



# Monthly President's Report

## Dear AFN Co-Chairs, Board Members & Membership,

The first quarter of 2013 has seen significant legislative, policy, and legal progress related to a wide range of our communities' priorities.

Highlights of our recent advocacy on the Hill and the Courts:

- We (finally) saw the renewal of the Violence Against Women Act signed into law in early March, but not without controversy -- more on page 2
- The Advisory Council on Historic Preservation (ACHP) formally endorsed a plan to support the United Nations Declaration on the Rights of Indigenous Peoples, a great step toward broader US endorsement of the Declaration -- more on page 7
- Our Congressional Delegation made an unprecedented unified declaration of support for the introduction of comprehensive immigration reform legislation, citing Alaska's diversity and strong Native community as their inspiration -- more on page 6
- Senator Begich will reintroduce his Safe Families and Villages Act and he needs our full support to move this important legislation forward -- more on page 4

Last week, Carol Daniel, Bob Anderson and Rick Agnew completed an AFN white paper on the recent Akiachak court decision on land into trust. The implications of the decision will be explained further at the May AFN Board meeting in Kotzebue by Carol Daniel, our In-House Counsel. The full text is included with this report in PDF format.

Please read on for further updates on these issues as well as some of our other priorities. . . .

May 2013

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## UPCOMING

### Listening Session

May 2, '13 | Ahtna Region, AK

### Alaska/Villages Visit

Chairwoman Maria Cantwell,  
US Senate Indian Affairs  
Committee | August 2013



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## Violence Against Women Act Signed into Law

### VAWA IN ALASKA

On March 7th, President Obama signed a bipartisan bill to reauthorize the Violence Against Women Act, finally ending a year-long effort to renew legislation that provides federal funding for programs aiding the prosecutions of domestic and sexual violence cases.

Although Alaska Natives comprise only 15.2% of the population of the State of Alaska, they comprise 47% of the victims of domestic violence and 61% of the victims of sexual assault. Regional studies revealed that Native women in the Ahtna region are 3 times more likely to experience domestic violence than other women in the U.S., and 8-12 times more likely to experience physical assault. The statistics are even higher among Athabascan women, 64% of whom reported that they had experienced domestic violence. Approximately half of the perpetrators in these situations were non-Natives. [read the text of AFN's submission to the Department of Justice with full citations in the PDF appended to this report]

The State of Alaska's public safety system does not effectively serve vast areas of the State, in which many remote Alaska Native villages are located, except in response to serious crimes involving severe injury or death, which are handled by Alaska State Troopers who are located in only a small number of hub communities around the State. The vast majority of Alaska Native communities have no formal state law enforcement presence. As of 2011, there were Village Public Safety Officers (VPSOs) in only 74 rural communities, and Village or Tribal Police Officers (VPOs and TPSs), which are supervised by the Tribes and not the State, in 52 communities. The remaining 91 rural communities have no law enforcement presence at all.

Alaska Natives are eligible to receive funding under many of the grant programs reauthorized or created through amendments to the VAWA, including the following:

- Grants to combat violent crime against women (STOP grants), which have been expanded to include training of law enforcement officers including for VPSOs.
- Grants to assist tribes and states to retain and expand rape crisis centers and other programs to help victims of sexual assault, including elder abuse, sexual assault and to provide training to law enforcement agencies to better serve the elderly.
- Amendments to the Public Health Service Act to include tribal sexual assault coalitions in the grant program for rape prevention and education; provides for grants to enhance the safety of youth and children who are victims of or exposed to domestic violence; and to revise and consolidate grant programs that address domestic violence, sexual assault, and stalking by developing or enhancing and implementing interdisciplinary training for health professionals, education programs and comprehensive statewide strategies to improve the response of clinics,

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- public health facilities, hospitals and other health settings to domestic violence and sexual assault.
- Grants for transitional housing assistance and support services for victims of domestic violence.
  - An amendment to the Omnibus Crime Control and Safe Streets Act of 1968 to include sex trafficking as a target of the grants to Indian tribal governments;
  - Also, under Title IX – Safety for Indian Women, Section 902 allows tribal coalition grants to be used to develop and promote state, local and tribal legislation and policies that enhance best practices for responding to violent crimes against Indian women; Section 903 requires the Secretaries of Interior, HHS and the Attorney General to participate in consultations with Indian tribes regarding the administration of tribal funds and programs, enhancement of Indian women's safety, and federal response to violent crimes against Indian women. Section 907 requires that Alaska Native Villages be included in the National Institute of Justice study of violence against Indian women, and Section 909 directs the Attorney General to report to Congress on whether the Alaska Rural Justice and Law Enforcement Commission should be continued.

Despite appalling statistics showing that Alaska Native women are vastly overrepresented among the victims of domestic violence, Alaska's tribes were excluded from the important tribal jurisdiction amendments to the VAWA.

By way of background, when AFN learned that Alaska's tribes had been excluded from major provisions of the VAWA in the Spring of 2012, AFN's Legislative/Litigation Committee convened an emergency meeting on April 23, 2012, to discuss S.1925 and H.R. 4154, both of which excluded Alaska's tribes from the jurisdiction provisions. The Committee passed a Resolution opposing any language that would exclude Alaska's tribes, and directing the staff to work with other Native and civil rights organizations, including NCAI and our tribes to preserve the ability of Alaska Native women and children to seek civil protections in their tribal courts on par with all Native Americans within the United States.

On April 26, 2012, the Senate voted to reauthorize the VAWA with the provisions that excluded Alaska's tribes. At that point AFN directed its efforts to trying to obtain better language in the House. On May 7, 2012, AFN partnered with the Leadership on Civil and Human Rights to send a joint letter to Congressman Young, urging him to work to include provisions



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that would enable tribal governments in Alaska to more effectively combat domestic violence. On May 10, 2012, the Alaska Native women who serve on AFN's Board (14 in number) also wrote to Congressman Young urging him to ensure the legislation included local solutions to address the crisis in Alaska's rural villages. Our efforts failed when, on May 16, 2012, the House passed H.R. 4970, which stripped out the tribal jurisdiction provisions altogether.

On January 22, 2013, S.47, a bill to reauthorize the VAWA, was introduced in the Senate. It was essentially the same bill that passed the Senate in the 112th Congress. S.47 passed the Senate on February 12, 2013, and on February 28, the House passed the Senate's version of the bill. The renewed act expanded federal protections to Native Americans but excluded Alaska's tribes from section 904 and the amendments to section 905 of the Act.

Section 904 amends the Indian Civil Rights Act of 1968 to provide special domestic violence criminal jurisdiction to participating tribes in Indian country. It recognizes and affirms the inherent power of a participating tribe to exercise special domestic violence criminal jurisdiction over all persons, concurrent with the jurisdiction of the United States, the State or both. Section 905 amends the current law which addresses tribal court jurisdiction to issue and enforce civil protective orders anywhere in Indian country of the Indian tribe *or otherwise within the authority of the Indian tribe*.

Unfortunately, Section 910 sets out special rules with regard to jurisdiction applicable to Alaska. It restricts the expanded jurisdiction afforded by sections 904 and 905 in Alaska to only the Metlakatla Indian Community. It further provides that the remaining tribes in Alaska retain their existing authority (prior to passage of the VAWA of 2013) to issue and enforce civil protection orders. In the face of criticism for excluding Alaska Native tribes from the jurisdictional provisions of the VAWA, and recognizing the devastating effects of substance abuse, the soaring rates of domestic violence and sexual assault in Alaska, and the lack of law enforcement in many of our communities, both Senator Murkowski and Senator Begich have expressed a desire to address the issue through legislation.

On Friday, March 15, Senator Murkowski unveiled a "discussion draft" of her Rural Public Safety Initiative, which would create a pilot project under the Justice Department for 12 villages. Her draft calls for the state to deputize tribal or village police to enforce state criminal laws, provide Justice Department grants to put one police officer in villages that lack law enforcement, and allow offenders who violate state misdemeanor laws under the influence of drugs or alcohol to choose to accept sanctions from tribal courts.

As discussed below, Senator Begich has agreed to reintroduce his Alaska Safe Families and Villages Act. Significant work remains ahead of us in securing full protection and support for Alaska Native women.

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## Safety for Our People

### SAFE FAMILIES AND VILLAGES ACT

Back in 2011, Senator Begich introduced the Alaska Safe Families & Villages Act to improve public safety in Alaska's most remote communities. Senator Begich's bill is more important than ever, following the passage of VAWA with amendments that leave most Alaska Native women and children vulnerable.

The bill would begin by creating a demonstration project by which participating tribes would have clearly confirmed authority to enforce tribal laws regarding alcohol and substance abuse, and domestic violence, within their villages.

The Act passed through committee, but died on the Floor of the Senate last year. Senator Begich pledged this month to reintroduce his legislation, vowing that he would "be more aggressive with this legislation now that I am on the Indian Affairs Committee."

Senator Begich is currently circulating a new draft bill, and is in discussions with Senator Murkowski in an effort to gain her support as a co-sponsor.

## ACTION ITEM

Tell Senator Begich you support his reintroduction of the Safe Families & Villages Act:

By Email Form: [www.begich.senate.gov](http://www.begich.senate.gov)  
By Mail: 111 Russell Senate Office Bldg,  
Washington, DC 20510  
By Fax: 202-224-2354  
By Phone: 202-224-3004



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## Voting Rights

### MAKING OUR VOICES HEARD

Early this year, AFN filed an Amici Curiae brief (or Friend of the Court brief) with the U.S. Supreme Court in the case of *Shelby County vs Holder* addressing the issue of whether Congress' decision in 2006 to reauthorize Section 5 of the Voting Rights Act under the pre-existing coverage formula of Section 4(b) of the Voting Rights Act exceeded its authority under the Fourteenth and Fifteenth Amendments, and thus violated the Tenth Amendment and Article IV of the United States Constitution. AFN supports the Voting Rights Act and Congress' 2006 decision to protect voting rights under Section 5.

AFN membership includes numerous tribes and villages covered by Sections 4(b), 5, and 203 of the Voting Rights Act, which have a direct interest in this case's outcome. Emmonak Tribal Council, Kasigluk Traditional Council, Levelock Village Council, Togiak Traditional Council, Willie Kasayulie, Anna Nick, Vicki Otte, and Mike Williams are also Applicants for Intervention in the State of Alaska's recent challenge to Section 5 of the Voting Rights Act in the District Court for the District of Columbia, *Alaska v. Holder*, which has been stayed pending a decision by the Supreme Court in the *Shelby County* case. All Applicants are registered voters or, in the case of the tribes, represent registered voters in Alaska who are impacted by the State's failure to comply with the Voting Rights Act and have a direct interest in the outcome in this case.

AFN submitted the brief for two reasons: (1) to correct misrepresentations about Alaska in support of the argument that the Voting Rights Act coverage formula is inappropriate, and (2) to respond to the State of Alaska's *amicus* brief that falsely claims that the State has no history of voting discrimination and thus Section 5 is not a congruent and proportional response. AFN is now, and has been, party in voting rights cases against the State of Alaska, and filed our brief to correct the record. AFN argued that "Alaska is a textbook case for why the coverage formula remains valid and Section 5 remains a necessary response to widespread educational and voting discrimination against Alaska Native citizens."

The full text of AFN's 100-page brief is appended to this report in PDF format.



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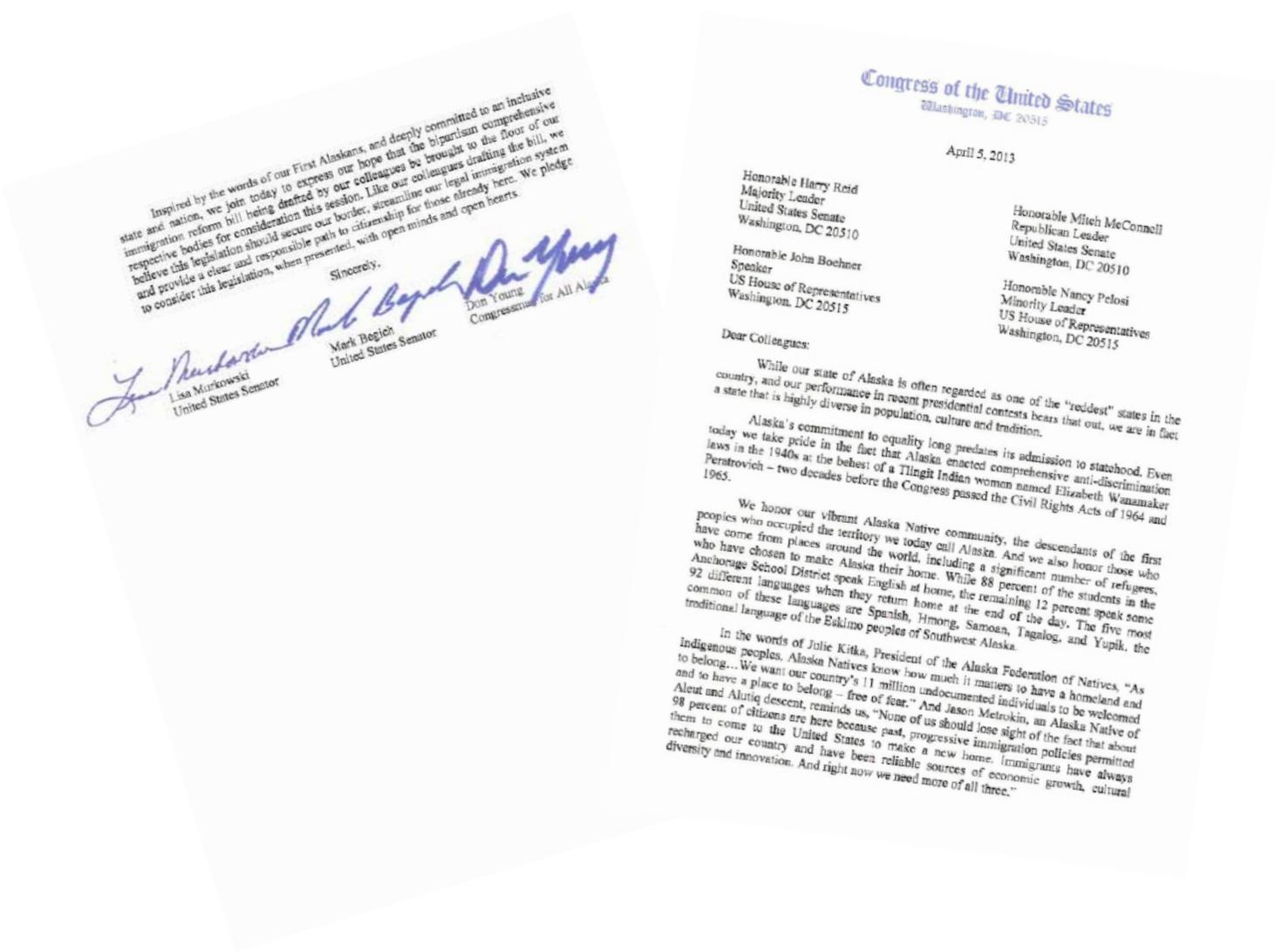
## Immigration Reform

### MAKING ALASKA'S VOICE HEARD

On April 5th Alaska's Congressional delegation boldly voiced their support for the drafting and introduction of a bipartisan comprehensive immigration reform bill with the strong backing of the Alaska Native community.

Senators Lisa Murkowski and Mark Begich and Congressman Don Young addressed their "Dear Colleague" letter to the leadership of both houses of Congress, sending a clear message of support for a bill that would "secure our border, streamline our legal immigration system and provide a clear and responsible path to citizenship for those already here."

Read the full text of the letter, our Delegation's press release about their statement, and AFN's supporting documents in PDFs appended to this report.



Inspired by the words of our First Alaskans, and deeply committed to an inclusive state and nation, we join today to express our hope that the bipartisan comprehensive immigration reform bill being drafted by our colleagues be brought to the floor of our respective bodies for consideration this session. Like our colleagues drafting the bill, we believe this legislation should secure our border, streamline our legal immigration system and provide a clear and responsible path to citizenship for those already here. We pledge to consider this legislation, when presented, with open minds and open hearts.

Sincerely,  
Mark Begich  
United States Senator  
Don Young  
Congressman for All Alaska

Lisa Murkowski  
United States Senator

Congress of the United States  
Washington, DC 20515

April 5, 2013

Honorable Harry Reid  
Majority Leader  
United States Senate  
Washington, DC 20510  
Honorable John Boehner  
Speaker  
US House of Representatives  
Washington, DC 20515  
Honorable Mitch McConnell  
Republican Leader  
United States Senate  
Washington, DC 20510  
Honorable Nancy Pelosi  
Minority Leader  
US House of Representatives  
Washington, DC 20515

Dear Colleagues:  
While our state of Alaska is often regarded as one of the "reddest" states in the country, and our performance in recent presidential contests bears that out, we are in fact a state that is highly diverse in population, culture and tradition.

Alaska's commitment to equality long predates its admission to statehood. Even today we take pride in the fact that Alaska enacted comprehensive anti-discrimination laws in the 1940s at the behest of a Tlingit Indian woman named Elizabeth Wanzamaker Peratrovich - two decades before the Congress passed the Civil Rights Acts of 1964 and 1965.

We honor our vibrant Alaska Native community, the descendants of the first peoples who occupied the territory we today call Alaska. And we also honor those who have chosen to make Alaska their home, including a significant number of refugees, Anchorage School District speak English at home, the remaining 12 percent speak some common of these languages are Spanish, Hmong, Samoan, Tagalog, and Yupik, the most traditional language of the Eskimo peoples of Southwest Alaska.

In the words of Julie Kitka, President of the Alaska Federation of Natives, "As indigenous peoples, Alaska Natives know how much it matters to have a homeland and to belong... We want our country's 11 million undocumented individuals to be welcomed and to have a place to belong - free of fear." And Jason Metrokin, an Alaska Native of Aleut and Alutiq descent, reminds us, "None of us should lose sight of the fact that about 98 percent of citizens are here because past, progressive immigration policies permitted them to come to the United States to make a new home. Immigrants have always recharged our country and have been reliable sources of economic growth, cultural diversity and innovation. And right now we need more of all three."

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## United Nations Declaration on the Rights of Indigenous Peoples

### ACHP ENDORSEMENT & PROGRESS

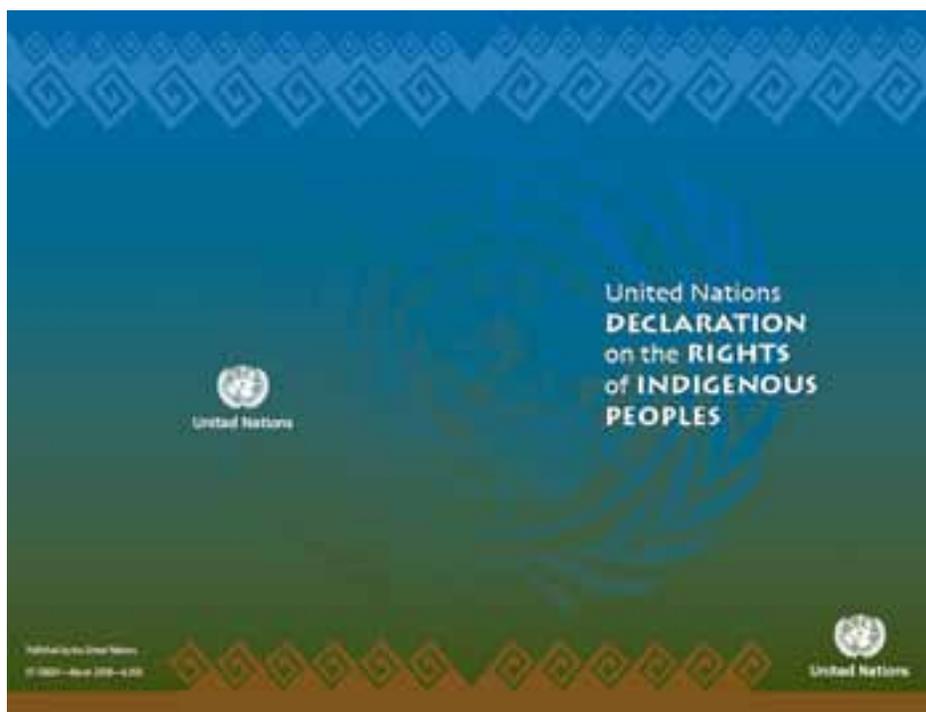
The Advisory Council on Historic Preservation (ACHP) formally endorsed a plan to support the United Nations Declaration on the Rights of Indigenous Peoples in early March.

John L. Berrey, Chairman of the Quapaw Tribe, is the Native American member on the 23-member ACHP. He moved that the ACHP endorse the Declaration plan. The motion was approved unanimously. The fact that the ACHP is the first federal agency to adopt such a plan makes this an important first step toward greater adoption of the tenants of the Declaration.

Under the approved plan, the ACHP will “raise awareness about the Declaration within the preservation community; make information about the Declaration available on its Web site; develop guidance on the intersection of the Declaration with the Section 106 process; reach out to the archaeological community about the Declaration and the conduct of archaeology in the United States; and generally integrate the Declaration into its initiatives such as the Traditional Cultural Landscapes Action Plan.”

A PDF of the ACHP's press release about their endorsement and plan is appended to this report in PDF format.

You can learn more about the ACHP's endorsement and download the full text of the Declaration here: <http://www.achp.gov/UNdeclaration.html>



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## Fighting Discrimination

### **SUPERINTENDENT MARY MILLER REINSTATED**

The National Park Service (NPS) has been ordered by the U.S. Merit Systems Protection Board to reinstate Mary A. Miller to her position as superintendent at the Sitka National Historical Park. Miller appealed her removal and brought suit claiming her removal among other charges was “tainted by discrimination” based on her Alaska Native race, sex and physical disability.

The park commemorates the 1804 Tlingit battle as part of its park status designation. Miller's termination from the NPS in August 2010 occurred amongst the park's major events celebrating its 100-year anniversary.

AFN, along with Sealaska, advocated for Miller from the beginning. This decision demonstrates there is due process for those facing similar circumstances. Mary had energy and brought value and a Native presence to the Sitka National Historical Park. We were disappointed about her removal and protested directly to the Department of Interior. This decision highlights the need for the federal government to look at Alaska Native employment statistics, with a view toward increased retention and increased opportunities for Alaska Natives in key management positions.

In addition to reinstatement, Miller will receive back pay and benefits. The agency must also report back to Miller once it has fully carried out the Merit System Protection Board's order.



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## Department of Interior in Transition

### SALLY JEWELL SWORN IN AS SECRETARY OF INTERIOR

Early this month, Secretary of the Interior Ken Salazar celebrated his last day on the job with a 40-second YouTube video thanking his staff -- you can view the video here: <http://www.youtube.com/watch?v=STKS-OfeoGU>

Secretary Salazar is replaced by Sally Jewell, who's appointment was confirmed by the Senate on April 10th. She was officially sworn in on April 12th.

Prior to her confirmation, Jewell worked in the private sector, most recently as President and Chief Executive Officer of REI. Jewell joined REI as Chief Operating Officer in 2000 and was named CEO in 2005. During her tenure, REI nearly tripled in business to \$2 billion and was consistently ranked one of the 100 best companies to work for by Fortune Magazine.

Before joining REI, Jewell spent 19 years as a commercial banker, first as an energy and natural resources expert and later working with a diverse array of businesses that drive our nation's economy. Read more about Secretary Jewell in the PDF press release attached.

Photo: RurAL CAP

### DEPUTY SECRETARY DAVID HAYES DEPARTS INTERIOR

This week, the Department of Interior announced that Deputy Secretary Hayes will leave Interior at the end of June to serve as a Senior Fellow at the Hewlett Foundation and teach at Stanford Law School in the fall.

Deputy Secretary Hayes "played an instrumental role in settling the long-standing Cobell Indian trust litigation and overseeing implementation of the settlement, ending 14 years of litigation regarding the Interior Department's management of trust resources for more than 500,000 American Indians and Alaska Natives."

Learn more in the PDF press release attached.



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## Contract Support Costs & Opportunity

### FY 2014 BUDGET IMPACT ON CONTRACT SUPPORT COSTS

Early this month, the President's proposed FY 2014 budget was released.

“It contains small increases for contract support costs (CSC) for both the Bureau of Indian Affairs (BIA) and the Indian Health Service (IHS). More significantly, the proposed appropriations bill for both agencies introduces a new approach to CSC spending that would cap not only the aggregate appropriation but also, apparently, the allocation of that amount to each individual tribe or tribal organization. The intent appears to be a legislative “Ramah fix” that would remove the Government’s responsibility, as held in *Salazar v. Ramah Navajo Chapter*, to fully fund CSC for each contract and eliminate tribes’ ability to recover CSC shortfalls through contract actions.”

Read a complete initial analysis in the HOBBS, STRAUS, DEAN & WALKER, LLP report attached here as a PDF.



### FUNDS AVAILABLE FROM THE DEPT. OF TRANSPORTATION

On April 22, the Department of Transportation announced the availability of \$473.8 million in funds to be awarded for National Infrastructure Investments (TIGER Funds). These funds, which are available to tribal applicants, will be awarded on a competitive basis for projects that will have a significant impact on a community.

Please read the NOFA at <http://www.dot.gov/policy-initiatives/tiger/tiger-notice-funding-availability-2013> for more information about project eligibilities, application requirements, and other important information.

The “Apply” function on [www.Grants.gov](http://www.Grants.gov) will open on April 29, 2013. Final applications are due by Monday, June 3, 2013.

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## Safety in Our Schools

### SAFE COMMUNITIES, SAFE SCHOOLS

Senator Murkowski has been working on two bills that include provisions intended to assist schools to better serve students and to keep schools safe.

The first bill is the Mental Health Awareness and Improvement Act, which is intended to allow schools to use Title I, II and Safe & Drug Free Schools funds to provide Positive Behavioral Supports and Intervention programs and to establish school-based mental health partnership programs and help states to help schools develop good crisis management plans. The next step for this bill is consideration by the full Senate.

The second bill passed the Senate Health, Education, Labor, and Pensions (HELP) Committee on April 10th and is currently under consideration on the Senate floor: S. 649, the Safe Communities, Safe Schools Act. The school-related provisions in this bill would allow schools to use Community Oriented Policing Services (COPS) grants to install surveillance equipment and establish tiplines, establish an interagency task force to update advisory school safety guidelines, establish a National Center for Campus Public Safety, and provide training and other assistance to colleges' public safety personnel.

Bill summaries and the full text of each of these bills is included with this report in PDF form. Senator Murkowski is seeking community input on both.

## ACTION ITEM

Share your thoughts and ideas with  
Senator Murkowski:  
Share your input, including recommendations  
for amendments, via Senator Murkowski's  
website:  
[http://www.murkowski.senate.gov/public/  
index.cfm?p=EMLisa](http://www.murkowski.senate.gov/public/index.cfm?p=EMLisa)



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## Protecting Our Children

### NEW AD HOC AFN CHILDREN'S TASK FORCE

The AFN Co-Chairs have approved the creation of an ad-hoc AFN Children's Task Force under the AFN Legislative & Litigation Committee. Patrick Anderson has been asked to Chair this new task force. AFN solicits recommendations of interested AFN Board members or others to be part of this task force. The task force will work with the NCAI's Children's Task Force.

The research and policy foundations for the task force will be the U.S. Attorney General's Task Force on Defending Children and the report filed in December, 2012. Link: <http://www.justice.gov/defendingchildhood/cev-rpt-full.pdf>

An additional research foundation will be the Adverse Childhood Experience Study. Link: [http://www.cdc.gov/ncipc/pub-res/pdf/childhood\\_stress.pdf](http://www.cdc.gov/ncipc/pub-res/pdf/childhood_stress.pdf)

We will also want to look at the NIH National Children's Study currently under development. Link: <http://www.nationalchildrensstudy.gov/Pages/default.aspx>

We hope the new AFN Children's Task Force will accomplish some important work which can be shared with the convention delegates in October. There will be an update at the AFN Board meeting in May.

## Thank You

I am repeatedly amazed and inspired by our membership's tireless commitment to not only defend our rights, but to do so on so many fronts simultaneously. We have made great strides already in 2013. We have laid the foundation for an incredible year. To accomplish all that we hope to achieve, we must remain strong, focused, and committed.

Sincerely,

Julie Kitka

Alaska Federation of Natives

1577 C Street, Suite 300 | Anchorage, Alaska | 99501 | 907.274.3611 | [afninfo@nativefederation.org](mailto:afninfo@nativefederation.org)



In 2006, four Tribes<sup>1</sup> and one individual<sup>2</sup> filed lawsuits to challenge the Secretary of the Interior's regulations, 25 C.F.R. § 151, which govern the procedures used by Indian Tribes and individuals when asking the Secretary of the Interior to acquire title to land in trust on their behalf. The regulations in effect bar the acquisition of land in trust in Alaska other than for the Metlakatla Indian Community or its members, by excluding application to Alaska.

*Akiachak Native Community v. Dep't of the Interior*, 1:06-CV-939, was filed by the Native American Rights Fund on behalf of the four tribes and *Kavairlook v. Salazar*, 1:06-CV-1405, was filed by the Alaska Legal Services Corporation on behalf of Alice Kavairlook. None of the lands at issue in these consolidated cases involve land or interests therein conveyed to the Village or Regional corporations under the Alaska Native Claims Settlement Act (ANCSA).

The Tribes argued that the Secretary's exclusion of Alaska Natives—and only Alaska Natives—from the land into trust application process is void under 25 U.S.C. § 476(g), which nullifies any regulation or administrative decision that discriminates among federally recognized Indian Tribes relative to the privileges and immunities available to them by virtue of their status as Indian tribes. The State of Alaska intervened to argue that the differential treatment for Alaska's tribes is required by ANCSA.

The Secretary took the position in the litigation that he has the statutory authority to take land into trust in Alaska, but is not legally obligated to do so. According to the Secretary, the existing regulations do not cover the acquisition of land in trust in Alaska, except for Metlakatla, but they do not legally prohibit him from doing so. Yet, the Secretary admitted that there were no procedures in place that would allow him to consider a request to take land into trust in Alaska, and suggested that he would only consider such a request if regulations were “amended or promulgated to provide a process and decisional criteria for the exercise of the discretion to acquire land in trust for Alaska Natives.”

Like the State of Alaska, the Secretary also argued that 25 U.S.C. § 476(g) only prohibits discrimination between “similarly situated” tribes, and because of ANCSA, Alaska Natives are not “similarly situated” in relation to other federally recognized tribes for purposes of the applicability of 25 C.F.R. Part 151.

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<sup>1</sup> The plaintiff tribes are the Akiachak Native Community, Chalkyitsik Village, Chilkoot Indian Association and Tuluksak Native Community (IRA). The Akiachak Native Community and the Native Village of Chalkyitsik seek trust status for several unclaimed Alaska Native Townsite lots conveyed to them by the Townsite Trustee, in connection with their efforts to fashion and enforce ordinances to stem the flow of alcohol into their communities. The Chilkoot Indian Association seeks trust status for approximately 73 acres of former mission land conveyed to it by the Presbyterian Church; and the Tuluksak Native Community seeks trust status for the former Moravian Mission Reserve, conveyed to it by the City of Tuluksak.

<sup>2</sup> *Kavairlook v. Salazar*, 1:06-CV-1405, was filed by Alice Kavairlook, who is an enrolled member of the Native Village of Barrow. She seeks to have an Alaska Native Townsite lot, currently held in unrestricted title, placed into trust.

On March 31, 2013, the U.S. District Court for the District of Columbia rejected the Secretary's and the State of Alaska's arguments and granted summary judgment to the plaintiffs, thereby affirming that the Secretary retains his statutory authority under Section 5 of the Indian Reorganization Act, 25 U.S.C. § 465 to take land into trust on behalf of all Alaska Natives. The court concluded that ANCSA left intact the Secretary's authority to take land into trust throughout Alaska. The court also rejected the Secretary's interpretation of the regulation, and found that his decision to exclude Alaska Natives from the land-into-trust regulation violated 25 U.S.C. § 476(g).

The Court ordered additional briefing on the scope of the remedy in this case, i.e., whether it is only the Alaska exception that is deprived of "force or effect" under 25 U.S.C. 476(g), or whether some larger portion of the land-into-trust regulation must fall.

The parties have until May 3, 2013, to provide briefing on the proper remedies. It is anticipated that the remedy will be a remand to the Department of Interior for promulgation of regulations. The remand could result in simply removing the Alaska exception from the regulation, or it could require a more deliberative process, and include substantive criteria for decision-making. Meanwhile, the State of Alaska has indicated that it will seek an interlocutory appeal. The general rule is that the losing party cannot appeal until the Court has entered a final decision. Interlocutory appeals are not routinely granted. The district court must enter an order granting permission, FRAP 5.

Assuming the State is not granted permission to take an immediate appeal, the matter is likely to be remanded to the Secretary for rulemaking. While the regulation is on remand to the Secretary, an appeal cannot be brought. Once the Secretary completes his rulemaking, the revised Rule becomes final and the Court will enter a final judgment. At that point, the State can elect to appeal to a three judge panel of the US DC Court of Appeals. While the appeal is pending, Alaska's tribes or individual Alaska Natives could petition the Secretary to have lands taken into trust.

**What are the immediate implications of the Decision?** Other than creating a very strong doubt that the Secretary will be able to continue to deny requests to accept land into trust in Alaska, there will be no *immediate* implications since the court's decision is not final and is likely to be appealed. In addition, before the Secretary can entertain petitions to take land into trust in Alaska, the Secretary will have to engage in rulemaking, which could take months, if not years to complete. In developing regulations to govern land-into-trust requests from Alaska Natives, the Secretary will be obligated to engage in consultation with both Alaska's tribes and the ANCSA corporations. Finally, the agency will give the State and local governments notice and an opportunity to comment on any proposed regulations. The BIA will also be required to comply with the requirements of the National Environmental Policy Act (NEPA) in assessing the environmental, endangered species, water quality, fish and wildlife, wetlands, transportation, air quality, cultural, historical value, hazardous waste and toxic material issues. So, while this decision is definitely a milestone in Native affairs in Alaska, it is far from final at this point.

A major issue is the effect the decision will have on ANCSA lands, i.e., may the Secretary take ANCSA lands into trust? This is one of the more significant issues presented by the application of the decision to Alaska, and is discussed in more detail below.

Assuming (1) the court's ruling is upheld, and (2) the Secretary proceeds to develop new regulations that provide a process for Alaska Natives to petition the Secretary to have lands placed into trust, such acquisitions would still be discretionary, i.e., the Secretary could deny the request. As discussed in more detail below, there are many factors individuals and tribes must satisfy before the Secretary will exercise his discretion to take land into trust under the current regulations. However, in light of the Court's decision in *Akiachak*, it is highly unlikely the Secretary will be able to justify a rejection of a petition based on the proposition that ANCSA did not contemplate the further acquisition of land in trust status.

### **What is the Regulatory Process and Requirements for converting fee land to trust status?**

Under the current regulations, the Secretary converts fee land to trust status by accepting legal title to the land in the name of the United States in trust for a tribe or individual Indian. Criteria for deciding when to place such property in trust status are set forth in 25 C.F.R., part 151. The process is normally initiated when an Indian tribe or an individual Indian submits a written request to take land into trust to their local BIA agency or regional office. The regulations authorize placing land in trust for a tribe if it is within the exterior borders of the reservation or adjacent to it, the tribe already owns an interest in the land, or the acquisition is necessary to facilitate tribal self-determination, economic development, or housing needs.

There are different regulatory standards for on-reservation and off-reservation acquisitions. For on-reservation acquisitions by a tribe, the Secretary must consider the need for the land, the purposes for which it will be used, the impact on the state and its subdivisions of removing the land from the tax rolls, jurisdictional issues and conflicts of land use that may arise, and whether the BIA is equipped to discharge the responsibilities associated with placing land in trust status.

For off-reservation acquisitions, additional criteria apply, and the farther the land from the reservation, the greater scrutiny the Secretary will give to the tribe's justification of anticipated benefits from the acquisition. When off-reservation land is acquired for business purposes, the tribe is required to provide a plan specifying the anticipated economic benefits of the proposed use.

In both on-and off-reservation acquisitions, the applicant is also required to provide sufficient information to comply with applicable environmental laws. State and local governments with jurisdiction over the land are provided notice of the proposed trust acquisition and given at least 30 days to comment on the proposal.

If a final agency determination to accept the land in trust is made, the BIA must publish notice of the final agency determination and indicate that the acquisition may take place as soon as 30 days following publication of the notice.

**What will it mean if tribally owned lands in Alaska are taken into trust?** The Supreme Court in *Oklahoma Tax Commission v. Citizen Band of Potawatomi Indian Tribe*, 498 U.S. 505,

511 (1991), held that land held in trust for an Indian tribe is Indian country, and the equivalent of a reservation even though not formally designated as such. If the decision in the *Akiachak* case is affirmed on appeal, Tribes in Alaska will be able to request that the Secretary take land into trust, and if granted, tribes' ability to regulate alcohol, respond to domestic violence, and generally protect the health, safety, and welfare of tribal members will be enhanced.

Trust status offers a number of benefits that are not available through other avenues. Tribes and tribal member activities on trust lands are generally beyond the reach of all state and local taxes. The lands, whether developed, leased (with the consent of the Secretary of Interior) or not developed or leased, would be entitled to all the protections of the ANCSA land bank, plus more, including protection from exercise of eminent domain, special review under environmental laws, and additional agency support. A trust land base is also often a significant factor in determining the amount of federal program funds are allocated to a tribe.

But with those added benefits comes additional oversight by the federal government, restrictions on alienation (which protects the land in perpetuity, but also limits flexibility in business dealings if a mortgage or sale of the land is desired), jurisdictional patchwork, and limitations on oil and gas leasing without Secretarial approval. The 2005 Energy Development Act allows tribes to remove the secretarial role in energy related lease and development approval, but only after undergoing an initial approval process. And, under the Indian Gaming Regulatory Act (IGRA), trust status may open the door for the tribes that obtain trust lands to conduct gaming on those lands. That is a difficult question, however, since off-reservation trust lands acquired after 1988 may only be used for gaming if the Secretary of the Interior finds that gaming would be in the best interest of the tribe, and not detrimental to the surrounding community. After that, gaming may occur only if the Governor of the State concurs in the Secretary's findings.

Because of P.L. 280, the State of Alaska would retain criminal jurisdiction over crimes on trust lands, and state courts would be open to resolve private civil disputes that arise within Indian country. Tribal trust lands, along with the people and activities on them are generally subject to tribal civil and criminal jurisdiction. This could include tribal regulation of fish and game resources, although since legal title would be in the United States, the trust lands could be covered by Title VIII's subsistence priority, which applies to all lands, waters and interests therein, title to which is held by the United States. Tribes would not have criminal jurisdiction over non-Natives.

Tribal courts could decide all matters involving members within the tribe's Indian country and involving members of the tribe. Also, Indian tribes may not be sued without their consent, but this is already the case and does not depend on the existence of Indian country. It needs to be understood that the issues involved in taking land into trust present extremely complicated legal situations.

**Should ANCSA lands become expressly eligible to be taken into trust?** Congress enacted ANCSA in 1971, in order to settle Alaska Native land claims and to create an entirely different regime for ownership and management of Alaska Native lands. Prior to 1971, six Indian reservations were created under the IRA, and a total of 23 Indian reservations existed in Alaska

under various statutes and Executive Orders, with the land held in trust for Alaska tribes under a similar system to the lower 48 states.

With the passage of ANCSA, Congress abolished the reservation system in Alaska, and created a system of lands held by Native corporations. Section 2 set forth Congressional findings describing the policy goals Congress was intending to establish through ANCSA:

[T]he settlement should be accomplished rapidly, with certainty, in conformity with the real economic and social needs of Natives . . . without creating a reservation system or lengthy wardship or trusteeship, and without adding to the categories of property and institutions enjoying special tax privileges . . .

Section 19 of ANCSA revoked the trust status of all 23 of the reservations that had been established in Alaska between 1891 and 1943, except for the Metlakatla Reservation. Section 19 allowed village corporations on the former reservations to select the surface and subsurface estate of their former reservation lands and forego all other ANCSA benefits in settlement of their land claims. Four large reservations took advantage of this provision, with a combined total land claims of nearly 4 million acres.<sup>3</sup> ANCSA did not repeal any portion of the IRA, or any portion of the 1936 Alaska amendments.

The surface estate of core traditional lands of the Native Villages (approximately 22 million acres) were patented in fee, not to tribal entities, but to newly created Village Corporations incorporated under state law. The twelve regional corporations located in Alaska generally received conveyance to the subsurface estate of all lands conveyed to the village corporations. The remaining acres of settlement lands were patented in fee to the 12 Regional Alaska Native Corporations.

Given its purpose, many, including the State of Alaska believe that ANCSA lands should not become eligible to go into trust. As discussed below, the State has urged Congress to totally ban any lands in Alaska from being taken into trust under Section 5 of the IRA. Yet, it is estimated that over 100 million acres of land are owned in fee by Alaska's tribes. These lands do not have any special protections from taxation or from potential loss through involuntary conveyances, bankruptcy, or eminent domain. Allowing lands to be taken into trust would provide protection against such loss. If Congress takes up this issue there should be hearings and more thoughtful consideration given to the future land needs in Alaska.

Indeed, as NCAI has suggested, Congress, in consultation with Alaska Natives, should consider whether the policy goals underlying ANCSA – to promote Native Alaskan self-determination through abolishment of the reservation system – have actually been met. Alaska Natives

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<sup>3</sup> The four reservations and associated villages were: St. Lawrence Island (Gambell and Savoonga), Elim (Elim), Chandalar (Venetie and Arctic Village), and Tetlin (Telin). Klukwan (Chilkat Indian Village was a fifth, much smaller reserve (800 acres). In 1976 Congress amended ANCSA to allow the village corporation (Klukwan, Inc.) to select a township under ANCSA if it conveyed the lands of the former reserve in fee to the Chilkat Indian Village tribal government.

continue to struggle with extraordinarily high rates of unemployment, alcohol and drug abuse, lack of basic law enforcement, racial discrimination, and a host of other economic and social problems. In light of that, many in Alaska believe the premises of ANCSA need to be revisited and Congress should return some measure of local control back to Alaska's Tribal Governments.

**It is incorrect to state that the Native community prior to ANCSA was categorically opposed to trust lands in Alaska.** While the district court pointed to the Native Community's distrust of the BIA and a reservation system, it is important to recall that Governor Hickel's 1968 task force on Native land claims did include possible trust status for land as an option. The Alaska Native Claims Task Force, chaired by State Representative Willie Hensley, and composed of Native leaders, state government leaders, and representative of the Department of the Interior, recommended a three-pronged settlement that included 40 million acres of land, money and continued use of traditional lands for hunting, fishing and gathering activities. Task Force Chairman Willie Hensley presented its findings to Congress in 1968.

I am submitting for the record a copy of a report by the Governor's Task Force on Native Land Claims. This report was drafted following lengthy work sessions by a tripartite group consisting of the natives of Alaska, the State, and Interior Department officials. We attempted to seek a solution acceptable to the major parties concerned in the settlement of the Alaska land issue.

This is my first appearance before this subcommittee, and I doubt that this committee has ever before considered legislation concerning the land claims of the Alaska Eskimos, Indians, and Aleuts on a statewide basis. You have undoubtedly seen and heard many delegations of Indian tribal groups from the lower 48, but we want to make clear that the situation with Alaska natives is quite unlike that of recognized tribal entities you are accustomed to dealing with.

1. Alaska natives are not recognized as a single tribe by Congress or the Interior Department.
2. We have only recently organized regional associations and a statewide federation. These associations grew as a result of the land issue and a desire by the native people to improve their economic and social condition, but these organizations are not recognized in law.
3. Only a very small percentage of Alaska's natives reside on few reservations.
4. The major Alaska native groups, the Eskimo, Indian, and Aleut, are culturally and linguistically distinct.

But we all basically agree on the major objectives in the land settlement.<sup>4</sup>

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<sup>4</sup> *Alaska Native Land Claims: Hearing on H.R. 11213, H.R. 15049 and H.R. 17129 Before the Subcomm. On Indian Affairs of the H. Comm. On Interior and Insular Affairs, 90th Cong. 117 (1968) (statement of Hon. Willie Hensley, a Representative in the Alaska Legislature from the 17th District, Kotzebue, Alaska).*

The Report Representative Hensley submitted reflected an approach different in many ways from the traditional reservation model used in the contiguous 48 states, but provided the same basic elements – land, monetary compensation and protection for traditional activities. Chairman Hensley’s testimony also carried a message of self-determination in that it called for Native management of lands reserved in Native ownership, and for any federal role to be informed by Native representation.<sup>5</sup>

A REPORT OF THE GOVERNOR'S TASK FORCE ON NATIVE LAND CLAIMS  
JUNEAU, JANUARY 10-16, 1968

HON. WALTER J. HICKEL,  
*Governor of Alaska:*

Your Task Force proposes a four part settlement of the Native land claim question, consisting of-

- (a) A grant of 40 million acres of land in fee, *or in trust*, to village groups (compared to the 102.5 million acres given the state of Alaska under the Statehood Act, or the much larger area encompassed in the Native claims) allocated among the villages in proportion to the number of persons on their rolls.
- (b) A grant of 10% royalty interest in outer continental shelf revenues, along the lines proposed by Secretary Udall, in lieu of the right to compensation for lands reserved or disposed of to third parties, with an immediate advance payment of \$20,000,000 by the Federal Government.
- (c) A grant by the State of 5% royalty interest in state selected lands, tidelands, and submerged lands, but excluding current revenue sources from the state lands (in order to avoid direct impact on the general fund) and commencing only upon lifting the land freeze and resumption of state selection.
- (d) A terminable license to use the surface of lands under occupancy and used by Natives.<sup>6</sup>

As you can see, the option of holding land in trust was explicitly set forth in the Task Force’s recommendation.

**What are the potential impacts on sub-surface ownership and opportunities for Native development of oil, gas, and minerals?** Under Section 5 of the IRA, the Secretary can take the surface estate, or partial land interest, into trust status. It is unlikely the Secretary would take a surface estate in trust for a tribe over the objection of a subsurface owner, or without a tribal disclaimer recognizing the right of the subsurface owner to access and develop its interests.

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<sup>5</sup> *Id.* at 118 (“The task force desires a simplification of the administrative process. The powers of the Secretary of the Interior should be limited and controls over land, if necessary, be located in Alaska with native representation.”). The actual Report was backed up by draft legislation and commentary on other legislative proposals.

<sup>6</sup> *Id.* at 119 (italics added).

Further research is needed on how the Secretary has exercised his discretion under the current regulations in situations involving split estates.

When land is taken into trust by the U.S. for a tribe, legal title is held by the U.S. in trust for the tribe. Although the tribe retains beneficial interest, it does not have the authority to alienate (sell, lease, pledge, or mortgage) the land without the consent of the U.S. It does retain the right to any proceeds derived from the use of the land or from its produce (i.e., timber sales, leases, grants of rights of way, or condemnations for public purposes). If the surface estate is taken into trust, the change in legal title has several implications. Notably, in addition to the tribe, the federal government would now be involved in any process relating to rights-of-ways and the leasing and extraction associated with development of oil and gas resources in the sub-estate.

There are numerous examples where the BIA has taken surface lands into trust for Tribes while leaving the subsurface in private ownership, even in extremely complicated circumstances. *See, e.g.*, 63 Fed. Reg. 64,968 (Nov. 24, 1998), *Land Acquisition for Little River Band of Ottawa Indians of Michigan* (152.8 acres of surface lands taken into trust, subject to prior reservations of oil, gas, minerals, and related hydrocarbon interests, including the right to explore for, develop, and market the same . . .); 65 Fed. Reg. 76,275 (Dec. 6, 2000), *Land Acquisition for Paskenta Band of Nomlaki Indians of California* (the BIA acquired approximately 1898.16 acres of surface lands into trust, divided between thirty-one parcels, most of which were divided into split estates (with surface trust lands and subsurface private ownership); 72 Fed. Reg. 9773 (March 5, 2007), *Land Acquisition for Cherokee Nation of Oklahoma* (BIA acquired 3.5 acres of surface lands into trust for the tribe, “less and except minerals”; land was within the former reservation boundaries and acquired for addition parking for a gaming facility); 76 Fed. Reg. 42,723 (July 19, 2011), *Land Acquisition for Osage Nation of Oklahoma* (BIA acquired 7.5 acres of surface lands located within the former reservation boundaries into trust, noting that the trust acquisition applied only to the surface lands; 77 Fed. Reg. 31,871 (May 30, 2012), *Land Acquisition for Ione Band of Miwok Indians of California*) (BIA acquired 228.04 acres of surface lands into trust where lands were subject to complicated split estates).

Until a regulatory process is adopted for taking lands into trust in Alaska, it is difficult to determine how the Secretary would approach a request to take land into trust in Alaska in cases involving split-estates. However, as indicated above, there is precedent for doing so even where subsurface ownership is complicated (i.e., mineral interest is subject to a life estate, a joint tenancy, or a fractionalized interest (in one case, a fraction interest of 840/1160)).

**Congress’s efforts to amend the IRA, 25 U.S.C. § 465, to reaffirm the authority of the Secretary to take land into trust in light of the Supreme Court’s decision In *Carcieri v. Kempthorne*, 129 S. Ct. 1058 (2009).** The *Carcieri* case concerned the scope of the Secretary’s authority to accept land into trust for the benefit of an Indian tribe under the IRA of 1934, as amended. 25 U.S.C. § 461 et seq. The US Supreme Court in 2009, held that the Secretary did not have the authority to take land into trust under the IRA for the Narragansett Indian Tribe because the Tribe was not “under federal jurisdiction” in 1934 when the IRA was enacted.

The Secretary’s authority to take lands into trust for the benefit of Alaska Natives is not governed by the language interpreted by the Supreme Court in *Carcieri*. In that case, the Court

interpreted the “now under federal jurisdiction” language of the 1934 IRA, whereas the corresponding question in Alaska is governed by the 1936 IRA Amendment. In fact, the Supreme Court’s opinion in footnote 6 used the language of the 1936 Alaska IRA Amendment as an example of how Congress would have or should have worded a statute had it intended the Secretary to have authority to take land into trust for tribes that were not under federal supervision as of 1934.

Numerous bills have been introduced in Congress to amend the IRA in response to the *Carcieri* decision. The general goal of these bills is to confirm the validity of prior trust land acquisitions, and confirm the Secretary’s authority to acquire lands in the future for all Indian tribes, regardless of when their federal recognition occurred.

In spite of the fact that the *Carcieri* decision had no impact in Alaska, the State Attorney General has requested that language be added to any legislative fix that would expressly exclude Alaska Natives from section 5 of the IRA. He argues that the amendments to the IRA proposed in H.R. 279 and H.R. 666, the current bills being considered by the House Committee on Natural Resources to fix the *Carcieri* decision, would somehow unravel ANCSA. In the last Congress, Congressman Young agreed to the State’s request and excluded Alaska from Section 5 of the IRA.

The Court in *Akiachak* rejected the State’s argument that allowing the Secretary to take land into trust in Alaska would be inconsistent with ANCSA. Given the *Akiachak* decision, the Congress should be reluctant to take that victory away by categorically excluding Alaska from the provisions of Section 5 of the IRA. Alaska Natives, their ANCSA corporations and their Tribal Governments, as well as the State of Alaska will all be given an important opportunity to shape future regulations and policies concerning the acquisition of lands into trust in Alaska through the regulatory process that will ensue as a result of the *Akiachak* decision.



February 4, 2013

**Officers**  
**Chair**  
Judith L. Lichtman  
National Partnership for Women  
& Families  
**Secretary**  
Barry Rand  
AARP  
**Treasurer**  
Lee A. Saunders  
American Federation of State,  
County & Municipal Employees

**Executive Committee**  
Debo P. Adegbile  
NAACP Legal Defense and  
Educational Fund, Inc.  
Barbara Arnwine  
Lawyers' Committee for  
Civil Rights Under Law  
Arlene Holt Baker  
AFL-CIO  
Warren David  
American-Arab  
Anti-Discrimination Committee  
Marcia D. Greenberger  
National Women's Law Center  
Chad Griffin  
Human Rights Campaign  
Linda D. Hallman  
American Association of  
University Women  
Mary Kay Henry  
Service Employees International Union  
Benjamin Jealous  
NAACP  
Michael B. Keegan  
People for the American Way  
Bob King  
International Union, United  
Automobile Workers of America  
Elisabeth MacNamara  
League of Women Voters of the  
United States  
Marc Morial  
National Urban League  
Mee Moua  
Asian American Justice Center  
Janet Murguia  
National Council of La Raza  
Debra Ness  
National Partnership for  
Women & Families  
Priscilla Ouchida  
Japanese American Citizens League  
Terry O'Neill  
National Organization for Women  
Jacqueline Johnson Pata  
National Congress of American Indians  
Mark Perriello  
American Association of  
People with Disabilities  
Dennis Van Roekel  
National Education Association  
Anthony Romero  
American Civil Liberties Union  
David Saperstein  
Religious Action Center  
of Reform Judaism  
Shanna Smith  
National Fair Housing Alliance  
Thomas A. Saenz  
Mexican American Legal  
Defense & Educational Fund  
Randi Weingarten  
American Federation of  
Teachers AFL-CIO

**Interim Compliance/Enforcement  
Committee Chair**  
Karen K. Narasaki  
**President & CEO**  
Wade J. Henderson  
**Executive Vice President & COO**  
Karen McGill Lawson

**VOTE YES on S. 47**  
**Support S.47, the “Violence Against Women Reauthorization Act of 2013,”**  
**and Oppose All Amendments**

Dear Senator:

On behalf of The Leadership Conference on Civil and Human Rights, a coalition charged by its diverse membership of more than 210 national organizations to promote and protect the civil and human rights of all persons in the United States, we urge you to support S.47, the Violence Against Women Reauthorization Act of 2013 (VAWA), and to vote against any amendments that would weaken this important legislation, including any amendments to impose mandatory minimum sentences for aggravated sexual abuse.

The Leadership Conference believes that the reauthorization of VAWA is critical for protecting the civil and human rights of American women to be free from domestic violence. These protections are especially important for women of color and Native American women, who experience the highest rates of domestic violence and sexual assault. Further, it is essential that these protections be extended to all instances of intimate partner violence, including for gay, lesbian, bisexual and transgender people. In short, S. 47 would strengthen our nation's ability to prosecute perpetrators of violence and provide protections to all victims.

While domestic violence, dating violence, sexual assault, and stalking occur in all parts of the nation and affect people of all backgrounds, according to the Centers for Disease Control and Prevention, these forms of violence and harassment disproportionately affect the communities represented by The Leadership Conference. For example, 37 percent of Hispanic women are victims; 43 percent of African-American women and 38 percent of African-American men are victims; and a staggering 46 percent of American Indian or Alaska Native women and 45 percent of American Indian or Alaska Native men experience intimate-partner victimization.<sup>1</sup>

VAWA-funded programs have dramatically improved the national response to domestic violence, dating violence, sexual assault, and stalking. The annual incidence of domestic violence has decreased by more than 53 percent since VAWA became law in 1994 and reporting by victims has also increased by 51 percent. Not

<sup>1</sup> [http://www.cdc.gov/ViolencePrevention/pdf/NISVS\\_Report2010-a.pdf](http://www.cdc.gov/ViolencePrevention/pdf/NISVS_Report2010-a.pdf)

only do these comprehensive programs save lives, they also save money. In its first six years, VAWA saved \$12.6 billion in net averted social costs.

Yet, as law enforcement officers, service providers, and health care professionals have acknowledged, even with the successes of the current VAWA programs, there are significant gaps in current VAWA programs which, if addressed, could have a significant impact on diminishing the incidences of domestic violence in the United States. S.47 helps address these concerns by strengthening services for minority communities and expanding protections for underserved communities to include lesbian, gay, bisexual and transgender people. Further, S.47 addresses the crisis of violence against women in tribal communities by strengthening legal protections for Native victims of domestic violence and sexual assault. S.47 also includes important improvements to VAWA protections for immigrant victims. In addition, the bill provides new tools and training to prevent domestic violence homicides.

VAWA has provided for a coordinated approach, improving collaboration between law enforcement and victim services providers and supporting community-based responses and direct services for victims. As a result, victims' needs have been better met, perpetrators have been held accountable, communities have become safer, and progress has been made toward breaking the cycle and culture of violence within families. Without question, VAWA reauthorization is the key to ensuring that victims and survivors of violence have continued access to these critical services.

We look forward to working with you to swiftly adopt, without any weakening amendments S.47, the Violence Against Women Reauthorization Act, and continue a strong federal response to domestic violence, dating violence, sexual assault, and stalking. If you have any questions, please feel free to contact June Zeitlin at 202-263-2852 or [zeitlin@civilrights.org](mailto:zeitlin@civilrights.org).

9to5

AFL-CIO

AIDS United

Alaska Federation of Natives

American Association of People with Disabilities (AAPD)

American Association of University Women (AAUW)

American Federation of Government Employees, AFL-CIO

American Federation of State, County and Municipal Employees (AFSCME), AFL-CIO

American Federation of Teachers, AFL-CIO

American-Arab Anti-Discrimination Committee (ADC)

Anti-Defamation League

Asian American Justice Center, Member of Asian American Center for Advancing Justice

Asian Pacific American Labor Alliance

Asian Pacific American Legal Center, a member of the Asian American Center for Advancing Justice

Association of Flight Attendants - CWA

Association of Jewish Family & Children's Agencies  
Center for Women's Global Leadership  
Center for Women Policy Studies  
CenterLink: The Community of LGBT Centers  
Coalition on Human Needs  
Communications Workers of America  
Disability Rights Education and Defense Fund (DREDF)  
Disciples Home Missions & Family and Children's Ministries of the Christian Church (Disciples  
of Christ)  
Family Equality Council  
Friends Committee on National Legislation  
Gay, Lesbian & Straight Education Network (GLSEN)  
GetEQUAL  
GlobalSolutions.org  
Hip Hop Caucus  
Human Rights Campaign  
Institute for Science and Human Values, Inc.  
International Center for Research on Women  
Jewish Council for Public Affairs  
Jewish Women International  
LatinoJustice PRLDEF  
The Leadership Conference on Civil and Human Rights  
League of United Latin American Citizens (LULAC)  
Log Cabin Republicans  
Maryknoll Sisters  
NAACP  
National Association of Human Rights Workers (NAHRW)  
National Association of Social Workers  
National Bar Association  
National Black Justice Coalition  
National Center for Lesbian Rights  
National Center for Transgender Equality  
National Coalition for Asian Pacific American Community Development  
National Community Reinvestment Coalition  
National Congress of American Indians  
National Council of Jewish Women (NCJW)  
National Council on Independent Living  
National Education Association  
National Employment Law Project  
National Fair Housing Alliance  
National Gay and Lesbian Task Force Action Fund  
National Health Law Program  
National Immigration Law Center  
National Latina Institute for Reproductive Health

National Law Center on Homelessness & Poverty  
National Legal Aid and Defender Association  
National Low Income Housing Coalition  
National Partnership for Women & Families  
National Urban League  
National Women's Law Center  
People For the American Way  
Planned Parenthood Federation of America  
Presbyterian Church (U.S.A.)  
Refugee Women's Network  
Sealaska Heritage Institute  
The Sentencing Project  
Southern Poverty Law Center  
Transgender Law Center  
Union for Reform Judaism  
United Church of Christ, Justice and Witness Ministries  
United Food and Commercial Workers International Union (UFCW)  
US National Committee for UN Women  
Women of Reform Judaism  
Women's Environment and Development Organization (WEDO)  
Women's International League for Peace and Freedom, U.S. Section  
The Woodhull Sexual Freedom Alliance

## **Impacts of the Violence Against Women Act of 2013 in Alaska**

**Background:** Alaska is home to 229 federally recognized tribes, representing 45% of the tribes in the United States. Although Alaska Natives comprise only 15.2% of the population of the State of Alaska, they comprise 47% of the victims of domestic violence and 61% of the victims of sexual assault. *See UAA Justice Center Report to the Council on Domestic Violence and Sexual Assault (May 13, 2010).* Regional studies revealed that native women in the Ahtna region are 3 times more likely to experience domestic violence than other women in the U.S., and 8-12 times more likely to experience physical assault. *See Intimate Partner Violence Against Ahtna Women (August 2006).* The statistics are even higher among Athabascan women, 64% of whom reported that they had experienced domestic violence. *See Intimate Partner Violence Against Athabascan Women Residing in Interior Alaska (November 2006).* Approximately half of the perpetrators in these situations were non-Natives.

Alaska Native villages also suffer from disproportionately high rates of illicit drug use, alcohol abuse and suicide. The suicide rate in these villages is 6 times the national average, and the alcohol-related mortality rate is 3.5 times that of the general national population. According to the 2006 Initial Report and Recommendations of the Alaska Rural Justice and Law Enforcement Commission, more than 95% of all crimes committed in rural Alaska can be attributed to alcohol.

The State of Alaska's public safety system does not effectively serve vast areas of the State, in which many remote Alaska Native villages are located, except in response to serious crimes involving severe injury or death, which are handled by Alaska State Troopers who are located in only a small number of hub communities around the State. The vast majority of Alaska Native communities have no formal state law enforcement presence. As of 2011, there were Village Public Safety Officers (VPSOs) in only 74 rural communities, and Village or Tribal Police Officers (VPOs and TPSs), which are supervised by the Tribes and not the State, in 52 communities. The remaining 91 rural communities have no law enforcement presence at all.

The VPSO program is not able to adequately serve all remote Alaska Native villages because there is insufficient funding or officers to address the urgent need for additional law enforcement in these villages. Studies have concluded that the lack of effective law enforcement in Alaska Native Village contributes significantly to increased crime, alcohol abuse, drug abuse, domestic violence, and rates of suicide.

### **Violence Against Women Act of 2013**

Alaska Natives will benefit from many of the grant programs reauthorized or created through amendments to the VAWA, including the following:

- Title I of the VAWA amends the Omnibus Crime Control and Safe Streets Act of 1968 to authorize appropriators for FY200014-2018 for grants to combat violent crime against women (STOP grants), and expands what grants can be used for, to include training of law enforcement officers including for VPSOs.
- Title II improves services for victims of domestic violence through grants to assist tribes and states to retain and expand rape crisis centers and other programs to help victims of sexual assault, including elder abuse, sexual assault and to provide training to law enforcement agencies to better serve the elderly.
- Title III amends the Public Health Service Act to include tribal sexual assault coalitions in the grant program for rape prevention and education; provides for grants to enhance the safety of youth and children who are victims of or exposed to domestic violence.
- Title V amends the Public Health Service Act to revise and consolidate grant programs that address domestic violence, sexual assault, and stalking by developing or enhancing and

implementing interdisciplinary training for health professionals, education programs and comprehensive statewide strategies to improve the response of clinics, public health facilities, hospitals and other health settings to domestic violence and sexual assault. It also revises a number of the grant programs and requirements.

- Title VI amends VAWA with respect to housing rights of victims of domestic violence and includes grants for transitional housing assistance grants and support services
- Title IX, Safety for Indian Women, amends the Omnibus Crime Control and Safe Streets Act of 1968 to include sex trafficking as a target of the grants to Indian tribal governments; Section 902 allows tribal coalition grants to be used to develop and promote state, local and tribal legislation and policies that enhance best practices for responding to violent crimes against Indian women; Section 903 requires the Secretaries of Interior, HHS and the Attorney General to participate in consultations with Indian tribes regarding the administration of tribal funds and programs, enhancement of Indian women's safety, and federal response to violent crimes against Indian women. Section 907 requires that Alaska Native Villages be included in the National Institute of Justice study of violence against Indian women, and Section 909 directs the Attorney General to report to Congress on whether the Alaska Rural Justice and Law Enforcement Commission should be continued..

However, in spite of appalling statistics showing that Alaska Native women are vastly overrepresented among the victims of domestic violence, Alaska's tribes were excluded from the important tribal jurisdiction amendments to the VAWA contained in Sections 904 and 905 of the Act.

**Section 910** of the Act excludes Alaska's tribes (with the exception of Metlakatla Indian Community, Annette Island Reserve) from the amendments made to the Act by sections 904 and 905 of the VAWA,

**Section 904** amends the Indian Civil Rights Act of 1968 to provide special domestic violence *criminal* jurisdiction to participating tribes in Indian country that elect to exercise such jurisdiction. It "recognizes and affirms" domestic violence jurisdiction over non-Indians who (1) reside in the Indian country of the tribe; (2) are employed in the Indian country of the tribe; OR (3) are the "spouse, intimate partner, or dating partner" of a tribal member. The third option does not require that the perpetrator live or be employed in Indian country.

**Section 905** amends current law (18 U.S.C. § 2265(e) which addresses tribal court *civil* jurisdiction to issue and enforce protective orders), to clarify that a tribe's jurisdiction to issue protective orders applies to "any person" in matters of domestic violence occurring anywhere in the Indian country of the tribe OR "otherwise within the authority of the Indian tribe." Alaska's tribes have utilized their inherent authority over domestic relations that impact the health and safety of their tribal members to issue protective orders in cases of domestic violence. The most common exercise of this power has been to issue a protective order directing the perpetrator to stay away from his victim. Under the VAWA these protective orders are entitled to full faith and credit in the state courts or in other tribal courts.

Under the amendments to this section Alaska's tribes would have had the unquestioned ability to issue *civil* protective orders against "any person" and also would have had the ability to arrest or detain *any* perpetrator, whether Native or non-Native. However, Section 910(a) excluded tribes in Alaska (other than Metlakatla) from the amendments made by Section 905. While Section 910(b), entitled "Retained Jurisdiction" was intended to ensure that Tribes in Alaska retain their *existing authority* to issue and enforce civil protection orders, that language is vague and may call into question what the tribe's "existing authority" was under the previous provisions of the law. Prior to the amendments to Section 905, Tribes in Alaska were issuing protective orders against non-members and non-Natives who threatened the health and safety of their tribal members. The lack of clarity in the savings clause and the changes to Section 905 could result in a court challenge to a tribe's inherent authority to issue a *civil*

domestic violence protection order against a non-member or non-Native who is harming or threatening to harm a tribal member.

### **Tribal Jurisdiction in Alaska**

The civil jurisdiction of tribes in Alaska over its members and territory is defined by two cases: The United States Supreme Court's 1998 decision in *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998) and the Alaska Supreme Court's 1999 decision in *John v. Baker*, 982 P.2d. 738 (Alaska 1999). In *Venetie*, the Supreme Court held that ANCSA lands do not constitute Indian country. The effect is that while Alaska tribes exist as governments, after ANCSA they have no "territorial reach" absent the existence of Indian country. Indian country is defined to mean (a) reservations (b) dependent Indian communities, and (c) allotments. Today, the only land in Alaska that may qualify as "Indian country" are Native allotments or other trust or restricted lands set aside under federal superintendence such as some townsites.

As a matter of federal Indian common law, territory and membership are considered separate sources of tribal authority. In *John v. Baker I*, the Alaska Supreme Court addressed jurisdiction based on membership in a child custody dispute between two Alaska Native parents, neither of whom lived within "Indian country," but whose children were members or eligible to be members of an Alaska Native tribe. The court affirmed the subject matter jurisdiction of the tribal court, finding that "Tribes not only enjoy the authority to exercise control within the boundaries of their lands, but they also possess the inherent "power of regulation their internal and social relations." *Id.* at 754-755 (citing to *U.S. v. Mazurie*, 419 U.S. 544, 557 (1975).

Tribes in Alaska can also exercise federally delegated criminal and civil authority. The Indian liquor laws are perhaps the most prominent example of this sort of delegated authority. Under these statutes, Indian tribes have concurrent authority with states to regulate the introduction of liquor into Indian country even through the tribes supposedly did not exercise such authority traditionally. This authority has been delegated to villages in Alaska. See *Liquor Ordinance, Village of Allakaket, Alaska*, Op. Assoc. Sol. Ind. Aff. (October 1, 1980). Under this authority, the Interior Department published three Alaska village ordinances exercising federally delegated authority to control the introduction of liquor into the Villages of Chalkyitsik, Northway, and Minto. Other statutes, including the Indian Child Welfare Act (ICWA).

Over one hundred tribal courts and councils are actively resolving disputes in Native communities in Alaska. These courts are critical not only to tribal issues, but also to dispute resolution and administration of justice in rural Alaska generally, because the great majority of Native communities lack a resident magistrate or other state court judicial officer. Unfortunately, without "territorial reach", tribes in Alaska are unable to raise governmental revenue through the traditional means of taxation. Without this ability to secure stable funding for their justice systems, the operations of tribal courts in Alaska are severely hampered by inadequate funding and resources. These limitations are exacerbated by the lack of a formal working relationship with the State.

### **Steps that should be taken to Ensure Protection of Alaska Native Women**

The bottom line is that Alaska Natives did not benefit significantly from the Violence Against Women Act amendments – and may have even been harmed -- despite the worse statistics in the country on assault and violence against Native women. The only provisions included in the bill that specifically address the situation in Alaska are (1) the inclusion of Alaska Native villages in a baseline study of domestic violence (2) a provision that would evaluate the merits of restarting the Alaska Rural Justice and Law Enforcement Commission; (3) federal dollars that would go the State of Alaska for additional VPSOs; and (4) provisions to maintain the *status quo* in Alaska in terms of tribal civil jurisdiction to issue

protective orders (although as discussed earlier, there is uncertainty over whether the language used will actually maintain the status quo). Obviously, more concrete measures are needed to address domestic violence in Alaska's rural Native communities.

First, instead of giving the State of Alaska more money for the VPSO program, that funding should be provided directly to the Regional Native non-profit tribal consortia that currently administer the VPSO Program for the State. These organizations currently do not receive full reimbursement for administering the program and are thus limited in the other services they can provide to the victims of domestic violence and sexual assault. The State has basically relied on federal funding to address the issue of rural justice and law enforcement, even though that is a state responsibility. The State should be held accountable for the protection of all its citizens, and Alaska's tribes and Native nonprofits should be provided with more funding and resources to address the problem locally. Law enforcement that is created and administered by Alaska's tribes will be more responsive to the need for greater local control, local responsibility and local accountability in the administration of justice.

Second, more funding needs to be provided to Alaska's tribes under the Indian Tribal Justice Act, which was enacted in an effort to strengthen and enhance tribal justice systems. That Act specifically includes Alaska Native tribes that administer justice under their inherent authority, 25 USC § 3602(3). The Office of Tribal Justice Support should provide more funds and technical assistance to tribes in Alaska for the development, enhancement and continuing operation of tribal justice systems.

Finally, the Administration needs to work with the Alaska congressional delegation to have legislation introduced that will supplement state jurisdiction in Alaska's Native villages with federal and tribal resources. Senator Begich introduced S. 1192, the Alaska Safe Families and Villages Act, in 2011. That bill would have authorized and funded a pilot project authorizing a select number of Alaska's tribes to enforce their civil ordinances dealing with domestic violence, assault and child abuse, as well as with possession and importation of alcohol and illegal drugs. To participate, a tribe would have had to demonstrate to the Attorney General sufficient governance capacity, as evidenced by the history of the tribe in operating government services. Once certified, the participating tribe would exercise jurisdiction, concurrent with the State over (a) drug, alcohol, or related matters within the project area of the Indian tribe; and (b) over Indian or Alaska Natives or *other persons with consensual relationships with the Indian tribe or a member of the tribe*. Because of objections from the State of Alaska, agreement could not be reached to include the provisions of the Alaska Safe Families and Villages Act in the VAWA of 2013, nor was he able to move the bill in the Senate. However, Senator Begich has indicated a continued interest in moving forward with legislation that would enhance tribal jurisdiction in Alaska. We urge the Department to assist in that effort.

Tribal courts in Alaska need to be armed with the ability to stop violence in the early stages. They are an essential partner for state law enforcement. Improving law enforcement in the villages and empowering Alaska's tribes to address these issue is absolutely necessary to fill the gap in local authority and ensure domestic safety for Native women in Alaska. This fact was readily recognized by Alaska Supreme Court Chief Justice Dana Fabe, in her recent address on the "State of the Judiciary" to the Alaska Legislature. In focusing on rural justice and the need to more effectively serve rural villages, Justice Fabe noted:

... for courts to effectively serve the needs of rural residents, justice cannot be something delivered in a far-off court by strangers, but something in which local people – those most intimately affected – can be directly and meaningfully involved.

Justice Fabe noted the growing role that tribal courts are playing in improving access to justice in remote villages, and the need to weave a more clear role for tribal courts into the overall fabric of Alaska's judicial system in order to be responsive to the needs and concerns of Alaska Natives.

Tribal courts bring not only local knowledge, cultural sensitivity and expertise to the table, but also valuable resources, experience and a high level of local trust. They exist in at least half the villages of our state and stand ready, willing, and able to take part in local justice delivery.

Congress should exercise its plenary authority over Indian affairs and enact federal legislation that will expand Alaska tribes' jurisdiction over domestic violence and other violence fueled by alcohol and substance abuse, in order to ensure Native villages have the tools they need to protect their citizens from domestic violence, assault and other crimes fueled by alcohol and drug abuse.

In The  
**Supreme Court of the United States**

—◆—  
SHELBY COUNTY, ALABAMA,

*Petitioner,*

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL, *et al.*,

*Respondents.*

—◆—  
**On Writ Of Certiorari To The  
United States Court Of Appeals  
For The District Of Columbia Circuit**

—◆—  
**AMICI CURIAE BRIEF OF THE  
ALASKA FEDERATION OF NATIVES,  
ALASKA NATIVE VOTERS AND TRIBES  
IN SUPPORT OF RESPONDENTS**

—◆—  
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**QUESTION PRESENTED**

Whether Congress' decision in 2006 to reauthorize Section 5 of the Voting Rights Act (VRA) under the pre-existing coverage formula of Section 4(b) of the Voting Rights Act exceeded its authority under the Fourteenth and Fifteenth Amendments and thus violated the Tenth Amendment and Article IV of the United States Constitution.

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**STATEMENT OF INTEREST<sup>1</sup>**

The Alaska Federation of Natives (AFN) is the largest statewide Native organization in Alaska. Its membership includes 178 villages (both federally-recognized tribes and village corporations), 13 regional Native corporations, and 12 regional nonprofit and tribal consortiums. AFN's mission is to enhance and promote the cultural, economic, and political voice of Alaska Natives, including advocacy in election laws and voting. Its membership includes numerous tribes and villages covered by Sections 4(b), 5, and 203 of the VRA, which have a direct interest in this case's outcome.

Emmonak Tribal Council, Kasigluk Traditional Council, Levelock Village Council, Togiak Traditional Council, Willie Kasayulie, Anna Nick, Vicki Otte, and Mike Williams are Applicants for Intervention in Alaska's recent facial and as-applied challenge to Section 5 in the District Court for the District of Columbia, *Alaska v. Holder*, case no. 1:12-cv-001376 (RLW), which has been stayed pending this case. All Applicants are registered voters or, in the case of the

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<sup>1</sup> All parties have consented to the filing of this brief, as provided by Rule 37.3(a). Letters of consent have been filed with the Clerk of the Court. No counsel for a party authored the brief in whole or in part and no such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than amici curiae, its members, or its counsel, made a monetary contribution to its preparation or submission.

tribes, represent registered voters in Alaska who are impacted by the State's failure to comply with the VRA and have a direct interest in the outcome in this case.



## SUMMARY OF ARGUMENT

Amici submit this brief for two reasons: (1) to correct Petitioner's misrepresentations about Alaska in support of its argument that the coverage formula is inappropriate, and (2) to respond to Alaska's amicus brief that falsely claims it has no history of voting discrimination and thus Section 5 is not a congruent and proportional response. Indeed, even the Court of Appeals seemed unaware of Alaska's substantial record of discrimination. Thus, Amici—who are or have been parties in voting rights cases against the State of Alaska—correct the record here. The unvarnished truth is that Alaska is a textbook case for why the coverage formula remains valid and Section 5 remains a necessary response to widespread educational and voting discrimination against Alaska Native citizens.

Amici make five points. First, a facial challenge to Section 4(b) is contrary to the longstanding principle of judicial restraint. Such a challenge is also inappropriate in light of this Court's recent holding in *Northwest Austin Mun. Util. Dist. No. One (NAMUDNO) v. Holder*, 557 U.S. 193, 203 (2009), that Section 4(b) must be assessed with reference to a

covered jurisdiction's own unique record of discrimination.

Second, Alaska was not accidentally "swept in" to Section 5 but became covered because of its long history of educational discrimination, resulting in a legacy in which thousands of Alaska Natives cannot understand college-level English used on ballots and voting information. The gulf between statewide turnout and Native turnout has barely narrowed since 1975, largely because of Alaska's violations of the VRA. Today, seven years after reauthorization, Alaska Native turnout is 17 percent below the statewide average, and some places with a higher Limited English Proficiency ("LEP") population are more than 30 percent below.

Third, during reauthorization Congress had substantial evidence of *first generation* barriers to voting in Alaska, many of which persist today. Thus it is not accurate to assert, as Petitioner does, that Congress based its decision solely on second generation barriers. Indeed, most evidence about Alaska in the record demonstrated that it never complied with the mandates of the VRA, Section 203 in particular.

Fourth, although there are few objections and More Information Requests (MIRs) in Alaska's record, they have been critical in preventing retrogression and voter disenfranchisement. Therefore, Section 5 remains critically important to prevent voting discrimination against Alaska Natives.

Finally, Alaska’s amicus brief focuses on the bailout standard, which it calls “a mirage.” Bailout may be a mirage for Alaska, not because the standard is too high, but because Alaska’s discrimination is unrelenting. Violations are often ignored for years, or even decades in the case of Section 203. The broadened bailout standard adopted by this Court in *NAMUDNO* properly limits 4(b) coverage to jurisdictions that truly deserve it—jurisdictions like Alaska.

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## ARGUMENT

### **I. A Facial Challenge To Section 4(b) Is Contrary To The Principle Of Judicial Restraint And Ignores The Localized Appraisal Of Discrimination Described In *NAMUDNO*.**

The Question Presented is not limited to whether Congress acted within the scope of its broad constitutional authority in covering Petitioner under Section 4(b). Instead, it asks more generally whether Congress did so when it reauthorized “the pre-existing coverage formula of Section 4(b)” in 2006. The Question Presented thereby suggests a facial challenge to the coverage formula. Such a consideration would mark a significant departure from the Court’s reluctance to entertain facial challenges. It also would ignore the Court’s earlier admonition that a geographic trigger such as Section 4(b) must be assessed with reference to a covered jurisdiction’s own particular record of discrimination.

The Court has repeatedly emphasized that “facial challenges to legislation are generally disfavored,” *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 223 (1990), *overruled on other grounds by City of Littleton v. Z.J. Gifts D-4, LLC*, 541 U.S. 774 (2004), and are to be used “sparingly and only as a last resort.” *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). As the Chief Justice has observed, facial challenges are “contrary to the fundamental principle of judicial restraint.” *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450 (2008). “They ‘often rest on speculation,’ can lead courts unnecessarily to anticipate constitutional questions or formulate broad constitutional rules, and may prevent governmental officers from implementing laws ‘in a manner consistent with the Constitution.’” *Doe v. Reed*, 130 S.Ct. 2811, 2838 (2010) (Thomas, J., dissenting) (quoting *Washington State Grange*, 552 U.S. at 450-51). Consequently, a “facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that *no set of circumstances exists under which the Act would be valid.*” *United States v. Salerno*, 481 U.S. 739, 745 (1987) (emphasis added).

These principles apply with particular force to the Court’s present consideration of whether Section 4(b) is constitutional. When the Court last confronted the constitutionality of the reauthorized Section 5 in *NAMUDNO*, it was “keenly mindful” of its “institutional role” in determining whether to review legislation enacted by a “coequal branch of government.”

557 U.S. at 204-05. It acknowledged that the “Fifteenth Amendment empowers ‘Congress,’ not the Court, to determine in the first instance what legislation is intended to enforce it.” *Id.* at 205 (citation omitted). It found that “Congress amassed a sizable record in support of its decision to extend the preclearance requirements” including what the District Court found was “document[ed] contemporary racial discrimination in covered states.” *Id.* (citation omitted). Therefore, the Court exercised the principle of constitutional avoidance and limited itself to a construction of the VRA’s bailout provisions. *Id.* at 205-06.

*NAMUDNO* emphasized that the VRA’s “disparate geographic coverage” must be “sufficiently related to the problem that it targets.” *Id.* at 203. It is permissible to make distinctions between states if remedies are necessary for “‘local evils which have subsequently appeared.’” *Id.* (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 328-29 (1966)) (emphasis in original). That “requires a showing that a statute’s disparate geographic coverage is sufficiently related to the problem that it targets.” *NAMUDNO*, 557 U.S. at 203. Application of the preclearance requirements to one State may be “unconstitutional in another.” *Id.* Each of these points weighs heavily against a facial challenge, particularly for reauthorization of a statutory provision the Court has upheld repeatedly, *see id.* at 200 (collecting citations), and which Congress supported with a substantial record

of local discrimination including, as described herein, Alaska. *Id.* at 204.

## **II. Alaska Became Covered Under Section 4(b) Because Its Educational Discrimination Depressed Native Participation In Elections, Which Persists Today.**

Alaska did not become covered by Section 5 by chance. Nor was Alaska “swept in” to coverage despite “little or no evidence of current problems,” as the Court of Appeals stated in dictum. *Shelby Cnty., Alabama v. Holder*, 679 F.3d 848, 881 (D.C. Cir. 2012). These statements stand in marked contrast to the well-developed record of discrimination considered by Congress in amending Section 4 in 1975 and in reauthorizing it in 2006. In addition, they highlight the danger posed by the Third Branch’s consideration of a facial challenge to Section 4(b)’s coverage formula. Departing from what the Court has described as its limited “institutional role,” such categorical conclusions would substitute the Court’s judgment for that of Congress, the branch charged with enforcing the guarantees of the Fifteenth Amendment. *NAMUDNO*, 557 U.S. at 204-05. They also neglect evidence of the “*local evils*” identified by Congress in covering Alaska. *Id.* at 203 (emphasis in original). Alaska’s continuing record of educational discrimination and first generation voting barriers necessarily must limit Petitioner to an as-applied challenge.

**A. In 1975, Congress found that Alaska’s discriminatory schooling resulted in high Native limited-English proficiency and illiteracy rates and depressed political participation.**

In 1975, Congress amended the Section 4(b) coverage formula to address the “pervasive” problem of “voting discrimination against citizens of language minorities.” 42 U.S.C. § 1973b(f)(1). Coverage was extended to minority citizens “from environments in which the dominant language is other than English.” *Id.* Those citizens had “been denied equal educational opportunities by State and local governments, resulting in severe disabilities and continuing illiteracy in the English language.” *Id.* Congress found that “language minority citizens are excluded from participating in the electoral process” where elections are conducted “only in English.” *Id.* In many areas, that exclusion was “aggravated by acts of physical, economic, and political intimidation.” *Id.* Therefore, the term “test or device” in Section 4(b) was amended to be “virtually identical” to the original trigger, except it was expanded to “also mean the use of English-only election materials in jurisdictions where more than 5 percent of the voting age citizen population is comprised of members of any single language minority group.”<sup>2</sup> 121 CONG. REC. H4716 (daily ed. June 2,

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<sup>2</sup> “Language minorities” include “persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage.” 42 U.S.C. § 1973l(c)(3).

1975) (statement of Rep. Edwards); *see* 42 U.S.C. § 1973b(f)(3).

“[T]he purpose of suspending English-only and requiring bilingual elections [was] not to correct the deficiencies of prior educational inequality. It [was] to permit persons disabled by such disparities to vote now.” S. REP. NO. 94-295 at 34 (1975), *reprinted in* 1975 U.S.C.C.A.N. 774, 800. The prohibition would “fill that hiatus until genuinely equal educational opportunities are afforded language minorities” allowing them to understand election information in English. *Id.* The amendment to Section 4(b)’s formula resulted in statewide coverage in Alaska for Alaska Natives and in Arizona and Texas for persons of Spanish Heritage. Nineteen political subdivisions of six states remain covered by Section 4(b) for language minority citizens.<sup>3</sup> *See* U.S. Department of Justice, Voting Rights Act Amendments of 1975, Partial List of Determinations, 40 Fed. Reg. 49,422 (Oct. 22, 1975).

In 1975, Congress identified “substantial” evidence of discriminatory practices against Alaska Natives. S. REP. NO. 94-295 at 31, *reprinted in* 1975 U.S.C.C.A.N. at 797. That evidence came in four forms. First, Alaska Natives suffered from severe and systemic educational discrimination. The Senate

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<sup>3</sup> Originally, 24 political subdivisions were covered for language minorities. By 1978, five covered counties in two states, New Mexico and Oklahoma, bailed out. *See* JAMES THOMAS TUCKER, THE BATTLE OVER BILINGUAL BALLOTS 74-75 (2009) (hereinafter “TUCKER”).

Report described Alaska's practice of offering only non-Native children "public secondary schools in their own communities." *Id.* at 29-30, reprinted in 1975 U.S.C.C.A.N. at 795-96 (citing *Hootch v. State Operated Sch. Sys.*, case no. 72-2450 CIV (Alaska Super. Ct. 1973)); see also TUCKER, at 235-57 (summarizing Alaska's history of educational discrimination).

Alaska subsequently settled *Hootch*, making several admissions. It acknowledged the pervasiveness of a century of segregated schooling.<sup>4</sup> See Settlement Agreement at ¶¶ 9-30, *Hootch*, settled *sub nom, ex rel. Tobeluk v. Lind*, case no. 72-2450 CIV (Alaska Super. Ct. Sept. 13, 1976) ("*Hootch* Settlement"), available at [http://www.alaskool.org/native\\_ed/law/tobeluk.html](http://www.alaskool.org/native_ed/law/tobeluk.html). It was premised upon "resentment [that] grew among the relatively few whites over emphasis on education for Natives and a belief that integrated schools would give only inferior education." *Id.* at ¶ 9. In 1959, the year of statehood, only six out of 34 public secondary schools were in communities where at least half the population was Native. *Id.* at ¶ 12. By the mid-1970s, there were 2,783 secondary school-age children who lived in villages without daily access to a secondary school. Over 95 percent were Native; statewide, only 120

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<sup>4</sup> Alaska euphemistically refers to this as "long-distance schooling." Brief of Amicus Curiae the State of Alaska in Support of Petitioner Shelby County, Alabama at 28, *Shelby Cnty., Alabama v. Holder*, No. 12-96 (Jan. 2, 2013) (*hereinafter* "Alaska Amicus").

non-Native children had no access to a secondary school. *Id.* at ¶ 19. If Native children did not “wish to leave home, [were] not able to leave home, or refuse[d] to leave home to attend boarding school . . . they [were] denied secondary school education,” resulting in “a highly disproportionate number of Alaska Natives . . . not . . . attending secondary schools.” First Amended Complaint at ¶ 51, *Hootch*, case no. 72-2450 CIV (Alaska Super. Ct. Oct. 5, 1972). *Hootch* was not settled until 1976, when Alaska agreed to establish a public secondary school in all 126 Native villages that wanted one. *Hootch Settlement, Hootch*, case no. 72-2450 CIV. The schools were not completed until the mid-1980s, nearly three decades after *Brown v. Board of Education*, 347 U.S. 483 (1954).

Second, Alaska Natives suffered from illiteracy rates rivaling rates of southern Blacks. According to the 1960 Census, 38.6 percent of Alaska’s Native population age 25 years and older failed to complete the fifth grade, rendering them illiterate, higher than the rates for Black voters in Alabama, Florida, North Carolina, and Virginia. See *Extension of the Voting Rights Act of 1965: Hearings on S. 407, S. 903, S. 1297, S. 1409, and S. 1443 Before the Subcomm. on Const’l Rts. of the Senate Comm. on the Judiciary* (“1975 Senate Hearings”), 94th Cong., 1st Sess., at 664 (1975) (Ex. 23 to the statement of J. Stanley Pottinger). Conversely, only 1.2 percent of non-Natives were illiterate. *Id.* By 1970, Alaska Natives’ illiteracy rate was “approximately 36 percent,” exceeding the rate for Black voters in *every state* covered by Section 5. *Id.*

Third, the illiteracy of Natives was exacerbated by their high LEP rates. Thousands of LEP Native voters spoke over 18 languages including Central Yup'ik, Inupiaq, Siberian Yup'ik, Suypiaq, Tlingit, and Tutchone. 1975 Senate Hearings at 531 (statement of Sen. Mike Gravel). Most required an interpreter. *Id.* at 526. But lack of English proficiency or literacy was an insufficient reason to disenfranchise them, *id.*, which largely resulted from state-sponsored educational discrimination. S. REP. NO. 94-295 at 28-29, *reprinted in* 1975 U.S.C.C.A.N. at 794-95.

Fourth, Congress considered Alaska's constitutional literacy test and its impact on Native voters. The Alaska Voters' Literacy Act of 1925 was enacted to disenfranchise Natives newly granted citizenship by the federal government. *See* Indian Citizenship Act of June 2, 1924, 43 Stat. 253 (codified at 8 U.S.C. § 1401(b)). The Act achieved its purposes by requiring voters to demonstrate they were "able to read and write the English language." Stephen Haycox, *William Paul, Sr., and the Alaska Voters' Literacy Act of 1925*, 2 ALASKA HIST. 16, 17, 28-30 (Winter 1986-1987). Non-Natives later lobbied Congress to enact the law for the Territory. *See* Act of Mar. 3, 1927, c. 363, § 1, 44 Stat. 1392, 1393 (codified at 48 U.S.C. § 51) (repealed). Alaska adopted this literacy test in its state constitution, providing that applicants must "read or speak the English language" to vote. ALASKA CONST. art. V, § 1 (1959). "[M]any Alaskans, Natives and non-Natives alike" viewed the literacy test as "an

affront” with “its racist overtones.” Gordon S. Harrison, *Alaska’s Constitutional “Literacy Test” and the Question of Voting Discrimination*, 22 ALASKA HIST. 23, 30 (Spring/Fall 2007). High LEP rates among Alaska Natives made even a requirement to speak English a significant barrier to voting. 1975 Senate Hearings at 526, 531 (statement of Sen. Gravel). Senator Gravel acknowledged there was “some evidence” of discrimination because “this provision did creep into law,” which facilitated “the possibility of disenfranchising people.” *Id.* at 525-26, 529. Alaska did not repeal its constitutional literacy test until two months after Congress amended the VRA to ban all literacy tests nationwide. *See* Pub. L. No. 91-285, 84 Stat. 314 (June 22, 1970); H.J. Res. 51, 6th Leg., Reg. Sess. (Alaska Aug. 25, 1970).

Alaska’s discrimination against Natives profoundly affected their ability to participate in its English-only elections. Alaska was covered under Section 5 statewide in 1965 and again in certain areas in 1970 because voter turnout was below fifty percent in 1964 and 1968. S. REP. NO. 94-295 at 12-13, *reprinted in* 1975 U.S.C.C.A.N. at 777-78. In 1968, Alaska’s voter turnout was 49.9 percent, lower than every southern state except Georgia, South Carolina, and Texas. *See* 1975 Senate Hearings at 717-18 (Ex. 40 to the statement of J. Stanley Pottinger). In 1972, Alaska’s voter turnout decreased to 48.2 percent, comparable to low participation rates in the South. *See id.*

**B. In 2006, Congress found that educational discrimination continues to result in high LEP and illiteracy rates and low Alaska Native turnout.**

When Section 4(b) was reauthorized in 2006, Congress considered substantial evidence of ongoing educational discrimination against Native voters. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 (“VRARAA”), Pub. L. No. 109-246, 120 Stat. 577 (2006). Court decisions found “degraded educational opportunities” for Alaska Natives, resulting in graduation rates lagging far behind non-Natives. H.R. REP. NO. 109-478, at 50-51, *reprinted in* 2006 U.S.C.C.A.N. 651. Congress cited to *Kasayulie v. State*, which found in 1999 that Alaska had “discrepancies in funding made available to Native and non-Native students.” *Id.* at 51, *reprinted in* 2006 U.S.C.C.A.N. 651 (citing Order Granting Plaintiffs’ Motions for Partial Summary Judgment on Facilities Funding, *Kasayulie v. State*, case no. 3AN-97-3782 CIV (Alaska Super. Ct. Sept. 1, 1999)). Despite “the affirmative duty on the State to provide public education,” funding discrepancies between non-Native urban areas and the Native villages “unconstitutionally discriminated against Alaska Natives.” H.R. REP. NO. 109-478, at 51, *reprinted in* 2006 U.S.C.C.A.N. 651. There also was evidence of ongoing funding disparities in *Moore v. State*, case no. 3AN-04-9756 CIV (Alaska Super. Ct. 2007), which was pending during reauthorization. *See Voting Rights Act:*

*Evidence of Continued Need, Hearing Before the Subcomm. on the Const. of the House Comm. on the Judiciary* (“*Continued Need*”), 109th Cong., 2d Sess., at 1336 (2006).

In *Moore*, Alaska was found to have violated its “constitutional responsibility to maintain a public school system” by failing to oversee the quality of secondary education in Alaska Native villages and to provide a “meaningful opportunity to learn the material” on a graduation exam. Decision and Order at 194-95, *Moore*, case no. 3AN-04-9756 CIV (Alaska Super. Ct. June 21, 2007). Nearly three years later, the Alaska superior court found the State still had not demonstrated that its remedial steps would “result in compliance with this constitutional responsibility.” Order on Review of 2009 Submissions, *Moore v. State*, case no. 3AN-04-9756 CIV (Alaska Super. Ct. March 1, 2010). The case was not settled until 2012. See Settlement Agreement, *Moore v. State*, case no. 3AN-04-9756 CIV (Alaska Super. Ct. Jan. 2012), available at [http://www.eed.state.ak.us/news/releases/2012/moore\\_settlement\\_signed.pdf](http://www.eed.state.ak.us/news/releases/2012/moore_settlement_signed.pdf).

Alaska’s continued educational discrimination profoundly affected the ability of Native voters to read election materials. In 2004, only 47.5 percent of all Native students graduated from high school compared to the statewide average of 62.9 percent. H.R. REP. NO. 109-478 at 50-51, reprinted in 2006 U.S.C.C.A.N. 651. In 2005, just 19.5 percent of all Native seniors statewide “were proficient in reading comprehension” in a high school graduation test.

*Continued Need*, 109th Cong., 2d Sess., at 1335; *Modern Enforcement of the Voting Rights Act, Hearing Before the Senate Comm. on the Judiciary* (“*Modern Enforcement*”), 109th Cong., 2d Sess., at 79 (2006).

Notwithstanding this substantial evidence, Alaska now questions what educational discrimination has to do with voting and its coverage under Section 4(b). Alaska Amicus at 28, *Shelby Cnty.*, No. 12-96. The Court has answered this question on several occasions, finding that Congress reasonably exercised its authority in Section 4 to remedy the effects of English literacy tests on voters suffering from educational discrimination. *See Oregon v. Mitchell*, 400 U.S. 112, 134-35 (1970) (unanimously upholding the nationwide ban on literacy tests); *Gaston Cnty. v. United States*, 395 U.S. 285, 291-92 (1969) (upholding the Section 4 formula, which used voting rates to identify jurisdictions with “racially disparate school systems”); *Katzenbach v. Morgan*, 384 U.S. 641, 658 (1966) (upholding suspension of New York’s literacy test for Puerto Rican voters educated in Spanish); *South Carolina v. Katzenbach*, 383 U.S. at 314, 327-30 (upholding the Section 4 trigger to identify jurisdictions with a “significant danger” of voting discrimination, as documented by “a low voting rate”).

Congress developed a strong link between educational discrimination and low voter participation by Alaska Natives. Where education barriers are present, they have “a deleterious effect on the ability of language minorities to become English proficient and literate.” H.R. REP. NO. 102-655 at 6, *reprinted in*

1992 U.S.C.C.A.N. 766, 770. In 2006, Congress considered the effects of unequal educational opportunities on Alaska Natives. According to census data, the average LEP rate among Native voters in 59 villages and regions was 22.6 percent. *See Continued Need*, 109th Cong., 2d Sess., at 2169. Forty percent of all Native areas had LEP rates “greater than 50 percent.” *Id.* Among LEP Native voters, 28.3 percent were illiterate, nearly 21 times the national illiteracy rate. *Id.* at 2163, 2170. There was a strong correlation between limited-English proficiency and illiteracy, with 40 percent of Native areas having “illiteracy rates greater than 50 percent.” *Id.* at 2170.

Congress determined that because of Alaska’s discrimination, Native voters continued “to experience hardships and barriers to voting and casting ballots because of their limited abilities to speak English and high illiteracy rates . . . particularly among the elders.” H.R. REP. NO. 109-478, at 45-46, *reprinted in* 2006 U.S.C.C.A.N. 650-51. Those barriers contributed to Native voter turnout of 44.8 percent in the 2004 election, compared to non-Native turnout of 68.4 percent. 152 CONG. REC. S7962 (daily ed. July 20, 2006) (statement of Sen. Arlen Specter). This substantial record of Alaska’s educational discrimination establishes the constitutionality of the State’s continued coverage under Section 4(b).

**C. Post-enactment Native turnout remains far below the statewide average.**

In *NAMUDNO*, the Court observed that in some covered jurisdictions, turnout among white and minority voters is nearly equal. 557 U.S. at 201. That is not true in the seven regions of Alaska with large numbers of Native voters. In the 2012 Presidential Election, among 100 Native villages required to provide language assistance under Section 203 of the VRA, just *four* achieved turnout rates at or above the statewide rate of 59.6 percent.<sup>5</sup> *See* Appendix 1-11. Over three-quarters had turnout more than 10 percent lower than the statewide turnout rate. *See* Appendix 2-11. Fifty-nine villages had turnout over 15 percent lower. *See* Appendix 2-11.

The gulf in voter turnout was greatest in Native villages with the highest LEP and illiteracy rates, a pattern repeated across the State. In Bethel, voter turnout was 25.7 percent below the statewide rate; 41.8 percent of voters there are LEP in Yup'ik, with an illiteracy rate of 33.9 percent. *See* Appendix 3. In Barrow, turnout was 22.8 percent below the statewide rate; there, 20.4 percent of voters are LEP in Inupiat, with an illiteracy rate of 12.5 percent. *See* Appendix 3. The turnout in all 44 Native villages with LEP

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<sup>5</sup> The Census Bureau identified 104 Native villages covered by Section 203. Election data is unavailable for four villages. *See* Appendix 2-11.

rates exceeding 10 percent fell far below statewide turnout. *See* Appendix 2-11. On average, 16.1 percent of LEP voters in those villages were illiterate, nearly fourteen times the national illiteracy rate among all voting-age citizens of 1.16 percent. *See* Appendix 2-11; U.S. CENSUS BUREAU, STATISTICAL MODELING METHODOLOGY FOR THE VOTING RIGHTS ACT SECTION 203 LANGUAGE ASSISTANCE DETERMINATIONS 35 (Dec. 2011). The 44 villages had average turnout of just 39.9 percent, about 20 percent lower than the statewide rate of 59.6 percent. *See* Appendix 2-11; STATE OF ALASKA, DIVISION OF ELECTIONS, 2012 GENERAL ELECTION RESULTS, STATEMENT OF VOTES CAST—OFFICIAL, *available at* <http://www.elections.alaska.gov/results/12GENR/index.shtml> (listing the results of all races appearing on the ballot by district and precinct). Statewide, in the 104 villages located in seven regions covered for language assistance under Section 203, turnout among nearly 30,000 Native voters was just 41.8 percent, or 17.8 percent below statewide turnout. *See id.*

The 2012 Election demonstrates that “dramatic improvements” have not occurred in Native voting. *NAMUDNO*, 557 U.S. at 201. Educational discrimination is not the only barrier. LEP voters denied equal schooling are confronted with election practices imposing the sort of English literacy tests or devices the VRA was intended to eradicate, along with other discrimination. H.R. REP. NO. 109-478 at 52, *reprinted in* 2006 U.S.C.C.A.N. 652-53.

### **III. Pre- And Post-Enactment Evidence Reveals Alaska Still Has First Generation Barriers.**

#### **A. In 2006, Congress considered substantial evidence of first generation barriers to voting by Alaska Natives.**

Congress developed a voluminous record of discrimination against Alaska Natives when reauthorizing Section 4(b) in 2006. Petitioner ignores that record, contending that few “first generation” barriers to voting remained and that reauthorization rested on only “second generation” barriers. Brief for Petitioner at 41, 45, *Shelby Cnty.*, No. 12-96 (Dec. 26, 2012). Compounding that error, Petitioner argues the coverage formula is not “rational” because it does not correlate with results from “second generation” lawsuits (Section 2 claims) in covered jurisdictions. *Id.* at 40-48. The record showed that first generation barriers remain widespread in Alaska, affecting tens of thousands of Native voters.

The House Report observed that “many of the first generation barriers to minority voter registration and voter turnout that were in place prior to the VRA have been eliminated.” *NAMUDNO*, 557 U.S. at 201 (citing H.R. REP. NO. 109-478, at 12). That may be true in some jurisdictions, but not in Alaska. The Alaska Native population still experiences:

- Unequal voter registration opportunities, including English-only registration materials and poll workers who fail to register voters;

- Unequal access to election materials, including information available only via the Internet, which is inaccessible to most rural Natives;
- Unequal access to election information through lack of voting assistance in Native languages, except for one census area recently under a court-ordered remedial program;
- Unequal early voting opportunities, offered nearly exclusively in non-Native urban areas and not in Native villages;
- Unequal polling place access, through closures and “precinct realignments” that would require some Natives to travel more than 70 miles by plane to vote;
- Unequal in-person voting opportunities, including designation of villages with high LEP rates as “Permanent Absentee Voting” sites with no election workers; and
- Unequal voter assistance, denying voters with physical limitations or illiteracy assistance from their person of choice, contrary to Section 208 of the VRA.

Congress considered evidence of these first generation barriers during the 2006 Reauthorization. The record for Alaska alone was substantial. *See Continued Need*, 109th Cong., 2d Sess., at 1308-62; *Modern Enforcement*, 109th Cong., 2d Sess., at 18-20,

25-27, 29-30, 73-81, 124-26. In the 31 years since the 1975 amendments, Alaska *never* complied with many provisions of the VRA. *Modern Enforcement*, 109th Cong., 2d Sess., at 18, 26, 30, 77-78, 126. Alaska still conducted English-only elections in heavily-LEP regions despite the clear mandate to provide assistance in Native languages pursuant to Sections 4(f)(4) and 203, with elections in English functioning like “an old-fashioned literacy test” or a “test or device.” *Id.* at 77-79, 125-26. Alaska’s entire language assistance “program” was that “minority voters in Alaska may ask for oral assistance with translation of English ballot measures, and assistance may or may not be available at that time.” *Id.* at 79. The complete lack of translated information even caused many Alaska Native LEP voters to mistakenly vote *for* an English-only Constitutional amendment because they could not understand the ballot language. *Id.* at 26-27. Untranslated ballot language written at a twelfth grade level or higher was virtually incomprehensible in Yup’ik-speaking areas, where the illiteracy rate was 16 times or more the national average. *Id.* at 78-79.

Other first generation barriers impacted Alaska Native voters. In the 2004 Election, 24 Alaska Native villages did not even have polling places. Some that did sometimes had to cut voting hours short to haul their one voting machine to the other side of a river or to the next village so other people could vote. *Id.* at 124. Turnout in Native villages varied but was as low as 12 percent in some places. *Id.* at 73. Given these

many barriers, it was no surprise that, as of 2000, no Native candidate had “been elected to office from a majority white district.” *Id.* at 34. The lack of white support resulted “in a disparity between the number of white elected officials and the number” of Alaska Natives elected to office. *Id.* In sum, the congressional record refutes Petitioner’s unfounded claim that there was no evidence of first generation barriers presented during the 2006 Reauthorization.

Because Petitioner ignores the evidence of first generation barriers in Alaska, its criticisms of the coverage formula rely on Section 2 lawsuits elsewhere. Brief for Petitioner at 41, 47-48, 50, *Shelby Cnty.*, No. 12-96. Employing this metric, Petitioner singles out Alaska as not having “a single reported Section 2 suit” or “a single reported suit with a finding of racially polarized voting.” *Id.* at 47-48. Petitioner fails to mention that unlike other covered jurisdictions, Alaska has few organized governmental bodies. Its statewide legislative redistricting plan is the only one in the State that includes significant numbers of Native and non-Native voters.<sup>6</sup> Prior to the latest round of redistricting, Alaska’s legislative redistricting plan was the product of a very significant Section 5 objection.<sup>7</sup>

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<sup>6</sup> Alaska has a single congressional representative elected at-large and no congressional redistricting plan.

<sup>7</sup> The unconstitutional interim plan currently in place further degraded Native representation, so that Alaska’s legislature is now 90 percent white, even though Alaska is only

(Continued on following page)

Moreover, while successful Section 2 suits may be one indicator of ongoing problems, it does not follow that their absence reflects a lack of violations, as Petitioner contends. Brief for Petitioner at 47-48, *Shelby Cnty.*, No. 12-96. Meritorious litigation is often not brought because voting litigation is complex, expensive, and labor-intensive. As voting rights attorney Robert McDuff explained:

Voting rights is intensely complex litigation that is both costly and time-consuming. To be appropriately presented, these cases require costly experts including historians, social scientists and statisticians, among others. . . . there are not enough lawyers who specialize in this area to carry the load. . . . [I]t is incredibly difficult for minority voters to pull together resources needed to push private challenges under the Act. Without the mechanism of Section 5 in place to bar retrogressive voting changes from implementation, we will likely witness the resurgence of discriminatory voting changes that will not be adequately or evenly addressed by private litigation under Section 2.

*Modern Enforcement*, 109th Cong., 2d Sess., at 96. That is particularly true in Alaska, where the violations are numerous and ongoing. Post-enactment,

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67 percent white. See Pat Forgey, *Election, redistricting diminishes Natives' power in Alaska Legislature*, ALASKA DISPATCH, Dec. 6, 2012, <http://www.alaskadispatch.com/article/election-redistricting-diminishes-natives-power-alaska-legislature>.

four LEP Alaska Native voters and four Alaska tribes in just one census area sued election officials for violating Sections 4(f)(4), 5, 203 and 208 of the VRA. The case took almost three years, two million dollars in attorney time, \$250,000 in out-of-pocket costs, and nearly 700 docket entries. Settlement Agreement and Release of All Claims Under §§ 203, 4(f)(4), 5 and 208 of the VRA, *Nick v. State*, case no. 3:07-cv-00098-TMB, docket no. 787-2 (D. Alaska Feb. 16, 2010). The time and costs were prohibitive and demonstrate why voting discrimination lawsuits are not more common, even in a scofflaw jurisdiction like Alaska.

**B. Post-enactment evidence confirms Congress properly reauthorized Section 5 coverage for Alaska.**

The 2006 Reauthorization was a watershed moment for Alaska. It shed light on many problems that had festered for decades and prompted voting litigation that continues to this day. Federal court supervision over Alaska election official's fledgling efforts to begin complying with Sections 4(f)(4), 203, and 208 of the VRA in just one census area ended only one month ago. Enforcement efforts may soon commence in other regions. Those areas have suffered not only from decades of neglect by Alaska's election officials, but also by seemingly benign policies that result in unequal treatment of Natives in diminished registration and voting opportunities. Although post-enactment, this evidence is highly relevant to showing

why Congress concluded that continued coverage of Alaska under Section 4(b) was necessary.

The Court has recognized repeatedly that post-enactment evidence is relevant to Congress's exercise of its broad powers under the Reconstruction Amendments. *See Tennessee v. Lane*, 541 U.S. 509, 524-25 & nn.6-8, 11, 13-14 (2004); *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 733-34 & nn.6-9 (2003); *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 143 n.6 (1948). Therefore, the evidence Congress considered during reauthorization is not the only important factor. For Alaska, the post-enactment evidence is especially relevant because it grew out of evidence in the Congressional record.

Alaska was keenly aware of the widespread problems identified to Congress yet it did nothing to remedy them. Less than a year after reauthorization, four LEP Yup'ik-speaking Native voters and four federally recognized Alaska Native tribes sued Alaska's Division of Elections in *Nick v. State* for violating Sections 5, 203, and 208 of the VRA in the Bethel Census Area. The region's population was 85.5 percent American Indian and Alaska Native. First Amended Complaint at ¶ 25, *Nick*, case no. 3:07-cv-00098-TMB, docket no. 201 (D. Alaska May 22, 2008). Among citizen voting-age population, 20.8 percent were LEP. *Id.* at ¶ 34. Almost a quarter of LEP voters were illiterate, nearly sixteen times the national illiteracy rate. *Id.*

The literacy barriers the plaintiffs faced were not the result of happenstance but the product of Alaska's educational discrimination. Each individual Plaintiff had been denied a public school education because Alaska did not provide middle or high schools in their individual villages until the 1980s. Plaintiff Anna Nick left home briefly to attend school but only reached the fifth grade. *Id.* at ¶ 6. The remaining individual plaintiffs completed the second, third, and fourth grades. *Id.* at ¶¶ 7-9. There are thousands of Alaska Native voters just like them. *See* Appendix 1-11. More than 30 years after the VRA was extended to language minorities, and just one year after reauthorization, those LEP Native voters were still subjected to English-only elections.

Tellingly, Alaska omits any mention of the *Nick* case in its brief, instead misleading the Court by asserting it has “no history of voting discrimination.” Alaska Amicus at 26, *Shelby Cnty.*, No. 12-96. A federal court found otherwise in *Nick* in 2008, citing the State's lack of responsiveness in remedying discrimination against Alaska Natives and enjoining further violations of the Act. *See* Appendix 12-31. The evidence revealed that Alaska provided all voter registration and voting information in English-only, despite its use of touch-screen voting units capable of “speaking” eight different languages. Plaintiffs' Motion for a Preliminary Injunction at 10-11, *Nick*, case no. 3:07-cv-00098-TMB, docket no. 202 (D. Alaska May 22, 2008). Between 2000 and 2007, translators generally were unavailable and untrained.

*Id.* at 11-14. Alaska provided no Yup'ik translations, forcing poll workers to translate ballots written in college-level English "on the spot." *Id.* at 7. That led to widely diverging translations that denied plaintiffs and other Native voters effective language assistance even when translators were available. *Id.* at 7, 15-16.

In July 2008, a federal court issued a preliminary injunction to bar Alaska from further violations of the VRA. The court found the Plaintiffs met their burden and demonstrated they were likely to succeed on the merits of their 203 and 4(f)(4) claims:

The State has failed to: provide print and broadcast public service announcements (PSA's) in Yup'ik, or to track whether PSA's originally provided to a Bethel radio station in English were translated and broadcast in Yup'ik; ensure that at least one poll worker at each precinct is fluent in Yup'ik and capable of translating ballot questions from English into Yup'ik; ensure that "on the spot" oral translations of ballot questions are comprehensive and accurate; 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.

Appendix 22-23. The court was troubled that "State officials became aware of potential problems with their language-assistance program in the spring of 2006," during reauthorization but their "efforts to overhaul the language assistance program did not

begin in earnest until after this litigation.” Appendix 23. The court cited three reasons for its injunction: (1) Alaska had been covered by Section (4)(f)(4) “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.” Appendix 23-24. The court concluded “the evidence of past shortcomings justifies the issuance of injunctive relief to ensure that Yup’ik-speaking voters have the means to fully participate in the upcoming State-run elections.” Appendix 24. The *Nick* injunction remained in place until December 31, 2012.<sup>8</sup>

#### **IV. Section 5 Remains A Necessary And Appropriate Prophylactic Measure To Prevent Voting Discrimination Against Alaska Natives.**

Section 5 is a “vital prophylactic tool” protecting Amici “from devices and schemes that continue to be employed” in Alaska, which is covered statewide for Alaska Natives. H.R. REP. NO. 109-478 at 21, *reprinted in* 2006 U.S.C.C.A.N. 631. Preclearance has protected Alaska Natives from discriminatory redistricting practices, closure of necessary polling sites,

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<sup>8</sup> Although federal court oversight has expired, the procedures cannot be changed without Section 5 preclearance. Consequently, the *Nick* plaintiffs and other Native voters rely upon Section 5 to keep their fragile victory intact.

and retrogressive language assistance procedures. Section 5's importance cannot be measured just by the number of objections, but also "the number of voting changes that have never gone forward as a result of Section 5." *Id.* at 24, *reprinted in* 2006 U.S.C.C.A.N. 633. Its "deterrent effect" is "substantial." *Id.* In renewing Section 5, Congress examined evidence of "continued discrimination" including interposed objections, "requests for more information submitted followed by voting changes withdrawn from consideration," and Alaska's lack of compliance. VRARAA, Pub. L. No. 109-246, § 2(b)(4)(A), 120 Stat. 577. Alaska is unique not because it has numerous objections, but because it fails to submit critical changes for preclearance at all.

#### **A. Alaska often fails to comply with Section 5.**

Alaska has fewer objections and More Information Requests (MIR) because it has often failed to submit voting changes for preclearance. For example, when the State submitted new language assistance procedures for preclearance during the *Nick* litigation, the U.S. Department of Justice observed that the "last precleared bilingual election procedures" for Alaska Natives were under a plan "precleared by letter dated October 5, 1981." Appendix 38. However, Department officials noted that discovery in *Nick*, "admissions by State elections officials," and assertions by officials in a letter withdrawing the changes

indicated that “Alaska is not currently fully implementing the 1981 plan and is instead implementing new and different procedures.” Appendix 38. The Department requested that Alaska indicate its planned action “to take regarding the changes affecting voting that have not been submitted for judicial review or preclearance.” Appendix 44. State officials ignored the Department’s request. The *Nick* plaintiffs were compelled to pursue their Section 5 claim against Alaska, which were ultimately settled in early 2010.

Alaska has been sued twice in recent years for implementing voting changes before those changes were precleared under Section 5. In the 2010 General Election, Alaska’s Division of Elections provided poll workers with a list of write-in candidates and their political affiliations, something it had never done before. *See* Complaint, *Alaska Democratic Party v. Fenumiai*, case no. 3AN-10-11621 (Alaska Super. Ct. Oct. 24, 2010); Complaint for Declaratory and Injunctive Relief, *Rudolph, et al. v. Fenumiai*, 3:10-cv-00243-RRB (D. Alaska Nov. 1, 2010). Notably, incumbent Senator Lisa Murkowski ran as a write-in candidate in that election, and the Division’s move was widely viewed as an attempt to help Senator Murkowski, whose surname was difficult for illiterate and LEP voters to spell. *See* Chad Flanders, *How Do You Spell M-U-R-K-O-W-S-K-I? Part I: The Question of Assistance to the Voter*, 28 ALASKA L. REV. 1 (June 2011). In 2012, the Division of Elections began implementing an entire redistricting plan without

preclearance. Complaint at ¶ 26, *Samuelson v. Treadwell*, case no. 3:12-cv-00118-RRB-AK-JKS, docket no. 1 (D. Alaska June 7, 2012). Before submitting the plan, election officials opened and closed candidate qualifying, and sent notices to voters. Both incidents reveal that Alaska’s election officials treat Section 5 coverage as an afterthought that can be freely ignored.

**B. Alaska’s one objection was very significant.**

A Section 5 objection does not just stop enforcement of the discriminatory voting change at issue, it often discourages State officials from enforcing similar discriminatory changes in the future. The Attorney General’s objection to the 1990s statewide redistricting plan illustrates the lasting deterrent effect that a Section 5 objection has in Alaska. The State’s initial plan, which was prepared in secret, diluted the voting strength of Alaska Natives. *See Continued Need*, 109th Cong., 2d Sess., at 1345-46. Several Native groups complained to the Justice Department about the “anti-Native” plan. *Id.* at 1346-47. The Department responded by sending an MIR asking that Alaska address concerns such as: the plan’s reduction of the number of Alaska Native majority districts; the retrogressive effects of at least one district on Native voting strength; the “extraordinary” deference towards incumbent legislators’ districts except those of Native legislators, whose

districts had been combined; and the State's preparation of the redistricting plan without public input. *Id.* at 1347.

A State trial court subsequently rejected the original redistricting plan as unconstitutional and the Alaska Supreme Court ordered implementation of an interim plan. *Id.* In *Hickel v. Southeast Conference*, 846 P.2d 38 (Alaska 1992), the State's highest court struck down 11 districts in the interim plan, but left intact State District 36, which reduced the voting strength of Yup'iks. *Continued Need*, 109th Cong., 2d Sess., at 1347. In 1993, the Attorney General interposed an objection to the retrogression in District 36 and its companion Senate District R, which reduced the Native voting age population from 55.7 percent to 50 percent despite the presence of extremely racially polarized voting there. *Id.* at 1348. Section 5 thereby served as the only line of defense between the retrogressive redistricting plan and its discriminatory impact on Alaska Natives. *Id.*

The 1993 objection compelled Alaska to take "an entirely different approach to the process" in the 2000 redistricting cycle. *Modern Enforcement*, 109th Cong., 2d Sess., at 81. It "hired a national voting rights expert to ensure that its proposed plan did not violate the VRA or reduce the ability of Alaska Natives to elect candidates of their choice." *Id.* State officials adopted a plan that did not "reduce the ability of Alaska Natives to elect candidates of their choice" and appointed a Native to the redistricting board to represent the nearly 20 percent of the State's

population excluded from the 1990 redistricting process. *Id.*; see *Continued Need*, 109th Cong., 2d Sess., at 1318-19, 1350-51. That one “objection was felt statewide and continues to have an impact today.” *Modern Enforcement*, 109th Cong., 2d Sess., at 81.

### **C. More Information Requests prevent voting discrimination by Alaska.**

More Information Requests also play an important role in preventing voting discrimination against Alaska Natives. MIRs are an “administrative mechanism” used by the Department of Justice to obtain additional information needed to determine whether preclearance of a voting change is warranted under Section 5. H.R. REP. NO. 109-478 at 40, *reprinted in* 2006 U.S.C.C.A.N. 645. Their use forces “covered jurisdictions to take action” that can include withdrawing “a proposed change from consideration because it is discriminatory,” submitting “a new or amended non-discriminatory voting plan,” or simply not making a change at all. *Id.*

Alaska routinely withdraws discriminatory voting changes after receiving an MIR, a pattern that has continued since reauthorization. In March 2008, Alaska attempted to circumvent the language claims brought in the *Nick* litigation. State officials made a short submission of a language plan without any explanation for their failure to implement the plan precleared by the Department in 1981. See First Amended Complaint at Attachments B-C, *Nick*, case

no. 3:07-cv-00098-TMB, docket nos. 201-3, 201-4 (D. Alaska May 22, 2008). In May 2008, the Justice Department issued a detailed MIR letter identifying 16 categories of facts suggesting the absence of enforcement of the prior plan. *See* Letter of May 19, 2008 from Christopher Coates, Acting Chief, Voting Section, to Gail Fenumiai, Director, Division of Elections, *Nick*, case no. 3:07-cv-00098-TMB, docket no. 293-14 (D. Alaska July 3, 2008). Instead of responding, the State abruptly withdrew its submission, preventing implementation of its retrogressive procedures. *See* Appendix 37-44. In the process, Alaska derided the request, arguing that “DOJ’s questions on past practices are inappropriate.” Opposition to Motion for Preliminary Injunction at 9 n.19, *Nick*, case no. 3:07-cv-00098-TMB, docket no. 249 (D. Alaska May 22, 2008). State officials later attempted to circumvent the MIR by submitting the State’s changes piecemeal, which the Department of Justice also rejected. According to the Department, it was necessary to review the entire plan together to determine whether it provided effective equal registration and voting opportunities to Alaska Natives. *See* Appendix 39-40.

In recent years, Section 5 has prevented Alaska from implementing a number of discriminatory polling place changes. In May 2008, the State submitted for preclearance a plan to eliminate precincts in several Native villages. *See* Appendix 32-36. State officials proposed to (1) “realign” Tatitlek, a community in which about 85 percent of the residents are

Alaska Native, to the predominately white community of Cordova, located over 33 miles away and not connected by road; (2) consolidate Pedro Bay, where a majority of residents are Alaska Native, with Iliamna and Newhalen, located approximately 28 miles away, are not connected by road, and were the subject of a critical initiative on the August 2008 ballot; and (3) consolidate Levelock, in which about 95 percent of residents are Alaska Native, with Kokhanok, approximately 77 miles apart and not connected by road.<sup>9</sup> In sum, Alaska was attempting to combine precincts accessible to one another only by air or boat with high concentrations of Alaska Native voters.

The Department of Justice responded with a MIR letter requesting information about reasons for the voting changes, distances between the polling places, and their accessibility to Alaska Native voters. Appendix 32-36. The Department inquired about “the methods of transportation available to voters traveling from the old precinct to the new consolidated precinct” asking that if there were no roadways connecting them that the State “indicate how voters will get to the consolidated location.” Appendix 34. The MIR suggested that Alaska’s election officials had not consulted with Native voters about the changes

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<sup>9</sup> Population data from the 2000 Census can be found at <http://www.census.gov/>. Distance data is calculated using the U.S. GEOLOGICAL SURVEY, GEOGRAPHIC NAMES INFORMATION SYSTEM. See <http://www.infoplease.com/atlas/calculate-distance.html>.

and requested a “detailed description” of efforts “to secure the views of the public, including members of the minority community, regarding these changes.” Appendix 34-35. Finally, the MIR documented that when Department of Justice personnel communicated with State officials, they learned that Alaska also was taking steps to implement an unsubmitted voting change designating “specified voting precincts” as “permanent absentee by-mail precincts.” Appendix 35. Rather than responding and submitting the additional voting changes for Section 5 review, the State abruptly withdrew the submission two weeks later. *See* Appendix 45-46.

The MIRs issued to Alaska may be few in number in recent years, but they were significant. They prevented the State from circumventing the federal courts in its efforts to remedy the State’s violations of Sections 203 and 4(f)(4), and they prevented the “realignment” of precincts requiring Native voters to fly to vote. Section 5 has prevented many voting changes that would have disenfranchised Alaska Native voters.

#### **V. The Broadened Bailout Standard Adopted By The Court In *NAMUDNO* Limits Section 4(b) Coverage To Jurisdictions Like Alaska That Need It.**

In *NAMUDNO*, the Court broadened eligibility for jurisdictions to be removed from Section 4(b) coverage, concluding that “piecemeal bailout is now

permitted” under the VRA following the 1982 Amendments. 557 U.S. at 211. In particular, the Court held that “all political subdivisions . . . are eligible to file a bailout suit.” *Id.*

Nevertheless, Alaska complains bailout remains too difficult, referring to it as “a mirage.” Alaska Amicus at 29, *Shelby Cnty.*, No. 12-96. That may be true for Alaska, not because the standard is too difficult but because its discrimination continues. If the day arrives when Alaska’s record is clean, it should apply for a bailout of coverage, just as it can do if it wants to terminate federal observer coverage in the Bethel region. These points highlight why a facial challenge of Section 4(b) is improper; jurisdictions each have unique records and numerous ways to lessen or remove the “yoke of federal oversight,” as Alaska calls it. *Id.* at 26. Individual jurisdictions simply must have a record to support it.

Alaska has twice attempted to bailout from Section 5 since being covered in 1975. It dropped both lawsuits without being denied bailout. “In 1982, Congress amended the bailout provision to encourage jurisdictions to end their discriminatory practices and to integrate minority voters into the electoral process.” H.R. REP. NO. 109-478 at 25, *reprinted in* 2006 U.S.C.C.A.N. 634. The bailout standard requires that jurisdictions demonstrate that they have been free of voting discrimination for ten years. *See* 42 U.S.C. § 1973b(a). In 1978 and again in 1984, Alaska dismissed its lawsuits after the evidence showed that the State denied equal electoral opportunities to

Native voters. See Paul F. Hancock & Lora L. Tredway, *The Bailout Standard of the Voting Rights Act: An Incentive to End Discrimination*, 17 URB. LAW. 379, 403, 415 (1985). Strangely, Alaska now contends it dismissed the actions because discovery was too burdensome. Alaska Amicus at 30-31, *Shelby Cnty.*, No. 12-96. However, Alaska's covered status "has been and continues to be within the control of the jurisdiction." H.R. REP. NO. 109-478 at 25, *reprinted in* 2006 U.S.C.C.A.N. 634. Its ongoing violations are not those of a jurisdiction with "a genuinely clean record" for which coverage can be terminated now. Nevertheless, once Alaska makes the VRA's unfulfilled promise of equal access a reality for Alaska Native voters, bailout would be appropriate. *Id.* Until that day arrives, the bailout mechanism is functioning exactly as it should in maintaining Alaska's coverage.

Alaska also argues bailout is more difficult since federal observers were appointed in 2009. Alaska Amicus at 7, *Shelby Cnty.*, No. 12-96. However this argument fails on two points. First, the appointment of observers is not "unreviewable," as Alaska maintains. Alaska Amicus at 6-7, *Shelby Cnty.*, No. 12-96. Section 13 of the VRA provides a jurisdiction may terminate coverage by petitioning the Attorney General or by bringing a declaratory judgment action in the District of Columbia. See 42 U.S.C. § 1973k. Alaska has done neither, making its complaints ring hollow. Second, the Attorney General's certification was derived from statutory violations of voting in the

Bethel region, which Alaska knew about and failed to remedy. Appendix 12-31. Far from “arbitrary,” the certification was based on a court’s detailed findings, most of which were based on Alaska’s own evidence.



## CONCLUSION

The Court should exercise “judicial restraint” and limit its review of Petitioner’s challenge to whether Section 4(b), as applied to Petitioner, is constitutional. *Washington State Grange*, 552 U.S. at 450. That approach properly balances the substantial deference owed to Congress in exercising its broad powers under the Fifteenth Amendment, *see NAMUDNO*, 557 U.S. at 204, while permitting covered jurisdictions to pursue their own challenges, as Alaska has already begun to do.

Alaska’s rhetoric to the contrary is refuted by the reality of its sad legacy of excluding Native voters. There is a substantial record of “*local evils*” of educational and voting discrimination in Alaska supporting its continued coverage under Section 4(b). *Id.* at 203 (citation omitted). Ignoring that record, as Petitioner and Alaska suggest, would depart from the Court’s “institutional role” and mark a serious encroachment into powers properly exercised by a “coequal branch

of government.” *Id.* at 204-05. Amici respectfully submit that the Court should decline that invitation.

Respectfully submitted,

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**Table 1. Rates of Limited-English Proficiency and Illiteracy in Alaska Census Areas and Boroughs Covered under Section 203 of the Voting Rights Act.**

Source: U.S. Census Bureau, 2011 Voting Rights Determination File, *available at* [http://www.census.gov/rdo/data/voting\\_rights\\_determination\\_file.html](http://www.census.gov/rdo/data/voting_rights_determination_file.html) (providing data for Voting Rights Act Amendments of 2006, Determinations under Section 203, 76 Fed. Reg. 63,602 (Oct. 13, 2011)).

Legend:

“Language” refers to the Alaska Native or American Indian language in the Census Area or Bureau that is covered under Section 203. “CVAP” refers to the number of U.S. citizens who 18 years of age or older (voting age). “CVAP that is LEP” refers to the number of voting-age U.S. citizens who are Limited-English Proficient in the covered language. “CVAP % that is LEP” refers to the percentage of all U.S. citizens of voting-age who are LEP in the covered language. “% LEP CVAP that is illiterate” refers to the percentage of U.S. citizens of voting-age who are LEP in the covered language and have not completed more than the fifth primary grade.

Census Area or Borough	Language	CVAP	CVAP that is LEP	CVAP % that is LEP	% LEP CVAP that is illiterate
Bethel	All languages	10700	3350	31.30%	11.60%
Bethel	Inupiat	300	70	23.30%	14.30%
Bethel	Yup'ik	7435	3110	41.80%	11.60%
Dillingham	All languages	3225	415	12.90%	30.10%
Dillingham	Yup'ik	2050	375	18.30%	32.00%
Nome	All languages	6185	585	9.50%	13.70%
Nome	Inupiat	2725	240	8.80%	16.70%
Nome	Yup'ik	1195	265	22.20%	11.30%
North Slope	All languages	7025	830	11.80%	12.00%
North Slope	Inupiat	2710	575	21.20%	11.30%
North Slope	Alaska Native – Unspecified	605	130	21.50%	23.10%
Northwest Arctic	All languages	4835	475	9.80%	11.60%
Northwest Arctic	Inupiat	3420	420	12.30%	10.70%
Wade Hampton	All languages	4335	610	14.10%	22.10%

Census Area or Borough	Language	CVAP	CVAP that is LEP	CVAP % that is LEP	% LEP CVAP that is illiterate
Wade Hampton	Inupiat	470	70	14.90%	28.60%
Wade Hampton	Yup'ik	3195	515	16.10%	21.40%
Yukon-Koyukuk	All languages	4010	195	4.90%	15.40%
Yukon-Koyukuk	Athabascan	2665	170	6.40%	14.70%

**Table 2. Rates of Limited-English Proficiency, Illiteracy, and Turnout in Alaska Native Villages Covered under Section 203 of the Voting Rights Act, Compared to the Statewide Turnout Rate in the November 2012 Presidential Election.**

Sources: U.S. Census Bureau, 2011 Voting Rights Determination File, *available at* [http://www.census.gov/rdo/data/voting\\_rights\\_determination\\_file.html](http://www.census.gov/rdo/data/voting_rights_determination_file.html) (providing data for Voting Rights Act Amendments of 2006, Determinations Under Section 203, 76 Fed. Reg. 63,602 (Oct. 13, 2011)); State of Alaska, Division of Elections, Election Results for the Nov. 2012 Presidential Election, *available at* <http://www.elections.alaska.gov> (last visited Jan. 27, 2013).

Legend:

“CVAP % that is LEP” refers to the percentage of all U.S. citizens of voting-age who are LEP in the covered language. “% LEP CVAP that is illiterate” refers to the percentage of U.S. citizens of voting-age who are LEP in the covered language and have not completed more than the fifth primary grade. “Turnout % of Reg. Voters in 2012 Pres. Election” refers to the percentage of registered voters in the Alaska Native village who voted in the 2012 Presidential Election. “% above or below Statewide Turnout %” refers to the percentage that the village’s turnout in the 2012 Presidential Election was above or below the statewide turnout rate of 59.6 percent.

Blank fields indicate that the Census Bureau has suppressed data for privacy reasons and/or that turnout data is unavailable because the Native village does not have its own polling place.

Alaska Native Village	Census Area or Borough	Language Covered Under Section 203 of VRA	CVAP % that is LEP	% LEP CVAP that is Illiterate	Turnout % of Reg. Voters in 2012 Pres. Election	% above or below Statewide Turnout %
Akiachak	Bethel	American Indian	39.7%	10.3%	36.0%	-23.6%
Akiachak	Bethel	Yup'ik	42.0%	10.3%	36.0%	-23.6%

## App. 3

Alaska Native Village	Census Area or Borough	Language Covered Under Section 203 of VRA	CVAP % that is LEP	% LEP CVAP that is Illiterate	Turnout % of Reg. Voters in 2012 Pres. Election	% above or below Statewide Turnout %
Akiak	Bethel	American Indian, Yup'ik			52.3%	-7.3%
Alakanuk	Wade Hampton	American Indian	15.1%	18.2%	47.6%	-12.0%
Alakanuk	Wade Hampton	Yup'ik	15.6%	20.0%	47.6%	-12.0%
Aleknagik	Dillingham	American Indian, Yup'ik			33.6%	-26.0%
Algaaciq (St. Mary's)	Wade Hampton	American Indian, Yup'ik			34.7%	-24.9%
Allakaket	Yukon-Koyukuk	American Indian, Athabascan			33.6%	-26.0%
Ambler	Northwest Arctic	American Indian, Inupiat			46.0%	-13.6%
Anaktuvuk Pass	North Slope	American Indian, Inupiat			36.0%	-23.6%
Andreafsky (St. Mary's)	Wade Hampton	American Indian, Yup'ik			34.7%	-24.9%
Aniak	Bethel	American Indian	34.7%	11.8%	40.6%	-19.0%
Aniak	Bethel	Yup'ik			40.6%	-19.0%
Atmautluak	Bethel	American Indian, Yup'ik			39.1%	-20.5%
Atqasuk	North Slope	American Indian, Inupiat			38.1%	-21.5%
Barrow	North Slope	American Indian	20.4%	12.5%	36.8%	-22.8%
Barrow	North Slope	Inupiat	21.4%	10.3%	36.8%	-22.8%
Beaver	Yukon-Koyukuk	American Indian, Athabascan			44.4%	-15.2%
Bethel	Bethel	American Indian	32.1%	12.4%	33.9%	-25.7%
Bethel	Bethel	Yup'ik	41.8%	11.6%	33.9%	-25.7%

## App. 4

Alaska Native Village	Census Area or Borough	Language Covered Under Section 203 of VRA	CVAP % that is LEP	% LEP CVAP that is Illiterate	Turnout % of Reg. Voters in 2012 Pres. Election	% above or below Statewide Turnout %
Brevig Mission	Nome	American Indian	9.8%	20.0%	50.2%	-9.4%
Brevig Mission	Nome	Inupiat	7.5%	26.7%	50.2%	-9.4%
Buckland	Northwest Arctic	American Indian	11.1%	16.0%	25.7%	-33.9%
Buckland	Northwest Arctic	Inupiat	12.5%	16.0%	25.7%	-33.9%
Chefornak	Bethel	American Indian	41.7%	10.0%	43.1%	-16.5%
Chefornak	Bethel	Yup'ik	42.6%	10.0%	43.1%	-16.5%
Chevak	Wade Hampton	American Indian	14.6%	26.7%	42.8%	-16.8%
Chevak	Wade Hampton	Inupiat	14.6%	30.8%	42.8%	-16.8%
Chuathbaluk	Bethel	American Indian, Yup'ik			35.9%	-23.7%
Clarks Point	Dillingham	American Indian, Yup'ik			31.7%	-27.9%
Crooked Creek	Bethel	American Indian, Yup'ik			45.7%	-13.9%
Deering	Northwest Arctic	American Indian, Inupiat			41.0%	-18.6%
Dillingham	Dillingham	American Indian	15.1%	30.0%	45.2%	-14.4%
Dillingham	Dillingham	Yup'ik	18.2%	32.0%	45.2%	-14.4%
Eek	Bethel	American Indian, Yup'ik			41.7%	-17.9%
Ekwok	Dillingham	American Indian, Yup'ik			45.6%	-14.0%
Emmonak	Wade Hampton	American Indian	15.4%	21.4%	43.4%	-16.2%
Emmonak	Wade Hampton	Yup'ik	15.9%	21.4%	43.4%	-16.2%

App. 5

Alaska Native Village	Census Area or Borough	Language Covered Under Section 203 of VRA	CVAP % that is LEP	% LEP CVAP that is Illiterate	Turnout % of Reg. Voters in 2012 Pres. Election	% above or below Statewide Turnout %
Fort Yukon	Yukon-Koyukuk	American Indian	6.8%	16.0%	38.2%	-21.4%
Fort Yukon	Yukon-Koyukuk	Athabascan	5.9%	20.0%	38.2%	-21.4%
Galena	Yukon-Koyukuk	American Indian	6.7%	26.7%	71.7%	12.1%
Galena	Yukon-Koyukuk	Athabascan			71.7%	12.1%
Gambell	Nome	American Indian	22.1%	11.8%	48.1%	-11.5%
Gambell	Nome	Yup'ik	23.0%	11.8%	48.1%	-11.5%
Golovin	Nome	American Indian, Inupiat			70.6%	11.0%
Goodnews Bay	Bethel	American Indian	40.0%	6.7%	40.5%	-19.1%
Goodnews Bay	Bethel	Yup'ik			40.5%	-19.1%
Grayling	Yukon-Koyukuk	American Indian, Athabascan			48.7%	-10.9%
Holy Cross	Yukon-Koyukuk	American Indian, Athabascan			41.1%	-18.5%
Hooper Bay	Wade Hampton	American Indian	12.0%	20.0%	41.9%	-17.7%
Hooper Bay	Wade Hampton	Yup'ik	16.1%	21.4%	41.9%	-17.7%
Hughes	Yukon-Koyukuk	American Indian, Athabascan			70.0%	10.4%
Huslia	Yukon-Koyukuk	American Indian, Athabascan			57.8%	-1.8%

App. 6

Alaska Native Village	Census Area or Borough	Language Covered Under Section 203 of VRA	CVAP % that is LEP	% LEP CVAP that is Illiterate	Turnout % of Reg. Voters in 2012 Pres. Election	% above or below Statewide Turnout %
Inalik (Diomede)	Nome	American Indian, Inupiat			34.7%	-24.9%
Kaktovik	North Slope	American Indian, Inupiat			47.3%	-12.3%
Kalskag	Bethel	American Indian, Yup'ik			57.3%	-2.3%
Kaltag	Yukon-Koyukuk	American Indian, Athabascan			43.9%	-15.7%
Kasigluk	Bethel	American Indian	40.3%	12.0%	30.4%	-29.2%
Kasigluk	Bethel	Yup'ik	41.7%	12.0%	30.4%	-29.2%
Kiana	Northwest Arctic	American Indian	12.5%	16.0%	33.9%	-25.7%
Kiana	Northwest Arctic	Inupiat	13.5%	16.0%	33.9%	-25.7%
Kipnuk	Bethel	American Indian	40.8%	10.3%	36.8%	-22.8%
Kipnuk	Bethel	Yup'ik	42.0%	10.3%	36.8%	-22.8%
Kivalina	Northwest Arctic	American Indian	11.6%	16.0%	43.3%	-16.3%
Kivalina	Northwest Arctic	Inupiat	11.6%	16.0%	43.3%	-16.3%
Kobuk	Northwest Arctic	American Indian, Inupiat			41.5%	-18.1%
Kongiganak	Bethel	American Indian	41.2%	9.5%	43.8%	-15.8%
Kongiganak	Bethel	Yup'ik	41.7%	10.0%	43.8%	-15.8%
Kotlik	Wade Hampton	American Indian	15.4%	20.0%	43.5%	-16.1%
Kotlik	Wade Hampton	Yup'ik	16.1%	22.2%	43.5%	-16.1%

App. 7

Alaska Native Village	Census Area or Borough	Language Covered Under Section 203 of VRA	CVAP % that is LEP	% LEP CVAP that is Illiterate	Turnout % of Reg. Voters in 2012 Pres. Election	% above or below Statewide Turnout %
Kotzebue	Northwest Arctic	American Indian	10.7%	11.4%	37.9%	-21.7%
Kotzebue	Northwest Arctic	Inupiat	12.2%	10.0%	37.9%	-21.7%
Koyuk	Nome	American Indian	8.6%	26.7%	50.0%	-9.6%
Koyuk	Nome	Inupiat	9.1%	26.7%	50.0%	-9.6%
Koyukuk	Yukon-Koyukuk	American Indian, Athabascan			53.6%	-6.0%
Kwethluk	Bethel	American Indian	41.0%	11.8%	40.7%	-18.9%
Kwethluk	Bethel	Yup'ik	41.3%	12.1%	40.7%	-18.9%
Kwigillingok	Bethel	American Indian, Yup'ik			42.7%	-16.9%
Kwinhagak (Quinhagak)	Bethel	American Indian	41.6%	12.5%	37.7%	-21.9%
Kwinhagak (Quinhagak)	Bethel	Yup'ik	42.1%	12.5%	37.7%	-21.9%
Lower Kalskag	Bethel	American Indian, Yup'ik			55.3%	-4.3%
Manokotak	Dillingham	American Indian	17.9%	30.0%	47.5%	-12.1%
Manokotak	Dillingham	Yup'ik			47.5%	-12.1%
Marshall	Wade Hampton	American Indian	11.4%	16.0%	46.5%	-13.1%
Marshall	Wade Hampton	Yup'ik	16.7%	16.0%	46.5%	-13.1%
Mekoryuk	Bethel	American Indian, Inupiat			52.5%	-7.1%
Minto	Yukon-Koyukuk	American Indian, Athabascan			42.7%	-16.9%

App. 8

Alaska Native Village	Census Area or Borough	Language Covered Under Section 203 of VRA	CVAP % that is LEP	% LEP CVAP that is Illiterate	Turnout % of Reg. Voters in 2012 Pres. Election	% above or below Statewide Turnout %
Mountain Village	Wade Hampton	American Indian	15.4%	21.4%	41.5%	-18.1%
Mountain Village	Wade Hampton	Yup'ik	16.7%	21.4%	41.5%	-18.1%
Napakiak	Bethel	American Indian	41.9%	11.1%	35.0%	-24.6%
Napakiak	Bethel	Yup'ik	40.5%	11.8%	35.0%	-24.6%
Napaskiak	Bethel	American Indian	41.3%	10.5%	40.8%	-18.8%
Napaskiak	Bethel	Yup'ik			40.8%	-18.8%
Nenana	Yukon-Koyukuk	American Indian, Athabascan			47.3%	-12.3%
New Koliganek	Dillingham	American Indian, Yup'ik			46.0%	-13.6%
New Stuyahok	Dillingham	American Indian	17.2%	30.0%	44.6%	-15.0%
New Stuyahok	Dillingham	Yup'ik	17.5%	30.0%	44.6%	-15.0%
Newtok	Bethel	American Indian, Yup'ik			42.8%	-16.8%
Nightmute	Bethel	American Indian	36.7%	7.3%	50.4%	-9.2%
Nightmute	Bethel	Yup'ik	42.3%	7.3%	50.4%	-9.2%
Noatak	Northwest Arctic	American Indian	12.1%	11.4%	49.3%	-10.3%
Noatak	Northwest Arctic	Inupiat	12.5%	11.4%	49.3%	-10.3%

App. 9

Alaska Native Village	Census Area or Borough	Language Covered Under Section 203 of VRA	CVAP % that is LEP	% LEP CVAP that is Illiterate	Turnout % of Reg. Voters in 2012 Pres. Election	% above or below Statewide Turnout %
Noorvik	Northwest Arctic	American Indian	12.0%	8.9%	39.0%	-20.6%
Noorvik	Northwest Arctic	Inupiat	12.3%	8.9%	39.0%	-20.6%
Nuiqsut	North Slope	American Indian, Inupiat, Unspecified Alaska Native			43.5%	-16.1%
Nulato	Yukon-Koyukuk	American Indian	5.6%	40.0%	42.3%	-17.3%
Nulato	Yukon-Koyukuk	Athabascan	5.6%	40.0%	42.3%	-17.3%
Nunam Iqua	Wade Hampton	American Indian, Yup'ik			55.8%	-3.8%
Nunapitchuk	Bethel	American Indian	33.9%	10.5%	38.5%	-21.1%
Nunapitchuk	Bethel	Yup'ik	42.2%	10.5%	38.5%	-21.1%
Oscarville	Bethel	American Indian, Yup'ik				
Pilot Station	Wade Hampton	American Indian	15.4%	20.0%	50.5%	-9.1%
Pilot Station	Wade Hampton	Yup'ik	15.9%	20.0%	50.5%	-9.1%
Pitkas Point	Wade Hampton	American Indian, Yup'ik				
Platinum	Bethel	American Indian, Yup'ik				
Point Hope	North Slope	American Indian	21.5%	11.8%	39.8%	-19.8%
Point Hope	North Slope	Inupiat	20.5%	12.5%	39.8%	-19.8%
Point Lay	North Slope	American Indian, Inupiat			32.0%	-27.6%
Ruby	Yukon-Koyukuk	American Indian, Athabascan			35.9%	-23.7%

Alaska Native Village	Census Area or Borough	Language Covered Under Section 203 of VRA	CVAP % that is LEP	% LEP CVAP that is Illiterate	Turnout % of Reg. Voters in 2012 Pres. Election	% above or below Statewide Turnout %
Russian Mission	Wade Hampton	American Indian, Yup'ik			51.8%	-7.8%
St. Michael	Nome	American Indian	7.1%	26.7%	34.7%	-24.9%
St. Michael	Nome	Yup'ik			34.7%	-24.9%
Savoonga	Nome	American Indian	21.4%	11.1%	57.3%	-2.3%
Savoonga	Nome	Yup'ik	22.8%	11.1%	57.3%	-2.3%
Scammon Bay	Wade Hampton	American Indian	15.2%	28.6%	53.0%	-6.6%
Scammon Bay	Wade Hampton	Yup'ik	15.6%	28.6%	53.0%	-6.6%
Selawik	Northwest Arctic	American Indian	11.4%	8.0%	37.6%	-22.0%
Selawik	Northwest Arctic	Inupiat	12.0%	8.0%	37.6%	-22.0%
Shageluk	Yukon-Koyukuk	American Indian, Athabascan			49.2%	-10.4%
Shaktoolik	Nome	American Indian, Inupiat			54.7%	-4.9%
Shishmaref	Nome	American Indian	8.1%	16.0%	57.4%	-2.2%
Shishmaref	Nome	Inupiat	8.3%	16.0%	57.4%	-2.2%
Shungnak	Northwest Arctic	American Indian, Inupiat			51.7%	-7.9%
Sleetmute	Bethel	American Indian, Yup'ik			49.2%	-10.4%
Stebbins	Nome	American Indian	20.7%	6.7%	36.7%	-22.9%
Stebbins	Nome	Yup'ik	22.2%	6.7%	36.7%	-22.9%

Alaska Native Village	Census Area or Borough	Language Covered Under Section 203 of VRA	CVAP % that is LEP	% LEP CVAP that is Illiterate	Turnout % of Reg. Voters in 2012 Pres. Election	% above or below Statewide Turnout %
Stony River	Bethel	American Indian, Yup'ik				
Tanana	Yukon-Koyukuk	American Indian, Athabascan			48.1%	-11.5%
Teller	Nome	American Indian	7.4%	40.0%	38.6%	-21.0%
Teller	Nome	Inupiat			38.6%	-21.0%
Togiak	Dillingham	American Indian	17.6%	31.3%	36.2%	-23.4%
Togiak	Dillingham	Yup'ik	18.6%	31.3%	36.2%	-23.4%
Toksook Bay	Bethel	American Indian	40.4%	13.0%	47.8%	-11.8%
Toksook Bay	Bethel	Yup'ik	41.8%	13.0%	47.8%	-11.8%
Tuluksak	Bethel	American Indian	41.3%	10.5%	29.8%	-29.8%
Tuluksak	Bethel	Yup'ik	42.2%	10.5%	29.8%	-29.8%
Tuntutuliak	Bethel	American Indian	42.5%	11.8%	49.5%	-10.1%
Tuntutuliak	Bethel	Yup'ik	41.0%	12.5%	49.5%	-10.1%
Tununak	Bethel	American Indian	40.5%	13.3%	40.8%	-18.8%
Tununak	Bethel	Yup'ik	42.9%	13.3%	40.8%	-18.8%
Twin Hills	Dillingham	American Indian, Yup'ik				
Unalakleet	Nome	American Indian	8.9%	11.4%	51.6%	-8.0%
Unalakleet	Nome	Inupiat	8.6%	13.3%	51.6%	-8.0%
Wainwright	North Slope	American Indian	21.5%	14.3%	44.3%	-15.3%
Wainwright	North Slope	Inupiat	20.6%	6.2%	44.3%	-15.3%
Wales	Nome	American Indian, Inupiat			60.4%	0.8%
White Mountain	Nome	American Indian, Inupiat			42.8%	-16.8%

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA

Nick, et al.  
Plaintiffs,  
vs.  
Bethel, et al.  
Defendants.

Case No. 3:07-cv-0098 TMB

**ORDER**  
**Re: Plaintiffs' Motion  
for a Preliminary  
Injunction Against  
the State Defendants**

(Filed Jul. 30, 2008)

**I. MOTION PRESENTED**

At Docket 202, Plaintiffs seek a preliminary injunction requiring the Defendants to adopt certain measures related to the minority language and voter assistance rights guaranteed by the Voting Rights Act of 1965 ("VRA"). Specifically, the Plaintiffs urge the Court to order mandatory relief to ensure that Yup'ik-speaking voters in the Bethel Census area receive effective language assistance under sections 203<sup>1</sup> and (4)(f)(4)<sup>2</sup> of the VRA, and that eligible voters receive assistance during the voting process, including in the voting booth, as guaranteed by section 208<sup>3</sup> of the VRA. Defendants oppose the motion, on which oral argument was heard July 8, 2008.

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<sup>1</sup> 42 U.S.C. § 1973aa-1a.

<sup>2</sup> 42 U.S.C. § 1973b(f)(4).

<sup>3</sup> 42 U.S.C. § 1973aa-6.

In light of the fact that the State's August 26, 2008 primary election is rapidly approaching, the Court issues this ruling with regard to the State Defendants<sup>4</sup> only. The portion of the Plaintiffs' motion seeking injunctive relief against the Bethel Defendants<sup>5</sup> remains under consideration.

As to the State Defendants, the Court has determined that the Plaintiffs are entitled to injunctive relief in connection with the upcoming state-run elections. The Court therefore GRANTS the Plaintiffs' motion with regard to the State Defendants and directs the State to comply with the relief described in section IV.B. of this order.

## II. LEGAL STANDARD

A party moving for preliminary injunction must show that a legal remedy is inadequate, meaning that the moving party is faced with an immediate and irreparable injury for which they cannot be

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<sup>4</sup> The "State Defendants" include Sean Parnell, in his official capacity as state Lieutenant Governor; Whitney Brewster, in her official capacity as Director of the state Division of Elections; Becka Baker, in her official capacity as Elections Supervisor of the Nome Regional Elections Office; and Michelle Speegle, in her official capacity as Elections Supervisor of the Fairbanks Regional Elections Office.

<sup>5</sup> The "Bethel Defendants" include Bethel, Alaska and Lori Strickler, in her official capacity as municipal clerk of Bethel.

compensated with money damages.<sup>6</sup> “[A] preliminary injunction should issue . . . upon a clear showing of either (1) probable success on the merits and possible irreparable injury, or (2) sufficiently serious questions going to the merits to make them fair grounds for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief.”<sup>7</sup> Under this second test, it must be shown, at a minimum, that “even if the balance of hardships tips decidedly in favor of the moving party, it must be shown as an irreducible minimum that there is a fair chance of success on the merits.”<sup>8</sup>

Thus, the standard for a preliminary injunction balances the moving party’s likelihood of success against the relative hardship to the parties.<sup>9</sup> “If the harm that may occur to the [moving party] is sufficiently serious, it is only necessary that there be a fair chance of success on the merits.”<sup>10</sup>

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<sup>6</sup> See *Dymo Industries, Inc. v. Tapeprinter, Inc.*, 326 F.2d 141, 143 (9th Cir. 1964).

<sup>7</sup> *Aguirre v. Chula Vista Sanitary Serv. & Sani-Trainer, Inc.*, 542 F.2d 779, 781 (9th Cir. 1976) (citing *Gresham v. Chambers*, 501 F.2d 687, 691 (2nd Cir. 1974)); *Walczak v. EPL Prolong, Inc.*, 198 F.3d 725, 731 (9th Cir. 1999).

<sup>8</sup> *Martin v. Int’l. Olympic Comm.*, 740 F.2d 670, 675 (9th Cir. 1984).

<sup>9</sup> See *Sun Microsystems, Inc. v. Microsoft Corp.*, 188 F.3d 1115, 1118 (9th Cir. 1999)

<sup>10</sup> *William Inglis & Sons Baking Co. v. ITT Continental Baking Co., Inc.*, 526 F.2d 86, 88 (9th Cir. 1975).

In the instant case, the Court must also consider the nature of the relief sought by the Plaintiffs. Where a party seeks mandatory relief that “goes well beyond maintaining the status quo *pendente lite*, courts should be extremely cautious about issuing a preliminary injunction.”<sup>11</sup> Mandatory preliminary relief is to be issued only where “the facts and law clearly favor the moving party.”<sup>12</sup>

### III. BACKGROUND

On June 11, 2007, the Plaintiffs initiated this action seeking declaratory and injunctive relief with respect to election-related policies and procedures used by the state of Alaska and the city of Bethel in the Bethel census area. The Plaintiffs’ original complaint asserted violations of the VRA’s bilingual language and voter-assistance guarantees. The Plaintiffs later amended their complaint to add an additional cause of action, alleging that the Defendants violated the “preclearance” requirements of section 5<sup>13</sup> of the VRA. A three-judge panel was then appointed to hear the section 5 claim, as required by federal law.<sup>14</sup>

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<sup>11</sup> *Id.*

<sup>12</sup> *Stanley v. University of Southern Calif.*, 13 F.3d 1313, 1320 (9th Cir. 1994).

<sup>13</sup> 42 U.S.C. § 1973c.

<sup>14</sup> 42 U.S.C. § 1973c; 28 U.S.C. § 2284.

On May 22, 2008, the Plaintiffs filed the motion for a preliminary injunction at issue here, along with a 29-page proposed order addressing the purported shortcomings of the Defendants' efforts to provide language assistance to Yup'ik-speaking voters in the Bethel region. The Plaintiffs seek injunctive relief in connection with three upcoming state-run elections: the August 26, 2008 primary, the October 7, 2008 Regional Educational Attendance Area (REAA) and Coastal Resources Service Area (CRSA) elections; and the November 4, 2008 general election.

The Plaintiffs did not seek expedited review of their request for injunctive relief until June 9, 2008. Following a Court-convened status conference, the Plaintiffs filed a status report with a much-reduced list of actions sought as relief for the August 26, 2008 primary election. The pared down list includes: the appointment of federal election observers, the hiring of a bilingual elections coordinator fluent in English and Yup'ik, the development of a Yup'ik glossary of common election terms, the airing of pre-election publicity and announcements in Yup'ik, consultation with Plaintiffs' counsel and tribal leaders to ensure the accuracy of any materials translated into Yup'ik, mandatory poll worker training on the VRA's bilingual language requirements, and pre- and post-election reports summarizing the State's efforts to comply with these measures. The Plaintiffs also seek, for each polling place within the Bethel census area, the provision of a sample ballot translated into Yup'ik and the display of a poster written in Yup'ik and

English notifying voters of the availability of language and voting assistance.

Even while opposing the Plaintiffs' motion for a preliminary injunction, the State has, during the course of this litigation, taken substantial steps to overhaul its minority language assistance program ("MLAP") for Alaska Native voters. The revised MLAP includes many – but not all – of the actions sought by the Plaintiffs in their status report. The State's plan does not, however, call for the translation of all written election materials into Yup'ik, because the State contends this is not required under the VRA. The State moved for summary judgment on this issue, which the Court granted before the hearing on July 8, 2008; in a written ruling issued on July 23, 2008, the Court found that Yup'ik is a "historically unwritten" language for purposes of the VRA and, therefore, the VRA requires the Defendants to provide oral – but not written – assistance to Yup'ik-speaking voters. While granting summary judgment to the State Defendants on this issue, the Court noted that they may need to print some election-related materials in Yup'ik, such as sample ballots, to provide "effective" language assistance, as required by federal regulations implementing the VRA.<sup>15</sup>

Because it initially appeared that the Plaintiffs' original motion for a preliminary injunction implicitly involved the section 5 claim, the three-judge panel

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<sup>15</sup> 28 C.F.R. § 55.2.

appointed to hear that claim participated in the July 8, 2008 hearing. But the parties' arguments at the hearing, and the Plaintiffs' filing of a separate motion for a preliminary injunction on the section 5 claim shortly before the hearing, made clear that the issues raised in this motion are distinct from the section 5 claim. Because of this, Judge Burgess, to whom this case was originally assigned, retained jurisdiction over the Plaintiffs' original motion for a preliminary injunction. The Plaintiffs' second motion seeking injunctive relief – which deals exclusively with the section 5 claim – remains pending before the three-judge panel.

#### IV. DISCUSSION

As noted above, a party seeking a preliminary injunction must show either the possibility of an irreparable injury and a likelihood of succeeding on the merits, or sufficiently serious questions going to the merits and a balance of hardships tipping decidedly in their favor. Given the importance accorded an individual's constitutional right to vote, the Court finds at the outset that the Plaintiffs have satisfied the "irreparable harm" prong of the first preliminary injunction standard. The "right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."<sup>16</sup> Denial

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<sup>16</sup> *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

of the right to participate in an election is by its nature an irreparable injury.<sup>17</sup>

### **A. Probable Success on the Merits**

Shifting to the second prong of the analysis, the Plaintiffs assert that there is “overwhelming evidence” of the State Defendants’ failure to provide effective language and voter assistance in violation of sections 4(f)(4), 203 and 208 of the VRA. The State Defendants respond that injunctive relief should be denied because they are in the process of improving their MLAP and, therefore, the Plaintiffs cannot establish a likelihood of success on the merits.

The requirements of sections 4(f)(4) and 203 of the VRA are essentially identical. They bar covered jurisdictions from providing English-only voting instructions and materials in any public election; all “voting materials” provided in English must also be provided in each language triggering coverage under the VRA. Specifically, the VRA’s provisions direct that whenever a State or political subdivision “provides any 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 minority group as well as in the English language . . . ” Both sections also include the following exemption:

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<sup>17</sup> *Id.* at 585.

*Provided, That where the language of the applicable minority group is oral or unwritten or in the case of Alaskan Natives and American Indians, if the predominant language is historically unwritten, the State or political subdivision is only required to furnish oral instructions, assistance, or other information relating to registration and voting.*<sup>18</sup>

Because the Court has ruled that Yup'ik is a “historically unwritten” language, this exemption applies and the Defendants are required to provide oral assistance only to Yup'ik-speaking voters.

Compliance with the VRA's bilingual provisions is measured by an “effectiveness” standard. The critical question is whether materials are provided in a such a way that voters from applicable language groups are “effectively informed of and participate effectively in voting-connected activities” and whether a covered jurisdiction has taken “all reasonable steps to achieve that goal.”<sup>19</sup> In addition, the U.S. Attorney General has issued regulations on oral assistance and election-related publicity, which state:

(a) General. Announcements, publicity, and assistance should be given in oral form to the extent needed to enable members of the applicable language minority group to participate effectively in the electoral process.

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<sup>18</sup> 42 U.S.C. §§ 1973b(f)(4) and 1973aa-1a(c) (emphasis added).

<sup>19</sup> 28 C.F.R. § 55.2.

(b) Assistance. The Attorney General will consider whether a jurisdiction has given sufficient attention to the needs of language minority group members who cannot effectively read either English or the applicable minority language and to the needs of members of language minority groups whose languages are unwritten.

(c) Helpers. With respect to the conduct of elections, the jurisdiction will need to determine the number of helpers (i.e., persons to provide oral assistance in the minority language) that must be provided. In evaluating the provision of assistance, the Attorney General will consider such facts as the number of a precinct's registered voters who are members of the applicable language minority group, the number of such persons who are not proficient in English, and the ability of a voter to be assisted by a person of his or her own choice. The basic standard is one of effectiveness.<sup>20</sup>

It is undisputed that the state of Alaska is a "covered jurisdiction" under Section 4(f)(4) for Alaska Natives, and that the Bethel census area, which includes the city of Bethel, is a "covered jurisdiction" under Section 203 for Alaska Natives and the Yup'ik language.<sup>21</sup> Section 208 of the VRA applies to all jurisdictions, and not just those deemed "covered" for

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<sup>20</sup> 28 CFR § 55.20.

<sup>21</sup> See 28 C.F.R. Pt. 55, App.

the language assistance provisions. It provides that voters who need assistance because they are blind, disabled, or unable to read or write, may receive assistance from a person of their choice, other than their employer, agent of their employer, or an agent of their union.<sup>22</sup>

Based on the evidence presented, the Court finds that the Plaintiffs have met their burden and established that they are likely to succeed on the merits on the language assistance claims brought under sections 203 and 4(f)(4) of the VRA, and the voter assistance claims brought under section 208 of the VRA. In reaching this conclusion, the Court relies on affidavits, depositions and other evidence showing that the State has failed to: provide print and broadcast public service announcements (PSA's) in Yup'ik, or to track whether PSA's originally provided to a Bethel radio station in English were translated and broadcast in Yup'ik;<sup>23</sup> ensure that at least one poll worker at each precinct is fluent in Yup'ik and capable of translating ballot questions from English into Yup'ik;<sup>24</sup> ensure that "on the spot" oral translations of ballot questions are comprehensive and accurate;<sup>25</sup> or require mandatory training of poll workers in the Bethel census area, with specific instructions on

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<sup>22</sup> 42 U.S.C. § 1973aa-6.

<sup>23</sup> Dkt. 202, Ex. 191 at 127-28, 148.

<sup>24</sup> Dkt. 202, Ex. 191 at 166; Ex. 159 at 73; Ex. 183 at ¶¶ 198-99. *See also* Dkt. 90 at ¶ 17.

<sup>25</sup> Dkt. 202, Ex. 159 at 76-77.

translating ballot materials for Yup'ik-speaking voters with limited English proficiency.<sup>26</sup>

After considering this evidence and the parties' arguments at the July 8, 2008 hearing, the Court also rejects the State Defendants' contention that injunctive relief should be denied because the State is in the midst of revamping its MLAP. The evidence shows that State officials became aware of potential problems with their language-assistance program in the spring of 2006, after the Native American Rights Fund issued a report describing the State's alleged failure to comply with the VRA's minority language provisions. Yet the State's efforts to overhaul the language assistance program did not begin in earnest until after this litigation began. Whitney Brewster, director of the State's Division of Elections, testified during her deposition that the Division began working to improve the MLAP in April 2006. These efforts were put on hold, however, while the Division prepared for elections in the fall of 2006 and a statewide special election in April 2007.<sup>27</sup> Therefore, while the State contends that an injunction is unnecessary, the court disagrees in light of the fact that: 1) the State has been covered by Sections 203 and 4(f)4 for many years now; 2) the State lacks adequate records to document past efforts to provide language assistance to Alaska Native voters; and 3) the revisions to the

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<sup>26</sup> Dkt. 202, Ex. 191 at 169-71; Ex. 159 at 60, 63.

<sup>27</sup> Dkt. 202, Ex. 191 at 70-71.

State’s MLAP, which are designed to bring it into compliance, are relatively new and untested. For all these reasons, the Court concludes that injunctive relief is both appropriate and necessary. The Court acknowledges that the State has undertaken significant efforts to improve its language assistance program. But by the State’s own admission, the overhaul remains a work in progress. In opposing the Plaintiffs’ motion, the State asserts that it is “in the process of adopting enhancements,” and counsel for the State acknowledged during the July 8, 2008 hearing that officials are still working to train and recruit poll bilingual poll workers and to assemble a Yup’ik glossary of election-related terms. Until these measures and others are fully in place, the evidence of past shortcomings justifies 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>28</sup>

In addition to the language-assistance claims brought under sections 203 and 4(f)(4) of the VRA, Plaintiffs have demonstrated that they are likely to prevail on their section 208 voter-assistance claim as

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<sup>28</sup> The Court also rejects the State’s arguments that injunctive relief should be denied on the grounds of laches and unclean hands. The State asserts that the Plaintiffs unreasonably delayed filing for injunctive relief and “tried to block” the Division’s implementation of improvements by filing critical comments with the U.S. Department of Justice in response to the State’s effort to obtain “preclearance” of its new procedures. The Court finds these arguments to be without merit.

well. That claim asserts that poll workers have regularly failed to allow voters (or apprise voters of their right) to bring an individual of their choice into the voting booth to assist them in the voting process. While the evidence on this claim is more anecdotal, it nonetheless satisfies the Plaintiffs' burden for injunctive relief. This evidence primarily consists of affidavits and deposition testimony showing that some poll workers in the Bethel census area do not understand that blind, disabled or illiterate voters have the right to receive assistance from a "helper" of their choosing. For example, Plaintiff Anna Nick has heard poll workers in Akiachak tell other voters that they "cannot bring anyone with them into the booth because their vote must remain private."<sup>29</sup> Similarly, Elena Gregory, a resident of the village of Tuluksak, reports being told by a poll worker that she "could not help the others vote if they did not understand" the ballots written in English.<sup>30</sup> In her declaration, she states: "I have voted in an election where the poll worker told me that elders could not have help interpreting or reading the ballots, and that everyone had to be 50 feet away from the person voting."<sup>31</sup> And in the city of Bethel of the village of Kwigillingok, election workers have failed to offer assistance to voters who needed it, and who were entitled to it under section 208.<sup>32</sup>

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<sup>29</sup> Dkt. 90 at ¶¶ 19-20.

<sup>30</sup> Dkt. 164 at ¶ 8.

<sup>31</sup> *Id.*

<sup>32</sup> Dkt. 89 at ¶ 24. *See also* Dkt. 161 at ¶¶ 22, 23.

Although courts have denied injunctions based on isolated instances of election-related misconduct, the evidence here appears to go well beyond that. Multiple individuals, in different districts and with different poll workers, have reported strikingly similar experiences. These accounts suggest that the violations of section 208 – which deny voters rights guaranteed by the VRA – are more than disparate incidents. As a result, an injunction appears to be an appropriate way to provide relief. Notably, as the Court will explain in the following section, most of the ordered relief simply obligates the State, under penalty of contempt, to do what it already promised to do at the July 8, 2008 oral argument. Accordingly, the burden imposed by this injunction will be minor.

### **B. Injunctive Relief**

Having established that Plaintiffs are entitled to some form of injunctive relief, the Court turns next to the specific relief sought by the Plaintiffs. As noted above, the Plaintiffs submitted a pared-down list of requested actions in their June 6, 2008 status report to the Court. At oral argument, counsel for the State Defendants indicated that the State has already taken significant steps to implement a number of these actions. As a result, the issues in this case have narrowed considerably, and the remedial actions on which the parties remain at odds are relatively few. Based on the July 8, 2008 hearing and the parties' briefs, the Court orders the State Defendants to implement the following actions:

**1. Provide mandatory poll worker training.** Poll workers shall be instructed on the VRA's guarantees of language and voter assistance. In addition, poll workers serving as translators should be trained on the methods and tools available for providing complete and accurate translations.

**2. Hire a language assistance coordinator fluent in Yup'ik.** In addition to implementing the State's revised language assistance program in the Bethel region, the coordinator should act as a liaison to the tribal councils and Yup'ik-speaking community to ensure the State's efforts result in effective language assistance.

**3. Recruit bilingual poll workers or translators.** At least one poll worker or translator fluent in Yup'ik and English shall be assigned to each polling place within the Bethel census area for the upcoming State-run elections.

**4. Provide sample ballots in written Yup'ik.** At least one such ballot shall be available at each precinct within the Bethel census area to aid poll workers in translating ballot materials and instructions for Yup'ik-speaking voters with limited English proficiency.

**5. Provide pre-election publicity in Yup'ik.** Election-related announcements provided in English shall be broadcast or published in Yup'ik as well. Pre-election publicity should

specifically inform Yup'ik speakers that language assistance will be available at all polling locations within the Bethel census area.

**6. Ensure the accuracy of translations.**

The State must consult with Yup'ik language experts to ensure the accuracy of all translated election materials.

**7. Provide a Yup'ik glossary of election terms.**

During oral argument, counsel for the State Defendants indicated that the State has already compiled a draft version of a Yup'ik glossary of election-related terms. At least one copy of this glossary shall be provided to each polling place within the Bethel census area to assist bilingual poll workers and translators.

**8. Submit pre-election and post-election progress reports.**

The State Defendants shall submit information on the status of efforts to comply with this Court-ordered program of relief and, more generally, the VRA's language and voter assistance provisions. The information should be specific and provided in a verifiable form, e.g., a precinct-by-precinct list of the names of designated bilingual poll workers or translators for the upcoming fall elections. Progress reports must be filed with the Court 15 days before each election (beginning with the August 26, 2008 statewide primary), and again 30 days after each election.

The Court's reasons for requesting the pre- and post-election progress reports are two-fold: First, they

will assist the Court in gauging compliance with the measures ordered here and with sections 4(f)(4), 203 and 208 of the VRA. Second, the reports will aid the three-judge panel in assessing the baseline for Plaintiffs' section 5 preclearance claims. As mentioned above, the Plaintiffs' motion for a preliminary injunction on that claim remains pending before the panel.

In ordering this injunctive relief, the Court declines the Plaintiffs' request for federal election observers. Under 42 U.S.C. § 1973a(a) the Court has authority to appoint federal election observers "if the Court determines that the appointment of such examiners is necessary to enforce" the voting guarantees of the fourteenth and fifteenth amendments.<sup>33</sup> Given the significant efforts made by the State to revamp the language assistance program for Alaska Natives, and the progress reports required in connection with this order, the Court concludes that federal observers are not necessary at this time.

The Court also denies the Plaintiffs' request that the State be required to display a poster at each polling location within the Bethel census area announcing, in Yup'ik and English, the availability of language assistance. The State asserts that such a requirement would contradict the VRA's written-assistance exemption for "historically unwritten" languages. Without addressing this argument, the Court

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<sup>33</sup> 42 U.S.C. § 1973a(a).

is satisfied that the State is pursuing adequate alternative means to inform Yup'ik-speaking voters about the availability of language assistance via pre-election publicity, poll worker training, and buttons for poll workers.

## V. CONCLUSION

For the reasons stated above, the Court GRANTS the Plaintiffs' Motion for a Preliminary Injunction at Docket 202 as to the State Defendants and orders the specific relief listed in Section IV.B. of this order.<sup>34</sup>

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<sup>34</sup> Although courts typically require the plaintiff to post a bond before obtaining a preliminary injunction, *see* Fed. R. Civ. P. 65(c), this procedure may be excused when the defendant fails to request a bond, or when a case presents “exceptional” circumstances. Both apply here. First, the Defendants have effectively waived the requirement by failing to request a bond in their opposition. *See Aoude v. Mobile Oil Corp.*, 862 F.2d 890, 896 (1st Cir. 1988); *Connecticut Gen. Life Ins. Co. v. New Images of Beverly Hills*, 321 F.3d 878, 82 (9th Cir. 2003) (appellate court will not consider issues not raised in the trial court). Further, bonds may also be excused in exceptional cases, such as suits to protect the public interest, *Pharmaceutical Soc. of State of New York, Inc. v. New York State Dept. of Social Services*, 50 F.3d 1168, 1175-75 (suit to ensure that State complied with federal Medicaid Act), or cases in which a bond would effectively deny access to judicial review, *see Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1126 (9th Cir. 2005) ([R]equiring nominal bonds is perfectly proper in public interest litigation”). The Court finds that these exceptional circumstances exist here: Plaintiffs have brought a public interest lawsuit, seeking only equitable and declaratory relief, to enforce the voting rights guaranteed themselves (and others) under federal law. Accordingly, the Court

(Continued on following page)

Dated at Anchorage, Alaska, this 30th day of July  
2008.

/s/ Timothy Burgess  
Timothy M. Burgess  
United States District Judge

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concludes that a bond is unnecessary. *See Roth v. Bank of the  
Commonwealth*, 583 F.2d 527, 538 (6th Cir. 1988).

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[SEAL]

**U.S. Department of Justice**  
Civil Rights Division

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CC:MSR:SMC;jdh      *Voting Section – NWB*  
DJ 166-012-3        *950 Pennsylvania Avenue, NW*  
2008-2739            *Washington, DC 20530*  
2008-3714

July 14, 2008

Gail Fenumiai, Esq.  
Director, Division of Elections  
P.O. Box 110017  
Juneau, Alaska 99811-0017

Dear Ms. Fenumiai:

This refers to the consolidation of the Tatitlek Precinct into the Cordova Precinct, and the subsequent polling place change, precinct realignment and precinct name change to the Cordova-Tatitlek Precinct; consolidation of the North Prince of Wales Precinct into the Klawock Precinct, and the subsequent polling place change, and precinct realignment; consolidation of the Pedro Bay Precinct into the Iliamna-Newhalen Precinct, and the subsequent polling place change precinct realignment and precinct name change to the Iliamna Lake North Precinct; and the consolidation of the Levelock Precinct into the Kokhanok Precinct, and the subsequent polling place change, precinct realignment and precinct name change to the Iliamna Lake south Precinct, for the State of Alaska, submitted to the Attorney General

pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your submission on May 13, 2008.

With regard to the changes affecting the North Prince of Wales Precinct, the Attorney General does not interpose any objection to the specified change. However, we note that Section 5 expressly provides that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the change. Procedures for the Administration of Section 5 of the Voting Rights Act (28 C.F.R. 51.41).

With regard to the remaining specified changes, our analysis indicates that the information sent is insufficient to enable us to determine that the proposed changes do not have the purpose and will not have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group, as required under Section 5. The following information is necessary so that we may complete our review of your submission:

1. A detailed explanation of the proposed changes including: (a) the criteria used to determine that the Tatitlek, Pedro Bay and Levelock Precincts should be eliminated; (b) reasons for the selection of the precincts these would be consolidated into; (c) a description of any alternative(s) precincts considered for the consolidation and the reason(s) why each such alternative was not recommended or approved; and (d) the factual basis, including any reports, studies,

analyses, or views (whatever formal or informal), for the State's determination that the proposed changes will not have a retrogressive effect on minority voters.

2. A map for each of the consolidations, which depicts the existing voting precincts and the locations of their current polling places, and any other locations considered as potential polling places for these consolidated precincts. The maps should be accompanied by a listing of the names and addresses of the current polling place locations along with the distance between each current location and the location with which it is being consolidated.

3. Please indicate the methods of transportation available to voters traveling from the old precinct to the new consolidated precinct. If no roadways connect the two, please indicate how voters will get to the consolidated location.

4. Please provide any methodology the State used to determine that there are no Alaskan Native-speakers in the impacted precincts, which are covered by the provisions of Section 203 of the Voting Rights Act. Please provide names of community members spoken to regarding the presence or absence of limited-English proficient voters, including their daytime telephone numbers.

5. A detailed description of the efforts, both formal and informal, made by the State to secure the views of the public, including members of the minority community, regarding these changes. Describe the substance of any comments or suggestions received,

provide the names and daytime telephone numbers of the persons making the comments or suggestions, and articulate the State's response, if any.

6. Voter registration and turnout data, by race, for elections since 1998 for the precincts being eliminated and subsequently consolidated.

During your recent conversation with Ms. Stephanie Celandine, of our staff, regarding these consolidations, you noted that the specified voting precincts affected by the consolidations would be designated as *permanent* absentee by-mail precincts. According to our records, this change affecting voting has not been submitted to the United States District Court of the District of Columbia for judicial review or to the Attorney General for administrative review as required by Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. If our information is correct, it is necessary that this change be brought before the District Court for the District of Columbia or submitted to the Attorney General for a determination that it does not have the purpose and will not have the effect of discriminating on account of race, color, or membership in a language minority group. Changes which affect voting are legally unenforceable without Section 5 preclearance. *Clark v. Roemer*, 500 U.S. 646 (1991); Procedures for the Administration of Section 5 of the Voting Rights Act (28 C.F.R. 51.10).

The Attorney General has sixty days to consider a completed submission pursuant to Section 5. This sixty-day review period will begin when we receive

the information specified above. See the Procedures for the Administration of Section 5 of the Voting Rights Act (28 C.F.R. 51.37). However, if no response is received within sixty days of this request, the Attorney General may object to the proposed changes consistent with the burden of proof placed upon the submitting authority. See also 28 C.F.R. 51.40 and 51.52(a) and (c). Changes which affect voting are legally unenforceable unless Section 5 preclearance has been obtained. *Clark v. Roemer*, 500 U.S. 646 (1991); 28 C.F.R. 51.10. Therefore, please inform us of the action the State of Alaska plans to take to comply with this request.

If you have any questions concerning this letter or if we can assist you in obtaining the requested information, you should call Ms. Celandine of our staff. Refer to File Nos. 2008-2739 and 2008-3714 in any response to this letter so that your correspondence will be channeled properly.

Sincerely,

/s/ Maureen S. [Illegible]  
for Christopher Coates  
Chief, Voting Section

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[SEAL]

**U.S. Department of Justice**  
Civil Rights Division

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CC:TFM:SBD:LB:jdh *Voting Section – NWB*  
DJ 166-012-3 *950 Pennsylvania Avenue, NW*  
2008-1726 *Washington, DC 20530*

August 1, 2008

VIA FACSIMILE & FIRST CLASS MAIL

Gail Fenumiai  
Director  
Division of Elections  
State of Alaska  
P.O. Box 110017  
Juneau, Alaska 99811-0017

Dear Ms. Fenumiai:

This refers to the changes in bilingual election procedures for the State of Alaska (“State”), submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your response to our May 19, 2008 request for additional information on June 9, 2008.

Your June 9, 2008, letter withdraws your submission of the State’s revised Minority Language Assistance Program (“MLAP”) from Section 5 review. Accordingly, no determination by the Attorney General is required concerning this matter. *See Procedures for the Administration of Section 5 of the Voting Rights Act*, 28 C.F.R. 51.25(a). Please be advised, however, that the State of Alaska is required to

provide bilingual election materials and minority language assistance in the Native American and Alaska Native languages under Sections 4(f)(4) and 203 of the Voting Rights Act. Therefore, to the extent that the State seeks to implement new procedures, preclearance of those procedures will be required before they may be implemented.

The last precleared bilingual election procedures for the State are the 1981 plan for the Alaska Native languages, precleared by letter dated October 5, 1981, and the 2002 and 2003 plans for the Tagalog language, precleared by letters dated October 22, 2002 and November 17, 2003. However, according to discovery conducted in the case, *Nick, et al. v. Bethel, et al.* (D. AK, 3:07-CV-00098-TMB) (“*Nick*”), admissions by State elections officials, and assertions in your letter dated June 9, 2008, regarding “conditions existing at the time of the submission” and the State’s continued implementation of “enhancements,” it appears that the State of Alaska is not currently fully implementing the 1981 plan and is instead implementing new and different procedures. Any procedures deviating from the prior precleared procedures are changes affecting voting for which preclearance is required. *See Clark v. Roemer*, 500 U.S. 646 (1991).

According to our records, some of those changes affecting voting in the state’s minority language program that have been implemented since 1981 have not been submitted to the United States District Court for the District of Columbia for judicial review or to the Attorney General for administrative review

as required by Section 5 of the Voting Rights Act. If our information is correct, it is necessary that these changes either be brought before the District Court for the District of Columbia or submitted to the Attorney General for a determination that they do not have the purpose and will not have the effect of discriminating on account of race, color, or membership in a language minority group. Changes which affect voting are legally unenforceable without Section 5 preclearance. *Id.*; 28 C.F.R. 51.10.

Should you elect to make a submission to the Attorney General for administrative review rather than seek a declaratory judgment from the District Court for the District of Columbia, it should be made in accordance with Subparts B and C of the procedural guidelines, 28 C.F.R. Part 51. At that time we will review your statewide bilingual procedures; however, any documentation previously provided need not be resubmitted.

The State of Alaska has recently submitted portions of its statewide bilingual procedures for Section 5 review in submissions dated June 2, 2008 (bilingual assistance forms and posters), June 10, 2008 (bilingual vote-by-mail materials), June 13, 2008 (bilingual vote-by-mail instructions), June 23, 2008 (Native Language and Tagalog audio on voting machines, and Native language audio CDs in polling places), and July 21, 2008 (using Native language audio CD recordings on automated phone system and website). With regard to these changes, please refer to the separate letter to you dated today, in which we state that

it would be inappropriate for the Attorney General to make a preclearance determination until the related changes have been submitted for Section 5 review.

We are aware of the Order entered on July 30, 2008, in the *Nick* litigation, requiring the State to implement certain bilingual elections procedures within the Bethel Census Area in the Yup'ik language. While those specific federal court-ordered procedures do not have to be submitted for Section 5 review, any procedures outside the scope of the Order that are changes affecting voting are legally unenforceable without Section 5 preclearance. *Id.*

Additionally, your letter dated June 9, 2008, contains some misconceptions regarding the Section 5 process, specifically the standard and scope of review of Section 5 submissions by the Attorney General, the process involving comments from outside parties, and reason for and purpose of the more information letter.

The Voting Rights Reauthorization Act of 2006<sup>1</sup> made clear that the standard of review under Section 5 includes any discriminatory purpose and not simply “retrogressive purpose” as explained in *Reno v. Bossier Parish School Board*, 528 U.S. 320 (2000). The applicable legal standard for determining whether discriminatory purpose exists is *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,

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<sup>1</sup> Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, sec. 5, 5(c), 120 Stat. 577, 581

429 U.S. 252, 266 (1977). This approach requires an inquiry into 1) the impact of the decision; 2) the historical background of the decision, particularly if it reveals a series of decisions undertaken with discriminatory intent; 3) the sequence of events leading up to the decision; 4) whether the challenged decision departs, either procedurally or substantively, from the normal practice; and 5) contemporaneous statements and viewpoints held by the decision-makers. *Id.* at 266-68.

Likewise, the discriminatory effect of a voting change must be measured by whether there is retrogression from a “benchmark” practice which is legally enforceable under Section 5, either by virtue of having been precleared or not being subject to preclearance. The Attorney General’s review of a submission thus requires the covered jurisdiction to accurately and completely identify the relevant benchmark practice. 28 C.F.R. 51.27(b), 51.54.

The Supreme Court has emphasized with respect to a covered jurisdiction that seeks judicial or administrative preclearance of a voting change under Section 5, “irrespective of which avenue of preclearance the covered jurisdiction chooses, it has the same burden of demonstrating that the changes are not motivated by a discriminatory purpose and will not have an adverse impact on minority voters . . . ” *McCain v. Lybrand*, 465 U.S. 236, 247 (1984).

A request for more information, like the Department's May 19, 2008 letter, seeks to assist the submitting jurisdiction in meeting its burden of establishing an absence of discriminatory purpose and discriminatory effect, where such information was not clearly presented in the initial submission. Therefore, the questions contained in the May 19, 2008 letter are relevant to the Section 5 analysis and necessary for the Attorney General to determine whether the submitted changes were motivated by any discriminatory purpose or will have a discriminatory effect as compared to the relevant benchmark. Moreover, we believe that the State of Alaska's response to the questions contained in the May 19, 2008 letter are necessary for the Department to review the State's submissions relating to or including bilingual election procedures, and to make a determination as to discriminatory purpose and retrogressive effect.

Likewise, the scope of review of Section 5 submissions by the Attorney General is broad and includes all information and documentation before him, including information provided by the submitting jurisdiction, information provided by outside parties in the form of comment, and any other relevant information obtained through a variety of public and internal means. 28 C.F.R. 51.26 through 51.30. In its letter dated March 18, 2008, the State informed the Attorney General that it was involved in the *Nick* private litigation regarding the very issues submitted for review. Court filings in that litigation are publicly available and were reviewed during the Attorney

General's consideration of the State's submission, as were comments from third parties.

The Procedures for Section 5 review contemplate and encourage comments from third parties and the Attorney General reviews, as a matter of course, those comments received during the sixty day period. 28 C.F.R. 51.26 through 51.33. Both the Section 5 Procedures and the Freedom of Information Act, 5 U.S.C. 552, allow for persons outside of the Department to obtain a copy of the submission and any comments upon request, subject to certain restrictions of privacy and confidentiality. 28 C.F.R. 51.29. An individual or group who provides information concerning a change affecting voting may choose to keep their identity confidential. 28 C.F.R. 51.29(d). Additionally, the Attorney General may, in his discretion, inform the submitting authority of comments made by third parties, as was done in this matter. 28 C.F.R. 51.36. However, no jurisdiction has a standing request to be notified of all comments received for all submissions.

Lastly, the Section 5 Procedures provide a means for the Attorney General to seek clarification and additional information from a jurisdiction, when necessary, including when issues are raised during the sixty-day review process or information provided by the submitting authority is insufficient. 28 C.F.R. 51.37. Such procedures also allow the jurisdiction and opportunity to respond to and rebut allegations so that the Attorney General can make a fully informed determination. *Id.* During the review of the State's submission dated March 18, 2008, those issues set

forth in the Department's letter dated May 19, 2008, came to light and the Attorney General sought the State's response to and clarification of same.

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action the State of Alaska plans to take regarding the changes affecting voting that have not been submitted for judicial review or preclearance. If you have any questions, you should call Ms. Lema Bashir (202-305-0063) of our staff. Please refer to File No. 2008-1726 in any response to this letter so that your correspondence will be channeled properly.

Since the Section 5 status of Alaska's minority language assistance program is before the court in *Nick, et al. v. Bethel, et al.* (D. AK, 3:07-CV-00098-TMB), we are providing a copy of this letter to the court and counsel of record in that case.

Sincerely,

/s/ [Illegible]  
for  
Christopher Coates  
Chief, Voting Section

cc: Court and Counsel of Record

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[SEAL]

**U.S. Department of Justice**  
Civil Rights Division

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CC:MSR:SMC:par      *Voting Section – NWB*  
DJ 166-012-3        *950 Pennsylvania Avenue, NW*  
2008-2739            *Washington, DC 20530*  
2008-3714

September 10, 2008

Ms. Gail Fenumiai  
Director, Division of Elections  
P.O. Box 110017  
Juneau, Alaska 99811-0017

Dear Ms. Fenumiai:

This refers to the consolidation of the Tatitlek Precinct into the Cordova Precinct, and the subsequent polling place change, precinct realignment and precinct name change to the Cordova-Tatitlek Precinct; consolidation of the Pedro Bay Precinct into the Iliamna-Newhalen Precinct, and the subsequent polling place change, precinct realignment and precinct name change to the Iliamna Lake North Precinct; the consolidation of the Levelock Precinct into the Kokhanok-Iguigig Precinct, and the subsequent polling place change, precinct realignment and precinct name change to the Iliamna Lake South Precinct; and resulting designation of the Tatitlek, Pedro Bay and Levelock Precincts as permanent absentee by-mail precincts for the State of Alaska, submitted to the Attorney General pursuant to Section 5 of the Voting

Rights Act, 42 U.S.C. 1973c. We received your response to our July 14, 2008, request for additional information on July 30, 2008.

Your July 30, 2008, letter withdraws your submission from Section 5 review. Accordingly, no determination by the Attorney General is required concerning this matter. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.25(a)).

Sincerely,

/s/ Maureen S. [Illegible]  
for Christopher Coates  
Chief, Voting Section

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## Alaska Federation of Natives

1577 C Street, Suite 300, Anchorage, Alaska 99501  
907.274.3611 Fax: 907.276.7989 | [www.nativefederation.org](http://www.nativefederation.org)

FOR IMMEDIATE RELEASE  
April 5, 2013

CONTACT  
Judy Jaworski - 907.274.3611  
[jjaworski@nativefederation.org](mailto:jjaworski@nativefederation.org)

## Alaska Delegation Speaks Out for Immigration Reform

*Delegation voices "deep commitment to an inclusive state and nation," cites Alaska's rich diversity as inspiration for support*

**Anchorage, AK** - Alaska's Congressional delegation today boldly voiced their support for the drafting and introduction of a bipartisan comprehensive immigration reform bill with the strong backing of the Alaska Native community.

"We are very pleased and very proud to see our delegation speaking out for equality and diversity with a strong, united voice," said Alaska Federation of Natives (AFN) President Julie Kitka. "Alaska Natives understand what it means to have a homeland. We believe everyone in this great nation should share that sense of belonging, security and hope."

Senators Lisa Murkowski and Mark Begich and Congressman Don Young addressed their "Dear Colleague" letter to the leadership of both houses of Congress, sending a clear message of support for a bill that "should secure our border, streamline our legal immigration system and provide a clear and responsible path to citizenship for those already here."

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*The Alaska Federation of Natives was formed in October 1966, when more than 400 Alaska Natives representing 17 Native organizations gathered for a three-day conference to address Alaska Native aboriginal land rights. It is now the largest statewide Native organization in Alaska. Its membership includes 178 villages (both federally-recognized tribes and village corporations), 13 regional Native corporations and 12 regional nonprofit and tribal consortiums that contract and run federal and state programs. AFN is governed by a 37-member Board, which is elected by its membership at the annual convention held each October. The mission of AFN is to enhance and promote the cultural, economic and political voice of the entire Alaska Native community. Learn more at [www.nativefederation.org](http://www.nativefederation.org).*

###

# Alaska Congressional Delegation



Senator Lisa Murkowski  
Senator Mark Begich  
Congressman Don Young

Matthew Felling 202-224-9301  
Heather Handyside 907-258-9304  
Mike Anderson 202-225-5765

FOR IMMEDIATE RELEASE

April 5, 2013

## Alaska Delegation United for Immigration Reform

### *Murkowski, Begich, Young Call on Hill Leaders for Intelligent Policy*

WASHINGTON, D.C. – With negotiations over comprehensive immigration reform continuing over the Easter state work period, Alaska’s Congressional Delegation is weighing in on the matter in a letter (*attached*) to leaders in both chambers, citing Alaska’s historic commitment to diversity and inclusion as the spirit to be kept in mind as the process moves forward.

Leading with an allusion to Elizabeth Wanamaker Peratrovich’s successful fight for equality during the 1940s, and pointing out that Alaska’s civil rights movement preceded the national cause by roughly a generation, Senators Lisa Murkowski and Mark Begich and Representative Don Young wrote that the 49<sup>th</sup> state may be considered the “reddest” of states by national political observers, but the reality on the ground shows it to be “a state that is highly diverse in population, culture and tradition.”

The delegation closes with a call to action for party leaders, asking for a three-pronged approach to be considered as discussion continues on the issue, including border security and enforcement, efficiency and well-crafted policy that is forward-looking:

Inspired by the words of our First Alaskans, and deeply committed to an inclusive state and nation, we join today to express our hope that the bipartisan comprehensive immigration reform bill being drafted by our colleagues be brought to the floor of our respective bodies for consideration this session. Like our colleagues drafting the bill, we believe this legislation should secure our border, streamline our legal immigration system and provide a clear and responsible path to citizenship for those already here.

###

**Congress of the United States**  
Washington, DC 20515

April 5, 2013

Honorable Harry Reid  
Majority Leader  
United States Senate  
Washington, DC 20510

Honorable Mitch McConnell  
Republican Leader  
United States Senate  
Washington, DC 20510

Honorable John Boehner  
Speaker  
US House of Representatives  
Washington, DC 20515

Honorable Nancy Pelosi  
Minority Leader  
US House of Representatives  
Washington, DC 20515

Dear Colleagues:

While our state of Alaska is often regarded as one of the “reddest” states in the country, and our performance in recent presidential contests bears that out, we are in fact a state that is highly diverse in population, culture and tradition.

Alaska’s commitment to equality long predates its admission to statehood. Even today we take pride in the fact that Alaska enacted comprehensive anti-discrimination laws in the 1940s at the behest of a Tlingit Indian woman named Elizabeth Wanamaker Peratrovich – two decades before the Congress passed the Civil Rights Acts of 1964 and 1965.

We honor our vibrant Alaska Native community, the descendants of the first peoples who occupied the territory we today call Alaska. And we also honor those who have come from places around the world, including a significant number of refugees, who have chosen to make Alaska their home. While 88 percent of the students in the Anchorage School District speak English at home, the remaining 12 percent speak some 92 different languages when they return home at the end of the day. The five most common of these languages are Spanish, Hmong, Samoan, Tagalog, and Yupik, the traditional language of the Eskimo peoples of Southwest Alaska.

In the words of Julie Kitka, President of the Alaska Federation of Natives, “As Indigenous peoples, Alaska Natives know how much it matters to have a homeland and to belong... We want our country’s 11 million undocumented individuals to be welcomed and to have a place to belong – free of fear.” And Jason Metrokin, an Alaska Native of Aleut and Alutiq descent, reminds us, “None of us should lose sight of the fact that about 98 percent of citizens are here because past, progressive immigration policies permitted them to come to the United States to make a new home. Immigrants have always recharged our country and have been reliable sources of economic growth, cultural diversity and innovation. And right now we need more of all three.”

Inspired by the words of our First Alaskans, and deeply committed to an inclusive state and nation, we join today to express our hope that the bipartisan comprehensive immigration reform bill being drafted by our colleagues be brought to the floor of our respective bodies for consideration this session. Like our colleagues drafting the bill, we believe this legislation should secure our border, streamline our legal immigration system and provide a clear and responsible path to citizenship for those already here. We pledge to consider this legislation, when presented, with open minds and open hearts.

Sincerely,



Lisa Murkowski  
United States Senator

Mark Begich  
United States Senator

Don Young  
Congressman for All Alaska



## ACHP Endorses *United Nations Declaration on the Rights of Indigenous Peoples*

The Advisory Council on Historic Preservation (ACHP) formally endorsed a plan to support the *United Nations Declaration on the Rights of Indigenous Peoples* at its Winter Business Meeting on March 1, 2013.

“This is an opportunity to promote better stewardship and protection of Native historic properties and sacred places, and in doing so helps to ensure survival of indigenous cultures,” said Milford Wayne Donaldson, FAIA, ACHP chairman. “The *Declaration* reinforces the agency’s principles and goals contained in our Native American Traditional Cultural Landscapes Action Plan and other works with Native Hawaiian organizations and tribes.”

John L. Berrey, Chairman of the Quapaw Tribe, is the Native American member on the 23-member ACHP. He moved that the ACHP endorse the *Declaration plan*. The motion was approved unanimously. It is believed that the ACHP is the first federal agency to adopt such a plan.

Under the plan, the ACHP will raise awareness about the Declaration within the preservation community; make information about the Declaration available on its Web site; develop guidance on the intersection of the Declaration with the Section 106 process; reach out to the archaeological community about the Declaration and the conduct of archaeology in the United States; and generally integrate the Declaration into its initiatives such as the Traditional Cultural Landscapes Action Plan.

The *United Nations Declaration on the Rights of Indigenous Peoples* was adopted by the United Nations General Assembly on September 13, 2007, with 143 nations in favor, 34 not-participating, and four opposed. Among the four opposing the measure at that time was the United States of America. Subsequently, the U.S. took a formal review of its position in consultation with Indian tribes and other parties. On December 16, 2010, President Barack Obama announced U.S. support for the *Declaration* and the State Department issued [a formal announcement](#). The *Declaration* is not legally binding but is an inspirational international instrument that includes a broad range of provisions regarding the relationship among nations, organizations, and indigenous peoples.

The ACHP oversees federal compliance with Section 106 of the National Historic Preservation Act, which stipulates that federal undertakings must take into account the resultant impact of actions on historic properties. In this role, the ACHP works on a government-to-

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government basis with federally recognized Indian tribes. It has established an Office of Native American Affairs and, among many other efforts, has published extensive guidance regarding various tribal and Native Hawaiian organizations to inform and assist federal Section 106 efforts.

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**ALASKA FEDERATION OF NATIVES**  
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### **Reinstatement of Superintendent Mary A. Miller Ordered at the Sitka National Historical Park**

SITKA, Alaska, April 4, 2013 – The National Park Service (NPS) has been ordered by the U.S. Merit Systems Protection Board to reinstate Mary A. Miller to her position as superintendent at the Sitka National Historical Park. Miller appealed her removal and brought suit claiming her removal among other charges was “tainted by discrimination” based on her Alaska Native race, sex and physical disability.

The park commemorates the 1804 Tlingit battle as part of its park status designation. Miller’s termination from the NPS in August 2010 occurred amongst the park’s major events celebrating its 100-year anniversary.

The Alaska Federation of Natives advocated for Miller from the beginning and this action demonstrates there is due process for those facing similar circumstances according to AFN President Julie Kitka. “Mary had energy and brought value and a Native presence to the Sitka National Historical Park. We were disappointed about her removal and protested directly to the Department of Interior,” she said. “This decision highlights the need for the federal government to look at Alaska Native employment statistics, increased retention and increased opportunities for Native representation in key management positions.”

In addition to reinstatement, Miller will receive back pay and benefits. The agency must also report back to Miller once it has fully carried out the Merit System Protection Board’s order.

“I am so grateful to my family, friends, colleagues and members of the community who have supported me throughout this arduous process. This decision has restored my faith in the system and I’m looking forward to getting back to work to continue building agency relations with the community,” said Miller. “From the beginning of this ordeal I have never wavered in my commitment to Sitka — Sitka is my home and there is still much work here to do and lost time to make up for.”

Sealaska Board Chair Albert Kookesh says Sealaska has been pulling for Miller and hopeful for her reinstatement. “We are so proud of our tribal member shareholders who show leadership, even in the face of adversity, to stand up for their rights for the benefit of our culture and communities,” he said. “Alaska Native representation across our municipal, state and federal agencies is vital to ensuring our community interests are advanced. We bring unique knowledge of the history and land and a passion for maintaining strong communities into the future and Mary is an asset in this effort.”

Miller is a professional engineer and holds an executive MBA degree from University of Washington. She is Eagle of the *Shungukeidi* (Thunderbird) Clan from the *Kaawdliyaayi Hit* (House Lowered from the Sun) of Klukwan and was born and raised in Sitka where she continues to reside.

#### **About the Alaska Federation of Natives**

The Alaska Federation of Natives (AFN) is the largest statewide Native organization in Alaska. Its membership includes 178 villages (both federally-recognized tribes and village corporations), 13 regional Native corporations and 12 regional nonprofit and tribal consortiums that contract and run federal and state programs. AFN is governed by a [37-member Board](#), which is elected by its membership at the annual convention held each October. The mission of AFN is to enhance and promote the cultural, economic and political voice of the entire Alaska Native community.

Contact: Mary Miller 907.738.9305 or Julie Kitka 907.274.3611



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of the Interior**

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# News Release

## Sally Jewell Gets to Work as Secretary of the Interior

### Spends first day on the job greeting career employees, holding in-depth briefings

**04/15/2013**

Contact: Jessica Kershaw (DOI), 202-208-6416

**WASHINGTON, D.C.** -- Assuming her responsibilities as the 51st Secretary of the Interior, Sally Jewell is spending her first full day in the office meeting some of the Department's more than 70,000 employees. She also began to hold meetings on important issues before the Department, including energy development, conservation, Indian Affairs and youth engagement.

During brief remarks to employees who greeted Secretary Jewell as she entered the main Interior building in Washington, D.C., Jewell underscored her commitment to public service.

"There is no higher calling than public service, and I am honored and humbled to be serving as your Secretary of the Interior," Jewell said. "At Interior, we have vast responsibilities to the American people, from making smart decisions about the natural resources with which we have been blessed, to honoring our word to American Indians and Alaska Natives."

"Our public lands are huge economic engines for the nation," added Jewell. "From energy development to tourism and outdoor recreation, our lands and waters power our economy and create jobs. I look forward to working with you all to ensure that we are managing our public lands wisely and sustainably so that their multiple uses are available for the generations to come."

Jewell was officially sworn in on Friday, April 12 at the Supreme Court of the United States. Retired Justice Sandra Day O'Connor administered the oath of office. O'Connor and Jewell worked together on the National Parks Second Century Commission, an independent commission charged with developing a twenty-first century vision for the National Park Service.

As Secretary of the Interior, Jewell leads an agency with more than 70,000 employees. Interior serves as steward for approximately 20 percent of the nation's lands, including national parks, national wildlife refuges, and other public lands; oversees the responsible development of conventional and renewable energy supplies on public lands and waters; is the largest supplier and manager of water in the 17 Western states; and upholds trust responsibilities to the 566 federally recognized American Indian tribes and Alaska Natives.

Prior to her confirmation, Jewell served in the private sector, most recently as President and Chief Executive Officer of Recreation Equipment, Inc. (REI). Jewell joined REI as Chief Operating Officer in 2000 and was named CEO in 2005. During her tenure, REI nearly tripled in business to \$2 billion and was consistently ranked one of the 100 best companies to work for by Fortune Magazine.

Before joining to REI, Jewell spent 19 years as a commercial banker, first as an energy and natural resources expert and later working with a diverse array of businesses that drive our nation's economy.

Trained as a petroleum engineer, Jewell started her career with Mobil Oil Corp. in the oil and gas fields of Oklahoma and the exploration and production office in Denver, Colo. where she was exposed to the remarkable diversity of our nation's oil and gas resources.

An avid outdoorswoman, Jewell finds time to explore her backyard in the Pacific Northwest where she enjoys skiing, kayaking, hiking and other activities. She has scaled Mount Rainier on seven occasions, and recently climbed Vinson Massif, the highest mountain in Antarctica.

Over her career, Jewell has worked to ensure that public lands are accessible and relevant to all people from all backgrounds.

"We have a generation of children growing up without any connection to nature," said Jewell. "From our urban parks to the vast lands of the BLM, the Department of the Interior is well positioned to build a deep and enduring connection between the great outdoors and a new generation of Americans and visitors."

Jewell is a graduate of the University of Washington. She and her husband, Warren, have two adult children, Peter and Anne.

To see photographs of Secretary Jewell's official swearing in ceremony, [click here](#).

To see photographs of Secretary Jewell's arrival at the Stuart Lee Udall Building in Washington, DC, [click here](#).

You can welcome Secretary Jewell to the Department of the Interior by following her at [www.twitter.com/SecretaryJewell](http://www.twitter.com/SecretaryJewell).

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# News Release

## Deputy Secretary David J. Hayes to Conclude Successful Tenure at Interior Department

**Jewell praises Hayes for his leadership, dedication to public service**

**04/30/2013**

Contact: Blake Androff, 202-208-6416

**WASHINGTON, D.C.** – David J. Hayes will conclude his role as Deputy Secretary at the Department of the Interior this year after serving in the position for the Obama Administration for more than four years. Hayes will serve as a Senior Fellow at the Hewlett Foundation and will teach at Stanford Law School in the fall. Hayes expects to leave Interior at the end of June.

“David has been a key architect for nearly every significant initiative undertaken at Interior over the last four years,” said Secretary of the Interior Sally Jewell. “From his work on expanding renewable energy production on public lands and waters, to coordinating federal family energy activities in Alaska, to developing a landscape-scale approach to conservation and climate change, David has left an indelible mark. I am grateful for his wisdom and guidance to me throughout this transition and I wish him the best as he heads out to California for this next chapter.”

As Deputy, Hayes has been a key leader in implementing President Obama’s priorities, including: promoting conservation initiatives such as the America’s Great Outdoors agenda; encouraging thoughtful renewable energy development on public lands and offshore resources through initiatives like the Western Solar Plan and the “Smart from the Start” offshore wind strategy; implementing unprecedented oil and gas safety reforms after Deepwater Horizon and forward-thinking changes to onshore oil and gas leasing; fulfilling the nation’s trust responsibilities to American Indians and Alaskan Natives, including unprecedented water rights and legal settlements in Indian Country; managing the nation’s water supplies sustainably, including improvements to California’s water infrastructure; and implementing Interior’s scientific integrity policy.

“It’s been an honor and a privilege to serve in President Obama’s Administration and to work on some of the most important and challenging issues of our time,” said Hayes. “It was a difficult decision to leave the Department, but I’m looking forward to heading out West to return to Stanford and to partner with the Hewlett Foundation where I will continue to develop progressive solutions to our nation’s environmental and natural resources challenges.”

Hayes was confirmed as Deputy Secretary in May 2009 by unanimous vote of the United States Senate.

In July 2011, the President appointed Hayes as Chair of the Interagency Working Group on Coordination of Domestic Energy Development and Permitting in Alaska, which works to organize the efforts of Federal agencies that oversee the safe and responsible development of onshore and offshore, renewable and conventional energy in Alaska. This month, Hayes released a report to the President on Arctic, *Managing for the Future in a Rapidly Changing Arctic*, recommending that the United States develop an innovative, government-wide “Integrated Arctic Management” strategy for the rapidly changing Arctic.

Hayes played an instrumental role in settling the long-standing Cobell Indian trust litigation and overseeing implementation of the settlement, ending 14 years of litigation regarding the Interior Department's management of trust resources for more than 500,000 American Indians and Alaska Natives.

Hayes also headed up the Interior Department's response to the Deepwater Horizon oil spill for the Secretary, managing day-to-day operational issues and helping to implement the significant oil and gas safety and reform agenda. Since 2009, he has served as co-chair of the Secretary's Energy and Climate Change Task Force, guiding Interior's energy programs and its climate change adaptation activities.

Hayes previously served as the Deputy Secretary and counselor to the Secretary of the Interior in the Clinton Administration. He worked for many years in the private sector where he chaired the Environment, Land and Resources Department at Latham and Watkins, an international law firm.

Hayes is a former chairman of the Board of the Environmental Law Institute; he was a consulting professor at Stanford University's Woods Institute for the Environment; he served as a Senior Fellow for the World Wildlife Fund, and was the Vice-Chair of the Board of American Rivers. Hayes has written and lectured widely in the environmental and natural resources field.

Hayes is a native of Rochester, New York. He graduated summa cum laude from the University of Notre Dame and received his J.D. from Stanford University, where he was an editor of the Stanford Law Review. He is the former Chairman of the Board of Visitors for Stanford Law School.

Hayes and his wife Elizabeth reside in Arlington, Virginia and he has three children, Katherine, Stephen and Molly.

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## MEMORANDUM

April 11, 2013

TO: Contract Support Cost Clients

FROM: HOBBS, STRAUS, DEAN & WALKER, LLP /s/

RE: ***President's FY 2014 Budget Provides Minimal CSC Increases, Proposes Cap on Each Contractor's CSC Allocation***

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Earlier today the President's proposed FY 2014 budget was released. It contains small increases for contract support costs (CSC) for both the Bureau of Indian Affairs (BIA) and the Indian Health Service (IHS). More significantly, the proposed appropriations bill for both agencies introduces a new approach to CSC spending that would cap not only the aggregate appropriation but also, apparently, the allocation of that amount to each individual tribe or tribal organization. The intent appears to be a legislative "*Ramah* fix" that would remove the Government's responsibility, as held in *Salazar v. Ramah Navajo Chapter*, to fully fund CSC for each contract and eliminate tribes' ability to recover CSC shortfalls through contract actions.<sup>1</sup>

The budget proposes \$230 million for CSC for BIA for ongoing awards, an increase of \$10 million but below the \$242 million estimated to represent full need. In addition, BIA would receive \$1 million for CSC associated with new and expanded agreements. IHS fared worse, with a proposal of \$477,205,000, an increase of only \$5,768,000, and far below the estimated full need of \$617 million. Within that total, up to \$500,000 is for CSC associated with new and expanded awards.

These funding levels will leave many tribal contractors, especially on the IHS side, with significant CSC shortfalls, and the proposed new appropriations act language appears designed to ensure that tribes will not be able to recover any shortfalls through breach of contract claims. In *Ramah*, the Supreme Court read current law as placing the agencies on the horns of a "dilemma." On the one hand, the Indian Self-Determination Act (ISDA) requires full funding of CSC; on the other hand, Congress never appropriates enough CSC to fully fund every contractor's CSC need. Although the ISDA makes funding "subject to the availability of appropriations," all of the CSC funding in the lump sum appropriated by Congress was legally available to pay any individual contractor in full, so the failure to do so in any instance was a breach of contract and the contractor could sue to recover the shortfall. The Court identified several options for Congress to resolve this dilemma, one of which was to make line-item

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<sup>1</sup> For a detailed discussion of *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181 (2012), please see our memorandum of June 20, 2012.

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appropriations allocating CSC on a contractor-by-contractor basis.<sup>2</sup> This way the entire aggregate CSC appropriation would no longer be "available" to any individual contractor, only the amount in its own line-item appropriation.

The FY 2014 appropriations bill language proposes entirely new accounts for CSC. In addition to caps on aggregate CSC spending for each agency, both the BIA and IHS language specifies that "notwithstanding any other provision of law, the amount available for contract support costs associated with each ongoing Indian Self-Determination Act agreement" with BIA or IHS "shall not exceed the amount identified in the [BIA or IHS] Contract Support Costs table submitted by the Secretary . . . to the House and Senate Committees on Appropriations." Incorporating these funding tables by reference into the appropriations act appears to be an attempt to limit the Government's liability in the way the Supreme Court suggested.

The tables identifying the CSC funding levels for each ISDA agreement are not yet available. It is not clear whether tribes and tribal organizations will be consulted as to their funding levels.

The budget narrative for IHS includes the following description of CSC and its relation to other IHS funding:

Funding for CSC is an important part of self-determination, but it must be balanced with funding for health care services. In 2012, the Supreme Court ruled in *Salazar v. Ramah Navajo Chapter* that past appropriations language was not sufficiently constructed to execute the longstanding policy of managing CSC costs. The Court identified five legislative remedies, ranging from changing payments for CSC through amendments to underlying self-determination authorities, to enacting line-item appropriations for each contract, to appropriating the full estimates for CSC. Consistent with the Supreme Court ruling, the Budget proposes a new approach for CSC, along with a funding increase, for IHS and BIA to continue the policy of supporting self-determination while protecting funding for health care services for AI/ANs. The Administration looks forward to working with the Tribes and the Congress to develop a balanced, long-term solution.<sup>3</sup>

The BIA narrative contains a similar description. Unfortunately, the "longstanding policy of managing CSC costs" invoked by the agencies has, in practice, meant saddling ISDA contractors and compactors with CSC shortfalls, effectively imposing a penalty for self-determination and self-governance.

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<sup>2</sup> 132 S. Ct. at 2195.

<sup>3</sup> FISCAL YEAR 2014 BUDGET OF THE U.S. GOVERNMENT 96-97.

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### *Conclusion*

The budget narratives describe the new approach as a "short-term" one on the way toward "a balanced, long-term solution." Nonetheless, it is disappointing that the Administration chose this approach, without tribal consultation. Tribes and tribal organizations that are submitting testimony on CSC issues prior to the April 24 and 25 hearings may wish to raise concerns about this proposed approach and ask that Congress reject it and fully fund CSC for both agencies—another of the options suggested by the Supreme Court.

If you have any questions about this memorandum, please do not hesitate to contact Joe Webster ([jwebster@hobbsstrauss.com](mailto:jwebster@hobbsstrauss.com), 202-822-8282), Geoff Strommer ([gstrommer@hobbsstrauss.com](mailto:gstrommer@hobbsstrauss.com), 503-242-1745), Steve Osborne ([sosborne@hobbsstrauss.com](mailto:sosborne@hobbsstrauss.com), 503-242-1745), or Stephen Quesenberry ([squesenberry@hobbsstrauss.com](mailto:squesenberry@hobbsstrauss.com), 510-280-5135).

**Congressional Research Service Summary**  
**S. 649 , the Safe Communities, Safe Schools Act**  
**As of 3/21/2013 As Introduced**

Safe Communities, Safe Schools Act of 2013 - Amends the NICS Improvement Amendments Act of 2007 (NICS Act), the Brady Handgun Violence Prevention Act (Brady Act), the Omnibus Crime Control and Safe Streets Act of 1968, and the federal criminal code to require background checks for all firearm sales, prohibit straw purchases of firearms, and expand the school safety grant program.

Fix Gun Checks Act of 2013 - Amends the NICS Act to eliminate from the records concerning persons who are prohibited from possessing or receiving a firearm, about which a state must submit estimates to the Attorney General for purposes of the National Instant Criminal Background Check System: (1) a record that identifies a person for whom an indictment has been returned for a crime punishable by imprisonment for a term exceeding one year or who is a fugitive from justice and for which a record of final disposition is not available; and (2) a record that identifies a person who is an unlawful user of, or addicted to, a controlled substance. Directs the Attorney General to establish the applicable time period for the occurrence of events which would disqualify a person from possessing a firearm (currently, within the prior 20 years) in pertinent records.

Replaces provisions requiring that a specified percentage of grants to states and Indian tribal governments for establishing, planning, or improving identification technologies for firearms eligibility determinations be used to maintain a relief from disabilities program with provisions authorizing states to use such grants for such a program. Authorizes appropriations for FY2014-FY2018 for such grants and eliminates allocation restrictions based on the percentage of records states provide.

Revises the periods during which the Attorney General may withhold Edward Byrne Memorial Justice Assistance Grant funds from states that do not provide specified percentages of required records. Eliminates the Attorney General's authority to waive such withholding if a state provides evidence it is making a reasonable effort to comply.

Requires the Attorney General to publish and made available on a publicly accessible website an annual report that ranks states by the ratio of the number of records submitted by each state under the NICS Act to the estimated total number of available records of the state.

Amends the Brady Act to include federal courts as federal agencies from which the Attorney General is authorized to secure information on persons prohibited from receiving a firearm.

Amends the Brady Act to prohibit any person who does not hold a federal firearms license from transferring a firearm to any other unlicensed person unless a licensed importer, manufacturer, or dealer: (1) has first taken possession of the firearm for the purpose of complying with national instant criminal background check requirements; and (2) upon taking possession, complies with all firearms requirements as if transferring the firearm from the licensee's inventory to the unlicensed transferee. Specifies exceptions, including for: (1) bona fide gifts between immediate

family members; (2) a transfer from a decedent's estate; (3) a transfer of possession between unlicensed persons in the transferor's home for less than seven days; and (4) certain temporary transfers without the transfer of title in connection with lawful hunting or sporting purposes at a shooting range, at a shooting competition, or while hunting, fishing, or trapping during hunting season.

Authorizes the Attorney General to implement this section with regulations that shall include provisions: (1) setting a maximum fee that may be charged by licensees for services provided, and (2) requiring a transaction record of any transfer that occurs between an unlicensed transferor and unlicensed transferee.

Makes it unlawful for any person who lawfully possesses or owns a firearm that has been shipped, transported, or possessed in interstate or foreign commerce to fail to report the theft or loss of the firearm to the Attorney General and the appropriate local authorities within 24 hours of discovery.

Stop Illegal Trafficking in Firearms Act of 2013 - Amends the federal criminal code to prohibit any person, other than a licensed firearms importer, manufacturer, collector, or dealer (licensed dealer), from knowingly purchasing in interstate or foreign commerce (including through receipt on consignment or by way of pledge or pawn as security for payment) a firearm from a licensed dealer, or from any person who is not a licensed dealer, for another individual, knowing or having reasonable cause to believe that such individual meets specified criteria disqualifying such individual from possessing a firearm. Sets forth an enhanced penalty for such a violation committed knowing or with reasonable cause to believe that any firearm involved will be used to commit a crime of violence. Specifies exceptions for purchases for certain bona fide gifts or for a bona fide winner of an organized raffle, contest, or auction.

Prohibits: (1) transferring two or more firearms to, or receiving two or more firearms from, a person in interstate or foreign commerce knowing or with the reasonable belief that such transfer, possession, or receipt would violate a federal law punishable by a term of imprisonment exceeding one year; or (2) attempting or conspiring to commit such conduct. Authorizes an enhanced penalty for someone who organizes or supervises such conduct.

Subjects: (1) property derived from or used to commit such an offense to forfeiture, and (2) a person who derives profits from such an offense to a fine equal to twice such profits.

Includes firearm trafficking offenses: (1) among offenses for which wiretapping may be authorized, (2) within the definition of "racketeering activity," and (3) within the definition of "specified unlawful activity" for purposes of money laundering violations.

Directs the U.S. Sentencing Commission to review and amend its guidelines and policy statements to: (1) ensure that persons convicted of offenses involving straw purchases of firearms and firearms trafficking are subject to increased penalties; and (2) reflect congressional intent that a person convicted of such offense who is affiliated with a gang, cartel, or organized crime ring should be subject to higher penalties.

Amends the Brady Handgun Violence Prevention Act to prohibit the sale or other disposition of a firearm or ammunition knowing or having reasonable cause to believe that the purchaser intends: (1) to sell or otherwise dispose of it to a person in a category of individuals excluded from firearms possession, (2) to sell or otherwise dispose of it in furtherance of a crime of violence or drug trafficking offense, or (3) to export it in violation of law.

Increases the maximum terms of imprisonment for violating prohibitions against: (1) selling firearms or ammunition to any person knowing or having reasonable cause to believe that such person is disqualified from possessing such firearms or ammunition; (2) any such disqualified person transporting or possessing any firearm or ammunition in interstate or foreign commerce or receiving any firearm or ammunition that has been transported in interstate or foreign commerce; (3) receiving or transferring a firearm or ammunition knowing or having reasonable cause to believe that it will be used to commit a crime of violence, a drug trafficking crime, or other specified crimes under the Arms Export Control Act, the International Emergency Economic Powers Act, the Foreign Narcotics Kingpin Designation Act, or the Immigration and Nationality Act; or (4) smuggling into or out of the United States a firearm or ammunition with intent to engage in or promote conduct that is punishable under the Controlled Substances Act, the Controlled Substances Import and Export Act, or maritime drug law enforcement provisions or that constitutes a crime of violence.

Prohibits the Department of Justice (DOJ) and any of its law enforcement coordinate agencies from conducting any operation where a federal firearms licensee is directed or encouraged to sell firearms to an individual if DOJ or a coordinate agency knows or has reasonable cause to believe that such individual is purchasing such firearms on behalf of another for an illegal purpose, unless the Attorney General, the Deputy Attorney General, or the Assistant Attorney General for the Criminal Division approves the operation in writing and determines that the agency has prepared an operational plan to prevent firearms from being transferred to third parties without law enforcement taking reasonable steps to lawfully interdict those firearms.

**School and Campus Safety Enhancements Act of 2013** - Amends the Omnibus Crime Control and Safe Streets Act of 1968 to authorize school security grants by the DOJ Office of Community Oriented Policing Services to be used for the installation of surveillance equipment and the establishment of hotlines or tiplines for the reporting of potentially dangerous students and situations.

Requires a grant application to be accompanied by a report that is signed by the heads of each law enforcement agency and school district with jurisdiction over the schools where the safety improvements will be implemented and that demonstrates that each proposed use of the grant funds will be: (1) an effective means for improving school safety, (2) consistent with a comprehensive approach to preventing school violence, and (3) individualized to the needs of each school.

Requires the Director of the Office of Community Oriented Policing Services and the Secretary of Education to establish an interagency task force to develop and promulgate a set of advisory school safety guidelines.

Authorizes appropriations for such grant program for FY2014-FY2023.

**Center to Advance, Monitor, and Preserve University Security Safety Act of 2013 or CAMPUS Safety Act of 2013** - Amends the Omnibus Crime Control and Safe Streets Act of 1968 to authorize the Attorney General to: (1) establish and operate a National Center for Campus Public Safety; and (2) make subawards to institutions of higher education and other nonprofit organizations to assist the Center in carrying out its assigned functions, including providing education and training for public safety personnel of institutions of higher education, identifying and disseminating information, policies, and best practices relevant to campus public safety, and promoting cooperation among public safety and emergency management personnel of institutions of higher education and their collaborative partners.

# The Mental Health Awareness and Improvement Act

The Mental Health Awareness and Improvement Act reauthorizes and improves programs administered by both the Departments of Education and Health and Human Services related to awareness, prevention, and early identification of mental health conditions, and the promotion of linkages to appropriate services for children and youth.

Title I focuses on school settings by promoting school-wide prevention through the development of positive behavioral supports and encouraging school-based mental health partnerships. Title II focuses on suicide prevention, helping children recover from traumatic events, mental health awareness for teachers and other individuals, and assessing barriers to integrating behavioral health and primary care. This bipartisan legislation makes targeted improvements designed to advance Federal efforts to assist states and local communities in addressing the mental health needs of their citizens.

## Title I- Education Programs

**Sec. 101. Short Title-** Establishes that Title I may be cited as the “Achievement through Prevention Act”.

**Sec. 102. Purpose-** Sets forth the purpose of the title to expand the use of positive behavioral interventions and supports, as well as early intervening services in schools to improve student academic achievement, reduce over-identification of individuals with disabilities, and reduce disciplinary problems in schools.

### **Sec. 103. Amendments to the Elementary and Secondary Education Act of 1965 (ESEA)**

- Encourages the development of school-wide prevention programs, such as positive behavioral interventions and supports (PBIS) to promote positive behaviors in students, create positive conditions for learning in schools, and identify students in need of supports and link them with appropriate services.
- Encourages states to provide technical assistance to Local Educational Agencies and school personnel on the implementation of school-based mental health programs and other approaches designed to improve learning environments in schools.
- Modifies the use of funds for grants under section 4121 to include the promotion of school-based mental health partnerships designed to help schools link students with the clinical mental health services they need.
- Clarifies that Title I funds from ESEA can be used for school-wide intervention services and can also be used to create or update school emergency management plans.

## Title II- Health Programs

### **Sec. 201. Garrett Lee Smith Memorial Act Reauthorization**

- Codifies the suicide prevention technical assistance center to provide information and training for suicide prevention, surveillance, and intervention strategies for all ages, particularly among groups at high risk for suicide.
- Reauthorizes the Youth Suicide Early Intervention and Prevention Strategies grants to states and tribes and clarifies that states may receive continuation grants after the first grant is awarded.
- Reauthorizes the Mental Health and Substance Use Disorder Services on Campuses grant program and updates the use of funds to allow for the education of students, families, faculty, and staff to increase awareness and training to respond effectively to students with mental health and substance use disorders, to provide outreach to administer voluntary screenings and assessments to students, and to enhance networks with health care providers who treat mental health and substance use disorders. Incorporates consideration of the needs of veterans enrolled as students on campus.

### **Sec. 202. Mental Health Awareness Training**

- Reauthorizes grants to states, political subdivisions of states, Indian tribes, tribal organizations, and nonprofit private entities to train teachers, appropriate school personnel, emergency services personnel, and others, as appropriate, to recognize the signs and symptoms of mental illness, to become familiar with resources in the community for

individuals with mental illnesses, and for the purpose of the safe de-escalation of crisis situations involving individuals with mental illness.

**Sec. 203. Children's Recovery from Trauma**

- Reauthorizes the National Child Traumatic Stress Initiative (NCTSI), which supports a national network of child trauma centers, including university, hospital, and community-based centers and affiliate (formerly funded) members.
- Supports the coordinating center's collection, analysis, and reporting of child outcome and other data to inform evidence-based treatments and services. Also supports the continuum of training initiatives related to such evidence-based treatments, interventions, and practices offered to providers.
- Encourages the collaboration between NCTSI and HHS to disseminate evidence-based and trauma-informed interventions, treatments, and other resources to appropriate stakeholders.

**Sec. 204. Assessing Barriers to Behavioral Health Integration**

- Requires a GAO report on the federal requirements impacting access to mental health and substance use disorder treatment related to integration with primary care, administrative and regulatory issues, quality measurement and accountability, and data sharing.

**Sec. 205. Improving Education and Awareness of Treatments for Opioid Use Disorders**

- Directs the Substance Abuse and Mental Health Services Administration (SAMHSA) to advance, through its current programs, the education and awareness of providers, patients, and other stakeholders regarding FDA-approved products to treat opioid use disorders.
- Calls for a report on such activities, including the role of adherence in the treatment of opioid use disorders, and recommendations on priorities and strategies to address co-occurring substance use disorders and mental illness.

**Sec. 206. Examining Mental Health Care for Children**

- Requires a GAO report on the utilization of mental health services for children, including information about how children access care and referrals; the tools and assessments available for children; and the usage of psychotropic medications.

**Sec. 207. Evidence-Based Practices for Older Adults**

- Encourages the Secretary to disseminate information and provide technical assistance on evidence-based practices for mental health and substance use disorders in older adults.

**Sec. 208. National Violent Death Reporting System**

- Encourages the Director of the Centers for Disease Control and Prevention to improve, particularly through the inclusion of other states, the existing National Violent Death Reporting System.
- The reporting system was created in 2002 and currently collects surveillance data from 18 states.

**Sec. 209. GAO Study on Virginia Tech Recommendations**

- Recommendations were outlined in a report to President Bush in 2007 by the Secretaries of Health and Human Services and Education and the Attorney General of the United States after the Virginia Tech tragedy.
- This provision requires a GAO study on the status of implementation of the recommendations, as well as identification of any barriers to implementation and identification of additional actions the Federal government can take to support states and local communities to ensure the Federal government and laws are not obstacles at the community level.
- The report will only address those recommendations that require participation by the Department of Health and Human Services.