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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

REPLY IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER

I. INTRODUCTION

Defendants' opposition to the Motion for Temporary Restraining Order and their supporting documents make one thing clear: Plaintiffs are entitled to injunctive relief under Section 5 of the Voting Rights Act ("VRA"), 42 U.S.C. § 1973c ("Section 5"). Defendants concede that the Plaintiffs have set forth the proper standard for a preliminary injunction. Defendants' Opposition to Motion for Temporary Restraining Order ("Opp.") at 6. They do not dispute that Alaska is covered by Section 5. Opp. at 3. They apparently agree that candidate qualifying and other activities antecedent to conducting elections under the Amended Proclamation Plan ("the Plan") are changes affecting the right to vote that are covered by Section 5. Opp. at 4. They acknowledge that the Plan has not received preclearance from the U.S. Department of Justice or the U.S. District Court for the District of Columbia, as required by Section 5. Opp. at 4; Landreth Affidavit, Exhibits A-C thereto. They also admit that that they have unlawfully implemented the unprecleared Plan by not only opening and closing candidate qualifying, but that they are in the process of conducting additional activities under the Plan, as described in the affidavit of Defendant Fenumiai, the State Director of Elections. Opp. at 2, 8-9; Fenumiai Affidavit ¶ 4. In short, Defendants have admitted all of the facts that entitle Plaintiffs to not only the temporary relief they are seeking from the single-judge court, but also the permanent injunctive relief they have requested from the three-judge court once it is empaneled by the Chief Circuit Judge.

Against the backdrop of the Defendants' concessions establishing Plaintiffs' entitlement to relief, Defendants pin their opposition to Plaintiffs' Motion on an erroneous construction of Section 5. On the one hand, they point to the statement in 28 U.S.C. § 2284 requiring a demonstration of "irreparable harm" for a temporary injunction pending the convening of a

three-judge panel. Opp. at 5-7. On the other hand, they ignore well-established authority that Plaintiffs have demonstrated irreparable harm because the Defendants' violations of Section 5 impact the fundamental right to vote of the Plaintiffs. Indeed, one of the two cases discussed by the Defendants expressly held that a violation of Section 5 necessarily established irreparable harm, while the other case involved unique circumstances that are not at issue here. Opp. at 5-6.

Defendants compound their error by asking the Court to ignore the plain language of Section 5. They maintain that the Court must maintain what they describe as the "status quo" – that is, to keep the unlawfully completed candidate qualifications in place and allow the Defendants to continue to violate Section 5 by implementing the Plan until such time, if any, that it is precleared. Opp. at 7-9. This argument misses the mark. The statutory purpose of Section 5 *is* to maintain the status quo: namely, the last precleared change affecting voting, or what is called the "benchmark." *See* 42 U.S.C. § 1973c(a). Here, the benchmark is not the unprecleared Plan, but the existing state legislative districts that received preclearance from the U.S. Department of Justice following the 2000 Census. Section 5 does not permit the Court the luxury to allow an unprecleared voting change like the Plan to remain in effect pending a preliminary injunction hearing. Any such unprecleared change is a legal nullity and is void *ab initio* under the VRA. That is true even if it will only take a few weeks before the three-judge panel is convened to consider Plaintiffs' Motion for a Preliminary Injunction. The only way for the status quo to be preserved is to void the results of the unlawful candidate qualifications under the unprecleared Plan and to enjoin the Defendants from continuing to violate Section 5 by implementing additional procedures under the Plan. A contrary construction would turn Section 5 on its head and reward election officials such as the Defendants who have violated the VRA's unambiguous mandate.

Defendants' arguments against the temporary restraining order (and presumably against a preliminary injunction) in the face of the admitted violations of Section 5 also hinge on administrative convenience. Similar arguments have proven unavailing for the past 45 years simply because the public interest in a constitutional election will always outweigh an agency's convenience. The public has absolutely no interest in Defendants illegally preparing for an election under a Plan that is unenforceable under Section 5. Given the clarity and uniformity of the precedent and the very real danger presented to the election cycle, Plaintiffs – who are standing in for the tens of thousands of Alaska voters who are harmed – are entitled to a temporary restraining order to prevent Defendants from implementing any changes prior to preclerarance in the coming weeks before a three-judge court can be empaneled and hear oral argument. That is the very purpose of a temporary restraining order. It is also the most practical solution because, by their own admission, Defendants will continue to engage in unlawful preparations under the unprecleared plan. It is the voters – not the convenience of Defendants – that must be protected first.

II. A TEMPORARY RESTRAINING ORDER FURTHERS SECTION 5'S PURPOSE BY MAINTAINING THE STATUS QUO.

In considering Plaintiffs' Motion, it is critical to remember the purpose of Section 5. By its own terms it is designed to preserve the status quo because it prevents any change in voting practices and procedures unless and until the U.S. Department of Justice or the U.S. District Court for the District of Columbia can determine that the changes neither have "the purpose nor will have the effect of denying or abridging the right to vote on account of race or color" or membership in a language minority group. 42 U.S.C. § 1973c(a). Section 5 is therefore far more than just a ministerial procedure; it is a review process specifically designed to determine whether the proposed change is discriminatory. As the Supreme Court explained, "enduring

nearly a century of systematic resistance to the Fifteenth Amendment, Congress might well decide to shift the advantage of time and inertia from the perpetrators of the evil to its victims" through its enactment of Section 5. *South Carolina v. Katznebach*, 383 U.S. 301, 328 (1966). By asking for a temporary restraining order and then a preliminary injunction unless and until preclearance is obtained, Plaintiffs are employing Section 5 exactly as Congress meant for it to be used. Defendants' acknowledged enforcement of unprecleared changes including closing candidate qualifying and other activities under the Plan is the very sort of "end run" around Section 5 that Congress expressly rejected in the provisions plain language.[1]

Indeed, the entire Voting Rights Act is a statutory enactment of the Constitutional principles that prevent discrimination in voting. As one court described:

> The Voting Rights Act and its history reflect a strong national mandate for the removal of all impediments, intended or not, to equal participation in the election process. Thus when [the Voting Rights Act] is violated the public as a whole suffers irreparable injury.

Puerto Rican Legal Defense and Education Fund v. City of New York (PRLDEF), 769 F.Supp. 74, 79 (E.D.N.Y. 1991) (citing *Harris v. Gradick*, 593 F.Supp. 128, 135 (M.D. Ala. 1984) (internal quotations omitted)). Given that that this "national public directive" to protect the right to vote freely for the candidate of one's choice is "at the heart of representative government," Plaintiffs in such cases generally do not have to prove irreparable injury. *Id.* at 135-36. Rather, "such injury is presumed by law." *Id.* Thus any violation, including a violation of Section 5, "would by its nature be an irreparable injury." *Id.*

With respect to the particular Plan at issue here, when it was adopted and reviewed by the Alaska Supreme Court on appeal, there were approximately seven objections filed by different municipalities and Native corporations. Several of these alleged that the Plan is discriminatory

[1] Defendants' citation of cases discussing the preservation of the status quo in footnote 14 of page 7 of their brief are entitled to no weight; none of those decisions involved Section 5 or even elections.

against Alaska Native voters. While Plaintiffs do not have to demonstrate the likelihood of success on the merits for any injunction, as described in the Motion at pages 3-5, this nonetheless shows that there is some concern on the part of the voters that the Amended Proclamation Plan may be discriminatory. Preclearance is by no means assured. In any event, the Court need not speculate, as the Defendants apparently suggest, on the ultimate disposition of the Plan. It is undisputed that the Defendants have unlawfully begun implementing the Plan. As a result, the Court should issue a temporary restraining order to preserve the status quo, as Section 5 clearly requires.

III. VIOLATION OF THE VRA IS ITSELF IRREPRABLE INJURY

Defendants' primary argument is that the standard for a temporary restraining order differs from the standard set forth for a preliminary injunction. In particular, they argue that even in Section 5 cases, Plaintiffs must demonstrate irreparable injury. Defendants then deny that Plaintiffs have met this standard because they have not explained their injury with specificity. Opp. at pp. 5-9. Defendants cite only two cases for this argument and neither is availing.

Preliminarily, Plaintiffs agree with the Defendants that the standard for issuance of a temporary restraining order requires demonstrating irreparable harm whereas the three-part test for issuing a preliminary injunction in a Section 5 case does not. However, as touched upon above, violation of the VRA is presumed to be an irreparable injury. *See Reynolds v. Sims,* 377 U.S. 533, 562, 565 (1964); *Dillard v. Crenshaw County*, 640 F.Supp. 1347, 1363 (M.D. Ala. 1986); and *Harris v. Gradick*, 593 F.Supp. 128, 135 (M.D. Ala. 1984). Once plaintiffs establish that there is a violation of Section 5, the irreparable injury requirement is met. None of the plaintiffs in the cases have been required to show how they were personally and specifically

harmed by the posting of a candidate list or similar activities implementing unprecleared changes.

The *PRLDEF* case, which Defendants cite in suggesting the absence of irreparable harm, Opp. at 6, directly refutes their argument. There, after the court acknowledged the different approaches taken toward temporary restraining orders versus preliminary injunctions, it quickly agreed that if a Section 5 violation has occurred, irreparable harm has been established:

> As to irreparable harm, it is well-settled that the claimed deprivation of a constitutional right such as the right to a meaningful vote or to the full and effective participation in the political process is in and of itself irreparable harm.

PRLDEF, 769 F.Supp. at 79 (citations omitted).

PRLDEF is persuasive because it is incredibly similar to the case at bar. There, voters sought a temporary restraining order to prevent the City Council from starting the candidate petitioning process under new district lines until the new plan had been precleared. The court concluded that (1) changing district lines and changing the eligibility of persons to become candidates were both changes covered by Section 5, thus requiring preclearance; (2) that the traditional standards for a preliminary injunction do not apply but that the three-factor test described in *Herron v. Koch* applied instead; and (3) even if Plaintiffs had to show irreparable harm under the TRO standard, they could do so easily because it is presumed in cases of VRA violations. *Id.* at 78-79.

The second case cited by Defendants, *Barron v. New York City Board of Elections*, is no more helpful to their argument. In a one and a half page opinion, the court noted the irreparable harm standard and held that the Plaintiffs had not satisfied it because the court could not actually find any harm. Rather, the candidate the plaintiffs wanted on ballot was in fact the only candidate running, and roundly expected to win, and thus her omission from the absentee and

special ballots would make no difference in the ultimate result. 2008 WL 4449650 at * 2 (E.D.N.Y. 2008) (unreported). In contrast, here there is an admission of a violation of Section 5 based upon the Defendants' concession that they are conducting numerous activities under the Amended Redistricting Plan for which they have not received preclearance, including not only candidate qualifying but a host of other activities antecedent to the election under the Plan. *See* Fenumiai Affidavit ¶ 4; Landreth Affidavit ¶ 2-6, Exhibits A-C; and Opp. at 2, 4 ("preclearance has not yet been obtained"). This case bears no relationship to the unique situation in *Barron.*

Because Defendants misunderstand the application of the Section 5 standard, they underestimate the harms to Plaintiffs and indeed to all affected voters. As alleged in the Complaint, the Plaintiffs all reside in districts in which Defendants have implemented candidate qualifying procedures and closed candidate qualifying under the unprecleared Plan. Complaint ¶ 10, 11. Moreover, Plaintiffs now know that the Defendants are implementing or intend to implement the Plan in additional ways, such as by printing absentee ballots and candidate lists for the unprecleared districts and even assigning voters to new districts. Fenumiai Affidavit ¶ 4.[2] Their harms are thus compounded because not only have candidates been qualified for Plaintiffs' districts, but also the Plaintiffs themselves are being assigned to new districts and new ballots are being prepared for them more than two months before the actual election. While their harms are already established under the proper legal standard as set forth above, these additional violations present even more of a direct impact upon the individual voters.

Nevertheless, Defendants argue that voters will be "unaware that these activities are occurring" and these "tasks do not in any practical sense violate anyone's rights." Opp. at 9. Under this theory, there is no violation if the voters do not know about it. This is of course not

[2] Interestingly, Defendant Fenumiai does not separate out which activities actually require use of the Plan, she only states that "most" of them do, nor does she explain anywhere why these activities must be conducted specifically in the next two weeks or so.

the law. Second, this theory also supposes that the "tasks" undertaken in preparation for an election do not harm voters. As Plaintiffs discussed in their brief, several courts, particularly the District Court for the District of Columbia in *South Carolina v. United States*, have expressly rejected that argument. There, the court granted a preliminary injunction under Section 5. In doing so, the court rejected South Carolina's argument that conducting candidate qualifying and other activities antecedent to an election under an unprecleared redistricting plan would not cause any harm because the state "assures the Court that it will not hold its state senate primary elections . . . unless [the unprecleared plan] is precleared." 585 F. Supp. 418, 421 (D.D.C. 1984) (three-judge panel). Finally, Defendants' view on the alleged lack of harm assumes preclearance is forthcoming. As the *South Carolina* decision and the other cases discussed in Plaintiffs' Motion show, such speculation is not only irrelevant, it is directly refuted by the plain language of Section 5's mandate to freeze the benchmark plan in place until after preclearance is obtained – and not before.

Finally, Defendants also assert that Plaintiffs are not trying to preserve the status quo but to alter it which, they argue, is not appropriate for a temporary restraining order. There are three reasons this argument fails.

First, as set forth in the statute itself, the change "may not be lawfully implemented" unless and until preclearance is received. 42 U.S.C. § 1973c(a). Thus the changes – the candidate qualifying and certification – were not enforceable and thus void *ab initio* without any action from Plaintiffs. As a result, the *status quo* is that what it was before the Defendants took the unlawful actions – namely, the benchmark state legislative redistricting plan adopted following the 2000 Census.

Second, as the court recognized in *South Carolina v. United States*, Defendants "derive no equitable benefit, however, from the [candidate] qualification status quo which [they] unilaterally brought into being knowing in advance that . . . they were unlawful." 585 F. Supp. at 421 n.4. In other words, courts do not allow you to take advantage of the status quo position if you have arrived there illegally. *See* 28 C.F.R. § 51.10(b).

Third, as a matter of public policy, it would be poor practice to hold that Plaintiffs cannot obtain a temporary restraining order to change the status quo if the status quo were arrived at by illegally implementing voting changes in advance of preclearance; this would clearly encourage jurisdictions to make the changes (and end run Section 5) and thus insulate themselves from temporary restraining orders. This makes no sense and is directly contrary to the purpose and language of the statute. The Justice Department's guidelines for Section 5 make this clear: "It is unlawful to enforce a change affecting voting without obtaining preclearance under section 5. *The obligation to obtain such preclearance is not relieved by unlawful enforcement*." 28 C.F.R. § 51.10(b) (emphasis added).

IV. THE PUBLIC INTEREST FACTOR DOES NOT APPLY HERE

Defendants also claim that a restraining order would "harm the public interest." Opp. at 10-12. First and foremost, it is important to remember what this Motion is asking for: a temporary restraining order that will last a matter of days or weeks until a three-judge panel can make its decision. It is a limited form of relief. Plaintiffs have not asked that an election be enjoined from occurring with this motion.

With respect to the "public interest" argument, Defendants' argument is misplaced. Whether an injunction is in the public interest is a factor employed in the traditional test used for preliminary injunctions. As Plaintiffs described in their Motion and Defendants acknowledge in

their opposition, the traditional test does not apply to Section 5 cases. Motion at 4-5; Opp. at 6. Instead, courts use a straightforward three-factor test. Motion at p. 4. This test does not include the "public interest" requirement because it is presumed to be in the public interest for jurisdictions to comply with Section 5 and conduct non-discriminatory elections. In fact, as set forth in *Lopez v. Monterey County*, "[i]f a voting change subject to Section 5 has not been precleared, Section 5 plaintiffs are *entitled* to an injunction prohibiting implementation of the change." 519 U.S. 9, 20 (1996) (emphasis added); *see also PRLDEF*, 769 F.Supp. at 78 ("On these premises, section 5's prohibition against implementation of unprecleared changes requires this court to grant the relief plaintiffs seek.") (citing *Clark v. Roemer*, 500 U.S. 646 (1991). All of the cases cited by Defendants in footnote 14 are Equal Protection or Section 2 cases in which the courts properly applied the traditional standard for an injunction – none of which applies here. Moreover, unlike "irreparable harm," the statutory procedure authorizing a single-judge to enter a temporary restraining order pending the convening of a three-judge court does not include any "public interest" showing.[3]

V. ADMINISTRATIVE CONVENIENCE IS NOT A DEFENSE TO VIOLATION OF SECTION 5

Throughout Defendants' brief, they argue that the Division of Elections needs to complete its preparatory tasks in order to conduct an orderly election, and they paint the imposition of a temporary restraining order as a destructive interference. Given the nature of the

[3] *See generally* 28 U.S.C. § 2284(b)(3), which provides:

> A single judge may conduct all proceedings except the trial, and enter all orders permitted by the rules of civil procedure except as provided in this subsection. He 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 district court of three judges of an application for a preliminary injunction. A single judge shall not appoint a master, or order a reference, or hear and determine any application for a preliminary or permanent injunction or motion to vacate such an injunction, or enter judgment on the merits. Any action of a single judge may be reviewed by the full court at any time before final judgment.

relief, as well as the fundamental interest at issue, courts have had no difficulty sacrificing administrative convenience. Indeed, if jurisdictions were permitted to argue administrative convenience, it would create an incentive to wait until the last minute to submit redistricting plans (and all election law changes) and eviscerate the preclearance requirement altogether.[4] The law does not tolerate such a result.

At the outset, Plaintiffs acknowledge that the conduct of an election is no small feat, and that it is largely the Alaska Redistricting Board that caused most of the delays that have created the current quagmire.[5] Further, Plaintiffs understand that being unable to perform certain tasks in the upcoming days or weeks may cause employees at the Division of Elections to have to work longer hours closer to the election or accelerate other tasks.[6] However, when compared to the hardships faced by voters like the Plaintiffs who don't know who their candidates are or which district they are in, the convenience of Defendants pales in comparison. It is for this reason that courts have never, to Plaintiffs' knowledge, found administrative convenience to be a defense to Section 5 claims.

This is not to say that jurisdictions have not tried. In *South Carolina v. United States*, for example, a case very similar to the one at bar, the State asserted exactly what Defendants assert here:

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[4] In fact, courts are aware of this tactic and have warned that this may be a strategy employed by jurisdictions. *See, e.g. South Carolina v. United States*, 585 F.Supp. at 423 n. 9.

[5] Defendants take issue with Plaintiffs' assertion that the Redistricting Board waited until the eleventh hour to submit its plan for preclearance and argue that the Board had to wait for the decision of the Supreme Court. This is not so. As set forth in paragraphs 18 and 19 of the Complaint, the Board submitted the original Proclamation Plan for preclearance in the middle of litigation at the superior court level without waiting for any kind of court approval. In addition, it was entirely within Defendants' control to submit for preclearance any other changes to election laws, such as asking for an extension of the candidate qualifying deadline, which they did not do.

[6] As noted in footnote 1, Defendants have not explained exactly which tasks require the use of a redistricting plan and thus would have to be suspended, and which could continue as normal. Tasks such as election worker recruitment and the purchasing of supplies, for example, are unlikely to require use of a redistricting map. Thus Defendants have not been clear as to what inconveniences they might actually suffer in the next 2-3 weeks.

> Although it agrees not to conduct its primaries prior to preclearance, however, it clearly believes it itself entitled and intends to conduct the antecedent activities necessary to prepare for them prior to preclearance, which include, we know, at least the candidate qualification filing . . . [and] printing ballots, reserving polling places, coordinating lection judges, and advertising the elections. Only if it is allowed to conduct these activities now, the State asserts, will it be able to go forward with the primary elections whenever they are to take place.

585 F. Supp. at 421. The court ultimately concluded that burden of the delay fell on the State, not the voters, and entered an injunction that is very similar to the one Plaintiffs have requested in this case. *Id.* at 425. The City of New York raised a similar argument in the *PRLDEF* case and the court also found it unpersuasive: "Congress expressly indicated its intention that the States and subdivisions, rather than citizens seeking to exercise their rights, bear the burden of delays in litigation." 769 F.Supp. at 79 (citing *Perkins v. Matthews*, 400 U.S.379, 396 (1971)).

VI. CONCLUSION

For all of the foregoing reasons, Plaintiffs' Motion for a Temporary Restraining Order should be GRANTED and the Court should order the relief described in Plaintiffs' Motion pending the convening of the three-judge panel on Plaintiffs' Motion for a Preliminary Injunction.

DATED this 12th day of June 2012.

Respectfully submitted,

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Certificate of Service

I hereby certify that on the 12th day of June 2012, a true and correct copy of the foregoing document was served electronically pursuant to the Court's electronic filing procedures upon the following:

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