IN THE SUPREME COURT OF THE STATE OF ALASKA

In re 2011 REDISTRICTING CASES:

Supreme Court No. S-14441

Superior Court No. 4FA-11-2209CI
Consolidated Cases
4FA-11-2213CI
1JU-11-0782CI

BRIEF OF *AMICI CURIAE* CALISTA CORPORATION AND ASSOCIATION OF VILLAGE COUNCIL PRESIDENTS

PETITION FOR REVIEW FROM THE SUPERIOR COURT
FOURTH JUDICIAL DISTRICT AT FAIRBANKS
HONORABLE MICHAEL P. MCCONAHY, PRESIDING

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Filed in the Supreme Court of the State of Alaska
this 17th day of February, 2012.

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I. INTRODUCTION

Calista Corporation ("Calista") is a wholly Alaska Native owned regional corporation, formed under the Alaska Native Claims Settlement Act. The Association of Village Council Presidents ("AVCP") is a non-profit association whose members are 56 federally recognized tribes in the Southwestern Alaska Region. Calista and AVCP, as *amici curiae*, urge the court to reverse the trial court's decision in which it held that the Board was not justified in deviating from strict compliance with the Alaska Constitution in its configuration of House Districts ("HD") 37 and 38 in order to comply with the requirements of Section 5 of the federal Voting Rights Act ("VRA").

II. QUESTIONS PRESENTED FOR REVIEW

1. Did the trial court err in holding the configuration of Proclamation House District 37 was not justified by the Board's need to adopt a non-retrogressive redistricting plan that complied with Section 5 of the federal Voting Rights Act?

2. Did the trial court err in holding the configuration of Proclamation House District 38 was not justified by the Board's need to adopt a non-retrogressive redistricting plan that complied with Section 5 of the federal Voting Rights Act?

III. STATEMENT OF FACTS

Calista and AVCP adopt as accurate and complete the rendition of facts contained in the Redistricting Board's Petition for Review and incorporate those herein. In their argument of the issues, Calista and AVCP will reference relevant facts contained in the Alaska Redistricting Board's Excerpt of Records with citations to that record.

IV. STANDARD OF REVIEW

The Court has previously stated that it will review the Board's plan *de novo* upon the record developed in the Superior Court. *Groh v. Egan,* 526 P.2d 863, 867 (Alaska 1974). The Court is to apply an administrative law standard of review of the plan, and make a determination of whether the plan is reasonable and not arbitrary. *Id.,* at 866. But the Court should not substitute its judgment for that of the Board absent a violation of the Alaska Constitution. *Kenai Peninsula Borough v. State,* 743 P2d 1352, 1357-1358 (Alaska 1987), quoting *Carpenter v. Hammond*, 667 P.2.2d 1204, 1215 (Alaska 1983)(internal citations omitted).

V. ARGUMENT

A. House District 37's Configuration Was Necessary In Order to Comply With Section 5 of the Federal Voting Rights Act.

1. The Trial Court Erroneously Concluded That the Five Effective House Districts' Native VAP Were Higher Than They Needed to Be, and That There Was Still Mathematical and Legal Latitude To Modify District Boundaries To Avoid House District 37's Non-Contiguous And Non-Compact Characteristics.

Calista actively participated in the Board's proceedings throughout the redistricting process and witnessed first hand the evolution of the maps of the Board and third parties as everyone struggled to meet what they believed were the benchmark targets that would be applied by the Department of Justice in its VRA Section 5 pre-clearance review. AVCP members in turn filled the Board's hearing rooms in Bethel and Dillingham to ensure their voices were heard during the redistricting process.

The game changer for all parties occurred late in the process when the Board's VRA expert rendered her opinion that the applicable Benchmarks would be five effective House districts and three effective Senate districts. [Jt.Exc. 104]. At that moment, the challenge laid before all of the parties was to create one of the five effective House districts with a Native voting age population ("VAP") that materially exceeded the benchmark standard of 42% so that when it was paired with a sixth non-Native House district, the resulting Senate district would still qualify as an effective Senate district with at least a 42% Native VAP. Thus, from the outset, the trial court's legal premise that all effective House districts must be set at minimum benchmark levels to meet the requirements of the Alaska Constitution ignored the basic math required to meet the benchmarks.

What you learn quickly when you actually try to construct district maps, is that obtaining Native VAP percentages at the correct levels is easy. The hard part is doing so while maintaining a total population for the district that does not run afoul of Article VI, Section 4 of the Alaska Constitution and the Equal Protection requirement that the population of House districts not deviate substantially from one another. "Whatever the means of accomplishment, the overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the state." *Reynolds v. Sims*, 377 U.S. 533, 579 (1964). What made the Board's challenge even greater was the fact that the Native benchmark districts had lost significant populations through outmigration to urban areas, and no alternative urban Native districts could be drawn because there was no geographic

concentration within the urban areas. So at the same time that Native VAP percentages were being established, the benchmark districts had to be geographically expanded to reach constitutionally-defendable population levels. This is the mathematical equivalent of patting your head while rubbing your belly- a feat that is harder than it looks.

In trying to form the three effective Senate districts (R, S, and T), the Board quickly learned that the traditional pairing of effective House districts, starting in the north: HD 40 with HD 39 (T), HD 38 with HD 37 (S), HD 36 with HD 35 (R), did not work. While Senate districts S and T were effective, the Native VAP for HD 36 was too low when paired with HD 35, the Kodiak Island district (the non-Native House district) to yield an effective Senate district. The Board searched for ways to pair a different effective district with HD 35, but HD 40 and HD 39 which had the largest benchmark Native VAPs (62.22% and 67.09% respectively) were too far north to be paired in a constitutionally appropriate manner with HD 35. The pairing of HD 35 with either HD 40 or HD 39 would have raised substantial problems of compactness, contiguity, and socio-economic compatibility due to the substantial distances between the paired districts.

Contrary to the implication of the trial court's decision, the Board could not reduce the Native VAP percentages of these two districts by stripping out populations and adding them to the southern House districts 37 and 38. This is because the majority of the populations in northern House districts 39 and 40 are on the coast, and these populations cannot be easily shifted to other districts without creating long, skinny, oddly shaped districts similar to those that have previously been struck down by this Court.

(See *Hickel v. Southeast Conference*, 846 P2d 38, 39-43 (Alaska 1992) where District 28 known as the "Oosik District" was struck down.)

The choice that was left to the Board was to tinker within the boundaries of House districts 36, 37 and 38 and create one House district that would have a sufficiently large enough Native VAP, that when paired with HD 35, which had a Native VAP of merely 17.19%, would yield an effective Senate district.

The trial court erroneously assumed that the only factor that needed to be managed and manipulated by the Board was the Native VAP percentages. That was not true mathematically or legally. The choices the Board had available to them to reconfigure House districts 36, 37, and 38 were difficult and involved several factors, not just Native VAP levels. The Board needed to maintain adequate population levels for all three districts. The Department of Justice has stated in its recent guidance directives that, "[f]or state legislative and local redistricting, a plan that would require significantly greater overall population deviations is not considered a reasonable alternative. In assessing whether a less retrogressive plan can reasonably be drawn, the geographic compactness of a jurisdiction's minority population will be a factor in the Department's analysis." Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, Fed. Reg. Vol. 76, No. 27 (February 9, 2010), pg 7472 ("DOJ Guidelines"). The Board properly tackled the challenge of maintaining minimum population deviations in the face of the challenges of outmigration of the Native populations and their disparate locations throughout the region.

The Board also had to juggle a third factor. In assessing a minority group's opportunity to participate in the political process, one must "examine the comparative position of legislative leadership, influence and power for representatives of the benchmark majority-minority districts… A lawmaker with more legislative influence has more potential to set the agenda, to participate in closed-door meetings, to negotiate from a stronger position and to shake hands on a deal. Maintaining or increasing legislative positions of power for minority voters' representatives of choice while not dispositive by itself can show the lack of retrogressive effect under §5." *Georgia v. Ashcroft*, 539 U.S. 461, 483 (2003) While *Ashcroft* was superseded by the 2006 VRA amendments on issues relating to influence districts, the amendments did not remove the need to consider impacts on incumbent minority representatives and whether those impacts were regressive. Under the VRA 2006 amendments, Congress clarified that a redistricting plan that "has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race, color … to elect their preferred candidates of choice" violates Section 5 of the VRA. 42 U.S.C. §1973c(b). The Board had to be concerned that the Department of Justice might view a plan that pitted an existing Alaska Native representative against an incumbent non-Native Senator as purposefully or having the effect of "diminishing the ability" of the Alaska Natives in the Bethel area from re-electing their long serving senior Senator. Thus, the Board evaluated the impact that the map change would have on Alaska Native lawmakers and their political power and influence. Their concern was properly placed since the question of Alaska Native incumbency was the sole question posed by the Department of Justice during the

preclearance analysis. The Board's proper consideration of population deviations and the impact on the status of Alaska Native incumbency clearly demonstrate that the trial court's suggested solution of further minimizing the Native VAP percentages was overly simplistic.

The Final Plan that the Board ultimately adopted beefed up the Native population of HD 36 to a Native VAP level of 71.45%, and at the same time, managed to combine within HD 36 all of the socio-economically compatible Native groups in and around Bristol Bay and the Aleutians. All of the Aleutians East Borough was conjoined with the majority of the Lake and Peninsula Borough in HD 36. From the view of the Alaska Native commenters on the process, this configuration of HD 36 was the best choice the Board could have made to achieve the most compatible senate pairing with HD 35 on a social, cultural and economic basis. Most importantly, the pairing did no harm to existing Alaska Native incumbents and their political power base.

To create the new HD 36, the Board had to sacrifice the level of the Native VAP in HD 37, the region served by Calista and AVCP. House district 37's Native VAP was lowered from its benchmark level of 82.67% to 46.63%, yet it was still above the minimum 42% benchmark. House district 37's Bethel region was viewed as the stronghold of the Alaska Native population in Southwest Alaska. The Board believed that of all the districts, this district could sustain the addition of the bulk of the non-Native population needed to balance the population deviations. Thus, House district 37's Native VAP was lowered by causing it to absorb the non-Native population in the

remaining unincorporated western half of the Aleutian chain, a population with an extremely low percentage of Alaska Natives.[1]

The trial court's view that the contiguity and compactness issues associated with HD 37 could have been avoided while still meeting the legal requirements of the VRA by merely reducing some or all of the other House districts to levels closer to the minimum 42% was both mathematically naïve, and legally incorrect given the other important factors that the Board had to balance under § 5 of the VRA.

2. The Trial Court Erroneously Characterized As "Speculative" The Board's Assumption That the Department Of Justice Would Take Issue With the Pairing of an Alaska Native Incumbent Senator With a Non-Native Incumbent Senator.

After the Board's expert released her findings that there had to be three effective Senate districts, the Board developed two maps called the TB plan and the PAME plan to meet this benchmark. The TB and PAME maps drew immediate fire from the Alaska Native community. Their fatal flaw was that each plan paired a different Alaska Native incumbent senator with a non-Native incumbent senator who was the Senate Majority President. The TM plan paired Sen. Donny Olson from the Bering Straits region with Sen. Gary Stevens, while the PAME plan paired Sen. Lyman Hoffman from the Bethel

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[1] The splitting of the Aleutian chain area into two Senate districts has support in the Court's ruling in *In re 2001 Redistricting Cases,* 44 P3d 141 (Alaska 2002). There, the Court found acceptable the board's need under the Voting Rights Act to divide the Lake and Peninsula Borough between two senate districts. "Although the board should not unnecessarily divide a borough between two senate districts, we conclude that the board offered acceptable reasons for doing so in this case." *Id.* at 145. In the case at bar, the Board did not split a single borough into two Senate districts. Rather it acted less intrusively by separating a borough (Aleutians East) and an area adjacent to that borough (the unincorporated Aleutian chain) into two Senate districts.

region with Sen. Gary Stevens. In both cases, there was loud objection from the Native community:

1) May 27, 2011, Calista wrote, "It is important to Calista that District 37 remains strong as it is important that our incumbent Native Senator Hoffman, who has high seniority, be able to maintain strong native support in this district."[ARB ExR[2] 1118]

2) May 28, 2011, Bering Straits Native Corporation wrote, "This proposed district [TM Plan] …has a significant and unacceptable flaw. …[I]t stretches the [Senate] district to the south to incorporate Kodiak island, and pairs the Bering Strait district with this southern district for a seat in the Alaska Senate….[T]his plan threatens the continued, fair representation for the residents of the Bering Strait region, and significant dilutes the Native population and our vote." [Arbitration Board Record- ARB 00005973]

3) May 31, 2011, Calista wrote, "Calista is very concerned about the proposed District 35-36 senate pairing [PAME plan] and believes it would be highly regressive to force our most senior Native State Senator (Democrat) to face the incumbent State Senate President (Republican) in the next election... .We cannot afford to lose this highly experienced, senior Native leader for our Region." [ARB ExR 1120]

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[2] References of "ARB ExR" are to the stated page contained in the "Alaska Redistricting Board Excerpt of Record"

4) June 3, 2011 Koniag Incorporated wrote, "Koniag is writing to put forward our concern with the proposed Senate District reapportionment which will pair the communities of Bethel and Kodiak [PAME plan]. ...[W]e strongly feel that differences in location and need will, in fact, dilute representation of the two communities which are the hubs for the native communities within their region." [ARB ExR 1126].

The Native communities were not the only parties attacking these plans because of their incumbent pairing. Non-Native interests impacted by the plans also voiced their objections to the plans:

1) June 1, 2011, Kodiak Island Borough wrote, "The Kodiak Island Borough has grave concerns about the legality and damage caused to rural Alaska and the Alaska Native voters by the proposed Senate District which pairs Kodiak with Bethel [PAME plan]. On the surface there appears to be an intentional pitting of two of the strongest rural and Alaska Native advocates against each other which will reduce rural and Alaska Native voices in the Alaska Senate by one more vote. These people need more representation not less." [ARB ExR 1122]

2) June 3, 2011, the Kodiak City Council wrote, "[T]he Board and the Voting Rights Act consultant believe that pairing Kodiak with the Bethel house district will best meet the Department of Justice requirements for preclearance. We do not support this pairing because the two areas are non-contiguous, completely different geographically, socio-

> economically and culturally. We don't believe one Senator could effectively represent the interest and needs of such diverse areas of rural Alaska… . [We] want the Board to support pairing the Kodiak district with that of Bristol Bay and the Aleutians." [ARB ExR 1124].

The danger the Board soon realized was that if they adopted a plan that pitted an Alaska Native senator incumbent against the non-Native Kodiak senator, there was a high likelihood that the Department of Justice would not give preclearance to the plan. This concern was not speculative.

Calista was primed and ready to attack any plan that attempted to jeopardize the standing of the long serving, very senior, and politically powerful Senator in its region. Calista's vigilance to this issue can be seen in its letter to the Board dated May 13, 2011, before any Board plan had yet proposed a pairing of its Native senator with any other incumbent. [ARM ExR 1021-1022] In that letter, Calista attacked a third party's proposed senatorial pairing of Sen. Olson and Kodiak's senator and elevated it concerns by copying its letter to the Department of Justice, Chief of the Voting Section, Federal Civil Rights Division. Let there be no doubt that Calista would have attacked the two plans that preceded the final Proclamation Plan vigorously before the Department of Justice had one of them been chosen as the Proclamation Plan. There can also be no doubt that the 56 tribal organizations that are members of AVCP would have voiced their concerns and objections vocally with the Department of Justice as well, given the strong turnout of their membership at the Board's in-region hearings on the earlier plans.

The trial court erroneously assumed that because the Proclamation Plan received preclearance from the Department of Justice without any serious objection from Alaska Natives that reducing Native VAP percentages and adding another Native incumbent pairing would not have created any greater risk that the plan would not have received the Department of Justice's preclearance. On that basis, the trial court concluded that it was unreasonable for the Board to give this concern any weight. Given that the only question the Department of Justice asked the Board was the impact of the plan on Native incumbents, it requires no "speculation" to understand that Calista's arguments and concerns would have received a fair and thorough hearing before the Department of Justice, along with those of AVCP and the many other parties noted in the record who raised specific complaints about the incumbent pairing threat.

B. House District 38's Configuration Was Necessary In Order to Comply With Section 5 of the Federal Voting Rights Act.

1. The Trial Court Erred When It Concluded That the Board's Configuration of HD 38 Was the Result of the Incumbent Pairing Issue.

The trial court stated in its decision that the configuration of HD 38 "was obviously influenced by the decision to not pair Senator Hoffman." [Joint Parties Excerpts of Record at 132-133.] This conclusion does not comport with the facts. HD 38, as it is currently proposed in the Proclamation plan, was first configured in the PAME map that included the objectionable Sen. Hoffman incumbent pairing. Thus, the subsequent changes in the configurations of HD 36 and 37 to remove the objectionable pairing did not cause the socio-economic compatibility issues now complained of in HD 38. House district 38's configuration pre-dated the expression of those concerns and

subsequent actions. House district 38 remained unchanged throughout the process whereby the PAME plan was modified to remove the incumbent issue, and it became the final Proclamation House district 38.

2. The Trial Court Erred When It Concluded That There Was Excess Native VAP That Could Be Reallocated, Thereby Avoiding the Need To Add the Urban Communities of Fairbanks To HD 38.

Native VAP percentage issues did not drive the need to add several western Fairbanks area communities to HD 38. Rather, these communities were added to increase the total population of HD38, thereby reducing its total population deviation and avoiding equal protection violations.

If the trial court envisioned that populations could be moved from the higher Native VAP House districts of 40 and 39, that solution was discussed in (a) above and shown to be an unworkable solution. It is the geographic location of the communities within HD 39 and 40 along the coastline that would make the re-configuration of HD 38 to collect those coastal populations unworkable. The resulting geometry of such a reconfigured HD 38 would do far greater injury to the Alaska Constitutional criteria of compactness and contiguity than is caused by the current complaint about socio-economic incompatibility. In addition, the attempt to join populations from HD 40 with those of HD 38 could run into equally if not stronger objections on the basis of socio-cultural incompatibility. See *Hickel v. Southeast Conference,* 846 P. 2d at 44 where a similar effort at repacking by "joining of the North Slope Inupiaq [HD40] and the Interior Athabaskan areas [HD 38 and 39] into one district" was described "as probably the single worst combination that could be selected if a board were trying to maximize socio-

economic integration in Alaska."

If a plan were built following the trial court's directions to reduce the Native VAP percentages to their minimums in the Native districts surrounding HD 38, the plan could easily run afoul of Section 2 of the VRA. 42 U.S.C. § 1973. Establishing at the outset of a ten year span of time, a minimum threshold, with full knowledge of the outmigration trends of the Native population could be seen as tantamount to purposeful disenfranchisement of the Alaska Native population's electoral rights.

The Department of Justice's analysis of such a flawed plan would consider more than impacts of out-migration trends. The Native population statistics in the census would be mined for data demonstrating the likely trends over the coming ten years of the relative numbers of new voters that would be added to the voting rolls from those that are now under the age of 18 and not included in the current Native VAP data. With an active trend of outmigration from rural areas and growth in urban area of our state, an eye on the durability of an effective minority district is critical. The addition of the 8 to 18 year olds to the voter pool during the next decade is the most critical aspect of the probable pending change. The risk of these young people seeking further education and employment opportunities outside of their rural communities is significant. The same age group in urban Alaska is much more like to find their education and employment opportunities within their local area. The factors of outmigration and birthrate will reduce the Alaska Native VAP% within all Native HDs currently designated as "effective" over the upcoming decade.

For these reasons, setting Native VAP levels at minimum levels is not a wise

approach to redistricting if one truly intends to meet the spirit of the VRA. The Board, who was mindful of the challenges of outmigration and relative birth rates in the various Native districts, knew better. Its judgment should stand.

VI. CONCLUSION

The Court should reverse the trial court's decision that the Board's configuration of House Districts 37 and 38 was not justified by the Board's need to create a non-retrogressive Plan that met the requirements of the Voting Rights Act and that the deviations from the State Constitutional requirements for these two districts were permissible in light of the priority given to compliance with the Federal Voting Rights Act.

DATED: February 17, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

This certifies that on February 17th, 2012, a true and correct copy of the foregoing document was served via first class mail and electronic mail on:

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