

## Statement to the House and Senate Legislative Redistricting Committees and the Tribal Area Subcommittee

I am Scott Herman, President of the Rosebud Sioux Tribe.

The Voting Rights Act requires South Dakota to draw and maintain districts that provide Native voters an equal opportunity to elect their candidates of choice. This means that any map chosen must give Natives in majority-minority districts a reliable ability to elect their candidates of choice.

I am here to urge you to keep the current boundaries of Districts 26A, 28A, 27, and 26 intact in whatever redistricting plan you ultimately select. All four are well-established majority-Native districts. Each was drawn either by this Legislature or the federal courts to ensure that South Dakota has met its obligations under the Voting Rights Act. Despite the substantial undercount of Native populations in the 2020 census, these districts can remain within the population deviation permitted under federal law.

### (1) Districts 26, 26A, 27, 28A are well-established majority-minority districts in which Native voters are entitled to elect their candidates of choice.

In 1990, the South Dakota Legislature created House District 28A for the express purpose of protecting minority voting rights.<sup>1</sup> Districts 26A and 27, too, were drawn specifically to assure majority-Native voting age populations. The South Dakota District Court, later affirmed on appeal by the Eighth Circuit, redrew these two Districts after determining that South Dakota legislature had violated Section 2 of the Voting Rights Act by packing District 27 with Native Americans at the expense of District 26's would-be Native majority.<sup>2</sup> All of these districts must remain a majority-Native district to ensure VRA compliance, and this goal is best accomplished by leaving them in their current shape.

### (2) Native populations were undercounted in the 2020 Census, such that there are undoubtedly more Native people in these four districts than census data suggests.

Although it is difficult to determine exactly how many did not respond to the census, low self-response rates are strongly correlated with undercounting.<sup>3</sup> In South Dakota, the self-response rate among American Indians/Alaska Natives in South Dakota is just under 30%, while the statewide self-response rate was about 65%.<sup>4</sup>

The discrepancy between the 2019 ACS five-year estimates for the Tribal communities included in our proposed map hints at the magnitude of this census undercount. The census figure for the total population for each of the six Sioux Nations represented in the four majority-minority districts at issue here fell below the 2019 ACS estimate. Cheyenne River and Pine Ridge counted more than 1,000 people fewer than the ACS estimate each; Standing Rock counted less than half.

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<sup>1</sup> *Bone Shirt v. Hazeltine*, 336 F. Supp. 2d 976, 982 (D.S.D. 2004).

<sup>2</sup> *Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1016 (8th Cir. 2006).

<sup>3</sup> See William P. O'Hare & Jae June J. Lee, *Who Responded in the 2020 Census?: Variation in Tract-Level Self-Response Rates in the 2020 U.S. Census*, Georgetown Center on Poverty and Inequality (2021), available at [www.georgetownpoverty.org/issues/who-responded-in-the-2020-census](http://www.georgetownpoverty.org/issues/who-responded-in-the-2020-census); William P. O'Hare, *Are Self-Participation Rates Predictive of Accuracy in the U.S. Census?*, 9 Int. J. Soc. Sci. Stud. 23 (2020), available at <https://redfame.com/journal/index.php/ijsss/article/view/4967/5200>.

<sup>4</sup> United States Census Bureau, *2020 Census: Tracking Self-Response Rates Map* (2021), <https://www.census.gov/library/visualizations/interactive/2020-census-self-response-rates-map.html>.

This undercount is further exacerbated by prison gerrymandering, or the practice of counting incarcerated persons as residents of the facility in which they are being held at the time of the census. Prison gerrymandering has a particularly distortive effect on census data about Native populations: 1,345 of the 3,948 incarcerated people in South Dakota in 2018 were Native American.<sup>5</sup> Native people make up 34% of those in jail and prison despite comprising only 8.6% of our state's total population.

I ask that this Legislature, in selecting a redistricting plan, consider the new census data with its inaccuracies firmly in mind.

(3) Each of these four districts has a population within the federally permissible range, such that no redistricting is required.

Under federal law, a district's population may deviate no more than 10% from its "ideal" population – that is, the total number of people in the state divided by the total number of districts. Even with these district's census undercounts, each could remain not only within a 10% deviation, but within an 8% deviation or less from its ideal population.

I recognize that this exceeds the +/- 5% deviation rule adopted by this Legislative Redistricting Committees. However, I urge you consider modifying this rule. It is far more restrictive than either South Dakota or federal law requires. It will require modifying longstanding majority-minority districts that have proven themselves to be both VRA-compliant and effective at protecting the right of Native voters to an equal voice in our democracy. It is, in short, an artificial and unnecessary constraint upon this these Committees.

### Conclusion

In closing, I ask that you leave Districts 26, 26A, 27, and 28A in their current forms to ensure that Native voters remain able to elect the candidates we believe will best represent us, our interests, and our communities. Thank you again for your time today, and I look forward to a redistricting plan that will provide fair representation for everyone in South Dakota.

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<sup>5</sup> United States Department of Justice, *Prisoners in 2018* (2020) at \*36, available at <https://bjs.ojp.gov/content/pub/pdf/p18.pdf>.