

ATTORNEYS
Heather R. Kendall-Miller
Natalie A. Landreth

Native American Rights Fund

420 L Street, Suite 505, Anchorage, AK 99501 • (907) 276-0680 • FAX (907) 276-2466

EXECUTIVE DIRECTOR
John E. Echohawk

American Civil Liberties Union of Alaska
Executive Director: Jeffrey Mittman
P.O. Box 201844
Anchorage, AK 99520-1844
Phone: 907-276-2258
Fax: 907-258-0288
E-mail: akclu@akclu.org



American Civil Liberties Union
ACLU Voting Rights Project
Associate Director Neil Bradley
2600 Marquis One Tower
245 Peachtree Center Ave.
Atlanta, GA 30303
Phone: 404-523-2721, ext. 217
E-mail: nbradley@aclu.org

VIA E-MAIL AND FAX (202-307-3961)

To: Christopher Coates, Acting Chief
Voting Section
Department of Justice
Room 7254 – NWB
1800 G St., N.W.
Washington, DC 20006

Re: Comment under Section 5 of the Voting Rights Act (2008-1726)
State of Alaska's Minority Language Program

Dear Acting Chief Coates:

Pursuant to 28 C.F.R. § 51.29, the American Civil Liberties Union (ACLU) and Native American Rights Fund (NARF) ask for your consideration of information pertaining to the State of Alaska's submission regarding its minority language program. The ACLU and NARF are co-counsel in *Nick et al. v. City of Bethel et al.*, Case No. 3:07-cv-0098-TMB (D. Alaska filed June 11, 2007), which challenges, among other things, Alaska's failure to provide effective language assistance to limited-English proficient (LEP) Yup'ik voting-age U.S. citizens in the Bethel Census Area, in violation of Sections 4(f)(4) and 203 of the Voting Rights Act (VRA). The evidence developed in the *Nick* litigation is directly relevant to Alaska's Section 5 submission.¹ See 28 C.F.R. § 51.31.

Alaska's Section 5 submission requires it to demonstrate that the proposed changes in its minority language program "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color" or membership in a language minority group. 42 U.S.C. § 1973c(a). Alaska has failed to meet its burden.

¹ We will cite many examples from Yup'ik voters in the Bethel Census Area to highlight problems with the State's submission. Although we do not have a fully developed record for other tribes in the balance of Alaska, Yup'ik voters are the single largest Alaskan Native group and are illustrative of complaints we have received from other Alaskan Natives in other parts of the state, particularly the Dillingham Census Area, Wade Hampton Census Area, and North Slope Borough.

Additionally, according to the 2000 Census the Bethel Census Area is one of just three county-level jurisdictions in the United States in which a majority of persons five years and older speak an American Indian or Alaskan Native language at home (the Wade Hampton Census Area in Alaska and Apache County, Arizona are the other two jurisdictions). Statement of Facts in support of the *Nick* Motion for Preliminary Injunction ("SOF") ¶ 33.

I. ALASKA’S 1981 MINORITY LANGUAGE PLAN IS NOT A VALID BENCHMARK.

In evaluating Alaska’s submission, it is first necessary for the Department to determine the benchmark of comparison. The Department’s regulations describe the manner in which the proper benchmark is identified:

In determining whether a submitted change is retrogressive the Attorney General will normally compare the submitted change to the voting practice or procedure in effect at the time of the submission. If the existing practice or procedure upon submission was not in effect on the jurisdiction’s applicable date for coverage (specified in the appendix) and is not otherwise legally enforceable under section 5, it cannot serve as a benchmark, and, except as provided in paragraph (b)(4) of this section, the comparison shall be with the last legally enforceable practice or procedure used by the jurisdiction.

28 C.F.R. § 51.54(b).

Courts have found that the Department’s regulation means what it says: the benchmark is not just the last plan or voting change to have been precleared, but it must have been implemented by the submitting jurisdiction. See generally *Abrams v. Johnson*, 521 U.S. 74, 95-98 (1997) (explaining the “sound reasons for requiring benchmarks to be plans that have been in effect”); *Navajo Nation v. Arizona Indep. Redistricting Comm’n*, 230 F. Supp.2d 998, 1004 n.8 (D. Ariz. 2002) (“The last legally enforceable plan used by the jurisdiction serves as the ‘benchmark,’ or baseline for comparison in a Section 5 retrogression analysis”).

Here, although the State of Alaska obtained preclearance for a language program for Alaskan Natives in 1981, that plan was never implemented.² There is no earlier benchmark because Alaska did not provide language assistance to Alaskan Natives before that date. Instead, Alaska required English literacy until the State’s literacy test was suspended in 1970 by the VRA and it was repealed in 1971. Under these circumstances, there is no lawful practice or procedure that was implemented that can serve as a benchmark. Therefore, the “preclearance determination will necessarily center on whether the submitted change was designed or adopted for the purpose of discriminating against members of ... language minority groups.” 28 C.F.R. § 51.54(d).

The 1981 submission cannot serve as a benchmark for a distinct, but equally important, reason. As a result of Alaska’s misrepresentations about the facts in that submission, even if the State had implemented that language program – which it did not – its enforcement would have violated federal law. For the reasons described in the *Nick* Motion for Preliminary Injunction, the program has resulted in wholly ineffective language assistance being provided, even where it has been offered in limited form in more recent years.³ The ineffective assistance is heightened

² Alaska’s failure to implement the 1981 language program is discussed in more detail in Part II(B)(2).

³ The information we have received from our tribal contacts is that any language assistance provided occurs only where a poll worker happens to be a speaker in the native language and deviates from the official State policy of only offering “passive” assistance. There is no other language assistance offered at any other stage of the voting and registration process. This is discussed in more detail in Part II(B)(2).

for Yup'ik voters, by far the largest group of Alaskan Natives, by the lack of election materials provided in the historically written and commonly used written Yup'ik language.

Consequently, the 1981 plan cannot be considered a valid benchmark because it violates federal law. *See generally Abrams*, 521 U.S. at 97 (“Section 5 cannot be used to freeze in place the very aspects of a plan found unconstitutional”); *Wilson v. Jones*, 130 F.Supp.2d 1315, 1325-26 (S.D. Ala. 2000) (where a plan violates federal law and “requires a remedy, [it] cannot logically serve as its replacement’s benchmark”).

II. ALASKA’S MINORITY LANGUAGE PLAN HAS A DISCRIMINATORY PURPOSE.

Section 5 provides that a voting change should not be precleared if it has a discriminatory purpose. *See* 42 U.S.C. § 1973c(a). A “purpose” is defined in the 2006 amendments as “any discriminatory purpose.” 42 U.S.C. § 1973c(c). Discriminatory purpose often is subtle rather than overt, which can make it difficult to prove.⁴

In *Arlington Heights v. Metropolitan Housing Development Corp.*, the Supreme Court recognized that difficulty by describing several considerations for assessing evidence of discriminatory intent: the historical background of a challenged decision, its relative impact on minorities, specific antecedent events, departures from normal procedures, and contemporary statements of decision-makers. 429 U.S. 252, 266-68 (1977). These factors are not exhaustive, but instead describe some of the “subjects of proper inquiry in determining whether racially discriminatory intent existed.” *Id.* at 268. The purpose determination must be made through a “sensitive inquiry into such circumstantial and direct evidence of intent as may be available.” *Id.* at 266.

Applying the *Arlington Heights* factors, there are several indicia of Alaska’s discriminatory purpose in the adoption of its submitted language program. The State’s history of Section 5 submissions of language procedures, including its failure to consult with Alaskan Natives about those procedures and misrepresentations about how those procedures will be applied and impact LEP voters demonstrate discriminatory purpose. The State also has engaged in discrimination in education, English-only election procedures, and its complete disrespect for tribal sovereignty. Furthermore, the State purposefully ignores the Alaskan Native community by failing to engage in outreach and publicity and providing any resources for effective language assistance. Additionally, the State fails to investigate voter complaints, despite its knowledge that its lack of effective language assistance has resulted in extremely depressed voter participation by Alaskan Natives.

Throughout this discussion, we have provided many examples of testimony by the State’s election officials that demonstrates their intentional discrimination. We likewise have identified instances in which the State has not only misrepresented the true nature of its ineffective language program, but has made those statements to and about federal agencies including the Department itself. Taken together, this evidence demonstrates that the State of Alaska has

⁴ *See generally* Michael Selmi, *Proving Intentional Discrimination: The Reality of the Supreme Court Rhetoric*, 86 GEO. L.J. 279, 284 (1997) (describing “a broad consensus that discrimination today is generally perpetrated through subtle rather than overt acts”).

adopted its submitted language assistance program for a discriminatory purpose.

A. Alaska's Section 5 submissions show a discriminatory purpose.

Under the Arlington Heights analysis, Section 5 preclearance submissions can provide an evidentiary source of discriminatory purpose. *See, e.g., Miller v. Johnson*, 515 U.S. 900, 916-19, 927 (1995); *Prejean v. Foster*, 227 F.3d 504, 511-12 (5th Cir. 2000). Alaska's Section 5 submissions demonstrate a discriminatory purpose as to Alaskan Natives and American Indians in several respects. The State has never voluntarily made a Section 5 submission. When Alaska has been compelled to make a submission, it has responded by including misrepresentations in its submissions. The State's fabrications are compounded by its failure to implement a language assistance program using the precleared procedures.

1. Alaska has not voluntarily complied with Section 5.

Alaska has never made a Section 5 submission of its minority language program for Alaskan Natives voluntarily. The entire State of Alaska, including its political subdivisions, has been subject to the requirements of Section 4(f)(4) of the VRA for Alaskan Native languages since October 22, 1975.⁵ *See* 40 Fed. Reg. 49,422 (Oct. 22, 1975). Despite its coverage, Alaska took no action to implement a language assistance program.

On March 17, 1981, Wilson L. Condon, the Attorney General for the State of Alaska, submitted chapter 100 of the 1980 Alaska Session Laws to the U.S. Attorney General for Section 5 preclearance. In a May 19, 1981 letter to Attorney General Condon, the Chief of the Voting Section "noted that the election code and its revisions do not make reference to bilingual procedures for language minorities" and requested more information about "the manner by which the state will, or plans to, comply with the language minority requirements of the Voting Rights Act." On July 31, 1981, nearly six years after its coverage date, Alaska submitted its language assistance program. On October 5, 1981, the Department precleared Alaska's program.

The State of Alaska made no further submissions of its minority language program as it pertains to Alaskan Natives until March 20, 2008.⁶ That submission followed two events in the Nick litigation. In late November 2007, Whitney Brewster, Director of Elections at the time,⁷ admitted in her deposition that the State did not use nearly all of the language assistance procedures identified in its 1981 submission. As a result of the State's admissions, the Nick plaintiffs filed a Motion for Leave to File an Amended Complaint that included a Section 5 enforcement action. Alaska's Section 5 submission followed.

⁵ In addition, several political subdivisions of Alaska are individually covered under Section 203 for various Alaskan Native and American Indian languages. Kodiak Island is covered for an Asian language, Tagalog. *See* Voting Rights Act Amendments of 1992, Determinations Under Section 203, 67 Fed. Reg. 48,871 (July 26, 2002) (to be codified at 28 C.F.R. Part 55 App.).

⁶ In 2002 and 2003, Alaska submitted its language program for Tagalog, which only applies to the 470 LEP Tagalog voters who reside on Kodiak Island.

⁷ Ms. Brewster resigned on December 12, 2007, two weeks after her deposition in the *Nick* litigation.

2. Alaska misrepresented evidence in its 1981 submission.

In its 1981 submission, Alaska represented that its language assistance program had several components. These components, along with what the State has admitted it has actually done since its coverage date, are as follows:⁸

- “The State of Alaska provides oral assistance to the minority language groups who cannot read English or the minority language.”

All of the voter information the State provides is in English-only in accordance with policy directives issued by the State’s Director of Elections and its own practice and precedent of conducting English-only elections. The State has only aired two radio ads with elections information in Alaskan Native languages, in 2006, and those were poorly translated and wholly deficient. The State informed us that those two 2006 radio ads were the first ads that it had purchased, and that it had no records whether any public service announcements have ever been aired in Alaskan Native languages. The State has undermined the minimal language assistance that could be available in voting precincts with bilingual poll workers through its own policies and directives regarding how assistance is to be provided. *See* Part II(B)(2).

- Voter registration officials “appointed in the rural areas of the state speak the minority language spoken in that particular area” and “information requested on the voter registration form may be translated into the minority language.”

The State has admitted that it does not appoint any voter registration officials in rural areas who speak the local minority language, with one exception. Under State law, any person serving as a poll worker is an appointed registrar for purposes of registering any unregistered person who comes into a polling place on the day of an election. Therefore, to the extent that some poll workers happen to speak the covered language, they are able to accept completed voter registration materials. Tellingly, even though this is true for all poll workers, one-quarter of the State’s Yup’ik poll workers in the Bethel Census Area did not even know they could do it under those limited circumstances. SOF ¶ 451.

With the exception of Election Day registration at polling places where there happens to be a bilingual poll worker, the State has never provided voter registration information in the covered Alaskan Native languages. Voter registration forms are in English (and following the Department’s enforcement activities in Kodiak, Tagalog) only. All publicity about voter registration has been in English-only.⁹ The State does not provide any language assistance in Alaskan Native languages via telephone. None of the State’s elections employees speaks

⁸ Many of the State’s admissions regarding its failure to ever implement the procedures in its 1981 submission came during the deposition of the State’s Director of Elections. *See* Brewster Dep., 28:20-33:7, 62:25-63:17, 125:7-128:9, 145:19-153:25. This information is summarized in the Motion for a Preliminary Injunction and accompanying Statement of Facts.

⁹ Alaska did not include any information about voter registration deadlines or opportunities in the two radio ads it aired in 2006, with the exception of the following statement in broken Yup’ik about the November 2006 general election: “If your voting [unknown] needs to be filled or needs to be changed, they can be fixed before October 8th.” SOF ¶¶ 335-336.

Yup'ik, the most common Alaskan Native language. As the State's Region IV Supervisor acknowledged, no registration information is provided in Alaskan Native languages because "All our communications are done in English." SOF ¶¶ 168, 187, 437, 454-459.

Information for voter purges, like all of the State's other elections publicity, is "in English that we send to a radio station that we ask to translate into Yup'ik." SOF ¶¶ 173, 242-243. The State has no records indicating whether any radio station has ever aired a public service announcement on voter purges in an Alaskan Native language.

- The State provides "a minority language interpreter" in precincts where needed and "at least one member of the [elections] board must speak the minority language spoken in that area."

Alaska has not provided minority language interpreters in every precinct where they are needed, particularly at the time of the 1981 submission. Our tribal contacts have told us that the number of bilingual poll workers has increased in the past few years, apparently in response to the *Nick* litigation. The data we have obtained from the State regarding bilingual poll worker coverage in the Bethel Census Area since 2000 corroborates what the tribes have told us; however, even today many precincts with a need for language assistance have never had a bilingual poll worker.

In many precincts where there is a need for Alaskan Native language assistance, the State would be hard pressed *not* to hire any poll workers who speak the covered language. Alaskan Native villages in particular are very homogenous, with nearly all (and in many cases all) of the registered voters Alaskan Natives. In many polling places, having poll workers who speak the covered language is not the problem.

Instead, the State's English-only elections policies and directions to its poll workers effectively prevent most bilingual poll workers from acting as translators. Among other things, these policies have included directions to only provide "passive" language assistance, to not permit assistance inside the voting booth, refraining from including any information about language assistance in public announcements or poll worker training, and the State's failure to provide any audio recordings or written translations of any election information. The State's practices have negated much of the language assistance that could have been provided by bilingual poll workers. *See* Part II(B)(2).

- "Instructions and information are provided to the public through public service announcements and short programs which are prepared in the minority languages. The material will be supplied in Yupik, Inupiaq, Siberian Yupik, Koyukon, Tlingit, and Tsimshian. The matters to be covered in these materials include the availability of minority language assistance for both voter registration and the election day procedures, filing deadlines, absentee balloting procedures and deadlines, requirements for identification at the polls, the types of identification required and the frequency and length of time for voting in order to remain on the list of registered voters."

The State Director of Elections admitted that none of this information had been provided in covered Alaskan Native languages, with the exception of the two incomplete and poorly translated 2006 radio ads. Otherwise, any translation that has been done has been by radio stations translating the instructions and information on their own, with no guidance from the State. The State has never prepared any “short programs” in any of the covered Alaskan Native languages. *See* Part II(B)(2); SOF §§ 171, 226-248, 333-342, 504-505, 511-512. Our tribal contacts have told us that they have never received any of this information in their Alaskan Native language, and have taken it to mean that the State does not want them to participate in the elections process.

- “The State of Alaska provides publicity in minority languages for elections. Through the Alaska Native Language Center at the University of Alaska in Fairbanks, the names of persons who can speak the minority languages are provided to the Division of Elections. Those persons are then contacted and asked to assist in the preparation of audio and video tapes for use by radio and television stations.”

Same response as the preceding comment. The State admitted that when it has contacted the Alaska Native Language Center (ANLC), it has been to obtain the names and contacts of persons who might be able to work as bilingual poll workers and not to secure audio and video translations. All such translations have been completed by private parties, and not by the State or the ALNC. The State also has never aired any television ads or programs in Alaskan Native languages. SOF § 244.

- “An employee of the Division of Elections travels to each locality to work with the interpreters in preparing the tapes.”

The State has admitted that this statement is false in every respect. The State does not and never has prepared any audio tapes in Alaskan Native languages; all materials and information is in English-only, with the expectation that private companies, bilingual translators, and even the voters themselves will translate it. SOF §§ 167-188, 393-401. The State does not have any interpreters who review oral translations in covered Alaskan Native languages, and it has never had any quality control to ensure effective language assistance is provided. SOF §§ 332-342. The State also does not send Division of Elections employees to any of the native villages to solicit feedback or input on language assistance, as demonstrated by the State’s records for employee travel to just the City of Bethel – for poll worker training and polling place accessibility surveys – and not the outlying villages. *See* Part II(C).

- “If the facilities are not available for preparation of the tapes in that locality the interpreter may be transported to the facility for tape preparation. Upon completion of the tape preparation process, the tapes are distributed for use by the stations. Several tapes are prepared covering various election procedures and information.”

Same response as the preceding comment.

- The information in tapes distributed in the covered languages for use by radio and television stations includes information: “(1) that assistance in the minority language is available during the registration and election process; (2) that the voter may bring a person of his or her choice to the polls to assist during voting; (3) the availability of registrars including names and locations; (4) the voting procedures that are followed at the polls; (5) the questioned ballot procedures; and (6) identification requirements and types of documents that may need to be brought at the time of registration and voting.”

Same response as the preceding comment. The State Director of Elections admitted during her deposition that the State did not use any of these components for providing language assistance in its elections. Moreover, the State also admitted in its 2008 submission that “[t]he audio translation of the ballot in Alaska Native languages will be new for the 2008 state and federal elections.” 2008-1726 letter, at 2.

The State misrepresented in its 1981 submission that all Alaskan Native languages are historically unwritten. The State did not proffer any proof to back up its assertion. In the *Nick* litigation, the State’s evidence demonstrates that its conclusion is ideologically, rather than factually, based. The State made its determination based upon its own interpretation of Section 203 and “the precedent set by the State” of conducting English-only elections. SOF ¶ 214. As discussed in Part III, the State’s assertion is contrary to the plain language of Section 203, the Department’s regulations, and the facts with respect to the historically written and commonly used Yup’ik language.¹⁰

The 1981 submission contains no representations by the State regarding outreach to the Alaskan Native community about the proposed language assistance program. We have been unable to identify any native contacts or organizations that even knew that the State of Alaska made the 1981 submission, much less provided input on its content.

3. Alaska misrepresented evidence in its 2008 submission.

Alaska’s 2008 submission also is a sham prepared in a transparent attempt to undermine the *Nick* litigation. We will summarize some of these misrepresentations.

a. The State’s submission letter.

Page two of the submission states: “Previously, Alaska’s minority language assistance plan (precleared in 1981) did not include written translation because Alaska was not covered for any historically written languages until 2002.” That statement is untrue, merely reflecting the State’s ideological assertion that Section 203 categorically excludes all native languages from written materials, regardless of whether the language is historically written and commonly used

¹⁰ A few of the other Alaskan Native languages also might be historically written and commonly used, such as Inupiq. Since those languages are not directly at issue in the *Nick* litigation, we have not developed evidence regarding them. Nevertheless, it is evident under both Section 203 and the Department’s regulations that any such determinations regarding whether those other Alaskan Native languages are historically written must be factually, and not ideologically, based.

and written materials are needed for effective language assistance. *See* Part III.

Page two of the submission contends that the “Alaska Division of Elections recently surveyed Alaska’s tribal governments to determine the language assistance needs of Alaska Native voters.” This “survey” was the State’s first ever effort to contact tribal councils about the State’s language assistance program, and was conducted in the Bethel Census Area in early 2008. SOF ¶¶ 403-405, 435-436. The English-only survey document, titled “Oral Language Assistance Survey,” only asked about the need for and availability of translators and local media in the village; it did not request opinions about the State’s language assistance program, such as whether written bilingual materials would be helpful. SOF ¶¶ 187, 215, 405. Prior to that survey, the Region IV Supervisor had not engaged in any voter outreach to ask whether the State’s language assistance program was effective because “I haven’t seen the need to do that.” SOF ¶ 406. The State concluded what it was doing was effective without seeking any information or conducting any evaluation to determine whether its conclusion was accurate. SOF ¶ 407. In short, the “survey” is nothing more than an effort to establish that oral language assistance is all that is needed because no other questions were asked. *See* Part III.

Page two of the submission likewise misrepresents that “the new Minority Language Assistance Program includes consultation with Alaska’s tribal administrators, native organizations, the Alaska Native Language Center and other minority organization... to determine the most effective method to provide assistance to language minority voters.” In addition to the evidence discussed in the previous paragraph, the State has not consulted with any native organizations or tribes about its proposed plan.

Illustrative of that fact, the State falsely contends on page 4 that it “discussed the enclosed Minority Language Assistance Program with several minority contacts.” Their contacts did not see the proposed program nor did they approve of it:

- One, Myron Naneng, represents the Yup’ik region that is the subject of the *Nick* case and he was not aware of the components of this language program.
- Another purported contact, Linda Joule, who represents a large Inupiaq speaking population in the Arctic, informed us that the State sent her a one page letter asking if she would serve as a contact to help secure translators for elections, to which she readily agreed, but she was neither provided with nor does she agree with, the proposed language assistance program contained within the State’s submission.
- We did not discuss the State’s language program with the contacts from the Regional Native Corporation in Doyon. While preparing the Alaska report for the 2006 reauthorization, NARF conducted an extensive investigation that included the Doyon region. Doyon is a predominately Athabascan region, where there are very few LEP voters.

The State clearly listed contact persons without their knowledge or permission and implied that those persons approve of their proposed program. We can assure you the ones to whom we spoke do not because they had not even seen it, and encourage you to contact Ms.

Joule and Mr. Naneng directly to confirm that fact. This is simply part of a larger pattern and practice of a failure to consult with or perform any outreach in the Native community, and is powerful evidence of the State's discriminatory purpose.

Page four of the submission is incorrect in two other respects. The reasons for the change were not because of the State's desire to comply with the VRA, but were in response to the clear violations we established during depositions in the *Nick* litigation, as summarized in our Amended Complaint filed two and a half months earlier. For the reasons discussed in this letter, the "changes" in the State's plan have both a discriminatory effect and a discriminatory purpose.

b. The State's proposed language program.

The Attachment to the State's 2008 submission includes many components that are largely a carbon-copy of its 1981 submission. The State has done so by design, to keep in effect its unlawful English-only elections practices.

As discussed above and in Part III, the Attachment (at page one) misrepresents all Alaskan Native languages as historically unwritten. It likewise misrepresents materials and information provided for oral language assistance.

The Attachment (at page one) also misrepresents how it determines the affected areas and language minority groups. As discussed above and in Part II(C), the State has not worked with "local tribal administrators and tribal councils, native organizations... and outreach to representatives from minority language groups."

The Attachment (at pages one and two) misrepresents language assistance for written minority languages. The State does not provide any materials written in Alaskan Native languages, regardless of whether they are historically written or commonly used.

The Attachment (at page two) misrepresents how bilingual poll workers are used "to assist minority language voters in the registration and voting process." As discussed in Part II(B)(2), the State instructs its bilingual poll workers in a manner that denies language assistance. Further, as discussed in Parts II(B)(2) and II(C), no language assistance is offered for voter registration, except in those cases where a bilingual poll worker may be present on Election Day and knows that they can register an unregistered person.

The Attachment (at pages two through five) misrepresents in its entirety the language assistance that is offered to Alaskan Natives. Since most of these misrepresentations have been discussed elsewhere in this comment letter, they may be summarized as follows:

- Some Alaskan Native languages are commonly used in written format. In the *Nick* litigation, we provided extensive evidence to the State of the common usage of written Yup'ik, including by its own poll workers. *See* Part III.
- The State does not provide oral language assistance "through the use of bilingual voter registrars, poll workers, interpreters and audio translations." *See* Part II(B)(2).

- The State does not consult “with local tribal administrators and native organizations to determine the most effective method to provide information about the registration and election process and to assist minority language voters.” *See* Part II(C).
- The State does not provide “[a]udio translations of voter registration and election information... through various radio stations and through the tribal offices.” Instead, all election information, including public service announcements, is in English-only. *See* Parts II(B)(2) and II(C).
- The illustrative list of election materials the State says will be translated in the polls into the covered Alaskan Native languages is not currently being done. *See* Motion for a Preliminary Injunction, at 12-22, 26-29.
- The State’s representation that “[t]he Division of Elections provides voter registration materials and election information to the tribal council offices in each village” at “the beginning of each election cycle” is false. The State admitted that it did it for the first time in 2006 (after the *Nick* case was filed), but our tribal contacts in the Bethel Census Area inform us that many of them did not receive the English-only registration materials. Although there was a statewide special election in 2007, the State admitted that it did not send any voter registration materials to any tribes. SOF ¶¶ 455-459.
- The State has not consulted “with the tribal offices about the most effective means of assisting minority language voters in their community,” nor does it work with minority groups and/or tribal officials on Section 203 compliance. The State does not engage in any outreach. *See* Part II(C).
- The State’s misrepresentation about providing audio translations “of voter registration and election information in the minority language” is similar to those it made in 1981. That statement is false, as described above.
- The State’s representation about having one bilingual poll worker for each precinct, like its representation in 1981, is false, as is its representations about voter assistance. Identification that there is language assistance available at the polls has never been provided. SOF ¶¶ 90, 227-228, 333.
- The State’s optional training and training materials are wholly ineffective and have resulted in vote denial of voter and language assistance to those who need it. The State does not provide separate language assistance training, and its proposal to continue to use the same optional training provided to all poll workers will continue to perpetuate voting discrimination. *See* Motion for a Preliminary Injunction, at 20-22.

- The State has never consulted with any of the tribes about providing written translations that are “clear and understandable.” The State apparently is only seeking this change for Tagalog and not any of the Alaskan Native languages, which would keep its ineffective language assistance program in place and continue to deny Alaskan Natives the election information they need.
- The State has never confirmed the accuracy of any of its translations into Alaskan Native languages, or the qualifications of its bilingual poll workers to provide it. SOF ¶¶ 332-368.
- The State has never provided the publicity or outreach it describes at the bottom of page four for any covered Alaskan Native language. *See* Parts II(B)(2) and II(C).
- The State’s proposed plan on page five for publicizing elections information has never happened in writing for Alaskan Native languages, even where it is needed. *See* Part III.
- The State’s only occasion of running two paid radio ads prepared by radio stations in Alaskan Native languages in 2006 resulted in incomprehensible and incomplete translations. The State’s proposal to use that program for all future ads will continue to deny Alaskan Natives effective language assistance. SOF ¶¶ 171, 333-340.
- The State’s final statement that “[e]ach election cycle the Division works with local minority language groups to review the language assistance program offered by the Division” and engages in “ongoing consultation” is completely false. The State not only has failed to engage in any outreach in its elections, it has not done so with respect to this submission either.

c. The State’s failure to advertise its submission.

The Department’s regulations require a submitting jurisdiction, such as Alaska, to provide public notice of submissions that are potentially controversial. Here, there is no question the State’s proposed changes are controversial because the State has informed the Department that it is the very subject of the *Nick* litigation. Under these circumstances, the regulations provide that information about the submission should be included in “public notices that describe the proposed change and invite public comment or participation in hearings and statements regarding where such public notices appeared (e.g., newspaper, radio, or television, posted in public buildings, sent to identified individuals or groups).” 28 C.F.R. § 51.28(f).

The State has not included any information regarding publicity about its proposed language program because it has not advertised it at all in any form that has been accessible to our organizations, other native organizations, tribal councils, or the LEP voters themselves. As discussed above, the State has not even provided the submission to the minority contacts with whom it claims to have consulted.

In the *Nick* litigation, we have had a standing discovery request for all Section 5 submissions since the fall of 2007. However, to date the State has not produced it to us. We first learned about the submission in late March from the Department. At the end of April (about two weeks ago), Sarah Felix, the Assistant Attorney General representing the State in *Nick*, faxed just the five page Attachment to Natalie Landreth without the accompanying Section 5 submission. The State's failure to publicize its submission or to disclose it to us as required by our discovery request shows the State's bad faith.

B. Alaska's history and current discrimination against Alaskan Natives.

Alaska has a pattern of official discrimination against Alaskan Natives that persists to this day. The history of discrimination by state officials is too lengthy to discuss here. A summary is included in Natalie Landreth & Moira Smith, *Voting Rights in Alaska: 1982-2006*, 17 S. CAL. REV. L & SOC. J. 79 (Fall 2007) (Alaska report submitted into the congressional record during VRA reauthorization). We will touch on a few specific examples of discrimination that are particularly germane to this submission.

1. Educational discrimination resulting in high illiteracy rates.

The need for language assistance in Alaska is the direct product of state-sponsored educational discrimination.¹¹ From the late nineteenth century until 1980, a dual and segregated system of education that separated white and Native American students existed in Alaska. All Native Alaskans were sent to vocational secondary boarding schools outside of the state while white residents were allowed to educate their children locally. "Rural Native students were presented with the choice of either staying at home and forgoing attendance at a secondary school or leaving home and attending Mt. Edgecumbe [in Sitka]. When enrollment at Mt. Edgecumbe exceeded the school's capacity, the BIA began admitting Native Alaskans to Indian boarding schools in other states. Hundreds of Alaska Natives entered boarding schools in Chemawa, Oregon, and Chilocco, Oklahoma."

After 1966, the State began creating in-state boarding schools for Native Alaskans. However, "these efforts did not completely eradicate the pattern – generated by the former dual school system established prior to statehood – of requiring a large proportion of Native children to board away from home if they wished to attend a secondary school." In addition, the policy "had detrimental effects upon some of the students which outweighed the benefits," such as "accelerated drop-out rates, psychological and social problems, including disruption of family life and loss of sense of identity, and failure to live up to educational potential."

By 1976, when the State settled an education discrimination suit brought against it by a class of Alaskan Native students and their parents, there were 2,783 secondary school age children residing in communities that had primary but not secondary schools; more than 95 percent of those children were Native Alaskans. The State did not fund the creation of secondary schools under that order until 1980, 26 years after *Brown v. Board of Education*, when it provided high school for the first time in 126 native villages.

¹¹ All of the evidence on educational discrimination has been admitted by the State of Alaska or is the result of judicial findings in schooling cases. See SOF at ¶¶ 46-56.

Today, courts continue to find that Alaska deliberately underfunds schooling programs for Alaskan Natives. In 1999, a court held that Alaska had a dual, arbitrary, unconstitutional, and racially discriminatory system for funding school facilities. *Kasayulie v. State of Alaska*, Case No. 3AN-97-3782-CIV (Alaska Super. Ct. 1999). In 2007, a court found that Alaska violated its “constitutional responsibility to maintain a public school system” by failing to sufficiently oversee the quality of secondary education in many Alaska Native villages and to provide a “meaningful opportunity to learn the material” on a graduation exam.¹² Therefore, the State violated the due process rights of Alaska Native students when it conditioned high school graduation on passing that exam. Decision and Order, *Moore v. State of Alaska*, Case No.3AN-04-9756-CIV (Alaska Super. Ct. June 21, 2007) at 30, 32, 37.

The State’s discrimination has disabled Alaskan Natives by leaving them with low levels of educational attainment. In the Bethel Census Area, 34.7 percent (2,682 persons) of the 7,728 American Indian and Alaskan Native persons (“AIAN”) aged eighteen and older have not graduated from high school, nearly 3.5 times the rate for non-AIAN persons. Over 18 percent (1,405 persons) of AIAN voting-age persons have less than a ninth grade education, including 9 percent (699 persons) who have less than a fifth grade education. Nearly 92 percent of the Yup’ik elders (the 947 persons aged sixty and older) who were denied secondary schooling by the State do not have a high school diploma; 86.3 percent (817 persons) have less than a ninth grade education and 5.4 percent (51 persons) have a ninth to twelfth grade education but without a high school diploma.

The low level of educational attainment has resulted in very high levels of illiteracy for LEP voters. According to the 2002 Census Determinations, the illiteracy rate among the Eskimo LEP citizen voting age population (CVAP) in the Bethel Census Area is 21.46 percent, nearly sixteen times the national illiteracy rate of 1.35 percent. At least five Alaska Native Village Statistical Areas (ANVSAs) have illiteracy rates among Eskimo LEP CVAP of forty percent or greater, including: Akiak (40.0 percent, over 29 times the national illiteracy rate); Aniak (66.7 percent, over 49 times the national illiteracy rate); Kongiganak (42.9 percent, over 31 times the national illiteracy rate); Lower Kalskag (100 percent, over 74 times the national illiteracy rate); and Mekoryuk (75.0 percent, over 55 times the national illiteracy rate). At least nineteen of the 24 ANVSAs have illiteracy rates among Eskimo LEP CVAP of 15.0 percent or greater, which is a minimum of at least eleven times the national illiteracy rate.

The 2002 Determinations show comparably high illiteracy rates for Alaskan Native language minorities in other parts of Alaska.

¹² Statistics for students currently enrolled in the Bethel area schools (Lower Kuskokwim School District) have the following proficiency levels: only 45% of students in grades 3-10 in 2006-2007 were proficient in language arts, as measured by No Child Left Behind; 46.3% of grade 9 students were below or not proficient in reading in 2007 according to State of Alaska Standards Based Assessment Data; and 51.2% of the grade 9 students were not proficient as measured by the 2007 High School Graduation Qualifying Exam. SOF ¶ 55.

2. Alaska's official English law and English-only elections policy.

Alaska has a longstanding state policy of mandating English-only in all of its government functions, including elections. The State's Constitution included an English literacy test, which remained in effect until it was repealed in 1971 as a result of the federal Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601, *et seq.*

In 1998, Alaska voters enacted Ballot Measure 6, which provided one of the most sweeping official English laws in the United States. The Official English Initiative (OEI) made English the state's official language and required its sole use in "all government functions and actions." Alaska Stat. § 44.12.300 (1998). Civil rights groups, including the ACLU and NARF, objected to the OEI, in part because of the discriminatory impact it would have on the ability of Native Alaskans to participate in the electoral process. *See* ACLU, Statement in Opposition to Ballot Measure 6: Requiring Government to Use English, *available at* <http://www.gov.state.ak.us/litgov/elections/1998oep/98bal6.htm>.

The ACLU and NARF represented several Alaskan Native individuals, including LEP Inupiaq and Yup'ik voters, in a subsequent challenge to the OEI. The plaintiffs alleged that implementation of the law "would adversely affect numerous Alaskans who are themselves bi- or multi-lingual government officials or employees, or citizens who rely on such individuals to communicate with or participate in local and state government." *Alaskans for a Common Language, Inc. v. Kritz*, 170 P.3d 183, 187-88 (Alaska 2007). Alaska's state courts agreed, enjoining the OEI provision requiring the use of English by all government officers and employees in all government functions and actions. *See id.* at 183.

Despite the injunction barring implementation of the OEI, State officials have enforced it as a matter of policy in many aspects of their administration of elections. Alaska's Director of Elections and Region IV Supervisor admitted during their depositions that they implement a variety of English-only practices as a matter of "policy," including:¹³

- Failing to advertise the availability of language assistance in the polls, something the State's Region IV Supervisor has never even considered, SOF ¶ 227;
- Shifting all responsibility for providing language assistance to private companies, untrained translators, and even the LEP voters themselves so the State will not have to provide language assistance itself, SOF ¶¶ 167-182, 332-342, 395-401;
- With the exception of two poorly translated and incomplete radio ads aired in a few Alaskan Native languages in 2006 (aired after the *Nick* case was filed), all announcements and information are provided in English-only with a notation "Local Native Language Requested," SOF ¶¶ 171-172;

¹³ This information is described in greater detail in the Motion for Preliminary Injunction and accompanying Statement of Facts we have filed in the *Nick* litigation.

- Although the State uses audio recordings of ballots for disabled voters, those recordings are in English-only and have never been provided in any of the covered Alaskan Native languages – the State did not even consider providing them in the covered languages until the Department of Justice asked the State to enter into a consent decree in late 2007, SOF ¶¶ 393-401;
- Offering a polling place locator and telephone assistance for voters that is in English-only, SOF ¶¶ 229-233;
- Providing all voter registration information in English-only because “All our communications are done in English,” SOF ¶¶ 455-456;
- Conducting the optional poll worker training in English-only, without any separate training on language assistance in the covered languages because that is “a policy call” by the Director, SOF ¶ 295;
- Failing to mention language assistance in the written poll worker handbook that provides the outline for all of the State’s poll worker training, SOF ¶¶ 314-316;
- Failing to observe language assistance to ensure it is providing clear, complete, and accurate translations because that is a “policy call from the Director’s office,” SOF ¶ 413; and
- Failing to conduct voter education meetings to assist language minorities in understanding the voting process because “that would take a policy decision from the Director’s office,” SOF ¶ 448.

One of the clearest examples of the State’s deliberate decision to enforce English-only procedures is its pernicious policy to only offer “passive” language assistance. The State Director of Elections reported this policy to the GAO in response to the GAO’s language assistance survey, stating that “poll workers were instructed to wait until a voter asked for assistance before providing it.” SOF ¶¶ 250-257. The State’s policy of passive language assistance not only has denied language assistance to LEP Alaskan Natives, it also has denied them voter assistance in violation of Section 208 of the VRA.

The State’s policy is further confirmed by its written instructions to poll workers, which provide: “If requested, an election worker may assist the voter. The election workers should maintain a reasonable distance from the ballot box to ensure the secrecy of the voter’s ballot...” SOF ¶ 488. Consistent with those instructions, many poll workers – including those who speak an Alaskan Native language fluently – have refrained from providing language assistance and have denied LEP voters their right to receive assistance from the person of their choice, including in the voting booth. *See* Motion for a Preliminary Injunction, at 35-38.

Alaska’s English-only elections policy is obvious in other ways, including its failure to engage in community outreach (discussed in Part II(C)), to evaluate whether materials provided in a covered language would result in more effective assistance based upon “the precedent set by

the State” of conducting English-only elections (discussed in Part III), and to investigate and remedy complaints by language minority voters (discussed in Part II(E)).

3. Other evidence of State discrimination.

Perhaps the most egregious example of other State discrimination against Alaskan Natives is through the Alaska Legislative Council, a body consisting of members of the Alaska Legislature. The Council distributes memoranda and asserts in federal and state court cases that tribes in fact do not exist in Alaska, that they have no government or authority and are nothing more than a modern construct invented by lawyers. The most recent such memorandum from the Alaska Legislative Council was distributed on May 17, 2007. The bias exhibited in these memoranda is disturbing, especially coming from a legislative body.

Because this categorical and offensive argument has failed in the courts, the State has shifted focus to attacking tribal authority piece by piece. For example, the State has refused to recognize adoptions over tribal member children adjudicated in tribal courts. When a tribe completes an adoption and sends the court order to the Bureau of Vital Statistics for a new birth certificate reflecting the names of the adoptive parents, the BVS sends a letter to the Tribe that their adoptions are not “recognized” and that the parents should instead pursue adoption through the State. The result is that the child does not have a valid birth certificate so his or her parents cannot enroll him or her in school, obtain medical care, get a passport or social security card and the child lives in legal limbo. The State was sued over this practice and it lost (the case is called *Kaltag v. Bureau of Vital Statistics*), yet just last week it informed NARF that it would be appealing this case to the Ninth Circuit. In other words, the State would prefer for Alaska Native children to live in legal limbo rather than have to recognize tribes and tribal courts.

Similarly, Alaska Natives experience discrimination in the justice system. A 2005 report by the Alaska Judicial Council determined that Alaska Natives serve longer sentences for the same crime and with the same previous record than other ethnic groups in Alaska. They also represent the largest percentage of the prisoners compared to their population.

Further, the State provides no law enforcement for the vast majority of Alaska’s 231 tribes. There are no police officers stationed in the villages, only in regional hubs like Kotzebue, and Alaska Native residents therefore live completely without public safety in most areas. Some villages are fortunate to have village public safety officers (VPSOs), but even this is a poor substitute since VPSOs cannot even carry weapons. Recognizing that most crime in the villages (90%) was caused by alcohol, the tribes attempted to pass a regulation through the Rural Justice Commission that they have authority to arrest bootleggers and alcohol distributors in their villages, but the State refused.

Lastly, there are numerous attempts each year by the State to reduce Alaska Native subsistence (hunting and fishing) rights in order to create more opportunities for sport hunting and fishing. More than 80 percent of Alaska Natives practice subsistence hunting and fishing each year. Just last year, the State created an income cap for subsistence permits so that you could not obtain one if you earned more than a certain salary. The Alaska Native community responded that subsistence was a way of life and a cultural imperative, not a welfare system, but the State refused to change the rule. Once again, the State was sued and it lost, yet the State has

appealed this ruling in the hope of retaining its income cap. This latest activity is part of a longstanding pattern to restrict subsistence further and further. The cultural impact has been devastating.

C. Alaska fails to engage in meaningful outreach to Alaskan Natives.

Community outreach is critical to any successful language assistance program. “A jurisdiction is more likely to achieve compliance” with Section 203’s requirements “if it has worked with the cooperation of and to the satisfaction of organizations representing members of the applicable language minority group.” 28 C.F.R. § 55.16. To ensure that “clear, complete, and accurate” translations of voting materials and information is provided, a jurisdiction should consult “with members of the applicable language minority group with respect to the translation of materials.” 28 C.F.R. § 55.19(b). Ultimately, such outreach makes it more likely that the assistance provided allows “members of the... language minority group to participate effectively in the electoral process.” 28 C.F.R. § 55.20(a).

The State has failed to engage in any meaningful outreach to Alaskan Natives and tribal governments since becoming covered by Section 5 in 1975. The State has never solicited feedback about its language program from any of the leading Alaskan Native groups, including the Alaskan Federation of Natives (AFN), the Alaskan Inter-Tribal Council (AITC), the Association of Village Council Presidents (AVCP), NARF, or the National Congress of American Indians (NCAI). SOF ¶ 430. Although Native American meetings are regularly held in Anchorage and Juneau and are attended by tribal leaders, the State has not used those events as an opportunity to schedule meetings. SOF ¶¶ 431, 433. Even though the State admits that “it would be helpful to have the opportunity to meet face-to-face with some of these leaders,” it has not done so even when it has been convenient for State employees. SOF ¶¶ 431-433.

The State likewise has not bothered to interview its own bilingual poll workers about their experience providing language assistance. Pls.’ SOF ¶ 416. We completed interviews of approximately 100 out of the 135 Yup’ik poll workers the State has used in the Bethel Census Area. The poll workers told us that they were excited we called because no one had ever asked them for their opinion about how to address the numerous difficulties they had in providing clear, complete, and accurate translations. Time and again, the poll workers asked us to do what we could to get the State to provide election information written in Yup’ik, language assistance training, and audio recordings to help them translate elections materials effectively.

In addition, the four tribal councils we represent in the *Nick* litigation – the Kasigluk Traditional Council, Kwigillingok I.R.A. Council, Tuluksak Tribal Council, and Tuntutuliak Traditional Council – have never been contacted by the State about its purported language program. All of the State’s outreach occurred at the end of 2007 and in early 2008, after the *Nick* litigation was filed. Even then, the extent of the State’s outreach has been limited to a “survey” written in English, the results of which the State has included as an exhibit to its Section 5 submission.

Although the State contends that its survey demonstrates its outreach, the opposite is true. Whitney Brewster admitted during her deposition that the State prepared the survey without consulting tribal governments or native groups. Instead, she testified, “we know the information

that we need to get from – from those – from the folks who we’re sending the survey to.” Brewster Dep., 75:3-9. The survey was devised by “a group of managers within the Division of Elections,” without considering the need for cultural variations, consulting language experts, or determining whether a survey written in English was an effective way of communicating with tribes in high LEP areas. *Id.* at 76:25-80:4. As a result, the State only asked about the need for and availability of translators and local media in the village; it did not request opinions about the State’s language assistance program, such as whether written bilingual materials would be helpful or ways to make the program effective.

Prior to the survey, the State’s outreach consisted of a single mailing of a voter registration form and instructions in English, with no follow-up mailings or phone calls. SOF ¶¶ 429, 437. State elections employees have not visited any of the native villages in the Bethel Census Area at any time since Alaska became covered in 1975. Since 2000, State election workers have only traveled to the City of Bethel a combined total of five times, and have not been to any of the surrounding native villages. SOF ¶¶ 418-419, 422-424. All of those trips were for polling place accessibility studies and poll worker training in the City of Bethel. SOF ¶ 420. State election workers have not conducted any in-person polling place accessibility visits or poll worker training in any of the dozens of native villages in the rest of the Bethel Census Area. SOF ¶¶ 421-422. The State also has not talked to educators to get their feedback about the State’s program. SOF ¶ 440.

The State’s Region IV Supervisor explained that since assuming her position in 2003, she had not attended any tribal council meetings to provide information about elections because “[m]y job is to conduct elections... that’s what I’m focused on. I’m not focused on attending tribal council meetings in all of these communities.” SOF ¶ 438. Although the Supervisor admitted that attending those tribal meetings “quite possibly may” provide an opportunity to ask tribal leaders for feedback about the language assistance program, she also stated, “but I wouldn’t know that unless I attended one.” SOF ¶ 439. The State’s admissions on these points show that its representations of outreach in its Section 5 submission are a sham.

The State’s wholesale lack of outreach demonstrates its lack of responsiveness to the concerns of Alaskan Natives, providing powerful evidence of its racially discriminatory purpose.

D. Alaska deliberately under-funds language assistance.

The State also has deliberately avoided committing adequate resources to provide language assistance to Alaskan Natives. In 2007, the State did not have any funds specifically allocated for language assistance and the State Elections Director had not asked for any. SOF ¶¶ 465-466. The State has gone out of its way to avoid spending any state funds on language assistance, other than any expenses it might otherwise incur for poll workers who happen to speak a covered language.

The State has several million dollars in unspent federal Help America Vote Act (HAVA) funding. SOF ¶ 461. However, Lieutenant Governor Parnell has not had any discussions with the State Elections Director about using any of those funds to provide language assistance. SOF ¶¶ 462, 464. As of late November 2007, the State has spent a combined total of \$5,584.70 in federal HAVA funds for all languages covered in the State, with all but \$51.86 spent on

advertising during State Fiscal Year 2007. SOF ¶ 463. Those funds were spent on the only two radio ads the State has ever aired in an Alaskan Native language, which were poorly translated, incomplete, and wholly ineffective. SOF ¶¶ 335-36.

The State has only one elections employee, Hannah Stickel, who works on the State's language assistance program "about half" of the time even though she is responsible for all languages in the State of Alaska, including Tagalog, Yup'ik, Athabascan, and the other Section 203 covered languages.¹⁴ SOF ¶¶ 467-468. At the time of the State Elections Director's deposition in November 2007, Ms. Stickel was out on maternity leave until the end of January 2008. SOF ¶ 469. The State did not conduct its "survey" of oral language assistance until the end of January and early February 2008, after her return. The State did not even start "thinking seriously" about having a full-time staff worker whose only responsibility is language assistance until the State was "contacted by the... Department of Justice" in approximately August 2007. SOF ¶ 470.

According to the State Elections Director, Alaska "started looking in April 2006" at improving its language assistance program. However, the State "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." SOF ¶ 472. The State Elections Director also put aside the language program because "Language assistance is not the only assistance that the Division of Elections provides.... We have... the demands of every voter in the state. I think it would [be] important to balance all of those needs and our resources to be able to make that determination." SOF ¶ 473.

The State's "justification" is particularly telling. The State views compliance with the VRA as optional, something extraneous to running an election rather than one of its core responsibilities. Section 203 requires language assistance be provided to covered LEP voters for every public election, not merely when it is administratively convenient for elections officials to do so. *See Chinese for Affirmative Action v. Leguennec*, 580 F.2d 1006, 1008-09 (9th Cir. 1978), *cert. denied*, 439 U.S. 1129 (1979); 42 U.S.C. § 1973aa-1a(b)(1).

E. Alaska fails to facilitate, investigate, and address voter complaints.

The State compounds its lack of responsiveness to language minorities by failing to facilitate, investigate, and address voter complaints. SOF ¶¶ 474-485.

The State was made aware of many of the problems with its language assistance program, what little there was of one, as early as late 2005 or early 2006. The authors of the VRA reauthorization report on Alaska (Landreth and Smith) called many State offices and agencies as well as borough clerks to inquire about the language assistance being offered and then described the purpose of the report they were writing. As the report was submitted to Congress, it was also provided to the State. In fact, when Ms. Landreth heard former Director of Elections Whitney Brewster say on the radio that she had not seen the report, Landreth forwarded her another copy by email in May of 2006 to ensure the State was aware of its contents.

¹⁴ The handful of e-mail exchanges between Ms. Stickel and the Alaskan Native Languages Center and election officials in a couple of other jurisdictions covered by Section 203 before the end of 2007 suggests that Ms. Stickel spends far less than half her time on language assistance.

We assumed that the State, once it aware of these problems, would be quick to rectify any issues. However, three elections passed (the August 2006 primary, the November 2006 general, and the March 2007 special) and still there was no change in the language assistance program. It was only after this long grace period that the plaintiffs in the *Nick* case actually sued.

F. Alaska misrepresents facts to and about contacts with federal officials.

The State's misrepresentations are not limited to its Section 5 submission. For example, in the General Accountability Office (GAO) study released in January 2008, the GAO noted the following about the need for language assistance in the Kenai Borough of Alaska:

The one election jurisdiction included in our study where election officials did not report actively providing any bilingual voting assistance is the Kenai Peninsula Borough in Alaska. The Kenai Peninsula Borough Clerk is responsible for the administration of local elections whereas the State of Alaska, Division of Elections, is responsible for the administration of statewide and federal elections. A local Kenai Peninsula Borough election official reported that while they were aware that the Kenai Peninsula Borough was covered under Section 203, they maintained that bilingual voting assistance wasn't needed and provided documentation that one Native Alaskan community declined the assistance. In addition, state election officials in one region, who are responsible for the administration of statewide and federal elections in Kenai Peninsula Borough such as the November 2006 election, did not report making any special arrangements to provide bilingual voting assistance in this particular area of the state.

However, we learned that local poll workers in at least two targeted communities took the initiative to provide bilingual voting assistance to those who sought it for this election. Senior officials with Alaska's Division of Elections reported that they were, at the time of the 2006 election, unaware that Kenai Peninsula Borough was covered under Section 203. These officials also told us that they are in the process of reviewing their bilingual voting assistance program.

GAO, BILINGUAL VOTING ASSISTANCE: SELECTED JURISDICTIONS' STRATEGIES FOR IDENTIFYING NEEDS AND PROVIDING ASSISTANCE 13 n.18 (Jan. 2008).

Moreover, in the *Nick* litigation, the State apparently has misrepresented the Department's position in at least two respects. First, the State contends that the Department has told it that it is complying with Section 203. Lieutenant Governor Parnell testified that he asked Department trial attorney Sara Beth Donovan, "do you have any specific concerns under any of your jurisdiction and the answer was no. And I asked her to please let us know if she does have concerns because I would like the opportunity to address those with Justice." Parnell Dep., 30:21-32:19. Second, the State Director of Elections testified, "in... our meeting with Sara Beth Donovan... she made the statement and confirmed that the Department of Justice believes that Alaska Native languages are historically unwritten." Brewster Dep., 150:4-10. It is our understanding that neither of these statements is true.

G. Alaska is aware of the discriminatory impact of its VRA violations.

The State has been dismissive of the known impact its VRA violations have had on depressing Alaskan Native voter turnout, including Yup'iks in the Bethel Census Area. SOF ¶¶ 496-502. The State's Director of Elections said she was not concerned, "Because that has been the trend of that area." SOF ¶ 495. Between 2000 and the present, Yup'ik turnout has averaged 13 percent lower than the statewide voter turnout. SOF ¶ 496. Low Yup'ik turnout was particularly pronounced in the last Presidential Election in 2004, when it trailed the statewide average by more than 20 percent. SOF ¶ 499. The City of Bethel experienced some of the lowest turnout. In every statewide election from 2000 to 2006, the three precincts in the City of Bethel have been below the average turnout in the Bethel Census Area; each was more than 22 percent lower than the statewide average in 2004. SOF ¶¶ 498, 500.

The State also is aware that its ineffective language assistance effectively disenfranchises Alaskan Native voters that do turn out, particularly on ballot questions. The Director of Elections has received complaints from language minority voters about ballot questions written in English, which require a very high level of English literacy and often provide that a "yes vote would mean no or a no vote would mean yes." SOF ¶ 378; *see* SOF ¶¶ 369-381. Yet, the State deliberately performs its "readability" assessment of ballot questions on draft language and not the actual language that appears on the ballot. The net result frequently leads to more complex language being used, such as the 2003 cruise ship ballot question that was scored at a tenth to twelfth grade level in draft form but appeared on the ballot requiring a thirteenth to sixteenth grade (college graduate) education.¹⁵ SOF ¶¶ 372-373.

The State also knows of ways it can correct these problems, but deliberately takes no action. For example, the Director of Elections admitted that voting materials written in Yup'ik read "from the poll worker to the voter" would provide a uniform translation. SOF ¶ 279. However, Alaska refuses to consult with Alaskan Native groups to prepare those materials because of "the precedent set by the State" of conducting English-only elections. SOF ¶ 214.

III. SOME ALASKAN NATIVE LANGUAGES ARE HISTORICALLY WRITTEN AND COMMONLY USED.

Section 203 requires that "any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots" shall be provided "in the language of the applicable language group as well as in the English language." 42 U.S.C. § 1973aa-1a(c).

The State admits that it does not provide any materials written in Yup'ik, with all ballots and other written election materials in English only. SOF ¶¶ 183-185, 187-188. According to the State, it has not even considered providing written Yup'ik election materials because its

¹⁵ Moreover, even the limited readability analysis the State performs on draft ballot question language does not accurately reflect the actual level of reading comprehension required, discounting that text with multi-syllabic words is more difficult and harder to read. SOF ¶ 374.

election officials have concluded that all Alaskan Native languages, including Yup'ik, are historically unwritten. SOF ¶¶ 186, 214.

Section 203 only exempts jurisdictions from providing election materials written in a covered minority language under very narrow circumstances:

[W]here 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.

42 U.S.C. § 1973aa-1a(c).

Contrary to what the State has contended, this exception does not provide a categorical exemption for all Alaskan Native languages.¹⁶ The Justice Department's regulations make that clear, providing that the languages of "some American Indians and Alaskan Natives, are unwritten." 28 C.F.R. § 55.12(c) (emphasis added). The touchstone of whether a language is considered unwritten is whether it is "commonly used in written form." *Id.* The Court in the *Nick* litigation recognized in its April 17, 2008 Order granting Plaintiffs' Rule 56(f) Motion, at page 3, determination of whether Yup'ik is a written language is a mixed question of law and fact. That is why the Justice Department's regulations state that although a jurisdiction bears the responsibility of making that determination, 28 C.F.R. § 55.12(c), it cannot use the guidelines themselves as "a substitute for analysis and decision." 28 C.F.R. § 55.2(c).

We will discuss this rule in the context of Yup'ik voters, for whom we have a well developed record. The State, by its own admission, has not engaged in any of the required analysis of the extent to which written Yup'ik is historically written or commonly used in the Bethel Census Area. Instead, the State made its determination based upon its own interpretation of Section 203 and "the precedent set by the State" of conducting English-only elections. SOF ¶ 214. The State has not surveyed any Yup'ik-speaking voters to determine whether written Yup'ik would be helpful to them. SOF ¶ 215. Lieutenant Governor Parnell and the former State Elections Director admitted that they did not have any first hand knowledge of whether Yup'ik is historically written. SOF ¶¶ 216-217, 219. Instead, the State relies upon statements it inaccurately attributes to Professor Lawrence Kaplan, an Inupiaq linguist. SOF ¶ 218. The former State Elections Director apparently recognized the tenuousness of the State's position, testifying that she briefed municipal clerks about the possibility of having to provide election materials written in Alaskan Native languages as a result of the *Nick* litigation. SOF ¶ 220.

Yup'ik is a historically written language dating back to its wide use in the nineteenth century. SOF ¶¶ 189-192. A study of Yup'ik villages in the 1950s found that "between villagers, letters are commonly written in Yup'ik," including laws and council minutes "recorded in Eskimo." SOF ¶¶ 193-194. There was a considerable amount of literacy in the older, or Moravian, form of written Yup'ik, which the Plaintiffs, who are in their late 60s and 70s, learned

¹⁶ A copy of our Response and Statement of Facts in opposition to the State's Motion for Summary Judgment has been provided to the Department, which discussed this standard in more detail.

to read when they were children. SOF ¶¶ 195-197. Yup'ik is a single written language that has developed and been improved, like other written languages. SOF ¶ 198. In the 1970s, academics such as Professor Jacobson, the leading expert on the Yup'ik language at the Alaska Native Languages Center, merely built upon the existing written Yup'ik language to make it more precise, easier to learn, and easier to type on an English keyboard. SOF ¶ 199.

Yup'ik also is commonly used in written form in the Bethel Census Area. SOF ¶ 200. In the native village of Tuntutuliak, between 75 and 85 percent of tribal members read written Yup'ik. Pls.' Ex. 192, Lupie Decl. ¶ 18. In the native village of Tuluksak, more than half of all tribal members read written Yup'ik; many of those who do not read Yup'ik also cannot read anything in English. Pls.' Ex. 193, Alexie Decl. ¶ 18. In the native village of Kasigluk, nearly all of the tribal members, about 85 to 90 percent, read written Yup'ik. Pls.' Ex. 194, Nicholas Decl. ¶ 18. In the native village of Kwigillinok, most tribal members read modern Yup'ik, and more than half read both modern and the older Moravian form of written Yup'ik. Pls.' Ex. 195, Jimmie Decl. ¶ 26.

In about one quarter of the 68 Yup'ik villages, children grow up speaking and reading Yup'ik as their first language. SOF ¶ 201. Schools in the Lower Kuskokwim School District have bilingual education programs and regularly teach written Yup'ik. SOF ¶ 202. Books, educational materials, government publications, religious books, and even bank loan forms are produced and used in written Yup'ik. SOF ¶ 203.

The State of Alaska, through its departments other than the Division of Elections, admits that written Yup'ik is commonly used by preparing and disseminating Yup'ik materials, including information for domestic violence victims, guides for special needs children, information on bird flu, text books and other materials used in the public schools, a handbook for crime victims, and fish and game notices, among others. SOF ¶¶ 212-213. Some of the Defendants even admitted seeing signs in the Bethel Census Area and the City of Bethel that were written in Yup'ik. SOF ¶ 211.

The overwhelming majority of Defendants' own Yup'ik translators also read and use written Yup'ik. Of 89 interviewed State translators, 88.8 percent (79 translators) read at least some written Yup'ik, including 70 translators who read written Yup'ik fluently.¹⁷ SOF ¶¶ 204-205. In 28 of the 29 voting precincts in the native villages, there was at least one interviewed State translator who read written Yup'ik for every election since 2000. SOF ¶ 207. Of the 79 State translators who reported that they read written Yup'ik, about 90 percent (71 translators) reported that they read the modern form of written Yup'ik, and about 70 percent (55 translators) read the older Moravian form of written Yup'ik. SOF ¶ 208. Four out of five interviewed State translators in the City of Bethel read written Yup'ik. SOF ¶ 209. Out of seven interviewed City of Bethel translators who are fluent in Yup'ik, four read written Yup'ik and a fifth translator said that written Yup'ik materials would help him translate more accurately. SOF ¶¶ 210, 288.

¹⁷ Among the ten State translators who do not read written Yup'ik, two are not fluent in Yup'ik, two have not worked as Yup'ik translators, and one is illiterate in both English and Yup'ik because she has only completed the third primary grade. SOF ¶ 206.

IV. CONCLUSION.

The State of Alaska's submitted language assistance program has both a discriminatory effect on Alaskan Native LEP voters and was adopted for a discriminatory purpose. Accordingly, we urge the Department to issue an objection to the submission on those bases.

If you have any questions, please free to contact Natalie Landreth, NARF lead co-counsel in the *Nick* litigation, at (907) 276-0680, or James Tucker, ACLU co-counsel in the *Nick* litigation, at (202) 675-2318.

Very truly yours,



Natalie A. Landreth
Litigation Management Committee
Senior Staff Attorney
Native American Rights Fund



Jeffrey Mittman
Executive Director
Alaska Civil Liberties Union

cc: Tim Mellett, Acting Deputy Chief
Sarabeth Donovan, Trial Attorney
Heather Thompson, NCAI
Virginia Davis, NCAI
Neil Bradley, ACLU Voting Rights Project
Dr. James Tucker, ACLU
Jason Brandeis, Alaska ACLU