


BY PATTY FERGUSON-BOHNEE & JAMES THOMAS TUCKER

VOTING DURING A PANDEMIC

VOTE-BY-MAIL CHALLENGES
FOR NATIVE VOTERS

PATTY FERGUSON-BOHNEE is the Director of the Indian Legal Clinic and Faculty Director of the Indian Legal Program at the Sandra Day O'Connor College of Law and is Of Counsel at Sacks Tierney P.A. She serves as a Co-Chair of the Native America Concerns Committee of the American Bar Association's Civil Rights and Social Justice Section and leads the AZ Native Vote – Election Protection Project.

JAMES T. TUCKER is an attorney at Wilson Elser Moskowitz Edelman & Dicker LLP, with offices in Phoenix and Las Vegas, Nev. He is the Chair of the State Bar of Arizona Indian Law Section, Pro Bono Voting Rights Counsel to the Native American Rights Fund, and Vice Chair of the Census Bureau National Advisory Committee on Racial, Ethnic and Other Populations (NAC). He earned his J.D. at the University of Florida, his S.J.D. and LL.M. at the University of Pennsylvania, and his M.P.A. at the University of Oklahoma.



COMING INTO 2020, IT WAS APPARENT THAT THIS WOULD BE A MOMENTOUS YEAR. THE SUMMER OLYMPICS WOULD BE HELD IN TOKYO. THE UNITED STATES CENSUS BUREAU WOULD CONDUCT THE DECENNIAL CENSUS, WHICH IS USED FOR REAPPORTIONING SEATS IN THE HOUSE OF REPRESENTATIVES AMONG THE STATES, REDISTRICTING TO MEET EQUAL POPULATION REQUIREMENTS, AND PRODUCING DATA USED FOR FEDERAL APPROPRIATIONS OVER THE NEXT 10 YEARS. PARTY CAUCUSES AND PRIMARIES WERE TO BEGIN IN EARLY FEBRUARY, CULMINATING IN THE PRESIDENTIAL ELECTION IN NOVEMBER.

Most of those events will still happen. But the timing and the way in which they are conducted may change significantly due to the COVID-19 pandemic. The 2020 Olympics have been postponed a year and will not commence until July 2021.¹ In mid-March, the Census Bureau announced it was delaying its in-person field operations.² In mid-April, the Bureau requested that Congress extend the statutory deadlines by 120 days to complete the decennial Census, report the reapportionment numbers to the President and prepare the data files used for redistricting.³ On March 19, California became the first state to issue a stay-at-home order. Arizona followed on March 31, along with most of the remaining states.⁴



Elections proved that they were not immune to the pandemic's effects. Arizona held its primary on March 17, but it was one of the last states to do so. Sixteen states postponed their primaries because of the pandemic.⁵ Despite a stay-at-home order, the closure of all non-essential businesses, and limits on the size of gatherings, Wisconsin proceeded with in-person voting during its primary on April 7—and was widely criticized for doing so.⁶ Milwaukee closed 175 of 180 polling locations, resulting in long lines and increased risks.⁷ A terrible price may have resulted from the election. It was reported that over 50 people who voted in-person during the Wisconsin primary tested positive for the COVID-19 virus within two weeks of voting.⁸

Against this backdrop, there is an increasing call for alternatives to in-person voting, such as Vote-By-Mail (“VBM”). Nationally, polls show that a clear majority of Americans support VBM, with approximately two-thirds in favor. While there is some partisan disagreement about VBM—those who identify as Democrats or Independents overwhelmingly favor it compared to 40 percent of Republicans—that divide tends to evaporate in states that already use it.⁹ A Pew survey reported that 68 percent of Republicans in those states support it.¹⁰ Several bills have been introduced in Congress that would mandate making VBM an option for conducting federal elections in November 2020.¹¹

Elections conducted by VBM have been on the rise. In 1972, only four percent of all ballots were cast by mail. By 2008, 30 percent of all ballots nationwide were cast by mail. In some states that offered a mail-in voting option, up to half of all ballots were cast using that option. According to the National Conference of State Legislatures (NCSL), by the end of 2019, at least 22 states currently use some form of VBM for their elections, with three states (Colorado, Oregon and Washington) conducting all voting by mail.

Arizona first made VBM available to all voters in 1998. Arizona law provides, “Any election called pursuant to the laws of this state shall provide for early voting. Any qualified elector may vote by early ballot.”¹² The 2010 election marked the first time that more than half of all ballots cast in Arizona were through VBM.¹³ Currently, approxi-

mately 80 percent of all Arizonans receive their ballot by mail.¹⁴

NCSL explains how VBM commonly works:

The voter marks the ballot, puts it in a secrecy envelope or sleeve and then into a separate mailing envelope, signs an affidavit on the exterior of the mailing envelope, and returns the package via mail or by dropping it off. Ballots are mailed out well ahead of Election Day, and thus voters have an “election period,” not just a single day, to vote. ... [T]his does not preclude in-person voting opportunities on and/or before Election Day. For example, despite the fact that all registered voters in Colorado are mailed a ballot, voters can choose to cast a ballot at an in-person vote center during the early voting period or on Election Day (or drop off, or mail, their ballot back).¹⁵

VBM is a viable option for many voters. However, it is not a panacea for the challenges of voting during a pandemic. For many voters, especially Native Americans and others living in remote or rural areas, casting a ballot by mail is not possible. As a result, the Inter Tribal Council of Arizona opposes having all ballots cast through VBM.¹⁶ One tribal member from Montana went even further, describing VBM as “regressing ... I would see it as a Jim Crow law.”¹⁷ This article explains why having in-person and related voting options are necessary to ensure that those living in Indian Country have a voice in the political process.

DISPARITIES AFFECTING NATIVE VOTER ACCESS

Members of the 574 federally recognized tribes¹⁸ face many barriers to political participation. Although many other American voters share some of these obstacles, no other racial or ethnic group faces the combined weight of these barriers to the same degree as Native voters in Indian Country. Moreover, the government-to-government relationship between the tribes and the United States is unique to the American Indian and Alaska Native (AIAN) population. “First generation” voting barriers—those that prevent eligible people from registering to vote, casting a ballot, and having that ballot

counted—remain the dominant paradigm in Indian Country. Those obstacles often are exacerbated by the general disparities that Native voters face when trying to participate in non-tribal elections.

HISTORICAL DISTRUST OF THE FEDERAL GOVERNMENT

It is impossible to fully understand voting barriers in Indian Country without starting with the bad relationship the indigenous population has had, and continues to have, with the federal government. Antipathy and distrust persist toward federal, state and local governments because of past (and in some cases ongoing) actions that discriminate against Natives or that undermine the preservation of their culture and heritage.

In a recent survey of 2,800 Native voters in four states, including Arizona, Native voters expressed the greatest trust in their Tribal Governments. Although the federal government was identified by respondents as the most trusted of non-tribal governments (federal, state, local), the level of trust ranged from a high of just 28 percent in Nevada to a low of only 16.3 percent in South Dakota.¹⁹ Those negative experiences often are exacerbated and reinforced when Native Americans are denied equal opportunities to register to vote and to cast ballots that are counted. This distrust also helps to explain why many Native voters choose not to cast a ballot using VBM.

GEOGRAPHIC ISOLATION

While 84 percent of the U.S. population lives in urban areas,²⁰ many Native Americans live in rural communities. The isolated locations of tribal lands contribute to the political exclusion of Native Americans. Approximately one-third of all American Indians and Alaska Natives live in Hard-to-Count Census Tracts—roughly 1.7 million out of 5.3 million people from the 2011-2015 American Community Survey (ACS) estimates.²¹ The states with the greatest percentage of the Native population in such tracts reside in the western states: New Mexico (78.6 percent), Arizona (68.1 percent) and Alaska (65.6 percent).²² Geographic isolation is a significant reason states like Arizona have such a large percentage of their Native population in Hard-to-Count areas.

Isolation due to physical features such as mountains, canyons, oceans, rivers and



vast expanses of unoccupied land are compounded by an absence of paved roads to connect tribal lands with off-reservation communities. Even where roads are present, Native voters often lack reliable transportation to travel the vast distances to county seats, election offices and post offices. Inclement weather conditions frequently make such travel impossible, particularly in early November when general elections are held and VBM ballots are returned.

SOCIOECONOMIC BARRIERS

Socioeconomic barriers likewise make the voting process less accessible for Native Americans. Native peoples have the highest poverty rate of any population group, 26.6 percent, which is nearly double the poverty rate of the nation as a whole.²³ The poverty rate is even higher on Indian reservations and in Alaska Native villages, at 38.3 percent.²⁴ The median household income of single-race AIAN households in 2016 was \$39,719, far below the national median household income of \$57,617.²⁵

Native Americans also have lower rates of

educational attainment. Among the AIAN population 25 years of age and older, 20.1 percent had less than a high school education. The unemployment rate of those aged 16 and older in the workforce was 12 percent. Approximately 19.2 percent lacked health insurance, and 13.4 percent of all occupied households lacked access to a vehicle, making it impossible to travel great distances to register and vote.²⁶

LANGUAGE BARRIERS AND ILLITERACY

Dozens of different dialects are widely spoken among the major AIAN languages. Over a quarter of all single-race AIANs speak a language other than English at home.²⁷ Two-thirds of all speakers of AIAN languages reside on a reservation or in a Native village,²⁸ including many who are linguistically isolated, have limited English skills, or a high rate of illiteracy.²⁹

Alaska, Arizona and New Mexico have the largest number of Limited-English Proficient (LEP) persons voting-age citizens (that is, U.S. citizens who are 18 years of age and older). Between them,

they account for approximately 87 percent of all AIANs who reside in an area required to provide language assistance in an AIAN language under Section 203 of the Voting Rights Act.³⁰

Illiteracy also is very prevalent among LEP AIANs, especially among Tribal Elders. In Alaska, in Section 203-covered areas for which Census data is available, the illiteracy rate among LEP Alaska Natives of voting age is 40 percent for Aleut-speakers, 28.4 percent for Athabascan-speakers, 15 percent for Yup'ik-speakers, and 8.2 percent for Inupiat-speakers.³¹ In Arizona, in covered areas for which Census data is available, the illiteracy rate among LEP American Indians of voting age is 25 percent for Navajo-speakers and 6.8 percent for Apache-speakers.³² Similar levels of illiteracy are prevalent in other areas of Indian Country.

LACK OF BROADBAND ACCESS AND INTERNET USE

Among all population groups, the digital divide is most profoundly felt in Indian Country. People residing in tribal areas have virtually no access to computers or the internet,

with the Federal Trade Commission estimating broadband penetration in tribal communities at less than 10 percent.³³ Not surprisingly, the hardest to count Census areas for the rural AIAN population are all on reservations or in Alaska Native villages lacking reliable and affordable broadband access. To illustrate that fact, a mapping tool shows how Hard-to-Count Census Tracts correlate with reservations.³⁴

BARRIERS THAT VBM IMPOSES ON NATIVE VOTERS

VBM is not a simple or easy task for Native American voters. In addition to general barriers impeding voting access, VBM adds an additional layer of challenges. Lack of home mail delivery, the need for language translations, and lack of access to public transportation and vehicles impede voter participation by mail. In general, VBM is not as accessible for Native Americans living in tribal communities as it is for voters in urban areas. In

MEMBERS OF THE 574 FEDERALLY RECOGNIZED TRIBES FACE MANY BARRIERS TO POLITICAL PARTICIPATION. NO OTHER RACIAL OR ETHNIC GROUP FACES THE COMBINED WEIGHT OF THESE BARRIERS TO THE SAME DEGREE.

fact, an all-VBM system can effectively eliminate voting opportunities for some AIAN communities if no polling locations are located within their communities.

HOUSING INSTABILITY, HOMELESSNESS AND “NON-TRADITIONAL” ADDRESSES

VBM is premised on what appears to be a simple concept in Arizona: Any registered voter can inform their county elections office that they want a mail-in-ballot, which will be mailed to them and returned by the deadline. Despite its seeming appeal, that concept readily breaks down in much

of Indian Country, primarily for two reasons: housing instability/homelessness and lack of a physical address where election materials will be mailed.

According to the 2016 ACS, only 52.9 percent of single-race AIAN householders owned their own home, compared to 63.1 percent of the total population.³⁵ AIANs also experience high levels of literal homelessness and near homelessness.³⁶

When defining “literal homelessness” as living on the street and “near homelessness” as living in a place that is not one’s own (e.g., not having their own home—couch surfing, living with a friend, doubling up), the Department of Housing and Urban Development (HUD) discovered that 99.8 percent of tribes surveyed said that their members experience near homelessness³⁷ and 88 percent of tribes also stated that, despite “doubling up” or living with a friend, their members also experience literal homelessness.³⁸ HUD has estimated that, out of 399,400 households in tribal areas, 67,900



households include someone who qualifies as near homeless. There are an estimated 42,100 to 84,700 living in near homelessness in tribal areas. Seventeen percent of AIANs surveyed stated that they have people living in their household only because they have nowhere else to go.³⁹

Even for those who have a home, access to voting in Indian Country is made substantially more difficult because of the prevalence of “non-traditional” addresses. Non-traditional addresses are prevalent among AIANs residing on tribal lands. These addresses encompass “noncity-style addresses, which the Census Bureau defines as those that do not contain a house number and/or a street name.”⁴⁰ Examples of non-city-style mailing addresses include: general delivery; rural route and box number; highway contract route and box number; post office box only delivery; or location descriptions such as “Brick house with attached garage on the right,” geographic coordinates, or other geographic coding. It is commonplace for homes on tribal lands to use noncity-style addresses.

Urban Native Americans also struggle to receive mail. In some cases, multiple unrelated families live in a single housing unit, making it difficult to receive mail.⁴¹

LACK OF REGULAR AND RELIABLE ACCESS TO MAIL

As a part of their unique reality, many Tribal communities do not have the same infrastructure as the majority of America. Some limitations in infrastructure include lack of paved roads and public transportation. The lack of paved roads on reservation lands hinders access to voting locations, voter registration sites, and post office locations. During inclement weather, unpaved roads may become impassable and further impede voters. The Indian Reservation Roads (IRR) program takes care of more than 144,000 miles of roads, and over 60 percent of those roads are unpaved dirt and gravel roads.⁴² According to the BIA, approximately 17,130 miles of existing roads in the National Tribal Transportation Facility Inventory are unimproved and earth surface roads.⁴³ When considering only BIA and tribal roads, the percent of unpaved roads increases to 80 percent.⁴⁴

In addition, 27 percent of all the bridges in the IRR system are deficient.⁴⁵ In Arizona,

the Navajo Reservation has over 10,000 miles of roads, 86 percent of which are unpaved.⁴⁶ “Because of the poor quality of the road systems on Indian reservations, many of the roads are unnamed and not serviced by the U.S. Postal Service. ... A significant number of these reservation residents have no traditional street addresses.”⁴⁷

Due to the lack of traditional addresses:

Most reservation residents do not receive mail at their homes and either pay to maintain a post office box in a nearby town or receive their mail by general delivery at a trading post or other location. Some reservation residents have to travel up to seventy miles in one direction to receive mail.⁴⁸

In Arizona, for example, only 18 percent of Native American voters outside of urban Maricopa (metropolitan Phoenix) and Pima (metropolitan Tucson) areas have physical addresses and receive mail at home.⁴⁹ The Navajo Nation, the largest reservation in the United States, does not have an addressing program, and most people live in remote communities.⁵⁰ Residents have “little to no vehicle access, only post office boxes, sometimes shared by multiple families.” Similarly:

There is no home delivery in the Tohono O’odham Nation, where there are 1,900 post office boxes and some cluster mail boxes. ... Residents come to the post office every two or three weeks to get their mail. Due to the lack of transportation, the condition of the roads, and health issues, some go to post office only once per month.⁵¹

Throughout Indian Country, many Native voters can only receive election mail through post office boxes.⁵² There is an insufficient supply of post office boxes on or near tribal lands to meet the high demand, requiring many tribal members to obtain post office boxes in communities that can be located more than 100 miles away.⁵³ The lack of P.O. boxes causes multiple families to share a single box, including unrelated adults living in different households.⁵⁴ When a family is kicked off a shared mailbox, they are effectively disenfranchised because there is no way for them to receive early ballots by mail.⁵⁵

The difficulties accessing mail make VBM difficult because traveling to the P.O. box to pick up your ballot and then returning it can be an all-day task; without a car, it may be impossible. The distances Native voters must travel to obtain mail is compounded by the socioeconomic factors faced by Native because of decreased access to public transportation, personal transportation, or requisite funds to travel such distances to obtain or return a ballot. Getting mail-in ballots is a “big problem” for Native voters.⁵⁶

THE NEED FOR IN-PERSON LANGUAGE ASSISTANCE

Even if a voter receives a ballot by mail, some Native voters need oral language assistance to cast a ballot. There are over 370,000 Native American language speakers.⁵⁷ Of these, about 84,000 Native Americans report speaking English “less than very well.”⁵⁸ Only a handful of Native languages are written, and not every speaker can read their native language. Without adequate translations, both oral and written, Native language speakers are at a disadvantage when trying to vote. However, there is no effective way to provide this oral language assistance by mail as required by Section 203 of the Voting Rights Act.

Section 203 mandates, “Whenever any State or political subdivision [covered by the section] provides registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, it shall provide them in the language of the applicable minority group as well as in the English language.”⁵⁹ As of 2016, jurisdictions in 10 states must provide language assistance to Native American and Alaska Native voters under Section 203.⁶⁰ Despite this requirement, not all jurisdictions provide adequate language assistance, and several admitted to doing nothing to comply with Section 203.⁶¹

VBM leads to the closure of polling locations, which can result in effectively denying voting opportunities for Native voters. When San Juan County, Utah, switched to an all-VBM system, it closed all of the polling locations on the Navajo Reservation. Navajo voters, including those who needed language assistance, were required to travel up to four hours one way to the sole in-per-

son voting location to vote.⁶² Changes to and closure of polling locations and anything that increases costs, such as increased travel and distance, decreases voter turnout.⁶³ The decreased socioeconomic status affects the ability of the Native voter to bear the additional costs.⁶⁴

VBM also results in ballots not being counted and is concerning for LEP voters. Ballots cast by mail are 10 times more likely to be rejected than votes cast in-person.⁶⁵ VBM requires that multiple steps be completed in order for the ballot to count, resulting in more risks that the ballot will not be counted or “lost” as compared to in-person voters.⁶⁶ In the 2008 election, approximately 4.1 million votes were lost in the VBM pipeline. The primary problem was unfulfilled ballot requests; other problems included rejection of ballots for failure to sign the ballot, failure to return the ballot timely, and mistakes marking the ballot.⁶⁷ For reservation voters, it

**LACK OF HOME MAIL DELIVERY,
THE NEED FOR LANGUAGE
TRANSLATIONS, AND LACK OF
ACCESS TO PUBLIC TRANSPORTATION
AND VEHICLES IMPEDE VOTER
PARTICIPATION BY MAIL.**

can take a week to receive mail, and a week to return mail due to the circuitous route of mail delivery, making VBM an unreliable option.

Following the 2018 election, the Navajo Nation and Navajo voters filed suit arguing that the lack of language assistance in the VBM process violated Section 203. Even though there is low participation in VBM on the Navajo Reservation, over 100 ballots were discarded for failure to sign the ballot affidavit. These voters were neither prop-

erly instructed in the Navajo language on how to complete the ballot and were not given an opportunity to cure the deficiency, violating Section 203, and the lack of curing violated the Equal Protection and Due Process clauses of the U.S. Constitution.⁶⁸

Marginalized communities show a greater rate of ballot rejection, and “[m]ail-in ballots in Apache and Coconino counties were rejected for missing

signatures at twice the statewide rate.”⁶⁹ Although the settlement agreement in that case required the Secretary of State to include a ballot-curing provision in the election manual to allow unsigned ballot voters the same amount of time to cure as those with mismatched signatures and those who fail to show ID on election day, the Attorney General quashed that change.⁷⁰ Because curing is not equally accessible, a VBM system would further disenfranchise Native voters in Arizona.



THE NEED FOR BALLOT COLLECTION

In *DNC v. Hobbs*,⁷¹ plaintiffs challenged the validity of Arizona's ballot collection law, which criminalized the collection and delivery of another person's ballot. Until the state Legislature enacted H.B. 2023, Arizona did not restrict third parties from collecting or dropping-off completed early ballots. Due to various factors, such as lack of access to reliable mail and lack of transportation, minority voters relied heavily on third-party assistance to return their early ballots as compared to non-minority voters. A similar law failed to receive preclearance approval from the Department of Justice when Arizona was covered under Section 5 of the Voting Rights Act.

An en banc panel of the Ninth Circuit found that Arizona's ballot collection law violated Section 2 of the Voting Rights Act and disproportionately impacted Native Americans and other minorities. The Court also found that the law was passed with discriminatory intent in violation of the Fifteenth Amendment to the U.S. Constitution.

Due to the mail issues, lack of transportation and general disparities noted above, ballot collection can ensure that a Native voter's ballot arrives to the county or polling location in order to be included in the count. Also, because many voters rely on others to deliver and return mail, it is likely that Native voters would violate the ballot collection law just by engaging in their regular activities of assisting their neighbors.

CULTURAL ISSUES FAVORING IN-PERSON VOTING

Many Native voters reject VBM because it is antithetical to their culture of in-person civic participation. "[P]eople like to vote in person, because there's a community attitude, almost carnival-like attitude." Tribes create a festive environment with food and

events to encourage Native voters to participate.⁷² A consistent theme is that Native voters on both reservations⁷³ and in urban areas "want to go into a space" to vote, such as polling place in their community.⁷⁴

The preference for in-person voting also has its roots in the high levels of distrust that Native voters have for non-tribal government. Native voters have "the least trust in the local levels" of non-tribal government, such as the state and county officials running the elections. That distrust is manifest in their opinions on VBM compared to other methods of casting ballots. About 89 percent had at least some trust that their in-person ballot would be counted. "Vote by mail, in contrast, garnered much lower levels of trust. Only 24 percent had complete trust. And the same percentage, 24 percent, had no trust in voting by mail." The high levels of distrust for VBM show that it "is not a viable substitute for in-person or voting at an early election site someplace where the individuals put the ballots themselves in the box."⁷⁵

The voting experiences of Native voters corroborate their lack of trust that their mail-in ballot will be counted.⁷⁶ In the 2016 election in Arizona, voters at the Bylas precinct on the San Carlos Reservation and the Pasqua Yaqui Tribal precinct were told they had to vote by provisional ballot because they were either on the permanent early voting list, and in one case a voter was told she had "voted early already, even though she insisted that she had not."⁷⁷

The negative experience that Native voters continue to have with non-tribal governments plays a significant role in their fear of VBM. Researchers found that Native voters did not want to put their address on the mail-in ballot because they believed that their address would be used to discriminate against them.⁷⁸ This is a remarkable finding because it so closely parallels the experience of African-American voters in the South.⁷⁹

Native voters also expressed concerns that VBM is less secure than voting in a polling place. The lack of security increases the distrust that some voters have in the process.⁸⁰

CONCLUSIONS: THE 2020 ELECTION AND BEYOND

While social distancing and reducing contact are important measures for the 2020 election, states and counties have a duty and responsibility to provide accessible voting to all voters. Instead of trying to force all voters to cast a ballot by mail, which may be rejected, election officials can do a variety of things to increase voting opportunities while reducing contact.

Expand in-person voting opportunities. Indian Country has unequal access to early voting, and expanding early voting to Tribal lands during the early voting period will reduce lines and in-person contact on election day. Pinal County purchased a mobile voting unit, designating it as an early voting location. This will allow the county to reach more voters during the early voting period.


Maintain polling locations on Tribal lands.

Provide additional opportunities for elderly and sick voters to vote at home by advertising the use of special election boards.

Increase the use of curbside and/or drive through voting.

Inform voters of the changes and additional opportunities to address potential fears of contact and to inform them of measures being taken to address health concerns.

For those who do vote by mail, add drop-box locations to Tribal lands and deputize Tribal employees as election officials to collect and receive ballots.

Election officials should coordinate with Tribal officials to ensure that they are working together to address the needs of Tribal voters. 

endnotes

1. Olympic.org, IOC, IPC, Tokyo 2020 Organising Committee and Tokyo Metropolitan Government Announce New Dates for the Olympic and Paralympic Games Tokyo 2020 (Mar. 30, 2020), available at <https://bit.ly/2APhEe>.
2. See U.S. Census Bureau, *Census Bureau Statement on Modifying 2020 Census Operations to Make Sure College Students are Counted*

- (Mar. 15, 2020), available at <https://bit.ly/2Ye3iVU>; U.S. Census Bureau, *Census Bureau Statement on Suspending In-Person Interviews for Surveys* (Mar. 27, 2020), available at <https://bit.ly/3fBI5Lm>.
3. See U.S. Census Bureau, U.S. Department of Commerce Secretary Wilbur Ross and U.S. Census Bureau Director Steven Dillingham

Statement on 2020 Census Operational Adjustments Due to COVID-19 (Apr. 13, 2020), available at <https://bit.ly/2Cm99A1>.

4. See Sarah Mervosh, Denise Lu & Vanessa Swales, *See Which States and Cities Have Told Residents to Stay at Home*, N.Y. TIMES (updated Apr. 20, 2020), available at



- https://nyti.ms/30NSnns.
5. See Nick Corasaniti & Stephanie Saul, *16 States Have Postponed Primaries During the Pandemic. Here's a List*, N.Y. TIMES (May 5, 2020), available at <https://nyti.ms/2C-cqtHm>.
6. See Alex Seitz-Wald & Shaquille Brewster, *Wisconsin, facing heavy criticism, plans Tuesday primary despite coronavirus*, NBC NEWS (Apr. 1, 2020), available at <https://nbcnews.to/3ebVZUd>.
7. Brianna Reiley, *Madison has 66 polling sites on election day, Milwaukee has five. What's the deal?* CAP TIMES (April 7, 2020), available at <https://bit.ly/2ACDQ3p>.
8. Scott Bauer, *52 People Who Took Part in Wisconsin's Primary Have Tested Positive for Coronavirus*, TIME (Apr. 29, 2020), available at <https://bit.ly/2Y8XI6W>.
9. See Mohamed Younis, *Most Americans Favor Voting by Mail as Option in November*, GALLUP (May 12, 2020), available at <https://bit.ly/2YKaNCR>.
10. See Aaron Blake, *A very interesting number on GOP support for vote-by-mail*, WASH. POST (Apr. 28, 2020), available at <https://wapo.st/2N7sqHh>.
11. See Alex Seitz-Wald & Sahil Kapur, *Coronavirus has ignited a battle over voting by mail. Here's why it's so controversial*, NBC NEWS (Apr. 7, 2020), available at <https://nbcnews.to/3e7NEke>.
12. A.R.S. § 16-541(A).
13. See *Archived Table: Voting by Mail*, N.Y. TIMES (Oct. 7, 2012), available at <https://nyti.ms/3fEKQeV>.
14. See Ariz. Clean Elections Comm'n, *Ballot by Mail*, available at <https://bit.ly/3fz2a4P> (last visited June 17, 2020).
15. NCSL, Dylan Lynch, *All-Mail Elections (aka Vote-By-Mail)*, Introduction (June 27, 2019) ("All-Mail Elections"), available at <https://bit.ly/2BgryH>.
16. Native American Rights Fund (NARF), *Obstacles at Every Turn: Barriers to Political Participation Faced by Native American Voters* 93 (2020) ("NARF Report") (quoting Travis Lane). The NARF Report is available at <https://bit.ly/2CcreAc>.
17. *Id.* (quoting Sharon Stewart-Peregoy).
18. U.S. Dep't of the Interior, Bureau of Indian Affairs, *Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs*, 85 Fed. Reg. 5462-5267 (Jan. 30, 2020) (listing federally recognized tribes and Alaska Native villages).
19. See The Native American Voting Rights Coalition, *Survey Research Report: Voting Barriers Encountered by Native Americans in Arizona, New Mexico, Nevada and South Dakota* ("NAVRC Report") 15, 45, 77, 111 (Jan. 2018), available at <https://bit.ly/2YRyVnk>.
20. UNIV. MICH. CTR. FOR SUSTAINABLE SYSTEMS, *US Cities Fact Sheet*, available at <https://bit.ly/2BfSBsI>.
21. Hard-to-Count Census Tracts include those Census Tracts "in the bottom 20 percent of 2010 Census Mail Return Rates (i.e. Mail Return Rates of 73 percent or less) or tracts for which a mail return rate is not applicable because they are enumerated in 2010 using the special Update/Enumerate method." See The Leadership Conference Education Fund, Table 1a: States Ranked by Number of American Indian/Alaska Natives (race alone or combination) living in Hard-to-Count (HTC) Census Tracts, available at <https://bit.ly/2ACvn08>.
22. See The Leadership Conference Education Fund, Table 1b: States Ranked by Percent of American Indian/Alaska Natives (race alone or combination) living in Hard-to-Count (HTC) Census Tracts, available at <https://bit.ly/2CfY9nv>.
23. U.S. Census Bureau, *Profile America Facts for Features: CB16-FF.22, American Indian and Alaska Native statistics*, available at <https://bit.ly/3e7NZU2> (Nov. 2, 2016).



- (“2016 AIAN FFF”).
24. U.S. Census Bureau, Table B17001C: Selected Population Profile in the United States: 2015 American Community Survey 1-Year Estimates (last visited on Feb. 7, 2018), *available at* <https://bit.ly/2Y-Mi7Od>.
25. U.S. Census Bureau, Facts for Features: American Indian and Alaska Native Heritage Month: November 2017 (Oct. 6, 2017), *available at* <https://bit.ly/37F2z2R> (“2017 AIAN Summary”).
26. *See* U.S. Census Bureau, 2016 American Community Survey 1-Year Estimates, Selected Population Profile in the United States: American Indian and Alaska Native alone (300, A01-Z99) (“2016 AIAN Profile”), *available at* <https://bit.ly/3fB3yDY>.
27. 2016 AIAN FFF, *supra* note 23 (27 percent).
28. *See* U.S. Census Bureau, Native American Languages Spoken at Home in the United States and Puerto Rico: 2006-2010 at 2 (Dec. 2011).
29. *See* U.S. Census Bureau, Public Use Data File for the 2016 Determinations under Section 203 of the Voting Rights Act, *available at* <https://bit.ly/37MhBEg> (Dec. 5, 2016).
30. AAJC, NALEO & NARF, Voting Rights Act Coverage Update 3 (Dec. 2016) (“Section 203 Update”), *available at* <https://bit.ly/2Binug6>.
31. *See* U.S. Census Bureau, Voting Rights Determination File: Section 203 Determinations (Dec. 5, 2016), Public Use Data File and Technical Documentation (Excel spreadsheet of “Determined Areas Only”) (“Section 203 Determination File”), *available at* <https://bit.ly/3diHdd6>.
32. *See id.* In Arizona, the illiteracy rate among LEP voting-age citizens in covered areas compares to the national illiteracy rate of 1.31 percent as follows: 19.1 times higher for Navajo-speakers; and 5.2 times higher for Apache-speakers.
33. Parkhurst et al., The Digital Reality: E-Government and Access to Technology and Internet for American Indian and Alaska Native Populations 3, *available at* <https://bit.ly/3edV2uz>.
34. *See* Mapping Hard to Count (HTC) Communities for a Fair and Accurate 2020 Census, *available at* <https://bit.ly/2CfYt5H>.
35. *See* 2017 AIAN Summary, *supra* note 25.
36. Nancy Pindus et al., U.S. Dep’t of Housing and Urban Development, Housing Needs of American Indians and Alaska Natives in Tribal Areas 76-77 (U.S. Dep’t of Hous. and Urb. Dev. 29 (2017)).
37. *Id.* at 79.
38. *Id.* at 82.
39. *Id.* at 85.
40. U.S. Census Bureau, 2020 Census Local Update of Census Addresses Program Improvement Project Recommendations 2 (Apr. 13, 2015), *available at* <https://bit.ly/3fB3OCW>.
41. NARF Report, *supra* note 16, at 40 (quoting Thomas Eugene).
42. TRIBAL TRANSPORTATION: PAVING THE WAY FOR JOBS, INFRASTRUCTURE AND SAFETY IN NATIVE COMMUNITIES: HEARING BEFORE THE S. COMM. ON INDIAN AFFAIRS, 112th Cong. 112-424 (2011) (statement of John R. Baxter, Assoc. Adm’r for Fed. Lands, Fed. Highway Adm’r).
43. ENHANCING TRIBAL SELF-GOVERNANCE AND SAFETY OF INDIAN ROADS: HEARING BEFORE THE S. COMM. ON INDIAN AFFAIRS, 116th Cong. (2019) (statement of Leroy Gishi, Chief of the Div. of Trans., BIA, DOI).
44. TRIBAL TRANSPORTATION: PAVING THE WAY FOR JOBS, INFRASTRUCTURE AND SAFETY IN NATIVE COMMUNITIES: HEARING BEFORE THE S. COMM. ON INDIAN AFFAIRS, 112th Cong. 112-424 (2011) (statement of John R. Baxter, Assoc. Adm’r for Fed. Lands, Fed. Highway Adm’r).
45. *Id.*
46. FY2019 Navajo Nation Tribal Transportation Plan at 1, *available at* <https://bit.ly/>

47. Brief for National Congress of American Indians et al. as Amici Curiae supporting Petitioners, *Crawford v. Marion County* at 11-12 (2008), available at <https://bit.ly/3fznLKp>.
48. *Id.* at 12.
49. *Democratic Nat'l Comm. v. Reagan*, 329 F. Supp. 3d 824, 869-870 (D. Ariz.), *rev'd sub nom* *DNC v. Hobbs*, No. 18-15845 (9th Cir. Jan. 27, 2020) (en banc).
50. Carrie Jung, *Home Addresses on Navajo Nation are Rare* (Oct. 8, 2015), available at <https://bit.ly/2USR3Ma>.
51. *DNC v. Reagan*, 329 F. Supp. 3d at 869.
52. NARF Report, *supra* note 16, at 40 (quoting Beverly Harry and Thomas Eugene).
53. *Id.* (quoting Alta Edison).
54. *Id.* (quoting Natalie Landreth, Sarah Gonski, Steve Titla and Darrell Marks).
55. *Id.* (quoting Rani Williams, Patty Hansen and Darrell Marks).
56. *Id.* (quoting Henry Cagey).
57. JULIE SIEBENS & TIFFANY JULIAN, U.S. CENSUS BUREAU, REPORT NO. ACSBR/10-10, NATIVE NORTH AMERICAN LANGUAGES SPOKEN AT HOME IN THE US AND IN PUERTO RICO: 2006-2010 1, 2 (2011), available at <https://bit.ly/3hybrfr>.
58. U.S. CENSUS BUREAU, 2013-2017 AMERICAN CMTY. SURVEY 5-YEAR ESTIMATES, available at <https://bit.ly/3hDuWDk>.
59. 52 U.S.C. § 10503(c) (2012) (Westlaw through Pub. L. No. 115-90).
60. U.S. CENSUS BUREAU, Determinations under Section 203 of the Voting Rights Act, 81 Fed. Reg. 87532 (Dec. 5, 2016).
61. ARIZONA STATE UNIVERSITY INDIAN LEGAL CLINIC, NATIVE VOTE – ELECTION PROTECTION PROJECT 2016 ELECTION REPORT 1, 34 (2016).
62. *Navajo Nation Human Rights Comms'n v. San Juan County*, No. 2:2016cv00154 (D. Utah).
63. Jean Schroedel et al, Assessing the Efficacy of Early Voting Access on Indian Reservations: Evidence from a Natural Experiment in Nevada 2, available at <https://bit.ly/3djk0aJ>.
64. *Id.* at 4.
65. *Id.* at 7.
66. Charles Stewart III, *Losing Votes by Mail*, NYU J. OF LEG. & PUB. POL'Y 573, 580-581 (2010), available at <https://bit.ly/2VbhdKv>.
67. *Id.* at 589-90.
68. *Navajo Nation v. Hobbs*, No. CV-18-08329-PCT-DWL, First Amended Complaint (Dec. 11, 2018).
69. Dianna Nañez, *Navajo Nation: Arizona's Broken Compact Discriminates Against, Disenfranchises Native Voters* (May 7, 2020) available at <https://bit.ly/3fzJSAn>.
70. *Navajo Nation v. Hobbs*, No. CV-18-08329-PCT-DWL, Settlement Agreement (Aug. 6, 2019).
71. *DNC v. Hobbs*, No. 18-15845 (9th Cir. Jan. 27, 2020) (en banc).
72. NARF Report, *supra* note 16, at 94 (quoting Kris Beecher).
73. *Id.* (quoting Max Zuni).
74. *Id.* (quoting Chrissie Castro).
75. *Id.* (quoting Jean Schroedel).
76. *Id.* (quoting Natalie Landreth).
77. *Id.* (quoting Solveig Parson).
78. *Id.* (quoting Joseph Dietrich).
79. See generally James Thomas Tucker, *Affirmative Action and [Mis]representation: Part I – Reclaiming the Civil Rights Vision of the Right to Vote*, 43 How. L.J. 343, 345-46 (2000) (summarizing evidence of how efforts by black voters to register subjected them to discrimination including “losing their job or their business, hav[ing] loans denied to them, sec[ing] their rent increase, be evicted from their home, or have basic government services taken away after local newspapers printed their name so that everyone in the community would know what they had done”).
80. NARF Report, *supra* note 16, at 94 (quoting Joseph Dietrich).