IN THE SUPREME COURT FOR THE STATE OF ALASKA

In Re 2011 REDISTRICTING CASES	)	Supreme Court No. S-14441 Superior Court No.: 4FA-11-2209 CI

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

REPLY TO PETITION FOR REVIEW OF ALASKA REDISTRICTING BOARD (Riley et. al)

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Filed in the Superior Court of
the State of Alaska this ________
day of ___________________, 2012.

By: ________________________________
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H.R. Rep. No. 109-47 4

THE REALISTS GUIDE TO REDISTRICTING,
2 ed. (ABA Section of Admin.
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PRINCIPAL CONSTITUTIONAL PROVISIONS RELIED UPON

AK. CONST. Art. VI, Section 6

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

I. INTRODUCTION.

The Alaska Constitution wisely provides for judicial review of redistricting,[1] and in exercising that review, Alaskan Courts have displayed a tradition of healthy skepticism, to the effect that our Courts have corrected the errors that have been in every initial Alaskan redistricting plan.[2] That healthy skepticism is born from the realities of the redistricting process. As one commentator has observed,

> In *Reynolds v Sims,*[3] the Supreme Court declared that one person, one vote was the requisite basis for equality in the voting process. ... the decision in *Reynolds* and in a series of cases[4] exploring issues of voter representation sought to determine what constituted "fair and effective representation." Though in principle redistricting is intended to protect every citizen's fundamental right to participate in democracy, it is procedurally subject to one of the most political and unpredictable components of our democracy – buffeted by prevailing partisan winds, caprices of state legislators, and a host of complex and evolving issues. This intersection of a fundamental right and political district drawing determines where political party candidates run, who gets to elect them, and thus who controls state legislative and even congressional seats.[5]

"When something bad happens there is no point in wishing it had not happened. The only option is to minimize the damage."[6] We can all appreciate the difficulty in redistricting, but Court can only address the "bad things that happen" if it

1 AK CONT., Art. VI, § 11
2 See *Wade v Nolan,* 414 P.2d 689 (1966); *Egan v Hammond,* 502 P.2d 856 (1972); *Carpenter v. Hammond,* 667 P.2d 1204, 1215 (Alaska 1983), *Hickel v Southeast Conference,* 846 P.2d 38 (Alaska, 1992); *In re 2001 Redistricting Cases,* 44 P.3d 141, 144 (Alaska, 2002)
3 377 U.S. 533 (1964),
4 *Westbury v Sanders, 376 US 1 (1964); Baker v Carr, 369 US 186 (1962)*
5 THE REALISTS GUIDE TO REDISTRICTING, 2 ed. , at vii (ABA Section of Admin. Law and Regulatory Practice, 2010)
6 Lady Grantham, Downton Abby, Series 1, Episode 6

acknowledges them. With that in mind, it is important to appreciate the opportunities for improvement that plagued the current Redistricting Board.

a) **<u>This Was Not The Most Open Process In Alaska's Redistricting History</u>.**

The Trial Court's conclusion that the Board's process reflects openess[7] does not comply with the Court's findings of fact nor the evidence. As the Trial Court noted, the end of the process, the Board often retired into executive sessions --- during discussion of plans--- in order to discuss "litigation," when no litigation was pending.[8] Critical discussions about VRA compliance occurred with the off record, and that too much information was relayed by staff and counsel from Handley to the Board."[9] This included all the discussion with its expert about the need to put urban white Democrats in a rural Native effective District,[10] and her revised opinions about whether publicly submitted plans were non-retrogressive.[11] And of course, the entire plan for Anchorage was developed by the Republican party outside the public process, submitted to the Board, and adopted without changes.[12] The sad truth is that the

7 Jt. Exc. 92

8 Jt. Exc. 27 (June 1), 28 (June 4 and 6), and 29 (June 13, 2011)

9 Jt. Exc. 105

10 Tr. 796: 8-17 All references to "Tr." refer to transcripts submitted by the Board in support of its Petition for review. "Plt. Tr." refers to transcripts submitted by the Riley Plaintiffs in support of their Petition for review.

11 Jt. Exc. 105

12 Tr. 676:25- 680:16; See also Ex. J-62 (Depo J. Torgerson) at 59:18-25

openness of the Board's process had room for improvement.[13]

b) **The Tight Time-frames Established By the 1998 Constitutional Amendments Do Not Excuse Non-compliance With The Other Provisions of the Constitution.** This Court has noted that the tight time-frames imposed by the 1998 Alaska Constitutional Amendments "do not absolve this court of its duty to independently measure each district against constitutional standards."[14]

c) **The VRA Experts Committed Serious Errors Which Undermined the Board Process and Public Participation.** It would be obvious understatement to observe that the Board's expert witness made a mess of things. Dr. Handley was brought into the process late and and so that neither the Board nor the public had any idea about the Benchmark standards during the draft plan process.[15] Once on board, Dr. Handley also advised the Board that the AFFR, AFFER, and RIGHTS Coalition proposals were all non-retrogressive.[16] Later, her opinion changed.[17]

Most importantly, Dr. Handley reported that the VRA benchmark to avoid

13 The Court actually found that "we learn how we can do things better every redistricting cycle." Jt. Exc. 105

14 *In Re 2001 Redistricting Cases*, 44 P.3d 141, 147 (Alaska 2002).

15 Jt. Exc. 103; Plt. Tr. 143: 2-11; 144:13-146:7

16 ABR00003917-3918; ABR00003922

17 Exc. 1056 et. seq.

retrogression of Native Voting strength for the 2010 plan was four (4) effective house districts and two (2) influence or "equal opportunity" districts and three (3) effective Senate Districts.[18] This did not change throughout the process, until after this litigation started. After this litigation started, Dr. Handley changed her opinion. Dr. Handley learned that her "equal opportunity" analysis was not appropriate in a § 5 VRA analysis.[19] She also learned that after the 2006 Amendment to the VRA eliminated "influence" districts from being considered as part of § 5 VRA benchmark.[20] As a result, she changed her opinion to fix the Benchmark at five (5) effective house districts.[21] However, this error was not discovered until her deposition in this litigation.

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18 ABR00003881: 12-13; ABR00003882: 3-4

19 Tr. 808:18-810:24; See also, Exhibit J-57 at 70:3-71:16; 75:19-77:12; 114:4-149:24 The Texas case explains why the use of equal opportunity analysis is in appropriate in a § 5 case, but appropriate in a § 2 case: i.e. § 5 deals with preserving realized minority voting strength and protects them from future loss; § 2 concerns itself with the possibility of a minority groups present, but unrealized opportunity to elect. *Texas v US*, supra at 28 (ARB Exc. at 1352)

20 *Texas v US*, 2011 WL 6440006, (DDC, December 22, 2011) at 28 (ARB Exc. at 1361 n 31) In 2006, Congress amended Sec. 5 [42 USC 1973c] by changing subsection (b) and adding subsections (c) and (d). The Legislative history behind the Amendments stated

> The language in subsection (d) makes clear that it is the intent of Congress that the relevant analysis in determining whether a voting change violates subsection (b) is a comparison between the minority community's ability to elect their genuinely preferred candidate of choice before and after a voting change, consistent with the standard established by the *Beer (v United States)* Court and the precedent that followed.

H.R. Rep. No. 109-478, at 71

21 Jt. Exc. 104

d) **Partisan Motivations Infected The Process.** Equally, the evidence is clear that partisan motivations infected the process. There was direct evidence that Chairman Torgerson is reported to have said that his goal in the process was to pay back Democrats for what he considered a partisan gerrymander in 2001.[22] But there was overwhelming indirect evidence. According to Jim Holm, the Republicans were in charge of the redistricting process.[23] Four (4) of the (5) Board members were Republican.[24] Mr. Holm was concerned and took steps to insure that he did not draw Republican Rep. Tammy Wilson and Sen. John Coghill out of their districts, but he was unconcerned that he was pairing Democratic Senators Paskavan and Thomas.[25] The Board's Executive Director was the former head of the Republican Victory election campaign.[26] The Board's VRA expert wrote an article in 1987 which explains how maximizing VRA compliance necessarily helps Republicans. [27]And of course, the entire plan for Anchorage was developed by the Republican party outside the public process, submitted to the Board, and adopted without changes.[28] The preponderance of the evidence suggests that partisan motivations infected the Board Process.

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22 Plt. Tr. 113:3- 115:15
23 Ex. J-61 (Holm Depo) at 22-23
24 Id., see Tr. 117:19; 364:21-23
25 Tr. 450:21-453:24
26 Tr. 460: 20-22
27 See Plt. Ex. 10
28 Tr. 676:25- 680:16; See also Ex. J-62 (Depo J. Torgerson) at 59:18-25

II. HD 37 AND 38 FAIL TO COMPLY WITH THE ALASKA CONSTITUTION AND TRADITIONAL REDISTRICTING PRINCIPLES: BURDEN OF PROOF AND RACIAL GERRYMANDER IMPLICATIONS.

a) The Multiple Violations of Alaska's Constitution. The Board's petition under-emphasizes a critical threshold issue: i.e. HD 37 and HD 38 do not comply with the Alaska Constitution in multiple ways.[29] Specifically, the Trial Court held, HD 37 was neither compact[30] nor contiguous,[31] and that HD 38 did not comprise a socioeconomically integrated area[32] and was presumptively invalid because HD 38, together with HD 6, split the excess population of the Fairbanks North Star Borough into two districts.[33] Compactness, contiguity and socioeconomic integration are all requirements of Art. VI, § 6 of Alaska's Constitution. The Board does not challenge these holdings in its Petition for Review.

The only excuse offered by the Board for violating these Art. VI, § 6 standards is

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29 Jt. Exc. 148, 165-197

30 Jt. Exc. 121; See also Jt. Exc. 183. HD 37 contains the Bethel Census Area and jumps over hundreds of miles of open ocean in the Bering Sea to include the Western Aleutians. See ARB 00006578 (District Descriptions)

31 Jt. Exc. 121-122; In particular, the Proclamation Plan splits the Aleutian Chain between HD 36 and 37. See ARB 00006578 (District Descriptions) This Court has previously held, *sua sponte,* violated the contiguity requirements of Art. 6, § 6 of the Alaska Constitution. See Jt. Exc. 122 citing *Hickel,* 846 P.2d at, 54. This split would necessarily mean that HD 36 (which contains the other half of the Aleutians) is similarly flawed.

32 Jt. Exc. 148. This holding was based upon the Board's admission in response to Plaintiff's requests for admission.

33 Jt. Exc. 209 et. seq.

the demands of the Voting Rights Act.[34] In light of the Board's assertion of a VRA excuse defense, the violation of these standards has critical importance because of the implications respecting burdens of proof (which the Trial Court noted) and racial gerrymander concerns (which the Trial Court did not).

b) The Board's Burden of Proof. The Plan's multiple constitutional violations clearly shift the burden of proof to the Board to show that the "plan was **necessary** to effectuate policy of compliance with the Voting Rights Act."[35] Subsequently , this Court explained, " A reapportionment plan may minimize article VI, section 6 requirements when minimization is **the only means available** to satisfy Voting Rights Act requirements."[36] (emphasis added) This necessity or "only means available" standard is a very high standard. The Trial Court held that necessity to comply with the VRA was the applicable standard.[37] Again, the Board does not contest this holding in its petition for review.[38]

34 See ARB's Petition for Review, at 18-37

35 *Kenai Peninsula Borough v State,* 743 P.2d 1352, 1361 (Alaska 1987); See *In re 2001 Redistricting Cases,* 44 P.3d, at 145

36 *Hickel,* 846 P.2d at, 51-52 n 22

37 Jt. Exc. 9 The Trial Court makes a distinction between the "necessity" standard it applied and the "absolute necessity" standard that is implied by the "only means available" language found in *Hickel*. It is not clear that the differences between these two standards is meaningful, given that the Court found that the Board failed to meet the implied lower standard.

38 See ARB's Petition for Review *in passim.* At best, the Board's Petition argues that compliance with the VRA is more art than science, and that the Board had

c) **The VRA Excuse Defense: The Balance Between Non-retrogression and Racial Gerrymander.** The Trial Court invalidated HD 37 and 38 based upon its findings that the districts were not necessary to comply with the VRA, and as a result, never reached the issue as to whether the Board's application of the VRA was legitimate. Therefore, absent from the Trial Court's considerations was an appreciation that the application of the VRA requires balance between avoiding retrogression and racial gerrymandering.

The necessity or "only means available" standard evinces the notion the VRA must be applied by the Board in a manner permitted by the US Constitution because compliance with the US Constitution has priority over compliance with the VRA.[39] Since *Shaw v Reno,*[40] it has become clear that while the VRA is constitutional on its face,

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legitimate and reasonable concerns regarding DOJ. See ARB's Petition for Review, at 39 That simply doesn't meet the "only means available" or necessity test discussed above, which, as a matter of law, is required for a viable VRA excuse defense.

39 *Hickel,* 846 P.2d at, 62 ["Priority must be given first to the Federal Constitution, second to the federal voting rights act, and third to the requirements of article VI, section 6 of the Alaska Constitution. The requirements of article VI, sec. 6 shall receive priority *inter se* in the following order: (1) contiguousness and compactness, (2) relative socioeconomic integration, (3) consideration of local government boundaries, (4) use of drainage and other geographic features in describing boundaries."]; See also, See *In re 2001 Redistricting Cases,* 44 P.3d, at 143

40 509 S. 630 (1993)

it is possible that its application may run afoul of the Federal Equal Protection Clause's prohibitions by effectuating a racial gerrymander. As discussed below, the distinction between valid application of the VRA and a racial gerrymander admittedly lacks a desirable degree of clarity and must consider the size of the minority group in question, the motivations of the redistricting authority, whether it used traditional redistricting principles and whether political considerations were a proxy for race.

Under the so-called *Gingles* test a minority must be "sufficiently large and geographically compact to constitute a majority in a single- member district."[41] Thus, one component of evaluating the validity of a VRA excuse defense will initially turn on the relative size and the locus of the minority group. But the Court's have not confined themselves to compactness alone. More recently, the Courts have considered whether a redistricting authority uses other "traditional districting principles."[42] As J. O'Conner explained, "(D)istricts that are bizarrely shaped and noncompact, and that otherwise neglect traditional districting principles and deviate substantially from the hypothetical court-drawn district, *for predominantly racial reasons*, are unconstitutional."[43] For these purposes "traditional redistricting principles include, but are not limited to, compactness, contiguity, and respect for political subdivisions

41 *Thornburg v. Gingles,* 478 U.S. 30, 50 (1986),
42 *Bush v Vera, surpa.*
43 *Bush v Vera,* 517 U.S., at 994

or communities defined by actual shared interests."[44] Of course, Alaska's Art. VI, § 6 standards (i.e. compactness, contiguity and socioeconomic integration) are largely the same as"traditional redistricting principles." Thus, to the extent that the Board violated Alaska's Art. VI, § 6 standards, the Board also failed to utilize "traditional districting principles" which is indicative of a a racial gerrymander, and renders the reliance upon the VRA suspect.

Of course, the Board's motive is also relevant. O'Connor's prescription in *Bush v Vere*, as to a valid application of the VRA will necessarily implicate the relationship between compliance with "traditional districting principles" and the intent behind the district configurations.[45] On this later point, the Board's motivations of the Board are very important. Strict scrutiny under Federal equal protection analysis applies where race is "the predominate factor" motivating the drawing of district lines, and traditional, race neutral redistricting principles were subordinated to race.[46] Moreover, "To the extent that race is used as a proxy for political characteristics, a racial stereotype requiring strict scrutiny is in operation."[47] Thus, these concerns, not reached by the Trial Court in its analysis, become relevant to the extent that the

44 *Miller v Johnson*, 515 U.S. 900, 916 (1995)
45 *Bush v Vera*, 517 U.S. 952, 958 & 962 (1996); *Shaw v. Reno*, 509 U.S. 630, 642 (1993)
46 Id.
47 *Bush v Vera*, 517 U.S. 952 (1996)

configuration of HD 37 and HD 38 were required by the VRA.

III. THE PROCLAMATION PLAN IS NOT THE ONLY POSSIBLE PLAN NECESSARY TO COMPLY WITH THE VRA.

The Board's petition omits any mention that the Proclamation Plan was not the only means available to satisfy the VRA. The Board did not make any findings on the record that the Proclamation Plan was the only means available to comply with VRA, so the Court was not reviewing this issue in light of the Board record or its findings. Indeed, as noted, the Board never attempted to draw a plan that principally complied with the Alaska Constitution.[48]

Based upon the evidence at trial, however, the Trial Court held that there were other plans – specifically the TB plan – that complied with the VRA, and kept the Aleutians together.[49] This was fully supported by the evidence. The trial testimony by Board-members, staff and the Board's VRA expert was less than forthright and inconsistent on this point. Chairman Torgerson said that the Proclamation Plan was the only plan the Board could come up with that complied with the VRA.[50] But Taylor Bickford testified that both the TB and the PAM plans met the VRA Benchmark, but

48 Ex. J-62 (Torgerson Depo @ 49: 7-11); Trial Test. Of Torgerson
49 Jt. Exc. at 123
50 Tr. 227:24-228:11

he did not consider them to comply with the VRA for other reasons.[51] Dr. Handley, the Board's VRA expert, testified that the TB plan met the VRA benchmark standards.[52]

The Court made no specific findings as to HD 38 other than to note that HD 38 "is not necessary under the VRA for the same reasons " HD 37 is not necessary.[53] The evidence in the record, however, points to the possibility of plans that comply with the VRA and cure the HD 38 infirmaries. The last plan submitted at trial by the Plaintiffs – the Modified Rights Plan 2 – complied with the VRA.[54] Moreover, this Plan also corrects Art. VI, § 6 problems with both HD 37 and 38 by uniting the Aleutians, not placing Ester/Goldstream and Wade Hampton in the same house district, and placing all the Fairbanks excess population in one district.[55] Thus, the Proclamation Plan was not the only means available to comply with the VRA. Moreover, it is possible to comply with the VRA and correct the problems with HD 37 and 38 at the same time. These facts mean that Proclamation HD 37 and 38 were not necessary because they were not the only means available to satisfy the VRA. On this ground alone, the Trial

51 Tr 703:23-704:11
52 Tr. 917:10-919:16
53 Jt. Exc. 132.
54 Plt. Tr. 163:22-164:11 See Plt. Exhibit 14. The Board never objected to the hearsay testimony of Mr. Lawson to the opinion by Dr. Arrington as to the compliance of the plan with the VRA.
55 Plt. Tr. 164:15-20; See also 167:16-168:25 (regarding placing Homer into a rural district)

Court holding should be affirmed as to HD 37 and 38.

IV. THE TRIAL COURT DID NOT MISINTERPRET *HICKEL*

The Board argues that the Trial Court misinterpreted *Hickel's* holding that excessive Native VAP in the Native effective districts were not necessary.[56] The Board argues that the Trial Court interpreted *Hickel* to require minimization of Native VAP in the Native effective districts.[57] The Board's argument is a "straw-man," which is premised upon a mischarcterization of the Trial Court's ruling.

The Trial Court correctly found that Proclamation HD 40, 39, 38, 37, and 36 all have more Native VAP than is needed to be effective.[58] The Board does not take exception to these findings, and the findings are clearly supported in the record by the testimony of the Board's VRA expert.[59] The Court's ruling was simply that the configuration of HD 37 and 38 was not necessary because a plan could be developed that provided lower Native VAP in the Native effective districts that would still

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56 ARB's Petition at 22 et. seq.

57 Id.

58 Jt. Exc. 127 - 128 The Court found that Proc. HD 40 has 62.09% Native VAP but only needs 42% to be effective. Proc. HD 39 has 6.09% Native VAP but only needs 42-50% to be effective. Proc. HD 38 has 46.36% Native VAP but only needs 42% to be effective. Proc. HD 37 has 71.45% Native VAP but only needs 35% to be effective.

59 Tr. 917:10-919:16 (Handley Test.); Tr. 57:21-61:8 (Arrington Test.) See also, Ex. J-40 @ 29

comply with the VRA. The Trial Court did not hold that the Board had to minimize Native VAP in all the districts in order to comply with the VRA. Rather, the Court held that creating districts with excessive Native VAP is not necessary and, therefore, does not excuse violations of Alaska Constitution. This is clearly in accord with *Hickel.*

Oddly, the Board urges a different interpretation of *Hickel,* which nonetheless does not provide a justification for HD 37 and 38 Constitutional violations. When considering the VRA excuse defense, this Court has observed that "a reapportionment plan is invalid (under the VRA) if it would lead to retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."[60] Prior to *Hickel,* this Court held that the Board did not meet its burden of proof to assert a viable VRA excuse defense to a violation of Alaska Constitution where the Board increased Native VAP in a district from 27.5% (Benchmark district) to 41.9% (Proclamation District).[61] Subsequently, in *Hickel,* this Court held that district that raised Native VAP by 2% over the benchmark level was not justification for violation of the compactness requirement.[62] Thus, increasing Native VAP in excess of the

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60 *Kenai Peninsula Borough v State,* 743 P.2d at, 1361. As Court also observed, §5 of the VRA " "aims to preserve the voting prerogatives of minority voters." id., at 1356 n 2

61 *Kenai Peninsula Borough v State,* 743 P.2d at, 1361

62 *Hickel v Southeast Conference,* 846 P.2d,, at 51-52

minimum benchmark standard needed to achieve preclearance fails to meet the Board's burden of proof under a VRA excuse defense. The Board correctly notes that the Trial Courts analysis differed in that the Trial Court compared the Proclamation Plan Native VAP to what was actually needed: i.e. levels of effective Native VAP. The Board argues that the Court should have compared the Native VAP in the Proclamation Plan to comparable District in the Benchmark plan.[63] Assuming that the Trial Court was required to look at Benchmark Native VAP and was not free to look at the Native VAP necessary to be effective, the result is the same: the Native Districts, including HD 37 and 38 fail to meet this test, because the Native VAP in Proclamation Native districts substantially exceed Benchmark Native districts

Benchmark HD 37 (i.e. Bristol Bay and the Aleutians) has a Native VAP of 37.79%.[64] The majority of the Benchmark HD 37 is in Proclamation HD 36, which has a Native VAP of 78.26%, which is nearly twice the Benchmark level. The remaining portion of Benchmark HD 37 (the Western Aleutians) is in Proc. HD 37, which has 46.63% Native VAP, or a 9% increase over the Benchmark Plan. Thus, both Proclamation house districts increase Native VAP over benchmark levels for Bristol Bay and the Aleutians areas of the State.

63 ARB's Petition, at 23-23

64 Exc. 2 & 1001 for the percentages in this paragraph. See also Jt. Exc. 127

Benchmark HD 6 (i.e. the Interior Villages) has a Native VAP of 49.97.%.[65] The majority of the Benchmark HD 6 is in Proclamation HD 39, which has a Native VAP of 67.09%, which is an 18% increase over the Benchmark level in Benchmark HD 6. The remaining portion of Benchmark HD 6 is in Proc. HD 38, which has 46.36% Native VAP, or a 3% decrease under the Benchmark Plan.

Since Native VAP substantially increased in the Bristol Bay, Aleutians and the majority of Interior Village districts under the Proclamation Plan over levels in the Benchmark Plan, both *Kenai* and *Hickel*, **as interpreted by the Board,** hold that the Proclamation Plan was not necessary to comply with the VRA. This Court should either hold that the Trial Court did not misinterpret *Kenai* and *Hickel*, or, if it did, the error was harmless because the same result would occur.

V. TEXAS v US DOES NOT REJECT *KENAI* AND *HICKEL*.

The Board confuses the approach taken in *Kenai* and *Hickel* with that taken by the Court in *Texas v US*.[66] The Texas case simply doesn't deal with the concerns over comparative minority VAP levels addressed in *Hickel*.

65 Exc. 2 & 1001 for the percentages in this paragraph. See also Jt. Exc. 127

66 2011 WL 6440006, (DDC, December 22, 2011)

The issue in *Texas* involved the attempt by Texas to use " opportunity district "analysis in setting a VRA benchmark.[67] Oddly, it was in connection with this case that Dr. Handley learned that her "equal opportunity" analysis originally used in Alaska was not appropriate in a § 5 VRA analysis.[68] But Texas' "opportunity" district analysis was similar to Dr. Handley "equal opportunity" approach used in this Alaska case. In *Texas*, Dr. Handley actually submitted expert testimony rebutting the use of an equal opportunity analysis that she originally used in Alaska. In truth, what the Texas case illustrates best is that Dr. Handley's equal opportunity analysis used in her final report to the Alaska Redistricting Board was fundamentally flawed, and that she didn't tell the Board of these analytical errors.[69]

The *Texas* case underscores other errors made by Dr. Handley. As the Board notes, the *Texas* Court held retrogression analysis requires a "multi-factored" functional analysis.[70] However the *Texas* Court criticized Dr. Handley's type of

67 Exc. 1350--

68 Tr. 808:18-810:24; See also, Exhibit J-57 at 70:3-71:16; 75:19-77:12; 114:4-149:24 The Texas case explains why the use of equal opportunity analysis is in appropriate in a § 5 case, but appropriate in a § 2 case: i.e. § 5 deals with preserving realized minority voting strength and protects them from future loss; § 2 concerns itself with the possibility of a minority groups present, but unrealized opportunity to elect. *Texas v US*, supra at 28 (ARB Exc. at 1352)

69 Supra FN 44. See particularly Tr 70:3-71:16

70 ARB Petition 26.

analysis noting that she "relied upon a limited set of data".[71] The Texas court went on to note that "population statistics are significant and an important starting point for retrogression analysis,"[72] but **where there is no super-majority** in a district, a Section 5 analysis must go beyond mere population data to include factors such a minority voter registration, minority voter turn out, election history and minority/majority voting behaviors."[73] At trial in Alaska, Dr. Handely explained that, as in Texas, she looked a very limited data set. She did not look at minority voter registration,[74] minority voter turn out,[75] nor minority/majority voting behaviors [76]in the operation of Proc. HD 38. Indeed, Dr. Arrington, the Plaintiffs VRA expert, criticized Dr. Handley report based upon her "reliance on the numbers" and the failure to look at these other factors relevant to a retrogression analysis.[77] If the Texas case stands for anything, it stands for the proposition that the Trial Court overly relied upon Dr. Handley's analysis.[78]

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71 *Texas v US,* supra at 14 (ARB Exc. at 1338)
72 Id. at 29 (ARB Exc. at 1353)
73 Id. at 30 (ARB Exc. at 1354)
74 Tr. 743:12-14; 856:11-13
75 Tr. 858:6-16; 859:1-9; 885: 13-17
76 Tr. 857:2-859:9
77 Tr. 34:1-22, 36:15-39:8, 50:14-53:2
78 The Trial Court made no finding as the creditability of Dr. Handely's opinions, and does not cite Dr. Handley in support of its findings. The Trial Court relied more often upon the Plaintiffs VRA expert, Dr. Arrington.

VI. Pairing of Sen. Hoffman Was A Factor Used By The Board In Considering An Overall Rural Plan.

The Board argues that concerns over pairing Senator Hoffman was not relevant to the configuration of HD 38[79] and was not speculative with regards to HD 37.[80]Neither is correct. As Chair Torgerson testified, concern over Sen. Hoffman led to the rejection of the TB and PAM plans.[81] Additionally, Chair Torgerson testified that

> Kodiak was paired with Bethel through something similar to that, but in this plan, we took the Chain -- I think about, maybe about 6,000 individuals and split it. And moved it up here into – into the Bethel area. And that then allowed us to pair 37 with 38 and create the effective Senate district.

Contrary to assertions in the Board's Petition, the evidence is clear that the Board Chair believed that the configuration of both 37 and 38 were related to concerns over pairing Sen. Hoffman.

The Board attacks the Trial Court's holding that concerns over pairing Sen. Hoffman and how it would affect preclearance were speculative. The Board cites no legal authority, either in the DOJ § 5 regulations,[83] DOJ guidance[84] nor case authority for the proposition pairing a Native incumbent would be a basis for DOJ objection to

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79 ARB's Petition at 27-28
80 ARB's Petition at 33 et. seq.
81 Tr 219:9-222:2; 223:20-29; 225:6-13; 226:4-24
82 Tr. 225: 17-23
83 Exhibit J-50 (28 CFR 51.59)
84 Exhibit J-49

preclearance. The only evidence cited to by the Board in support of its concerns are the beliefs of its members. Those beliefs may have been sincerely held, and they may have been informed by the Board's DOJ expert opinion, but the Board never presented any evidence that its beliefs were anything more than speculation.

VII. THE APPLICATION OF THE VRA IS QUESTIONABLE.

The Trial Court did not reach racial gerrymander considerations. If the Court finds that the Trial Court erred in holding that HD 37 and 38 were not necessary nor "the only means available" to comply with the VRA, this Court (or the Trial Court on remand) should consider whether the configurations constitute a valid application of the VRA or whether they constitute a racial gerrymander. Such a review should consider the motivations of the redistricting authority, whether it used traditional redistricting principles and whether political considerations were a proxy for race.[85] The evidence strongly suggest that the Plan is a racial gerrymander.

As noted above, to the extent that the Board violated Alaska's Art. VI, § 6

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85 See Sec. II(c) supra. The relative size of the rural Native population has little relevance in the § 5 VRA context because the the groups in question have realized a level of minority voting strength that is protected from future loss, while§ 2 concerns itself with the possibility of a minority groups present, but unrealized opportunity to elect. *Texas v US*, supra at 28 (ARB Exc. at 1352)

standards, the Board also failed to utilize "traditional districting principles" which is indicative of a a racial gerrymander, and renders the reliance upon the VRA excuse defense as suspect.[86] This is particularly relevant in the context of HD 37 and 38, which the parties do not seriously dispute are non-compact, non-contiguous, not socioeconomically integrated and fail to respect the political sub-divisional boundaries of the Fairbanks North Star Borough. These infirmities run afoul of "traditional redistricting principles," which is evidence of racial gerrymandering.[87] More to the point, if the Board had first attempted to use ""traditional redistricting principles," as directed in *Hickel* in an attempt to create a plan that principally complied with Art. VI, § 6 standards the Board might have some evidence that minimization of "traditional redistricting principles" was necessary to comply with the VRA.[88] No such evidence exists.

Second, as the evidence clearly illustrated, race was the predominating motivation in the drawing of the plan. The Board members clearly testified that they did not attempt to draft a plan complying with the Alaska Constitution.[89] As the Trial

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86 See Sec. II(c) supra.
87 *Bush v Vera,* 517 U.S., at 994
88 See Riley Petition for Review, at Sec. V. 1
89 Ex. J-62 (Torgerson Depo @ 49: 7-11); Trial Test. Of Torgerson

Court noted, the Board placed undue emphasis on not pairing Native incumbents.[90] And of course, the Board's expert testified that they were trying to make the Native effective districts have the strongest Native voting strength possible.[91] This racial motivation was reflected in the Board processes which intentionally drew the rural districts first before considering Fairbanks districts.[92] The Board chair's testimony reflected this motivation when he testified that "any plan that we do that ...(needed) the support of the Native community.[93] .There is substantial evidence in the record that the race was the primary motive in drafting the Proclamation plan.

Finally, there is substantial evidence that political affiliation was used as a proxy for race. Clearly, the Board was intentionally placing FNSB Democrats in HD 38 in an effort to enhance Native voting strength.[94] Dr. Handley testified that "Native Alaskans vote Democratic."[95] She testified,

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90 Jt. Exc. 124-127; Tr. 405:9-11 (Torgerson) ["Native community wanted to make sure that they had their representation. They didn't want Senator Hoffman paired with Senator Stevens."]

91 Tr. 879:23-881:13; 950:3-22

92 Tr. 372: 4-7 (Holm) [Senator Torgerson told us, and all of us agreed, that we had to take care of the Native districts first before we could set any boundaries on any of the rest of the state.] See also, Tr 187: 10-17 (Torgerson) [And when we all knew that, we couldn't really set the boundaries of some of the rural areas of the state, if not all of them, until we finished with the -- or the urban areas of the state until we finished with the rurals.]

93 Tr. 220:10-11

94 Tr. 201:2-17; 209:6-9; 245:17-22; 319:14-21; 323:12-324:12.

95 Tr. 796:2-3

> I specifically told the Board the thing to do was to actually add the Democrats to the district and not Republicans, because that's white crossover vote. Because Natives typically vote for Democratic candidates in general elections, if you had whites in that district, you are more likely to elect a Native-preferred candidate."[96]

Dr. Handley further testified that there was no other reason for putting white Democrats in HD 38 except to enhance Native voting strength.[97] The focus upon using party affiliation as a proxy for race was so complete that the Board never considered other alternatives to comply with the VRA. For example, Dr. Handley testified that Native voting strength could be maintained in HD 38 by adding military population because of low military voting turn-out, which was a proposal in one of the public plans.[98] In this regard, she stated, "I'm not concerned about the military. I'm concerned about Republicans."[99] The Board never seriously considered this option which would have avoided using political affiliation as a proxy for race. The evidenced is overwhelming that party affiliation was used as a proxy for race, which is evidence of racial gerrymandering.[100]

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96 Tr. 796:8-14
97 Tr. 796:18-22
98 Tr. 951: 8- 952:5
99 Tr. 952: 12-13
100See Sec. II(c) supra.

VIII. CONCLUSION.

The Court should affirm the Trial Court's holding that HD 37 and 38 were not necessary to comply with the VRA, and, in light of the fact that the Districts reflect multiple violations of Alaska's Constitution, are therefore invalid.

Date: February 17, 2011

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Certificate of Service
I certify that a true and correct copy of the foregoing was served by e-mail on this February 17 2011 to:
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