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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA**

ANNA NICK, *et al*,

Plaintiffs,

v.

BETHEL, ALASKA; *et al*,

Defendants.

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

**PLAINTIFFS' MOTION FOR A
PRELIMINARY INJUNCTION**

Pursuant to Rule 65(a), Fed. R. Civ. P., Plaintiffs move for a preliminary injunction enjoining Defendants and their employees, agents, and successors in office, from enforcing their current procedures for providing language and voter assistance for the August 26, 2008 statewide Primary Election and any future elections. The grounds for Plaintiffs' motion are that: (1) there is a substantial likelihood Plaintiffs will prevail on the merits of their claims that Defendants' language and voter assistance procedures, and their enforcement of those procedures, violate Sections 4(f)(4), 203, and 208 of the Voting Rights Act ("VRA"), 42 U.S.C. §§ 1973b(f)(4), 1973aa-1a, and 1973aa-6; (2) Plaintiffs will suffer irreparable injury unless the injunction issues; (3) the threatened injury to Plaintiffs' fundamental right to vote outweighs whatever damage an injunction may cause Defendants; and (4) the injunction would not be adverse to the public interest. These reasons are discussed in more detail below. For the Court's convenience, Plaintiffs have filed an accompanying Statement of Facts, which in turn cites to the exhibits and evidence supporting those statements ("Pls.' SOF").

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I. BACKGROUND AND DEMOGRAPHICS

Plaintiffs are Alaska Native U.S. citizens and registered voters residing in the Bethel Census Area, Alaska. Plaintiffs Anna Nick, Billy McCann, David O. David, and Arthur Nelson are limited-English proficient (“LEP”) voters for whom their first and primary language is Yup’ik.¹ Each Plaintiff has a low level of educational attainment; three Plaintiffs are “illiterate” as defined by the U.S. Census Bureau because they completed less than the fifth primary grade, and the fourth Plaintiff, Anna Nick, only finished the fifth primary grade. Because of their limited-English proficiency, and the Defendants’ failure to comply with the language assistance and voter assistance provisions of the VRA, Plaintiffs Nick, McCann, David, and Nelson are unable to participate meaningfully in the electoral process. [Pls.’ SOF ¶¶ 70-115] Plaintiffs Kasigluk Traditional Council, Kwigillingok I.R.A. Council, Tuluksak Tribal Council, and Tuntutuliak Traditional Council are federally recognized tribal councils representing LEP Yup’ik-speaking voting-age citizens who reside in Alaska Native villages located within the Bethel Census Area who have been denied meaningful access to the electoral process by the State Defendants.² [Pls.’ SOF ¶¶ 40-42; Pls.’ Ex. 192, Declaration of Henry Lupie (“Lupie Decl.”) ¶¶ 4-11 (Tuntutuliak); Pls.’ Ex. 193, Declaration of Joseph Alexie (“Alexie Decl.”) ¶¶ 4-10 (Tuluksak); Pls.’ Ex. 194, Declaration of Steven Nicholas (“Nicholas Decl.”) ¶¶ 4-11 (Kasigluk); Pls.’ Ex. 195, Declaration of Peter Jimmie (“Jimmie Decl.”) ¶¶ 4-9 (Kwigillingok)] Defendants are officials responsible for the administration of elections in the Bethel Census Area. [Pls.’ SOF ¶¶ 144-159]

¹ Plaintiff Nelson and the four tribal council Plaintiffs seek to join this action through Plaintiffs’ Motion for Leave to File First Amended Complaint, filed within the time period set by agreement of the parties and the Court’s Scheduling Order. Plaintiffs’ Motion remains pending.

² The declarations of the four tribal representatives explain the manner in which their respective tribal council represents the political, social, and cultural needs of LEP voters in their tribes.

The Bethel Census Area is located in southwest Alaska and has a land area of 40,631.31 square miles, approximately the size of the State of Tennessee. The City of Bethel, which lies within the Bethel Census Area, is located at the mouth of the Kuskokwim River 40 miles inland from the Bering Sea about 400 air miles west of Anchorage. The Bethel Census Area also contains several “Alaska Native village statistical areas” (“ANVSAs”), which are comprised of federally recognized native villages and communities without legally designated boundaries. Despite its large size, the Bethel Census Area has only 19 miles of paved roads, all in the City of Bethel, with most travel between communities by air or by boat. [Pls.’ SOF ¶¶ 1-7]

The Bethel Census Area has a total population of 16,006 persons.³ Of that total population, 85.5 percent, or 13,680, are American Indian and Alaskan Native (“AIAN”) persons of one or more races, the seventh highest such percentage among all county-level jurisdictions in the United States. The Bethel Census Area has a citizen voting age population (that is, U.S. citizens 18 years of age and older, or “CVAP”) of approximately 9,512 persons, or 98.93 percent of the 9,615 persons of voting age. Approximately 81.2 percent (7,728 persons) of the CVAP are AIAN persons. [Pls.’ SOF ¶¶ 10-14]

The City of Bethel is the most populous municipality of the Bethel Census Area, with a total population of 5,471 persons, of whom 3,719 (67.98 percent) are AIAN persons. It has a CVAP of approximately 3,429 persons, or 97.19 percent of the 3,528 persons of voting age. Approximately 2,097 (61.2 percent) of the CVAP in the City of Bethel are AIAN persons of one or more races. Approximately 61.2 percent (2,097 persons) of the CVAP in the City of Bethel are AIAN persons. [Pls.’ SOF ¶¶ 17-19]

³ Unless otherwise specified, all references to U.S. Census data are from the 2000 Decennial Census.

II. THE REQUIREMENT OF LANGUAGE ASSISTANCE IN THE BETHEL CENSUS AREA AND COVERAGE UNDER SECTIONS 4(f)(4) AND 203 OF THE VRA.⁴

The Bethel Census area is covered by the language provisions of the VRA because of the number or percentage of citizens with limited English proficiency. [Pls.’ SOF ¶¶ 116-124] Both the number of affected citizens and the level of LEP are statutorily determined in the Census process. *See* 42 U.S.C. § 1973aa-1a(b)(2)(A). Those coverage determinations are final and non-reviewable by any court. 42 U.S.C. §§ 1973b(a)(9)(b), 1973aa-1a(b)(4); 28 C.F.R. § 55.4(a).

The Bethel Census Area is one of just three county-level jurisdictions in the United States in which a majority of persons five years and older speak an American Indian or Alaskan Native language at home. [Pls.’ SOF ¶ 33] Of the 13,586 AIAN persons of a single race in the Bethel Census Area, 9,132 (67.2 percent) of persons five years and older speak a language other than English at home. [Pls.’ SOF ¶ 32] Yup’ik is the predominant language used by the AIAN CVAP for every ANVSA in the Bethel Census Area for which census data is available, comprising at least 6,060 voting age citizens. [Pls.’ SOF ¶ 43] There are at least 1,155 voting age citizens who speak Yup’ik in the City of Bethel. [Pls.’ SOF ¶ 44] Just a handful of the Bethel Census Area CVAP that speaks a language other than English at home speaks a language other than Yup’ik. [Pls.’ SOF ¶ 45]

Section 203 of the VRA defines LEP as the inability “to speak or understand English adequately enough to participate in the electoral process.”⁵ 42 U.S.C. § 1973aa-1a(b)(3)(B). The LEP rate for the Bethel Census Area’s voters is very high. According to the July 26, 2002

⁴ The requirements under Sections 4(f)(4) and 203 of the VRA are described at the beginning of Part III.

⁵ The Census Bureau determines whether a person is LEP through responses to a Census question “inquiring how well they speak English by checking one of the four answers provided – ‘very well,’ ‘well,’ ‘not well,’ or ‘not at all.’ The Census Bureau has determined that most respondents over-estimate their English proficiency and therefore, those who answer other than ‘very well’ are deemed LEP.” [Pls.’ SOF ¶ 36]

Determinations by the Census Bureau under Section 203 of the VRA (“2002 Determinations”), among the Bethel Census Area’s CVAP, 20.82 percent, or 1,980 persons, are LEP in the covered Eskimo language, Yup’ik. [Pls.’ SOF ¶ 37] The Bethel Census Area has at least eight ANVSAs in which 50 percent or more of the village’s CVAP is LEP in Yup’ik, at least ten ANVSAs in which 20 to 49.9 percent of the village’s CVAP is LEP in Yup’ik, and at least six ANVSAs and municipalities in which 5 to 19.9 percent of the village’s CVAP is LEP. [Pls.’ SOF ¶¶ 39-42] Among the City of Bethel’s CVAP, 9.31 percent, or 195 persons, are LEP in Yup’ik. [Pls.’ SOF ¶ 44]

LEP Yup’ik-speaking voters in the Bethel Census Area suffer from the present effects of educational discrimination by the State of Alaska.⁶ [Pls.’ SOF ¶¶ 46-56] From the late nineteenth century until 1976, Alaska used a dual system of education that separated white and Native American students. [Pls.’ SOF ¶ 47] Between 1947 and 1976, the only secondary schooling option the State offered to AIAN students was to attend boarding schools in Sitka, Alaska, Chemawa, Oregon, or Chilocco, Oklahoma, where they received inferior educational opportunities. [Pls.’ SOF ¶¶ 49-52] By 1976, there were 2,783 secondary school age children, more than 95 percent Alaskan Natives, residing in communities that had a primary but no secondary school. [Pls.’ SOF ¶ 53] In 1999, a court found that Alaska continued to maintain a dual, arbitrary, unconstitutional, and racially discriminatory system for funding school facilities. [Pls.’ SOF ¶ 54] As recently as 2007, Alaska failed to provide a “meaningful opportunity to learn the material” required to pass a graduation exam, resulting in high failure rates among students in many Alaskan Native villages. [Pls.’ SOF ¶¶ 55-56]

⁶ Plaintiffs do not have to demonstrate educational discrimination to establish a Section 203 claim. Instead, Plaintiffs have included the information derived from the State’s past admissions and judicial findings as background. It is intended to merely show the manner in which the low educational attainment experienced by Plaintiffs and other LEP Yup’ik voters is the product of State discrimination.

Because of the State's educational discrimination, approximately 34.7 percent (2,682 persons) of the 7,728 AIAN voting age population ("VAP") has not graduated from high school, nearly 3.5 times the rate for non-AIAN persons. [Pls.' SOF ¶ 58] About 18.2 percent (1,405 persons) of the AIAN VAP has less than a ninth grade education, including 9 percent (699 persons) who have less than a fifth grade education. [Pls.' SOF ¶ 59] Yup'ik elders denied secondary schooling have the lowest rates of educational attainment. [Pls.' SOF ¶¶ 61-62] Among 947 AIAN persons aged sixty and older, 91.7 percent (868 persons) lack a high school diploma and 86.3 percent (817 persons) have less than a ninth grade education. [Pls.' SOF ¶ 61] Among the 1,718 AIAN persons aged 45 to 59 years, 40.7 percent (700 persons) lack a high school diploma and 27.7 percent (476 persons) have less than a ninth grade education. [Pls.' SOF ¶ 62]

Low educational attainment has led to very high illiteracy among AIAN LEP voters in the Bethel Census Area. Section 203 of the VRA defines "illiteracy" as "the failure to complete the 5th primary grade." 42 U.S.C. § 1973aa-1a(b)(3)(B). According to the 2002 Determinations, the illiteracy rate among the LEP Yup'ik CVAP is 21.46 percent, nearly sixteen times the national illiteracy rate of 1.35 percent. [Pls.' SOF ¶ 64] At least five ANVSAs have illiteracy rates among Eskimo LEP CVAP of forty percent or greater, with some as high as 100 percent. [Pls.' SOF ¶ 66] At least nineteen ANVSAs have illiteracy rates among LEP Yup'ik CVAP of 15.0 percent or greater, at least eleven times the national illiteracy rate. [Pls.' SOF ¶ 67] The illiteracy rate among the LEP Yup'ik CVAP in the City of Bethel is 20.51 percent, over fifteen times the national illiteracy rate. [Pls.' SOF ¶ 65] Test scores indicate that approximately half of all AIAN students in the public schools are not proficient in language arts, making it likely "that the average reading level of the VAP in the Bethel Census Area is considerably lower than their

grade level of educational attainment.” [Pls.’ SOF ¶¶ 68-69] Congress found that the “severe disabilities and continuing illiteracy in the English language,” such as those experienced by Plaintiffs and other Yup’ik voters in the Bethel Census Area, resulted from the denial of “equal educational opportunities by State and local governments.” 42 U.S.C. § 1973b(f)(1); *See* 42 U.S.C. § 1973aa-1a(a).

As result of the LEP and illiteracy rates among Yup’ik-speaking voters, the Bethel Census Area and the City of Bethel are covered by Section 203 of the VRA. In the 2002 Determinations, the Census Bureau listed Eskimo as one of the languages covered under Section 203 of the VRA in the Bethel Census Area. *See* 67 Fed. Reg. at 48,872 (July 26, 2002). In addition, the entire State of Alaska has been subject to the requirements of Section 4(f)(4) of the VRA for Alaskan Natives since October 22, 1975. *See* 28 C.F.R. Part 55, App. Neither the Bethel Census Area nor the City of Bethel has bailed out from coverage under Sections 4(f)(4) and 203 of the VRA. [Pls.’ SOF ¶¶ 116-124]

III. DEFENDANTS HAVE FAILED TO PROVIDE EFFECTIVE LANGUAGE ASSISTANCE IN VIOLATION OF SECTIONS 4(f)(4) AND 203 OF THE VRA.

Section 203 of the VRA prohibits covered jurisdictions from providing English-only voting materials in any public election.⁷ *See* 42 U.S.C. §§ 1973aa-1a(b)(1), 1973l(c)(1); 28 C.F.R. § 55.10. All “voting materials,” which are defined as “registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots,” that are provided in English also must be provided in each language triggering Section 203 coverage. 42 U.S.C. §§ 1973aa-1a(b)(3)(A); 1973aa-1a(c).

⁷ “The statutory requirements of section 4(f)(4) and section 203(c) regarding minority language material and assistance are essentially identical.” 28 C.F.R. § 55.8(a).

Similarly, translations must be provided for all information pertaining to “voting,” defined as “all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant to this Act, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election.” 42 U.S.C. § 1973l(c)(1); *see also* 28 C.F.R. § 55.15 (requiring that voting and voting materials be “broadly construed to apply to all stages of the electoral process”). Translations must be “clear, complete and accurate.” 28 C.F.R. § 55.19(b).

Oral language assistance also must be offered at every stage of the election process, including at polling places during elections. *See* 42 U.S.C. § 1973aa-1a(c); 28 C.F.R. § 55.20.

The availability of language assistance is measured under an effectiveness standard. The U.S. Attorney General has established “two basic standards” to “measure compliance” with how well a jurisdiction meets Section 203’s objective of “enabl[ing] members of... language minority groups to participate effectively in the electoral process”:

- (1) That materials and assistance should be provided in a way designed to allow members of ... language minority groups to be effectively informed of and participate effectively in voting-connected activities; and
- (2) That an affected jurisdiction should take all reasonable steps to achieve that goal.

28 C.F.R. § 55.2(b). Even good faith efforts by a covered jurisdiction to comply with Section 203, in which Defendants have not engaged, are actionable if they are not effective. *See Chinese for Affirmative Action v. Leguennec*, 580 F.2d 1006, 1008–09 (9th Cir. 1978), *cert. denied*, 439 U.S. 1129 (1979).

Defendants fail to provide effective language assistance to Plaintiffs and other LEP Yup'ik voters in the Bethel Census Area. Defendants evade providing assistance by shifting their responsibility to others. With the exception of two incomplete and poorly translated radio ads aired by the State in 2006, all of Defendants' voter information and elections publicity is in English-only. Defendants do not provide equal voter registration opportunities in Yupik. They fail to staff all voting precincts with qualified Yup'ik translators who have received training on providing effective language assistance. They do not provide any elections materials written in Yup'ik, which is historically written and commonly used throughout the Bethel Census Area.⁸ They deny LEP voters the clear, complete, and accurate translations that they need for effective participation in the electoral process. Defendants' elections employees do not engage in any meaningful outreach to the Yup'ik community, and have not implemented quality control measures that are necessary to cure violations of the VRA. Defendants commit few, if any, resources to their language programs. This evidence clearly establishes that Defendants are in violation of Section 203 of the VRA.

A. Defendants evade providing language assistance by shifting their responsibility to others, denying Plaintiffs effective language assistance.

Section 203 places the burden of providing language assistance squarely on the shoulders of the covered jurisdiction. The statute requires that “[w]henver any State or political subdivision... provides... materials or information relating to the electoral process..., *it shall provide them in the language of the applicable minority group as well as in the English language.*” 42 U.S.C. § 1973aa-1a(c) (emphasis added). Defendants have evaded their duty under Section 203 by shifting their responsibility to private companies, untrained translators who

⁸ The narrow exception for written materials for languages that are “historically unwritten” is discussed in Section III(F), including an explanation of why Defendants' contention that it provides a categorical exception is unsupported by the law or the facts.

do not have the tools they need to comply with the law, and even the language minority voters themselves.

As noted, with the exception of two radio advertisements the State purchased in 2006, Defendants send out all information for public service announcements (PSAs) regarding elections to media organizations in English. The State includes a notation of “Local Native Language Requested” with its PSAs, that is, it requests the print, radio, and television media to provide the translation. [Pls.’ SOF ¶¶ 171-172] The City of Bethel likewise sends its election PSAs to a local radio station in English-only and is not involved in translating them into Yup’ik. [Pls.’ SOF ¶ 175] They place the burden for both translating the PSAs and determining if and when to broadcast any announcements translated into Yup’ik on the media. They do not take any steps to confirm whether the PSAs are actually aired in Yup’ik, or whether the PSAs include clear, complete, and accurate translations. [Pls.’ SOF ¶¶ 332-342]

Defendants place a similar burden on their bilingual poll workers. The State does all of its bilingual poll worker recruitment by word of mouth, making the precinct chair responsible for recruiting all poll workers and providing assistance on election day. [Pls.’ SOF ¶ 169] Neither the State nor the City of Bethel provides their designated bilingual poll workers with elections information in Yup’ik, whether in oral or written form, instead making poll workers responsible for translating all English voting materials at the polls. [Pls.’ SOF ¶¶ 177, 182-188, 395-401] Without providing any instructions, the State expects other poll workers to identify if a bilingual poll worker is not capable of providing clear, complete, and accurate translations. [Pls.’ SOF ¶ 182]

The State also imposes its duties on tribal governments and voters. In 2006, the State sent out English-only voter registration information to certain tribal councils, requesting that the

tribes “provide as much assistance to the LEP applicants as needed.” [Pls.’ SOF ¶ 168] Although the State performs polling place accessibility assessments for the three voting precincts in the City of Bethel, it places that burden on the tribal governments for all of the Yup’ik villages. [Pls.’ SOF ¶ 180] Elderly LEP Yup’ik voters are expected to get assistance from a family member who delivers the voter a special-needs ballot or accompanies them to the polling place. [Pls.’ SOF ¶ 170] In a Catch-22, LEP Yup’ik voters are provided with English-only voter information pamphlets that ask those voters to let the State know before the election whether they will need language assistance at the polls. [Pls.’ SOF ¶ 178] The State expects that LEP Yup’ik voters who cannot read the English-only request “might” be told about it by a friend or family member. [Pls.’ SOF ¶ 179]

B. Defendants do not provide Yup’ik language assistance for election information.

“Announcements, publicity, and assistance should be given in oral form to the extent needed to enable members of the... language minority group to participate effectively in the electoral process.” 28 C.F.R. § 55.20(a). Furthermore, “public notices and announcements of electoral activities” should be “handled in a manner that provides members of the... language minority group an effective opportunity to be informed about electoral activities.” 28 C.F.R. § 55.18(b). And a covered jurisdiction should publicize information including “the display of appropriate notices, in the minority language, at voter registration offices, polling places, etc., the making of announcements over minority language radio or television stations, the publication of notices in minority language newspapers, and direct contact with language minority group

organizations.” 28 C.F.R. § 55.18(e). Defendants have failed to comply with these requirements.⁹

With the exception of the two radio ads aired by the State in 2006, all of the PSAs prepared by Defendants are in English-only. [Pls.’ SOF ¶¶ 171, 333-340] Defendants have not produced any evidence that they have aired any radio or television announcements in Yup’ik about the voting information including: candidate qualifying; voter registration; voter purges; time, places and subject matter of elections; information in voter guides; polling place notices and forms; ballots; voter assistance; absentee voting; questioned ballot procedures; and the availability of language assistance. [Pls.’ SOF ¶¶ 228, 333-342, 504-505, 511-512] Prior to 2006, the State had not purchased any radio ads. [Pls.’ SOF ¶¶ 236-237] Although the State claims that the 2006 ads were meant to include information in Yup’ik about voter registration deadlines, the date of the election, absentee voting, election day procedures, and filing deadlines, among others, the ads did not do so. [Pls.’ SOF ¶¶ 333-338] Instead, the 2006 ads included statements in broken Yup’ik that a native speaker would have difficulty understanding. [Pls.’ SOF ¶¶ 335-337] The ad for the 2006 primary election is illustrative:

On August 22nd, from 7 in the morning until 8 o'clock in the evening there will be voting for leaders. When you vote [unknown, something like all your choices] are written in the Division of Elections. Also [unknown]. And be sure to bring your ID when you go to vote. For those who need more information, call 888-383-8683.

[Pls.’ SOF ¶ 335] The State has not aired any television announcements in Yup’ik. [Pls.’ SOF ¶ 244]

Other voting information provided by the Defendants is also in English-only. The State’s English-only information includes: the polling place locator system; notices requesting public

⁹ With the exception of a small category of materials printed for the City of Bethel’s municipal elections, such as ballots, the State provides all of the materials and directions for the conduct of elections there. [Pls.’ SOF ¶ 160]

comments on its HAVA plan; absentee and vote by mail notices; notices about polling place changes; announcements about voter purges; information about new voting equipment; and poll worker recruitment flyers. [Pls.' SOF ¶¶ 238-246] All of the City of Bethel's documents are written in English: "[t]he City of Bethel does not provide notices in Yup'ik." [Pls.' SOF ¶¶ 247-248] Defendants have not conducted any voter education meetings and training sessions even when they have started using new voting equipment. [Pls.' SOF ¶¶ 447-450]

Defendants' lack of public announcements in Yup'ik about elections information is compounded by their failure to make that information available to LEP Yup'ik voters through other methods. Defendants do not have any full-time elections employees fluent in Yup'ik, including election recruiters and trainers. [Pls.' SOF ¶¶ 221-225] The State does not provide a dedicated telephone line that LEP voters can call to obtain election information. [Pls.' SOF ¶¶ 229-230] The State also does not advertise a toll free number for contacting its elections office even though it is aware of socio-economic barriers that many rural Alaskans including LEP Yup'iks might face. [Pls.' SOF ¶¶ 484-485; *see* Pls.' SOF ¶¶ 20-30]

In addition, the State does not provide any language assistance through the use of audio recordings. [Pls.' SOF ¶¶ 393-401] The State has not even considered providing its Yup'ik translators with oral Yup'ik translations on audio tapes or compact disks, despite requests from its translators to help them provide clear, complete and accurate translations. [Pls.' SOF ¶ 401] Although the State provides audio ballots for the disabled, those recordings are only provided in English, and not in Yup'ik. [Pls.' SOF ¶ 397] The State has not actively considered providing any audio translations into any Alaskan Native languages, including Yup'ik, until the U.S. Department of Justice asked the State to enter into a consent decree in October 2007 requiring audio translations on the State's touch-screen voting units. Only then did the State revive

consideration of a proposal it abandoned when it was not immediately sued following voter complaints it received from the Native American Rights Fund (NARF) in 2006. [Pls.' SOF ¶¶ 398-400]

C. Defendants do not provide effective voter registration opportunities in Yup'ik.

Voter registration in jurisdictions covered by Section 203 must be “conducted in such a way that members of the... language minority group have an effective opportunity to register.” 28 C.F.R. § 55.18(c). One way to offer such opportunities is by providing in the “minority language, all notices, forms and other materials... and to have only bilingual persons as registrars.” *Id.* Another is to use “deputy registrars who are members of the... language minority group and the use of decentralized places of registration, with minority language materials available at places where persons who need them are most likely to come to register.” Defendants do not provide effective voter registration opportunities in Yup'ik.¹⁰

Defendants' voter registration forms are available only in English and Tagalog. [Pls.' SOF ¶ 454] In 2006, for the first time the State sent out voter registration packets – though only in English – to some tribes in other parts of Alaska, but did not send them to all of the tribal governments in the Bethel Census Area. [Pls.' SOF ¶¶ 168, 437, 455-456] Oral Yup'ik was not provided for any of that voter registration information because according to the State's Region IV Supervisor, “All our communications are done in English.” [Pls.' SOF ¶ 456] Even though the State conducted two elections in the Bethel Census Area in 2007, it did not send out any voter registration packets to tribal councils there. [Pls.' SOF ¶ 457] Defendants have not

¹⁰ The State is responsible for all voter registration in the Bethel Census Area, including for the City of Bethel's municipal elections. [See Pls.' SOF ¶¶ 142, 150, 159-60]

conducted any voter registration drives or attended tribal council meetings in the Bethel Census Area to increase voter registration. [Pls.' SOF ¶ 459]

To the limited extent that Defendants have designated Yup'ik speakers as deputy registrars, it has not provided effective voter registration opportunities to LEP Yup'iks. Nearly all of those deputy registrars only serve in that capacity in polling places on the day of an election, and not at other times and locations. About one quarter of all of the Yup'ik poll workers the State has designated as deputy registrars were not even aware that they could register unregistered people coming into polling places. [Pls.' SOF ¶ 451]

D. Defendants do not provide qualified Yup'ik translators at all polling places where language assistance is needed.

Jurisdictions covered by Section 203 “need to determine the number of helpers (i.e., persons to provide oral assistance in the minority language)” necessary for polling places, measured under the basic standard of “effectiveness.” 28 C.F.R. § 55.20(c).

Defendants have not had qualified Yup'ik translators at every polling place where language assistance is needed:

- The State has not had Yup'ik translators available over one-third of the time at voting precincts in the Bethel Census Area for the statewide and Regional Educational Attendance Area (REAA) elections it administers. [Pls.' SOF ¶ 259]
- Only twelve of the 32 precincts in the Bethel Census Area have had a Yup'ik translator for every statewide election since 2000 and just fourteen of 32 have had translators for every REAA election. [Pls.' SOF ¶¶ 262, 267]

- Overall, thirteen of the 32 precincts for statewide elections and twelve of the 32 precincts for REAA elections have not had a Yup'ik translator for four or more elections held since 2000. [Pls.' SOF ¶ 261]
- The three voting precincts in the City of Bethel have not had a Yup'ik translator for nearly all of the nine statewide elections since 2000: Bethel #1 has only had a translator once, Bethel #2 three times, and Bethel #3 twice. [Pls.' SOF ¶ 263]
- The three City of Bethel precincts have not had Yup'ik translators for seven of the eight REAA elections administered by the State since 2000. [Pls.' SOF ¶ 268]

In addition, many of the poll workers the State has identified as translators either have not worked as translators, are not fluent in Yup'ik, or did not work an entire election shift. Nine of 89 State translators who were interviewed reported that they had not worked as translators. [Pls.' SOF ¶ 269] Four of the nine State translators interviewed in the City of Bethel either are not fluent in Yup'ik or have not worked as Yup'ik translators. [Pls.' SOF ¶ 271] Another three of the State's translators worked less than a full day, leaving gaps in language assistance coverage. [Pls.' SOF ¶ 270]

Similarly, the City of Bethel has not provided qualified Yup'ik translators at the three polling places it uses for municipal elections. Five of the 11 interviewed City translators either are not fluent in Yup'ik or reported that they have not worked as Yup'ik translators. [Pls.' SOF ¶ 272] Two of the City's remaining six Yup'ik translators reported that they only worked for half or less of the hours that their assigned polling places were open, adding to the lack of Yup'ik language assistance. [Pls.' SOF ¶ 273] Two of the City's interviewed translators reported that

the City of Bethel needed more reliable translators and poll workers because many of the ones the City uses are inexperienced and cause frustration with the Yup'ik-speaking elders who need language assistance. [Pls.' SOF ¶ 274]

The lack of qualified Yup'ik translators is aggravated by Defendants' failure to confirm the abilities of the translators they do have. [Pls.' SOF ¶¶ 343-368] Defendants do not assess any of the language or literacy skills of their poll workers, including their translators. [Pls.' SOF ¶¶ 349, 353-355, 357-359, 361-362, 365-366] Many of the State's translators have low levels of educational attainment, including about one-third who have not completed high school. [Pls.' SOF ¶ 351] Seven voting precincts had more than one translator with less than a high school education, including one translator who has only completed the third grade and could not read written English materials. [Pls.' SOF ¶ 352] Although other states routinely require that their poll workers be literate,¹¹ – and common sense dictates that persons providing language assistance should be literate – the State's Region IV Supervisor claimed that confirming the literacy abilities of Yup'ik translators would be “disenfranchising.” [Pls.' SOF ¶ 357] In summary, Defendants assume that translators are capable of performing their duties in English and Yup'ik without any independent confirmation of whether that is true.

E. Defendants fail to train all of their Yup'ik translators and provide inadequate training for those who attend it.

The overwhelming majority of poll workers, specifically the Yup'ik translators, received no training. Defendants' use of optional, and not mandatory, training that only covers election responsibilities without addressing the particular requirements of language assistance, has contributed to the ineffective language assistance they offer.¹² [Pls.' SOF ¶¶ 291-292, 295-296]

¹¹ See U.S. ELECTION ASSISTANCE COMM'N, COMPENDIUM OF STATE POLL WORKER REQUIREMENTS (Aug. 2007), available at <http://www.eac.gov/files/BPPollWorker/Compendium.pdf>.

¹² Defendants conduct their poll worker training together. [Pls.' SOF ¶ 292]

Poll workers are not required to attend training at all, much less at regular intervals before each set of elections. [Pls.' SOF ¶¶ 295-296] Several voting precincts have had no poll workers who have received training. [Pls.' SOF ¶¶ 297, 300] Among the 726 poll workers the State has used in the Bethel Census Area since 2000, just 10.47 percent (76 poll workers) received training. [Pls.' SOF ¶ 298] Among the 135 Yup'ik translators the State has used since 2000, just 31.85 percent (43 poll workers) have received training. [Pls.' SOF ¶ 299] Eight of the 32 voting precincts have not had any trained Yup'ik translators. [Pls.' SOF ¶ 300] Overall, the State's poll workers have only received training for 8.1 percent of all election shifts covered. [Pls.' SOF ¶ 301] Many poll workers have worked multiple elections without receiving any training. [Pls.' SOF ¶¶ 303-305]

Even when Defendants' Yup'ik translators do attend training, what they receive is "the same training as non-bilingual poll workers." [Pls.' SOF ¶ 306] The Region IV Supervisor, who runs the training, has not received any training on effective language assistance. [Pls.' SOF ¶¶ 310-311] The training Defendants provide merely tracks the poll worker handbook, which does not include any information on providing language assistance. [Pls.' SOF ¶¶ 314-316] In the three training sessions held between 2005 and 2007, the training did not include any role-playing on how language assistance should be provided to voters who need it. [Pls.' SOF ¶ 323] Role-playing is critical because it facilitates confirmation of translators' English and Yup'ik skills, reinforces training, and allows demonstration of how to translate common election materials and terms that translators will encounter. [Pls.' SOF ¶ 321] Although other Section 203 covered jurisdictions offer separate translator training on language assistance lasting a full day for each election, Defendants' optional training on all election procedures might include as little as a few minutes on language assistance. [Pls.' SOF ¶¶ 309, 317]

Defendants instruct poll workers to provide only “passive” language assistance at the polls; that is, “poll workers were instructed to wait until a voter asked for assistance before providing it.” [Pls.’ SOF ¶¶ 250, 256] Passive assistance conflicts with the Yup’ik tradition of offering active assistance to their elders by asking whether the Yup’ik voter needs assistance and offering it at every stage of the voting process. [Pls.’ SOF ¶¶ 252-254] Alfred Yazzie, who has worked as an expert consultant with the U.S. Department of Justice in language assistance cases for native voters, explained, “‘passive language assistance is not language assistance at all’.... The failure to offer active language assistance ‘results in disenfranchisement of LEP voters who are confused about the voting process and are not sure what is on the ballot and whether they have voted how they intended.’” [Pls.’ SOF ¶ 257] Defendants’ policy of passive assistance imposes a barrier that prevents Yup’ik speakers from being able “to participate effectively in the electoral process.” 28 C.F.R. § 55.20(a).

F. Defendants fail to provide written Yup’ik election materials despite the common usage of written Yup’ik, which is a historically written language.

Section 203 requires that “any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots” shall be provided “in the language of the applicable language group as well as in the English language.” 42 U.S.C. § 1973aa-1a(c). Defendants admit that they do not provide any materials written in Yup’ik, with all ballots and other written election materials in English only. Pls.’ SOF ¶¶ 183-185, 187-188. According to the State, it has not even considered providing written Yup’ik election materials because its election officials have concluded that all Alaskan Native languages, including Yup’ik, are historically unwritten. The City of Bethel has taken a similar position. Pls.’ SOF ¶¶ 186, 214.

Section 203 only exempts jurisdictions from providing election materials written in a covered minority language under very narrow circumstances:

[W]here the language of the applicable minority group is oral or unwritten or in the case of Alaskan Natives and American Indians, if the predominant language is historically unwritten, the State or political subdivision is only required to furnish oral instructions, assistance, or other information relating to registration and voting.

Id. Contrary to what Defendants have contended in their earlier summary judgment motions, this exception does not provide a categorical exemption for all Alaskan Native languages.¹³ The Justice Department's regulations make that clear, providing that the languages of "*some* American Indians and Alaskan Natives, are unwritten." 28 C.F.R. § 55.12(c) (emphasis added). The touchstone of whether a language is considered unwritten is whether it is "commonly used in written form." *Id.* As the Court recognized in its April 17, 2008 Order granting Plaintiffs' Rule 56(f) Motion, at page 3, determination of whether Yup'ik is a written language is a mixed question of law and fact. That is why the Justice Department's regulations state that although a jurisdiction bears the responsibility of making that determination, 28 C.F.R. § 55.12(c), it cannot use the guidelines themselves as "a substitute for analysis and decision." 28 C.F.R. § 55.2(c).

Defendants, by their own admission, have not engaged in any of the required analysis of the extent to which written Yup'ik is historically written or commonly used in the Bethel Census Area. Instead, the State, which provides most of the written materials to the City of Bethel, made its determination based upon its own interpretation of Section 203 and "the precedent set by the State" of conducting English-only elections. [Pls.' SOF ¶ 214] The State has not surveyed any Yup'ik-speaking voters to determine whether written Yup'ik would be helpful to them. [Pls.' SOF ¶ 215] Lieutenant Governor Parnell and the former State Elections Director

¹³ Plaintiffs have described in detail why Defendants' argument is contrary to the plain language of the statute and will not repeat all of that discussion here. Instead, Plaintiffs incorporate by reference their arguments in their brief in opposition to Defendants' Motions for Summary Judgment.

admitted that they did not have any first hand knowledge of whether Yup'ik is historically written. [Pls.' SOF ¶¶ 216-217, 219] Instead, the State relies upon statements it inaccurately attributes to Professor Lawrence Kaplan, an Inupiaq linguist. [Pls.' SOF ¶ 218] The former State Elections Director apparently recognized the tenuousness of the State's position, testifying that she briefed municipal clerks about the possibility of having to provide election materials written in Alaskan Native languages as a result of this litigation.¹⁴ [Pls.' SOF ¶ 220]

Yup'ik is a historically written language dating back to its wide use in the nineteenth century. [Pls.' SOF ¶¶ 189-192] A study of Yup'ik villages in the 1950s found that "between villagers, letters are commonly written in Yup'ik," including laws and council minutes "recorded in Eskimo." [Pls.' SOF ¶¶ 193-194] There was a considerable amount of literacy in the older, or Moravian, form of written Yup'ik, which the Plaintiffs, who are in their late 60s and 70s, learned to read when they were children. [Pls.' SOF ¶¶ 195-197] Yup'ik is a single written language that has developed and been improved, like other written languages. [Pls.' SOF ¶ 198] In the 1970s, academics such as Professor Jacobson, the leading expert on the Yup'ik language at the Alaska Native Languages Center, merely built upon the existing written Yup'ik language to make it more precise, easier to learn, and easier to type on an English keyboard. [Pls.' SOF ¶ 199]

Yup'ik also is commonly used in written form in the Bethel Census Area. [Pls.' SOF ¶ 200] In the native village of Tuntutuliak, between 75 and 85 percent of tribal members read written Yup'ik. [Pls.' Ex. 192, Lupie Decl. ¶ 18] In the native village of Tuluksak, more than half of all tribal members read written Yup'ik; many of those who do not read Yup'ik also

¹⁴ Defendants' argument that Yup'ik is not an historically written language, even if it had merit, has no bearing on the balance of plaintiffs' claim and the relief plaintiffs seek. Language assistance is required by the VRA and poll worker translators should be provided written translation so that they may accurately and uniformly read election information to LEP voters. There is no dispute that Yup'ik is a written language and defendants are not currently providing language assistance, written or otherwise.

cannot read anything in English. [Pls.' Ex. 193, Alexie Decl. ¶ 18] In the native village of Kasigluk, nearly all of the tribal members, about 85 to 90 percent, read written Yup'ik. [Pls.' Ex. 194, Nicholas Decl. ¶ 18] In the native village of Kwigillinok, most tribal members read modern Yup'ik, and more than half read both modern and the older Moravian form of written Yup'ik. [Pls.' Ex. 195, Jimmie Decl. ¶ 26] In about one quarter of the 68 Yup'ik villages, children grow up speaking and reading Yup'ik as their first language. [Pls.' SOF ¶ 201] Schools in the Lower Kuskokwim School District have bilingual education programs and regularly teach written Yup'ik. [Pls.' SOF ¶ 202] Books, educational materials, government publications, religious books, and even bank loan forms are produced and used in written Yup'ik. [Pls.' SOF ¶ 203]

The State of Alaska, through its departments other than the Division of Elections, admits that written Yup'ik is commonly used by preparing and disseminating Yup'ik materials, including information for domestic violence victims, guides for special needs children, information on bird flu, text books and other materials used in the public schools, a handbook for crime victims, and fish and game notices, among others. [Pls.' SOF ¶¶ 212-213] Some of the Defendants even admitted seeing signs in the Bethel Census Area and the City of Bethel that were written in Yup'ik. [Pls.' SOF ¶ 211]

The overwhelming majority of Defendants' own Yup'ik translators also read and use written Yup'ik. Of 89 interviewed State translators, 88.8 percent (79 translators) read at least some written Yup'ik, including 70 translators who read written Yup'ik fluently.¹⁵ [Pls.' SOF ¶¶ 204-205] In 28 of the 29 voting precincts in the native villages, there was at least one

¹⁵ Among the ten State translators who do not read written Yup'ik, two are not fluent in Yup'ik, two have not worked as Yup'ik translators, and one is illiterate in both English and Yup'ik because she has only completed the third primary grade. [Pls.' SOF ¶ 206]

interviewed State translator who read written Yup'ik for every election since 2000. [Pls.' SOF ¶ 207] Of the 79 State translators who reported that they read written Yup'ik, about 90 percent (71 translators) reported that they read the modern form of written Yup'ik, and about 70 percent (55 translators) read the older Morovian form of written Yup'ik. [Pls.' SOF ¶ 208] Four out of five interviewed State translators in the City of Bethel read written Yup'ik. [Pls.' SOF ¶ 209] Out of seven interviewed City of Bethel translators who are fluent in Yup'ik, four read written Yup'ik and a fifth translator said that written Yup'ik materials would help him translate more accurately. [Pls.' SOF ¶¶ 210, 288]

G. Defendants' failure to provide written Yup'ik election materials denies Plaintiffs clear, complete, and accurate translations.

"It is essential that material provided in the language of a language minority group be clear, complete and accurate." 28 C.F.R. § 55.19(b). In addition, a jurisdiction must give "sufficient attention to the needs of language minority group members who cannot effectively read either English or the applicable minority language..." 28 C.F.R. § 55.20(b). Covered jurisdictions must provide "a complete and accurate translation of the English ballots," including "instructions in the minority language explaining the operation of the voting machine." 28 C.F.R. § 55.19(d). The State admitted the importance of these requirements to provide translations that are "understandable to the people in that community." [Pls.' SOF ¶¶ 325-330] At the same time, the State acknowledged that some translations given to voters might not be complete and accurate, particularly because the quality of Yup'ik translations varies from translator to translator. [Pls.' SOF ¶¶ 327, 361]

Defendants only provide written election materials in English, even though the State has admitted that several forms of written Yup'ik materials would help provide more accurate to LEP Yup'ik voters. For example, the State Elections Director admitted that voting materials

written in Yup'ik read "from the poll worker to the voter" would provide a uniform translation. [Pls.' SOF ¶ 279] In addition, the State has considered using an English/Yup'ik glossary of election terms, but has not prepared one, even though a similar Yup'ik glossary has been prepared for use in judicial proceedings and the U.S. Election Assistance Commission has encouraged the use of such glossaries. [Pls.' SOF ¶¶ 280-282] Similarly, the State admitted that providing pictures to illustrate certain words might be an effective way of communicating an English word into Yup'ik. [Pls.' SOF ¶ 283] Defendants' own translators enthusiastically endorsed the use of election materials written in Yup'ik, with about 91 percent of State translators and all the City of Bethel's translators who read written Yup'ik (as well as one translator who does not) saying that it would help them translate. [Pls.' SOF ¶¶ 284-290]

Defendants' election materials are complex and require a high level of English literacy. Common English-only election materials Defendants provide to Plaintiffs, such as voter registration forms, absentee ballot questions, and voter information guides, require between a high school and college graduate education to understand. [Pls.' SOF ¶ 381]

The problem is especially pronounced for ballot questions written in English, which have the highest readability scores and often provide that a "yes vote would mean no or a no vote would mean yes." [Pls.' SOF ¶ 378; *See* Pls.' SOF ¶¶ 369-381] Although the State performs readability analysis pursuant to state law, it does so on draft language and not the actual language that appears on the ballot; the net result frequently leads to more complex language being used, such as the 2003 cruise ship ballot question that was scored at a tenth to twelfth grade level in draft form but appeared on the ballot requiring a thirteenth to sixteenth grade (college graduate)

education.¹⁶ [Pls.' SOF ¶¶ 372-373] The City of Bethel, which apparently does not conduct any readability analysis, had an alcohol ballot question in 2006 that required the highest level of reading comprehension of all State and City ballot questions analyzed since 2000: a 16.7 grade level (college graduate) was necessary to understand it. [Pls.' SOF ¶ 375] Over one quarter of voters in the Bethel Census Area have not attained the level of education required to understand even the simpler ballot questions. [Pls.' SOF ¶ 376] The low level of education attainment by Yup'ik voters and many of Defendants' translators, makes their efforts to read, understand and translate English-only materials an impossible task, especially when combined with high LEP rates and Defendants' lack of comprehensive language assistance training. [Pls.' SOF ¶¶ 377-380] The State is aware of the problem, having received complaints from both English-speaking and non-English speaking voters about the complexity of ballot questions, which its own Yup'ik translators have echoed. [Pls.' SOF ¶¶ 377-380]

Defendants' failure to provide election materials written in Yup'ik denies LEP Yup'ik voters effective language assistance, as the following example illustrates. Two translators used by the State and the City were asked to translate the following ballot that appeared on the ballot in the State of Alaska's November 5, 2002 general election:

“Initiative on Gas Pipeline Development Authority. This bill would create the Alaska Natural Gas Development Authority (Authority) as a public corporation of the State. The Authority would acquire and condition North Slope natural gas, and construct a pipeline to transport the gas. The Authority's powers would include buying property or taking it by eminent domain, and to issue state tax-exempt revenue bonds. The gasline route would be from Prudhoe Bay to tidewater on Prince William Sound and the spur line from Glennallen to the Southcentral gas distribution grid. The Authority would operate and maintain the gas pipeline, ship the gas, and market the gas. Should this initiative become law?”

¹⁶ Moreover, even the limited readability analysis the State performs on draft ballot question language does not accurately reflect the actual level of reading comprehension required, discounting that text with multi-syllabic words is more difficult and harder to read. [Pls.' SOF ¶ 374]

[Pls.' SOF ¶ 384] One translator, who has a high school education, provided the following translation of the November 2002 State ballot question into Yup'ik:

This Initiative on Gas Pipeline Development Authority. This thing that needs to be made, this, that needs to be followed, this the path for the **gas**, this the **gas**, the one that is not water, but is a... gas in the stomach, that can be used to the point where it can become fire. This, to our big lands authority and to the whole population, it will get (pause). These leaders will be able to take and finish from the place to our North, this gas in the stomach, **gas**, they'll be able to take from there and take it to the place where it will be stored, where it will be its place. Those leaders power will include the purchase of land or (pause) it will take the things that are underground, they will take away from that person. They will work till completion, this our lands **tax** (pause) **tax, tax, tax**, will be non-**taxable** towards this thing. These things that will be gotten. The path of the pipeline, from the point on **Prudhoe Bay** to the beach, the sandy place, of **Prince William Sound**. And over the mountains from there, Glenallen to, through the mountains, its path, to the end of our ocean. (pause) Those leaders workers on the pipeline, and also the gas in the stomach, the **gas**, they will be able to oversee, that. Like this! They will take it out, work on it, store it (pause) and then they will take it to the place where they will sell it. All that, they are deeming it important to be completed.

[Pls.' SOF ¶ 385] The net result was a translation rendering the ballot question incomprehensible to any Yup'ik voters who would have received the translation, including the translator's use of a word for "'gas' that means the bodily function, rather than the natural resource." [Pls.' SOF ¶ 386] The other translator, who possesses a Masters Degree, experienced similar problems by using numerous English words for Yup'ik terms because of the difficulty of translating on the spot. [Pls.' SOF ¶ 387] The two translators also had trouble translating the City of Bethel's alcohol ballot question from 2006, which used particularly complex language requiring a graduate school level of reading comprehension in English. [Pls.' SOF ¶¶ 375, 388-392]

H. Defendants' lack of outreach to the Yup'ik community and lack of quality control has denied Plaintiffs effective language assistance.

Defendants' language assistance program is so minimal and flawed as to be basically non-existent. But on top of that, Defendants completely failed to engage in any community

contact, visits, or outreach which would have identified deficiencies and needs. This failure guaranteed that their program would be inadequate. This failure to look to see what was going on over so many years, buttresses the need for injunctive relief.

Community outreach is critical to any successful language assistance program. “A jurisdiction is more likely to achieve compliance” with Section 203’s requirements “if it has worked with the cooperation of and to the satisfaction of organizations representing members of the applicable language minority group.” 28 C.F.R. § 55.16. To ensure that “clear, complete, and accurate” translations of voting materials and information is provided, a jurisdiction should consult “with members of the applicable language minority group with respect to the translation of materials.” 28 C.F.R. § 55.19(b). Ultimately, such outreach makes it more likely that the assistance provided allows “members of the... language minority group to participate effectively in the electoral process.” 28 C.F.R. § 55.20(a). Outreach is especially important for native voters, who do not have a long tradition of voting because of their historical disenfranchisement throughout much of the United States. [Pls.’ SOF ¶ 427]

The State Elections Director admitted that voter outreach is one of the key components of an effective language program. [Pls.’ SOF ¶ 425] However, State elections employees have not visited any of the native villages. Since 2000, State election workers have only traveled to the City of Bethel a combined total of five times, and have not been to any of the surrounding native villages.¹⁷ [Pls.’ SOF ¶¶ 418-419, 422-424] All of those trips were for polling place accessibility studies and poll worker training in the City of Bethel. [Pls.’ SOF ¶ 420] State election workers have not conducted any in-person polling place accessibility visits or poll

¹⁷ There is strong evidence suggesting that State of Alaska elections employees have never traveled (for election-related purposes) to most, if not all, of the native villages outside of the City of Bethel since Alaska became covered under Section 203 in 1975. [See Pls.’ Ex. 192, Lupie Decl. ¶¶ 27-29; Pls.’ Ex. 193, Alexie Decl. ¶¶ 28-30; Pls.’ Ex. 194, Nicholas Decl. ¶¶ 27-29; Pls.’ Ex. 195, Jimmie Decl. ¶¶ 20-21]

worker training in any of the dozens of native villages in the rest of the Bethel Census Area. [Pls.' SOF ¶¶ 421-422]

The State also has admitted that “[w]orking with the tribal governments seemed to be the most effective approach in reaching out to LEP voters in areas where Alaska Native languages are spoken.” [Pls.' SOF ¶ 426] Yet, Defendants have done virtually no outreach to the Yup'ik community. By the end of November 2007, the State's outreach consisted of a single mailing of a voter registration form and instructions in English, with no follow-up mailings or phone calls. [Pls.' SOF ¶¶ 429, 437] The State has not communicated with any native organizations, such as NARF or the National Congress of American Indians, to determine how to provide effective language assistance. [Pls.' SOF ¶ 430] Although Native American meetings are regularly held in Anchorage and Juneau and are attended by tribal leaders, the State has not used those events as an opportunity to schedule meetings. [Pls.' SOF ¶¶ 431, 433] Even though the State admits that “it would be helpful to have the opportunity to meet face-to-face with some of these leaders,” it has not done so even when it has been convenient for State employees. [Pls.' SOF ¶¶ 431-433]

The State's first ever effort to contact tribal councils in the Bethel Census Area about the State's language assistance program was a survey sent to tribal governments in early 2008. [Pls.' SOF ¶¶ 403-405, 435-436] That English-only document, titled “Oral Language Assistance Survey,” only asked about the need for and availability of translators and local media in the village; it did not request opinions about the State's language assistance program, such as whether written bilingual materials would be helpful. [Pls.' SOF ¶¶ 187, 215, 405; Pls.' Ex. 83] Prior to that survey, the Region IV Supervisor had not engaged in any voter outreach to ask whether the State's language assistance program was effective because “I haven't seen the need

to do that.” [Pls.’ SOF ¶ 406] The State concluded what it was doing was effective without seeking any information or conducting any evaluation to determine whether its conclusion was accurate. [Pls.’ SOF ¶ 407]

Except for the 2008 survey, the Region IV Supervisor has not engaged in any community outreach in the Bethel Census Area. She explained that since assuming her position in 2003, she had not attended any tribal council meetings to provide information about elections because “[m]y job is to conduct elections... that’s what I’m focused on. I’m not focused on attending tribal council meetings in all of these communities.” [Pls.’ SOF ¶ 438] Although she admitted that attending those tribal meetings “quite possibly may” provide an opportunity to ask tribal leaders for feedback about the language assistance program, she also stated, “but I wouldn’t know that unless I attended one.” [Pls.’ SOF ¶ 439] The Region IV Supervisor also has not talked to educators to get their feedback about the State’s program. [Pls.’ SOF ¶ 440]

Similarly, the City of Bethel’s clerk has ignored numerous opportunities to meet with tribal leaders within the city limits about her language assistance program during the two and a half years she held her position. [Pls.’ SOF ¶ 415] She attended between eight to twelve meetings with the leaders of the Orutsaramiut Native Council (ONC), Bethel’s local tribal council, but has not discussed any elections issues with them or asked for elections items to be placed on the agenda. [Pls.’ SOF ¶¶ 441-442] The City Clerk also had not met with any tribal leaders about elections in the City of Bethel. [Pls.’ SOF ¶ 443] When the City Clerk visited the Yup’ik cultural center and the senior center in Bethel, “None of it was based around elections.” [Pls.’ SOF ¶¶ 444-445] Alfred Yazzie concluded that the Defendants’ admissions demonstrated that “[t]hey are not doing any community outreach.” [Pls.’ SOF ¶¶ 427-428, 446]

Defendants also have not independently assessed whether LEP Yup'ik voters are receiving clear, complete, and accurate translations of all elections materials and information. [Pls.' SOF ¶¶ 403, 411] Although observing the actual conduct of elections is important to know whether effective language assistance is being offered, the State has not had any of its elections employees in the Bethel polling places on election day, and the former City of Clerk of Bethel had only seen assistance at one City polling place. [Pls.' SOF ¶¶ 412-415] Defendants have not asked their own translators for their opinions about what is necessary to provide effective language assistance and accurate translations. [Pls.' SOF ¶ 416] Even after the State was sued in this action, Lieutenant Governor Parnell did not direct the State Elections Director to investigate Plaintiffs' allegations, simply accepting the Director's conclusion that the State "was in compliance" with the VRA. [Pls.' SOF ¶¶ 474-479] The State likewise has not used any information on best practices for providing language assistance, including its own experience under federal oversight of Tagalog assistance in Kodiak, to improve its assistance program for other languages including Yup'ik. [Pls.' SOF ¶¶ 402, 408-409] Instead, the Region IV Supervisor concluded, "we have election workers who speak fluent Yup'ik. I didn't see the need to make any changes to that." [Pls.' SOF ¶ 410] Defendants' lack of outreach and quality control has contributed to the inaccurate, incomplete, and arbitrary translations of voting materials and information provided to LEP Yup'ik voters.

I. The State has committed inadequate resources to language assistance.

Defendants' violations of Section 203 are heightened by the inadequate resources that the State has committed to its Yup'ik language assistance program. In 2007, the State did not have any funds specifically allocated for language assistance and the State Elections Director had not asked for any. [Pls.' SOF ¶¶ 465-466] The State has several million dollars in unspent federal Help America Vote Act (HAVA) funding. [Pls.' SOF ¶ 461] However, Lieutenant Governor

Parnell has not had any discussions with the State Elections Director about using any of those funds to provide language assistance. [Pls.' SOF ¶¶ 462, 464] As of late November 2007, the State has spent a combined total of \$5,584.70 in federal HAVA funds for all languages covered in the State, with all but \$51.86 spent on advertising during State Fiscal Year 2007. [Pls.' SOF ¶ 463]

The State has only one elections employee who works on the State's language assistance program "about half" of the time, even though that employee is responsible for all languages in the State of Alaska, including Tagalog, Yup'ik, Athabascan, and the other Section 203 covered languages. [Pls.' SOF ¶¶ 467-468] At the time of the State Elections Director's deposition in November 2007, that employee was out on maternity leave until the end of January 2008. [Pls.' SOF ¶ 469] The State Elections Director knew that southwestern states had bilingual coordinators for their language programs, but admitted Alaska did not have one even though "it would be a good idea." [Pls.' SOF ¶ 471] The State did not start "thinking seriously" about having a full-time staff worker whose only responsibility is language assistance until the State was "contacted by the... Department of Justice" in approximately August 2007. [Pls.' SOF ¶ 470]

According to the State Elections Director, Alaska "started looking in April 2006" at improving its language assistance program. However, the State "put it aside as we were conducting our major statewide election as well as our REAA/CSRA election... and we picked it back up after the election and then we were hit with another statewide special election in April of 2007." [Pls.' SOF ¶ 472] The State Elections Director also put aside the language program because "Language assistance is not the only assistance that the Division of Elections provides.... We have... the demands of every voter in the state. I think it would [be] important

to balance all of those needs and our resources to be able to make that determination.” [Pls.’ SOF ¶ 473] This “justification” is particularly telling. Defendants view compliance with the VRA as optional, something extraneous to running an election rather than one of their core responsibilities. Section 203 requires language assistance be provided to covered LEP voters for every public election, not merely when it is administratively convenient for elections officials to do so. *See Leguennec*, 580 F.2d at 1008-09; 42 U.S.C. § 1973aa-1a(b)(1); *see also* 42 U.S.C. § 1973l(c)(1) (describing types of elections covered by Section 203); 28 C.F.R. § 55.10 (same).

IV. DEFENDANTS HAVE DENIED PLAINTIFFS VOTER ASSISTANCE IN VIOLATION OF SECTION 208 OF THE VRA.

Section 208 provides that “[a]ny voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter’s choice, other than the voter’s employer or agent of that employer or officer or agent of the voter’s union.” 42 U.S.C. § 1973aa-6. Defendants continue to deny Plaintiffs voter assistance in violation of Section 208 by: falsely informing them they must go into the voting booth alone and that no one is allowed to see their votes; denying them their assistor of choice at any stage of the election process; and requiring them to be assisted by poll workers who do not speak Yup’ik fluently and/or who do not read English well enough to provide a complete and accurate translation of voting materials.

Defendants are not providing proper training to their poll workers on the requirements for providing voter assistance. One of the poll worker training pamphlets used by the State and the City of Bethel includes the following statement about voter assistance: “If requested, an election worker may assist the voter. The election workers should maintain a reasonable distance from the ballot box to ensure the secrecy of the voter’s ballot....” [Pls.’ SOF ¶ 488] Alfred Yazzie has explained, “If a translator can’t go into the voting booth with a voter who wants language or

voter assistance, that is no assistance. What results instead is an uninformed voter who has no idea whether they are voting the way they intended.” [Pls.’ SOF ¶¶ 486-487]

Consistent with Defendants’ improper instructions:

- Poll workers in Akiachak provide translation assistance only at the voting table and do not go into the booth to assist voters with translation. [Pls.’ SOF ¶ 489]
- In the City of Bethel, Plaintiff McCann has been told that his vote had to be in private and that he had to go into the voting booth alone because voting is confidential. [Pls.’ SOF ¶ 492]
- Elena Gregory, a resident of Tuluksak, “voted in an election where the poll worker told [her] that elders could not have help interpreting or reading the ballots, and that everyone had to be 50 feet away from the person voting.” [Pls.’ SOF ¶ 493]
- Poll workers in Kwigillingok do not allow translators “to help voters inside the tent or voting booth.” [Pls.’ Ex. 195, Jimmie Decl. ¶ 22]
- Henry Lupie, a tribal representative for Tuntutuliak, recalls “something about the State telling [poll workers] not to help voters.” [Pls.’ Ex. 192, Lupie Decl. ¶ 23]

Defendants’ poll workers also deny voters the opportunity to receive assistance from the person of their choice:

- Poll workers in Akiachak tell voters that they cannot bring another person of their choice into the voting booth to help them vote. [Pls.’ SOF ¶ 490]

- In the City of Bethel and the native village of Kwigillingok, voters including Plaintiff McCann and Mr. Jimmie, have not been told, nor have they seen any signs indicating, that they are allowed to bring someone into the voting booth to assist them. [Pls.’ SOF ¶ 492; Pls.’ Ex. 195, Jimmie Decl. ¶ 17]
- Ms. Gregory was told by a poll worker in Tuluksak that she “could not help the others vote if they did not understand.” [Pls.’ SOF ¶ 493]
- Joseph Alexie, President of the Tuluksak Tribal Council, explained, “No poll worker has ever offered to help translate my ballot. We vote like we are blind because we don’t know what we are voting for.” [Pls.’ Ex. 193, Alexie Decl. ¶ 24]
- Poll workers in Tuntutuliak do not offer assistance to voters who need it. [Pls.’ Ex. 195, Jimmie Decl. ¶ 22]

Yup’ik speakers would be able to fully understand their voting choices if voting materials were translated into Yup’ik and if they could bring a friend or family member or a poll worker with them into the voting booth to translate. [Pls.’ SOF ¶ 491]

Defendants also deny Plaintiffs voter assistance opportunities through their violations of Section 203. *See* Part III. Even where Defendants have translators who are fluent in Yup’ik, their translators often do not offer language assistance. In Tuluksak, Ms. Gregory says that the “ballots are not translated at the elections... because we had no idea we were allowed to do that. No one ever told me I could help others vote and translate for them; in fact they have said the opposite.” [Pls.’ SOF ¶ 494] This problem is worsened because “The ballots and voting materials are in English only. Even though there are poll workers who speak Yup’ik, they do not offer to help...” [Pls.’ Ex. 193, Alexie Decl. ¶ 23] Mr. Lupie has experienced similar problems

in Tuntutuliak. [Pls.' Ex. 192, Lupie Decl. ¶ 23] Defendants' failure to permit meaningful assistance from the voter's person of choice, including Defendants' own poll workers and translators, violates Section 208. *See* 42 U.S.C. § 1973aa-6.

V. INJUNCTIVE RELIEF IS NECESSARY AND APPROPRIATE.

To obtain a preliminary injunction, a plaintiff must demonstrate: “(1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to plaintiff if preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4) advancement of the public interest (in certain cases).” *Johnson v. Cal. State Bd. of Accounting*, 72 F.3d 1427, 1430 (9th Cir. 1995). Alternatively, injunctive relief can be granted if a party demonstrates: “either 1) a combination of probable success on the merits and the possibility of irreparable injury, or 2) the existence of serious questions going to the merits and that the balance of hardships tips sharply in its favor.” *F.D.I.C. v. Garner*, 125 F.3d 1272, 1277 (9th Cir. 1997), *cert. denied*, 523 U.S. 1020 (1998); *accord Connecticut General Life Ins. Co. v. New Images*, 321 F.3d 878, 881 (9th Cir. 2003); *S.W. Voter Reg. Educ. Project v. Shelley*, 344 F.3d 914, 917-18 (9th Cir. 2003). As the court explained in *Clear Channel Outdoor Inc. v. Los Angeles*, 340 F.3d 810, 813 (9th Cir. 2003), “[t]hese two alternatives represent ‘extremes of a single continuum,’ rather than two separate tests.” Under the applicable standards, Plaintiffs are entitled to injunctive relief on their language assistance and voter assistance claims.

A. Plaintiffs are likely to prevail on the merits

In light of the overwhelming evidence of Defendants' failure to provide effective language assistance to LEP Yup'ik voters in the Bethel Census Area, and Defendants' denial of voter assistance opportunities, Plaintiffs should prevail on the merits of their Section 203 and Section 208 claims. Plaintiffs' likelihood of prevailing on the merits strongly favors the granting

of injunctive relief. *See United States v. Berks County, Pa.*, 250 F. Supp.2d 525 (E.D. Pa. 2003) (granting preliminary injunction for language assistance claim brought under Section 4(e) of the VRA and voter assistance claim under Section 208 of the VRA); *see also Johnson v. Halifax County*, 594 F. Supp. 161, 171 (E.D.N.C. 1984) (enjoining elections where plaintiffs showed a substantial likelihood of prevailing on the merits); *Taylor v. Haywood County, Tenn.*, 544 F. Supp. 1122 (W.D. Tenn. 1982) (granting a preliminary injunction against pending elections after finding that plaintiffs established a likelihood of prevailing on vote dilution claim); *Foster v. Kusper*, 587 F. Supp. 1191, 1193 (N.D. Ill. 1984) (plaintiff entitled to preliminary injunction in election contest who established “a substantial likelihood of success on the merits”).

B. Plaintiffs will be irreparably injured absent an injunction

The right to vote is one of the most fundamental rights in our system of government. *Reynolds v. Sims*, 377 U.S. at 554; *Harman v. Forssenius*, 380 U.S. 528, 537 (1965); *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Idaho Coalition United for Bears v. Cenarussa*, 342 F.3d 1073, 1076 (9th Cir. 2003). The right to vote is entitled to special constitutional protection because:

The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. . . . [T]he right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil rights.

Reynolds v. Sims, 377 U.S. at 555, 562; *accord Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) (“[o]ther rights, even the most basic, are illusory if the right to vote is undermined”). Because of the preferred place it occupies in our constitutional scheme, “any illegal impediment to the right to vote, as guaranteed by the U.S. Constitution or statute, would by its nature be an irreparable injury.” *Harris v. Graddick*, 593 F. Supp. 128, 135 (M.D. Ala. 1984), *opinion withdrawn on other grounds*, 615 F. Supp. 239 (M.D. Ala. 1985); *accord Dillard v. Crenshaw County*, 640 F.

Supp. 1347, 1363 (M.D. Ala. 1986) (“denial of the right to vote” constitutes irreparable injury); *Foster v. Kusper*, 587 F. Supp. at 1193 (denial of the right to vote for candidate of choice constitutes “irreparable harm”); *see also Elrod v. Burns*, 427 U.S. 347, 373 (1976) (the loss of constitutionally protected freedoms “for even minimal periods of time, constitutes irreparable injury”). “Federal courts have recognized that the holding of an upcoming election in a manner that will violate the Voting Rights Act constitutes irreparable harm to voters.” *Berks County*, 250 F. Supp.2d at 540 (collecting citations).

Plaintiffs will suffer irreparable injury if Defendants continue to deny them effective language assistance by failing to provide all “voting materials” and election information in oral and written Yup’ik, as well as voter assistance from the person of their choice at every stage of the voting process. In the face of this evidence, the State has been dismissive of the known impact its violations have had on depressing Yup’ik voter turnout in the Bethel Census Area, [Pls.’ SOF ¶¶ 496-502], suggesting that it was not concerned “Because that has been the trend of that area.” [Pls.’ SOF ¶ 495] Between 2000 and the present, Yup’ik turnout has averaged 13 percent lower than the statewide voter turnout. [Pls.’ SOF ¶ 496] Low Yup’ik turnout was particularly pronounced in the last Presidential Election in 2004, when it trailed the statewide average by more than 20 percent. [Pls.’ SOF ¶ 499] The City of Bethel experienced some of the lowest turnout. In every statewide election from 2000 to 2006, the three precincts in the City of Bethel have been below the average turnout in the Bethel Census Area; each was more than 22 percent lower than the statewide average in 2004. [Pls.’ SOF ¶¶ 498, 500]

Plaintiffs have detailed in the SOF that the State engaged in decades-long programs which limited the educational opportunities of Alaskan Natives. [Pls.’ SOF ¶¶ 46-56] Historic discrimination is not an element claims under the language assistance provisions of the VRA.

But the severe disabilities that the State has inflicted on Plaintiffs through its educational discrimination, combined with Defendants' largely English-only elections and denial of voter assistance, has resulted in the very evil the VRA was intended to remedy: "language minority citizens [being] excluded from participating in the electoral process." 42 U.S.C. § 1973b(f)(1).

Injunctive relief, preventing further injury, is further appropriate because Plaintiffs and other LEP Yup'ik voters in the Bethel Census Area and the City denied "equal access to the electoral process cannot collect money damages after trial for the denial of the right to vote." *Berks County*, 250 F. Supp.2d at 540. The absence of a monetary remedy is heightened by the fact that "denial of equal access to the electoral process discourages future participation by voters." *Id.* at 540-41 (citing *Gomez v. City of Watsonville*, 863 F.2d 1407, 1416 n.4 (9th Cir. 1988)). The severe injury to Plaintiffs is especially true given the longstanding "trend" of depressed Yup'ik voter turnout in the Bethel Census Area and the City of Bethel, [Pls.' SOF ¶ 495], which is likely to be heightened even in this Presidential Election year as it was in 2004 if Defendants' violations of the VRA are not cured. [Pls.' SOF ¶¶ 499-500]

C. The threatened injury to Plaintiffs outweighs any injury to Defendants

The threatened injury to Plaintiffs outweighs any damage that an injunction might cause Defendants. Plaintiffs have requested that Defendants engage in reforms necessary to provide LEP Yup'ik-speaking voters equal access to the electoral process. "Although these reforms may result in some administrative expenses for Defendants, such expenses are likely to be minimal and are far outweighed by the fundamental right at issue." *Berks County*, 250 F. Supp.2d at 541; *see also Johnson v. Halifax County, N.C.*, 594 F. Supp. 161, 171 (E.D.N.C. 1984) (finding that administrative and financial burdens on defendant jurisdiction were not undue in light of irreparable harm caused by the unequal voting opportunity the county provided to plaintiffs).

“Administrative convenience” cannot justify a state practice that impinges upon a fundamental right such as the right to vote. *Taylor v. Louisiana*, 419 U.S. 522, 535 (1975).

Moreover, Plaintiffs have filed their Motion for a Preliminary Injunction nearly four months before the State’s August 26, 2008 statewide primary and over five months before the City of Bethel holds its municipal elections on October 7, 2008. Courts have ordered the type of relief Plaintiffs request within far shorter time periods for Defendants to comply. For example, in *Chinese for Affirmative Action v. Leguennec*, the Ninth Circuit held that Chinese and Spanish-speaking plaintiffs were entitled to injunctive relief in a Section 203 case, even though the defendant jurisdiction had “only a few days in which to make the contracts and accomplish the changes necessary to modify its election procedures to comply with the Act” before the next election. 580 F.2d at 1008. The *Leguennec* Court reasoned that “shortage of time” by itself was insufficient to create a hardship because “[i]t is Congress’s intention to eradicate voting discrimination with all possible speed.” *Id.* Other courts have agreed where there was far less time than the several months Plaintiffs have afforded Defendants to come into compliance with Sections 203 and 208 – about one-third of a century after Defendants became covered by Sections 4(f)(4) and 203. *See Berks County*, 250 F. Supp.2d at 541 (collecting examples of injunctions granted just days away from the next election).

D. An injunction would be in the public interest

The public has a broad interest in the integrity of elected government which is compromised by a system that fails to weigh the votes of all citizens equally. Subjecting the LEP Yup’ik-speaking voters of the Bethel Census Area and the City of Bethel to a government elected under an “inequitable” system would be adverse to the public interest. *Watson v. Commissioners of Harrison County*, 616 F.2d 105, 107 (5th Cir. 1980). As the Ninth Circuit

acknowledged in *Sammartano v. First Judicial District Court*, 303 F.3d 959, 974 (9th Cir. 2002), “it is always in the public interest to prevent the violation of a party's constitutional rights.” An injunction in this case would promote the public interest. *See generally Berks County*, 250 F. Supp.2d at 541 (“Ordering Defendants to conduct elections in compliance with the Voting Rights Act so that all citizens may participate equally in the electoral process serves the public interest by reinforcing the core principles of our democracy.”).

VI. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that their Motion for a Preliminary Injunction be granted enjoining Defendants from enforcing their current procedures for providing language and voter assistance for the August 28, 2008 statewide Primary Election and any future elections, ordering Defendants to provide oral and written language assistance in Yup'ik that is effective for LEP Yup'ik-speaking voters as required by Sections 4(f)(4) and 203, and to enjoin Defendants from interfering with plaintiffs' rights to receive assistance as required by Section 208 of the VRA.

Because a detailed structure is necessary to measure and monitor compliance with the language provisions of the VRA,¹⁸ plaintiffs are submitting a draft remedial order, drawn from orders in other Section 203 cases and adapted to the facts as developed in discovery.

DATED this 2nd day of May 2008.

¹⁸ For example, Defendants have failed to maintain many of the records necessary to measure their compliance with Section 203 [Pls.' SOF ¶¶ 503-513], contrary to the Justice Department's regulations. *See* 28 C.F.R. § 55.21. In addition, the use of bilingual Yup'ik outreach coordinators is necessary to fully cure Defendants' violations [Pls.' SOF ¶¶ 514-519], along with federal observers to act as “an independent check on the availability and quality of language assistance that Defendants are providing” [Pls.' SOF ¶ 520]. *See generally* 42 U.S.C. § 1973a(a) (authorizing a federal court to order federal observers “under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment”).

s/jtucker

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Certificate of Service

I hereby certify that on the 2nd day of May 2008, a true and correct copy of the foregoing Plaintiffs' Statement of Facts in Support of their Motion for a Preliminary Injunction was served electronically pursuant to the Court's electronic filing procedures upon the following:

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