ACLU Voting Rights Project
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Introduction

This report summarizes the work of the ACLU Voting Rights Project (VRP) for the 2010 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, as well as its focus on felon disfranchisement and ballot access. It has been involved in seven felon disfranchisement cases in six states (Alabama, Arizona, Mississippi, South Dakota, Tennessee, and Washington), and assisted in filing a petition to the Inter-American Commission on Human Rights challenging the State of New Jersey's felon disfranchisement law. 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. 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.

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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 Amoral 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 appealed the dismissal to the Alabama Supreme Court, and the court affirmed the trial court's order in a per curiam opinion on June 25, 2010, without offering any factual or legal basis for its decision.

Constitutional Challenge to Section 5

Shelby County, Alabama v. Holder, No. 1:10-CV-651 (D. D.C.) (JDB)

Shelby County, Alabama, on April 27, 2010, filed a facial challenge to the constitutionality of the 2006 extension of Section 5 of the Voting Rights Act, 42 U.S.C. §1973c, for an additional 25 years. The county makes the same arguments that other jurisdictions have made which have challenged the constitutionality of Section 5, i.e., that it is unduly burdensome, violates concepts of federalism, has outlived its usefulness, the coverage formula is outdated, minority voter registration and office holding have significantly increased, and there is no evidence of "gamesmanship" by covered jurisdictions. The VRP, the Alabama ACLU, and the NAACP represent defendant-intervenors who contend that the congressional record compiled in 2005-2006 fully supports the continuing need for Section 5 and that the judgment of Congress, which has constitutional authority to enforce the Fourteenth and Fifteenth Amendment by appropriate legislation, is entitled to deference from the courts.

On November 15, 2006, the Department of Justice and defendant-intervenors filed cross motions for summary judgment and oppositions to a motion for summary judgment filed by Shelby County. A hearing on the motions is set for February 2, 2011.

Alaska

Alaskan Native Minority Language Assistance

Nick v. Bethel, Alaska, No. 3:07-CV-0098 (TMB) (D. Alaska)

The VRP, the ACLU of Alaska, and the Native American Rights Fund represent Alaskan Natives in the Bethel Census Area of Alaska, where more than 10,000 Yup=ik speakers reside. They contended 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 claimed defendants had failed to comply with the preclearance provision of Section 5 of the Voting Rights Act, and sought 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 presented a number of distinct challenges. Not only were the plaintiffs geographically isolated and remote, making travel difficult and time consuming, but it was 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, but to do so they had to fly on small planes to several Native Villages, which were 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.

Following more litigation, the plaintiffs and the state defendants entered into a settlement agreement providing for minority language assistance to Yup'ik speakers including: poll workers who will serve as bilingual translators; Yuip'ik sample ballots; a comprehensive Yup'ik/ English glossary of election terms; radio election ads in Yup'ik; election video broadcasts in Yup'ik; outreach to Yup'ok speakers; the formation of a Yup'ik Translation Panel; translation of ballot measures; and compliance with Section 5 preclearance. The agreement also called for payment of costs and fees to plaintiffs' lawyers and retention of enforcement jurisdiction by the district court until December 31, 2012. The agreement was formally approved by the district court on February 16, 2010. Monitoring of elections and the implementation of the settlement agreements is ongoing.

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 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.181 (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 Aconditional 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 Alegal 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 Ais 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 Aonly 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 Ninth Circuit Court of Appeals, which in a 2-1 opinion issued on October 26, 2010, held that the National Voter Registration Act superceded Proposition 200's proof of citizenship requirement for registration and was therefore invalid. The Court of Appeals rejected the Plaintiffs' additional arguments that Proposition 2000 violated the Voting Rights Act and the Fourteenth and Twenty-Fourth Amendments. The defendants have filed a petition for en banc review.

Felon Disfranchisement

<u>Coronado v. Napolitano</u>, 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 Afor 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 Acommon 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 Aaffirmative sanction@ for states to disfranchise persons convicted of rebellion Aor 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, and the case was consolidated with Harvey v. Brewer, No. 08-17253, which focused solely on the disfranchisement of people convicted of non-common law felonies.

The Ninth Circuit heard oral argument on October 19, 2009, and issued its opinion affirming the lower court's decision on May 27, 2010. Harvey v. Brewer, 605 F.3d 1067 (9th Cir. 2010). As to Plaintiffs' common law felony claim, the court ruled that a plain reading of the phrase "other crime" in Section 2, as well as the phrase's past and contemporary usage, support the court's conclusion that the term applies to all crimes, not just common law felonies. Id. at 1073-1079. The court also rejected Plaintiffs' challenge to Arizona's LFO requirement, reasoning that "[j]ust as States might reasonably conclude that perpetrators of serious crimes should not take part in electing government officials, so too might it rationally

conclude that only those who have satisfied their debts to society through fulfilling the terms of a criminal sentence are entitled to restoration of their voting rights." Id. at 1079.

The Harvey plaintiffs filed a motion for rehearing en banc which the court denied on July 16, 2010. Plaintiffs decided not to file a petition for certiorari to the Supreme Court.

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 argued that based upon the 2008 house and senate elections it was 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, violated the political and associational rights of the Green Party and its members.

The district court, however dismissed the complaint. It acknowledged that the decertification statute undoubtedly burdens constitutionally protected rights, but held that Arkansas had a vital interest in organizing and regulating elections and the burden imposed upon plaintiffs' rights was not severe. Because of the importance of the constitutional rights at issue, and the burdens placed upon them by state law, plaintiffs appealed and filed their opening brief on December 13, 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 member 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 (ACVRA@). 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 B the so-called Gingles district. Moreover, the Atotality of the circumstances@ or ASenate 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 was 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. The superior court 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.

Following lengthy negotiations, the parties agreed to a settlement providing that a proposal be put on the ballot no later than June 2012 calling for the adoption of district, or "zone," elections for the Board of Directors. If the proposal were approved, the new plan would be implemented at the elections held in November 2012. Because plaintiffs were confident the proposal would be adopted, they agreed that if it were defeated they would not refile their complaint. The state court approved the settlement agreement on February 16, 2010.

Florida

Election Law Reform

Mario Diaz-Balart v. State of Florida, 1:10-cv-23968-UNGARO (S.D. Fla.)

This suit was filed by two members of Congress, Mario Diaz-Balart and Corrine Brown, challenging Article III, Section 20 of the Florida Constitution, which was adopted by more than 60% of the state's voters at the November 2010 election. The challenged provision provides standards for congressional redistricting, including that a plan may not favor or disfavor an incumbent or political party or deny racial or language minorities the equal opportunity to participate in the political process and elect representatives of their choice. The plaintiffs contend that the state law violates Article I, Section 4, Clause 1 of the U.S. Constitution, which gives state legislatures power to prescribe the times, places, and manner of holding elections for members of Congress.

The VRP has joined with the ACLU of Florida in representing defendant-intervenors who seek to defend the constitutionality of the state law. The ACLU of Florida played a major role in promoting the adoption of the challenged redistricting standards. The defendant-intervenors contend that the federal constitution does not prohibit the adoption of redistricting standards by a state's electorate. The motion seeking leave to intervene was filed on December 16, 2010.

Georgia

Restrictive Voter Identification Requirements/Section 5 Enforcement

Morales v. Kemp, 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 27, 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 Athe 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 Aflawed 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 also moved to dismiss the claim as moot and for summary judgment. The three-judge court, in an order issued on June 15, 2010, denied all motions and continued its preliminary injunction in effect. As appears below, the litigation was subsequently rendered moot by DOJ's preclearance of the data base matching system resubmitted by the state.

Challenge to the Constitutionality of Section 5

Georgia v. Holder, No. 1:10-cv-01062 (D. D.C.)

This action was filed by the State of Georgia seeking preclearance under Section 5 of the Voting Rights Act of its data based matching system for first time voter registration applicants. The Department of Justice had earlier objected to the system because it was error prone and had a disparate impact upon racial and language minorities. In the alternative, the state argued that if preclearance were denied Section 5 as reauthorized in 2006 was now unconstitutional. The VRP, along with the GA ACLU, the DC ACLU, and the Lawyers Committee, represent the Georgia Association of Black Elected Officials, the Georgia NAACP, and the Georgia Coalition for the Peoples Agenda, and their respective directors as defendant-intervenors. They sought to defend the constitutionality of Section 5, and were granted leave to intervene on July 7, 2010.

On August 18, 2010, however, DOJ in a surprise move granted preclearance to the state's system, and without giving the intervenors or other citizens an opportunity to comment on whether precelearance was appropriate. While DOJ gave no detailed reasons

for preclearance, the assumption is that it was granted to avoid the possibility that if preclearance were denied the issue of the constitutionality of Section 5 would ultimately be presented to the Supreme Court. The state and DOJ filed a joint motion to dismiss the pending litigation as moot, which was granted on November 2, 2010.

Denial of Access to Absentee Ballots

Swann v. Kemp, 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.

The parties filed cross-motions for summary judgment, and on October 18, 2010, the district court granted summary judgment in favor of the defendants as to both of Plaintiff's claims. Although the district court construed O.C.G.A. § 21-2-381(a)(1)(D)

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, 553 U.S. 181 (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 State Supreme Court subsequently agreed to hear the case on appeal.

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. The Indiana Supreme Court granted leave for the ACLU and the SCSJ to appear as Amici Curiae, and issued an order on June 30, 2010, affirming the trial court's dismissal of the complaint as a facial challenge. It held, however, that the dismissal was without prejudice to future as-applied challenges by any voter unlawfully prevented from exercising the right to vote.

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, 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 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, which the Sixth Circuit denied. The State also appealed the merits of the preliminary injunction.

In order to avoid more and costly litigation, the parties agreed to settle the case. On June 24, 2010, the district court approved a settlement whereby the Defendants agreed: (1) not to reject or cancel a voter's registration solely on the ground that the original disposition notice or voter ID card is returned by the Postal Service as undeliverable; and (2) not to cancel a voter's registration on the ground that the individual surrendered her state driver's license or ID card and obtained a driver's license or state ID card in another state, without specific written confirmation that the individual has changed her residence for voting purposes. The parties also agreed that the district court retained jurisdiction to enforce the terms of the settlement.

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. Instead of ruling on Plaintiffs' motion, the court dismissed the case without prejudice *sua sponte* on January 4, 2010.

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.

On September 25, 2008, the district court held a hearing on Plaintiffs' motion for a preliminary injunction. Ruling from the bench, the court denied Plaintiff's motion and subsequently issued an order to this effect. On October 2, 2008, the defendants filed a motion to dismiss Plaintiffs' complaint pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction or, in the alternative, pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief could be granted. On March 9, 2009, the district court summarily granted the defendants' motion for failure to state a claim, ruling that Plaintiffs' interpretation of Section 241 was neither fair nor reasonable, but did not offer any factual or legal basis for its conclusion. Plaintiffs appealed the court's denial of their motion for a preliminary injunction and the dismissal of their case to the Fifth Circuit Court of Appeals.

In their appellate brief, Plaintiffs argued the district court's failure to set forth the basis for its decision warranted a remand with instructions that the district court provide a supplemental order specifying the exact reasons for its decision so the appellate court could properly evaluate the correctness of the district court's decision. Plaintiffs also asserted that the plain language in Section 241 allows people convicted of one of the ten crimes enumerated in the state constitution to vote in presidential and vice presidential elections. In the alternative, Plaintiffs contended that their federal claims were grounded in an interpretation of an unsettled area of state law and, therefore, the district court should have abstained from hearing the case.

The Fifth Circuit heard oral argument on January 6, 2010, and affirmed the dismissal of Plaintiffs' claims on February 25, 2010. In the opinion, the court interpreted the presidential exception clause as allowing "individuals who meet the qualifications of § 241 but for the bar on felon voting (i.e. sanity, age, citizenship, residency, and registration) . . . to vote in presidential elections if they also satisfy any requirements established by Congress."

Young v. Hosemann, 598 F.3d 184, 191 (5th Cir. 2010). Plaintiffs decided not to file a petition for certiorari to the Supreme Court.

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. On February 3, 2010 the district dismissed the complaint on the grounds that neither of the plaintiffs had standing. The plaintiffs appealed.

The Ninth Circuit heard oral argument on November 5, 2010, and on December 10, 2010 reversed and remanded concluding that both plaintiffs had standing as a matter of law as registered voters. Plaintiffs have filed a motion to reassign the case to a different district court judge upon remand, which is pending.

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 plaintiffs are represented by lawyers of the VRP, the ACLU national office, and the ACLU of Nebraska.

The complaint was filed on December 16, 2009, and following extensive discovery the district court issued an order that the case would by submitted on April 7, 2011 for final determination based upon the stipulations, affidavits, discovery responses, and depositions filed by the parties.

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 United States filed a response on April 7, 2010, arguing that the petition should be dismissed for failure to exhaust domestic remedies. The ACLU filed responses on May 20, 2010 and November 15, 2010, arguing that the petitioners had exhausted all available remedies and that further pursuit of such remedies would be futile. A decision is expected in February 2011.

North Carolina

Challenge to the Constitutionality of Section 5

Laroque v. Holder, No. 1:10-cv-0561 (D. D.C.)

This is an action filed by residents of Kinston, North Carolina, seeking a declaration that Section 5 is now unconstitutional. The ACLU, with the Southern Coalition for Social Justice and Gerry Hebert, filed a motion to intervene on behalf of the N.C. state conference NAACP and residents of Kinston on July 7, 2010. They seek to defend the constitutionality of Section 5, and also argue that the plaintiffs, who seek review of a Section 5 objection by DOJ involving non-partisan elections, lack standing and that the district court is without jurisdiction over the plaintiffs' claim. Notably, the city of Kinston did not join the lawsuit, nor did it seek judicial preclearance of the Section 5 objection.

The outcome of the cases now pending in the District of Columbia challenging the constitutionality of Section 5 could have enormous impact on racial and language minorities. If Section 5 is upheld progress in minority political participation will continue to be made; if not,

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

there is little doubt there would be significant retrogression.

On December 20, 2010, the district court issued an opinion granting motions to dismiss filed by DOJ and the defendant-intervenors. The court concluded there was no cause of action for private persons to challenge the constitutionality of Section 5 as applied to DOJ's objection to a proposed electoral change. The plaintiffs promptly filed a notice of appeal.

North Dakota

American Indian Vote Dilution

Spirit Lake Tribe v. Benson County, North Dakota , No. 2:10-CV-095 (D. S.D.)

Shortly before the November 2010 election, Benson County, North Dakota, announced that it was closing all but one of the county polling places, including the two that were located on the Spirit Lake Indian Reservation. The Spirit Lake Tribe filed suit in federal district court that closing the precincts on the Reservation would make it difficult or impossible for many Indians to vote in violation of the federal and state constitutions and Section 2 of the Voting Rights Act. The VRP filed an amicus brief in support of the Tribe's Section 2 claim and its motion for a preliminary injunction.

Following an expedited hearing, the district issued a preliminary injunction on October 21, 2010, requiring the county to maintain the two polling places on the Reservation. It concluded that closing the precincts would have a disparate impact on Indian voters who lacked access to transportation or to voting by mail. The case has not been resolved on the merits, but in light of the preliminary injunction it is anticipated that the county will continue to maintain the two precincts on the Reservation, especially since the Tribe has offered to provide polling places at no cost to the county and to staff them on a volunteer basis.

Pennsylvania

African American Vote Dilution

English v. Chester County, No. 2:10-cv-244 (E.D. Pa.)

Residents of the Lower Oxford East precinct in Chester County, Pennsylvania, most of whom are African Americans, traditionally voted at a polling place located on the campus of Lincoln University, a predominantly black institution. In 1992, however, the polling place was moved to a building several miles away which was significantly smaller and had fewer voting machines. Prior to the 2008 general election precinct residents, anticipating a large turn out of black voters, asked the board of elections to return the polling place to the Lincoln University campus, but it refused to do so. As a consequence, hundreds of voters in the Lower Oxford

precinct either had to wait several hours to vote or left without voting in the 2008 election.

Following the 2008 election, five residents of Chester County, represented by the Public Interest Law Center of Philadelphia, local counsel, the VRP, and the ACLU of Pennsylvania, filed suit alleging that use of the existing polling place was in violation of Section 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments. On August 10, 2010, the parties settled the case based upon an agreement with the board of elections that it would return the polling place to the Lincoln University campus.

South Carolina

African American Vote Dilution

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 Avoluminous@ 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.

On remand, the district court conducted more hearings and heard testimony from the parties expert witnesses concerning the 2006 and 2008 elections. The last hearing was held on November 8, 2010, at which the court indicated it would seek to retain an independent expert to help resolve some of the statistical issues raised by the parties. Despite the fact that another cycle of elections has now taken place, no decision has yet been entered by the district court.

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 Afusion@ 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 plaintiffs appealed. The Fourth Circuit issued its opinion on July 20, 2010, affirming the decision of the district court. It concluded that the burden imposed on associational rights by the sore loser statute was not severe and advanced the state's interests in minimizing excessive factionalism and party splintering.

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 affirmed the decision of the trial court on January 19, 2010. The Supreme Court concluded that the burdens placed upon Platt's associational rights were not severe and served the state's interest in promoting ballot integrity.

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 VRP 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 claimed that the new rule violated their associational rights under the First and Fourteenth Amendments.

Following a hearing and the submission of supplemental briefs, the three-judge court issued an order on March 1, 2010, concluding that the requirement of filing multiple notices of candidacy was a change in voting that could not be implemented absent preclearance under Section 5. The parties subsequently submitted a joint stipulation of dismissal of plaintiffs' remaining constitutional claims on April 21, 2010, based upon the Election Commission's representations that it would abide by the ruling of the three-judge court and did not intend to seek preclearance of the enjoined voting change.

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 VRP 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 established the third Gingles factor, i.e., 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 Atotality 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.

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.

In a divided 7-4 opinion, the en banc court ruled on May 5, 2010, that the original decision of the district court dismissing the complaint for failure to satisfy the third Gingles

factor was proper. The plaintiffs filed a petition for a writ of certiorari, but it was denied by the Supreme Court on November 15, 2010. The City of Martin may have to redraw its wards following the 2010 census, and if so every effort will be made to insure that they are drawn in such a way as to provide Indian voters an equal opportunity to elect candidates of their choice.

Malapportionment/American Indian Vote Dilution/Section 5 Monitoring

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 Voting Rights Act, 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 - 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 Atake[] 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 and the county's compliance with Section 5 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 and the county's compliance with Section 5 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.2

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: ACongress 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: ASouth 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

[2]The VRP was prepared to file a lawsuit challenging the cancellation of early voting on the Pine Ridge Indian Reservation in Shannon County approximately 30 days prior to the 2010 general election. That would mean tribal members would have to vote absentee, which would itself present significant problems, or travel to Hot Springs in adjacent Fall River County, a distance of up to 150 miles round trip. Fortunately, a solution was worked out between Fall River County officials and a tribal organization which made a grant to underwrite the cost of early voting on the reservation.

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.

An importance settlement was reached in this case on May 25, 2010, pursuant to which the Plaintiffs got most of the relief they sought, i.e., putting people improperly purged back on the voter rolls, compliance with Section 5 of the Voting Rights Act, establishing procedures to insure that unlawful removals won't happen in the future, public education, damages for the plaintiffs, and attorney fees.[3]

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. In a 2-1 decision, a panel of this Court affirmed the dismissal of the plaintiffs' claims. Johnson v. Bredesen, 624 F.3d 742 (6th Cir. 2010). The majority ruled

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that: (1) Tennessee's re-enfranchisement scheme does not violate the Equal Protection Clause because the State has a rational basis for requiring payment of restitution and child support, even if the child support payment has nothing to do with the underlying crime of conviction; (2) conditioning the right to vote on payment of restitution and child support is not equivalent to imposing a poll tax and, therefore, the Twenty-Fourth Amendment is not implicated; and (3) Tennessee's retroactive application of Tenn. Code Ann. §§ 40-29-202(b)§§ and (c) does not contravene the Ex Post Facto Clause in the Tennessee Constitution because the Tennessee Supreme Court's ruling that the state's disfranchisement law is penal in nature was "pure dicta" and, therefore, not binding on this Court. Id. at 750-754. The majority also rejected the plaintiffs' claim under the Privileges and Immunities Clauses of the U.S. Constitution and Tennessee Constitution, reasoning that provisions do apply to voting rights. Id. at 751-752.

In her dissent, Judge Moore concluded that the Supreme Court's decisions in Harman v. Forssenius, 380 U.S. 528 (1965), as well as Griffin v. Illinois, 351 U.S. 12 (1956) and its progeny, required this Court to conclude that Tenn. Code Ann. §§ 40-29-202(b)§§ and (c) violate both the Equal Protection Clause and the Twenty-Fourth Amendment. Id. at 754-780. Judge Moore further concluded that the Court was obligated to accept the Tennessee Supreme Court's interpretation of the state's disfranchisement law as penal in nature and, based on the retroactive application to the plaintiffs, Tennessee's imposition of a monetary fee as a prerequisite to vote violated the state's Ex Post Facto Clause. Id. at 778-780.

Plaintiffs filed a petition for rehearing en banc which the Sixth Circuit denied on December 17, 2010. Plaintiffs are deciding whether or not to file a petition for certiorari to the Supreme Court.

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 Ainfamous 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.

However, on October 7, 2010, in an en banc decision, the Ninth Circuit reversed the panel's ruling and concluded that the plaintiffs had failed to present any evidence of intentional racial discrimination in the operation of Washington state's criminal justice system and, therefore, did not meet their burden of establishing a violation of Section 2 of the Voting Rights Act. Farrakhan v. Gregoire, 623 F.3d 990, 994 (2010). The plaintiffs do not plan to file a petition for certiorari to the Supreme Court.

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. The plaintiffs alleged that at-large elections for the county Board of Commissioners diluted 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. On April 29, 2010, the district court issued an opinion finding that at-large elections for the Fremont County Commission diluted the voting strength of American Indians in violation of Section 2. The decision was an important victory for tribal members. Although Indians had repeatedly run for the County Commission, none had been elected prior to the filing of the lawsuit, despite the fact that they received substantial support from Indian voters. In a 102 page opinion, the court made extensive findings, including past and continuing discrimination against Indians, racially polarized voting, the isolation of the Indian community, and the lack of responsiveness by the County Commission to the special needs of Indians. The parties were directed to proposed districting plans to replace the at-large system.

Following a hearing, on August 10, 2010 the district court adopted a plan proposed by the plaintiffs consisting of five single member districts. The county proposed plans which created a majority Indian single member district with the other four members of the commission elected from the remainder of the county at-large. In adopting the plaintiffs' plan, the court held the county's proposal was not an adequate remedy for the Section 2 violation, it treated Indian and white voters differently, and "hybrid" plans were not authorized by state law. A general election under the court ordered plan is set for January 18, 2011.

While it did not appeal the finding of a Section 2 violation, the county appealed the remedy adopted by the district court. The filing of briefs in the Tenth Circuit was completed on December 20, 2010.

II. Summary Table of Litigation

In 2010, the VRP was involved in 34 lawsuits in 21 states. These cases addressed a variety of issues which can be summarized as follows:

Issue	Number of Cases[1]
African American Voting Rights	4
Alaskan Native Minority Language Assistance	1
American Indian Voting Rights	6
Amicus Briefs	3
Ballot Access	5
Constitutionality of the Voting Rights Act	3
Denying Requests for Absentee Ballots	1
Felon Disfranchisement	7
Hispanic/Latino Voting Rights	2
Malapportionment	1
NVRA Enforcement	1
Proof of Citizenship Requirements	1
Public Education	1
Restrictive Voter Identification Requirements	3
Section 5 Enforcement	4
Voter Challenges	1
Whistle Blower Enforcement	1
Total:	45

III. Section 5 Comment Letters

Telfair County, Georgia

On October 13, 2009, the VRP submitted a comment letter to the Department of Justice requesting 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

[1] The total number of cases in this column (45) is greater than the number of lawsuits (32) because some cases encompass more than one issue.

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 Athe 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. Telfair County has yet to submit the additional information, and until it does so the voting change is unenforceable. The VRP continues to monitor the submission process.

State of Georgia

Following the decision of the three-judge court in Morales v. Kemp 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 Athe 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 Aflawed 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.@

The state subsequently asked DOJ for reconsideration of the objection, but in a February 22, 2010, letter DOJ declined to do so. However, as noted in the above

discussion of Georgia v. Holder, the state made a resubmission and the change was precleared on August 18, 2010.

Fairfield County, South Carolina

The South Carolina legislature enacted a law in 2010 authorizing the Fairfield County Legislative Delegation, composed of two white males, to appoint two additional members to the Board of Trustees of the Fairfield County School District. The Board of Trustees is composed of seven members elected from single member districts, which were established as the result of Section 2 litigation. Fairfield County is 59% African American, and six of the seven members of the Board of Trustees are African American.

The bill passed by the legislature would dilute the power of existing members of the Board of Trustees, but more important it would dilute the power of county voters by taking from them the power to select all members of the Board of Trustees and placing some of that power in the hands of the Legislative Delegation. And given the demographics of the county and the Board of Trustees, that transfer of power would have an adverse impact and would be retrogressive within the meaning of Section 5.

The state submitted the voting change to the Department of Justice for preclearance under Section 5. The VRP submitted a comment letter to DOJ on April 1, 2010, discussing the history of racial discrimination in South Carlina and Fairfield County and the racially charged circumstances surrounding the adoption of the 2010 voting change. The VRP urged an objection to the change on the grounds that it would have an adverse effect upon minority voters and had been enacted with a discriminatory purpose. On August 16, 2010, DOJ objected to the proposed change because the state had failed to carry its burden of proof that the change would not have a discriminatory effect.

Todd and Shannon Counties, South Dakota

On August 25, 2010, pursuant to the settlement agreement in Janis v. Nelson, the VRP submitted a comment letter in support of the request for preclearance the Secretary of State for South Dakota filed on behalf of Todd and Shannon Counties related to changes made to the state's software code. The changes ensure the proper application of the state's felon disfranchisement law which allows people convicted of felonies serving a sentence of probation to vote. The Department of Justice precleared the changes in August 2010.

IV. NVRA Enforcement

The VRP is working with Demos and the Legal Defense Fund to enforce the provisions of the National Voter Registration Act (NVRA) in Mississippi. NVRA requires states to provide the opportunity to register to vote when a person applies for or seeks renewal of a driver's license or applies for social services. We exchanged correspondence and met with officials from the Secretary of State's office and various social service agencies in Jackson, Mississippi in August 2010, and have had calls with them in early December. In an effort to avoid litigation, the state officials have agreed to make virtually all the changes we requested in their NVRA procedures – including instituting monthly reporting of data showing the number of persons registered at the various state agencies. We drafted a new implementation manual for the public assistance agencies, and they are going to submit that for preclearance under Section 5 of the Voting Rights Act. We also worked up a PowerPoint for them to use in re-training people. We will continue to monitor the state's implementation of the NVRA requirements.

V. 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 Afaithless 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 Athat 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 December 2010, six states have enacted the National Popular Vote compact: Hawaii, Illinois, Massachusetts, Maryland, New Jersey, and Washington. That amounts to 27% of the 270 electoral votes needed to activate the compact. The compact has also passed 30 legislative chambers in 20 states.

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. 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.

VI. Publications and Websites

ACLU

The VRP published a revised 2010 version of Everything You Always Wanted To Know About Redistricting But Were Afraid To Ask. The manual, which is in a Q&A format, is designed to assist ACLU affiliates, other groups and organizations, and citizens in understanding the redistricting process and the vital and important roles they can play in the drawing of election districts. The manual is available in print and can be downloaded from our website http://www.aclu.org/voting-rights/redistricting. In addition to the manual other redistricting resources are available on our website: a "Redistricting Q&A," and a video on vote dilution techniques - "Stacking, Cracking, and Packing."

Other resources available on our website - www.aclu.org/voter - include:

* State-specific voter empowerment cards and other voter education materials;
* State-specific resources on voting with a criminal conviction;
* Ten "Quick Tips for Voters," applicable to voters everywhere;
* Our "Always Practice Safe Voting" video, designed to help voters exercise their rights;
* Information about the ACLU's voter protection hotline, 877-523-2792 (staffers available to answer calls from 6 am to midnight on Election Day, and from 9 am to 6 pm EST weekdays).

A mobile version of the website, optimized for viewing on iphones, Blackberries, and other mobile devices with web browsers, is available at mobile.aclu.org/voter. The ACLU Communications Department promoted the websites by providing press releases detailing the websites and their contents. The websites are informative, interactive, and always available.

Laughlin McDonald

American Indians and the Fight for Equal Voting Rights (Oklahoma U. Press; Norman, 2010).

"Accurate census count matters for states - and our democracy," Atlanta Journal Constitution, Op-Ed, March 8, 2010.

Meredith Bell-Platts
Jointly published a white paper with the ACLU of Arizona on provisional ballots, 2010

Published a piece in the ACLU of S.C. newsletter on voter ID laws, April 2010

VII. Public Speaking

Laughlin McDonald

Panelist, Federalist Society, Atlanta, Georgia, March 23, 2010

Speaker, Georgia Association of Black Elected Officials, Savannah, Georgia, June 26, 2010

Interviewed, WRFG, Atlanta, Georgia, June 28, 2010

Speaker, Alabama NAACP, Birmingham, Alabama, October 22, 2010

Speaker, American Constitution Society, U. of Miami Law School, Florida, October 27, 2010

Panelist, U. of Seattle Law School, Washington, November 18, 2010

Speaker, Concerned Black Clergy, Atlanta, Georgia, December 6, 2010

Meredith Bell-Platts

Speaker, S.C. Legislative Black Caucus, 2010

Speaker, University of S.C. chapter of ACS, 2010

Speaker, Bloody Sunday Commemorative Legal Panel, Selma, Alabama, 2010

Speaker, LDF Conference, Airlie, Virginia, October 2010

Nancy G. Abudu

Panelist, National Lawyers Guild Regional Conference, CLE, Georgia State School of Law, March 19, 2010

Speaker, ACLU of Georgia "By the People Day" at the Georgia State Capital, March 31, 2010

Speaker, WAOK radio show "Sisters in Law," May 3, 2010
Speaker, Public Interest Law Brown Bag Lunch Series, June 16, 2010

Speaker, Felons Adjusting to Life Again (FALA) Conference, Decatur, Georgia, September 1, 2010

Speaker, Coffee Party of Atlanta, October 17, 2010

Panelist, Center for a Better South Annual Conference, Little Rock, Arkansas, November 13, 2010

Participant in several civil rights conferences

Fred McBride

Speaker, Northeast Georgia Black Leadership Council, November 18, 2010 (redistricting)

Speaker, Barrow County, Georgia Democratic Party meeting, December 13, 2010 (redistricting)

Bryan Sells

Panelist, Community Census and Redistricting Institute, Southern Coalition for Social Justice, July 26-31, 2010

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 has provided information, analysis, opinions, and advice to affiliates on a variety of issues, including: (1) redistricting plans for Shelby, North Carolina, Mahnomen County, Minnesota, Chester County, Pennsylvania, Telfair County, Georgia, Cordele, Georgia, and the states of Maryland, Georgia, and South Carolina; (2) how to count prisoners in redistricting, whether in the places where they reside or their previous residences; (3) whether a proposed bill giving local officials the power to appoint additional members to an elected school board would dilute the voting strength of voters; (4) whether a

local affiliate should support proposed legislation incorporating provisions similar to Sections 2 and 5 of the Voting Rights Act into state law; (5) whether the refusal of a county election board to register as voters persons who do not reside in the county should be challenged; (6) whether the decision of a county election board to close all but one of its polling places should be challenged; (7) whether an affiliate should oppose legislation that would allow counties to adopt "hybrid" redistricting plan allowing for the use of both single member and multi-member districts. This list is illustrative, and far from exhaustive.