous/5848270001/>.

## VI. Conclusion

Since statehood, Arizona has sought to impair racial and language minorities' political power. Although the contemporary efforts are sometimes less overt, their results are just as insidious. The Supreme Court's 2013 *Shelby County* decision removed the protections of Section 5 preclearance from Arizona's racial and language minorities, and Arizona policymakers have seized this opening to adopt a series of measures that have disfranchised Arizona's minorities and burdened their access to voting. When these efforts were challenged under Section 2 of the Voting Rights Act, the Supreme Court created a new test—at the urging of Arizona's chief law enforcement officer—that will make it harder for minority communities to exercise the franchise on equal footing.

Efforts to disfranchise and intimidate Arizona minority voters show no signs of stopping. Racially polarized voting persists in Arizona, and in this year alone racial appeals over unsubstantiated claims of voter fraud have led to a series of new policies making it harder for Arizona minority voters to vote. Educational inequity persists among language minority communities and in some of these communities is only *beginning* to be remedied. The language protections of the Voting Rights Act remain vital to equal political participation in Arizona.

The Voting Rights Act provides effective tools to combat voter suppression campaigns like those underway in Arizona today, as well as the language barriers that persist in the state. The Supreme Court has substantially weakened those tools in its *Shelby County* and *Brnovich* decisions. Congress should pass the John Lewis Voting Rights Advancement Act to reinstate and sharpen those tools. A new coverage formula should bring Arizona back into coverage under Section 5, which has a powerful deterrent effect. Congress must also correct the Supreme Court's narrowing of Section 2, so that minority voters everywhere have a fair chance of reaching the equality in voting that the original 1965 Act sought to bring about.