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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA

MIKE TOYUKAK, et al.

Plaintiffs,

v.

MEAD TREADWELL, et al.,

Defendants.

Case No.: 3:13-cv-00137-SLG

**MOTION FOR PARTIAL SUMMARY  
JUDGMENT; ALTERNATIVE  
MOTION TO ESTABLISH LAW OF  
THE CASE; AND MEMORANDUM  
OF LAW IN SUPPORT**

Pursuant to Federal Rules of Civil Procedure 7 and 56, Mead Treadwell,  
Lieutenant Governor of the State of Alaska, Gail Fenumiai, Director of the Division of  
Elections for the State of Alaska, Michelle Speegle, Election Supervisor of the Fairbanks  
Regional Elections Office, and Becka Baker, Election Supervisor of the Nome Regional

*Toyukak et al v. Treadwell et al.*

DEFENDANTS' MOTION FOR SJ/EST. LAW OF CASE

Case No. 3:13-cv-00137-SLG

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Elections Office (hereinafter collectively “the Division”) move for partial summary judgment, or in the alternative, to establish the law of the case as follows.

## INTRODUCTION

The bulk of this case is about Yup’ik language assistance that the State of Alaska provides to limited-English proficient voters in the Dillingham and Wade Hampton Census Areas of the state.<sup>1</sup> The parties have engaged in extensive discovery. The Division has produced nearly 23,000 records reflecting its efforts to assist limited-English proficient Yup’ik speaking voters and outlining the nature and extent of its comprehensive Yup’ik language assistance program. The parties have collectively taken the depositions of eighteen witnesses.

The record shows that as a matter of law, the Division’s Yup’ik language assistance program complies with the United States Constitution and with Section 203 of the Voting Rights Act. As outlined in this memorandum, the Division has taken “all reasonable steps” to provide Yup’ik language assistance through a comprehensive program “designed to allow” Yup’ik limited-English voters “to be effectively informed

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<sup>1</sup> This motion does not address plaintiffs’ claims regarding the provision of Gwich’in language assistance in the Yukon-Koyukuk Census Area because plaintiffs have only recently identified tribal representatives for the named plaintiff villages and agreed to a date for deposing these representatives, and plaintiffs have not yet completed written discovery addressed to these villages. The Division nevertheless wholly denies all claims related to language assistance in the Yukon-Koyukuk Census Area. *See* Docket 22.

of and participate effectively in voting-connected activities.”<sup>2</sup> Plaintiffs have failed to meet their burden to prove a violation of the VRA or the Constitution with respect to the Division’s Yup’ik language assistance program as implemented in the Dillingham and Wade Hampton Census Areas. The Division is therefore entitled to summary judgment on those claims.

In the alternative, the Court should establish the law of the case for trial as follows: Section 203 of the Voting Rights Act triggers an obligation on the part of the Division to develop a tailored program of means and measures for language assistance derived from input from communities in covered jurisdictions and to make reasonable efforts to implement that language assistance program.

## **FACTUAL BACKGROUND**

### **A. Alaska Native populations and languages in the Dillingham and Wade Hampton Census Areas.**

The Dillingham and Wade Hampton Census Areas are largely rural, sparsely-populated, geographically vast regions of Alaska located in the south-western corner of the state. The Dillingham Census Area covers 20,928 square miles and as of the 2010 census, had a population of 4,847.<sup>3</sup> The Wade Hampton Census Area covers

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<sup>2</sup> See 28 C.F.R. § 55.2(b)(1) & (2).

<sup>3</sup> Exhibit A at 4 (Census Area Map Data).

19,669 square miles and as of the 2010 census, had a population of 7,459.<sup>4</sup> The Bethel Census Area is sandwiched between the Wade Hampton Census Area to the north and the Dillingham Census Area to the south.<sup>5</sup>

The Dillingham Census Area has 375 limited-English proficient Yup'ik citizens of voting age in its total population of 4,847.<sup>6</sup> Under federal regulation, 120 of the Yup'ik limited-English proficient voters are considered “illiterate.”<sup>7</sup> In the Wade Hampton

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<sup>4</sup> Exhibit A at 9.

<sup>5</sup> Exhibit A at 3. For purposes of elections administration, the communities in the Dillingham Census Area are: Aleknagik, Clark's Point, Dillingham, Ekwok, New Koliganek, Manokotak, New Stuyahok, and Togiak. The communities in the Wade Hampton Census Area are: Alakanuk, Chevak, Emmonak, Hooper Bay, Kotlik, Marshall, Mountain Village, Nunam Iqua, Pilot Station, Pitka's Point, Russian Mission, Scammon Bay, and St. Mary's. In 2012, Pitka's Point and St. Mary's were merged. Exhibit B (2012 General Election Turnout Statistics).

<sup>6</sup> Exhibit C at 20 (2011 Voting Rights Public Use File Documentation and Citizen Voting Age Population (CVAP) Special Tabulation). In the Dillingham Census Area, there are 3,225 voting-age citizens; 2,425 are Alaska Native and 2,050 are Yup'ik.

For purposes of Section 203, “limited-English proficient means unable to speak or understand English adequately enough to participate in the electoral process.” 28 C.F.R. § 55.6(b). A person is considered “limited-English proficient” if the person is reported on a census bureau survey as speaking English “less than very well.” *See* Exhibit C at 8-9.

<sup>7</sup> Exhibit C at 20. *See also* 28 C.F.R. § 55.6(b) (defining “illiteracy” as “the failure to complete the fifth primary grade”).

Census Area, out of a population of 7,459 there are 515 limited-English proficient Yup'ik voters; 110 of whom are classified as "illiterate."<sup>8</sup>

Yup'ik limited-English proficient voters are spread widely and unevenly throughout the several villages in the Dillingham and Wade Hampton Census Areas. In the Dillingham Census Area, New Stuyahok has fifty Yup'ik limited-English proficient voters in a community of 323 voting-age citizens, while in Dillingham there are only 125 limited-English proficient Yup'ik voting-age citizens out of 1,554 voters.<sup>9</sup> In smaller communities, limited-English proficient Yup'ik voters are even more dispersed – in Clark's Point there are no limited-English proficient voters but in Manokotak 152 of the 268 voting-age citizens speak a language other than English and speak English less than very well.<sup>10</sup>

This dispersal is similar, though not as pronounced, in the Wade Hampton Census Area. Certain communities, such as Hooper Bay, have proportionately fewer Yup'ik limited-English proficient Yup'ik voters – seventy out of a voting population of 728.<sup>11</sup>

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<sup>8</sup> Exhibit C at 20 (2011 Voting Rights Public Use File Documentation and CVAP Special Tabulation). There are 4,335 voting-age citizens in the Wade Hampton Census Area; 4, 150 are Alaska Native and 3,195 are Yup'ik.

<sup>9</sup> Exhibit C at 20. Exhibit D at 2, 4 (2007-2011 American Community Survey 5-year Estimates Age by Language Spoken at Home by Ability to Speak English).

<sup>10</sup> Exhibit D at 2, 3.

<sup>11</sup> Exhibit C at 20 (2011 Voting Rights Public Use File Documentation and CVAP Special Tabulation). Exhibit D at 2 (2007-2011 American Community Survey 5-year Estimates Age by Language Spoken at Home by Ability to Speak English).

Other villages have a higher percentage of Yup'ik limited-English proficient voters, although the actual number of voting-age citizens who are Yup'ik limited-English proficient varies based on the size of the community. For instance, both Emmonak and Scammon Bay have approximately 15.3% Yup'ik limited-English proficient voters among their Alaska Native voting-age populations, which equates to seventy Yup'ik limited-English proficient voters in Emmonak but only thirty-five in Scammon Bay.<sup>12</sup>

The covered minority language group for the Dillingham and Wade Hampton Census Areas at issue in this lawsuit is “Alaska Native (Yup'ik).”<sup>13</sup> The Yup'ik language is spoken throughout the Dillingham and Wade Hampton Census Areas, with slight dialectical differences in different regions.<sup>14</sup> According to the plaintiffs' expert Dr. Walkie Charles, “[t]he dialects have different rhythms and indeed some words are different, although not different enough to require their own books or classes.”<sup>15</sup> Linguists have identified five dialects of Yup'ik, two of which have “subdialects.”<sup>16</sup> The main dialect is General Central Yup'ik, and the other four dialects are Norton Sound,

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<sup>12</sup> Exhibit C at 20.

<sup>13</sup> Docket 21 at ¶¶ 24, 34 (citing 76 Fed. Reg. 63,602 (Oct. 13, 2011)).

<sup>14</sup> Exhibit E at 44 (Map of Dialects of Central Alaskan Yup'ik, Declaration of Dr. Walkie Charles at Attachment D).

<sup>15</sup> Exhibit E at 5 (Declaration of Dr. Walkie Charles ¶ 12).

<sup>16</sup> Exhibit F at 4-5 (Excerpt from Steven A. Jacobson, *Yup'ik Dialect Atlas and Study*, xii-xiii (1988)).

Hooper Bay-Chevak, Nunivak, and Egegik.<sup>17</sup> General Central Yup'ik is the most commonly spoken dialect.<sup>18</sup>

Yup'ik-speaking plaintiffs and their witnesses in different communities, however, appear to disagree with academics regarding the number of Yup'ik dialects and the boundaries of where those dialects are spoken. Several plaintiffs and witnesses have stated that the language they speak is “Yup'ik,” and in the dialect of their village.<sup>19</sup> In one case, a witness explained that he spoke the Alakanuk dialect of Yup'ik, different from the dialect of Yup'ik spoken eight miles away in Emmonak.<sup>20</sup> In other instances, witnesses from Hooper Bay have denied that they speak either “Cup'ik,” as plaintiffs assert in their complaint, or “Hooper Bay-Chevak,” the dialect assigned to them by linguists.<sup>21</sup> Instead,

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<sup>17</sup> Exhibit F at 4-5. *See also* University of Alaska Fairbanks, Alaska Native Language Center Website, *Central Alaskan Yup'ik*, at <http://www.uaf.edu/anlc/languages/cy/> (last visited April 1, 2014).

<sup>18</sup> *See* Exhibit E at 4-5 (Declaration of Dr. Walkie Charles ¶ 12).

<sup>19</sup> Exhibit G at 149 (Deposition Transcript Excerpts, Toyukak Dep. at 19:12-19:16); Exhibit G at 93 (Deposition Transcript Excerpts, Sheldon Dep. at 9:6-9:10); Exhibit G at 88 (Deposition Transcript Excerpts, Paukan Dep. at 25:11-25:16).

<sup>20</sup> Exhibit G at 99 (Deposition Transcript Excerpts, Sheldon Dep. at 28:12-30:21).

<sup>21</sup> Amended Complaint, Docket 21 ¶ 9, Exhibit F at 5 (Excerpt from Steven A. Jacobson, *Yup'ik Dialect Atlas and Study*, xiii (1988)).

the tribal council representative plaintiff and another witness from Hooper Bay reported that they speak “Hooper Bay Yup’ik.”<sup>22</sup>

**B. Alaska’s Yup’ik Language Assistance Program.**

The Division’s current Yup’ik language assistance program consists of a system of oral and written Yup’ik language assistance, which is provided to voters in the three census areas covered for Yup’ik—Bethel, Dillingham, and Wade Hampton.<sup>23</sup> Among other things, the Division provides to the communities in these areas: bilingual poll workers; in-person and video training for bilingual poll workers; bilingual outreach workers; Yup’ik sample ballots; a written Yup’ik/English glossary of election terms; bilingual radio and video broadcasts; a toll-free number for Yup’ik language assistance; a Yup’ik Translation Panel of Yup’ik speakers to review translations; a language assistance log procedure; a post-election language assistance assessment program; touch-screen voting machines with Yup’ik audio; language assistance posters; poll worker agreements; translation of ballot measures, summaries, voter registration and absentee voting

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<sup>22</sup> Exhibit G at 69 (Deposition Transcript Excerpts, Joseph Dep. at 12:1-13:5 (“We don’t call ourselves Cup’ik. Only Chevak and Mekoryuk call themselves Cup’ik.”), 55:25-56:2); Exhibit G at 108 (Deposition Excerpts, Tall Dep. at 12:8-12:18).

<sup>23</sup> Because Yup’ik is a historically unwritten language the Division is only required to provide oral language assistance under the VRA. *See* 42 U.S.C. § 1973aa-1a(c); 28 C.F.R. § 55.12(c). The Division does, however, produce written materials as part of its oral language assistance program.



processes, and candidate statements; and a full-time Yup'ik Language Assistance Coordinator.<sup>24</sup>

## STANDARD OF REVIEW

Federal Rule of Civil Procedure 56(a) provides that “[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” The Supreme Court has held that “at the summary judgment stage, the judge’s function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.”<sup>25</sup> No such issue exists “unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.”<sup>26</sup>

Summary judgment is mandatory if, “after adequate time for discovery and upon motion,” a party “fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.”<sup>27</sup> Thus, the Division has the burden to prove that summary judgment is

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<sup>24</sup> See generally Aff. of Shelly Growden.

<sup>25</sup> *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

<sup>26</sup> *Anderson*, 477 U.S. at 249 (Internal citations and quotations omitted).

<sup>27</sup> *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

proper, but plaintiffs must establish the existence of essential issues for which they bear the burden of proof at trial. That burden requires plaintiffs to prove their claims by a preponderance of the evidence.<sup>28</sup>

The “law of the case” may be established if, for example, an order denying a summary judgment motion manifests the Court’s intent to decide a particular issue.<sup>29</sup>

## **ARGUMENT**

### **A. The statutory and regulatory scheme governing bilingual election assistance.**

In 1975, Congress amended the Voting Rights Act to expand its protections to voters who are minority language speakers. One of the enacted provisions, Section 203, requires covered jurisdictions to provide election materials and assistance in the language of the applicable minority language group.<sup>30</sup> Although there are approximately twenty

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<sup>28</sup> See, e.g., *Woodby v. Immigration and Naturalization Service*, 385 U.S. 276, 285 (1966).

<sup>29</sup> See, e.g., *Federal Ins. Co. v. Scarsella Bros. Inc.*, 931 F.2d 599 n. 4 (9th Cir. 1991) (citing *Dessar v. Bank of Am. Nat’l Trust & Sav. Ass’n*, 353 F.2d 468, 470 (9th Cir. 1965)).

<sup>30</sup> 42 U.S.C. § 1973aa-1a(c) provides:

Whenever any State or political subdivision subject to the prohibition of subsection (b) of this section provides any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, it shall provide them in the language of the applicable minority group as well as in the English language: *Provided*, That where the

different Alaska Native languages<sup>31</sup>, the Act treats Alaska Natives as a “single language minority.”<sup>32</sup>

Section 203 of the VRA applies only to “covered” jurisdictions – those that have a specified number of voting-age citizens belonging to a single language minority who are limited-English proficient and have an illiteracy rate higher than the national rate.<sup>33</sup>

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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.

(Emphasis in original).

<sup>31</sup> University of Alaska Fairbanks, Alaska Native Language Center Website, *Languages*, at <http://www.uaf.edu/anlc/languages/> (last visited April 1, 2014).

<sup>32</sup> 28 C.F.R. § 55.1.

<sup>33</sup> 42 U.S.C. § 1973aa-1a(b)(2)(A)(i). 28 C.F.R. §§ 55.6(a)(1) and (4) describe the two coverage formulas relevant to this case as follows:

(1) Political subdivision approach. A political subdivision is covered if--

(i) More than 5 percent of its voting age citizens are members of a single language minority group and are limited-English proficient; and

(ii) The illiteracy rate of such language minority citizens in the political subdivision is higher than the national illiteracy rate.

[. . .]

Coverage determinations are made by the Director of the Census based on census bureau survey results.<sup>34</sup> The Director's determinations under Section 203 are published in the Federal Register and are "unreviewable in any court."<sup>35</sup> The Director counts as "limited-English proficient" any person identified by the census's American Community Survey as speaking English "less than very well."<sup>36</sup> The Director determines the literacy rate of a population by counting people who did not go further than fifth grade in school as illiterate.<sup>37</sup>

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(4) Indian reservation approach. A political subdivision is covered if there is located within its borders all or any part of an Indian reservation--

(i) In which more than 5 percent of the voting age American Indian or Alaska Native citizens are members of a single language minority group and are limited-English proficient; and

(ii) The illiteracy rate of such language minority citizens is higher than the national illiteracy rate.

<sup>34</sup> 42 U.S.C. § 1973aa-1a(b)(2)(A) (stating that the Director of the Census bases the determination on "the 2010 American Community Survey census data and subsequent American Community Survey data in 5-year increments").

<sup>35</sup> 28 C.F.R. § 55.4(a)(2) and (b).

<sup>36</sup> See Exhibit C at 8-9 (2011 Voting Rights Public Use File Documentation and CVAP Special Tabulation, Bates Stamp 30015-30016); see also *United States v. Berks County, Pa.*, 250 F. Supp. 2d 525, 528 (E.D. Pa. 2003). The American Community Survey asks respondents to characterize the English fluency of the persons in their households by selecting one of four options: speaks English very well, well, not well, or not at all. See Exhibit H at 8 (ACS Survey).

<sup>37</sup> 28 C.F.R. § 55.6(b).

In 2011, the Director of the Census determined that the Wade Hampton and Dillingham Census Areas were covered for “Alaska Native (Yup’ik)” and that the Yukon-Koyukuk Census Area was covered for “Alaskan Athabascan.”<sup>38</sup> The determination was published in the Federal Register on October 13, 2011, and it was later communicated to the Division in a letter from the Department of Justice.<sup>39</sup>

Section 203 contemplates that jurisdictions will provide written election-related materials in the minority languages for which they are covered.<sup>40</sup> But the law also recognizes that, for some groups whose languages are “historically unwritten,” such

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<sup>38</sup> 76 Fed. Reg. 63,602 (Oct. 13, 2011).

The federal regulations define the term “political subdivision” as “any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting. (Section 14(c)(2)).” 28 C.F.R. § 55.1. Neither the Census Bureau nor the Department of Justice has explained how census areas in Alaska fall within this definition.

<sup>39</sup> 76 Fed. Reg. 63,602 (Oct. 13, 2011); Exhibit I (Letter to G. Fenumiai from Department of Justice).

The relevant covered jurisdictions are the census areas rather than individual villages. The Federal Register, which states that it “publishes the Bureau of the Census (Census Bureau) Director’s determinations as to which political subdivisions are subject to the minority language assistance provisions of the Act,” lists only census areas. 76 Fed. Reg. 63,602 (Oct. 13, 2011). And the letter from the Department of Justice specifies that “the following Census Areas in Alaska are subject to the bilingual election requirements of Section 203 of the Voting Rights Act.” Exhibit I at 1. The Department of Justice letter further clarifies that the coverage determination was made as to the listed census areas, with the village names included because they “triggered the determinations.”

<sup>40</sup> 42 U.S.C. § 1973aa-1a(c).

materials will be of limited use, even if they could be produced. Therefore, for “historically unwritten” languages, a jurisdiction “is only required to furnish oral instructions, assistance, or other information relating to registration and voting.”<sup>41</sup> Beyond this basic requirement, the Act itself offers no guidance to covered jurisdictions regarding compliance.

Similarly, the Department of Justice regulations governing language assistance under the VRA lack specific detail and, instead, direct that “[t]he determination of what is required for compliance with . . . Section 203(c) is the responsibility of the affected jurisdiction.”<sup>42</sup> Nonetheless, several significant principles can be gleaned from the regulations. First, the regulations recognize that the purpose of Section 203 – “to enable members of applicable language minority groups to participate effectively in the electoral process” – informs and limits a covered jurisdiction’s obligation under the Act.<sup>43</sup> As the Department of Justice wrote to the Division, Section 203 “does not require that

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<sup>41</sup> 42 U.S.C. § 1973aa-1a(c).

<sup>42</sup> 28 C.F.R. § 55.2(c) (also cautioning that the regulation’s “guidelines should not be used as a substitute for analysis and decision by the affected jurisdiction”). *See also* Exhibit I at 3 (advising that “[b]ilingual election programs may differ from one another based on particular local circumstances and the needs of the local minority language community”).

<sup>43</sup> 28 C.F.R. § 55.2(b). *See also* Exhibit I at 3 (“Under Section 203, all information that is provided by your jurisdiction in English about the electoral process . . . must be provided in the language of members of the covered language group to the extent needed to allow them to participate effectively in the electoral process and all voting-connected activities.”).

information in the minority language be provided to people who have no need for it.”<sup>44</sup> In this vein, the regulations explicitly permit a covered jurisdiction to “target” its language assistance at voters who need it, such that “minority language materials or assistance required by the Act are provided to fewer than all persons or registered voters.”<sup>45</sup> The regulations state that “a targeting system will normally fulfill the Act’s minority language requirements if it is designed and implemented in such a way that language minority group members who need minority language materials and assistance receive them.”<sup>46</sup>

The regulations also provide a few more specific directions regarding a covered jurisdiction’s obligations under Section 203. A covered jurisdiction does not have to produce written materials in more than one language or more than one written form of a language.<sup>47</sup> When oral assistance is provided, a political subdivision must provide

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<sup>44</sup> Exhibit I at 3.

<sup>45</sup> 28 C.F.R. § 55.17.

<sup>46</sup> 28 C.F.R. § 55.17.

<sup>47</sup> 28 C.F.R. § 55.12 provides that:

(a) Language minority groups having more than one language. Some language minority groups, for example, Filipino Americans, have more than one language other than English. A jurisdiction required to provide election materials in the language of such a group need not provide materials in more than one language other than English. The Attorney General will consider whether the language that is used for election materials is the one most widely used by the jurisdiction’s voting-age citizens who are members of the language minority group.

assistance only in the dialects that are “commonly used” within its boundaries.<sup>48</sup> Finally, the regulations specify that United States Attorney General will “measure compliance” with Section 203 against two standards: “(1) That materials and assistance should be provided in a way *designed* to allow members of applicable 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.”<sup>49</sup>

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(b) Languages with more than one written form. Some languages, for example, Japanese, have more than one written form. A jurisdiction required to provide election materials in such a language need not provide more than one version. The Attorney General will consider whether the particular version of the language that is used for election materials is the one most widely used by the jurisdiction’s voting-age citizens who are members of the language minority group.

(c) Unwritten Languages. Many of the languages used by language minority groups, for example, by some American Indians and Alaskan Natives, are unwritten. With respect to any such language, only oral assistance and publicity are required. Even though a written form for a language may exist, a language may be considered unwritten if it is not commonly used in a written form. It is the responsibility of the covered jurisdiction to determine whether a language should be considered written or unwritten.

<sup>48</sup> 28 C.F.R. § 55.13(a) states: “Some languages, for example, Chinese, have several dialects. Where a jurisdiction is obligated to provide oral assistance in such a language, the jurisdiction’s obligation is to ascertain the dialects that are commonly used by members of the applicable language minority group in the jurisdiction and to provide oral assistance in such dialects.”

<sup>49</sup> 28 C.F.R. § 55.2(b) (emphasis added). *See also* 28 C.F.R. § 55.20(c) (directing that a covered jurisdiction should “determine the number of helpers” needed to provide



**B. Cases interpreting the language assistance requirement.**

Although the bilingual election provisions of the VRA have been in effect for nearly forty years, there are only a handful of cases interpreting them or assessing whether a jurisdiction's language assistance program complies with the statute.

The most recent—and, because it deals with oral language assistance to speakers of historically unwritten languages, most relevant—is *United States v. Sandoval County, New Mexico*.<sup>50</sup> The *Sandoval* Court, echoing the language of the Section 203 regulations, noted that “in determining whether Sandoval County has complied with § 203 of the VRA, the Attorney General asks whether the county has taken ‘all reasonable steps’ to ensure that Native American language voters have received information and assistance allowing them ‘to participate *effectively* in voting-connected activities.’”<sup>51</sup> In analyzing what that meant, the court continued:

This standard does not demand perfection, but only, as the United States describes it, ‘substantial compliance’ with § 203. ... This standard accounts for the fact that the occasional irregularity or inconsistency in oral translation may occur. If every such instance constituted a violation of § 203, federal oversight of Sandoval County’s electoral process might extend in perpetuity . . .<sup>52</sup>

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oral assistance in the minority language and adding that “[t]he basic standard is one of effectiveness”).

<sup>50</sup> 797 F. Supp. 2d 1249 (D.N.M. 2011).

<sup>51</sup> *Id.* at 1253 (quoting 28 C.F.R. § 55.2(b)(1) & (2), emphasis added by the court).

<sup>52</sup> *Id.*

The conclusion that Section 203 is not violated by a single failure or even sporadic failures in a program was shared by the court in an unpublished decision from the Eastern District of Pennsylvania, *United States v. City of Philadelphia*.<sup>53</sup> In denying the United States’ motion for a preliminary injunction against the City of Philadelphia, the court noted that “[i]ndividual accounts of disparate incidents that do not establish a standard, practice, or procedure attributable to the City comprise the entirety of the Government’s evidence,” and held that this was insufficient to establish a likelihood of success on the merits of a Section 203 claim.<sup>54</sup>

These cases—and the regulations they interpret—establish that Section 203 requires that a covered jurisdiction take “all reasonable steps” to ensure that limited-English-proficient voters receive information and assistance allowing them “to participate effectively in voting-connected activities.”<sup>55</sup> To establish a violation of Section 203, plaintiffs must offer evidence of more than occasional failures; rather they must show that the defendants’ language assistance program suffers from systemic defects that could be remedied by taking “reasonable steps.” This they cannot do.

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<sup>53</sup> No. 2:06cv4592, 2006 WL 3922115 (E.D. Pa. Nov. 7, 2006). The Alaska Local Rules prohibit citation to unpublished decisions “if citation is prohibited in the court that rendered the decision.” D.Ak.L.R. 7.1(c)(1)(A). Review of the rules of the Eastern District of Pennsylvania does not reveal any rule prohibiting citation of unpublished cases.

<sup>54</sup> *Id.* at \*3.

<sup>55</sup> *See generally Sandoval*, 797 F. Supp. 2d at 1253, *City of Philadelphia*, 2006 WL 3922115, at \*3; 28 C.F.R. § 55.2(b).

**C. The Division's Yup'ik language assistance program.**

As noted above, the Division's Yup'ik language assistance program consists of a comprehensive system of oral and written language assistance that includes: the recruitment and training of bilingual poll workers, including in-person training with DVD and telephone back-up for those who cannot attend in-person training; Yup'ik voter registration and election announcements; a Yup'ik sample ballot and glossary of election terms to help poll workers assist voters; a Yup'ik translation panel to translate and verify ballot measures; a Yup'ik language assistance toll free telephone number; Yup'ik audio translation of the ballot on touch-screen voting machines; Yup'ik audio translations of election materials on the Division's website; language assistance logs; post-election assessments and surveys to evaluate the efficacy of the language assistance program; and a full-time Yup'ik Language Assistance Coordinator. Following is a comprehensive description of that program, along with authenticated record evidence that the program is being implemented and executed in the Dillingham and Wade Hampton Census Areas.<sup>56</sup>

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<sup>56</sup> In order to keep the record on this motion to a manageable size, the Division is including representative samplings of materials used in implementing its Yup'ik language assistance program. These materials are a representative—not exhaustive—depiction of all elements of the program.

**1. Recruitment and training of bilingual poll workers and bilingual outreach workers.**

In 2008, the Division developed training materials specifically designed to help bilingual poll workers provide language assistance in Yup'ik. The training materials were created for regional supervisors to use when conducting poll worker training, and have been part of the Division's standard training practices for every state-conducted election since 2008, including those in the Wade Hampton and Dillingham Census Areas.<sup>57</sup> In 2010, the Division developed training videos about language assistance that are included with all election supplies sent to poll workers so that poll workers who do not attend in-person training can be trained by video.<sup>58</sup>

Although in-person training attendance is mandatory for all poll workers, including bilingual poll workers—and the Division pays for these workers' travel, food, and lodging for training—the Division has been unable to achieve a perfect in-person attendance rate due to the challenges of rural life including weather, subsistence activities, family illnesses, and small populations. There are a very limited number of people willing to serve as poll workers, so the Division is sometimes forced to accept

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<sup>57</sup> Aff. of Shelly Growden at ¶ 27.

<sup>58</sup> Aff. of Shelly Growden at ¶ 64.

workers who have not attended in-person training to keep rural village polling places open and functioning on Election Day.<sup>59</sup>

Since 2012, all of the communities in the Wade Hampton and Dillingham Census Areas are within the Division's Region IV, which is supervised by Becka Baker.<sup>60</sup> Ms. Baker described her poll worker training efforts at deposition, specifically: bringing workers to various rural hub locations for in-person training in early May of every even-numbered election year; the difficulties involved in bringing poll workers to in-person training due to weather; the measures taken when a poll worker is unexpectedly unavailable on Election Day; and the use of DVD videos for poll worker training for workers not able to attend in-person.<sup>61</sup> Exhibit J contains a sample sign-in sheet for election worker training in Dillingham (for the 2012 elections); the above-mentioned *Election Procedures for Bilingual Election Workers* handbook; and the polling place procedure manuals for both hand count and optical scan precincts.<sup>62</sup>

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<sup>59</sup> Aff. of Shelly Growden at ¶ 63.

<sup>60</sup> Aff. of Shelly Growden at ¶ 5.

<sup>61</sup> Exhibit G at 7; (Deposition Transcript Excerpts, Baker Dep. at 26-29, 78-81, 114-125, 158-165).

<sup>62</sup> Exhibit J (Poll Worker Training Materials). Hand count precincts tabulate ballots by hand. Optical scan precincts tabulate ballots mechanically. All precincts in the Wade Hampton Census Area are hand count precincts. With the exception of Dillingham and Togiak, all precincts in the Dillingham Census Area are also hand count precincts. Each precinct receives the appropriate training manual. Aff. of Shelly Growden at ¶ 29.

Also in 2008, the Division implemented a system of bilingual outreach workers to provide language assistance to voters when registering to vote and while voting. The Division pays outreach workers to perform these tasks, and also to make bilingual election announcements over local VHF radio. The Division provides all bilingual outreach workers with the text of these announcements in both Yup'ik and English, and has done so for each state-conducted election since 2010.<sup>63</sup> The Division has used bilingual outreach workers in the Dillingham and Wade Hampton Census Areas for each state-conducted election since 2008.<sup>64</sup>

Division records indicate that when recruiting bilingual outreach workers, the Division contacts workers by phone, explains their duties, and mails them their training packets.<sup>65</sup> In addition to performing outreach duties, the bilingual outreach worker serves as the language assistance worker on Election Day at the polling place. If the workers do not return a certificate of outreach, the hours they list on the Election Day timesheet are used to compensate them for their services in both jobs—bilingual outreach worker and bilingual poll worker.<sup>66</sup>

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<sup>63</sup> Aff. of Shelly Growden at ¶ 31.

<sup>64</sup> Aff. of Shelly Growden at ¶ 32.

<sup>65</sup> Exhibit K at 39 (Bilingual Outreach Materials).

<sup>66</sup> Exhibit K at 39.

In March 2010, the Division developed a training handbook specifically designed for Alaska Native bilingual outreach workers, including those in the Dillingham and Wade Hampton Census Areas. The handbook contains information on outreach worker job duties, voter registration, absentee voting, special needs voting, and language assistance. Exhibit K includes this handbook; a sampling of bilingual outreach worker certificates of outreach for workers in the Dillingham and Wade Hampton Census Areas; the bilingual text of the radio announcements made by those workers; and a list of the recruited election workers for 2012 in the Dillingham and Wade Hampton Census Areas.<sup>67</sup>

The record shows that the Division has verified and confirmed the Yup'ik and English language ability of bilingual poll workers in communities in the Dillingham and Wade Hampton Census Areas by having the local village council confirm language ability. Exhibit L is a sampling of just a few of those recommendations. The record shows—for example—that the following poll workers were recommended by the tribal council as bilingual poll workers for recent state-conducted elections: Ida Noonkesser in Dillingham; Brenda Tall in Hooper Bay; Irene Camille in Nunam Iqua; and Karen Kasak

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<sup>67</sup> Exhibit K.

in Togiak.<sup>68</sup> Plaintiffs named Ida Noonkesser, Brenda Tall, and Irene Camille as witnesses.<sup>69</sup>

At deposition, tribal council representative Frank Logusak testified that he knows Karen Kasak personally and that she speaks Yup'ik fluently and “very well.”<sup>70</sup> Fred Joseph also testified at his deposition that he knows Brenda Tall, confirmed her bilingual abilities, and indicated that her recommendation to the Division as a bilingual poll worker was authorized.<sup>71</sup> Exhibit M is a sampling of poll worker agreements for bilingual poll workers who worked recent elections in the Wade Hampton and Dillingham Census Areas.<sup>72</sup>

## **2. Yup'ik voter registration and election announcements and posters.**

For every state-conducted election since 2008, the Division has prepared text for several election-related public service announcements to be aired on the radio. The announcements air in Central Yup'ik on KYUK and KDLG twice a day for five days, and provide information on the candidate filing deadline; voter registration information and deadline; absentee voting information; Election Day information and procedures; and the

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<sup>68</sup> Exhibit L (Bilingual Poll Worker Language Recommendations).

<sup>69</sup> Docket 24.

<sup>70</sup> Exhibit G at 53 (Deposition Transcript Excerpts, Logusak Dep. 102:7-21).

<sup>71</sup> Exhibit G at 81 (Deposition Transcript Excerpts, Joseph Dep. 88:18-90:23).

<sup>72</sup> Exhibit M (Poll Worker Agreements).



Division's toll-free Yup'ik language assistance hotline.<sup>73</sup> As noted above, the Division provides all bilingual poll workers with the Yup'ik and English text of these ads, and has done so for every state-conducted election since 2010.<sup>74</sup> Exhibit N is a sampling of affidavits of airing for these ads.<sup>75</sup> For those communities in the Dillingham and Wade Hampton Census Areas that do not receive KYUK and KDLG, bilingual election workers read these announcements over VHF radio.<sup>76</sup>

In 2008, the Division created a voter assistance poster for poll workers to hang up in each polling place to inform voters that they could receive assistance when voting. The Division submitted that poster to Department of Justice for preclearance,<sup>77</sup> but ultimately

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<sup>73</sup> Aff. of Shelly Growden at ¶ 34.

<sup>74</sup> Aff. of Shelly Growden at ¶ 31; Exhibit K.

<sup>75</sup> Exhibit N.

<sup>76</sup> Aff. of Shelly Growden at ¶ 38; Exhibit G at 114-115, 134-135, 139-140, 141-142. (Deposition Transcript Excerpts, Tall Dep. 41-42, 76-77, 106-107, 122-123).

<sup>77</sup> Prior to June 2013, the Division was required to submit every change to statute, regulation, policy, or procedure to lawyers and analysts at the United States Department of Justice for pre-approval—or “preclearance”—under Section 5 of the VRA before such changes could take effect. On June 25, 2013, the United States Supreme Court decided *Shelby County, Alabama v. Holder*, 133 S. Ct. 2612 (2013). The Court held that Section 4 of the VRA—which codified the formula under which Alaska was covered for purposes of Section 5 preclearance—was an unconstitutional abridgement of state sovereignty. The result of *Shelby County* is that the division is no longer required to submit its election changes to the federal government for preclearance unless and until either: (1) Congress acts to create a new coverage formula that includes Alaska under Section 5; or (2) a Court “bails in” the state to Section 5 preclearance under Section 3(c) of the VRA. The “bail in” procedures of Section 3(c) of the VRA are an alternative means to the Section 4 coverage formula to subject a jurisdiction to preclearance under Section 5. Rarely used prior to

withdrew the submission when Department of Justice requested more information about it and other documents submitted along with it for preclearance at that time. The Division submitted the poster for preclearance again on June 3, 2009 and Department of Justice pre-cleared it on August 3, 2009. The Division has been sending the poster along with the precinct supplies to each polling place for each election ever since.<sup>78</sup> Exhibit O is a copy of that poster; an excerpt from the training materials that each poll worker receives regarding hanging this poster; and a sample precinct inventory sheet showing that the posters are sent.<sup>79</sup>

In 2010, the Division's Yup'ik Language Assistance Coordinator, Dorie Wassilie, prepared a Yup'ik audio translation that provides a summary of the voter registration, absentee voting, and special needs voting processes. The audio was placed on the Division's website in 2010, where it remains, available to the public. Once preclearance was no longer required, the audio was distributed on CD in 2013 to Yup'ik-speaking tribal councils, including those in the Dillingham and Wade Hampton Census Areas.<sup>80</sup>

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*Shelby County*, Section 3(c) allows a court to order “bail-in” to Section 5 if the court “finds that violations of the fourteenth or fifteenth amendment justifying equitable relief have occurred within the territory of such State or political subdivision.” 42 U.S.C. § 1973a(c).

<sup>78</sup> Aff. of Shelly Growden at ¶ 38.

<sup>79</sup> Exhibit O (Poster and Associated Materials).

<sup>80</sup> Aff. of Shelly Growden at ¶ 65; Exhibit P (Proof of Distribution of Yup'ik Glossary and Voter Info CD).

Also in 2013, when preclearance was no longer required, the Division sent list maintenance announcements to bilingual outreach workers in villages that do not receive KYUK with instructions to broadcast those announcements over VHF radio.<sup>81</sup>

**3. Yup'ik sample ballot and glossary of election terms to be used by poll workers.**

In 2008, the Division contracted with Mary Gregory in Bethel to prepare a written Yup'ik translation of ballot measure text. This was distributed to all tribal councils in Yup'ik-speaking villages—including those in the Dillingham and Wade Hampton Census Areas—for input and comment, and all of the councils responded that it would be useful.<sup>82</sup> After the July 30, 2008 order on Plaintiffs' Motion for Preliminary Injunction Against State Defendants in *Anna Nick, et al. v. Bethel, et al.*, Case No. 3:07-cv-00098-TMB, the Division prepared a Yup'ik sample ballot using Ms. Gregory's translations and distributed it to election workers in the Bethel Census Area to use when providing oral language assistance to Yup'ik limited-English proficient voters.<sup>83</sup>

The Division subsequently determined that it could also improve its Yup'ik language assistance program by distributing the Yup'ik sample ballot to election workers

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<sup>81</sup> Exhibit Q (Outreach for List Maintenance); Aff. of Shelly Growden at ¶ 38; Exhibit G at 114-115, 134-135, 139-140, 141-142 (Deposition Transcript Excerpts, Tall Dep. 41-42, 76-77, 106-107, 122-123).

<sup>82</sup> Aff. of Shelly Growden at ¶ 26.

<sup>83</sup> Aff. of Shelly Growden at ¶ 44.

in other Yup'ik-speaking communities. Accordingly, on July 22, 2009, the Division submitted a preclearance request to Department of Justice to expand the distribution of the Yup'ik sample ballot, and Department of Justice pre-cleared the Division's request on August 19, 2009. Beginning with the 2009 REAA election, the Division has prepared and distributed a written Yup'ik sample ballot for every state-conducted election held in the Bethel, Dillingham, and Wade Hampton Census Areas. The Yup'ik sample ballot is written in Central Yup'ik, because the Division determined that the Central Yup'ik dialect is the primary and most commonly spoken and written dialect of Yup'ik.<sup>84</sup> The Yup'ik sample ballot is provided to election workers and any member of the general public who is providing language assistance to Yup'ik-speaking limited-English proficient voters during an election. It is also distributed to the tribal councils in the Bethel, Wade Hampton, and Dillingham Census Areas.<sup>85</sup> Exhibit S is the Yup'ik sample ballot used during the statewide 2012 primary and general elections.<sup>86</sup>

In June 2009, with the assistance of Ms. Gregory, the Division completed a comprehensive Yup'ik/English glossary of election terms setting out words and phrases commonly used in elections, to be provided at each polling place for poll workers to use

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<sup>84</sup> Aff. of Shelly Growden at ¶ 49-52. One village—Chevak—also speaks Cup'ik, a dialect of Yup'ik. The Division provides oral language assistance in the Cup'ik dialect. See Exhibit R at 4, 6, 8, 9) (Language Assistance Logs).

<sup>85</sup> Aff. of Shelly Growden at ¶ 53.

<sup>86</sup> Exhibit S.

when providing oral language assistance. The glossary was distributed to all Yup'ik-speaking tribal councils, including those in the Dillingham and Wade Hampton Census Areas, along with a survey form for the tribal councils to offer feedback on the glossary. All responses the Division received indicated that the tribal councils agreed with the translations and that the terms and phrases were understandable.<sup>87</sup> The Division has distributed the printed Yup'ik glossary of election terms to bilingual poll workers and outreach workers, including those in the Dillingham and Wade Hampton Census Areas, for each state-conducted election since 2009. The written glossary was also distributed to tribal councils in the Dillingham and Wade Hampton Census Areas in 2009 and again in 2013.<sup>88</sup>

On June 19, 2009, the Division submitted a preclearance request to Department of Justice to supplement the written version of the Yup'ik glossary with an audio version of that same glossary. Department of Justice pre-cleared that request on August 17, 2009, permitting the Division to use an audio version of the glossary and distribute it to Yup'ik-speaking tribal councils—including those in the Wade Hampton and Dillingham Census Areas—and to post an audio version of the glossary on the Division's website. Dorie Wassilie used the written glossary to record its audio counterpart. In November 2009, the audio version of the glossary was placed on CD and distributed to tribal

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<sup>87</sup> Aff. of Shelly Growden at ¶¶ 46-47.

<sup>88</sup> Aff. of Shelly Growden at ¶ 48.

councils in the Dillingham and Wade Hampton Census Areas. The Division also placed the audio glossary on its website, where it has remained ever since.<sup>89</sup> Exhibit T is the written Yup'ik/English glossary of election terms.<sup>90</sup>

#### **4. Yup'ik translation panel to verify ballot measure translations.**

In February 2009, the Division organized a seven-member Yup'ik Translation Panel to review and update the Yup'ik translations included in the glossary of election terms, including terms used on the Yup'ik sample ballot. At that time, the panel members were: Dorie Wassilie, Oscar Alexie, Sophie Alexie, Frank Chingliak, Lincoln Enoch, Alice Fredson, and Elsie Jimmie.<sup>91</sup>

In May 2010, the Yup'ik Translation Panel members met to discuss and finalize the Yup'ik sample ballot measure language for ballot measures appearing on the 2010 primary and general election ballots. A Yup'ik Translation Panel member also verified the accuracy and comprehensibility of the Yup'ik translation of the ballot measures for the 2012 primary election, the only election on which ballot measures appeared that election cycle. The Division is in the midst of convening the Yup'ik Translation Panel to discuss and finalize ballot measures for the 2014 primary election ballot, the only election on which ballot measures will appear this election cycle. The Division has sent letters to

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<sup>89</sup> Aff. of Shelly Growden at ¶¶ 55-56.

<sup>90</sup> Exhibit T (Yup'ik/English Glossary of Election Terms).

<sup>91</sup> Aff. of Shelly Growden at ¶ 45.

all panel members asking if they will serve on the panel for the 2014 elections but has not heard back from all members at this time. The Division is trying to convene the panel in early May 2014 if members' schedules allow.<sup>92</sup>

#### **5. Yup'ik language assistance toll-free number.**

In 2008, the Division established a Yup'ik language assistance toll-free number and maintains it to this day. The number appears on election-related forms and materials, and is included on nearly every communication the Division sends to tribal councils, including those in the Dillingham and Wade Hampton Census Areas.<sup>93</sup> Since 2009, the number has appeared on the letter sent to every registered voter with their voter identification card.<sup>94</sup>

#### **6. Language assistance logs.**

In 2008, the Division developed a language assistance log procedure to track the number of language assistance requests received by the election board in each precinct. These logs have been distributed to each precinct election board in each state-conducted election since 2008. The Division maintains a statewide spreadsheet showing the number

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<sup>92</sup> Aff. of Shelly Growden at ¶ 68.

<sup>93</sup> Aff. of Shelly Growden at ¶ 33.

<sup>94</sup> Aff. of Shelly Growden at 33; Exhibit P (Voter Identification Card & Letter).

of language assistance requests that each precinct records at each election.<sup>95</sup> The poll worker training includes an explanation of how workers should maintain these language assistance logs.

Exhibit R includes the statewide spreadsheets for language assistance requests in the Dillingham and Wade Hampton Census Areas during the 2012 primary and general elections.<sup>96</sup> It also includes a small sampling of language assistance logs from the Wade Hampton and Dillingham Census Areas—including documentation of language assistance received by plaintiff Fred Augustine in 2008 and 2009.<sup>97</sup> It also includes documentation of language assistance provided in Chevak in the Wade Hampton Census Area in the Cup'ik dialect of Yup'ik since 2008.<sup>98</sup>

## **7. Yup'ik audio ballots on touch-screen voting machines.**

On June 2, 2009, the Division submitted a preclearance request to Department of Justice to create an audio Yup'ik sample ballot identical to the written Yup'ik sample ballot to add to the Division's touch-screen voting equipment, the use of which is required by the Help America Vote Act.<sup>99</sup> On July 30, 2009, the Division received

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<sup>95</sup> Aff. of Shelly Growden at ¶ 37.

<sup>96</sup> Exhibit R at 1-2. (Language Assistance Logs).

<sup>97</sup> Exhibit R at 3. (Language Assistance Logs).

<sup>98</sup> Exhibit R (Language Assistance Logs).

<sup>99</sup> 42 U.S.C. § 15481; Aff. of Shelly Growden at ¶ 57.



preclearance from Department of Justice to add an audio Yup'ik sample ballot to the touch screens in each polling place in the Bethel Census Area during federal elections.<sup>100</sup>

Although this touch-screen equipment is used by only about one percent of Alaska's voters, in spring of 2012, the Division sought and received preclearance to include a Yup'ik audio translation of the complete ballot on touch screens used in polling places in the Wade Hampton and Dillingham Census Areas for the 2012 primary and general elections and all future elections with a federal race on the ballot.

In the Division's experience, the audio Yup'ik sample ballot on the touch screens is less effective than the written Yup'ik sample ballot, because most of the people who need language assistance are elders who are more comfortable using a paper ballot instead of a machine. Notwithstanding, the Division continues to implement the touch-screen audio measures detailed above.<sup>101</sup>

#### **8. Post-election assessments and surveys showing few problems.**

In early 2008, the Division developed a language assistance survey and distributed it to the regional election offices for regional supervisors to send to every tribal council in a Section 203-covered area, including those in the Dillingham and Wade Hampton Census Areas. The Division has found that the information collected from these surveys

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<sup>100</sup> Aff. of Shelly Growden at ¶ 58.

<sup>101</sup> Aff. of Shelly Growden at ¶ 59.

is a useful tool to supplement census data, and so continues to send various language assistance surveys and post-election assessments to tribal councils.<sup>102</sup>

Oddly, and despite its requirement under the *Nick* settlement,<sup>103</sup> plaintiffs now characterize all of the Division's language assessment efforts in this vein as inadmissible hearsay, unauthorized correspondence from the tribes, a nefarious attempt by the Division to second guess the Census Bureau's Section 203 determinations, and information upon which the Division is generally not entitled to rely.<sup>104</sup> As noted above, however, the Division has implemented these measures in an effort to provide increasingly effective language assistance—not to circumvent Section 203 or the census. And the Division has never received any information from any tribal council indicating that anyone corresponding with the Division was not authorized to do so.<sup>105</sup>

Exhibit V contains a small sampling of some of these surveys, outreach letters, and post-election assessments distributed by the Division's Language Assistance

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<sup>102</sup> Aff. of Shelly Growden at ¶¶ 16-17.

<sup>103</sup> Exhibit V at 6 (*Nick* Settlement Agreement).

<sup>104</sup> Exhibit W (Plaintiffs' Responses to Defendants' First Set of Written Discovery).

<sup>105</sup> Aff. of Shelly Growden at ¶¶ 17-20.

Coordinator and regional supervisors.<sup>106</sup> The assessments returned to the Division indicate that the Division's language assistance efforts are generally successful, and neither of the tribal councils for plaintiff villages expressed dissatisfaction with the Division's language assistance program prior to filing this lawsuit.<sup>107</sup>

### **9. Full-time Yup'ik Language Assistance Coordinator.**

In July 2008, the Division hired Dorie Wassilie to serve as the full-time Yup'ik Language Assistance Coordinator. Ms. Wassilie fulfilled these duties until her retirement from state service on December 28, 2012.<sup>108</sup> The Division promptly recruited to replace Ms. Wassilie, placing a notice for her open position on the state's online hiring system and sending the notice to various Alaska Native entities, including the Alaska Federation of Natives, the Alaska Native Language Center, the Association of Village Council Presidents, and the Native American Rights Fund.<sup>109</sup>

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<sup>106</sup> Exhibit X (Surveys and Assessments). Exhibit Q also includes a survey that tribal representative Frank Logusak filled out one way before this lawsuit was filed, filled out another way after the lawsuit was filed, and offered no meaningful explanation at deposition as to why. Exhibit D (Deposition Transcript Excerpts, Logusak Dep. 88:8-90:3).

<sup>107</sup> Exhibit V (Surveys and Assessments); Exhibit G (Deposition Transcript Excerpts, Logusak Dep. 75:14-78:23; Joseph Dep. 37:21-38:24).

<sup>108</sup> Aff. of Shelly Growden at ¶ 69.

<sup>109</sup> Aff. of Shelly Growden at ¶ 70.

The position was posted on March 22, 2013, with recruitment ending April 5, 2013. The Division received no applications, so it extended the recruitment period for another ten days. Again the Division received no applications, so on May 5, 2013, re-posted the recruitment notice for an additional fifteen days. The Division received only one application, so it again extended the recruitment period for ten more days, and this time received three more applications. From the total four applications received, only two applicants were qualified to interview. The Division conducted interviews and offered the position to Michael (Bryan) Jackson on July 2, 2013. Mr. Jackson accepted the offer and started as the Division's Yup'ik Language Assistance Coordinator on August 5, 2013.<sup>110</sup>

Exhibit Y documents the Division's recruitment for the Yup'ik Language Assistance Coordinator position in 2013.<sup>111</sup>

### **CONCLUSION**

The Division of Elections must provide Yup'ik language assistance to Yup'ik speaking limited-English proficient voters in the Dillingham and Wade Hampton Census Areas. After extensive discovery, the record established at this juncture demonstrates that the Division is providing this assistance. The Division has taken "all reasonable steps" to provide Yup'ik language assistance through a comprehensive program "designed to

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<sup>110</sup> Aff. of Shelly Growden at ¶ 73.

<sup>111</sup> Exhibit Y (Yup'ik Language Assistance Coordinator Recruitment).

allow” Yup’ik speaking limited-English voters “to be effectively informed of and participate effectively in voting-connected activities.”<sup>112</sup>

Plaintiffs want to equate compliance with perfection, but perfection is not realistic, nor is it what Section 203 of the VRA requires.<sup>113</sup> Plaintiffs do not raise genuine issues of material fact by pointing to isolated, irregular instances where the Division’s Yup’ik language assistance program has fallen short. Nor can plaintiffs maintain that the Division is non-compliant because plaintiffs and their witnesses may be unaware of certain aspects of the Division’s Yup’ik language assistance program as implemented in the Dillingham and Wade Hampton Census Areas. The Division is therefore entitled to summary judgment on these claims.

If—despite the voluminous record of the division’s Yup’ik language assistance program in the Dillingham and Wade Hampton Census Areas—the Court finds that plaintiffs have raised a genuine issue of material fact as to a violation of Section 203 of the VRA, the Court should grant the division’s alternative motion to establish the law of the case. Specifically, the Court should establish the law of the case for trial as follows: Section 203 of the Voting Rights Act triggers an obligation on the part of the Division to develop a tailored program of means and measures for language assistance derived from

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<sup>112</sup> See 28 C.F.R. § 55.2(b).

<sup>113</sup> See *United States v. Sandoval*, 797 F. Supp. 2d 1249, 1253 (D.N.M. 2011); *United States v. City of Philadelphia*, No. 2:06cv4592, 2006 WL 3922115, at \*3 (E.D. Pa. Nov. 7, 2006).

input from communities in covered jurisdictions and to make reasonable efforts to implement the language assistance program.

For the foregoing reasons, this Court should grant the Division's partial motion for summary judgment regarding its Yup'ik language assistance program, or, in the alternative, establish the law of the case as requested by defendants.

DATED: April 4, 2014.

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