



**STATEMENT OF JULIE KITKA**

**PRESIDENT**

**THE ALASKA FEDERATION OF NATIVES**

**U.S. SENATE COMMITTEE ON INDIAN AFFAIRS**

**OVERSIGHT HEARING ON  
“VOTING MATTERS IN NATIVE COMMUNITIES”**

**OCTOBER 27, 2021**

## **Introduction**

Chairman Schatz, Vice Chairwoman Murkowski, and Members of the U.S. Senate Committee on Indian Affairs, thank you for the opportunity to testify today on “Voting Matters in Native Communities.” My name is Julie Kitka, and I am the President of the Alaska Federation of Natives (AFN).<sup>1</sup>

Established in 1966 to achieve a fair and just settlement of aboriginal land claims, AFN is the oldest and largest statewide Native membership organization in Alaska. Our members include most of the federally recognized Alaska Native tribes; most of the regional and village Native corporations (ANCs) established under the Alaska Native Claims Settlement Act of 1971 (ANCSA);<sup>2</sup> and all of the regional nonprofit tribal consortia that contract or compact to administer federal programs pursuant to the Indian Self-Determination and Education Assistance Act of 1975 (ISDEAA).<sup>3</sup>

Having worked to overcome the decades-long disenfranchisement of Alaska Native voters, and counting as members nearly 500 federally-recognized tribes and ANCSAs, AFN is well positioned to help the Committee understand the continuing need to protect the Alaska Native vote. The provisions in S.4, The John R. Lewis Voting Rights Advancement Act of 2021 (VRAA), and Title III of that bill, The Frank Harrison, Elizabeth Peratrovich, and Miguel Trujillo Native American Voting Rights Act of 2021 (NAVRA), are essential to address the obstacles that continue to impede the political participation of Alaska Natives.

I want to begin by acknowledging the Committee’s important work on H.R. 1688, the Native American Child Protection Act, a bipartisan bill that Representative Don Young of Alaska supports as an original co-sponsor. H.R. 1688 strengthens programs related to the prevention, investigation, treatment, and prosecution of family violence, child abuse, and child neglect involving Native children and families. These are critical issues for Alaska Natives, and I commend the Committee for moving forward with their discussion of the House legislation.

Before turning to the topic of today’s hearing, I want to remind the Committee that we are still dealing with unprecedented change going on in our lives. Rapid change has been a key part of our lives for a number of decades and this change and disruption continues. Working together with our Congressional Delegation, we have made lasting improvements – extending life expectancy, reducing poverty, increasing access to life-saving health care, and building the capacity to stand on our own two feet. I want to express my deepest appreciation for the federal help we have received to try and combat the pandemic and economic collapse which affects us all. The acceleration of

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<sup>1</sup> I have served as AFN’s President for 30 years. For nearly 15 years, I have been a Director for Chugach Alaska Corporation (CAC), the Alaska Native regional corporation for the Chugach region. I also serve as a Commissioner for the Denali Commission (DC), an independent federal agency designed to provide critical utilities, infrastructure, and economic support throughout Alaska, including remote tribal communities. Two of my proudest accomplishments as a DC Commissioner have been overseeing the build out of 120 rural village-based clinics, supporting the establishment of rural regional hospitals and the replacement of leaking fuel farm tanks throughout the state.. I hold a B.A. degree in Business Administration from Alaska Pacific University; an Honorary Doctorate in Humane Letters from the University of Alaska, Anchorage (2004) and an Honorary Doctorate in Law from the University of Alaska, Fairbanks (2014)

<sup>2</sup> 43 U.S.C. § 1601 *et seq.*

<sup>3</sup> 25 U.S.C. § 5301 *et seq.*

technological change while with many benefits still exasperates inequities, especially in our rural remote communities. Your willingness to craft solutions with this understanding would be greatly appreciated.

Today, I will be focusing on four issues.

***First, I will dispel the false narrative that voting rights violations are a thing of the past in Alaska, attributable to previous administrations. The facts, evidence and judicial decisions say otherwise and point to the role of the current Director of the Division of Elections in those violations.*** It is very uncomfortable to point to an individual, and may reflect the systems in place more than a single person. Every successful enforcement action on behalf of Alaska Natives under the Voting Rights Act in the past quarter-century has occurred because of violations which occurred, in whole or in part, during the tenure of Alaska's current Director of the Divisions of Elections (DOE). Under Alaska law, DOE's Director is responsible for the conduct of all state elections including compliance with requirements under federal law.<sup>4</sup> Internal documents from DOE show that the current Director issued policy decisions that were knowing violations of federal law. Those violations have continued to the present, resulting in ongoing federal court oversight of Alaska. More regions of Alaska are currently designated for federal observers under the Voting Rights Act than in the remainder of the United States.

***Second, I will explain how the current Director of DOE has exercised discretionary authority under Alaska law to impede equal access of Alaska Natives to voting opportunities.*** The current Director has pushed for closing in-person voting locations in Alaska Native villages, whether through designating some villages as Permanent Absentee Voting (PAV) sites or proposing vote-by-mail despite large numbers of Limited-English Proficient (LEP) Alaska Native Elders whose language and illiteracy barriers require in-person bilingual assistance to cast effective ballots. Under the current Director's watch, federal Help America Vote Act (HAVA)<sup>5</sup> funds designated for uses including language assistance languished in interest-bearing accounts, while the Director prioritized opening a new elections office in the small non-Native community of Wasilla, just outside of Anchorage. Rural election workers were required to be volunteers and paid a stipend of \$100 (or \$ .15/hr) vs urban election workers were hired and paid \$15.00 /hr. For years, the Director rejected requests by Alaska Native villages for early voting sites at the same time early voting locations proliferated in the predominately non-Native urban areas. Only after AFN intervened on behalf of those villages and engaged in self-help to open those locations did the Director acquiesce.

***Third, I will briefly describe how the preclearance requirements of Section 5 stopped voting discrimination before it occurred in Alaska.*** In the absence of Section 5 coverage following the *Shelby County* decision, voting rights violations have flourished. Elections officials, led by the Director of DOE, consistently have provided unequal opportunities for Alaska Natives to register to vote, to cast a ballot and to have their ballot counted, compared to non-Natives living in urban areas. The unfettered discretion of state officials has directly led to a decade of successful voting rights

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<sup>4</sup> See generally ALASKA STAT. § 15.10.105 (2006) (director of elections division is responsible for "the supervision of central and regional election offices, the hiring, performance evaluation, promotion, termination, and all other matters relating to the employment and training of election personnel, and the administration of all state elections" and activities under the National Voter Registration Act of 1993).

<sup>5</sup> Pub. L. No. 107-252, 116 Stat. 1666 (2002).

cases brought by Alaska Natives. The straight-forward, cost-effective and timely preclearance mechanism has been replaced by years of disenfranchisement of Alaska Native voters while discriminatory practices have been challenged in the courts. Alaska has incurred a monetary price in the millions of dollars it has had to pay Alaska Natives for their attorneys' fees and costs. But the far greater cost has been to the thousands of Alaska Natives disenfranchised during the pendency of the litigation.

***Fourth, I will conclude with an explanation of why both the VRAA and NAVRA are needed to address Alaska's present and ongoing discrimination against Alaska Natives.*** This is not the time for half-measures that will leave Alaska Native voters without the full protections guaranteed by the Fourteenth and Fifteenth Amendments, the Elections Clause to the United States Constitution and the broad plenary powers that Congress has to regulate its relations with federally recognized tribes through free and equal access to the political process. The VRAA and NAVRA are complimentary provisions that the Senate must pass immediately. Anything short of passage of both the VRAA and NAVRA would reflect a lack of commitment to eradicating, once and for all, the first-generation voting barriers that Alaska Native voters face every day.

### **The Prevalence of Voting Discrimination Against Alaska Natives**

Alaska Natives were the last of the ingenuous peoples in this country to obtain our fundamental right to vote. I will only briefly describe some of the voting discrimination against Alaska Natives, summarizing some of the details that are presented in Attachments A and B of my written testimony.<sup>6</sup>

Alaska Natives, like all of the First Peoples, were disenfranchised for much of our history. In Alaska's 1915 Territorial Act, Alaska Natives were denied citizenship unless they could prove through individual examination, conducted by non-Native examiners, that they had abandoned "any tribal customs or relationship" and adopted "the habits of a civilized life."<sup>7</sup> Thus, Alaska Natives could only become eligible to become citizens, based upon the subjective and often racist whims of non-Native decisionmakers, and only if the Alaska Natives gave up their cultural identity. The Indian Citizenship Act of 1924, which formally made all American Indians and Alaska Natives citizens of the United States who had not already become so, did little to improve the access of Alaska Natives to the ballot.

In 1925, Alaska's Territorial Legislature responded to the Indian Citizenship Act of 1924 by passing a literacy test requirement for voting. Two of Alaska's leading newspapers at the time laid bare what was behind the new law:

The *Alaska Daily Empire* stated that Alaska Natives "cannot be even remotely considered as possessing proper qualifications" for voting, and the *Fairbanks Daily*

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<sup>6</sup> Attachment A, James Thomas Tucker, Natalie Landreth & Erin Dougherty-Lynch, "Why Should I Go Vote Without Understanding What I Am Going to Vote For?" *The Impact of First Generation Voting Barriers on Alaska Natives*, 22 MICH. J. RACE & LAW 327 (2017); Attachment B, Alaska Advisory Comm. to the U.S. Comm'n on Civil Rights, Advisory Mem. on Alaska Native Voting Rights (Mar. 27, 2018).

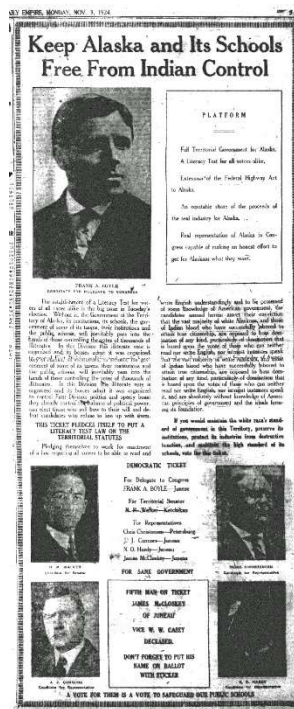
<sup>7</sup> Tucker, Landreth & Dougherty-Lynch, *supra*, at 330.

*News-Miner* warned of Native voters of a “lower order of intelligence.” Supporters of the literacy test ran an advertisement in the Juneau newspaper stating that its purpose was “to prevent the mass voting of illiterate Indians” and that the test was an “opportunity to keep the Indian in his place.”<sup>8</sup>

The literacy test was designed to exploit the illiteracy of most Alaska Natives, who were denied schooling opportunities by educational discrimination that failed to provide any public schools in Alaska Native villages regardless of population.<sup>9</sup> Compounding that discrimination, courts in Alaska upheld state efforts to maintain segregated schooling that denied admission to any Alaska Natives that non-Native officials deemed to be “uncivilized” through application of offensive cultural and racial stereotypes.<sup>10</sup>

The discriminatory purpose of the 1925 Literacy Test was evident, much like what is motivating modern day violations: to prevent Alaska Natives from being part of the body politic and to elect representatives responsive to their needs.

**Figure 1. Advertisement with a racial appeal by non-Native candidates for the legislature.**



Non-Natives feared the political power that Alaska Native voters could wield if they were allowed to register to vote and cast ballots on an equal footing. The same motivations remain present today, as I will show in some of the internal correspondence from Alaska’s Division of Elections.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 330-31.

<sup>10</sup> *See id.* at 331-32 (quoting *Sitka School Board*, 3 Alaska 481, 489–90 (D. Alaska Terr. 1908)).

Alaska Natives also faced discrimination paralleling much of what was directed against Black citizens in the South. They were denied access to housing through race based restrictive covenants that barred Alaska Natives and persons of color from owning homes in many communities. Native families attempting to dine out or show encountered signs in businesses that read, “No Natives, No Dogs” or advertised “All White Help.” Movie theaters and other places of public accommodation were segregated, with Alaska Natives and non-White patrons confined to balcony areas with derogatory references such as “N\_\_\_er Heaven.”<sup>11</sup>

Through their work with the Alaska Native Sisterhood and the Alaska Native Brotherhood, Elizabeth and Roy Peratrovich began lobbying in 1941 for an anti-discrimination bill in Alaska’s Territorial Legislature. Four years later, the bill had not moved. A Territorial Senator spoke out against the bill, denouncing efforts to desegregate Alaska’s social and economic life by arguing, “Who are these people, barely out of savagery, who want to associate with us whites, with 5,000 years of recorded civilization behind us?”<sup>12</sup> Elizabeth Peratrovich responded forcefully, decrying Alaska’s Jim Crow practices fostered by non-Natives who “believe[d] in the superiority of the white race.”<sup>13</sup> She continued, “I would not have expected that I, who am barely out of savagery, would have to remind gentlemen with five thousand years of recorded civilization behind them, of our Bill of Rights.”<sup>14</sup>

Alaska’s Territorial Legislature took action by enacting the Alaska Equal Rights Act of 1945. The Act protected equal access to public accommodations to Alaska Natives and all non-Whites, providing that “All citizens ... shall be entitled to the full and equal enjoyment of accommodations, advantages, facilities, and privileges” of public places.<sup>15</sup> Sadly, although Elizabeth Peratrovich lived to see the Alaska Equal Rights Act signed into law, she passed away in 1958, long before other discriminatory laws in Alaska, such as the Territorial and State literacy tests, were nullified by the federal Voting Rights Act (VRA).<sup>16</sup> I can think of no greater honor to bestow upon the first lady of civil rights for Alaska Natives, Elizabeth Peratrovich, than including her name on NAVRA.

When schooling began to become available after statehood in 1959, it was provided to Alaska Native children by requiring them to fly thousands of miles from their homes to attend boarding schools, including some as far away as the east coast of the United States. Another alternative was for Alaska Native children to effectively become laborers for non-Native households who took them in to allegedly provide them with access to public schooling in Alaska’s urban centers. Alaska Native students were largely girls, with Alaska Native boys mostly staying home to assist their families with subsistence hunting and fishing.

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<sup>11</sup> JAMES THOMAS TUCKER, *THE BATTLE OVER BILINGUAL BALLOTS: LANGUAGE MINORITIES AND POLITICAL ACCESS UNDER THE VOTING RIGHTS ACT 235-48* (2009).

<sup>12</sup> *Id.* at 237.

<sup>13</sup> *Id.*

<sup>14</sup> Fran Ulmer, *Honoring Elizabeth Wanamaker Peratrovich*, Alaska House of Representatives (May 1, 1992).

<sup>15</sup> TUCKER, *supra*, at 237.

<sup>16</sup> 42 U.S.C. §§ 1973 to 1973aa-6.

Girls sent away to schooling frequently were sexually assaulted, subjected to mental and physical abuse, targeted with racial slurs, and segregated among student populations to make it difficult (and for some students impossible) to learn anything. Boys left behind in their villages then are today's male Elders who suffer the highest rates of limited-English proficiency and illiteracy. "By 1972, only 2,200 out of over 51,000 Alaska Natives had a high school education,"<sup>17</sup> with illiteracy rates exceeding those of Black voters in every southern state covered by Section 5 of the Voting Rights Act.

Alaska Natives today bear the scars of educational discrimination, which can limit our ability to participate effectively in the voting process. "In 2002, the Alaska Advisory Committee to the U.S. Commission on Civil Rights found that Alaska Native students 'score lower on achievement tests than any other minority group, and considerably lower than White students.' Over 80 percent of Alaska Native graduating seniors were not proficient in reading comprehension."<sup>18</sup>

Language and literacy barriers were prevalent in Senator Murkowski's successful effort to become the first United States Senate candidate in more than 50 years to win electoral office in a write-in campaign in 2010. In that case, a federal court rejected efforts to throw out write-in votes that clearly expressed the voter's intent for Senator Murkowski, but misspelled her last name.<sup>19</sup> One can imagine how a different electoral result would have occurred in the absence of substantial efforts by Alaska Native villages to assist LEP and illiterate Elders in identifying their candidate of choice by writing it out as best they could.

Alaska's well-documented history of voting discrimination has been prevalent throughout recent years, in a series of decisions by both the U.S. Department of Justice and federal courts examining claims against the State's two election officials responsible for administering the state's elections: the Lieutenant Governor and the Director of the Division of Elections. As described in the attached article, contemporary discrimination by those election officials has included, among other things:

- Retrogression, or backsliding, by failing to provide language assistance according to the plan that the State of Alaska precleared with the U.S. Department of Justice;
- Unequal compensation for poll workers in many Alaska Native villages, compared to the compensation received by poll workers in urban polling locations;
- Disparate use of federal Help America Vote Act of 2002 (HAVA) funding, including use of funds to open a new elections office and voter registration site in the predominately non-Native community of Wasilla, while failing to use funds for language assistance until the State was sued in federal court;
- Widespread designation of rural Alaska Native villages as Permanent Absentee

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 332-33.

<sup>19</sup> See *Federal judge dismisses challenge to Murkowski's re-election*, CNN (Dec. 28, 2010), available at <http://www.cnn.com/2010/POLITICS/12/28/alaska.senate.race/index.html>.

Voting (PAV) sites, in which all voting materials and information was sent by mail in English, providing no in-person language assistance for LEP Alaska Native voters who were unable to read voting materials or to vote effectively without assistance;

- Shirking responsibility to provide language assistance to Alaska Native voters by sending English-only materials to radio stations and villages asking them to provide translations “if available;”
- Attempting to “realign” (a euphemism for “close”) polling places in Alaska Native villages and consolidating them with other Native villages accessible only by air travel, weather permitting, a practice the U.S. Department of Justice stopped through its Section 5 review process;
- Declining to provide early voting sites in Alaska Native villages, instead only authorizing some sites after AFN, through my staff’s efforts, to recruit workers in 128 villages to provide early voting services in just eleven days (due to an arbitrary deadline set by the State), only to be followed by the Director of the Division of Elections falsely claiming credit in her public statements for the work that AFN did;
- Failing to implement any meaningful efforts at Yup’ik language assistance in Alaska Native villages in the Bethel Census Area until State officials were sued in *Nick v. Bethel*,<sup>20</sup> and even then the efforts by those officials was so poor that a federal judge entered a preliminary injunction against them after finding a substantial likelihood of success on the merits that the State had violated Sections 203 and 208 (the voter assistance provision) of the Voting Rights Act in 2008;
- Engaging in intentional discrimination against Alaska Native voters, with State officials including the Director of the Division of Elections, directing election staff to limit all Yup’ik language materials and information to the “Bethel Census Area only” in repeated written correspondence;
- Ending the employment of the one Yup’ik language coordinator on the last day that the *Nick v. Bethel* settlement agreement was in effect, and not replacing her until after the State officials were sued a second time for violating Section 203 in three other census areas in *Toyukak v. Treadwell* in 2013;
- Directing the one permanent bilingual Yup’ik bilingual coordinator hired after the *Toyukak* litigation was filed to spend most of his time doing data entry of voter registration records and voting history, instead of the language assistance needed throughout Alaska;

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<sup>20</sup> *Nick v. Bethel*, No. 3:07-cv-00098-TMB (D. Alaska filed June 11, 2007); *see also* Tucker, Landreth & Dougherty-Lynch, *supra*, at 350-58 (discussing the *Nick* litigation).



- Arguing in the *Toyukak* litigation that the Fifteenth Amendment did not apply to Alaska Natives because they were Alaska Natives;
- Maintaining that the State could paternalistically decide what election information Alaska Natives were entitled to know, with the State contending that Alaska Natives could receive less information than non-Native voters received in English simply because they were Natives;
- Failing to translate most ballot measures and materials in the Gwich'in language, even after being warned by the U.S. Department of Justice of the need to translate voting information provided on electronic voting machines;
- Failing to provide effective language assistance in three regions of Alaska, the Dillingham, Kusilvak (formerly known as Wade Hampton, named after a Confederate General who advocated forced segregation of the races), and Yukon-Koyukuk Census Areas, as determined by a federal judge in *Toyukak v. Treadwell*, the first Section 203 language assistance case fully litigated through trial to a decision since 1980;
- Falling short of compliance with the requirements of the *Toyukak* order, as documented by federal observers in several elections since 2014;<sup>21</sup> and
- Most recently, in 2020, a state court suspended Alaska's witness signature requirement (which mandated a witness outside of the voter's household verify the signature was the voter's), which would have prevented Alaska Native voters subject to village lock-down orders to limit the spread of COVID-19 from being able to vote.<sup>22</sup>

Many of these practices which I have described, as well as other examples in a comprehensive report by NARF,<sup>23</sup> are the very ones that would be stopped by the amendments to the Voting Rights Act included in S.4 and Title III of the bill, NAVRA.

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<sup>21</sup> Tucker, Landreth & Dougherty-Lynch, *supra*; Alaska Advisory Comm. to the U.S. Comm'n on Civil Rts., *supra*.

<sup>22</sup> *Arctic Village Council vs. Meyer*, No. 3AN-20-7858 CIL, 2020 WL 6120133 (Alaska Oct. 5, 2020).

<sup>23</sup> See James Thomas Tucker, Jacqueline De Léon & Dan McCool, *Obstacles at Every Turn: Barriers to Political Participation Faced by Native American Voters* (NARF June 2020) <<https://vote.narf.org/obstacles-at-every-turn/>>.

**All Judicial Findings of Voting Rights Violations in the State of Alaska Have Occurred under the Current Director of the Division of Elections.**<sup>24</sup>

Prior to the reauthorization of the VRA in 2006, Alaska had done little to comply with federal requirements under Section 203 of the Act. As the Alaska report included in the congressional record observed, “[s]ince its inclusion in the VRA in 1975, Alaska appears to have not complied with its obligation to provide voting assistance in Alaska Native languages.”<sup>25</sup> This record of deliberate inaction and indifference by Alaska came despite clear evidence that Alaska’s election officials knew about their responsibilities under the VRA but chose to ignore them, including:

- Correspondence from the U.S. Department of Justice informing Alaska of its coverage under Section 4(f)(4) of the Act in 1975;
- Correspondence from the U.S. Department of Justice information Alaska of its coverage under Section 203 of the Act, following each determination made under that Section in 1975, 1982, 1992, 2002, 2006, and 2011;
- In 1981, Alaska submitted its language assistance plan to the U.S. Department of Justice for preclearance, which it received based upon its assurances that it would provide bilingual translations for voting information in all Alaska Native languages covered by Sections 4(f)(4) and 203 of the VRA;
- Correspondence from the U.S. Department of Justice periodically informed Alaska of its concerns that the State was not providing language assistance contrary to its precleared language plan and the requirements of Sections 4(f)(4) and 203 of the VRA;
- Alaska election officials acknowledged receipt of the Alaska report in 2006, which documented their violations of the VRA, with those officials denying that there were any violations.

At the same time that Division of Elections officials denied they were violating the VRA, they acknowledged their awareness of those violations and their plans to address them. But all of those plans were put on hold by what they considered higher priorities: the 2006 and 2007 elections. Admissions by DOE officials made clear that they did not consider the State’s failure to provide bilingual outreach, information and assistance to Alaska Natives as important as running English-only elections that facilitated voting by non-Natives:

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<sup>24</sup> Prior to the *Nick* case filed in 2007, a lawsuit was filed by the Native Village of Barrow against the municipal government for failing to provide translations of a ballot measure into the Inupiaq language. The case was settled before any judicial finding was made. See Natalie Landreth & Moira Smith, *Voting Rights in Alaska: 1982-2006*, 17 S. CAL. REV. LAW & SOC. JUST. 79, 116-17 (2007).

<sup>25</sup> Landreth & Smith, *supra*, at 110 (reprinting the Alaska report included in the record supporting passage of the Voting Rights Act Reauthorization Act of 2006).

- Whitney Brewster, who was the predecessor of the current DOE Director,<sup>26</sup> admitted under oath that DOE “started looking in April 2006” at improving its language plan, but “put it aside as we were conducting our major statewide election as well as our REAA/CSRA election ... and we picked it back up after the election and then we were hit with another statewide special election in April of 2007”;
- Shelly Growden, a supervisor who reported to Ms. Brewster and the current DOE Director until her retirement, acknowledged that Alaska had done little to provide language assistance until approximately when Alaska was sued in the *Nick* litigation. “We started working on updating the plan in 2007. The Division was hit with a statewide special election. After that special election in April, we started making updates to our language assistance plan.”
- Ms. Brewster crystallized the priorities of DOE officials by making clear that language assistance for Alaska Native voters simply was not on par with other legal requirements for Alaska’s elections: “Language assistance is not the only assistance that the Division of Elections provides ... We have ... the demands of every voter in the state.”

When the current Director of DOE took over supervision of Alaska’s elections, she admitted that her office was not performing most of the tasks required by Alaska’s precleared 1981 language assistance plan. Specifically, contrary to the plan that Alaska told the U.S. Department of Justice it used for its elections:

- The State did not track the language abilities of its voting registrars and prior to May 2008 had never translated any voter registration information into Yup’ik;
- Alaska election officials had never produced and used Yup’ik video recordings for elections information, which according to Whitney Brewster, “based on precedent, it hadn’t been done”;
- With the exception of two incomplete and poorly translated 30-second radio ads aired by the State in 2006, the DOE had never produced and used Yup’ik audio recordings for elections information. Instead, the State tried to place its legal duty to translate on radio stations, asking station personnel to translate English-only voting information “if available”;
- Alaska election officials never traveled to Yup’ik villages to work with interpreters in preparing audio recorded translations because according to the Director, “We do not” do that;
- State officials never confirmed the English and Yup’ik language skills and literacy

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<sup>26</sup> Ms. Brewster was removed from her position as Director of DOE and reassigned to direct Alaska’s Department of Motor Vehicles just days after her deposition in the *Nick* case.

abilities of election workers designated as their Yup'ik translators and often had had no translators in the polls; and

- All Yup'ik translators required to translate “on the spot” without uniform Yup'ik translations; in 2008, no uniform translations for offices on ballot, instructions, and other key information.

Although Section 203 of the VRA placed the duty to provide language assistance on the State of Alaska, the State's Director of DOE responsible for administering elections, admitted that Yup'ik translations were only available if voters engaged in self-help: “They would have to have an individual translate the ... English version for them.” As Regional supervisor Becka Baker explained, oral Yup'ik translations were not provided because “All our communications are done in English.”

Division of Elections officials conceded that most voting announcements communicated to voters in English was not offered in any Alaska Native language, including critical information such as:

- The right of voters to receive language assistance in Alaska Native languages during the registration and voting process;
- How to complete a questioned ballot;
- Polling place information and how to get that information in Alaska Native languages;
- Absentee voting information;
- Information that tribal ID cards, which the State admits are an acceptable form of voter identification, can be presented at the polls to vote;
- Information about the petition process and status reports about petitions;
- Candidate statements provided to voters in English;
- Maps of election districts, boundary lines, & explanatory information;
- Information about becoming an election worker;
- Polling place information;
- How to contact an elections office by phone;
- Voter purges and notices;
- Polling place notices and forms;

- Notices requesting public comments about changes such as polling place closures;
- Vote-by-mail notices;
- Information about new voting equipment;
- Voting machine instructions;
- And all other voting information included in Alaska's 100+ page Official Election Pamphlet (OEP).

Alaska officials similarly failed to provide any audio translations into the Yup'ik language, even after acquiring voting machines in 2005 that were capable of accommodating up to nine languages. The State took no further action, and only started considering the use of audio ballots after the U.S. Department of Justice contacted state officials in Fall 2007 to inform Alaska its failure to provide audio translations in Yup'ik violated the VRA. Even then, Alaska failed to provide any audio translations until State election officials were sued.

In the summer of 2007, Yup'ik-speaking Alaska Native voters and villages sued the State of Alaska for failing to provide language assistance in violation of Section 203 of the VRA and denying voter assistance in violation of Section 208 of the VRA. The State of Alaska denied their violations, claiming that contrary to the evidence that they had ignored the 1981 language plan it had "been providing minority language assistance under a plan precleared by the United States Department of Justice for over 26 years."

A federal judge found otherwise. On July 30, 2008, the *Nick* court issued an injunction that determined based upon the evidence that Alaska election officials had violated the language assistance and voter assistance provisions of the VRA:

Based on the evidence presented, the Court finds that the Plaintiffs have met their burden and established that they are likely to succeed on the merits on the language assistance claims brought under sections 203 and 4(f)(4) of the VRA, and the voter assistance claims brought under section 208 of the VRA. In reaching this conclusion, the Court relies on affidavits, depositions and other evidence showing that the State has failed to: provide print and broadcast public service announcements (PSA's) in Yup'ik, or to track whether PSA's originally provided to a Bethel radio station in English were translated and broadcast in Yup'ik; ensure that at least one poll worker at each precinct is fluent in Yup'ik and capable of translating ballot questions from English into Yup'ik; ensure that "on the spot" oral translations of ballot questions are comprehensive and accurate;" require mandatory training of poll workers in the Bethel census area, with specific instructions on translating ballot materials for Yup'ik-speaking voters with limited English proficiency.<sup>27</sup>

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<sup>27</sup> Preliminary Injunction in *Nick, supra*, Docket No. 327, at 7-8. A copy of the injunction is included as Attachment C to my testimony.

In issuing the injunction, the *Nick* court rejected the argument made by Alaska officials, including the current Director of the DOE, that Alaska Native voters were not entitled to relief because Alaska was taking steps in 2008, for the first time since becoming covered by Sections 4(f)(4) and 203 in 1975, to begin to provide a nascent form of language assistance. The Court reasoned:

Therefore, while the State contends that an injunction is unnecessary, the court disagrees in light of the fact that: 1) the State has been covered by Sections 203 and 4(f)(4) for many years now; 2) the State lacks adequate records to document past efforts to provide language assistance to Alaska Native voters; and 3) the revisions to the State's [language program], which are designed to bring it into compliance, are relatively new and untested. For all these reasons, the court concludes that injunctive relief is both appropriate and necessary.<sup>28</sup>

The *Nick* court also found that Alaska election officials violated the voter assistance provisions in Section 208 of the VRA:

Plaintiffs have demonstrated that they are likely to prevail on their section 208 voter assistance claim as well. That claim asserts that poll workers have regularly failed to allow voters (or apprise voters of their right) to bring an individual of their choice into the voting booth to assist them in the voting process. While the evidence on this claim is more anecdotal, it nonetheless satisfies the Plaintiffs' burden for injunctive relief. This evidence primarily consists of affidavits and deposition testimony showing that some poll workers in the Bethel census area do not understand that blind, disabled or illiterate voters have the right to receive assistance from a "helper" of their choosing. For example, Plaintiff Anna Nick has heard poll workers in Akiachak tell other voters that they "cannot bring anyone with them into the booth because their vote must remain private." Similarly, Elena Gregory, a resident of the village of Tuluksak, reports being told by a poll worker that she "could not help the others vote if they did not understand" the ballots written in English. In her declaration, she states: "I have voted in an election where the poll worker told me that elders could not have help interpreting or reading the ballots, and that everyone had to be 50 feet away from the person voting." And in the city of Bethel of the village of Kwigillingok, election workers have failed to offer assistance to voters who needed it, and who were entitled to it under section 208.<sup>29</sup>

In short, the federal court in *Nick* found that Alaska election officials had taken no steps to comply with the VRA in 2006, placed their beginning efforts on hold and only resumed those efforts after being sued by Alaska Native voters and villages.

If the *Nick* case was the only successful litigation brought against Alaska's election officials, it would provide powerful evidence sufficient to establish the need for the remedies in the VRAA and NAVRA to voting discrimination against Alaska Natives. But it is not the only example. After *Nick*, the current Director of the Division of Elections appeared to engage in intentional

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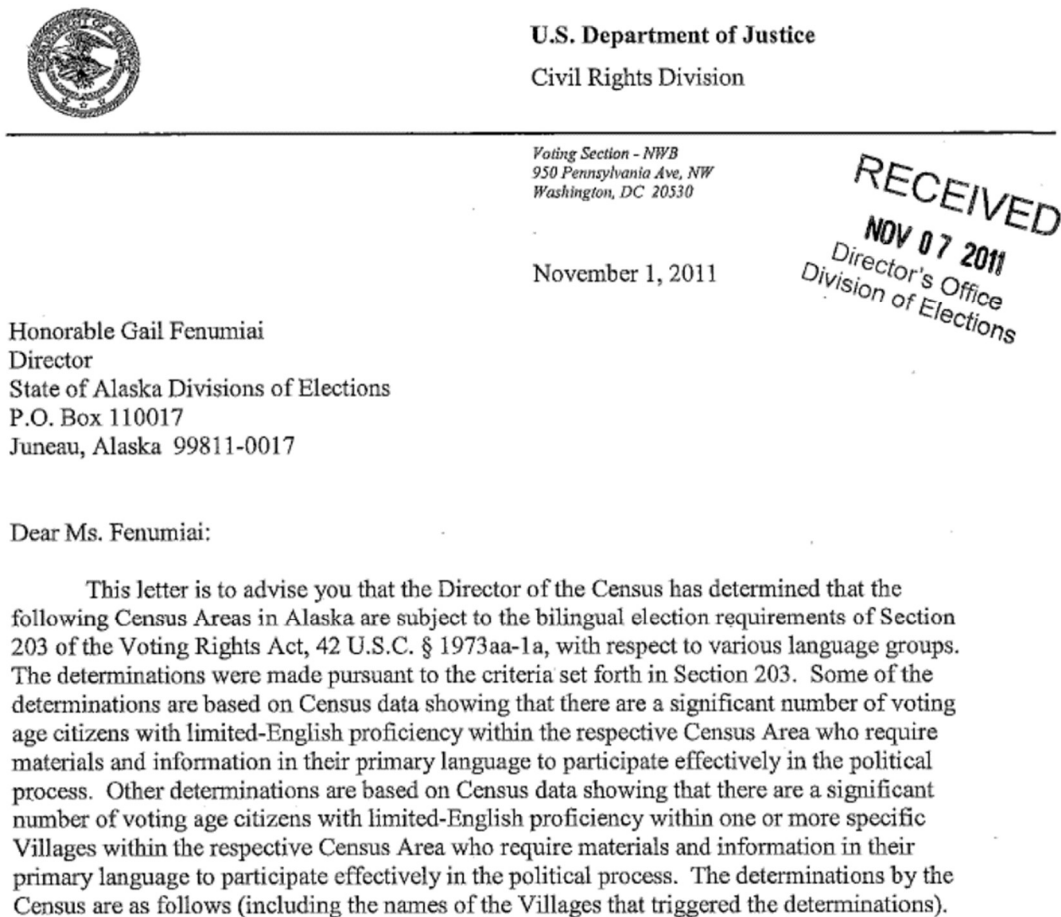
<sup>28</sup> *Id.* at 8.

<sup>29</sup> *Id.* at 9.

discrimination to deny the language assistance to Alaska Native voters in other regions of Alaska.

Following the 2011 coverage determinations, Alaska was notified it has to provide language assistance to Alaska Native voters, including those residing in the Dillingham, Kuslivak (Wade Hampton<sup>30</sup> at the time), and the Yukon-Koyukuk regions.<sup>31</sup> In addition, the U.S. Department of Justice sent the Director of the Division of Elections, in this instance the Director, a notice letter of its coverage and a reminder of the need to comply fully with the requirements of Section 203 of the VRA. A copy of the letter is included as Figure 2.

**Figure 2. Department of Justice Notice Letter to Gail Fenumiai, Director of DOE.**



<sup>30</sup> Wade Hampton was a Confederate general and an ardent segregationist. Naming a predominately Alaska Native region after a racist leader of the Confederacy offers a good window into the hearts of Alaska's elected officials responsible for naming it.

<sup>31</sup> See U.S. Dep't of Commerce, Bureau of the Census, Voting Rights Act Amendments of 2006, Determinations under Section 203, 76 Fed. Reg. 63602 (Oct. 13, 2011).

**Dillingham Census Area (Yup'ik)**

Aleknagik (Yup'ik)  
Clarks Point (Yup'ik)  
Dillingham (Yup'ik)  
Ekwok (Yup'ik)  
Manokotak (Yup'ik)

New Koliganek (Yup'ik)  
New Stuyahok (Yup'ik)  
Togiak (Yup'ik)  
Twin Hills (Yup'ik)

**Wade Hampton Census Area (Inupiat and Yup'ik)**

Alakanuk (Yup'ik)  
Algaaciq (Yup'ik)  
Andreafsky (Yup'ik)  
Chevak (Inupiat)  
Emmonak (Yup'ik)  
Hooper Bay (Yup'ik)  
Kotlik (Yup'ik)

Marshall (Yup'ik)  
Mountain Village (Yup'ik)  
Nunam Iqua (Yup'ik)  
Pilot Station (Yup'ik)  
Pitkas Point (Yup'ik)  
Russian Mission (Yup'ik)  
Scammon Bay (Yup'ik)

**Yukon-Koyukuk Census Area (Alaskan Athabascan)**

Allakaket (Alaskan Athabascan)  
Beaver (Alaskan Athabascan)  
Fort Yukon (Alaskan Athabascan)  
Galena (Alaskan Athabascan)  
Grayling (Alaskan Athabascan)  
Holy Cross (Alaskan Athabascan)  
Hughes (Alaskan Athabascan)  
Huslia (Alaskan Athabascan)

Kaltag (Alaskan Athabascan)  
Koyukuk (Alaskan Athabascan)  
Minto (Alaskan Athabascan)  
Nenana (Alaskan Athabascan)  
Nulato (Alaskan Athabascan)  
Ruby (Alaskan Athabascan)  
Shageluk (Alaskan Athabascan)  
Tanana (Alaskan Athabascan)

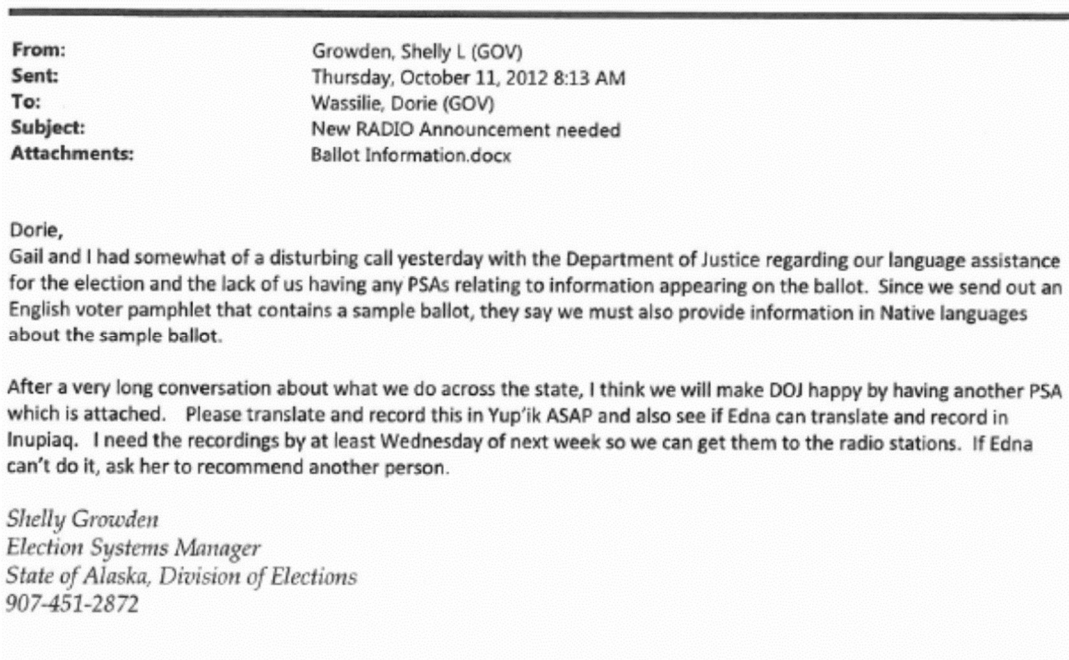
The determinations became effective upon publication of the Federal Register on October 13, 2011. *See* 76 Fed. Reg. 63,602. We are enclosing a copy of the Federal Register publication of the determinations, as well as a copy of relevant provisions of the Voting Rights Act and the

These notices made it clear to Alaska and the Director of their legal duties to provide language assistance in all areas covered by Section 203 of the VRA, including the three regions noted above.

In 2012, a year after receiving that letter, the Director was contacted by the U.S. Department of Justice and notified of its concern that Alaska was failing to translate voting information. See Figure 3.



**Figure 3. Internal DOE e-mail regarding lack of information in Alaska Native languages.**



Like the Director, Alaska's regional elections supervisors also knew where language Assistance in Alaska Native villages was required. For example, Becka Baker, who supervised elections in two Yup'ik-speaking regions, admitted that Yup'ik language assistance was required in all of the villages in those regions:

Q: Are there any communities in Dillingham that you're aware of that have LEP rates that would be less than 5 percent?

A: Right off the top of my head, no.

Q: Okay. What about Wade Hampton?

A: No.<sup>32</sup>

Alaska's Director of DOE and her staff plainly knew about the requirements of language assistance from several sources: notification and requests for language assistance from the Native American Rights Fund (NARF) and AFN; the court order in the *Nick* litigation; official notices from the U.S. Department of Justice, which included a copy of Section 203 of the VRA; and communications from the Department of Justice informing the Director and her staff that Alaska was violating Section 203. Despite that information, Alaska's Yup'ik language coordinators admitted they had no duties to provide language information in the Dillingham and Wade Hampton Census Areas.<sup>33</sup>

<sup>32</sup> Deposition of Becka Baker, 55:18-23.

<sup>33</sup> Deposition of Dorie Wassilie, 134:13-19; Deposition of Bryan Jackson, 27:23-28:12.

Between 2008 and 2012, DOE’s own records showed that few Alaska Natives received any information in their covered languages before Election Day, despite the distribution of an Official Election Pamphlet to voters in English that had more than 100 pages of information about registration and voting.<sup>34</sup> In the Dillingham Census Area, Alaska provided Yup’ik translators for pre-election materials and information only 25 percent of the time, while Yup’ik translators were provided in the Wade Hampton (Kusilvak) Census Area just 37 percent of the time. In the Gwich’in-speaking communities of Artic Village and Venetie, Gwich-in speaking translators were only provided by DOE 31 percent of the time.

Alaska’s record on providing language assistance on Election Day was not much better. For that same 2008 to 2012 period, the Director’s office failed to have an in-person bilingual translator for all election hours 48 percent of the time in the Dillingham Census Area and 22 percent for the Wade Hampton (Kusilvak) Census Area. No sample ballots were translated into the Gwich’in language.<sup>35</sup>

The reason language assistance was not provided in regions of Alaska outside of the Bethel Census Area is apparent, and is confirmed by the internal documents and communications of the Director’s office: intentional discrimination. The Director made a “policy decision” to limit Yup’ik language assistance to the only region covered by the *Nick* order and settlement agreement: the Bethel Census Area. Internal documents, such as those below, included limitations on Yup’ik to “BCA only,” referring to the Bethel region. Thousands of other LEP Yup’ik-speaking voters were denied language assistance in violation of Section 203.

**Figure 4. DOE documentation directing that language assistance be limited to Bethel region.**

2012 Alaska Native Language Assistance	
Tasks	
1. Dorie send written 2012 list maintenance radio announcements to all BCA tribes (January 2012). <i>Nick settlement requirement</i>	
2. Dorie send tribes in Dillingham, Nome, North Slope, Northwest Arctic, Wade Hampton and Yukon-Koyukuk census areas a 2012 LA survey. Record results in spreadsheet and email to Shelly, Becka and Mickey. (January/February 2012)	
3. Regions send all tribes letter with 2012 election information, registration forms, absentee ballot apps in May/June and again after the Primary. For Yup’ik villages, include Yup’ik language assistance toll-free number.	
4. Dorie send BCA PAV tribes (Lime Village, Oscarville, Platinum, Red Devil, and Stony River) PAV flyer and information on how to get Yup’ik LA.	
5. Dorie send BCA tribes Glossary of Election Terms, audio (CD) summary of voter registration, absentee voting and special needs voting. (any time ready, can send sometime in June instead of waiting until July) <i>Nick settlement requirement</i>	
	6. Dorie send BCA/tribe Primary sample ballot. (on or before July 27 <sup>th</sup> ) <i>Nick settlement requirement</i>
	7. Dorie send BCA tribes written and audio copy (CD) of translated neutral summary and pro/con statements for each Primary ballot measure - (22 days before election, early August) <i>Nick settlement requirement</i>
	8. Dorie send BCA tribes having REAA election the REAA sample ballot. (on or before September 2 <sup>nd</sup> ) <i>Nick settlement requirement</i>
	9. Dorie send BCA tribes General election sample ballot (on or before October 5 <sup>th</sup> ) <i>Nick settlement requirement</i>
	10. Dorie send BCA tribes written and audio copy (CD) of translated neutral summary and pro/con statements for each General ballot measure. In addition, the audio (CD) will also include the audio translated candidate statements for candidates appearing in OEP - (22

<sup>34</sup> Alaska law requires that the Official Election Pamphlet be sent to every Alaska household with at least one registered voter at least 22 days before any statewide general election or an election with a ballot measure. See ALASKA STAT. §§ 15.58.010 (2014), 15.58.080 (2000).

<sup>35</sup> Deposition of Mickey Speegle, 24:21-23.

Even more disturbing, Alaska election officials treated the availability of language assistance in the Bethel region following the *Nick* litigation as a secret that should not be shared with LEP voters in other areas of the state. The following e-mail, in which the Director was copied, is illustrative of their discriminatory intent. In the e-mail, the Yup'ik language coordinator informed the Director that a Yup'ik-speaking tribal administrator from Emmonak, located in the Wade Hampton (Kusilvak) Census Area asked why LEP voters in her region were not receiving election information in Yup'ik.

Instead of addressing the complaint, DOE staff acknowledged that Emmonak had told them “they need language assistance” in a 2012 survey, but questioned how the Tribal Council “would know we have Yup'ik materials.” The state’s Yup'ik language coordinator confirmed that she did not send translations, noting “I’m pretty sure that I only sent the Yup'ik ads and sample [ballots] to the BCA [Bethel Census Area] outreach workers.” See Figure 5.

**Figure 5. Director Fenumiai’s DOE staff discussing intent to restrict language assistance.**

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**Baker, Becka (GOV)**

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**From:** Baker, Becka (GOV)  
**Sent:** Tuesday, November 27, 2012 1:15 PM  
**To:** Growden, Shelly L (GOV)  
**Cc:** Fenumiai, Gail M (GOV)  
**Subject:** RE: KNOM News story re: Emmonak Tribal Council intervening in SoA lawsuit

Shelly,

You’re right – the only materials that I send are voter registration and absentee ballot applications.

I’m pretty sure that I only sent the Yup'ik ads and samples to the BCA outreach workers.

I looked at the LA logs for Emmonak, and the translators indicated that they provided assistance to 3 people during the PRIM & REAA; and 6 people during the GENR. So they are getting the assistance they need while voting.

The tribal administrator indicated that the voters need to be more educated on what is on the ballot, and the candidates running for office – and that the Division of Elections should provide all the information in Yup'ik, including the ballots. She stated that she was concerned that the elders there aren't getting assistance, yet the entire board speaks Yup'ik. I think this all boils down to the fact that they want to be told “how to vote” so to speak, what a yes vote means – and what a no vote means when it comes to the ballot measures and props.

Becka

**Becka Baker, Election Supervisor**  
State of Alaska - Office of the Lt. Governor  
Region IV Elections Office  
PO Box 577  
Nome, AK 99762  
PH: (907) 443-5285  
FAX: (907) 443-2973  
email: [becka.baker@alaska.gov](mailto:becka.baker@alaska.gov)

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**From:** Growden, Shelly L (GOV)  
**Sent:** Tuesday, November 27, 2012 12:34 PM  
**To:** Baker, Becka (GOV); Fenumiai, Gail M (GOV)  
**Subject:** RE: KNOM News story re: Emmonak Tribal Council intervening in SoA lawsuit

Emmonak is in Wade Hampton Census area so the precinct workers get the Yup'ik sample and Yup'ik on touch screen. Not exactly sure what materials you send to the TC Becka, but since they are not in BCA, Dorie doesn't send them anything so not sure how the TC would know we have Yup'ik materials. They did respond to our 2012 survey indicating they need language assistance. Becka, did you send the outreach workers there the Yup'ik samples and radio ads? Just wondering if we need to re-evaluate what we send out.

---

Voters in the Gwich'in-speaking villages in the Yukon-Koyukak region fared little better. One of the Director's staff members told a Gwich'in translator that it "would be fine" if only two out of four 2008 ballot measures were translated into the Gwich'in language, providing LEP voters with no information in their language about the other two. See Figure 6.

**Figure 6. DOE communication indicating only two out of four ballot measures to be translated.**

**Growden, Shelly L (GOV)**

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**From:** Adeline Peter Raboff <arivahan@yahoo.com>  
**Sent:** Saturday, August 02, 2008 5:56 PM  
**To:** Growden, Shelly L (GOV)  
**Subject:** RE: Ballot Measure Text  
**Attachments:** Ballot Measure for Gwich'in.doc

Dear Shelly,  
Here is the text of Ballot Measure 1 and 4. I will come into the office Monday, if you will be there, with the paper work.

Thank you.

Adeline  
Gwint'aii gwitr'it t'agwah'in.

--- On Tue, 7/29/08, Growden, Shelly L (GOV) <[shelly.growden@alaska.gov](mailto:shelly.growden@alaska.gov)> wrote:

> From: Growden, Shelly L (GOV) <[shelly.growden@alaska.gov](mailto:shelly.growden@alaska.gov)>  
> Subject: RE: Ballot Measure Text  
> To: [arivahan@yahoo.com](mailto:arivahan@yahoo.com)  
> Date: Tuesday, July 29, 2008, 12:10 PM Yes. If you have time to do  
> the other measures, that would be fine, but at the least we need # 1  
> and #4.  
>  
> Shelly Growden  
> HAVA Election Systems Manager  
> 907-451-2872  
> -----Original Message-----  
> From: Adeline Peter Raboff [<mailto:arivahan@yahoo.com>]  
> Sent: Tuesday, July 29, 2008 11:09 AM  
> To: Growden, Shelly L (GOV)  
> Subject: Re: Ballot Measure Text  
>  
> I want to clarify our agreement. I am going to give you a written  
> translation of measures 1 and 4.  
>

DOE provided no Gwich'in translations at all following the 2008 election, until DOE staff reached out to a translator over five years later in December 2013. The Director's office only did so after the State of Alaska was sued again for failing to provide language assistance in the Yukon-Koyukak Census Area. At that time, not only were no voting materials translated into Gwich'in, the State also failed to provide audio translations on the voting machines in Gwich'in.<sup>36</sup>

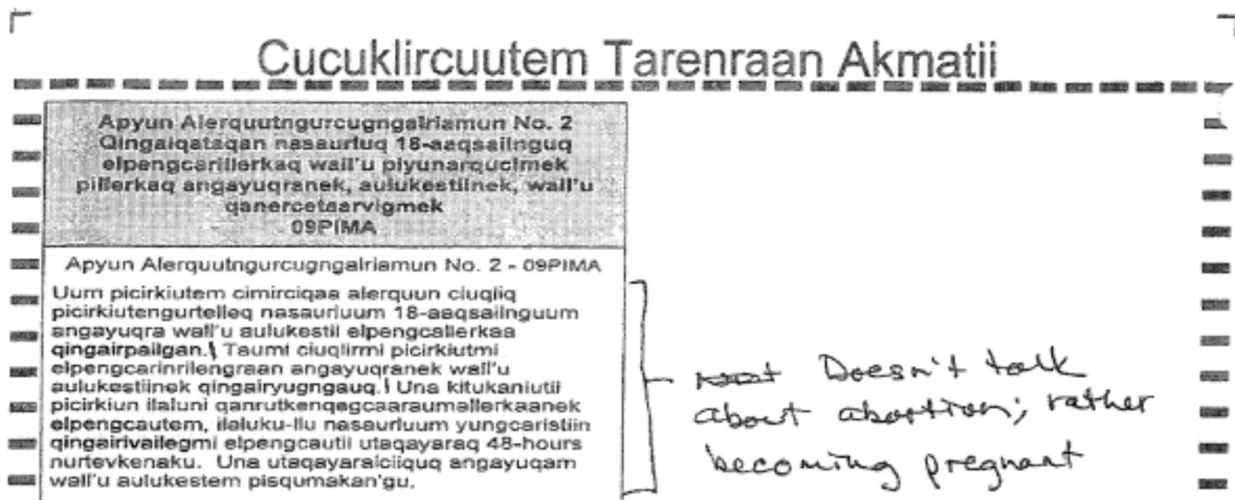
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<sup>36</sup> Deposition of Mickey Speegle, 24:15-19.

Even when the Director’s office provided translations in Alaska Native languages, they were unconcerned about whether the translations accurately translated what was on the ballot and whether those translations allowed LEP Elders to cast an informed vote. I will give two examples.

In 2009, there was a ballot measure that “would change the law to require notice to the parent or guardian of a female under the age of 18 before she has an abortion.”<sup>37</sup> Although Alaska’s DOE translated the ballot measure into Yup’ik, the translation completely altered the meaning of the ballot measure so it bore no resemblance to the actual measure written in English. As Figure 7 shows, Professor Walkie Charles, the preeminent expert on the Yup’ik language, determined that the State’s actual translation was that the ballot measure “would change the law to require notice to the parent or guardian of a female under the age of 18 before she gets pregnant.” *An LEP Yup’ik voter would think that they were being asked to vote on a measure requiring parental permission for minor females to get permission to get pregnant, not to get an abortion.*

Figure 7. DOE’s erroneous translation of abortion consent ballot measure.



In a second example, Alaska’s DOE knew that their Yup’ik translation was incorrect, but proceeded using it anyway. As Figure 8 shows, Alaska’s Yup’ik translator explained that the translation for absentee voting in the information being provided to LEP Yup’ik voters was mistranslated to mean “to vote for a long time.”

<sup>37</sup> Ballot measure No. 2 – 09PIMA, Abortion for Minor Requires Notice to or Consent from Parent or Guardian or Through Judicial Bypass.



**Figure 8. DOE e-mail identifying an incorrect Yup'ik translation.**

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**From:** Wassilie, Dorie (GOV)  
**Sent:** Thursday, September 17, 2009 10:36 AM  
**To:** Tonkovich, Alexa D (GOV); Growden, Shelly L (GOV)  
**Subject:** FW: REAA retakes attached

I've listened to both PSAs. They are done almost perfectly but there is one mispronounced word in Absentee Voting PSA. I don't want to sound picky nor do I want anyone to take what I have to say with wrong impression, but, most importantly, we must have our words pronounced as they are written in our PSAs or they will throw the meaning of the word and sentence off – it will mean completely different than what we have written in Yup'ik as translated by our YTP.

In Absentee Voting PSA, the mispronounced word is "absentee voting" – our translation and what is written in PSA is "cucukliumaurallerkaq." She pronounced it "cucukliumallerkaq" which means "to be voting for a long time" and that is not a proper word to use for absentee voting. Since the PSAs were translated by our YTP, I decided to call Alice Fredson and discuss this with her this morning after listening to the PSAs (since she's the one most easy to contact). We both said that the word used/pronounced "cucukliumallerkaq" ("to be voting for a long time") is not correct. That throws the meaning of absentee voting off and makes it mean all together different.

Please let me know what you guys decide.

Thanks. Dorie

When Alaska's Yup'ik language coordinator told her supervisor about the mistake, the supervisor agreed that the translation should be used as-is. The language coordinator minimized its impact by arguing, "I don't think it will cause too much confusion..." Referring to the *Nick* plaintiffs, the coordinator explained, "**We'll be criticized by the plaintiffs if they catch it, but what the heck, it's a similar word and hope that it goes right over their heads!** 😊" The language coordinator's supervisor agreed to use the inaccurate translation.

**Figure 9. Alaska Elections Supervisor approving use of inaccurate translation.**

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**From:** Growden, Shelly L (GOV)  
**Sent:** Thursday, September 17, 2009 11:36 AM  
**To:** Wassilie, Dorie (GOV); Tonkovich, Alexa D (GOV)  
**Subject:** RE: REAA retakes attached

Thanks Dorie. We will go with your recommendation. I too think it should be fine.

Shelly Growden  
Election Systems Manager  
State of Alaska, Division of Elections  
907-451-2872

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**From:** Wassilie, Dorie (GOV)  
**Sent:** Thursday, September 17, 2009 11:10 AM  
**To:** Growden, Shelly L (GOV); Tonkovich, Alexa D (GOV)  
**Subject:** RE: REAA retakes attached

Due to the timing restraints, I'm fine in letting it go like it is. The recording is done very good except for that one mispronounced word. I don't think it will cause too much confusion in what we are trying to get across to voters. It's not a correct word but a similar word so I don't think it should cause too much confusion. We have the LA toll free number on there that they can call if they have any questions or comments regarding the PSA. We'll be criticized by the plaintiffs if they catch it, but what the heck, it's a similar word and hope that it goes right over their heads! 😊

Thanks. Dorie

In *Toyukak v. Treadwell*, Alaska Native voters and villages from three additional regions of Alaska (Dillingham, Wade Hampton/Kusilvak, and Yukon-Koyukak) sued the State of Alaska, the Director and other elections staff in 2013. They alleged violations of Section 203 of the VRA and the Fourteenth and Fifteenth Amendments. In opposing the litigation, the Director's office argued through its counsel that the Fifteenth Amendment was inapplicable to Alaska Natives. The federal court rejected Alaska's argument:

I've considered the position of the State that the Fifteenth Amendment does not apply in this case because this is a case that is focused primarily on limited-English proficiency and yet, given that specific language that is at issue here, the one that the addressed solely to Native Alaskans and American Indians, I do see that the strictures of the Fifteenth Amendment do apply....<sup>38</sup>

Following a two week trial in the summer of 2014, the federal court found that Alaska officials, including the Director, had violated Section 203 of the VRA. A copy of the decision is included as Attachment D.

In September 2015, the federal court entered a Stipulation and Order to impose remedies for Alaska's violations of Section 203. That relief included, among other things: mandatory poll worker training; pre-election outreach in Gwich'in and Yup'ik in all of the covered Alaska Native villages in the three regions; bilingual voting information, materials and public service announcements; use of translation panels to provide accurate translations; translations into several dialects of Yup'ik to ensure that the translations were understandable to all LEP voters; and trained bilingual poll workers in all covered Alaska Native villages in the three regions. To ensure that these remedies were implemented, the federal court retained jurisdiction over the case through the end of 2020. In addition, the court authorized the appointment of federal observers under Section 3(a) of the VRA to act as the court's eyes and ears in the polling places to monitor the State's progress.<sup>39</sup>

By the end of 2020, over six years after the federal court first granted relief in *Toyukak*, the Director's office was still not in compliance with Section 203 in the Dillingham, Kusilvak and Yukon-Koyukak regions. Federal observer reports and Alaska's own records documented the continued failure to meet the requirements in the court's order. Despite mandating training for all poll workers, more than one-third have never been trained. Of those who were trained, many received no instruction on providing bilingual assistance. Alaska does not provide pre-election outreach in many of the covered Alaska Native villages, failing to offer translations of critical information, such as ballot measures, that will allow Native voters to cast effective ballots. In the 2016 Primary election, outreach was offered in just six of the more than three dozen Alaska Native villages. In the 2018 statewide election, no outreach was offered in any of the villages in the Yukon-Koyukak region. Bilingual translators were not provided in many villages on Election Day for every election since 2014. In the 2018 election, DOE failed to provide translated sample ballots in 53 percent of all covered villages. In that same election, 60 percent of village precincts lacked voting machines with audio translations.<sup>40</sup>

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<sup>38</sup> *Toyukak*, Transcript of Decision on the Record, at 6:19-25 (June 4, 2014).

<sup>39</sup> Tucker, Landreth & Dougherty-Lynch, *supra*, at 374-77.

<sup>40</sup> See Attachment E, Expert Witness Report of Professor Dan McCool (Dec. 22, 2020).

As a result of these violations, the *Toyukak* plaintiffs filed a motion to extend the terms of the court’s order for the three regions of Alaska. State officials agreed to the extension. Court oversight remains in place through December 31, 2022. In addition, the three regions of Alaska remain certified for federal observers for all elections through the end of 2022. ***Notably, today there is more federal observer coverage in Alaska than the rest of the United States combined.***

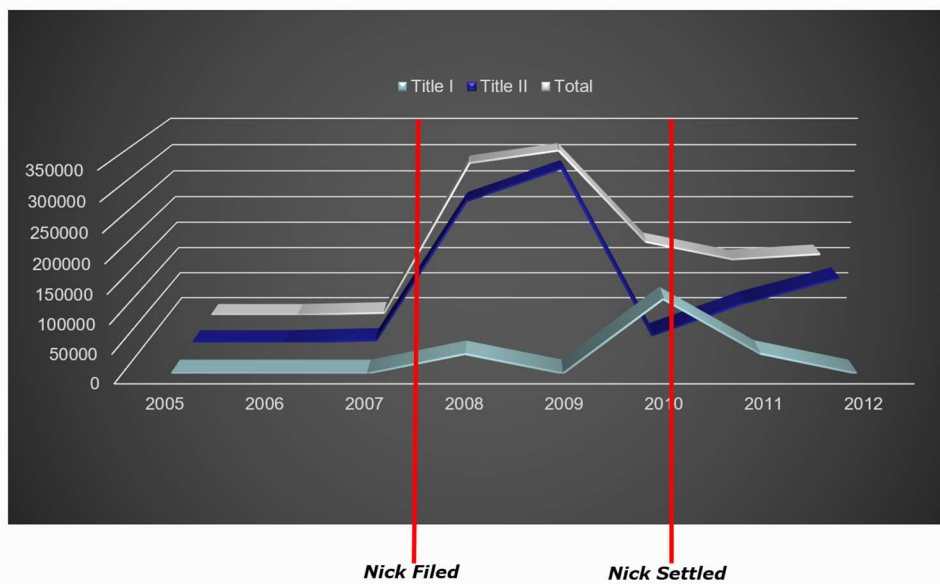
To summarize, every violation of the VRA that has been found by a federal court has occurred under the supervision of the current Director of the Division of Elections. Far from being attributable to previous administrations, Alaska’s violations have been under the same Director of DOE and have continued to the present. Those violations have necessitated federal court oversight through at least the end of next year. The violations provide powerful evidence of the need to strengthen protections for Alaska Natives through passage of the VRAA and NAVRA.

**The current Director of the Division of Elections exercises discretionary authority to deny Alaska Natives equal voting opportunities, necessitating passage of the VRAA and NAVRA.**

Alaska’s expenditure of federal Help America Vote Act (HAVA) funds likewise makes clear that the Director and DOE staff made Alaska Native language assistance a priority only when required to do so by a federal court through an action to enforce Section 203 of the VRA. Although HAVA funds were provided by the federal government to improve language accessibility in elections, the Director chose two paths outside of litigation: to use the funds to expand access of non-Natives to the voting process, such as by opening a new DOE office in the non-Native community of Wassila; and holding the balance of the funds in interest-bearing accounts. Figure 10 shows that DOE’s use of HAVA funds for language assistance was directly tied to the *Nick* litigation:

**Figure 10. Alaska’s use of HAVA funds and relationship to timing of the *Nick* litigation.**

***Amount of HAVA funds spent for language assistance by year and timing of Section 203 litigation***





The Director of the Division of Elections also has exercised her discretion to deny Alaska Native voters equal early voting opportunities.<sup>41</sup> Like over two-thirds of all states,<sup>42</sup> Alaska offers early voting (also called absentee in-person voting) for statewide elections.<sup>43</sup> State law provides that “[f]or 15 days before an election and on election day, a qualified voter ... may vote in locations designated by the director.”<sup>44</sup> Early voting allows eligible voters to cast ballots in person, just as they can do on the day of the election.<sup>45</sup> However, the location of early voting sites can effectively discriminate against Native voters by denying them in-person early voting opportunities equal to that of non-Natives.<sup>46</sup> Prior to 2014, Alaska’s early voting sites were in predominately urban non-Native areas and a few rural “hub-communities.”<sup>47</sup>

The disparity becomes readily apparent by looking at the census data for the locations where in-person early voting was provided. For example, in the November 2012 election, the City of Anchorage, where non-Natives comprise about 92 percent of the total population,<sup>48</sup> had four absentee voting locations open during the entire fifteen-day early voting period.<sup>49</sup> The Matanuska-Susitna Borough, where non-Natives comprise about 94 percent of the total population and which has less than one-third the population of Anchorage,<sup>50</sup> had five absentee voting locations open during the

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<sup>41</sup> The discussion of early voting is from Tucker, Landreth & Dougherty-Lynch, *supra*, at 344-50.

<sup>42</sup> Currently, in “37 states ... and the District of Columbia, any qualified voter may cast a ballot in person during a designated period prior to Election Day. No excuse or justification is required.” Nat’l Conf. of State Legis., *Absentee and Early Voting* (Jan. 5, 2016), <http://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx#early>. Eleven percent of all ballots cast nationwide in the 2014 elections did so through early voting. See U.S. Election Assistance Comm’n, *2014 Election Administration and Voting Survey* (June 2015), <http://www.eac.gov/assets/1/Page/How-Voters-Voted-2014.jpg>.

<sup>43</sup> Use of Alaska’s early voting locations (those other than the state’s five permanent elections offices) is limited to statewide primary, general and special elections. See 6 ALASKA ADMIN. CODE § 25.500(b) (2008). Ballots for local elections conducted by the state are only available during the early voting period at the five permanent election offices. See *id.* at § 25.500(c).

<sup>44</sup> ALASKA STAT. § 15.20.064(a) (2005); see also 6 ALASKA ADMIN. CODE § 25.500(a) (2008) (“Absentee voting stations will be established through the direction and approval of the director” of the DOE).

<sup>45</sup> See generally ALASKA STAT. § 15.20.064(b)-(c) (2005) (describing early voting procedures).

<sup>46</sup> See *Black Bull v. Dupree Sch. Dist.*, case no. 3:86-cv-03012 (D.S.D. 1986) (granting temporary and permanent relief to address 150 mile travel distance of Native voters to the closest polling place).

<sup>47</sup> “Hub-communities” are larger villages in rural areas of Alaska with airports that typically have jet service to urban areas such as Anchorage and Fairbanks. Residents of smaller villages in an area serviced by a hub-community will travel to that hub by bush plane, boat, or snow-mobile (when winter conditions permit) for basic shopping needs and for air transportation to larger cities, often to obtain health care services. Examples of hub-communities include Bethel in the Bethel Census Area and Dillingham in the Dillingham Census Area.

<sup>48</sup> See U.S. Census Bureau, *Quickfacts: Anchorage Municipality, Alaska (County)*, available at <http://www.census.gov/quickfacts/> (enter “Anchorage, Alaska” in field that says “Enter state, county, city, town, or zip code”).

<sup>49</sup> See STATE OF ALASKA, OFFICIAL ELECTION PAMPHLET: REGION II (MUNICIPALITY OF ANCHORAGE & MATANUSKA-SUSITNA BOROUGH) 9-11 (Nov. 6, 2012) [“2012 OEP REGION II”], <https://www.elections.alaska.gov/doc/oep/2012/Region-2-Book-Final-2012.pdf>.

<sup>50</sup> Compare U.S. Census Bureau, *Quickfacts: Matanuska-Susitna Borough, Alaska*, available at <http://www.census.gov/quickfacts/> (enter “Matanuska-Susitna Borough, Alaska” in the field that says “Enter state, county, city, town, or zip code”) with *supra* note 47.

entire early voting period.<sup>51</sup>

In sharp contrast, three of the regions with the largest percentage of Native voters were limited to just a handful of in-person early voting locations. The Bethel Census Area, home to at least 39 villages<sup>52</sup> and where Natives comprise about 83 percent of the total population,<sup>53</sup> had only three early voting locations: Bethel, Aniak and Kasigluk.<sup>54</sup> Of those, only Kasigluk is a predominantly Native community. The other 36 Native villages had no early voting. Furthermore, these voters did not have the option of flying to one of the three early voting locations (if anyone would fly to vote), because voters must vote in their assigned precinct in order to ensure their vote counts; if a voter from Chefornak went to Kasigluk for example, he or she would have to vote a questioned ballot. Even worse, the Kusilvak Census Area, which has at least fifteen villages and in which 95 percent of the total population is Native,<sup>55</sup> had only a single early voting location at St. Mary's.<sup>56</sup> The Dillingham Census Area, with more than one dozen villages<sup>57</sup> and Natives comprising nearly three-quarters of the total population,<sup>58</sup> had just one early voting site in Dillingham.<sup>59</sup> With a handful of exceptions, early voting was nearly universally unavailable in Native villages.

Beginning in at least 2011, AFN, other organizations, corporations, tribal councils, and voters, began requesting that DOE establish early-voting locations in Native villages.<sup>60</sup> The ANCSA Regional Corporation CEO's explained why in-person absentee voting in advance of the scheduled elections was necessary:

This is very important to people in our communities because, in August especially [during the primary election], subsistence fishermen and those who are berry picking are likely to be gone for significant periods of time. They often cannot be at voting

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<sup>51</sup> See 2012 OEP REGION II, *supra*, at 9-11.

<sup>52</sup> See Bethel Census Area, Communities, [https://en.wikipedia.org/wiki/Bethel\\_Census\\_Area,\\_Alaska](https://en.wikipedia.org/wiki/Bethel_Census_Area,_Alaska) (last visited Jan. 4, 2016).

<sup>53</sup> See U.S. Census Bureau, *Quickfacts: Bethel Census Area, Alaska*, available at <http://www.census.gov/quickfacts/> (enter "Bethel Census Area, Alaska" in field that says "Enter state, county, city, town, or zip code").

<sup>54</sup> See STATE OF ALASKA, OFFICIAL ELECTION PAMPHLET: REGION IV (NORTHERN AND SOUTHWEST ALASKA, ALEUTIAN CHAIN, WESTERN COOK INLET) 9-11 (Nov. 6, 2012) ["2012 OEP REGION IV"], <https://www.elections.alaska.gov/doc/oep/2012/Region-4-Book-Final-2012.pdf>.

<sup>55</sup> See U.S. Census Bureau, *Quickfacts: Wade Hampton Census Area, Alaska*, available at <http://www.census.gov/quickfacts/> (enter "Wade Hampton Census Area, Alaska" in field that says "Enter state, county, city, town, or zip code").

<sup>56</sup> See OEP, *supra*.

<sup>57</sup> See Dillingham Census Area, Communities, [https://en.wikipedia.org/wiki/Dillingham\\_Census\\_Area,\\_Alaska](https://en.wikipedia.org/wiki/Dillingham_Census_Area,_Alaska) (last visited Jan. 4, 2016).

<sup>58</sup> See U.S. Census Bureau, *Quickfacts: Dillingham Census Area, Alaska*, available at <http://www.census.gov/quickfacts/> (enter "Dillingham Census Area, Alaska" in field that says "Enter state, county, city, town, or zip code").

<sup>59</sup> See 2012 OEP REGION IV, *supra* note 56, at 9-11.

<sup>60</sup> See generally Stmt. of Interest of the Alaska Fed'n of Natives at 2, *Toyukak v. Treadwell*, case no. 3:13-cv-00137-SLG (D. Alaska filed July 3, 2014) [AFN Stmt. of Interest] (referring to requests for the preceding three years "that the DOE automatically provide early (absentee-in-person) voting locations throughout rural Alaska").

locations on the exact date of the election. Similar problems often arise in November as well [during the general election], when the weather adds to travel problems. Moreover, given how slow and unpredictable absentee by mail voting can be, many people in our community do not trust this option. Voting by fax is also not considered an option because almost no one has their own personal fax machine, and to fax from the tribal or municipal office costs the voter between \$1 to \$3 per page; there should be no cost associated with voting. The lack of personal fax machines also eliminates private voting rights, forcing individuals to share their choices if they want to participate in the election.<sup>61</sup>

Moreover, the Native corporations emphasized the inequality of offering early voting to those “who live in urban areas like Fairbanks, Anchorage, and Juneau,” asserting “that our rural residents should have the same access to the polls as urban Alaskans.”<sup>62</sup> DOE acknowledged receiving several letters from Native groups raising similar concerns.<sup>63</sup> Nevertheless, the DOE’s response ignored the obvious unequal treatment, even questioning why in-person early voting was needed there. Instead, the Director of DOE maintained that “there are several ways other than early in-person voting that residents of your community can vote prior to Election Day” that she argued “will be effective and will not result in disenfranchisement.”<sup>64</sup> The Director also blamed the Section 5 preclearance requirement for the discriminatory treatment of Natives, contending that it precluded the DOE from making “further adjustments or changes for the 2012 elections.”<sup>65</sup>

In August 2013, following the *Shelby County* decision removing Alaska from coverage for the Section 5 preclearance requirements, at least half a dozen Native organizations and three tribal councils again requested early voting in the villages with the hope that it could easily be done since the preclearance the DOE complained about was no longer required.<sup>66</sup> In response to those requests, DOE conceded that preclearance was “no longer required.”<sup>67</sup> Nevertheless, instead of granting the repeated request, DOE’s Director devised a new three-step process as a condition for adding locations in Native villages. First, regardless of any previous requests they had made, tribal councils were required to respond to a survey.<sup>68</sup> There were several different versions of the survey, with the

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<sup>61</sup> Letter from Kim Reitmeier, Exec. Dir. of ANCSA Regional Ass’n, to Gail Fenumiai, Dir., Div. of Elections (July 26, 2012).

<sup>62</sup> *Id.*

<sup>63</sup> See Letter from Gail Fenumiai, Dir., Div. of Elections, to Kim Reitmeier, Exec. Dir. of ANCSA Regional Ass’n 1 (Aug. 1, 2012).

<sup>64</sup> *Id.* at 1-2.

<sup>65</sup> Letter from Gail Fenumiai, Dir., Div. of Elections, to Kim Reitmeier, Exec. Dir. of ANCSA Regional Ass’n 2 (Aug. 1, 2012).

<sup>66</sup> See Letter from Gail Fenumiai, Dir., Div. of Elections, to Myron Naneng, President of Ass’n of Village Council Presidents 1 (Aug. 1, 2012) (listing the organizations). Some of the organizations represented several tribal councils. For example, the letter sent by Mr. Naneng was on behalf of the “56 federally recognized Tribes on the Yukon-Kuskokwim Delta” seeking early voting “in all villages in rural Alaska for the 2014 election cycle.” Letter from Myron Naneng, President of Ass’n of Village Council Presidents, to Gail Fenumiai, Dir., Div. of Elections 1 (Aug. 15, 2013).

<sup>67</sup> See Letter from Gail Fenumiai, Dir., Div. of Elections, to Myron Naneng, President of Ass’n of Village Council Presidents 1 (Aug. 1, 2012).

<sup>68</sup> *Id.* at 2.

questions worded slightly differently for no clear reason. All surveys were in English and the key question was often buried in a lengthy and sometimes incomprehensible paragraph describing all the various ways to cast a ballot. Each did ask the village to opt-in by indicating “if they would like an absentee in-person voting location” as well as requiring the tribal council to state that “it is willing to serve as the absentee voting location.”<sup>69</sup> If the tribal council did not respond, DOE took no further action.<sup>70</sup> Second, if the tribal council responded to the survey, DOE sent out a second letter asking them to reaffirm their earlier response on “whether the tribal council office would agree to serve as the absentee voting location.”<sup>71</sup> Third, the tribal council, not the DOE, was required to “designate an individual to serve as the absentee voting official.”<sup>72</sup> Only then would DOE consider establishing an in-person early voting location in a Native village.<sup>73</sup> Despite the many requests already made from organizations representing dozens of tribes, the Director noted that only two, Chevak and Larsen Bay, had succeeded in negotiating these confusing bureaucratic requirements.<sup>74</sup>

In early 2014, in the months leading up to the primary and general elections, the DOE had still taken no steps to establish in-person early voting locations in Native villages. These stalling tactics prompted Native organizations to again request that rural villages be treated equally to non-Native urban areas. Specifically, they asked for the provision of “early voting in every village without requiring villages to ‘opt-in’ by survey or otherwise. Urban communities are not required to opt-in to early voting, and ... rural Alaska should have as equal access to voting as urban Alaska.”<sup>75</sup> They likewise requested that DOE provide an additional early voting station during the three-day Alaska Federation of Natives conference to make it more accessible to the thousands of voters who attend that conference.<sup>76</sup> DOE waited more than one month to respond, rejecting both requests.<sup>77</sup> The Director rationalized the disparate treatment to Native villages by asserting that adequate voting locations and absentee voting officials “have historically been more easily found in more populated and/or urban areas.”<sup>78</sup>

Ultimately, in-person early voting locations were only established in Native villages after AFN, the ANCSA CEO’s Association, and Get Out The Native Vote agreed to engage in self-help and pay the costs.<sup>79</sup> In June 2014, the Native groups took on a burden not required for non-Native

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<sup>69</sup> *Id.*

<sup>70</sup> *See id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *See id.*

<sup>74</sup> *Id.*

<sup>75</sup> *See* Letter from Jason Metrokin, Chair of ANCSA Regional Ass’n, to Gail Fenumiai, Dir., Div. of Elections 1 (Apr. 7, 2014).

<sup>76</sup> *Id.* at 2.

<sup>77</sup> *See* Letter from Gail Fenumiai, Dir., Div. of Elections, to Jason Metrokin, Chair of ANCSA Regional Ass’n 1-2, 4 (May 9, 2014).

<sup>78</sup> *Id.* at 2.

<sup>79</sup> *See* Alaska Fed’n of Natives, *AFN and ANCSA Regional Ass’n Release Final List of New Absentee Early Voting Sites in Rural Alaska* (July 16, 2014) [Rural Alaska Early Voting], <http://www.nativefederation.org/afn-and-ancsa-regional->

groups or voters living in urban areas of Alaska. They performed DOE’s statutory duty<sup>80</sup> by identifying voting locations and recruiting absentee voting officials.<sup>81</sup> A total of 128 villages throughout rural Alaska were designated by the Native groups and approved by DOE for in-person early voting locations.<sup>82</sup>

Afterwards, DOE’s director attempted to claim credit for making early voting accessible in the villages.<sup>83</sup> AFN sharply rebuked her efforts, explaining that Native organizations were “[t]ired of having our repeated requests rejected” and “offered to do the work for the DOE and organize new early voting locations ourselves ... The DOE did not do this—we did.”<sup>84</sup> DOE then attempted to limit the number of ballots sent to the Native early voting locations to between 25 and 50, even though most of locations had hundreds of voters.<sup>85</sup>

While Alaska Native voters finally secured early voting opportunities, they did so only after substantial struggles and requirements not imposed on non-Natives. The examples of the use of HAVA funds and the creation of early voting sites highlights the importance of strong federal legislation to protect the voting rights of Alaska Native voters.

While some critics of the VRAA and NAVRA have maintained that voting rights should be “left to the states,” the Alaska experience has shown why that argument is specious. Left to her own devices, the current Director of the Division of Elections repeatedly has exercised her discretion to expand registration and voting opportunities for non-Natives, while denying those opportunities to Alaska Native voters. The VRAA and NAVRA are strong medicine needed to address the discrimination of Alaska’s election officials.

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[association-release-final-list-of-new-absentee-early-voting-sites-in-rural-alaska/](#).

<sup>80</sup> See generally ALASKA STAT. §§ 15.15.060 (2000) (DOE’s *director* “shall pay the cost of necessary election expenses incurred in securing a place for holding the election...”) (emphasis added); 15.20.045 (2014) (“*The director or election supervisor* may designate persons to act as absentee voting officials” and the “*director* may designate ... locations at which absentee voting stations will be operated on or after the 15th day before an election up to and including the date of the election”) (emphasis added); see also 6 ALASKA ADMIN. CODE § 25.500(a) (2008) (“Absentee voting stations will be established through the direction and approval of *the director*” of the DOE) (emphasis added).

<sup>81</sup> See Rural Alaska Early Voting, *supra*.

<sup>82</sup> See *id.*

<sup>83</sup> See Trial Tr. 1714:5-17, *Toyukak v. Treadwell*, case no. 3:13-cv-00137-SLG (D. Alaska July 2, 2014) (Gail Fenumiai Test.).

<sup>84</sup> AFN Stmt. of Interest, *supra*, at 2-3.

<sup>85</sup> See Letter from Andrew Guy, President & CEO of Calista Corp., to Lt. Gov. Mead Treadwell, Gail Fenumiai, Dir., Div. of Elections, & Becka Baker, Region IV Super. (July 31, 2014).

**Before *Shelby County*, the preclearance requirements of Section 5 stopped discrimination by the current Director of the Division of Elections against Alaska Natives before it occurred.**

AFN filed an amicus curiae brief in *Shelby County* in support of the Section 5 coverage formula and the coverage of Alaska under it. In that brief, AFN cited several examples of how preclearance stopped voting discrimination against Alaska Natives. For example, in 1993, the U.S. Department of Justice objected to Alaska's statewide legislative redistricting plan because it reduced the Alaska Native voting age population in House District 36, despite the presence of highly racially polarized voting. Similarly, Section 5 prevented Alaska from implementing a newly proposed language assistance plan in 2008, which Alaska officials designed to reduce language assistance provided under its precleared 1981 language plan in an effort to undermine the *Nick* litigation.

Section 5 also was an effective means of blocking discrimination that occurred under the supervision of the current Director of the Division of Elections.

In May 2008, within weeks of when the Director assumed her position, Alaska submitted for preclearance a plan to eliminate precincts in several Native villages.<sup>86</sup> State officials proposed to (1) "realign" Tatitlek, a community in which about 85 percent of the residents are Alaska Native, to the predominately white community Cordova, located over 33 miles away and not connected by road; (2) consolidate Pedro Bay, where a majority of residents are Alaska Native, with Iliamna and Newhalen, located approximately 28 miles away, are not connected by road, and were the subject of a critical initiative on the August 2008 ballot; and (3) consolidate Levelock, in which about 95 percent of residents are Alaska Native, with Kokhanok, approximately 77 miles apart and not connected by road. In other words, *the DOE was attempting to combine precincts accessible to one another only by air or boat with high concentrations of Alaska Native voters.*

The Department of Justice responded with a More Information Request (MIR) letter requesting information about reasons for the voting changes, distances between the polling places, and their accessibility to Alaska Native voters. The Department inquired about "the methods of transportation available to voters traveling from the old precinct to the new consolidated precinct" asking that if there were no roadways connecting them that the State "indicate how voters will get to the consolidated location." The MIR suggested that Alaska's election officials had not consulted with Native voters about the changes and requested a "detailed description" of efforts "to secure the views of the public, including members of the minority community, regarding these changes." Finally, the MIR documented that *when Department of Justice personnel communicated with State officials, they learned that Alaska also was taking steps to implement an unsubmitted voting change designating "specified voting precincts" as "permanent absentee by-mail precincts."*

Rather than responding and submitting the additional voting changes for Section 5 review, the Director abruptly withdrew the submission two weeks later.<sup>87</sup>

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<sup>86</sup> See Letter from Christopher Coates, Chief, Voting Section, to Gail Fenumiai, Director, Division of Elections, dated July 14, 2008.

<sup>87</sup> See Letter from Christopher Coates, Chief, Voting Section, to Gail Fenumiai, Director, Division of Elections, dated Sept. 10, 2008.

Alaska’s election officials, including their current Director of the Division of Elections, have shown that time and again, they cannot be trusted to exercise their discretion to provide equal registration and voting opportunities to Alaska Natives. The VRAA and NAVRA are needed to provide a failsafe against the discriminatory actions of the Director and other Alaska election officials. In the absence of Section 5 coverage, which stopped discrimination in its tracks before it could disenfranchise Alaska Native voters, those same voters and organizations like AFN that represent them are left with pursuing relief through the federal courts. As I will explain in the next section, the VRAA and NAVRA both add important weapons to the arsenal available to fight discrimination.

Without the protections in both bills, Alaska Native voters will be left to have their fundamental right to vote rise or fall at the whims of election officials, such as the Director of DOE, who have proven they will not exercise their statutory discretion in a nondiscriminatory manner.

**Enactment of both the VRAA and NAVRA is necessary to protect Alaska Native voters from current discrimination that impedes their equal access to registration, voting, and having their ballots count.**

In *Shelby County v. Holder*,<sup>88</sup> the D.C. Circuit Court of Appeals showed the dangers of the Third Branch engaging in dictum. The question of Alaska’s coverage under Section 5’s preclearance provisions was not before the Court. No evidence was taken by the court from Alaska Natives who have experienced Alaska’s long history of past and present voting discrimination first-hand. Nevertheless, the appellate court speculated that the Section 5 coverage formula might be imprecise because some jurisdictions, such as Alaska, were “swept in” under preclearance despite “little or no evidence of current problems.”<sup>89</sup>

The record I have described demonstrates the dangers of federal courts ruling on factual questions that are not before them. The “case or controversy” requirement necessitates that judicial rulings be limited to only those facts and legal questions before the court. The continued need for coverage of Alaska was not one of those questions that the appellate court could consider properly in *Shelby County*. Nevertheless, at least the appellate court’s non-binding dictum had no effect on the continued – and necessary – coverage of Alaska under Section 5.

The same cannot be said of the Supreme Court’s 2013 decision. In *Shelby County*, a narrow 5-4 majority of the Court ignored the broad enforcement powers that the Constitution conferred on Congress to remedy voting discrimination<sup>90</sup> by usurping that authority to overrule the sound judgments that the Senate and House made in the 2006 reauthorization of Section 5 of the Voting Rights Act. Although the case involved a single county in Alabama covered under a different provision of the Voting Rights Act, Section 4(b) of the Act, the Supreme Court broadly intruded on powers reserved to Congress to expand its decision to include all states and political subdivisions covered by Section 5, including those like Alaska that were covered under Section 4(f)(4) of the Act. With the issue of the continued need for coverage of Alaska not properly before the Court, five

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<sup>88</sup> 570 U.S. 529 (2013).

<sup>89</sup> 679 F.3d 848, 880–81 (D.C. Cir. 2012).

<sup>90</sup> See U.S. CONST. amend. XIV § 5; U.S. CONST. amend. XV § 2.

Justices struck down all of Section 5’s coverage formulas, including the one covering Alaska.<sup>91</sup>

The impact that the loss of Section 5 coverage has had on Alaska Natives cannot be overstated. AFN’s members and the Alaska Native voters they represent saw critical protection for their voting rights disappear overnight. Preclearance effectively stopped discrimination before it occurred, whether it was through the intentional discrimination of Alaska’s Division of Elections to willfully ignore the language assistance requirements for Alaska’s indigenous peoples or to limit efforts to disenfranchise Alaska Native voters by eliminating in-person voting opportunities or consolidating polling places with far-flung communities that voters could not reach.

As explained in the previous section, in the absence of Section 5, Alaska’s election officials have accelerated efforts to replace in-person voting with mail-in Permanent Absentee Voting (PAV) voting that denies LEP voters with much-needed language assistance. Often, mail-in voting simply is not feasible in villages where mail service is too unpredictable and unreliable to allow Alaska Natives to exercise their fundamental right to vote. Unequal opportunities for in-person early voting are provided to Alaska Natives, who are compelled to engage in self-help for services that the Division of Elections prioritizes for non-Native communities where registration and voting already is much more accessible.

The expensive and time-consuming *Toyukak* litigation itself was a byproduct of *Shelby County*’s assault on the voting rights of Alaska Natives. Immediately after that decision, when Division of Elections personnel, including the current Director, were informed of widespread violations of language assistance requirements for Gwich’in and Yup’ik speaking villages in three regions of Alaska, they demurred. Rather than taking efforts to correct their violations of Section 203 of the Voting Rights Act, Alaska’s election officials rejected their legal duties and forced Alaska Native voters and villages to sue them. Despite being fast-tracked to secure relief before the 2014 election, it was a year before the case went to trial. The case was marred by the State of Alaska’s racially discriminatory argument that the Fifteenth Amendment did not apply to Alaska Natives. Following a two-week bench trial, which cost the plaintiffs and the State of Alaska over \$2 million, the federal court issued a decision several months later, in September 2014, holding that election officials violated Section 203 of the Voting Rights Act.<sup>92</sup>

Other decisions by the Supreme Court have exacerbated *Shelby County*’s impact on ensuring that Alaska Natives, like all Americans, have equal opportunities to exercise their most fundamental right, the right to vote. Those decisions, which have been discussed in detail by other witnesses during the hearings on S.4 and its House counterpart, H.4, include:

- *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, in which the Court diminished the ability of organizations and individuals seeking relief from voting discrimination to recover their reasonable attorneys’ fees and costs under the Voting Rights Act, by rejecting the well-accepted catalyst theory to determine litigants who qualified as “prevailing

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<sup>91</sup> See 570 U.S. 529 (2013).

<sup>92</sup> See Tucker, Landreth & Dougherty-Lynch, *supra*, at 358-82.



parties”;<sup>93</sup>

- *Purcell v. Gonzalez*, a decision that gave rise to the so-called “*Purcell Principle*,” which discourages federal courts from providing substantive relief from voting discrimination if it would potentially disrupt administration of elections, even where a voting rule, procedure or practice was adopted by election administrators close to an election;<sup>94</sup> and
- *Brnovich v. Democratic National Committee*, decided on July 1 of this year, in which the Supreme Court substantially narrowed the scope of vote denial or abridgment claims by rewriting Section 2 of the Voting Rights Act to use a new “totality of the circumstances” test inconsistent with the plain language of the Act and over a half century of jurisprudence interpreting the Act’s general non-discrimination provision.<sup>95</sup>

Current discrimination against Alaska Natives is neither sophisticated nor covert. The examples I have described show that intentional discrimination by Alaska’s election officials are done openly and comprise the most basic efforts to reduce opportunities by Alaska Natives to register to vote, cast ballots, and to have their votes counted. Each of these four Supreme Court decisions makes it more difficult for Alaska Natives to eliminate these barriers to their political participation. S.4 includes critically needed fixes that will clarify congressional intent on the proper scope of protections under the Voting Rights Act.

### **AFN joins NARF in its support for passage of the VRAA.**

NARF and other civil rights organizations have described in detail the reasons why the provisions in the VRAA are needed to ensure that all minority voters, including Alaska Native voters, have equal access to the political process.

I am going to limit my comments on the VRAA to one provision that is important for protecting the voting rights of Alaska Natives: the *Brnovich* fix. *Brnovich* is an especially pernicious decision not just for the impact it has on Alaska Native voters but because a judicially active majority wrongfully usurped the role of Congress to write legislation. In the 1982 amendments to the Voting Rights Act, Congress made clear its intent on the broad scope that vote denial or abridgment claims were to be given under Section 2 of the Act. Despite four decades of jurisprudence respecting that broad scope, Justice Alito’s opinion in *Brnovich* purports to rewrite the statute to add a gloss of several new “factors” to be considered for the first time in voting rights enforcement actions.

*Brnovich* itself involved challenges to two voting procedures in Arizona that substantially restricted the ability of Native voters to cast ballots that were counted: a prohibition of out-of-precinct voting and making it unlawful for the ballots of Native voters lacking access to reliable mail service or transportation to be collected and delivered to drop boxes or election offices at the voter’s request.

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<sup>93</sup> 532 U.S. 598 (2001).

<sup>94</sup> 549 U.S. 1 (2006) (per curiam).

<sup>95</sup> 141 S.Ct. 2321 (2001).

I will focus my remarks on the second prohibition on ballot collection.

In the face of strong evidence that Arizona’s ballot collection ban had a disproportionately great impact on Native voters with nontraditional addresses and lack of access to mailing facilities, Justice Alito contrived several factors to reject such claims. In particular, he wrote that “the size of the burden imposed by a challenged voting rule is highly relevant ... Mere inconvenience cannot be enough to demonstrate a violation of § 2.”<sup>96</sup> In addition, Justice Alito contended:

The size of any disparities in a rule’s impact on members of different racial or ethnic groups is also an important factor to consider. Small disparities are less likely than large ones to indicate that a system is not equally open. To the extent that minority and non-minority groups differ with respect to employment, wealth, and education, even neutral regulations, no matter how crafted, may result in some predictable disparities in rates of voting and noncompliance with voting rules.... The size of any disparity matters.... What are at bottom very small differences should not be artificially magnified.<sup>97</sup>

In *Brnovich*, the majority found that even though the ballot collection ban disenfranchised thousands of Native voters, that number was small because it constituted a very small fraction of all voters in Arizona.

The exception for so-called “*de minimis*” violations of the Voting Rights Act could have a similar effect in Alaska. Most Alaska Native villages have populations of less than 350, with an even smaller number of registered voters. Application of so-called “neutral” election procedures that required a certain threshold of voters for in-person registration, early voting and Election Day voting, could effectively deny those same opportunities to most, if not all, Alaska Native villages. That would further cement the practices in which the current Director of the DOE has engaged, by establishing two tiers of voting citizens in Alaska: those living in urban areas that are predominately non-Native and are entitled to a multitude of voting opportunities; and those living in rural areas that are predominately Alaska Native and receive only a fraction of the registration and voting access.

As a result, AFN strongly supports the VRAA and the fixes it provides to decisions such as Justice Alito’s in *Brnovich*, which is a clear example of legislating from the bench in a manner that would disenfranchise thousands of Alaska Natives.

**NAVRA offers complimentary protections for Alaska Natives needed to strengthen the protections offered to all minority voters in the VRAA.**

NAVRA is an especially important part of S.4 because it targets the unique barriers that Alaska Native and American Indian voters experience when they attempt to register to vote, to cast a ballot and to have that ballot counted. Equally important, Congress has broad authority to enact NAVRA to remedy voting discrimination not just through its Enforcement Clause powers under the Reconstruction Amendments, but also through its constitutional abilities to regulate relations with

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<sup>96</sup> *Brnovich*, 141 S.Ct. at 2338.

<sup>97</sup> *Id.* at

Tribes and their citizens in the Government-To-Government relationship the United States has with federally recognized Tribes. NAVRA spells out that authority very clearly in its introductory section.

I am going to concentrate on some of NAVRA's provisions next to explain why they are needed to protect Alaska Native voters.

***A Native American Voting Task Force Grant Program is needed.***

As an initial matter, Section 304 of NAVRA establishes a Native American Voting Task Force Grant Program, seeking to improve voter registration and ballot access in Native American communities through many methods. A fully funded grant program purposed to expand registration and voting opportunities for rural Alaska and the rest of Indian Country is critical to securing equal access for Native voters.

Far too often, Tribes, Native organizations or individuals, like AFN, are compelled to engage in self-help to secure the most basic services that are provided on a routine basis at no-cost to non-Natives. That is apparent in some of the actions Alaska's election officials have taken in registration and voting opportunities in Alaska Native villages.

Passage, implementation and funding of a Grant Program would go a long way to providing resources for efforts in the future, as well as others like: outreach; establishing early voting sites; improving bilingual materials and assistance; enhancing election official training; and encouraging greater cooperation by election officials with Alaska Native governments and organizations such as AFN.

I want to emphasize the importance of ensuring that funds for the Grant Program actually are used for their designated purposes, and are not simply a means for a state to earn interest or use funds to subsidize programs election officials are required to provide already. That is precisely what happened in Alaska. For years, Alaska left federal HAVA funds untouched, accruing interest on the funds. When Alaska officials began using the funds in earnest, they did so to improve registration and voting of non-Natives for whom both already were accessible, at the expense of neglecting Alaska Native communities. There must be accountability for how those funds are used.

***NAVRA makes registration and voting more accessible in Alaska Native communities.***

Section 305 of NAVRA amends § 7 of the National Voter Registration Act of 1993<sup>98</sup> by adding as designated voter registration sites those federally funded facilities located on Indian land or primarily engaged in providing services to Native Americans. This provision is important for two reasons. First, many Alaska Native villages have federally funded offices that help service programs that are essential to the social, economic and health needs of residents. Second, those offices are not currently required to offer voter registration services. Section 305 would cure that deficiency through the common-sense measure of requiring existing federal service centers in rural Alaska to simply add voter registration to the mandated services they provide already.

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<sup>98</sup> 52 U.S.C. § 20506(a).

Section 306 would allow Tribal Governments to designate at least one in-person polling site on the Tribe's Indian lands, which includes ANCSA lands, to prevent the reduction of polling places on those lands, and provide additional polling sites based upon several criteria such as the number of voters assigned to polling places, travel distances and time to reach polling sites, transportation barriers, waiting times, and other factors. This measure responds to a growing problem in Alaska. Far too often, citing expense and inconvenience to their office, Division of Elections staff have sought to avoid federal language assistance mandates by designating Alaska Native villages as Permanent Absentee Voting sites. Such designations effectively can disenfranchise all voters in villages that receive that designation. NAVRA would stop that discriminatory practice. In its place, it would leave the authority for determining the polling place for Alaska Native villages where it properly belongs: in the hands of the Tribal Government for that village. In the process, this measure helps preserve the right to vote of all Alaska Natives through the simple act of allowing sovereign Tribal Governments to decide the best interests of their voters, and not be subject to the discriminatory whims of non-Native officials located hundreds of miles away.

Voting during the COVID-19 pandemic increasingly has relied upon alternatives to in-person voting, such as mail-in voting. When such alternatives are appropriate (that is, for voters other than LEP Tribal Elders who need in-person language assistance and those voters lacking reliable mail service), NAVRA facilitates their use in Alaska Native communities. Tribal Governments may designate at least one building per voting precinct as ballot pickup and collection sites. At the request of Tribes, mail-in and absentee ballots are to be provided to registered Native voters without requiring a residential address or completed application for the ballot. Tribally designated buildings may be substituted for required residential or mailing addresses. At least one ballot drop box must be provided for each Tribal Nation's lands, with additional drop boxes provided if the totality of the circumstances demonstrates their need. In-person early voting opportunities must be offered on Tribal lands if a State or political subdivision offers them elsewhere, which must provide at least a 10-hour period to vote for each day early voting sites are open.

Provisional ballots have impaired the ability of many Alaska Native voters to cast effective ballots. Section 306 of NAVRA addresses the problems of forcing Native voters to travel extensive distances to resolve any deficiencies preventing the counting of their ballot. Under NAVRA, Native voters must be provided clear notice of any errors or issues with their ballots, and be allowed to resolve those issues at any polling place on Indian lands or through alternative means such as facsimile. The bill also resolves a barrier created by the Help America Vote Act by creating a private cause of action for Native voters to enforce the provisional ballot requirements in NAVRA. That fix will ensure that Native voters, or their Tribal Governments, are able to take legal action against any recalcitrant election officials who fail to comply with provisional ballot mandates.

Section 307 of NAVRA offers an important recognition of Tribal Sovereignty in the voting process. It requires that any State or political subdivision seeking to remove a voter registration or polling site on Indian lands must either obtain the consent of the Tribal Government or institute a declaratory judgment action in the U.S. District Court for the District of Columbia. Alternatively, the change may be submitted for review and approval by the Attorney General after consultation with the Tribal Government. This provision ensures that approval authority for changes in voting locations affecting Alaska Native voters comes from Tribal Governments, not non-Native election officials.

***Acceptance of Tribal identification to confirm Native voters' identities.***

Voter identification problems faced by Native voters are the focus of Section 308 of NAVRA. Under that provision, if a state or political subdivision requires identification to register to vote or to cast a ballot, they must accept an identification card issued by a federally recognized Tribe, the Bureau of Indian Affairs, the Indian Health Service, or any other Tribal or Federal agency that issues identification cards to eligible Native voters. This remedy cannot be circumvented by requiring multiple forms of identification. Election officials also must consult with Tribes to ensure that any identification that must be submitted online is accessible to Native voters.

Like the other provisions of NAVRA, this is a much-needed common-sense measure. Because so many Alaska Native villages are located off the state road system in places where ATVs or snowmobiles – not cars – are used, thousands of Alaska Native voters lack a Real ID driver's license issued by the State Department of Motor Vehicles. Instead, they use identification issued by Federal agencies, the ANCs or their village corporations, including when they use public transportation.

Section 308 of NAVRA recognizes this common usage of identification cards that are not issued by state governments. It ensures that the unique circumstances of Alaska Native voters, which range from inability to get a state identification card because they lack a birth certificate or other required documentation, or they simply do not need one because of where they live, is not a means to disenfranchise them.

***Ballot collection procedures can resolve some transportation issues.***

NAVRA also facilitates ballot collection from Native voters who often lack access to reliable and affordable transportation to get to voting locations, post offices or drop boxes. Section 309 permits any person to return a sealed ballot of a voter residing on Indian lands, as long as the person returning the ballot receives no compensation. There is no limit placed on the number of ballots that may be returned. Organizations collecting and returning sealed ballots are required to keep a record of the materials collected and the location and date the ballot materials were submitted.

***Section 203 of the VRA is amended to fix a proviso used to disenfranchise Native voters.***

Section 310 of NAVRA includes a simple, but important, fix to the language assistance provisions of the Voting Rights Act. As currently written Section 203 provides that covered jurisdictions do not have to provide written translations for languages that are “historically unwritten.”<sup>99</sup> For decades, Alaska election officials used this proviso to deny all language assistance to Alaska Native voters.

In the *Nick* litigation, Alaska election officials argued that no written translations of voting materials and information were required because they claimed that all Alaska Native languages are

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<sup>99</sup> See generally 52 U.S.C. § 10503(c) (“... Provided, That where the language of the applicable minority group is oral or unwritten or in the case of Alaskan natives and American Indians, if the predominant language is historically unwritten, the State or political subdivision is only required to furnish oral instructions, assistance, or other information relating to registration and voting.”).

“historically unwritten.” They made that argument even though several Alaska Native languages including but not limited to Gwich’in, Inupiaq and Yup’ik, are written and widely used by Native voters and even Alaska’s own poll workers.<sup>100</sup> The federal court in *Nick* ultimately found that even where a language is “historically unwritten” bilingual written translations might be needed to ensure that oral language translations were accurate and effective.<sup>101</sup> However, that narrow construction of Section 203’s requirements leaves all LEP Alaska Native voters vulnerable to a contrary interpretation that may revert back to placing the entire burden of translations on bilingual workers to interpret complex ballot measures on-the-spot.

This section of NAVRA cures this problem by providing that Native voters in jurisdictions covered by Section 203 for their language may receive written translations in their language if their Tribal Government determines that written translations are needed. Again, that ensures that Tribal Governments, not non-Native election officials or federal judges, are the ones who decide whether written translations are to be provided in the covered Alaska Native language.

***NAVRA’s remaining provisions facilitate Alaska Native voting.***

Section 311 of NAVRA allows Tribes to request that the Attorney General send federal observers by identifying one or more instances in which a voting rights violation is expected to occur in an election. That provides Tribal Governments in Alaska a means to request early intervention by the U.S. Department of Justice if it appears that Alaska’s election officials are failing to comply with one or more provisions of federal voting rights law.

Section 312 recognizes Tribal jurisdiction to detain or remove any non-Indian unaffiliated with the Federal or a State or local government who intimidates, harasses or impedes the conduct of an election or voting. This provision acknowledges authority that Tribal Governments have already. In Alaska, this section is especially important because most Alaska Native villages lack any access to or coverage by state law enforcement officials. If Tribal Government officials do not have that authority, which NAVRA provides, it would leave unaddressed efforts to disenfranchise Alaska Native voters through direct suppression.

Section 313 requires the Attorney General annually consult with Tribal Nations regarding Federal elections. While this is something that should occur without legislation, far too often it does not.

Section 314 provides for recovery of attorneys’ fees, litigation expenses and expert fees to a prevailing party in any enforcement action brought under NAVRA. As I have explained briefly in my discussion of the *Buckhannon* decision, more restrictive attorneys’ fees provisions can significantly hamper enforcement of federal voting rights protections for Alaska Natives.

Section 315 directs the Government Accounting Office (GAO) to conduct a study and report on the prevalence of nontraditional or nonexistent mailing addresses for Native voters and to identify alternatives to resolve those barriers. Finally, Section 316 requires consultation with the U.S. Postal

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<sup>100</sup> See generally TUCKER, *supra*, at 91-98, 280-85; see also Tucker, Landreth & Dougherty-Lynch, *supra*, at 354-55.

<sup>101</sup> See Tucker, Landreth & Dougherty-Lynch, *supra*, at 355-57.

Service to resolve addressing problems. Both of these are significant issues in Alaska.

AFN applauds the Senate for including NAVRA in the bill, to help ensure that all Alaska Natives have equal access to the voting process.

**The Senate should pass S.4, including both the VRAA and NAVRA, to protect voting by Alaska Natives from discrimination by Alaska's election officials.**

Protecting the right to vote is not a partisan issue. It is a fundamental civil rights issue for Alaska Natives. Everyone suffers, and elected government has less legitimacy, each time an Alaska Native is prevented from registering to vote or is turned away at the polls. Now is the time to act. Now is the time to pass S.4, the John R. Lewis Voting Rights Advancement Act of 2021, and Title III of that bill, The Frank Harrison, Elizabeth Peratrovich, and Miguel Trujillo Native American Voting Rights Act of 2021.

Thank you very much for your attention and your commitment to making voting fully accessible for Alaska Natives and other voters in Indian Country. I welcome the opportunity to answer any questions you may have.