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## “Why Should I Go Vote Without Understanding What I Am Going to Vote For?” The Impact of First Generation Voting Barriers on Alaska Natives

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“WHY SHOULD I GO VOTE WITHOUT  
UNDERSTANDING WHAT I AM  
GOING TO VOTE FOR?”<sup>1</sup>  
THE IMPACT OF FIRST GENERATION VOTING  
BARRIERS ON ALASKA NATIVES

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1. Trial Tr. 424:14-15 (Test. of Frank Logusak), *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska June 24, 2014). Please note that docket citations are included for filings, motions, orders, and any exhibits attached to those documents. There are no docket citations for deposition transcripts, exhibits introduced in depositions, trial transcripts, and trial exhibits, except those that were filed with motions. All materials are on file with the authors.

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## INTRODUCTION

In 1975, Congress amended the Voting Rights Act of 1965 (VRA) specifically to include voters who spoke a language other than English. Designated Section 203, the amendment added language minorities to the protected categories of voters, and created a mandate that all voting materials in Alaska be provided in several Alaska Native languages. Another key component of the VRA, Section 5, required certain jurisdictions with egregious histories of voting discrimination to clear voting changes with the U.S. Department of Justice (DOJ), a process known as preclearance. Taken together Sections 203 and 5 of the VRA meant that the State of Alaska and all of its political subdivisions were required to provide all voting materials in Alaska Native languages, and once initiated none of this assistance could be removed or reduced absent preclearance from DOJ.

Despite these protections, the State of Alaska ignored federal law and subjected Alaska Natives to discriminatory voting practices for decades. Yet, regardless of the open and fairly widespread discrimination in Alaska, in *Shelby County v. Holder*, the D.C. Circuit Court of Appeals remarked that the VRA's Section 5 coverage formula may be imprecise because certain jurisdictions—like Alaska—were simply “swept in” under preclearance despite “little or no evidence of current problems.”<sup>2</sup> The court cited no evidence for its sweeping conclusion, and—as *Toyukak v. Treadwell* later demonstrated—the Circuit Court and later the Supreme Court were wrong. The first generation voting barriers that existed when the VRA was amended in 1975 still existed nearly 40 years later when *Shelby County* was decided. Indeed, until recently Alaska was a stark example of the various forms voting discrimination and its antecedents can take.

Alaska's discriminatory voting practices existed well before the VRA and began with the State's decision to offer unequal educational opportunities to Alaska Native students, first when Alaska was a territory and later as a fledging state. Up until the late 1970s, Alaska operated a public school system in urban, largely non-Native areas only. School-age children in rural, largely Native areas had no local schools in their villages, and thus had to choose between their home and families and an education at a boarding school far from their community. This system was not dismantled until after nearly a decade of litigation ended in the early 1980s, and litigation aimed at securing equal educational opportunities continued until recently. Discrimination begets discrimination, and the generations of students that grew up in this system who chose not to go to boarding school or were otherwise denied equal educational opportunities were, as a consequence, largely unable to read and write English fluently. These students became voters who should have benefitted from the protections of Sections 203 and 5, yet Alaska maintained discriminatory voting practices until it was sued in 2007 and 2013.

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2. *Shelby Cnty. v. Holder*, 679 F.3d 848, 880–81 (D.C. Cir. 2012).

This article explores the many forms of discrimination that have persisted in Alaska, the resulting first generation voting barriers faced by Alaska Native voters, and the two contested lawsuits it took to attain a measure of equality for those voters in four regions of Alaska: *Nick v. Bethel* and *Toyukak v. Treadwell*. In the end, the court's decision in *Toyukak* came down to a comparison of just two pieces of evidence: (1) the Official Election Pamphlet that English-speaking voters received that was often more than 100 pages long; and (2) the single sheet of paper that Alaska Native language speakers received, containing only the date, time, and location of the election, along with a notice that they could request language assistance. Those two pieces of evidence, when set side by side, showed the fundamental unequal access to the ballot. The lessons learned from *Nick* and *Toyukak* detailed below are similarly simple: (1) first generation voting barriers still exist in the United States; and (2) Section 203 of the VRA does not permit American Indian and Alaska Native language speaking voters to receive less information than their English-speaking counterparts. The voters in these cases had been entitled to equality for 40 years, but they had to fight for nearly a decade in two federal court cases to get it.

### I. ALASKA: A LEGACY OF DISCRIMINATION

The United States purchased Alaska in 1867 from Russia, without consulting Alaska's Native people or considering them citizens.<sup>3</sup> Decades of neglect by the federal government followed, until in 1884 Congress created a governing structure for Alaska with an Organic Act that invited settlers to come to Alaska and claim land from the indigenous peoples already living there.<sup>4</sup> The following influx of non-Natives resulted in not only a loss of lands, but in Alaska Natives being subjected to segregation and discrimination in nearly every aspect of cultural, political, and social life.<sup>5</sup> For example, stores and restaurants placed signs in their windows that

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3. See 33 HUBERT HOWE BANCROFT, *THE WORKS OF HUBERT HOWE BANCROFT* 609 (San Francisco, A.L. Bancroft & Co. 1886) (describing Alaska Natives' reaction as "discontent arose, not from any antagonism to the Americans, but from the fact that the territory had been sold without their consent, and that they had received none of the proceeds of the sale."); see also THOMAS R. BERGER, *VILLAGE JOURNEY: THE REPORT OF THE ALASKA NATIVE REVIEW COMMISSION* 77 (1985) (quoting a man from Western Alaska: "They sold this land, which is ours and belonged to our forefathers since time immemorial. The Russians . . . sold our land to the U.S. government for money, even if it was not their land.").

4. See CHARLES K. RAY, *DEP'T OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, ALASKA NATIVE EDUCATION: AN HISTORICAL PERSPECTIVE* 1-2 (1973).

5. See STEPHEN HAYCOX, *ALASKA: AN AMERICAN COLONY* 209 (2002). The Alaska Advisory Committee to the U.S. Commission on Civil Rights summarized the relationship between Alaska Natives and non-Natives: "The histories of Alaska Natives and American Indian groups have many similarities. Theirs are histories marked by conquest, genocide, forced cultural and land loss." *ALASKA ADVISORY COMM. TO THE U.S. COMM'N ON CIVIL RIGHTS, RACISM'S FRONTIER: THE UNTOLD STORY OF DISCRIMINATION AND DIVISION IN ALASKA* 3 (2002) [hereinafter *ALASKA ADVISORY COMM.*].

read, “No Natives or Dogs Allowed.”<sup>6</sup> Communities established segregated churches, hotels, playgrounds, swimming pools, and movie theatres, which often restricted Native patrons to seats in the balcony.<sup>7</sup> In addition, many deeds included restrictive covenants that prevented property from being conveyed to Alaska Natives.<sup>8</sup> Although the territorial legislature passed the Alaska Equal Rights Act in 1945, which provided to all Alaska citizens “the full and equal enjoyment of accommodations, advantages, facilities, and privileges” of public places, discrimination against Alaska Natives persisted, perhaps most prominently in Alaska’s voting laws and segregated schooling system.

The 1915 Territorial Act continued the policy of denying Alaska Natives citizenship unless they could prove through individual examination that they had abandoned “any tribal customs or relationship” and adopted “the habits of a civilized life”<sup>9</sup>—forcing Alaska Natives to choose between their culture and identity, and the right to vote. After Congress passed the Indian Citizenship Act in 1924, it should have become more difficult to disenfranchise Alaska Native voters. Nevertheless, the following year the territorial legislature responded by passing a literacy test requirement for voting. The Alaska Daily Empire stated that Alaska Natives “cannot be even remotely considered as possessing proper qualifications”<sup>10</sup> for voting, and the Fairbanks Daily News–Miner warned of Native voters of a “lower order of intelligence.”<sup>11</sup> 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>12</sup>

The new literacy test law made education a critical component of the political process at a time when educational opportunities for Alaska Natives lagged far behind those of their non–Native counterparts. After Russia’s cession of Alaska in 1867, the federal government offered no schooling to Alaska Natives. In the communities where limited educational opportunities were available, it was due solely to the presence of

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6. Donn Liston, *Gruening Rights Fight Recalled*, ANCHORAGE DAILY NEWS (June 18, 1974), [http://www.alaskool.org/projects/anca/articles/ADN/Gruening\\_Rights\\_Fight.htm](http://www.alaskool.org/projects/anca/articles/ADN/Gruening_Rights_Fight.htm).

7. Terrence M. Cole, *Jim Crow in Alaska: The Passage of the Alaska Equal Rights Act of 1945*, in AN ALASKA ANTHOLOGY: INTERPRETING THE PAST 314, 315–19 (Steven W. Haycox & Mary Childers Mangusso eds., 1996).

8. See *Copy of a Covenant Restriction Drafted in 1948 in Anchorage, Alaska*, Alaskool.org, [http://www.alaskool.org/projects/JimCrow/cov\\_res.htm](http://www.alaskool.org/projects/JimCrow/cov_res.htm) (last visited Mar. 24, 2017); *1953 Warranty Deed*, ALASKOOL.ORG, <http://www.alaskool.org/projects/JimCrow/warrdeed.htm> (last visited Mar. 24, 2017).

9. Ch. 24, §§ 1–2, 1915 Alaska Sess. Laws 52, 52–53 (repealed 1959).

10. FRED PAUL, THEN FIGHT FOR IT at 47 (2003).

11. Cole, *supra* note 7, at 318.

12. Stephen W. Haycox, *William Paul, Sr. and the Alaska Voters’ Literacy Act of 1925*, 2 ALASKA HIST. 17, 21 (1986).

missionaries.<sup>13</sup> Generally, there was no secondary schooling available for communities without missionary schools. With 1884's Organic Act, the federal government assumed responsibility for the education of Alaska Natives.<sup>14</sup> Segregated schools were established by non-Natives before the turn of the century and into the gold rush era.<sup>15</sup> The Nelson Act of 1905 created a fully segregated school system, and required that "the schools specified and provided for in this Act shall be devoted to the education of White children and children of mixed blood who lead a civilized life."<sup>16</sup>

Three years later, the definition of "civilized life" was tested in *Davis v. Sitka School Board*, a case in which six Native children, each with a parent who was part-White, attempted to attend a public school for White children.<sup>17</sup> The court explained that the "civilized life" requirement in the Nelson Act arose because the "Indian in his native state has everywhere been found to be a savage, an uncivilized being, when measured by the White man's standard."<sup>18</sup> The court proceeded to evaluate the children's civilized characteristics by inspecting the features of one of the children's mothers, considering the children's geographical location and relationship with their tribe, and who the children played with. The court ultimately ruled that the children were not sufficiently civilized: "Those who from choice make their homes among the uncivilized or semi-civilized people and find their sole social enjoyments and personal pleasures and associations cannot, in my opinion, be classed with those who lead a civilized life."<sup>19</sup> The *Davis* decision effectively barred Alaska Native children from public schools. Though a Native mixed-blood student won the right to attend a public school in Ketchikan twenty years later,<sup>20</sup> subsequent events showed that segregated schools in Alaska persisted.

Alaska's limited involvement in Native education, and the federal government's inadequate efforts to provide for it, negatively impacted Alaska Native children in a wide variety of ways. Many were sent to feder-

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13. See JAMES THOMAS TUCKER, *THE BATTLE OVER BILINGUAL BALLOTS: LANGUAGE MINORITIES AND POLITICAL ACCESS UNDER THE VOTING RIGHTS ACT 239* (David Schultz, ed., 2009) (listing communities where schooling was available and the churches who offered education).

14. Thomas Alton, *Politics, Economics, and the Schools: Roots of Alaska Native Language Loss Since 1867*, 20 *ALASKA HIST.* 17, 25 (2005).

15. Stephen E. Cotton, *Alaska's "Molly Hootch Case": High Schools and the Village Voice*, 8 *EDUC. RES. Q.* 30, 31-32 (1984) [hereinafter Cotton, *Molly Hootch Case*].

16. An Act To provide for the construction and maintenance of roads, the establishment and maintenance of schools, and the care and support of insane persons in the district of Alaska, and for other purposes, S. 3728, 58th Cong. §7 (1905).

17. 3 Alaska 481, 489-90 (D. Alaska Terr. 1908).

18. *Id.* at 484.

19. *Id.* at 486-94.

20. Jones v. Ellis, 8 Alaska 146, 147-49 (D. Alaska Terr. 1929).

ally-run boarding schools thousands of miles from home.<sup>21</sup> The state began providing public education to Native children in certain locations in the 1960's, but only at the primary school level.<sup>22</sup> The lack of secondary school options for Alaska Natives had profound and harmful effects on children, families, and communities.<sup>23</sup> By 1972, only 2,200 out of over 51,000 Alaska Natives had a high school education.<sup>24</sup> It was not until *Tobeluk v. Lind*, commonly known as the Molly Hootch case, was settled in 1976 that Alaska agreed for the first time to establish secondary schools in all 126 villages that requested one.<sup>25</sup>

Though the Molly Hootch settlement ultimately resulted in the building of 92 new high schools around Alaska, the state persisted in providing Alaska Native children with unequal educational opportunities.<sup>26</sup> In 1999, in *Kasayulie v. State of Alaska*, the Alaska Superior Court found that the state continued to use a dual, arbitrary, unconstitutional, and racially discriminatory system for funding schools.<sup>27</sup> In 2007, the Alaska Superior Court again found that the state had violated its constitutional responsibility to maintain a public school system by failing to sufficiently oversee the quality of secondary education in many Alaska Native communities and provide a "meaningful opportunity to learn the material" on a graduation exam.<sup>28</sup>

Alaska's history of educational discrimination against its Native citizens has had a direct impact on Alaska Native enfranchisement. The complete lack of schooling available to village elders and the poorer quality rural schools that slowly appeared in more recent years are closely connected to limited English proficiency. The data on literacy and educational attainment bears this out.<sup>29</sup> And the effects of educational discrimination persist; 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

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21. Agreement of Settlement at 6, *Tobeluk v. Lind*, No. 72-2450 (Alaska Super. Ct. Sept. 3, 1976) [hereinafter Molly Hootch Settlement]. See also CHARLES K. RAY, ALASKA NATIVE EDUCATION: A HISTORICAL PERSPECTIVE (1973).

22. Stephen Cotton, *Thirty Years Later: The Molly Hootch Case*, 9 SHARING OUR PATHWAYS (Alaska Rural Systemic Initiative, Fairbanks, A.K.), Sept./Oct. 2004, at 4.

23. Molly Hootch Settlement, *supra* note 21, at 9-12.

24. Natalie Landreth & Moira Smith, *Voting Rights in Alaska: 1982-2006*, 17 S. CAL. REV. L. & SOC. JUST. 79, 108 (2007).

25. Molly Hootch Settlement, *supra* note 21, at 14.

26. Cotton, *Molly Hootch Case*, *supra* note 15, at 31.

27. See *Kasayulie v. Alaska*, No. 3AN-97-3782-CIV (Alaska Super. Ct. 1999), 1999 WL 34793400.

28. Decision and Order at 193-95, *Moore v. Alaska*, No. 3AN-04-9756-CIV (Alaska Super. Ct. June 10, 2007), 2007 WL 8310251, at \*84.

29. Dan McCool Expert Witness Report 28-29, *Toyukak v. Treadwell*, case no. 3:13-cv-00137-SLG (D. Alaska), Trial Exh. 151.

than White students.”<sup>30</sup> Over 80 percent of Alaska Native graduating seniors were not proficient in reading comprehension.<sup>31</sup> Quite simply, as access to education increases, so does literacy and vice versa.

## II. THE VOTING RIGHTS ACT IN ALASKA

### A. *Section 5 of the Voting Rights Act*

Section 5 provides that any “voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting” different from that in force or effect in a jurisdiction or its subdivisions on November 1, 1972,” cannot be implemented unless it “has been submitted . . . to the [U.S.] Attorney General, and the Attorney General has not interposed an objection within sixty days . . .” or the jurisdiction obtains a declaratory judgment from the U.S. District Court for the District of Columbia that the change “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.<sup>32</sup> Colloquially called “preclearance,” essentially froze election laws in place, and changes could not be made unless and until they were approved by the Attorney General or District Court in advance. The purpose of preclearance was to stop discriminatory laws from being implemented and prevent harm before it occurred, rather than placing the burden on voters to sue to stop the law’s implementation or allowing an election tainted by discriminatory practices to be conducted. Section 5 did not apply everywhere; its application was limited to states and jurisdictions that had a demonstrated history of discrimination.

Accordingly, Section 4 of the VRA created a “coverage formula” consisting of two elements. First, the state or jurisdiction maintained a “test or device” as a prerequisite to registration or voting as of November 1, 1964. This prong targeted literacy tests, morality tests, and the like. Second, less than 50 percent of persons of voting age were registered to vote in the state or jurisdiction as of November 1, 1964, or less than 50 percent of persons of voting age voted in the state or jurisdiction in the presidential election of November 1964.<sup>33</sup> This prong targeted jurisdictions in which the “test or device” had reduced registration and turnout. Although Section 5 was renewed five times, the last time in 2006, the coverage formula in Section 4 largely remained the same, with two exceptions. Amendments added the benchmark years of 1968 and 1972 to the statute.<sup>34</sup> In 1975, Congress added language minorities to the Section 4 coverage formula and added that “test or device” would now also mean

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30. ALASKA ADVISORY COMM., *supra* note 5, at 19.

31. Landreth & Smith, *supra* note 24, at 108–09.

32. 42 U.S.C. § 1973c(a).

33. 42 U.S.C. § 1973b.

34. 42 U.S.C. § 1973b(b).



using English only voting materials in a state or jurisdiction “where the Director of the Census determines that more than five per centum of the citizens of voting age residing [in that jurisdiction] are members of a single language minority.”<sup>35</sup>

Although the Census numbers and turnout percentages would change over time, the jurisdictions identified by the Section 4 coverage formula and subject to the preclearance requirements in Section 5 changed very little over time. There was a set of usual suspects: Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas and Virginia. Those states were covered in their entirety at the time of the *Shelby County v. Alabama* decision. In addition, the Census determinations resulted in various counties being covered in California, Florida, New York, North Carolina and South Dakota.<sup>36</sup> The statewide coverage applied primarily to southern states, except Arizona and Alaska. This led to the development of a myth that the coverage formula targeted, and was intended to punish, the southern states and Alaska was simply swept in by mistake.

### B. *The Alaska Native Landscape*

While Native voters nationwide experience a wide variety of barriers to political participation, nowhere have the obstacles to voting been more prevalent than in America’s “Last Frontier.” Alaska is uniquely situated because it has the largest percentage of Native voters of any state. According to 2010 Census estimates, American Indians and Alaska Natives comprise 17.7 percent of Alaska’s citizen voting-age population. New Mexico is the next closest state, with 10.4 percent.<sup>37</sup> Alaska’s Native peoples are also more geographically isolated than American Indians in the lower forty-eight states. Many Native villages are “roadless,” meaning there are no roads that lead to them. They are only accessible by air or by boat, and they may be unreachable for long periods because of unpredictable inclement weather conditions.<sup>38</sup> Physical separation of villages is compounded by language barriers among non-English speaking voters of the more than

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35. 42 U.S.C. § 1973b(f)(3).

36. A table that includes all of the Federal Register cites for covered jurisdictions is available at <https://www.justice.gov/crt/jurisdictions-previously-covered-section-5>.

37. See U.S. CENSUS BUREAU, 2006–2010 AMERICAN COMMUNITY SURVEY 5-YEAR ESTIMATES SEX BY AGE BY CITIZENSHIP STATUS, [https://factfinder.census.gov/faces/tablesevervices/jsf/pages/productview.xhtml?pid=ACS\\_10\\_5YR\\_B05003&prodType=table](https://factfinder.census.gov/faces/tablesevervices/jsf/pages/productview.xhtml?pid=ACS_10_5YR_B05003&prodType=table) (last visited Apr. 14, 2016).

38. See Sari Horwitz, *In Rural Villages, Little Protection for Alaska Natives*, WASH. POST (Aug. 2, 2014), <http://www.washingtonpost.com/sf/national/2014/08/02/in-rural-villages-little-protection-for-alaska-natives>. See also *Maps of Alaska*, ALASKA.ORG, <http://www.alaska.org/assets/content/maps/Alaska-Driving-Map.pdf> (last visited Apr. 14, 2017) (giving an overview of the roads in Alaska). The roads are represented in red and almost entirely concentrated in the areas around Anchorage and between Anchorage and Fairbanks. The areas with the highest LEP population, and the subject of the two cases discussed herein, are directly to the west of Anchorage along the Bering Sea.

twenty indigenous languages spoken in Alaska.<sup>39</sup> Native voters in six Alaska regions have limited-English proficiency (LEP) rates of at least nine percent among voting-age citizens,<sup>40</sup> with as many as one-third of those eligible voters illiterate.<sup>41</sup> Alaska thus has a very significant population of Native language speakers who are limited-English proficient and geographically isolated.

These geographic and linguistic barriers are further complicated by another unique feature of Alaska's election system: most Alaskan Native villages are located in regions with no organized county-level government.<sup>42</sup> Unlike other states, "a large part of Alaska is not in any organized borough," the state's county-equivalent, but instead subdivide "the unorganized portion of Alaska into *census areas* for the purposes of presenting statistical data."<sup>43</sup> As a result, in nearly all Alaskan Native villages state officials conduct every aspect of elections, except for some municipal elections.<sup>44</sup> The state's Division of Elections (DOE) is responsible for voter registration, poll worker recruitment and training, absentee and early voting, ballot and voting machine preparation, Election Day activities, and

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39. See Alaska Native Language Ctr., *Languages*, U. ALASKA-FAIRBANKS <https://www.uaf.edu/anlc/languages> (last visited Jan. 4, 2016) (listing twenty Alaska Native languages and their many dialects).

40. See U.S. CENSUS BUREAU, PUBLICLY RELEASED DATA FILES FOR THE 2011 SECTION 203 DETERMINATIONS, [https://www.census.gov/rdo/pdf/Census2010\\_Section203DeterminationsData.zip](https://www.census.gov/rdo/pdf/Census2010_Section203DeterminationsData.zip) (last visited Jan. 4, 2016) [hereinafter ALASKA BOROUGH/CENSUS AREAS, 2011 DETERMINATIONS DATA FILES]. Those regions include: the Bethel Census Area (31.3 percent); the Kusilvak Census Area (14.1 percent); the Dillingham Census Area (12.9 percent); the North Slope Census Area (11.8 percent); the Northwest Arctic Census Area (9.8 percent); and the Nome Census Area (9.5 percent). *Id.*

41. See *id.* (showing illiteracy rate among Yup'ik-speaking LEP voting-age citizens in the Dillingham Census Area is estimated at 32 percent). The VRA defines "illiteracy" as "the failure to complete the 5th primary grade." 42 U.S.C. § 1973aa-1a(b)(3)(E).

42. Compare Michael E. Krauss, *Indigenous Peoples and Languages of Alaska*, ALASKA NATIVE LANGUAGES CENTER (2013), <http://www.uafanlc.arsc.edu/data/Online/G961K2010/ipla-map-20130712.pdf> (mapping geographic location of Alaska Native villages by language group), with ALASKA DEP'T OF LABOR & WORKFORCE DEV., ALASKA BOROUGH/CENSUS AREAS (2014), <http://labor.alaska.gov/research/census/maps/state/2014/AlaskaBorCA.pdf> [hereinafter Alaska Map] (depicting the boundaries of Alaska's organized boroughs and unorganized census areas).

43. U.S. CENSUS BUREAU, GEOGRAPHIC AREAS REFERENCE MANUAL 4-2 (Nov. 1994), <https://www.census.gov/geo/reference/garm.html> (*italics in original*). A majority of Alaska's land mass is included in the ten designated census areas. See ALASKA BOROUGH/CENSUS AREAS, 2011 DETERMINATION FILES, *supra* note 40.

44. Native villages with municipal governments are responsible for conducting certain municipal elections. See generally ALASKA STAT. § 29.26.010 (2014) (the governing body of a municipality "shall prescribe the rules for conducting an election"); see also ALASKA STAT. § 15.10.105 (2006) (municipal elections not conducted by the local government are administered by the state).

vote tabulation.<sup>45</sup> There are four regional election offices: Anchorage, Juneau, Fairbanks, and Nome.<sup>46</sup> Three of those four are on the limited road system, while Nome is only accessible by air or boat. Moreover, Nome is on the Seward Peninsula, north of the Yukon-Kuskokwim Delta where the voters at issue in the following cases reside, and Nome is roughly 300 miles as the crow flies from the City of Bethel. In other words, for Native voters in these areas there is no physical access to election offices, unless a voter is willing to fly to it. The ability of Alaska Natives to register and cast a vote that is counted is thus directly conditioned on whether the state-wide DOE officials provide access to election services equal to those offered to non-Natives. This article addresses that very issue.

### C. *American Indians and Alaska Natives, and the VRA*

Like election officials in other parts of Indian Country, the DOE is required to provide election services in Native languages. In 1975, Congress responded to the disenfranchisement of American Indian and Alaska Native voters by amending the VRA to require assistance in their native languages.<sup>47</sup> The mandate, codified in Section 203 of the Act, applies to jurisdictions where language minority citizens suffer from the effects of educational discrimination and need assistance and materials in a non-English language in order to register and vote effectively.<sup>48</sup> Since 1975, sev-

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45. 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). The Division’s activities are administered by four regional supervisors located in Anchorage, Fairbanks, Juneau, and Nome. See ALASKA STAT. § 15.10.110 (1996).

46. See the list of locations at: <http://elections.alaska.gov/Core/contactregionalelection-offices.php> (last visited June 26, 2017).

47. See Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, 89 Stat. 400 (1975). For a comprehensive discussion of the legislative history of the language assistance provisions, see JAMES THOMAS TUCKER, *THE BATTLE OVER BILINGUAL BALLOTS: LANGUAGE MINORITIES AND POLITICAL ACCESS UNDER THE VOTING RIGHTS ACT* at 55–110, 165–203 (David Schultz, ed., 2009).

48. The amended VRA states:

The Congress finds that, through the use of various practices and procedures, citizens of language minorities have been effectively excluded from participation in the electoral process. Among other factors, the denial of the right to vote of such minority group citizens is ordinarily directly related to the unequal educational opportunities afforded them, resulting in high illiteracy and low voting participation. The Congress declares that, in order to enforce the guarantees of the fourteenth and fifteenth amendments to the United States Constitution, it is necessary to eliminate such discrimination by prohibiting these practices, and by prescribing other remedial devices.

eral regions of Alaska must provide assistance in Alaska Native languages.<sup>49</sup> In those regions, language assistance must be available for voting activities in every type of public election, including primary, general, and special elections.<sup>50</sup> Jurisdictions covered by Section 203, such as Alaska, generally must ensure that all “voting materials” they provide in English are also provided to voters in the languages of all groups or sub-groups that triggered coverage:

[A]ny registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, it shall provide them in the language of the applicable language minority group as well as in the English language.<sup>51</sup>

This provision was qualified by a term that allowed oral translation for a brand new category called “historically unwritten” languages:

[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.<sup>52</sup>

The term “historically unwritten” was not defined there and appeared nowhere else in statute, creating a knot that would take the next decade to unravel.<sup>53</sup>

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42 U.S.C. § 1973aa-1a(a). For a summary of educational discrimination suffered by Native voters, resulting in low levels of educational attainment and contributing to the lack of English proficiency, see generally James Thomas Tucker, *The Battle Over “Bilingual Ballots” Shifts to the Courts: A Post-Boerne Assessment of Section 203 of the Voting Rights Act*, 45 HARV. J. ON LEGIS. 507, 553–59 (2008).

49. See TUCKER, *supra* note 47, at 333; 28 C.F.R. § 51, App. Fifteen regions are currently covered in Alaska for Alaska Native languages under the most recent Section 203 determinations issued in late 2016. See Voting Rights Act Amendments of 1992, Determinations Under Section 203, 81 Fed. Reg. 87532, 87533 (Dec. 5, 2016).

50. See 28 C.F.R. § 55.10 (1990).

51. 52 U.S.C. § 10503(c) (2016). “Voting materials” include: voter registration materials, voting notices such as information about opportunities to register, registration deadlines, polling place information (including the times they are open, their location, and the voter’s election precinct assignment), absentee voting, voting materials provided by mail, all election forms, polling place activities and materials, instructions, publicity, ballots, and other materials or information relating to the electoral process. See *id.*; 28 C.F.R. §§ 55.15, 55.18 (1984). A discussion of what jurisdictions must do to comply with Section 203 is provided in TUCKER, *supra* note 47, at 90–105.

52. 42 U.S.C. § 1973aa-1a(c).

53. See *infra* Section IV.

The regulations accompanying Section 203 issued by the U.S. Department of Justice (DOJ) do not clarify the term. Importantly, the regulations do make it clear that the “historically unwritten” proviso is not a categorical exception for Native languages: “the languages of *some* American Indians and Alaska Natives are unwritten.”<sup>54</sup> However, the closest they get to a definition of “historically unwritten” is to say that the language is “commonly used in written form,” which merely replaces one vague term for another.<sup>55</sup> Moreover, the two descriptors are not necessarily congruent, since “commonly” suggests current rather than past or historic use. There is no further explanation of the term in the Department’s regulations. Compliance with Section 203 is measured by “two basic standards” that do not distinguish between any of the languages covered under the VRA:

- (1) That materials and assistance should be provided in a way designed to allow members of . . . language minority groups to be effectively informed of and participate effectively in voting-connected activities; and
- (2) That an affected jurisdiction should take all reasonable steps to achieve that goal.<sup>56</sup>

In addition, the regulations require that the voting materials “provided in the language of a language minority group be clear, complete and accurate.”<sup>57</sup>

Similarly, the legislative history provides some discussion of the reason for the term “historically unwritten,” but fails to reveal the clear meaning. When the Voting Rights Act amendments were being debated in 1975, two of Alaska’s three-member congressional delegation, Senator Ted Stevens and Representative Don Young, challenged efforts to apply the new language provisions to Alaska Natives.<sup>58</sup> After congressional leadership rejected those efforts, Senator Stevens took a different tack. Acknowledging that “we do want to print our election materials in English only,”<sup>59</sup> Stevens argued that written translations of voting materials should not be provided in Native languages.<sup>60</sup> To achieve that result, he maintained that written translations were unnecessary for what he called “his-

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54. 28 C.F.R. §55.12(c) (emphasis added).

55. *Id.*

56. 28 C.F.R. § 55.2(b).

57. *See Apache Cnty. v. United States*, No. 77-1515, Nat’l Indian Law Library 003926 (D.D.C. June 12, 1980) (three-judge court).

58. *See TUCKER, supra* note 47, at 62–63, 66, 69–70, 84, 93–98. The third member of the state’s delegation, Senator Mike Gravel, testified and submitted evidence in support of efforts to provide language assistance to Alaska Natives. *See id.* at 256.

59. 121 CONG. REC. 24,761(1975).

60. *See TUCKER, supra* note 47, at 94–95.

torically unwritten” languages.<sup>61</sup> Congress adopted the Stevens Proviso without objection,<sup>62</sup> and it appears as part of Section 203(c) of the amended VRA.<sup>63</sup> The enacted language does not define “historically unwritten.” Senator Stevens himself suggested that a Native language had to be written for longer than 15 years in order to meet the statutory requirement.<sup>64</sup> Interestingly, Senator Stevens added to the Congressional record a letter from Lori Leary, an Alaska election supervisor, that did encourage providing at least some materials written in Native languages, such as sample ballots:

Perhaps printing “sample” bilingual ballots would be a plausible solution. Sample ballots printed in all those languages which are in written form could be effectively disseminated to the public through a number of ways—the news media, posted in public gathering places, election offices, registrars, city and borough clerk’s offices, village and minority leaders, as well as the candidates themselves. Here would be a means whereby the voter would have the opportunity to study, discuss and decide, prior to all elections and in the privacy and leisure of his own time and language, what and how he will vote. . . . Sample bilingual ballots can be the only logical means of reaching this small percentage of our population, without implementing a burdensome, unnecessary and somewhat more confusing feature to our voting system—and still obtain the same objective!<sup>65</sup>

This letter was followed by another one from then-Director of the Division of Elections, Patty Ann Polley, who had gone the extra step of figuring out which districts would require sample ballots and how many would be required.<sup>66</sup> Senator Stevens inserted this letter into the record without objection. Taken together, the context of discussions by the bill managers, with input from the Department of Justice, was that “the Stevens amendment simply exempted any language that was unwritten or was not commonly used by the covered language minority.”<sup>67</sup> The goal was a practical one: to provide written materials only for people who could read them.

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61. See 121 CONG. REC. 24,761 (1975).

62. See 121 CONG. REC. H4893 (1975).

63. See 52 U.S.C. § 10503(c); see also 52 U.S.C. § 10303(f)(4) (2016) (including similar language for jurisdictions covered under Section 5 of the VRA for minority language groups).

64. See 121 CONG. REC. 24,208 (1975).

65. *Id.* at 24,207, 24,209 (quoting letter from Lory B. Leary, Se. Election Supervisor, State of Alaska, to Ted Stevens, U.S. Senator from Alaska (May 28, 1975)).

66. *Id.* at 24,209.

67. See JAMES THOMAS TUCKER, *THE BATTLE OVER BILINGUAL BALLOTS: LANGUAGE MINORITIES AND POLITICAL ACCESS UNDER THE VOTING RIGHTS ACT 95-98* (David Schultz, ed., 2009).

Overall, Section 203 and the implementing regulations require that covered jurisdictions: (1) determine whether a language is written or “historically unwritten” based on whether it is “commonly used” by the applicable language minority group; (2) if “historically unwritten,” provide all voting materials in oral form; (3) if written, provide voting materials in the covered minority language(s); (4) provide translations of the voting materials that are clear, complete and accurate; and (5) ensure that translations are effective by making them understandable in the language and dialect spoken by the voters, including voting information, assistance through translators, and access equal to what is provided in English. Alaska’s failure to comply with these mandates erected yet another barrier for Alaska Native voters, and each of these components would be vigorously challenged in litigation from 2007 to 2015.

### III. FIRST GENERATION BARRIERS IN ALASKA

As if these federal barriers were not enough to impede Alaska Natives’ access to the ballot box, there are also several “first generation” barriers unique to Alaska. The term “first generation” refers to voting claims focused on ballot access, such as the ability to register to vote or to cast a ballot that is counted.<sup>68</sup> In Alaska, first generation barriers often take the form of disparate in-person voting opportunities between Native and non-Native voters, and—from 1975 to 2015—the lack of language assistance to help LEP Native voters understand the issues on which they were voting. First generation barriers are not a thing of the past and, as discussed below, they have persisted in Alaska. It is only now, after extensive litigation, that they are finally being broken down.

#### A. Unequal In-Person Voting Opportunities

Voting is the means through which citizens to choose their elected representatives, and in the case of direct democracy, determine whether ballot questions should become law. When equal in-person voting opportunities are denied to a particular group, “it perpetuates their place as second-class citizens.”<sup>69</sup> But Michael Waterstone<sup>70</sup> has identified another,

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68. See, e.g., James Thomas Tucker, *Tyranny of the Judiciary: Judicial Dilution of Consent Under Section 2 of the Voting Rights Act*, 7 WM. & MARY BILL RTS. J. 443, 547–48, n.517 (1999) (collecting citations). By comparison, “second generation” voting claims are most commonly associated with redistricting or other features of the method of election system itself that result in the votes of minorities being diluted. See Pamela S. Karlan, *The Impact of the Voting Rights Act on African-Americans: Second- and Third-Generation Issues*, in VOTING RIGHTS AND REDISTRICTING IN THE UNITED STATES 121, 121–40 (Mark E. Rush ed. 1998).

69. Michael Waterstone, *Constitutional and Statutory Voting Rights for People with Disabilities*, 14 STAN. L. & POL’Y REV. 353, 369 (2003).

70. Michael Waterstone is a “nationally recognized expert in disability and civil rights law.” Michael Waterstone, *Loyola Law School*, LLS.EDU, <http://lls.edu/faculty/facultylists-z/waterstonemichael> (last visited Sept. 20, 2017).

equally important aspect of voting: “an expressive element” that is a means for “voters to assert their membership in their community, and the community in turn to perpetuate its membership and values over time.”<sup>71</sup> Likewise, as noted by Constitutional law scholar Adam Winkler:

Through participation itself, the voter expresses an identification with the greater community and reveals her attachments to and associations with it. In this way, the act of voting is the individual’s . . . method by which the individual ‘signs’ her name to the social contract and becomes herself part of the collective self-consciousness.<sup>72</sup>

The challenge in administering elections in geographically isolated Native communities can certainly be daunting. As described above, Alaska is unique in that it has “roadless” communities; almost all of which are Native villages.<sup>73</sup> Many villages are also divided by natural barriers. For example, the Yup’ik village of Kasigluk in the Bethel Census Area consists of two smaller villages, Akiuk and Akula, which are divided by the Johnson River.<sup>74</sup> At the time of the 2006 Reauthorization of the VRA, the DOE provided only a single ballot for Kasigluk, at the Community Center located on the Akiuk side of the river.<sup>75</sup> On Election Day, the local election officer announced over the radio “that anyone who wants to vote has to come down to the community center by 11:30 a.m. because that is when the officer is taking the single polling machine to the other side of the river,” to the school located in Akula.<sup>76</sup> In short, part-time poll workers and tribal leaders in Native villages have had to come up with their own solutions to the real-world geographical barriers they face. State law at the time required that polling places open at 7 a.m. and close at 8 p.m.<sup>77</sup> However, that law was not obeyed in Kasigluk, so that voters on both sides

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71. Michael Waterstone, *Constitutional and Statutory Voting Rights for People with Disabilities*, 14 *STAN. L. & POL’Y REV.* 353, 368–69.

72. Adam Winkler, *Expressive Voting*, 68 *N.Y.U. L. REV.* 330, 368 (1993).

73. See *supra*, Section II.B; Landreth & Smith, *supra* note 24, at 82. DOE acknowledged that there are at least “151 rural communities with precincts that are isolated from connecting road systems; the only way to access these communities is by airplane or boat.” Alaska Div. of Elections, *State of Alaska HAVA State Plan 2005 Updated* (Feb. 8, 2005), [https://www.elections.alaska.gov/doc/hava/hava\\_master\\_plan\\_january\\_2005.pdf](https://www.elections.alaska.gov/doc/hava/hava_master_plan_january_2005.pdf).

74. See Kasigluk, AKIUK MEMORIAL SCH., <http://www.akiukmemorialschool.com/about-kasigluk-akiuk.html> (last visited Jan. 4, 2006). Some residents of Akiuk, which is sometimes called “Old Kasigluk,” migrated to the Akula side of the river because it has more land. *Id.* However, residents of both villages consider themselves to be a single community. *Id.*

75. See State of Alaska, Division of Elections, *List of Polling Place Locations*, <http://www.elections.alaska.gov/Core/pollingplacelocations.php> (last visited June 26, 2017).

76. Landreth & Smith, *supra* note 24, at 82.

77. See ALASKA STAT. § 15.15.080 (1984).



of the river had at least some opportunity to vote in person. It is unknown just how many villages have faced similar geographical challenges.

Many Native villages have been denied polling places altogether. In 2004, twenty-four villages with approximately 1,500 Natives of voting age lacked opportunities to vote in person.<sup>78</sup> DOE's four regional supervisors have been authorized by regulation to "designate a person as a permanent absentee voter" if the "election supervisor determines that the voter resides in a remote area in Alaska where distance, terrain, or other natural conditions deny the voter reasonable access to the polling place."<sup>79</sup> Most voters who reside in the "remote areas of Alaska" are Native,<sup>80</sup> resulting in the impact falling disproportionately on Native voters. Moreover, contrary to the plain language of the regulation, DOE's supervisors have in the past not redesignated voters as "permanent absentee voters" because they lack "reasonable access to the polling place."<sup>81</sup> Rather, they have eliminated existing polling places in the villages where those voters resided. Before 2014, DOE had removed polling places from at least five villages in the Bethel area, one in the Dillingham area, and one in the Kusilvak Census Area.<sup>82</sup> All of the voters in those villages who wished to vote had to do so by a mailed-in absentee ballot.<sup>83</sup> These are called permanent absentee voting (PAV) sites. Even though most of the PAV sites require the DOE to provide assistance in Native languages, all of the materials sent to voters in those villages were in English,<sup>84</sup> and there was no poll worker to provide language assistance.<sup>85</sup> The state's practices prevented many Natives in the

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78. Landreth & Smith, *supra* note 24, at 105.

79. 6 ALASKA ADMIN. CODE § 25.650 (2011).

80. U.S. Census Bureau, *American Indians and Alaska Natives in Alaska Map* (2010), [http://www2.census.gov/geo/maps/special/AIANWall2010/AIAN\\_AK\\_2010.pdf](http://www2.census.gov/geo/maps/special/AIANWall2010/AIAN_AK_2010.pdf) (map depicting locations of Alaska Native villages and population data from the 2010 Census).

81. *See supra* note 77.

82. The Kusilvak Census Area had been known as the Wade Hampton Census Area for several decades. Its namesake was Wade Hampton III, a slave-holding Confederate general from South Carolina, whose son-in-law named a mining region after him in 1913. Alaska Governor Bill Walker renamed the region following backlash in the aftermath of the July 2015 massacre in the Emanuel AME Church in Charleston, South Carolina. *See* Jeff Wilkinson, *After a Century, Alaska District Drops SC Civil War General Hampton's Name*, HERALD (July 14, 2015), <http://www.heraldonline.com/news/state/south-carolina/article27202492.html>. Although the *Toyukak* litigation was tried before the area was renamed, this article will refer to it as the Kusilvak Census Area.

83. *See* Dep. of Edna Rae "Becka" Baker, *Toyukak v. Treadwell*, at 40:15-41:18, No. 3:13-cv-00137-SDG (D. Alaska Oct. 30, 2013) [hereinafter Baker Dep.].

84. *Id.* at 48:25-49:4; Dep. of Dorie Wassilie, *Nick v. Bethel*, No. 3:07-cv-00098-TMB (D. Alaska April 7, 2009), at 43:23-44:23; Exhibit 5, *Nick v. Bethel*, No. 3:07-cv-00098-TMB (D. Alaska Aug. 11, 2008), No. 362-8.

85. Baker Dep., *supra* note 83, at 54:8-23.

affected communities from voting at all, which has been reflected in depressed voter turnout among Native communities.<sup>86</sup>

#### B. “Precinct Realignment”

The use of permanent absentee voting is not the only method DOE officials have used to restrict Native voting. In 2008, the DOE began to implement what it called “precinct realignment,” a plan to combine voting locations in several Native villages. The problem was that those villages were not connected by road, so the voters would have had to fly to a neighboring village in order to vote. First, it proposed to “realign” the village of Tatitlek, where 85 percent of the residents are Alaska Native, by closing its polling place and requiring voters to vote in the predominately non-Native community of Cordova 33 miles away.<sup>87</sup> Second, it wanted to “consolidate” the majority Native community of Pedro Bay, which was the subject of a critical mining initiative on the August 2008 ballot, with Iliamna and Newhalen, located 28 miles away by air.<sup>88</sup> Officials likewise sought to “consolidate” Levelock—in which about 95 percent of residents are Alaska Native—with Kokhanok, approximately 77 miles away.<sup>89</sup> In the process, the DOE would have effectively disenfranchised nearly all of the registered Native voters residing in the three villages.<sup>90</sup> This “use of polling places at locations remote” from a minority community violates federal law.<sup>91</sup>

The Department of Justice stopped the DOE’s precinct realignment plans. At that time, the entire state of Alaska was covered by Section 5 of the Voting Rights Act,<sup>92</sup> requiring the State to obtain “preclearance,” or

86. For example, in the 2008 General Election, voter turnout was a little more than 66 percent. See 2008 General Election November 4, 2008 Official Results, ST. OF ALASKA (Dec. 3, 2008), <https://www.elections.alaska.gov/results/08GENR/data/results.pdf>. By comparison, turnout in the village of Sleetmute was below 30 percent. See Aff. of Shelly Growden, *Nick v. Bethel*, No. 3:07-cv-00098-TMB (D. Alaska Dec. 4, 2008), no. 496 at 8–9.

87. Letter from Christopher Coates, Chief, Voting Sec. of U.S. Dep’t of Just., to Gail Fenumiai, Dir., Div. of Elections (July 14, 2008) [hereinafter Coates Letter], [http://www.narf.org/bloglinks/shelby\\_county\\_brief.pdf](http://www.narf.org/bloglinks/shelby_county_brief.pdf) (App. 32–36). For population data from the 2000 Census, see U.S. CENSUS BUREAU, <http://www.census.gov/> (last visited Apr. 14, 2017). Distance data is calculated using the U.S. Geological Survey, Geographic Names Information System. See U.S. GEOLOGICAL SURVEY, GEOGRAPHIC NAMES INFORMATION SYSTEM, <http://www.infoplease.com/atlas/calculate-distance.html> (last visited Apr. 14, 2017).

88. *Id.*

89. *Id.*

90. See State of Alaska, Division of Elections, *Number of Registered Voters by Party Within Precinct Date: 11/4/2008*, [http://www.elections.alaska.gov/statistics/2008/vi\\_vrs\\_stats\\_party\\_2008.11.04.htm](http://www.elections.alaska.gov/statistics/2008/vi_vrs_stats_party_2008.11.04.htm).

91. *Brown v. Dean*, 555 F. Supp. 502, 505 (D.R.I. 1982) (“The United States Supreme Court has made it clear beyond cavil that the location and accessibility of a polling place have a direct effect on a person’s ability to exercise his franchise.”) (citing *Perkins v. Matthews*, 400 U.S. 379, 387 (1971)).

92. See 40 Fed. Reg. 49,422 (Oct. 22, 1975).

approval, of any voting changes from the Attorney General of the United States or the U.S. District Court for the District of Columbia before implementing them.<sup>93</sup> When the DOE submitted its proposed changes to the DOJ, the DOJ responded by requesting information about reasons for the voting changes, distances between the polling places, and their accessibility to Alaska Native voters.<sup>94</sup> Department of Justice officials focused on the obvious problem created by the State's proposal: "how voters will get to the consolidated location" when there were no roads connecting the Native villages to the communities with the polling places.<sup>95</sup> The DOJ also expressed concerns that DOE officials had not consulted with Native voters in the affected villages.<sup>96</sup> Instead of answering the DOJ's inquiries, the DOE abruptly withdrew the submission two weeks later.<sup>97</sup> As a result of the Department of Justice's review, the three villages still have their polling places. However, the absence of Section 5 coverage of Alaska will require Native voters to bring costly litigation in order to block any future efforts by DOE to reduce voting accessibility<sup>98</sup>

### C. Early Voting

Alaska Native voters have also not had equal early voting opportunities. Similar to over two-thirds of all states,<sup>99</sup> Alaska offered early voting—also called absentee in-person voting—for statewide elections.<sup>100</sup> State law provides that "[f]or 15 days before an election and on election day, a

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93. See 42 U.S.C. § 1973b. For additional discussion of the application of Section 5 preclearance procedures to Alaska, see TUCKER, *supra* note 47, at 58-76; see also *id.* at 70-71 (summarizing preclearance requirements).

94. Coates Letter, *supra* note 87.

95. *Id.*

96. *Id.*

97. Letter from Christopher Coates, Chief, Voting Sec. of U.S. Dep't of Just., to Gail Fenumiai, Dir., Div. of Elections (Sept. 10, 2008), [http://www.narf.org/bloglinks/shelby\\_county\\_brief.pdf](http://www.narf.org/bloglinks/shelby_county_brief.pdf) (App. 45-46).

98. Alaska was removed from coverage in 2013, following the Supreme Court's ruling in *Shelby County v. Holder* that the coverage formula was unconstitutional. See 133 S.Ct. 2612, 2631 (2013).

99. 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* (Mar. 20, 2017), <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>.

100. 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).

qualified voter . . . may vote in locations designated by the director.”<sup>101</sup> Early voting allows eligible voters to cast ballots in person, just as they can do on the day of the election.<sup>102</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>103</sup> Prior to 2014, Alaska’s early voting sites were in predominately urban non-Native areas and a few rural “hub-communities.”<sup>104</sup>

The disparity becomes readily apparent by looking at the census data for the locations where in-person early voting was provided, highlighting that predominately non-Native areas were offered early voting locations even where the numbers of voters did not appear to warrant it. For example, in the November 2012 election, the city of Anchorage, where non-Natives comprise about 92 percent of the total population,<sup>105</sup> had only four absentee voting locations open during the entire fifteen-day early voting period.<sup>106</sup> Similarly, in 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>107</sup> five absentee voting locations were open during the entire early voting period.<sup>108</sup> One of those was in Sarah Palin’s home town of Wasilla, where the DOE used nearly half of a million dollars in federal Help America Vote Act (HAVA) funds to

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101. 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).

102. *See* ALASKA STAT. § 15.20.064(b)-(c) (2005) (describing early voting procedures).

103. *See, e.g., Black Bull v. Dupree Sch. Dist.*, No. 3:86-cv-03012 (D.S.D. Dec. 9, 1986) (granting temporary and permanent relief to address 150 mile travel distance of Native voters to the closest polling place).

104. “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.

105. *See* U.S. CENSUS BUREAU, QUICKFACTS: ANCHORAGE MUNICIPALITY, ALASKA (COUNTY), <http://www.census.gov/quickfacts>.

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

107. *Quickfacts: Matanuska-Susitna Borough, Alaska*, U.S. CENSUS BUREAU, <http://www.census.gov/quickfacts>.

108. *See* 2012 OEP REGION II, *supra* note 106, at 9–11.

open a permanent satellite office in 2006<sup>109</sup> for the predominately non-Native community of about 8,000 residents.<sup>110</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>111</sup> and where Natives comprise about 83 percent of the total population,<sup>112</sup> had only three early voting locations: Bethel, Aniak and Kasigluk.<sup>113</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 even if they wanted to, because voters must vote in their assigned precinct in order to ensure their vote counts: if a voter from Cheformak 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, 95 percent of whom are Native<sup>114</sup>—had only a single early voting location, St. Mary's.<sup>115</sup> The Dillingham Census Area, with more than one dozen villages<sup>116</sup> and Natives comprising nearly three-quarters of the total population,<sup>117</sup> had just one early voting site, in Dillingham.<sup>118</sup> With a handful of exceptions, early voting was universally unavailable in Native villages.

Beginning in at least 2011, the Alaska Federation of Natives (AFN), corporations, tribal councils, voters, and other organizations began re-

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109. See Alaska Div. of Elections, *State of Alaska HAVA State Plan 2008 Updated* 25, 38 (Feb. 8, 2008), [https://www.elections.alaska.gov/doc/hava/2008HAVA StatePlan.pdf](https://www.elections.alaska.gov/doc/hava/2008HAVA%20StatePlan.pdf) (last visited Jan. 4, 2016) [hereinafter 2008 HAVA Plan].

110. See *Quickfacts: Wasilla, Alaska*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/table/PST045216/0283080,00> (last visited Apr. 14, 2017). Approximately 95 percent of Wasilla's residents are non-Native. See *id.*

111. See Bethel Census Area, WIKIPEDIA, [https://en.wikipedia.org/wiki/Bethel\\_Census\\_Area,\\_Alaska](https://en.wikipedia.org/wiki/Bethel_Census_Area,_Alaska) (last visited Jan. 4, 2016).

112. See *Quickfacts: Bethel Census Area, Alaska*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/table/PST045216/02050,00> (last visited Apr. 14, 2017).

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

114. See QUICKFACTS: KUSILVAK CENSUS AREA, ALASKA, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/table/PST045216/02158,4573870,00> (last visited Apr. 14, 2017).

115. See 2012 OEP REGION IV, *supra*, note 113.

116. See *Dillingham Census Area, Alaska*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Dillingham\\_Census\\_Area,\\_Alaska](https://en.wikipedia.org/wiki/Dillingham_Census_Area,_Alaska) (last visited Jan. 4, 2016); see also DILLINGHAM CENSUS AREA, ALASKA DEP'T OF LABOR, <http://live.laborstats.alaska.gov/cen/maps/bor/current/070.pdf> (identifying some of the Census Area's villages).

117. See QUICKFACTS: DILLINGHAM CENSUS AREA, ALASKA, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/table/PST045216/02070,00>.

118. See 2012 OEP REGION IV, *supra* note 113, at 9–11.

questing that DOE establish early-voting locations in Native villages.<sup>119</sup> The ANCSA Regional Association's Executive Director 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 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>120</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>121</sup> DOE acknowledged receiving several letters from Native groups raising similar concerns.<sup>122</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>123</sup> The Director also blamed the Section 5 preclearance requirement for the discriminatory treatment of Natives, contending that it

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119. Alaska Federation of Natives Stmt. of Interest at 2, *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska July 3, 2014), No. 188-1 (referring to requests for the preceding three years “that the DOE automatically provide early (absentee-in-person) voting locations throughout rural Alaska”).

120. Letter from Kim Reitmeier, Exec. Dir. of ANCSA Regional Ass'n, to Gail Fenumiai, Dir., Div. of Elections (July 26, 2012) (on file with author).

121. *Id.*

122. See Letter from Gail Fenumiai, Dir., Div. of Elections, to Kim Reitmeier, Exec. Dir. of ANCSA Regional Ass'n 1 (Aug. 1, 2012) (on file with author).

123. *Id.*

precluded the DOE from making “further adjustments or changes for the 2012 elections.”<sup>124</sup>

In August 2013, following the *Shelby County* decision removing Alaska from coverage for the Section 5 preclearance requirements,<sup>125</sup> at least half a dozen Native organizations and three tribal councils again requested early voting in the villages.<sup>126</sup> They hoped it would easily be accommodated since the preclearance the DOE had complained about was no longer required.<sup>127</sup> In response to those requests, DOE conceded that preclearance was “no longer required.”<sup>128</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>129</sup> There were several different versions of the survey, with the 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 survey 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>130</sup> If the tribal council did not respond, DOE took no further action.<sup>131</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>132</sup> Third, the tribal council, not the DOE, was required to “designate an individual to serve as the absentee voting official.”<sup>133</sup> Only then would DOE consider establishing an in-person early voting location in a Native village.<sup>134</sup> Despite the many requests already made from

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124. *Id.* at 2.

125. *See supra* note 98 and accompanying text.

126. *See* Letter from Gail Fenumiai, Dir., Div. of Elections, to Myron Naneng, President of Ass’n of Village Council Presidents 1 (Aug. 30, 2013) (on file with author) (listing those who requested early voting).

127. 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.” *See* Letter from Myron Naneng, President of Ass’n of Village Council Presidents, to Gail Fenumiai, Dir., Div. of Elections 1 (Aug. 15, 2013) (on file with author).

128. *See* Letter from Gail Fenumiai, Dir., Div. of Elections, to Myron Naneng, President of Ass’n of Village Council Presidents 1 (Aug. 30, 2013) (on file with author).

129. *See id.* at 2.

130. *Id.*

131. *See id.*

132. *See id.*

133. *Id.*

134. *See id.*

organizations representing dozens of tribes, the Director noted that only two, Chevak and Larsen Bay, successfully navigated through these confusing bureaucratic requirements.<sup>135</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>136</sup> Native organizations 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>137</sup> DOE waited more than one month to respond, rejecting both requests.<sup>138</sup> DOE’s Director rationalized the disparate treatment of 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>139</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>140</sup> In June 2014, the Native groups took on a burden not required for non-Native groups or voters living in urban areas of Alaska: they performed DOE’s statutory duty<sup>141</sup> by identifying voting locations and recruiting absentee voting officials.<sup>142</sup> A total of 128 villages throughout rural Alaska were

135. *See id.*

136. *See* Letter from Jason Metrokin, Chair of ANCSA Regional Ass’n, to Gail Fenumiai, Dir., Div. of Elections 1 (Apr. 7, 2014) (on file with author).

137. *See id.* at 2.

138. *See* Letter from Gail Fenumiai, Dir., Div. of Elections, to Jason Metrokin, Chair of ANCSA Regional Ass’n 1-2, 4 (May 9, 2014) (on file with author).

139. *See id.* at 2.

140. *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) [hereinafter *Rural Alaska Early Voting*], <http://www.nativefederation.org/afn-and-ancsa-regional-association-release-final-list-of-new-absentee-early-voting-sites-in-rural-alaska/>.

141. *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).

142. *See* *Rural Alaska Early Voting*, *supra* note 140.



designated by the Native groups for in-person early voting locations and approved by DOE.<sup>143</sup> Afterwards, DOE's director attempted to claim credit for making early voting accessible in the villages.<sup>144</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>145</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>146</sup> While Alaska Native voters finally secured early voting opportunities, they did so only after substantial struggles and requirements not imposed on non-Natives.

#### IV. THE SECTION 203 CASES

##### A. *Nick v. Bethel*

##### 1. Background

Following passage of the language assistance provisions of the VRA in 1975, Alaska became covered for Alaska Native languages. That coverage remained in place in the predominately Native regions of the state when successive determinations were made in 1984, 1992, 2002, and in 2011.<sup>147</sup> As described in the two cases that follow, from 1975 to 2015, the DOE did little to provide complete, clear, and accurate translations of all voting materials and information to Native voters.<sup>148</sup> Municipal officials responsible for conducting certain city elections in Alaska also failed to provide language assistance.<sup>149</sup> Their recalcitrance may have been due, in part, to the English-only movement in Alaska, which succeeded in getting

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143. See *id.*

144. See Testimony of Gail Fenumiai at 1714:5-17, *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska July 2, 2014).

145. Alaska Federation of Natives Stmt. of Interest at 2-3, *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska July 3, 2014), No. 188-1.

146. 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. 2 (July 31, 2014) (on file with author).

147. See JAMES THOMAS TUCKER, *THE BATTLE OVER BILINGUAL BALLOTS: LANGUAGE MINORITIES AND POLITICAL ACCESS UNDER THE VOTING RIGHTS ACT* 239, 333 (David Schultz, ed., 2009); Voting Rights Act Amendments of 1992, Determinations Under Section 203, 76 Fed. Reg. 63602 (Oct. 13, 2011).

148. See generally 28 C.F.R. § 55.19(b) ("It is essential that material provided in the language of a language minority group be clear, complete and accurate. In examining whether a jurisdiction has achieved compliance with this requirement, the Attorney General will consider whether the jurisdiction has consulted with members of the applicable language minority group with respect to the translation of materials."); see also 28 C.F.R. § 55.2 ("materials and assistance should be provided in a way designed to allow members of applicable language minority groups to be effectively informed of and participate effectively in voting-connected activities").

149. See generally *Native Vill. of Barrow v. City of Barrow*, No. 2BA-95-117-CI (Alaska Super. Ct. 1995) (discussed in Landreth & Smith, *supra* note 24, at 117-18). The City of Bethel

voter approval of a ballot measure in 1998 that required that only English be used for “all government functions and actions.”<sup>150</sup> The ballot measure was meant to block bilingual materials and services to the state’s non-English speaking population.<sup>151</sup> Even after Alaska’s highest court struck down the provision,<sup>152</sup> Alaska continued to provide English-only elections.

DOE employees were arguably aware of the need for language assistance and the impact of the failure to provide it. In 2004, Native turnout in a predominately Yup’ik region of the state was more than 20 percent below the statewide average turnout rate.<sup>153</sup> The Director of the DOE acknowledged that disparity but was dismissive of it, explaining only that “has been the trend of that area”<sup>154</sup> without recognizing what caused that trend. In preparation for the renewal of the VRA in 2006, the Native American Rights Fund began to investigate the compliance with Section 203 and contacted DOE with several complaints heard from voters.<sup>155</sup> Interviews revealed a wholesale failure to comply with Section 203: lack of trained poll workers fluent and literate in English and the Native language, no outreach and publicity about the availability of language assistance, no telephonic assistance in Native languages, and no translations of written and audio voting information and materials distributed in English.<sup>156</sup> Those facts were later included as part of the record supporting the reauthorization of expiring provisions of the VRA.<sup>157</sup> Instead of addressing the complaints from Native voters, Lieutenant Governor Loren Leman, who was charged by statute with supervision of the DOE, wrote a letter rejecting the information and asserting without any support that Alaska was in full compliance with the VRA.<sup>158</sup>

One year later with no changes in sight, Alaska’s inaction compelled Native voters to sue the Lieutenant Governor and DOE officials in the summer of 2007. That case, *Nick v. Bethel*, was brought by Yup’ik-speak-

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was one of the defendants in *Nick v. Bethel*, discussed *infra*, for failing to provide language assistance in municipal elections.

150. See Alaska Stat. § 44.12.300 (1998).

151. See Susan Fischetti, *Official Language Practical, Reins in Bureaucracy*, ANCHORAGE DAILY NEWS, Apr. 4, 2002, at B6.

152. See *Alaskans for a Common Language, Inc. v. Kritz*, 170 P.3d 183, 187–88 (Alaska 2007).

153. See TUCKER, *supra* note 147, at 261.

154. *Id.*

155. *Id.* at 262.

156. Landreth & Smith, *supra* note 24, at 110–19.

157. The report was included in the congressional record supporting reauthorization. See *Voting Rights Act: Evidence of Continued Need, Hearing Before the Subcommittee on the Constitution of the House Committee on the Judiciary*, 109th Cong., 2d Sess. 1308-62 (2006) (appendix to the statement of Wade Henderson, Exec. Dir., Leadership Conf. on Civ. Rts); see also *Modern Enforcement of the Voting Rights Act: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 18 (testimony of Natalie Landreth, Staff Attorney, Native Am. Rts. Fund).

158. See TUCKER, *supra* note 147, at 262.

ing Native voters and tribes located in the Bethel Census Area.<sup>159</sup> The plaintiffs alleged that state election officials violated Section 203 by failing to provide translations of all voting information and assistance in Native languages for voter registration, absentee voting, and Election Day activities.<sup>160</sup> They further contended that officials violated Section 208 of the VRA,<sup>161</sup> which requires that voters be allowed to receive voting assistance from the person of their choice.<sup>162</sup> Although DOE was violating voting rights throughout the state, Native voters in the Bethel region sued before voters in other regions for two reasons. First, the Bethel area has the largest concentration of LEP Native voters in Alaska.<sup>163</sup> Second, Native voters anticipated that DOE officials would implement the remedies obtained in the *Nick* litigation in other regions of Alaska, obviating the need to sue for statewide relief.

Alaska's response to the *Nick* lawsuit took three forms. First, DOE officials blamed the Native language speaking voters themselves. Despite admitting that they had engaged in no outreach and offered no method of feedback for voters about their language needs, the DOE nevertheless criticized voters for not informing them that the state was violating federal law.<sup>164</sup> They offered no explanation for why DOE never responded to the complaints that Native voters made,<sup>165</sup> other than being dismissive and contending they were not valid.<sup>166</sup> Officials also argued that despite the plain language of the law, which required covered jurisdictions to provide language assistance,<sup>167</sup> any violations were attributable to those they asked

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159. See Complaint at ¶¶ 5–8, *Nick v. Bethel*, No. 3:07-cv-0098-TMB (D. Alaska June 11, 2007).

160. See *id.* at ¶ 25(a)–(e).

161. *Id.* at ¶ 27.

162. See Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 5, 96 Stat. 131, 134–35 (1982) (codified as Section 208 of the VRA at 42 U.S.C. § 1973aa-6 (2006)) (providing that “[a]ny voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter’s choice, other than the voter’s employer or agent of that employer or officer or agent of the voter’s union”). Congress added this amendment because it determined that blind, disabled, elderly, and illiterate were susceptible to having “their vote unduly influenced or manipulated” without assistance. S. REP. NO. 97-417, at 62 (1982), as reprinted in 1982 U.S.C.C.A.N. 177, 240. Like the mandate for minority language assistance contained in Section 203, voter assistance under Section 208 must be permitted at every stage of the voting process, from registration through actually casting a ballot. See S. REP. NO. 97-417, at 63 (1982), as reprinted in 1982 U.S.C.C.A.N. 241.

163. See TUCKER, *supra* note 147, at 359–61 (identifying the number of LEP Alaska Native voters in each region of the state, according to the 2002 Section 203 coverage determinations in effect when the *Nick* litigation was brought).

164. See *id.* at 263–64.

165. Landreth & Smith, *supra* note 24, at 82.

166. See TUCKER, *supra* note 147, at 262–63.

167. See generally 42 U.S.C. § 1973aa-1a(c), which provides in pertinent part: “Whenever any State or political subdivision subject to the prohibition of subsection (b) of this section provides any registration or voting notices, forms, instructions, assistance, or other materials or

to provide that assistance, and not to DOE. In particular, the Division left translations for radio announcements to local media to air at their discretion as Public Service Announcements (PSAs), without compensation.<sup>168</sup> DOE did not provide any voting information, instructions, or materials in Yup'ik, leaving it to poll workers to struggle with translating often complex ballots and procedures on-the-spot—if they could do it at all.<sup>169</sup> Officials also argued that any language assistance that LEP voters needed could be provided by family members,<sup>170</sup> even though when many tried they were blocked from doing so in violation of Section 208.<sup>171</sup> The DOE also faulted tribal councils for not translating voting materials that they received in English into Yup'ik.<sup>172</sup> In short, the DOE contended that the nearly-universal lack of language assistance for registration and voting activities was caused by the very Native voters who were supposed to receive that assistance.

Second, after the litigation had been filed, the DOE began to develop a fledgling language assistance program. DOE's Director "started looking" at "improving" the State's language program—where references to "improving" were a euphemism for a program that did not exist.<sup>173</sup> When a lawsuit was not immediately filed against DOE, the Director admitted that the language program was "put . . . aside as we were conducting our major statewide election as well as our [school board] election," and was set aside again when DOE was "hit with another statewide special election in April of 2007."<sup>174</sup> The Director maintained that Native voters were not entitled to any language services beyond those the State chose to provide explaining, "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."<sup>175</sup> After the *Nick* plaintiffs sued, state officials took the first

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information relating to the electoral process, including ballots, *it shall provide them* in the language of the applicable minority group as well as in the English language" (emphasis added).

168. See JAMES THOMAS TUCKER, *THE BATTLE OVER BILINGUAL BALLOTS: LANGUAGE MINORITIES AND POLITICAL ACCESS UNDER THE VOTING RIGHTS ACT* 265 (David Schultz, ed., 2009).

169. *Id.* at 265, 274–75. For example, in a particularly disturbing example of the difficulty Yup'ik-speaking poll workers had in translating complex ballot measures, a natural gas pipeline was translated as "this the path for the gas, this the gas, the one that is not water, but is a . . . gas in the stomach, that can be used to the point where it can become fire." *Id.* at 273–75 (providing other examples of voting information and instructions that were mistranslated by poll workers on-the-spot).

170. See *id.* at 265.

171. See *id.* at 275–77, 285.

172. See *id.* at 265.

173. See *id.* at 264.

174. See *id.*

175. *Id.*

steps to create a language program in Yup'ik in the Bethel region—and nowhere else.<sup>176</sup> Alaska's newfound efforts in early 2008 included the first expenditure of the millions of dollars of federal HAVA funds languishing in an interest-bearing account,<sup>177</sup> compared to the hundreds of thousands already spent to open new voting offices in non-Native areas.<sup>178</sup>

Third, the Stevens Proviso was the cornerstone of Alaska's response to *Nick*.<sup>179</sup> The DOE argued that the Proviso exonerated it from providing any written translations, allowing the DOE to rely solely on the Yup'ik-speaking poll workers it hired in villages—many of whom were untrained—to provide all language assistance. It did not matter to state officials that written Yup'ik was widely taught in the Bethel region, including through bilingual education in the public schools in which children learned to start reading Yup'ik in elementary school.<sup>180</sup> The State likewise urged the federal court to ignore the common usage of written Yup'ik, including among 90 percent of their own poll workers.<sup>181</sup> The State rejected out-of-hand requests from those poll workers for translations of voting materials written in Yup'ik that could be read orally to LEP Native voters.<sup>182</sup> According to DOE, application of the Stevens Proviso required that all Alaska Native languages be considered “unwritten” based solely on the “precedent set by the State” of conducting English-only elections.<sup>183</sup>

## 2. The Court's Decision

The federal court issued two substantive decisions in the *Nick* case. The first was a decision granting summary judgment to the DOE and holding that Yup'ik was indeed historically unwritten under Section 203. First, the federal court rejected the State's contention that all Native languages were exempt from Section 203's mandate for written translations.<sup>184</sup> Instead, it concluded that a language only fell under the Stevens Proviso if the evidence showed it was “historically unwritten.”<sup>185</sup> The court struggled with the meaning of the Proviso because Section 203 was silent on the meaning of “historically unwritten.”<sup>186</sup> The court concluded

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176. See *supra* notes 168–169 and accompanying text.

177. See TUCKER, *supra* note 168, at 264; see also 2008 HAVA Plan, *supra* note 111, at 36 (“Alaska has applied for and received \$400,000 in accessibility grants for FY 2003, FY 2004, FY 2005, and FY 2006. To date, the Division has not spent these funds . . .”).

178. See *id.* at 25, 38.

179. See *supra* note 61–63 and accompanying text.

180. TUCKER, *supra* note 168, at 283.

181. See *id.*

182. See *id.*

183. See *id.* at 280, 284.

184. See Summary Judgment Order at 7, *Nick v. Bethel*, No. 3:07-cv-00098-TMB (D. Alaska July 23, 2008), No. 319 [hereinafter *Nick* Summary Judgment Order].

185. *Id.* at 7.

186. See *id.* at 9–10.

the term had to mean that “ ‘unwritten’ must extend at least several generations into the past,”<sup>187</sup> without considering the contrary statements of the Proviso’s own sponsor, Senator Stevens, who said it meant a language had to be written and used for at least 15 years.<sup>188</sup> The court explicitly did “not examine or draw any conclusions on the extent to which written Yup’ik is commonly used today.”<sup>189</sup> Applying the “imprecise” test it had developed, the court found that Yup’ik was to be considered a “historically unwritten” language because it did not become commonly used until “after the modern version was developed in the late 1960s.”<sup>190</sup> Nevertheless, the court concluded that Alaska “may need to produce certain written materials in order to provide effective oral assistance to Yup’ik voters.”<sup>191</sup> This holding, that written materials may be required even if the language was historically unwritten under Section 203, was the first time the Stevens Proviso had been interpreted. It was a critical first step toward the result in the second case. It meant that even if the Proviso was applied, Native voters might still receive the written materials they needed for compete and accurate translations. It was key to eliminating Alaska’s use of the Proviso as a vehicle for voting discrimination.

After the federal court found that the Yup’ik language was “historically unwritten” under the VRA, it proceeded to the merits of the Section 203 claim itself. This required the federal court to compare the voting materials received by English-speaking voters and those received by the Yup’ik-speaking voters. In July 2008, the *Nick* court determined that Native voters had met their burden of proving the likelihood of success on their claims that Alaska had violated the VRA.<sup>192</sup> The Court found that the voters had established their Section 208 claim, which “asserts that poll workers have regularly failed to allow voters (or apprise voters of their right) to bring an individual of their choice in the voting booth to assist them in the voting process.”<sup>193</sup> The court likewise concluded that the State violated Section 203 by failing to:

[P]rovide print and broadcast public service announcements (PSA’s) in Yup’ik, or to track whether PSA’s [*sic*] 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

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187. *Id.* at 10.

188. *See supra* note 61–63 and accompanying text.

189. *Nick* Summary Judgment Order, *supra* note 184, at 10 n.30.

190. *See id.* at 10, 12.

191. *Id.* at 1–2.

192. *See* Order Re: Plaintiffs’ Motion for a Preliminary Injunction Against the State Defendants at 7, *Nick v. Bethel*, No. 3:07-cv-00098-TMB (D. Alaska July 30, 2008), No. 327 [hereinafter *Nick* Order].

193. *Id.* at 9–10.

questions from English into Yup'ik; ensure that “on the spot” oral translations of ballot questions are comprehensive and accurate; or 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>194</sup>

The court was especially troubled that “[s]tate officials became aware of potential problems with their language-assistance program in the spring of 2006,” but their “efforts to overhaul the language assistance program did not begin in earnest until after this litigation.”<sup>195</sup> The court cited three reasons for its injunction: (1) Alaska had been required to provide language assistance to Native voters “for many years”; (2) “the State lacks adequate records to document past efforts to provide language assistance to Alaska Native voters”; and (3) Alaska’s post-litigation efforts to come into compliance were “relatively new and untested.”<sup>196</sup> Taken together, this “evidence of past shortcomings justify[ed] the issuance of injunctive relief to ensure that Yup'ik-speaking voters have the means to fully participate in the upcoming State-run elections.”<sup>197</sup> The decision was accompanied by a preliminary injunction.

The court ordered several remedies to be in place for the 2008 elections.<sup>198</sup> The DOE had to provide poll workers who were fluent in English and Yup'ik in each polling place in the Bethel region.<sup>199</sup> Those workers were to be trained on the requirements for language and voter assistance, as well as “the methods and tools available for providing complete and accurate translations.”<sup>200</sup> A language coordinator fluent in Yup'ik had to be hired to “act as a liaison to the tribal councils and Yup'ik-speaking community to ensure the State’s efforts result in effective language assistance.”<sup>201</sup> Pre-election publicity provided to voters in English had to be “broadcast or published in Yup'ik as well” to include a notice of the availability of language assistance.<sup>202</sup> State officials were required to “consult with Yup'ik language experts to ensure the accuracy of all translated election materials.”<sup>203</sup>

Notwithstanding the court’s ruling on the Stevens Proviso, and staying true to the order on summary judgment, the court ordered that some

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194. *Id.* at 7–8.

195. *Id.* at 8.

196. *Id.*

197. *Id.* at 9.

198. *Id.* at 10–11.

199. *Id.* at 10.

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.* at 11.

voting materials must be provided to poll workers in written Yup'ik to ensure the accuracy of translations: a glossary of common election terms and a sample ballot in written Yup'ik, which was "to aid poll workers in translating ballot materials and instructions" for LEP Native voters.<sup>204</sup> Finally, the court ordered that Alaska submit pre- and post-election reports describing its efforts to comply with these requirements.<sup>205</sup>

### 3. The Settlement

In February 2010, DOE officials settled with the *Nick* plaintiffs.<sup>206</sup> The settlement agreement included several supplements to the court-ordered remedies. Bilingual poll workers unable to attend in-person training had to be provided with training through alternative means, including a video of the in-person training.<sup>207</sup> The DOE was required to confirm the language abilities of the bilingual poll workers and their willingness to provide translations of voting information.<sup>208</sup> The Yup'ik language coordinator had to engage in outreach with Native villages in the Bethel region, including an in-person meeting held every even-numbered year.<sup>209</sup> A Yup'ik Translation Panel was to include language experts who could account for "variations in dialects within the Central Yup'ik language."<sup>210</sup> Because many Native villages did not receive signals from radio stations, the DOE was required to distribute written Yup'ik translations of all election ads to bilingual outreach workers in each village, with instructions "to broadcast those announcements over their village's VHF radio."<sup>211</sup> Outreach announcements were to include information about Alaska's annual "list maintenance" procedures—or voter purges—to all Natives, informing them of the steps required to remain registered to vote.<sup>212</sup> DOE agreed to disseminate written Yup'ik translations of the ballot questions, neutral summaries, for and against statements, and audio translations of candidate statements, except for those of judicial officers.<sup>213</sup> Audio translations were to be provided for several voting procedures, including how to register to vote, procedures for absentee voting, and "special needs" voting for persons physically unable to enter a polling place.<sup>214</sup> The remedies in the set-

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204. *Id.* at 10–11.

205. *Id.* at 11.

206. See Settlement Agreement and Release of All Claims at 1-3, *Nick v. Bethel*, No. 3:07-cv-00098-TMB (D. Alaska Feb. 16, 2010), No. 787-2 [hereinafter *Nick* Settlement Agreement].

207. *Id.* at 6.

208. *Id.* at 7.

209. *Id.*

210. *Id.* at 8.

211. *Id.*

212. *Id.* at 9–10.

213. *Id.* at 8–9.

214. *Id.* at 9.



tlement agreement remained in place with court oversight through the end of 2012.<sup>215</sup>

## B. *Toyukak v. Treadwell*

### 1. Background

The expectation was that the *Nick* settlement would serve as a model for language assistance not only for Yup'ik speakers, but statewide. This expectation was not realized. Rather than simply using the same methods of translations to other areas covered for Alaska Native languages, state officials chose a different path: they limited application of the *Nick* remedies to the Bethel Census Area.<sup>216</sup> DOE officials soon received indications that the decision to limit language assistance in this fashion violated the law. In October 2012, one wrote that she had “a disturbing call yesterday with the Department of Justice regarding our language assistance . . . and the lack of us having any PSAs relating to information appearing on the ballot.”<sup>217</sup> She explained, “Since we send out an English voter pamphlet that contains a sample ballot, they say we must also provide information in Native languages about the sample ballot.”<sup>218</sup> In February 2013, at the Director’s manager’s meeting, DOE officials discussed that “we might have a new lawsuit against us about language assistance.”<sup>219</sup> Even with that knowledge, the DOE still made no effort to provide language assistance to Native voters outside of the Bethel Census Area.

The absence of language assistance was particularly acute for pre-election information provided to every voter in English. By state law, Alaska is required to mail its Official Election Pamphlet (OEP) to every household with a registered voter at least twenty-two days prior to a statewide general election or an election with a ballot measure.<sup>220</sup> The OEP, which is frequently 100 pages or longer,<sup>221</sup> contains a tremendous amount of information necessary to cast an informed ballot on Election Day, including: candidate statements; Judicial Council recommendations for retention of judicial candidates; sample ballots for all offices; for each ballot proposition, the full text, statement of costs, neutral summary, and pro and con statements; statements explaining bond propositions; material submit-

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215. Order Granting Parties’ Joint Request for Approval of Settlement Agreement on §§ 203, 4(f)4 & 208 Claims, Rescission of Preliminary Injunction, and Dismissal of Case With Prejudice at 2, *Nick v. Bethel*, No. 3:07-cv-00098-TMB (D. Alaska Feb. 16, 2010), No. 787-1.

216. See *supra* Section IV.A.3; *supra* note 159 and accompanying text.

217. Trial Tr. 881:15-884:2, *Toyukak v. Treadwell*, No. 3:13-cv-00137 (D. Alaska June 26, 2014) (quoting Exhibit 330).

218. *Id.* at 883 (referencing Exhibit 330).

219. *Id.* at 661 (referencing Exhibit 321).

220. See ALASKA STAT. §§ 15.58.010 (2014), 15.58.080 (2000).

221. See, e.g., Official Election Pamphlets available at <http://www.elections.alaska.gov/Core/publications.php>.

ted by political parties; constitutional convention questions; and any other information on voting procedures the lieutenant governor considers important.<sup>222</sup> Absent complete, clear, and accurate translations into Native languages of the pre-election information disseminated to voters in English, Alaska Natives were effectively denied an opportunity to meaningfully participate in the election process.

This prompted Alaska Native voters outside the Bethel Census Area to file a second lawsuit in July 2013.<sup>223</sup> *Toyukak v. Treadwell* would become the first Section 203 case fully tried through a decision in thirty-four years.<sup>224</sup> The plaintiffs included two individual voters and four tribal councils from three different regions of Alaska.<sup>225</sup> The Bethel Census Area lies between these regions: the Kusilvak Census Area is to the northwest, the Yukon-Koyukuk Census Area to the northeast, and the Dillingham Census Area to the south.<sup>226</sup> Four plaintiffs represented Yup'ik-speaking LEP voters in the Dillingham and Kusilvak regions,<sup>227</sup> including some close to the Bethel area who speak the Central Yup'ik dialect, and many who speak the Bristol Bay, Chevak/Hooper Bay, Norton Sound, Nunivak, and Yukon dialects (among others).<sup>228</sup> Two tribal councils from Arctic Village and Venetie represented LEP voters who speak the Athabascan language of Gwich'in.<sup>229</sup> In addition to a Section 203 claim, this time the plaintiffs brought a claim under the Fourteenth and Fifteenth Amendments to the United States Constitution because, as a result of the *Nick* case, DOE officials knew they were denying equal registration and voting opportunities to Natives, but had persisted in their violations.<sup>230</sup>

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222. See ALASKA STAT. § 15.58.020 (2014).

223. See Complaint at ¶ 38, *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska July 22, 2013), No. 1.

224. Prior to the *Toyukak* trial in 2014, the last time a Section 203 case went to trial was in 1980. See *Apache County v. United States*, Civil Action No. 77-1515, mem. op. (D.D.C. June 12, 1980) (three-judge court). Most language assistance violations are resolved through pre-litigation memoranda of understanding or shortly after a case is filed by consent decree. See U.S. Dep't of Just., Civ. Rts. Div. *Voting Section Litigation*, <http://www.justice.gov/crt/voting-section-litigation> (last visited Feb. 22, 2016) (listing cases with links to settlement agreements and consent decrees). A minority of language cases are resolved by motions for temporary restraining orders or preliminary injunctions without the need for trial. See, e.g., *Nick v. Bethel*, *supra* Section IV.A.3 (case settled after injunction granted); *U.S. v. Berks County*, 277 F. Supp. 2d 570 (E.D. Pa. 2003) (case terminated after injunction granted); *U.S. v. Metro. Dade Cnty.*, 815 F. Supp. 1475 (S.D. Fla. 1993) (case terminated after TRO granted).

225. See Amended Complaint at ¶¶ 6-11, *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska Jan. 10, 2014), No. 21 [hereinafter Amended Complaint].

226. See Alaska Map, *supra* note 42.

227. See Amended Complaint, *supra* note 225, at ¶¶ 6-7, 9-10.

228. See Krauss, *supra*, note 45.

229. See Amended Complaint, *supra* note 225, at ¶¶ 8, 11.

230. See *id.* at ¶¶ 1, 64-70. The Complaint also documented Alaska's discrimination that created the need for language assistance, particularly educational discrimination, which resulted

Although *Nick* had focused on the Stevens Proviso and whether the fledgling language assistance program should be measured under a “totality of the circumstances” test,<sup>231</sup> in *Toyukak* the DOE asserted that Section 203 merely required “reasonable steps” at providing language assistance measured by “substantial compliance” to be determined at the sole discretion of the election officials.<sup>232</sup> DOE based this argument on the final clause of the regulation that says “an affected jurisdiction should take all reasonable steps to achieve that goal.”<sup>233</sup> In other words, the explicit mandate of Section 203 that “any” election materials “shall” be provided “in the language of the applicable minority group” instead meant that a jurisdiction only had to make “reasonable efforts” to achieve the goals of Section 203. This was the crux of the *Toyukak* case. The rest of the case focused on one question: is a covered jurisdiction required to translate every single material or is a covered jurisdiction only required to take “reasonable” steps to allow voters to cast their ballots?

The State’s approach would have turned 203’s mandate on its head. The statute uses a bottom-up approach, focusing on the LEP voters with “the basic purpose . . . to allow members of applicable language minority groups to be effectively informed of and participate effectively in voting-connected activities;”<sup>234</sup> in other words, “[c]ompliance . . . is best measured by results.”<sup>235</sup> In contrast, DOE urged a top-down approach that had already been rejected,<sup>236</sup> focusing on the means of what state officials did instead of the ends of whether those efforts, if any, allowed Native voters to meaningfully exercise their right to vote.<sup>237</sup> State officials likewise disregarded the *Nick* order that some written translations might be required to

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in high LEP and illiteracy rates among Alaska Natives in the three areas. *See id.* at ¶¶ 21, 23, 27–28, 32–33, 36–44.

231. *See* Draft Jt. Final Pre-Tr. Order, Proposed at 5, *Nick v. Bethel*, No. 3:07-cv-00098-TMB (D. Alaska filed Oct 5, 2009), No. 674.

232. *See* Motion for Partial Summary Judgment & Alt. Motion to Establish the Law of the Case at 16–17, *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska Apr. 4, 2014), No. 47; *see* Defendants’ Trial Brief at 2–3, *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska Jun. 13, 2014), No. 138.

233. 28 C.F.R. § 55.2(b).

234. 28 C.F.R. § 55.15.

235. 28 C.F.R. § 55.16.

236. *See Chinese for Affirmative Action v. Lequennec*, 580 F.2d 1006, 1008–09 (9th Cir. 1978) (holding that good faith efforts of compliance were no defense to a Section 203 claim).

237. *See generally* *United States v. Berks Cnty.*, 250 F. Supp. 2d 550, 527 (E.D. Pa. 2003):

The meaningful right to vote extends beyond the four corners of the voting machine. If voters cannot understand English-only ballot language such as the offices for which candidates are running, propositions, bond authorizations, and constitutional amendments, as well as the printed advertisements of polling place locations and sample ballots, their right to vote is effectively diminished.

“provide effective oral assistance to Yup’ik voters.”<sup>238</sup> Instead, the State urged that under the language of the Stevens Proviso the “Court may not order written materials on the ground that they will improve the effectiveness of the Division’s program.”<sup>239</sup> In reality, DOE officials knew they could not produce evidence that the Division had translated every voting material, and were trying to reduce the scope of Section 203’s mandate in order to increase DOE’s chances of success at trial.

The argument was unsuccessful at oral arguments on cross-motions for summary judgment, which set the stage for the standards to be applied at trial. The court quickly zeroed in on the problem with DOE’s contention: if a jurisdiction is not translating every voting material, it is picking and choosing what materials LEP voters receive. The court inquired whether Section 203 allowed the State to “provide less information if it’s an oral language speaker,” such as to a Native voter.<sup>240</sup> DOE answered affirmatively, contending “it can provide the information that the specific voter needs.”<sup>241</sup> The court suggested that this was inconsistent with statutory language describing an “across the board” approach in which all covered LEP voters were entitled to all voting information in their language.<sup>242</sup> But DOE asserted that although “that may be true for written language, [ ] for Alaska Natives, we can figure out just what really is important for them to get and not provide all the same information . . . that people are otherwise entitled to if they have a written language.”<sup>243</sup> DOE asserted it could do this because “that’s the language of the proviso,” which it claimed provided for “different” treatment of Native voters who were entitled to less information than non-Native voters.<sup>244</sup>

The court pressed DOE as to whether its approach was unconstitutional because it would mean that Alaska Natives were “not going to get everything” non-Natives would receive, but would instead get “fewer things that we think are the most important for them.”<sup>245</sup> DOE persisted, contending “it’s not just a question of what we think is most important for them but what they need.”<sup>246</sup> DOE also asserted there was no Constitutional problem with its approach because “this isn’t a Fifteenth Amendment issue,” arguing the amendment was limited to “race, color, and previous condition of servitude,” and therefore was inapplicable to Native

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238. *Nick* Summary Judgment Order, *supra* note 184, at 1–2.

239. Defendants’ Trial Brief, *supra* note 232, at 7–8.

240. See Tr. of Excerpt of Proceedings (Oral Arg. on Mot. for S.J.) at 40:7–10, *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska May 30, 2014), No. 120.

241. *Id.* at 40:11–12.

242. *Id.* at 41:18–23.

243. *Id.* at 41:23–42:3 (court paraphrasing position of the DOE).

244. See *id.* at 42:5–17.

245. See *id.* at 42:18–43:14.

246. *Id.* at 43:15–16.

voters.<sup>247</sup> DOE further asserted that any disparate treatment between Natives and non-Natives under the approach it urged to be taken created equal protection “constitutional problems, potentially, with the entire language assistance scheme.”<sup>248</sup>

DOE’s assertion that LEP Native voters were entitled to less voting information simply because they spoke a Native language prompted an immediate response from the Department of Justice.<sup>249</sup> The Department filed a Statement of Interest to “set out the Attorney General’s position that, contrary to Defendants’ argument, Section 203 requires providing *all* the election information in the covered minority languages.”<sup>250</sup> The Stevens Proviso did not exempt Native languages from the statutory mandate; it “addresses only the question of *how* the required translation is to be accomplished, not *whether* it must be done.”<sup>251</sup> As the Attorney General explained, the “statutory language of Section 203 is clear and broad[:] any information related to the electoral process, including ballots, that is provided to voters in English also must be provided in the covered language, whether the method of providing the information is in written or oral form.”<sup>252</sup> Therefore, “[c]ontrary to Defendants’ position, the guidance to ‘take all reasonable steps’ [to provide language assistance] does not exempt a covered jurisdiction. . . . Rather, it articulates the requirement that the jurisdiction take the necessary steps to provide the information contained in *all* election materials . . . in a form that enables protected voters to participate effectively.”<sup>253</sup> The Department of Justice also asserted that the Stevens Proviso did not bar the use of written translations: “[J]urisdictions are free to translate information and materials in that written form to supplement its oral translation program where it can assist in outreach and training, and to help ensure consistent and accurate translations.”<sup>254</sup> The

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247. *Id.* at 44:9-12.

248. *See id.* at 45:4-15.

249. *See* Statement of Interest of the United States of America, *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska June 3, 2014), No. 121.

250. *Id.* at 3 (emphasis in original).

251. *Id.* (emphasis in original).

252. *Id.* at 4.

253. *Id.* at 5 (emphasis in original). The Attorney General explained:

[T]he steps a covered jurisdiction takes towards compliance cannot be viewed as “reasonable” if the jurisdiction fails to provide effective assistance to voters regarding the content of the ballots. Hiring purportedly “bilingual” poll officials without ensuring their fluency level or training them to competently perform their job is not reasonable and does not reach the standard required by the Attorney General for Section 203 compliance. Reasonable steps for the jurisdiction to take in that situation would be to ensure fluency, competence and adequate training for the bilingual poll officials, so that they *are* able to provide effective assistance.

*Id.* at 8 (emphasis in original).

254. *Id.* at 6 n.3.

Attorney General concluded that DOE's "purported exemption finds no support in the text of Section 203 or in three decades of case law involving Indian country."<sup>255</sup> This Statement of Interest confirmed what the Plaintiffs had been arguing, namely that a jurisdiction had to translate *everything*, and the Stevens Proviso only affected the mode by which that could be done.

## 2. The Court's Decision on the Legal Standard

The court agreed with the plaintiffs and the Attorney General of the United States. As an initial matter, the Court rejected "the position of the State that the Fifteenth Amendment does not apply in this case," finding that "the Ninth Circuit recognized applicability of that Amendment to the rights of Native Alaskans and American Indians to exercise the right to vote."<sup>256</sup> The constitutional mandate of equal treatment therefore did not support the State's argument that the Stevens Proviso required that Natives receive less voting information:

[T]he goal of the Voting Rights Act is to accord equal opportunity for all citizens to participate in elections and it would be, in my mind, inconsistent with that goal to have a lower level of assistance provided to limited-English proficient Alaska Native and American Indian citizens than is provided to other individuals that fall within the category that Congress identified as needing assistance in elections . . . . [T]he [Stevens] [P]roviso should be interpreted as altering only the means by which information relating to registration and voting is communicated to limited-English proficient Alaska Natives but it does not permit the Division to diminish the content and extent of the information that must be provided.<sup>257</sup>

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255. *Id.* at 9.

256. See Tr. of Law of the Case, at 6:19-7:5, *Toyukak v. Treadwell*, (3:13-cv-00137-SLG) (D. Alaska June 4, 2014) (citing *United States v. Blaine Cnty.*, 363 F.3d 897 (9th Cir. 2004)); see also *United States v. Blaine Cnty.*, 157 F. Supp. 2d 1145, 1152 (D. Mont. 2001) ("The fact that the [Voting Rights] Act was primarily intended to remedy discrimination against African Americans in the southern states in the 1960's does not make it any less proper to use as a remedy for discrimination against Native Americans today. There is ample evidence that American Indians have historically been the subject of discrimination in the area of voting."), *aff'd*, 363 F.3d at 897.

257. See Tr. of Law of the Case, at 6:19-7:5, *Toyukak v. Treadwell*, (3:13-cv-00137-SLG) (D. Alaska June 4, 2014) (citing *United States v. Blaine Cnty.*, 363 F.3d 897 (9th Cir. 2004) at 14:14-15:3); see also *id.* at 15:12-16:6 (finding that approach consistent with how federal courts applied the Stevens Proviso). See generally *U.S. v. Sandoval County*, 797 F. Supp.2d 1249, 1251 (D.N.M. 2011) (three-judge court) (observing that "in ongoing violation of both the VRA" and a consent decree, the county "had failed to furnish the covered voters all oral instructions, assistance, and other information relating to voting" to the covered LEP American Indian voters).

This interpretation flatly rejected the construction urged by the State by avoiding “putting . . . election officials . . . in the position of having to determine what may or may not be most important . . . to a [LEP] Alaska Native voter. . . .”<sup>258</sup> In the court’s view, it was simply untenable to place the DOE in the position of having to make those choices. Moreover, the very practice of selecting which materials to translate resulted in unequal access to election information.

Considering this was the first Section 203 case to be fully tried in over three decades, the court had no choice but to break new ground. In rejecting differential access to voting information, the court set forth a two-step test to examine 203 claims. The first step is to examine “whether the State’s standards, practices, and procedures provide substantially equivalent registration and voting information to [LEP] Alaska Natives . . . as is communicated in the English language . . . .”<sup>259</sup> The second step required proof “that the State has not taken all reasonable steps to try to implement its standards, practices, and procedures” to provide equal voting information to Native voters.<sup>260</sup> The threshold was whether the DOE provided the “substantial equivalent” for each voting material. The court would find that because the DOE did not do so, the second step would never be applied.

### 3. The Trial

Against the backdrop of this legal standard, the evidence showed that the DOE had made a policy choice to limit the *Nick* remedies to the Bethel Census Area. The DOE’s 2012 plan entitled “Alaska Native Language Assistance” identified those remedies as being restricted to “BCA tribes,” referring to the Bethel Census Area.<sup>261</sup> Yup’ik voting materials, such as audio CDs for the 2012 General Election with translations of candidate statements, ballot measure and neutral summaries, and pro and con statements for ballot measures, were designated for the “BCA only” and were not sent to villages in other regions.<sup>262</sup> The State’s only language coordinator had “election duties for the Bethel census area only,”<sup>263</sup> despite being responsible for coordinating translations of all Native languages covered in Alaska.<sup>264</sup> The coordinator did not recall spending any time working on language assistance in villages located in the Dillingham or

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258. See Tr. of Law of the Case, *supra* note 257, at 16:9-14.

259. *Id.* at 16:18-22.

260. *Id.* at 17:10-12.

261. See Pls.’ Trial Exh. 58 at SOA 006154-55, *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska).

262. See Dep. of Dorie Wassilie, Yup’ik Language Coordinator, at Vol. 2, 161:19-163:4 & Exh. 196 [hereinafter Dep. of Dorie Wassilie].

263. *Id.* at 133:19-23; see also *id.* at 133:4-5, 134:13-19.

264. *Id.* at 82:20-83:21.

Kusilvak areas.<sup>265</sup> DOE's in-person community outreach meetings in 2008, 2009, 2011, and October 2013 (after the *Toyukak* case was filed in July) were held in Bethel and limited to only villages in the Bethel Census Area.<sup>266</sup> Native villages in the rest of the State were not invited.<sup>267</sup>

A November 2012 e-mail contained one of the more surprising admissions of the lack of language assistance in other areas. A regional elections supervisor acknowledged that she "only sent the Yup'ik ads and samples to the BCA outreach workers."<sup>268</sup> The supervisor described receiving a complaint from the village of Emmonak (located in the Kusilvak region) "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 elders there aren't getting assistance."<sup>269</sup> Reflecting the DOE's official policy at that time, another manager reminded the supervisor that because the village was "not in BCA" the language coordinator "doesn't send them anything" and she was "not sure how the [Tribal Council] would know we have Yup'ik materials."<sup>270</sup> Not only was Yup'ik language assistance limited to the Bethel area, election officials were wondering how voters in other regions found out about the translated materials. DOE first attributed their inaction to Section 5 preclearance, arguing that the VRA mandate required unequal treatment because they had only had approval to implement language procedures in the Bethel region. However, the DOE also conceded it made no effort to submit changes in language procedures in other areas after the *Nick* settlement agreement was reached in early 2010.<sup>271</sup>

Moreover, even for the Bethel region, language assistance appeared to decline after the *Nick* settlement agreement ended. The State's language coordinator left DOE on December 31, 2012,<sup>272</sup> the same day that the settlement agreement expired.<sup>273</sup> A new language coordinator was not

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265. *Id.* at 58:3-10.

266. Exh. 181; Dep. of Shelly Growden, 129:3-130:6, 134:15-23, 135:17-136:10, 187:16-20; Dep. of Michael Jackson, 73:3-74:6.

267. *Id.*

268. Exhibit 49 at 1: E-mails between Edna Rae "Becka" Baker, Election Supervisor for Region IV, and Shelly Growden, Elections System Manager, *Toyukak v. Treadwell* No. 3:13-cv-00137-SLG (D. Alaska Nov. 27, 2012) [hereinafter Baker Email].

269. *Id.*

270. *Id.*

271. See Trial Tr. 817:19-18:23, *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska June 26, 2014) [hereinafter Test. of Shelly Growden].

272. See Trial Tr. 558:12-14 (test. of Dorie Wassilie), *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska June 25, 2014).

273. See *Nick Settlement Agreement*, *supra* note 206, at 14.



hired until August 2013,<sup>274</sup> two weeks after the *Toyukak* case was filed.<sup>275</sup> During the nine months that the new language coordinator worked for DOE, he reported that he only spent ten percent of his time working on language assistance in the Bethel region, with the remaining ninety percent performing data entry of voter registration forms.<sup>276</sup> Those limitations were contrary to the allocation of federal HAVA funds, which paid for half of the coordinator's salary and required that he spend fifty percent of his time on language assistance.<sup>277</sup> Tellingly, the State's records showed that expenditure of HAVA funds spiked during the *Nick* litigation and decreased precipitously after the case was settled.<sup>278</sup> Alaska's Yup'ik Translation Panel likewise almost fell into disuse following *Nick*, holding no in-person meetings after March 2009<sup>279</sup> until May 2014, on the eve of the *Toyukuk* trial.<sup>280</sup>

DOE did little to provide translations of election information in the Gwich'in language in the Yukon-Koyukuk region. All voting materials offered in the area were written in English.<sup>281</sup> From 2004 to 2013, the State did not disseminate any sample ballots written in Gwich'in.<sup>282</sup> Alaska officials did not view their duty to provide Native voters with equal access to the voting process as a priority, or even a necessity. For example, in 2008, when there were four propositions on the ballot, a DOE manager asked that only two be translated into Gwich'in. The manager wrote, "If you have time to do the other measures, that would be fine, but at the least we need #1 and #4."<sup>283</sup> There is no evidence that even the partial translations were ever provided to Yukon-Koyukuk poll workers or voters. In December 2013, after the *Toyukak* case was filed, DOE contacted a translator for

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274. Dep. of Shelly Growden, Elections System Manager, at 21:8-18, 86:5-11, 121:21-24.

275. See Amended Complaint, *supra* note 225.

276. See Trial Tr. 1065:14-1070:18 (Test. of Michael Bryan Jackson), *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska June 30, 2014).

277. See Trial Tr. 1723:1-1724:22 (Test. of Gail Fenumiai), *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska July 2, 2014).

278. See Pl.'s Closing Arg. PowerPoint at slide 95, "Amount of HAVA funds spent for language assistance by year and timing of Section 203 litigation," *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska July 3, 2014).

279. See Dep. of Dorie Wassilie, *supra* note 262, at 34:8-14, 35:1-8.

280. See Pls.' Closing Arg. PowerPoint, *Yup'ik Translation Panel Work During Litigation*, *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska July 3, 2014); see also Trial Tr. 1680:23-1681:9 (Test. of Frank Chingliak), *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska July 2, 2014) (panel member did no work for the Yup'ik Translation Panel between 2010 and May 2014).

281. See Trial Exh. 249, *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska).

282. See Trial Exh. 251, *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska); Dep. of Michelle "Mickey" Speegle, Region III Supervisor, at 24:21-23.

283. E-mail from Shelly Growden, Elections System Manager, to Adeline Peter Raboff (Aug. 2, 2008), Trial Exh. 252 at SOA\_011164, *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska).

the first time since 2008 to request translations of voting materials into Gwich'in for the upcoming 2014 election.<sup>284</sup> Similarly, state officials made no effort to provide radio announcements in Gwich'in, even after a voter in the region informed them of a radio station that reached a large number of LEP voters.<sup>285</sup> When *Toyukak* went to trial in July 2014, Alaska still had not made any voting announcements in the Gwich'in language through radio stations located in the Yukon-Koyukuk Census Area.<sup>286</sup> Like other regions outside of the Bethel area, election officials did not travel to any of the Gwich'in-speaking Native villages to facilitate their provision of language assistance.<sup>287</sup> Touch-screen voting machines, which included English language audio to assist sight-impaired voters,<sup>288</sup> did not have any audio translations in the Gwich'in language on them.<sup>289</sup>

Alaska officials also disregarded Section 203's mandate to provide language assistance in all dialects of Yup'ik in the Dillingham and Kusilvak regions.<sup>290</sup> Curiously, they did so despite recognizing that "[w]e will have to provide assistance in several dialects of the covered language,"<sup>291</sup> as they had for Inupiaq language assistance "in both the Seward Peninsula dialect and the Northern dialect."<sup>292</sup> DOE officials were aware that there was more than one dialect of Yup'ik<sup>293</sup> and that the most common dialects spoken in the Dillingham and Kusilvak regions were the Bristol Bay and

284. See E-mail from Shelly Growden, Elections System Manager, to Marilyn Savage (Dec. 12, 2013), Trial Exh. 252 at SOA\_011164, *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska).

285. See Exh. 499, *Toyukak v. Treadwell*, case no. 3:13-cv-00137-SLG (D. Alaska); Test. of Shelly Growden, *supra* note 271, at 1398:20-1399:11.

286. Dep. of Shelly Growden, Elections System Manager, at 1398:11-19.

287. See Dep. of Michelle "Mickey" Speegle, Region III Supervisor, at 18:24-19:11, 21:1-17.

288. See generally ALASKA STAT. § 15.15.032 (2004) (authorizing the director to designate precincts with touch-screen voting machines and requiring one unit at each such precinct with electronically generated ballots "that would allow voters with disabilities, including those who are blind or visually impaired, to cast private, independent, and verifiable ballots").

289. See Dep. of Michelle "Mickey" Speegle, Region III Supervisor, at 24:15-19; Trial Exh. 250 at SOA\_006355, *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska).

290. See generally 28 C.F.R. § 55.13(a) ("Some languages . . . have several dialects. Where a jurisdiction is obligated to provide oral assistance in such a language, the jurisdiction's obligation is to ascertain the dialects that are commonly used by members of the applicable language minority group in the jurisdiction and to provide oral assistance in such dialects."); see also 28 C.F.R. § 55.11 ("In enforcing the Act, the Attorney General will consider whether the languages, forms of languages, or dialects chosen by covered jurisdictions in the electoral process enable members of applicable language minority groups to participate effectively in the electoral process . . .").

291. E-mail from Shelly Growden, Elections System Manager, to several recipients (Jan. 2, 2008), Trial Exh. 11 at SOA\_5863, *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska).

292. E-mail from Shelly Growden, Elections System Manager, to Cindy Allred (Sept. 13, 2010), Trial Exh. 177, *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska).

293. See Dep. of Shelly Growden, Election System Manager, at 28:3-20; Trial Exhs. 180 & 240, *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska).

Yukon dialects, respectively.<sup>294</sup> They had received voter requests for voting materials and information to be translated into several Yup'ik dialects.<sup>295</sup> Nevertheless, DOE prepared one common written translation for all of its Yup'ik material, and that is Modern Central Yup'ik,<sup>296</sup> spoken primarily in the Bethel region.<sup>297</sup> Translations on touch-screen voting units likewise were all in the Central Yup'ik dialect.<sup>298</sup> The State downplayed the import of translating voting materials into all Yup'ik dialects, arguing that the differences were “slight.”<sup>299</sup> Bilingual poll workers in villages outside of the Bethel area told a different story at trial. They did not use the Bethel Yup'ik sample ballots because they could not read them, having to instead perform on-the-spot translations from the English ballots into the dialect spoken in their village.<sup>300</sup> One of the Yup'ik Translation Panel members admitted that panel members “were aware that the dialect might not be . . . understandable in parts of the Yukon Yup'ik, Bristol Bay, and Chevak, Mekoryuk. You know, they have totally different dialects.”<sup>301</sup>

Expert Dan McCool testified that DOE's resistance to providing full language assistance to Alaska Native voters was part of a “continuing organizational culture” in which Alaska viewed the VRA “as something [it is] forced to do, instead of looking at the policy goal of being sure that everyone has the opportunity to participate” in elections.<sup>302</sup> According to McCool, the State's behavior was “part of a pattern I see over a long period of time, a consistent culture—they're going to fight this. When forced to do something, they're going to do it, but only when they've been ordered

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294. See Dep. of Dorie Wassilie, *supra* note 262, at 84:1-4, 85:12-22; Trial Exh. 244 at 83-86, *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska).

295. Trial Tr. 1546:4-1547:9 (Cross examination of Edna Rae “Becka” Baker), *Toyukak v. Treadwell*, No. 3:13-cv-00137 (D. Alaska July 2, 2014).

296. See Dep. of Shelly Growden, Election System Manager, at 28:3-20; Trial Exhs. 180 & 240, *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska).

297. See Michael E. Krauss, *Indigenous Peoples and Languages of Alaska*, ALASKA NATIVE LANGUAGES CENTER (2013), <http://www.uafanlc.arsc.edu/data/Online/G961K2010/ipla-map-20130712.pdf>; see also Dep. of Dorie Wassilie, *supra* note 262, at 85:23-86:6 (testifying that Central Yup'ik is the most common dialect spoken in the Bethel area).

298. See Trial Tr. 175:5-175:20 (Test. of Brenda Tall), *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska June 23, 2014).

299. See State's Motion for Partial Summary Judgment & Alternative Motion to Establish the Law of the Case at 6, *Toyukak v. Treadwell*, No. 3:13-cv-00137 (D. Alaska Apr. 4, 2014).

300. See Trial Tr. 170:25-171:8, 175:5-175:20 (Test. of Brenda Tall); see also Trial Tr. 716:14-24 (Testimony of Edna Rae “Becka” Baker), *Toyukak v. Treadwell*, No. 3:13-cv-00137 (D. Alaska June 26, 2014) (“It's the poll worker's responsibility to provide oral translations in their language . . . I am assuming that if they are providing assistance to the voter, that they would provide that assistance to that voter in their language of their community.”).

301. Dep. of Frank Chingliak, at 13:1-13, *Toyukak v. Treadwell*, No. 3:13-cv-00137 (D. Alaska).

302. Rich Mauer, *Expert in Native Voting Rights Trial Says Alaska Has Long History of Discrimination*, ALASKA DISPATCH NEWS (June 30, 2014), <http://www.adn.com/article/20140630/expert-native-voting-rights-trial-says-alaska-has-long-history-discrimination>.

to.”<sup>303</sup> He explained the evidence of DOE’s resistance to Section 203’s mandate by placing it in the context of state policy toward the Native tribes:

This enduring, multi-faceted conflict has generated bitter feelings and resentment; it is impossible to analyze this conflict and not conclude that purposeful discrimination is at work here. I do not believe any fair-minded, objective observer could examine the history of Alaska Natives and their relationship to the state government, and reach any other conclusion. Whether it is the delivery of educational resources or other services, or assistance in voting, each act of beneficence by the state toward Native people has been presaged by a federal law or court case that mandated such behavior. This could only be interpreted as purposeful behavior intended to reduce or minimize Native Alaskan voting.<sup>304</sup>

McCool concluded that the DOE’s “attitudes and behaviors don’t look to me like the behaviors of an agency that’s absolutely devoted to providing equal opportunity to all voters, even if it’s difficult. The attitude is let’s do what the law requires and absolutely no more.”<sup>305</sup>

Even where some language assistance was provided, there were problems as well. The quality of the Central Yup’ik translations provided by the State frequently changed the meaning from the information provided to voters in English. Experts on the translation panel struggled with how to translate words and election terms, some of which have no counterpart in the Yup’ik language.<sup>306</sup> When translation problems were identified, DOE managers did not always correct them. For example, a 2009 audio recording of voting procedures inaccurately translated the term “absentee voting” as “to be voting for a long time.”<sup>307</sup> DOE’s language coordinator and a translation panel member agreed that the translation error “throws the meaning of absentee voting off and makes it mean all together [sic] different.”<sup>308</sup> Nevertheless, an election manager directed the recording to be aired over the radio anyways. In response, the language coordina-

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303. *Id.*

304. Dan McCool Expert Witness Report, 47–48, *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska), Trial Exh. 151.

305. Mauer, *supra* note 302.

306. For example, the five-member panel spent two days trying to translate the Alaska’s 2014 oil tax ballot measure, but were unable to complete it. See Trial Tr. 1574:10–12, 1581:18–1582:10 (Test. of Alice Fredson), *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska July 2, 2014).

307. E-mail from Dorie Wassilie, Yup’ik Language Coordinator, to Shelly Growden, Elections System Manager, and Alexa Tonkovich (Sept. 17, 2009), Trial Exh. 247, at SOA\_12081, *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska).

308. *See id.*

tor tried to justify the inaccuracy by writing that she did not “think it should cause too much confusion . . . 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!☺”<sup>309</sup> With this lack of attention to accuracy, bilingual poll workers and the LEP voters themselves were left to try to figure out the meaning of complex election terms and ballot language.

Alaska attempted to explain the lack of complete, clear, and accurate written and audio translations by arguing that “[t]he Division relies primarily on outreach workers and poll workers to provide oral language assistance.”<sup>310</sup> However, the State’s own records showed that outreach workers were unavailable about two-thirds of the time to provide translations of any pre-election information.<sup>311</sup> Sometimes, even when the State recruited an outreach worker, that individual did not provide any translations or other voting information to LEP voters in their village.<sup>312</sup> The DOE used a “Certificate of Outreach” to identify the tasks that were to be completed before the election. Those tasks included posting a notice and announcing over the radio that language assistance was available, a date for voter registration in the village, and announcements about election deadlines.<sup>313</sup> Workers were not directed to translate the voluminous OEP mailed to every voter in English.<sup>314</sup> Lead plaintiff Mike Toyukak testified that at his polling place in Manokotak (in the Dillingham area),<sup>315</sup> no one had ever translated the candidate statements for him.<sup>316</sup> The absence of pre-election information in their native language had a direct impact on how Native voters cast their ballots. Frank Logusak from the village of Togiak, in the Dillingham area, testified that without translations of judicial candidate statements, “I always put ‘no’ all to the judges because I don’t know their background. I vote no all of them to that, all the judges

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309. E-mail from Dorie Wassilie, Yup’ik Language Coordinator, to Shelly Growden, Elections System Manager, and Alexa Tonkovich (Sept. 17, 2009), Trial Exh. 248, at SOA\_12080, *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska) (emoji included in original).

310. Trial Tr. 1830:5-6 (State’s closing argument), *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska July 3, 2014).

311. See Pls.’ Closing Arg. PowerPoint at slide 45, “Defendants’ lack of pre-election workers (2008-2012)” *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska July 3, 2014). For elections held from 2008 to 2012, outreach workers were unavailable 75 percent of the time in the Dillingham area, 63 percent of the time in the Kusilvak area, and 69 percent of the time in the plaintiff villages of Arctic Village and Venetie. *Id.*

312. See, e.g., Trial Exh. 226 at SOA\_833, *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska) (outreach worker in a Kusilvak area village reported in response to identified activities, “forgot to do that,” “no, didn’t do that,” and “did not provide any services”).

313. Trial Exh. 226, *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska).

314. See *id.*; see also *supra* notes 220-22 and accompanying text (describing the content of the OEP and requirements for its dissemination under Alaska law).

315. See Amended Complaint, *supra* note 225, at ¶ 6.

316. Trial Tr. 392:11-12 (Test. of Mike Toyukak), *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska June 24, 2014).

in Alaska. . . . Without knowing their background, why should I vote yes for them to be a judge?”<sup>317</sup> It bears repeating that the only information being translated before the election was the registration deadline, the date and time for the election, and a notice that language assistance would be available at the polls on Election Day. All of the other information English-speaking voters receive in the OEP was missing.

The DOE fared little better in providing language assistance at polling places on Election Day. Although training was supposed to be mandatory,<sup>318</sup> between one-third and two-thirds of poll workers in the Dillingham and Kusilvak regions did not attend training in a given election cycle.<sup>319</sup> From 2008 to 2012, as many as half of the villages lacked an in-person translator for all the hours their polling places were open.<sup>320</sup> In the community of Dillingham—the village with the greatest number of LEP voters of any village in the three census areas<sup>321</sup>—the DOE designated the bilingual poll worker as an “on-call” translator who was not physically present in the polling place.<sup>322</sup> Despite Section 203’s mandate and census data showing that at least 125 LEP Native voters lived in Dillingham (18.2 percent of all voters), an election supervisor rationalized the lack of a bilingual poll worker in Dillingham by speculating it was “[p]robably because there was no need for one there.”<sup>323</sup> The only translated written material available in the polling place was the sample ballot. All of the information contained in the OEP was unavailable in the polling place, because the DOE considers it campaign material and thus not allowed.<sup>324</sup> This meant that that an LEP Native language speaking voter was not receiving the information from the Official Election Pamphlet either before or on Election Day. It was a voting information blackout. As for the ballot measures themselves, those were translated and available at the polling place, but the

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317. Trial Tr. 418:20-419:15 (Test. of Frank Logusak), *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska June 24, 2014).

318. Test. of Shelly Growden, at 1404:2-4; *see also* Trial Tr. 727:5-11 (Test. of Edna Rae “Becka” Baker), *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska June 26, 2014) (DOE communicates to poll workers that training is mandatory and “we beg and plead with them to come to training”).

319. *See* Trial Exhs. 217, 219-220, *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska). For example, in the 2008 election, 69 percent of all poll workers in the Dillingham area and 50 percent in the Kusilvak area did not attend training. *See id.*

320. *See id.* For elections held from 2008 to 2012, bilingual poll workers were unavailable during all voting hours 48 percent of the time in the Dillingham Census Area and 22 percent of the time in the Kusilvak Census Area. *See id.*

321. *See* ALASKA BOROUGH/CENSUS AREAS, 2011 DETERMINATIONS DATA FILES, *supra* note 40.

322. Dep. of Edna Rae “Becka” Baker at 85:4-9, 105:11-16.

323. *Id.* at 86:6-13.

324. Trial Tr. 1797:3-1798:9 (Plaintiffs’ Closing Argument and Summary), *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska July 3, 2014).

first time LEP voters saw them was when they walked into the voting booth.<sup>325</sup>

#### 4. The Court's Findings and Holding

After weighing the evidence, the federal district court issued a decision on record in early September 2014.<sup>326</sup> The court concluded that “based upon the considerable evidence,” the plaintiffs had established that DOE’s actions in the three census areas were “not designed to transmit substantially equivalent information in the applicable minority . . . languages.”<sup>327</sup> The public service announcements and translated materials DOE offered to Natives were “only a limited subset of the election materials” and were not a “substantial equivalent” of what the Division provided in English.<sup>328</sup> In particular, the court found the greatest disparity in the dissemination of voting information in the OEP:

[It is] [s]ignificant to the Court that the English version of the official election pamphlet that is mailed in English in every household in the state with a registered voter a few weeks before the election is not available in any language, English or otherwise, at the polling sites due to statutory restrictions on campaigning at the polling place. So what you have at the polling place is the ballot language and the list of candidates but not the material that is distributed in English in the official election pamphlet, such as the pro/con statements and the neutral summaries for ballot measures, the candidate statements, and other information in the official pamphlet.<sup>329</sup>

The evidence did not support the State’s argument that its outreach workers disseminated pre-election information.<sup>330</sup> DOE failed to provide any outreach worker in villages where a tribal administrator had declined assistance even where Census numbers indicated a covered population,<sup>331</sup> an approach that violated Section 203.<sup>332</sup> Where outreach workers were avail-

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325. Trial Tr. 386:16-386:18 (Test. of Irene Camille), *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska June 24, 2014).

326. See Tr. of Decision of the Court, *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska Sept. 3, 2014).

327. *Id.* at 6:24-7:6.

328. *Id.* at 7:21-8:1.

329. *Id.* at 8:24-9:10.

330. *Id.* at 9:21-10:6.

331. *Id.* at 10:8-11:4.

332. See generally 42 U.S.C. § 1973aa-1a(b)(4) (providing that Section 203 coverage determinations are not reviewable and are effective upon publication in the Federal Register); see also *Briscoe v. Bell*, 432 U.S. 404, 410 (1977) (unanimously concluding that Congress had the authority to prohibit court challenges to the finality of coverage determinations). As the court explained, surveys “should not be used as a basis to eliminate language assistance in a community

able, they were limited to working no more than five hours before each election to translate for every voter in the village—which in some cases was hundreds of voters—and were not paid at a rate consistent with “comprehensive translators and interpreters.”<sup>333</sup> There was also no evidence that workers were provided with copies of the OEP or informed that they were expected to translate it into the Native language spoken in their village.<sup>334</sup> The four minutes that DOE included on language assistance on its training video and its written materials focused solely on Election Day, and did not include any instructions that pre-election translations and assistance were to be offered.<sup>335</sup> The lack of pre-election assistance could not be redressed on Election Day because Alaska’s electioneering statutes barred anything beyond translating the ballot in the polling place, such as by providing translations of candidate statements and pro/con statements of ballot measures.<sup>336</sup>

The court found that the language needs in each of the three census areas were not being met. The plaintiffs had “demonstrated that there are different dialects in Dillingham and [Kusilvak] from the Central Yup’ik dialect in Bethel.”<sup>337</sup> There was evidence that “different individuals . . . raised this concern with the Division over the past several years,” but the Division “only translated its Yup’ik materials solely into the Central Yup’ik dialect” and other dialects were not represented among translation panel members.<sup>338</sup> As a result, while “a Yup’ik sample ballot is a sound idea for the provision of language assistance services, its value outside of the Bethel Census Area [was] limited.”<sup>339</sup> As to the Yukon-Koyukuk Census Area, during 2014 the DOE had “approached with some renewed energy the goal of providing meaningful oral language assistance to Gwich’in LEP Alaska Natives,”<sup>340</sup> but it had “not yet provided the substantial equivalent there.”<sup>341</sup> Accordingly, the State of Alaska violated Section 203 of the

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that has been designated as needing services under the Voting Rights Act.” Tr. of Decision of the Court, *supra* note 326, at 11:2-4.

333. *Id.* at 11:5-12.

334. *Id.* at 11:12-12:1.

335. *Id.* at 12:2-23.

336. *Id.* at 12:24-13:13; *see generally* ALASKA STAT. § 15.15.160 (1960) (“During the hours that the polls are open, an election board member may not discuss any political party, candidate, or issue while on duty.”); ALASKA STAT. § 15.15.170 (“During the hours the polls are open, a person who is in the polling place or within 200 feet of any entrance to the polling place may not attempt to persuade a person to vote for or against a candidate, proposition, or question.”).

337. Tr. of Decision of the Court, *supra* note 326, at 13:14-16.

338. *Id.* at 13:14-24.

339. *Id.* at 13:24-14:4.

340. *Id.* at 14:22-14:25; *Compare with* Nick Order, *supra* note 192, at 8 and accompanying text (finding that Alaska’s efforts to comply with Section 203 in the Bethel census area began after the Nick litigation was brought and were “relatively new and untested”).

341. Tr. of Decision of the Court, *supra* note 326, at 14:22-15:1.



VRA because its “standards, practices, and procedures” did not permit LEP voters in the three “census areas to receive information about elections . . . that is substantially equivalent to that provided . . . to English-speaking voters.”<sup>342</sup>

The court declined to reach the question of whether the plaintiffs had established that Alaska intentionally discriminated against Native voters, taking under advisement the constitutional claim to focus on remedies for the looming general election.<sup>343</sup> The court made several suggestions to be considered by the parties in addressing the Section 203 violation. The readability of public service announcements was a concern because it included confusing election jargon and did not make clear when and how language assistance was available.<sup>344</sup> In addition, the court was concerned with having a bilingual translator in Dillingham “on call” instead of “present at the polling place on election day to assist voters.”<sup>345</sup> Translations also needed to correct for dialectical differences in the Dillingham and Kusilvak regions, with minor adjustments included as footnotes on written materials.<sup>346</sup> DOE’s use of outreach workers likewise needed to be improved, by including them in all of the covered villages, training them, and ensuring that material in the OEP was translated and disseminated, such as through community meetings.<sup>347</sup> Finally, like in *Nick*,<sup>348</sup> the *Toyukak* court observed that notwithstanding the Stevens Proviso, “even if the statute does not require written materials, are there circumstances in which written materials would be preferable to oral, or in conjunction with oral, to be provided to voters or is that not a good tact to take to meet this 203 obligation.”<sup>349</sup>

With the general election less than 60 days away, the court asked the parties to brief what remedies should apply just to the impending election. The court ultimately entered an interim remedial order for the November 2014 General Election with relief more comprehensive than what Native voters obtained in the *Nick* litigation.<sup>350</sup> Perhaps most importantly, the court closed the gap in pre-election information:

15. On or before October 10, 2014, the Division shall send to each of the outreach workers in the three census areas (in addi-

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342. *Id.* at 15:8-20.

343. *Id.* at 15:21-25.

344. *Id.* at 16:18-17:19.

345. *Id.* at 17:20-24.

346. *Id.* at 17:25-18:5.

347. *Id.* at 18:6-19:11.

348. See *Nick* Order, *supra* note 192, at 6.

349. Tr. of Decision of the Court, *supra* note 326, at 19:15-19.

350. Compare Order Re Interim Remedies, *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG, No. 2206 (D. Alaska Sept. 22, 2014) [hereinafter Interim Order], with *Nick* Settlement Agreement, *supra* note 206.

tion to the audio translations of ballot measure neutral summaries, pro/con statements, and candidate statements) written translations of the following so as to assist the outreach workers in providing oral translations to LEP voters:

- a. Sample ballots including ballot questions;
- b. Neutral summaries of each ballot question prepared by the State;
- c. Statements of cost associated with ballot questions;
- d. Summary of bond measures;
- e. Pro and con statements for ballot questions and bond measures;
- f. Candidate statements (federal and state offices and judicial candidates);
- g. A copy of the Official Election Pamphlet; and
- h. A cover letter and updated instruction packet to the outreach workers that emphasizes to each outreach worker that she/he is expected to be available to assist voters to understand all voting information and that encourages workers to call the Division with any questions about performing these tasks.<sup>351</sup>

Acutely aware of the timing in the weeks leading up to the 2014 election, the court added a footnote to this section alerting the DOE to the fact that it was expected to translate the entire Official Election Pamphlet or explain why it could not:

To the extent the Division maintains it is unable to translate the entire Official Election Pamphlet for the 2014 General Election, it shall make all reasonable efforts to translate as much as possible in accordance with this Order, and shall be prepared to detail in its November 28, 2014 report to the Court the reasons why, despite all reasonable efforts, it was unable to translate the entire pamphlet for the General Election.

For many LEP Native voters, the 2014 General Election was the first time that they would have both early voting and information about the candidate and ballot measures. They were inching closer to being able to cast a meaningful ballot including understanding who and what they were voting for.

In November 2014, Byron Mallott—an Alaska Native who grew up in a household that spoke a Native language—was elected Lieutenant

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351. Interim Order, *supra* note 350, at 6–7.

Governor.<sup>352</sup> In the days leading up the election, Mallott and his running mate, Bill Walker, stated their intent to address the issues identified in the *Toyukak* litigation.<sup>353</sup> The federal court directed the parties to meet and confer to see if they could settle the case and jointly propose a remedial plan for the Section 203 violations.<sup>354</sup> Over the course of nine months of negotiations, the parties did so. The plaintiffs, Lieutenant Governor Mallott, and DOE officials worked collaboratively to produce a proposed stipulation and judgment that was entered by the court in late September 2015.<sup>355</sup> The thirty-three page order identifies comprehensive procedures to be put into place to remedy Alaska's Section 203 violations that account for practical issues faced by election administrators.<sup>356</sup> In recognition of voting barriers that predated even the *Nick* litigation, the order includes strong relief to cure the violations, such as federal observers to document compliance efforts and court oversight enforceable by its contempt powers through the end of 2020.<sup>357</sup> Based upon but expanding the interim order, the order made the following changes:

Pre-election dissemination of information in the Official Election Pamphlet to Alaska Native voters in their language and dialect;

Translation of election information into Gwich'in and several Yup'ik dialects in addition to the translations already made in the Central Yup'ik dialect;

Increased collaboration with tribal councils to meet the needs of Alaska Native voters who need to receive election information in their native languages and dialects;

A full-time employee responsible for administrating and coordinating all of the Division's language assistance activities;

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352. See Richard Walker, *Election of Walker and Mallott is Historic on Several Levels*, INDIAN COUNTRY TODAY (Nov. 19, 2014), <http://indiancountrytodaymedianetwork.com/2014/11/19/election-walker-and-mallott-historic-several-levels-157893>.

353. See generally Alex DeMarban, *Parnell and Walker Focus on State-Native Relations in AFN Debate*, ANCHORAGE DAILY NEWS (Oct. 24, 2014), <http://www.adn.com/article/20141024/parnell-and-walker-focus-state-native-relations-afn-debate> ("Walker said that with Mallott as lieutenant governor, there won't be elections disputes between the state and Alaska Natives that must be sorted out in court. 'More communication, less litigation will be our approach,' Walker said.").

354. See Order Re Defendants' Comprehensive Report Detailing Compliance, *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska filed Dec. 4, 2014), No. 235.

355. See Stipulated Judgment and Order, *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG (D. Alaska Sept. 30, 2015), No. 282.

356. See *id.* The Order provided that in "exchange" for its entry, "Plaintiffs agree to dismiss their claim under the Fourteenth and Fifteenth Amendments to the United States Constitution and their request for relief under Section 3(c) of the Voting Rights Act . . . without prejudice to Plaintiffs' right to rely on the underlying facts and findings of this case" should further litigation be necessary. *Id.* at 5.

357. See *id.* at 7-8, 30.

Providing sample ballots in Gwich'in and Yup'ik that voters can bring into the voting booth with them;

Making Gwich'in and Yup'ik dialects available on touch-screen voting machines when it is technologically feasible;

Increased pre-election outreach by bilingual election workers;

Preparation of glossaries of election terms and phrases in Gwich'in and several Yup'ik dialects to guide bilingual poll workers providing language assistance;

Mandatory bilingual poll worker training on how to provide language assistance to voters;

Providing Gwich'in and Yup'ik-speaking voters with a toll-free number through which they can make inquiries in their native languages and dialects;

Relying on Yup'ik and Gwich'in language experts to translate election materials, including information on ballot measures, candidates, absentee and special-needs voting and voter registration;

Pre-election publicity in Gwich'in and Yup'ik through radio ads, public service announcements and announcements over VHF radios in villages that do not receive local radio stations.<sup>358</sup>

With this order, Alaska went from what was a model of poor practices to what could become a model of best practices for language assistance.

As the settlement discussions were reaching their conclusion, Lieutenant Governor Mallott appointed a new DOE Director who is Inupiaq.<sup>359</sup> On January 11, 2016, the DOE hired an Elections Language Assistance Compliance Manager, a new position required under the *Toyukak* settlement agreement.<sup>360</sup> As the new Coordinator explained, she embraced the difficult challenges ahead of her because her position “was created to ensure that Alaskans have . . . an opportunity to exercise their right to vote and be actively engaged in shaping their society, expressing their needs, and holding governing entities accountable.”<sup>361</sup>

Although DOE's preparation for the 2016 elections reflected significant progress, reports filed by federal observers suggest its efforts still fell short of fully remedying the Section 203 violations. Some two years after

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358. See Stipulated Judgment and Order, *supra* note 355.

359. See Charles L. Westmoreland, *Mallott Ejects Elections Director*, JUNEAU EMPIRE (July 27, 2015), <http://juneauempire.com/state/2015-07-27/mallott-ejects-elections-director>.

360. See Office of the Lieutenant Governor Byron Mallott, *New Year Sees Changes for Election Division* (Jan. 11, 2016) [hereinafter DOE Changes], <http://ltgov.alaska.gov/Mallott/press-room/full-press-release.html?pr=280>; see also Stipulated Judgment and Order, *supra* note 355, at 18.

361. DOE Changes, *supra* note 360.

Judge Gleason's September 2014 bench ruling for the Plaintiffs and entry of her interim remedial order, bilingual poll worker training was spotty or lacking for several villages. Federal observers were present for both the August 2016 Primary and November 2016 General Election in villages located in the three census areas.<sup>362</sup> Out of the 120 poll workers interviewed by the federal observers for those elections, only 46 percent (55 poll workers) reported that they had been trained in 2016.<sup>363</sup> In contrast, four percent (5 poll workers) reported receiving training in 2015, ten percent (12 poll workers) reported being trained two or more years earlier, 39 percent (47 poll workers) reported they had never been trained, and one percent declined to answer.<sup>364</sup> Some of the poll workers who did receive training indicated that it was "conducted in English by a non-Native instructor from the Election Office."<sup>365</sup> Bilingual poll workers or interpreters were not trained on "how to translate the contents of the ballot or how to provide procedural instructions" in the covered Alaska Native languages.<sup>366</sup>

In a marked improvement, most, but not all, of the villages had a bilingual poll worker available. In the August 2016 Primary Election, federal observers reported there was no bilingual poll worker available in three out of the nineteen Native villages they observed.<sup>367</sup> In Koliganek, a bilingual poll worker was only available "on call" and was "not present at the polling place."<sup>368</sup> No bilingual assistance was available at polling places located in Dillingham, Kotlik, and Marshall during a portion of the time federal observers were there when the observers documented the only bilingual worker took a break or left the polling place.<sup>369</sup> In the November 2016 General Election, federal observers reported there was no bilingual poll worker available in just one of the twelve Native villages they observed.<sup>370</sup> While federal observers were present, they reported that no bilingual assistance was available at Fort Yukon for an hour and twenty minutes when the interpreter left the polling place.<sup>371</sup> In Venetie, one of the Plaintiff villages, the only Gwich'in-speaking poll worker left three and one-half hours before the polling place closed, and did not return.<sup>372</sup>

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362. See Federal Observer Reports for 2016 Elections, *Toyukak v. Treadwell*, No. 3:13-cv-00137-SLG, No. 295, attachments 295-1 to 295-33 (D. Alaska filed Dec. 13, 2016).

363. See *id.*

364. See *id.*

365. Federal Observer Reports for 2016 Elections, *supra* note 362, at 8, attachment 295-1.

366. *Id.* at 9.

367. *Id.* at attachments 295-1 to 295-20.

368. *Id.* at 6, attachment 295-3.

369. *Id.* at 6-7, attachments 295-2, 295-10, 295-11.

370. *Id.* at 6-7, attachments 295-21 to 295-33.

371. *Id.* at 6, attachment 295-32.

372. *Id.* at 6-7, attachment 295-33.

For both elections in 2016, many voting materials were unavailable in the applicable Alaska Native language and dialect. Almost all signage was in English only.<sup>373</sup> Among the nineteen villages in which federal observers were present for the August 2016 primary election, they observed that no voting materials were available in Alaska Native languages in six villages: Alakanuk, Kotlik, Arctic Village, Beaver, Fort Yukon, and Venetie.<sup>374</sup> The “I voted” sticker was the only material in an Alaska Native language in Marshall and Mountain Village.<sup>375</sup> Only the Yup’ik glossary was observed in Emmonak.<sup>376</sup> Ten villages had a sample ballot written in Yup’ik,<sup>377</sup> but only two—Koliganek and Manokotak—had written translations of the candidate lists.<sup>378</sup> Only one village, Aleknagik, had a written translation of the OEP available for Yup’ik-speaking voters.<sup>379</sup>

In the November 2016 General Election, federal observers documented that half of the twelve polling places they observed did not have a translated sample ballot available for voters. Five villages—New Stuyakok, Alakanuk, Hooper Bay, Arctic Village, and Venetie—had no translated sample ballot at all,<sup>380</sup> while the Gwich’in sample ballot in Fort Yukon was “kept at the poll workers’ table” and was not provided by the voting machine where voters could use it.<sup>381</sup> The absence of written voting materials had its greatest impact in villages where a trained bilingual poll worker was not present at all times during the election. In sum, Alaska had made significant improvements and committed to changing to better serve its voters, but almost 40 years of violating the VRA cannot be changed overnight. This illustrates why the settlement agreement requires court oversight through the end of 2020.

The 2016 General Election added to the scope of language assistance election officials must provide in Alaska. On December 5, 2016, the Director of the U.S. Census Bureau issued a notice of determination identifying the jurisdictions subject to the language assistance provisions of Section 203.<sup>382</sup> As a result of the 2016 determinations, Alaska Native language assistance now must be provided in fifteen political subdivisions of

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373. *Id.* at 5, attachments 295-1, 295-3, 295-33.

374. *Id.* at 10, attachments No. 295-7, 295-10, 295-17, 295-18, 295-19, 295-20.

375. *See id.* at 10, attachments 295-11, 295-12.

376. *See id.* at 10, attachment 295-8.

377. *See, e.g., id.* at 10, attachments 295-1, 295-6, 295-9, 295-13, 295-16.

378. *See id.* at 10, attachments 295-3, 295-4.

379. *See id.* at 10, attachment 295-1.

380. *See id.* at 10, attachments 295-23, 295-25, 295-28, 295-31, and 295-33.

381. *See id.* at 10, attachment 295-32.

382. *See* Voting Rights Act Amendments of 2006, Determinations Under Section 203, 81 Fed. Reg. 87,532 (Dec. 5, 2016) (to be codified at 28 C.F.R. pt. 55) [hereinafter 2016 Section 203 Determinations].

Alaska,<sup>383</sup> which is an increase of eight political subdivisions from 2011.<sup>384</sup> Yup'ik coverage was added to the Aleutians East Borough, Bristol Bay Borough, Kenai Peninsula Borough, Kodiak Island Borough, and Lake and Peninsula Borough.<sup>385</sup> Alaskan Athabascan (predominately Gwich'in) coverage has been added to the Southeast Fairbanks and Valdez-Cordova Census Areas, while Inupiat language assistance has been added to the Yukon-Koyukuk Census Area.<sup>386</sup> This “new” coverage has restored the requirement that language assistance be provided in areas where it was lost following *Shelby County's* elimination in 2013 of statewide coverage for Alaska Native languages that had been in place since 1975.<sup>387</sup> However, the doubling of Alaska Native coverage will be challenging for the DOE because they had not provided language assistance in those areas during the 38 years the areas were included under statewide coverage. Nevertheless, Alaska's election officials have stated their commitment to come into compliance in all covered areas.<sup>388</sup>

### CONCLUSION

As the Supreme Court recognized, voting is critical to a democratic society because it is “preservative of all rights.”<sup>389</sup> It is the people's primary voice in government and the source of political power.<sup>390</sup> Keeping that in mind, probably the most stunning moment of the *Toyukak* case was when Mr. Mike Toyukak himself took the stand. Counsel flipped through page after page of the Official Election Pamphlet on an overhead projector, asking him if he had ever seen certain election materials before. Had he seen a pro-con statement for a ballot measure? No. Did he recognize an absentee ballot form? No. Did he know there was information about the judicial candidates available? No, he didn't. Finally, going off script, counsel asked when the first time he saw the actual ballot measures or candidates on the ballot was. When he walked into the voting booth on Election Day, he said.<sup>391</sup> In those few moments, it became very real that these Alaska Native

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383. See 81 Fed. Reg. at 87,533.

384. See Voting Rights Act Amendments of 2006, Determinations Under Section 203, 76 Fed. Reg. 63,602–63,603 (Oct. 13, 2011).

385. 2016 Section 203 Determinations, *supra* note 382, at 87,533.

386. See *id.*

387. See 28 C.F.R. pt. 55 (2013).

388. See Andrew Kitchenman, *Census Bureau Adds Areas, Languages to Be Translated for Alaska Elections*, ALASKA PUB. RADIO (Dec. 8, 2016), <http://www.alaskapublic.org/2016/12/08/census-bureau-adds-areas-languages-to-be-translated-for-alaska-elections>.

389. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

390. See generally *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (“[T]he right to vote freely for a candidate of one's choice is the essence of a democratic society and any restrictions on that right strike at the heart of representative government.”)

391. Tr. of Record at 391–93, *Toyukak v. Treadwell*, No. 3:13-cv-00137 (D. Alaska Sept. 30, 2015).

voters had experienced exclusion from not just one or two pieces of voting information that they needed to make informed choices, but exclusion from the entire political process.

The legacy of the *Toyukak* case is a clear statement of equality. The court rejected any notion that a jurisdiction may choose or edit what information to which certain groups of voters have access. And there is no escape hatch for a jurisdiction to claim that it *tried*. In fact, the term “historically unwritten” itself seemed to lose its relevance because it only changed the manner in which information was to be conveyed—not whether or not a voter would receive it. After the first trial in over 30 years, Section 203 now has a clear path. Remedying the impact of Alaska’s legacy of discrimination against Alaska Natives, including first generation voting barriers, remains a work in progress. Nevertheless, *Toyukak* marks an important step towards achieving that goal.

The election processes in Alaska have begun to change in recent years due to *Nick* and *Toyukak* and a change in state leadership. However, in closing, it is important to note that the ability of Alaska Natives, among other minority groups, to participate in the political process is now being threatened by the current administration. In response to unproven claims by President Donald Trump that he won the popular vote in November 2016 “if you deduct the millions of people who voted illegally,”<sup>392</sup> the President established a “Presidential Advisory Commission on Election Integrity.”<sup>393</sup> The Commission ostensibly has been constituted to examine “the registration and voting processes used in Federal elections,” including “those vulnerabilities in voting systems and practices used for Federal elections that could lead to . . . fraudulent voter registrations and fraudulent voting.”<sup>394</sup> However, members of the Commission include several individuals who have made careers of actively attempting to suppress the vote of racial, ethnic, and language minority voters whom they believe do not tend to support conservative candidates: Vice-Chair Kris Kobach, Secretary of State of Kansas; Ken Blackwell, Secretary of State of Ohio; Hans von Spakovsky; and J. Christian Adams.<sup>395</sup> Instead of attempting to make voting more accessible for all Americans, these Advisory Commission members have focused their careers on the passage of restrictive voter identification laws, unlawful politicization of the Department of Justice, and policies and practices intended to suppress the voting power of historically disenfranchised groups, including Alaska Natives. The Commission will likely issue “findings” that will serve as a basis for federal legislation that suppresses specific groups of voters. This means that the threats to

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392. Michael D. Shear & Emmarie Huetteman, *Trump Repeats Lie About Popular Vote in Meeting With Lawmakers*, N.Y. TIMES (Jan. 23, 2017).

393. Exec. Order No. 13,799, 82 Fed. Reg. 22,389 (May 16, 2017).

394. 82 Fed. Reg. at 22,389.

395. For a list of Commission members, see <https://www.whitehouse.gov/blog/2017/07/13/presidential-advisory-commission-election-integrity> (last visited Nov. 3, 2017).



historically disenfranchised groups, like the limited-English proficient Alaska Natives in the *Nick* and *Toyukak* cases, may no longer come from state and local governments that fail to abide by the mandates of the Voting Rights Act. Instead, these voters face threats on the federal level from those who would roll back laws meant to protect them, including possibly even the Voting Rights Act itself.