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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

H. ROBIN SAMUELSEN, JR., RUSSELL S. NELSON, VICKI OTTE, MARTIN B. MOORE, SR. Plaintiffs, v. MEAD TREADWELL, in his official capacity as Lieutenant Governor for the State of Alaska; and GAIL FENUMIAI, in her official capacity as Director of the Division of Elections for the State of Alaska, Defendants.	)	Case No. 3:12-cv-00118-SLG

OPPOSITION TO MOTION FOR TEMPORARY RESTRAINING ORDER

Lieutenant Governor Mead Treadwell and Gail Fenumiai, Director of the Division of Elections (collectively, "the division") oppose the plaintiffs' motion for a temporary restraining order barring the division from preparing for the 2012 elections. Because the plaintiffs have failed to show how the division's upcoming administrative preparations will harm them before their Voting Rights Act claim reaches a three-judge panel, and because the potential harm to the citizens of Alaska from unnecessarily

disrupting the 2012 election cycle is significant, this Court should deny the plaintiffs' motion.

The Alaska Supreme Court has ordered the use of an interim redistricting plan for the 2012 elections, and that plan has been submitted to the Department of Justice for preclearance. While preclearance is pending, the division has begun election preparations using that plan because, given the late date, it is the only way to preserve Alaska's chance for a normal election cycle. If the division continues its preparations and the plan is ultimately precleared, Alaska will have a normal election cycle. If the division is not permitted to continue its preparations, the elections may be seriously disrupted—and *unnecessarily* disrupted—even if the plan is ultimately precleared.

The plaintiffs have not justified their request for such a disruption. The plaintiffs misstate—and fail to meet—the standard that is applicable where, as here, a single-judge Court is asked to impose a TRO pending further proceedings before a three-judge panel. To obtain such a TRO, the plaintiffs must demonstrate that they will suffer irreparable harm if the division continues its preparations for the week or two before their claim reaches a three-judge panel. They have not done so. The administrative tasks that the division will perform in the immediate future are important for the elections but will not affect the plaintiffs at all, much less irreparably harm them.

The division seeks only to maximize the chance that it will be able to hold a normal, timely 2012 election cycle in which all Alaskans can exercise their fundamental right to vote with minimal confusion and disruption. This Court should not jeopardize that chance at this early stage where no showing of harm justifies such an intrusion.

I. BACKGROUND

The State of Alaska must engage in legislative redistricting following each decennial census.[1] Redistricting is a notoriously difficult and contentious process that frequently results in litigation in jurisdictions across the country. In Alaska, the difficulty is compounded by the fact that the state is subject to Section 5 of the Voting Rights Act, which requires that all changes to voting practices and procedures, including redistricting, be submitted to the Department of Justice (DOJ) for approval, a process known as "preclearance."[2]

In Alaska, the state constitution assigns the task of redistricting to an independent redistricting board.[3] That board has its own legal counsel and has exclusive authority to obtain DOJ preclearance of any plan that it draws.[4] The Division of Elections has no authority to create redistricting plans or seek preclearance of any plan; its responsibility is simply to hold elections, using whatever plan is adopted by the board and approved by the courts and the DOJ.

In this redistricting cycle, the state courts rejected as inconsistent with state constitutional requirements the board's original Proclamation Plan, which had earlier been precleared by the DOJ, and its Amended Proclamation Plan. Exhibit A. Nevertheless, because the board did not have sufficient time before the 2012 elections to try again, the Alaska Supreme Court ordered that the 2012 elections be held using the

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1 Alaska Const. art. VI, § 3.
2 42 U.S.C. § 1973c.
3 Alaska Const. art. VI, § 8.
4 Alaska Const. art. VI, § 9; AS 15.10.220.

Amended Proclamation Plan as an interim plan. Exhibit B. Accordingly, the board submitted that plan to the DOJ for preclearance on May 25, 2012. Preclearance has not yet been obtained, but unless the DOJ requests additional information, a decision is due by July 24, 2012, more than a month before the primary election.[5]

Contrary to the plaintiffs' suggestion, the division has not been dilatory in seeking preclearance of the interim plan that was ordered by the Alaska Supreme Court. Quite simply, the division has no authority to submit redistricting plans for preclearance. The division has diligently followed the redistricting process, and has consistently informed the board, the courts and the DOJ about its deadlines, both statutory and administrative. Exhibits C–E. But while the board, the courts, and the DOJ have roles that influence the choice and timing of a redistricting plan for the 2012 elections; the division does not, and therefore is not responsible for the difficult situation in which the State of Alaska finds itself.[6]

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[5] 28 C.F.R. 51.1(a)(2); 28 C.F.R. 51.9(a).

[6] Nor is the plaintiffs' criticism of the board fair. It is easy—with hindsight—to argue as the plaintiffs do that if the board had submitted the Amended Proclamation Plan for preclearance immediately after it was adopted in early April, the DOJ would likely have made a decision by now and we would not be in this position. TRO Motion at 10. But it was far from clear in early April that the Alaska courts would approve the Amended Proclamation Plan for use in the 2012 elections. Indeed, both the state superior court and the Alaska Supreme Court quickly rejected the plan. Exhibits F, B. And even when the Alaska Supreme Court decided, due to time constraints, to select an interim plan for use only in the 2012 elections, it was far from clear that it would choose the Amended Proclamation Plan for that purpose. Given all of this uncertainty, the board acted reasonably in not submitting Amended Proclamation Plan for preclearance until after its use was ordered by the Alaska Supreme Court.

II. STANDARD FOR TEMPORARY RESTRAINING ORDER

The plaintiffs argue that this single-judge Court, in deciding whether to issue a TRO pending the decision of a three-judge panel, should apply the three-part test for determining whether to enjoin a government from implementing a voting change under Section 5 of the Voting Rights Act.[7] TRO Motion at 5. But although that three-part test may be appropriate for the three-judge panel's consideration of whether to issue an injunction, the more limited inquiry of the single-judge Court at this stage is simply whether a TRO is necessary to prevent irreparable harm in the meantime.[8]

The purpose of a TRO is to prevent irreparable injury before a three-judge panel convenes and holds a hearing on the preliminary injunction.[9] A specific demonstration of irreparable injury by the party seeking relief is thus an essential prerequisite to such a TRO.[10] This requirement is explicit in 28 U.S.C. § 2284(b)(3), which states in part that a single judge

> may grant a temporary restraining order *on a specific finding, based on evidence submitted, that specified irreparable damage will result if the order is not granted*, which order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the

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[7] *See Lopez v. Monterey County, Cal.*, 519 U.S. 9, 23-24 (1996).

[8] *Cf. Backus v. Spears*, 677 F.2d 397, 400 (4th Cir. 1982) ("The district court properly recognized that, sitting as a single judge, it had no power to rule on the merits of a claim alleging the failure to preclear Ordinance 81-3 in accordance with § 5 of the Voting Rights Act, 42 U.S.C. § 1973c. The only power of a single judge in respect of such a claim is to enter a temporary restraining order to preserve the status quo until a three-judge district court can be convened.")

[9] 11A Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, & Richard L. Marcus, Federal Practice and Procedure § 2951 (2d ed.).

[10] *Id*.

> district court of three judges of an application for a preliminary injunction. (emphasis added)

The court in the *Puerto Rican Legal Defense* case, which the plaintiffs repeatedly cite, explicitly recognizes that a single-judge court considering whether to grant a TRO must employ this irreparable harm standard—a standard different from the standard employed by a three-judge panel considering whether to grant a preliminary injunction.[11] Thus, for example, in *Barron v. New York City Bd. of Elections*, a single-judge court denied the plaintiffs' motion for a TRO to enjoin an alleged Section 5 violation, holding that they had failed to demonstrate irreparable harm.[12] A three-judge panel convened a week later and held a hearing on the preliminary injunction motion, applying the three-part test for Section 5 injunctive relief.[13]

Accordingly, this single-judge Court need consider only whether the plaintiffs will suffer irreparable injury in the meantime if it does not grant a TRO; it must leave to the three-judge panel the application of the three-part Section 5 test laid out by the plaintiffs. As discussed below, the plaintiffs have not demonstrated that they will suffer irreparable injury in the week or two that will pass before a panel convenes and considers their motion for a preliminary injunction.

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[11] *Puerto Rican Legal Def. & Educ. Fund, Inc. v. City of New York*, 769 F. Supp. 74, 79 (E.D.N.Y. 1991) ("Although that conclusion may be correct as it pertains to injunctions, 28 U.S.C. § 2284(b)(3) provides that a temporary restraining order may be granted on a specific finding that specified irreparable damage will result if the order is not granted.").

[12] No. 08 CV 3839, 2008 WL 4449650 (Oct. 1, 2008).

[13] No. 08 CV 3839, 2008 WL 4809450 at *2 (Nov. 4, 2008).

In addition, TROs are granted to prevent irreparable injury by preserving the status quo, not by undoing past events.[14] The plaintiffs have not limited the relief they request to preserving the status quo, but rather ask the Court to affirmatively disrupt the candidate filings and certification process that have already occurred. They request a TRO "declar[ing] the candidate qualification filings under the unprecleared Amended Proclamation Plan null, void and of no effect" and ask the Court to order "the Defendants …to accord the candidate qualifying filings and certifications of no legal force and effect." TRO Motion at 11. Even if the plaintiffs had shown that irreparable injury will occur between now and when the three-judge panel considers the preliminary injunction motion, their request to declare filed and certified candidates unfiled and uncertified is not appropriate for a TRO.[15]

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[14] *Pan Am. World Airways, Inc. v. Flight Engineers' Int'l Ass'n, PAA Chapter, AFL-CIO*, 306 F.2d 840, 842 (2d Cir. 1962) ("The purpose of a temporary restraining order is to preserve an existing situation in status quo until the court has an opportunity to pass upon the merits of the demand for a preliminary injunction."); *Sosa v. Lantz*, 660 F. Supp. 2d 283, 290 (D. Conn. 2009) ("[B]ecause Plaintiff seeks a temporary restraining order that would provide him with affirmative relief *changing* the status quo, he has not shown "specific facts" that "clearly show" his entitlement to a temporary restraining order, and for this reason his motion for a temporary restraining order will be denied) (emphasis in original); *Whitman v. Hawaiian Tug & Barge Corp./Young Bros., Ltd. Salaried Pension Plan*, 27 F. Supp. 2d 1225, 1228 (D. Haw. 1998) ("A temporary restraining order is designed to preserve the status quo until there is an opportunity to hold a hearing on the application for a preliminary injunction."); *Bronco Wine Co. v. U.S. Dept. of Treasury*, 997 F. Supp. 1309, 1313 (E.D. Cal. 1996) (same); *but see Palmigiano v. Travisono*, 317 F.Supp. 776, 787-88 (D.C. R.I., 1970) (citing with approval a 1965 law review note that criticized the limitation of a TRO to the status quo).

[15] The plaintiffs could have filed this lawsuit before the candidate filing deadline. The Alaska Supreme Court ordered the use of this plan on May 22, and it denied a request for a stay of the filing deadline on May 30. Exhibits G, H. The plaintiffs should have filed their complaint at that time if they wished to prevent the operation of the filing deadline.

III. PLAINTIFFS HAVE FAILED TO ESTABLISH THAT THEY WILL SUFFER IRREPARABLE HARM WITHOUT A TRO, AND IN FACT THEY WILL NOT

The plaintiffs have failed to specify what irreparable injury they will suffer without a TRO. They have the burden of showing, "on evidence submitted, that specified irreparable damage will result if the order is not granted."[16] While the plaintiffs assert that "[t]he harm caused by the Defendants' unlawful implementation of the illegal plan is immediate and clear," and that "[t]he damage caused by Defendants' actions cannot be overstated," they have neither submitted evidence of harm nor explained what specific harm they might suffer in the next two weeks, should it even take that long for this case to come before a three-judge panel. TRO Motion at 7, 9.

And in fact, the plaintiffs will not be injured by any of the preparations the division will make in the immediate future. While the division must conduct certain tasks in the next two weeks in order to assure a timely and orderly election, those tasks not only will not irreparably harm the plaintiffs, they will not impact the plaintiffs at all during this time. *See* Affidavit of Gail Fenumiai, ¶¶ 4-6. Nor will the division's completion of these tasks *ever* impact the plaintiffs if the redistricting plan is ultimately rejected by the DOJ and its use enjoined. The only possible impact these actions could have on the plaintiffs or other voters is a positive one—if the DOJ ultimately preclears the plan, the division's completion of these tasks now will ensure that the 2012 elections occur in a timely, normal fashion.

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16 28 U.S.C. § 2284(b)(3).

The plaintiffs will not be harmed by the division's processing of applications for absentee voting by mail; printing special absentee ballots and candidate lists; recruiting election workers; training election workers; preparing tally books; preparing solicitation for tally book printing bids; finalizing the list of polling places and activating polling place online lookup and Interactive Voice Response system for locating polling place; preparing supplies for precincts; continuing to work with vendor for statewide voter ID card mailing; finalizing the election database in GEMS (Global Election Management System – the division's ballot tabulation system); activating the system that places voters in new districts/precincts; and preparing on an on-going basis, as received, the candidate biographies and statements for the Official Election Pamphlet. Affidavit of Gail Fenumiai, ¶ 4.

While completing these tasks will assure that the division can conduct an election without disruption if the DOJ preclears the submitted redistricting plan, the plaintiffs and other Alaskans will be largely unaware that these activities are occurring. The tasks do not in any practical sense violate anyone's rights. If the three-judge panel ultimately grants a preliminary injunction that prohibits the division from continuing with election preparations, the plaintiffs will be no worse off than they are today. Because the one- or two- week delay will have no impact on the effectiveness of the relief that the plaintiffs seek from the three-judge panel, they do not face irreparable injury from this delay and are thus not entitled to a TRO.

IV. A TEMPORARY RESTRAINING ORDER HARMS THE PUBLIC INTEREST

Although the standard for granting a temporary restraining order under 28 U.S.C. § 2284 does not expressly require an analysis of the public interest, courts are typically reluctant to enjoin elections without considering the impact on the public.[17] In this case, the future of Alaska's 2012 election cycle is uncertain. Only one course of events will permit the state to hold its elections in an orderly and normal manner: if the DOJ preclears the Amended Proclamation Plan *and* the federal courts decline to enjoin the division's election preparations pending preclearance. Without any demonstrable harm to the plaintiffs threatened in the next two weeks, a temporary restraining order throwing the election into doubt will sow unnecessary confusion and concern among Alaska's voters and is contrary to the public interest.

Moreover, notably missing from the plaintiffs' motion is any indication of what it is that they think the division should be doing instead of preparing to hold an election using the interim plan ordered by the Alaska Supreme Court. Indeed, they

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[17] *See, e.g.*, *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 919 (9th Cir. 2003) ("In this case, hardship falls not only upon the putative defendant, the California Secretary of State, but on all the citizens of California, because this case concerns a statewide election. The public interest is significantly affected."); *Montano v. Suffolk County Legislature*, 268 F. Supp. 2d 243, 260 (E.D.N.Y. 2003) ("Even if the plaintiffs are able to show irreparable harm and a likelihood of success on the merits, the Court must then consider whether it is against the public interest to grant injunctive relief faced with an impending election."); *United States v. Charleston County*, 318 F. Supp. 2d 302, 328 (D.S.C. 2002) ("[T]he court would be ill-advised to engage in the serious business of intervening in local elections, and it is difficult to see how the public interest would be served by enjoining the elections."); *Cardona v. Oakland Unified Sch. Dist., California*, 785 F. Supp. 837, 842 (N.D. Cal. 1992) ("The unique concerns associated with redistricting cases make public interest a critical factor in deciding whether to preliminarily enjoin an existing redistricting plan.")

appear simply to be advocating that the division sit on its hands until the federal government gives it permission to start work again. But this Court should not be dismissive of the division's need to prepare for the elections.

Without an election the citizens of Alaska will be completely disenfranchised. The division exists only to administer elections. It has no role in redistricting; the Redistricting Board is a constitutionally created independent state agency, outside the control of the executive branch. The division has no authority to create or select an alternative redistricting plan to use for the 2012 elections—and even if it did, no legal alternatives are currently available. In this context, the plaintiffs' concerns about "creat[ing] a perverse incentive" for jurisdictions to delay submitting plans for preclearance are misplaced. TRO Motion at 11.

And although the plaintiffs assert that they wish "to preserve the status quo of the current districts (also called 'the benchmark')," TRO Motion at 2, not only is the 2002 plan patently violative of the federal constitution's one-person, one-vote requirement after the demographic changes of the past ten years,[18] but it also is *not* the "benchmark" plan under DOJ guidance on redistricting. The DOJ guidance states that "[w]hen a jurisdiction has received Section 5 preclearance for a new redistricting plan, or a Federal court has drawn a new plan and ordered it into effect, that plan replaces the last

[18] *Reynolds v. Sims*, 377 U.S. 533 (1964). Although the federal constitution does not require exactly equality of size in state legislative districts, the 2002 plan now contains population deviations from the ideal district size ranging from -22.02% to 46.29%. Exhibit I.

legally enforceable plan as the Section 5 benchmark."[19] Thus, under DOJ guidance, the current benchmark plan is the board's original Proclamation Plan, which was precleared by the DOJ on October 11, 2011, but subsequently invalidated by the Alaska Supreme Court on March 14, 2012. If the division attempted to use the old 2002 plan without renewed DOJ preclearance, it would be violating Section 5 according to DOJ guidance.

Thus, the only plan that currently complies with Section 5—the precleared Proclamation Plan—was soundly rejected by the state courts. To comply with state law, the division must implement the Amended Proclamation Plan as ordered by the Alaska Supreme Court on May 22, 2012. Because the original Proclamation Plan has been rejected by the state courts, and the Amended Proclamation Plan may yet be precleared by the DOJ, the division is moving forward with preparations for an election under that plan. Permitting it to continue those preparations while this court convenes a three-judge panel inflicts no harm on the plaintiffs and maintains at least the possibility that the state of Alaska can have a normal election cycle. This is unquestionably in the public interest.

V. CONCLUSION

For the foregoing reasons, this Court should deny the plaintiffs' motion for a temporary restraining order.

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[19] DOJ's "Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act," 76 Fed. Reg. 7470 (Feb. 9, 2011).

DATED June 11, 2012.

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Certificate of Service

The undersigned hereby certifies that on the, **11th day of June, 2012**, a true and correct copy of the above document, **Opposition to Motion for Temporary Restraining Order**, was electronically served on the following:

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