IN THE SUPREME COURT FOR THE STATE OF ALASKA

In Re 2011 REDISTRICTING CASES	Supreme Court No. S-14441

Trial Court Case # 4FA-11-02209CI
Consolidated Cases #4FA-11-2213CI/1JU-11-0782CI

BRIEF OF THE ALEUTIANS EAST BOROUGH AS AMICUS CURIAE

APPEAL FROM THE SUPERIOR COURT FOR THE STATE OF ALASKA,
FOURTH JUDICIAL DISTRICT AT FAIRBANKS
THE HONORABLE MICHAEL P. MCCONAHY, PRESIDING

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ALASKA CONSTITUTION

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The Redistricting Board shall establish the size and area of house districts, subject to the limitations of this article. Each house district shall be formed of contiguous and compact territory containing as nearly as practicable a relatively integrated socio-economic area. Each shall contain a population as near as practicable to the quotient obtained by dividing the population of the state by forty. Each senate district shall be composed as near as practicable of two contiguous house districts. Consideration may be given to local government boundaries. Drainage and other geographic features shall be used in describing boundaries wherever possible.

INTRODUCTION

The Aleutians East Borough ("the Borough"), through its attorneys, WALKER & LEVESQUE, L.L.C., submits this amicus brief pursuant to this Court's Order dated February 10, 2012.

The Borough is a second-class borough organized under the laws of the State of Alaska, incorporated on October 23, 1987. The Aleutians Islands and the Borough have always been united within the same House and Senate District. The Borough is populated by people who share not only a common history, but also similar interests and concerns. As this Court is aware, every ten years a State Redistricting Board ("the Board") is appointed for the purpose of drawing a new legislative reapportionment plan. Therefore, the 2011 plan that is finally approved by this Court will determine the fate of the Aleutian Islands and the Borough for the next decade.

The Borough is primarily concerned with the portions of the Board's plan that fractures the Borough's municipal boundaries by splitting the City of Akutan ("Akutan") from the rest of the Borough, and placing Akutan's residents into House District 37, rather than House District 36, where the rest of the Borough's citizens reside. The Board's action further divides the Borough into two separate Senate districts, with the majority of the Borough in Senate District 36-R, while Akutan is placed within Senate District 37-S.

However, the Borough is also deeply concerned with the Board's decision to split the Aleutian Islands into two districts. This is not the first time that this Court has had

occasion to review a redistricting plan seeking to break up the Aleutian chain. In *Hickel v. Southeast Conference*,[1] this Court held that a redistricting plan that sought to split the Aleutian Islands into two districts "[o]n its face . . . violates the contiguous territory requirement of article VI, section six of the Alaska Constitution."[2] This Court further explained:

> Although the parties did not raise this issue, the separation of the Aleutian Islands is so plainly erroneous that we address the issue *sua sponte*. Thus, in exercise of our authority under article IV, section two of the Alaska Constitution, we hold that the separation of the Aleutian Islands into two districts violates article VI, section six of the Alaska Constitution.[3]

The Borough submits this amicus brief because it is convinced that the Board's action was in contravention of the Alaska Constitution's requirement that "[e]ach house district shall be formed of contiguous and compact territory containing as nearly as practicable a relatively integrated socio-economic area."[4] The testimony at trial proved that the Board's Proclamation Plan does not comprise the only plan that would satisfy the Voting Rights Act.[5]

But more importantly, the Borough submits this brief in the true spirit of an amicus curiae, with the purpose of explaining to the Court the Borough's sincere belief that the Board's unconstitutional Proclamation Plan was the direct result of its failure to adopt and execute the specific methodology that this Court outlined in *Hickel* for the

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[1] 846 P.2d 38 (Alaska 1992).
[2] *Id.*, at 54.
[3] *Id.*
[4] Alaska Const. art. VI, § 6.
[5] Ex. J-31; Defendant's Ex. W and Plaintiff's Ex.14 (showing that the PAME, TB, and Modified Rights Plan #2 were not retrogressive).

drawing of reapportionment plans. The Borough also wishes to provide this Court with additional insight as to why the *Hickel* plan remains the best and most practical way of ensuring that the requirements of the Alaska Constitution are given the maximum effect possible, and that no unnecessary measure of the State's interest in choosing a method for ensuring that the rights of its citizens are protected are subordinated to other federal mandates.

STANDARD OF REVIEW

This Court reviews reapportionment plans promulgated by the Board as it would any other regulation adopted by state administrative agencies pursuant to Legislative delegation.[6] Consequently, this Court will first review whether the Board has exceeded the power that was delegated to it.[7] Second, this Court will determine whether the Board's action "is reasonable and not arbitrary."[8] Third, this Court will "consider whether the regulation conflicts with any other state statutes or constitutional provisions."[9]

Thus, with redistricting plans, this Court "always ha[s] authority to review the constitutionality of the action taken . . . ."[10] "Issues of constitutional interpretation are

[6] *Groh v. Egan*, 526 P.2d 863, 866 (Alaska 1974). *See also Carpenter v. Hammond*, 667 P.2d 1204, 1214 (Alaska 1983); *Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1357-58 (Alaska 1987); *Hickel v. Southeast Conference*, 846 P.2d 38,

[7] *Groh*, 526 P.2d at 866.

[8] *Id.*

[9] *Grunert v. State*, 109 P.3d 924, 929 (Alaska 2005) (quoting *O'Callaghan v. Rue*, 996 P.2d 88, 95 (Alaska 2000).

[10] *Groh*, 526 P.2d at 866.

questions of law which [this Court reviews] de novo."[11] Further, this Court reviews legislative reapportionment plans that deviate from the Alaska Constitution to determine whether those deviations are "necessary or required under the VRA."[12]

ARGUMENT

In Alaska, legislative reapportionment plans are subject to the requirements of the U.S Constitution, the Voting Rights Act, and the Alaska Constitution.[13] Because of the delicate interplay between state and federal law, as well as the challenges presented by Alaska's unique geography and cultural composition, it goes without question that "[r]edistricting in Alaska is a task of 'Herculean proportions.'"[14] The sheer magnitude of the process, coupled with the relatively short time period for submitting a final reapportionment plan, doubtlessly require the Board charged with designing a comprehensive system of election districts to recognize and avoid numerous legal and procedural pitfalls while executing its duties. However, the record below establishes unequivocally that by failing to adopt a process where it began with a plan designed to give effect to the Alaska Constitution, and only then seeking to adapt that plan to meet the requirements of the Voting Rights Act, the Board produced a scheme that

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[11] *Stephanie F. v. George C.*, _ P.3d _ (Alaska 2012), 2012 WL 163904 at *7 (quoting *State v. Alaska Civil Liberties Union*, 978 P.2d 597, 603 (Alaska 1999)).
[12] *Memorandum Decision and Order Re: 2011 Proclamation Plan,* February 3, 2012, at 9 (citing *Hickel v. Southeast Conference*, 846 P.2d 38, 51-52 (Alaska 1992)).
[13] *Hickel*, 846 P.2d at 44.
[14] *In re 2001 Redistricting Cases*, 44 P.3d 141, 146 (Alaska 2002) (quoting *Egan v. Hammond*, 502 P.2d 856, 865-66 (Alaska 1972)). *See also Hickel*, 846 P.2d at 50; *Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1359 (Alaska 1987); *Groh v. Egan*, 526 P.2d 863, 875 (Alaska 1974).

"unnecessarily compromised" and served to minimize the requirements of the Alaska Constitution.[15]

A. The Alaska Constitution.

Article VI, section 6 of the Alaska Constitution provides the following requirements regarding the drawing of state legislative districts:

> The Redistricting Board shall establish the size and area of house districts, subject to the limitations of this article. Each house district shall be formed of contiguous and compact territory containing as nearly as practicable a relatively integrated socio-economic area. Each shall contain a population as near as practicable to the quotient obtained by dividing the population of the state by forty. Each senate district shall be composed as near as practicable of two contiguous house districts. Consideration may be given to local government boundaries. Drainage and other geographic features shall be used in describing boundaries wherever possible.[16]

The Alaska Constitution requires that legislative districts reflect the qualities of compactness, contiguity and relative socio-economic integration.[17] This Court has accordingly pronounced that, "A district lacking any one of these characteristics may not be constitutional under the Alaska Constitution."[18] "The[se] constitutional requirements help to ensure that the election district boundaries fall along natural or logical lines rather than political or other lines," and were put into place so as to "prevent gerrymandering."[19]

"Contiguous territory is territory which is bordering or touching."[20] This Court has recognized that, due to Alaska's unique geographical and topographical

[15] *Hickel*, 846 P.2d at 51 n. 22.
[16] Alaska Const. art. VI, § 6.
[17] *Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1360-61 (Alaska 1987).
[18] *Hickel*, 846 P.2d at 44-45.
[19] *Id.*, at 46.
[20] *Id.*

characteristics "[a]bsolute contiguity of land masses is impossible . . ."[21] Therefore, while Alaska's constitution recognizes that the principle of contiguity cannot always be strictly adhered to when drawing election districts, it provides the additional requirements of compactness and relative socio-economic integration to prevent the adoption of illogically or improperly shaped districts.[22]

This Court has defined the principle of compactness prescribed by the Alaska Constitution as meaning that the election district "'ha[s] a small perimeter in relation to the area encompassed.'"[23] This Court has interpreted the compactness requirement as necessitating against the drawing of election districts that "yield 'bizarre designs.'"[24] In discussing the compactness requirement, this Court has advised that:

> The compactness inquiry thus looks to the shape of a district. Odd-shaped districts may well be the natural result of Alaska's irregular geometry. However, "corridors" of land that extend to include a populated are, but not the less-populated land around it, may run afoul of the compactness requirement. Likewise, appendages attached to otherwise compact areas may violate the requirement of compact districting.[25]

The third requirement prescribed by the Alaska Constitution is that districts must "contain[] as nearly as practicable a relatively integrated socio-economic area."[26] This Court has distinguished the constitutional requirement for relative socio-economic integration from its sister requirements of compactness and contiguity, stating:

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[21] *Id.*
[22] *Hickel*, 846 P.2d at 44-45.
[23] *Id.* (quoting *Carpenter v. Hammond*, 667 P.2d 1204, 1218 (Alaska 1983)).
[24] *Id.* (quoting *Davenport v. Apportionment Comm'n of New Jersey*, 304 A.2d 736, 743 (N.J.Super.Ct.App.Div. 1973)). *See also Carpenter*, 667 P.2d at 1218-19 (Matthews, J., concurring).
[25] *Id.*, at 46.
[26] Alaska Const. art. VI, § 6.

> The requirement of relative socio-economic integration is given some flexibility by the constitution since districts need be integrated only "as nearly as practicable." However, the flexibility that this clause provides should be used only to maximize the other constitutional requirements of contiguity and compactness. The governor is not permitted to diminish the degree of socio-economic integration in order to achieve other policy goals.[27]

This statement makes it clear that, while Alaska's constitution mandates that election districts must reflect the requirements of compactness and contiguity to the greatest extent possible, the requirement of relative socio-economic integration may in some instances be more leniently observed (i.e. "as nearly as practicable"), but only to the extent that the grant of leniency maximizes the other two constitutional requirements.

B. This Court's Decision in *Hickel* Established a Methodology to Ensure that the Board Does Not Improperly Minimize the Requirements of Alaska's Constitution In Favor of the Voting Rights Act.

Despite the fact that this Court has interpreted relative socio-economic integration to be a more flexible standard than its sister requirements of compactness and contiguity,[28] this Court has indicated that, even in relation to that more flexible standard, the Board must strictly guard against the unnecessary elevation of the Voting Rights Act above the Alaska Constitution.[29] In *Hickel v. Southeastern Conference*, this Court addressed, inter alia, whether a proposed district violated the relative socio-economic integration requirement of article VI, section 6 of the Alaska Constitution.[30] There, as here, the Board used the Voting Rights Act, and the Board's asserted desire to create a

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[27] *Hickel*, 846 P.2d at 45.
[28] *Id.*
[29] *Id.*, at 51.
[30] *Id.*, at 50-52.

Native influence district, as justification for the creation of an election district that did "not take into account several local municipal boundaries."[31]

The *Hickel* Court began its analysis by holding that the "awkward reapportionment of the Southeast Native population was not necessary for compliance with the Voting Rights Act."[32] This Court then explained that it was the Board's improper methodology that led to the fact that one of the proposed districts did not pass muster under the Alaska Constitution:

> 22. Our conclusion underscores the error in the Board's methodology in reconciling the requirements of the Voting Rights Act with the requirements of the Alaska Constitution. The Board was advised to expect that any challenges to the reapportionment plan would come under the newly amended section 2 of the Voting Rights Act. Consequently, the Board accorded minority voting strength priority above other factors, including article VI, section 6 of the Alaska Constitution. This methodology resulted in district 3, a district which does not comply with the requirements of the Alaska Constitution. However, proposed district 3 is not required by the Voting Rights Act, either.
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> Article VI, cl. 2 of the United States Constitution provides that "This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land . . . ." This mandates that provisions of state law, including state constitutional law, are void if they conflict with federal law. To the extent that the requirements of article VI, section 6 of the Alaska Constitution are inconsistent with the Voting Rights Act, those requirements must give way. However, to the extent that those requirements are not inconsistent, they must be given effect. *The Voting Rights Act need not be elevated in stature so that the requirements of the Alaska Constitution are unnecessarily compromised. The Board must first design a reapportionment plan based on the requirements of the Alaska Constitution. That plan must then be tested against the Voting Rights Act. A*

[31] *Hickel*, 846 P.2d at 51.
[32] *Id.*

> *reapportionment plan may minimize article VI, section 6 requirements when minimization is the only means available to satisfy Voting Rights Act requirements.*[33]

The *Hickel* Court's decision on this point is notable for a number of reasons. First, it recognized as erroneous a methodology for designing reapportionment plans that seeks to first satisfy the requirements of the Voting Rights Act, and only then attempts to adapt that design to comply with the Alaska Constitution's article VI, section 6 requirements.[34]

Second, the *Hickel* Court prescribed the precise method that the Board must take so as to ensure that the Alaska constitutional principles of contiguity, compactness and relative socio-economic integration are given maximum effect in future redistricting plans. According to that methodology, the Board must begin by designing a plan that meets the requirements of article VI, section 6 of the Alaska Constitution.[35] Once that task has been completed, the Board must then "test" the plan for compliance with the Voting Rights Act.[36] If the original plan does not comply with the requirements of the Voting Rights Act, only then may the Board adopt a plan that minimizes any requirement of the Alaska Constitution, but only if that minimization presents the *only means available* for satisfying federal law.[37]

Third, the apportionment design methodology was established by this Court in response to a challenge relating to the constitutional requirement of relative socio-economic integration–a requirement that this Court has indicated is more flexible than the

[33] *Hickel*, 846 P.2d at 51 n. 22 (emphasis added).
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.*

contiguity and compactness requirements also prescribed by article VI, section 6.[38] It follows that, because this Court has instituted a specific scheme for ensuring the maximization of the principles embodied in Alaska's Constitution, and because this process was developed in response to the improper minimization of the most flexible of the applicable Alaska constitutional requirements, it must surely grant protections to the other two, less flexible constitutional requirements in a measure that is at least equal to that afforded to the principle of socio-economic integration.

Fourth, the *Hickel* case established a test for determining whether the Board's reapportionment plan improperly elevates the role of federal law in Alaska's redistricting process such "that the requirements of the Alaska Constitution are unnecessarily compromised."[39] That test asks a simple question: Whether it is possible to configure the district at issue in a way "which satisfies the requirements of the Voting Rights Act" and which is weighed more in favor of the requirements set forth in article VI, section 6.[40]

C. The *Hickel* Methodology Provides the Best and Most Reasonable Means of Ensuring that the Board Seeks to Maximize the Spirit and Purpose of Article VI, Section 6 of the Alaska Constitution.

The *Hickel* Court began its discussion of Alaska's redistricting process by quoting the proceedings of the Alaska Constitutional Convention, where the framers of article VI,

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[38] *Hickel*, 846 P.2d at 50-52.
[39] *Id.*, at 51.
[40] *Id.* (holding that the redistricting plan's "awkward reapportionment of the Southeast Native population *was not necessary for compliance* with the Voting Rights Act. An "Island District" can be configured which satisfies the requirements of the Voting Rights Act and which is *more compact and better integrated socially*." (emphasis added)).

section 6 explained the principles that underpin the state's concept of legislative reapportionment:

> Now the goal of all apportionment plans is simple: the goal is adequate and true representation by the people in their elected legislature, true, just, and fair representation. And in deciding and in weighing this plan, never lose sight of that goal, and keep it foremost in your mind; and the details that we will present are merely the details of achieving true representation, which, of course, is the very cornerstone of a democratic government.[41]

Article VI, section 6 thus shows that the framers of the reapportionment provisions of the Alaska Constitution concluded that, for Alaska, the best way to ensure adequate, true, fair and just representation is to require that the state's legislative districts reflect the principles of contiguity, compactness, and relative socio-economic integration.[42] This Court's decision in *Hickel* makes it clear that, because a state reapportionment plan must conform to both the Alaska Constitution and federal law, that plan will necessarily fall somewhere within a spectrum of compliance.[43] That is, the reapportionment plan's degree of compliance will weigh more heavily in favor of one set of laws or the other.

Hickel stands for the proposition that, although the Supremacy Clause of the U.S. Constitution requires the Alaska Constitution to yield to the Voting Rights Act whenever they conflict, it should yield only to the degree necessary to correct that inconsistency.[44] To prevent the Board from yielding the requirements of Alaska law to any degree greater

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[41] *Hickel*, 846 P.2d at 44 (quoting 3 Proceedings of the Constitutional Convention (PACC) 1835 (January 11, 1956)).
[42] Alaska Const. art. VI, § 6.
[43] *Hickel*, 846 P.2d at 51.
[44] *Id.*, at 51 n 22 ("A reapportionment plan may minimize article VI, section 6 requirements when minimization *is the only means available to satisfy Voting Rights Act requirements.*").

than that which is "necessary" to correct a conflict between state and federal law, this Court established a precise methodology that was calculated to ensure that the Board never unnecessarily compromises the principles that the framers of the reapportionment process deemed necessary to protect the rights of Alaska's citizens.[45]

An exploration of that methodology demonstrates not only its wisdom, but also the fact that it is the most reasonable, and the only truly effective, means of ensuring that Alaska's constitutional requirements are not subordinated to other federal mandates in any measure that is greater than necessary. The *Hickel* methodology requires the Board to begin its redesign process by drawing election districts that meet the exclusive requirements of Alaska law.[46] In doing so, the Board will have as its benchmark a plan that from its outset is in perfect harmony with the Alaska Constitution, and gives maximum effect to its spirit and purpose. Step two of the *Hickel* methodology requires the Board to then "test" that plan against the Voting Rights Act in order to determine whether the plan in "perfect" form complies with the federal law.[47] If the Board finds that disharmony exists between the initial plan and the Voting Rights Act, only then may the Board make changes to it that in any way minimize the requirements of the Alaska Constitution.[48]

However, the Board's right to make changes to the "perfect" plan so that it meets the requirements of the Voting Rights Act is not absolute: *Hickel* makes clear that

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[45] *Hickel*, 846 P.2d at 51.
[46] *Id.*
[47] *Id.*
[48] *Id.*

changes to the plan that minimize the requirements of the Alaska Constitution may only be made when that minimization presents the "only means available" for complying with the federal law.[49] This requirement is further evidenced by the fact that in *Hickel*, this Court held that the proposed District 3 did not meet the requirements of the Alaska Constitution because there existed other ways in which the district could be configured that would "satisf[y] the requirements of the Voting Rights Act and [would be] *more compact and better integrated socially*."[50]

Beginning the redistricting process with the drawing of a reapportionment plan that is in perfect harmony with the Alaska Constitution ensures that the constitutional requirements of contiguity, compactness and relative socio-economic integration are in the end given the greatest possible effect. Because the *Hickel* methodology allows the Board to make changes to the plan that minimize the effect of these requirements only if those changes are absolutely necessary, the Board is better able to achieve compliance through incremental adaptations, rather than adopting modifications that unnecessarily compromise the degree of alignment with Alaska law. Put simply, the *Hickel* methodology is designed to produce a reapportionment plan that does meet the strictures of federal law, but does not do "unnecessary violence to [Alaska's] constitutional commands."[51]

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[49] *Hickel*, 846 P.2d at 51.
[50] *Id.*, at 52.
[51] *Holt v. 2011 Legislative Reapportionment Com'n*, _ A.3d _ (Penn. 2012), 2012 WL 375298 at *41.

D. The Record Shows That the Board Did Not Follow the *Hickel* Methodology, and Thus Failed in Its Duty to Give Maximum Effect to the Alaska Constitution.

Despite the fact that *Hickel* provides a clear directive as to how legislative reapportionment plans are to be developed in Alaska, the record below shows unequivocally that the Board failed to follow this Court's clear instructions. In its order dated December 23, 2011, the superior court noted that the Board acknowledged that it began the design process by drawing a plan that complied with the Voting Rights Act.[52]

The trial testimony of John Torgerson, the Board Chair, further proves that the Board's process was fatally flawed. Despite the fact that Mr. Torgerson admitted at trial that he understood that if particular measures were not required by the Voting Rights Act, the Board was required to use state law,[53] he went on to describe a process that sought to do far more than simply meet the requirements of the Voting Rights Act. According to Mr. Torgerson, the Board instead designed a plan that it thought would present the best possible chance of achieving Department of Justice clearance.[54] This methodology is the antithesis of that prescribed by *Hickel*.

E. The *Hickel* Methodology Serves to Diminish the Specter of Gerrymandering, and Thus Promotes Trust in Government.

As this Court has explained, "The requirements of contiguity, compactness and socio-economic integration were incorporated by the framers of the reapportionment

[52] *Order on the Plaintiffs' Motion Summary Judgment: Invalid Process*, December 23, 2011 at 2.
[53] Tr. 144:15-23 (January 11, 2012).
[54] Tr. 254:12-21 (January 11, 2012).

provisions to prevent gerrymandering."[55] The framers of the reapportionment provisions prescribed these constitutional requirements because they believed that gerrymandering would be "prevented by these restrictive limits."[56] Although the Aleutians East Borough does not allege that the Board engaged in gerrymandering or had any improper political purpose when it drew the legislative reapportionment plan that is the subject of this appeal, it notes that Alaska's redistricting cases overwhelmingly include such allegations. The present case is no exception.

The superior court's decision following trial summarizes in detail the many allegations of improper political purpose that were made by the plaintiffs in this case.[57] The plaintiffs not only challenged the Board's makeup, which they argued was controlled by Republicans and therefore "made choices based on partisan affiliation,"[58] but also made several other allegations regarding statements and actions taken by individual Board members that they argued revealed an improper political purposes in the drawing of legislative districts.[59]

These allegations were underscored by the fact that the Board's Voting Rights Act expert, Ms. Handley, has "previously written an article explaining how 'at the state level,

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[55] *Hickel,* 846 P.2d at 45 (citing 3 PACC 1846 (January 11, 1956)).
[56] 3 PACC 1846 (January 11, 1956).
[57] *Memorandum Decision and Order Re: 2011 Proclamation Plan*, February 3, 2012 at 93-96.
[58] *Id.*, at 93.
[59] *Id.*, at 93-94.

helping to elect more (minorities) will also help elect more Republicans.'"[60] As the superior court explained:

> The article explained that advocacy for the strongest minority effective districts would necessarily help Republicans because the resulting plan would pack Democrats. The plaintiffs contended this was significant circumstantial evidence that the "shedding" of Democrats from the Ester/Goldstream area, by the implementation of a plan to create "as strong Native districts as possible" and in excess of benchmark standards, merely implemented the blueprint contained in Handley's article to manipulate the VRA for partisan gain.[61]

Regardless of whether the allegations of gerrymandering and improper political purpose involved in this appeal are supported by the evidence, it is clear that these sorts of allegations represent a fundamental distrust of Alaska's citizens in the redistricting process. The Aleutians East Borough is convinced that the *Hickel* methodology, in addition to ensuring that the proper weight is granted to Alaska's constitutional requirements, has the added benefit of diminishing the specter of gerrymandering that pervades legislative reapportionment. It presents the best possible way of restoring the public's trust, by adhering to the neutral criteria that the framers of article VI, section 6 prescribed as the appropriate remedy for the problem of gerrymandering. Strict adherence to the *Hickel* methodology allows the Board to demonstrate to the public with conviction that it has taken every reasonable step to ensure that the public's right to equal and fair representation in government has from the start been its foremost concern.

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[60] *Memorandum Decision and Order Re: 2011 Proclamation Plan*, February 3, 2012, at 95 (quoting Plaintiffs' Exhibit 10).
[61] *Id.*

Conversely, the adoption of a methodology that begins with the drawing of districts according to the Voting Rights Act (which is designed to protect the rights of only some of Alaska's population bases), as opposed to the Alaska Constitution (which guards her citizens as a whole), serves to undermine the confidence of voters by seeking to "back into" compliance with article VI, section 6. The problem of diminished confidence is exacerbated if the Board, as it did with the plan that is the subject of this appeal, apparently sought to simply retrofit its Voting Rights Act compliant plan to meet the requirements of Alaska's Constitution, thus affording to Alaska's citizens only that degree of compliance with Alaska's constitutional requirements, and thereby affording to the public a lesser degree of the protections prescribed by article VI, section 6.

F. The Trial Court Was Incorrect When it Held that, Even if *Hickel* Did Prescribe a Specific Methodology, the Board's Abandonment of That Methodology Was Justified by the Current Shorter Time Frame for Redistricting.

During the motion practice that preceded the trial that gave rise to this appeal, the "[p]laintiffs argued that the Board followed an invalid process by not first attempting to draft a plan that complied with the Alaska Constitution."[62] That motion, like the present argument advanced by the Aleutians East Borough, was premised on the theory that the *Hickel* case mandated a clear methodology that must be undertaken when drawing election districts as part of the decennial reapportionment process.[63]

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[62] *Memorandum Decision and Order Re: 2011 Proclamation Plan,* February 3, 2012, at 8.

[63] *Order on the Plaintiffs' Motion Summary Judgment: Invalid Process*, December 23, 2011 at 2.

Importantly, the superior court noted that the Board admitted that it began its process by drawing the minority districts in order to satisfy the requirements of the Voting Rights Act.[64] The superior court ultimately denied the Plaintiffs' motion, finding that *Hickel* does not "create[] a mandate or a claim for invalid process."[65] Further, the Board argued that, even if *Hickel* did create some sort of mandatory process by which the Board must redesign the state's legislative districts, that methodology is no longer required due to the fact that, since *Hickel* was decided, the time period for the redistricting process has been truncated.[66] Ultimately, the court apparently agreed with all of the Board's arguments.[67]

The superior court's finding that the Board's "timeframe" argument was justification for treating *Hickel* as if it "is no longer good law" is simply erroneous. It is true that article VI, section 10 of the Alaska Constitution was amended in 1998 to remove the ninety-day period afforded to the Governor following submission of a final plan, and required the Board to produce a proposed plan within 30 days of receiving the initial census report.[68] However, the 90-day timeframe allotted to the Board for submitting a final plan to the governor remained the same.[69] Thus, both before the 1998 amendments

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[64] *Order on the Plaintiffs' Motion Summary Judgment: Invalid Process*, December 23, 2011.
[65] *Id.*, at 3.
[66] *Id.*, at 2.
[67] *Id.*, at 3.
[68] *Id.*, at 2 n. 3.
[69] *Id.*

and after, the Board has had identical timelines for submitting to the Governor a finalized product.[70]

The scarcity of time in which to complete reapportionment activities is surely a hurdle that is faced by all redistricting boards, and not the 2011 Board alone. This Court has in the past stated unequivocally that the challenges created by the short time frame prescribed by article VI, section 10 of the Alaska Constitution does not justify unconstitutionality.[71] An excerpt from this Court's decision *In re 2001 Redistricting Cases* makes this clear:

> The challenge of creating a statewide plan that balances multiple and conflicting constitutional requirements is made even more difficult by the very short time frames mandated by article VI, section 6 of the Alaska Constitution. But these great difficulties do not absolve this court of its duty to independently measure each district against constitutional standards.[72]

Further, while it is true that, since *Hickel*, article VI, section 10 of the Alaska Constitution has been amended so as to reduce the time in which the Board is expected to produce its first preliminary plans, the reality is that in the decades since *Hickel* was decided, advances in redistricting software have surely compensated for that reduced timeframe. For example, in *Holt v. 2011 Legislative Reapportionment Com'n*, the Pennsylvania Supreme Court expressly noted "the development of computer technology appears to have substantially allayed the initial, extraordinary difficulties in achieving

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[70] *Id.*

[71] *In re 2001 Redistricting Cases,* 44 P.3d 141, 147 (Alaska 2002).

[72] *Id.*

acceptable levels of population deviation without doing unnecessary violence to other constitutional commands."[73]

As is the case with this Court, the Board is never absolved of its duty to ensure that the requirements of the Alaska Constitution are not unnecessarily compromised in reapportionment plans. Therefore, the superior court was in this case patently incorrect in its conclusion that the adoption of a truncated timeframe since the *Hickel* case in any way excused the Board from carrying out this Court's mandated methodology, as well as the duties entrusted to it by the Governor, the Alaska Constitution, and the people of Alaska.

CONCLUSION

For the reasons stated above, this Court should remand to the Board the Proclamation Plan, and the Board should be ordered to redraw House District 37 to be joined with House District 36, so that the Aleutians East Borough will maintain its compact and contiguous nature, and thereby meet the requirements of the Alaska Constitution. Further, this Court should order the Board to comply with the procedures outlined in *Hickel*, so as to ensure that the Alaska Constitution is not unnecessarily minimized simply to ensure the likelihood of approval by the Department of Justice by increasing the degree to which the plan complies with the Voting Rights Act.

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[73] *Holt*, 2012 WL 375298 at *41.

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