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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT AT FAIRBANKS

IN RE: 2011 REDISTRICTING CASES:)
)
)

Case No. 4FA-11-2209CI

BRIEF OF AMICUS CURIAE FAIRBANKS NORTH STAR BOROUGH

I. Introduction: Interest of the Fairbanks North Star Borough.

The Fairbanks North Star Borough (FNSB) submits this brief as *amicus curiae* in support of the Plaintiffs in this matter. The Defendant Alaska Redistricting Board (Board) promulgated a redistricting plan that departed from and disregarded the essential protections guaranteed by the Alaska Constitution. The excess population of FNSB is unnecessarily divided between two house districts thereby diluting the effective strength of these voters. The voters in the Goldstream and Ester area are isolated from FNSB and placed in a house district that extends to the Bering Sea, and they share a senate district with communities as far away as the Aleutian Islands. The Board failed to prove that these constitutional violations are the only means available to comply with the Voting Rights Act.

II. Legal Standards.

In determining whether a plan is "reasonable and not arbitrary", the court employs the "hard look" test:[1] the court examines the process and then determines whether the board has failed to consider an important factor or whether the Board has not really taken

[1] *Hickel v. Southeast Conference,* 846 P.2d 38, 55 (Alaska 1992).

a "hard look" at the salient problems or has not genuinely engaged in reasoned decision making.[2] The Alaska Supreme 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."[3] Similarly, just because the Board had time constraints, it was not absolved of its duty to create a constitutional plan.

III. The Board did not prove that it was required to draw bizarre, contorted districts that violate the Alaska Constitution.

The Proclamation Plan redraws the state.[4] HD 37 is not contiguous or compact,[5] HD 38 is not socio-economically integrated[6] and likely not compact;[7] and HD 1 and HD 2 are not compact.[8] Five districts are identified in the Proclamation that purportedly are required to comply with the Voting Rights Act: House Districts 34, 36, 37, 38, 39.[9]

FNSB has enough population for 5.49 house districts. 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.[10] The excess population of FNSB is instead divided between two districts, HD 6 and HD 38.[11] HD 38 is comprised of communities stretching from Interior Alaska to the Bering Sea, combining vastly different urban and rural communities which have no political, social or governmental links.

[2] *Interior Alaska Airboat Association, Inc. v. State,* 18 P.3d 686, 693 (Alaska 2001).
[3] *In Re 2001 Redistricting Cases*, 44 P.3d 141, 147 (Alaska 2002).
[4] Testimony of Lisa Handley, January 16, 2012.
[5] Order on Compactness of House Districts 1, 2 and 37, dated 12/23/11.
[6] Order on Plaintiffs' MSJ: Invalidity of House District 38, dated 12/23/11.
[7] Testimony of John Torgeson, January 11, 2012.
[8] Order on Compactness of House Districts 1, 2 and 37, dated 12/23/11.
[9] ARB00006545.
[10] *Hickel v. Southeast Conference,* 846 P.2d 38, 52 (Alaska 1992).
[11] ARB00006584.

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Alaska is subject to Section 5 of the Voting Rights Act, as amended (VRA), and accordingly, it must formulate a plan that affords Alaska Natives the same ability to elect their candidate of choice as exists in the benchmark plan.[12] 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."[13] The VRA need not be elevated in stature so that the requirements of the Alaska Constitution are unnecessarily compromised.[14] The Board did not just minimize the Alaska Constitutional requirements in its Proclamation Plan, it threw them out the window. The Board cannot show that this was the only means available to satisfy the VRA because it never took a hard look at the problems.

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A. It was not logical to draw from the excess population of Fairbanks.

The Board divided the state by region, and assigned each region to Board members to begin drafting plans.[15] Jim Holm was assigned the Fairbanks region, and Peggy Ann McConnochie and Marie Green were assigned the rural areas. Despite the promises in its opening statement that every board member would testify at trial, the Board only called two members as witnesses in this case, John Torgeson, its Chairperson,

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[12] The benchmark plan is the last legally enforceable redistricting plan in force or effect; in this case, it is the Amended Final Plan adopted in 2002.
[13] *Hickel v. Southeast Conference*, 846 P.2d 38, 52 fn 22 (Alaska 1992) (emphasis added).
[14] *Id.*
[15] Testimony of John Torgeson, January 11, 2012.

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and Jim Holm.[16] Both members knew relatively little about the plan the Board adopted or its reasons for major decisions.[17]

The Board did not provide legitimate reasons for combining the urban areas of Ester and Goldstream with the rural communities on the Bering Sea. The Board's trial brief cites to a portion of the record that is completely devoid of any discussion of historical, cultural, economic or other ties between Ester and Goldstream and rural Alaska.[18] At trial, Mr. Bickford referred to a submission of a third party, AFFR, to support this contention; however, AFFR merely asserted that FNSB was a regional hub for the eastern and central portions of their proposed district (a portion of which is current HD 6 and included in Proclamation HD 39); the eastern and central areas are not actually included in Proclamation HD 38.[19] Mr. Bickford claimed that Fairbanks' ties with Alaska Natives were "fairly obvious" and that he could "go on and on;"[20] however, neither trial testimony nor the record contains evidence of the ties between Ester and Goldstream and the remaining communities in HD 38.

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

[16] Board members Robert Brodie and Peggy Ann McConnochie were present in the courtroom for a portion of the trial, and were introduced to the court by Michael White.
[17] No deference is given when an agency does not invoke its expertise. *University of Alaska v. University of Alaska Classified Employees Assoc.*, 952 P.2d 1182, 1184 n. 6 (Alaska 1998).
[18] ARB's Trial Brief, page 34 of 49 (citing to ARB00004156-4157).
[19] ARB00006319
[20] Testimony of Taylor Bickford, January 12, 2012.

that it was required to be slightly higher (closer to 50%) in the polarized area of Benchmark HD 6. In the Aleutians region, she stated that "you need a lot lower Native VAP"[21] and "certainly around 35, maybe around 30. 35 is better. 35 is certainly safer."[22] 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.[23]

Dr. Handley utilized statewide averages in analyzing HD 38; this resulted in her being unaware that a high turnout, white Republican area was placed into Proclamation HD 38.[24] Voter turnout in the Ester/Goldstream precincts is the highest of anywhere in the state.[25] Some of the precincts in the Native areas of HD 38 have more substantial Republican vote. 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. 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. 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.

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

[21] ARB00003887 (5/17/2011 Board Meeting, p. 46, l. 21-23).
[22] ARB00003888, 5/17/2011 Board Meeting, p. 47, l. 5-7).
[23] Testimony of Dr. Arrington, January 10, 2012.
[24] Testimony of Lisa Handley, January 16, 2012.
[25] Testimony of Joseph Hardenbrook, January 10, 2012.

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order to create an effective district.[26] It is impossible to claim you took a hard look if you have not even glanced at the problem. The untested urban/rural combination in HD 38 and SD S dilutes the effectiveness of the voters by fracturing the Aleutians and Ester and Goldstream communities and placing them in districts consisting of totally disconnected voters.

The Board did not seriously look at the excess population of other areas of the state to determine whether a more reasonable alternative existed than the expansive east-west district in HD 38. 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 sure if members McConnochie and Green looked to other areas of the state.[27]

If the Board was required to combine urban and rural population, it should have considered Anchorage. Anchorage has a total population of 291,826[28] or 16.436 house districts and 8.218 senate districts; i.e., it also has an excess population. Anchorage has 26% of the state's Native population, and is where the majority of the outmigration from rural Alaska has gone, and was not considered. The Anchorage portion of the plan was drawn by third parties and the Board deferred to this plan because there was no Board

[26] Trial Testimony of Lisa Handley, January 16, 2012.
[27] Testimony of John Torgeson, January 11, 2012.
[28] ARB00006584.

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member from the Anchorage area.[29] The Board neglected to consider this as a reasonable alternative.

B. The Board was legally required to consider unavoidable retrogression.

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 from its VRA expert.[30] Mr. Bickford testified that the Board made clear that it was going to draw a plan that met that standard.[31] However, the Board was legally required to consider unavoidable retrogression as an option prior to adopting a plan that considerably disregarded the Alaska Constitution. Failure to examine all available options unnecessarily sacrifices the rights guaranteed to all Alaska citizens.

At least one Native group argued to the Board that there may be some unavoidable retrogression.[32] Alaska is the state with the largest land area and the lowest population density in the United States. According to the 2010 census, there is a substantial under-population of the benchmark rural districts. There has been an outmigration from rural to urban areas. Urban areas have showed a high rate of growth, while rural and predominantly Alaska Native areas experienced either a slow or negative growth rate.[33] Most of the state's Native population resides in eight majority Native areas and in Anchorage (25.9%), and the remaining third is divided between City and Borough of Juneau (3.9%); the Kenai Peninsula Borough (4.3%); the Mat-Su Borough (6.3%), and

[29] Testimony of Taylor Bickford, January 13, 2012. Mr. Bickford testified that the plan was drawn by Mayor Sullivan, the city clerk, and Randy Reudrich.
[30] ARB00002023-2025 (4/9/2011 Board Meeting, see p. 47 l. 19-24; p. 49, l. 3-4).
[31] Trial Testimony of Taylor Bickford, January 12, 2012.
[32] ARB00012612 (4/26/2011 Public Hearing, p. 11, l. 22-25).
[33] ARB00013482.

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the FNSB (7.8%).[34] The Board represents that due to population distribution, it is impossible to create a protected district in any urban area of the state.

DOJ recognizes that there may be circumstances where retrogression may be unavoidable because of shifts in population or other significant changes.[35] If unavoidable retrogression is claimed, the Board has the burden of establishing "that a less retrogressive plan cannot reasonably be drawn." DOJ considers whether plans require highly unusual features to link together widely separate minority concentrations in order to meet the benchmark. 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.[36]

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."[37] Notably absent from the list are two requirements in the Alaska Constitution designed to prevent gerrymandering: socio-economic integration and contiguity.

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[34] ARB00006772.
[35] 2011 DOJ Guidance at 7472.
[36] Id.
[37] 2011 DOJ Guidance at 7472.

Dr. Handley's description is that, "If it's possible to meet the benchmark without creating incredibly contorted districts, they'll (sic) probably be an objection…"[38] During the process, she 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."[39] Dr. Handley thought the Board "could probably make the benchmark without completely redrawing the state"[40] and that she did not know that DOJ "could oblige you to do something so dramatically different."[41]

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.

IV. The Board has fatal procedural flaws in drafting its plans; the Board did not timely retain an expert, and was using an incorrect VRA standard.

The Board made drastic changes to existing districts without even attempting to first comply with Alaska's Constitution. The Board admits it did not first draw a redistricting plan that complied with the Alaska Constitution.[42]

The proposed plans adopted by the Board in April as Option 1 and Option 2 were considered by the Board to be drafts with no real chance of adoption,[43] and the senate pairings were done only to fulfill what they viewed as a technical legal requirement.[44] Third party groups also submitted plans at this point. The Board had not retained its

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[38] ARB00003916 (5/17/2011 Board Meeting, p. 75, l. 1-3).
[39] ARB00003917 (5/17/2011 Board Meeting, p. 76, l. 17-20).
[40] ARB00003920 (5/17/2011 Board Meeting, p. 79, l. 19-20).
[41] ARB00003921 (5/17/2011 Board Meeting, p. 80, l. 9-10).
[42] Testimony of John Torgeson, January 11, 2012; Deposition of John Torgeson, November 16, 2011, p. 49, l. 7-11.
[43] Testimony of John Torgeson, January 11, 2012.
[44] Testimony of Jim Holm and Taylor Bickford.

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.[45]

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. The Board was appointed and a Planning Committee was convened by September, 2010. The Board knew the U.S. census data would be released in February or March, and no later than April 1, 2011;[46] 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 conducted.[47] 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.[48]

The Board waited until February 23, 2011 to issue its Request for Proposal for its VRA expert.[49] 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.[50] Drafting the proposed plans without knowing the benchmark standard rendered them completely arbitrary.

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[45] Testimony of Taylor Bickford.
[46] PL 94-171.
[47] Testimony of Taylor Bickford.
[48] 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.
[49] Testimony of Taylor Bickford.
[50] ARB00006019. Dr. Handley testified that she was available in March 2011, and Eric Sandberg testified he could have had the data to her as soon as he received the census data on March 15, 2011.

The last public hearing on the proposed plans was held on May 6, 2011.[51] 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.[52] The Board attempts to rely on the failure of third parties to draft non-retrogressive plans as support for its Proclamation Plan being the only means available to comply with VRA.[53] However, third parties had only one week to re-draft plans that met VRA requirements.[54]

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. 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."[55] Her notes from the same day also reflect this standard.[56]

At the May 24th meeting Dr. Handley generally repeated the incorrect standard.[57] 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

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[51] ARB00013491.
[52] ARB00013478.
[53] Trial Testimony; Handley report.
[54] ARB00013479.
[55] ARB00003882 (5/17/2011 Board Meeting, p. 41, l. 15-18).
[56]
[57] ARB00004206. Instead of referring to influence districts, she called them "equal opportunity districts"

additionally an equal opportunity district and an influence district.[58] 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.[59] 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.[60]

There are not nine protected districts. 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. The Board has now admitted, and the law is clear, that influence districts are not required by the Voting Rights Act.

Dr. Handley also advised the Board that it should draft as strong a plan as possible to present to DOJ. This, however, is contrary to Alaska law, which allows the VRA to trump the Alaska Constitution only to the extent required for compliance. The Board did not have the discretion to exceed the benchmark standards if doing so required disregard of Alaska Constitutional principles.

As discussed above, districts are generally effective at 42% NVAP. 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%.[61] Only 35% NVAP is required in the Aleutians region, yet

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[58] ARB00013481.
[59] 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.
[60] Id. at page 31-32.
[61] J-40 at 29 and 31.

HD 36 is 71.45%.[62] The Board was required to look at alternatives that "unpacked" the higher NVAP districts before creating districts stronger than required by the benchmark.

V. <u>The Board failed to look at other, more reasonable alternatives.</u>

A. The Board did not properly consider third party plans.

Third party plans were presented to the Board as submitted by various groups, and no efforts were made to fix the various proposals.[63] Dr. Handley's opinion was that all of the third party plans were retrogressive; however, she based this strictly on NVAP in each proposed district. Dr. Arrington specifically agreed with Dr. Handley that "benchmark and potential districts must be judged by their ability to elect, not by some bright-line standard such as [NVAP]."[64]

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."[65] This analysis includes an examination of election history, voting patterns, voter turnout, registration, and crossover patterns, among other information.[66] Contrary to DOJ Guidance, Dr. Handley 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.

[62] Id.
[63] Testimony of Eric Sandberg, January 16, 2012.
[64] Expert's Report of Theodore S. Arrington, Ph.D. ("Arrington Report"), page 4, ¶10.
[65] See Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 76 Fed. Reg. 7470, 7471 (Feb. 9, 2011) ("2011 DOJ Guidance"); Arrington Report, p. 4, ¶10.
[66] 2011 DOJ Guidance at 7471.

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Instead of exploring potential modifications to the submitted plans to see if the Board could draft a plan that both complied with the Alaska Constitution and VRA, the Board relies heavily on the failure of third parties to draft nonretrogressive plans as evidence to support the Proclamation Plan. This should be rejected by the court. At least one plan was able to be modified and is considered non-retrogressive using Dr. Handley's revised benchmark standard.[67]

B. Other plans exist that are not retrogressive.

The Board rejected two plans,[68] both of which Dr. Handley opined were non-retrogressive and could be pre-cleared by the DOJ,[69] because each paired a Native incumbent with Senator Stevens of Kodiak.[70] While taking into account the preference of Native groups on pairing of incumbents is a policy goal, it is not necessarily required by DOJ.[71]

The terms of the incumbents in nine Senate districts are truncated under the Proclamation Plan.[72] Ultimately, DOJ looks at a plan as a whole and determines whether it is retrogressive. As explained by Dr. Handley, "I don't think the justice department cares if you try and save incumbents or not"[73] although "a **pattern** of drawing [Native] incumbents out of their seats would not look good."[74] The draft plans did not exhibit a

[67] Plaintiff's Exh. 14, Modified RIGHTS Plan #2; Testimony of Dr. Arrington and Leonard Lawson.
[68] These plans, which were not included in Dr. Handley's report or in the Preclearance Submission, are the TB plan and the PAME plan.
[69] Trial testimony of Lisa Handley, Ph.D., January 16, 2012.
[70] Trial testimony of Chair Torgeson, January 11, 2012, and Testimony of Taylor Bickford, January 12, 2012.
[71] The Board never adopted a policy of protecting incumbents, although it was advised by their attorney that it could legally do so.
[72] ARB00006545.
[73] ARB00003901 (5/17/2011 Board Meeting, p. 60, l. 13-14).
[74] ARB00003903 (5/17/2011 Board Meeting, p. 62, l. 2-3).

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pattern of targeting Native incumbents, and Dr. Handley testified the plans were non-retrogressive. Rejection of these plans was not required by the VRA.

VI. 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. It is respectfully submitted that the Plan must be remanded to the Board.

DATED at Fairbanks, Alaska this 23rd day of January, 2012.

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CERTIFICATE OF SERVICE
This is to certify that on this date, a copy of the foregoing is being e-mailed to the following attorney or parties of record:

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