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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,	) Case No. 3:12-cv-00118-RRB-AK-JKS
vs.	
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.	

OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Lieutenant Governor Mead Treadwell and Gail Fenumiai, Director of the Division of Elections (collectively, "the division") oppose the plaintiffs' motion for an injunction barring the division from preparing for the 2012 elections. This Court should deny the plaintiffs' motion because the 2006 reauthorization of Section 5 of the Voting Rights Act is unconstitutional—a fact highlighted by the example of Alaska—and because even if it is not, enjoining the division's election preparations is not the appropriate remedy for any Section 5 violation in this case.

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 under Section 5. While preclearance is pending, the division has begun election preparations using that plan because, given the late date, Alaska otherwise cannot have a timely primary election. Although a denial of preclearance may prevent a timely election, if the division continues its preparations and the plan is ultimately precleared, Alaska will have a normal election cycle. But if the division is not permitted to continue its preparations, the elections may be seriously—and *unnecessarily*—disrupted even if the plan is ultimately precleared.

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. Jeopardizing that chance by enjoining election preparations is neither appropriate nor necessary at this point.

Moreover, imposing the extraordinary remedy of enjoining the state's

elections would be a stark reminder of Alaska's undeserved second-class status among the supposedly equal sovereigns of the United States—an intrusion highlighting the fact that Section 5 imposes on selected states burdens that are neither congruent nor proportional to the problem of voting discrimination in the 21st century. Because this Court has the discretion to select a less intrusive remedy, constitutional avoidance principles counsel against awarding the drastic injunction the plaintiffs seek.

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 triggers 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 (VRA), which requires that all changes to voting practices and procedures, including redistricting plans, be submitted to the Department of Justice (DOJ) for approval, a process known as "preclearance."[2]

I. Alaska's coverage under Section 5 of the Voting Rights Act

Section 5 of the VRA was designed to combat the "insidious and pervasive evil" of race discrimination in voting, "which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution."[3] In *South Carolina v. Katzenbach*, the Supreme Court described how the states of Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Virginia

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1 Alaska Const. art. VI, § 3; *Reynolds v. Sims*, 377 U.S. 533 (1964).
2 42 U.S.C. § 1973c.
3 *State of South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966).

had instituted literacy tests as a voter qualification with the intent to exclude African Americans from the franchise; and had responded to court decisions striking down these racist laws by enacting new measures to keep African Americans from the polls.[4] Section 5 was crafted expressly to target these states and foreclose this stratagem by requiring them to obtain preclearance from the Attorney General or the D.C. district court before they could implement any further changes to their voting laws.[5]

As the D.C. Circuit recently explained, Congress "reverse-engineer[ed] a formula" to decide what states would be covered by Section 5.[6] As originally enacted, the formula applied Section 5 to any state or political subdivision of a state that "maintained a voting test or device as of November 1, 1964, and had less than 50% voter registration or turnout in the 1964 presidential election."[7] Congress "chose [these] criteria not because tests, devices, and low participation rates were all it sought to target, but because they served as accurate proxies for pernicious racial discrimination in voting."[8] But the D.C. Circuit also noted that the "coverage formula's fit … was hardly perfect in 1965."[9] Indeed, it conceded "that the 1965 formula swept in several … jurisdictions—including Alaska, Virginia, and counties in Arizona, Hawaii, and Idaho—*for which Congress apparently had no evidence of actual voting discrimination*."[10]

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4 *Id.* at 310-15, 335.
5 *Id.* at 315-16.
6 *Shelby County, Ala. v. Holder (Shelby County II)*, No. 11-5256, 2012 WL 1759997 at *25 (D.C. Cir., May 18, 2012.
7 Voting Rights Act of 1965, Pub.L. No. 89–110, § 4(b), 79 Stat. 437, 438.
8 *Shelby County II*, 2012 WL 1759997 at *25.
9 *Id.* at *27.
10 *Id.* (citing *Katzenbach*, 383 U.S. at 318, 329–30) (emphasis added).

Despite lacking any history of voter discrimination even remotely comparable to that of the states targeted by Congress, Alaska was nevertheless caught up by the formula because the state constitution originally contained a "literacy test" of sorts for voting. But Alaska's so-called "literacy test" is more accurately described as a "read or speak" test because Article V, Section 1 of the original Alaska Constitution limited the franchise to those who could "read *or speak* the English language."[11]

Moreover, no evidence supports the notion that this test was designed to exclude or suppress the Alaska Native vote. Indeed, the test was created by Alaska Native Frank Peratrovich, who was instrumental in getting the Alaska Equal Rights Act passed in 1945.[12] And the Constitutional Convention delegates debated an amendment that would have altered this language to limit the franchise to those who "read *and* speak" English but rejected it by a vote of 36 to 18, after many delegates expressed concern that it might improperly prevent Alaska Native citizens from voting.[13] In 1970, Alaskan voters amended the state constitution to eliminate the "read or speak" language. Exh. A at 30; Affidavit of Gordon Harrison, ¶¶ 6-8, 10.

The reality that Alaska's "read or speak" test did not have either "the purpose or … the effect of denying or abridging the right to vote on account of race or color" 42 U.S.C. § 1973b(a)(1)(A) was central to Alaska's successful efforts in 1966 and

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11 Alaska Const. art. V, § 1 (emphasis added).

12 Gordon S. Harrison, "Alaska's Constitutional 'Literacy Test' and the Question of Voting Discrimination," 22 *Alaska History* 24 (Spring/Fall 2007), attached as Exh. A; *see* Affidavit of Gordon Harrison.

13 As delegate John Coghill commented: "You take the villages. You find that if there are 80 people eligible to vote, there will be 80 votes cast in that village. They are very proud of their heritage to take part in the government …" Exh. B.

in 1972 to bail out from Section 5 coverage through declaratory judgment actions in D.C. district court. Exh. A at 27-29, 31; Affidavit of Gordon Harrison, ¶¶ 6-8. The DOJ did not oppose either of these bailouts. *Id.*

However, Alaska again became a covered jurisdiction in 1975, when Congress altered the coverage formula for Section 5.[14] This time, Alaska was included as a result of its "English-only" elections and the presence of significant Alaska Native language minorities. Though the DOJ considered this sufficient to justify Alaska's renewed inclusion as a covered jurisdiction, Exh. A at 31-33, Alaska's provision of election materials only in English must be understood in the context of the historically unwritten character of the minority languages at issue.

As the minority language provisions of the VRA expressly acknowledge, many Alaska Native languages are "historically unwritten."[15] Although academics have developed orthographies for these languages in the last forty years or so, Congress had no evidence in 1975 that written materials in Alaska Native languages would have actually been of assistance to any voters in Alaska. Exh. C at 11-16. As a result, the language assistance requirements contained an express exception for "historically unwritten" languages, providing that only oral assistance be provided in such languages.[16]

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[14] Voting Rights Act Amendments of 1975, Pub.L. No. 94–73, § 203, 207, 89 Stat. 400, 401–02 (codified as amended at 42 U.S.C. § 1973b(f)(3), § 1973*l*(c)(3)).

[15] *See* 42 U.S.C. § 1973b(f)(4) (providing 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 predominate 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")

[16] 42 U.S.C. § 1973b(f)(4).

When Congress heard testimony in 2006 about whether to renew the VRA, the most specific evidence about Alaska concerned complaints that the state was ignoring its obligations under the minority language provisions of the VRA, in large part because it did not provide written materials in Alaska Native languages. Exhs. D; E. But Alaska's belief that Alaska Native languages are historically unwritten has since been partially vindicated in the only litigation of which the division is aware that addressed this issue, *Nick v. Bethel*.[17] In *Nick*, after written briefing, review of "voluminous exhibits submitted by both sides," and oral argument, this Court held that Alaska is not required to provide written language assistance in Yup'ik because "Yup'ik is a 'historically unwritten' language for purposes of the VRA." Exh. F at 11, 15. Although the Court's analysis was specific to the Yup'ik language, its holding supports the division's position that it has been correctly analyzing this question with regard to languages in Alaska.

This history calls into question whether Alaska, in 1975 or in 2006, actually employed a "test or device" that would properly include it as a covered jurisdiction. It also implicates the standard of review this Court should apply in determining whether Section 5 is constitutional as applied to Alaska, as discussed below.

II. Alaska's 2012 redistricting

The Alaska Constitution assigns the task of redistricting to an independent redistricting board.[18] That board has its own legal counsel and has exclusive authority to

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17 Case No. 3:07-cv-0098 TMB.

18 Alaska Const. art. VI, § 8.

seek DOJ preclearance of the redistricting plans it draws.[19] The Division of Elections has no authority to create or seek preclearance of any plan; its responsibility is to hold elections using whatever plan the board adopts and the courts and the DOJ approve.

The 2010 census revealed that Alaska's state legislative districts had become severely malapportioned due to population growth and shifting.[20] The redistricting board convened to draw new districts, and adopted its original Proclamation Plan in June 2011. Exh. H. The DOJ precleared this plan in October 2011. Exh. I. But a group of voters challenged the plan on the grounds that it was inconsistent with state constitutional requirements, and the state courts struck it down in early 2012. Exh. J. Specifically, the Alaska Supreme Court expressed concern that the board might compromised state constitutional redistricting criteria more than necessary to comply with the VRA. In April 2012, the board adopted its Amended Proclamation Plan, but the courts rejected that plan as well. Exh. K. By that point the board did not have sufficient time before the 2012 elections to try again, so the Alaska Supreme Court ordered that the Amended Proclamation Plan should serve as an interim plan for the 2012 elections. Exh. L. Three days later, on May 25, the board submitted the Amended Proclamation Plan to the DOJ for preclearance. Exh. M. The DOJ has not yet responded, but unless it requests additional information, it must decide by July 24, more than a month before the primary election.[21]

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[19] Alaska Const. art. VI, § 9; Alaska Stat. § 15.10.220.

[20] The previous districts, drawn in 2002, now contain population deviations from the ideal district size ranging from -22.02% to 46.29%. Exh. G.

[21] 28 C.F.R. 51.1(a)(2); 28 C.F.R. 51.9(a).

While the board awaits the DOJ's response, the division has begun to prepare for the fast-approaching primary using the Amended Proclamation Plan, as ordered by the Alaska Supreme Court. State elections must be conducted on a schedule that complies with various state and federal deadlines.[22] The division cannot shift these deadlines at will simply because the DOJ has not responded regarding the plan—moving any election deadline would require a court order, DOJ preclearance, or both. More importantly, however, each deadline serves a purpose beyond mere administrative convenience—for example, sending ballots to military and overseas voters well before an election ensures that they can vote.

Given the late date, if the DOJ rejects the plan the division will probably not be able to implement any alternative in time for the August primary. But because preclearance is still pending and may ultimately be granted, the division is preparing for

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[22] *See, e.g.*, 3 U.S.C. § 1 (setting November date for presidential election); 42 U.S.C. 1973ff *et seq*. (setting deadlines for sending ballots to overseas and military voters); Alaska Stat. § 15.25.040 (setting candidate certification deadline); Alaska Stat. § 15.25.042 (setting deadline to determine eligibility of a candidate upon receipt of complaint); Alaska Stat. § 15.20.082(a)(setting deadline to distribute special absentee ballots); Alaska Stat. § 15.07.140 (setting deadline to make available to political parties list of registered voters); Alaska Stat. § 15.25.055 (setting deadline for candidate withdrawal from primary election ballot); Alaska Stat. § 15.10.080 (setting deadline to establish precinct boundaries); Alaska Stat. § 15.15.050 (setting deadline for delivery of ballots and election materials to regional offices); Alaska Stat. § 15.58.010 and Alaska Stat. § 15.58.080 (setting deadline for distribution of election pamphlets to voters); Alaska Stat. §§ 15.20.061 and 15.20.064 (setting deadline for early and absentee in-person voting); Alaska Stat. § 15.25.020 (setting date of primary election); Alaska Stat. § 15.20.081(h)(setting deadline for receipt of ballots from overseas voters); Alaska Stat. § 15.25.110 (setting deadline for filling of vacancies by party petition); Alaska Stat. § 15.25.200 (setting deadline for candidate withdrawal from general election ballot); Alaska Const. art. V, § 5 and Alaska Stat. § 15.15.020 (setting date for general election).

the election using the interim plan so that it will be able to hold a timely election in the event the plan is precleared.

ARGUMENT

I. Courts perform a three-part inquiry when considering challenges brought under Section 5 of the Voting Rights Act.

When entertaining a challenge such as this, courts typically apply a three-part inquiry, considering "whether § 5 covers a contested change, whether § 5's approval requirements were satisfied, and if the requirements were not satisfied, what temporary remedy, if any, is appropriate."[23]

This inquiry is entrusted to a three-judge panel,[24] because it involves a "clash between federal and state power and the potential disruption to state government."[25] As the U.S. Supreme Court has recognized, "Federal supervision over the enforcement of state legislation always poses difficult problems for our federal system," problems that "are especially difficult when the enforcement of state enactments may be enjoined and state election procedures suspended because the State has failed to comply with a federal approval procedure."[26]

In this case, the Court's three-part inquiry should be tempered by deference to the policy judgments of the Alaska Redistricting Board and the orders of the Alaska Supreme Court. The U.S. Supreme Court's recent decision in *Perry v. Perez* instructs that when entertaining a Section 5 challenge pending pre-clearance, a court

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23 *Lopez v. Monterey County, Cal.*, 519 U.S. 9, 23 (1996).
24 42 U.S.C. § 1973c(a).
25 *Allen v. State Bd. of Elections*, 393 U.S. 544, 562 (1969).
26 *Id.*

should not frustrate the policy decisions reflected in a state's redistricting plan unless the plan "stand[s] a reasonable probability of failing to gain § 5 preclearance."[27] The *Perry* decision involved the drawing of interim maps pending preclearance, but the same principle applies to determining whether to enjoin election preparations pending pre-clearance: the Court should avoid intruding on state sovereignty by frustrating the state's policies "without any reason to believe those state policies are unlawful."[28]

The plaintiffs have not asserted that Alaska's redistricting plan stands a reasonable probability of failing to be pre-cleared.[29] Their silence on the likelihood of preclearance is relevant to this Court's determination of the appropriate remedy. Without evidence that the plan is unlikely to be precleared, the Court should not preemptively frustrate the state's ability to hold an election.

II. The redistricting plan being used by the division is not subject to preclearance because Section 5 of the Voting Rights Act is unconstitutional both facially and as applied to Alaska.

The first part of this Court's three-part inquiry is to determine whether Section 5 applies to the voting change at issue, meaning that preclearance is necessary. Because Section 5 is unconstitutional both facially and as applied to Alaska, it does not cover Alaska's adoption of a redistricting plan and thus preclearance of the Amended Proclamation Plan is not necessary.

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[27] *See Perry v. Perez*, 132 S. Ct. 934, 942 (2012) (ruling that when district is charged with drawing interim electoral map for use while Section 5 preclearance is pending, the court should deviate from the state's redistricting plan only in those areas of the plan that "stand a reasonable probability of failing to gain § 5 preclearance.").

[28] *Id.* at 942.

[29] *See* Docket 1 at 1–9; Docket 4 at 1 – 12.

Although the D.C. Circuit recently upheld the 2006 reauthorization of Section 5 in *Shelby County v. Holder*—against a vigorous dissent—the majority's analysis is fundamentally flawed.[30] The majority recognized that "what is needed to make section 5 congruent and proportional is a pattern of racial discrimination in voting so serious and widespread that case-by-case litigation is inadequate," but nevertheless also found that a bailout mechanism that requires a "clean"—effectively perfect—record over a ten-year period is sufficient to make Section 5's coverage formula constitutional.[31] This is an untenable position. A jurisdiction that lacks a perfect record is not *therefore* one with a "serious and widespread" pattern of racial discrimination in voting.

Indeed, the legislative history of Congress's 2006 reauthorization of the VRA reflects a much more complex reality, in which most of the covered jurisdictions have made substantial improvements. Many compare favorably to non-covered jurisdictions in the key metrics that Congress used to measure race discrimination in voting. And Alaska provides a particularly powerful example of the mismatch that the coverage formula creates between the problem of voting discrimination and the remedy of Section 5.

But Congress failed to acknowledge these changes and to amend Section 5's coverage formula when it reauthorized the VRA for another 25 years in 2006. As the *Shelby County* dissent pointed out, the "freshest, most recent data" used in the coverage formula now "relate to conditions in November 1972—34 years before

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30 *See Shelby County II*, 2012 WL 1759997.

31 *Id.* at *14, 28.

Congress extended the act for another 25 years (and thus 59 years before the extension's scheduled expiration)."[32] As originally enacted in 1965, Section 5 was supposed to remain in effect for only five years. Paradoxically, the further the country moves beyond the serious historical voting discrimination problems that inspired the extraordinary remedy of Section 5, the longer the reauthorization periods chosen by Congress have become. Moreover, without considering the consequences to Section 5's constitutionality, Congress's 2006 reauthorization overruled two Supreme Court decisions that carefully interpreted the VRA to avoid constitutional problems.[33]

Because Congress failed to acknowledge the march of time and historical changes by carefully updating the coverage formula in 2006, Section 5 is no longer a congruent and proportional response to the problem of voting discrimination and should be struck down as an unconstitutional intrusion on an area of traditional state authority.

A. The appropriate standard of review for Section 5 is congruence and proportionality.

In order for Section 5 to pass constitutional muster as prophylactic legislation enforcing the 14th and 15th Amendments, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to

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32 *Shelby County II*, 2012 WL 1759997 at *31 (Williams, J., dissenting).

33 *See id.* at *4 (citing *Georgia v. Ashcroft*, 539 U.S. 461, 479–80 (2003) (holding that "any assessment of the retrogression of a minority group's effective exercise of the electoral franchise depends on an examination of all the relevant circumstances" and that "a court should not focus solely on the comparative ability of a minority group to elect a candidate of its choice") and *Reno v. Bossier Parish School Board*, 528 U.S. 320, 328 (2000) (holding that "the 'purpose' prong of § 5 covers only retrogressive dilution"); *id.* at *33-34 (Williams, J., dissenting) (explaining that in overruling *Georgia v. Ashcroft*, and *Reno v. Bossier Parish School Board*, Congress "not only disregarded but flouted Justice Kennedy's concern" about the race-conscious redistricting required by Section 5).

that end."[34]

In two recent cases on Section 5's constitutionality, *NAMUDNO* and *Shelby County*, the parties extensively debated the standard of review.[35] The jurisdictions challenging Section 5 relied on the 14th Amendment case *City of Boerne v. Flores*,[36] contending that prophylactic legislation must be "congruent and proportional" to the injury it is meant to prevent.[37] The DOJ, defending Section 5, relied on *South Carolina v. Katzenbach*,[38] arguing that prophylactic legislation under the 15th Amendment is different and need only be a "rational means" to effectuate constitutional provisions.[39]

In *NAMUDNO*, the Supreme Court acknowledged this debate but declined to resolve it, noting only that "[Section 5's] preclearance requirements and its coverage formula raise serious constitutional questions under either test."[40] But two years later in *Shelby County*, both the district and circuit courts agreed that the *Boerne* "congruence and proportionality" standard applies.[41] The D.C. Circuit read *NAMUDNO* as "sending a

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34 *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

35 *See Nw. Austin Mun. Util. Dist. No. One v. Holder (NAMUDNO II)*, 557 U.S. 193, 204 (2009); *Shelby County II*, 2012 WL 1759997 at *8-10; *Shelby County, Ala. v. Holder (Shelby County I)*, 811 F. Supp. 2d 424, 447-62 (D.D.C. 2011); *Nw. Austin Mun. Util. Dist. No. One v. Mukasey (NAMUDNO I)*, 573 F. Supp. 2d 221, 235-46 (D.D.C. 2008).

36 521 U.S. 507.

37 *See, e.g., Shelby County II,* 2012 WL 1759997 at *7 (noting that "Shelby County argues that the 'congruence and proportionality' standard for Fourteenth Amendment legislation applies").

38 383 U.S. 301.

39 *See, e.g., Shelby County II,* 2012 WL 1759997 at *7 (noting that "the Attorney General insists that Congress may use 'any rational means' to enforce the Fifteenth Amendment").

40 *NAMUDNO II*, 557 U.S. at 204.

41 *Shelby County II*, 2012 WL 1759997 at *8-10; *Shelby County I*, 811 F. Supp. 2d at 447-62.

powerful signal that congruence and proportionality is the appropriate standard of review" for Section 5.[42] And the district court found "no basis upon which to differentiate between the standards of review to be applied in the Fourteenth and Fifteenth Amendment enforcement contexts," holding that "*Boerne* merely explicated and refined the one standard of review that has always been employed to assess legislation enacted pursuant to both the Fourteenth and Fifteenth Amendments."[43]

Even if it were unclear whether the *Boerne* test applies to 15th Amendment legislation, it would still be the appropriate standard for this case because Alaska is covered by Section 5 due to 14th Amendment concerns about language discrimination—not 15th Amendment concerns about racial discrimination. Alaska successfully bailed out of Section 5 coverage in 1966 and 1972 because it did not have a sufficient record of racial discrimination. Exh. A at 29, 31. Alaska became a covered jurisdiction again in 1975 when Congress added language protections to the VRA and altered the Section 5 coverage formula to include states that had English-only elections and had a significant minority language population.[44] Congress relied on the 14th Amendment when it extended VRA protections to language minorities.[45] There is no doubt that the *Boerne*

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42 *Shelby County II*, 2012 WL 1759997 at *7.

43 *Shelby County I*, 811 F. Supp. 2d at 449.

44 42 U.S.C. §§ 1973b(f)(3), 1973l(c)(3).

45 *See Shelby County I*, 811 F. Supp. 2d at 461 (explaining that "in adopting the [VRA's] protections for language minorities in 1975 and then extending them in 2006, Congress expressly relied on its Fourteenth Amendment enforcement power as well, since the Fifteenth Amendment speaks only of discrimination on the basis of 'race.'"); *but see NAMUDNO I*, 573 F. Supp. 2d at 243–44 (asserting that Congress could have relied solely on the 15th Amendment in enacting protections for language minorities because language minority status is similar to race).

standard applies to legislation enforcing the 14th Amendment.[46]

The fact that Alaska's coverage under Section 5 is based on the 14th Amendment rather than the 15th Amendment also serves to distinguish this case from *Shelby County,* in which the court upheld Section 5.[47] *Shelby County* involved a jurisdiction covered by Section 5 due to a history of race discrimination in voting, prohibited by the 15th Amendment, rather than language discrimination, prohibited by the 14th Amendment's Equal Protection clause.

Accordingly, the appropriate standard of review is congruence and proportionality. But, as the U.S. Supreme Court recognized, Section 5 "raise[s] serious constitutional questions under either test."[48] Section 5 would be unconstitutional under even the more deferential standard because, as Alaska's record demonstrates, Section 5 is not even a rational response to the alleged problem.

B. Section 5 imposes extraordinary burdens on covered states, violating the principle of equal sovereignty and undermining federalism.

In applying Section 5 to Alaska, Congress has deprived the state of its equal sovereignty to a degree unauthorized by the Constitution. Section 5's radical intrusion on covered states' equal sovereignty requires a level of justification which Congress has not met and cannot meet in the case of Alaska.

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46 *See Boerne*, 521 U.S. at 520.

47 *See Shelby County II*, 2012 WL 175997 at *31.

48 *NAMUDNO II*, 557 U.S. 193, 204 (2009).

Alaska, like all states, was admitted to the union with sovereignty equal to the original states.[49] The Supreme Court has held that Congress's constitutional power to admit new states is a "'power to admit *states*,'" not a power "to admit political organizations which are less or greater, or different in dignity or power, from those political entities which constitute the Union."[50] Congress admitted the first two states into the Union, Vermont and Kentucky, each "'as a new and entire member of the United States of America.'"[51] Thereafter, every new state, including Alaska, was admitted to the Union "on an equal footing with the original states in all respects whatsoever," which the Court found to be "even stronger" language.[52] The union is "a union of states, equal in power, dignity, and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself."[53]

Section 5 gravely undermines equal sovereignty. The Supreme Court has acknowledged that it "differentiates between the States, despite our historic tradition that all the States enjoy 'equal sovereignty.' "[54] As Justice Black observed, Section 5 "radically curtail[s] the power of certain States to conduct their own elections while leaving other States wholly free of any such restraint."[55] Justice Black further opined that it is doubtful "that any of the 13 Colonies would have agreed to our Constitution if they had dreamed that the time might come when they would have to go to a United States

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49 *Coyle v. Smith*, 221 U.S. 559, 567 (1911).
50 *Id.* at 566 (emphasis added).
51 *Id.*
52 *Id.* at 567; *see* Alaska Statehood Act, § 1, Pub. L. No. 85-508, 72 Stat. 339 (1958).
53 *Coyle*, 221 U.S. at 567.
54 *NAMUDNO II*, 557 U.S. at 203 (internal citations omitted).
55 *Perkins v. Matthews*, 400 U.S. 379, 405 (1971) (Black, J., dissenting).

Attorney General or a District of Columbia court with hat in hand begging for permission to change their laws."[56] "Still less would any of these Colonies have been willing to agree to a Constitution that gave the Federal Government power to force one Colony to go through such an onerous procedure while all the other former Colonies, now supposedly its sister States, were allowed to retain their full sovereignty."[57]

Congress must sufficiently justify such a drastic departure from the bedrock principle of equal sovereignty. The Supreme Court has indicated that although Congress can make distinctions between states in some cases, it must substantiate the need for the distinction.[58] Although "[t]he doctrine of the equality of States ... does not bar ... remedies for local evils which have subsequently appeared," any "departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets."[59]

The required nexus should be applied with particular rigor to Section 5 because of that statute's debilitating intrusion on a state's ability to run its own elections. The Supreme Court has consistently recognized that the Constitution gives states primary authority over the structuring of electoral systems.[60] The "Framers of the Constitution intended the States to keep for themselves ... the power to regulate elections."[61]

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56 *Allen v. State Bd. of Elections*, 393 U.S. at 595-96 (1969) (Black, J., dissenting).

57 *Id.*

58 *NAMUDNO II*, 557 U.S. at 203.

59 *Id.* (internal citations omitted).

60 *See NAMUDNO II*, 557 U.S. at 216 (Thomas, J., dissenting) (citing *White v. Weiser*, 412 U.S. 783, 795 (1973); *Burns v. Richardson*, 384 U.S. 73, 84–85 (1966)).

61 *Id.* at 217 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 461–62 (1991)).

"No function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution the qualifications of their own voters for state, county, and municipal offices and the nature of their own machinery for filling local public offices."[62]

And because Section 5 "goes beyond the prohibition of the Fifteenth Amendment by suspending all changes to state election law—however innocuous—until they have been precleared by federal authorities in Washington, D.C," "its encroachment on state sovereignty is significant and undeniable."[63] This "encroachment is especially troubling because it destroys local control of the means of self-government, one of the central values of our polity."[64]

Section 5 significantly encroaches on Alaska's sovereign authority to conduct the elections of its own state officials in two ways. First, as Justice Black noted, Alaska must call upon Washington, D.C. officials—either the DOJ or a federal court—"with hat in hand begging for permission" to change its laws.[65] Alaska cannot move a polling place across the street, or amend a simple election-related form, without federal preclearance. Such examples could be viewed as mere annoyances if they did not vividly highlight that—without history or evidence of discriminatory voting practices—Alaska has been branded with Section 5's degrading mark as a state not sufficiently trusted to

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62 *Id.* at 216 (citing *Oregon v. Mitchell*, 400 U.S. 112, 125 (1970) (opinion of Black, J.)).

63 *United States v. Sheffield Bd. of Comm'rs*, 435 U.S. 110, 141 (1978) (Stevens, J., dissenting) (footnote omitted).

64 *City of Rome v. U. S.*, 446 U.S. 156, 201 (1980) (Powell, J., dissenting).

65 *Allen v. State Bd. of Elections*, 393 U.S. at 596 (Black, J., dissenting).

make even the most mundane changes without federal permission. And of course, the impact of Section 5 can be far more devastating. The circumstances of this case itself illustrate the possibility that Section 5 might, through no fault of the state, prevent Alaska from conducting an election and thereby deprive Alaskans of the right to choose their legislature in a timely and orderly manner.

In addition, Section 5's prohibition on any proposed changes that would have a retrogressive effect on minority voters compromises the requirements of the Alaska Constitution that are aimed at depoliticizing redistricting.[66] In attempting to comply with Section 5, Alaska's redistricting board had to sacrifice constitutional criteria for districts such as compactness, contiguity, conformity to existing political boundaries, and satisfaction of one person, one vote requirements. Exh. J. Moreover, as Justice Kennedy observed in *Georgia v. Ashcroft*, compliance with Section 5's command to avoid retrogression necessarily requires covered jurisdictions to consider race in drawing district boundaries in ways that seem contradictory to the prohibitions contained in Section 2 of the VRA and the 14th and 15th Amendments.[67] Because Alaska is a covered jurisdiction due to concerns about minority language assistance rather than a history of race discrimination in voting, Section 5 imposes an obligation to perform race-

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[66] *See Hickel v. Se. Conference*, 846 P.2d 38, 45 (Alaska 1992) (noting that Alaska's constitutional delegates incorporated the "requirements of contiguity, compactness and socio-economic integration …to prevent gerrymandering"); *Shelby County II*, 2012 WL 1759997 at *33 (Williams, J., dissenting) (noting that Section 5 "requires a jurisdiction not only to engage in some level of race-conscious decision making, but also on occasion to sacrifice principles aimed at depoliticizing redistricting").

[67] *See Georgia v. Ashcroft*, 539 U.S. at 491 ("Considerations of race that would doom a redistricting plan under the Fourteenth Amendment … seem to be what save it under § 5.")

conscious redistricting where race was not a consideration before.

This intrusion might be warranted under "exceptional conditions [that] can justify legislative measures not otherwise appropriate."[68] But Alaska's history does not identify a voting discrimination problem that can be characterized as "exceptional conditions." Unlike most other Section 5 covered jurisdictions, the racial minority group of concern in Alaska for VRA purposes is not African-Americans. Instead, Alaska Native are the only minority of sufficient size and geographic concentration statewide to be pertinent to the VRA.[69] Exh. EE at 7. And Alaska does not have a record of voting discrimination against Native Alaskans sufficient to justify the intrusive imposition of Section 5 on the state.

C. Alaska's record does not justify Section 5 coverage.

Both commentators and courts have reflected on the extensive record of continuing voting discrimination in the covered jurisdictions amassed by Congress in the 2006 reauthorization of the VRA.[70] But this aggregated evidence obscures the irrationality of the scope of Section 5 coverage, and this is particularly apparent in the case of Alaska. It is plain from the record compiled in support of the 2006 reauthorization that Congress could have had no basis to rationally conclude that Alaska's record on voting discrimination was so egregious as to warrant Section 5

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[68] *Katzenbach*, 383 U.S. at 334-35.

[69] On the island of Kodiak only, the Filipino population also appears to be covered under the VRA. Exhibit EE at 7.

[70] *See, e.g.*, *Shelby County II*, 2012 WL 1759997 at *4; Kristen Clarke, *The Congressional Record Underlying the 2006 Voting Rights Act: How Much Discrimination Can the Constitution Tolerate?*, 43 Harv. C.R.-C.L. L. Rev. 385 (2008).

coverage. And that reality illuminates the bankruptcy of the entire Section 5 formula, because Congress simply declined to reconsider the appropriate reach of this extraordinary intrusion on an area of traditional state concern.

Both the D.C. district court and the D.C. Circuit majority in *Shelby County* discussed several types of evidence in affirming the constitutionality of Section 5: voter registration and turnout statistics and the number of minority elected officials; racially polarized voting; successful Section 2 lawsuits; DOJ objections to preclearance submissions; DOJ requests for additional information ("more information requests," or MIRs); the deployment of federal observers tasked with monitoring elections; and Section 5 enforcement actions.[71] Review of the evidence that Congress had about Alaska's record on these matters does not provide a rational basis for Section 5 coverage of the state, much less a congruent and proportional response to any problem. And although Alaska is one of the more extreme outliers among the covered jurisdictions, its treatment is paradigmatic of Congress's failure to re-evaluate the record of individual jurisdictions to determine that continued Section 5 coverage was appropriate in each case.

Certain other types of evidence are not properly pertinent to Section 5 coverage. Congress must have before it evidence of current state discrimination in voting. Historical problems alone are insufficient, as "the Act imposes current burdens and must be justified by current needs."[72] And the evidence must be related to *voting* discrimination. Generalized evidence of disparities in life outcomes—for example,

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[71] *Shelby County I*, 811 F.Supp.2d at 465-66; *Shelby County II*, 2012 WL 1759997 at *11.

[72] *NAMUDNO II*, 557 U.S. 193, 203 (2009).

higher poverty rates or poorer educational outcomes among minorities—is not enough to justify the federal infringement on state sovereignty represented by Section 5. As the Supreme Court has explained, "a departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets."[73] Section 5 coverage is not a remedy for poverty or other social problems, and to allow otherwise would stretch federal power well beyond the limits of congruence and proportionality.[74]

i. Minority voter registration and turnout

Measuring minority voter registration and relative voter turnout among racial groups is difficult in Alaska because the state does not collect information about voters' racial identities. Fenumiai Affidavit, ¶ 12. Attempts at measuring voter turnout by race apply either proxies or regression analysis. But even though these estimates show some variations, none of them supports a finding that Alaska has a "serious and widespread" pattern of discrimination.[75]

One source of estimates is the expert reports submitted in support of recent redistricting preclearance submissions. Dr. Lisa Handley served as the VRA consultant for the redistricting board in the 2000 and 2010 redistricting cycles. *See* Exh. N at 1; Exh. O at 1. She used three different methodologies for estimating Alaska Native voter

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73 *Id.*

74 *Cf. Farrakhan v. Washington*, 359 F.3d 1116, 1122-27 (2004) (Kozinski, J., dissenting from denial of en banc rehearing).

75 *See Shelby County II*, 2012 WL 1759997 at *12 ("[W]hat is needed to make section 5 congruent and proportional is a pattern of racial discrimination in voting so serious and widespread that case-by-case litigation is inadequate.").

turnout and determined that in elections from 1996 through 2010, Alaska Native turnout generally slightly exceeded white turnout. *See* Exh. N at 18; Exh. O at 18.

Other sources suggest that Alaska Native turnout may be slightly lower than non-Native turnout, but these sources either used only one of Dr. Handley's methodologies — homogenous precinct analysis, or a lay variation thereof[76]— or do not reveal their methodology at all.[77] Thus, the best estimates of relative turnout do not indicate a problem of low minority participation in the political process in Alaska.

ii. Minority elected officials

Both the majority and dissent in *Shelby County* found the election of minority officials to be relevant to the existence of racial discrimination in voting.[78] Alaska stands out in this regard because of its many Alaska Native elected officials.

The number of Alaska Native elected officials closely corresponds to the Alaska Native share of the state's voting-age population. Evidence in the legislative record of the VRA reauthorization shows that in 2006, seven of the sixty-member Alaska

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[76] *See* Exh. E. The authors attempted to measure Alaska Native turnout by compiling a list of communities with a population 80% or greater Alaska Native and averaging voter turnout in those communities over four presidential election cycles, 1992-2004. *Id.* at 24 – 25. The authors found much variation in the rate of turnout but calculated an average turnout in these communities of 50%, compared to a statewide turnout of 66.6%. *Id.* at 25. They did not explain how they derived the average statewide turnout for the four election cycles studied.

[77] *See* Exh. P at 4-15, 14, which fails to identify the data on which it relies and does not explain the methods for analyzing that data. To the extent the report can be relied on at all, it also shows that the alleged disparity between Native and non-Native turnout is not a long-standing phenomenon. Rather, Alaska Native and non-Native turnout rates were comparable in the 1996 election, but non-Native turnout spiked in 2000 and 2004. *See id.* at 14. A recent history of comparable turnout rates followed by an uptick in non-Native turnout does not create a strong inference of racial discrimination in voting.

[78] *Shelby County II*, 2012 WL 1759997 at *21 – 22 (Williams, J., dissenting).

legislature were Alaska Native.[79] Thus, the ratio of the proportion of Alaska Native elected officials (11.6%) against the Alaska Native share of voting-age population (13.7%), Exh. Q at 45, is almost one-to-one (.847).

If minority candidates' inability to be elected is evidence of racial discrimination in voting,[80] then their election in proportion to minority voters' percentage of the voting-age population suggests the absence of such discrimination.[81] And Alaska is among the best in the nation in this regard. *See* Exh. R. In his dissenting opinion in *Shelby County*, Judge Williams drew a chart showing each state's ratio of black elected officials to its black share of the citizen voting-age population.[82] When Alaska's ratio regarding Alaska Native elected officials is compared to other states' ratio for black elected officials, Alaska's ratio is closer to one-to-one than any other state. Exh. R.

And the election of Alaska Natives to legislative office is not a recent phenomenon. Although the election of minority officials was exceedingly rare in some covered jurisdictions until the advent of the VRA,[83] Alaskans have been electing Alaska Native candidates to legislative office since well before statehood: ten

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79 S. Rep. No. 109-295, at 134 (2006)(citing Nat'l Comm'n on the Voting Rights Act, *Protecting Minority Voters: The Voting Rights Act at Work*, 1982 – 2005 (2006), attached as Exh. Q). The Senate Report mistakenly describes the Alaska Legislature as having 67 members. *Id.*

80 H.R. Rep. 109-478, at 32 – 33.

81 *Shelby County II*, 2012 WL 1759997 at *37 (Williams, J., dissenting).

82 *Id.* The chart shows that the states with a ratio closest to one-to-one—that is, those states where the percentage of black elected officials mirrors the percentage of black voters—tend to be the states which are fully or partially covered by Section 5. Because the figure excludes states in which blacks make up less than 3% of the state's voting-age population, *id.*, Alaska was excluded from the comparison.

83 *See* Exh. Q at 32 ("By ... 1910, the black franchise in the South had been severely restricted, and black officeholders in the region had virtually disappeared.").

Alaska Native legislators were elected in territorial days between 1925 and 1958. *See* Exh. S.

As the *Shelby County* dissent points out, Congress essentially ignored the clear evidence of remarkable gains in minority representation in the Southern states by 2006, putting many of the non-covered jurisdictions to shame.[84] In Alaska the level of minority representation has been and remains consistently high, providing strong evidence of a lack of voting discrimination in the state.

iii. Racially-polarized voting

Racially polarized voting data does not provide evidence of voting discrimination sufficient to justify Section 5 because it is not a measure of state action and because even if it were, the data for Alaska does not demonstrate a problem.

Racially polarized voting, which Congress understands to "occur[] when voting blocs within the minority and white communities cast ballots along racial lines,"[85] is entirely beyond the state's control. The voting choices of private individuals are irrelevant to uncovering discriminatory action—much less intention— by the state.[86]

Courts and Congress have theorized that this data is important because of the "close link between racially polarized voting and intentional, state-sponsored

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84 *Shelby County II*, 2012 WL 1759997 at *31-32.

85 H.R. Rep. No. 109-478, at 34 (2006).

86 *See NAMUDNO II*, 557 U.S. at 228 (Thomas, J., concurring in part and dissenting in part) ("['Second generation barriers are] not probative of the type of purposeful discrimination that prompted Congress to enact § 5 in 1965. . . [R]acially polarized voting is not evidence of unconstitutional discrimination, is not state action, and is not a problem unique to the South.") (internal citations omitted).

minority vote dilution."[87] The *Shelby County* district court acknowledged that racially polarized voting "does not provide evidence of unconstitutional voting discrimination by covered jurisdictions" but asserted that the data is important because state attempts to dilute minority voting strength "can only be effective in areas that are marked by racially polarized voting."[88] Thus, racially polarized voting data shows only that state action with the goal of diluting minority voting strength—*if attempted*—may prove effective. It provides no evidence whatsoever that such discriminatory state action actually has occurred or is likely to occur. Moreover, the VRA protects minority voters against vote dilution on the assumption that they might vote for a candidate who is not the majority-preferred candidate. Using racially polarized voting as a discrimination metric thus punishes states for voter preferences the VRA seeks to protect.

And even if racially polarized voting is considered, it does not justify the imposition of Section 5 on Alaska. In state elections from 1994-2000, Alaska Native and non-Native voters "often prefer[red] the same candidates" and when they preferred different candidates, "the Native-preferred candidate usually wins." Exh. N at 2. Although Dr. Handley found evidence of racial polarization in elections between 2002 and 2010, she also found that the 2011 proclamation plan would protect Alaska Native voters' ability to elect their preferred candidate. Exh. T at 4. And the DOJ precleared the plan despite the evidence of polarization, *id.*at 1, indicating that even the DOJ does not consider this to be evidence of official discrimination. Racially polarized voting in

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87 *Shelby County I*, 811 F. Supp. 2d at 488.

88 *Id.*

Alaska, to the extent that it exists and is relevant, simply does not provide evidence of state voting discrimination.

iv. Successful Section 2 lawsuits

Although Congress may have "reasonably concluded that successful Section 2 suits provide powerful evidence of unconstitutional discrimination,"[89] such suits could only be evidence of unconstitutional discrimination in Alaska if they actually involved Alaska.[90] Because none of the evidence before Congress concerning Section 2 litigation involves Alaska, this evidence cannot justify subjecting Alaska to continued coverage under Section 5.

The *Shelby County* court, in applying the congruence and proportionality standard of review to Section 5, noted that the key question is whether Section 2 litigation is adequate to address the issue of voting discrimination in the covered jurisdictions.[91] As the court put it, "what is needed to make Section 5 congruent and proportional is a pattern of racial discrimination in voting so serious and widespread that case-by-case litigation is inadequate."[92]

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89 *Shelby County II*, 2012 WL 1759997 at *17.

90 Notably, this assumption ignores the inherent tension between the commands of Section 2 and Section 5 recognized by Justice Kennedy in *Georgia v. Ashcroft*, 539 U.S. at 491, and the *Shelby County II* dissent. *Shelby County II*, 2012 WL 1759997 at *44-46.

91 *Id.* at *14 (stating "basic question" to be: "Does the legislative record contain sufficient probative evidence from which Congress could reasonably conclude that racial discrimination in voting in covered jurisdictions is so serious and pervasive that section 2 litigation remains an inadequate remedy?").

92 *Id.* at *12.

The legislative record contains no evidence of successful Section 2 suits in Alaska.[93] Although the record contains evidence that more successful Section 2 cases have been filed in the covered jurisdictions *as a group* compared to the non-covered jurisdictions as a group,[94] the evidence pertaining to individual states shows a much more varied picture. Yet Congress has lumped Alaska—which has not seen a single successful Section 2 suit—in with states that have seen hundreds.

Congress's evidence of Section 2 litigation outcomes comes primarily from two sources. The first is a study by Professor Ellen Katz documenting published decisions in Section 2 cases nationwide.[95] Congress relied on the Katz study's finding that more than half of successful Section 2 cases were filed in covered jurisdictions even though covered jurisdictions contain only 39% of the U.S. population.[96] The Katz study also found a higher rate of success in Section 2 litigation in covered jurisdictions as a group than in non-covered jurisdictions as a group. Exh. U at 14.

But when the Katz study's data on individual states is examined, the generalities break down. The data shows that no successful Section 2 suits have been

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93 S. Rep. 109-295, at 77 (showing that Alaska (including its political subdivisions) has never received an adverse outcome in Section 2 litigation). The one instance of significant VRA litigation in Alaska, *Nick v. Bethel,* 3:07-cv-0098-TMB (D. Alaska), involved claims of inadequate language assistance under Sections 203 and 208 of the VRA, not voting discrimination claims under Section 2.

94 H.R. Rep. No. 109-478, at 53.

95 Ellen Katz, *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 Mich. J. Law Reform 643 (2006), cited in S. Rep. No. 109-295, at 86. A copy of the Katz study is attached as Exh. U.

96 H.R. Rep. No. 109-478, at 53 (quoting Katz, *supra*).

filed in Alaska.[97] The data also shows that many non-covered jurisdictions—such as Montana, Arkansas, and Illinois—have had more successful Section 2 suits, both in absolute terms and on a per capita basis, than several of the covered jurisdictions, such as Alaska, Arizona, and Georgia.[98] As the dissent in *Shelby County* observed, the data compiled in the Katz study provides scant justification for the section 4(b) coverage formula in general, and no justification at all for Alaska's coverage under the Act.[99]

The second source Congress relied on is equally silent on Section 2 litigation in Alaska. The National Commission on the Voting Rights Act collected data on the number of Section 2 claims "resolved in a manner favorable to minority voters" without a published judicial decision. Exh. Q. But the Commission did not collect any data from Alaska.[100] Nor did the Commission collect any data from non-covered jurisdictions,[101] making impossible any comparison between individual covered jurisdictions and individual non-covered jurisdictions—the comparison needed in order to "target jurisdictions with the most serious problems."[102] Congress therefore had no evidence in the form of Section 2 litigation outcomes that would justify subjecting Alaska to continued coverage under Section 5.

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97 S. Rep. No. 109-295, at 65, 77.

98 See S. Rep. No. 109-295, at 77 – 81; *Shelby County II*, 2012 WL 1759997 at *39, fig. V (Williams, J., dissenting). Figure V is attached as Exh. V.

99 *See Shelby County II*, 2012 WL 1759997 at *39 (Williams, J., dissenting) (noting absence of successful Section 2 litigation in Alaska in opining that "a formula with an error rate of 50% or more does not seem 'congruent and proportional.' ").

100 Exh. Q at 85. The Commission explained that it did not collect information from Alaska "because of limited information available in the short time in which the research was conducted." *Id.*

101 *See id.*

102 *Shelby County II*, 2012 WL 1759997 at *26.

And in the course of Alaska's history as a covered jurisdiction, there has been only one significant VRA lawsuit.[103] *Nick v. Bethel*, which did not involve any Section 2 claims, Exh. W at 9-11, was filed against the state in 2007. The case resulted in a settlement agreement between the parties in February 2010, and during the course of the litigation, one important legal ruling favored Alaska.

The *Nick* plaintiffs were Yup'ik-speaking voters residing in the Bethel census area. They sued several division officials, as well as the city of Bethel and its municipal clerk. The litigation had two goals. First, believing that it was required by the VRA, the plaintiffs sought to force Alaska to create a written language assistance program for Yup'ik speakers. They also requested court assistance in improving Alaska's current oral language assistance improvement program. Exh. W at 7-11.

The plaintiffs failed at the first goal and succeeded in the second. The court refused to require Alaska to enact a written language assistance program, holding instead that the state had no obligation under the VRA to assist Yu'pik speakers using written materials because Yup'ik was not a historically written language. Exh. F at 11, 15.

The second goal of the *Nick* litigation was to improve Alaska's existing oral language assistance program. Here, the plaintiffs arguably succeeded; the case resolved with a court-approved settlement agreement in which the parties agreed that Alaska would expand its existing Bethel-area language assistance program to include additional

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[103] Another short-lived VRA lawsuit was filed two days before the 2010 general election, alleging violations of both Section 5 and Section 2 of the VRA. The Section 5 claim (discussed below) was almost immediately mooted by preclearance and plaintiffs, who did not pursue the litigation after the election, voluntarily dismissed their Section 2 claim in February 2011. Exh. Y at 5,8; Exh. Z at 1-2.

training, outreach, work with bilingual poll workers, and translation of various election materials to assist poll workers in assisting Yu'pik-speaking voters. Exh. AA.[104]

The existence of one partially successful VRA lawsuit against Alaska is not persuasive or sufficient evidence that the state should be a covered jurisdiction. First, the *Nick* case was in many ways a victory for Alaska; the federal court roundly rejected the plaintiffs' assertions that Yu'pik was a historically written language subject to the written language assistance requirement.

More fundamentally, although the *Nick* litigation may reasonably be characterized as a partially successful VRA lawsuit, it is the *only* VRA lawsuit filed against the state in its entire history that is related to the underlying reason for Alaska's Section 5 coverage. Given the existence of only one, partially successful suit, it strains credulity to argue that the litigation record reflects "continued efforts by [a] recalcitrant jurisdiction[] not only to enact discriminatory voting changes, but to do so in defiance of Section 5's preclearance requirement."[105] If it proves anything, the litigation record reflects that Alaska is not engaged in such tactics.

v. DOJ objections to preclearance submissions

By its own report, the DOJ has formally objected to just one state

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104 Notably, although these upgrades were ultimately enacted pursuant to the *Nick* settlement agreement, the state earlier had proposed a similar upgrade program on its own initiative. Exh. BB. The proposal was withdrawn after the DOJ responded with an onerous MIR; the program upgrades negotiated by the parties were instead approved by the *Nick* court. *See* Fenumiai Affidavit, ¶ 17.

105 *Shelby County II*, 2012 WL 1759997 at *19.

preclearance submission in the history of Alaska's Section 5 coverage.[106] This objection was to the redistricting plan that was devised after the 1990 census but not finalized until 1994 due to extensive litigation. This single objection does not support the conclusion that Alaska has a "pattern of racial discrimination in voting so serious and widespread that case-by-case litigation is inadequate."[107] Although the DOJ has sent several MIRs, it has not formally objected to any other preclearance submissions before or since the 1993 redistricting process. Fenumiai Affidavit ¶14-15.

In their report "Voting Rights in Alaska 1982-2006," Natalie Landreth and Moira Smith discuss the 1993 redistricting cycle. The report states that the DOJ's objection in September 1993 was based on the fact that House District 36 and its companion Senate District R "showed evidence of racially polarized voting and that the proposed plan reduced the Alaska Native share of the [voting age population] from 55.7 percent to 50 percent." Exh. E at 40. Landreth and Smith characterize this objection as "the last line of defense, as it were" in preventing "retrogressive practices" from becoming effective in Alaska in 1993. *Id.*

But the DOJ's objection—and the assumptions of the Landreth & Smith report—are grounded in the constitutionally questionable requirement that Alaska engage in race-conscious redistricting even though Alaska is a Section 5 jurisdiction based on minority language statistics rather than on any history of racial discrimination in voting. Further, the report lionizes the role of the DOJ and Section 5 enforcement in Alaska in a

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106 *See* http://www.justice.gov/crt/about/vot/sec_5/ak_obj2.php (last visited June 20, 2012, 11:20 a.m.).

107 *Shelby County II*, 2012 WL 1759997 at *12.

manner belied by history: the scant record of the DOJ's objections to Alaska's preclearance submissions is irrefutable. A single formal objection in four decades of Section 5 coverage cannot reasonably be considered the type of evidence sufficient to justify the extraordinary federal imposition permitted by Section 5.

vi. More information requests from the DOJ (MIRs)[108]

The MIRs that the DOJ has made to Alaska also do not reflect a pattern of racial discrimination in voting. In Alaska's history as a covered jurisdiction, only 0.01% of all preclearance submissions have received MIRs—a total of five MIRs out of 488 submissions.[109] Of the five, three proposed changes were subsequently precleared after Alaska submitted more information, and the division withdrew the other two. *Id.* at 15. Alaska's experience with MIRs does not show discriminatory intent, but rather exemplifies the disproportionate burden Section 5 places on the state.

Because MIRs do not reflect a judgment on the merits of a proposed change,[110] both MIRs themselves and a jurisdiction's decision to modify or withdraw proposed changes in response have low probative value as measures of discriminatory intent. An MIR's purpose is merely to "enhance the information that [the DOJ] has

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[108] The DOJ may respond to a preclearance submission by issuing a formal letter requesting more information before making its decision—an MIR. *See Shelby County I*, 811 F. Supp. 2d at 476. Upon receipt of an MIR, a covered jurisdiction may (1) supply the requested information; (2) withdraw the proposed change; (3) submit a proposed change to supersede the initial proposal; or (4) choose not to respond. *See id.*

[109] Fenumiai Affidavit, ¶ 14. Ms. Fenumiai's affidavit describes only four of the five MIRs. The fifth—the 1999 Census MIR—was directed to the Alaska Department of Law without including the division. Exh. II at 22-26.

[110] *See Shelby County II*, 2012 WL 1759997 at *16.

available to assess a proposed change."[111] Although Congress inferred that withdrawal of a change in the face of an MIR could be a tacit admission that the change was discriminatory, a jurisdiction may have many legitimate reasons for withdrawing a change rather than responding.[112] Sometimes the change may not be worth the trouble, particularly when the MIR is oppressively broad. Compiling additional information may be impractical when resources are limited, or when, because election deadlines are close, it could jeopardize a timely and orderly election. Thus, MIRs can be analyzed as evidence of discriminatory intent only on a case-by-case basis.[113]

Tlingit and Tsimshian Language Assistance MIR

Alaska discontinued its voter language assistance program for Tlingit and Tsimshian speakers in 2009 because every speaker of these languages also spoke English. Exh. CC. The DOJ requested additional evidence. Exh. DD. In response, the division provided census data, surveyed 44 organizations representing Southeast Alaskan communities, and took testimony from experts at the Sealaska Corporation— the largest Alaska Native-run corporation and Alaska Native landholder in Alaska. Exh. CC. All responses confirmed the division's conclusion that state resources would be better allocated to other language groups with greater need. Exhs. CC; EE. The MIR therefore served only to impede the division's ability to apply its knowledge of local matters and to delay its more efficient allocation of limited state resources.

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111 2 *Voting Rights Act: Evidence of Continued Need: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 109th Cong. 2d Sess. 2546 (Mar. 8, 2006).

112 *Shelby County II*, 2012 WL 1759997 at *16.

113 *See Shelby County I*, 811 F. Supp. 2d at 476-77.

Coastal Resource Service Areas Board (CRSA) Elections MIR

After the Alaska Legislature declined to renew the Alaska Coastal Management Program,[114] the division sought preclearance to cease holding elections for coastal resource district boards that were no longer necessary. Exh. FF. Underscoring the absurdity of Section 5, the DOJ filed an MIR. Exh. GG. The division then had to spend two months and needless resources to compile a supplementary submission, solely to justify to the federal government why it was no longer holding elections for a defunct government agency.[115]

1999 Census MIR

In September 1999, the state submitted a preclearance request for House Joint Resolution (HJR) 44, an amendment to the Alaska Constitution changing Alaska's redistricting procedure, and Senate Bill (SB) 99, a statute to implement the amendment. Exh. II at 1-12. SB 99 specified that only official census data would be used for redistricting in Alaska after the 2000 census. Exh. II at 18.

In its preclearance submission, the state correctly anticipated that any claim that these changes adversely affected minority voters would center on the use of only official census data. Exh. II at 5. And indeed, in November 1999, the DOJ sent an MIR indicating that it was concerned that SB 99 required use of census data that was likely to undercount minority citizens at rates greater than those at which white citizens

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[114] HCS CSSB 102, Chapter 31, SLA 2005.

[115] The division submitted the proposed elimination of board elections on September 16, 2011, Exh. FF, but did not receive preclearance until January 18, 2012, Exh. HH.

are undercounted, and about the inclusion of nonresident military personnel in the numbers to be used for future redistricting. Exh. II at 22-26. Six months later, the state responded with several binders' worth of information answering each of the DOJ's concerns. Exh. II at 27-40. Accordingly, on June 29, 2001, the DOJ granted preclearance of HJR 44 and SB 99 on a standard form letter. Exh. II at 52.

In their article on voting rights in Alaska, Landreth and Smith speculate that although the 2000 redistricting was uneventful, "the preclearance process had singled out an issue that could have caused significant problems, especially since here it could have undercut the validity of all the 2000 redistricting." Exh. E at 40-41. In so doing, they fail to acknowledge that the change originally submitted for preclearance and the change ultimately precleared were identical in all respects. This is evident from Alaska Statute 15.10.200, which today remains the codified version of SB 99 as enacted. Therefore, the preclearance process made no difference to the law enacted; it simply imposed a substantial and unnecessary burden on the state.

Nick Language Assistance MIR

The next MIR arose in the context of the *Nick v. Bethel* litigation. As discussed above, the *Nick* plaintiffs sought a written language assistance program for Yup'ik speakers. They also requested court assistance in improving Alaska's current oral language assistance improvement program. Exh. W. After the *Nick* plaintiffs filed suit, the division sought preclearance for an upgraded language assistance program. Exh. BB. The preclearance submission disclosed the existence of the *Nick* litigation and attached the complaint. *Id.* at 4, 44-54. The submission included upgrades to the oral language

assistance for traditionally unwritten Alaska Native languages and a written language assistance program for Tagalog, a historically written Filipino language. *Id.* at 1-2, 6-10.

Unfortunately, Alaska's submission got caught in the crossfire of *Nick* litigation strategy, and numerous groups affiliated with the *Nick* plaintiffs objected to Alaska's proposed language assistance program. Exh. JJ. In light of these objections, the DOJ responded with an MIR asking for sixteen additional types of detailed information. Exh. KK. Faced with this onerous MIR and the prospect of justifying its decisions about its language assistance program both to the DOJ and in court, Alaska simply withdrew its preclearance submission. Exh. LL. A very similar language assistance program was ultimately negotiated by the parties and approved by the *Nick* court, alleviating the need for preclearance. Exh. AA.

In light of the litigation-entwined context of the MIR, the court's ultimate approval of a very similar program, and the court's determination that Alaska had no legal obligation to provide written language assistance in Yup'ik, the 2008 language assistance MIR cannot reasonably be construed as evidence that Alaska's proposed program was discriminatory. Indeed, the federal court's approval of a language assistance program similar to the one for which Alaska sought preclearance indicates that it was not discriminatory or retrogressive. Thus, the primary effect of Section 5 coverage in that case was to delay the implementation of an improved language assistance program until after the election.

Tatitlek and Cordova Precinct Consolidation MIR

In preparation for the 2008 election, the division proposed the consolidation

of several precincts. The division's motivation for the changes was to address problems with ballot secrecy in precincts with extremely low turnout and to improve voter turnout in those precincts by improving access to polling places. Exh. MM. The potential benefits that the division envisioned never occurred, however, because the DOJ issued an extensive MIR in July 2008, to which the division could not respond in time to implement the change in 2008. Exh. NN; Fenumiai Affidavit, ¶ 12. The 60-day clock for preclearance would have restarted when the state submitted the requested information,[116] and given the magnitude of the MIR, the division would first have had to spend significant time, effort and resources with little hope that the process could be completed in time for the August primary.

Alaska's sparse MIR record thus provides no evidence of discrimination. Indeed, the scarcity of MIRs and the burden that each one places on the state underscores the absence of congruence and proportionality in applying Section 5 to Alaska.

vii. Federal observers

The number of times federal election observers have been sent to Alaska also does not provide evidence of voting discrimination sufficient to justify Section 5, both because few federal observers have ever been sent to Alaska and because the presence of federal observers does not necessarily indicate any violation.

When the VRA was reauthorized in 2006, the National Commission on the

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116 28 C.F.R. 51.9(b).

VRA reported to Congress that no federal observers had ever been sent to Alaska.[117] Congress therefore could not actually have relied in any way on the state's history of federal observers to justify the reauthorization of Section 5.

And Alaska's post-2006 experience demonstrates that federal observers are a problematic measure of voting discrimination in any event because the decision to send them is not necessarily related to any actual violation. The Attorney General certified election observers in the Bethel Census Area in 2009 and 2010.[118] The observers were dispatched on the basis of allegations made by opposing counsel in pending litigation, and the DOJ did not notify the state of the request or invite it to respond to the allegations. Fenumiai Affidavit, ¶¶ 32-36. Alaska could not question the decision to send observers, which is unreviewable,[119] and the division has never been told what was observed. Fenumiai Affidavit, ¶ 35.

Based on this experience, it appears that the jurisdiction running an election has no control whatsoever over the DOJ's decision to send observers. Without court approval or notice to the jurisdiction, the Attorney General can dispatch federal observers

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[117] *See* Exh. Q at 172. Election observers in fact were present in Kodiak, Alaska to monitor the 2004 municipal and general elections. Fenumiai Affidavit, ¶¶ 25-31. According to available records, the state was not formally certified for federal observers in the Kodiak Island Borough, and it appears that the monitors were sent to make sure that the state was providing bilingual language assistance for Tagalog, which was required as of 2002. *See id.*

[118] *See* http://www.justice.gov/crt/about/vot/examine/activ_exam.php (last viewed June 17, 2012); Fenumiai Affidavit, ¶¶ 25, 36.

[119] *See United States v. Louisiana,* 265 F.Supp. 703, 715 (E.D. La. 1966) *aff'd sub nom. Louisiana v. United States*, 386 U.S. 270 (1967) ("Under Section 8 of the Voting Rights Act of 1965, 42 U.S.C. § 1973f, the appointment of observers is a matter of executive discretion and is not subject to judicial review.")

to a Section 5 jurisdiction upon certification that

> (A) the Attorney General has received written meritorious complaints from residents, elected officials, or civic participation organizations that efforts to deny or abridge the right to vote under the color of law on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title are likely to occur; or
>
> (B) in the Attorney General's judgment ... the assignment of observers is otherwise necessary to enforce the guarantees of the 14th or 15th amendment....[120]

At the request of opposing counsel in *Nick v. Bethel*,[121] the Attorney General certified the Bethel Census Area for federal observers on October 1, 2009, stating that "in my judgment the appointment of federal observers is necessary to enforce the guarantees of the Fourteenth and Fifteenth Amendments of the Constitution of the United States...." *See* Fenumiai Affidavit, ¶ 33; Exh. PP. Despite the statute's requirement that before certifying the need for federal observers, the Attorney General should consider whether "substantial evidence exists that bona fide efforts are being made within such subdivision to comply with the 14th or 15th amendment," the state's records do not show that the DOJ ever asked it to provide any evidence of its efforts to do anything. Fenumiai Affidavit, ¶ 35. The DOJ apparently did not inform the state that anyone had requested federal observers, or that it was considering dispatching them based on allegations of state election misconduct.

The state became aware that one of the attorneys involved in the pending *Nick* litigation was asking for federal observers when that attorney gave "misleading and

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120 42 U.S.C. § 1973f(a)(2).

121 Case no. 3:07-CV-0098-TMB; Exh. OO at 13.

inflammatory" testimony, *see* Exh. QQ, to a house subcommittee in March of 2009. *See* Fenumiai Affidavit, ¶ 32; Exh. OO. The attorney described the state in the worst light possible. After making his allegations, he asked the subcommittee to "encourage Attorney General Holder to appoint federal observers in Alaska." Exh. OO at 13.

Opposing counsel could make one-sided representations to Congress and to the DOJ without giving the state a chance to respond, but it could not do so in court. The same attorneys asked this Court to order election observers under 42 U.S.C. 1973a(a) in the *Nick* litigation, a forum where Alaska was given a fair opportunity to respond by presenting evidence and argument. The Court denied the request, stating that "[g]iven 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."[122]

Nevertheless, because of the Attorney General's certification, federal observers went to Bethel for local elections in October, 2009. Fenumiai Affidavit, ¶ 34; Exh. PP. Since then, the DOJ has never given the state a report or any feedback from the observers, and never notified it that its practices were improper or illegal. *Id.*, ¶ 35. The process remains shrouded in secrecy.

In 2010, the Attorney General again certified Bethel for federal observers, again at the request of opposing counsel in the *Nick* litigation, and again without any notice to the state that a complaint had been filed. Fenumiai Affidavit, ¶ 36; Exhs. RR;

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122 *Nick v. Bethel,* no. 3:07-cv-0098-TMB, Order re: Plaintiffs' Motion for a Preliminary Injunction Against the State Defendants, docket 327, July 30, 2008 at 11.

SS, W. Although the complaint letter purported to copy a state attorney, opposing counsel delivered it by fax and Federal Express to the DOJ thousands of miles away in Washington, D.C. six days before delivery to Alaska's attorneys. *See* Fenumiai Affidavit, ¶ 36; Exhs. TT; RR. By then, the DOJ had already made its decision to certify without any input from the state—the division first learned of the matter when a DOJ attorney called to inform the state of the certification. Fenumiai Affidavit, ¶ 36. And again, despite opposing counsel's very specific list of potential problems that it alerted the observers to watch for, Alaska has never received a report or other indication of what they saw.

The state will continue to accommodate federal observers and welcomes suggestions to improve its elections. But the process by which the DOJ decides to dispatch observers makes their presence a poor gauge of whether Section 5 oversight is justified. As Alaska's experience shows, the presence of election observers actually demonstrates only that someone has requested them and made allegations that they might see improper election practices.

viii. Successful Section 5 enforcement actions

The DOJ has never filed a Section 5 enforcement action against Alaska, and to the division's knowledge, it has been sued for violating Section 5 on only three occasions. Fenumiai Affidavit, ¶ 38-40. The first was *Nick v. Bethel*, which settled before the three-judge panel convened. This lawsuit is the third.

The second was during the 2010 general election, when, faced with a major write-in campaign by the incumbent U.S. Senator, the division decided to provide poll

workers with a list of write-in candidates for use in providing legally required assistance to any voters who requested help with write-in voting.[123] The division sought expedited preclearance for this change on October 15, 2010, and the DOJ precleared the change on October 26. Exhs. UU; VV. However, on October 27, 2010, the Alaska Supreme Court ordered the removal of party affiliation information from the list—and although the division immediately sought expedited preclearance of that further change—the division was sued on October 30, 2010 for obeying the court's order without first obtaining preclearance. Exh. Y. The DOJ precleared the change two days later, Exh. WW, but the incident highlights the manner in which Section 5 coverage hamstrings a jurisdiction's ability to respond quickly to election-related developments and state court orders, and exposes it to unwarranted litigation.

In sum, then, when Congress reauthorized the Section 5 coverage formula in 2006 it ignored the individual records of the covered states. If it had bothered to consider Alaska's record disaggregated from other covered jurisdictions, it would have learned that there had never been a successful VRA lawsuit against the state; that the DOJ had objected to only one preclearance submission in the history of Alaska's coverage and never dispatched federal observers to the state; and that Alaska Natives had been elected to the legislature in numbers roughly proportional to their representation in

[123] Alaska Stat. § 15.15.240.

he voting-age population. The suggestion that this record reflects the kind of "flagrant" voting discrimination that Section 5 is intended to target is absurd.[124]

* * *

This review of the evidence of Alaska's voting practices and experiences under Section 5 demonstrates the inadequacy of the 2006 reauthorization record. As the the *Katzenbach* court explained and the *Shelby County* majority recognized, Section 5 may be appropriate where case-by-case litigation is inadequate to protect voting rights.[125] But in 2006, the only evidence of voting discrimination in Alaska that was before Congress was a single DOJ objection to a redistricting plan, some questionable numbers on Alaska Native voter turnout, and testimony complaining about the state's language assistance program from an attorney actively suing the state on that issue. The evidence included no successful Section 2 litigation; no Section 5 enforcement actions (other than one filed against the Municipality of Anchorage, which is not under state control); no certified federal observers; and close to proportional representation of the state's major minority population in the state legislature. Since 2006, the concerns about the state's language assistance program have been addressed in a single lawsuit—exemplifying the appropriateness of a "case-by-case" approach in Alaska. This record is inadequate to justify coverage under Section 5.

Moreover, it exposes a deeper problem with the 2006 reauthorization of the

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[124] Nor does the single partially-successful VRA lawsuit and related dispatch of federal observers that has occurred since 2006 affect that analysis.

[125] *Katzenbach*, 383 U.S. at 328; *Shelby County II*, 2012 WL 1759997 at *12.

Section 5 formula. Because every jurisdiction's record is different, a congruent and proportional response to the problem of voting discrimination *required* that Congress re-examine the individual record of each covered jurisdiction—and, indeed, the non-covered jurisdictions too—to ensure that the sledgehammer remedy of Section 5 was applied only where it was actually necessary. Congress failed to do this. And the reauthorization of the Section 5 coverage formula was unconstitutional as a result.

D. The Voting Rights Act bailout provisions do not save Section 5 from unconstitutionality.

Although the *Shelby County* court noted that "the coverage formula's fit is not perfect," it relied on Section 5's bail-in and bailout provisions to hold that the statute's "disparate geographic coverage is sufficiently related to the problem that it targets."[126] But the court's confidence is misplaced. As Justice Thomas pointed out in *NAMUDNO*, the "promise of a bailout opportunity has, in the great majority of cases, turned out to be no more than a mirage."[127] Because the standards for bailing out require absolute perfection and because failure can result from circumstances beyond the control of the covered jurisdiction, this provision cannot preserve Section 5's constitutionality.

To qualify for bailout, a jurisdiction must show that during the previous ten years:

> (A) no "test or device has been used within such State or political subdivision for the purpose or with the effect of denying or abridging the right to vote on account of race or

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126 *Shelby County II*, 2012 WL 1759997 at *27, *22 (quoting *NAMUDNO II*, 557 U.S. at 203).

127 *NAMUDNO II*, 557 U.S. at 215 (Thomas, J., concurring in the judgment in part and dissenting in part).

> color" or language minority status;
>
> (B) "no final judgment of any court of the United States ... has determined that denials or abridgments of the right to vote on account of race or color [or language minority status] have occurred anywhere in the territory of" the covered jurisdiction;
>
> (C) "no Federal examiners or observers ... have been assigned to" the covered jurisdiction;
>
> (D) the covered jurisdiction *"and all governmental units within its territory"* have fully complied with § 5;
>
> (E) "the Attorney General has not interposed any objection (that has not been overturned by a final judgment of a court) and no declaratory judgment has been denied under [§ 5];" and
>
> (F) that the covered jurisdiction has "eliminated voting procedures and methods of election which inhibit or dilute equal access to the electoral process" and has "engaged in constructive efforts" to expand voting opportunities.[128]

Thus, a single misstep in a wide variety of categories precludes a jurisdiction from qualifying for a bailout for the next ten years. The effect of this is not to permit those states erroneously captured by Section 5's coverage formula to escape unwarranted federal intrusion as the *Shelby County* majority suggests, but rather to trap jurisdictions with strong but not perfect records, subjecting them to extraordinary federal oversight that is simply not justified by their electoral history or current practices.

Indeed, many non-covered states could not pass this purity test—for example, Hawaii,[129] Massachusetts,[130] Montana,[131] New York,[132] Ohio,[133]

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128 42 U.S.C. § 1973b(a)(1)(A)-(F)(emphasis added).

129 *See Arakaki v. Hawaii*, 314 F.3d 1091 (9th Cir. 2002) (trustee qualification violated Section 2).

Pennsylvania,[134] Wisconsin,[135] and Wyoming.[136]

Nor does Alaska pass the test. But nothing in the Constitution or the language of the precedents justifying earlier incarnations of the VRA suggests that perfection is the appropriate standard for determining whether a state should be subject to the extraordinary federal intrusion that Section 5 represents.[137] To the contrary, "exceptional conditions" are required; and there is nothing exceptional about Alaska's record on voting discrimination.[138] Moreover, even the *Shelby County* majority recognized that the appropriate inquiry is whether a jurisdiction's record of discrimination is sufficiently bad that case-by-case litigation could not adequately protect

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130 *See Black Political Task Force v. Galvin*, 300 F. Supp. 2d 291 (D. Mass. 2004) (redistricting plan diluted voting power of African-Americans in violation of the VRA).

131 *See United States v. Blaine County, Montana*, 363 F.3d 897 (9th Cir. 2004) (county's at-large voting system violated the VRA).

132 *See, e.g., Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany*, 281 F. Supp. 2d 436 (N.D.N.Y. 2003) (county's redistricting plan violates Section 2 of the VRA); *United States v. Vill. of Port Chester*, 704 F. Supp. 2d 411 (S.D.N.Y. 2010) (village's method of electing board members violated the VRA); *New Rochelle Voter Def. Fund v. City of New Rochelle*, 308 F. Supp. 2d 152 (S.D.N.Y. 2003) (city deliberately diluted majority minority district to plurality minority district).

133 *United States v. City of Euclid*, 580 F. Supp. 2d 584 (N.D. Ohio 2008) (city's school board elections violated Section 2 of VRA).

134 *United States v. Berks County, Pennsylvania*, 277 F. Supp. 2d 570 (E.D. Pa. 2003) (county's election practices violated Section 2 of VRA).

135 *Baldus v. Members of Wisconsin Gov't Accountability Bd.*, 2012 WL 983685 (E.D. Wis. Mar. 22, 2012) (redistricting plan violated VRA by "cracking" Latino community into two Latino influence districts).

136 *Large v. Fremont County, Wyo.*, 709 F. Supp. 2d 1176 (D. Wyo. 2010) (at-large system of electing county commissioners diluted Native American voting strength in violation of VRA).

137 *See NAMUDNO*, 557 U.S. at 229 (Thomas, J., dissenting) ("Perfect compliance with the Fifteenth Amendment's substantive command is not now—nor has it ever been—the yardstick for determining whether Congress has the power to employ broad prophylactic legislation to enforce that Amendment.").

138 *Katzenbach*, 383 U.S. at 334.

voters.[139] But it is hard to see how a jurisdiction with a single partially successful VRA lawsuit and a single DOJ objection to proposed changes could possibly be one where case-by-case litigation is inadequate.

Moreover, a jurisdiction can fail the bailout purity test as a result of the conduct of election authorities over which it has no control.[140] So, for example, Alaska would fail the bailout test regardless of anything the state did, because in 2002 the Municipality of Anchorage failed to submit a change to its charter before the mayoral election, thereby violating Section 5.[141] Similarly, a jurisdiction's ability to qualify under this standard is subject to the unreviewable decision of the Attorney General to certify the jurisdiction for federal observers.[142]

The paucity of the record in front of Congress with regard to voting discrimination in Alaska is emblematic of the 2006 reauthorization record as a whole, which is marked by the absence of any systematic evidence that voting discrimination continues to be such a severe problem that the extraordinary federal intrusion of Section 5 is still warranted anywhere, much less the kind of evidence specific to the covered jurisdictions that would justify singling them out for special opprobrium. The key insight here was apparent to the *Shelby County* majority—the inquiry is not whether racism remains a problem in our society or even whether any discrimination in voting persists, but whether the record reflects a problem of such magnitude—of such "exceptional

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139 *Shelby County II*, 2012 WL 1759997 at *14.

140 *See* 42 U.S.C. § 1973b(a)(1)(D) (providing that for a jurisdiction to qualify for bailout, all of its sub-jurisdictions must also have perfect records).

141 *See Luper v. Municipality of Anchorage*, 268 F. Supp. 2d 1110 (D. Alaska 2003).

142 *U.S. v. Louisiana.*, 265 F. Supp. at 715.

conditions"[143]— that it cannot be dealt with through case-by-case litigation.[144]

And the answer is plain. As the example of Alaska demonstrates, the record of the covered jurisdictions in 2006 (and today) simply did not justify— could not justify— the continued use of the extraordinary remedy of Section 5. Thus, the decision to renew the coverage formula for another 25 years was beyond Congress's authority and violated the Constitution.

III. The redistricting plan was timely submitted for preclearance and a response from the DOJ is expected before any election.

If this Court believes that Section 5 is constitutional as applied to Alaska and that preclearance of the Amended Proclamation Plan is thus required, the second part of the three-part inquiry is to determine whether preclearance has been obtained. The division does not dispute that the plan has not yet received preclearance. But the redistricting board and the division have diligently attempted to comply with Section 5 and have done nothing that can be fairly characterized as an attempt to circumvent its requirements or delay the preclearance process.

Contrary to the plaintiffs' suggestion, the division has not been dilatory in seeking preclearance of the Amended Proclamation Plan. Docket 4 at 10. Quite simply, the division has no authority to submit redistricting plans for preclearance. The division has closely followed the redistricting process, and has consistently informed the board, the courts and the DOJ about its deadlines, both statutory and administrative. Exhs. XX; YY; ZZ. But while the board, the courts, and the DOJ have roles that influence the

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143 *Katzenbach*, 383 U.S. at 334.

144 *Shelby County II*, 2012 WL 1759997 at *12.

choice and timing of a redistricting plan for the 2012 elections, the division does not.

And the plaintiffs' criticism of the board is likewise unfair. The board obtained preclearance of its original Proclamation Plan in October 2011—which would have allowed the division sufficient time to prepare for the election—but that plan was subsequently invalidated by the Alaska Supreme Court. Exh. J. The board submitted the Amended Proclamation Plan for preclearance on May 25, 2012, just three days after the Alaska Supreme Court ordered that it be used for the 2012 elections. Exh. M. It is easy with hindsight for the plaintiffs to argue that if the board had submitted the Amended Proclamation Plan for preclearance when it was created in early April, the DOJ would likely have made a decision on that plan by now. Docket 4 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, and in fact, both the state superior court and the Alaska Supreme Court quickly rejected the plan. Exhs. AAA; K; L. And even when the Alaska Supreme Court decided, due to time constraints, to select an interim plan for use only in the 2012 election, the board did not know that it would choose the Amended Proclamation Plan for that purpose.

Moreover, according to DOJ guidance, each change that is submitted for preclearance and is precleared creates a new "benchmark" against which all future submissions will be judged.[145] Because the DOJ takes the view that each submission, if precleared, constrains all future submissions, it would be unwise to preemptively submit

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

a change for preclearance before it has been approved at the state level. Given all of this uncertainty—and the significant resources needed to prepare a preclearance submission—the board acted reasonably in not submitting the Amended Proclamation Plan for preclearance until after the Alaska Supreme Court ordered its use.

The DOJ has not yet precleared the Amended Proclamation Plan, but unless the DOJ requests additional information, a decision is due by July 24, more than a month before the primary election.[146] The U.S. Supreme Court has stated that the goal of a three-judge panel faced with a Section 5 challenge is "to ensure that the covered jurisdiction submits its election plan to the appropriate federal authorities for preclearance as expeditiously as possible."[147] Here, Alaska has achieved that goal without the need for this Court's intervention.

IV. The injunction proposed by the plaintiffs is not an appropriate remedy because it would seriously disrupt Alaska's ability to hold a normal election even if preclearance is ultimately granted.

Even if this Court holds that Section 5 may be applied to Alaska and that preclearance of the plan is thus necessary, an injunction prohibiting the division's election preparations is neither required nor appropriate. The third part of the three-part inquiry is, given the entirety of the circumstances, "what temporary remedy, if any, is appropriate."[148] This question is critical, given the serious implications of federal

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146 28 C.F.R. 51.1(a)(2); 28 C.F.R. 51.9(a).

147 *Lopez v. Monterey County, Cal.*, 519 U.S. at 23.

148 *Id.*

interference with state elections.[149] As explained above, Section 5 raises serious constitutional concerns—concerns which this Court can avoid confronting by selecting a less drastic remedy.[150] Because preclearance was timely sought and is pending, and because an injunction would seriously disrupt Alaska's state-wide election even if preclearance is ultimately granted, the sweeping injunction requested by the plaintiffs is contrary to the public interest and not an appropriate remedy at this time.

A. A complete and immediate injunction is not automatic.

The plaintiffs assume that an immediate and outright injunction must automatically issue whenever the first two parts of the three-part inquiry are satisfied—that is, whenever a court has determined that preclearance is necessary and has not been obtained. Docket 4 at 8-10. But if such a drastic injunction were simply automatic, the third part of the three-part inquiry would have no purpose. Courts must take seriously their duty to select an "appropriate" remedy for a Section 5 violation, particularly in light

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[149] *Cf. Allen v. State Bd. of Elections*, 393 U.S. at 562 (noting "difficult problems for our federal system" presented where "the enforcement of state enactments may be enjoined and state election procedures suspended because the State has failed to comply with a federal approval procedure."); *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."); *Page v. Bartels*, 248 F.3d 175, 195-96 (3d Cir. 2001) (noting "important equitable consideration, going to the heart of our notions of federalism" that "Federal court intervention that would create such a disruption in the state electoral process is not to be taken lightly").

[150] *Cf. NAMUDNO II*, 557 U.S. at 205-06 (applying constitutional avoidance principle and declining to address constitutionality of Section 5); *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also some other ground upon which the case may be disposed of.").

of the importance to Alaskans of electing their legislators and the federalism concerns raised by Section 5. The Supreme Court reaffirmed earlier this year that, even when a proposed plan has not yet received preclearance, "a district court should take guidance from the State's recently enacted plan in drafting an interim plan."[151] This Court should accordingly exercise its equitable discretion to craft a solution that defers to the state's lawful policy goals, is consistent with the purposes of the Voting Rights Act, and acknowledges practical realities.[152]

Of course, choosing the appropriate remedy may be simple under simpler circumstances. An injunction against implementation of an unprecleared change, with little need for analysis, is probably the appropriate remedy whenever a jurisdiction seeks to adopt a new voting practice—say, a new ballot format—but can use its old ballot format until preclearance of the new format is obtained. But sometimes, as here, a jurisdiction has no acceptable prior practice to fall back on. A complete injunction would create a serious problem where, as here, use of a prior practice—the grossly

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151 *Perry v. Perez*, 132 S.Ct. at 941.

152 *Cf. Clark v. Roemer*, 500 U.S. 646, 660 (1991) (instructing district court to "adopt a remedy that in all the circumstances of the case implements the mandate of § 5 in the most equitable and practicable manner and with least offense to its provisions"); *United States v. Louisiana*, 952 F. Supp. 1151, 1173 (W.D. La. 1997) *aff'd sub nom. Louisiana v. United States*, 521 U.S. 1101 (1997) (recognizing "broad equitable powers to craft a § 5 remedy that best comports with local conditions as well as § 5 of the Voting Rights Act"); *Brooks v. State Bd. of Elections*, 775 F. Supp. 1470, 1482 (S.D. Ga. 1989) ("[W]e must exercise our discretion in fashioning the appropriate remedy for the case at hand."); *South Carolina v. United States*, 585 F. Supp. 418, 422 (D.D.C. 1984) (considering the "equities as to whether an injunction should issue, and if so, its scope"); *Charlton County Bd. of Ed. v. United States*, 459 F. Supp. 530, 533 (D.D.C. 1978) (stating that three-judge courts are "endowed with ample equitable discretion to decline to enjoin some changes in voting practices covered by Section 5 even though they have not been precleared by the Attorney General or this court").

malapportioned 2002 districts[153]—is clearly unconstitutional and repugnant to voting rights ideals, and where indefinitely postponing the election would disenfranchise the entire electorate. An unthinking automatic injunction rule, if applied in such situations, could easily result in the medicine for a Section 5 violation being worse than the disease.

The plaintiffs conflate a violation of Section 5 with a violation of substantive rights. Docket 4 at 9. But Section 5 is not an end in and of itself—there is no inherent good in obtaining federal approval of state voting changes. Section 5 does not even apply in most states. Section 5 is simply a means for enforcement of the substantive rights to vote and be free from voting discrimination that are created by the remainder of the Voting Rights Act and the federal Constitution. The choice of remedy for a Section 5 violation must take into account the purpose behind Section 5, which is to enforce these substantive rights, not to impose a federal approval requirement for its own sake at all cost to federalism and democracy.[154]

Courts do not apply a rigid injunction rule even in cases involving violations of the substantive rights that Section 5 exists to protect.[155] Courts should not

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[153] The previous districts contain population deviations from the ideal district size ranging from -22.02% to 46.29%. Exh. G.

[154] *See United States v. Louisiana*, 952 F. Supp. at 1173 ("[A] § 5 remedy should not throw a City's political or legal system into chaos or materially undermine the expectations of the electorate and those seeking elective office for purposes of effectuating the purposes of § 5.").

[155] *Cf. Upham v. Seamon*, 456 U.S. 37, 44 (1982) ("It is true that we have authorized District Courts to order or to permit elections to be held pursuant to apportionment plans that do not in all respects measure up to the legal requirements, even constitutional requirements. Necessity has been the motivating factor in these situations.") (internal citations omitted); *Reynolds v. Sims*, 377 U.S. at 585 ("[U]nder certain circumstances, such as where an impending election is imminent and a State's election machinery is

apply a rigid injunction rule for Section 5 violations when they are not blind to considerations of practicality even in the face of substantive voting rights problems. To do so would be to elevate Section 5's procedural pre-approval requirements above Section 2's anti-discrimination provisions and the Constitution itself.

The plaintiffs may argue that Section 5 can only work as an enforcement mechanism if the remedy for every violation is a complete and immediate injunction. But Section 5 is a very powerful tool even without such a rigid rule. It has forced Alaska to submit hundreds of voting changes to federal scrutiny over the years. Section 5 has given these plaintiffs a means to bring the division before this Court preemptively, without the need to prove, or even allege, a violation of any substantive rights. Section 5 has put the division, and Alaska's 2012 elections, in the hands of this Court. It would be absurd to suppose that a jurisdiction would willingly invite such a situation by purposely ignoring Section 5's requirements simply because a possibility existed that the court might, in exercising its equitable discretion, choose as a remedy something short of an absolute and immediate injunction.

And indeed, giving life to the "appropriate remedy" part of the analysis, various courts considering Section 5 cases have selected remedies short of the type of

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already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid. In awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles."); *Chisom v. Roemer*, 853 F.2d 1186, 1189 (5th Cir. 1988) (considering public interest in determining whether election should be enjoined, assuming probability of success on merits of Section 2 claim).

injunction requested by the plaintiffs.[156] For example, in *Kennedy v. Riley*, a three-judge panel declined to enjoin enforcement of unprecleared changes in Alabama election law, instead giving the state 90 days to seek preclearance.[157] And in *Salazar v. Monterey County, California*, the defendant county argued, as the division does here, that an immediate injunction was not appropriate because preclearance was pending and "even a temporary interruption of their preparations ... would have the practical effect of delaying the election even if preclearance ultimately is obtained."[158] The court considered the "practical realities of the election process" and concluded that the county could prepare for its election despite not yet having obtained preclearance "up to the point at which

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156 *Petteway v. Henry*, 2011 WL 6148674 (S.D. Tex. Dec. 9, 2011) (declining to enjoin unprecleared plan where preclearance deadline was imminent); *Lopez v. Merced County, Cal.*, 473 F. Supp. 2d 1072 (E.D. Cal. 2007) (allowing election to proceed and results to be certified where Section 5 suit was filed shortly before the election and the balance of the equities favored the city); *Kennedy v. Riley*, 445 F. Supp. 2d 1333, 1337 (M.D. Ala. 2006) (declining to enjoin enforcement of unprecleared changes and giving the state 90 days to obtain preclearance); *Salazar v. Monterey County, Ca.*, 2003 WL 22025010 , at *2 (N.D. Cal. Aug. 15, 2003) (not reported) (considering "practical realities of the election process" and concluding that county could prepare for election despite not having obtained preclearance "up to the point at which actual voting or other direct participation is implicated" and that "thereafter injunctive relief will be warranted in the absence of Section 5 preclearance"); *United States v. County Commission, Hale County, Ala.*, 425 F. Supp. 433 (S.D. Ala. 1977) (allowing scheduled election to be held under unprecleared scheme but holding that those elected would serve provisionally pending the further orders of the court); *Moore v. Leflore County Bd. of Election Com'rs*, 351 F. Supp. 848, 850-52 (N.D. Miss. 1971) (considering "equities of the situation" and fact that "the districts as presently constituted are seriously malapportioned" and permitting election under unprecleared scheme, with a new and final election to be held a year later); *Wilson v. N. Carolina State Bd. of Elections*, 317 F. Supp. 1299, 1303 (M.D.N.C. 1970) (enjoining unprecleared voting change in primary procedure but stating that "[d]ue to the proximity of the date of the general election" the injunction would not become effective until after the general election).

157 *Kennedy*, 445 F. Supp. 2d at 1337.

158 *Salazar*, 2003 WL 22025010 at *1.

actual voting or other direct participation is implicated" and that "thereafter injunctive relief will be warranted in the absence of Section 5 preclearance."[159]

Courts considering the appropriate remedy after an election has already been held in violation of Section 5 also consider matters of equity and practicality when deciding whether to void election results.[160] Although these cases are clearly different from the case at hand, the fact that courts often refuse to void election results demonstrates that the plaintiffs are incorrect that any unprecleared change "is a legal nullity and is void ab initio under the VRA." Docket 17 at 3. On the contrary, courts have considerable discretion to figure out how to handle any Section 5 problem.

Accordingly, this Court should reject the rigid rule proposed by the plaintiffs and should instead carefully consider what would actually be the most "appropriate" remedy under the circumstances of this case.

B. A complete and immediate injunction is not an appropriate remedy here.

The future of Alaska's 2012 election cycle is uncertain. The Amended Proclamation Plan has been submitted to the DOJ for preclearance and an answer is expected by July 24. The August 28 primary date is fast approaching. If the division continues its preparations and the plan is precleared, Alaska will have a normal election

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159 *Id.* at *2.

160 *See, e.g.*, *United States v. City of Houston*, 800 F. Supp. 504, 507 (S.D. Tex. 1992) (considering equitable and practical factors in determining whether to set aside election results due to lack of preclearance); *Lopez v. Hale County, Tex.*, 797 F. Supp. 547, 549 (N.D. Tex. 1992) *aff'd*, 506 U.S. 1042 (1993) (same); *Henderson v. Graddick*, 641 F. Supp. 1192, 1201 (M.D. Ala. 1986) (same); *Dotson v. City of Indianola*, 514 F. Supp. 397, 403 (N.D. Miss. 1981) (same).

cycle. But if the plaintiffs receive their requested injunction, the elections will be seriously disrupted even if the plan is precleared. Because this Court has the discretion to craft an "appropriate" remedy, it need not blind itself to this reality.

The plaintiffs assert that anything less than an immediate and total injunction will "create a perverse incentive for jurisdictions to wait until the very last minute to submit their plans." Docket 4 at 10. The plaintiffs are correct that this Court may take into account equitable considerations such as the blameworthiness of the division's conduct.[161] But these considerations militate against an injunction here because, as explained above, the redistricting board and the division have diligently attempted to comply with Section 5. This case bears no resemblance to other cases in which jurisdictions have ignored or attempted to evade Section 5's requirements.[162]

Furthermore, the blameworthiness of the division's conduct is not the only consideration relevant to fashioning an appropriate remedy—this Court must also consider the public interest in elections.[163] The plaintiffs characterize the division's

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161 *South Carolina v. United States*, 585 F. Supp. at 423 (considering "the relative culpability of the parties for any delay").

162 *See, e.g., Lopez v. Monterey County, Cal.*, 519 U.S. at 21-24 (noting that the defendant jurisdiction had "been on notice" of the need to obtain preclearance "[f]or several years" yet had never obtained preclearance of its voting changes and had failed to comply with a court order mandating that it seek preclearance for several ordinances); *Clark v. Roemer*, 500 U.S. at 653 (noting that the state had been on notice of Section 5 violation for over three years).

163 *See Butler v. City of Columbia*, 2010 WL 1372299 at *4 (D.S.C. Apr. 5, 2010) (not reported) ("In determining what temporary remedy, if any, is appropriate, the court focuses on the harm which will result if the election proceeds without preclearance versus the harm which will result if the court enjoins the election."); *United States v. Louisiana*, 952 F. Supp. at 1173 ("On the one hand, courts have held that local officials who have violated § 5 should not be rewarded for any delay in obtaining proper preclearance from

desire to hold a timely election as a matter of "administrative convenience." Docket 4 at 10. But a great deal more than convenience is at stake. Voters expect elections to be held on schedule. They must plan ahead to obtain absentee ballots if they will not be able to get to their polling station on election day or they may be disenfranchised. Candidates too must plan their campaigns. And an injunction pending preclearance of the plan would not postpone the election for a specified period of time—it would suspend Alaska in a state of limbo with no way to know whether or when an election could be held and a new legislature elected.

This cannot be an appropriate remedy where, as here, the plaintiffs have not even alleged any violation of the constitution or Section 2 of the VRA. Nor do they argue that there is a "reasonable probability" that the state's plan will ultimately be denied preclearance. Under *Perry v. Perez*, this Court must accordingly defer to the state's duly-adopted redistricting plan and decline to enjoin the election while the preclearance process is pending.[164] Section 5's grave constitutional concerns "would only be exacerbated if section 5 required a district court to wholly ignore the State's policies … without any reason to believe those state policies are unlawful."[165] Aside from compliance with the preclearance requirement for its own sake, the plaintiffs here have failed to offer any reason to believe that the state's redistricting plan is unlawful.

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federal officials. ... On the other hand, a § 5 remedy should not throw a City's political or legal system into chaos or materially undermine the expectations of the electorate and those seeking elective office for purposes of effectuating the purposes of § 5.") (internal citations omitted).

164 *Perry v. Perez*, 132 S.Ct. at 942.

165 *Id.*

Because this Court has the discretion to select an "appropriate" remedy, and because the requested injunction would place a serious—and unconstitutional—burden on Alaska, constitutional avoidance principles counsel caution.[166] Accordingly, the Court should deny the requested injunction because it is not an appropriate remedy.

V. If this Court enjoins the division from preparing for the election under the Amended Proclamation Plan, it must give the division a legal alternative so that the citizens of Alaska can still elect a legislature.

Notably missing from the plaintiffs' motion is any indication of what 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 appear simply to be advocating that the division sit on its hands indefinitely until the federal government gives it permission to start work again. But without an election all citizens of Alaska will be completely disenfranchised—a result that does not serve the purposes behind the Voting Rights Act. Accordingly, if this Court enjoins the division's election preparations under the Amended Proclamation Plan, it should give the division a legal alternative so that the citizens of Alaska can still elect a legislature this fall.

Although the plaintiffs assert that they wish "to preserve the status quo of the current districts (also called 'the benchmark')," Docket 4 at 2, not only do the malapportioned 2002 districts patently violate the Constitution's one-person, one-vote requirement,[167] but they are also not the "benchmark" under DOJ guidance.

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166 *Cf. NAMUDNO II*, 557 U.S. at 205-06; *Ashwander*, 297 U.S. at 347.

167 *Reynolds v. Sims*, 377 U.S. 533. Although the Constitution does not require exactly equality of size in districts, the 2002 districts now contain population deviations from the ideal district size ranging from -22.02% to 46.29%. Exh. G.

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 legally enforceable plan as the Section 5 benchmark."[168] Accordingly, the DOJ considers the benchmark to be the board's original Proclamation Plan, which was precleared in October 2011 but subsequently invalidated by the Alaska Supreme Court. Using the 2002 districts without renewed preclearance would thus violate Section 5 according to the DOJ. Because the division cannot use the 2002 districts and the Alaska courts invalidated the original Proclamation Plan, if this Court enjoins the use of the Amended Proclamation Plan, it should give the division a legal alternative—and soon—so that the division can prepare for and administer an election.[169]

This Court should keep in mind that the division is subject to many important state and federal deadlines in the months before an election. One of these deadlines—the candidate filing deadline—has already passed.[170] If this Court enjoins the division's election preparations, the division will have to reset the candidate filing deadline and will likely be unable to comply with the remaining deadlines. But the

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

[169] *Cf. Lopez v. Monterey County, Cal.*, 871 F. Supp. 1254, 1257 (N.D. Cal. 1994) ("A return to the system that was last in effect before the adoption of the unprecleared ordinances is impractical and no party seems to seriously advocate that even as an interim solution. Continuance of the injunction without any election pending implementation of a precleared system would deprive the voters of their right to elect judges. Obviously, the court cannot overlook the importance of the citizens' right to elect judges while a permanent legislative solution is being developed and precleared.").

[170] Another significant deadline is June 29, 2012, the day following the hearing scheduled in this case, when the division will start sending out advanced absentee ballots pursuant to AS 15.20.82(a). If the division cannot send out these ballots, some voters may be disenfranchised or else the election must be postponed.

division cannot push back the deadlines without a court order or DOJ preclearance. Accordingly, the division respectfully requests that any order enjoining its preparations under the Amended Proclamation Plan include a suspension of election deadlines.

CONCLUSION

For the foregoing reasons, this Court should deny the plaintiffs' motion for a preliminary injunction.

DATED June 20, 2012.

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Certificate of Service
The undersigned hereby certifies that on the, **20th day of June, 2012**, a true and correct copy of the above document, **Opposition to Motion for Preliminary Injunction**, was electronically served on the following:

Natalie A. Landreth, Esq.
Erin C. Dougherty, Esq.
Native American Rights Fund

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By: /s/ Margaret Paton-Walsh