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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

REPLY TO PLAINTIFFS' OPPOSITION TO STATE'S MOTION FOR PARTIAL SUMMARY JUDGMENT; ALTERNATIVE MOTION TO ESTABLISH LAW OF THE CASE

The plaintiffs have sued the Division of Elections, claiming that it is violating Section 203 of the Voting Rights Act by failing to provide effective language assistance to limited-English-proficient voters in the Wade Hampton, Dillingham, and Yukon-Koyukuk

Census Areas.[1] Both sides have moved for summary judgment. But despite the nature of their claim, the plaintiffs have offered barely a scintilla of evidence about the experience of voters who need language assistance to participate effectively in elections—either in their own motion or in their opposition to the Division's motion. Thus the plaintiffs argue for a unique approach to the burden of proof and one for which they have identified no legal authority: they appear to think that all they need to do is make a bare allegation that the Division has violated Section 203—devoid of any specific details—and then the Division must not only produce evidence to show what kind of language assistance it is providing but also establish that that assistance is effective, while the plaintiffs bear *no evidentiary burden of any kind* in order to defeat summary judgment. This is not the law.

In order to prevail on their claims at trial, the plaintiffs must prove two things by a preponderance of the evidence: First, that the division is providing ineffective language assistance in the Wade Hampton, Dillingham, and Yukon-Koyukuk census areas, and second that there are reasonable steps that the Division could take that would make the assistance more effective.[2] For the plaintiffs to win summary judgment, they must show that there is no dispute of material fact on both of these issues. By contrast, for the Division to win summary judgment, the Division merely needs to establish that it is entitled to judgment as a matter of law because the plaintiffs cannot meet their burden on just one of these elements, not both—as the plaintiffs appear to believe. Thus, the Division has no affirmative burden to offer evidence in support of its claim that its program is effective. It may simply—as it has done in its motion—describe its

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1 *See* Docket 21 (Amended Complaint) at ¶ 47.

2 *See* 28 C.F.R. 55.2(b).

program, thereby showing that it offers some assistance to voters and creating a reasonable inference that the assistance is effective. The burden then shifts to the plaintiffs to offer some admissible evidence to contradict that reasonable inference.

Though they concede that effectiveness and results are the touchstones for determining whether the Division's language assistance program is adequate,[3] the plaintiffs' summary judgment opposition largely ignores the only pertinent question before this Court: Does the Division of Elections' language assistance program allow voters in the Dillingham, Wade Hampton, and Yukon-Koyukuk Census Areas to effectively exercise their right to vote? The plaintiffs have failed to present any evidence to this Court tending to show that the Division's program is ineffective. Instead, they complain that the Division's program is not flawless and that it theoretically could be doing more to assist voters. But the law does not require elections officials to do more than is necessary to ensure that a language assistance program is actually working—and thus plaintiffs cannot prevail without producing evidence showing systemic language assistance problems that are impairing voters' ability to vote. Because they have failed to present any evidence that voters are, in fact, receiving insufficient language assistance, the plaintiffs have failed to rebut the Division's showing that its language assistance program is effective. The Division is therefore entitled to summary judgment.

[3] Docket 74 at 8 (The plaintiffs' opposition contains repeating and competing page numbers; to avoid confusion, the Division's citations refer to the numbering in the PACER footer).

I. The plaintiffs have the burden of proof to show that the Division's language assistance program is actually ineffective, and they have not done so.

Despite their insistence that effectiveness "is the polar star for evaluating a Section 203 claim,"[4] conspicuously absent from the plaintiffs' summary judgment opposition is any evidence, or even mention, of the experiences of actual limited-English-proficient voters who are harmed, disenfranchised, or even discouraged by the purported insufficiencies in the Division's language assistance program. But "[c]ompliance with the requirements of section 4(f)(4) and section 203(c) is best measured by results."[5] Accordingly, this Court cannot evaluate effectiveness in a vacuum. It must hear from the voters themselves about the on-the-ground results of the Division's language assistance program. And in the absence of evidence that significant numbers of voters are not receiving effective assistance, the Division is entitled to judgment as a matter of law.

The plaintiffs badly misunderstand the applicable burdens of proof in this case, both as a whole and in opposition to summary judgment. As a general matter, of course, civil plaintiffs bear the burden of proof on their civil claims.[6] The plaintiffs here have pointed to no provision of Section 203 that relieves them of this responsibility and instead shifts the overall burden of proof to defendants, and there is none. But rather than presenting evidence to the Court in support of their core allegation—that the Division's language assistance program is ineffective—the

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4 Docket 74 at 9.

5 28 C.F.R. § 55.16.

6 *See, e.g., Chow Sing v. Brownell*, 235 F.2d 602, 603 (9th Cir. 1956) (holding that plaintiffs must prove their claims by a preponderance of the evidence).

plaintiffs have taken the unusual position that the actual experiences of the voters are "superfluous." [7]

Rather than proffering evidence that could meet their burden to show ineffectiveness, the plaintiffs instead have chosen to "draw[] nearly every salient fact from Defendants' records and the testimony of Division of Elections officials."[8] The plaintiffs seem to believe that this tactical choice to ignore what should be the core evidence in their case-in-chief somehow strengthens their position, but in fact it does the opposite. The plaintiffs' decision not to put before the Court any admissible evidence that the language assistance program is ineffective from the perspective of actual voters represents a failure of proof at the most fundamental level.

Where, as here, a defendant moves for summary judgment and presents substantial evidence in support of its case, the burden of proof is even more clear. The Division's opening motion set forth facts showing that it maintains a comprehensive oral language assistance program in the Dillingham and Wade Hampton Census Areas. The Division presented evidence about the comprehensive nature of its program both before and during elections;[9] logs showing that voters are actually utilizing the language assistance program;[10] and evidence of the lack of voter complaints about the effectiveness of the language assistance program, even after the Division specifically solicited feedback from the tribal councils who represent the limited-English-proficient voters in the pertinent districts.[11]

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7 Docket 74 at 13.

8 Docket 74 at 13.

9 *See* Docket 47 at 20-33, 35-36 and related exhibits.

10 *See* Docket 47 at 31-32 and related exhibits.

11 *See* Docket 47 at 33-34 and related exhibits.

This evidence constitutes a prima facie case that the program is effective, as well as demonstrating the reasonableness of the Division's efforts to maintain and enhance its effectiveness. At this point, under well-settled, black-letter principles of summary judgment law, the burden shifted to plaintiffs to rebut the effectiveness showing.[12] But the plaintiffs' opposition attacks the language assistance program not by putting forth evidence that the Division's efforts are actually ineffective at providing voting assistance to people who need it, but instead by arguing that the program is not as complete and comprehensive as the Division says, and by hypothesizing ways in which the program could be improved. These complaints are completely unmoored from any actual evidence that the current program is not effective. To rebut defendants' case, the plaintiffs needed to produce admissible evidence that the program actually is ineffective—not merely that it is imperfect.[13] The plaintiffs' failure "to make a showing sufficient to establish the existence of an element essential to that party's case, and on

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[12] *See* Fed. R. Civ. Proc. 56(e); *see also, e.g., Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 250 (1986) ("[W]hen a properly supported motion for summary judgment is made, the adverse party "must set forth specific facts showing that there is a genuine issue for trial." (internal citations omitted)); *Avila v. Travelers Ins. Co.*, 651 F.2d 658, 660 (9th Cir. 1981) ("The moving party has the burden of establishing that there is no genuine issue of material fact. Once, however, this burden is met by presenting evidence which, if uncontradicted, would entitle the moving party to a directed verdict at trial, Rule 56(e) shifts the burden to the opposing party to "set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." (internal citations omitted)).

[13] *United States v. Sandoval County, New Mexico*, 797 F.Supp.2d 1249, 1253 (D.N.M. 2011) ("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, thereby upsetting the appropriate balance between national, state, and local authority."); *United States v. McKinley County, New Mexico*, 941 F. Supp. 1062, 1068 (D.N.M. 1996) (holding that "not "every inconsistency or irregularity in ballot translation" is a Section 203 violation).

which that party will bear the burden of proof at trial" requires the Court to grant summary judgment to the Division.[14]

The plaintiffs' assertion that they bear no burden of proof in this litigation at all, and that instead *the Division* must prove that the language assistance program is effective, not only is at odds with well-settled legal principles, but it would place the Division in an impossible position. The Division can design a language assistance program, can implement it, can work with local voters, tribal councils, and other groups to improve its language assistance, and can ask for feedback on the program's effectiveness from affected groups; it has done all these things, and presented evidence of them to the Court. These measures may be imperfect gauges of the effectiveness of the program, but they are the best the Division can obtain, as it cannot see into the minds of voters to determine with certainty whether the language assistance they received was actually effective or not. It can only gauge effectiveness from voter feedback—and in this case it has received feedback from voters indicating that the program is indeed effective, and presented some of that evidence to the court.[15] (Remarkably, the plaintiffs have moved to exclude as irrelevant this core evidence of effectiveness.)[16] It is only the plaintiffs, who specifically allege that they personally were "unable to participate meaningfully in the electoral process"[17] and/or represent numerous other voters who were unable to meaningfully exercise the franchise due to the lack of effectiveness of the Division's deficient language assistance

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14 *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

15 Docket 47 at 33-35; Docket 47-22 (Exhibit V to State's MPSJ); Docket 49 at 4-5 (Shelly Growden Aff. at ¶¶ 16-20).

16 *See* Docket 51 (Plaintiffs' Second Motion in Limine to Exclude State's Survey Evidence of Effectiveness).

17 Docket 21 at ¶¶ 6-7.

program,[18] who would be able to present evidence based on personal knowledge about how effective the Division's program really is, and about any specific problems they experienced while voting that might support their claims of widespread disenfranchisement. Nothing in Section 203, the regulations detailing it, the case law, civil procedure, logic, or common sense supports relieving the plaintiffs from presenting evidence solely within their control on the central allegation motivating this litigation. If such evidence exists, it is incumbent on the plaintiffs to produce it. They have not, and their failure to do so justifies summary judgment in the Division's favor.

II. The standard for determining whether a language assistance program complies with Section 203 is not a simple "effectiveness" standard as the plaintiffs suggest, but rather balances effectiveness with reasonableness.

In their own motion for summary judgment the plaintiffs argued that liability under Section 203 could be determined through an analysis "akin to strict liability," simply by identifying things that they believed the Division should be doing to provide language assistance and claiming that the Division was not doing those things.[19] But in their opposition to the Division's motion, they appear to concede that compliance is "best measured by results" and that the appropriate analysis is one that focuses on "effectiveness."[20] Their framing of the "effectiveness" standard, however, is both internally contradictory and inconsistent with the language of the regulations. Indeed, although the plaintiffs argue that "'[e]ffectiveness,' not the

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18 Docket 21 at ¶¶ 8-11.

19 Docket 56 at 3.

20 Docket 74 at 4.

'reasonable steps' taken to achieve the goal of effectiveness, is what controls,"[21] they also claim that the Division can violate Section 203 because of alleged weaknesses in the program that they believe make it "*per se* ineffective."[22] Thus, the plaintiffs attempt to defeat summary judgment by accusing the Division of failing to show that its program is effective—even though it has no such burden—while at the same time making almost no effort themselves to address the effectiveness issue.

Nor do the regulations support the plaintiffs' argument that effectiveness is the only thing that matters. 28 C.F.R. § 55.2(b) "establishes *two basic standards* by which the Attorney General will measure compliance,"[23] not one. And even the effectiveness standard looks also at the appropriateness of the jurisdiction's efforts, providing 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."[24] Thus, while the goal of Section 203 is "to enable members of the applicable language minority groups to participate effectively in the electoral process,"[25] a program that is not always completely effective may nevertheless be compliant as long as the jurisdiction has taken "all reasonable steps to achieve that goal."[26] Thus, this Court must evaluate the Division's language assistance program by focusing on real-world effectiveness and results, and, if those are found to be

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21 Docket 74 at 10.

22 Docket 74 at 5. (Emphasis in original).

23 (Emphasis added).

24 28 C.F.R. § 55.2(b).

25 *Id*.

26 28 C.F.R. § 55.2(b)(2).

lacking, by looking to whether there are reasonable steps that the Division could take to increase effectiveness.

III. Neither the settlement agreement nor the order granting a preliminary injunction to the *Nick* plaintiffs is controlling here, nor do they relieve the plaintiffs of their burden to produce evidence supporting their claim of ineffectiveness.

Contrary to the plaintiffs' claims, neither the preliminary injunction order nor the settlement agreement in *Nick v. Bethel* is relevant here, and they certainly do not constitute any basis for denying summary judgment to the Division. As an initial matter, the plaintiffs badly mischaracterize the District Court's decision when they state that Judge Burgess "found that in order for the required 'voting materials' to be 'uniform, complete and accurate,' they had to be in writing."[27] To the contrary, the *Nick* preliminary injunction order reiterated its earlier holding that Yup'ik language assistance did *not* need to be written: "Yup'ik is a 'historically unwritten' language for purposes of the VRA and, therefore, the VRA requires the Defendants to provide oral – but not written – assistance to Yup'ik-speaking voters."[28]

Even had the plaintiffs correctly stated *Nick*'s legal standard, *Nick* simply is not pertinent here. *Nick* dealt with a different language assistance program in a different Census Area more than six years ago; information about the efficacy of the language assistance provided to Bethel voters in 2006 cannot satisfy plaintiffs' burden to show the ineffectiveness of the current language assistance program in Wade Hampton and Dillingham. Nothing in *Nick* extended the court's factual or legal conclusions beyond the current conditions as they then existed in the Bethel Census area. Given the lapse of time and different geographical areas involved (and, with

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[27] Docket 74 at 15 (citing generally to *Nick*, case no. 3:07-cv-00098 (TMB), Docket 327)).

[28] *Nick*, case no. 3:07-cv-00098 (TMB), Docket 327 at 4.

respect to the Gwich'in-speaking plaintiffs, an entirely different Native language), plaintiffs' repeated, conclusory suggestion that the current plaintiffs are "similarly-situated"[29] seems questionable at best; certainly, plaintiffs' tactical choice to present essentially no evidence about today's Wade Hampton, Dillingham, and Yukon-Koyukuk voters prevents the Court from making any judicial findings about the similarity of these groups. And the little direct evidence we do have about the voters involved in this litigation directly contradicts the idea that today's Wade Hampton and Dillingham voters are similarly situated to Bethel's 2007 plaintiffs. Named plaintiff Fred Augustine testified in his deposition that while in 2008 and before, the Division's language assistance program was of limited assistance to him, the current program is effective: "voting issues in the past were harder to understand and to follow, but with things that are working now to help people understand the ballots and it will help the people to - to vote better."[30] The Division's current compliance with Section 203 must be measured by whether its current program achieves satisfactory results for current voters—not with reference to obsolete and preliminary factual findings made six years ago regarding an entirely different group of voters. The plaintiffs must actually prove their claims in this case, not re-litigate a past one.

Nick is not pertinent here for legal reasons as well as for factual ones. As explained in the Division's opposition to the plaintiffs' summary judgment motion,[31] *Nick* never resulted in a final merits ruling; the court there ruled only on a request for preliminary injunctive relief. Thus,

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29 Docket 74 at 12, 13

30 Exhibit PP at 2-7 (Augustine Dep. at 20:16-20; 21:20-22:14, 25:13-27:12) (explaining that in the last two years poll workers have personally visited his home to satisfactorily explain, in Yup'ik, the ballots to him).

31 Docket 69 at 18-21 (hereby incorporated by reference).

neither the facts nor the legal standards were the same in that case as they are here. Nor did the settlement constitute any admission of liability or finding that the Division had violated Section 203, much less establish a standard against which the language assistance in the Wade Hampton, Dillingham, and Yukon-Koyukuk Census Areas can be measured and found wanting.

IV. The record evidence before this Court is manifestly insufficient to rebut the Division's showing that its language assistance program is effective.

In repeatedly insisting that the Division has not proven the effectiveness of its program, the plaintiffs ignore both the proper burden of proof and the record evidence about effectiveness. Again, it is not the Division's burden to prove effectiveness—it is the plaintiffs' burden to prove ineffectiveness, and they must do so by presenting admissible evidence of systemic, not isolated, problems that rebuts the Division's evidence that voters use the language assistance that it provides and that its efforts are generally successful and well-received.[32]

A. The plaintiffs cannot defeat summary judgment by manufacturing non-material disputes of fact.

Although the plaintiffs purport to identify an array of disputed facts in the State's motion, they fail to establish that any of these alleged factual disputes are *material*. Most importantly, nearly all of the plaintiffs' "disputed facts" relate solely to the Division's description of its language assistance program—not any deficiencies that are experienced by voters, diminishing the actual effectiveness of the program. For example, the plaintiffs point to evidence that not all poll workers were able to attend in-person training and attack the Division's recordkeeping regarding remote video training sessions.[33] But they fail to tie these alleged problems to any

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[32] Docket 47 at 18.

[33] Docket 74 at 16.

deficits in the language assistance that was actually received by voters. Bare speculation that in-person training is necessary for effectiveness is manifestly insufficient to defeat summary judgment—instead, the plaintiffs must at a minimum identify evidence supporting their claim that the Division's program is ineffective *and* make some kind of showing that there are reasonable steps that the Division is not taking that would ameliorate the claimed ineffectiveness. Thus, to turn the lack of 100% poll worker attendance at in-person training into a material dispute over effectiveness, the plaintiffs would need to show that (1) voters did not receive adequate language assistance as a direct result of poll workers' receiving videotaped rather than in-person training, impairing the voters' ability to exercise the franchise; and (2) that there were reasonable steps the Division could have made—considering the rural nature of the affected voting districts, poll worker schedules, and the logistics of providing in-person sessions to remote villages—to increase poll worker attendance at trainings. The plaintiffs' speculation that in-person training is probably more effective than other types falls far short of this showing, failing entirely to include any testimony from voters or poll workers about why and how the remote training actually led to less effective language assistance, and failing to grapple with the reasonableness inquiry by examining the logistical difficulties of providing in-person sessions with every single poll worker. The plaintiffs' other quarrels with the details of the Division's program similarly fail entirely to link the alleged deficits in the program to actual ineffectiveness at the polls.

B. The plaintiffs' identification of only two arguably relevant pieces of evidence of ineffectiveness is insufficient to survive summary judgment.

In the entirety of their opposition and all its exhibits, in fact, the plaintiffs have identified only two pieces of conceivably relevant evidence of ineffectiveness. The first is a tribal council

survey from Kotlik in 2013.[34] The second is the declaration of plaintiff Fred Augustine[35]—remarkably, the *only* actual voter complaint presented by the plaintiffs in either their own motion for summary judgment or their opposition to the Division's motion for summary judgment. Both of these pieces of evidence are disputed;[36] but even if one or both are taken at face value, they establish, at most, isolated instances in which the language assistance program did not function optimally—and this is not enough to proceed to trial, as Section 203 demands only "substantial compliance,"[37] not perfection.[38]

1. The plaintiffs cannot simultaneously rely on the Division's surveys and argue that the surveys are not admissible evidence.

The plaintiffs suggest that surveys of tribal councils about their members' experiences with the Division's language assistance programs show that the program was not effective at assisting limited language proficiency voters.[39] As an initial matter, the plaintiffs' attempts to use the tribal council surveys as evidence to oppose summary judgment is perplexing given their recent motion in limine vigorously arguing that these very surveys are inadmissible hearsay and opinion evidence that should not be considered by this Court.[40] Since the Court can only

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34 Docket 74 at 39.

35 Docket 74 at 36.

36 *See infra* at pp. 18-19 and accompanying footnotes.

37 *United States v. Sandoval County, New Mexico*, 797 F.Supp.2d 1249, 1253 (D.N.M. 2011).

38 *Id.*; *United States v. McKinley County, New Mexico*, 941 F. Supp. 1062, 1068 (D.N.M. 1996).

39 Docket 74 at 23, 24, 39, 34.

40 *See* Docket 51 (Plaintiffs' Motion in Limine No. 2: to Exclude State Survey Evidence of Effectiveness); and Docket 75 (Plaintiffs' Reply in Support of Plaintiffs' Motion in Limine No. 2).

consider admissible evidence in deciding summary judgment motions, plaintiffs appear to be simultaneously arguing that the surveys are relevant and admissible when used by them, *and* that they are neither if used by the Division.

But the plaintiffs cannot have it both ways. If, as they have argued, the surveys are inadmissible because "the surveyed tribal employees are either offering their own or their employer's opinion on another individual's linguistic understanding or comprehension, which they are not qualified to do, or they are basing their answers on hearsay,"[41] then this must be just as true when the answers are helpful to the plaintiffs as when they are helpful to the Division. Despite their efforts to exclude this evidence when it favors the Division, the plaintiffs' attempt to themselves utilize these surveys as evidence on the core question of effectiveness acknowledges what common sense also tells us: that the Division is correct that the surveys constitute "the best evidence this Court has before it regarding the effectiveness of the Division's program."[42] This is especially so given the plaintiffs' failure to put forth evidence from more than one voter about how the Division's language assistance program fell short at the polls—and given the plaintiffs' Yup'ik expert witness's testimony that although individual voters would be unlikely to complain directly to the Division, they would be more likely to approach their tribal council with any concerns.[43]

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41 Docket 75 at 3.

42 Docket 61 at 3 (State's Opposition to Motion in Limine No. 2).

43 Docket 47-5 8 (Exhibit E to State's MPSJ at ¶ 21; Exhibit PP at 15 (Charles Dep. at 119:3-24).

2. The vast majority of tribal council surveys cited by the plaintiffs are not relevant to recent elections in the Dillingham and Wade Hampton Census Areas.

If the Court decides—as it should—that the Division's surveys are admissible evidence of the effectiveness of the State's language assistance program, the surveys offer strong support for the Division's position that its "language assistance efforts are generally successful."[44] Indeed, the plaintiffs' use of the surveys is striking, albeit indirect, evidence that the Division's program provides effective language assistance in the Dillingham, Wade Hampton and Yukon-Koyukuk Census Areas—because the plaintiffs have unearthed only *one* survey complaining about language assistance provided in any of those regions over the last five election cycles (2009-2013).

There are twenty-three communities in the Wade Hampton and Dillingham census areas and approximately seven Gwich'in-speaking villages,[45] but the plaintiffs have attached in exhibits 310, 317, and 320 to their opposition only twenty specific survey responses from surveys conducted over a six-year period. None of the surveys in Exhibit 310 or 317 contains any complaint about the Division's language assistance program.[46] The five surveys in Exhibit 310 are offered to show the reach of radio stations in different communities in the Dillingham and Wade Hampton census areas,[47] and the three in Exhibit 317 are offered to show that surveys

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[44] Docket 47 at 35.

[45] Docket 69-1 at 7 (Hayton Dep. at 26:2-3); Docket 69-1 at 87-88 (Frank Dep. at 14:14-15:6).

[46] *See* Docket 81-2; 81-9.

[47] Docket 74 at 24-25 [Rows 10-11 in the plaintiffs' table].

were completed by persons with varying positions at tribal council offices.[48] These surveys do not suggest that voters experienced any problems with the language assistance program.

The plaintiffs offer the twelve surveys in Exhibit 320 purportedly to represent the "many complaints about language assistance" that the Division has allegedly received,[49] but of these surveys, eight date from the 2008 elections,[50] when the Division was in the middle of a substantial updating of its language assistance program; and six of those eight are from villages *outside of the census areas at issue in this lawsuit* and are, therefore, plainly irrelevant.[51] Of the two 2008 "complaints" that are from villages within the scope of this lawsuit, the survey from Pitka's Point checked "yes" in answer to the question about whether the LEP voters had "received the language assistance they needed."[52]

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48 Docket 74 at 39 [Row 39 in the plaintiffs' table].

49 Docket 74 at 39-40 [Row 40 in the plaintiffs' table].

50 Docket 81-12 at 10-17.

51 Kalskag (Bethel Census Area) (Docket 81-12 at 10); St. Michael (Nome Census Area) (Docket 81-12 at 13); Stebbins (Nome) (Docket 81-12 at 14); Kobuk (Northwest Arctic Borough) (Docket 81-12 at 15); Brevig Mission (Nome) (Docket 81-12 at 16); Anaktuvuk Pass (North Slope Borough) (Docket 81-12 at 17). The Court can take judicial notice of the geographic boundaries of the census areas in Alaska.

52 The survey offers the additional comment that "[b]efore elections have a training or workshop for the election workers to better explain the ballots," (Docket 81-12 at 12), which is perhaps why the plaintiffs have included this as a "complaint."

Four of the surveys are more recent, but again, three of them are irrelevant because they concern census areas outside the scope of this litigation.[53] This leaves one, and only one, survey identified by the plaintiffs that reported any problems within the relevant Census Areas in the last six years. In that one survey, after the 2013 REAA elections, Kotlik's tribal administrator stated with respect to language assistance materials that "none was provided and Yup'ik version was not provided during election."[54]

3. The plaintiffs' scant evidence is insufficient to create a genuine issue of material fact about the effectiveness of the Division's language assistance program.

Thus, at most the plaintiffs have identified three survey responses—two from 2008 and one from 2013—that are even conceivably relevant to their claims.[55] And two of those three are from six years ago and no longer meaningfully reflect the Division's current language assistance program—the single complaint from Kotlik in 2013 is the only directly relevant one. [56]

The only other recent evidence of ineffectiveness besides the Kotlik complaint is the statement of a single voter, Fred Augustine, who complains in a declaration that he thinks that

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[53] Lower Kalskag (Bethel Census Area) (Docket 81-12 at 18); Kwinhagak (Bethel Census Area) (Docket 81-12 at 19) (after the 2012 General Election, indicating that the language assistance they had received was helpful and effective, but commenting that "some complained that translations where [sic] too long"); Nunapitchuk (Bethel Census Area) (Docket 81-12 at 20) (indicating that the language assistance they had received was helpful and effective, but suggesting "change election workers they're mostly family members – (nepotism)").

[54] Docket 81-12 at 1.

[55] None of the three came from tribal councils in the Dillingham Census Area or the Yukon-Koyukuk Census Area.

[56] The Division notes that its records indicate that the audio translation of voter registration and absentee voting information, glossary of election terms and the Yup'ik sample ballot were sent to Kotlik Traditional Council, that its outreach worker performed a variety of outreach work and that three voters received language assistance at the 2013 REAA election. *See* EXHIBIT QQ.

Anthony Shelton, the translator who assisted him in the 2012 General Election, did not do a good job.[57] Notably, however, at his deposition, Mr. Augustine testified that although he had signed the declaration, he did not understand it all;[58] and that while the declaration states that he voted in-person at his polling place in Alakanuk in the November 2012 Presidential Election, in fact two poll workers came to his house to help him vote because he was not well enough to go to the polling station.[59]

But even assuming, as the Court should for purposes of summary judgment, that these two complaints are justified, one failure of assistance per election is patently inadequate to support a Section 203 claim, and the plaintiffs have offered no other evidence of ineffectiveness. Because the burden to show ineffectiveness lies with them, the Division is entitled to summary judgment.

The plaintiffs' remaining attempts to identify disputed material facts fail both because they focus on immaterial disputes, and because the characterizations of what is disputed are overblown. This Court should not be fooled by the volume of plaintiffs' tables that purport to set forth factual disputes, for a close examination reveals many flaws. The plaintiffs' "counter-statements" often do not actually contradict the Division's factual claims;[60] they cite evidence—

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57 Docket 80-12 at ¶¶ 17-20.

58 Exhibit PP at 12-13, (Augustine Dep. at 38:20-21; "He said that's his signature, but the writing on that he could not understand"; 40:1-2 "He said that when I read it to him, he did not completely understand it.")

59 Exhibit PP at 10-11 (Augustine Dep. at 35:15-36:9).

60 For example, the plaintiffs attempt to dispute the Division's claim that it "has never received any information from any tribal council indicating that anyone corresponding with the Division was not authorized to do so;" Docket 47 at 34; by noting that survey responses have been signed by people who describe themselves with titles such as "finance manager" and

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and even counsel's oral argument presentation—from the *Nick* litigation, which is not admissible in this case;[61] and they cherry-pick testimony and evidence, obscuring the full picture of the

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"office assistant;" that Ms. Growden acknowledged that she is not in a position to know about the authority of the person completing the survey; and that "common sense" suggests that tribal leadership would be authorized to speak on behalf of the councils. *See* docket 74 at 39, row 39. But these facts do not contradict the Division's statement about information that it has received at all. Similarly, the plaintiffs' evidence about the range of two radio stations—KDLG and KYUK—does not contradict the Division's statement that "[f]or every state-conducted election since 2008, the Division has prepared text for several election-related public service announcements to be aired on the radio;" *see* docket 74 at 24, row 10, citing docket 47 at 34. Not only does the reach of the radio's stations' signals not create a factual dispute with the Division's statement, the plaintiffs have also ignored the fact that the Division has, since 2012, also contracted with KICY to air these announcements and that KICY reaches all of the communities in the Wade Hampton and Dillingham Census Areas that do not receive KDLG or KYUK. *See* Docket 71 (Second Affidavit of Shelly Growden) at ¶ 15, 24. Another example is the plaintiffs' claim to contradict the Division's statement that "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," with testimony supporting their argument that these logs do not reflect all assistance because sometimes poll workers forget to fill them out. *See* Docket 74 at 36, row 32. Not only does this testimony not dispute the Division's description of Exhibit R, it suggests that in fact the Division provides *more assistance* to voters than the logs indicate.

[61] For example, the plaintiffs cite the Declaration of Louise Leonard—who has never been listed as a potential witness in this litigation—and attach as Exhibit 327 slides from a presentation used by counsel at oral argument on the motion for preliminary injunction in *Nick*. *See* Docket 74 at 15-16, nn. 36-37. This evidence is inadmissible and should be stricken from the record. *See* Ak. L.R. 7.1(c)(3), which provides that "[t]he contents of other case files may not be used to establish disputed substantive facts unless those facts are established in a previous ruling, order, or judgment entitled to *res judicata* or collateral estoppel effect." Similarly, the plaintiffs' citation of the declaration of Marie Meade, a Yup'ik language expert used by the plaintiffs in the *Nick* case, *see* Docket 74 at 30, row 21, is prohibited by Ak. L.R. 7.1(c)(3). Although the plaintiffs listed Ms. Meade as a potential witness on their final witness list, *see* Docket 24 at 3, they have not produced an expert report from her for this case and, indeed, their opposition states unequivocally that "there is only <u>one</u> Yup'ik language expert in this case who met all the court ordered deadlines and requirements: Dr. Walkie Charles." Docket 74 at 27. Thus Ms. Meade's declaration from the *Nick* case is inadmissible and cannot be used to defeat summary judgment here.

evidence.[62] Moreover, the alleged "disputed" facts identified by the plaintiffs are almost exclusively attempts to nitpick the Division's description of its program rather than disputes going to the plaintiffs' central burden—to offer evidence that the Division's program is ineffective. In the absence of factual disputes that are both truly disputed and material under the applicable legal standard, the Division is entitled to summary judgment.

The plaintiffs also fail to create a dispute of material fact with their assertions that the Division relies on the unsupported statements of counsel and what they describe as a "sham affidavit." First, a sentence without a citation at the end of it is not an "unsupported statement of counsel" when even a cursory review of the sources cited by the surrounding sentences reveals that those sources provide ample evidentiary support for the statements.[63] Second, the plaintiffs

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[62] For example, the plaintiffs cite the testimony of Vincent Nicketa for the claim that some of the State's poll workers had not heard of the Division's Yup'ik language assistance toll free number, despite his express testimony later in his deposition that not only was he aware of the number, but that he had actually called it. *Compare* Docket 74 at 35, row 30, *with* Exhibit PP at 28-34 (Nicketa Dep. at 97:25-103:14); and Exhibit PP at 35 (Voter ID Card and Letter). Similarly, the plaintiffs rely on the testimony of poll workers to dispute the Division's claim that it sent bilingual outreach workers Yup'ik translations of the text of election announcements to be read over VHF radio, despite the fact that those same witnesses also testified to making these very same announcements. *Compare* Docket 74 at 25, row 12-13 *with* Exhibit PP at 17-28, 36-46 (Nicketa Dep. at 86:12-97:14, acknowledging that he received the outreach worker packet—deposition exhibit 160--and made Yup'ik language announcements); *and* Exhibit PP at 48-53 (Camille Dep. at 87:1-92:8, describing her work as an outreach worker).

[63] Indeed, every fact identified in a row in the table in plaintiffs' opposition asserting that something is an "unsupported statement of counsel" does, in fact, have record evidence to support the statement. In most instances, these purported "statements of counsel" are direct testimony from the Affidavit of Shelly Growden at Docket 49. *See* and *Cf.*: Row 7 (Growden Aff. at ¶ 61); Row 17 (Growden Aff. at ¶ 51); Row 20 (Growden Aff. at ¶ 46); Row 22 (Growden Aff. at ¶ 48); Row 24 (Growden Aff. at ¶56); Row 25 (Growden Aff. at ¶ 68); Row 26; (Growden Aff. at ¶ 68); Row 27 (Growden Aff. at ¶ 68); Row 28 (Growden Aff. at ¶ 68); Row 30 (Growden Aff. at ¶ 33); Row 31 (Growden Aff. at ¶ 37); Row 37 (Growden Aff. at ¶ 58); and Row 38 (Growden Aff. at ¶ 16). The remaining "unsupported statements of counsel" are supported by exhibits. *See* and *Cf.*: Row 6 (Exhibit K); and Row 33 (Exhibit J at 10).

accuse the Division of relying on a "sham affidavit" provided by Shelly Growden, claiming that it "contains statements for which Ms. Growden admitted under oath that she lacked personal knowledge and which contradict the testimony of her own subordinates."[64] Ironically, the plaintiffs have provided no citation for this assertion; and as they themselves note, "the arguments and statements of counsel 'are not evidence and do not create issues of material fact capable of defeating an otherwise valid motion for summary judgment.'"[65] In other words, they cannot dispute the evidence of Ms. Growden's affidavit simply by describing it is as a "sham;" they must actually identify its alleged flaws. [66]

The plaintiffs have devoted themselves to attempting to undermine the Division's description of its language assistance program, but in doing so, they fail even to try to tackle their central task—identifying some evidence to support their basic claim that the program is ineffective. And without some evidence of ineffectiveness beyond occasional lapses,[67] the plaintiffs have failed to create a genuine dispute of material fact on an issue for which they have the burden at trial. Thus, the Division is entitled to summary judgment as a matter of law.

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64 Docket 74 at 14.

65 Docket 74 at 13, quoting *Barcamerica Intern v. Tyfield Importers, Inc.*, 289 F.3d 589, 593 n.4 (9th Cir. 2002) (citations omitted).

66 It is particularly improper for the plaintiffs to make an allegation of dishonesty against an individual state employee without providing a sufficient explanation for the claim for the State to respond in a meaningful way.

67 *See United States v. Sandoval County, New Mexico*, 797 F.Supp.2d 1249, 1253 (D.N.M. 2011) (recognizing that Section 203 "does not demand perfection" but only "substantial compliance.").

V. In the alternative, the Court should establish the law of the case with respect to the parties' burdens at trial and the standard against which the Division's language assistance program will be judged.

If this Court determines that neither party is entitled to summary judgment, it still should grant the Division's alternative motion to establish the law of the case for trial. This will necessarily require ruling on the applicable burden of proof in this case to clarify that plaintiffs bear the burden of proof at trial to show that the Division's language assistance program is ineffective, based on the non-isolated experiences of actual voters, and to identify "reasonable steps" that the Division could take that would actually address any deficiencies in the program established by the plaintiffs. Making clear where the burden of proof lies and the types of evidence that can fulfill it will promote judicial economy by allowing the parties to present relevant, helpful evidence to the Court on the pertinent legal issues.

A close review of the pleadings shows that the parties do not actually dispute the applicable legal standard mandated by Section 203. In their opposition, the plaintiffs effectively concede that the standard is "effectiveness" and "reasonable steps" under 28 C.F.R. 55.2(b). That regulation clearly provides that materials and assistance must be provided "in a way designed to allow" members of the minority language group to be "effectively informed of and participate effectively in voting-connected activities" and that a jurisdiction should take "all reasonable steps to achieve that goal." The plaintiffs cite this precise regulatory language in their opposition to argue at length about what Section 203 demands of the Division.[68] Thus, the plaintiffs apparently agree that trial must address both whether the program is effective and if it is not, what reasonable steps, if any, the Division could take to improve its efficacy. This Court should

[68] *See* Docket 74 at 8-11.

clarify that to show ineffectiveness, the plaintiffs must at a minimum present some admissible evidence from voters about their experiences. If the Court declines to grant summary judgment to either party, it should establish this standard as the law of the case for trial.

VI. Conclusion

The plaintiffs have not come close to meeting their burden to present admissible evidence sufficient to survive summary judgment. Thought the relevant legal standard requires evidence that the Division's program does not provide effective language assistance to voters, the plaintiffs have offered no such evidence. The Division is entitled to judgment as a matter of law.

DATED: May 12, 2014.

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Certificate of Service

I hereby certify that on May 12, 2014, copies of the foregoing REPLY TO PLAINTIFFS' OPPOSITION TO STATE'S MOTION FOR PARTIAL SUMMARY JUDGMENT; ALTERNATIVE MOTION TO ESTABLISH LAW OF THE CASE were served electronically on the following parties of record pursuant to the Court's electronic filing procedures:

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