No. 08-322

In The
Supreme Court of the United States

NORTHWEST AUSTIN MUNICIPAL
UTILITY DISTRICT NUMBER ONE,

Appellant,

v.

ERIC H. HOLDER, JR., Attorney General, et al.,

Appellees.

On Appeal From The United States District Court For The District Of Columbia

BRIEF OF *AMICI CURIAE* ALASKA NATIVE VOTERS AND TRIBES IN SUPPORT OF APPELLEES

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STATEMENT OF INTEREST[1]

Alaska is one of only three states covered in its entirety by Section 4(f)(4) of the Voting Rights Act ("VRA"). *Amici Curiae* are Alaska Native, limited-English proficient ("LEP") individual voters and tribal councils representing hundreds of voters who reside in Alaska. *Amici* have been disenfranchised by the State's use of literacy tests, or their modern-day equivalent, since before statehood. That pattern has continued since the VRA was reauthorized in 2006. State officials failed to provide language materials and permit voter assistance for the *amici*, as required by its voting procedures that the Attorney General precleared in 1981. *Amici* were forced to file claims against the State in federal court for violating substantive provisions of the VRA and failing to obtain Section 5 preclearance for its changes to the 1981 plan. In 2008, that court found that *amici* had "met their burden and established that they are likely to succeed on the merits of the language assistance claims brought under Sections 203 and 4(f)(4) of the VRA and the voter assistance claims brought under Section 208 of the VRA." Dkt. 327, Order Granting

[1] All parties have consented to the filing of this brief, as provided by Rule 37.3(a). Letters of consent have been filed with the Clerk of the Court. No counsel for a party authored the brief in whole or in part and no such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than *amici curiae*, its members, or its counsel, made a monetary contribution to its preparation or submission.

Mot. for Prelim. Inj. ("*Nick* PI Order"), *Nick v. City of Bethel*, case no. 3:07-cv-0098-TMB (D. Alaska filed July 30, 2008). *Amici's* parallel Section 5 claims have been stayed pending the outcome of this case.

Amici submit their brief to expressly address Question Presented 2 as posed by the Respondent United States: whether "discrimination against minority voters continues to be a problem in covered jurisdictions" and whether "Section 5 remains a valuable tool in preventing, remedying and deterring such discrimination." Petitioner argues that voting discrimination only "persists in haphazard and uncoordinated instances" that is insufficient to justify renewing Sections 4 and 5. Petitioner's Br. at 42-43. However, Alaska's recent violations of the VRA demonstrate that discrimination still exists and that those sections remain vital remedial measures to provide Alaska Natives with equal registration and voting opportunities.

Amici Anna Nick, Billy McCann, David O. David, and Arthur Nelson are LEP Alaska Native voters who reside in the Bethel Census Area of Alaska and whose primary language is Yup'ik. *Amici* Kasigluk Traditional Council, Kwigillingok I.R.A. Council, Tuluksak Tribal Council, and Tuntutuliak Traditional Council are elected governments for federally recognized tribes in the Bethel Census Area. *See* 73 Fed. Reg. 18,553, 18,557 (Apr. 4, 2008). The population of the Bethel Census Area is 85.5 percent American Indian and Alaska Native. Among the citizen voting age population in the Bethel Census Area, 20.82 percent

are LEP. Almost a quarter of LEP voters there are illiterate, nearly sixteen times the national illiteracy rate. These barriers are not the result of happenstance, but are the product of educational discrimination by the State that has not yet been eradicated. *Amici* each were denied public school growing up because Alaska did not provide complete educational services in their villages until as recently as the 1980s.

For example, one of the *amici*, Anna Nick was born in 1939 in Nunapichuk, a remote Yup'ik village inaccessible by road and without any hotels, stores, electricity or running water. *See* Dkt. 201, First Am. Compl. ¶6 ("*Nick* Am. Compl."), *Nick*, *supra* (2008). Like most Alaska Natives in the region, she relies upon a subsistence lifestyle of hunting and fishing for most of her food. When she was growing up, there were no schools in Nunapicthuk or any other Yup'ik-speaking village in the Bethel Census Area, denying Ms. Nick and others like her the opportunity to learn to speak or read English. *See infra* Part III(A). Only a handful of children from her village were willing and able to leave their homes and travel to one of the few distant boarding schools. *See id.* Ms. Nick left home briefly to attend school but only reached the fifth grade. *Nick* Am. Compl., *supra*, at ¶6. The remaining *amici* also are the victims of Alaska's unequal education system; Mr. McCann completed the second grade, Mr. Nelson completed the third grade, and Mr. David completed the fourth grade. *Id.* at ¶¶7-9. There are thousands of Alaska Native voters just like them.

While Congress was reauthorizing the VRA to cover Alaska Natives in 1975, a landmark equal protection case was pending against the State to remedy the lack of education available to Alaska Natives. It was brought by a class of Alaska Native parents and students whose villages did not have secondary schools. *See infra* Part III(A). Although the case was settled in 1976, it was not until the early 1980s that the State legislature appropriated funds to pay for the construction of the first secondary schools in Native villages; the last of those schools were not completed until the mid-1980s. Because of the discriminatory education system, with very few exceptions, only those Alaska Natives born *in the 1970s or later* would have any opportunity to receive a high school diploma.

Alaska's coverage under Section 4(f)(4) of the Act has proven to be an unfulfilled promise to Alaska Natives to help them overcome the State's discrimination. Alaska ignored the mandate of providing language assistance under Section 4(f)(4) for the first six years after it went into effect. In 1981, the Department of Justice reminded the State that it was covered statewide for Alaska Native languages and was required to submit a minority language assistance plan under Section 5. The State complied with the request by obtaining preclearance for a plan that it then did not implement. *See infra* Parts I(A)-(B). During the nearly three decades since then, *amici* and thousands of other Alaska Native LEP voters tried to vote, often skipping ballot questions and initiatives they could not understand. Ms. Nick

served as a poll worker in an effort to assist Yup'ik voters who could not read or speak English, but was forced to quit because she could not understand most of the election materials herself. *Nick* Am. Compl., *supra*, at ¶6. Alaska's violations of Section 4(f)(4) and its failure to submit for preclearance the changes to its unused 1981 language plan have resulted in Alaska Native turnout that consistently trails statewide turnout by 20 percent or more.

If Alaska had complied with Section 5's mandate and submitted the unprecleared changes in its language and voter assistance program in the Bethel region, *amici's* case would have been unnecessary. After two years, $150,000 in out-of-pocket costs, 20 depositions, and a docket that now consists of almost 600 entries, *amici* still do not have relief; even when secured, relief will only apply to the 15,000 persons in the Bethel Census Area. If Alaska had complied with Section 5's mandate, it would have obviated the need for this protracted and costly litigation and helped LEP Alaska Natives statewide. The Justice Department could have identified that Alaska's voting changes had a discriminatory purpose or effect and prevented those procedures from ever being implemented in the first place. Today, all Alaska Natives would be able to exercise their fundamental right to vote. Unfortunately, that will not occur under the "case-by-case" approach advocated by Petitioner, which would perpetuate the exclusion of Alaska Natives from the political process. Petitioner's Br. at 55. Section 5 remains vital to prevent that draconian result. *See infra* Part II.

SUMMARY OF ARGUMENT

Section 5 continues to be essential to protect *amici* from Alaska's discriminatory practices. State officials have been recalcitrant to correct identified violations of the VRA. *See Nick* PI Order, *supra*. They have evaded the requirements of preclearance, routinely submitting discriminatory voting changes and then withdrawing them when the U.S. Department of Justice makes additional inquiries. *See infra* Parts I(A)-(B). They have attempted to realign predominantly Native polling places that are sometimes more than 70 miles apart and inaccessible except by air or boat. *See infra* Part I(C). Absent Section 5, the fragile gains that Alaska Natives have made are at risk. *See infra* Part I(D). Moreover, other substantive provisions of the VRA are inadequate substitutes for Section 5 because of the presence of ongoing discrimination by the State and the extraordinary costs that *amici* have incurred by trying to stop it through a case-by-case approach. *See infra* Part II. Preclearance helps ensure that *amici's* fundamental right no longer has to be conditioned on a federal lawsuit. Finally, the record from the 2006 reauthorization of the VRA refutes Petitioner's argument that the Section 4 coverage formula is outdated. Evidence from Alaska shows that the measures resulting in coverage, educational discrimination and low voter turnout, remain barriers for *amici* and other Alaska Natives. *See infra* Part III. Therefore, the Court should affirm the judgment of the District Court.

ARGUMENT

Section 5 is necessary to remedy ongoing discrimination and the present effects of past discrimination against *amici* and other Alaska Natives. The trigger in Section 4 narrowly targets coverage under Section 5 of the Act to areas where it is needed most. All of Alaska is covered because of the impact that discrimination against Alaska Natives continues to have on political participation statewide. *Amici* and other Alaska Natives like them who were denied access to public schools suffer from illiteracy and lack of English fluency that prevents them from exercising their fundamental right to vote without assistance. Section 5 remains essential to compel Alaska to remove the disabling effects of its discrimination against Alaska Natives. State officials have not done so absent enforcement of Section 5, such as *amici's* pending claim against Alaska. The future of *amici's* enforcement action awaits this Court's decision.

Discrimination is not as overt as it once was, when Alaska Natives were barred from every aspect of political and social life by signs that read "No Natives or Dogs Allowed."[2] Donn Liston, *Gruening Rights Fight Recalled*, Anchorage Daily News, June 28, 1974. Officially, Alaska Native voters are not

[2] Public places such as hotels, playgrounds, swimming pools, and theaters were segregated until 1945. *See* Terrence M. Cole, *Jim Crow in Alaska: The Passage of the Alaska Equal Rights Act of 1945*, in AN ALASKA ANTHOLOGY: INTERPRETING THE PAST 314, 316-21 (Haycox & Mangusso eds. 1996).

supposed to be required to pass an English literacy test.[3] Nonetheless, the effects of State discrimination against Alaska Natives linger, along with other forms of unequal treatment that continue today.

When Congress renewed the expiring provisions of the VRA in 2006, it found that "significant progress" had been made towards reducing certain barriers to Alaska Natives. *Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Reauthorization and Amendments Act of 2006* ("VRARA"), Pub L. No. 109-246 §2(b)(1), 120 Stat. 577 (2006). Although Native turnout remained "among the lowest of all communities in the U.S.," their participation rates were "closer than ever" to non-Natives. H.R.REP.NO. 109-478 at 20, *reprinted in* 2006 U.S.C.C.A.N. 630. The number of Native candidates had increased, resulting in "the election of seven new Alaskan Natives to the Alaska State legislature." *Id.* Those examples of "increased participation levels" were "directly attributable to the effectiveness of the

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[3] *See generally* ALASKA CONST. of 1959, art. V, §1 (repealed) (requiring voters to be "able to read or speak the English language as prescribed by the Legislature"); Stephen Haycox, *William Paul, Sr., and the Alaska Voters' Literacy Act of 1925*, 2 ALASKA HIST. 16 (1986-1987) (describing Alaska's literacy test law of 1925 and its 1927 federal counterpart, which required that anyone who did not vote in the 1924 election had to be "able to read and write the English language"). Alaska's constitutional literacy test remained in effect until it was repealed by the 1970 amendments to the VRA. *See* Pub. L. No. 91-285, 84 Stat. 314 (June 22, 1970).

VRA's temporary provisions." *Id.* at 21, *reprinted in* 2006 U.S.C.C.A.N. 630-31.

Despite that progress, the evidence also demonstrated there had been insufficient "time to eliminate the vestiges of discrimination" against Alaska Natives. VRARA §2(b)(7), 120 Stat. 577-78. Discrimination was "more subtle" than the methods previously used but the results were "the same," diminishing the political participation of Native voters. H.R.REP.NO. 109-478 at 6, *reprinted in* 2006 U.S.C.C.A.N. 620. As of 2000, no Native candidate had "been elected to office from a majority white district." *Id.* at 34, *reprinted in* 2006 U.S.C.C.A.N. 638. The lack of white support resulted "in a disparity between the number of white elected officials and the number" of Alaska Natives elected to office. *Id.* Native voters also continued "to experience hardships and barriers to voting and casting ballots because of their limited abilities to speak English and high illiteracy rates ... particularly among the elders." *Id.* at 45-46, *reprinted in* 2006 U.S.C.C.A.N. 650-51. Court decisions found "degraded educational opportunities" for Alaska Natives, resulting in graduation rates that lagged far behind non-Natives. *Id.* at 50-51, *reprinted in* 2006 U.S.C.C.A.N. 651. The record of discrimination in Alaska was substantial. *See Voting Rights Act: Evidence of Continued Need, Hearing Before the Subcomm. on the Const. of the House Comm. on the Judiciary* (*Continued Need*), 109th Cong., 2d Sess., at 1308-1362 (2006); *Modern Enforcement of the Voting Rights Act*, *Hearing Before the Senate Comm. on the*

Judiciary (*Modern Enforcement*), 109th Cong., 2d Sess., at 18-20, 25-27, 29-30, 73-81, 124-26 (2006).

The State's legacy of disenfranchisement remains manifest in the *amici*, who are victims of unequal educational opportunities and have been denied registration and voting opportunities because of their illiteracy and limited-English proficiency. Alaska Natives such as the *amici* continue to encounter English-only election practices that impose the very sort of English literacy tests or devices that the VRA was intended to eradicate. H.R.REP.NO. 109-478 at 52, *reprinted in* 2006 U.S.C.C.A.N. 652-53. Such barriers contributed to Alaska Native voter turnout of just 44.8 percent in the 2004 election, compared to non-Native turnout of 68.4 percent. 152 CONG. REC. S7962 (daily ed. July 20, 2006) (statement of Sen. Specter). Turnout in some Native villages was as low as 12 percent. *Continued Need*, *supra*, at 1333. State officials steadfastly refused to correct any of these violations until they were compelled to do so in 2008 by a federal court. Despite the relief that *amici* obtained, those remedies only apply to Natives residing in a single Census Area of Alaska. Thousands of other Alaska Natives in other parts of the State continue to face barriers to registration and voting that Section 5 could resolve without the need for additional burdensome litigation that would delay their relief for many more years.

Alaska is demonstrative of the congressional finding that without the continuation of the VRA's protections, "racial and language minority citizens

will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted, undermining the significant gains made by minorities in the last 40 years." VRARA §2(b)(9), 120 Stat. 577-78. The record from Alaska establishes the constitutionality of the Act's reauthorized provisions, regardless of whether the Court applies a rational basis or a congruence and proportionality standard of review. Far from an unnecessary relic of a bygone era, Section 5 remains essential to combat the present realities of voting discrimination and educational discrimination against *amici* and other Alaska Natives.

I. Section 5 remains a necessary and appropriate prophylactic measure to prevent voting discrimination against Alaska Natives.

Section 5 is a "vital prophylactic tool" that protects the *amici* "from devices and schemes that continue to be employed" in Alaska, which is covered statewide for Alaska Natives. H.R.REP.NO. 109-478 at 21, *reprinted in* 2006 U.S.C.C.A.N. 631. Preclearance has protected Alaska Natives from discriminatory redistricting practices, closure of necessary polling sites, and retrogressive language assistance procedures. The importance of Section 5 cannot be measured just by the number of objections, but also "the number of voting changes that have never gone forward as a result of Section 5." *Id.* at 24, *reprinted in* 2006 U.S.C.C.A.N. 633. Its "deterrent effect" is

"substantial." *Id.* In renewing Section 5, Congress examined evidence of "continued discrimination" including objections that were interposed, "requests for more information submitted followed by voting changes withdrawn from consideration," and actions brought to enforce the mandate in Alaska. VRARA §2(b)(4)(A), 120 Stat. 577. That evidence sustains the provision's constitutionality.

A. Alaska continues to evade the requirements of Section 5.

Petitioner's characterization of the record supporting Section 5 is deeply flawed, particularly as that evidence pertains to Alaska. Petitioner makes a categorical generalization that the VRA is "based on an illegitimate presumption of resolute intransigence," contending that "[t]he record Congress amassed in 2006 does not demonstrate that covered jurisdictions continue to evade enforcement." Petitioner's Br. at 2, 13. Petitioner's argument ignores the rich, detailed examples of covered jurisdictions such as Alaska that continue to evade the requirements of Section 5. *See* H.R.REP.NO. 109-478 at 41-44, *reprinted in* 2006 U.S.C.C.A.N. 646-48.

Congress received evidence demonstrating that State officials have been the single greatest barrier that Alaska Natives face. The House Report explained that while there had been "substantial strides ... toward racial equality, the attitudes and actions of some States ... continue to fall short." H.R.REP.NO.

109-478 at 56, *reprinted in* 2006 U.S.C.C.A.N. 657. Alaska's election officials demonstrated that recalcitrance. In 2006, Lieutenant Governor Loren Leman, who was responsible for administering elections, was presented with evidence of the State's lack of language assistance and failure to obtain preclearance for its English-only election procedures. Instead of investigating those issues, he rejected them after making a single telephone call to one English-speaking voter. *See Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Reauthorization and Amendments Act of 2006 (Part II): Hearing on H.R. 9 Before the Subcomm. on the Const. of the House Comm. on the Judiciary*, 109th Cong., 2d Sess., at 115, 116 (2006) (letter from Alaska Lt. Gov. Loren Leman) (commenting on *Continued Need*, *supra*, at 1308-62). He then informed the House that Alaska was "in compliance" and "[h]appily so" with the VRA. *Id.* at 115.

A federal court found otherwise in 2008, citing the State's lack of responsiveness in remedying discrimination against Alaska Natives and enjoining further violations of the Act. *See Nick* PI Order, *supra*. The evidence showed that the State's 1981 precleared language assistance plan had "never been complied with in Alaska," except for the narrow remedy for a single election in Barrow a decade earlier. *Modern Enforcement*, *supra*, at 26. In over three decades, Alaska had aired only two incomplete and poorly translated election announcements over the radio in Yup'ik, compelling private parties to

obtain self-help to get information. *Nick* PI Mot., *supra*, at 6-8. The State provided all voter registration and voting information in English-only, despite Alaska's use of touch-screen voting units capable of "speaking" eight different languages. *Id.* at 10-11. Between 2000 and 2007, translators generally were unavailable and untrained. *Id.* at 11-14. Alaska provided no Yup'ik translations, forcing poll workers to translate ballots written in college-level English "on the spot." That led to widely diverging translations that denied *amici* and other voters effective language assistance even when translators were available. *Id.* at 7, 15-16.

Alaska election officials began looking into implementing a language assistance program after being informed of their violations. However, the State Director of Elections "put it aside" to prepare for elections in 2006 and 2007. *Id.* at 20. She claimed, "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." *Id.* Alaska's justification is particularly telling. State officials view compliance with the VRA as optional or extraneous to an election, rather than an integral part of it. Therefore, LEP Yup'ik voters and tribal councils from the Bethel region were forced to sue the State in 2007 to obtain relief. *See* Dkt. 1, Compl., *Nick*, *supra* (filed June 11, 2007).

In July 2008, a federal court issued a preliminary injunction to bar Alaska from further violations of the VRA. *See Nick* PI Order, *supra*. The court found that "State officials became aware of potential problems with their language-assistance program in the spring of 2006," but their "efforts to overhaul the language assistance program did not begin in earnest until after this litigation." *Id.* at 8. The court reasoned that an injunction was needed for three reasons: (1) the State had been covered by Section (4)(f)(4) "for many years"; (2) "the State lacks adequate records to document past efforts to provide language assistance to Alaska Native voters"; and (3) the State's post-litigation efforts to come into compliance were "relatively new and untested." *Id.* Therefore, the court concluded that "the evidence of past shortcomings justifies the issuance of injunctive relief to ensure that Yup'ik-speaking voters have the means to fully participate in the upcoming State-run elections." *Id.* at 8-9. The *Nick* injunction remains in place today.

The U.S. Department of Justice also found strong evidence of Alaska's violations. The Department observed that the "last precleared bilingual election procedures" for Alaska Natives were under a plan "precleared by letter dated October 5, 1981." App. 6-13, Letter from Christopher Coates, Chief, Voting Section to Gail Fenumiai, Director, Division of Elections, dated Aug. 1, 2008. However, Department officials noted that discovery in *amici's* case against Alaska, "admissions by State elections officials," and assertions by officials in a letter withdrawing the

changes indicated that "Alaska is not currently fully implementing the 1981 plan and is instead implementing new and different procedures." *Id.* The Department requested that Alaska inform it of the action the State planned "to take regarding the changes affecting voting that have not been submitted for judicial review or preclearance." *Id.* State officials ignored the Department's request. *Amici* therefore were compelled to pursue their Section 5 claim against Alaska, which has been stayed pending the Court's decision in this case.

Alaska's bailout history likewise reflects the State's evasion of Section 5. "In 1982, Congress amended the bailout provision to encourage jurisdictions to end their discriminatory practices and to integrate minority voters into the electoral process." H.R.REP.NO. 109-478 at 25, *reprinted in* 2006 U.S.C.C.A.N. 634. The bailout standard requires that jurisdictions demonstrate that they have been free of voting discrimination for ten years. *See* 42 U.S.C. §1973b(a). Alaska unsuccessfully attempted to bailout in 1978 and 1984, but dismissed its lawsuit on both occasions after the evidence showed that the State denied equal electoral opportunities to Native voters. *See* Paul F. Hancock & Lora L. Tredway, *The Bailout Standard of the Voting Rights Act: An Incentive to End Discrimination*, 17 URB. LAW. 379, 403, 415 (1985). Evidence of the State's present failure to comply with the VRA explains why. Alaska's covered status "has been and continues to be within the control of the jurisdiction." H.R.REP.NO. 109-478 at

25, *reprinted in* 2006 U.S.C.C.A.N. 634. However, its ongoing violations have made it clear that it is not a jurisdiction with "a genuinely clean record" that will allow it to terminate coverage. *Id.*

The congressional record in 2006 highlights the continuing need for Section 5 in Alaska. It does not suffer from "utter hollowness" that "ignores the reality of today's America," but instead reflects the reality that despite some important progress, much work is left to be done to fully integrate Alaska Natives into the political process. Petitioner's Br. at 43-44. Alaska's persistent failure to implement "the mandate placed on it in 1975" makes it "no less deserving of coverage today than it was in 1975." *Modern Enforcement*, *supra*, at 79.

B. More Information Requests prevent voting discrimination by Alaska.

More Information Requests (MIR) play an important role in preventing voting discrimination against Alaska Natives. MIRs are an "administrative mechanism" used by the Justice Department to obtain additional information needed to determine whether preclearance of a voting change is warranted under Section 5. H.R.REP.NO. 109-478 at 40, *reprinted in* 2006 U.S.C.C.A.N. 645. Their use forces "covered jurisdictions to take action" that can include withdrawing "a proposed change from consideration because it is discriminatory," submitting "a new or

amended non-discriminatory voting plan," or simply not making a change at all. *Id.*

Alaska routinely withdraws discriminatory voting changes after receiving an MIR, a pattern that has continued since reauthorization. In March 2008, Alaska attempted to circumvent the language claims brought in the *Nick* litigation. State officials made a short submission of a language plan without any explanation for their failure to implement the plan precleared by the Department in 1981. *See* First Am. Compl., *Nick*, *supra*, at Attachs. B-C. In May 2008, the Justice Department issued a detailed MIR letter identifying 16 categories of facts suggesting the absence of enforcement of the prior plan. *See* Dkt. 292 at Exh. 199, Letter from Christopher Coates, Acting Chief, Voting Section, to Gail Fenumiai, Director, Division of Elections, dated May 19, 2008, *Nick*, *supra*. Instead of responding, the State abruptly withdrew its submission, preventing implementation of its retrogressive procedures. *See* Dkt. 292 at Pls.' Exh. 271, Withdrawal Letter dated June 9, 2008, *Nick*, *supra*. In the process, Alaska derided the request, arguing that "DOJ's questions on past practices are inappropriate." Dkt. 249, at 9 n.19, Opp. to Mot. for Prelim. Inj., *Nick*, *supra*.

State officials later attempted to circumvent the MIR by submitting the State's changes piecemeal, which the Department also rejected. According to the Department, it was necessary to review the entire plan together to determine whether it provided effective equal registration and voting opportunities

to Alaska Natives. *See* App. 6-13. Alaska's experience with MIRs refutes Petitioner's argument that "a jurisdiction's voluntary abandonment of a change after a more-information request ... evidences an attempt to comply with constitutional guarantees, not to evade their enforcement." Petitioner's Br. at 53.

C. Polling place changes continue to discriminate against Alaska Natives.

Petitioner downplays the important role that Section 5 plays in preventing discrimination by requiring that all voting changes be submitted for preclearance. *See* 42 U.S.C. §1973c. Without citing any evidence to support its conclusion, Petitioner criticizes Section 5 for "not confining itself to such issues as redistricting but continuing to apply to the most minute and obviously benign changes like moving a polling place from a private garage to a public school." Petitioner's Br. at 14.

This Court has rejected the narrow impact that Petitioner contends that polling place changes can have on minority voter participation. *See Perkins v. Matthews*, 400 U.S. 379 (1971). The reason for requiring preclearance of polling place changes is apparent: "The abstract right to vote means little unless the right becomes a reality at the polling place on election day." *Id.* at 387. The Court reasoned that "there inheres in the determination of the location of polling places an obvious potential for 'denying or abridging the right to vote on account of race or color.'" *Id.* at

388. Consequently, the Court determined that it was "clear" that Section 5 "requires prior submission of any changes in the location of polling places." *Id.*

Evidence from Alaska demonstrates why polling place changes are not "obviously benign." Petitioner's Br. at 14. Native villages in many parts of the State, such as the Bethel region, are separated from each other by large expanses of water and frozen tundra without any roads to connect them. Some Native villages (such as Kasigluk) are divided by rivers, requiring that polling places be split for a half day on one side of the river and then transported by boat to voters living on the other side. *See Continued Need*, *supra*, at 1316. The State Division of Elections estimates that statewide there are about 150 Native villages that are inaccessible by road. *Id.* Relocating polling places in Alaska is "an incredibly big deal" because moving "a polling station in a community that does not have cars and operates by snow machines or walking in 10-below weather in November ... may actually disenfranchise an entire community." *Modern Enforcement*, *supra*, at 25.

Just last year, Section 5 prevented Alaska from implementing a number of discriminatory polling place changes. In May 2008, the State submitted for preclearance a plan to eliminate precincts in several Native villages covered by Section 4(f)(4) of the Act. *See* App. 1-5, Letter from Christopher Coates, Chief, Voting Section, to Gail Fenumiai, Director, Division of Elections, dated July 14, 2008. State officials proposed to (1) "realign" Tatitlek, a community in which

about 85 percent of the residents are Alaska Native, to the predominately white community Cordova, which is located over 33 miles away and is not connected by road; (2) consolidate Pedro Bay, in which a majority of its residents are Alaska Native, with Iliamna and Newhalen, which are located approximately 28 miles away, are not connected by road, and were the subject of a critical initiative on the August 2008 ballot; and (3) consolidate Levelock, a community in which about 95 percent of the residents are Alaska Native, with Kokhanok, which are approximately 77 miles apart and not connected by road.[4] In summary, Alaska was attempting to combine precincts which are accessible to one another only by air or boat and have high concentrations of Alaska Native voters. *See id.*

The Justice Department responded to the State's submission with a MIR letter requesting information about the research on which the voting changes were based, the distances between the polling places, and their accessibility to Alaska Native voters. *See id.* For example, the Department inquired about "the methods of transportation available to voters traveling from the old precinct to the new consolidated precinct" asking that if there were no roadways connecting them that the State "indicate how voters will get

[4] Population data is from the 2000 Census. *See* U.S. Census, http://www.census.gov/. Distance data is calculated using the Geographic Names Information System of the U.S. Geological Survey. *See* http://www.infoplease.com/atlas/calculate-distance.html.

to the consolidated location." *Id.* The MIR also suggested that Alaska's election officials had not consulted with Native voters about the changes and requested a "detailed description" of efforts "to secure the views of the public, including members of the minority community, regarding these changes." *Id.* Finally, the MIR documented that when Department personnel communicated with State officials, they learned that Alaska also was taking steps to implement an unsubmitted voting change that would designate "the specified voting precincts" as "permanent absentee by-mail precincts." *Id.* Rather than respond to these questions and submit the additional voting changes for Section 5 review, the State abruptly withdrew the submission two weeks later. *See* App. 14-15, Letter from Christopher Coates, Chief, Voting Section, to Gail Fenumiai, Director, Division of Elections, dated Sept. 10, 2008.

The record from Alaska shows that preclearance remains necessary to block State officials from enforcing polling place changes that would disenfranchise Alaska Native voters.

D. A Section 5 objection in Alaska has lasting impact in deterring future discrimination against Alaska Natives.

In Alaska, a Section 5 objection does not just stop enforcement of the discriminatory voting change at issue. It also discourages State officials from attempting to enforce similar discriminatory changes in the

future. Petitioner downplays that deterrent effect, arguing that there is "no evidence ... that officials in covered jurisdictions would revert to the conduct of their forbears if §5 were allowed to expire." Petitioner's Br. at 42-43. Arriving at that conclusion sidesteps the substantial record that Congress considered regarding the deterrent effect of objections. With respect to Alaska, that deterrent effect does not just prevent State officials from reverting to discrimination by their forbears, but the discriminatory conduct in which they would continue to engage themselves without Section 5.

The Attorney General's objection to a statewide redistricting plan following the 1990 Census illustrates the lasting deterrent effect that a Section 5 objection has in Alaska. The State's initial plan, which was prepared in secret, diluted the voting strength of Alaska Natives. *See Continued Need*, *supra*, at 1345-46. Several Native groups complained to the Justice Department about the "anti-Native" plan. *Id.* at 1346-47. The Department responded by sending an MIR asking that the State address concerns such as: the plan's reduction of the number of Alaska Native majority districts; the retrogressive effects of at least one district on Native voting strength; the "extraordinary" deference towards incumbent legislators' districts except those of Native legislators, whose districts had been combined; and the State's preparation of the redistricting plan without public input. *Id.* at 1347.

A State trial court subsequently rejected the original redistricting plan as unconstitutional. *Id.* The Alaska Supreme Court then ordered the trial court to formulate an interim plan. *Id.* In *Hickel v. Southeast Conference*, 846 P.2d 38 (Alaska 1992), the State's highest court struck down 11 districts in the interim plan, but left intact State District 36, which reduced the voting strength of Yup'iks. *Continued Need*, *supra*, at 1347. In 1993, the Attorney General interposed an objection to the retrogressive effects of District 36 and its companion Senate District R, which reduced the Native voting age population from 55.7 percent to 50 percent despite the presence of extremely racially polarized voting in those districts. *Id.* at 1348. Section 5 thereby served as the only line of defense between the retrogressive redistricting plan and its discriminatory impact on Alaska Natives. *Id.*

As a result of the 1993 objection, Alaska was compelled to take "an entirely different approach to the process" in the 2000 redistricting cycle. *Modern Enforcement*, *supra*, at 81. It "hired a national voting rights expert to ensure that its proposed plan did not violate the VRA or reduce the ability of Alaska Natives to elect candidates of their choice." *Id.* State officials adopted a plan that did not "reduce the ability of Alaska Natives to elect candidates of their choice" and appointed a Native to the redistricting board to represent the nearly 20 percent of the State's population excluded from the 1990 redistricting process. *Id.*; *see Continued Need*, *supra*, at 1318-19,

1350-51. That one "objection was felt statewide and continues to have an impact today." *Modern Enforcement*, *supra*, at 81.

Petitioner's argument suggests that a Section 5 objection should be treated as an isolated occurrence that has no deterrent effect on a covered jurisdiction's future actions. The House Report rejected that narrow view of Section 5's role, referring to the impact of an objection in Georgia that closely parallels the result of the 1993 objection in Alaska:

> This does not mean, however, that Section 5 did [not] play a critical role in the redistricting process. Rather, it means Section 5 encouraged the legislature to ensure that any voting changes would not have a discriminatory effect on minority voters, and that it would not become embroiled in the preclearance process.

H.R.REP.NO. 109-478 at 24, *reprinted in* 2006 U.S.C.C.A.N. 633. Alaska's post-reauthorization violations of Section 5 are a strong indication that State officials would readily return to their discriminatory conduct if they did not have to obtain preclearance.

II. Other substantive provisions of the VRA are inadequate substitutes for Section 5.

Section 5 is a central feature in the VRA's arsenal to combat existing voting discrimination and the present effects of past unequal treatment in Alaska.

Other substantive provisions of the Act play an important role as well. However, they remain far less effective than the broad prophylactic relief that preclearance provides in preventing discriminatory voting changes from ever being implemented. Yet, Petitioner asks the Court to reject the role of Section 5 in its entirety because Petitioner asserts that "private action is more effective than executive review." Petitioner's Br. at 54.

Petitioner's argument is fundamentally at odds with longstanding precedent. This Court recognized that Congress could remedy discrimination in an "inventive manner" as it did in Section 5. *South Carolina v. Katzenbach*, 383 U.S. at 327. Specifically, the VRA implemented the preclearance remedy "without any need for prior adjudication" because a case-by-case approach in challenging discriminatory tests and devices had proven unworkable. *Id.* at 328. Voting suits were "unusually onerous to prepare" and litigation of individual cases was "exceedingly slow." *Id.* at 314. When the cases were successful, states would simply switch to a new discriminatory test, device, or procedure. *Id.* Therefore, the Court concluded that "Congress might well decide to shift the advantage of time and inertia from the perpetrators of the evil to its victims." *Id.* at 328.

Amici's experience in the *Nick* litigation confirms the continuing vitality of the Court's reasoning in *Katzenbach*. Almost two years after filing their claims under Sections 4(f)(4) and 208 of the VRA, *amici* have spent nearly $150,000 in out-of-pocket

costs, dedicated thousands of hours by four experienced attorneys, employed four expert witnesses and five translators, completed nearly 20 depositions, and traveled thousands of miles back and forth across the frozen tundra in hazardous winter months. *Amici* have had to sacrifice their subsistence fishing to travel 500 miles to Anchorage to pursue their claims. The parties have exchanged over 7,000 pages of documents. There are now nearly 600 docket entries in the record of a single case that the presiding federal judge refers to as "vigorous." Still, *amici* have not obtained final relief. In February 2009, *amici* had to file a comprehensive motion supported by more than three dozen declarations from Native voters in 17 villages because of the State's failure to comply with the more limited remedies ordered in the preliminary injunction. *See* Dkt. 518, Mot. for Further Relief, *Nick*, *supra*. After *amici* obtain final relief in their case, that relief will only apply to the approximately 15,000 Alaska Natives living in the Bethel Census Area, and not to tens of thousands of Alaska Natives residing in other parts of the State. Far from being quick and effective as Petitioner maintains, *amici's* experience has proven the model of protracted, intense and costly litigation that *Katzenbach* described as antithetical to the fundamental right to vote. *See* 383 U.S. at 327-28.

III. Educational discrimination that depresses Native turnout shows the closeness of fit between the Section 4 trigger and statewide coverage of Alaska.

Petitioner contends that the Section 4 coverage formula improperly "relies on two proxies in attempting to identify jurisdictions with histories of voting discrimination: (1) literacy tests or other devices that prohibited voting, and (2) voting registration and turnout rates." Petitioner's Br. at 58 (citing 42 U.S.C. §1973b(b)). Without addressing the considerable record that Congress assembled in 2006, Petitioner maintains that these "proxies are out of date and cannot show a recent" relationship with ongoing discrimination. *Id.* at 58-59. Petitioner's argument is refuted by this Court's jurisprudence and evidence from Alaska showing the trigger's closeness of fit with discrimination against Alaska Natives.

The preclearance requirements in Section 5 of the VRA apply to jurisdictions covered under the formula in Section 4 of the Act. As originally enacted, the Section 4 trigger focused on states and locales that had used literacy tests and experienced low voter registration or turnout. *See* Pub. L. No. 89-110, §4(a)-(b), 79 Stat. 437, 438 (1965). The Act defined "test or device" to include any prerequisites to registering or voting that required demonstration of "the ability to read, write, understand, or interpret any matter," to prove education achievement or knowledge of any subject, possession of "good moral character," or to prove qualifications "by the voucher of registered

voters, or members of any other class." 42 U.S.C. §1973b(c). In 1975, Congress amended the Section 4 trigger to include Alaska Natives and other minority voters who had experienced discrimination that impeded their political participation.

The trigger for Alaska Natives is "virtually identical" to the original trigger in Section 4, except that it expanded the term "test or device" to "also mean the use of English-only election materials in jurisdictions where more than 5 percent of the voting age citizen population is comprised of members of any single language minority group."[5] 121 CONG. REC. H4716 (daily ed. June 2, 1975) (statement of Rep. Edwards); *see* 42 U.S.C. §1973b(b). Application of the triggering formula resulted in statewide coverage of Alaska for Alaska Natives. *See* 40 Fed. Reg. 49,422 (Oct. 22, 1975). Because of its coverage, Alaska must provide all election materials in the Alaska Native languages. *See* 42 U.S.C. §1973b(f)(4). The State also must obtain Section 5 preclearance of any voting change different from what was in force or effect on November 1, 1972, *see* 42 U.S.C. §1973c(a), including any changes necessary to provide effective language assistance. *See* 28 C.F.R. §55.22. Administrative preclearance of the State's voting changes remains essential to protect the fundamental right of the *amici* to participate in the political process.

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[5] *See* 42 U.S.C. §1973b(f)(3). "Language minorities" was defined as "persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage." 42 U.S.C. §1973l(c)(3).

Congress amended the coverage trigger in Section 4 because of overwhelming evidence of "a systematic pattern of voting discrimination and exclusion against minority group citizens who are from environments in which the dominant language is other than English." S.REP.NO. 94-295 at 24 (1975), *reprinted in* 1975 U.S.C.C.A.N. 774, 790. Intentional discrimination against language minorities was combined with educational discrimination "resulting in severe disabilities and continuing illiteracy in the English language." 42 U.S.C. §1973b(f)(1). Congress responded by applying "the Act's special remedies to jurisdictions where language minorities reside in greatest concentrations and where there is evidence of low voting participation." S.REP.NO. 94-295 at 32 (1975), *reprinted in* 1975 U.S.C.C.A.N. 798. The statutory findings declare that, "in order to enforce the guarantees of the fourteenth and fifteenth amendments to the United States Constitution, it is necessary to eliminate such discrimination by prohibiting English-only elections, and by prescribing other remedial devices." 42 U.S.C. §1973b(f)(1).

This Court repeatedly has upheld the Section 5 triggers, narrowed by the bailout provision, as a constitutional exercise of congressional powers to protect the fundamental right to vote. *See Lopez v. Monterey County*, 525 U.S. 266, 283 (1999); *City of Rome v. United States*, 446 U.S. 156, 177 (1980); *South Carolina v. Katzenbach*, 383 U.S. 308, 325-27 (1966). In a quartet of decisions, the Court also determined that Congress reasonably exercised its

authority in remedying the discriminatory effects of English literacy tests and unequal educational opportunities in covered jurisdictions. *See Oregon v. Mitchell*, 400 U.S. 112 (1970) (unanimously upholding the nationwide ban on literacy tests); *Gaston County v. United States*, 395 U.S. 285, 291-92 (1969) (upholding the Section 5 coverage formula based upon voter participation rates as a proxy for identifying jurisdictions with "racially disparate school systems"); *Katzenbach v. Morgan*, 384 U.S. 641 (1966) (upholding the requirement that jurisdictions provide language assistance for Puerto Rican voters educated in Spanish); *South Carolina v. Katzenbach*, 383 U.S. at 314, 327-30 (upholding the Section 5 trigger as a permissible way to identify jurisdictions with a "significant danger" of voting discrimination, as documented by "a low voting rate").

Amici and other Alaska Natives are a testament to the relationship between Alaska's coverage under Section 4 and continuing discrimination against them by the State. Set against the well-established framework for remedying the effects of unequal educational opportunities, the continuing coverage of Alaska under the Section 4 trigger is constitutional. *Amici* and other Alaska Natives were denied access to public schooling, resulting in their high illiteracy and LEP rates. Coupling that discrimination with Alaska's use of English-only elections has resulted in low voter participation rates. Instead of invalidating the efficacy of the Section 4 trigger, Petitioner's argument reaffirms it.

A. Alaska has denied equal educational opportunities to Alaska Natives.

Amici and other Alaska Natives face "present barriers to equal educational opportunities" and "the current effect that past educational discrimination has on today's ... adult population." S.REP.NO. 102-315 at 5 (1992). Segregated schooling was the norm in Alaska for over a century, and was a reality for *amici* when they wanted to attend public school but could not. *See* Settlement Agreement, *Hootch v. State Operated Sch. Sys.*, Civil No. 72-2450, *settled sub nom.*, *ex rel. Tobeluk v. Lind* (Alaska Super. Ct. Sept. 3, 1976) (*Hootch* Settlement). Specifically, "a dual school system emerged unofficially in Alaska" because of "resentment among the relatively few whites over emphasis on education for Natives and a belief that integrated schools would give only inferior education." *Id.* at ¶9. In 1956, Alaska's territorial attorney general indicated that the territory had not created school districts in Alaska Native areas, despite the territory's clear authority to do so. *See* U.S. Dep't of Interior, *Organization of School Districts on Indian Reservations in Alaska*, 63 Interior Dec. 333, 335 (Sept. 17, 1956).

In 1959, the year Alaska became a state, out of 34 public secondary schools operated by the territorial government, just six were in communities in which at least half of the population was Alaska Native. *Hootch* Settlement at ¶12. By 1960, just 1,832 out of 5,365 Native children between the ages of 14 and 19 were enrolled in high school. State of Alaska,

Governor's Comm. on Educ., *An Overall Education Plan for Rural Alaska* 2 (rev. Feb. 26, 1966), at App. E. By the mid-1970s, there were about 2,783 secondary school age children who lived in villages with a public or Bureau of Indian Affairs elementary school but without a secondary school or daily access to such a school. Over 95 percent of those children were Native; statewide, only 120 non-Native children of secondary school age had no ready access to a secondary school. *Hootch* Settlement at ¶19. If Native children did not "wish to leave home, [were] not able to leave home, or refuse[d] to leave home to attend boarding school or the boarding home program, they [were] denied secondary school education," resulting in "a highly disproportionate number of Alaska Natives ... not ... attending secondary schools." First Am. Compl. ¶51, *Hootch v. State Operated Sch. Sys.*, case no. 72-2450-CIV (Alaska Super. Ct. Oct. 5, 1972). *Amici* therefore received no schooling past the fifth primary grade.

In *Hootch v. State Operated School System*, a class of Eskimo, Aleut, and Indian parents and children from some of the *amici's* villages sued the State to remedy the separate and unequal schooling.[6] *Id.* The case was settled in 1976, when Alaska agreed for the first time to establish a public secondary school in all 126 Native villages that wanted one, including the

[6] The Senate cited *Hootch* as evidence of educational discrimination that necessitated amending the Section 4 trigger to include Alaska Natives. *See* S.REP.NO. 94-295 at 29, *reprinted in* 1975 U.S.C.C.A.N. at 795-96.

amici's own villages. *See Hootch* Settlement. It took Alaska nearly three decades to begin to implement the mandate of *Brown v. Board of Education*, 347 U.S. 483 (1954). Secondary schools were unavailable in most Native villages until the early 1980s, when Alaska's legislature approved $137 million to provide secondary education in 105 villages and to build 92 new high schools. Stephen E. Cotton, *Thirty Years Later: The Molly Hootch Case*, SHARING OUR PATHWAYS vol. 9, issue 4, at 4, 9 (Sept./Oct. 2004). Construction of the last of the so-called "Molly Hootch" high schools was not completed until the mid-1980s. Diane Olthuis, *The Molly Hootch Case: 1972, Emmonak*, in IT HAPPENED IN ALASKA 129 (2006).

Building schools did not end the State's discrimination. In 1999, *Kasayulie v. State* found that Alaska had "discrepancies in funding made available to Native and non-Native students." H.R.REP.NO. 109-478 at 51, *reprinted in* 2006 U.S.C.C.A.N. 651. Despite "the affirmative duty on the State to provide public education," the court held that the funding discrepancies between the predominately non-Native urban areas and the Native villages "unconstitutionally discriminated against Alaska Natives." *Id.* There was evidence of ongoing funding disparities in another case that was pending during reauthorization. *See Continued Need*, *supra*, at 1336; Decision and Order, *Moore v. State*, case no. 3AN-04-9756-CIV slip op. at 194-95 (Alaska Super. Ct. June 21, 2007).

Alaska's continued failure to provide equal educational opportunities has profoundly affected the

ability of Native voters to read registration and voting materials. In 2004, only 47.5 percent of all Native students graduated from high school compared to the statewide average of 62.9 percent. H.R.REP.NO. 109-478 at 50-51, *reprinted in* 2006 U.S.C.C.A.N. 651. In 2005, just 19.5 percent of all Alaska Native seniors statewide "were proficient in reading comprehension" in a high school graduation test. *Continued Need*, *supra*, at 1335; *Modern Enforcement*, *supra*, at 79. Educational discrimination in Alaska is not limited only to *amici*, but now impacts a new generation of young adults who are or soon will become eligible to vote.

B. Alaska Natives continue to suffer from high illiteracy rates and low voter participation resulting from discrimination in education and voting.

Where education barriers are present, they have "a deleterious effect on the ability of language minorities to become English proficient and literate." H.R.REP.NO. 102-655, at 6, *reprinted in* 1992 U.S.C.C.A.N. 766, 770. Alaska Natives suffer from the effects of present unequal educational opportunities and past discrimination identified by Congress in 1975. According to 2002 Census data, the average LEP rate among Alaska Native voters on 59 reservations was 22.6 percent. *See Continued Need*, *supra*, at 2169. Forty percent of all Alaska Native reservations had LEP rates "greater than 50 percent." *Id.* Among LEP Alaska Native voters, 28.3 percent are illiterate,

nearly 21 times the national illiteracy rate of 1.35 percent for voting-age U.S. citizens. *See id.* at 2163, 2170. There is a strong correlation between limited-English proficiency and illiteracy, with forty percent of all Alaska Native reservations having "illiteracy rates greater than 50 percent." *Id.* at 2170.

Alaska Natives in the Bethel area have some of the highest LEP rates in Alaska, including eight Yup'ik villages in which more than half of eligible voters are LEP and 10 villages with LEP rates between 20 to 50 percent. *See Id.* at 2281. Among the region's Alaska Natives aged sixty and older, 91.7 percent lack a high school diploma and 86.3 percent have less than a ninth grade education. *See Nick* PI Mot., *supra*, at 4. Yup'ik voters in the Bethel area have consistently had depressed voter turnout because of the lack of language assistance, trailing statewide turnout in the 2004 Presidential Election by more than 20 percent. *Id.* at 24. Alaska election officials were dismissive of the known impact their violations of the VRA had on depressing Yup'ik turnout in the Bethel area, stating their lack of concern "because that has been the trend of that area." *Id.* at 23-24. In the 2008 Presidential Election, turnout among Alaska Natives was just 47 percent,[7] nearly 20

[7] *See* Nat'l Cong. of Am. Indians, *Election 2008: Impact in Indian Country* (Nov. 6, 2008), http://www.ncai.org/fileadmin/pdf Election2008AnalysisFINALCompatibilityMode.pdf.

percent lower than the statewide turnout rate of 66 percent.[8]

"Sections 4(f) and 203 have been instrumental in fostering progress" to combat the "unequal educational opportunities" provided to Alaska Natives. H.R.REP.NO. 109-478 at 18, *reprinted in* 2006 U.S.C.C.A.N. 628. They "level the playing field" for illiterate and LEP Native voters, "ensuring that the most fundamental right of all citizens is preserved regardless of one's ability to speak English well." *Id.* at 61, *reprinted in* 2006 U.S.C.C.A.N. 661-62. Section 4(f)(4) requires that Alaska provide assistance in Alaska Native languages for "any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots..." 42 U.S.C. §1973b(4)(f)(4); *see also* 42 U.S.C. §1973aa-1a (providing for identical requirements under Section 203); 28 C.F.R. §55.18 (summarizing language assistance that must be provided under both sections).

Alaska is demonstrative of the "significant number of jurisdictions" that "have yet to fully comply" with Section 4(f)(4)'s obligations. H.R.REP.NO. 109-478 at 58, *reprinted in* 2006 U.S.C.C.A.N. 659. Alaska's violations have "had the effect of keeping citizens from experiencing full participation in the

[8] *See* State of Alaska, Division of Elections, Official Results of the Nov. 4, 2008 General Election, http://www.elections.alaska.gov/08general/data/results.pdf.

electoral process." *Id.* at 58-59, *reprinted in* 2006 U.S.C.C.A.N. 659. In reauthorizing Section 4(f)(4), Congress cited "the enforcement actions filed to protect language minorities" such as those to compel Alaska's compliance. VRARA §2(b)(8), 120 Stat. 578. Petitioner's criticism of the Section 4 trigger rests on the incorrect assumption that the passage of time, rather than eliminating the discrimination that resulted in coverage, should be the constitutional touchstone. Jurisdictions like Alaska "are covered because they discriminated against their minority populations. They should not be released from oversight simply because time has passed; they should be released if they can demonstrate that they are no longer discriminating, such as through bailout." *Modern Enforcement*, *supra*, at 74. Section 5 remains essential to ensure that Alaska provides all of its citizens, including Alaska Natives, with equal access to registration and voting.

IV. Conclusion.

Sections 4 and 5 of the VRA are essential to protect the ability of Alaska Natives to have equal access to registration and voting opportunities. State discrimination continues to be a part of the contemporary reality of elections in Alaska. Congress was well aware of that fact when it reauthorized the temporary provisions of the VRA in 2006. *See* VRARA §2(b)(b), 120 Stat. 577-78. As such, it properly acted "under its broadest power – to remedy continued

discrimination." H.R.REP.NO. 109-478 at 53, *reprinted in* 2006 U.S.C.C.A.N. 654.

Accordingly, the judgment of the District Court should be affirmed.

Respectfully submitted,

JAMES THOMAS TUCKER
Counsel of Record
NATALIE LANDRETH
NATIVE AMERICAN RIGHTS FUND
801 B Street, Suite 401
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(907) 276-0680

25th of March 2009

[SEAL] **U.S. Department of Justice**
Civil Rights Division

CC:MSR:SMC:jdh
DJ 166-012-3
2008-2739
2008-3714

Voting Section – NWB
950 Pennsylvania Avenue, NW
Washington, DC 20530

July 14, 2008

Gail Fenumiai, Esq.
Director, Division of Elections
P.O. Box 110017
Juneau, Alaska 99811-0017

Dear Ms. Fenumiai:

This refers to the consolidation of the Tatitlek Precinct into the Cordova Precinct, and the subsequent polling place change, precinct realignment and precinct name change to the Cordova-Tatitlek Precinct; consolidation of the North Prince of Wales Precinct into the Klawock Precinct, and the subsequent polling place change, and precinct realignment; consolidation of the Pedro Bay Precinct into the Iliamna-Newhalen Precinct, and the subsequent polling place change precinct realignment and precinct name change to the Iliamna Lake North Precinct; and the consolidation of the Levelock Precinct into the Kokhanok Precinct, and the subsequent polling place change, precinct realignment and precinct name change to the Iliamna Lake south Precinct, for the State of Alaska, submitted to the Attorney General pursuant to Section 5 of the Voting

Rights Act, 42 U.S.C. 1973c. We received your submission on May 13, 2008.

With regard to the changes affecting the North Prince of Wales Precinct, the Attorney General does not interpose any objection to the specified change. However, we note that Section 5 expressly provides that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the change. Procedures for the Administration of Section 5 of the Voting Rights Act (28 C.F.R. 51.41).

With regard to the remaining specified changes, our analysis indicates that the information sent is insufficient to enable us to determine that the proposed changes do not have the purpose and will not have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group, as required under Section 5. The following information is necessary so that we may complete our review of your submission:

1. A detailed explanation of the proposed changes including: (a) the criteria used to determine that the Tatitlek, Pedro Bay and Levelock Precincts should be eliminated; (b) reasons for the selection of the precincts these would be consolidated into; (c) a description of any alternative(s) precincts considered for the consolidation and the reason(s) why each such alternative was not recommended or approved; and (d) the factual basis, including any reports, studies, analyses, or views (whatever formal or informal), for

the State's determination that the proposed changes will not have a retrogressive effect on minority voters.

2. A map for each of the consolidations, which depicts the existing voting precincts and the locations of their current polling places, and any other locations considered as potential polling places for these consolidated precincts. The maps should be accompanied by a listing of the names and addresses of the current polling place locations along with the distance between each current location and the location with which it is being consolidated.

3. Please indicate the methods of transportation available to voters traveling from the old precinct to the new consolidated precinct. If no roadways connect the two, please indicate how voters will get to the consolidated location.

4. Please provide any methodology the State used to determine that there are no Alaskan Native-speakers in the impacted precincts, which are covered by the provisions of Section 203 of the Voting Rights Act. Please provide names of community members spoken to regarding the presence or absence of limited-English proficient voters, including their daytime telephone numbers.

5. A detailed description of the efforts, both formal and informal, made by the State to secure the views of the public, including members of the minority community, regarding these changes. Describe the substance of any comments or suggestions received, provide the names and daytime telephone numbers of

the persons making the comments or suggestions, and articulate the State's response, if any.

6. Voter registration and turnout data, by race, for elections since 1998 for the precincts being eliminated and subsequently consolidated.

During your recent conversation with Ms. Stephanie Celandine, of our staff, regarding these consolidations, you noted that the specified voting precincts affected by the consolidations would be designated as *permanent* absentee by-mail precincts. According to our records, this change affecting voting has not been submitted to the United States District Court of the District of Columbia for judicial review or to the Attorney General for administrative review as required by Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. If our information is correct, it is necessary that this change be brought before the District Court for the District of Columbia or submitted to the Attorney General for a determination that it does not have the purpose and will not have the effect of discriminating on account of race, color, or membership in a language minority group. Changes which affect voting are legally unenforceable without Section 5 preclearance. *Clark v. Roemer*, 500 U.S. 646 (1991); Procedures for the Administration of Section 5 of the Voting Rights Act (28 C.F.R. 51.10).

The Attorney General has sixty days to consider a completed submission pursuant to Section 5. This sixty-day review period will begin when we receive the information specified above. See the Procedures

for the Administration of Section 5 of the Voting Rights Act (28 C.F.R. 51.37). However, if no response is received within sixty days of this request, the Attorney General may object to the proposed changes consistent with the burden of proof placed upon the submitting authority. See also 28 C.F.R. 51.40 and 51.52(a) and (c). Changes which affect voting are legally unenforceable unless Section 5 preclearance has been obtained. *Clark v. Roemer*, 500 U.S. 646 (1991); 28 C.F.R. 51.10. Therefore, please inform us of the action the State of Alaska plans to take to comply with this request.

If you have any questions concerning this letter or if we can assist you in obtaining the requested information, you should call Ms. Celandine of our staff. Refer to File Nos. 2008-2739 and 2008-3714 in any response to this letter so that your correspondence will be channeled properly.

Sincerely,

/s/ Maureen S. [Illegible]
for Christopher Coates
Chief, Voting Section

[SEAL] **U.S. Department of Justice**
Civil Rights Division

CC:TFM:SBD:LB:jdh
DJ 166-012-3
2008-1726

Voting Section – NWB
950 Pennsylvania Avenue, NW
Washington, DC 20530

August 1, 2008

VIA FACSIMILE & FIRST CLASS MAIL

Gail Fenumiai
Director
Division of Elections
State of Alaska
P.O. Box 110017
Juneau, Alaska 99811-0017

Dear Ms. Fenumiai:

This refers to the changes in bilingual election procedures for the State of Alaska ("State"), submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your response to our May 19, 2008 request for additional information on June 9, 2008.

Your June 9, 2008, letter withdraws your submission of the State's revised Minority Language Assistance Program ("MLAP") from Section 5 review. Accordingly, no determination by the Attorney General is required concerning this matter. *See Procedures for the Administration of Section 5 of the Voting Rights Act*, 28 C.F.R. 51.25(a). Please be advised, however, that the State of Alaska is required to provide bilingual election materials and minority

language assistance in the Native American and Alaska Native languages under Sections 4(f)(4) and 203 of the Voting Rights Act. Therefore, to the extent that the State seeks to implement new procedures, preclearance of those procedures will be required before they may be implemented.

The last precleared bilingual election procedures for the State are the 1981 plan for the Alaska Native languages, precleared by letter dated October 5, 1981, and the 2002 and 2003 plans for the Tagalog language, precleared by letters dated October 22, 2002 and November 17, 2003. However, according to discovery conducted in the case, *Nick, et al. v. Bethel, et al.* (D. AK, 3:07-CV-00098-TMB) ("*Nick*"), admissions by State elections officials, and assertions in your letter dated June 9, 2008, regarding "conditions existing at the time of the submission" and the State's continued implementation of "enhancements," it appears that the State of Alaska is not currently fully implementing the 1981 plan and is instead implementing new and different procedures. Any procedures deviating from the prior precleared procedures are changes affecting voting for which preclearance is required. *See Clark v. Roemer*, 500 U.S. 646 (1991).

According to our records, some of those changes affecting voting in the state's minority language program that have been implemented since 1981 have not been submitted to the United States District Court for the District of Columbia for judicial review or to the Attorney General for administrative review as required by Section 5 of the Voting Rights Act. If

our information is correct, it is necessary that these changes either be brought before the District Court for the District of Columbia or submitted to the Attorney General for a determination that they do not have the purpose and will not have the effect of discriminating on account of race, color, or membership in a language minority group. Changes which affect voting are legally unenforceable without Section 5 preclearance. *Id.*; 28 C.F.R. 51.10.

Should you elect to make a submission to the Attorney General for administrative review rather than seek a declaratory judgment from the District Court for the District of Columbia, it should be made in accordance with Subparts B and C of the procedural guidelines, 28 C.F.R. Part 51. At that time we will review your statewide bilingual procedures; however, any documentation previously provided need not be resubmitted.

The State of Alaska has recently submitted portions of its statewide bilingual procedures for Section 5 review in submissions dated June 2, 2008 (bilingual assistance forms and posters), June 10, 2008 (bilingual vote-by-mail materials), June 13, 2008 (bilingual vote-by-mail instructions), June 23, 2008 (Native Language and Tagalog audio on voting machines, and Native language audio CDs in polling places), and July 21, 2008 (using Native language audio CD recordings on automated phone system and website). With regard to these changes, please refer to the separate letter to you dated today, in which we state that it would be inappropriate for the Attorney

General to make a preclearance determination until the related changes have been submitted for Section 5 review.

We are aware of the Order entered on July 30, 2008, in the *Nick* litigation, requiring the State to implement certain bilingual elections procedures within the Bethel Census Area in the Yup'ik language. While those specific federal court-ordered procedures do not have to be submitted for Section 5 review, any procedures outside the scope of the Order that are changes affecting voting are legally unenforceable without Section 5 preclearance. *Id.*

Additionally, your letter dated June 9, 2008, contains some misconceptions regarding the Section 5 process, specifically the standard and scope of review of Section 5 submissions by the Attorney General, the process involving comments from outside parties, and reason for and purpose of the more information letter.

The Voting Rights Reauthorization Act of 2006[1] made clear that the standard of review under Section 5 includes any discriminatory purpose and not simply "retrogressive purpose" as explained in *Reno v. Bossier Parish School Board,* 528 U.S. 320 (2000). The applicable legal standard for determining whether discriminatory purpose exists is *Village of Arlington Heights v. Metropolitan Housing Development Corp*.,

[1] Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, sec. 5, 5(c), 120 Stat. 577, 581

429 U.S. 252, 266 (1977). This approach requires an inquiry into 1) the impact of the decision; 2) the historical background of the decision, particularly if it reveals a series of decisions undertaken with discriminatory intent; 3) the sequence of events leading up to the decision; 4) whether the challenged decision departs, either procedurally or substantively, from the normal practice; and 5) contemporaneous statements and viewpoints held by the decision-makers. *Id*. at 266-68.

Likewise, the discriminatory effect of a voting change must be measured by whether there is retrogression from a "benchmark" practice which is legally enforceable under Section 5, either by virtue of having been precleared or not being subject to preclearance. The Attorney General's review of a submission thus requires the covered jurisdiction to accurately and completely identify the relevant benchmark practice. 28 C.F.R. 51.27(b), 51.54.

The Supreme Court has emphasized with respect to a covered jurisdiction that seeks judicial or administrative preclearance of a voting change under Section 5, "irrespective of which avenue of preclearance the covered jurisdiction chooses, it has the same burden of demonstrating that the changes are not motivated by a discriminatory purpose and will not have an adverse impact on minority voters . . . " *McCain v. Lybrand*, 465 U.S. 236, 247 (1984).

A request for more information, like the Department's May 19, 2008 letter, seeks to assist the submitting jurisdiction in meeting its burden of establishing an absence of discriminatory purpose and discriminatory effect, where such information was not clearly presented in the initial submission. Therefore, the questions contained in the May 19, 2008 letter are relevant to the Section 5 analysis and necessary for the Attorney General to determine whether the submitted changes were motivated by any discriminatory purpose or will have a discriminatory effect as compared to the relevant benchmark. Moreover, we believe that the State of Alaska's response to the questions contained in the May 19, 2008 letter are necessary for the Department to review the State's submissions relating to or including bilingual election procedures, and to make a determination as to discriminatory purpose and retrogressive effect.

Likewise, the scope of review of Section 5 submissions by the Attorney General is broad and includes all information and documentation before him, including information provided by the submitting jurisdiction, information provided by outside parties in the form of comment, and any other relevant information obtained through a variety of public and internal means. 28 C.F.R. 51.26 through 51.30. In its letter dated March 18, 2008, the State informed the Attorney General that it was involved in the *Nick* private litigation regarding the very issues submitted for review. Court filings in that litigation are publicly available and were reviewed during the Attorney

General's consideration of the State's submission, as were comments from third parties.

The Procedures for Section 5 review contemplate and encourage comments from third parties and the Attorney General reviews, as a matter of course, those comments received during the sixty day period. 28 C.F.R. 51.26 through 51.33. Both the Section 5 Procedures and the Freedom of Information Act, 5 U.S.C. 552, allow for persons outside of the Department to obtain a copy of the submission and any comments upon request, subject to certain restrictions of privacy and confidentiality. 28 C.F.R. 51.29. An individual or group who provides information concerning a change affecting voting may choose to keep their identity confidential. 28 C.F.R. 51.29(d). Additionally, the Attorney General may, in his discretion, inform the submitting authority of comments made by third parties, as was done in this matter. 28 C.F.R. 51.36. However, no jurisdiction has a standing request to be notified of all comments received for all submissions.

Lastly, the Section 5 Procedures provide a means for the Attorney General to seek clarification and additional information from a jurisdiction, when necessary, including when issues are raised during the sixty-day review process or information provided by the submitting authority is insufficient. 28 C.F.R. 51.37. Such procedures also allow the jurisdiction and opportunity to respond to and rebut allegations so that the Attorney General can make a fully informed determination. *Id*. During the review of the State's

submission dated March 18, 2008, those issues set forth in the Department's letter dated May 19, 2008, came to light and the Attorney General sought the State's response to and clarification of same.

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action the State of Alaska plans to take regarding the changes affecting voting that have not been submitted for judicial review or preclearance. If you have any questions, you should call Ms. Lema Bashir (202-305-0063) of our staff. Please refer to File No. 2008-1726 in any response to this letter so that your correspondence will be channeled properly.

Since the Section 5 status of Alaska's minority language assistance program is before the court in *Nick, et al. v. Bethel, et al*. (D. AK, 3:07-CV-00098-TMB), we are providing a copy of this letter to the court and counsel of record in that case.

Sincerely,

/s/ [Illegible]
for
Christopher Coates
Chief, Voting Section

cc: Court and Counsel of Record

[SEAL] **U.S. Department of Justice**
Civil Rights Division

CC:MSR:SMC:par
DJ 166-012-3
2008-2739
2008-3714

Voting Section – NWB
950 Pennsylvania Avenue, NW
Washington, DC 20530

September 10, 2008

Ms. Gail Fenumiai
Director, Division of Elections
P.O. Box 110017
Juneau, Alaska 99811-0017

Dear Ms. Fenumiai:

This refers to the consolidation of the Tatitlek Precinct into the Cordova Precinct, and the subsequent polling place change, precinct realignment and precinct name change to the Cordova-Tatitlek Precinct; consolidation of the Pedro Bay Precinct into the Iliamna-Newhalen Precinct, and the subsequent polling place change, precinct realignment and precinct name change to the Iliamna Lake North Precinct; the consolidation of the Levelock Precinct into the Kokhanok-Iguigig Precinct, and the subsequent polling place change, precinct realignment and precinct name change to the Iliamna Lake South Precinct; and resulting designation of the Tatitlek, Pedro Bay and Levelock Precincts as permanent absentee by-mail precincts for the State of Alaska, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your

response to our July 14, 2008, request for additional information on July 30, 2008.

Your July 30, 2008, letter withdraws your submission from Section 5 review. Accordingly, no determination by the Attorney General is required concerning this matter. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.25(a)).

Sincerely,

/s/ Maureen S. [Illegible]
for Christopher Coates
Chief, Voting Section