



UCLA VOTING RIGHTS PROJECT, UNM CENTER FOR SOCIAL POLICY¹

New Mexico Vote-by-Mail: Matters of the Primary and State Election Laws

I. Introduction

New Mexico had a very successful Primary Election with one of the highest voter turnouts in state history, despite the tremendous challenges generated by the COVID-19 crisis. The overall number of ballots cast, just under 402,000, is a record for a Primary. While the turnout as a percentage of eligible voters (40%) was not quite a record for a Primary, it is six points higher than in 2016, and 15 points higher than in 2012. These numbers are even more impressive considering the backdrop of COVID-19 and the lack of the presidential race's relevance to New Mexicans on either side of the ticket. The Secretary of State and County Clerks offices did a tremendous job moving quickly to allow most voters to cast a mail ballot and provide a safe environment for voters to cast a ballot in person where necessary or desired.

However, despite these efforts, there were several issues with the Primary that raise concerns for the general election in November. These include lack of absentee ballot receipt after submitting a request, confusion regarding the due date to submit absentee ballots, and several counties failing to confirm their results until days (weeks, in the case of Dona Ana County) later. Most importantly, due to travel restrictions on Tribal lands and issues associated with access to absentee voting, New Mexico's current election laws proved inadequate to avoid disproportionately disenfranchising Native American voters during the COVID-19 crisis.

As we discuss in more detail in this research brief, and despite the efforts of many New Mexico Election Officials, the mostly by-mail New Mexico Primary combined with the state's cumbersome election laws to impose preventable burdens on many New Mexican voters. This is especially true for Native American voters who did not have access to voting centers in most of their communities. This report details the existing voting landscape in New Mexico, examines

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some of its shortcomings, and proposes a series of remedies to ensure that all voters have an equitable opportunity to cast their ballot in November and beyond. This is an ideal time to consider these issues given that voting laws may feature in the deliberations of the special legislative session this week. We recommend that the State of New Mexico amend New Mexico’s election laws and policies to:

- 1. Canvass all absentee ballots postmarked on Election Day or received up to seven days after Election Day;**
- 2. Establish a robust curing process for rejected ballots;**
- 3. Allow absentee ballot collection at designated sites for Native voters; and**
- 4. Place voting centers on or adjacent to Tribal lands, restricted to and staffed by residents of those tribes.**

II. New Mexico and COVID-19

a. Health Orders

Governor Michelle Lujan Grisham’s original “Stay at Home” order instructed New Mexicans to stay at home except for emergency or essential outings and mandated the closure of non-essential businesses. Having extended the order multiples time, the Governor’s most recent order came into effect on May 27, 2020. While gatherings and occupancy in stores are still limited and many facilities and areas remain closed, restaurants may begin a “soft” re-opening.²

b. COVID-19 Cases

New Mexico’s aggressive “Stay at Home” orders helped the state garner national attention for its handling of COVID-19. New Mexico has now had a total of 9,845 positive tests for COVID-19 in 31 of the state’s 33 counties.³ The number of deaths of New Mexico residents related to COVID-19 is now 440,⁴ much lower than what predictive models suggested the state would endure due to its high poverty rates and limited resources. However, COVID-19 is devastating the Native American population. Native Americans make up 10.6% of the state’s population but represent 45.98% of COVID-19 cases.⁵ As we discuss later in this brief, this vast inequality facing Native Americans was the motivation to decrease voting centers in Pueblo communities.

² NEW MEXICO DEP’T OF HEALTH, <https://cv.nmhealth.org/2020/05/26/stay-at-home-order-extended> (last visited June 17, 2020).

³ NEW MEXICO DEP’T OF HEALTH, <https://cvprovider.nmhealth.org/public-dashboard.html> (last visited June 15, 2020)

⁴ *Id.*

⁵ *Id.*

III. Current New Mexico Election Law

a. Court Order

New Mexico provides no-excuse absentee voting, and this option is clearly attractive to many voters based on the turnout in the recent Primary Election. Data from the New Mexico Secretary of State's Office shows 5,571 people signed up online to vote by mail from March 20 — when the online portal to request an absentee ballot for the Primary first opened — through March 25. Seeking to expand vote-by-mail measures, 27 county clerks and the Secretary of State petitioned the New Mexico Supreme Court to mandate automatic mailing of absentee ballots to all registered voters. On April 14, the state Supreme Court issued an order instructing Secretary of State Toulouse Oliver and county clerks to mail all eligible voters an absentee ballot application to request a mail-in ballot. Voters were required to complete those ballot applications and send them in to/drop them off at their county clerk's office in order to receive an absentee ballot in the mail. An online application for absentee ballots is also available. The Justices also ordered all in-person voting on Election Day or in-person early voting to comply with the state's ongoing public health orders. Counties scrambled to meet this order, putting in large printing requests with vendors and strategizing about expanding vote-by-mail infrastructure. As of May 27, 155,673 New Mexico voters were registered to vote by mail,⁶ and the state saw a record number of votes cast through absentee ballots. Six counties delayed their results because of the number of absentee ballots received.⁷

b. Acquiring an Absentee Ballot

How to Acquire an Absentee Ballot:

- Applications will be mailed to all voters by court mandate and must be received by 5 p.m. on May 28. Applications can also be downloaded online through the Secretary of State's website. The Secretary of State has separately provided an online module where voters can apply for an absentee ballot, track their ballot, and more.
- Applications for an absentee ballot require:⁸
 - The applicant's printed and signed (or e-signed) name
 - Date of birth
 - NM Driver's License/NM State ID Number
 - Social Security Number
 - Registered address (see below)

⁶ Matthew Reichbach, *Election Officials Prepare to County Flood of Absentee Ballots*, N.M. POL. REP. (May 27, 2020), <https://nmpoliticalreport.com/2020/05/27/election-officials-prepare-to-count-flood-of-absentee-ballots>.

⁷ New Mexico Secretary of State (@NMSecOfState), TWITTER (June 3, 2020, 9:50 AM), <https://twitter.com/NMSecOfState/status/1268223564420837383?s=20>.

⁸ N.M. Stat. § 1-6-4(C); *see also* NEW MEXICO SECRETARY OF STATE, <https://portal.sos.state.nm.us/OVR/WebPages/AbsenteeApplication.aspx?type=RA>.

c. Returning Absentee Ballots

Voters have three options to return their completed absentee ballot:

- By mail with the provided envelope no later than 7 p.m. on Election Day; postage is covered by the state and ballots can be tracked online.
- In-person delivery to the County Clerk's Office; while the offices are closed, some (if not all) county clerk offices are offering drop box services for ballots.
- By dropping off at an alternative voting site or regular polling location, both during the early voting period and on Election Day.

IV. Shortcomings in New Mexico Election Law

a. Issue Areas for all New Mexicans

i. Lack of Curing Provision

New Mexico's election laws are silent regarding a curing process for rejected absentee ballots. Rejected ballots are recorded and placed in a designated container. While a voter may contest or appeal the rejection and provide the required missing element of the ballot, no provision of New Mexico election law covers how voters are to be contacted about their rejected ballot.⁹ Data is limited, but in 2018, for example, New Mexico rejected at least 1,562 provisional ballots and 240 absentee ballots.¹⁰ Failing to provide an adequate curing process is a violation of procedural due process based on the fundamental right to vote. This straightforward but critical limitation of New Mexico's law can and should be remedied before November's general election.

ii. Reduction of Polling Sites

Both early voting sites and polling sites on Election Day were reduced substantially from their planned numbers. Statewide there were 21 fewer early voting locations and 167 fewer sites open on Election Day than usual, according to figures provided by the Secretary of State's office. The numbers are tabulated here:¹¹

⁹ N.M. Stat. § 1-6-14, NMSA 1978.

¹⁰ ELECTION ADMINISTRATION COMMISSION, 2018 ELECTION ADMINISTRATION AND VOTING SURVEY REPORT 34 (2019), https://www.eac.gov/sites/default/files/eac_assets/1/6/2018_EAVS_Report.pdf.

¹¹ Gwyneth Doland, *Fewer Polling Places Present Challenges for Native Voters*, N.M. DEPTH (May 27, 2020), nminddepth.com/2020/05/27/fewer-polling-places-present-challenges-for-native-voters.

Polling Locations				
County	Early In-Person		Election Day	
	Original Plan	Actual	Original Plan	Actual
Bernalillo	21	17	72	61
Catron	2	2	8	8
Chavez	3	3	11	11
Cibola	4	2	18	9
Colfax	2	1	8	8
Curry	2	2	9	9
De Baca	1	1	1	1
Dona Ana	8	8	40	21
Eddy	2	2	13	9
Grant	2	2	11	6
Guadalupe	1	1	5	5
Harding	1	1	2	2
Hidalgo	1	1	6	6
Lea	5	5	17	6
Lincoln	2	2	6	3
Los Alamos	2	2	5	3
Luna	2	2	3	3
McKinley	7	5	44	25
Mora	1	1	11	11
Otero	5	5	17	17
Quay	1	1	6	6
Rio Arriba	6	6	28	28
Roosevelt	2	2	5	5
San Juan	5	4	27	6
San Miguel	2	2	14	14
Sandoval	21	11	47	30
Santa Fe	9	9	31	20
Sierra	1	1	8	6
Socorro	2	2	8	8
Taos	5	5	36	13
Torrance	2	1	11	11
Union	1	1	4	4
Valencia	4	4	16	6
	135	114	548	381

Some early voting sites were closed, as four pueblos—Santa Ana, San Felipe, Cochiti and Zia—closed their borders to non-residents. Each notified election officials that they would not host early voting sites.¹² The elevated rates of COVID-19 infections and casualties in these communities demand a sensitive approach. There are creative solutions for this challenge,

¹² *Id.*

including having voting sites in these Pueblo's available only to residents of those communities to limit interactions with non-residents. More importantly, by addressing some of the challenges we identify below, fewer eligible Native American voters will need to consider voting in-person because of expanded access to vote-by-mail.

iii. Deadlines for Absentee Ballots

The receive-by date for absentee ballots is confusing and unnecessary. Absentee ballots must be received by 7 p.m. on Election Day if they are to be counted. Voters are accustomed to filling out their ballot on Election Day, but—if they do so—they cannot have their ballot counted. Voters are also left attempting to calculate the time it will take to mail their ballot. While county clerk offices provided some guidance on this point, they failed to account for serious delays that affected ballot mailing times.¹³ Voters reported nine-day delivery times from county clerk offices to addresses within the same city.¹⁴ This is not the fault of state officials, but there will be similar challenges with delays in mail delivery in the fall, when a second spike in COVID-19 cases is anticipated.

The deadline was especially problematic in light of other logistical issues. The Santa Fe County Clerk admitted the vendor they contracted to mail the ballots had the wrong list, resulting in residents not receiving their ballots.¹⁵ This includes at least 33 people at a senior living facility, who are at heightened risk from COVID-19 and for whom voting in person is not a safe option.¹⁶ Voters have reported a month-long delay between requesting a ballot and receiving it.¹⁷ Others reported still waiting to receive their mail ballots just three days before the Primary Election.¹⁸ The list error also resulted in voters being turned away when they attempted to vote early.¹⁹ Furthermore, some voters faced problems with the online voter registration system, which incorrectly determined that users were not registered to vote despite years-old voting registrations.²⁰ In the week following the election, Bernalillo and Santa Fe counties received 1,362 late absentee ballots.²¹ These logistical issues emphasize the importance of changing the

¹³ *Id.*

¹⁴ *Id.* (“It took nine days for my absentee ballot to get from the Bernalillo County Clerk’s office to my house in the Northeast Heights [of Albuquerque]”).

¹⁵ Michael Gerstein, *Luján: Extend New Mexico's Absentee Voting Deadline*, SANTA FE NEW MEXICAN (May 27, 2020), https://www.santafenewmexican.com/news/coronavirus/luj-n-extend-new-mexicos-absentee-voting-deadline/article_ff22de0c-a02f-11ea-b57a-ab9f76c23b03.html.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* New Mexico already ranks low on percent of voter registration by citizen voting age population. *See* ELECTION ADMINISTRATION COMMISSION, 2018 ELECTION ADMINISTRATION AND VOTING SURVEY REPORT 48 (2019), https://www.eac.gov/sites/default/files/eac_assets/1/6/2018_EAVS_Report.pdf.

²¹ Dan McKay, *About 1.3K NM Ballots Arrive Too Late to Count*, ALBUQUERQUE J. (June 8, 2020), <https://www.abqjournal.com/1464363/about-13k-nm-ballots-arrive-too-late-to-count-ex-statewide-total-could-exceed-3000-if-the-trend-continues.html>.

deadline for absentee ballot receipt. This simple solution can go a long way toward ensuring that everyone who desires to cast a ballot is able to do so.

b. Issues that Especially Burden Native Voters

i. Native Americans with Nontraditional Addresses Face Additional Burden

Although moving toward a mail-only voting system has many benefits, including reducing the spread of COVID-19, the challenges Native Americans face with mail voting creates the need to consider hybrid models.²² These hybrid models should incorporate some of the best practices associated with mail based voting for Tribal communities and directly address issues identified in New Mexico's Primary.

Many Native American people do not have traditional street addresses.²³ When registering to vote in New Mexico, voters with nontraditional addresses can enter their residence with a sufficiently detailed description or by drawing a small map. The area to draw a map is small, and this method often leads to registrars arbitrarily assigning a precinct that may be inappropriate and may result in that person not showing up on that precinct's voter list.²⁴ Voters may enter a separate address at which they receive their mail, and this can be a P.O. box. Voters must fill out an absentee ballot application with the same address on file with their registration. Absentee ballot applications and ballots are sent to the address which voters list as their preferred mailing address.

This process disparately imposes two burdens on Native American voters. First, voters who opt to receive their mail at another's residence or location may have trouble accessing their absentee ballot as voters isolate themselves to avoid transmission of COVID-19. Reports from the Primary Election indicated that some Native voters had to drive 50 miles to access their absentee ballot.²⁵ Further, because some reservations closed their borders due to COVID-19, the U.S. Postal Service could not access voters on the reservation. This forces voters to travel to access their absentee ballots. During the Primary, Zia Pueblo residents, for example, were forced to drive 20 miles to a post office in Bernalillo to pick up and drop off mail ballots.

²² See generally NATIVE AMERICAN RIGHTS FUND, VOTE BY MAIL IN NATIVE AMERICAN COMMUNITIES, <https://www.narf.org/vote-by-mail>.

²³ THE NATIVE AMERICAN VOTING RIGHTS COALITION, VOTING BARRIERS ENCOUNTERED BY NATIVE AMERICANS IN ARIZONA, NEW MEXICO, NEVADA AND SOUTH DAKOTA (Jan. 2018).

²⁴ *Id.*

²⁵ Gwyneth Doland, *Fewer Polling Places Present Challenges for Native Voters*, N.M. DEPTH (May 27, 2020), nminddepth.com/2020/05/27/fewer-polling-places-present-challenges-for-native-voters.

ii. Election Materials Do Not Meet Language Access Mandate

Under the Department of Justice’s guidelines for implementation of Section 203 of the Voting Rights Act regarding language minority groups, materials generally provided by mail to residents must be offered in the applicable minority language. This includes mailing of materials in the minority language to persons who are likely to need them or to residents of neighborhoods in which such a need is likely to exist, supplemented by a notice of the availability of minority language materials in the general mailing (in English and in the applicable minority language) and by other publicity regarding the availability of such materials.

In New Mexico, twelve counties are covered by Section 203 for Native American language groups.²⁶ Outreach to county clerks indicated a general dismissal of the Section 203 mandate. While counties appear to provide some Navajo language radio stations and interpreters at polling sites to facilitate voter comprehension, most election materials are not published in Navajo, Apache, or Ute. Ballots cast by limited-English-proficiency voters tend to be disproportionately rejected by election officials.²⁷ New Mexico is required by law to advance Native language access to the ballot where it is covered by Section 203. Nevertheless, the reduction in polling sites on reservations has reduced language access resources. For example, in a normal year, there would be one translator at each of 13 stations on the Navajo Nation, helping an average of 500 people who request the service. This year translators were sent to four sites, including just two on the reservation.²⁸

V. Policy Recommendations

a. Provide Robust Curing Options

New Mexico must allow voters to correct mistakes on their absentee ballots. The state should adopt measures identical or suitably similar to the following: if a vote-by-mail ballot is missing a signature or contains other discrepancies meriting its rejection, the envelope must remain sealed. A voter must be notified that their ballot has been rejected within 72 hours of its rejection, and all communications with the voter must be recorded. The county clerk must notify a voter through multi-modal communication, including telephone, text message, email, and/or mail to inform the voter that their ballot has been rejected; the official must document the attempts made to contact the voter. Once notified, the voter should be given the opportunity to cure the discrepancy. These include online or telephonic identity verification or providing the voter with a replacement absentee ballot and return envelope. The least preferable method would be for an in-person cure. The curing period should last until 21 days after election day. County

²⁶ Where minority languages are unwritten, language assistance is measured by an “effectiveness” standard. *See* 28 C.F.R. Ch. 1, §55.18(c).

²⁷ *See, e.g., La Follette v. Padilla*, No. CPF 17-515931, 2018 WL 4050727, (Cal. Super. Apr. 09, 2018).

²⁸ Gwyneth Doland, *Fewer Polling Places Present Challenges for Native Voters*, N.M. DEPTH (May 27, 2020), nmdepth.com/2020/05/27/fewer-polling-places-present-challenges-for-native-voters.

auditors should be required to contact by phone any voters with outstanding ballots awaiting to be cured. Similar measures are already in place across the country to ensure that voters are given a meaningful opportunity to correct mistakes in the ballots they cast via mail.

b. Adopt an Extended Absentee Ballot Deadline

New Mexico should change their deadline for absentee ballots to accept all ballots that are postmarked or submitted on Election Day and, if lacking a postmark, received in the mail up to seven days after Election Day. This second measure is important because postmarks are not uniformly affixed by USPS and not every piece of mail will receive a postmark date.²⁹ Further, USPS has stated the organization will carry and deliver ballots through the mail if they lack sufficient postage, creating the possibility that some ballots submitted on or before Election Day will not carry a postmark date.³⁰ This approach is thereby the best way to ensure that all ballots are counted.

Counting all ballots submitted by Election Day, postmarked by Election Day, or received up to seven days after Election Day is a clearer and more manageable standard. Multiple states count ballots that were postmarked by Election Day or hand delivered to a polling location/drop off box by Election Day.³¹ Additionally, a number of states count ballots that were received *more than* seven days after Election Day, such as Alaska,³² Maryland,³³ Illinois,³⁴ so long as they are postmarked by Election Day. Accepting all ballots postmarked or submitted on Election Day or received up to seven days after should be the new standard for New Mexico.

Canvassing ballots after Election Day in the manner prescribed is akin to the principle behind extending poll hours when voters face Election Day access issues, as is sometimes ordered by federal courts.³⁵ When conditions render polls less accessible, federal courts are regularly willing to extend the time in which ballots may be cast and counted; in light of

²⁹ “As indicated by this excerpt and confirmed by numerous local election officials, a postmark date is not uniformly applied during these processes and may look different in various jurisdictions.” See discussion of USPS Mail Processing Guidelines <https://elections.wi.gov/node/6846>.

³⁰ Sam Levine (@srl), TWITTER (Apr. 22, 2020, 2:30 PM), <https://twitter.com/srl/status/1253067025263595520>.

³¹ These states include: Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming.

³² In Alaska, mail-in ballots postmarked by Election Day will be counted if received by the tenth day following the election. Alaska Stat. Ann. § 15.20.081 (West).

³³ Maryland vote-by-mail ballots postmarked by Election Day will be counted if received by mail by a local board no later than 10 a.m. on the second Friday after a special election. Md. Code Ann., Elec. Law § 9-505 (West).

³⁴ Illinois mail-in ballots postmarked by Election Day will be counted if received by fourteen days after Election Day. See 10 Ill. Comp. Stat. Ann. 5/19-8.

³⁵ See, e.g., Idaho State Democratic Party v. Rich (B. Lynn Winmill, D. Idaho 1:16-cv-491); In re 2016 Primary Election (Susan J. Dlott, S.D. Ohio 1:16-mc-5); Obama for America v. Cuyahoga County Board of Elections (Solomon Oliver, Jr., N.D. Ohio 1:08-cv-562); Ohio Democratic Party v. Cuyahoga County Board of Elections (Dan Aaron Polster, N.D. Ohio 1:06-cv-2692).

COVID-19, New Mexico should do just the same, adopting this clear standard that provides voters with more time to mail their absentee ballot. As shipping times vary among the many counties in New Mexico, COVID-19 increases the possibility of postal service delays in delivering absentee ballots to voters and county clerk offices, and the increased use of the vote-by-mail system overwhelms officials, it is imperative that New Mexico modify their absentee ballot deadlines. This measure is not merely crisis oriented, but is a fairer, more sensible policy under normal circumstances.

c. Allow Absentee Ballots Collection at Designated Sites for Native Voters and Open Sites in Native American Communities Restricted to Residents

For pueblo communities which maintain open borders, the state should coordinate a system to allow voters to have absentee ballots sent to a centralized P.O. box, permitting voters to collect their ballot closer to homes to which absentee ballots cannot be sent. For closed Pueblo communities, the state should coordinate collection of all ballots for reservation residents outside of their boundaries, such that voters do not need to individually drive to their nearest county clerk office to collect their ballot.

Although widespread mail voting is likely the best approach to combat the spread of COVID-19,³⁶ ensuring equal access to the ballot box in November requires ample in-person voting options for Native American voters who cannot vote by mail. To prevent the same shortage of in-person polling sites on Pueblo land that affected the Primary Election, the state should work directly with Tribes to create voting sites in Native American communities. These sites should be restricted to and ideally staffed by members of those communities. Executed properly, these measures would be compatible with any future closures to Tribal communities imposed by Governors of Pueblo nations and help reduce a potential spike in COVID-19 cases.

VI. Potential Legal Claims

a. Relating to Creation of a Statewide Curing Process for Rejected Ballots

As stated above, failing to provide an adequate curing process is a violation of procedural due process based on the fundamental right to vote. In *La Follete v. Padilla*,³⁷ the California Supreme Court found that California's election code, which required officials to reject an absentee ballot if the signatures on the ballot did not "compare," was facially unconstitutional.

³⁶ See generally UCLA VOTING RIGHTS PROJECT, PROTECTING DEMOCRACY: IMPLEMENTING EQUAL AND SAFE ACCESS TO THE BALLOT BOX DURING A GLOBAL PANDEMIC (March 23, 2020), <https://latino.ucla.edu/wp-content/uploads/2020/03/VRP-VBM-red..pdf>; UCLA VOTING RIGHTS PROJECT, VOTING AND INFECTION PREVENTION OF COVID-19 (April 1, 2020), <https://latino.ucla.edu/wp-content/uploads/2020/04/UCLA-VBM-Health-Safety-Report-2.pdf>; UCLA VOTING RIGHTS PROJECT, DEBUNKING THE MYTH OF VOTER FRAUD IN MAIL BALLOTS (April 14, 2020), <https://latino.ucla.edu/wp-content/uploads/2020/04/LPPI-VRP-Voter-Fraud-res.pdf>.

³⁷ No. CPF 17-515931, 2018 WL 4050727, (Cal. Super. Apr. 09, 2018).

The Court reasoned that because voting is a fundamental right under both the federal and California constitution, notice and opportunity to contest deprivation of one's right are fundamental to due process.³⁸

Federal and state courts all over the United States have invalidated statutes that require election officials to reject a ballot without providing notice to voters and curing periods. In *Zessar v. Helander*, a federal court held that Illinois' laws that allowed election officials to reject mailed-in ballots which they determined to contain signatures unlike the voter signature on record violated due process because voters were not able to "remedy the loss of vote in *that* election."³⁹ In *Fla. Democratic Party v. Detzner*,⁴⁰ the Court invalidated Florida's election law scheme which provided an opportunity to cure ballots with no signature, but denied voters whose ballots were deemed to have a mismatched signature an opportunity to cure.⁴¹ In *Democratic Exec. Comm. of Fla. v. Detzner*,⁴² the court found unconstitutional a Florida law allowing county election officials to reject mailed-in and provisional ballots for mismatched signatures. Accordingly, New Mexico's process is at issue with the fundamental right to vote. New Mexico must provide voters with adequate notice that their ballot has been rejected and provide a curing process that is not illusory in order to ensure that voters are not deprived of their constitutional rights.

b. Relating to Nontraditional Addresses

The 14th Amendment proscribes certain burdens on the right to vote. Election laws or enactments that place a burden on the right to vote are evaluated by the court under a balancing analysis, in which a court weighs "the character and magnitude of the asserted injury" against "the precise interests put forward by the State as justifications for the burden imposed by the rule."⁴³ "However slight [the] burden may appear . . . it must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'"⁴⁴ Here, requiring a standardized address burdens Native American voters who are not able to access mail in the same manner as other Americans through no fault of their own. Americans with standardized addresses usually receive their mail at their homes, but USPS is not able to deliver mail at non-traditional addresses. Additionally, the nearest P.O. boxes may be over an hour away, making it difficult for Native American voters to obtain election materials in a timely manner.⁴⁵ Such a burden is significant, triggering a searching scrutiny by the courts to evaluate the state's reasons for failing to fully accommodate Native voters.

³⁸ *Id.* at *2.

³⁹ *Zessar v. Helander*, No. 05 C 1917, 2006 WL 642646, at *7 (N.D. Ill. Mar. 13, 2006).

⁴⁰ No. 4:16CV607-MW/CAS, 2016 WL 6090943 (N.D. Fla. Oct. 16, 2016).

⁴¹ *Id.* at *1.

⁴² *Democratic Exec. Comm. of Fla. v. Detzner*, 347 F. supp. 3d 1017 (N.D. Fla 2018).

⁴³ *See Burdick v. Takushi*, 504 U.S. 434, 433 (1992).

⁴⁴ *Crawford v. Marion Ct. Election Bd.*, 553 U.S. 181, 191 (2008).

⁴⁵ *Id.*

Similarly, the Voting Rights Act disallows any election standards, practices or procedures which provide minorities with “less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.”⁴⁶ For the reasons stated above, Native American voters face a greater burden than other racial groups because of the large number of non-traditional addresses at reservations and dispersed nature of reservation living. Native Americans have also been subject to a long history of discrimination and lack of political representation, compelling a court to find in favor of unlawful burdens on their right to vote.

c. Relating to the Voter Identity Verification Process

As above, New Mexico must not impose upon voters any voter identity measures that unduly burden the right to vote. New Mexico generally does not impose such burdens on its voters.⁴⁷ Nevertheless, in order to remain compliant with federal statutory and constitutional provisions, the state must refrain from establishing new voter identification or registration hurdles as the state embraces expanded vote-by-mail measures.

VII. Conclusion

Especially in light of the shortcomings of New Mexico’s Primary Election, the state should update their election laws to accommodate new challenges and revise its cumbersome, antiquated policies. In particular, the state should:

- 1. Canvass all absentee ballots postmarked on Election Day or received up to seven days after Election Day;**
- 2. Establish a robust curing process for rejected ballots;**
- 3. Allow absentee ballot collection at designated sites for Native voters; and**
- 4. Create voting sites on or adjacent to Tribal lands that are restricted to and staffed by residents of those communities.**

These policies will directly address the challenges presented by the COVID-19 pandemic and the administration of a substantial absentee ballot program for the November 2020 General Election. With such extraordinary turnout in the 2020 Primary Election, the state should assume that an even greater number of voters will participate in November. If the state takes appropriate steps now, it can ensure that New Mexico enjoys a safe and successful election that does not impose undue burdens on any particular class of voters.

⁴⁶ 42 U.S.C 1973 § 2.

⁴⁷ *Id.*