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

IN RE 2011 REDISTRICTING CASES

Case No. 4FA-11-02209 CI.

RILEY ET. AL. PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION TO STRIKE ARB'S CONSOLIDATED RESPONSE TO FNSB'S AMICUS BRIEFS OR IN THE ALTERNATIVE GRANT LEAVE TO FILE A RESPONSE

COMES NOW, the Riley Plaintiffs to move the Court to strike the Alaska Redistricting Board's Consolidated Response To FNSB (Fairbanks North Star Borough) Amicus Briefs, or in the alternative, allow the Plaintiffs leave to file a response or have the following memorandum deemed a response. The reasons for this request are set forth in the accompanying memorandum.

Date: October 1, 2013

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The Riley Plaintiffs seek to strike the Alaska Redistricting Board's Consolidated Response To FNSB (Fairbanks North Star Borough) Amicus Briefs because it was 1) not permitted by the Court's scheduling order, and 2) served as a pretext to address the Riley's arguments and did not actually address arguments presented by the FNSB. In the alternative, the Plaintiffs seek leave to file a response or have the following memorandum deemed a response.

1) **No Response To Amicus Briefing Were Permitted Under The Court's Scheduling Order.** The current briefing schedule was established by this Court in its Order of August 28, 2013, which provided that, "Amicus entities are free to file pleadings in response to motions no later than the date set for a reply to any pleading."[1] The Order did not permit a response from either the Plaintiffs nor the ARB, however, the Board filed a response. The Amicus memorandum filed by the

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1 Order (8/28/2013) ,at 2

FNSB was proper under the order. The ARB's response was not. The ARB's response should be stricken.

2) **The ARB's Response Served As A Pretext To Respond To The Plaintiff's Arguments And Did Not Actually Address Arguments Presented By The FNSB**. The Board claims that the FNSB raised no additional substantive rationale or legal arguments not raised by the Plaintiffs, yet somehow the Board believes it must file an eleven (11) page response to the FNSB briefs. As discussed below, the Board's response is not actually directed at the FNSB's argument. Rather, the Board is using its "response," which was not permitted under the scheduling order, as a pretext to reargue its response to the Riley Plaintiff's arguments, filling in the gaps of what it is worried that it left out when it replied to the pending summary judgment motions. This type of last ditch effort is not allowed under the rules nor under the specific briefing schedule set forth by this Court.

For example, the Board infers that FNSB merely wants the Board to pick a plan that the FNSB prefers.[2] This is the same mischaracterization the Board used relative to the Plaintiff's. However, this argument applied to FNSB is wholly inconsistent with the Board's justification of the Mat-Su and Anchorage portions of the plans. The Board has

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2 ARB's Consolidated Response, at 2("Indeed alternatives for which the FNSB advocates had other deficiencies.")

argued that the Southcentral districts are justified by the Board's desire to follow the recommendations of those Borough's political leadership. That is inconsistent with its argument that the FNSB should not expect any respect for its wishes. It also begs the question as to why the Board took into account the desires of the Mat-Su and Anchorage Boroughs but wholly ignored the desires of the FNSB? At best the disparate treatment between these borough's suggests geographic discrimination.

Of course, the FNSB never argued that the court should pick a plan it preferred, nor did FNSB support an alternative that it wanted the court to choose; it very specifically addressed defects in the 2013 Proclamation Plan on the specific issues raised by the parties and briefed the constitutional errors committed by the Board. Of course, Riley et. al. never asked the Board to adopt a specific plan, but offered plans as demonstrations of specific issues that the Plaintiffs thought should be addressed. The Board's argument presumes a rather transparent mischaracterization of both the FNSB and the Plaintiffs argument, and should be insulting to the Court.

Similarly, the Board accuses the FNSB of incorrect facts regarding HD 5, attempting to say that the 2011 version of the district is "nearly identical" to the 2013 plan.

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Again, this merely repeats the false statement of facts asserted in response to the Plaintiff's motion. It is both disingenuous and dishonest to claim that HD 5 (2011) and HD 5 (2013) have "minimal differences" when a visual inspection reveals the current version crosses the Tanana River, a natural boundary, and uses a block of vacant land to connect two populated areas that would otherwise not be contiguous, something that the 2011 plan did not do. While the Tanana Flats area has to go somewhere and may be connected with an area north of the Tanana River at one point, combining two populated areas separated by another house district is, in fact, a much different configuration, and quite obviously the reason the "anvil" is disputed by the parties.

Moving census blocks in populated areas <u>is</u> an easy task. The Board has all too quickly failed to remember the trial, where a demonstration was given to the court that resulted in the clean-up of the Kawasaki finger and the North Pole district. Cleaning up irregular and bizarrely shaped appendages will have a "ripple effect." Population will need to shift in order to keep deviations at acceptable levels. The point the Board misses, however, is that the ripple effect proposed by the Plaintiffs and FNSB remedies the compactness problem the Board created when it drafted House Districts 3 and 5.

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In another example, FNSB never argued that the deviations were unnecessarily high in the various districts; it specifically stated that the Board was not entitled to summary judgment on the issue because the districts were unconstitutional, arguing that the Board relied on "deviation statistics that are wholly irrelevant because they were not achieved while creating constitutionally compliant districts."[3] The FNSB's argument heading states, "It is not possible to determine whether the deviations are too high because there are districts within the Fairbanks North Star Borough that do not meet the constitutional standard of compactness."[4]

Again, the Board is mischaracterizing the FNSB briefs in an attempt to unfairly re-address the issues briefed by the Plaintiffs. Without actually citing to the record, the Board claims "…the Board Record reveals the effort expended by the Board to achieve low deviations while maintaining otherwise compact, contiguous and socio-economically integrated districts." This is, of course, the very antithesis of the Plaintiffs' and FNSB's arguments, and instead of a substantive response, the Board continues to make conclusionary and untrue statements of fact, and to mischaracterize the Plaintiff's and FNSB arguments.

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3 FNSB Brief, at 3
4 Id.

The Board's response to the FNSB is slightly inconsistent with its response to the Plaintiff's arguments regarding Senate pairings. In response to the Plaintiffs, the Board acknowledged that the holding in *Kenai*[5] required the Board to take a hard look at deviation between Senate districts, but ignored the "neutral factors" test adopted by the Court in *Kenai*. In response to the FNSB, the Board claims that it could do whatever it wanted with senate pairings provided that they are contiguous. In law, however, *Kenai* requires the Board to take a hard look at lowering deviations between Senate districts, **and also** sets forth a "neutral factors" test for senate districts which provides that districts which meander and ignore political subdivision and communities of interest are suspect under Alaska's equal protection clause. Under *Kenai,* such evidence shifts the burden of proof to the Board to demonstrate that such discrimination will lead to more proportional representation. The Board is completely unable to provide any such evidence, instead claiming it does not have to justify its senate pairings. It is wrong under the established law of this jurisdiction.

It is unclear why the Board filed a response to the amicus filing by the FNSB when such a response was not allowed under the Court's scheduling order. It is also unclear why the Board needed an eleven (11) page response to

5 *Kenai Penisula Borough v State,* 743 P.2d 1352 (Alaska, 1987)

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the FNSB brief when it claims the brief did not raise any substantive arguments. The former is disrespectful of the Court. The latter is premised upon a mischaracterization of the FNSB brief. But the pretext is clearly transparent: if the Board repeats itself enough times with bombast and uncritical certainty, someone will take the Board at its word despite a record to the contrary. The lady doth protest too much, methinks.

CONCLUSION.

The Court should strike the Board's Response to the FNSB brief, or, in the alternative, allow a response, or deem the above such a response.

Date: October 1, 2013

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Upon motion of the Riley Plaintiffs seeking an order from this Court to strike the Alaska Redistricting Board's Consolidated Response To FNSB (Fairbanks North Star Borough) Amicus Briefs, and the Court being apprised of the premises therein,

IT IS HEREBY ORDERED, that the above referenced motion is herby GRANTED. The Alaska Redistricting Board's Consolidated Response to the Fairbanks North Star Borough's Amicus Briefs is here-by stricken.

Date: _____

_____
The Honorable Michael P. McCohahy
Superior Court Judge

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