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 FAIRBANKS NORTH STAR BOROUGH
AS *AMICUS CURIAE*

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

FAIRBANKS NORTH STAR BOROUGH

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Filed in the Supreme Court of
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I. Introduction: Interest of the Fairbanks North Star Borough.

The Fairbanks North Star Borough (FNSB) submits this brief as *amicus curiae* with respect to the petitions for review filed in the 2011 redistricting cases. The Alaska Redistricting Board (Board) promulgated a redistricting plan that departed from and disregarded the essential protections guaranteed by the Alaska Constitution. The FNSB asks this Court to reverse the trial court's Memorandum Decision and Order Re: 2011 Proclamation Plan dated February 3, 2012[1] with respect to the process violations which occurred in the drafting of the Plan, and to reverse the court with respect to the splitting of the excess population of the FNSB.

The trial court properly ruled that the constitutional violations in formulating House Districts 37 and 38 were not required by the Voting Rights Act ("VRA"). Contrary to the Board's argument, the VRA is not an inflexible law that requires multiple violations of traditional redistricting criteria in order to accomplish compliance therewith.

II. Standard of Review.

In reviewing a redistricting plan, the Court considers the matter *de novo* based on the record developed in the superior court.[2]

In determining whether a plan is "reasonable and not arbitrary", the court employs the "hard look" test:[3] the court examines the process and then determines whether the

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[1] [Jt. Exc. 1-236.]
[2] *In re 2001 Redistricting Cases,* 47 P.3d 1089, 1090 (Alaska,2002)(citing *Groh v. Egan*, 526 P.2d 863, 867 (Alaska 1974)); *see also* Alaska Constitution article VI, section 11, which provides that claims of errors in redistricting "shall be reviewed by the supreme court on the law and the facts."
[3] *Hickel v. Southeast Conference,* 846 P.2d 38, 55 (Alaska 1992).

board has failed to consider an important factor or whether the Board has not really taken a "hard look" at the salient problems or has not genuinely engaged in reasoned decision making.[4] This Court, while recognizing the short time-frames in redistricting, made clear "...these great difficulties do not absolve this court of its duty to independently measure each district against constitutional standards."[5]

III. Summary of Argument.

FNSB supports the Petition for Review filed by Riley and Dearborn.[6] Specifically, FNSB agrees that there were fatal procedural errors by the Board and that the excess population of the FNSB was unnecessarily divided. HD 38 was not justified by the VRA, and the VRA in fact has more flexibility than the Board considered. The Board's erroneous, self-imposed limitations resulted in its failure to fully understand the options available in formulating a plan. In summary, the FNSB's brief addresses the following issues raised by the parties:

A. The constitutional violations in HD 37, HD 38 and SD S were not required by VRA.

It is undisputed that HD 38 is not socio-economically integrated, and it is composed of vastly different communities. HD 37 splits the Aleutian chain, and is not contiguous, or compact. The trial court found the configurations of HD 37 and HD 38 are not necessary under the VRA because all of the Native districts in the Proclamation Plan have more Native VAP than necessary. The court also found the configuration of

[4] *Interior Alaska Airboat Association, Inc. v. State,* 18 P.3d 686, 693 (Alaska 2001).
[5] *In Re 2001 Redistricting Cases*, 44 P.3d 141, 147 (Alaska 2002).
[6] [Riley Petition.]

these districts was influenced by the decision not to pair a Native incumbent for fear that Native groups would object to the plan, which the court found too speculative. Additionally, the VRA has the flexibility to account for Alaska's demographic and geographic uniqueness without drawing bizarre, contorted districts in an attempt to create Native districts.

B. Splitting the Excess Population of FNSB.

The excess population of the FNSB is not placed into one district, but is instead divided between HD 6 and HD 38 in the Proclamation Plan. The trial court found that that there is no evidence that the Board intended to discriminate against the FNSB by dividing the excess population into two districts.[7] The court also found that the evidence establishes that the Board had valid, nondiscriminatory reasons for doing so "including compliance with the federal VRA and the population equality requirements for urban areas of Article VI, Section 6 of the Alaska Constitution, as well as the need to accommodate excess population."[8] But HD 38 was not required by the VRA, and the trial court erroneously applied a subjective test as to the Board's intent instead of using the objective evidence to determine whether the Board's decision discriminated against FNSB voters.

[7] [Jt. Exc. 110.]
[8] Id.

C. Fair and Effective Representation.

FNSB voters are included in districts with serious shortcomings, including the invalid HD 1, HD 2, HD 38 and the problematic SD S. SD S stretches from the western Aleutians to Interior Alaska, and is composed of two constitutionally infirm districts--HD 38 and HD 37. The Board contends that this configuration is necessary to create a Native senate district for VRA purposes. The trial court addressed SD S and found that the Ester and Goldstream residents included in SD S are the only residents of FNSB who are not included in the three senate districts of which the majority of the population are FNSB residents, and that there was no intent to discriminate against FNSB residents by virtue of the Senate pairings.[9] While HD 37 and HD 38 are technically contiguous, the plan submerges voters from FNSB and the western Aleutians into a district that does not just dilute their strength as voters, but results in an effective denial of a fair chance to influence the political process.[10]

D. Fatal procedural errors.

The Board did not first attempt to draw a plan that complied with the Alaska Constitution. The trial court found that this transparent disregard of *Hickel* was justified by the limited time under which the Board had to draft a plan. This ignores the Board's duty to the voters in the state of Alaska. The Board was required to carefully consider each district. Further, the alleged time crunch was the result of the Board's own delay in retaining a VRA expert.

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[9] [Jt. Exc. 111.]
[10] *Hickel v. Southeast Conference*, 846 P.2d 38, 49 (Alaska,1992).

E. Incorrect VRA standard.

Throughout the Board's process it utilized an incorrect Benchmark standard, i.e., the Board only considered plans with nine protected districts. While the Board dismisses this as a technicality, and the trial court addresses it as nomenclature problem, there are only eight protected districts. The Board and the public were drafting plans that aimed for a standard that was not required by law.

IV. Argument.

A. The bizarre configurations of HD 37, HD 38 and SD S were not required by the VRA.

The Proclamation Plan redraws the state.[11] HD 37 is not contiguous or compact,[12] HD 38 is not socio-economically integrated[13] and likely not compact;[14] and HD 1 and HD 2 are not compact.[15] Five districts are identified in the Proclamation Plan that purportedly are required to comply with the Voting Rights Act: House Districts 34, 36, 37, 38, 39.[16]

HD 38 is a sprawling, east-west district, comprised of communities stretching over 600 miles from Interior Alaska to the Bering Sea.[17] This district, for the first time in the history of Alaska redistricting, combines vastly different urban and rural communities.[18] Despite a finding that Fairbanks is a "hub" for rural Alaska, there is no actual evidence in

[11] [TT Handley p. 918, l. 24-25, p. 919, l. 1-8.]
[12] [Jt. Exc. 165-185, 186-197.]
[13] [Jt. Exc. 148.]
[14] [TT Torgeson p. 357, l. 8-13.]
[15] [Jt. Exc. 165-185.]
[16] [Bd. Exc. 1128; 1135-1136; 1085 n. 22.]
[17] [Bd. Exc. 1157.]
[18] [Jt. Exc. 129, n. 221.]

the Board record or at trial that Fairbanks has political, social or governmental links with most of the western communities contained in HD 38.[19] While it is true that Fairbanks is a hub for the Interior villages,[20] characterizing it as a hub for all of rural Alaska (which is composed of numerous communities all over the state) is clear error.[21]

The Board argues that the configuration of HD 38 was required by the federal VRA.[22] The Board describes DOJ Preclearance as a daunting process during which Alaska Native groups can practically lodge an objection and the Board's plan will be rejected.[23] The DOJ Guidance contradicts this characterization by the Board, and in fact contemplates the unique challenges faced by the Board during the 2011 redistricting process.[24]

1. The Board drafted "as strong a plan as possible" instead of a plan that was required by VRA.

The trial court properly found that the Plan had districts with more Native VAP than necessary, and that the Board rejected plans because of speculative concerns that DOJ would withhold approval if Native groups objected to them.[25]

The Board asserts it drew as strong a plan as possible to present to DOJ.[26] This, however, is contrary to Alaska law, which allows the VRA to trump the Alaska

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[19] The Board discussed retention of a socio-economic expert, but the record is wholly devoid of any expert opinion on socio-economic integration. ARB00004322-4326.
[20] ARB00006319; [TT Bickford, p. 718, l. 10-18.]
[21] [TT Bickford, p. 718, l. 21-23.]
[22] Board Petition, p. 18.
[23] Board Petition, p. 34-35.
[24] [Bd. Exc. 1003-1007]; Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 76 Fed. Reg. 7470, 7471 (Feb. 9, 2011) ("2011 DOJ Guidance").
[25] [Jt. Exc. 126.]
[26] Board Petition, p. 15 and 22.

Constitution only to the extent required for compliance.[27] The Board did not have the discretion to exceed the benchmark standards if doing so disregarded Alaska Constitutional principles.[28] There is no legal requirement that a plan be as strong as possible to pass DOJ muster;[29] this is analogous to a prosecutor requiring a signed confession before submitting a case to a jury.

Districts are generally effective at 42% NVAP.[30] However, in the Proclamation Plan, HD 40 is 62.09%; HD 39 is 67.09%; HD 38 46.36%; HD 37 is 46.63%; and SD T is 65.05%.[31] Only 35% NVAP is required in the Aleutians region, yet HD 36 is 71.45%.[32] The Board was required to look at alternatives that "unpacked" the higher NVAP districts before creating districts stronger than required by the benchmark.[33]

The Board asserts that it had concerns that DOJ may not grant preclearance of a plan based upon objections by the Native groups with respect to the pairing of Native incumbents.[34] The Board rejected two plans,[35] both of which Dr. Handley opined were non-retrogressive and could be pre-cleared by the DOJ,[36] because each paired a Native

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[27] *Hickel v. Southeast Conference*, 846 P.2d 38, 52 fn. 22 (Alaska 1992).
[28] *Id.*
[29] 2011 DOJ Guidance.
[30] See e.g. [Jt. Exc. 122-123.]
[31] [Bd. Exc. 1084, 1086.]
[32] Id.
[33] [TT Handley, p. 919, l. 10-14.]; [Jt. Exc. 127.]
[34] Board Petition o. 33-36.
[35] [Jt. Exc. 125.] These plans, which were not included in Dr. Handley's report or in the Preclearance Submission, are the TB plan and the PAME plan. FNSB does not concede that these plans are constitutional, but rather submits that they were rejected for invalid purposes and therefore require further consideration by the Board.
[36] Trial testimony of Lisa Handley, Ph.D., January 16, 2012.

incumbent with Senator Stevens of Kodiak.[37] While taking into account the preference of Native groups on pairing of incumbents is a policy goal, it is not necessarily required by DOJ.[38]

The terms of the incumbents in nine Senate districts are truncated under the Proclamation Plan.[39] Ultimately, DOJ looks at a plan as a whole and determines whether it is retrogressive.[40] As explained by Dr. Handley, "I don't think the justice department cares if you try and save incumbents or not"[41] although "a **pattern** of drawing [Native] incumbents out of their seats would not look good."[42] The draft plans did not exhibit a pattern of targeting Native incumbents, and Dr. Handley testified the plans were non-retrogressive.[43] Rejection of these plans was not required by the VRA.[44]

The trial court properly found that these speculative "the Alaska Natives did not like it"[45] concerns were insufficient to prove that serious violations of the Alaska Constitution were required by the VRA.[46]

2. The Voting Rights Act has more flexibility than the Board is representing to the Court.

DOJ recognizes that there may be circumstances where retrogression may be unavoidable because of shifts in population or other significant changes.[47] If unavoidable

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[37] [Jt. Exc. 125.][TT Torgeson, p. 217, l. 23-25, p. 218, l. 1-20.] [TT Bickford p. 571, l. 8-20.]
[38] DOJ Guidance at 7471 (determination is based on review of plan in its entirety).
[39] [Bd. Exc. 1134-1135.]
[40] DOJ Guidance at 7471.
[41] ARB00003901 (5/17/2011 Board Meeting, p. 60, l. 13-14).
[42] ARB00003903 (5/17/2011 Board Meeting, p. 62, l. 2-3).
[43] [Jt. Exc. 126.]
[44] DOJ Guidance at 7471.
[45] Board Petition p. 12, n. 8.
[46] [Jt. Exc 126.]

retrogression is claimed, the Board has the burden of establishing "that a less retrogressive plan cannot reasonably be drawn."[48] DOJ considers whether plans require highly unusual features to link together widely separate minority concentrations in order to meet the benchmark.[49] Preventing retrogression under Section 5 does not require jurisdictions to violate the one-person, one-vote principle, which most commonly arises from substantial demographic changes.[50]

It is not disputed that demographic changes during the past decade resulted in the under population of Benchmark Alaska Native districts; the lack of Alaska Native population concentrations adjacent to the Benchmark Alaska Native districts; and, the inability to create minority districts in urban Alaska.[51] Alaska's Native population has been historically geographically concentrated in rural areas of the state.[52] As of 2010, nearly 50% of the Alaska Native population in the state resides in five main urban areas.[53] However, FNSB takes issue that these facts required the Board to extend a Native district hundreds of miles to an urban, non-Native area;[54] to divide the Aleutian chain;[55] and, to combine two constitutionally infirm house districts to form a Native senate district[56] in order to comply with the VRA.

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[47] 2011 DOJ Guidance at 7472.
[48] Id.
[49] Id.
[50] Id.
[51] Board Petition, p. 5-8.
[52] [Bd. Exc. 1087-1095.]
[53] [Bd. Exc. 1078.]
[54] [Bd. Exc. 1157 (HD 38).]
[55] [Id. (HD 37).]
[56] [Id. (SD S).]

Redistricting criteria that a jurisdiction may be required to depart from to create a nonretrogressive plan are those that "require the jurisdiction to make the least possible change to existing district boundaries, to follow county, city or precinct boundaries, protect incumbents, preserve partisan balance, or in some cases, require a certain level of compactness of district boundaries."[57] Notably absent from the list are two requirements in the Alaska Constitution designed to prevent gerrymandering: socio-economic integration and contiguity.[58]

The Board adopted a policy of nine Native districts on April 9, 2011, foreclosing the idea of unavoidable retrogression before it even had an opinion on the benchmark standard from its VRA expert.[59] Mr. Bickford testified that the Board made clear that it was going to draw a plan that met that standard.[60] The Board's efforts at drafting nine Native districts, while commendable, was not legally required and handcuffed the Board. While the Board was certainly required to try to draw a Plan that complied with both the Benchmark and the Alaska Constitution, it also was legally required to consider unavoidable retrogression as an option when it was not able to do both.[61] Failure to examine all available options unnecessarily sacrifices the rights guaranteed to all Alaska citizens and considerably disregards that the federal VRA and the Alaska Constitution can be harmonized.

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[57] 2011 DOJ Guidance at 7472.
[58] *Hickel v. Southeast Conference*, 846 P.2d 38 (Alaska 1992)(constitutional requirements ensure that district boundaries fall along natural or logical lines rather than political or other lines).
[59] ARB00002023-2025 (4/9/2011 Board Meeting, see p. 47 l. 19-24; p. 49, l. 3-4).
[60] [TT Bickford, p. 533, l. 20-22.]
[61] DOJ Guidance at 7472.

At least one Native group argued to the Board that there may be some unavoidable retrogression.[62] Initially, Dr. Handley did not even see the need to look at a plan that "just completely redrew the state. It has all these districts going from east to west and doesn't bear any resemblance to the current plan."[63] Dr. Handley conceded that she did not know that DOJ "could oblige you to do something so dramatically different."[64]

The Board argues that as a result of the outmigration and the lack of geographic concentration in urban areas, "non-Alaska Native population from urban areas had to be added in order to increase the population of the under-populated Alaska Native districts in order to meet the one-person/one-vote standard and avoid retrogression."[65] The Board's exasperation at trying to meet one person/one vote and to draft a plan that met the Benchmark standard was not the result of the VRA, but its chosen policy goals of unavoidable retrogression and drawing a stronger than required plan in order to look good in front of DOJ.[66]

Compliance with the VRA does not require a violation of the one person/one vote principle.[67] The failure of the Board to explore unavoidable retrogression, which would have constituted compliance with both the VRA and Alaska law, resulted in contorted districts and was error.

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[62] ARB00012612 (4/26/2011 Public Hearing, p. 11, l. 22-25).
[63] ARB00003917 (5/17/2011 Board Meeting, p. 76, l. 17-20).
[64] ARB00003921 (5/17/2011 Board Meeting, p. 80, l. 9-10).
[65] Board Petition p. 8.
[66] DOJ Guidance at 7472 (the burden of proof is on the board if it argues unavoidable retrogression).
[67] Id.

3. The urban/rural crossover in HD 38 is untested and there is no proof it will perform as an ability to elect district.

There is no proof that HD 38 will even perform as an ability to elect district. Dr. Handley's general guideline for analyzing plans was that 41.8% Native Voting Age Population (NVAP) was required for a district to perform; she stated this number could be significantly lower in areas such as the Aleutians where voting is not polarized, and that it was required to be slightly higher (closer to 50%) in the polarized area of Benchmark HD 6.[68] In the Aleutians region, she stated that "you need a lot lower Native VAP"[69] and "certainly around 35, maybe around 30. 35 is better. 35 is certainly safer."[70] Dr. Arrington testified that in areas which are not polarized, it is not clear you need any minimum NVAP, because in those districts, being a minority does not matter.[71]

The DOJ Guidance provides that in determining whether the ability to elect exists, the Attorney General does not rely on any predetermined or fixed demographic percentages, but rather, "this determination requires a functional analysis of the electoral behavior within the particular jurisdiction or election district."[72] This analysis includes an examination of election history, voting patterns, voter turnout, registration, and crossover patterns, among other information.[73] Contrary to DOJ Guidance, Dr. Handley

[68] [Bd. Exc. 1098.]
[69] ARB00003887 (5/17/2011 Board Meeting, p. 46, l. 21-23).
[70] ARB00003888, 5/17/2011 Board Meeting, p. 47, l. 5-7).
[71] [TT Arrington, p. 421, l. 6-19.]
[72] 2011 DOJ Guidance at 7471; J55 Arrington Report, p. 4, ¶10.
[73] Id.

did not do an individual analysis of the districts presented to determine whether the districts in the various plans performed but based her opinion on the statewide averages.[74]

Dr. Handley utilized statewide averages in analyzing HD 38; this resulted in her being unaware that a high turnout, white Republican area (Denali Borough) was placed into Proclamation HD 38.[75] Further, voter turnout in the Ester/Goldstream precincts is the highest of anywhere in the state.[76] Some of the precincts in the Native areas of HD 38 have more substantial Republican vote.[77] As both experts testified, the reasons a district does not perform (i.e. offer Natives the ability to elect their candidate of choice) are that minority voters are not cohesive; Native turnout is lower than white turnout; or, there is insufficient white cross-over vote.[78] The premise of cross-over voting is that the non-Native Democratic voters will support a Native candidate, thereby allowing the Natives to elect their candidate of choice.[79] However, here, there is no evidence that non-Native voters from an urban area will provide a sufficient white cross-over vote to candidates supported by rural Natives other than they tend to vote Democratic.[80]

Dr. Handley testified at trial that she was unaware that this was the first time a redistricting plan was adopted in Alaska that combined urban and rural populations in order to create an effective district.[81] The untested urban/rural combination in HD 38

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[74] See, e.g., [TT Handley, p. 901, l. 13-23.]
[75] [TT Handley, p. 951, l. 17-25, p. 952, l. 1-5.]
[76] [TT Hardenbrook, p. 129, l. 1-11.]
[77] [TT Hardenbrook, p. 133, l. 7-15.]
[78] J55 Arrington Report.
[79] [Jt. Exc. 131-132.]
[80] Id.
[81] [TT Handley, p. 854, l. 23-25, 855 l. 1-5.].

dilutes the effectiveness of the voters of the Ester and Goldstream communities by placing them in a district of totally disconnected voters.

The types of constitutional deviations in the Proclamation Plan are not those that DOJ requires jurisdictions to minimize to comply with the VRA. The Board therefore cannot claim it took a hard look without having considered unavoidable retrogression.

B. The trial court's finding that it was permissible to split the excess population of FNSB cannot be reconciled with its finding that HD 38 was not required by the VRA.

FNSB has enough population for 5.5 house districts.[82] Where possible, all of a municipality's excess population should go to one other district in order to maximize effective representation of the excess group.[83] The excess population of FNSB is instead divided between two districts, HD 6 and HD 38.[84] The trial court agreed that the division of the excess population of FNSB gives rise to an inference of intentional discrimination; thereby shifting the burden of proof to the Board to show the failure to place the excess population in one district resulted from legitimate, nondiscriminatory policies.[85]

The trial court erroneously found that the Board's reasons for dividing the excess population of FNSB were (1) compliance with the federal VRA; (2) population equality requirements of Article VI, section 6; and (3) the need to accommodate excess population.[86] The court in a footnote attempts to explain the inconsistency that HD 38 was not actually required by the VRA as follows: "The court clarifies that even though it

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[82] [Riley Exc. 000002.]
[83] *Hickel v. Southeast Conference,* 846 P.2d 38, 52 (Alaska 1992).
[84] [Riley Exc. 000002.]
[85] *In Re 2001 Redistricting Cases*, 44 P.3d 141, 144 (Alaska 2002).
[86] [Jt. Exc. 110.]

finds that Proclamation House District 38 is not necessary under the VRA, it still finds that the choice of using excess population from Fairbanks was reasonable and could be used in a Native district that actually is necessary."[87] The trial court was determining the subjective intent of the Board based upon the Board's stated reasons for splitting the excess population.[88] The appropriate test is not whether the Board subjectively intended to discriminate against FNSB voters, but whether objectively it can be determined that the Board's decision resulted from legitimate, nondiscriminatory policies such as Article VI, section 6.[89]

The Board did not provide legitimate reasons for combining the urban areas of Ester and Goldstream with the rural communities on the Bering Sea, i.e., it did not prove HD 38 was required by the VRA.[90] With respect to the population equality and need to accommodate excess population findings, the Board did not seriously look at the excess population of other areas of the state to determine whether a more reasonable alternative existed, and therefore cannot meet its burden of proof.[91]

Chair Torgeson testified that the only option the Board considered for creating an effective district with urban population other than Fairbanks was Mat-Su, but he was not

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[87] [Jt. Exc. 111, n. 164.]
[88] [Jt. Exc 110-111.]
[89] *In Re 2001 Redistricting Cases*, 44 P.3d 141, 144 (Alaska 2002). In analyzing equal protection claims, the court looks at the process followed by the Board in formulating its decision and the substance of the Board's decision in order to ascertain whether the Board intentionally discriminated against a particular geographic area. *Kenai Peninsula Borough v. State*, 743 P.2d 1352 (Alaska 1987).

[90] [Jt Exc. 149.]
[91] [TT Torgeson, p. 208, l. 23-25, p. 209, l. 1-9.]

sure if members McConnochie and Green looked to other areas of the state.[92] The population equality and excess population accommodations resulted from the Board's choice of Fairbanks as the place to draw urban population.[93] This same problem would not have been created if the Board had looked at the excess population of another area of the state.[94] Anchorage has a total population of 291,826[95] or 16.436 house districts and 8.218 senate districts; i.e., it also has an excess population.[96] It indeed has less excess population than Fairbanks, and more districts to spread any remaining population; logically this will eliminate the need to split the excess population into two discrete districts such as the Board did to FNSB.[97] Anchorage has 26% of the state's Native population, and is where the majority of the outmigration from rural Alaska has gone.[98]

The Board's claimed that Fairbanks' ties with Alaska Natives were "fairly obvious"[99] however, neither trial testimony nor the record contains evidence of the ties between Ester and Goldstream and the remaining communities in HD 38.[100] Notably, the Board discussed retaining a socio-economic expert, but there is no expert opinion anywhere in the record regarding socio-economic integration.[101]

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[92] Id.
[93] [Jt. Exc. 110.]
[94] Riley Petition, p. 23.
[95] [Riley Exc. 000002.]
[96] [Id.]
[97] [Id.]
[98] ARB00006772.
[99] [TT Bickford, p. 718, l. 10-16.]
[100] [TT Bickford, p. 718, l. 19-23.]
[101] ARB00004322-4326.

The objective evidence is that the Board did not have legitimate, nondiscriminatory reasons for dividing the excess population of FNSN. The decision of the trial court must be reversed.

C. The Board's plan denies FNSB voters of fair and effective representation.

Senate District S is composed of two districts that have constitutional shortcomings: HD 37, which is not contiguous or compact,[102] and HD 38, which is not socio-economically integrated.[103] HD 37 separates the western Aleutians from the eastern Aleutians and instead includes these voters in a house district with Bethel on the Kuskokwim delta.[104] HD 38 peels off approximately 5,500 voters from the Ester/Goldstream area of FNSB and places them in a house district that extends to the Wade-Hampton communities on the Bering Sea.[105]

Senate districts which meander and ignore political subdivision boundaries and communities of interest will be suspect under the Alaska equal protection clause.[106] The equal protection clause of the Alaska Constitution imposes a stricter standard than its federal counterpart.[107] Under the principle of fair and effective representation, "certain mathematically palatable apportionment schemes will be overturned because they

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[102] [Jt. Exc. 165-185; 185-197.]
[103] [Jt. Exc. 148.]
[104] [Jt. Exc. 187.]
[105] [Jt. Exc. 109.]
[106] *Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1365, n. 21 (Alaska,1987).
[107] *Kenai Peninsula Borough,* 743 P.2d at 1371; *Isakson v. Rickey,* 550 P.2d 359, 362–63 (Alaska 1976) (requiring a more flexible and demanding standard and noting that the court "will no longer hypothesize facts which would sustain otherwise questionable legislation as was the case under the traditional rational basis standard").

systemically circumscribe the voting impact of specific population groups."[108] Degradation of voting power in more than one election is not required under the Alaska Constitution.[109]

The effect of SD S is that two distinct groups—the voters in the western Aleutians and the voters in Goldstream/Ester—are denied fair and effective representation. They do not have a chance to influence the political process in their Senate district, and in fact, were specifically included in smaller numbers to ensure they did not impact the effective control by the Native voters in their respective districts.[110] The Board's claimed reason for this was the need to create a protected Native district; i.e., the voters from Ester/Goldstream are included because they are Democrats and need to provide "crossover votes" to make HD 38 effective,[111] and the western Aleutian voters are included in HD 37 because of the alleged need to separate non-Native populations in the Aleutians and place them into the high concentration of NVAP of Bethel.[112] In other words, both of these groups are included in their respective house districts and in SD S only for racial purposes.[113] As discussed above, this action was not required by the VRA, and therefore violates the equal protection clause of the Alaska Constitution.

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[108] *Hickel*, 846 P.2d at 49.
[109] *Id.*
[110] [Jt. Exc. 109.]; Board Petition, p. 32, n. 21.
[111] [Jt. Exc. 109.]
[112] Board Petition, p. 32, n. 21.
[113] Id.

D. The Board used a fatally flawed process in drafting its plans.

The Board made drastic changes to existing districts without even attempting to first comply with Alaska's Constitution.[114] The trial court excused this failure due to time constraints on the Board.[115] This flawed process, however, requires remand of the Plan to the Board.

The *Hickel* court explained the relationship between the VRA and the Alaska Constitution: "The Board must first design a reapportionment plan based on the requirements of the Alaska Constitution. That plan then must be tested against the Voting Rights Act. A reapportionment plan may minimize article VI, section 6 requirements when minimization is the **only means available** to satisfy Voting Rights Act requirements."[116] The VRA need not be elevated in stature so that the requirements of the Alaska Constitution are unnecessarily compromised.[117] The trial court refers to the process as one of harmonizing the Alaska Constitutional requirements with the federal VRA.[118] The failure to first draw a constitutional plan constrains the ability of the Board to scrutinize whether a constitutional violation is required for VRA compliance.

There could have easily been constitutionally compliant plans drafted within the required timeframes.[119] The proposed plans adopted by the Board in April 2011 as Option 1 and Option 2 were considered by the Board to be drafts with no real chance of

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[114] [Jt. Exc. 206.] Deposition of John Torgeson, November 16, 2011, p. 49, l. 7-11.
[115] [Jt. Exc. 206.]
[116] *Hickel v. Southeast Conference,* 846 P.2d 38, 52 fn 22 (Alaska 1992) (emphasis added).
[117] *Id.*
[118] [Jt. Exc. 11.]
[119] Alaska Const., Art. VI, section 10.

adoption,[120] and the senate pairings were done only to fulfill what they viewed as a technical legal requirement.[121] These plans could have easily been draft, but constitutionally compliant, plans instead. In fact, the plans had to be redrawn anyway; the Board had not retained its expert before adopting its proposed plans, and both the Board and third parties were utilizing an erroneous VRA standard in the drafting of these plans.[122]

Further, any alleged time crunch was self-induced by the Board's action and was not the result of the timeframes set forth in the Alaska Constitution.[123] The Board knew there had been population shifts from rural to urban areas of the state, and that redistricting the state would be no easy task.[124] The Board was appointed and a Planning Committee was convened by September, 2010.[125] The Board knew the U.S. census data would be released in February or March, and no later than April 1, 2011;[126] it also knew that the census data and election results for the past 10 years needed to be given to its chosen voting rights expert in order for a racial bloc voting (rbv) analysis to be

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[120] [TT Torgeson, p. 295, l. 3-25.].
[121] [TT Holm, p. 377, l. 1-7.]
[122] [TT Torgeson, p. 294, l. 1-10.] Dr. Handley did not offer an opinion to the Board until May 17, 2011 as to what the minimum percentage of NVAP and the number of effective districts was to have a nonretrogressive plan, which was drastically different than the standard used for the proposed plans. ARB00013478. The Board attempts to rely on the failure of third parties to draft nonretrogressive plans as evidence that its Proclamation Plan was required by the VRA. This should be rejected by the court. At least one third party was able to draw a nonretrogressive plan when actually provided with the correct standard. Plaintiff's Exh. 14, Modified RIGHTS Plan #2; [Leonard Lawson TT p. 163, l. 20-25, p. 164, l. 1-6.].
[123] Alaska Const., Art. VI, Section 10.
[124] Board Petition, p. 10; see also [TT Bickford, p. 469, l. 8-13.]
[125] [Bd. Exc. 1333.]
[126] PL 94-171.

conducted.[127] The rbv analysis was a critical first step in the drafting of plans—without it, the Board did not know what percent of Native VAP was required to form an "ability to elect" district, or how many such districts were in the benchmark plan.[128]

The Board waited until February 23, 2011 to issue its Request for Proposal for its VRA expert.[129] The census data was received on March 15, 2011, and Dr. Handley was not under contract until April 8, 2011, after the proposed plans were adopted.[130] The Board therefore lost approximately 25 critical days in working on a plan that complied with both the Alaska Constitution and the VRA. This self-induced time crunch should not excuse the Board's failure to "first draft a plan that complies with the Alaska Constitution."[131]

E. The Board utilized an incorrect VRA standard throughout the process.

The Board adopted a policy of nine protected districts prior to retaining its VRA expert.[132] There are not nine protected districts.[133] According to the testimony of Dr. Arrington and the revised opinion of Dr. Handley, there are five protected house districts and three protected senate districts.[134] The Board has now admitted, and the law is clear, that influence districts are not required by the Voting Rights Act.[135]

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[127] [TT Bickford, p. 563, l. 14-20.].
[128] Testimony of Taylor Bickford and Lisa Handley. It should be noted that "ability to elect" districts, effective districts, and protected districts are now used synonymously by the parties.
[129] [TT Bickford, p. 645, l. 22-25, p. 646, l. 1-3.]
[130] ARB00006019. Eric Sandberg testified he could have had the data to Dr. Handley as soon as he received the census data on March 15, 2011. [TT Sandberg p. 743, l. 3-6.]
[131] Hickel
[132] ARB00002023-2025 (4/9/2011 Board Meeting, see p. 47 l. 19-24; p. 49, l. 3-4).
[133] [Jt. Exc. 104.]
[134] Id.
[135] Id.

The Board, and therefore third parties submitting plans, was never advised of the proper standard regarding the number of protected, or ability to elect, districts.[136] Dr. Handley advised the Board on May 17th, "So your benchmark is nine but it's not nine (indiscernible) districts. It's not even nine effective districts. It's four effective and two influence in the house and three effective in the senate."[137] Her notes from the same day also reflect this standard.[138]

At the May 24th meeting Dr. Handley generally repeated the incorrect standard.[139] The Preclearance Submission by the Board to DOJ claims a benchmark of four effective house districts and three effective senate districts, and then goes on to state that there is additionally an equal opportunity district and an influence district.[140] In a pleading filed on November 4, 2011, the Board continued to maintain that it had to draw nine Alaska Native districts in order to obtain preclearance.[141] The Board in fact relied on Dr. Handley's erroneous opinion that in order to meet the benchmark, an influence district of at least 30% NVAP had to be created in Southeast Alaska.[142]

The testimony of Leonard Lawson and the *amicus curiae* trial brief of Bristol Bay Native Corporation detail the frustrations resulting from the condensed time frames and

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[136] Id.
[137] ARB00003882 (5/17/2011 Board Meeting, p. 41, l. 15-18).
[138] ARB0000296-299.
[139] ARB00004206. Instead of referring to influence districts, she called them "equal opportunity districts"
[140] ARB00013481.
[141] Alaska Redistricting Board's Memorandum in Support of Opposition to Motion for Summary Judgment on Compactness and Cross Motion for Summary Judgment filed on November 4, 2011, page 31 of 41.
[142] Id. at page 31-32.

the lack of any identifiable VRA standard.[143] This was more than mere nomenclature; this was a failure in the process that requires this Court to remand the plan to the Board to analyze plans under the proper VRA standard.

V. Conclusion.

The Board has not demonstrated that the "only means available" to satisfy the Voting Rights Act was to depart from and disregard the Alaska Constitution's traditional redistricting principles of contiguity, compactness, and relative socio-economic integration, and to divide FNSB's excess population group. The Board failed to take a "hard look" at the challenges presented and did not consider other alternatives that did not require bizarre, contorted districts.

The Board and the public utilized an incorrect VRA standard throughout the redistricting process. The Board never engaged in a critical analysis of the issues and did not consider alternatives such as unavoidable retrogression, and therefore is unable to show that the numerous violations of Alaska's traditional redistricting principles were the "only means available" to comply with the Voting Rights Act.

Based on the foregoing, FNSB respectfully asks this Court to remand the Plan to the Board.

[143] [Riley Exc. 000005-000026.] [TT Lawson p. 159-161.]

DATED at Fairbanks, Alaska this 16th day of February, 2012.

FAIRBANKS NORTH STAR BOROUGH

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CERTIFICATE OF TYPEFACE

Pursuant to Alaska Rule of Appellate Procedure 513.5(c)(2), I hereby certify that the foregoing document was prepared in typeface 13 point Times New Roman.

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of February, 2012, a true and correct copy of the foregoing document was served upon each of the following by electronic mail and U. S. First class Mail:

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