Nos. 24-109, 24-110

IN THE

Supreme Court of the United States

LOUISIANA,

Appellant,

v.

PHILLIP CALLAIS, *et al.*,

Appellees.

[Additional Caption On Inside Cover]

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA

BRIEF FOR THE NAVAJO NATION AS *AMICUS CURIAE* SUPPORTING NEITHER PARTY

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Appellants,

v.

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Appellees.

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae Navajo Nation ("Nation") is a federally recognized Indian Tribe.[2] The Nation has approximately 420,000 Tribal citizens. The Navajo Nation's land base spans Arizona, New Mexico, and Utah and comprises over 27,000 square miles, which is larger than the state of West Virginia and larger than any other Tribe in the United States. *Roundtable on Voting Barriers and Election Administration on the Navajo Nation, Part III: Navajo Nation Council*, 118th Cong. (Feb. 19, 2024) (testimony of Hon. Crystalyne Curley, Speaker, Navajo Nation Council).

The Nation has a strong and demonstrated interest in ensuring its members can exercise their right to vote on Election Day. Navajo is a racial and language minority under Section 2 of the Voting Rights Act, and the Navajo Nation is covered for minority language assistance under

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1. Pursuant to Supreme Court Rule 37.6, *Amicus Curiae* states that no counsel for a party authored this brief in whole or in part, and no person or entity other than *Amicus*, their members, or their counsel made a monetary contribution to its preparation or submission.

2. The Navajo Nation's government-to-government relationship with the United States is recognized by the Treaty Between the United States of America and the Navajo Tribe of Indians, Sept. 9, of 1849, 9 Stat. 974 (ratified Sept. 24, 1850) ("Treaty of 1849") and the Treaty Between the United States of America and the Navajo Tribe of Indians, June 1, of 1868, 15 Stat. 667–68 (ratified Aug. 12, 1868) ("Treaty of 1868"). The Treaty of 1868 established the initial boundaries of the Navajo Indian Reservation, which has been expanded since that time, hereinafter referred to as "Navajo Nation land base."

Section 203 of the Voting Rights Act. Voting Rights Act of 1965, 52 U.S.C. §§ 10301 *et seq.* ("VRA"); 52 U.S.C. § 10503(c) ("Section 203"); Census Bureau, Voting Rights Act Amendments of 2006, Determinations under Section 203, 86 Fed. Reg. 69611, 69612 (Dec. 8, 2021). Navajo voters have suffered a long history of discrimination. The Nation has fought efforts by the states, and their political subdivisions, to dilute and deny the right to vote to its citizens and has filed litigation to protect Navajo citizens' voting rights. The Nation engages with state and local election administrators, coordinates on voter registration drives, and conducts Navajo Nation elections alongside state and federal elections to encourage Navajo participation. 2 Navajo Nation Code § 877. The Nation participates in the redistricting processes at both the state and local levels on behalf of its citizens. Limiting Section 2 relief has the potential to deny Navajo voters the opportunity to elect candidates of their choice.

Amicus has a direct interest in the outcome because the Court's decision will shape the future of Section 2 of the VRA—a provision that has been essential to protecting Native voters' ability to elect candidates of their choice. The intentional creation of majority-minority districts is not only lawful under Section 2; it is often the only effective remedy for vote dilution in Tribal communities.

SUMMARY OF THE ARGUMENT

Despite the passage of the Indian Citizenship Act of 1924, it took decades for Native Americans in New Mexico, Arizona, and Utah to secure the right to vote. States and local jurisdictions denied voting rights to Navajos and other Native Americans through discriminatory laws and

policies. Even when the right to vote was legally recognized, states and local jurisdictions limited the effectiveness of the Native American vote. The Voting Rights Act of 1965 was a transformative federal intervention that finally opened pathways for Native American participation in state and federal elections. Exercising the right to vote for Navajo and other Native American voters only came with protections afforded by the VRA and enforcement of those rights has required sustained litigation.

Section 2 of the VRA is a constitutional remedy for racial discrimination and within Congress's legislative authority to enact. Creating majority-minority districts is not only consistent with the Fourteenth and Fifteenth Amendments, but also supported by existing precedents that strike a proper balance between race-conscious remedies and concerns about race predominance, due to the necessary flexibility inherent in the totality-of-the-circumstances evaluation.

Section 2 remains the most effective legal mechanism for Native American communities to protect their right to vote, access elections, and elect candidates of their choice while exercising their federal rights as Indians to live on Tribal lands and within their sovereign Tribal communities. The Nation and its voters rely on Section 2 of the VRA because Navajo voters continue to experience overwhelming challenges with voting. A brightline rule prohibiting race-conscious remedies will unquestionably imperil the interests of the Nation and Navajo voters.

ARGUMENT

I. States Have a Long History of Disenfranchising Native Americans.

A. The Fourteenth and Fifteenth Amendments Did Not Secure the Right to Vote for Native Americans.

Although voting is a fundamental right, securing the right to vote has been a struggle for Native Americans. *See generally Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964) (describing "the right of suffrage" as a fundamental matter in a free and democratic society). This is especially true for the Navajo Nation, and states with large Native American populations where the Native American vote could be decisive. *See* Patty Ferguson-Bohnee, *The History of Indian Voting Rights in Arizona: Overcoming Decades of Voter Suppression*, 47 Ariz. St. L.J. 1099, 1104 (2015) (hereinafter "Ferguson-Bohnee").

Tribes are separate sovereign governments recognized by the U.S. Constitution, treaties, statutes, common law, and international law. *Worcester v. Georgia*, 31 U.S. 515 (1832) (Tribes are sovereign and distinct political communities); *Williams v. Lee*, 358 U.S. 217, 219 (1959) (holding that Tribes have jurisdiction over disputes on Tribal lands). Approximately 100 years ago, Congress passed the Indian Citizenship Act and made all Indians United States citizens while preserving their rights as Indians. An Act of June 2, 1924, 43 Stat. 253, Pub. L. 175 (1924) (codified as amended at 8 U.S.C. § 1401(b)). The 1924 Act ended the period in United States history in which obtaining United States citizenship required an

Indian to sever tribal ties, renounce tribal citizenship, and assimilate into the dominant culture. COHEN'S HANDBOOK ON FEDERAL INDIAN LAW, § 14.01[3], n. 42–44 (2012 Ed.). Thus, the Indian Citizenship Act did not require assimilation. Tribes maintain their sovereignty and tribal citizens do not lose their political status by voting in state and federal elections. As this Court has acknowledged, "Congress can welcome Native Americans to participate in the broader political community without sacrificing their tribal sovereignty." *McGirt v. Oklahoma*, 591 U.S. 894, n. 6 (2020).

After the passage of the Indian Citizenship Act, states moved quickly to devise legal justifications to prevent Native Americans from voting. Ferguson-Bohnee at 1105–09. Despite the Fifteenth Amendment's prohibition on denying a citizen's right to vote based on "race, color, or previous condition of servitude," states used poll taxes, literacy tests, voter qualifications, and intimidation to deny Native Americans the right to vote for decades. Joseph D. Morelle, H. COMM. ON H. ADMIN, VOTING FOR NATIVE PEOPLES: BARRIERS AND POLICY SOLUTIONS, 118th Cong., 2d Sess. at 32 (2024); *Continuing Need for Section 203's Provision for Limited English Proficient Voters: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 309 (2006) (letter from Joe Garcia, NCAI). Arizona, New Mexico, North Dakota, and Utah were among the last states to recognize Native Americans had the right to vote.

In Arizona, state and local officials relied on the Arizona Constitution to deny Navajos and other Native Americans the right to vote until 1948. *Harrison v. Laveen*, 196 P.2d 456 (1948). Recognizing that Native Americans, over 14% of Arizona's total population, could

have an impact on elections, efforts were made to limit or exclude Native Americans from voting. Arizona Governor George Hunt sought a legal opinion to limit Indian suffrage, specifically Navajos, and adopted a practice to challenge the voter registration of Native American voters. *See* Ferguson-Bohnee at 1107–08. When Native Americans challenged the denial of voter registration, the Arizona Supreme Court held that Arizona's Constitution prevented "persons under guardianship, non compos mentis, or insane" from voting. *Porter v. Hall*, 271 P. 411, 413 (Ariz. 1928) (quoting Ariz. Const. § 2, art. VII). The court concluded that Native Americans were ineligible to vote due to their "guardianship" status resulting from the federal trust relationship. *Id.* at 419. This extended to Indians living on or off reservation in Arizona. Ferguson-Bohnee at 1110–11. It took over two decades before the Arizona Supreme Court overturned this decision in 1948. *Harrison v. Laveen*, 196 P.2d 456 (1948) (finding that federal guardianship could not be used to deprive the right to vote to Native Americans).

In New Mexico, suffrage was withheld from "Indians not taxed" thus denying the right to vote to twenty-three Indian Tribes (nineteen Pueblos, three Apache Tribes, and the Nation). *See Tapia v. Lucero*, 195 P.2d 621 (N.M. 1948). This prohibition was not overturned until 1948 when the New Mexico Supreme Court held that the "Indians not taxed" provision of the New Mexico Constitution violated the Fourteenth Amendment of the U.S. Constitution. *See Montoya v. Bolack*, 372 P.2d 387, 390 (N.M. 1962) (discussing unreported decision in *Trujillo v. Garley*, No. 1350 (D. N.M. 1948)). That year, the same court ordered the McKinley County clerk to register all Navajo Indians "and not exclude them" because they lived on the Navajo

Nation land base. *See Montoya*, 372 P.2d at 390–91 (discussing unreported decision in *Bowman v. Lopez*, No. 1391 (D. N.M. 1948)). In 1964, the fear of Navajo political power was expressed by a local leader when two Navajos were elected to the New Mexico Legislature. The non-Indian leader stated, "[i]f this keeps up the Indians will take over." Daniel McCool et al., Native Vote: American Indians, the Voting Rights Acts, and the Right to Vote 19 (2007) (hereinafter "McCool").

Utah passed a law shortly after statehood to prevent Native Americans from voting. The law defined reservation Indians as nonresidents for voting purposes. *See Allen v. Merrell*, 305 P.2d 490, 491 (Utah 1956), *vacated*, 353 U.S. 932 (1957). In 1956, a Native American living on the Uintah and Ouray Reservation, unsuccessfully challenged the law claiming it violated the Fourteenth and Fifteenth Amendments of the U.S. Constitution. *Allen v. Merrell*, 305 P.2d 490 (Utah 1956). In upholding the law, the Utah Supreme Court noted concern that if Native Americans are allowed to vote, they might control county government due to their sizable population. *Id.* at 495. The Utah legislature finally rescinded the reservation non-resident provision in 1957. H.B. 31, 32d Leg., Reg. Sess. (Utah 1957).

Once these de jure barriers on Native American voting were lifted, new barriers were erected to deny Native American voters access to the ballot: literacy tests, Indian citizenship challenges, Native American candidate challenges, Indian Citizenship Act challenges, lack of on-reservation voter registration opportunities, lack of voting information in Native American languages, and lack of on-reservation polling locations, among others. Joseph D. Morelle, H. Comm. On H. Admin, Voting for

Native Peoples: Barriers and Policy Solutions, 118th Cong., 2d Sess. at 32–40 (2024). These barriers effectively denied Native Americans the opportunity to vote and participate in elections. Other tactics include creating districts that limit Navajo voters' political power. *Klahr v. Williams*, 339 F. Supp. 922, 924, 927 (D. Ariz. 1972). In *Klahr*, the court found that Arizona adopted a map with the intent of "destroy[ing] the possibility that the Navajos, if kept within a single legislative district, might be successful in electing one or more of their own choices to the Legislature." *Id.* at 926–27.

Today, Navajo voters continue to face infrastructural barriers to voting in the form of lack of at-home mail delivery, lack of public transportation, lack of access to broadband, and lack of access to telecommunications infrastructure. *See Hearing on Native American Voting Rights: Exploring Barriers and Solutions, Before the House Comm. on Admin., Subcomm. on Elections*, 116th Cong. 26 (Feb. 11, 2020) (testimony of Navajo Attorney General Doreen McPaul). Many Navajo voters face further difficulties when registering to vote and voting because of language barriers, poverty, and geographic isolation. *Id.* These lived realities interact with state policies such as rejection of out-of-precinct ballots, bans on third party ballot collection, lack of on-reservation in-person and early voting opportunities, and systems that fail to accommodate non-standard addresses to make voting harder for Navajo people. *Id.* As a result, Navajo people have yet to reach their fullest political potential in local, state, and federal elections.

B. The VRA Opened the Door for Native Americans to Vote in State and Federal Elections.

The VRA and its amendments provided mechanisms for Navajos and other Native Americans to exercise their rights as citizens to vote. The VRA was successfully used to address challenges to candidate eligibility, denial of on-reservation polling locations, and attempts to create at-large voting systems that undermined Indian political power. Ferguson-Bohnee at 1115–17 (2015). A 2024 Congressional report highlighted that the VRA has been a powerful and successful mechanism in eliminating discriminatory practices and procedures against racial and language minorities and increasing "access to the political process for Native peoples." *See* Joseph D. Morelle, H. Comm. On H. Admin, Voting for Native Peoples: Barriers and Policy Solutions, 118th Cong., 2d Sess. at 38–39 (2024).

In Arizona, many Native Americans could not register to vote until the 1970 Amendments to the VRA abolished literacy tests. *Oregon v. Mitchell*, 400 U.S. 112 (1970) (holding that Congress has the power to ban literacy tests under the Enforcement Clauses of the Fourteenth and Fifteenth Amendments). Like southern states, Arizona required voters to pass an English literacy test as a prerequisite to voter registration. *See* Ariz. Rev. Stat. § 16-101(A)(4)–(5) (1956); *Voting Rights Act: Evidence of Continued Need, Vol. I: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 1372 (2006) (appendix to the statement of Wade Henderson). After *Harrison*, Indians could vote

only if they passed the literacy test. This prevented most Indians from voting because illiteracy rates for Arizona Indians were estimated at 80—90%. James Tucker et al., *Voting Rights in Arizona: 1982–2006*, 17 S. Cal. Rev. L. & Soc. Just. 283, 283–85 (2008). To take advantage of the low registration among Native Americans, Arizona passed a law in the 1960s to apportion legislative districts by counting only registered voters as opposed to the total population. *Klahr v. Williams*, 303 F. Supp. 224, 225 (D. Ariz. 1969). The court in *Klahr* noted that the Native Americans in Apache and Navajo counties would be underrepresented if voter registration was used as the basis for redistricting, thereby reducing Native American voter strength. *Id.* at 227 n. 6. At the time, "half of the voting-age population on the [Navajo] reservation could not vote because of the literacy test." McCool at 19; *see Ely v. Klahr*, 403 U.S. 108, 118–19 (1971) (acknowledging "in 1965 the Bureau of the Census determined that less than 50% of the residents of voting age were registered or voted in the 1964 presidential election in Apache County, Navajo County, and Coconino County."); *Oregon v. Mitchell*, 400 U.S. 112, 235 (1970) (Brennan, J., White, J., and Marshall, J., dissenting in part, concurring in part) (noting that Navajos are registered in a greater percentage in New Mexico because it has no literacy test). In upholding the ban on literacy tests in 1970, the Supreme Court noted that "Arizona also has a serious problem of deficient voter registration among Indians." *Oregon v. Mitchell*, 400 U.S. at 132.

As Navajos began to participate in elections and elect candidates of choice, states and local governments created

new barriers for Native Americans. After literacy tests were banned, numerous efforts to dilute the Navajo vote and to prevent Navajos from participating in state and federal elections evolved. Many state laws and policies have made it more difficult for Navajo voters to register to vote and cast a ballot. These laws often ignore or dismiss the unique challenges faced by Navajo voters, who already have less access than others to cast a ballot in state and federal elections.

C. Districting, Malapportionment, and At-Large Electoral Systems Have Been Used to Suppress Native American Political Power.

States and local jurisdictions have repeatedly used redistricting to dilute Native voting strength—by splitting Tribal lands, packing Native voters, or creating malapportioned districts. Because of their defined geography and demography, Tribal communities are regular targets for vote-dilution efforts through districting, malapportionment, and at-large electoral systems. These methods frustrate the "[Native American] community's ability to fully participate in the electoral process and to elect their preferred candidates of choice." *See* H.R. Rep. No. 109-478, at 6 (2006); Joseph D. Morelle, H. Comm. On H. Admin, Voting for Native Peoples: Barriers and Policy Solutions, 118th Cong., 2d Sess. at 76–88 (2024).

Section 2 and Section 5 have played pivotal roles in upholding the protections afforded by the Fourteenth and Fifteenth Amendments. Preclearance was a powerful tool

used to counteract efforts to reduce Native American voting strength through redistricting. Indian voters comprised a substantial percentage of the voting age population in jurisdictions previously covered by Section 5 at the time of the *Shelby County* decision, including Shannon County, SD (95.5%); Todd County, SD (86.8%); Apache County, AZ (75%); Navajo County, AZ (45.7%); Coconino County, AZ (27.4%); Jackson County, NC (9.1%); Pinal County, AZ (6.6%). *Voting Matters in Native Communities: Hearing Before the Comm. on Indian Affairs*, 117th Cong. 7 (2021) (statement of Patty Ferguson-Bohnee).

Section 5 preclearance required states with a documented history of discriminatory voting practices, such as Arizona, to obtain approval from federal officials or a three-judge district court before they changed election laws. Section 5 jurisdictions included those that used a test or device for voting and had low voter participation. When the Section 5 preclearance regime was in effect, the U.S. Department of Justice ("DOJ") objected to nine redistricting proposals due to the harmful impact the plans had on Native American voters. Five of those objections were for Arizona and its political subdivisions. The DOJ also objected to election changes that failed to sufficiently meet the language minority requirements for Navajo voters. *See* U.S. Dep't of Justice, Civil Rights Division, Letter re: Voting Rights Act Section 5 Submission (AZ 91-3167) (Nov. 4, 1991); U.S. Dep't of Justice, Civil Rights Division, Letter re: Voting Rights Act Section 5 Submission (AZ 87-1799) (Feb. 10, 1988). Section 5 improved the political landscape for Tribal participation in elections, but it neither ended animosity against Native

American voters nor has it eliminated all discrimination in voting. This court invalidated the coverage formula for Section 5 preclearance in 2013. *Shelby Cnty., Ala. v. Holder*, 570 U.S. 529 (2013).

In instances where preclearance did not end the discriminatory practice or system, cases have been brought under Section 2 of the VRA. Since 1996, there have been twenty-five federal cases brought on behalf of Indian Tribes or Native American voters challenging at-large election systems, redistricting lines, or malapportionment of Native American voters in state and local government. Since 1996, all cases filed on behalf of Navajo voters have been brought by the Nation itself or by private parties.

Statistics of Federal Cases Brought on behalf of Native Americans Challenging Redistricting, At-Large Voting Systems, and Malapportionment since 1996[3]

State	Arizona	Montana	New Mexico	North Dakota
Total Number of Cases	1	7	3	3
Total Brought by DOJ	-	2	-	2
Total Brought by Private Parties	1	5	3	1
Challenging At-Large Elections	-	5	-	2
Redistricting	1	1	3	1
Malapportionment	-	1	-	-

State	South Dakota	Utah	Wyoming	Total
Total Number of Cases	9	1	1	25
Total Brought by DOJ	2	-	-	6
Total Brought by Private Parties	7	1	1	19
Challenging At-Large Elections	2	-	1	10
Redistricting	4	1	-	11
Malapportionment	2	-	-	3

3. *See* McCool at 48–67 tbl. 10; Michigan Law Voting Rights Initiative, *Section 2 Cases Database*, *available at* https://voting.law.umich.edu/database/.

1. At-Large Districting Schemes

At-large districting schemes have been used against Native American voters to deny reservation-residents the ability to elect candidates of their choice. Under these schemes, all voters cast votes for multiple offices instead of representational single member districts. As a result, Native American votes are diluted by the non-Indian voting bloc because their population is larger. In the last twenty-five years, jurisdictions across the country have used at-large districts to diminish the Native American vote.

At-large districts have specifically targeted Navajo voters across Arizona, New Mexico, and Utah—states that include the Navajo Nation land base. In 1994, the DOJ objected to two at-large electoral schemes impacting Navajo voters. The DOJ objected to the use of an at-large electoral system for county judges in Coconino County, AZ because "no Native American candidate has been elected to any office that uses an at-large election system." U.S. Dep't of Justice, Civil Rights Division, Letter re: Voting Rights Act Section 5 Submission (AZ 93-0681) at 1 (April 8, 1994). The DOJ determined that racially polarized voting existed in Coconino County elections. According to the 1990 census of the 95,591 people in Coconino County, 29% were Native American. *Id.* The DOJ also objected to the use of an at-large voting scheme for Navajo County, AZ judges because "the at-large system does not allow Native American voters an equal opportunity to participate . . . and elect candidates of their choice." U.S. Dep't of Justice, Civil Rights Division, Letter re: Voting Rights Act Section 5 Submission (AZ 93-0684) (May 16, 1994). Under the 1990 census, Native Americans constituted 51%

of Navajo County's total population and 47% of its voting age population with Navajo people constituting about two-thirds of the county's Native American population. *Id.*

In the 1980s in New Mexico, there were eight successful challenges to at-large electoral systems that diluted Native American voting power in McKinley County Consolidated School District, Cibola County Commission, Cuba Independent School District, San Juan College Board, City of Gallup, and Bernalillo School District. *See* McCool at 48–67 tbl. 10. These challenges resulted in single-member districts through consent decrees, injunctions, or settlements. *See* Consent Decree, *Largo v. McKinley Cnty. School Dist.*, No. 84-175 (D. N.M. March 21, 1988); *Estevan v. Grants-Cibola Cnty. School Dist.*, No. 84-1752-HB (D. N.M. 1984); Consent Decree, *Felipe and Ascencio v. Cibola Cnty. Comm'n*, No. 85-1023-JB (D. N.M. Feb. 18, 1987); Consent Decree, *Tso v. Cuba Indpt. School Dist.*, No. 85-1023-JB (D. N.M. May 18, 1987); *Kirk v. San Juan College Bd.*, No. 86-1503 (D. N.M. 1987); Consent Decree, *Bowannie v. Bernalillo School Dist.*, No. 88-0212-JP (D. N.M. Nov. 23, 1988).

In 1979, the DOJ sued San Juan County, Utah alleging that the at-large election system violated Section 2 of the VRA by diluting the power of the Navajo vote in county government. The challenge resulted in a consent decree that created three single-member districts. *U.S. v. San Juan Cnty.*, No. 79-507-JB (D. N.M. 1979); *Navajo Nation v. San Juan Cnty.*, 162 F. Supp. 3d 1162, 1169–71 (D. Utah 2016).

2. Malapportionment

State and county officials have used malapportionment to minimize Native American civic participation. Malapportionment occurs when there is an inequitable or unsuitable apportioning of population to electoral districts such that it creates a representational imbalance.

In Apache County, the board of supervisors created malapportioned districts to maintain a white majority. Apache County had three supervisor districts. District 3 had a population of 26,700 of whom 23,600 were Indian; District 1 had a population of 1,700 of whom only 70 were Indian; and District 2 had a population of 3,900 of whom only 300 were Indian. *Goodluck v. Apache County*, 417 F. Supp. 13, 14 (D. Ariz. 1975), *aff'd*, 429 U.S. 876 (1976). Native American voters challenged the malapportionment under the VRA. In response, Apache County challenged the constitutionality of the Indian Citizenship Act. *Id.* The Court rejected the county's claims and ordered a reapportionment according to the one-person, one-vote standard. *Id.* at 16.

3. Cracking and Packing

Tribes in Arizona have fought efforts to "crack" Tribal and reservation communities. In 1984, the DOJ objected to Navajo County's plan to change the board of supervisor district that elects three members from three districts to five members from five districts. The existing plan allowed a realistic opportunity to elect one member to the board of supervisors, and the proposed plan maintained "one district in which Indians have a realistic opportunity for electing a representative of their choice." U.S. Dep't of

Justice, Civil Rights Division, Letter re: Voting Rights Act Section 5 Submission (AZ 84-1778) at 1 (Aug. 31, 1984). The DOJ noted that the plan "reduces a realistic opportunity of the Indian minority to elect one of three members to the board to a situation where they would be able to elect only one of five members to the board." *Id.* The county drew the map to crack the Navajo and Hopi populations into separate districts and reduce their voting power. *Id*.

In the 1980s, Arizona once again "cracked" an Indian reservation. The Arizona legislative redistricting plan split the San Carlos Apache Reservation into multiple districts. The court found the map reduced the voting strength and "divid[ed] the Apache community of interest." *Goddard v. Babbitt*, 536 F. Supp. 538, 541 (D. Ariz. 1982). In the 1990s, the Arizona Legislature reached an impasse, and a three-judge panel was convened to draw a plan. *See Arizonans for Fair Representation v. Symington*, 828 F. Supp. 684, 687 (D. Ariz. 1992) *aff'd sub nom. Hispanic Chamber of Com. v. Arizonans for Fair Representation*, 507 U.S. 981 (1993). In adopting this plan, the court recognized that Native American voters "should not be engulfed in a structure that minimizes their potential for meaningful access to the political process." *Id.* at 690. The court took judicial notice of the wide-spread practices of discrimination against Native Americans and adopted the Indian Compromise Plan. *Id*.

Recently, the Nation sued San Juan County, New Mexico election officials for packing Navajo voters in the 2021 county commission map into one district in violation of Section 2 of the VRA. Just under two-thirds of the county are located on the Navajo Nation, and Navajos are 40% of the county's population. The five-member board of

supervisors' map had one district with a Native American voting age population greater than 80%. The remaining districts lacked sufficient voting strength for Navajos to elect candidates of choice. The Nation challenged the 2021 San Juan County redistricting map, alleging it violated Section 2 of the VRA. The parties settled the case by revising the map to create two majority-Native American districts.

II. Indian Country Faces Unique Geographic and Jurisdictional Barriers that Dilute Reservation Voting Power.

Indian reservations and Tribal lands are legally classified as "Indian Country." 18 U.S.C. § 1151. Indian Country is defined as lands in which "Indian laws and customs and federal laws relating to Indians are generally applicable." Nell Jessup Newton et al., Cohen's Handbook on Federal Indian Law, §3.04 (2012 ed.). Tribal Nations have jurisdiction and are the primary governing authority over Tribal lands. Mariel J. Murray, Cong. Rsch. Serv., IF11944, Tribal Lands: An Overview (2021). Since President Richard Nixon's administration, it has been the policy of the United States to "assure the Indian that he can assume control of his life without being separated involuntarily" from their Tribal community. Special Message to the Congress About Reorganization Plans to Establish the Environmental Protection Agency and the National Oceanic and Atmospheric Administration, 1 Pub. Papers 578–86 (July 9, 1970). Once Indians became citizens of the United States, this changed the broader political context because now Native Americans enjoyed Tribal, State, and Federal citizenship. As such, Tribal communities are unique because they have a defined

geography, have a right to self-determination while living on their Tribal lands, and have a right to an undiluted vote and meaningful political representation.

Despite Indian lands being recognized as distinct political jurisdictions and lands of separate, self-governing sovereigns in federal law, of the 326 Tribal geographies across the country, 201 Indian reservations extend into multiple counties, and 12 are located in multiple states. By virtue of these divisions, many Native American communities are inherently impacted by the variations in state law or in local election administration through precinct boundaries, county boundaries, and other jurisdictional boundaries. These geographic barriers frustrate the ability of many Tribal communities to politically mobilize in support of one candidate for many federal, state, and local offices because Tribal lands may be split among multiple states, districts, or counties. Torey Dolan, *American Indian Geopolitical Rights* 66 (2025), *available at* https://ssrn.com/abstract=5381886.

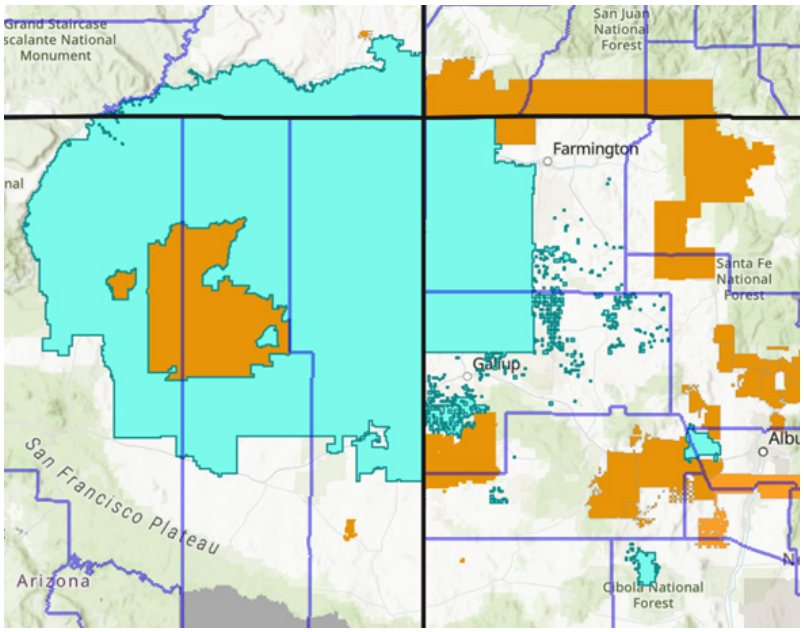
Although Tribal lands, including reservations, often predate statehood, redistricting can fracture Native American communities and limit their political effectiveness. Without intentional redistricting criteria to respect Tribal boundaries, Native American voters can be structurally excluded from meaningful participation. In recent years, redistricting bodies have divided Tribal communities into multiple districts in Wisconsin, Washington, Montana, and California. James Tucker et al., Obstacles at Every Turn 115–16 (2020). Ignoring Tribal boundaries and communities in the redistricting process dilutes the Native American vote and deprives voters in Indian Country of political power.

The Navajo Nation land base was recognized in 1868, prior to Arizona, New Mexico, and Utah's statehood. The Navajo Nation land base predates many of the county and state boundaries that cross the Nation's lands.[4] Given the history and purpose of Indian reservations, many reservation-populations are predominately Native American. Because the Navajo Nation is a racial and language minority, and 96% of the population is American Indian, dividing the Nation among several counties and states has reduced the Nation's voting strength across all levels of local, state, and federal governments.

The population of the Arizona portion of the Navajo Nation is larger than five of the fifteen counties in Arizona. Stanford Data Commons, *Ranking by Population: All Counties in Arizona*, [https://perma.cc/S74Y-DDDF] (last visited Aug. 27, 2025). The map below shows the Navajo Nation land base (teal), other Indian lands (orange), county boundary lines (blue), and state boundary lines (black).

4. For a detailed history of county and state boundaries in Arizona and New Mexico, *see Arizona: Individual County Chronologies, Atlas of Historical County Boundaries* (Newberry Library, John H. Long ed., Peggy Tuck Sinko assoc. ed.), https://publications.newberry.org/ahcb/documents/AZ_Individual_County_Chronologies.htm#Individual_County_Chronologies [https://perma.cc/PL3W-J492] (last visited Aug. 24, 2025); *New Mexico: Individual County Chronologies, Atlas of Historical County Boundaries* (Newberry Library), [https://perma.cc/5CJ8-66BG] (last visited Aug. 24, 2025).

Map of the Navajo Nation Land Base, Other Indian Reservations, and County and State Boundary Lines[5]



Of the three states that overlap with the Nation, only New Mexico's redistricting criteria explicitly provides that the commission shall take into consideration "the boundaries of Indian nations, tribes, and pueblos." N.M. Stat. Ann. § 1-3A-7 (2021). Nationally, New Mexico is one of only five states that include Indian lands and explicitly references Tribal political boundaries in its redistricting criteria. Torey Dolan, *American Indian Geopolitical Rights* 66, app. I (2025), *available at* https://ssrn.com/abstract=5381886. (The other states include Alabama,

5. Torey Dolan, Navajo Nation and County Boundaries, ArcGIS (2025), https://arcg.is/0KTSjy0 (last visited Aug. 24, 2025).

Idaho, Montana, and Wyoming). *Id.* Meanwhile, Arizona and Utah's redistricting criteria require the districting process to respect state political subdivision boundaries and communities of interest, but neither require that Tribal boundaries be respected. Ariz. Const. art. IV, Pt. 2 § 1; Utah Code Ann. § 20A-20-302(5) (2021). This preference for keeping state political subdivisions together can result in the dilution of the Tribal community's voting power if county boundaries divide Indian lands into multiple counties.

III. The Fourteenth and Fifteenth Amendments Prohibit Racial Vote Dilution.

This Court has long recognized that racial vote dilution strikes at the heart of the Reconstruction Amendments. The Fourteenth Amendment enshrines the promise of meaningful political representation, and the Fifteenth Amendment guarantees that no citizen shall be denied the right to vote on account of race. Together, they form a constitutional bulwark against racial discrimination in the electoral process. *See Reynolds v. Sims*, 377 U.S. 533, 546 (1964). The Fourteenth and Fifteenth Amendments were critical to Reconstruction and restoration of the Union after the Civil War. Within this context, the ability to vote, to be meaningfully represented, and to be protected under law was paramount. The Fourteenth and Fifteenth Amendments grant Congress the power to enact legislation that protects against racial discrimination—including preventative and remedial measures that are race-conscious in nature. After this Court held that the Voting Rights Act remedies were limited to instances of racially discriminatory intent in *City of Mobile v. Boden*, Congress amended the Voting Rights Act to protect

voters from practices and procedures with discriminatory intent and those with discriminatory effects. 446 U.S. 55 (1980). As amended, Section 2 of the VRA aligns with the legislative aims envisioned by the framers of the Reconstruction Amendments.

This Court has recognized that the Equal Protection Clause embodies "the fundamental principle of representative government" in the context of redistricting. *Reynolds v. Sims*, 377 U.S. 533, 561 (1964). Accordingly, "the judicial focus must be concentrated upon ascertaining whether there has been any discrimination against certain of the State's citizens which constitutes an impermissible impairment of their constitutionally protected right to vote" including "invidious discriminations." *Reynolds v. Sims*, 377 U.S. at 561. Unconstitutional vote dilution occurs when "the political processes leading to nomination and election [are] not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political process and elect legislators of their choice." *White v. Regester*, 412 U.S. 755, 766 (1973). When districting dilutes the political power of racial minorities, such that their voices cannot be heard, they deny those communities the constitutional protection that suffrage is meant to provide. This undermines the very purpose of the Reconstruction Amendments: to guarantee that all citizens, regardless of race, can participate meaningfully in the democratic process.

IV. Race-Conscious Remedies are Not Inherently Offensive to the Fourteenth and Fifteenth Amendments.

Race-conscious remedies are not inherently incompatible with the United States Constitution. On the contrary, they are often essential to restoring equal protection and ensuring meaningful enforcement of constitutional rights. Under the Fourteenth Amendment, courts have long upheld race-conscious remedies in contexts such as workplace discrimination cases and school segregation cases—where such measures are necessary to "make the group whole" or "comparable" to where they would be without said violation. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023).

The Fifteenth Amendment not only explicitly prohibits racial discrimination in voting—it also empowers Congress to enact race-conscious remedies to prevent and redress such discrimination. U.S. Const. amend. XV. The Fifteenth Amendment presumes the possibility of racial harm, thereby requiring courts to remain conscious of race when evaluating claims under its protections. If Congress were barred from enacting race-conscious remedies pursuant to its Fifteenth Amendment enforcement authority—such as Section 2 of the VRA—the Amendment itself would be rendered toothless. Nothing in the Fifteenth Amendment limits Congress's legislative power to protect voting rights. That authority is both enduring and expansive. Congress not only possesses the power to legislate but bears the constitutional obligation to protect voters from race-based discrimination through Section 2 or any other legislative action.

The VRA and its race-conscious remedies fall squarely within Congress's remedial legislative authority under the Fourteenth and Fifteenth Amendments. The framers of the Reconstruction Amendments understood the enforcement clauses to confer robust legislative power "to protect equal citizenship and equity before the law." Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. Rev. 1801, 1809 (2010). Section 5 of the Fourteenth Amendment is a "positive grant of legislative power" to Congress. *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966). Within this power "legislation which deters or remedies constitutional violations can fall within the sweep of Congress's enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into legislative spheres of autonomy previously reserved to the States." *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997) (quoting *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976)).

The Fifteenth Amendment "was originally understood to apply to all races and to prohibit discriminatory schemes that relied on racial proxies." Travis Crum, *The Unabridged Fifteenth Amendment*, 133 Yale L.J. 1039, 1050 (2024). While the amendment includes a "self-executing" prohibition on racial discrimination in voting, it also expands Congressional authority to legislate in furtherance of that protection. *Guinn v. U.S.*, 238 U.S. 347, 363 (1915).

Congress's authority to enact strong remedial and preventative measures in the electoral context is well established. This Court has acknowledged that discrimination within the realm of elections has required Congress to employ "strong *remedial and preventative*

measures to respond to the widespread and persisting deprivation of constitutional rights resulting from this country's history of racial discrimination." *City of Boerne*, 521 U.S. at 526 (emphasis added). This Court has further regarded racial discrimination in elections and electoral systems as "an insidious and pervasive evil" so unrelenting that light remedies "would have to be replaced by sterner and more elaborate measures." *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966).

In 1982, Congress amended Section 2 of the VRA to incorporate both an intent and effects test while maintaining that there was no right to racially proportional representation. *Allen v. Milligan*, 599 U.S. 1 (2023). When evaluating Section 2 claims, courts engage in "intensely local" inquiries of fact about racial vote dilution and fashion appropriate remedies to ensure meaningful political representation. *Id.* Thus, Section 2 remains a constitutionally sound tool for remedying racial vote dilution.

V. Native American Voters Depend on Section 2 of the VRA and Race-Conscious Remedies to Access Voting Rights.

Creating districts that enable Navajos and other Native Americans to elect candidates of choice as a remedy for a Section 2 violation aligns squarely with the protections afforded by the Fourteenth and Fifteenth Amendments. Despite formal guarantees of equal access, jurisdictions continue to purposefully suppress the rights of Native voters. Jurisdictions continue to suppress and dilute Native voting rights through practices that

disproportionately burden Native American voters. Even when race-neutral justifications are offered, the disparate impact on Native American voters remains significant. Section 2 of the VRA remains a vital statutory mechanism for addressing these discriminatory effects.

The Supreme Court recently reaffirmed that legislatures may consider race when there is a strong evidentiary basis for doing so to comply with the VRA. *See Abbott v. Perez*, 585 U.S. 579, 606–08 (2018); *Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 189–90 (2017); *Cooper v. Harris*, 581 U.S. 285, 301–02 (2017) (explaining that a legislature may consider race where it has a strong basis in evidence that doing so is necessary to comply with the VRA). Remedying racial discrimination in voting almost inevitably requires consideration of race.

This principle was echoed in *Bone Shirt v. Hazeltine*, 336 F. Supp. 2d 976 (D.S.D. 2004), where the court found that South Dakota's legislative redistricting plan violated Section 2 by diluting Native American voting strength through racial packing. Following the 2000 U.S. Census, District 27 was 90% Native American and included the entire Rosebud Reservation and part of the Pine Ridge Reservation. *Id.* at 984–85. Neighboring District 26 was only 30% Native American and included part of the Standing Rock Reservation and all of the Cheyenne River Reservation. *Id*. at 984. The court concluded that this plan unlawfully violated Section 2 of the VRA by diluting the power of the Indian vote by packing Native Americans in District 27. *Id*. at 1052. In rejecting the argument that race-conscious remedies were inherently unconstitutional, the court stated:

> Having established the existing plan violates the Voting Rights Act, plaintiffs are entitled to a full and complete remedy for the unlawful dilution of their voting strength . . . It is no defense to claim that any remedy that might be imposed would consider race and therefore be unconstitutional. Remedying a violation of Section 2 by definition employs race . . . The remedy cannot, however, subordinate traditional political concerns to race any more than reasonably necessary.

Id. at 1052–53 (internal quotations omitted).

In 2023, the Winnebago Tribe of Nebraska along with the Omaha Tribe of Nebraska filed a Section 2 claim challenging a county supervisor map. Complaint, *Winnebago Tribe of Neb. v. Thurston Cnty*, Civ. No. 8:23-cv-20 (D. Neb. Jan. 19, 2023). The complaint alleged that although Native Americans constituted a majority of the county's voting age population, the adopted map—due to staggered terms and district configurations—limited Native American's ability to elect candidates of choice to only three of seven districts. Native Americans comprised a majority of the population in Districts 2, 4, and 6, with a Native American voting age population of 78%, 87%, and 96.65%, respectively. *Id.* at 11. In Districts 3 and 5, Native Americans comprised 59.50% and 51.26% of the voting age population but would be ineffective in providing Native Americans an opportunity to elect candidates of choice. *Id.* In remaining Districts 1 and 7, Native Americans constituted 1.32% and 7.07% of the voting age population, respectively. *Id.*

In the consent decree, Thurston County acknowledged, "[t]he Native American population in Thurston County is sufficiently numerous and geographically compact to comprise an effective majority of the voting age population in at least four single-member County Supervisor voting districts under a plan containing seven districts." Consent Decree, *Winnebago Tribe of Neb. v. Thurston Cnty.*, No. 8:23-cv-20 (D. Neb. Jan. 26, 2024).

These cases affirm that race-conscious remedies are not only legally permissible—they are essential to vindicating the rights of Native American voters under Section 2 of the VRA. When jurisdictions engage in practices that dilute Native American voting strength, courts must be empowered to consider the Native American population in crafting remedies that restore meaningful political representation.

CONCLUSION

The core purpose of Section 2 of the VRA, the Equal Protection Clause of the Fourteenth Amendment, and the Fifteenth Amendment is to guarantee meaningful political representation for all citizens, at all levels of government. When a court engages in an intensely local inquiry and finds that unlawful racial vote dilution has occurred, a race-conscious remedy is appropriate to ensure meaningful political representation.

Section 2 has been an effective and critical tool to expand the voting rights of Navajo citizens and other Native American voters. Navajo voters continue to face persistent and systemic barriers to full electoral participation. When redistricting practices divide Tribal

lands and fracture Tribal voting strength, the risk is not merely procedural—it is existential. Without effective remedies, Navajo voters may be denied the opportunity to elect candidates of choice and to shape policies that affect their communities.

Any categorical prohibition on race-conscious remedies would contradict both the text and purpose of the VRA and the Constitution. Worse still, it would erode the hard-won gains of Navajo citizens and other racial and language minority voters across the United States. Courts must retain the ability to consider race when necessary to dismantle discriminatory structures and to ensure that the promise of equal representation is not an empty one.

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