

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA

Nick, et al.

Plaintiffs,

vs.

Bethel, et al.

Defendants.

Case No. 3:07-cv-0098 TMB

**ORDER**

**Re: Bethel Defendants' Motion to Strike,  
Plaintiffs' Motion to Seal and for In Camera  
Review, and Bethel Defendants' Motion for  
Summary Judgment**

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**I. MOTIONS PRESENTED**

This action involves allegations that the city of Bethel, Alaska and Lori Strickler, the municipal clerk of Bethel, (the "Bethel Defendants"), along with the state of Alaska and a number of state officials, have violated provisions of the Voting Rights Act of 1965 ("VRA") that require them to provide language assistance to Yup'ik-speaking voters in the Bethel census area. The Plaintiffs also allege that the Bethel Defendants violated provisions of the VRA that permit blind, disabled or illiterate voters to bring an assistant of their choice into the voting booth, and that require the city of Bethel to obtain "preclearance" before altering previously approved election procedures related to language assistance.

This order addresses the following motions, which have been fully briefed and are ripe

for review: the Bethel Defendants' motion for summary judgment<sup>1</sup> against Plaintiffs Billy McCann and Arthur Nelson (the only Plaintiffs asserting claims against the Bethel Defendants);<sup>2</sup> the Bethel Defendants' motion to strike a witness certificate that lists proposed corrections to McCann's deposition testimony;<sup>3</sup> and the Plaintiffs' related motion to file a document under seal and for *in camera* review of materials related to the dispute over the McCann deposition.<sup>4</sup>

Because the Court finds that McCann and Nelson have established standing and that genuine issues of material fact exist as to those claims, the Court DENIES the Bethel Defendants' motion for summary judgment. The Court also DENIES the Bethel Defendants' motion to strike, and DENIES as moot the Plaintiffs' motion to file under seal.

## II. BACKGROUND

The Plaintiffs initiated this action on June 11, 2007. Their original complaint asserted two causes of action against the Defendants: 1) violation of the bilingual election requirements under sections 4(f)(4) and 203 of the VRA, and 2) violation of the voter-assistance requirement under section 208 of the VRA. The Plaintiffs later filed a motion to convene a three-judge court to hear their claims under section 203, which this Court denied.

On May 19, 2008, the Court granted the Plaintiffs' motion to amend their complaint,

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<sup>1</sup> Dkt. 127.

<sup>2</sup> A number of other Plaintiffs assert the same claims against the state of Alaska and three state officials: Sean Parnell, lieutenant governor; Whitney Brewster, director of the Division of Elections, and Becka Baker, elections supervisor of the Nome Regional Elections Office. This order addresses only the motions involving the Bethel Defendants and Plaintiffs McCann and Nelson.

<sup>3</sup> Dkt. 118.

<sup>4</sup> Dkt. 152.

allowing the addition of Plaintiff Arthur Nelson, four tribal councils as Plaintiffs, and the section 5 claim requiring the appointment of a three-judge panel. The First Amended Complaint asserts the following causes of action against both sets of Defendants: 1) violation of the minority language assistance requirements found in sections 4(f)(4), 42 U.S.C. § 1973b(f)(4) and section 203 of the VRA, 42 U.S.C. § 1973aa-1a; 2) violation of section 208 of the VRA, 42 U.S.C. § 1973aa-6; and 3) violation of the “preclearance” requirements under section 5, 42 U.S.C. § 1973c. The Plaintiffs seek declaratory relief related to allegedly illegal past conduct, and an injunction for future elections in the form of a court-ordered “remedial plan” aimed at ensuring compliance with the relevant VRA provisions. On June 6, 2008, a three-judge panel was appointed, in accordance with 42 U.S.C. § 1973c and 28 U.S.C. § 2284, to hear the section 5 claim. The panel includes: the Hon. M. Margaret McKeown, the Hon. Timothy M. Burgess, and the Hon. James K. Singleton.

The requirements of sections 4(f)(4) and 203 are essentially identical. They bar covered jurisdictions from providing English-only voting instructions and materials in any public election; all “voting materials” provided in English must also be provided in each language triggering coverage under the VRA. Specifically, the provisions direct that whenever a State or political subdivision “provides any voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, it shall provide them in the language of the applicable minority group as well as in the English language . . . ”

However, both sections also include the following exemption:

*Provided, That where the language of the applicable minority group is oral or unwritten or in the case of Alaskan Natives and American Indians, if the predominant language is historically unwritten, the State or political subdivision*

is only required to furnish oral instructions, assistance, or other information relating to registration and voting.<sup>5</sup>

The object of these provisions is to allow “members of applicable language minority groups to participate effectively in the electoral process.”<sup>6</sup> Compliance is measured by two standards: (1) whether materials are provided in a such a way that voters from applicable language groups are “effectively informed of and participate effectively in voting-connected activities” and (2) whether a covered jurisdiction has taken “all reasonable steps to achieve that goal.”<sup>7</sup>

It is undisputed that the state of Alaska is a “covered jurisdiction” under section 4(f)(4) for Alaska Natives, and that the Bethel census area, which includes the city of Bethel, is covered under section 203 for Alaska Natives and the Yup’ik language. Plaintiffs McCann and Nelson both live in Bethel and are Alaska Native registered voters, whose first language is Yup’ik and who primarily speak Yup’ik. In addition, both men have less than a high school education; McCann left school after the fourth grade, and Nelson after the third grade.

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<sup>5</sup> 42 U.S.C. §§ 1973b(f)(4) and 1973aa-1a(c) (emphasis added).

<sup>6</sup> 28 C.F.R. §55.2.

<sup>7</sup> *Id.*

### III. DISCUSSION

#### A. The Summary Judgment Motion<sup>8</sup>

The Bethel Defendants have moved for summary judgment on all claims against McCann and Nelson, relying on three alternative grounds.<sup>9</sup> First, they contend that McCann and Nelson<sup>10</sup> lack standing and, thus, the Court does not have jurisdiction to hear their claims. Second, they argue that any claims against the city are barred by a two-year statute of limitations borrowed from Alaska state law. Third, they assert that the undisputed evidence demonstrates that the municipality has complied fully with the VRA requirements at issue in this lawsuit. Because

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<sup>8</sup> Summary judgment is appropriate under Rule 56(c) where the moving party demonstrates the absence of a genuine issue of material fact and entitlement to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A dispute about a material fact is genuine if “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A party seeking summary judgment always bears the initial burden of establishing the absence of a genuine issue of material fact. If the moving party fails to discharge this initial burden, summary judgment must be denied and the court need not consider the nonmoving party’s evidence. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159-60 (1970). When making this determination, the court must view all inferences drawn from the underlying facts in the light most favorable to the nonmoving party. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

<sup>9</sup> The Bethel Defendants’ assert that they are moving for summary judgment on “all claims,” but their arguments focus solely on the claims brought under sections 4(f)(4), 203, and 208 of the VRA and do not specifically discuss the section 5 claim. Because the section 5 claim is not adequately briefed and, more importantly, falls under the jurisdiction of the three-judge panel, that claim is not addressed in this order.

<sup>10</sup> Although the Bethel Defendants’ summary judgment motion was filed before the Plaintiffs’ First Amended Complaint, which added Nelson as a plaintiff, the issue of Nelson’s standing has been briefed by both parties and was the subject of oral argument on June 11, 2008. Plaintiffs asserted Nelson’s right to bring his claims against the Bethel Defendants in their response brief, and the Defendants argued against standing in their reply brief.

standing is a threshold requirement,<sup>11</sup> the Court examines this issue first.

### 1. Standing

Under Article III of the United States Constitution, the jurisdiction of federal courts is limited to “cases” and “controversies.”<sup>12</sup> The standing inquiry has two components: the elements required to satisfy the constitutional case-and-controversy requirements, and court-crafted prudential limits. As to the former, the Supreme Court has “established that the irreducible constitutional minimum of standing contains three elements.”<sup>13</sup> First, the plaintiff must have suffered an “injury in fact” – “an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, and not conjectural or hypothetical.”<sup>14</sup> Second, a causal connection must exist between “the injury and the conduct complained of – the injury has to be ‘fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.’”<sup>15</sup> And third, it must be “‘likely,’ as opposed to merely ‘speculative,’ that the injury will be ‘redressed by a favorable decision.’”<sup>16</sup> Beyond constitutional standing, prudential limits require a plaintiff to assert his own legal rights and interests, rather than basing his claim on the legal interests or rights of third parties.<sup>17</sup>

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<sup>11</sup> *See Warth v. Seldin*, 422 U.S. 490, 498 (1975).

<sup>12</sup> *See* U.S. Const. art. III, § 2, cl. 1.

<sup>13</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)

<sup>14</sup> *Id.* (internal quotations and citations omitted).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 561.

<sup>17</sup> *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 474 (1982).

Prudential limits also require that the plaintiff's complaint fall within the "zone of interests to be protected or regulated by the statute or constitutional guarantee in question," and bar courts from adjudicating "abstract questions" or "generalized grievances."<sup>18</sup>

A party invoking federal jurisdiction has the burden of establishing these elements, and at the summary judgment stage must "provide cognizable evidence of specific facts, not mere allegations."<sup>19</sup> In other words, at the summary judgment stage, a "plaintiff can no longer rest on . . . 'mere allegations,' but must 'set forth' by affidavit or other evidence 'specific facts,' . . . which for purposes of the summary judgment motion will be taken to be true."<sup>20</sup>

The Bethel Defendants contend that McCann and Nelson lack standing because neither plaintiff has provided evidence of a personal and concrete injury caused by the Bethel Defendants that is likely to be redressed by the Court. The problem, as they see it, is that neither Plaintiff has presented evidence of a specific injury connected to an election run by the city. Rather, they contend, the plaintiffs have asserted only general harms that lack the specificity needed to establish a concrete injury and thus constitutional standing. The exception to this lack of specificity, they note, is McCann's assertion of injury in connection with an election held in November 2006. But that election was a general statewide election managed by state officials, and not the municipality. "Consequently," their brief states, "even if Mr. McCann were injured by events surrounding the November 2006 election, such injury was not caused by the Bethel Defendants." Moreover, they contend that McCann has failed to meet the third element of

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<sup>18</sup> *Id.*

<sup>19</sup> *Snake River Farmers' Assoc. v. Dep't of Labor*, 9 F.3d 792, 795 (9th Cir. 1993).

<sup>20</sup> *Lujan*, 504 U.S. at 561.

standing – the requirement that the alleged harm be capable of redress by the Court – because the city already provides effective language assistance. In particular, they assert that the city already provides Yup’ik-speaking poll workers to translate for limited-English proficient voters and that the poll workers are permitted to accompany voters into polling booths to provide assistance. They also contend that providing elections materials in written Yup’ik would not redress McCann’s alleged harms, because he admits that he cannot read Yup’ik.<sup>21</sup>

In their reply, the Bethel Defendants argue that Nelson lacks standing for the same reasons. “Like Mr. McCann,” they assert, “Mr. Nelson has not demonstrated a particularized, concrete and personal injury caused and redressable by the Bethel defendants.”<sup>22</sup> As with McCann, the Defendants’ argument focuses on the lack of evidence connecting the voting difficulties experienced by Nelson to any city-run election or conduct by city officials.

The Court respectfully disagrees. While the Bethel Defendants are correct that the Plaintiffs must meet the constitutional requirements of standing – and not merely the prudential principles as the Plaintiffs suggest – the Defendants interpret the rules on standing too narrowly, and make too much of the fact that neither Nelson nor McCann can recall having difficulties voting in a particular municipal election. The Defendants also ignore the fact that the Plaintiffs are seeking not just declaratory relief for past harms, but also injunctive relief to prevent future injuries. That injunctive relief is being sought is clear from the First Amended Complaint, which asserts that “[u]nless enjoined and monitored by this Court, State Defendants will continue to violate sections 4(f)(4) and 203 . . .” and that “[u]nless enjoined by this Court, Bethel Defendants

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<sup>21</sup> Dkt. 127, Defs.’ Mot. for Summ. J. at 11.

<sup>22</sup> Dkt. 217, Defs.’ Reply Br. at 3.

will continue to violate section 208 . . . ”<sup>23</sup> The request for injunctive relief is important because it requires Plaintiffs to demonstrate the likelihood of a *future* injury, or, as the court in *Newman v. Voinovich* stated, to establish that the plaintiff “personally faces a realistic, immediate, and non-speculative threat of being *prospectively subjected to or harmed* by the particular conduct at issue.”<sup>24</sup> In other words, a Plaintiff can establish standing by showing the likelihood of future harm, as long as the future injury is concrete and immediate.<sup>25</sup>

Here, McCann and Nelson have met this burden by demonstrating that they are likely to be harmed in a future Bethel-run election through statements about their past voting habits and the recurring problems they have experienced as illiterate Yup’ik speakers. For example, McCann’s declaration states: “I am a registered voter for non-tribal elections and have been for as long as I can remember. I would not say that I have voted in every non-tribal election, because I cannot remember them all. I try to vote whenever there is a non-tribal election.”<sup>26</sup> Similarly, Nelson’s declaration asserts: “I have voted in city elections before, such as for mayor and the

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<sup>23</sup> Dkt. 201, First Am. Compl. at 21, 23.

<sup>24</sup> *Newman v. Voinovich*, 789 F.Supp. 1410, 1415 (S.D. Ohio, 1992) (citing *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) (emphasis added).

<sup>25</sup> See, e.g., *Nevada v. Burford*, 918 F.2d 854, 856 (9th Cir. 1990) (“To satisfy the first of these [constitutional standing] requirements, Nevada must show that it has been *or will in fact be perceptibly harmed* . . . ”) (emphasis added); see also *Snake River Farmers’ Assoc., Inc. v. Dep’t of Labor*, 9 F.3d 792, 795-96 (9th Cir. 1993) (holding that farm worker lacked standing to challenge the government’s approval of wage schedules for wheel-line and four-inch hand-lines in two particular counties because his evidence failed to “establish that he has worked *or will work*” in either county”) (emphasis added).

<sup>26</sup> Dkt. 89, Decl. of Billy McCann, ¶ 9.

alcohol question.”<sup>27</sup> He also states: “I always try to vote, but sometimes I forget.”<sup>28</sup> These statements give rise to an inference that McCann and Nelson have voted in past municipal elections, and are likely to do so in the future. Both plaintiffs also describe recurring problems in reading ballots written in English and obtaining adequate translations from Yup’ik-speaking poll workers. McCann and Nelson assert that these problems have left them feeling confused and unable to make informed choices when voting. This is illustrated by the following excerpts from McCann’s declaration:

10. Voting in non-tribal elections in Bethel is difficult for me because almost everything is only in English. The voter registration forms are only in English. The signs in the polling place are only in English. The voting instructions are only in English. The ballot and all the information about the ballot measures are only in English.

11. There are usually no Yup’ik speakers working at my polling place for non-tribal elections in Bethel who can translate the ballot for me. I am not able to . . . fully understand the English ballot on my own.

12. Everything in non-tribal elections in Bethel is written in English so I do not understand what the ballot says and can’t choose for myself what to vote for. Sometimes I recognize the proper names of candidates, and so sometimes I can vote for one of them, but I almost never understand the initiatives, what I call the “yes-no questions.” . . .

24. I would like to bring someone with me into the booth, but no one has ever told me that I am allowed to do that. I recall being told at the polls at least once by a poll person that for non-tribal elections my vote had to be private and that I had to go into the voting booth or tent alone. No one ever told me, and there have not been any signs that I saw and could understand, that said for non-tribal elections I was allowed to bring anyone I wanted to help me vote.<sup>29</sup>

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<sup>27</sup> Dkt. 169, Decl. of Arthur Nelson, ¶ 6.

<sup>28</sup> *Id.* at ¶ 12.

<sup>29</sup> Dkt. 89, Decl. of Billy McCann.

These statements suggest that McCann has been harmed, on more than one occasion, by the lack of effective translators, the lack of election-related materials in Yup'ik, and the lack of assistance with the actual voting process in municipal and state elections. Coupled with McCann's declaration that he tries "to vote whenever there is a non-tribal election," these statements also support an inference that McCann is likely to be harmed by the Bethel Defendants' allegedly illegal conduct in a future municipal election. That a city-run election is scheduled for October 7, 2008 makes the threat of harm imminent. Therefore, despite McCann's inability to tie his difficulties in voting to a particular municipal election, he has established that he "personally faces a realistic, immediate, and non-speculative threat of being prospectively subjected to or harmed by the particular conduct at issue"<sup>30</sup> – that is, the conduct by the Bethel Defendants with regard to the VRA's language assistance requirements and section 208's guarantee of a right to voting assistance in the polling booth for illiterate voters. Finally, McCann's threatened injuries are likely to be redressed by the relief requested, because he seeks broad injunctive relief in the form of a "remedial plan" "to ensure that Alaska Native language-speaking voters with limited English proficiency are able to understand, learn of, and participate in all phases of the electoral process as required by the Bilingual Election Requirements" of sections 4(f)(4), 203 and 208.<sup>31</sup>

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<sup>30</sup> *Newman*, 789 F.Supp. at 1415.

<sup>31</sup> The Bethel Defendants argue that McCann's allegations fail to meet the third element of standing because they already provide the relief he seeks in the form of Yup'ik-speaking poll workers who are trained on the voter-assistance requirements of section 208. They further assert that "[a]n injunction and remedial plan instructing the same course of action would be duplicative." Dkt. 127, Def.'s Mot. for Summ. J. at 11. However, as discussed in section III.A.3 of this order, the Plaintiffs have raised issues of material fact as to whether the Bethel Defendants actually provide such relief. Therefore, it would be inappropriate for the Court to deny standing on this basis.

Likewise, Nelson’s declaration, brief as it is, supports an inference that he, too, is likely to suffer an “injury in fact” in a future municipal election based on his statements about the lack of Yup’ik-speaking translators available during past elections and, more significantly, the lack of clarity and completeness of the translations provided when translators were available. In particular, Nelson’s declaration states:

10. When I go vote, I tell the poll worker I need help and when there is a translator there, they give me a short summary of the ballot questions at the table. Then I go to the booth alone and I put an “X” next to the questions for which I can remember what the translator said. Sometimes I forgot which explanation the translator gave me at the table goes with which ballot question, so I have to go back to the table and ask again. They give me a summary again and I go back to the booth alone. I have to go back and forth like that when I vote.

11. I do not fully understand what is on the ballot, or that I always understand what I am voting for. It can be very confusing.<sup>32</sup>

While Nelson does indicate that translators have been provided at elections “only recently,” this does not assure that adequate translations will be provided at future municipal elections. As with McCann, Nelson’s assertion that he has voted in past city elections coupled with his statements about the lack of translators and the quality of translations provided, supports an inference that he will experience a concrete, particularized injury in a future municipal election. However, Nelson’s “injury in fact” does not extend – as McCann’s does – to his claim that the Bethel Defendants have violated section 208 of the VRA, because Nelson has offered no evidence that he has been denied the right to have a person of his choice assist him in the voting booth.

In arguing that McCann and Nelson lack standing because they have not presented evidence linking their injuries to a particular municipal election, the Bethel Defendants rely on

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<sup>32</sup> Dkt. 169, Decl. of Arthur Nelson.

several cases in which courts have denied standing because the asserted injuries were found to be too general, speculative, hypothetical, or simply nonexistent. These cases are distinguishable from the instant case. For example, the Bethel Defendants cite *Snake River Farmers' Assoc. v. Dep't of Labor*, for the proposition that “[a]llegations of general harm, including the failure to recall any specific harm, is insufficient to satisfy the jurisdictional standing requirement.”<sup>33</sup> They point in particular, to the Ninth Circuit’s conclusion that plaintiff Filemon Ballesteros, Jr. lacked standing for his claims challenging government-approved wages rates for moving certain types of irrigation lines in two particular counties because he had never moved those types of lines and had failed to offer evidence establishing “that he has worked or will work” in the two counties.<sup>34</sup>

The Ninth Circuit stated:

Ballesteros argues that he could have been transferred to or hired in the counties at issue or for the work at issue at some future time, and that lower pay for different work in different places might have affected his pay. The possibility that Ballesteros might obtain work of the kinds at issue is a “some day intention,” which, as *Lujan* holds, lacks the concreteness of an actual or imminent injury.<sup>35</sup>

In other words, the Ninth Circuit found it no more likely than not that Ballesteros had engaged in the work for which he challenged the wage rates.

In the instant case, it would be elevating form over function to conclude that McCann lacks standing simply because he has identified a *range* of elections – rather than a single specific election – in which he was allegedly denied the rights due under the VRA. McCann’s affidavit establishes that he is a 78-year-old man who has been a registered voter as long as he can remember and

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<sup>33</sup> Dkt. 127, Defs.’ Mot. for Summ. J. at 8.

<sup>34</sup> *Snake River Farmers' Assoc., Inc. v. Dep't of Labor*, 9 F.3d 792, 796 (9th Cir. 1993).

<sup>35</sup> *Id.*

who “tr[ies] to vote whenever there is a non-tribal election.” To adopt the Defendants’ view, the Court would have to conclude that an individual who has voted faithfully for decades has somehow failed during that time to vote in even a single Bethel-run election. This interpretation strains credulity. Far from the situation in *Snake River* – in which the facts failed to show that any violation was more likely than not – here, the facts suggest that McCann has voted in at least one (if not many) Bethel elections. What the affidavit lacks is simply an explicit sentence tying together what the other statements make clear in combination.

The Bethel Defendants also rely on *Segue v. Louisiana*, an unpublished decision from a district court in Louisiana.<sup>36</sup> This case, too, is distinguishable. In *Segue*, the district court granted the defendants’ motion for summary judgment after finding that the plaintiffs lacked standing. The *Segue* plaintiffs had sued to enjoin the state from implementing a particular step in its voter registration cancellation procedure, for which they claimed the state never received proper preclearance under section 5 of the VRA. The only named plaintiff, Segue, alleged in her complaint that she had been dropped from Louisiana’s voter registration rolls, making her ineligible to vote in the state. But the state presented evidence that, in fact, Segue remained a registered voter and had never been removed from the Louisiana’s voter registration rolls. Based on this evidence, the court found that neither Segue, nor any unnamed plaintiff, had suffered an “actual, particularized, and concrete injury in fact.”<sup>37</sup> By contrast, McCann and Nelson’s harm is not just based on some fixed event in the past; rather, they have presented specific evidence, based on their past experiences, that they are likely to be harmed by the alleged lack of effective

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<sup>36</sup> *Segue v. Louisiana*, 2007 WL 2900207 (E.D. La., 2007).

<sup>37</sup> *Id.* at \*4.

bilingual assistance in city-run elections.

In sum, McCann's statement that he votes in almost all non-tribal elections and Nelson's statement that he has voted in past city elections, give rise to a reasonable implication that they have participated in at least one, if not more, of the Bethel city elections and are likely to do so again in the future. Therefore, while the Court makes no determination on the merits of the Plaintiffs' claims, it finds that McCann has established standing for his claims under sections 4(f)(4), 203 and 208 under the VRA, and that Nelson has established standing under sections 4(f)(4) and 203, but not section 208.

## **2. Statute of Limitations**

The Bethel Defendants also assert that they are entitled to summary judgment because the plaintiffs' claims are time-barred under a two-year statute of limitations on personal injury claims borrowed from Alaska state law. Applying that limitations period to this action, which was filed on June 11, 2007, they reason that any injury alleged by McCann or Nelson must have accrued on or after June 11, 2005. And because neither McCann nor Nelson has established an injury in connection with a specific Bethel-run election during that time period, they argue, the statute of limitations bars their claims.

The Court rejects this argument. As their First Amended Complaint makes clear, the Plaintiffs are seeking a court-ordered remedial plan to ensure effective language assistance and requiring the city to provide language assistance to Yup'ik-speaking voters in the Bethel census. And while relief is being sought on the basis of past conduct, the relief sought is primarily prospective. Accordingly, the Court finds the limitations defense does not apply.

### 3. Bethel's Arguments on the Merits

Finally, the Bethel Defendants argue that they are entitled to summary judgment on the merits. They claim that the undisputed facts show that they have complied fully with the VRA by providing oral assistance to Yup'ik-speaking voters, and because written assistance is not required under the Act. The Court has addressed written assistance in its companion order on the State Defendants' motion for partial summary judgment,<sup>38</sup> which finds that Yup'ik is a "historically unwritten" language and, thus, exempt from the written assistance requirements of sections 4(f)(4) and 203.

With regard to oral language assistance, the Bethel Defendants assert that they fulfill the requirements of sections 4(f)(4) and 203 by: distributing election-related notices to the local radio station, KYUK, which then broadcasts them in English and Yup'ik; providing Yup'ik-speaking poll workers at every precinct on election day to translate instructions or ballots, review procedures, and "assist voters in any way needed;" and training poll workers on methods of providing language assistance to Yup'ik voters. They assert, too, that poll workers are trained on "Bethel's policy that voters may be assisted and accompanied into the voting booth by a person of the voter's choice."<sup>39</sup> The Defendants also contend that the allegations of McCann and Nelson are insufficient to establish that the municipality provides ineffective minority language assistance. In addition, they offer affirmative evidence of compliance in the form of declarations from a former municipal clerk's declaration stating that she never received a complaint regarding the adequacy or accuracy of the assistance provided to Yup'ik speaking voters, and similar

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<sup>38</sup> Dkt. 136.

<sup>39</sup> Dkt. 127, Bethel Defs.' Mot. for Summ. J. at 14.

declarations attesting to the lack of complaints about the announcements broadcast on KYUK and the lack of complaints made to poll workers.

Plaintiffs respond with evidence that raises issues of material fact as to whether this assistance is actually effective. Their evidence includes: statements by a former city clerk indicating that the city is not involved in – and does not keep records related to – the translation of election-related public service announcements (PSAs) into Yup'ik, but instead leaves this task to a radio station employee; McCann's statement that "[t]here are usually no Yup'ik speakers working at my polling place for non-tribal elections in Bethel who can translate the ballot for me;" statements by the former city clerk indicating that the city does not take steps to confirm the level of fluency in Yup'ik and English of bilingual poll workers, and that poll worker training is optional, rather than mandatory; McCann's statement that he was told "at least once by a poll person that for non-tribal elections my vote had to be private and that I had to go into the voting booth or tent alone" and that "No one has ever told me, and there have not been any signs that I saw and could understand, that said for non-tribal elections I was allowed to bring anyone I wanted to help me vote;" statements by the former clerk that between June 2005 and December 2007, she had observed language assistance being provided at only one of three polling places in Bethel.

This evidence raises genuine issues of material fact as to the city's compliance with the requirement of sections 4(f)(4) and 203 that the municipality "furnish oral instructions, assistance, or other information relating to registration and voting" in "the language of the applicable minority group as well as in the English language," and with section 208's guarantee of voting assistance for blind, disabled or illiterate persons.

Therefore, the Court denies the Bethel Defendants' motion for summary judgment, because they have failed to establish that McCann and Nelson lack standing, that their claims are time-barred, or that there is an absence of factual issues as to the city's compliance with the VRA.

### **B. The Motion to Strike**

Rule 30(e) of the Federal Rules of Civil Procedure permits a witness to review a deposition transcript and make changes "in form or substance" within thirty days of being notified by the court reporter that the transcript is ready for review. The rule also requires that the deponent sign a statement setting forth the reasons for each change.

In moving to strike McCann's witness certificate, the Bethel Defendants argue that his proposed changes to his deposition testimony should be stricken or disregarded because they were untimely and impermissibly altered the substance of his testimony.<sup>40</sup>

While FRCP 30(e) gives a party 30 days to submit an errata sheet to a deposition transcript, the parties in this case agreed to extend the review period to 40 days at the Plaintiffs' request. The transcript of McCann's deposition was first circulated to the parties via email on November 27, 2007,<sup>41</sup> giving McCann until January 7, 2008 to file an errata sheet. The court reporter also sent a hard copy of the transcript to Plaintiffs' counsel and requested that McCann sign the witness certificate page and return it within 40 days.<sup>42</sup> On January 7, 2008, Plaintiffs

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<sup>40</sup> A district court's grant of a motion to strike is reviewed for an abuse of discretion. *Hambleton Brothers Lumber Co. v. Balkin Enterprises, Inc.*, 397 F.3d 1217, 1224 n.4 (9th Cir. 2005).

<sup>41</sup> Dkt. 120 at 3.

<sup>42</sup> *Id.*

served the witness certificate on Defendants’ counsel. But they neglected to file a copy of the witness certificate with the court reporter, who issued the official transcript on February 5, 2008 without the witness certificate.<sup>43</sup> Plaintiffs’ counsel eventually filed the witness certificate with the court reporter, who sent it to the Bethel Defendants’ counsel on February 22, 2008.<sup>44</sup>

Because the Defendants received McCann’s witness certificate on January 7, 2008, the deadline for the submission of proposed changes, they knew of the proposed changes and were not prejudiced by the late filing with the court reporter. In addition, the Court finds no evidence in the record of “tactical timing” – that is, the filing of an errata sheet to create issues of fact in response to a summary judgment filing – because the Plaintiffs sent the witness certificate to the Defendants before the State had filed its first motion for summary judgment, in which the Bethel Defendants joined.<sup>45</sup> Given this lack of prejudice, the Court declines to strike McCann’s witness certificate on the ground of untimeliness. The Court also rejects the Bethel Defendants’ argument that the certificate was improperly filed because it was not notarized. The plain language of FRCP 30(e) requires only that the statement setting forth proposed changes be “signed.”

Alternatively, the Bethel Defendants argue that McCann’s witness certificate should be stricken for failing to adequately explain the reasons for the proposed changes and because a number of the proposed changes would substantively alter his testimony on material issues in this case. As noted above, FRCP 30(e) requires a party or deponent wishing to make changes “in

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> The State Defendants filed their first motion for summary judgment on February 27, 2008 and the Bethel Defendants filed their “Joinder in and Response to State Defendants’ Motion for Summary Judgment” on March 17, 2008. *See* Dkt. Nos. 75 and 81.

form or substance” to a deposition transcript to submit a signed statement listing the “reasons for making them.” This statement is important because it “permits an assessment concerning whether the alterations have a legitimate purpose.”<sup>46</sup> In applying the so-called “sham affidavit” rule to depositions, the Ninth Circuit has stated that “[w]hile the language of FRCP 30(e) permits corrections ‘in form or substance,’ this permission does not properly include changes offered solely to create a material factual dispute in a tactical attempt to evade an unfavorable summary judgment.”<sup>47</sup> To introduce and explain his proposed changes, McCann’s witness certificate states:

I hereby certify that I have reviewed the recording of the deposition and the transcript with the assistance of counsel and a translator, and accept is as true and correct, with the following exceptions which are almost all the result of sometimes imprecise translations.

In a June 24, 2008 order, the Court found this justification to be inadequate and ordered the Plaintiffs to submit additional briefing explaining the reason for each of their proposed “exceptions.” On June 26, 2008, the Plaintiffs submitted a 10-page brief setting forth detailed explanations of the purported problems in the translation of questions and answers from English into Yup’ik and Yup’ik into English during the deposition. The supplemental brief also notes that the transcript includes a number of statements by the translator that reflect her own opinions and observations, rather than statements by McCann.<sup>48</sup>

The Bethel Defendants focus their objections on proposed changes related to McCann’s statements about an election in 2006 and on whether Yup’ik was historically an oral language.

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<sup>46</sup> *Hambleton Bros. Lumber Co. v. Balkin Enterprises*, 397 F.3d 1217, 1224-25 (9th Cir. 1991).

<sup>47</sup> *Id.* at 1225 (quoting *Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262, 266 (9th Cir. 1991)).

<sup>48</sup> Dkt. 282, Pl.’s Suppl. Br., ¶ 2.

They suggest that the changes are akin to those barred in *Hambleton Brothers Lumber Co. v. Balkin Enterprises*, in which the Ninth Circuit affirmed the district court’s refusal to permit corrections that appeared to be “purposeful rewrites” aimed at manufacturing factual issues to avoid summary judgment.<sup>49</sup>

The Court disagrees with this characterization. Rather than directly contradicting the deposition transcript, McCann’s corrections seek to explain why some of his answers do not appear to respond to the precise question asked and why he grew frustrated with what he perceived to be redundant questions. Others seek to amend his answers, but only to make minor changes. For example, McCann was asked: “Is it your understanding that Yup’ik was an oral language until the missionaries came and began to put it into writing?” According to the transcript, he responded: “Yes, that is my understanding, that when the missionaries came, the written language started. Especially the Yup’ik Bible, Yup’ik orthography Bible, all started when the missionaries arrived.” McCann’s witness certificate states: “I did not say ‘all our language was oral.’ ” The deletion of this sentence would not fundamentally change the substance of McCann’s answer, because he stated that he agreed with the questioner’s statement that Yup’ik was an oral language.

While several of McCann’s proposed corrections touch on material issues in this case, they do not amount to the blatant rewrites at issue in *Hambleton Brothers*. The Court thus concludes that the witness certificate should not be barred under the rule against “sham affidavits,” and denies the Bethel Defendant’s motion to strike. Given this determination, the Court also denies as moot the Plaintiffs’ motion to file a response to the motion to strike under

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<sup>49</sup> *Hambleton Bros.*, 397 F.3d at 1225.

seal and request for *in camera* review.

#### **IV. CONCLUSION**

For the reasons discussed above, the Court DENIES the Bethel Defendants' summary judgment motion at Dkt. 127, DENIES the Bethel Defendants' motion to strike at Dkt. 118, and DENIES as moot the Plaintiffs' motion to seal at Dkt. 152.

Dated at Anchorage, Alaska, this 23rd day of July 2008.

/s/ Timothy Burgess  
TIMOTHY M. BURGESS  
UNITED STATES DISTRICT JUDGE