



December 7, 2021

Sent via email to:

House Judiciary Committee Members
House State Government, Elections & Indian Affairs Committee Members
Senate Judiciary Committee Members
Senate Rules Committee Members

Dear State Legislative Leaders,

In light of New Mexico's ongoing special session on redistricting, the **American Civil Liberties Union of New Mexico** seeks to ensure that redistricting plans produced during the reapportionment of state election boundaries: 1) comply with state and federal laws that prohibit practices and procedures that discriminate on the basis of race, color or membership in a language minority group; and 2) adhere to both the voting and self-determination rights of New Mexico's Native American voters.

Background:

It is in the State's collective interest to avoid repeating the shameful history of Native American-voter disenfranchisement during the redistricting process. In fact, current state and federal laws prohibit government actors from doing so. Notably, state legislators were found to have discriminated against Native American communities in both the 2001 and 2011 redistricting processes.¹ Given this history, it is imperative that state legislative leaders consult with tribal leadership to ensure that Native voters' redistricting preferences are adequately represented. A failure to do so lends further support for litigation based on discrimination, gerrymandering, and violations of the Equal Protection Clause's guarantee of "one person, one vote."

In particular, New Mexico's Northwest Quadrant is home to the State's Nineteen Pueblos and Jicarilla Apache and Navajo Nations. Findings from the 2011 redistricting litigation established that these Tribal Nations share a vast number of *political, social and economic* interests "...based on size, tradition and customs, political and legal issues [...]" and "protection of traditional cultural properties[.]"² Currently, Native Americans

¹ See *Jepsen v. Vigil-Giron*, No. D-101-CV-02177, filed Jan. 24, 2002 (finding that the Legislature "failed to provide adequately for equal Native American electoral access in Northwestern New Mexico" and adopting a partial plan wherein Native voters constituted more than a 60% majority in three Senate districts and six House districts); see also *Egolf v. Duran*, No. D-101-CV-2011-02942, filed Jan. 3, 2012 (holding that Native voters in New Mexico's northwest were cohesive in voting, that non-Native American voters routinely voted against them, and affirming legislative districts drawn the previous decade in *Jepsen*).

² See, *Egolf v. Duran*, No. D-101-CV-2011-02942 (Jan. 3, 2012), at 11-13 (finding "The Pueblos share concern for the protection of traditional cultural properties around Mt. Taylor. The Pueblos of Laguna and Acoma also share a common language and culture." "[...] Jicarilla Apache Nation and the Sandoval County Pueblos share common interests based on size, tradition and customs, political and legal issues and inter-marriages. The Jicarilla Apache Nation reservation extends into Sandoval County.").

comprise the majority of voters in six state House districts and three state Senate districts, and hold a voting-influence in one state Senate district. As such, New Mexico's Tribal Nations seek to maintain and improve Native-voting strength in State House Districts 4, 5, 6, 9, 65 and 69; and Senate Districts 3, 4, 22 and 30.

I. Section 2 of the Voting Rights Act:

Congress enacted Section 2 of the Voting Rights Act (VRA) to combat minority vote dilution. A violation of this law exists when "a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by minority [voters] to elect their preferred candidates." In 1975, Congress extended VRA protections to American Indians after finding that "a pattern of educational inequity exists with respect to children of Indian origin..." and substantial evidence of discriminatory practices that affected the right of Indians to vote."³ Cracking or packing, for example, dilutes Native American voting strength and, thus, undermines Native voters an opportunity to choose a candidate of their choice.

Further, U.S. Supreme Court precedent permits redistricting plans to deviate from equal population standards in order to create and maintain Majority-Minority and Influential districts, if certain legal factors are met. Known widely as the *Gingles* analysis, Native-Majority voting districts, for example, are deemed rationale if: A) the [Native] population is large and compact enough to create multiple, compact Native-majority districts; B) the [Native] population is politically cohesive; and C) racial bloc voting exists to defeat the representatives of the [Native] voters' choice.⁴

Significant to a VRA and *Gingles* analysis today are the following findings from the 2011 redistricting litigation that pertain to New Mexico's Native American voters:

- The continued effects of discrimination in education, employment, and health hinder their ability to effectively participate in the political process.
- Native American voters have and continue to encounter electoral discrimination.
- Elections in Northwest New Mexico involving Native American candidates and non-Native American candidates are racially polarized.
- Most often, Non-Native Americans vote sufficiently as a bloc in primary elections to veto the election of the Native voters' preferred candidate.
- Native Americans in northwestern New Mexico have a sufficiently numerous and geographically compact population to constitute a majority of voters in six districts.
- There remains a lack of legislative responsiveness to Native American concerns.⁵

II. Tribal Self-Determination:

³ *Gingles*, 478 U.S. at 47. See also *Windy Boy v. County of Big Horn*, 647 F.Supp. 1002, 1007 (D. Mont. 1986) quoting and citing 1975 U.S. Code Cong. & Ad. News at 774, 795, 797.

⁴ *Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986) (establishing three threshold criteria required to establish a Section 2 violation of the Voting Rights Act).

⁵ *Egolf v. Duran*, No. D-101-CV-2011-02942 (Jan. 3, 2012) at 11-12.

In addition to the VRA, New Mexico law requires courts to consider tribal self-determination as a factor in drawing legislative districts.⁶ Generally, self-determination is a right among Tribal Nations to: “(1) determine their relationship with the State, (2) be involved in setting up the structure under which they live, and (3) maintain their own political system and institutions.”⁷ As it pertains to their social, economic and political interests, past redistricting-litigation findings established that: “[t]ribal communities are in the best position to determine what is best for their own communities.”⁸ To that end, the “Multi-tribal/Navajo-Nation Plaintiffs” redistricting maps in 2011 were adopted, while those that “did not conform to the preferences of either the Multi-Tribal or the Navajo Nation Plaintiffs with respect to districts in the northwest quadrant of the state” were rejected.⁹

Conclusion:

In order to maintain and improve voting strength in New Mexico’s Native American-majority voter districts, the tribal leaders in the Northwest Quadrant have worked cohesively to develop and submit map proposals that reflect their redistricting preferences based on their collective *social, political and economic* interests. The ACLU of New Mexico fully supports the legislation during this special session that accounts for those shared tribal-community interests and their rightful exercise of tribal self-determination. Further, ACLU-NM opposes all legislation that violates the laws, practices and procedures intended to protect the rights of Native American voters.

Sincerely,

/s/ Preston Sanchez

Preston Sanchez
American Civil Liberties Union of New Mexico
Indigenous Justice Attorney
Psanchez@aclu-nm.org
505-266-5915

⁶ *Jepsen v. Vigil-Giron*, No. D-0202-CV-2001 (N.M. First Judicial District Court, January 24, 2002).

⁷ Echohawk, W.R., *In the Light of Justice: The Rise of Human Rights in Native America and the UN Declaration on the Rights of Indigenous People* (Published 2013) at 45.

⁸ *Egolf v. Duran*, No. D-101-CV-2011-02942 (Jan. 3, 2012) at 11.

⁹ *Maestas v. Hall*, 2012-NMSC-006, 276.