NATIVE AMERICAN RIGHTS FUND

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**November 2, 2026**

*Submitted via Federal e-Rulemaking Portal*

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Performing the Duties of the Director
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**Re: NARF Opposition to Proposed Census Rule 91 Fed. Reg. 57524 (Sept. 10, 2026), Docket No. USBC-2026-0628.**

Dear Deputy Under Secretary Cook:

## I. Overview

The Native American Rights Fund (NARF), opposes the rule that the U.S. Census Bureau proposed for the 2030 decennial census because it would exacerbate the undercounting of American Indian and Alaskan Native (AI/AN) peoples in the long run and would breach the United States' treaty and trust obligations to Indian Tribes.

Since 1970, NARF has provided legal assistance to Native American Tribal Nations, organizations, and individuals nationwide who might otherwise have gone without adequate representation. NARF has successfully asserted and defended the most important rights of Indians and Tribes in hundreds of major cases, and has achieved significant results in such critical areas as Tribal sovereignty, treaty rights, natural resource protection, voting rights, and Indian education. NARF has long advocated for accurate census counts of Indian Country, and has provided resources to assist Tribes, advocates, and Tribal members in their efforts to participate in the census.

On September 10, 2026, the Bureau proposed two sets of changes to the 2030 decennial census, designated as 15 C.F.R. Parts 60 and 70.[1] Part 60 of the Proposed Rule would change whether and where

[1] Decennial Census of the Population of Americans; Proposed Residence Criteria and Proposed Regulations for Demographic Questions, 91 Fed. Reg. 57524 (proposed Sept. 10, 2026) (to be codified at 15 C.F.R. pts. 60, 70).

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certain individuals are counted under the decennial census. Part 70 would banish from the decennial short-form questionnaire certain longstanding demographic questions, including those related to race and ethnicity. Announcing the Proposed Rule, the Bureau provided a comment deadline of October 13 and scheduled a single consultation with Indian Tribes only eleven days before that deadline, on October 2. After objections from Tribal governments, the Bureau extended the October 13 deadline to November 2, 2026, but did not use that additional time to add any Tribal consultation sessions.

Both Parts 60 and 70 have serious flaws that will negatively impact American residents across the country, and we anticipate that the Bureau will receive many comment letters highlighting the grave ramifications of those proposed changes. We therefore focus here on concerns uniquely applicable to Indigenous communities and individuals—notably Part 70's proposed eradication of data on AI/AN populations and the Bureau's failure to properly consult with Tribes. Our concerns, as discussed below, impact enumeration as well as the duties that the Federal Government owes Tribes as sovereign nations.

## II. Substantive Errors with Proposed Part 70

The language of Proposed Part 70 would restrict "the inclusion of certain demographic questions on the decennial census short-form questionnaire or any questionnaire used for the enumeration of the population," including questions about "race [or] ethnicity."[2] The identities of Tribal citizens are not racial or ethnic but instead political identities borne from the sovereignty of Tribal governments. Nonetheless, the only way in which the decennial census captures Tribal identity is through the race and ethnicity portion of the questionnaire.[3]

The United States has a special government-to-government relationship with each of the 575 federally recognized Indian Tribes, rooted in the United States Constitution, Indian treaties, bilateral agreements, Acts of Congress, Executive Orders, and common law long recognized by the U.S. Supreme Court. In fulfilling its obligations, the Federal Government has sometimes come to rely upon data from the decennial census's inquiry into race and ethnicity to determine the United States' AI/AN population.

### A. Errors with Enumeration and Apportionment

As the Bureau noted in the Proposed Rule, the core constitutional purpose of the decennial census is to apportion congressional seats among the 50 States. The Bureau attempts to justify its Proposed Rule by arguing that it would retain only what is necessary for accurate reapportionment. The Bureau ignores the role, however, that data about race and ethnicity plays in making future decennial censuses more accurate.

After each decennial census, the Bureau undertakes an extensive and sophisticated Post-Enumeration Survey, or PES, to determine which groups of persons were systematically undercounted.[4] While the

[2] *Id.* at 57530.

[3] In the 2020 Census, there were two separate questions to collect race and ethnicity data. The first read, "Is this person of Hispanic, Latino, or Spanish origin?" The second question asked, "What is this person's race?" and provided options with checkboxes (i.e., "White," "Black or African American," "American Indian or Alaska Native," and so on) as well as a space to print one's specific racial origin. U.S. CENSUS BUREAU, *2020 Census Frequently Asked Questions About Race and Ethnicity* (Aug. 21, 2021), https://www.census.gov/programs-surveys/decennial-census/decade/2020/planning-management/release/faqs-race-ethnicity.html#accordion-9072a6e07e-item-69f4218279.

[4] *See* SHADIE KHUBBA ET AL., U.S. CENSUS BUREAU, PES20-G-01, NATIONAL CENSUS COVERAGE ESTIMATES FOR PEOPLE IN THE UNITED STATES BY DEMOGRAPHIC CHARACTERISTICS: 2020 POST-ENUMERATION SURVEY ESTIMATION REPORT 1 (Mar. 2022), https://www2.census.gov/programs-surveys/decennial/coverage-measurement/pes/national-census-coverage-estimates-by-demographic-characteristics.pdf.

data gleaned from the PES is not directly used for actual enumeration or apportionment,[5] the PES is used to "provide[] a measure of overall census quality and [to] help [the Bureau] identify ways to improve the next census."[6]

Importantly, the decennial census's undercount is not, and has never been, uniformly distributed. According to the U.S. Government Accountability Office's review of data from the 2020 decennial census, "the estimate of populations of American Indians or Alaska Natives, alone or in combination, living on reservations was *the most undercounted of any demographic group*."[7] And the Native undercount stretches back through multiple decades. The Bureau has therefore made it a priority to work with Tribal governments to more accurately identify AI/AN individuals since at least the 1980s, holding programs and conferences for that express purpose.[8] However, even with these efforts, the population of Tribal peoples on reservations experienced a statistically significant undercount in both the 2010 and 2020 censuses.[9]

Data analyzing the differential undercount of AI/AN populations in the decennial census have been critical to helping the Bureau build a more accurate count of the Tribal population in the following decade. Inevitably, by removing the race and ethnicity question from the 2030 decennial census, the Bureau will undermine its own constitutionally mandated duty to enumerate each individual and properly apportion seats in Congress as it erases the data necessary to create a more accurate 2040 decennial census. Thus, the Bureau is simply incorrect in characterizing data on race and ethnicity as irrelevant to the Census's core constitutional purpose.

B. Harm to Federal Indian Programs and Funds that Rely on Decennial Census Data

Data on the AI/AN population gleaned from the decennial census has come to be instrumental to the Federal Government's administration of Tribally focused programs, services, and funding, including in designing and authorizing Federal Indian programs and services and in determining how much money to appropriate for those programs and services. According to the Bureau, decennial "[c]ensus data . . . help guide how billions of dollars in [F]ederal, state, and [T]ribal funding are distributed. Accurate census data leads to fairer allocations of funds that support [T]ribal programs in meeting community member needs."[10] In Fiscal Year 2025 alone, the President budgeted almost $35 billion for Federal Indian programs and services, touching more than 30 Federal departments and agencies that would distribute those funds to Tribes and AI/AN peoples.[11] As Congress has noted, the funding of these programs and services is part of the Federal Government's commitment "to support[] and assist[] Indian [T]ribes in the development of strong and stable [T]ribal governments, capable of administering quality

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[5] *See Dep't of Com.. v. U.S. House of Representatives*, 525 U.S. 316, 343 (1999); *see also id.* at 346 (Scalia, J., concurring) ("[A] strong case can be made that an apportionment census conducted with the use of 'sampling techniques' is not the 'actual Enumeration' that the Constitution requires.").

[6] Timothy Kennel, *The Post-Enumeration Survey: Measuring Cover Error,* U.S. CENSUS BUREAU (Dec. 16, 2021), https://www.census.gov/newsroom/blogs/random-samplings/2021/12/post-enumeration-measuring-coverage-error.html.

[7] U.S. GOV'T ACCOUNTABILITY OFF., GAO-23-105473, COVID-19 RELIEF FUNDS: LESSONS LEARNED COULD IMPROVE FUTURE DISTRIBUTION OF FEDERAL EMERGENCY RELIEF TO TRIBAL RECIPIENTS 7 (Dec. 15, 2022) (emphasis added), https://www.gao.gov/products/gao-23-105473.

[8] *See* U.S. CENSUS BUREAU, TRIBAL CONSULTATION HANDBOOK: BACKGROUND MATERIALS FOR TRIBAL CONSULTATIONS ON THE 2020 CENSUS 5–10 (2015), https://www.census.gov/content/dam/Census/library/publications/2015/dec/2020_tribal_consultation_handbook.pdf.

[9] *See* Press Release, U.S. Census Bureau, Census Bureau Releases Estimates of Undercount and Overcount in the 2020 Census (Mar. 10, 2022), https://www.census.gov/newsroom/press-releases/2022/2020-census-estimates-of-undercount-and-overcount.html.

[10] TRIBAL CONSULTATION HANDBOOK, *supra* note 8, at 2.

[11] U.S. DEP'T OF THE INTERIOR, *FY 2025 Native American Funding Crosscut* 7, 12–13 (Nov. 2024), https://www.doi.gov/libraries/pdf.js/web/viewer.html?file=https%3A%2F%2Fwww.doi.gov%2Fsites%2Fdefault%2Ffiles%2Fdocuments%2F2024-12%2F2025-native-american-funding-crosscut-report508.pdf.

programs and developing the economies of their respective communities."[12]

While there are multiple Federal programs that rely upon decennial census data regarding AI/AN populations, we will highlight three, for illustrative purposes: the Indian Housing Block Grants (IHBGs), the 2020 CARES Act, and Title IV-B and Title IV-E funding under the Social Security Act.

1. Indian Housing Block Grants

According to the U.S. Department of Housing and Urban Development, IHBGs are "the primary means by which the Federal Government fulfills its trust responsibilities to provide adequate housing to Native Americans and is the single largest source of Indian housing assistance."[13] These block grants are specifically intended to help American Indian families access affordable housing.[14] Since 2018, Congress has also appropriated funds for IHBG Competitive Grants, which provides additional competitive funding for housing projects for low-income American Indian families.[15] According to Congress, "providing affordable homes in safe and healthy environments is an essential element in the special role of the United States in helping [T]ribes and their members to improve their housing conditions and socioeconomic status."[16]

To determine the amount of money to be allocated to a given Tribe under IHBGs, Congress mandated that the Secretary of Housing and Urban Development "establish a formula" that would specifically account for the needs of Indian Tribes.[17] Consistent with that congressional mandate, 24 C.F.R. Part 1000 establishes a formula that depends in part on each Tribe's AI/AN population as derived from "the most recent U.S. Decennial Census data."[18] And the IHBG Competitive Housing Grants, in turn, are available to eligible IHBG formula recipients.[19] So the allocation of resources to Tribal governments is specifically and intentionally informed by the AI/AN data collected in the decennial census. If the Bureau promulgates Part 70, the 2030 decennial census will not generate any AI/AN data, and thus the formula used for the IHBG and, relatedly, IHBG Competitive Grants would be unusable.

Maintaining the data necessary to employ this formula is not merely a matter of bureaucratic convenience. Allocating housing funds efficiently and equitably among Tribal communities is essential to the United States' fulfilment of its treaty obligations to Tribal Nations. The very essence of the United States' hundreds of treaties with Tribal Nations was that the Tribe would cede thousands, sometimes millions, of acres of land that it previously inhabited, the United States would "reserve" to the Tribe a portion of land and hold it in trust for the benefit of the Tribe and its members, and the resulting "reservation" would be protected as a self-governing homeland for the Tribe and its members, in perpetuity. Because the land cessions required many Tribal families and communities to move from ceded lands to the reservation, housing was at least impliedly, and often expressly, central to the treaties' negotiated terms.[20] As such, the promise of Indian housing—currently fulfilled in significant part

[12] Indian Self-Determination and Educational Assistance Act of 1975, 25 U.S.C. §§ 5301, 5302(b).
[13] *Indian Housing Block Grant Program*, U.S. DEP'T OF HOUS. AND URB. DEV., https://www.hud.gov/helping-americans/public-indian-housing-ihbg (last visited Oct. 14, 2026).
[14] *See id.*; *see also* GRANTS.GOV, *Indian Housing Block Grant (IHBG) Competitive Grant Program* (May 13, 2026), https://simpler.grants.gov/opportunity/3991956e-0634-491e-8fce-5912ea4a59d0.
[15] *See Indian Housing Block Grant (IHBG) Competitive Grant Program*, U.S. DEP'T OF HOUS. AND URB. DEV., https://www.hud.gov/helping-americans/public-indian-housing-ihbg-cgp (last visited Oct. 13, 2026).
[16] Native American Housing and Self-Determination Act of 1996, 25 U.S.C. § 4101, 4101(5).
[17] *Id.* § 4152(a)(1), (b).
[18] 24 C.F.R. § 1000.330(b)(1) (2016).
[19] *See Indian Housing Block Grant (IHBG) Competitive Grant Program*, U.S. DEP'T OF HOUS. AND URB. DEV., https://www.hud.gov/helping-americans/public-indian-housing-ihbg-cgp (last visited Oct. 15, 2026).
[20] *See* Matthew L.M. Fletcher, *Failed Protectors: The Indian Trust and Killers of the Flower Moon*, 117 MICH. L. REV. 1253, 1257 (2019); RESTATEMENT OF THE LAW, THE LAW OF AMERICAN INDIANS § 4 (A.L.I. 2021).

through IHBGs that rely on AI/AN data from the decennial Census—has deep roots, dating back to the early days of the Republic.

Moreover, the United States has acknowledged the role that these funds play in fulfilling its longstanding obligations to Tribal governments. In the Native American Housing Assistance and Self-Determination Reauthorization Act of 1996, or NAHASDA, under which Congress originally allocated funding for IHBG grants, Congress recognized the "unique relationship between the Government of the United States and the governments of Indian [T]ribes" and the Federal Government's "unique Federal responsibility to Indian people."[21] And, according to the U.S. Department of Housing and Urban Development, "Tribal sovereignty and Tribal self-determination drive the IHBG program. These principles are grounded in long-standing treaties, court decisions, statutes, Executives Orders, the U.S. Constitution, and . . . NAHASDA."[22] As such, IHBGs help ensure that the Federal Government meets its longstanding treaty and trust obligations to our Nation's Indian Tribes.

2. The 2020 CARES Act

In the midst of the COVID pandemic, the Federal Government granted over $8 billion to Tribal governments as part of the CARES (or Coronavirus Aid, Relief, and Economic Security) Act.[23] This money was earmarked for relief to Tribal businesses, aid for Tribal governments for "'necessary expenditures' arising due to the COVID-19 outbreak," and additional relief for economic stabilization.[24] The CARES Act also set aside monies to assist Tribal governments with administering public safety and justice, deep-cleaning facilities and purchasing personal protective equipment, providing healthcare in response to COVID, and supporting public-health activities.[25] This funding was necessary to help Tribes across the country provide both financial and health-based resources for their citizenry in the midst of an unprecedented global pandemic.

Notably, these resources for Tribal governments were allocated using the same data and formulas utilized in IHBG distribution, including total counts of the AI/AN population from the decennial census.[26] The Department of the Treasury described this data as "the most consistent and reliable metric" to disburse the CARE Act funds, especially in the midst of an emergency.[27] The Treasury explained that other sources of data, specifically the American Community Survey, or ACS, would have been an inadequate measure for calculating Tribal populations when compared to the decennial census data, explaining that "the ACS sampling and weighting is based at the county level and since [T]ribal areas are sub-county entities, the Tribal population can fluctuate substantially from year-to-year."[28] Unlike the ACS, the decennial census accounts, or at least attempts to account, for every individual in the United States, making this data especially useful for circumstances, such as those here, where an exact population count truly matters.

This, too, is not just a modern concern tied to a recent Federal program. It has deep roots in the United

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[21] 25 U.S.C. § 4101(2).
[22] *Indian Housing Block Grant Program*, *supra* note 13.
[23] *See* Coronavirus Aid, Relief, and Economic Security (CARES) Act, 134 Stat. 281, 501 (2020) (codified at 42 U.S.C. § 801(a)(2)(B)).
[24] MAINON A. SCHWARTZ, CONG. RSCH. SERV., IF11500, THE CARES ACT: IMPLEMENTATION FOR TRIBES 1 (2020).
[25] *See id.*
[26] *See* U.S. DEP'T OF THE TREASURY, CORONAVIRUS RELIEF FUND ALLOCATIONS TO TRIBAL GOVERNMENTS 2–3 (May 5, 2020), https://home.treasury.gov/system/files/136/Coronavirus-Relief-Fund-Tribal-Allocation-Methodology.pdf.
[27] U.S. DEP'T OF THE TREASURY, CORONAVIRUS RELIEF FUND FREQUENTLY ASKED QUESTIONS ON TRIBAL POPULATION 1 (June 4, 2020), https://home.treasury.gov/system/files/136/FAQ-on-Tribal-Population-Data.pdf. Notably, Treasury cited this same decennial census data on AI/AN populations as central to administering the Tribal Transportation Program formula. *Id.* at 1 n.1.
[28] *Id.* at 2.

States' treaty obligations to Tribal Nations.[29] For example, in several treaties, as partial consideration for Tribal land cessions, the United States promised medical services and supplies to Tribes.[30] None of the three branches of our Federal Government take such promises lightly. Nor should they. As Justice Black wrote two-thirds of a century ago, "Great nations, like great men, should keep their word."[31]

3. Titles IV-B and IV-E of the Social Security Act

Title IV-B of the Social Security Act provides formula funding to Tribes for Tribal child-welfare services.[32] This program is aimed at prevention and early intervention in maintaining family structures for AI/AN children.[33] Additionally, to operate a direct Title IV-E program, which supports "foster care maintenance payments, adoption assistance, optional guardianship assistance programs, optional prevention services, optional legal representation, and related administration and training costs," a Tribe must already be receiving Title IV-B funds.[34] Therefore, a Tribal government's ability to care for its youth through both preventative and prescriptive programming is related to its ability to receive Title IV-B funds.

Since at least Fiscal Year 2003, the Department of Health and Human Services' management of these funds has relied on decennial census data, including "the number of individuals on the reservation and trust lands, by age and sex, who report themselves as American Indian or Native Alaskan only."[35] The decennial census data from 2020 has been used to administer these funds as the default option for determining the applicable Tribal population,[36] and—absent promulgation of the Bureau's proposed Part 70—these formulas will likely be recalibrated with AI/AN data from the 2030 decennial census.[37]

Congress has made it the policy of this Nation to "to protect the best interests of Indian children and to promote the stability and security of Indian Tribes."[38] "[T]hrough statutes, treaties, and the general course of dealing with Indian Tribes, [Congress] assumed the responsibility for the protection and preservation of Indian [T]ribes and their resources"—and most critically, "the continued existence and integrity of Indian Tribes [in] their children."[39] These types of child-welfare resources are precisely the ones provided for by Title IV-B and Title IV-E funding.

Just as with IHBGs and the 2020 CARES Act, Titles IV-B and IV-E have deep roots in the United States' Indian treaty and trust obligations. At least 110 Indian treaties provided for Indian education.[40] And many Indian treaties expressly protected orphans by providing property or funds, or by specifying who would appoint guardians.[41] Thus, Federal programs and services promoting Indian child welfare, no less

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[29] *See Rosebud Sioux Tribe v. United States*, 9 F.4th 1018, 1024 (8th Cir. 2021).
[30] Betty Pfefferbaum, Rennard J. Strickland, Everett R. Rhoades & Rose L. Pfefferbaum, *Learning How To Heal: An Analysis of the History, Policy, and Framework of Indian Health Care*, 20 AM. INDIAN. L. REV. 365, 369 (1996).
[31] *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (Black, J., dissenting).
[32] *See* ADMIN. FOR CHILD. AND FAMS., TRIBAL IV-B GUIDE: NAVIGATING FEDERAL CHILD WELFARE SERVICES FUNDING FROM THE CHILDREN'S BUREAU 14 (2025), https://acf.gov/sites/default/files/documents/cb/title-iv-b-guide.pdf.
[33] *See id.*
[34] *Id.* at 14–15.
[35] DEP'T OF HEALTH & HUM. SERVS., ACYF-CB-PI-02-07 (Aug. 19, 2002), https://acf.gov/sites/default/files/documents/cb/pi0207.pdf.
[36] *See* TRIBAL IV-B GUIDE, at 53.
[37] *See* DEP'T OF HEALTH & HUM. SERVS., ACYF-CB-PI-24-03 (Feb. 21, 2024), https://acf.gov/sites/default/files/documents/cb/PI-24-03.pdf.
[38] Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901, 1902.
[39] *Id.*
[40] *See* Raymond Cross, *American Indian Education: The Terror of History and the Nation's Debt to the Indian Peoples*, 21 U. ARK. LITTLE ROCK L. REV. 941, 950 (1999).
[41] *See* Matthew L.M. Fletcher and Wenona T. Singel, *Indian Children and the Federal–Tribal Trust Relationship*, 95 NEB. L. REV. 885, 923, 927 (2017).

than Federal block grants for Indian housing and Federal pandemic aid for Indian healthcare, are deeply rooted in the treaty and trust obligations that the United States owes all Native Americans.

The Census Bureau therefore should, whenever possible, avoid needlessly undermining these longstanding programs and services, as Part 70 of the Proposed Rule clearly would do. Indeed, doing so might well violate Federal law.[42] As Justice Gorsuch explained in the Supreme Court's most recent Indian-treaty case, *Washington State Department of Licensing v. Cougar Den, Inc.*,[43] this is "an old and familiar story."[44] Indians ceded "millions of acres … to the United States under significant pressure," in return for "a handful of modest promises."[45] An agency "dissatisfied with the consequences" of those promises seeks to evade them, proclaiming, "It is a new day."[46] But "the Court holds the parties to the terms of their deal" because, as Justice Gorsuch put it, "It is the least we can do."[47]

C. Programs Reliant on ACS Data

The harms inflicted on Indian Country by eliminating the decennial census's race and ethnicity question cannot be cured by recourse to other Census Bureau products, such as the American Community Survey, or ACS. Not only does ACS data have a higher margin of error in rural communities, such as reservations,[48] but ACS race and ethnicity data is reliant upon race and ethnicity data from the decennial census.

In addition to programs that rely directly on decennial census data, Tribal-facing initiatives reliant on ACS data would also be impacted by the Bureau's Proposed Rule. Notably, the Bureau has claimed that the change to the 2030 Census would not impact its "ability to ask demographic questions on the American Community Survey or any other surveys that are not used for the enumeration of the population, or to receive demographic data from other sources."[49] But the ACS is intrinsically linked to the results of the decennial census in at least two ways. First, "ACS estimates are . . . controlled to match the Census Bureau's annual population estimates, by age, sex, race, and Hispanic origin," which has a base population built from decennial census data.[50]

Second, decennial census data is used in the administration of the ACS, as the Bureau relies upon race and ethnicity statistics to determine the areas where it will first send a Computer Assisted Personal Interviewer (CAPI), rather than a mail questionnaire, to collect ACS data.[51] As the Bureau has noted,

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[42] *See, e.g., Morton v. Ruiz*, 415 U.S. 199, 236 (1973) (reaffirming "[t]he overriding duty of our Federal Government to deal fairly with Indians" and to uphold "'the distinctive obligation of trust incumbent upon the Government in its dealings with the[m]'" (citation omitted)).
[43] 586 U.S. 347 (2019).
[44] *Id.* at 377 (Gorsuch, J., concurring in the judgment).
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *See* U.S. CENSUS BUREAU, UNDERSTANDING AND USING AMERICAN COMMUNITY SURVEY DATA: WHAT USERS OF DATA FOR RURAL AREAS NEED TO KNOW 8 (Oct. 2020), https://www.census.gov/content/dam/Census/library/publications/2020/acs/acs_rural_handbook_2020.pdf.
[49] Proposed 15 C.F.R. § 70.4.
[50] Population Reference Bureau, *Differences Between the ACS and Decennial Census* (Apr. 14, 2009), https://www.prb.org/resource/differences-between-the-acs-and-decennial-census/; U.S. CENSUS BUREAU, UNDERSTANDING AND USING AMERICAN COMMUNITY SURVEY DATA: WHAT ALL DATA USERS NEED TO KNOW 15–17 (Sept. 2020), https://www.census.gov/content/dam/Census/library/publications/2020/acs/acs_general_handbook_2020_ch04.pdf; U.S. CENSUS BUREAU, METHODOLOGY FOR THE UNITED STATES POPULATION ESTIMATES: VINTAGE 2024, at 2-4 (Dec. 2024), https://www2.census.gov/programs-surveys/popest/technical-documentation/methodology/2020-2024/methods-statement-v2024.pdf.
[51] *See* U.S. CENSUS BUREAU, *Chapter 4: Sample Design and Selection*, in AMERICAN COMMUNITY SURVEY AND PUERTO RICO COMMUNITY SURVEY DESIGN AND METHODOLOGY (VERSION 3.0) 14–16 (Nov. 28, 2022),

the AI/AN population is perennially undercounted in the ACS, and to help remedy this concern, CAPIs travel in-person to collect responses from Native individuals and families in areas where at least ten percent of the population reported were AI/AN in the last decennial census. As such, without decennial data, the ACS may be unable to properly determine where additional resources, like CAPIs, are necessary to accurately capture responses from the AI/AN population, thereby leading to even more significant undercounting of AI/AN individuals. With the ACS being so significantly influenced by decennial data collection, the removal of questions on race and ethnicity in 2030 would undermine the Bureau's ability to accurately reflect race and ethnicity data in the ACS, too.

There are numerous Tribal-facing programs for which the Federal Government relies on ACS data, including research and services through the Office of Minority Health Services, the Department of Labor's Indian and Native American Programs, and the Bureau of Indian Education's Johnson-O'Malley program. The Office of Minority Health Services, which "supports research, education, service, and policy development that address health disparities in AI/AN" populations,[52] uses ACS data to map out Tribal populations in relation to life expectancy and health status, as well as health-insurance coverage.[53] The Department of Labor's Indian and Native American Programs uses 5-year ACS data to determine poverty and unemployment rates for the AI/AN population as part of their employment and training program.[54] And the Bureau of Indian Education uses the ACS data to determine which children are eligible for the Johnson-O'Malley program, which helps meet the needs of AI/AN children in public and Tribal schools.[55] The Federal Government would be unable to properly administer any of these programs to Tribal populations if the Bureau promulgates proposed Part 70.

D. Tribes' Ability to Self-Govern Effectively

The removal of the race and ethnicity questions from the decennial census will also harm Tribal governments' abilities to administer their own Tribal programs to their own Tribal citizenry—a congressionally protected interest. Tribes use census data to help inform their own governance decisions and understanding of their citizens. According to the Bureau, Tribal "planners and administrators, as well as national organizations that work with the AIAN community, may find ACS estimates useful in accessing funding for [T]ribal programs and initiatives."[56] For example, the Bureau has been providing a tool to Tribes known as My Tribal Area.[57] This interactive online tool provides specific data on Tribal lands, including data related to the race and ethnicity of persons residing in specific Tribal statistical areas. These data are provided through both the ACS and the decennial census. Tribes have come to rely on this tool when servicing their own populations. According to a Bureau intergovernmental-affairs specialist, My Tribal Area "can be especially useful for grant writers, who heavily rely on proof in

https://www2.census.gov/programs-surveys/acs/methodology/design_and_methodology/2022/acs_design_methodology_ch04_2022.pdf.

[52] U.S. OFF. OF MINORITY HEALTH, *Center for Indigenous Innovation and Health*, https://minorityhealth.hhs.gov/center-indigenous-innovation-and-health (last visited Oct. 16, 2026).

[53] *See* U.S. OFF. OF MINORITY HEALTH, *American Indian and Alaska Native Health*, https://minorityhealth.hhs.gov/american-indian-and-alaska-native-health (last visited Oct. 16, 2026).

[54] *See* Employment and Training (ETA) Program Year (PY) 2024 Workforce Innovation and Opportunity Act (WIOA) Section 166, Indian and Native American Programs Grantee Allotments, 89 Fed. Reg. 53646 (June 27, 2024).

[55] *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-24-106844, BUREAU OF INDIAN EDUCATION: INFORMATION ON EFFORTS TO COUNT STUDENTS FOR AN EDUCATIONAL SERVICES PROGRAM 3–4 (2023), https://www.gao.gov/assets/d24106844.pdf.

[56] U.S. CENSUS BUREAU, THE AMERICAN COMMUNITY SURVEY: RESOURCES FOR AMERICAN INDIAN AND ALASKA NATIVE GROUPS (Sept. 2026), https://www.census.gov/content/dam/Census/programs-surveys/acs/Library/OutreachMaterials/ACSFlyers/Resources_for_AIAN.pdf.

[57] U.S. CENSUS BUREAU, *My Tribal Area*, www.census.gov/tribal/ (last visited Oct. 13, 2026).

numbers to persuade funders to support their causes."[58]

It is Federal policy "to provide for the full participation of Indian Tribes in programs and services conducted by the Federal Government for Indians and to encourage the development of human resources of the Indian people."[59] And the Federal Government has committed itself to provide Tribes with "effective and meaningful participation by the Indian people in the planning, conduct, and administration of [Indian] programs and services."[60] Thus, by removing access to accurate census data on race and ethnicity, the Bureau's Proposed Rule would directly undercut Tribes' abilities to self-govern.

## III. Procedural Errors

This litany of substantive errors harming Tribal peoples seems to flow directly from the Proposed Rule's procedural defects—including a lack of intragovernmental consultation prior to dissemination of the Proposed Rule and the Bureau's failure to lawfully and adequately participate in intergovernmental consultation with Indian Tribes.

Regarding the first of these errors, it is disturbing that the Bureau has completely failed to acknowledge the host of Federal Indian programs and services that would be catastrophically impacted by promulgation of the Proposed Rule. Typically, the public might expect to be provided with some explanation of the impact of such a significant rule change, including a comprehensive catalog of the Federal programs that would be implicated. But the preamble to the Proposed Rule completely fails to mention any Federal Indian programs or services that would be put at risk by Part 70. This void suggests the Bureau's haphazard and rushed process in launching this Proposed Rule.

Similarly, the Bureau has hastily and carelessly rushed through its mandatory consultation with Tribal governments, in violation of both the letter and the spirit of Federal law guaranteeing proper consultation with federally recognized Tribes. The Proposed Rule indicates that the Bureau would consult with Tribal governments under Executive Order 13175, which allows for "an accountable process to ensure meaningful and timely input by [T]ribal officials in the development of regulatory policies that have [T]ribal implications."[61]

The Bureau has also developed—and here largely ignored—its own Tribal consultation policies to implement Executive Order 13175.[62] In carrying out their responsibilities under Executive Order 13175, Federal agencies' Tribal consultation "policies and procedures require extra, ***meaningful*** efforts to involve [T]ribes in the decision-making process."[63] According to the Bureau's Tribal consultation policy, "[t]he tenets of [T]ribal consultation require ***early*** notification and ***early*** opportunity to provide input and incorporation in the process where practicable and permitted by law."[64] Consultation should occur "throughout the planning and implementation of policy, rules, or programs that may affect [T]ribes to ensure that [T]ribal rights and concerns are addressed. Consultation will provide for, but is not limited

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[58] Emma VandenEinde, *Census Bureau's 'My Tribal Area' tool is helpful to some, incomplete to others*, KUNC (Aug. 27, 2023), https://www.kunc.org/regional-news/2023-08-27/census-bureaus-my-tribal-area-tool-is-helpful-to-some-incomplete-to-others.

[59] Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203, pmbl. (1975).

[60] *Id.* § 3(b).

[61] Exec. Order No. 13175, 65 Fed. Reg. 67429, § 5 (Nov. 6, 2000).

[62] *See* U.S. CENSUS BUREAU, HANDBOOK FOR CONSULTATION WITH FEDERALLY RECOGNIZED INDIAN TRIBES 1–3, app. A (Dec. 2011), https://www.census.gov/content/dam/Census/library/publications/2011/dec/2011-handbook-indian-tribes.pdf; *see also* Tribal Consultation: Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 57881 (Nov. 5, 2009).

[63] *See Wyoming v. U.S. Dep't of Interior*, 136 F. Supp. 3d 1317, 1346 (D. Wyo. 2015) (emphasis added), *vacated as moot sub nom. Wyoming v. Sierra Club*, No. 15-8126, 2016 WL 3853806 (10th Cir. July 13, 2016).

[64] HANDBOOK FOR CONSULTATION WITH FEDERALLY RECOGNIZED INDIAN TRIBES, *supra* note 62, at 6 (emphasis added).

to, mutually agreed-upon protocols for timely communication, coordination, cooperation, and collaboration."[65] Notably, "[f]ailure of the Bureau to make any real attempt to comply with its own policy of consultation not only violates those general principles which govern administrative decisionmaking, but also violates the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people."[66]

Following the *Federal Register*'s publishing of the Notice, the Bureau scheduled virtual consultation with Tribes for October 2, 2026, with only two weeks' notice rather than the standard 30 days' notice. This single, approximately two-hour consultation had more than 800 individuals register and 550 individuals attend and was wholly inadequate for meaningfully consulting with the 575 federally recognized Indian Tribes. Notably, "only 19 Tribal Leaders, Tribal Nation designees, and representatives from Tribal-serving organizations were able to testify before the consultation abruptly terminated," with others still in the queue waiting to comment.[67] By contrast, when making changes to the 2020 decennial census, the Bureau invited Tribes to participate in multiple consultation sessions and a multi-stage national webinar that was conducted over the course of six months.[68]

Furthermore, originally, public comments to the notice were due on October 13, 2026—only about a month after the notice was originally published and less than two weeks after the Tribal consultation. While the comment deadline eventually was pushed back to November 2, 2026, there has not been nearly enough time for the intergovernmental discussions required by Executive Order 13175 and the Bureau's own Tribal consultation policy.

## IV. Conclusion

The promulgation of proposed Part 70 would trigger a cascade of negative effects, including the failure to properly enumerate and apportion the population in future decennial censuses in violation of the Constitution and altered services and funding to Tribal governments in violation of countless Federal laws and treaties. As can be seen from the lack of meaningful Tribal consultation in violation of Executive Order 13175 and the Bureau's own policy, the Bureau has failed to adequately address a host of concerns that would render the Proposed Rule disastrous for Indian Country. As such, we strongly request that the Bureau neither finalize nor promulgate the Proposed Rule.

Respectfully submitted,



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[65] *Id.* at 4, app. A.
[66] *Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707, 721 (8th Cir. 1979) (citation modified).
[67] NCAI, SUMMARY: U.S. CENSUS BUREAU TRIBAL CONSULTATION (Oct. 2026), https://cdn.sanity.io/files/raa5sn1v/production/ad77c4b503f1dba6ea16f842ac711d52a03ab7ae.pdf.
[68] TRIBAL CONSULTATION HANDBOOK, *supra* note 8, at 10.