# ACLU VOTING RIGHTS PROJECT

## ANNUAL REPORT

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# INTRODUCTION

This report summarizes the work of the ACLU Voting Rights Project (VRP) for the 2009 calendar year. It includes litigation, Section 5 comment letters and other communications with the Department of Justice, lobbying, assisting and coordinating efforts with ACLU affiliates, proposals for electoral reform, publications, and public education. It does not include the numerous calls from members of the public requesting information or assistance concerning voting rights and civil liberties issues.

The VRP has continued its litigation to enforce the Voting Rights Act and the U.S. Constitution on behalf of African Americans and American Indians, but it also increased its focus on felon disfranchisement and ballot access. It has been involved in eight felon disfranchisement cases in seven states (Alabama, Arizona, Mississippi, New Jersey, South Dakota, Tennessee, and Washington). The plaintiffs in these cases have made various arguments, including that disfranchising ex-felons who have completed their terms of imprisonment is inconsistent with the states' interest in rehabilitation, that conditioning restoration of voting rights on payment of fines and other legal financial obligations is an impermissible wealth based qualification for voting, that the "affirmative sanction" to disfranchise felons is limited to crimes that were felonies at common law, and that felon disfranchisement laws have a disparate racial impact. While the courts have often been unreceptive to these arguments, on January 5, 2010, the court of appeals for the Ninth Circuit held there was racial discrimination in Washington's criminal justice system, that it hindered the ability of racial minorities to participate effectively in the political process, and that as a consequence the state's felon disfranchisement law violated Section 2 of the Voting Rights Act. The state has announced it will petition the Supreme Court for review.

The VRP is also litigating five ballot access cases in four states (Arkansas, Montana, Nebraska, and South Carolina). The cases challenge state laws that place onerous burdens on minor political parties and independent candidates in accessing the ballot that are alleged to diminish their constitutionally protected free speech and associational rights.

This report discusses numerous election reforms, but special note should be taken of the ACLU Executive Committee's approval on September 11, 2009, with the endorsement of the VRP, of the National Popular Vote (NPV) compact. The compact would award the presidency to the candidate who received the largest number of popular votes in all 50 states and the District of Columbia, and would go into effect when enacted by states collectively possessing a majority of the electoral

vote - 270 out of 538. Support of NPV is consistent with the one person, one vote standard of the Fourteenth Amendment and ACLU policy calling for a constitutional amendment abolishing the existing Electoral College system for choosing the president and vice-president.

Special thanks go to the members of the VRP staff who contributed to the work discussed in this report: Nancy Abudu, Meredith Bell-Platts, Donna Matern, Fred McBride, Katie O'Connor, and Bryan Sells.

# I. LITIGATION

## ALABAMA

### Felon Disfranchisement

Baker v. Chapman, Case No. 1080241 (Cir. Ct. Ala.)

The VRP and ACLU of Alabama filed this suit on July 21, 2008, challenging the state's felon disfranchisement scheme. The Alabama constitution provides for the disfranchisement of persons convicted of crimes involving "moral turpitude,"and authorizes the legislature to implement the state's voting laws. The legislature adopted a short list of felonies that involve moral turpitude: murder, impeachment, treason, rape, and various sex related offenses. The state attorney general, however, compiled another list of disfranchising offenses that includes many not contained on the legislature's list, such as the sale of marijuana, forgery, bigamy, and income tax evasion. The attorney general also compiled a list of six crimes that did not involve moral turpitude and were not disfranchising: assault, violation of liquor laws, driving under the influence, doing business without a license, aiding a prisoner to escape, and possession of marijuana. The three plaintiffs were all convicted of offenses - forgery, escape, and receiving stolen property - that are not on the legislature's list of disfranchising crimes, but they were disfranchised anyway. One of the plaintiffs attempted to register and vote but was told she was ineligible due to her offense even though her crime -receiving stolen property - is on neither the legislature's nor the attorney general's list of crimes involving moral turpitude.

Plaintiffs asserted that Alabama's disfranchisement scheme violates the state's separation of powers doctrine, which leaves the designation of disfranchising offenses to the legislature and not the attorney general, as well as state and federal equal protection, due process, and privileges and immunities doctrines. Plaintiffs also argued the state's requirement that a disfranchised person pay all restitution, fines, and legal costs before being restored to the right to vote violates equal protection laws and is an impermissible wealth based qualification for exercise of the franchise.

The trial court dismissed Plaintiffs' suit on October 9, 2008, for lack of standing on the grounds that two of the plaintiffs had not suffered any injury because they never attempted to vote, and the third plaintiff who was denied the right to register had not exhausted other state remedies. Plaintiffs have appealed the dismissal to the Alabama Supreme Court and are awaiting a decision.

## ALASKA

### Alaskan Native Minority Language Assistance
Nick v. Bethel, Alaska, No. 3:07-CV-0098 (TMB) (D. Alaska)

The Native American Rights Fund, the VRP, and the ACLU of Alaska represent Alaskan Natives in the Bethel Census Area of the state, where more than 10,000 Yup'ik speakers reside. They contend the state and the City of Bethel have failed to provide language assistance in the Yup'ik language as required by the special minority language provisions of the Voting Rights Act, Section 4(f)(4), 42 U.S.C. § 1973b(f)(4), and Section 203, 42 U.S.C.A. § 1973aa-1a. This encompasses both the failure to provide written language assistance to voter by way of translations of election materials, as well as the failure to provide oral language assistance by way of translators, interpreters, and adequately trained election officials. Plaintiffs also claim defendants have failed to comply with the preclearance provision of Section 5 of the Voting Rights Act, and seek to allow Alaska Native limited-English proficient voters to receive assistance from the person of their choice as required by Section 208 of the Voting Rights Act.

The litigation presents a number of distinct challenges. Not only are the plaintiffs geographically isolated and remote, making travel difficult and time consuming, but it is difficult to communicate without the assistance of Yup'ik translators. For example, attorneys for the plaintiffs engaged in election monitoring during the general election on November 4, 2008. They had to fly on small planes to several Native Villages, which are isolated even from each other, and utilize translators to interview voters about their experiences at the polls, then use those translators to follow up with the interviewees and obtain translated declarations.

In July 2008, plaintiffs obtained a preliminary injunction against the state defendants. The District Court held that plaintiffs had demonstrated a substantial likelihood of success on the merits of their claims, and enjoined the state from further failure to provide adequate and effective language assistance. Specifically, the court ordered the state to: undertake efforts to provide mandatory poll worker training in the requirements of the law; hire a language assistance coordinator fluent in Yup'ik; recruit bilingual poll workers or translators; provide written sample ballots in Yup'ik; provide preelection publicity in Yup'ik; ensure the accuracy of translations; provide a Yup'ik glossary of election terms; and submit pre and post election reports to the court.

On July 31, 2009, the court accepted a consent decree and settlement agreement entered into by the plaintiffs and the City of Bethel. It provided for: translators at the polls; mandatory training for all translators working in city elections; the

provision of a Yup'ik-English election glossary; broadcasting of Yup'ik-language election announcements; advance publication of translator services prior to elections; and translation of initiatives and referenda into written Yup'ik. The city also agreed to seek Section 5 preclearance of the settlement agreement.

A trial on the merits of the remaining claims against the state has been set to begin on February 16, 2010.

## ARIZONA

### Proof of Citizenship & Restrictive Voter Identification Requirements

Intertribal Council of Ariz. Inc. v. Brewer, No. CV06-01362 (D. Ariz.)

In November 2004, 56% of Arizona voters approved Proposition 200, a statewide referendum requiring individuals to provide proof of citizenship before they register to vote and requiring polling place identification. (The referendum also required applicants for public benefits to provide proof of citizenship; that application was not challenged in this litigation.) Three lawsuits were filed in federal court challenging the two features of the proposition that affected voting. The lawsuits were consolidated: Gonzalez v. Arizona,, No. CV06-01268; Intertribal Council of Ariz. Inc. v. Brewer, No. CV06-01362; and Navajo Nation v. Brewer, No. CV06-01575. The VRP and the Arizona ACLU are part of a broad coalition of groups involved in Intertribal Council while the Navajo Nation is sole counsel in their case and MALDEF is sole counsel in Gonzalez.

The proof of citizenship for voter registration was precleared by the Department of Justice and took effect on January 25, 2005. Procedures specifying what documents would be acceptable proof of identity at the polls were developed by the Secretary of State and were precleared by the Department of Justice, taking effect on September 6, 2005. To vote in person, by regular ballot on election day, voters must present either a valid state, tribal, or federal government issued photo ID bearing their current name and address, or if they do not have a photo ID, two documents bearing their name and address such as bank statements, utility bills, an Indian census or tribal enrollment card, or a voter registration card. (Proposition 200 did not change the requirements for early voting. All registered voters are eligible to vote by early ballot without proof of ID, even when their ballot is dropped off at a polling place on election day.)

Plaintiffs sought a preliminary injunction to prohibit the implementation of the identification and registration requirements for the 2006 mid-term election. The district court denied the motion, but a stay was initially granted by the U.S. Court

of Appeals for the Ninth Circuit. However, the Supreme Court vacated that order, Purcell v. Gonzalez, 549 U.S. 1 (2006). The Ninth Circuit subsequently affirmed the denial of injunctive relief by the district court. Gonzalez v. Arizona, 485 F.3d 1041 (9th Cir. 2007).

Discovery in the case proceeded and the court scheduled the trial to be after the Supreme Court ruled in Crawford v. Marion County Election Board, 533 U.S. ____, 128 S.Ct. 1610 (2008), a case involving the constitutionality of Indiana's photo ID requirement for in-person voting. The trial was held in July 2008. Plaintiffs' evidence included that: between January 2005 and the fall of 2007, 31,550 voter registration applications were rejected for failure to provide proof of citizenship; approximately 90% of the 31,550 listed the United States as their place of birth; only 11,000 of the total were subsequently able to register; though Arizona's population increased by 650,000 people (11%) between 2004 and 2007, in the first three years of Proposition 200 the number of registered votes declined by more than 11,000 voters; voters without acceptable ID may cast what is called a "conditional provisional ballot" which is counted only if the voter later produces an ID within 5 days (between 63% and 77% of such ballots go uncounted); Coconino County in northern Arizona kept records showing that at least 2,548 voters exited polling places in the 2006 election without casting any type of ballot afer being asked to present ID; under Proposition 200, driver licenses issued since October 1, 2006, are accepted as proof of citizenship (the drafters mistakenly thought the driver license bureau verified citizenship beginning that date, but what was verified was "legal presence," not citizenship), but approximately 23% of eligible residents who are not registered to vote either have no driver's license or have one issued before that date. Additionally, plaintiffs' evidence showed that many Native Americans over the age of 40 were not born in hospitals and do not have birth certificates and cannot get a delayed birth certificate because no living birth witness is available. Among the witnesses who testified as to the difficulties they had getting required documents, Shirley Preiss, age 98, testified that she was born in Kentucky in 1910 and not issued a birth certificate and has been unsuccessful in her attempts to get one. She did not possess any acceptable proof of citizenship and has been unable to register to vote in Arizona.

On August 20, 2008, the district court entered judgment for defendants. Applying a minimal level of constitutional scrutiny, the court found the burden on voters "is not excessive" either as regards individuals or Arizona citizens as a whole. Among it's conclusions, the court held that the scheme was not burdensome because "only 4,194 ballots, or 0.13% were uncounted due to lack of proof of identification," Order, p. 32. And, it held that the proof of citizenship requirement was not a significant burden even if some residents would have to purchase birth certificates, etc.

Plaintiffs appealed to the U.S. Court of Appeals for the Ninth Circuit, which heard oral argument on October 20, 2009.

### Felon Disfranchisement

Coronado v. Napolitano, No. 08-17567 (9th Cir.)

The VRP and the Arizona affiliate filed a lawsuit challenging two aspects of Arizona's felon disfranchisement law: (a) the denial of voting rights to ex-felons based on their inability to pay the court fines, fees, and restitution associated with their sentences; and (b) the disfranchisement of people convicted of certain offenses which never existed when Congress enacted Section 2 of the 14th Amendment, which grants states the authority to disfranchise people "for participation in rebellion, or other crime." Under current Arizona law, everyone who commits a felony is stripped of their civil rights, including the right to vote, serve on a jury, and run for public office. Those who have only one criminal conviction are eligible for automatic restoration of their voting rights once they receive a Certificate of Absolute Discharge from the state and pay all of their legal financial obligations. However, those convicted of two or more felonies must seek discretionary approval from a judge before the state can restore their civil rights, a process that is arbitrary and intimidating.

Three of the plaintiffs have only one criminal conviction, but remain ineligible for automatic rights restoration because they owe outstanding legal debts to the state. In the complaint, the plaintiffs argue that conditioning the right to vote on the payment of any fee is in the nature of a poll tax and violates the 14th and 24th Amendments of the U.S. Constitution, the Voting Rights Act, and state laws. The lawsuit also attempts to narrow the scope of crimes which Section 2 of the 14th Amendment covers. The complaint provides a brief historical analysis of Congress' intent when proposing the 14th Amendment and demonstrates that Congress only intended to allow for the disfranchisement of felons convicted of serious "common law felonies" such as murder and treason. Thus, there is no constitutional provision or exception that would permit states to automatically deny basic voting rights for drug-related crimes or other acts which were never felonies at common law.

On January 22, 2008, the district court dismissed the complaint for failure to state a claim. Relying upon Richardson v. Ramirez, 418 U.S. 24, 54 (1974), it held that section 2 of the Fourteenth Amendment provided an "affirmative sanction" for states to disfranchise persons convicted of rebellion "or other crime." Plaintiffs filed an amended complaint on February 21, 2008, to include specific allegations regarding the racial disparities which result from the practice of felon disfranchisement, and the negative and disproportionate impact that the state's LFO requirement has on indigent people. The defendants filed a motion in opposition to the amended complaint which the court denied.

Defendants moved to dismiss the amended complaint, and the court granted that motion on November 6, 2008. The court essentially relied upon is reasoning in dismissing the original complaint, ruling that Plaintiffs do not have a fundamental right to vote because of their criminal convictions, the legislative history behind passage of the Fourteenth Amendment did not support Plaintiffs' interpretation of Section 2, and the LFO requirement does not result in discrimination on the basis of wealth even though it might have a disparate impact on indigent people. The court also held that Plaintiffs were not entitled to any discovery regarding the factual allegations in the complaint and, therefore, dismissal at such an early stage in the litigation was warranted. Plaintiffs appealed the court's decision to the Ninth Circuit Court of Appeals, had oral argument on October 19, 2009, and are awaiting a decision.

## ARKANSAS

### Ballot Access

Green Party of Arkansas v. Daniels, Civ. No. 4:09-CV-695JLH (E.D. Ark.)

On August 27, 2009, the VRP and the ACLU of Arkansas filed suit in federal court on behalf of the Green Party of Arkansas and two of its members in an action to preserve the party's place on that state's ballots in the 2010 election. Under state law, a party is decertified if its gubernatorial or presidential candidate fails to receive at least 3% of the votes. Following the 2008 election, the Secretary of State decertified the party because of the poor showing of its candidate (Cynthia McKinney) in the presidential race, even though the party's candidates for Senate and the U.S. House of Representatives received hundreds of thousands of votes. The Green Party's candidate for U.S. Senate received 20% of the votes in the 2008 election, while candidates for the U.S. House received similar support from state voters.

The plaintiffs argue that based upon the 2008 house and senate elections it is apparent that the Green Party has substantial support among Arkansas voters, and that decertification of the party merely because of a poor showing by the presidential candidate, who did not campaign in the state, violates the political and associational rights of the Green Party and its members. The case is pending, and a resolution is expected in early 2010.

## CALIFORNIA

### Hispanic Vote Dilution/California Voting Rights Act

Avitia, et al. v. Local Healthcare District, 07-224773 (Sup. Ct. Tulare County)

In 2008, the ACLU joined a lawsuit brought on behalf of Rosalinda Avitia and several other Latina and Latino registered voters residing in and around the city of Visalia in Tulare County, California. Plaintiffs challenged at large elections for the five members of the Board of Directors of the Tulare Local Healthcare District.

Avitia is the VRP's first case involving claims under the California Voting Rights Act of 2001 ("CVRA"). CVRA provides a cause of action for vote dilution similar to Section 2 of the Voting Rights Act, but broader than Section 2 and without some of the limitations imposed by judicial decisions over the last two decades. Specifically, plaintiffs bringing claims under CVRA need not demonstrate the feasibility of a district in which a minority group constitutes a majority of the electorate—the so-called Gingles district. Moreover, the "totality of the circumstances" or "Senate Report Factors" usually required in addition to evidence of racially polarized voting and the Gingles district are probative, but not necessary to a claim of vote dilution under CVRA.

The plaintiffs in Avitia brought suit in 2007 to address the fact that there had only been one Latino on the Tulare Local Healthcare District's Board of Directors since that body's inception in 1946. This is despite the fact that as of 2000, Latinas and Latinos comprised 47.3% of the population in the district. Plaintiffs' expert witness, Dr. J. Morgan Kousser, did an analysis of voting patterns and concluded that voting was racially polarized in a number of Healthcare District elections and propositions since 1994.

In August of 2008, plaintiffs moved unsuccessfully for a preliminary injunction enjoining the district from conducting the November 2008 election for two members of the Board of Directors, or from certifying or finalizing the results of that election. Despite the defendant's failure to submit any contradicting expert testimony or evidence regarding polarized voting in the district, the state superior court held that plaintiffs had not established a strong likelihood of success on the merits because it adopted some of the concerns with plaintiffs statistical evidence proffered by the defendant, even though federal case law supported the plaintiffs' evidence and their interpretation of CVRA's requirements. Plaintiffs then sought a writ of mandamus in the Fifth District of the California Court of Appeals to correct the trial court's error, but, perhaps because of the proximity to the election and the complex nature of some of the legal questions, the court of appeals issued a summary denial of the petition. The superior court has also denied the defendant's

motion for judgment on the pleadings, two mot ions for summary judgment, various motions to compel discovery, and a motion to dismiss for failure to join indispensable parties.

Trial was originally scheduled for the end of January 2009, but has been reset to begin on June 7, 2010, a month prior to candidate qualifying for the November 2010 elections.

## FLORIDA

### African American Vote Dilution

Thompson v. Glades County, No. 2: 00-cv-212 (M.D. Fla.)

In 2000, the ACLU filed suit against Glades County, Florida on behalf of Billie Thompson, the first African American to run for the Glades County school board, and only the second African American to run for county-wide office.

In 1998, when Thompson ran for school board, the population of the county was 10,576, 10.5% of which was African American. Thompson received 42% of the vote in the Democratic primary against the incumbent, but was defeated. Thompson and other black residents of the county, represented by the ACLU, then filed suit challenging the at-large method of electing the five-member county commission and board of education, as diluting minority voting strength in violation of Section 2 and the Constitution.

Glades County is extremely economically depressed, with employment dependent mostly on citrus farming. Typical of rural counties, African Americans do not fare well compared with whites: per capita income of blacks is half that of whites and the unemployment rate of blacks is double that of whites. Also, of adults age 25 or older, 70% of blacks do not have a high school degree, compared to 40% of whites.

A trial was held in October 2001, but a decision was not rendered for nearly three years. The court found "white voters in Glades County tend to vote as a bloc so as to usually defeat the candidates of choice of African American voters." It also found "the size of Glades County makes at-large campaigning for elective office difficult, and more so for African Americans," and that African Americans had far less income, education, and access to automobiles, and that black public employees were employed in lower paying jobs. Thompson v. Glades County, Order of August 27, 2004.

Door-to-door campaigning is critical to success in a rural county like Glades, but according to Thompson, as “a black person and black female” she was “very apprehensive” about campaigning in some areas of the county. Trial Transcript, p. 23.

Despite its findings, the court ruled there was no Section 2 violation because there was no remedy. Plaintiffs had drawn an illustrative five member plan with one district containing an African American voting age population of 50.23%. The district also had a Hispanic voting age population of 15.23%, and the evidence showed that African Americans and Hispanics voted cohesively. The plan had an overall deviation of 8.6%. The court held it was not permitted to impose a plan with an 8.6% deviation, and African Americans would be a minority in an equal population plan. It further held a 50.23% African American voting age population was not viable: “To translate the statistical majority into reality would require that every voting-age African American be registered to vote, actually vote, and vote for the same person.” Order of August 27, 2004.

The court thus placed an unprecedented burden on Section 2 plaintiffs, because it effectively required them to prove it was impossible for a minority candidate to be outvoted in a remedial plan. Of course, no group - black, white, Hispanic or other - registers and turns out at 100%. The evidence of minority voter cohesion and racially polarized voting showed that in the illustrative district the white minority would not be able to defeat the choice of African American voters, and all the more so because of the presence of Hispanic voters.

Plaintiffs appealed the decision of the trial court to the Eleventh Circuit. The appeal was argued in May 2005, and in July 2007, nearly 27 months later, the appellate court reversed. It held that plaintiffs had established a viable remedy. Specifically, it held the district court’s ruling that a minority supported candidate could not win in the proposed district depending on an assumption, contrary to the record, that all whites would register, turn out to vote, and vote for the same candidate against the candidate of choice of the African American voters. The record in fact showed that the average white crossover vote was 19%. The court of appeals remanded for reconsideration of the record under the correct view of the law. Thompson v. Glades County, 493 F.3d 1253 (11th Cir. 2007).

The county filed a petition for rehearing en banc, which was granted. The court directed the parties to brief additional issues, particularly asking about the record on cross over voting and whether plaintiffs had raised the issue of using cross over votes to make their remedy effective. In our briefs we laid out in detail that we had raised the use of cross over as part of the remedy pre-trial, at trial, and in a motion for reconsideration. We also pointed out that this was an alternative argument since in plaintiffs’ view the evidence showed that the remedy would be effective no matter how white voters cast their votes.

Two weeks after the en banc argument, the court announced that "[t]he judges of the en banc court are equally divided on the proper disposition of this case." Consequently, the judgment of the district court which ruled against plaintiffs was affirmed by operation of law. 532 F.3d 1179 (11th Cir. 2008).

Because the U.S. Supreme Court had taken a similar case for review, we filed a petition for writ of certiorari. In Bartlett v. Strickland, No. 07-689, the Court agreed to hear an issue it has sidestepped in four previous cases, that is, whether the ability to draw a remedial district in which the affected minority group is at least 50% of the voting age population is an absolute, bright line requirement for a vote dilution claim under Section 2 of the Voting Rights Act. The Court subsequently held that no Section 2 violation could be established where a minority was less than 50% of the voting age population in a district. Bartlett v. Strictland, 129 S.Ct. 1231 (2009). The Supreme Court denied the petition for writ of certiorari in Thompson v. Glades County on March 23, 2009. 129 S.Ct. 1611.

## GEORGIA

### Restrictive Voter Identification Requirements

Common Cause v. Billups, 504 F.Supp.2d 1333 (N.D. Ga. 2009)

On September 19, 2005, two voters and seven non-profit organizations (including the VRP and the ACLU of Georgia), filed suit challenging a new Georgia law requiring voters to present certain forms of photo ID before voting in-person. The plaintiffs alleged that the law, which required some voters to purchase a photo ID, constituted a poll tax in contravention of the 24th Amendment, and violated Section 2 of the VRA, the Civil Rights Act of 1964, the Equal Protection Clause, and the state constitution because it unduly burdened the right to vote. On October 18, 2005, the federal court issued a preliminary injunction enjoining use of the photo ID requirement on the grounds that it was in the nature of a poll tax, as well as a likely violation of the Equal Protection Clause. Common Cause/Georgia v. Billups, 406 F.Supp.2d 1326 (N.D. Ga. 2005).

The legislature amended the statute in 2006 to provide a photo ID at not cost to those who needed one. Another injunction was issued immediately prior to the July 2006 primary elections, because the court concluded there was no time to implement the new law. A trial on the merits was held in August 2007. Despite its prior rulings, the district court ruled none of the plaintiffs had standing, and then went on to decide the constitutional issues against plaintiffs as well, dismissing the case. Common Cause/Georgia v. Billups, 504 F.Supp.2d 1333 (N.D. Ga. 2007). The court held the burden on plaintiffs was slight because they testified they could get

ID cards if they had to in order to vote. It also held the state's interest in preventing voter fraud trumped any burden on voters, though there was no evidence of vote fraud by impersonation in Georgia in more than a decade (the only type of fraud an ID requirement could address). The court recognized that under the amended statute, a person can get a voter ID card issued by the voter registrars based solely on his or her voter registration application (which requires no documentation). Though the court also recognized that issuing ID cards without any documentation could enable a person to commit fraud, the court nevertheless upheld the law as a proper response to a concern for fraud.

Plaintiffs appealed and argued that a large number of Georgia voters were affected by the law and that it had an adverse racial impact. Plaintiffs' evidence included a data match done by the Secretary of State which sought to identify registered voters who did not have an ID issued by the Department of Driver Services (DDS), the agency which issues driver licenses and non-driver photo IDs. These would be the type of photo ID voters would be most likely to have. The match identified 289,426 registered voters without a DDS issued ID. Tellingly, 49% of those voters without IDs were African Americans, though only 27.9% of all registered voter were African-American. Plaintiffs also contended that the district court's decision was inconsistent with the standards the Supreme Court established for assessing whether a voting requirement unduly burdens voters. The appellate court, while it concluded the plaintiffs had standing, affirmed the decision of the district court. Common Cause/Georgia v. Billups, 554 F.3d 1340 (11th Cir. 2009). The Supreme Court subsequently denied the plaintiffs' petition for a writ of certiorari. NAACP v. Billups, 129 S.Ct. 2770 (2009).

### Systematic Voter Challenges/Section 5 Enforcement
Morales v. Handel, Civ. No. 1:08-CV-3172 (N.D. Ga. Oct. 27, 2008)

This suit was filed by the VRP, the Lawyers Committee, and MALDEF challenging a new system of challenging voters as non-citizens implemented by the state of Georgia weeks prior to the 2008 presidential election. The state challenges were made after comparing the voter registration lists with the lists of persons who had applied for a Georgia driver's license. The plaintiff, Jose Morales, had applied for a Georgia driver's license prior to becoming a naturalized U.S. citizen. The license list, however, was never updated to reflect the change, and as a consequence the match flagged Morales as a non-citizen. He was sent a letter by election officials advising him that unless he presented proof of his citizenship he would not be allowed to vote. Approximately 5,000 voters or applicants for registration were sent similar letters based on the data base matching.

The complaint charged that the data base matching system was a change in voting that had not been precleared as required by Section 5 of the Voting Rights, and was in violation of the National Voter Registration Act which prohibits systematic challenges to voter registration 90 days prior to an election. A three-judge court heard the Section 5 claim, and in an opinion issued on October 24, 2008, concluded that the data bases matching was a change that must be precleared under Section 5. The court further required the state to notify all those who had been sent challenge letters that they would be allowed to vote on election day by a paper challenged ballot, and that their votes would be counted after they established their citizenship.

The state submitted the voting change to the Department of Justice for preclearance. The organizations representing Morales filed a comment letter with DOJ on November 25, 2008, asking it to either object to the submission or request additional information to evaluate its impact upon language and racial minorities. After requesting additional information, the Department of Justice objected to the state's submission on May 29, 2009. In its objection letter, DOJ concluded that "the state's process does not produce accurate and reliable information and that thousands of citizens who are in fact eligible to vote under Georgia law have been flagged." DOJ also found that the "flawed system frequently subjects a disproportionate number of African-American, Asian, and/or Hispanic voters to additional and, more importantly, erroneous burdens on the right to register to vote."

On September 25, 2009, the plaintiffs filed a motion for a permanent injunction on their Section 5 claim. The state has moved to dismiss the claim as moot. The motions are pending.

### Denial of Access to Absentee Ballots

Swann v. Handel, 1:09-CV-2674 (N.D. Ga.)

This lawsuit, filed on September 29, 2009, challenges the constitutionality of Section 21-2-381(a)(1)(D) of the Georgia Code which prohibits election officials from mailing absentee ballots to inmates in county jails who remain eligible to vote, but who are incarcerated in their county of residence. Under Georgia law, if the inmate is incarcerated in their county of residence, he or she cannot receive an absentee ballot at that county jail. However, there is no prohibition against an inmate receiving an absentee ballot if the person is incarcerated outside of his or her county of residence.

The plaintiffs assert that the law violates their right to equal protection under the Fourteenth Amendment to the U.S. Constitution. They also raise a due process claim based on the defendants' failure to inform them that they would not be able to receive an absentee ballot at the jail and failure to provide another means by

which they could vote. The court has issued a scheduling order and the parties have commenced discovery. Summary judgment motions are due on April 26, 2010.

### Denial of Adequate Public Education

Harris v. Atlanta Independent School System, 1:08-CV-1435 (N.D. Ga.)

On March 11, 2008, the ACLU Racial Justice Program, along with the ACLU of Georgia, ACLU Southern Regional Office, and several cooperating attorneys, filed this lawsuit on behalf of eight students challenging the lack of quality education in one of Atlanta's alternative schools. The defendants included the Atlanta Independent School System (AISS) and Community Education Partners (CEP), the company AISS hired to manage the alternative school.

Many of the students in the alternative school are transferred there because of behavioral problems, but others are there because they moved into the Atlanta school system from another city during the school year. The Georgia Constitution guarantees the right of every school-age child to receive an adequate public education. The plaintiffs maintained that the school does not have a sufficient number of teachers and support staff, and there is little or no classroom instruction or resources necessary for teaching and learning. As a result, some of the students, many of whom were getting good grades before attending the alternative school, have seen their academic performance deteriorate significantly. The plaintiffs also contended that police officers in the school are often physically aggressive and have a practice of using choke-holds on students. The school documented over 180 fights in 2006, and the school was responsible for nearly 68 percent of all the battery reports compiled by the 90 schools in the Atlanta Public School district. In addition, the school conducts daily searches of all students when they arrive at school, which the plaintiffs argue constitutes an unreasonable body search.

The complaint contained several legal claims, including violations of the plaintiffs' rights to an adequate education, due process in the enforcement of disciplinary procedures, and their right to be free from unreasonable searches and seizures. The case originally was filed in state court, but the defendants removed the case to federal court and filed motions to dismiss all of the claims. The district court dismissed all of the plaintiffs' state law claims, but denied the motion with respect to the federal law claims.

AISS decided not to renew its contract with CEP and, after several months of discovery, the parties settled the case. Pursuant to the settlement agreement, AISS will implement administrative changes to improve the manner in which students are referred and transferred to the alternative school, the basis and manner in which students are disciplined at the school, and the school's search procedures.

The district court administratively closed the case and ordered the plaintiffs to either file a motion to reopen the case by June 30, 2011, or file a stipulation of dismissal with prejudice by July 1, 2011.

### Whistle Blower Retaliation

Anderson v. Board of Regents, No. 1:04-CV-3135-JEC (N.D. Ga.)

The plaintiff in this case, Eugene Anderson, was the Safety Engineering Manager at Georgia Southern University (GSU) and the defendants fired him for allegedly abandoning his position while he was still recovering from a work-related injury. The complaint alleges that the defendants unlawfully limited the amount of time the plaintiff had to recover from his injury and did not afford him a meaningful opportunity to challenge his termination. The complaint also alleges that the reason the defendants gave for firing him was just a pretext and the real motivation was the statements he made to GSU employees and administrators, GSU students and their parents, the Board of Regents, the Georgia Environmental Protection Division (EPD), and the general public regarding GSU's violations of state and federal environmental laws, rules and regulations. The plaintiff raises claims under the due process clause of the Fourteenth Amendment of the U.S. Constitution and the free speech clause in the First Amendment, and he seeks declaratory relief, injunctive relief, and compensatory and punitive damages against the defendants.

This case originally was filed in the Fulton County Superior Court and contained state law and federal law claims. The defendants removed the case to federal court, but the district court remanded the state claims. The state court ultimately ruled in favor of the defendants and dismissed the case. The plaintiff reopened the federal case and filed a motion to amend the complaint, which the court granted. On May 18, 2009, the defendants filed a partial motion to dismiss the case on sovereign immunity and qualified immunity grounds, and a motion to stay discovery pending the court's ruling on their motion to dismiss. The plaintiff filed responses in opposition to both motions, and the court has not ruled on either motion. In the meantime, the plaintiff initiated discovery and has served the defendants with interrogatories and requests for production of documents to which the defendants have responded.

### Student Voting Rights

Moore v. Franklin County Board of Elections and Registration,
Case No. 2009-FV- 1038-J (Ga.)

The Superior Court of Franklin County, Georgia, set aside an election for mayor of Franklin Springs decided by a margin of only one vote after finding one of the voters was a non-resident. The court ordered a special election for December 29, 2009,

only nineteen days after its ruling. Franklin Springs is home to Emmanuel College, and many of its students would be away visiting family during the year-end holidays and would be unable or unlikely to participate in the special mayoral election. In addition, the winner of the disputed election, Brian James, was an employee of the college. Moreover, the losing candidate who brought the challenge also challenged some 55 registered Emmanuel College students as being non-residents. While the court did not reach the merits of those challenges, its setting of the election date would likely accomplish the result the challenger sought, i.e., decreased participation by student voters. The Superior Court also ordered the special election into effect without making any provision for its preclearance as required by Section 5 of the Voting Rights Act.

James appealed the decision of the Superior Court and requested a stay from the Georgia Supreme Court. The VRP and the Lawyers Committee for Civil Rights Under Law filed an amicus brief supporting the request. They argued that the lower court had failed to comply with Section 5 and that setting the election during the holiday season would unfairly and unnecessarily burden student voters. Amici relied upon the Twenty-Sixth Amendment and numerous court decisions which have invalidated disparate treatment of students seeking to register and to vote. The Supreme Court, however, summarily denied the request for a stay. The election was held on December 29, and the challenger was elected by five votes.

## INDIANA

### Restrictive Voter Identification Requirements

League of Women Voters of Indiana v. Rokita, No. 49A02-0901-CV0004-0 (S.Ct., Indiana)

Following the decision of the Supreme Court in Crawford v. Marion County Election Board, 128 S.Ct. 1610 (2008), which rejected a federal challenge brought by the ACLU to Indiana's voter ID law for in-person voting, the Indiana Court of Appeals struck down the law under the Equal Privileges and Immunities Clause of the state Constitution. League of Women Voters of Indiana v. Rokita, 915 N.E.2d 151 (Ind. App., 2009). The court held that exempting absentee voters and voters living in a state licensed care facility from the ID requirement was unconstitutional disparate treatment of voters and also violated the requirement of uniform application of state election laws. The case is now pending in the state supreme court.

On November 9, 2009, the VRP, together with the Southern Coalition for Social Justice, filed an amicus brief in which they argued that the decision of the court of appeals was in conformity with decisions from other states interpreting their

Equal Privileges and Immunities Clauses, and should be affirmed. On November 20, 2009, the Indiana Supreme Court granted leave for the ACLU and the SCSJ to appear as Amici Curiae. The case is pending.

## MICHIGAN

### Voter Purges/NVRA

United States Students Association v. Land, 2:08-cv-14019 (E. D. Mich.)

The Secretary of State of Michigan maintained the statewide voter registration database in a manner that would have purged tens (if not hundreds) of thousands of voters before the November 2008 election in violation of the NVRA. The first unlawful practice involved the purging of voters upon an unverified assumption that they have moved out of the state of Michigan. In Michigan, unlike many other jurisdictions, the Secretary of State administers both driver's licenses and voting registration. When an individual applies for a driver's license in a different state, the secretary is notified by the cooperating state motor vehicle licensing bureau that the individual has surrendered her Michigan driver's license and applied for a license in another state. Upon receipt of this information, the Secretary of State immediately canceled the voter's registration and removed the voter's name from the precinct voting list. The second practice involved the removal from Michigan's Qualified Voter File of newly-registered voters whose voter identification cards are returned as undeliverable. Rather than affording such voters the opportunity to confirm their residency and correct any errors — as required by federal law — the Secretary of State summarily removed the voters from the rolls.

These practices not only violated the NVRA, but arguably the Voting Rights Act of 1965, the First and Fourteenth Amendments of the United States Constitution, and state law. The NVRA requires a state to notify voters of any problem with their registration, and that a voter may only be removed from the registration list after not responding to the notice or not voting for two federal elections after the notice is sent or if the voter affirmatively contacts election officials in writing notifying them that he has moved. Most troubling is that these voters (most likely elderly, students, first time voters, and voters who live in multi-family units) would likely not know that they were purged until Election Day, leading to voter confusion, long lines, and unnecessary hurdles that the NVRA was designed to prevent.

The United States Students' Association and the ACLU of Michigan, represented by attorneys from the ACLU of Michigan, the Voting Rights Project, the Advancement Project, and Pepper Hamilton, LLP filed suit under the NVRA and Civil Rights Act, and sought a preliminary injunction to protect the ability of voters to cast ballots

in the November election. On October 13, 2008, the district court granted the preliminary injunction as to the removal of voters whose voter registration cards were returned. The State of Michigan then sought a stay of the order, and the Sixth Circuit upheld the district court's order. The case is now on appeal of the merits of the preliminary injunction.

Defendants again moved to dismiss the case for lack of standing, claiming that the organizational plaintiffs could not produce any members that would have been impacted by the challenged procedures. Discovery responses have shown numerous members and constituents of the ACLU of Michigan, NAACP, and United States Student Association were on the state's list of voters to be purged under the challenged practices. A hearing on the motion to dismiss was held on December 3, 2009 and parties are awaiting the district court's decision.

## MISSISSIPPI

### Felon Disfranchisement

Strickland v. Clark, Civil Action File No. G2006-1753 S/2 (Chanc. Ct. Miss.)

Section 241 of the Mississippi Constitution denies the right to vote to anyone convicted of one of the following ten crimes: murder, rape, forgery, bribery, obtaining money or goods under false pretense, bigamy, embezzlement, perjury, theft and arson. However, the provision allows individuals convicted of one of the ten crimes to vote in U.S. presidential elections. In 2004, the state Attorney General issued an advisory opinion expanding the list of disfranchising crimes, without legislative approval, to include eleven additional offenses. The Secretary of State then amended the voter registration form to include all twenty-one crimes and the form does not allow someone to register to vote only in federal elections.

Despite repeated requests, the Secretary of State refused to revise the registration form to list only the ten crimes enumerated in the constitution or to allow individuals to register to vote only for president and vice president. Therefore, on October 6, 2006, the ACLU of Mississippi and the VRP filed a lawsuit challenging the defendants' actions as violating state and federal law. Plaintiffs also moved to extend the voter registration deadline so that individuals convicted of one of the additional eleven crimes could vote in the November 2006 election, but the court denied the motion.

Defendants filed a motion to dismiss Plaintiffs' complaint for failure to state a claim, which the court denied on June 12, 2007. Plaintiffs filed a motion to amend the complaint on February 11, 2008, to include additional plaintiffs, and that motion is pending.

### Young v. Hosemann, Civ. Action No. 3:08CV567TSL-JLS (S.D. Miss.)

Plaintiffs Jerry Young and Christy Colley moved to be added parties to the Strickland v. Clark lawsuit, asserting their right to vote in presidential elections pursuant to Section 241 of the Mississippi Constitution. Given the fact that the November 2008 general elections were fast approaching and the state court had not ruled on their motion to join the state case, Plaintiffs filed a complaint and motion for preliminary injunction on September 12, 2008 in federal court to enjoin Defendants from denying their right to vote in the presidential election. Plaintiffs also filed a motion in state court to withdraw only their claims regarding their right to vote in presidential elections.

The district court summarily denied Plaintiffs' motion for a preliminary injunction ruling that Plaintiffs' interpretation of Section 241 was unreasonable. Plaintiffs appealed the denial of their motion to the Fifth Circuit Court of Appeals, and also requested that the Fifth Circuit stay the proceedings in the lower court pending the appeal to allow Plaintiffs to vote in November. The Fifth Circuit declined to stay the case. The Defendants then filed a Fed. R. Civ. P. 12(b)(6) motion to dismiss the complaint which Plaintiffs opposed. The district court granted that motion and Plaintiffs are appealing the dismissal. The Fifth Circuit heard oral argument on January 6, 2010, and the parties are awaiting a decision.

## MONTANA

### Ballot Access

Kelly v. McCulloch, CV-08-25-BU-SEH (D. Mont.)

On April 8, 2008, the VRP, along with the ACLU of Montana, filed a lawsuit in federal court challenging Montana's ballot access system for independent and previously unqualified parties. The complaint charges that the state's ballot access scheme violates the rights guaranteed by the First and Fourteenth Amendments. It was filed on behalf of would-be U.S. Senate candidate Steve Kelly and voter Clarice Dreyer, both of Bozeman, MT. Kelly ran as an independent candidate for U.S. Representative in 1994 and is the last independent candidate for statewide office to appear on the ballot. The defendant is Montana Secretary of State Linda McCulloch.

Under Montana law, independent and minor party candidates can appear on the general election ballot only if they submit the signatures of 5% of the total votes cast for the successful candidate for the same office in the last general election. A 2007 state law also added a filing fee and moved the petition deadline from June to March - more than 200 days before the election. Major party candidates, by

contrast, do not have to submit any signatures in order to appear on the primary ballot, and they appear on the general election ballot automatically when they win a primary election.

The district court denied the plaintiffs' motion for a preliminary injunction seeking to have Kelly put on the 2008 general election ballot. The parties filed cross motions for summary judgment in the summer of 2009. Those motions remain pending, and the court has suspended all further proceedings in the case until it rules on them. A ruling is expected sometime in 2010.

## NEBRASKA

### Ballot Access

Citizens In Charge v. Gale, Case No. 4:09-cv-03255 (D. Neb.)

The plaintiffs challenge three provisions of Nebraska law as violating political speech and associational rights protected by the First Amendment. The first law sets out a signature distribution requirement for would be independent candidates, requiring them to obtain at least 50 signatures from at least one-third of Nebraska's counties on a candidacy petition before they may appear on the ballot. The second requires petition circulators to be "electors" of the State of Nebraska, a requirement that has been invalidated by federal courts in other circuits. The third requires all petitions to contain language in large, red type stating whether the circulator is paid or is a volunteer.

Plaintiff Citizens in Charge is an educational non-profit organization dedicated to protecting and expanding the ballot initiative and referendum process in Nebraska and other states. Plaintiff Michael Groene is a Nebraska resident who has participated in securing petition signatures for ballot initiatives in Nebraska in the past and intends to do so in the future. Plaintiff Donald Sluti is a Nebraska resident and wants to run as an independent candidate for the office of Secretary of State of Nebraska, but he believes the statutes at issue in this case would render futile any attempt by him to gather signatures in order to appear on the ballot.

The complaint was filed on December 16, 2009.

## NEW JERSEY

### Felon Disfranchisement/African American & Hispanic Voting Rights

New Jersey State Conference/NAACP v. Harvey, No. UNN-C-4-04 (N.J. Sup. Ct. Ch. Div)

Several civil rights organizations and private plaintiffs, represented by the Rutgers Law School Constitutional Litigation Clinic and the VRP, filed suit on January 6, 2004, in state court challenging New Jersey law disfranchising convicted felons on probation or parole. The suit made two basic claims: First, that the state disfranchisement law has a disproportionate impact on African Americans and Latinos and thus denies them the equal right to vote in violation of the state constitution; Second, that the disproportionate impact of the state disfranchisement law dilutes the voting strength of the minority community, consisting of persons of African American and Hispanic descent, and deprives both communities of the ability to elect candidates of their choice in violation of the state constitution. Plaintiffs also contended the state's interest in rehabilitation of offenders negated any claim that disfranchisement of persons on probation or parole served a legitimate governmental purpose or interest.

The state court granted the state's motion for summary judgment and held the complaint failed to state a claim. On November 2, 2005, the state appellate court affirmed the lower court's judgment, and the Supreme Court of New Jersey denied certiorari on March 16, 2006. New Jersey State Conference/NAACP v. Harvey, 186 N.J. 363, 895 A.2d 450 (2006).

Following the final decision, the ACLU national office and the Rutgers Law School Constitutional Litigation Clinic filed a petition in September 2006, urging the Inter-American Commission on Human Rights to rule that denying New Jersey citizens on parole and probation the right to vote violates universal human rights principles.[1] The petition is pending.

1 The petition can be seen at: http://www.aclu.org/intlhumanrights/gen/26731lgl20060913.html

## SOUTH CAROLINA

### African American Vote Dilution

R.O. Levy v. Lexington County, South Carolina, School District Three Board of Trustees, Civ. No. 03-3093 (D.S.C.)

In March 2006, a trial was held in Levy v. Lexington County, South Carolina, School District Three, a vote dilution lawsuit brought by the VRP in 2003, on behalf of black residents of Lexington School District 3, one of five school districts lying wholly or partially within Lexington County, South Carolina. Prior to the filing of the lawsuit, no black person had ever been elected to the school board under the challenged system of at-large nonpartisan elections, despite the fact that blacks constituted 28.5% of the population of the school district.

Lexington County has a long history of racial discrimination. Schools were racially segregated; town ordinances required segregation in places of public accommodation; there was racial discrimination in hiring; the Ku Klux Klan was active in the county; blacks were excluded from juries; election campaigns were characterized by racial appeals; whites fled the Democratic Party because of its support of civil rights laws; and housing was constructed on a segregated basis.

Horace King, a resident of Lexington County, was head of the South Carolina chapter of the Christian Knights of the Ku Klux Klan in the 1990s. To promote the organization's white supremacist goals, he encouraged Klan members to burn black churches. In 1998, a member of the local Ku Klux Klan pled guilty to shooting three black teenagers outside a rural nightclub in Pelion in Lexington County.

After a lengthy delay of three years, during which elections were held for the school board in 2006 and 2008, the district court issued a detailed order on February 19, 2009, in which it held that the challenged at-large system diluted minority voting strength in violation of Section 2 of the Voting Rights Act. Among its numerous finding were: South Carolina and Lexington County had a "voluminous" history of racial discrimination which has continuing effects; voting was racially polarized; few minorities had been elected to office; churches, businesses, communities, and clubs remained segregated; blacks had a depressed socio-economic status; black registration and turnout were depressed; elected officials were unresponsive to the needs of the black community; black students had depressed levels of academic achievement; and after the complaint was filed the school board recruited a retired black school teacher to run for office in an effort to defeat the law suit.

The school district appealed, and one of its main arguments was that the trial court should have considered the two election cycles that took place after trial and

before the court issued its opinion. Oral argument was heard by the Fourth Circuit on September 24, 2009, and on December 21, 2009, it vacated and remanded the case for further consideration of the 2006 and 2008 elections.

### Ballot Access

South Carolina Green Party v. South Carolina Election Commission, 3:08-02790-CMC (D.S.C.)

In the first case of its kind, the VRP filed a lawsuit in federal court prior to the 2008 general election challenging the South Carolina election rules that prevent a candidate who is seeking the nomination of more than one political party from appearing on the general election ballot if that candidate wins one party's nomination but loses another's. South Carolina is one of only four states that permits "fusion" voting, which allows multiple political parties to nominate the same candidate, but also has a so-called "sore loser" statute disqualifying candidates who have been selected by one party but rejected by another. The ACLU brought this legal challenge on behalf of the state Green Party, a disqualified candidate for the state House of Representatives, and a South Carolina voter.

One of the plaintiffs is Eugene Platt, who was selected as the Green Party candidate for a South Carolina House seat, but later failed to win the endorsement of the Democratic Party. At the urging of the Democratic Party, and relying on the sore loser provision, the South Carolina Election Commission decided that Platt was ineligible to appear on the ballot under the Green Party banner. The complaint charges that South Carolina's ballot access scheme imposes an unjustified burden on the First Amendment's free association rights of Platt and voters who are supporting him as well as the Green Party's right to select its preferred candidate.

The district court denied the plaintiffs' motion for a preliminary injunction seeking to restore Platt to the ballot in the 2008 election. In August 2009, the district court granted the defendants' motion for summary judgment, and the plaintiff appeal. The appeal has been fully briefed, and a decision is expected in 2010.

Tempel v. Platt, 08-CP-10-4978 (Court of Common Pleas, 9th Judicial Circuit, S.C.)

The VRP represents Eugene Platt in this state court action brought by the Charleston County Democratic Party seeking an injunction prohibiting Platt from being on the ballot as a candidate of the Green Party for a state house seat. South Carolina law requires every candidate for office to sign an oath to abide by the results of a primary and not allow his or her name to be placed on the general election ballot by petition and not offer or campaign as a write-in candidate for the office or any other office for which the party has a nominee.

Platt was nominated for a state legislative house seat by the Green Party in 2008, and subsequently lost the nomination for the same office in the Democratic Primary. The Democratic Party then filed suit in state court to exclude Platt from running as the nominee for the Green Party. The state court granted the relief sought, but denied Platt the opportunity to present evidence that he was not in violation of the oath, and had not allowed his name to be placed on the general election ballot by petition and had not offered or campaigned as a write-in candidate. He also argued that the oath which prohibited the Green Party from keeping him as its candidate was an unconstitutional violation of the First Amendment.

South Carolina is one of only four states that permit fusion voting, allowing multiple political parties to nominate the same candidate. However, South Carolina's candidate oath statute prevents a candidate seeking the nomination of more than one political party from appearing on the general election ballot if that candidate wins one party's nomination but loses another's.

The court of common pleas granted the Democratic Party's injunction and subsequently denied Platt's motion for reconsideration. Platt appealed to the South Carolina Supreme Court, which heard oral argument on January 6, 2010. The case is awaiting decision.

### Section 5 Enforcement

Gray v. South Carolina State Election Commission, No. 3:09-cv-02126-JFA (D. S.C.)

South Carolina, as part of its fusion system, allowed candidates to be nominated by multiple political parties provided they filed a notice of candidacy with at least one political party before the March deadline prior to an election. That rule was rescinded in April 2008, when the State Election Commission required a notice of candidacy to be filed with each political party prior to the March deadline in order to be the candidate of that party. Even though the new rule was a change in voting practices or procedures, the state refused to submit it for preclearance under Section 5 of the Voting Rights Act.

The ACLU filed suit on August 12, 2009, on behalf of seven voters of South Carolina, and the United Citizens Party of South Carolina. The United Citizens Party, which has as one of its goals increasing the political participation of racial and other minorities, had frequently nominated candidates selected in other party primaries under the pre-existing system. Plaintiffs sought an injunction baring further use of the voting change absent preclearance under Section 5. They also claim that the new rule violates their associational rights under the First and Fourteenth Amendments.

The three-judge court heard the plaintiffs' Section 5 claim on November 18, 2009. On December 15, 2009, it issued an order requiring the parties to undertake additional discovery on any prior changes in the policies and practices of the Election Commission regarding filing deadlines and statements of intention of candidacy and whether any such changes had been submitted for preclearance. Supplemental brief are to be submitted by February 15, 2010.

## SOUTH DAKOTA

### American Indian Vote Dilution

Cottier v. City of Martin, Civ. No. 02-5021 (D. S.D.)

Martin, located in southwestern South Dakota, is a small city of slightly more than 1,000 people, nearly 45% of whom are Native American. It is the county seat of Bennett County, which was created out of the Pine Ridge Indian Reservation in 1909, and today has a slight Indian population majority (52%). Like many border towns in the American West, Martin has seen more than its share of racial conflict.

In Cottier v. City of Martin, a lawsuit filed by the ACLU in 2002 on behalf of two Indian voters, the plaintiffs alleged that the redistricting plan adopted by the city that year had the purpose and effect of diluting Native American voting strength in violation of the VRA and the Fourteenth and Fifteenth Amendments. Despite being a significant part of the population, Native Americans had been unable to elect any candidates of their choice to the city council because the redistricting plan ensured white voters controlled all three city council wards.

After more than two years of discovery, the case went to trial in June 2004. The district court ruled against the plaintiffs, finding on the basis of county elections that the plaintiffs had not shown that whites voted as a bloc usually to defeat the candidates preferred by Indian voters in city elections.

Plaintiffs appealed and in May 2006, the Eighth Circuit reversed the district court, concluding plaintiffs had established that the candidates of choice of Indian voters were usually defeated by whites voting as a bloc. It vacated the lower court's opinion and remanded it for further consideration of the "totality of circumstances." Cottier v. City of Martin, 445 F.3d 1113 (8th Cir. 2006).

On remand, the district court found the challenged system violated Section 2 of the Voting Rights Act. Among its findings were:

> There is a long, elaborate history of discrimination against Indians in South Dakota in matters relating to voting in South Dakota.

> Indians in Martin continue to suffer the effects of past discrimination, including lower levels of income, education, home ownership, automobile ownership, and standard of living.
>
> Martin city officials have taken intentional steps to thwart Indian voters from exercising political influence.
>
> [T]here is a persistent and unacceptable level of racially polarized voting in the City of Martin.

Cottier v. City of Martin, December 5, 2006, slip op. at 11, 15-6, 19.

The decision ordered a "full and complete remedy" for the plaintiffs. After the city refused to propose a new election plan, the district court ordered the city to implement a system of cumulative voting for the city council. The first election under the cumulative voting plan was held in June 2006, and three Indian-friendly candidates were elected. The city appealed the district court's ruling on the merits of plaintiffs' claim, as well as its remedial order imposing cumulative voting.

On December 16, 2008, a three-judge panel of the Eighth Circuit affirmed the district court's judgment in the plaintiffs' favor. The court held that the district court's finding of vote dilution was supported by substantial evidence in the record and that the district court did not abuse its discretion when it imposed cumulative voting as the remedy. The Eighth Circuit subsequently vacated the panel's ruling, however, when it granted the city's petition for rehearing en banc.

The full Eighth Circuit heard the appeal in September 2009, and the case remains pending. A decision is expected in early 2010.

### Malapportionment/American Indian Vote Dilution
Blackmoon v. Charles Mix County No. 05-4017 (D.S.D.)

In 2005, the VRP filed suit against Charles Mix County on behalf of four tribal members. The complaint alleged that the three county commission districts were malapportioned and had been drawn to dilute Indian voting strength. Each district had a majority white voting age population, despite the fact that Indians were 30% of the population of the county and it was possible to draw a compact majority Indian district. The total population deviation among the districts was 19%, and almost certainly unconstitutional.

In an effort to avoid court supervised redistricting in the event of a finding of a violation of one person, one vote or the VRA, the county asked the state legislature to pass legislation establishing a process for emergency redistricting. (State

law otherwise prohibited the county from redistricting until 2012.) The legislature complied and passed a bill, which the governor promptly signed, allowing a county to redistrict, with the permission of the governor and secretary of state, any time it became "aware" of facts that called into question whether its districts complied with federal or state law.

Before the county could take advantage of the new law, however, four Native Americans in a separate lawsuit obtained a preliminary injunction prohibiting the state from implementing the new law unless and until it obtained preclearance under Section 5 of the Voting Rights Act. See Quick Bear Quiver v. Nelson, 387 F. Supp. 2d 1027 (D. S.D. 2005) (three-judge court). This effectively put the law on hold for a few months.

While the new law was on hold, the district court in Blackmoon granted the plaintiffs' motion for partial summary judgment on their malapportionment claim. As a remedy, the county adopted a plan that had been proposed by the ACLU in 2001, and that remedied both the malapportionment and the dilution of Indian voting strength.

Reaction to the new districts was swift. Less than a month after the county adopted a redistricting plan with a majority Indian district, a white resident of the county began circulating a petition to split Charles Mix into two counties, one part of which would be almost all white. The petition received significant news coverage, and it was widely seen as directly related to the Indian victory in the Blackmoon case.

The succession movement fizzled after the media coverage, and the petitions to divide the county were never turned in. Instead, a new petitioning effort sprung up B this time seeking to increase the number of county commissioners from three to five. In a thinly veiled reference to an Indian candidate who was running for commissioner in the new majority Indian district, the circulator of the petition told the media that the purpose of increasing the size of the county commission was to "take[] power away from one strong commissioner."

Native Americans strongly opposed the increase, but it passed in November 2006 with strong white support. In an effort to stop the increase from being implemented, tribal members successfully circulated a petition to refer the county's five member plan to the voters. In a special election on the referendum, however, the petition failed and the increase was scheduled to take effect in 2008.

In early 2007, the district court ruled that the plaintiffs' remaining claims could go forward and set them for trial in March 2008. The primary issue was the plaintiffs' request for relief under Section 3 of the VRA, which would require the county to comply with Section 5.

Rather than go to trial, the county requested mediation. In December 2007, the parties negotiated a consent decree that, among other things, requires the county to comply with Section 5 until 2024. The county subsequently submitted for preclearance its plan to increase the size of the county commission from three to five. The Department of Justice objected to the change on the ground that the county had not met its burden of proving that the increase was not motivated by a discriminatory purpose. As a result of the objection, the three member plan with one majority Indian district remains in place.

Monitoring of voting changes in the county remains ongoing.

### American Indian Vote Dilution/Section 5 Enforcement
Kirkie v. Buffalo County, S.D., Civ. No. 03-3011 (D. S.D.)

One of the most blatant schemes to disfranchise Indian voters in South Dakota was used in Buffalo County. The population of the county was approximately 2,000 people, 83% of whom were Indian, and members primarily of the Crow Creek Sioux Tribe. Under the plan for electing the three member county commission, which had been in effect for decades, nearly all of the Indian population - some 1,500 people - was packed in one district. Whites, though only 17% of the population, controlled the remaining two districts, and thus the county government. The system, with its total deviation among districts of 218%, was not only in violation of one person, one vote, but had clearly been implemented and maintained to dilute the Indian vote and insure white control of county government.

Tribal members, represented by the ACLU, brought suit in 2003 alleging that the districting plan was malapportioned and had been drawn purposefully to discriminate against Indian voters. The case was settled by a consent decree in which the county admitted its plan was discriminatory and agreed to submit to federal supervision of its future plans under Section 5 of the Voting Rights Act through January 2013. Following the law suit, the Native American community was able to elect two candidates of choice and thereby secure control of the county commission which had eluded them previously, despite the overwhelming Indian population majority in the county.

Monitoring of voting changes in the county is ongoing. In 2008, the VRP's monitoring efforts revealed that the county had not fully complied with its obligation to submit voting changes to the Attorney General for preclearance. The VRP brought this to the attention of the Department of Justice, which subsequently asked the county to submit all unprecleared changes.

### **Felon Disfranchisement/American Indian Vote Dilution**

Janis v. Nelson, Case 5:09-cv-05019-KES-LLP-RLW (D. S.D.)

The plaintiffs are American Indians who reside on the Pine Ridge Reservation in Shannon County, which is one of two counties in South Dakota covered by Section 5 of the Voting Rights Act. They are represented by the VRP, the ACLU of South Dakota, and local counsel.

The plaintiffs were denied the right to vote because of their felony convictions, despite the fact that their sentences did not include incarceration and state law expressly provides that the right to vote is denied only while persons convicted of felonies are imprisoned in the state penitentiary. They contend the actions of state and local officials constitute a change in voting that has not been precleared as required by Section 5, and violate other provisions of federal law - the Fourteenth Amendment, the Help America Vote Act, the National Voter Registration Act, and Section 2 of the Voting Rights Act - as well as state law.

The state argued that Section 5 was now unconstitutional as applied to Shannon County because it was outdated, and Shannon County was experiencing high voter registration rates and above national average voter turnout rates. In rejecting these arguments in an opinion issued on December 30, 2009, the district court cited prior Supreme Court decisions dismissing challenges to the constitutionality of Section 5 and held that: "Congress could have rationally concluded that Section 5 helps enforce the Fifteenth Amendment's prohibition against denying the right to vote on account or race of color." Janis v. Nelson, slip op. at 21. The court further held that: "South Dakota's history of discriminating against Native Americans and the risk that such discrimination will increase in the absence of the preclearance requirement set forth in Section 5 of the Voting Rights Act compels the court to reject state defendants' argument that Section 5 of the Voting Rights Act is unconstitutional as applied to Shannon County." Id. at 22.

The district court also rejected the state's motion for judgment on the other claims by plaintiffs under the Fourteenth Amendment, HAVA, NVRA, Section 2 of the Voting Rights Act, and state law. In a second decision entered the same day, the district court denied requests by state and county officials that they not be required to comply with discovery requests made by the plaintiffs.

## TENNESSEE

### Felon Disfranchisement

Johnson v. Bredesen, No. 08-6377 (6th Cir.)

For several years, Tennessee had one of the most cumbersome and confusing felon re-enfranchisement schemes in the nation. In 2006, the legislature amended the law to allow people convicted of infamous crimes to apply for a Certificate of Restoration. The law, however, requires that applicants pay all victim restitution and be current on any child support obligations. Prior to the 2006 amendment, the state did not require individuals with criminal convictions who had otherwise completed all the terms of their sentence to pay legal financial obligations (LFOs) before being eligible to seek restoration of their voting rights.

On February 25, 2008, the VRP and the ACLU of Tennessee filed a lawsuit challenging the LFO requirement as unconstitutional under the Fourteenth and Twenty-Fourth Amendments and state laws. The lawsuit also highlights the fact that individuals who do not have a criminal conviction, but who owe outstanding child support do not risk losing their voting rights for failure to pay. Two of the three plaintiffs in the case, Terrence Johnson and Jim Harris, owe outstanding child support payments, but have custody of their children.

The complaint also included a due process claim on behalf of Plaintiff Alexander Friedmann who, prior to the lawsuit being filed, attempted to complete and submit a Certificate of Restoration application. The law requires a supervising authority, such as a probation officer or criminal court clerk, to complete a portion of the Certificate of Restoration. However, the state has not implemented a set of procedures that all counties have to follow when determining whether a person convicted of an infamous crime owes LFOs and, if so, whether that person has satisfied the requirement. Supervising authorities refused to sign the form for Friedmann on the ground that he owed victim restitution. Yet, neither the county nor the state provided him with documentation confirming whether or not he owed any money.

Three of the defendants filed a motion to be dismissed from the case for failure to state a claim which the court denied. Defendants then filed a motion for judgment on the pleadings arguing that, even assuming all of the allegations in the complaint were true, Plaintiffs' claims still failed as a matter of law. After a hearing, the court granted Defendants' motion as to all of the claims except for Friedmann's due process claim. The parties eventually settled Friedmann's claim and he was able to vote in the November 4, 2008 general elections. Plaintiffs appealed the dismissal of the remainder of their claims to the Sixth Circuit Court of Appeals and are awaiting a decision.

## TEXAS

### Defending the Constitutionality of the Renewed Voting Rights Act

NW Austin MUD Number One v. Gonzales, 573 F.Supp.2d 221 (D. D.C. 2008)

The first challenge to the constitutionality of the 2006 extension of Section 5 of the Voting Rights Act was filed in the District of Columbia court by the Northwest Austin Municipal Utility District Number One ("MUD") located in Austin, Texas. In this suit, MUD sought to bail out from Section 5 coverage, or in the alternative a declaration that the extension of Section 5 for an additional 25 years was unconstitutional. Texas first became covered by Section 5 as a result of amendments to the Voting Rights Act in 1975, and because of its Hispanic population.

The VRP, the ACLU of Texas, and the ACLU of the District of Columbia represented a minority resident of MUD and were granted leave to intervene to argue that MUD, since it did not register voters, lacked standing to bail out, and that in any case the extension of Section 5 was constitutional. Other civil rights organizations were also allowed to intervene to defend the constitutionality of Section 5.

Following discovery, all parties filed motions for summary judgment. In a lengthy decision entered on September 4, 2008, the three-judge court granted the motions of the Attorney General and the various defendant intervenors, and ruled that MUD was not entitled to bail out and that the extension of Section 5 was constitutional under the Fourteenth and Fifteenth Amendments. Northwest Austin Mun. Utility Dist. No. One v.Gonzales, 573 F.Supp.2d 221 (D. D.C. 2008). The court based its opinion on the extensive congressional record of Section 5 objections, continued racial bloc voting, patterns of discrimination by the covered jurisdictions, and litigation under Section 2 of the Voting Rights Act. The court also noted that the extension passed unanimously in the senate and by an overwhelming majority in the house, indicating that the considered judgment of Congress of the continued need for Section 5 was entitled to deference by the courts.

MUD filed a jurisdictional statement in the Supreme Court, which noted probable jurisdiction on January 9, 2009. No. 08-322. The Court heard oral argument on April 29, 2009, and based upon comments by individual Justices it appeared the Court was evenly divided on the issue of Section 5's constitutionality with Justice Kennedy being the deciding vote. The Court issued its much anticipated ruling on June 22, 2009, and in a 8-1 opinion written by Chief Justice Roberts, it declined to decide the issue of the constitutionality of Section 5. Instead, it held that the utility district was in fact eligible to bailout from Section 5 coverage, and as a consequence the Court would "avoid the unnecessary resolution of constitutional questions" involving Section 5. Northwest Austin Mun. Utility Dist. No. One v. Holder, 129 S.Ct. 2504, 2508 (2009).

Despite the prior limitations on bailout, the Supreme Court held that "the structure of the Voting Rights Act, and underlying constitutional concerns compel a broader reading of the bailout provision." Id. at 2514. As a consequence, it held the definition in § 14(c)(2) did not apply to the term "political subdivision" in Section 5's preclearance provision.

The majority opinion raised questions about the "current burdens" imposed by the Act and whether they were "justified by current needs," and whether the "statute's disparate geographic coverage is sufficiently related to the problem that it targets." But it also underscored the vital role the Act has played in American politics: "The historic accomplishments of the Voting Rights Act are undeniable," and the improvements in minority political participation "are no doubt due in significant part to the Voting Rights Act itself, and stand as a monument to its success." Id. at 2511.

The meaning of the Court's decision has been the subject of much discussion, but the most likely explanation is that there were not five votes to strike down one of the most important and effective civil rights acts in our nation's history. In any event, Section 5 remains in full force and effect, while its resistance to further constitutional challenges has been strengthened by the fact that the argument that it unfairly burdens covered jurisdictions has been significantly weakened. If any jurisdiction has a clean voting rights record and no longer needs to be covered by Section 5, it can bailout. If it remains covered, it would be a consequence of its own decision not to seek bailout, or because it does not have a clean voting rights record. Continuing coverage under either scenario does nothing to suggest Section 5 is an unconstitutional burden or that geographic coverage is unrelated to the problem that it targets.

Following remand, the utility district, the United States, and the intervenors filed a proposed consent decree allowing the utility district to bailout from Section 5 coverage. The consent decree was approved by the three-judge court on November 3, 2009, and the claim challenging the constitutionality of Section 5 was dismissed without prejudice.

## WASHINGTON

### Felon Disfranchisement/African American, Hispanic & American Indian Voting Rights

Farrakhan v. Gregoire No. 06-35669 (9th Cir.)

On July 7, 2006, the Eastern District Court of Washington dismissed the decade-long case, Farrakhan v. Gregoire, No. CV-96-076-RHW, in which minority plaintiffs argued that discrimination in the state's criminal justice system leads to high rates of disfranchisement for minorities in violation of Section 2 of the VRA. State law provided for the automatic disfranchisement of all persons convicted of "infamous crimes," defined as those punishable by death or imprisonment. The case had originally been filed by the NAACP Legal Defense and Educational Fund and the University Legal Assistance law clinic at Gonzaga Law School on behalf of a group of African American, Latino, and Native American incarcerated individuals. Collectively, African Americans, Latinos, and Native Americans represent only 12 percent of Washington's overall population but make up approximately 36 percent of the state's incarcerated population.

In Farrakhan v. Washington, 338 F.3d 1009 (9th Cir. 2003), the court of appeals ruled plaintiffs' stated a cognizable claim that the disproportionate disfranchising of racial minorities based on criminal convictions violated Section 2. On remand, the district court found there was racial bias in the enforcement of Washington's criminal laws. The court also found credible the testimony of expert witnesses that the disparate impact on racial minorities was not explained by causes other than the racial bias. Nonetheless, the district court granted the state's motion for summary judgment, ruling that the lack of evidence of other forms of discrimination within the electoral system weighed in favor of the state and there had to be more of a causal link between the discrimination within the criminal justice system and vote disfranchisement.

Plaintiffs appealed, and the VRP, along with the ACLU of Washington, submitted a motion to file an amicus brief supporting a reversal of the lower court's decision. The ACLU argued that the district court erred in applying Section 2. Because disfranchisement is automatic once a conviction occurs, the racial bias in the criminal justice system works with the state election law, and as a consequence nothing more was required to establish a violation of Section 2. The court denied the motion to file an amicus brief without providing any reason, but it listed the brief as one of the documents before the court in its opinion issued on January 5, 2010.

In its January 5 opinion, the court, in a 2-1 decision, granted summary judgment to the plaintiffs on their vote denial claim. It concluded that there is discrimination

in Washington's criminal justice system on account of race, and that such discrimination clearly hinders the ability of racial minorities to participate effectively in the political process. As a consequence, the state's felon disfranchisement law violated Section 2 of the Voting Rights Act.

## WYOMING

### Indian Vote Dilution

Large v. Fremont County, No. 05-CV-270-J (D. WY)

On October 20, 2005, the VRP brought suit against Fremont County, Wyoming, on behalf of Native American voters who are members of the Eastern Shoshone and Northern Arapaho Tribes residing on the Wind River Indian Reservation, alleging that at-large elections for the board of commissioners dilute Native American voting strength in violation of the Constitution and Section 2 of the VRA. The defendants, represented by the Mountain States Legal Foundation, filed their answer denying the allegations of the complaint. They also filed a motion for summary judgment on the grounds that Section 2 as applied in Indian Country to a county that was not covered by the special preclearance provisions of Section 5 of the Voting Rights Act was unconstitutional. Plaintiffs filed a brief opposing the motion. On December 14, 2006, the United States filed a Notice of Intervention to defend the constitutionality of Section 2, and subsequently filed a brief to that effect. By order of January 26, 2007, the district court denied the defendants' motion for summary judgment.

Following depositions and discovery, the case was tried over a two week period in February 2007, in Casper, Wyoming. The parties filed post-trial proposed findings and conclusions in May 2007, and the case is awaiting decision on the merits.

# II. SUMMARY TABLE OF LITIGATION

In 2009, the VRP was involved in 32 lawsuits in 19 states. These cases addressed a variety of issues which can be summarized as follows:

| Issue | Numberof Cases[2] |
|---|---|
| African American Voting Rights | 11 |
| Alaskan Native Minority Language Assistance | 1 |
| American Indian Voting Rights | 6 |
| Amicus Briefs | 3 |
| Ballot Access | 6 |
| Constitutionality of the Voting Rights Act | 2 |
| Denying Requests for Absentee Ballots | 1 |
| Felon Disfranchisement | 8 |
| HAVA Enforcement | 1 |
| Hispanic/Latino Voting Rights | 6 |
| Malapportionment | 2 |
| NVRA Enforcement | 2 |
| Proof of Citizenship Requirements | 1 |
| Public Education | 1 |
| Restrictive Voter Identification Requirements | 3 |
| Section 5 Enforcement | 6 |
| Student Voting Rights | 1 |
| Voter Challenges | 4 |
| Whistle Blower Enforcement | 1 |

2 The total number of cases in this column (66) is greater than the number of lawsuits (32) because some cases encompass more than one issue.

# III. SECTION 5 COMMENT LETTERS and Other Communications with the Department of Justice

## TELFAIR COUNTY, GEORGIA

On October 13, 2009, the VRP submitted a comment letter to the Department of Justice urging it to object to a Section 5 submission by the Board of Commissioners of Telfair County, Georgia. The submission was a state law that reduced the number of single member commission districts from five to four, and provided for the election of the chair of the board at-large rather than by the five members of the board. Aside from their retrogressive effect, there was substantial evidence that the changes were adopted with a racially discriminatory purpose.

The ACLU represented African American voters in Telfair County in four cases spanning over two decades that created or preserved single member district plans, including the five single member district plan that is proposed to be changed in the present submission. Prior to 2004, there had never been two African American commissioners sitting simultaneously on the board. Now that Districts 1 and 2 have been able to elect black candidates, the board seeks to reduce the black voting age population in both districts making it more difficult for black voters to elect candidates of their choice. In addition, given the prevalence of racial bloc voting, election of the chair of the board at-large, as opposed to election by members of the board, would further dilute the African American vote and reduce the likelihood of an African American ever serving as chair.

On November 17, 2009, the Chief of the Voting Section of DOJ sent a letter to the Telfair County attorney advising him that "the information sent is insufficient to enable us to determine that the proposed changes . . . have neither the purpose or 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 county was asked to submit additional information including the reasons for adopting the proposed changes, precinct election data, and the extent of any involvement by the minority community in the adoption of the proposed changes. The 60 day preclearance period will begin to run upon receipt by DOJ of the requested information. The request for more information is a clear indication that DOJ finds the submission problematic.

## STATE OF GEORGIA

Following the decision of the three-judge court in Morales v. Handel that Georgia's new data base matching system for processing voter registration applications was covered by Section 5, and after a submission of the change by the state to the Department of Justice, the VRP, together with the other civil rights organization representing Morales, filed a comment letter with DOJ on November 25, 2008. They asked DOJ to either object to the submission or request additional information to evaluate its impact upon language and racial minorities. DOJ did request additional information, and objected to the state's submission on May 29, 2009. In its objection letter, DOJ concluded that "the state's process does not produce accurate and reliable information and that thousands of citizens who are in fact eligible to vote under Georgia law have been flagged." DOJ also found that the "flawed system frequently subjects a disproportionate number of African-American, Asian, and/or Hispanic voters to additional and, more importantly, erroneous burdens on the right to register to vote."

## TODD AND CHARLES MIX COUNTIES, SOUTH DAKOTA

In September 2009, South Dakota announced plans to close 17 of its drivers' licensing offices around the state. Among the offices to be closed were those in Todd and Charles Mix Counties, both of which are covered jurisdictions subject to the preclearance provisions of Section 5 of the Voting Rights Act. Todd was covered by amendments to the Voting Rights Act in 1975, while Charles Mix was covered by a federal court order in 207. Residents of the two counties would in many instances have to drive long distances to get a drivers license or photo ID. Several residents of those counties complained, and the VRP began an investigation.

The closure would affect both voter registration and voting. Under the National Voter Registration Act, drivers' license offices in South Dakota conduct voter registration, and the closure of drivers' licensing offices would mean that residents of Todd and Charles Mix counties would have less access to motor-voter registration. Access to drivers' licenses would also affect voting because South Dakota is one of several states that require each voter to show identification before voting in person or by absentee ballot. The closure would likely mean that some voters would not be able to meet the identification requirements because they would not have a current driver's license or state issued photo identification card. Census data showed that Native Americans in Todd and Charles Mix counties had a lower socioeconomic status and less access to cars than their white counterparts, which would mean less access to gas money and the ability to travel long distances to obtain or renew the necessary identification.

The VRP asked the Department of Justice to send the state a "please submit" letter asking the state to submit its closure plan to the Attorney General for preclearance. It is unclear whether the Department did, in fact, send such a letter or make an oral request for a submission, but the state announced three weeks later that it was reversing the decision to close the offices in Todd and Charles Mix counties. The state's Department of Public Safety, which oversees the licensing program, issued a statement specifically citing the preclearance provisions of the Voting Rights Act and the state's desire to avoid potential litigation as a reason for its decision.

## MEETING WITH THE DEPARTMENT OF JUSTICE

The Voting Rights Project, along with other civil rights organizations, met with Department of Justice officials on November 20, 2009, in Washington, D.C., in an effort to improve the department's enforcement of federal voting rights laws. The VRP filed a document making specific recommendations for improving enforcement of Section 5 of the Voting Rights Act, including:

1. There is no room for partisanship in Section 5 preclearance. Voting changes are to be precleared or not based upon whether they have a discriminatory purpose or effect.

2. Career staff should be required to make recommendations whether a proposed change should be precleared, and the basis for the recommendation should be explained and documented.

3. No decision should be made to grant or deny preclearance without full review of the recommendations of the career staff. In the event the recommendation of the career staff is overruled by political appointees, the reasons for overruling should be stated and documented.

4. More information letters should be sent to submitting jurisdictions if there is doubt whether or not submitted changes should be precleared.

5. The comments of affected racial and language minorities submitted in connection with preclearance requests should be read and considered before a preclearance decision is made.

6. Partisanship can play no role in enforcing the requirement that certain jurisdictions provide bilingual material and other assistance in voting to language minorities, in the certification and assignment of federal observers

to monitor election, in investigations conducted by the Voting Section, or in decisions whether or where to bring litigation.

7. Any Voting Section attorney or reviewer who has taken a public position on a matter under submission, or has represented a matter for a party to a submission, should be recused from reviewing that submission.

# IV. ELECTORAL REFORM

## NATIONAL POPULAR VOTE

The ACLU Executive Committee at its meeting on September 11, 2009, with the endorsement of the VRP, approved ACLU support of the National Popular Vote compact, which would award the presidency to the candidate who received the largest number of popular votes in all 50 states and the District of Columbia. This compact would not go into effect until enacted by states collectively possessing a majority of the electoral vote - 270 of the 538 electoral votes.

To prevent partisan manipulation, the compact contains a six-month blackout period from before the election through the January 20 inauguration during which a state would be prevented from withdrawing from the compact. The compact would eliminate the possibility under the existing system of "faithless presidential electors," i.e., an elector casting a ballot for a candidate other than the one chosen by the majority of the state's voters. It would also eliminate the possibility that a presidential election would be decided by the House of Representatives and a vice presidential election would be decided by the Senate, in the event no person received a majority of the Electoral College votes, as is provided by current law.

Most notably, the compact would eliminate the possibility that a candidate who received the most popular votes, but did not receive the requisite 270 Electoral College votes needed to win, could lose the election, as happened, for example, in the Bush-Gore 2000 election. The 2000 election was actually the fourth time in American history when the winner of the popular vote failed to win the presidency. Those elections were in 1824 (Adams-Jackson), 1876 (Hayes-Tilden), 1888 (Harrison-Cleveland), and 2000 (Bush-Gore).

Current ACLU Policy #324, adopted in 1969, provides: "The Union supports an amendment to the Constitution of the United States to provide for the election of the President and Vice-President by direct popular vote, on condition, however, that such amendment contains the following provisos: (1) if no candidate receives more than a fixed percentage of the total number of votes cast - preferably a majority but not less than 40% - a run-off election be held between the two highest contenders for the offices of President and Vice-President respectively; and (2) federally prescribed and federally supervised uniform non-discriminatory procedures and standards for registration and voting in such elections are required." While NPV is not a constitutional amendment and does not contain a 40% provision, it is consistent with ACLU policy premised on the belief "that the electoral college from its basic conception was and is an undemocratic institution. It was brought into

being based on a concept of elitism, under which the most distinguished citizens of each state would choose the President and Vice-President of the United States, unhampered by the wishes of those who selected the electors. ACLU believes that the Electoral College should be abolished and the President of the United States should be chosen by direct popular election. Our position is based on the principle that each individual is entitled to the equal protection of the laws in having an elector's vote equally weighed, and on its corollary enunciated in the one-man, one vote rule."

The ACLU would be concerned that inserting a runoff provision into the National Popular Vote plan might lead to a scheme in which voters would have to go to the polls more than once. Such a result might place an undue burden on voters and has the potential to reduce the number of votes cast. Therefore, the Board is currently re-examining the 40% runoff provision of Policy #324. Only once has a presidential candidate failed to receive at least 40% of the popular vote. In the 1860 election, Abraham Lincoln received 39.65% of the popular vote and won the election with 59.41% of the Electoral College vote.

The constitutionality of the National Popular Vote compact is supported by Article II, Section 1 of the Constitution which provides that: "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . ." Thus, the states have inherent power to select their Electors as they see fit, provided the method of selection does not violate some other provision of the constitution, e.g., the Fourteenth or Fifteenth Amendments.

As of November 2009, five states have enacted the National Popular Vote compact: Hawaii, Illinois, Maryland, New Jersey, and Washington. That amounts to 61 (23%) of the 270 electoral votes needed to activate the compact. In 2009, the compact was introduced in legislatures in 31 other states. In nine of these states, the compact was approved by one of the two legislative bodies: Arkansas, Colorado, Connecticut, Delaware, New Mexico, Nevada, Oregon, Rhode Island, and Vermont.

## OTHER REFORMS

The Voting Rights Project has actively supported other electoral reforms, including:

1. A Federal Voter Empowerment Act, which would be applicable to federal elections and: (a) provide no-excuse absentee voting; (b) provide same day registration and voting; (c) provide minimum standards for ex-felon registration and voting, e.g., that all ex-felons are automatically eligible to register and vote upon completion of their sentences, and that payment of legal financial obligations and child

support cannot be a condition for restoration of voting rights; (d) provide that if a photo or other ID or proof of citizenship is required for voting by state law, voters without such ID or proof can vote upon signing a declaration under oath and subject to penalty of perjury that they are who they represent themselves as being and are citizens; (e) provide uniform standards for student registration and voting, e.g., that students may claim a residence at the schools they attend; (f) provide uniform standards for registration and voting by homeless persons, e.g., that homeless persons may use a shelter or other location as a residence; (g) provide uniform standards for voters who are required to vote by provisional ballots, e.g., that a voter who goes to the wrong polling place may vote in any election for which the voter is otherwise eligible to vote, and that provisional ballots be counted prior to certification of the electoral outcome; (h) provide uniform standards for voters who change their residence less than 30 days before an election by allowing them to either vote at their old polling place or register and vote on election day at their new polling place; (i) clarify the procedures in the Help America Vote Act for first time voters, e.g., that a voter who goes to the wrong polling place may vote by provisional ballot in any election for which the voter is otherwise eligible to vote; (j) prohibit challenges to voter eligibility based on caging or mortgage forfeiture lists, and require that challenges be detailed and voter specific; (k) provide uniform standards for insuring the reliability of voting technology, e.g., that any technology must insure accuracy and fairness, be verifiable, be accessible to voters with disabilities and to language minorities, insure privacy in voting, and be subject to independent testing and oversight; and (l) establishing guidelines for allocation of voting machines, poll workers, and provisional ballots based on the number of registered voters in a precinct.

2. An Accurate 2010 Census Count. Congress should provide adequate funding for the 2010 census and insure that every person is counted. An accurate census count is essential for insuring that post 2010 redistricting is performed in a fair manner, complies with one person-one vote and federal voting rights laws, and does not dilute the voting strength of any identifiable group.

3. State Electoral Reforms, including: (a) streamlining operations with county election boards to ensure accurate voter registration files and real time access for verifying voter information at polling locations; (b) prompt entry of new voter registration information into the statewide database so that voters are assured of their registration status before Election Day; (c) adoption of rules for following NVRA and HAVA guidelines regarding the proper purging of voters; (d) adoption of no-fault, universal absentee voting; (e) anticipating long lines for voting and planning accordingly, i.e., by adopting early/advance voting, increasing polling places, extending hours, and increasing the number of voting machines; (f) actively recruiting and effectively training poll workers; (g) effectively informing local county

election boards of felon enfranchisement laws, and universally processing voting rights restoration under specific and definitive guidelines; (h) adequately responding to absentee ballot requests; and (i) maintaining accurate websites providing information on polling places and registration procedures.

# V. PUBLICATIONS

Voting Rights Project:

Voting Rights in Indian Country: A Special Report of the Voting Rights Project of the American Civil Liberties Union, September 2009;

A Report on Voting Rights of Minority and Indigenous Communities in the United States, November 12, 2009.[3]

Laughlin McDonald:

"The Looming 2010 Census: A Proposed Judicially Manageable Standard and Other Reform Options for Partisan Gerrymandering," 46 Harvard J. on Legis. 243 (2009);

"A Challenge to the Constitutionality of Section 5 of the Voting Rights Act: *Northwest Austin Municipal Utility District Number One v. Mukasey*," 3 Charleston L. Rev. 231 (2009)

3 This report was prepared in conjunction with the ACLU Human Rights Program and was filed with the United Nations Human Rights Council Forum on Minority Issues, Geneva, Switzerland.

# VI. CONGRESSIONAL AND STATE TESTIMONY/PRESENTATIONS

## UNITED STATES SENATE

The VRP, together with the ACLU Washington Legislative Office, submitted a comment letter to the Senate Committee on Rules and Administration on March 17, 2009, identifying registration problems citizens encountered during the 2008 election cycle. Those problems included: failure to adequately process applications for registration and absentee ballots; the use of database matching systems which improperly targeted some voters as non-residents or non-citizens; a patchwork of laws across the country providing varying registration requirements for individuals who move less than 30 days before an election; unduly burdensome proof of citizenship requirements for voting; systematic challenges to registered student voters as non-residents; inconsistent state standards for voter registration by the homeless; and misinformation about, and inconsistent application of, state felon disfranchisement laws. The ACLU pledged to work with the committee in seeking solutions to these problems and expand voter access.

## GEORGIA GENERAL ASSEMBLY

The Voting Rights Project presented written and oral testimony before Georgia state Senate and House of Representatives in February-March 2009, urging the general assembly to vote against Senate Bill 86 which would require persons seeking to register to vote in Georgia after January 1, 2010 to show documentary proof of citizenship. Senate Bill also empowers the Secretary of State to undertake measures to verify the citizenship of registered voters. The Voting Rights Project's testimony focused on potential violations of the National Voter Registration Act, the disparate impact on minority voters as revealed by prior efforts of the state to verify citizenship using inaccurate databases, and the lack of evidence of non-citizen voting in the state of Georgia.

## GEORGIA ELECTION COMMISSION AND SECRETARY OF STATE PROPOSALS

The Voting Rights Project, along with other civil rights organizations, submitted a letter on December 4, 2009, to the Georgia Election Commission commenting on proposed rules for implementing a new Georgia law (S.B. 86) requiring documentary proof of citizenship and data base matching for registering to vote. The letter pointed out that: few states require such proof but rely instead upon an oath

affirming citizenship under penalty of perjury; the new law is in violation of the National Voter Registration Act which allows registration based upon an affirmation of citizenship under penalty of perjury; the proposed verification system was error prone and inaccurate; the law would unduly burden thousands of Georgia residents; the law would have a disparate impact upon the poor, elderly, and minorities; and there was no evidence that non-citizen voting was a significant problem in Georgia.

## SOUTH CAROLINA LEGISLATIVE BLACK CAUCUS

The Voting Rights Project presented testimony before the South Carolina Legislative Black Caucus on November 17, 2009 on the racially disparate impact of voter identification laws and their likely effects on the next redistricting cycle. South Carolina already has one of the more restrictive voter identification requirements. Voters must present a South Carolina state identification, driver's license, or the precinct card that the local elections officials mail to voters. The new voter identification bill requires a state issued photo identification and eliminates the use of the precinct card as a method of identification. The Voting Rights Project presentation urged the Legislative Black Caucus to study and document the numbers of registered voters who lack identification records with the state's Department of Motor Vehicles. We further argued that Section 5 of the Voting Rights Act requires that the state make such inquiries in order to meet its burden of showing that the proposed new identification requirements do not hamper minority voting strength.

## VII. PUBLIC SPEAKING

Laughlin McDonald:

Speaker, American Constitution Society, University of South Carolina Law School, March 26, 2009;

Panelist, University of Tennessee, "'Tent City' Celebration and Right to Vote Symposium," March 31-2, 2009;

Speaker, Emory Public Interest Committee, Emory Law School, November 3, 2009;

Panelist, International Municipal Lawyers Association, "Voting Rights Litigation: Dealing with the 2010 Census," Columbia, South Carolina, December 10, 2009.

Interviewed on Just Peace, a radio program on WRFG in Atlanta, about VRP's Voting Rights In Indian Country report and ACLU litigation on behalf of American Indians.

Numerous interviews with the press about voting issues.

Meredith Bell-Platts:

Speaker, South Carolina Legislative Black Caucus Annual Retreat, November 17, 2009.

Various interviews with media regarding proposed voter ID laws.

Lobbyist, Testimony before the Georgia General Assembly regarding Georgia's proof of citizenship for voter registration, February-March 2009.

Panelist, League of Women Voters of Georgia Legislative Action Day, January 2009.

Nancy G. Abudu:

Interviewed by several radio shows, online podcasts, and newspapers regarding our felon disfranchisement cases.

Made presentation before law students at John Marshall Law School in Atlanta regarding the Voting Rights Act and our felon re-enfranchisement work.

Contributing author to "The International Lawyer," a quarterly publication of the ABA/Section of International Law, and wrote on the 2008 elections in Zimbabwe.

Fred McBride:

Panelist at the NAACP Legal Defense and Education Fund's 2009 Civil Rights Training Institute (AIRLIE): Post-Racial America? Progress and Continuing Salience of Race in the Struggle for Minority Voting Rights;

Speaker at the Emory Law School Black Law Students Association: the 2010 census and the need for a complete and accurate count;

Participant at the Census and Redistricting Planning Committee of the Community Census and Redistricting Institute, a gathering of academics, legal experts, community organizations, researchers, and elected officials. The goals of the Institute are to draw fair and effective redistricting plans, advocate for their adoption, and defend their legality.

In addition to formal presentations, VRP staff has responded to numerous requests for information and interviews from the media on a wide range of voting issues.

## VIII. AFFILIATE ASSISTANCE

Aside from partnering on litigation, the VRP provides information, analysis, opinions, and advice to affiliates on a variety of issues, including: a Maryland bill criminalizing misleading information by political campaigns; whether the national parties' stripping some states of their national convention delegates for holding primaries contrary to the national parties' rules presented civil liberties issues; whether posting voter information on a Nevada state website presented a privacy or intimidation problem; answered affiliate inquiries about the ACLU position or concerns regarding the move in some states to adopt statutes to have their electoral votes cast for the national popular vote winner; whether a news organization could tell its employees not to participate in political caucuses in the presidential selection process; whether the Minnesota affiliate should take a position on a proposal to adopt an "instant runoff voting" proposal; what role the Iowa affiliate might take in a lawsuit which sought to prevent the Secretary of State from providing voting and ballot information in languages other than English; whether a public housing authority could ban voter registration drives at a housing facility; what steps the ACLU of Nevada should suggest to the secretary of state regarding efforts to comply with the Uniform & Overseas Citizens Absentee Voting Act; protections for Wisconsin voters with disabilities contained in the Help America Vote Act and the Americans With Disabilities Act; the ACLU position of disclosure of Social Security Numbers in order to register to vote; the ACLU position on filling a vacant U.S. Senate seat by gubernatorial appointment rather than by election; the ACLU position on cumulative voting; the ACLU position on a state compact to replace the Electoral College system of electing the president; how to oppose voter identification laws in Texas, Mississippi, North Dakota, Wyoming, Florida, Utah, Rhode Island, South Carolina, Kansas, Colorado, and Oklahoma; advising the Ohio affiliate on efforts to expand early voting and proper implementation of the Help America Vote Act's database comparison procedures; advising an affiliate on possible litigation over the closing of a polling place used by students at a historically black university; etc. This list is illustrative, and far from exhaustive.