No. 12-96

In The
Supreme Court of the United States

SHELBY COUNTY, ALABAMA,

Petitioner,

v.

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

Respondents.

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

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

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February 1, 2013

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QUESTION PRESENTED

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

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

CONSTITUTIONAL PROVISIONS AND STATUTES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

STATEMENT OF INTEREST[1]

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

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

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

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

SUMMARY OF ARGUMENT

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

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

covered jurisdiction's own unique record of discrimination.

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

[2] "Language minorities" include "persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage." 42 U.S.C. § 1973l(c)(3).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[6] Alaska has a single congressional representative elected at-large and no congressional redistricting plan.

[7] The unconstitutional interim plan currently in place further degraded Native representation, so that Alaska's legislature is now 90 percent white, even though Alaska is only

(Continued on following page)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> The State has failed to: provide print and broadcast public service announcements (PSA's) in Yup'ik, or to track whether PSA's originally provided to a Bethel radio station in English were translated and broadcast in Yup'ik; ensure that at least one poll worker at each precinct is fluent in Yup'ik and capable of translating ballot questions from English into Yup'ik; ensure that "on the spot" oral translations of ballot questions are comprehensive and accurate; or require mandatory training of poll workers in the Bethel census area, with specific instructions on translating ballot materials for Yup'ik-speaking voters with limited English proficiency.

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

begin in earnest until after this litigation." Appendix 23. The court cited three reasons for its injunction: (1) Alaska had been covered by Section (4)(f)(4) "for many years"; (2) "the State lacks adequate records to document past efforts to provide language assistance to Alaska Native voters"; and (3) Alaska's post-litigation efforts to come into compliance were "relatively new and untested." Appendix 23-24. The court concluded "the evidence of past shortcomings justifies the issuance of injunctive relief to ensure that Yup'ik-speaking voters have the means to fully participate in the upcoming State-run elections." Appendix 24. The *Nick* injunction remained in place until December 31, 2012.[8]

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

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

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

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

A. Alaska often fails to comply with Section 5.

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

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

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

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

B. Alaska's one objection was very significant.

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

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

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

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

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

C. More Information Requests prevent voting discrimination by Alaska.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

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

Respectfully submitted,

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February 1, 2013

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

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

Legend:

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

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

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

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

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

Legend:

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

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

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

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

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

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

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

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

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

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

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

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

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

Nick, et al. Plaintiffs, vs. Bethel, et al. Defendants.	Case No. 3:07-cv-0098 TMB **ORDER** **Re: Plaintiffs' Motion for a Preliminary Injunction Against the State Defendants** (Filed Jul. 30, 2008)

I. MOTION PRESENTED

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

[1] 42 U.S.C. § 1973aa-1a.

[2] 42 U.S.C. § 1973b(f)(4).

[3] 42 U.S.C. § 1973aa-6.

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

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

II. LEGAL STANDARD

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

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

[5] The "Bethel Defendants" include Bethel, Alaska and Lori Strickler, in her official capacity as municipal clerk of Bethel.

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

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

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[6] *See Dymo Industries, Inc. v. Tapeprinter, Inc.*, 326 F.2d 141, 143 (9th Cir. 1964).

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

[8] *Martin v. Int'l. Olympic Comm.*, 740 F.2d 670, 675 (9th Cir. 1984).

[9] *See Sun Microsystems, Inc. v. Microsoft Corp.*, 188 F.3d 1115, 1118 (9th Cir. 1999)

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

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

III. BACKGROUND

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

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[11] *Id.*

[12] *Stanley v. University of Southern Calif.*, 13 F.3d 1313, 1320 (9th Cir. 1994).

[13] 42 U.S.C. § 1973c.

[14] 42 U.S.C. § 1973c; 28 U.S.C. § 2284.

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

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

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

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

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

[15] 28 C.F.R. § 55.2.

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

IV. DISCUSSION

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

[16] *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

of the right to participate in an election is by its nature an irreparable injury.[17]

A. Probable Success on the Merits

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

The requirements of sections 4(f)(4) and 203 of the VRA are essentially identical. They bar covered jurisdictions from providing English-only voting instructions and materials in any public election; all "voting materials" provided in English must also be provided in each language triggering coverage under the VRA. Specifically, the VRA's provisions direct that whenever a State or political subdivision "provides any voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, it shall provide them in the language of the applicable minority group as well as in the English language . . . " Both sections also include the following exemption:

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[17] *Id.* at 585.

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

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

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

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

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[18] 42 U.S.C. §§ 1973b(f)(4) and 1973aa-1a(c) (emphasis added).

[19] 28 C.F.R. § 55.2.

> (b) Assistance. The Attorney General will consider whether a jurisdiction has given sufficient attention to the needs of language minority group members who cannot effectively read either English or the applicable minority language and to the needs of members of language minority groups whose languages are unwritten.
>
> (c) Helpers. With respect to the conduct of elections, the jurisdiction will need to determine the number of helpers (i.e., persons to provide oral assistance in the minority language) that must be provided. In evaluating the provision of assistance, the Attorney General will consider such facts as the number of a precinct's registered voters who are members of the applicable language minority group, the number of such persons who are not proficient in English, and the ability of a voter to be assisted by a person of his or her own choice. The basic standard is one of effectiveness.[20]

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

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[20] 28 CFR § 55.20.

[21] *See* 28 C.F.R. Pt. 55, App.

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

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

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[22] 42 U.S.C. § 1973aa-6.

[23] Dkt. 202, Ex. 191 at 127-28, 148.

[24] Dkt. 202, Ex. 191 at 166; Ex. 159 at 73; Ex. 183 at ¶¶ 198-99. *See also* Dkt. 90 at ¶ 17.

[25] Dkt. 202, Ex. 159 at 76-77.

translating ballot materials for Yup'ik-speaking voters with limited English proficiency.[26]

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

[26] Dkt. 202, Ex. 191 at 169-71; Ex. 159 at 60, 63.

[27] Dkt. 202, Ex. 191 at 70-71.

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

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

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

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

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[29] Dkt. 90 at ¶¶ 19-20.

[30] Dkt. 164 at ¶ 8.

[31] *Id.*

[32] Dkt. 89 at ¶ 24. *See also* Dkt. 161 at ¶¶ 22, 23.

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

B. Injunctive Relief

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[33] 42 U.S.C. § 1973a(a).

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

V. CONCLUSION

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

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

(Continued on following page)

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

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

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

[SEAL] **U.S. Department of Justice**
Civil Rights Division

CC:MSR:SMC:jdh
DJ 166-012-3
2008-2739
2008-3714

Voting Section – NWB
950 Pennsylvania Avenue, NW
Washington, DC 20530

July 14, 2008

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

Dear Ms. Fenumiai:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Sincerely,

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

[SEAL] **U.S. Department of Justice**
Civil Rights Division

CC:TFM:SBD:LB:jdh
DJ 166-012-3
2008-1726

Voting Section – NWB
950 Pennsylvania Avenue, NW
Washington, DC 20530

August 1, 2008

VIA FACSIMILE & FIRST CLASS MAIL

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

Dear Ms. Fenumiai:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Sincerely,

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

cc: Court and Counsel of Record

[SEAL] **U.S. Department of Justice**
Civil Rights Division

CC:MSR:SMC:par
DJ 166-012-3
2008-2739
2008-3714

Voting Section – NWB
950 Pennsylvania Avenue, NW
Washington, DC 20530

September 10, 2008

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

Dear Ms. Fenumiai:

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

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

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

Sincerely,

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