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

O R D E R
Re: Plaintiffs' Motion for a Preliminary Injunction Against the State Defendants

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 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]

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[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.

[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).

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]

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]

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

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[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).

[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.

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 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 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

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[15] 28 C.F.R. § 55.2.

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

[17] *Id*. at 585.

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:

> *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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> (b) Assistance. The Attorney General will consider whether a jurisdiction has given sufficient attention to the needs of language minority group members who cannot

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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.

> effectively read either English or the applicable minority language and to the needs of members of language minority groups whose languages are unwritten.
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> (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 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

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[20] 28 CFR § 55.20.

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

[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.

accurate;[25] 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.[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 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

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

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

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

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 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] Although courts have denied injunctions based on isolated instances of election-related misconduct, the evidence here appears to go well beyond that. Multiple

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[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.

[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.

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.
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> **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.
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> **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.
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> **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.
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> **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.
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> **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 is satisfied that the State is pursuing adequate alternative means to inform

[33] 42 U.S.C. § 1973a(a).

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]

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

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

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