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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

H. ROBIN SAMUELSEN, JR., RUSSELL S. NELSON, VICKI OTTE, MARTIN B. MOORE, SR., Plaintiffs, v. MEAD TREADWELL, in his official capacity as Lieutenant Governor for the State of Alaska; and GAIL FENUMIAI, in her official capacity as Director of the Division of Elections for the State of Alaska, Defendants.	Case No. 3:12-cv-00118-RBB-AK-JKS **REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**

I. INTRODUCTION

Plaintiffs have moved for a preliminary injunction under Section 5 ("Section 5") of the Voting Rights Act ("VRA"), 42 U.S.C. § 1973c. Plaintiffs seek to enjoin the Defendants from

their continued implementation of voting changes under Alaska's unprecleared state legislative redistricting, which is known as the Amended Proclamation Plan ("the Plan"). *See* Dkt. 4. Despite the length of the Defendants' opposition to Plaintiffs' Motion, totaling 62 pages of briefing and approximately 1,200 pages of exhibits, the Parties largely agree on the law. Defendants concur with the Plaintiffs that the three-judge Court must apply the following standard for evaluating the request for a preliminary injunction: "The three-judge district court may determine only whether [Section] 5 covers a contested change, whether [Section] 5's approval requirements were satisfied, and if the requirements were not satisfied, what temporary remedy, if any, is appropriate." *Lopez v. Monterey County*, 519 U.S. 9, 23-24 (1996); *see also* Defs.' Opp. Br. at 9 (same).

The parties likewise agree that "the plan has not yet received preclearance," Defs.' Opp. Br. at 49, and Defendants have implemented several activities antecedent to an election under the unprecleared Plan. Defendant Fenumiai has described a wide range of actions the Division of Elections ("DOE") has taken, and continues to take, that relate to the Plan. 06/11/12 Fenumiai Affidavit ¶ 4. Without question, many of the administrative actions described by Defendant Fenuniai, such as identifying polling places and recruiting poll workers, can continue unabated because they are not currently impacting the Plaintiffs or other voters. However, other actions by DOE personnel have already impacted candidates and voters like the Plaintiffs, such as the opening and closing of candidate qualifying less than five days after Defendants submitted the Plan for preclearance and DOE's posting of an official list of candidates under the Plan. 06/07/12 Landreth Affidavit and exhibits thereto. In addition, Defendant Fenumiai has indicated that the DOE intends to begin mailing out absentee and overseas ballots to voters under the unprecleared Plan on June 29, 2012. Defs.' Opp. Br. at 61, n. 170. Defendants' admitted

violations of Section 5 means that "plaintiffs are *entitled* to an injunction prohibiting implementation of the change." *Lopez*, 519 U.S. at 20 (emphasis added).

Defendants seek to avoid that result, ostensibly on two grounds. First, they dedicate nearly all of their brief and supporting exhibits to the argument that Alaska does not have to obtain Section 5 preclearance for the Plan or other activities they have already begun taking under the Plan. Instead, Defendants argue that because they believe "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." Defs.' Opp. Br. at 10. Second, Defendants suggest that any remedy that may be adopted should not invalidate their actions under the unprecleared Plan or that would otherwise foreclose them from continuing to implement the unprecleared Plan. Defs.' Opp. Br. at 58-60. Alternatively, Defendants ask "that any order enjoining its preparations under the Amended Proclamation Plan include a suspension of election deadlines." Defs.' Opp. Br. at 62.

The Court need not – and indeed cannot – consider the Defendants' first argument. By its express terms, Section 14(b) of the VRA deprives this three-judge panel of any jurisdiction to entertain a challenge to the constitutionality of Section 5 or any other action to enjoin "the execution or enforcement of any provision" of the VRA.[1] 42 U.S.C. § 1973l(b). As Plaintiffs have separately briefed, any such challenge can only be heard in the U.S. District Court for the District of Columbia. *See* Dkt. 39, Pls.' Resp. to Defs.' Notice Regarding Hr'g, at 2-3. The Court likewise is foreclosed from considering the propriety of Alaska's coverage under Section 5 or whether it is eligible to bailout from coverage. Pursuant to Section 4(a) of the VRA, 42

[1] Plaintiffs' Response to Defendants' Notice Regarding Hearing (Dkt. 39) includes two minor typographical errors. The correct citation for Section 14(b) of the VRA on page 2 should be "42 U.S.C. § 1973l(b)." The reference in point (3) on page 4 should be to "Section 4(a)" of the VRA, "42 U.S.C. § 1973b(a)(9)(b)." Plaintiffs regret any inconvenience these errors may have caused the Court.

U.S.C. § 1973b(a), jurisdiction over bailout and coverage determinations also rests exclusively in the U.S. District Court for the District of Columbia. *See* Dkt. 39, at 4. Therefore, Plaintiffs will refrain from responding to the Defendants' submissions supporting these arguments until such time as Defendants make them in the proper court. Accordingly, the balance of this Reply will be limited to the issues that this Court may decide.

II. ALASKA'S HISTORY OF DISCRIMINATION PROVIDES CONTEXT FOR ITS VIOLATIONS OF SECTION 5 AND THEIR IMPACT ON PLAINTIFFS.

Although the question of whether Alaska should remain covered under Section 5 is not germane to this action, a brief explanation of why Alaska is covered provides context for the harm that Plaintiffs will suffer if Defendants' violations are not enjoined. It also may assist members of the Court who are unfamiliar with the reasons why Alaska became covered under Section 5 in the first place.

Congress was well aware of the impact of Alaska's discrimination when it amended the coverage formula in Section 4 of the VRA to add language minorities, including Alaska Natives, in 1975. The Senate Report described documentation of "discriminatory practices" against Alaska Natives as "substantial."[2] The Senate report specifically cited to *Hootch v. State Operated School System ex rel. Tobeluk v. Lind*, Case No. 72-2450-CIV (Alaska Sup. Ct. Sept. 3, 1976), as an example of educational discrimination necessitating coverage of Alaska Natives under the VRA's preclearance and bilingual election provisions, Sections 5 and 203, respectively. S. Rep. No. 94-295, at 29, 31 (1975). In particular, Congress was concerned with the impact of Alaska's literacy tests on limited-English proficient Native voters for whom the

[2] Alaska's past and present history of discrimination against Native voters paralells the Jim Crow practices in the South. *See* Natalie Landreth & Moira Smith, *Voting Rights in Alaska 1982-2006*, 17 S. CAL. REV. L. & SOC. JUST. 79, 83-85 (2007); JAMES THOMAS TUCKER, THE BATTLE OVER BILINGUAL BALLOTS: LANGUAGE MINORITIES AND POLITICAL ACCESS UNDER THE VOTING RIGHTS ACT 235-89 (2009); Stephen Haycox, *William Paul, Sr., and the Alaska Voters' Literacy Act of 1925*, 2 ALASKA HIST. 16, 19 (Winter 1986/87).

State had denied equal educational opportunities. *See* ALASKA CONST. art. V, § 1 (1959) (requiring voters to "read or speak the English language"). As Senator Mike Gravel explained, "I think we do have some evidence of [discrimination] by the fact that this provision," Alaska's literacy test, "did creep into law" because there was "the possibility of disenfranchising people" under the test.[3] *See Extension of the Voting Rights Act of 1965: Hearings on S. 407, S, 903, S. 1297, S. 1409, and S. 1443 Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary,* 94th Cong., 1st Sess., at 525-26 (1975) ("1975 Senate Hearings").

When Section 5 coverage was added to Alaska in 1975, the State's illiteracy rates among Natives rivaled those of African-Americans in the South. According to 1960 Census data considered by Congress, 38.6 percent of Alaska's nonwhite population age 25 years and older was illiterate, higher than African-Americans in Alabama, Florida, North Carolina, and Virginia. *See* 1975 Senate Hearings at 664 (Ex. 23 to the testimony of J. Stanley Pottinger). By 1970, the illiteracy rate of Natives was at "approximately 36 percent," exceeding the illiteracy rate for African-Americans in every state covered by Section 5. *Id.* at 529 (statement of Senator Gravel). Alaska's discrimination against Alaska Natives had a profound effect on their ability to participate in the state's English-only elections. Alaska was covered under Section 5 statewide in 1965 and again in certain areas 1970 because voter turnout was below fifty percent in the 1964 and 1968 Presidential Elections, respectively. S. Rep. No. 94-295, at 12-13. In the 1968 Presidential Election, Alaska's voter turnout rate was 49.9 percent, lower than every southern state except Georgia, South Carolina, and Texas. In 1972, Alaska's voter turnout rate decreased to 48.2 percent. The data showed that Natives "generally suffer from severe language barriers" because of their high rate of English illiteracy. Congress was "obligated to intervene" on behalf

[3] A commentator supporting Defendants agreed that "many Alaskans, Natives and non-Natives alike" viewed the literacy test as "an affront" with "its racist overtones." Gordon S. Harrison, *Alaska's Constitutional "Literacy Test" and the Question of Voting Discrimination*, 22 ALASKA HIST. 23, 30 (Spring/Fall 2007).

of Natives and other language minorities because state and local election officials had been "disturbingly unresponsive" to voting barriers. S. Rep. No. 94-295, at 39.

Alaska's discriminatory practices in education and voting persist to this day. State officials did not provide secondary schools in Native villages until the 1980s. *See generally* Agreement of Settlement, *Tobeluk v. Lind*, Case No. 72-2450 CIV (Alaska Sup. Ct. Sept. 3, 1976) (admitting Alaska denied schooling to Native children in their communities of residence and requiring that a secondary schools be built in the 126 villages where the members of the appellants' class resided); *Tobeluk v. Lind*, 589 P.2d 873, 874-75 (1979). The last school was not built until thirty years after the Supreme Court's landmark decision in *Brown v. Board of Education*, 347 U.S. 483 (1954). In 1999, the State was found to continue to use a dual, arbitrary, unconstitutional, and racially discriminatory system for funding school facilities. Order Granting Plaintiffs' Motions for Partial Summary Judgment on Facilities Funding, *Kasayulie v. State of Alaska*, Case No. 3AN-97-3782 CIV (Alaska Sup. Ct. Sept. 1, 1999). In 2007, Alaska was found to have violated its "constitutional responsibility to maintain a public school system" by failing to adequately oversee secondary education in Native villages and by denying Natives a "meaningful opportunity to learn the material" on a mandatory graduation exam. Decision and Order at 194-95, *Moore v. State of Alaska*, Case No.3AN-04-9756 CIV (Alaska Sup. Ct. June 21, 2007). More recently, the State had inadequate evidence of language assistance offered to limited-English proficient Yup'ik-speaking voters and the Alaska District Court noted that election officials' efforts to provide that assistance "did not begin in earnest until after [] litigation began." Order Granting Plaintiffs' Motion for a Preliminary Injunction Against the State Defendants at 8, *Nick v. Bethel*, Case No. 3:07-cv-0098-TMB (D. Alaska July 30, 2008), Dkt. 327.

Against this backdrop of discrimination, it is unsurprising that Native voters such as the Plaintiffs continue to face substantial barriers to voting. For example, Plaintiffs H. Robin Samuelsen, Jr. and Russell S. Nelson reside in Dillingham. Among the 2,050 Yup'ik-speaking Native U.S. citizens of voting-age in Dillingham, 18.3 percent are limited-English proficient in Yup'ik. Those LEP Yup'ik-speaking voting-age citizens have an illiteracy rate of 32 percent, which is comparable to the illiteracy rate of Natives when Alaska first became covered by Section 5, and is more than 27 times the national illiteracy rate of 1.16 percent.[4] In 2008, turnout among registered voters in Dillingham was among the lowest in Alaska at 49.8 percent, over 16 percent lower than the statewide average of 66 percent.[5]

Section 5 remains a critical component of protecting Native voters like the Plaintiffs from discrimination by State election officials. It is not a mere administrative formality or a vestige of the distant past, as the Defendants appear to argue. Preclearance remains a vital weapon in the arsenal to combat voting discrimination in Alaska. And there are serious questions of whether the Amended Proclamation Plan will receive preclearance because of the retrogressive effect it has on Alaska Natives in the elimination of a majority-Native legislative district where the Plaintiffs reside. *See* 06/25/12 Landreth Decl. ¶ 3.

III. THE COURT'S JURISDICTION IS LIMITED TO DECIDING THE NARROW QUESTIONS OF THE DEFENDANTS' VIOLATIONS OF SECTION 5 AND THE REMEDIES FOR THOSE VIOLATIONS.

Aside from Defendants' improper challenge of Alaska's continued coverage under Section 5 and the constitutionality of that provision, the parties generally agree on the issues that the Court is to decide. "The three-judge district court may determine only whether [Section] 5

[4] U.S. Census Bureau, Determinations under Section 203 of the VRA, Public Data File, *available at* http://www.census.gov/rdo/data/voting_rights_determination_file.html (Oct. 13, 2011).

[5] Alaska, Division of Elections, November 4, 2008 General Election Results, *available at* http://www.elections.alaska.gov/ei_return_2008_GENR.php.

covers a contested change, whether [Section] 5's approval requirements were satisfied, and if the requirements were not satisfied, what temporary remedy, if any, is appropriate." *Lopez v. Monterey County*, 519 U.S. 9, 23-24 (1996); *see also* Defs.' Opp. Br. at 9 (same).

Despite acknowledging that rule, Defendants purport to expand the scope of the Court's inquiry further to include speculation on whether the Amended Proclamation Plan will be precleared. Specifically, Defendants quote *Perry v. Perez*, 132 S. Ct. 934, 942 (2012), for the proposition that the Court must also consider whether the Plan "stand[s] a reasonable probability of failing to gain [Section] 5 preclearance." Defs.' Opp. Br. at 10. Defendants then fault the Plaintiffs for not asserting "that Alaska's redistricting plan stands a reasonable probability of failing to be pre-cleared."[6] *Id.* According to the Defendants, "[w]ithout evidence that the plan is unlikely to be precleared, the Court should not preemptively frustrate the state's ability to hold an election" under the unprecleared Plan. *Id.* Defendants are incorrect under the plain language of *Perry*.

This Court cannot engage in any speculation about the prospects of preclearance. In *Perry*, the Supreme Court explained that the "calculus with respect to [Section] 5 challenges is somewhat different" than challenges under Section 2 of the VRA or constitutional challenges. 132 S. Ct. at 942. Outside of the U.S. District Court for the District of Columbia, the Supreme Court has "made clear that other district courts *may not* address the merits of [Section] 5 challenges." *Id.* (emphasis added). The language that the Defendants quote from that opinion does not alter the rule of limited jurisdiction. Instead, the *Perry* Court was simply explaining the factors that a federal court must consider in adopting an interim plan to remedy the violations of

[6] At least one Native corporation and a tribal consortium representing 31 federally recognized tribes have submitted comments to the Voting Section of the U.S. Department of Justice describing the retrogressive impact of the Amended Proclamation Plan on Alaska Natives, which was the product of significant flaws in the Redistricting Board's analysis and the lack of opportunity the Board gave Natives to comment on the Plan and propose non-discriminatory alternatives to it. *See* Landreth Decl. ¶ 3.

Section 2 and the constitutional equal population mandate alleged in the underlying action. *Id.* There, the Court was confronted with the situation that "an intervening event . . . a census" had rendered the benchmark plan "unusable" in violation of one person, one vote, mandating the district court to "undertake the 'unwelcome obligation' of creating an interim plan." *Id.* at 940 (quoting *Connor v. Finch*, 431 U.S. 407, 414-15 (1977)).

Here, the Plaintiffs have filed a Section 5 enforcement action to enjoin the Defendants' continued implementation of the unprecleared Amended Proclamation Plan. *See* Dkt. 1, Complaint. They have not challenged the constitutionality of the existing redistricting plan that is being replaced. *See id.* Nor have Plaintiffs challenged the existing plan under Section 2 of the VRA. *See id.* Therefore, the general rule stated in *Perry* applies. In reviewing Plaintiffs' Section 5 challenge, the Court "plays only a limited role in enforcing [Section] 5. The statute vests exclusive preclearance authority in the Attorney General and the District of Columbia District Court." *Bone Shirt v. Hazeltine*, 200 F. Supp. 2d 1150, 1153 (D.S.D. 2002) (three-judge court) (citing *Perkins v. Matthews*, 400 U.S. 379, 385 (1971)). The Court "may not address the merits" of whether the Amended Proclamation Plan will be precleared. 132 S. Ct. at 942. Rather, "[o]n a complaint alleging failure to preclear election changes under [Section] 5, [the three-judge] court *lacks authority* to consider the discriminatory purpose or nature of the changes." *Lopez*, 519 U.S. at 23-24 (emphasis added) (citing cases describing the narrow scope of a court's authority in a Section 5 enforcement actions).

IV. DEFENDANTS ADMIT VIOLATING SECTION 5, BUT ASK THE COURT TO DEPART FROM CONTROLLING PRECEDENT REQUIRING THAT THEIR ACTIONS BE ENJOINED.

Defendants admit the first two elements required for a preliminary injunction: (1) that the change is required to be submitted for preclearance (unless and until Alaska is successful in

bailing out of coverage in the District of Columbia), and (2) that they have not received preclearance for the Amended Proclamation Plan that they are currently implementing. The only question remaining, and thus the only issue left to be decided by this Court, is what remedy should be applied. *See Lopez*, 519 U.S. at 23-24.

It is well-established that "[i]f voting changes subject to [Section] 5 have not been precleared, [Section] 5 plaintiffs are *entitled* to an injunction prohibiting the State from implementing the changes." *Clark v. Roemer*, 500 U.S. 646, 652-53 (1991) (emphasis added) (citing *Allen v. State Bd. of Elections*, 393 U.S. 544, 572 (1969)). In *Clark*, a three-judge court refused to enjoin elections based on the "short time between election day and the most recent request for an injunction, the fact that qualifying and absentee voting had begun, and the time and expense of the candidates." 500 U.S. at 653. The Supreme Court acknowledged the district court's concerns about voter confusion and low voter turnout, but rejected them by reasoning that "[v]oters may be more confused and inclined to avoid the polls when an election is held in conceded violation of federal law." *Id.* at 653-54. The Supreme Court further rejected the district court's claim that its refusal to enjoin elections "closely paralleled" the Court's own precedent, pointing out that in the cited cases the elections in question had already been held and the "only issue was whether to remove the elected officials pending preclearance." *Id.* at 654. In contrast, the Supreme Court held in *Clark* that "[Section] 5's prohibition against implementation of unprecleared changes *required* the District Court to enjoin the election." *Id.* (emphasis added). The Court did so even though it intervened and enjoined elections under the unprecleared plan *just four days* before the scheduled election. *Id.* at 651.

The Supreme Court left open the question of whether a district court "may ever deny a [Section] 5 plaintiff's motion for an injunction and allow a covered jurisdiction to conduct an

election under an unprecleared voting plan." *Lopez*, 519 U.S. at 21. In *Lopez*, the Court revisited this issue and unanimously reiterated its holding in *Clark* that an injunction could only be denied in extreme or exigent circumstances: "An extreme circumstance might be present if a seat's unprecleared status is not drawn to the attention of the [covered jurisdiction] until the eve of the election and there are equitable principles that justify allowing the election to proceed." *Id.* at 21. The Court found "no such exigency to exist in *Clark* and we find none here." *Id.* at 22. Consequently, the Court reversed and remanded even though "simply enjoining elections would leave the County without a judicial election system." *Id.* at 22.

Consistent with those decisions, the Court recently reiterated that "[t]his Court has been *emphatic* that a new electoral map cannot be used to conduct an election until it has been precleared." *Perry*, 132 S. Ct. at 940 (emphasis added). While injunctions issued may vary in their scope, courts do not balance the equities in the traditional manner as Defendants suggest; rather an injunction is presumed to be the appropriate and necessary remedy unless Defendants can demonstrate exigent or extreme circumstances.[7] Defendants have made no such showing. Plaintiffs acted within days of Defendants' actions, the primary election is still two months away, and Plaintiffs and all Alaskan voters face serious harms if Defendants continue to implement the Amended Proclamation Plan without preclearance.

The case law cited by the Defendants does not change that result, largely because the Defendants have not properly characterized those decisions. They cite one case for an incorrect holding. In *Kennedy v. Riley*, the three-judge court did not "decline to enjoin enforcement of unprecleared changes" as Defendants claim, Defs.' Opp. Br. at 56; rather, the plaintiffs in that

[7] Citing *Upham v. Seamon*, 456 U.S. 37 (1982), and *Reynolds v. Sims*, 377 U.S. 533, 585 (1964), Defendants claim there is no "rigid rule" requiring an injunction. However, *Upham* suggested elections may have been allowed to proceed because of "necessity," a concept extremely similar to the Supreme Court's later "extreme circumstances" rule in *Clark*. *Upham* therefore does not advance Defendants' argument. Nor does *Reynolds*, which has a similar holding and is in any event not a VRA case.

case had not requested an injunction and asked only that the State be given 90 days to secure preclearance and the court obliged. 445 F.Supp. 2d 1333, 1337 (M.D. Ala. 2006).

Another case Defendants cite, *Salazar v. Monterey County*, 2003 WL 22025010 (N.D. Cal. 2003), also is not accurately described. *Salazar* is an unreported decision in which a single judge did not decline an injunction, as the Defendants contend. Defs.' Opp. Br. at 56-57. Instead, the court issued an order directing the defendants to show cause why they should not be restrained or enjoined from accepting any ballots or operating any polling places. Before the show cause hearing, the court did in fact enjoin the mailing of absentee ballots to overseas voters until preclearance had been obtained. 2003 WL 22025010 at *2. The court indicated that it would allow "the election process to proceed up to the point at which actual voting or other direct participation is implicated." *Id.* Plaintiffs find the *Salazar* court's approach to the remedy for a Section 5 violation to be reasonable and have tailored their proposed relief accordingly.

Next, Defendants cite to *Petteway v. Henry*, 2011 WL 6148674 (S.D. Tex 2011), a case in which the court declined to enjoin the candidate-filing deadline (no voting or other implementation had commenced) because that deadline was close to the 60-day deadline for a preclearance decision from the Department of Justice. Defs.' Opp. Br. at 56 n.156. Nevertheless, the court ordered that if preclearance was not obtained anyone who had filed would receive their filing fees back and the court would order interim relief at that time. 2011 WL 6148674 at *3.

Defendants cite three other cases in support of their argument that Plaintiffs should be granted limited or no relief for Defendants' admitted violations of Section 5: *United States v. Hale County Commission*, 425 F. Supp. 433 (S.D. Ala. 1977); *Moore v. Leflore County Board of Election Commissioners*, 351 F. Supp. 848, 850-52 (N.D. Miss. 1971); and *Wilson v. North*

Carolina State Board of Elections, 317 F.Supp. 1299, 1303 (M.D.N.C. 1970). However, all of these decisions significantly predate the Supreme Court's clear pronouncements in *Clark*, *Lopez* and most recently in *Perry*, and therefore are of little, if any, persuasive value. Clearly the balancing of equities practiced by a few courts in the early days of VRA enforcement has been replaced by the Supreme Court's "extreme circumstances" approach. The Court is bound to follow the latter, not the former.

Defendants further contend that the remedy should also "defer to the State's lawful policy goals." Defs.' Opp. Br. at 53. They cite *Perry v. Perez* for this proposition, but that is a misreading of that case for the reasons explained in Part III of this Reply.

Similarly, the Defendants overstate the relevance of "equity and practicality" in situations where courts have been asked to void the results of elections already held. At this point, the Plaintiffs are asking only that implementation of an unprecleared plan be enjoined as required under the plain language of Section 5 and clear Supreme Court precedent; they are not asking to enjoin an election or undo the results of an election that has already been held.

Even if that were not true and elections had been held, Defendants misstate the reasoning in the four district court decisions they cite. In *United States v. City of Houston*, the court did not refuse to set aside elections; instead, the court more narrowly explained that there had been a settlement between the plaintiffs and the City of Houston that "enforces an apportionment plan based on one that has mustered section 5 preclearance, we do not need to impose any additional remedy at this time." 800 F. Supp. 504, 507 (S.D. Tex. 1992). Even more telling, in *Henderson v. Graddick*, the court directed that the candidate in question not be certified and ordered the Democratic Party to conduct a new runoff election. 641 F. Supp. 1192, 1201 (M.D. Ala 1986). *Dotson v. City of Indianola*, likewise is of little use here because there the contested candidates

had already served three-quarters of their terms and new elections were scheduled to take place in a few months. 514 F.Supp. 397, 402-03 (N.D. Miss. 1981).

The Supreme Court has provided clear guidance on what will happen if elections are held under the unprecleared Amended Proclamation Plan. In *NAACP v. Hampton County Election Commission*, the Court observed that if the jurisdiction "failed to seek [preclearance] or [preclearance] is not forthcoming, the results of the March 1983 election should be set aside." 470 U.S. 166, 182-83 (1985). This case is not yet at the point where elections are being held under the unprecleared plan, although that will happen if absentee and overseas ballots are mailed out on June 29, 2012 as the Defendants plan to do. In any event, the Supreme Court's case law clearly establishes that unprecleared voting changes may not be used to conduct an election, as the Defendants apparently suggest. Section 5's mandate is clear. And, as the Department of Justice has separately explained in its guidance, "[t]he obligation to obtain such preclearance is not relieved by unlawful enforcement." 28 C.F.R. § 51.10(b).

V. DEFENDANTS HAVE NOT IDENTIFIED ANY "EXTREME CIRCUMSTANCES" REQUIRING DEPARTURE FROM SUPREME COURT CASES REQUIRING THEIR IMPLEMENTATION OF UNPRECLEARED CHANGES TO BE ENJOINED.

For the reasons described above, Defendants have clearly not met the Supreme Court's "extreme circumstances" requirement.[8] Although Defendants generally claim that an injunction will interfere with their preparations, they cite no evidence and no information of the kind that might justify a departure from the Supreme Court's precedent requiring that unprecleared changes be enjoined. They have also not explained how it can possibly be in the public interest

[8] Defendants challenge the Plaintiffs' assertions that the Alaska Redistricting Board delayed submission of its Plan for Section 5 preclearance because the plan was adopted on April 5, 2012 and not submitted until May 25, 2012. Defs.' Opp. Br. at 50. However, there is no requirement that the Board wait for the Alaska Supreme Court to rule. In fact, last year the Board submitted its Plan and received preclearance in the middle of litigation. Complaint ¶ 18-19.

for them to prepare for an election under a legally unenforceable redistricting plan about which there are numerous objections from the Native community. 06/25/12 Landreth Decl. ¶ 3, Exhibit A. They certainly have no argument that the public has an interest in voters receiving ballots for the wrong districts with the wrong candidates (if the plan is not precleared in time or at all), or in having their votes thrown out of they vote on a ballot that is invalid because the election is held under the Amended Proclamation Plan without preclearance or the election results are otherwise legally unenforceable. Moreover, the public surely does not have an interest in having elections conducted on time if the results of those elections may be vacated. All of the Defendants' arguments cut against them and have been rejected by the Supreme Court. *See* Part IV.

Nevertheless, the Court should consider the impact of the remedy on the public. As described in the declarations being filed herewith, candidates are already suffering financial impacts of trying to campaign in the new districts. 06/25/12 Representative Bryce Edgmon Decl. ¶ 6-8. One Plaintiff who was a candidate dropped out in part because of the Plan, 06/25/12 Plaintiff Nelson Decl. ¶ 7-9, and another Plaintiff has already begun campaigning and fundraising for candidates who she is unsure will be proper candidates. 06/25/12 Plaintiff Otte Decl. ¶ 6-7. These statements show that harms have already begun to accrue not only to Plaintiffs but to candidates and voters in general.

The most significant and irreparable harms, however, are right around the corner. Defendants intend to commence conducting an election under the unprecleared Amended Proclamation Plan the day after oral arguments on Plaintiffs' Motion. On Friday, June 29, 2012, the DOE intends to begin sending ballots to overseas voters. Defs.' Opp. Br. at 61, n.170. If this Court does not enjoin them, the Defendants will start an illegal election – not just preparatory implementation – under an unprecleared plan. Plaintiffs and candidates alike have legitimate

concerns that any ballots sent out will confuse voters and impair the integrity of the upcoming elections. *See* 06/25/12 Plaintiff Otte Decl. ¶ 8-9; 06/25/12 Plaintiff Nelson Decl. ¶ 6, 10-11; 06/25/12 Representative Edgmon Decl. ¶ 9-10. The next closest deadline, at least according to the DOE's website, is July 29, 2012, which is the registration deadline. Early and in-person absentee, special needs and voting by fax begins on August 13, 2012. The absentee by mail application deadline is August 18, 2012. Primary Election Day is August 28, 2012. These dates are important for two reasons. They warrant immediate relief from the Court to enjoin the voting that is scheduled to begin at the end of this week. At the same time, the other deadlines are not so close as to jeopardize other election activities at this time.

That raises the important question of what remedy the Court should order for the Defendants' violations. When asked at the oral argument for the temporary restraining order on June 14, 2012 what activities need to be enjoined specifically, undersigned counsel indicated that since Defendants were the party with the expertise is managing elections, Plaintiffs ask only for a general injunction prohibiting activities that implement the unprecleared Amended Proclamation Plan in any way and deferred to the Defendants to ascertain what those activities were. Plaintiffs are four individual voters and have no access to the kind of information Defendants possess. Nevertheless, because of the information vacuum caused by Defendants' failure to provide this Court with any guidance, Plaintiffs have proposed a remedy based on Supreme Court precedent and the limited information is available to them. Accordingly, a new proposed order is attached herewith.

As stated in that proposed order, this Court may need additional information from the Defendants to craft the remedies to narrowly fit to this case. Specifically, the Defendants should be directed to provide the Court with the following information: (1) pertinent deadlines under

state and federal law; (2) a list of activities that can be conducted without using the unprecleared Amended Proclamation Plan; (3) a list of activities that *require* use of the Amended Proclamation Plan and the names of candidates who have already been qualified for elections under it; (4) some indication of how much lead time Defendants require to prepare for and implement those required activities; (5) which of these activities involve disseminating information to the voting public so the Court can determine the impact of such activities and whether they need to be enjoined; and (6) any other information that might assist the Court. With that information, the Court will be able to fashion a remedy that specifically limits its impact on Defendants in their preparations while also abiding by the mandates of Section 5. Other than providing a vague list of activities and stating that "most" of them required use of the Amended Proclamation Plan, Defendants have failed to offer this Court any guidance. 06/11/12 Fenumiai Affidavit ¶ 4. Instead, they have simply dug in their heels and argued that the Court should ignore their admitted violations of Section 5 and deny Plaintiffs' Motion for a Preliminary Injunction. In the interim, Defendants should be enjoined generally from disseminating any information, including ballots, to the public based on the unprecleared Plan as set forth in the *Salazar*; behind closed doors, Defendants may prepare as they please.

VI. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant the preliminary injunction and: (1) *immediately issue an order suspending the election deadline set for this Friday, June 29th*; (2) immediately enjoin the Defendants from disseminating any information based upon the unprecleared Amended Proclamation Plan; and (3) order the further relief as described in the attached revised proposed order.

DATED this 25th day of June 2012.

Respectfully submitted,

s/nlandreth

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Certificate of Service

I hereby certify that on the 25th day of June 2012, a true and correct copy of the foregoing document was served electronically pursuant to the Court's electronic filing procedures upon the following:

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s/jbriggs