No. 12-96

IN THE

Supreme Court of the United States

SHELBY COUNTY, ALABAMA,
Petitioner,

v.

ERIC H. HOLDER, JR. ATTORNEY GENERAL, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF *AMICUS CURIAE* THE STATE OF ALASKA IN SUPPORT OF PETITIONER SHELBY COUNTY, ALABAMA

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INTEREST OF *AMICUS CURIAE*

The State of Alaska is a covered jurisdiction under the formula described in § 4 of the Voting Rights Act (VRA). 42 U.S.C. § 1973b(b). As a result, § 5 of the VRA prohibits the State from implementing any changes to its election practices and procedures without prior permission of the Department of Justice (DOJ) or the federal district court in Washington, D.C. § 1973c. Alaska is also the only state ever to bail out of § 5 coverage. Indeed, it has bailed out twice—after it was captured by the original coverage formula of the 1965 VRA, and again after it was recaptured by the Act's 1970 renewal. But since it was captured for the third time by the 1975 amendments—because it failed to provide written election materials in languages that almost no one could read—it has been ineligible to bail out. Thus, although Alaska has no history of voting discrimination, it nevertheless bears § 5's scarlet letter.

In its opinion below, the D.C. Circuit upheld the constitutionality of § 4's coverage formula by relying on the twin saviors of bailout and bail-in, §§ 1973b(a)(1), 1973a(c). *Shelby Cnty., Alabama v. Holder*, 679 F.3d 848 (D.C. Cir. 2012), *cert. granted*, 133 S. Ct. 594 (2012). The court believed that although the original conditions that justified § 5's intrusions have changed, Congress' "liberaliz[ation]" of bailout in 1982 preserves § 5's constitutionality today, stating that "[t]he importance of this significantly liberalized bailout mechanism cannot be overstated." *Id.* at 882. But even with no history of voting discrimination, Alaska cannot bail out under the supposedly liberalized standard enacted in 1982. The D.C. Circuit dismissed such concerns, advising that "[i]f something about the bailout criteria themselves

or how the Attorney General is applying them is preventing jurisdictions with clean records from escaping section 5 preclearance, those criteria can be challenged in a separate action brought by any adversely affected jurisdiction." *Shelby Cnty.*, 679 F.3d at 882. Alaska has recently brought such an action, challenging the constitutionality of §§ 4 and 5. *Alaska v. Holder*, No. 1:12-cv-01376-RLW (D.D.C.).

Alaska has repeatedly suffered the "extraordinary federalism costs" of §§ 4 and 5. *Shelby Cnty.*, 679 F.3d at 884. These provisions nearly derailed Alaska's 2012 elections, when the State was sued to stop election preparations under an interim redistricting plan ordered by the Alaska Supreme Court and submitted to the DOJ for preclearance. Although DOJ's eventual preclearance mooted the lawsuit, the damage to the state's sovereignty was done. Because Alaska has a strong interest in ending the extraordinary and unwarranted infringement of its sovereignty imposed by §§ 4 and 5 of the VRA, it submits this amicus brief in support of the petitioner, Shelby County, Alabama.

INTRODUCTION

Alaska exists at the margin of § 5 coverage. The State twice bailed out under the original bailout provision, but now stands unable to bail out because the amended standards are nearly impossible for states to meet. The D.C. Circuit's heavy reliance on the bailout and bail-in provisions to correct the imperfections of the basic formula reflects a serious misunderstanding about the operation of those provisions. Upholding the 2006 reauthorization of the VRA's coverage formula, the D.C. Circuit was satisfied that the covered jurisdictions deserved § 5's extraordinary

burden because (1) jurisdictions covered by § 4 would bail out if they had "a clean voting record as defined in section 4(a)," and (2) jurisdictions not covered by § 4 "but which nonetheless have serious, recent records of voting discrimination, may be 'bailed in'—i.e., subjected to section 5 preclearance—pursuant to section 3(c)." *Shelby Cnty.*, 679 F.3d at 873-74.

While the D.C. Circuit noted that Congress had before it "little or no evidence of current problems" in Alaska, *id.* at 881, it nevertheless upheld the statute's current reach, presumably relying on bail-out to cure the overbreadth. But although Alaska's history does not justify § 5 coverage, bailout cannot save it; the State exemplifies what Justice Thomas observed in *Northwest Austin Municipal Utility District No. One v. Holder*—that bailout is little more than a "mirage." 557 U.S. 193, 215 (2009) (Thomas, J., concurring in part and dissenting in part). Nor does bail-in combat the fundamental inequality of sovereigns created by the coverage formula, because it does not impose upon guilty jurisdictions the same burdens endured by those covered under § 5.

The D.C. Circuit also relied on the analysis in *South Carolina v. Katzenbach*, 383 U.S. 301, 332 (1966) to justify the formula's inaccuracies, explaining that while "the coverage formula's fit is not perfect[,] . . . the fit was hardly perfect in 1965." *Shelby Cnty.,* 679 F.3d at 880. But in 1965—and 1966 when this Court upheld the coverage formula—the Act imposed only a five-year sentence on the covered jurisdictions and bailout functioned as an effective error-correction device. As the Court noted in *Katzenbach*, "an area need not disprove each isolated instance of voting discrimination in order to obtain relief in the termination proceedings." *Katzenbach*,

383 U.S. at 332. In contrast, the 2006 reauthorization imposed a twenty-five-year sentence with an arbitrary and punitive bailout provision, in which a single "isolated instance" that may not even reflect voting discrimination bars escape for an additional decade.

Enough is enough. The Court should hold that § 5, applied to what is now a haphazard assortment of jurisdictions, is neither congruent nor proportional to the problems of voting discrimination in the 21st century. *See City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

ARGUMENT

I. The VRA's Current Bailout Standards are Hopelessly Difficult for States to Meet.

Congress originally designed the VRA's bailout provision to correct errors in the reach of the coverage formula. In 1965, bailout required only a showing that the formula had wrongly captured the jurisdiction, meaning that it had not used a test or device with the purpose or effect of discriminating against voters on the basis of race or color. Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(a), 79 Stat. 437, 438 (amended 1970, 1975, 1982, 2006). In contrast, the current standard, introduced in the 1982 VRA reauthorization, takes a more remedial approach, offering bailout to jurisdictions that can demonstrate the requisite improvement in their records on voting discrimination. In theory this new standard offers an incentive to eliminate discrimination and enhance minority access to the electoral process. Indeed, the D.C. Circuit noted that "[s]ignificantly for the issue before us, the 1982 version of the Voting Rights Act

made bailout substantially more permissive." *Shelby Cnty.*, 679 F.3d at 856. But the current bailout standard is only "more permissive" in the sense that it theoretically allows jurisdictions to earn release. In practice, it set the bar unreasonably high—at least for states—and it thus severed any meaningful connection between the conduct of the jurisdiction and the severity of the penalty, § 5's "strong medicine." *Id.* at 873.

The new standard requires a jurisdiction both to achieve perfection and to cross its fingers that factors beyond its control will not frustrate bailout. To qualify, a jurisdiction now must show that during the previous ten years: (A) it has not used a test or device with the purpose or effect of denying or curtailing the right to vote because of race, color, or minority language status; (B) no federal court has found that the right to vote has been denied or curtailed anywhere in the jurisdiction because of race, color, or minority language status; (C) federal examiners have not been certified to the jurisdiction; (D) the jurisdiction has complied with § 5, including submitting all voting changes for preclearance; and (E) the DOJ has not objected to any preclearance submission. 42 U.S.C. §§ 1973b(a)(1)(A)-(E). In addition, a covered jurisdiction must meet "subjective criteria," *Nw. Austin*, 557 U.S. at 215 (Thomas, J., concurring in part and dissenting in part), requiring a showing that it has "eliminated voting procedures and methods of election which inhibit or dilute equal access to the electoral process" and has "engaged in constructive efforts" to expand voting opportunities. § 1973b(a)(1)(F). Even after meeting this standard, the jurisdiction must maintain a record free of voting discrimination for an additional ten years under a "clawback" provision to secure permanent bailed-out status. § 1973b(a)(5).

Two aspects of this test render it ineffective to cure the coverage formula's overreach. First, on its face the statute requires a perfect record over twenty years—with not a single court finding of voting discrimination; not a single federal examiner; every voting change submitted for preclearance; and not a single DOJ objection to a preclearance submission. The severity of § 5's treatment is strikingly disproportionate to the slight imperfection that will frustrate bailout. Second, even a state's best possible efforts to achieve this perfection may not succeed because some of the criteria rely on unreviewable decisions of the DOJ and attribute to the State the behavior of others it cannot control.

A. Bailout Is Blocked by the DOJ's Unilateral Decision to Dispatch Federal Observers.

The DOJ's decision to dispatch federal observers is an example of an unreviewable decision that will prevent bailout. Federal observers may be sent to monitor elections either by order of a federal court, 42 U.S.C. § 1973a(a), or upon certification by the Attorney General, § 1973f(a)(2). According to the DOJ, courts have ordered federal observers only twelve times in the VRA's history. *See About Federal Observers and Election Monitoring,* UNITED STATES DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION, http://www.justice.gov/crt/about/vot/examine/activ_exam.php (last viewed December 27, 2012). By contrast, the Attorney General has certified 152 jurisdictions for observers. *Id*. To justify dispatching federal observers to a § 5 jurisdiction, the Attorney General must certify that he "has received written meritorious complaints from residents, elected officials, or civic participation organizations that efforts to deny

or abridge the right to vote under the color of law on account of race or color, or in contravention of the [language assistance] guarantees . . . are likely to occur"; or that in his judgment, "the assignment of observers is otherwise necessary to enforce the guarantees of the 14th or 15th amendment." 42 U.S.C. § 1973f(a)(2).

This standard for certification of observers means little, because the Attorney General's decision is unreviewable and therefore his discretion is unchecked. *See United States v. Louisiana,* 265 F. Supp. 703, 715 (E.D. La. 1966), *aff'd*, 386 U.S. 270 (1967) ("[T]he appointment of observers is a matter of executive discretion and is not subject to judicial review."). With no oversight or review to guide the exercise of the Attorney General's judgment, the assignment of federal observers may not accurately measure a jurisdiction's voting record. In fact, Alaska's example demonstrates that a covered jurisdiction hoping to maintain a perfect record for bailout may have that record blemished without explanation.

The Attorney General certified Alaska's Bethel Census Area for federal observers in October 2009. He justified his decision by reciting the statutory standard, explaining only that "in my judgment the appointment of federal observers is necessary to enforce the guarantees of the Fourteenth and Fifteenth Amendments of the Constitution of the United States." *See* Certification of the Bethel Census Area for Federal Observers (October 1, 2009) (attached as Appendix A). This certification was apparently in response to allegations made by opposing counsel in litigation then pending against the State and Bethel. *See Nick v. Bethel,* No. 3:07-cv-0098-TMB (D. Alaska) (challenging the State's voter language assistance

program). The Attorney General made his certification without informing the State that he had received a complaint or allowing the State to respond. Thus, it is difficult to understand how he could have determined that the complaint was "meritorious" or that observers were "necessary to enforce the guarantees of the Fourteenth or Fifteenth amendment."

Even more troubling, the *Nick* plaintiffs had tried and failed to obtain a court order for federal observers just a year before. Order re: Plaintiffs' Motion for a Preliminary Injunction Against the State Defendants at 11, *Nick v. Bethel,* No. 3:07-cv-0098-TMB (D. Alaska July 30, 2008), ECF No. 327. Unlike the DOJ, courts place an "onerous burden" on plaintiffs seeking appointment of federal observers. *United States v. City of Philadelphia*, No. 2:06-cv-4592, 2006 WL 3922115, at *6 (E.D. Pa. Nov. 7, 2006) (holding that plaintiff had "not met its onerous burden to demonstrate that it is entitled to extraordinary relief in the form of federal observers"). Because the DOJ could easily give the *Nick* plaintiffs what the federal court would not, plaintiffs complained to the DOJ instead of renewing their request with the court, and federal observers were sent to Bethel for local elections in 2009 without any opportunity for the State to respond or appeal. This restarted Alaska's bailout clock. In 2010, the Attorney General notified the State that federal observers would again be dispatched to Bethel, again at the request of opposing counsel in the *Nick* litigation and before the State knew of any complaint. The DOJ has never given the State any feedback from the observers or notified it that any observed practices were improper.

Because the process by which the DOJ decides to dispatch observers is secret and unreviewable, their presence is a poor gauge of whether § 5 oversight is justified. As Alaska's experience shows, the presence of election observers demonstrates only that someone has contacted the DOJ and made allegations of improper election practices. Because bailout can be so easily and arbitrarily blocked, it cannot save the coverage formula.

B. Bailout Is Blocked By a Single DOJ Objection to a Preclearance Submission, Which May Not be Evidence of Discriminatory Effect or Intent.

To achieve the perfect record needed for bailout, a jurisdiction also must have received no DOJ objections to any preclearance submission by the jurisdiction or "any governmental unit within its territory" for ten years prior to the bailout request. 42 U.S.C. § 1973b(a)(1)(E). Because a DOJ objection does not demonstrate actual discrimination sufficient to justify continued § 5 coverage, this requirement also keeps bailout from functioning as a meaningful cure for the overreach of the coverage formula.

A DOJ objection to preclearance is not a finding of discriminatory effect or intent. The DOJ must object to a proposed change whenever "the Attorney General is unable to determine that the change is free of discriminatory purpose and effect," 28 C.F.R. § 51.52(c) (2011), and the burden of proving otherwise lies with the submitting jurisdiction, § 1973c; 28 C.F.R. § 51.52(a) (2011). The D.C. Circuit recognized that a DOJ objection did not necessarily signal intentional voting discrimination, and that "to

sustain [the 2006 reauthorization of] section 5, the record [before Congress] must contain 'evidence of a pattern of constitutional violations.'" *Shelby Cnty.*, 679 F.3d at 866. But the court failed to recognize the impact of this insight on the effectiveness of the bailout as a savings clause. Because a DOJ objection is at best only circumstantial evidence even of discriminatory effect, much less intent, a rule that bars a jurisdiction from bailout for another ten years due to a single objection cannot rationalize the coverage formula.

Nor is it apparent that the DOJ applies a uniform, predictable standard to preclearance submissions. The only objection that the DOJ has ever made to a preclearance submission by Alaska was to a 1993 redistricting plan, on the ground that it reduced the Alaska Native voting age population in a house district from 55.7 percent to 50.6 percent. *See* Letter from James P. Turner, Acting Assistant Attorney General, Civil Rights Division, DOJ, to Virginia Ragle, Alaska Assistant Attorney General (September 28, 1993) (attached as Appendix B). But a jurisdiction that is covered by § 5 only because of the minority language assistance formula should be not forced to engage in race-conscious redistricting to comply with the VRA. Moreover, in later rounds of redistricting, the DOJ has precleared plans with effective Alaska Native districts with less than 50 percent Native voting age population.[1] Without clear guidance as to

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[1] Lisa Handley, A Voting Rights Analysis of the Alaska Amended Proclamation State Legislative Plan 8 (May 25, 2012), *available at* http://www.akredistricting.org/dojsubmission/May%2025,%202012%20Submission/Volume%2010/Folder%2004%20-%20Report%20of%20Dr.%20Lisa%20Handley/Dr.%20Handley's%20Report.pdf.

how the DOJ will apply the retrogression standard, jurisdictions attempting to redistrict are flying blind. *Cf. In re 2011 Redistricting Cases*, No. S-14721, 2012 WL 6721059, at *17 n.44 (Alaska Dec. 28, 2012) (Matthews, J. dissenting) ("Underlying this uncertainty [whether redistricting plan would be precleared] is the fact that it is difficult to determine just what is forbidden by section 5 of the Voting Rights Act."). And the failure of jurisdictions to intuit what might be acceptable to the DOJ is not a useful signal of discriminatory intent.

Similarly, the recent preclearance of a voting change in the City of Kinston, North Carolina, described in the Brief for Respondents Holder *et al.* in Opposition at 4-12, *Nix v. Holder,* No. 12-81 (Sept. 24, 2012) also demonstrates that DOJ objections often reflect only a failure of proof on the part of the jurisdiction. In the Kinston example, the DOJ unilaterally reversed course and precleared a proposal to which it had objected two years before, purportedly based on additional information it received from another source. Whatever its reasons for doing this, the DOJ's change of heart demonstrates that its earlier objection did not actually indicate that the city would have instituted a discriminatory change absent § 5. Nevertheless that objection alone would have barred Kinston from bailing out for ten years.

Because the bailout provision is based on such unreliable indicators of discrimination, it cannot ensure the congruence and proportionality of the coverage formula.

C. The Bailout Requirements Hold States Responsible for the Acts and Omissions of Sub-Jurisdictions They Cannot Control.

The impossibility of the bailout standard is aggravated for states and other larger jurisdictions because it attributes to them the conduct of political subdivisions and governmental units within their territories. 42 U.S.C. §§ 1973b(a)(1)(A)-(F). The larger the jurisdiction seeking bailout, the more devastating this requirement is. In Alaska, for example, the municipal league alone has approximately 160 members.[2] The State's eligibility for bailout depends on each subdivision maintaining a perfect record for ten years; none, facing litigation over a voting change, can decide to settle without jeopardizing the State's bailout prospects. § 1973b(a)(1)(B). And yet the State has no control over the actions of these subdivisions—either over their election practices or their litigation decisions. Moreover, the subjective criteria in § 1973b(a)(1)(F) demand that a jurisdiction seeking bailout compile an extensive documentary record over a ten-year period, for itself and "all governmental units within its territory." To imagine that a state could organize and maintain that kind of recordkeeping for all sub-jurisdictions within its territory for ten years is little more than a fantasy. Indeed, of the thirty-eight jurisdictions that have bailed out under the 1982 standard, none is larger than a County.[3]

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[2] The list of Alaska Municipal League members is available at *AML Municipal Members*, ALASKA MUNICIPAL LEAGUE, http://www.akml.org/members.html (last visited Dec. 30, 2012).

[3] The list of bailouts is available at *Section 4 of the Voting Rights Act*, UNITED STATES DEPARTMENT OF JUSTICE, CIVIL

D. In Practice, the DOJ has Complete Control Over the Bailout Process.

Given these onerous bailout standards, it is unsurprising that few jurisdictions have been able to take advantage of the bailout opportunity. And a close look at those that have raises further questions. The D.C. Circuit believed that § 5 was constitutional in large part because the bailout mechanism operated to ensure that the statute's reach was congruent and proportional. This view assumed that bailout was a workable mechanism to allow covered jurisdictions with clean records to escape the reach of § 5, as it placed "covered status . . . within the control of the jurisdiction." *Shelby Cnty.*, 679 F.3d at 882 (citing H.R. Rep. No. 109–478, at 25 (2006)). Instead, the process is so permeated by the DOJ's exercise of unfettered discretion that it neither functions consistently as an escape hatch for worthy jurisdictions nor prevents the bailout of jurisdictions that are not legally entitled to it.

In practice, bailout cannot be achieved without the DOJ's consent. Since the effective date of the 1982 bailout revisions, thirty-eight jurisdictions have bailed out. *See* Bailout List, *supra* note 3. All of these bailouts were accomplished by consent decree, and in none of them was the bailout criteria actually litigated. Instead, in all but one, the parties filed a proposed consent decree very shortly after the initiation of the litigation. (In the sole exception, *Northwest Austin*, the consent decree was entered shortly after this Court's remand. Consent Judgment and Decree, *Northwest Austin Municipal Utility District*

RIGHTS DIVISION, http://www.justice.gov/crt/about/vot/misc/sec_4.php (last visited December 23, 2012) [hereinafter Bailout List].

No. One v. Holder, No. 1:06-cv-10384-PLF-EGS-DST (D.D.C. Nov. 3, 2009), ECF No. 171. On remand, as in the other thirty-seven bailouts, the meaning, scope, and interpretation of the bailout criteria were never litigated.) Accordingly, these actions have generated neither judicial interpretations of the bailout criteria nor any published judicial opinions addressing their meaning or application. Nor has the DOJ promulgated any regulations elaborating on the bailout standards.

Thus, in practice, jurisdictions that obtain the DOJ's consent can bail out; those who do not are likely to be barred, even if their claims might have merit. Indeed, a bailout guide written by J. Gerald Hebert—an expert bailout attorney formerly with the DOJ's Voting Rights Section who has represented thirty of the thirty-eight bailed-out jurisdictions in their bailout actions—advises that jurisdictions interested in bailout should obtain the DOJ's blessing before filing suit because it would be expensive and likely impossible to obtain bailout without it:

> [T]he best course of action is to first seek the Attorney General's consent to bailout before petitioning the court. If a bailout lawsuit is filed before consulting with DOJ, and DOJ raises objections, the two choices available at that point for the jurisdiction are not good: either take on DOJ in contested litigation (costly and what is perhaps a losing cause), or withdraw the suit while the jurisdiction attempts to work out its differences with DOJ.

J. Gerald Hebert, *Process of Obtaining a Bailout*, § 16.III, *in* AM. VOTES! GUIDE TO MODERN ELECTION L. & VOTING (Benjamin E. Griffith ed. 2008). Thus, the DOJ, not the courts, effectively controls bailout.

The practical result of the DOJ's discretion is remarkable: its power stretches so far that it commonly agrees to bailouts for jurisdictions that are not legally entitled to receive them. In eighteen of the thirty-eight bailouts that have been granted under the post-1982 bailout standards, the consent decrees expressly indicate that the jurisdictions did not actually meet the statutory standards for bailout because they did not have perfect preclearance records for ten years preceding the bailout application. *See* Consent Judgment and Decree at 9, *Merced Cnty. v. Holder*, No. 1:12-cv-00354-TFH-DST-ABJ (D.D.C. Aug. 31, 2012), ECF No. 11 (noting that "several potential voting changes had not previously been submitted to the Attorney General over the preceding ten years"); Consent Judgment and Decree at 15, *City of Pinson v. Holder*, No. 1:12-cv-00255-CKK-KLH-RBW (D.D.C. April 20, 2012), ECF No. 11 (noting that city "failed to submit three 2008 unpopulated annexations to the Attorney General for review under Section 5 prior to implementation"); Consent Judgment and Decree at 12, *Prince William Cnty. v. Holder*, No. 1:12-cv-00014-ESH-TBG-JEB (D.D.C. April 10, 2012), ECF No. 9 (describing six changes enforced without preclearance, including salary increases, a special election, and the use of paper ballots); Consent Judgment and Decree at 9, *King George Cnty., Virginia v. Holder*, No. 1:11-cv-02164-BAH-KLH-ESH (D.D.C. April 5, 2012), ECF No. 10 (describing un-precleared changes involving an appointment to fill a vacancy and a change of boundary lines between counties); Consent Judgment and Decree at 8, *Culpeper Cnty., Virginia v. Holder*, No. 1:11-cv-01477-JEB-JWR-RLW (D.D.C. Oct. 3, 2011), ECF No. 5 (describing county's failure to submit for preclearance for a special election, an

appointment to fill a vacancy, and tax referenda); Consent Judgment and Decree at 10, *City of Kings Mountain v. Holder*, No. 1:11-cv-01153-PLF-DST-TFH (D.D.C. Oct. 22, 2011), ECF No. 7 (noting that city failed to submit for preclearance two annexations); Consent Judgment and Decree at 8, *Alta Irrigation Dist. v. Holder*, No. 1:11-cv-00758-RJL-DAG-PLF (D.D.C. July 15, 2011), ECF No. 9 (noting that three proceedings were carried out without preclearance); Consent Judgment and Decree at 12, *Jefferson Cnty. Drainage Dist. No. Seven v. Holder*, No. 1:11-cv-00461-DST-RWR-RJL (D.D.C. June 6, 2011), ECF No. 7 (noting existence of two un-precleared decisions to cancel elections); Consent Judgment and Decree at 5, *Augusta Cnty. v. Gonzales*, No. 1:05-cv-01885-TFH (D.D.C. Nov. 30, 2005), ECF No. 7 (noting that county seeking bailout had enforced three voting changes prior to preclearance); Consent Judgment and Decree at 6, *Pulaski Cnty., Virginia v. Gonzales*, No. 1:05-cv-1265-RBW (D.D.C. Sept. 27, 2005), ECF No. 8 (noting that county enforced fourteen voting changes without preclearance); Consent Judgment and Decree at 4, *Greene Cnty., Virginia v. Ashcroft*, No. 1:03-cv-01877-HHK (D.D.C. Jan. 19, 2004), ECF No. 10 (noting enforcement of one voting change without preclearance); Consent Judgment and Decree at 6, *Warren Cnty., Virginia v. Ashcroft*, No. 1:02-cv-01736-EGS (D.D.C. Nov. 26, 2002), ECF No. 9 (noting seven un-precleared changes, including a special election, several annexations and boundary changes, and alterations to the methods for selecting school board members); Consent Judgment and Decree at 6, *Rockingham Cnty., Virginia v. Ashcroft*, No. 1:02-cv-00391-ESH-EGS (D.D.C. May 21, 2002), ECF No. 6 (noting enforcement of one voting change without preclearance); Consent Judgment and Decree

at 5, *City of Winchester, Virginia v. Ashcroft*, No. 1:00-cv-03071-ESH-RCL (D.D.C. May 31, 2000), ECF No. 14 (describing an un-precleared agreement to suspend all annexations); Consent Judgment and Decree at 8-9, *Roanoke Cnty., Virginia v. Reno*, No. 1:00-cv-01949-RMU-JR (D.D.C. Jan. 24, 2001), ECF No. 6 (describing numerous voting changes for which preclearance was not obtained, including six annexations and boundary changes, and two amendments to the town charter regarding filling vacant seats for elected officials); Consent Judgment and Decree at 5, *Shenandoah Cnty., Virginia v. Reno*, No. 1:99-cv-00992-PLF (D.D.C. Oct. 15, 1999), ECF No. 12 (describing un-precleared changes including a special election and "various" annexations); *cf.* Consent Judgment and Decree at 5, *Frederick Cnty., Virginia v. Reno*, No. 1:99-cv-00941 (D.D.C. Sept. 9, 1999), ECF No. 13 (noting the parties' disagreement as to whether voting changes were enforced without preclearance). One recently-incorporated city lacked a ten-year history of any VRA compliance. Consent Judgment and Decree at 10, *City of Sandy Springs v. Holder*, No. 1:10-cv-01502-ESH-JRB-EGS (D.D.C. Oct. 26, 2010), ECF No. 8. And the DOJ recently consented to a bailout action by ten covered towns and townships in New Hampshire despite its acknowledgement that "several potential voting changes had not previously been submitted to the Attorney General over the preceding ten years," [Proposed] Consent Judgment and Decree at 14, *New Hampshire v. Holder*, No. 1:12-cv-01854-EGS-TBG-RMC (D.D.C. Dec. 21, 2012), ECF No. 10-1, even in the face of opposition from New Hampshire voters concerned about the jurisdictions' obvious ineligibility for preclearance, Memorandum of Points and Authorities in Support of Motion to

Intervene at 4-9, *New Hampshire v. Holder*, No. 1:12-cv-01854-EGS-TBG-RMC (D.D.C. Dec. 5, 2012), ECF No. 6.

Thus, even though a ten-year compliance record is a specific requirement of 42 U.S.C. § 1973b(a)(1)(D), the DOJ has nevertheless approved bailouts to numerous jurisdictions that did not meet this requirement. Indeed, had the law been followed, only twenty jurisdictions would have bailed out in the past three decades, demonstrating that the bailout provisions are unreasonably strict. Under these circumstances, the bailout criteria are not functioning as the escape hatch for jurisdictions with clean records that the D.C. Circuit postulated and that Congress intended. Instead, bailout has often occurred in spite of the law, not because of it.

Nor can the Act be saved by the willingness of the DOJ and courts to overlook the rules. The consent decrees of the eighteen ineligible jurisdictions cited above suggest that the DOJ is attempting to make bailout more widely available by bending the rules. For example, the decrees identify un-precleared changes that were implemented in violation of § 5, but then note that the DOJ later—apparently in anticipation of the bailout litigation—approved the changes as non-discriminatory. *E.g.,* Consent Judgment and Decree at 9, *Roanoke Cnty., Virginia v. Reno*, No. 1:00-cv-01949-RMU-JR (D.D.C. Jan. 24, 2001), ECF No. 6 (explaining that numerous un-precleared changes, at least one eight years old, were submitted for preclearance "immediately before the present action was filed"). The decrees therefore craft a "post-clearance" exception to § 5's preclearance requirement, under which some lucky jurisdictions can receive the DOJ's blessing for bailout despite

preclearance violations. The consent decrees also often note that the jurisdictions' § 5 failures were "inadvertent," or cite the jurisdictions' good-faith, but incorrect, belief that a change did not require preclearance. *See, e.g.,* Consent Judgment and Decree at 9, *Merced Cnty. v. Holder*, No. 1:12-cv-00354-TFH-DST-ABJ (D.D.C. Aug. 31, 2012), ECF No. 11 (explaining that failure to seek preclearance "was inadvertent or based on a good faith belief that the changes were not covered by Section 5"); Consent Judgment and Decree at 9, *King George Cnty., Virginia v. Holder*, No. 1:11-cv-02164-BAH-KLH-ESH (D.D.C. April 5, 2012), ECF No. 10 (explaining that county's failure to comply with § 5 was "inadvertent").

But the VRA does not permit relaxation of the bailout standards. It unambiguously provides that bailout is available only if a requesting jurisdiction has completely "complied with section 1973c of this title, including compliance with the requirement that *no change* covered by section 1973c of this title has been enforced without preclearance under section 1973c." 42 U.S.C. § 1973b(a)(1)(D) (emphasis added). The DOJ's regulations are in accord, lacking any exceptions to the full-compliance requirement. 28 C.F.R. § 51.64 (1987) ("Among the requirements for bailout is compliance with Section 5, as described in Section 4(a), during the ten years preceding the filing of the bailout action and during its pendency.").

Congress carefully crafted the bailout standards, intending that each of its provisions be strictly enforced: "Each and every requirement of the bailout is minimally necessary to measure a jurisdiction's record of non-discrimination in voting." S. Rep. No. 97-417, at 59, *reprinted in* 1982 U.S.C.C.A.N. 177, 238; *see also id.* at 222 ("This bailout was carefully

crafted to preserve the essential protections of section 5. The provisions work as an integrated complementary whole; removing any element would seriously undermine the entire structure.").

Congress could have allowed "post-clearance" to substitute for preclearance, but it did not. Instead, as the language of the statute conveys, Congress intended that absolute and complete compliance with the preclearance requirement was a prerequisite to any jurisdiction's ability to bail out:

> Timely submission of proposed changes before their implementation is the crucial threshold element of compliance with the law . . . . Prospectively, if bail-out were not made dependent on a record of timely submissions, there would be no incentive for jurisdictions to take seriously that requirement. This would further undermine the justice department's ability to enforce the act in the future.

Id. at 225-26. In fact, Congress specifically rejected the idea that "post-clearance" could ever substitute for preclearance, explaining that "[t]he rights of voters under the Voting Rights Act are violated not only when the voting change is first enforced without preclearance, but thereafter while it remains in force without having been precleared. Therefore, this requirement applies even if the voting change, when ultimately submitted, was not found objectionable." *Id.* at 226.

Similarly, the statutory language does not support the idea that inadvertent failure to comply with the preclearance requirement is excusable. And again, Congress expressly rejected the argument that "bailout should not be denied for 'inadvertence'" in failing to comply with the preclearance mandate,

explaining that "[f]or many years the submission requirements of section 5 have been well understood" and that any jurisdiction unclear as to its obligations should seek advice from its "state attorney general's office." *Id.*

The DOJ recently asserted that it has authority to excuse preclearance failures. It argued in the New Hampshire township bailout action that 42 U.S.C. § 1973b(a)(3) grants it discretion to waive the bailout requirements. *See* Attorney General's Opposition to Motion to Intervene at 15-17, *New Hampshire v. Holder*, No. 1:12-cv-01854-EGS-TBG-RMC (D.D.C. Dec. 19, 2012), ECF No. 9. This argument is unsupported by the language of the Act. Subsection (a)(3) prohibits bailout to a jurisdiction that does not possess a clean ten-year record of compliance with other federal, state, and local laws regarding voting discrimination, but softens that requirement with an exception if the jurisdiction shows that its violations of other voting discrimination laws were "trivial, were promptly corrected, and were not repeated." § 1973b(a)(3). On its face, this exception does not reach back to apply to subsection (a)(1)'s requirements for bailout. If anything, the existence of this exception in subsection (3) highlights the absence of any similar leniency in subsection (1).

In light of this unambiguous statutory language and legislative history, the DOJ may not simply decline to enforce portions of the VRA to help favored jurisdictions bail out. Rather, the DOJ must "give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). The DOJ is entitled to no deference when it makes "radical or fundamental change[s]" to the VRA, *MCI Telecomms.*

Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 229 (1994), by creating exceptions, loopholes, and leniency where Congress intended none to exist.

Rather than applying the law that Congress enacted, the DOJ bestows indulgences, applying its own, unwritten criteria in the form of negotiated consent decrees that forgive prior improprieties. Other jurisdictions, however, are not the recipients of this largesse. How the DOJ decides which jurisdictions can bail out despite their disqualifying records is unclear. Nor is it known how many jurisdictions, unaware of this option, have not sought bailout because their internal investigations revealed that the plain terms of the statute made them ineligible.

The Court should therefore reject any suggestion that the DOJ's actions can save the constitutionality of § 5. Congress did not intend that non-qualifying jurisdictions could bail out, or that the DOJ would have discretion to decide which non-qualifying jurisdictions to pardon. And even if it did, such a discretionary bailout standard would not make § 5 into a congruent and proportional response to modern problems of voting discrimination. A "standard" this arbitrary and unknowable is by definition neither congruent nor proportional, whatever the problem might be.

E. The DOJ's Discretion to Consent to Bailout Includes Application of Subjective Standards.

In addition to the objective criteria set forth in 42 U.S.C. §§ 1973b(a)(1)(A)-(E), the bailout statute also contains subjective criteria that a jurisdiction must satisfy before it may bail out. § 1973b(a)(1)(F). A

state must show that it and all governmental bodies within its borders "have engaged in constructive efforts to eliminate intimidation and harassment" of voters, and "have engaged in other constructive efforts, such as expanded opportunity for convenient registration and voting for every person of voting age and the appointment of minority persons as election officials throughout the jurisdiction and at all stages of the election and registration process." §§ 1973b(a)(1)(F)(ii)-(iii). No regulations elucidate the meaning and extent of the "constructive efforts" or the "expanded opportunity" that might qualify.

Especially in an area of law where decisions are made by consent decree, these subjective criteria increase the potential for inequities between jurisdictions that the DOJ favors and those it does not. As with the DOJ's practice of waiving the "objective" statutory criteria for certain jurisdictions, the subjective criteria allow the DOJ to exercise expansive discretion, determining for unexplained reasons whether a particular jurisdiction has made sufficient efforts. This again suggests that bailout is not a fair escape hatch that any meritorious jurisdiction can access, but rather is a favor that the DOJ can give or withhold as it chooses.

II. The VRA's Bail-In Provision Does Not Effectively Address the Underinclusiveness of the Coverage Formula.

Just as bailout does not tailor § 5's coverage to only the jurisdictions that deserve its extraordinary burdens, bail-in does little to cure the coverage formula's underinclusiveness. The D.C. Circuit discusses bail-in as if it worked in tandem with the bailout provisions to correct the inaccuracies of the coverage formula,

but that is not so. Bail-in is extremely rare, suggesting that non-covered jurisdictions are likely to escape it, regardless of how unfavorably their election practices compare to covered jurisdictions. And even when bail-in does happen, it is markedly different than § 5 coverage. It has a short lifespan, and it neither subjects a jurisdiction to § 5's requirements nor imposes the difficult standards for bailing out.

In the forty-seven year history of the VRA, federal courts have applied the bail-in provision a mere eighteen times. And on sixteen of those occasions, the bailed-in jurisdiction signed a consent decree submitting to coverage, often to avoid the cost of extended litigation. Travis Crum, *The Voting Rights Act's Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 YALE L. J. 1992, 2015-16 (2010).

More importantly, "bail-in" is a misnomer. The statute does not give courts authority to turn a non-covered jurisdiction into a covered one. Instead, the bail-in provision creates a third category of jurisdictions, subject to shorter, gentler hybrid coverage. Section 4 coverage lasts indefinitely, but bail-in coverage lasts only "for such period as [the court] may deem appropriate." § 1973a(c). Thus, a bailed-in jurisdiction need not meet the VRA's standards for bailout in order to escape coverage; bail-in coverage expires naturally, when the court-imposed period ends. *See, e.g.*, Consent Decree at 8, *Sanchez v. Anaya*, No. 82-0067M (D.N.M. Dec. 17, 1984) (requiring preclearance of redistricting plans for ten years).

And although the statute appears to require bailed-in jurisdictions to preclear changes to *any* "voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting," in prac-

tice courts have limited the bail-in preclearance obligation to changes related to the triggering litigation. *See, e.g.*, *Jeffers v. Clinton*, 740 F. Supp. 585, 601 (D.N.M. 1990) (holding that "any further statutes, ordinances, regulations, practices, or standards imposing or relating to a majority-vote requirement in general elections in this State must be subjected to the preclearance process"). Moreover, while § 4 coverage demands that a jurisdiction go hat in hand either to the DOJ or to the district court in Washington, D.C., a bailed-in jurisdiction can seek preclearance from the local district court, familiar with local conditions and realities. § 1973a(c).

Finally, bail-in fails to address the unequal sovereignty of the states under the VRA because it is triggered only by a finding that "violations of the fourteenth or fifteenth amendment justifying equitable relief *have occurred*." § 1973a(c) (emphasis added). While § 4 coverage is imposed by a formula that uses broad presumptions as a proxy for voting discrimination—encompassing jurisdictions like Alaska with no history of constitutional or statutory violations of voting rights—bail-in requires a court to find that the jurisdiction has *actually violated* the guarantees of the Fourteenth or Fifteenth Amendments. And indeed, in the only decision to discuss the bail-in provision in detail, the court held that multiple violations were required to trigger bail-in. *Jeffers*, 740 F. Supp. at 600. In so holding, that court noted that "it would be strange if a single infringement could subject a State to such strong medicine." *Id*. Yet a single misstep—even one providing no evidence of discriminatory effect, much less intent—subjects a State covered under § 4 to at least ten more years of § 5's "strong medicine."

Bail-in, therefore, is a temporary, narrowly-tailored remedy to rectify identified, repeated constitutional violations. It lacks the symmetry with § 5 coverage necessary to function as a meaningful equalizer of the coverage formula.

III. Alaska's Experience with the VRA Demonstrates Both the Overreach of § 5 Coverage and the Near-Impossibility of Bailout for a State.

Alaska's experience demonstrates both the over-inclusiveness of § 4's coverage formula and the ineffectiveness of bailout to cure the unconstitutionality of the preclearance regime. Alaska has never been found in violation of either constitutional guarantees of voting rights or statutory prohibitions against voting discrimination, yet it has carried the stigma of § 5 coverage and labored under the yoke of federal oversight of its election laws and procedures for more than thirty-five years. And Alaska still has no realistic prospect of bailout.

A. Alaska's § 5 Coverage is Not Now, and Never Was, Justified as a Congruent and Proportional Response to Voting Discrimination.

Alaska was swept up by the coverage formula despite having no history of voting discrimination, let alone the kind of history necessary to justify § 5's extraordinary burden. The 1965 formula presumed that a jurisdiction had discriminatory election practices if it used a test or device as a prerequisite for voting and had low voter turnout. *Hearings on H.R. 6400 Before Subcommittee No. 5 of the House Comm. on the Judiciary*, U.S. Congress, 89th Cong. 12 (1965) (Testimony of Nicholas Katzenbach). Bailout was

intended to release from § 5 coverage jurisdictions such as Alaska: in 1966 and 1972 when the State sought bailout, the DOJ agreed that Alaska had not discriminated based on race or color.

Alaska was covered in 1965 and 1970 because its constitution required that a voter speak or read English, Alaska Constitution, article V, section 1 (amended 1970), and because a third of its labor force was uniformed military personnel who generally did not vote in Alaska, pushing voter participation rates below the 50% threshold. *See* John Boucher and Kristen Trombley, *Federal Agencies Prominent Despite Downsizing*, ALASKA ECONOMIC TRENDS, September 1996, at 8; *Egan v. Hammond*, 502 P.2d 856, 862 (Alaska 1972) (Boochever, J., dissenting). Because Alaska's constitutional provision did not actually have the purpose or effect of denying the right to vote on account of race or color, the Attorney General consented to its bailout in 1966 and 1972. At that time, the bailout system worked.

But the 1975 amendments again ensnared Alaska. Although in 1970 Alaskans had repealed the Alaska Constitution's requirement that voters read or speak English, Alaska was covered in 1975 because the formula was expanded to include jurisdictions that provided "registration and election materials . . . only in English," on November 1, 1972, *see* 28 C.F.R. § 55.5(a) (1976) (interpreting 42 U.S.C. § 1973b(f)(3)), and that had a sufficient population of a "single language minority." § 1973b(f)(3).

This was an absurd basis for pulling Alaska back into § 5 coverage. The "single language minority group" that made up more than five percent of Alaska's voting age citizens was not a single group at

all; instead, approximately twenty distinct Alaska Native languages were spoken by different Alaska Native groups spread across Alaska's vast territory. *See* Michael Krauss, *Alaska Native Languages: Past, Present, and Future*, ALASKA NATIVE LANGUAGE CTR. RES. PAPERS NO. 4 at 33-52 (1980). Until recently, these languages had no widely-read orthographies, and few, if any, Alaska Natives were able to read them but unable also to read English. Section 5 therefore covered Alaska because it failed to print election materials in languages that no one would have been able to read, except a handful of people who also could read English.

The type of evidence that justified § 5 coverage for racial discrimination in the South in 1965 and 1970 simply did not exist for voting discrimination against Alaska Natives in 1975. Congress' apparent basis for including Alaska as a covered jurisdiction was a 1972 lawsuit alleging that the State violated the equal protection rights of Native teens by failing to provide local high schools in remote villages (it provided boarding school education). *See Hootch v. State Operated School System*, Civil No. 72-2450 (Super. Ct. Alaska 1973) (cited in S. Rep. No. 94-295 at 29 (1975)). The state entered into a consent decree in 1976, agreeing to build 126 high schools in small villages. *See Tobeluk v. Lind*, 589 P.2d 873, 875 (Alaska 1979). But long-distance schooling had nothing to do with voting discrimination, and even if it had, § 5 was not a congruent and proportional response to the targeted discrimination. *See City of Boerne v. Flores*, 521 U.S. 507, 520 (1997). Indeed, § 5's preclearance requirement does not impact a state's educational spending at all.

English-only elections in certain areas were not the same kind of "exceptional conditions" that initially made § 5's extraordinary burden constitutionally permissible. Congress had no evidence in 1975 that Alaska Natives in general were denied the right to vote; unlike the jurisdictions covered in 1965 and 1970, Alaska's voting practices had never violated voters' constitutional rights. And Alaska was covered despite never even violating voters' *statutory* rights, because it repealed its English-speaking requirement five years before language-based voting laws became illegal in 1975. Congress had no reason to believe that without § 5, Alaska or other states would repeatedly devise "unremitting and ingenious" new ways to make voting difficult for non-English-speaking citizens. *Katzenbach*, 383 U.S. at 309.

And the 1975 revisions to the bailout provision ensured that Alaska would be burdened by § 5 coverage for at least ten years. Alaska's repeal of its English-speaking requirement went into effect in 1972, so Alaska could not demonstrate until 1982 that it had not used this test or device for ten years. *See* Voting Rights Amendments of 1975, Pub. L. No. 94-73, tit. II, § 201, 89 Stat. 400, 401 (amended 1982, 2006).

B. Bailout Under the 1982 Standards is a Mirage for Alaska.

Even though § 5 coverage for Alaska was not constitutionally warranted in 1975, at least Alaska had the expectation that it would be able to bail out ten years later. But just as the ten-year period expired in 1982, Congress changed the bailout criteria so that, in the words of Alaska's Senator Ted Stevens, bailout became "difficult, if not impossible" for Alaska. *See* Letter from Senator Ted Stevens to

Governor Bill Sheffield 8a (March 9, 1983) (attached as Appendix C). The new bailout standard was touted as a liberalization because it allowed jurisdictions with histories of discrimination to redeem themselves with ten years of compliance, instead of tying bailout to a fixed calendar date that was pushed further into the future with each amendment to the VRA. But the new bailout standards had the reverse impact for states; they "require[d] states subject to the Act's special provisions to meet a more difficult standard for termination of the Act's coverage." Memorandum of Three-Judge Panel at 2, *Alaska v. United States,* No. 84-1362 (D.D.C. June 4, 1985). As Senator Stevens pointed out, for a state like Alaska, which "should have never been recaptured by the Voting Rights Act's preclearance provisions," bailout would be forever blocked by "technical violations, especially those in Alaska's small second class municipalities." *See* App. C at 8a. Senator Stevens urged Alaska to attempt to bail out before the 1982 amendments became effective on August 5, 1984. *Id.*

Alaska tried. It filed suit on May 1, 1984, requesting bailout under the 1975 Act's standards. But the DOJ asked the State for a volume and scope of specific information that was mostly unavailable and would have taken years to compile. Letter from Paul F. Hancock, Assistant for Litigation, Voting Section, Civil Rights Division, DOJ, to Norman Gorsuch, Alaska Attorney General (June 11, 1984) (attached as Appendix D). For example, it requested that the State break into four levels of English proficiency all the speakers in Alaska for each of eleven "primary" Native languages, and provide the number of persons of voting age and the number of registered voters who spoke each of these eleven

languages. *Id.* at 11a. This was not information collected by the United States Census—nor did Alaska conduct its own census—and the speakers of these languages lived almost exclusively in remote villages spread across a state nearly as wide and high as the lower forty-eight states combined.

The DOJ also asked Alaska to demonstrate how it informed voting age members who spoke each of these languages about every aspect of elections, listing seventeen separate categories of information, including the requirements and procedures of conducting voter registration drives; the location of election district boundaries and changes in locations or realignment of districts; the requirements and procedures for designating and regulating candidates' poll watchers; and rules applicable to candidates' financial disclosure and campaign finance statements. And because the bailout standards applied to all of the subdivisions within the state, the DOJ further requested that the State "identify every jurisdiction in the state that independently conducts elections" and for "each such jurisdiction . . . obtain and provide the information that is requested . . . above." *Id.* at 19a.

This request was a far cry from the DOJ's representation to this Court in 1966 that bailing out would be a simple matter of submitting affidavits from voting officials and refuting any evidence of discrimination adduced by the DOJ. *Katzenbach*, 383 U.S. at 332. Nevertheless, with the assistance of a number of Alaska Native organizations, the State gave the DOJ a lengthy report, attempting to provide the requested information. Despite the State's efforts, the DOJ alleged to the court that Alaska had applied a test or device with the purpose or effect of denying or

abridging language minorities' right to vote during the previous ten years. Without giving Alaska a chance to litigate the issue, the DOJ moved to dismiss the bailout complaint because Alaska had not successfully obtained a judgment before the August 5, 1984 effective date of the amendments. The three-judge panel agreed that Alaska could proceed with bailout only under the new standards. Memorandum of Three-Judge Panel at 7, *Alaska v. United States,* No. 84-1362 (D.D.C. June 4, 1985). The DOJ then propounded ninety-seven interrogatories spanning fifty-four pages and asked that the State provide answers pertaining not only to the State, but also to each municipality and educational system subdivision in Alaska. Letter from Lora Tredway, Attorney, Voting Section, Civil Rights Division, DOJ, to Virginia Ragle, Alaska Assistant Attorney General (May 23, 1985) (attached as Appendix E). Faced with this oppressive discovery burden—a clear signal that the DOJ would not consent to bailout—Alaska dismissed its case.

Alaska has never again been eligible for bailout because it has not maintained the ten-year perfect record required under the 1982 amendments. Bailout was unavailable for a decade because Alaska "enforced" the repeal of its statute providing for a presidential primary election before receiving DOJ's preclearance letter. *See* Letter from Virginia Ragle, Alaska Assistant Attorney General, to Maggie Moran, Legislative Assistant to Senator Ted Stevens 24a (March 14, 1985) (attached as Appendix F). Bailout was then precluded by the DOJ's 1993 objection to the state's redistricting plan after the 1990 census. *See supra*, p. 10. Not quite ten years later, the clock was reset again by the failure of the Municipality of Anchorage, which is not under the

State's control, to preclear a change to its mayoral election rules. *See generally Luper v. Municipality of Anchorage*, 268 F. Supp. 2d 1110 (D. Alaska 2003). In 2009 and 2010, the DOJ assigned federal observers to Bethel, restarting the clock yet again. Then, as the State attempted to prepare for the 2012 elections using an interim redistricting plan ordered by the Alaska Supreme Court—the only way it could hold the 2012 election on time—it was sued for violating § 5 because the plan had not yet been precleared. *See Samuelsen v. Treadwell*, No. 3:12-cv-0018-RRB-AK-JKS (D. Alaska). Although that lawsuit was mooted by the DOJ's preclearance of the plan, if the state of the law remains unchanged, it is an open question whether this disqualifies Alaska from bailing out until 2022.

If it does, by the time Alaska becomes eligible for bailout again, the State will have been subject to the extraordinary and intrusive federal oversight imposed by § 5 for forty-seven years, despite the fact that no federal court has ever issued a judgment finding that Alaska has violated either the guarantees of voting rights in the federal constitution or the VRA.

As this history shows, as a result of overreaching by Congress and the DOJ, Alaska is now indefinitely locked into § 5 coverage. Congress applied § 5 to Alaska by virtue of the Fourteenth Amendment without any finding that it was engaging in voting discrimination, and the perfection required to bail out has left the State without any real hope that this will change.

* * *

For these reasons, this Court should reverse the judgment of the Circuit Court and should find that Congress' 2006 reauthorization of § 5 of the VRA under the pre-existing coverage formula exceeded its authority under the Fourteenth and Fifteenth Amendments and thus violated the United States Constitution.

Respectfully submitted,

MICHAEL C. GERAGHTY
Attorney General
MARGARET PATON WALSH
Counsel of Record
JOANNE M. GRACE
RUTH BOTSTEIN
THE STATE OF ALASKA
1031 W. 4th Avenue, Suite 200
Anchorage, AK 99501
(907) 269-6612
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Counsel for Amicus
The State of Alaska

APPENDIX

APPENDIX A

[Seal omitted]

Office of the Attorney General
Washington, D.C. 20530

Billing Code 4410-13

UNITED STATES DEPARTMENT OF JUSTICE

Attorney General

CERTIFICATION OF THE ATTORNEY GENERAL

BETHEL CENSUS AREA, ALASKA

In accordance with Section 8 of the Voting Rights Act, as amended, 42 U.S.C. § 1973f, I hereby certify that in my judgment the appointment of federal observers is necessary to enforce the guarantees of the Fourteenth and Fifteenth Amendments of the Constitution of the United States in the Bethel Census Area, Alaska. This area is included within the scope of the determinations of the Attorney General and the Director of the Census made under Section 4(b) of the Voting Rights Act, 42 U.S.C. § 1973b(b), and published in the Federal Register on October 22, 1975 (40 Fed. Reg. 49,422).

/s/ Eric H. Holder
ERIC H. HOLDER JR.
Attorney General of the United States

Dated: 10-1-09

APPENDIX B

[Seal omitted]	U.S. Department of Justice Civil Rights Division
Office of the Assistant Attorney General	*Washington, D.C. 20035*
	September 28, 1993

Virginia B. Ragle, Esq.
Assistant Attorney General
State of Alaska
P.O. Box 110300 – State Capitol
Juneau, Alaska 99811-0300

Dear Ms. Ragle:

This refers to the 1993 redistricting plans for the state House and Senate in Alaska, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We received your initial submission on June 4, 1993; on August 3, 1993, we informed you that our receipt on July 30, 1993 of material supplemental information extended our deadline for making a determination to September 28, 1993. Additional supplemental information was received on September 21 and 27, 1993.

We have considered carefully the information you have provided, as well as comments and information from other persons. The Interim Plan ordered into effect by the Alaska state courts and precleared on July 8, 1992 serves as the benchmark for our analysis. *State of Texas v. United States*, 785 F.Supp. 201, 205 (D.D.C. 1992); see the Procedures for the Administration of Section 5 (28 C.F.R. 51.54(b)).

The proposed plan reduces the Alaskan Native share of the voting age population in House District 36 from 55.7 percent to 50.6 percent. It moves approximately 700 residents of the Lake and Peninsula Borough (among whom 70 percent are Alaskan Native) from District 36 to District 40, and moves approximately 1,080 residents (among whom over 90 percent are white) from the Copper River Valley into District 36 from District 35. Senate District R, which includes House District 36, declines from 33.5 percent to 30.5 percent in Alaskan Native voting age population, due to the removal of the majority-Native areas in the Lake and Peninsula Borough and the addition of approximately 2,150 persons (among whom over 90 percent are white) from the Palmer area. Athabascan Indians are the predominant minority language group in House District 36 and Senate District R.

Although the state courts do not appear specifically to have identified any changes to House District 36 or Senate District R that are required as a matter of state law, we have considered the state's contention that unification of the Lake and Peninsula Borough is a primary consideration under state law. Our analysis indicates that even if removal of the Lake and Peninsula Borough population from District 36 is required as a matter of state law, such a change does not require the reduction in Alaskan Native percentage occasioned by the proposed addition of population to District 36 from the Copper River Valley area.

Several areas with significantly greater Alaskan Native populations than the Copper River area, including the Nenana area and two villages in the Kuskokwim River area, were included in District 36

in one or more alternative plans considered by the Board. Indeed, the Nenana area had been included in Native-majority Interior districts under prior state redistricting plans. The information available to us indicates that the inclusion of one or more of these areas in House District 36 could have lessened or eliminated the reduction in the Alaskan Native share of the population in that district. Although your submission has provided evidence of opposition to placing Nenana into District 36, there appears to have been significant support for such a change, particularly within the Athabascan Indian community.

The state also contends that it has a significant interest in placing all residents of the Copper River Valley into District 36. Unlike the Lake and Peninsula Borough, however, the Copper River Valley is not an organized political subdivision. Nor does it appear that the objective of uniting specific communities along the length of the Copper River Valley required the addition of the entire region to House District 36.

In addition, the state contends that the proposed reductions in the Alaskan Native percentage in House District 36 and Senate District R are not significant because the 1992 election results show that voting in not radically polarized in the areas encompassed by those districts. However, our analysis indicates that although Alaskan Native candidates who were the preferred candidates among Alaskan Native voters were elected in 1992 to both House District 36 and Senate District R, there appears to have been a pattern of racially polarized voting in elections involving these districts, in which white voters' preferences differed from those of Alaskan

Native voters. In these circumstances, the proposed reduction in the Alaskan Native voting strength would appear to diminish the ability of Alaskan Native voters to elect candidates of their choice.

Under Section 5 of the Voting Rights Act, the submitting authority has the burden of showing that a submitted change has neither a discriminatory purpose nor a discriminatory effect. *See Georgia v. United States*, 411 U.S. 526 (1973); 28 C.F.R. 51.52. In light of the considerations discussed above, I cannot conclude, as I must under the Voting Rights Act, that your burden has been sustained in this instance. Therefore, on behalf of the Attorney General, I must object to the proposed redistricting plans for the state Senate and House to the extent that each incorporates the proposed configuration for House District 36 discussed above.

We note that under Section 5 you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the proposed changes have neither the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. In addition, you may request that the Attorney General reconsider the objection. However, until the objection is withdrawn or a judgment from the District of Columbia Court is obtained, the 1993 redistricting plans continue to be legally unenforceable. *Clark v. Roemer*, 111 S.Ct. 2096 (1991); 28 C.F.R. 51.10, 51.11, and 51.45.

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action the state plans to take concerning this matter. If you

have any questions, you should call Robert A. Kengle (202-514-6196), an attorney in the Voting Section.

Sincerely,
/s/ James P. Turner
James P. Turner
Acting Assistant Attorney General
Civil Rights Division

APPENDIX C

United States Senate
Committee on Appropriations
Washington, D.C. 20510

March 9, 1983

The Honorable Bill Sheffield
Governor
State of Alaska
Pouch A
Juneau, AK 99811

Dear Bill:

Last summer you may recall that Congress extended and revised the Voting Rights Act of 1965.

Alaska has been covered by the Act several times, mostly for technical reasons. The State has managed to bring actions which removed Alaska from the Act's coverage, particularly its election law pre-clearance provisions. *See Alaska v. United States*, C.A. No. 101-66 (D.D.C. Aug. 17, 1966); *Alaska v. United States*, C.A. No. 2122-21 (D.D.C. Mar. 10, 1972).

Alaska is still under the Act, and has been since the U.S. Attorney General and Director of Census determined that Alaska was recaptured under the 1975 Voting Rights Amendments. The State again filed another bail-out suit after the 1975 amendments were enacted, but abandoned the action. The U.S. Attorney General would not consent to an entry of judgment in favor of the state, since the Attorney General denied that "no test or device has been used anywhere in the state of Alaska during the ten years preceding the filing of this action for the purpose or

with the effect of denying or abridging the right of citizens of the United States to vote because they were members of language minority groups." *See Alaska v. United States*, C.A. No. 78-0484 (D.D.C. May 14, 1979) (stipulated dismissal of action).

In my judgment, the state should seriously consider renewing a bail-out action before the 1982 Voting Rights Act Amendments take effect on August 5, 1984. It has been over ten years since the State had an English language speaking requirement in its Constitution, and I believe that the state now has its best opportunity to prove that no other test or devices have been used in the last ten years to deny language minorities the right to vote. Alaska is still eligible to bail out from under the Act's pre-clearance provisions as the law presently stands. If the State waits to bail out under the new criteria after August of 1984, it will be very difficult, if not impossible, to do so.

When the 1982 Voting Rights Act Amendments were considered on the Senate floor, I attempted to offer my own amendments which would have made the bail-out criteria fairer to states like Alaska. The amendments would have prevented technical violations, especially those in Alaska's small second class municipalities, from disallowing the State to bail out. Unfortunately, the bail-out criterion was not modified, and if Alaska chooses to attempt its fourth bail-out action after August 5, 1984, it will in all likelihood be unsuccessful. Therefore, you and the Attorney General may want to consider commencing an action before that date. It's my firm belief that Alaska should have never been recaptured by the Voting Rights Act's pre-clearance provisions. We are the *only* state to even successfully bail out of this

Act, not just once, but twice. If a bail-out suit is commenced, it is my hope that it will be our last one.

If you should have any further questions, please do not hesitate to contact me or Mark Barnes of my staff.

Thanks again, Bill, for your attention to this matter.

With best wishes,

Cordially,

/s/ Ted Stevens
TED STEVENS

APPENDIX D

[Seal omitted] U.S. Department of Justice

PFH:RSB:LLT:sw
DJ 166-6-4

Washington, D.C. 20530

June 11, 1984

Honorable Norman C. Gorsuch
Attorney General, State of Alaska
Department of Law
Pouch K - State Capitol
Juneau, Alaska 99811

Re: *Alaska v. United States*, No. 84-1362 (D.D.C.)

Dear Mr. Attorney General:

We have been informed by Assistant Attorney General Virginia Ragle that your office is willing to provide, on an informal basis, factual information concerning elections in the State of Alaska to assist us in determining whether to consent to judgment in the above-referenced action. We appreciate your efforts to provide the information, and I write this letter to describe the factual information that we believe to be necessary.

As you will note from the inquiries below, we are attempting to obtain a complete description of the election structure and practices of the State of Alaska, and also are attempting to learn the precise steps taken by the state to enable members of the state's language minority groups to participate

effectively in the electoral process. Although the "language minority" groups of the State of Alaska are classified broadly in the Voting Rights Act as Alaskan Natives, we are aware that this broad category includes groups of persons who speak distinct languages. Thus, it would be helpful to our investigation if you would subdivide the responses for, or include information relevant to, each language spoken. To the best of our knowledge, the primary languages spoken are the following:

> Aleut, Inupiaq, Central Yupik, Siberian Yupik, Sugcestun Aleut, Tlingit, Upper Kuskokwim, Upper Tanana, Koyukon, Kutchin, and Ingalik.

It also would be helpful if you would provide the source of your response to each inquiry so that we may know who to contact for any necessary additional information.

The information we request is the following:

1. Describe the geographic boundaries of the areas into which the state has been divided for the conduct of elections (statewide and local). If the state's election districts are coterminous with the boroughs and census areas designated in the 1980 Census, please so indicate.

2. For the state as a whole and for each area described in the response to item 1, please list:

a) the total population and the number of persons who are members of each language minority group;

b) the total voting age population and the number of persons of voting age who are members of each language minority group; and

c) the total number of registered voters and the number of registered voters who are members of each language minority group.

If exact figures are unavailable, please estimate and state the basis for any estimated figures.

3. For each language minority group identified in response to items 2(a) and 2(b), please list the approximate number of persons who speak the particular language:

a) as a primary language and have little or no ability in English;

b) as a primary language and have difficulty with English;

c) as a primary language and are bilingual in English; and

d) as a secondary language with English as a primary language.

If exact figures are unavailable, please estimate and state the basis for any estimated figures. Please also identify the Native Alaskan languages that have been reduced to a written form, and indicate the extent to which the written form is used by the applicable language minority groups listed in response to items 2(a) and 2(b).

4. During previous litigation with the state in *Alaska v. United States*, No. 78-0484 (D.D.C. 1979), the United States deposed Dr. Michael Krause, Chief Linguist of the Alaskan Native Language Center. In his testimony, a copy of which is attached, Dr. Krause described the literacy in the English language of Alaskan Natives in various areas of the state. We

would appreciate your reviewing the deposition and indicating whether you believe that Dr. Krause's description accurately portrays the English-comprehension ability of Alaskan Natives during the past ten years.

If you disagree with Dr. Krause's conclusions, please provide the basis for your belief and your source(s) of authority. Also, if you believe Dr. Krause's views are incorrect, please describe the English-comprehension ability for each language minority group by age groups 18-24, 25-39, 40-55, and over 55, and indicate the source(s) of authority. Indicate how, if at all, the English-comprehension ability of each group has changed during the past ten years.

5. Describe any publicity that the state initiated after 1970 to inform the electorate that the English-only voting provision had been repealed. Indicate whether announcements of this change in the law were made to language minority groups. Please provide a copy of any such announcement and an English translation, and describe the method by which the announcement was conveyed to each language minority group.

6. Please provide an explanation of state programs or procedures to enable members of applicable language minority groups to participate effectively in all aspects of the electoral process. At a minimum, please include information for each area of voting-connected activity listed below, and indicate how far in advance of any relevant deadline or scheduled election the information is provided both in English and in the applicable minority languages. Where appropriate, please distinguish between primary and general elections. Also indicate the date that any

bilingual program or procedure was initially instituted or implemented, and, if relevant, the date when any program or procedure was discontinued, along with the rationale for such discontinuance.

a) Describe the manner in which both English-speaking and non-English-speaking persons are informed of the requirements and procedures for registering to vote and for conducting voter registration drives, and describe how such persons are informed of the location and hours of operation at registration locations.

b) Describe the bilingual assistance that is offered in the voter registration process.

c) Describe the manner in which both English-speaking and non-English-speaking electors are informed of the location of polling places and of election district boundaries, as well as of any changes in locations or realignment of districts.

d) Describe the manner in which both English-speaking and non-English-speaking electors are informed of the requirements and procedures to qualify as a candidate for public office, both by political party and as an independent.

e) Describe the manner in which, prior to an election, both English-speaking and non-English-speaking electors are provided information regarding the contents of the ballot, including the content of referenda or other special provisions or matters.

f) Describe what bilingual announcements are made of election dates and hours of polling.

g) Both prior to an election and at the polls, describe the manner in which both English-speaking and non-English-speaking electors are informed of the procedure for balloting.

h) Describe the manner in which both English-speaking and non-English-speaking electors are informed of the requirements and procedures for designating candidates' poll watchers and the restrictions placed on the use of such watchers.

i) Describe the manner in which both English-speaking and non-English-speaking electors are informed of the procedure for obtaining and casting an absentee ballot.

j) Describe the manner in which both English-speaking and non-English-speaking electors are informed of the qualifications and procedure for receiving assistance in voting, especially bilingual assistance.

k) Describe what bilingual assistance is offered to non-English-speaking voters in the balloting process.

l) Describe the manner in which both English-speaking and non-English-speaking electors are informed of the requirements and procedures for contesting or challenging an election.

7. Please indicate whether the state disseminates information to the electorate regarding the following:

a) requirements and criteria for establishing political parties and any standards such new parties must satisfy in order to place a candidate on the election ballot;

b) requirements for filing candidates' personal financial disclosure statements, campaign financing statements, or similar documents, and the sanctions for non-compliance;

c) regulations regarding paid political advertisements and of restrictions on the use of campaign materials generally or on campaign activities within the vicinity of a polling place, including the use of sample ballots by electors.

If so, please describe the manner in which both English-speaking and non-English-speaking electors are provided such information.

8. Please provide a copy of the English and minority language electoral publications or forms that are provided to the electorate, including (but not limited to) the state's official election handbook or pamphlet containing pictures and statements by candidates regarding their qualifications; voter registration forms; ballots; absentee voting materials, including applications and ballots; and any notices or instructions. Also, please include a tape, along with an English translation, of the oral dissemination of that electoral information in the applicable minority languages.

9. In connection with the Section 4 declaratory judgment action of 1978-79, the United States deposed Margaret Sirilo, an Eskimo and resident of Bethel who had served several years as an election

judge. In her testimony, a copy of which is attached, Mrs. Sirilo stated that her first language was English and that she also spoke Yupik (Upik). Mrs. Sirilo testified that she had provided bilingual assistance – without benefit of any translation supplied by the state – to voters who had difficulty comprehending the English-only ballot. She indicated that translating the ballot into Yupik was difficult even for those election officials who spoke both languages.

We would appreciate your reviewing the deposition and indicating whether you believe that Mrs. Sirilo's account accurately describes the activities and experience of an election judge in providing bilingual assistance. If you disagree with Mrs. Sirilo's statements and observations, please provide the basis for your belief and your source(s) of authority. Please describe the manner in which the state ensures that bilingual voter registrars and election officials are capable of providing appropriate and adequate bilingual assistance in the applicable minority languages.

10. If not provided in your response to item 9 above, please describe any program that the state conducts to train or educate voter registrars, election officials, and other persons regarding bilingual assistance to electors or to persons desiring to participate in the electoral process.

11. It is our understanding that the state has access to the broadcast media or to telecommunications systems for public service programming. Please describe in detail such media or systems, including area of the state that can be reached. If not provided in your response to item number 6, describe what uses the state has made of such media or systems, including use in the electoral process.

12. Indicate whether the state has conducted any studies or surveys regarding the following:

a) the need for providing bilingual information or procedures to electors or persons desiring to participate in the electoral process;

b) the availability of bilingual information or procedures to electors or person desiring to participate in the electoral process; and

c) the use and effectiveness of any bilingual procedures that have been provided.

Please provide a copy of each such study or survey that is identified, along with the following information, if it is not included in the actual publication: the dates, sponsor, and methodology; the portion of the electoral process that was the subject matter; and recommendations made and actions undertaken, as a result of the findings.

13. Other than electoral information, indicate whether the state has provided information to state residents in any Native Alaskan language. Describe the information that is provided in the Native Alaskan languages and explain the reasons for using the language.

14. Describe any persons and groups, whether formally or informally organized, that the state considers to be representative of the interests and concerns of language minority groups, or any of them, especially in electoral matters. Please provide the name of an officer of any group so identified, along with a current address and telephone number.

15. Describe in detail what contact the state has had or maintained with each person or group identi-

fied in item 14 concerning the dissemination of electoral information in the applicable minority languages or concerning the effective participation of such persons in the electoral process.

16. Please describe in detail any constructive efforts by the state to achieve the following:

a) the elimination of voting procedures, including English-only elections, that inhibit equal access by Alaskan Natives to the electoral process;

b) the expansion of opportunities for convenient registration and voting for electors who are Alaskan Natives;

c) the appointment of Alaskan Natives as election officials at every level in the state and at all stages of the registration and election processes.

17. As you are aware, the standards for the state to bailout from coverage under Section 4 apply not only to the state as an entity, but also to all of the subdivisions within the state. Therefore, please identify every jurisdiction in the state that independently conducts elections. For each such jurisdiction, please obtain and provide the information that is requested in items 1-16 above.

18. Please feel free to provide any additional information that you believe to be relevant to this litigation.

As mentioned previously, these inquiries are designed to obtain a complete understanding of the bilingual election program that the state offers. In asking these questions, we have attempted to avoid

being too general and, at the same time, being so specific that you are limited in your responses. We are prepared to discuss these matters with you so that the factual development may proceed promptly. If you have any questions, please contact either Robert S. Berman at 202-724-3100 or Lora L. Tredway at 202-724-3113.

Sincerely,
/s/ Paul F. Hancock
Paul F. Hancock
Assistant for Litigation
Voting Section
Civil Rights Division

Attach.

APPENDIX E

[Seal omitted] U.S. Department of Justice
Civil Rights Division

LLT:sw
DJ 166-6-4

Washington, D.C. 20530

May 23, 1985

Virginia Ragle, Esq.
Assistant Attorney General
State of Alaska
Department of Law, State Capitol
Pouch "K"
Juneau, Alaska 99811

Dear Ms. Ragle:

Enclosed please find the United States's first set of interrogatories directed to the State of Alaska pursuant to Rule 33 of the Federal Rules of Civil Procedure. As you will note, the interrogatories are structured into three parts in order to obtain certain basic information concerning, first, the state; second, each of the state's municipalities; and, finally, each of the state's educational system subdivisions. In each of the three parts, we in essence have repeated the same questions, merely directing them to a different level of government.

The interrogatories request a substantial amount of information, but we believe that all of the information sought is relevant to the factors that must be established to obtain bailout. We recognize that it may be difficult for the state to complete its responses within the thirty-day period provided under

the Federal Rules of Civil Procedure. Therefore, we will agree to a reasonable extension of time in which to complete the answers; any objections should be filed within the thirty-day period. Also, we recognize that it will be necessary to obtain information from the individual municipalities and school districts, and we would have no objection to each such jurisdiction completing a separate response. We do request, however, that a state-level official review any such responses to assure uniformity and completeness.

We would appreciate your reviewing the interrogatories at your earliest convenience and telling us whether such initial review reveals any particular problems. We are willing to cooperate with state officials in obtaining the information, and, if you believe that any interrogatory is unduly burdensome, we will consider suggestions of alternate means of obtaining the information. In sum, we are willing to seek a voluntary resolution of any problems that may arise in answering the interrogatories.

If you have any questions, please feel free to contact me at (202) 724-3113.

Sincerely,
/s/ Lora L. Tredway
Lora L. Tredway
Attorney, Voting Section
Civil Rights Division

cc: Martha Fox, Esq.

APPENDIX F

March 14, 1985

Ms. Maggie Moran
Legislative Assistant to
Senator Ted Stevens
522 Hart Building
Washington, D.C. 20510

Re: *Alaska v. United States*,
No. 84-1362 (D.D.C.)
Voting Rights Act preclearance bailout

Dear Ms. Moran:

You have requested further information concerning the state's action for declaratory judgment to "bail-out" of the preclearance requirements of the Voting Rights Act. That action was filed on May 1, 1984. Every possible effort was made, with the cooperation of Senator Stevens' office and a number of Native organizations throughout the state, to provide the U.S. Department of Justice with the information it needed to consent to judgment. Nevertheless, in its answer filed on July 24, 1984, the department denied that the state had applied no test or device for the purpose or with the effect of denying or abridging the right to vote on account of membership in a language minority group during the 10 years preceding the filing of the action.

On August 5, 1984, new provisions of the Voting Rights Act became effective, which greatly increased the burden that must be met by the state in a bailout action. One of the additional requirements is that

the state must prove that, for the past 10 years, no change in any voting practice or procedure by the state or any of its political subdivisions has been enforced without having first been precleared.

The state has amended its complaint to allege, in one count, compliance with the bailout standards in effect before August 5, 1984, and in a second count, compliance with the bailout standards in effect on and after August 5, 1984. The Department of Justice has moved to dismiss Count I of the complaint. In opposition to that motion we have cited legislative history that indicates that Congress did not intend the new standards to apply to pending actions (*see United States v. Marengo County Commission*, 731 F.2d 1546, 1554 (11th Cir. 1984)), and have argued that application of the new standards to this action would be manifestly unjust.

If the court grants the Department of Justice's motion to dismiss, the state will have to prove the facts necessary to entitle it to bailout under the new standards. This we cannot do. The Department of Justice is well aware that, last year, the state "enforced" the repeal of the statute providing for a presidential primary election before receiving the preclearance letter from the Department of Justice.

When the Department of Justice refused to consent to judgment last year, we requested that Senator Stevens explore the possibility of a legislative solution. The solution that seemed least disruptive of the Voting Rights Act was an amendment clarifying that the standards in effect on the date of filing would be applied in determining a bailout action. This amendment would affect only the State of Alaska, since no other bailout action was pending on August

5, 1984. The governor has renewed the request for this amendment.

In July, we sent Senator Stevens a copy of the three volume report and appendices we provided to the Department of Justice in support of the action. Enclosed for your further information, are copies of the state's second amended complaint, the Department of Justice's motion to dismiss Count I and the state's opposition to the motion to dismiss.

Please do not hesitate to call if we can provide you with any further information concerning this action.

Very truly yours,

NORMAN C. GORSUCH
ATTORNEY GENERAL

By:

Virginia B. Ragle
Assistant Attorney General

VBR/pjg