9/21

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT AT FAIRBANKS

In Re 2011 Redistricting Cases.	) **CONSOLIDATED CASE NO.:**) **4FA-11-2209-CI**) 4FA-11-02213 CI) 1JU-11-00782 CI

MEMORANDUM IN REPLY TO OPPOSITIONS TO MOTION TO DISMISS FOR LACK OF STANDING

I. INTRODUCTION

The Alaska Supreme Court has made absolutely clear that:

> Nothing in the text of Article VI, section 11, or the relevant portions of the record of the constitutional convention, *furnishes justification for a judicial construction departing from the section's unambiguous text.*

Carpenter v. Hammond, 667 P.2d 1204, 1210 (Alaska 1983)(emphasis added, footnote omitted). The unambiguous text of Article VI, section 11 expressly allows only a "**qualified voter**...to apply to the superior court to compel the Redistricting Board...to correct any error in redistricting."

In their Oppositions both the City of Petersburg ("City") and the Fairbanks North Star Borough ("FNSB") ignore the actual question at issue – whether municipalities are "qualified voters" under the Alaska Constitution. Petersburg concedes it is not a 'qualified voter.' The FNSB admits it is only joined in its lawsuit by a qualified voter. Both plaintiffs, however, attempt to hide these admissions behind alternative theories of standing and irrelevant concepts far removed from the actual issue. By their own admissions, neither the City nor the FNSB are qualified voters. Accordingly, the Alaska

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Constitution makes clear they lack standing to challenge the Alaska Redistricting Board's plan. As a result, the court should dismiss them as parties from this case.[1]

II.
ARGUMENT

A. The City and the FNSB Are Not Qualified Voters Under Article VI, Section 11 of the Alaska Constitution and Therefore Lack Standing to be Parties.

The City admits it is not a qualified voter. FNSB attempts to categorize itself as a qualified voter simply by asserting the qualified voter status of its co-plaintiff as its own. Whether expressly or impliedly, the City and the FNSB admit they are not qualified voters.

The City attempts to avoid this shortcoming by claiming it need not establish qualified voter standing to challenge the Board's plan. It does so by misconstruing the Alaska Supreme Court's decision in *Carpenter v. Hammond* and misapplying its holding to the facts at hand.

The issue in *Carpenter* was whether an individual, qualified voter had standing to challenge aspects of a redistricting plan that did not affect the election district in which the plaintiff resided. 667 P.2d at 1208. The court found the "unambiguous text" of Article VI, section 11 resolved the standing issue because the plaintiff was an

[1] By its motion, the Board seeks only to dismiss the City and FNSB as improper parties. It does not seek dismissal of the Fairbanks and Petersburg cases in their entirety. Thus, while standing is a matter of subject matter jurisdiction, *Ruckle v. Anchorage School District,* 85 P.3d 1030, 1035 (Alaska 2004)(if a plaintiff lacks standing to bring suit, then the court lacks subject matter jurisdiction and cannot address the plaintiff's claims) assuming the individual plaintiffs in each case are qualified voters, they would have standing to bring the claims and the cases themselves would be properly before this court.

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individual, qualified voter. *Id.* at 1209-1210. As a qualified voter, the she could challenge any aspect of the Board's plan, not just those which directly affected her district. *Id.*

The City fails to recognize the important difference between the facts in *Carpenter* and the facts at hand – the plaintiff in *Carpenter* was a qualified voter. The City is not. The City is correct that the only standing threshold under the Constitution is the challenger must be a qualified voter. The City by its own admission fails to meet this initial hurdle and therefore lacks the ability to challenge a redistricting plan.

The City's argument that because the *Carpenter* Court found that the plaintiff in that case also had standing to challenge the reapportionment plan under its traditional standing cases, means that the City has standing is misplaced for several reasons. First, unlike the City, Carpenter was in fact a qualified voter and thus met the threshold standing requirement in redistricting challenges. Second, as the City itself points out in its Opposition[2] the standing challenge made in that case involved the claim that the term "qualified voter" created a "a jurisdictional threshold" that should be "interpreted as supplementing rather than repealing the traditional standing requirements." *Carpenter*, 667 P.2d at 1209 & n. 11. In other words, the State in *Carpenter* claimed that the term "qualified voter" limited challenges to those that occurred in the geographic location in which the plaintiff resided. It was this argument the *Carpenter* Court was rejecting

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[2] *See* City Opposition at pp. 6-7

when it held that the plaintiff in that case also had traditional standing to raise challenges to the "military exclusion and the Cordova inclusion issues." *Id.* at 1210.

The City and the FNSB both argue they have standing because other municipalities have challenged redistricting plans in the past. While the plaintiffs are correct that cities and boroughs have brought suit against redistricting plans before, the plaintiffs fail to recognize that in no other suit has the defendant asked the Alaska Supreme Court if a municipality is legally authorized to do so. The Alaska Supreme Court, the only court in Alaska whose opinions hold precedential value, has not decided this issue. The trial court in the 2001 redistricting litigation attempted to resolve the issue, but instead ignored the only clear precedent on the matter.

During the 2001 redistricting litigation, the redistricting board moved to dismiss a number of municipal plaintiffs for the same reason the Board brings forth the current motion to dismiss – a municipality is not a qualified voter. The trial court denied the motion from the bench directly after oral argument, adding a footnote regarding its decision in its Memorandum and Order. In making its decision, the court ignored the Supreme Court's finding in *Carpenter* that Article VI, section 11 is dispositive of the standing issue and that "nothing in the text...furnishes justification for judicial construction departing from the section's unambiguous text." *Carpenter*, 667 P.2d at 1210. Instead, it misconstrued the broad challenging authority afforded qualified voters to mean the term itself was broad in nature.

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This is the same wrong legal conclusion plaintiffs ask this court to make. The question of whether a municipality is a "qualified voter" has not been addressed, let alone resolved by our Supreme Court. Contrary to the FNSB's characterization that this motion is essentially pointless, this issue needs to be resolved. Other cities and boroughs have been allowed to challenge redistricting plans not because they were legally entitled to do so, but because no one questioned their ability to do so. Such has simply been the practice, but is not the law. Past practice, however, does not trump the law. To hold otherwise subjects every law to nullification by lack of enforcement or agreement of the litigants.

Finally, the City argues that this Court should ignore both the intent of the framers of the Alaska Constitution and the legislative history of the 1998 constitutional amendments that the term "qualified voter" means *an individual citizen with the right to vote*[3] because there is no statement by "the legislature or the framers" which excludes "municipalities from challenging redistricting." The City's argument turns the law on its head.

It is well established that "[w]here a statute's meaning appears plain and unambiguous ... the party asserting a different meaning bears a correspondingly heavy burden of demonstrating contrary legislative intent." *Alaskans for a Common Language, Inc. v. Kritz*, 170 P.3d 183, 193 (Alaska 2007) (*quoting State v. Alaska State Employees Ass'n/AFSCME Local 52*, 923 P.2d 18, 23 (Alaska 1996)). Our Supreme Court has

[3] *See* Board's Memorandum in Support of Motion to Dismiss at pp. 2-3 & Exhibits A, B.

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made clear that the term "qualified voter" is "unambiguous" *Carpenter,* 667 P.2d at 1210. A qualified voter is an individual citizen with the right to vote. Thus, it is the City's "heavy burden" to demonstrate a contrary legislative intent. A burden they do not and cannot meet because "[n]othing in the text of Article VI, section 11, or the relevant portions of the record of the constitutional convention, *furnishes justification for a judicial construction departing from the section's unambiguous text.*" *Id.* (emphasis added). Because the term qualified vote is unambiguous and clearly expresses the intent of the framers and legislators courts can not modify or extend it by judicial construction. *E.g. Young v. Embley*, 143 P.3d 936, 944 (Alaska 2006): "If a statute is unambiguous and expresses the legislature's intent, we will not modify or extend it by judicial construction.") Since the City and FNSB are not "qualified voters" they lack standing to be parties in this case and therefore must be dismissed from the law suit.

B. Neither the City Nor the FNSB Qualifies Under Traditional Standing Principles.

The City and the FNSB also contend that they have standing in this case under various theories of traditional standing principals. None of their arguments have merit.

Both the City and the FNSB argue they have standing under an "interest-injury analysis." However, when applied correctly, neither qualifies under this traditional standing test. Just as the plaintiffs fail to recognize the real issue is whether a municipality is a qualified voter, the plaintiffs also fail to identify the real purpose behind redistricting. Both claim it is a municipality's ability to obtain state funding,

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which is facilitated by drawing district lines to ensure a representative who is most inclined to help the local government is elected. This process is better known as political gerrymandering, and is the exact reason the Alaska legislature amended the Alaska Constitution in 1998 to create an independent board, without political ties and political agendas, to be responsible for redrawing Alaska's house and senate districts. The constitutional framers did not mention political entities, such as a municipality, when they were drafting Article VI, section 11, presumably to prevent the exact situation the City and the FNSB are currently advocating.

The true purpose behind redistricting is to protect an individual's personal constitutional right to vote. As noted by the United States Supreme Court "[t]he right to vote is personal and the rights sought to be vindicated in a suit challenging an apportionment scheme are personal and individual." *Reynolds v. Sims*, 377 U.S. 533, 554-555 (1964).[4] Lines are drawn so as to maximum this individual right. Throughout the years, governments have discovered ways to manipulate this process so as not to protect an individual's right, but to foster a favorable political result. This usurpation caused the Alaska legislature to amend the Constitution in 1998 in an effort to remove

[4] *See also In re 2001 Redistricting,* 44 P.3d 141, 147 (Alaska 2002) "the basic goal of redistricting—[is] 'adequate and true representation by *the people* in their elected legislature'")(emphasis added); *Groh v. Egan*, 526 P.2d 863, 890 (Alaska 1974) (Erwin, J., dissenting) "we should not lose sight of the fundamental principle involved in reapportionment--truly representative government where the *interests of the people* are reflected in their elected legislators." (emphasis added); *Albert v. 2001 Legislative Reapportionment Comm'n*, 790 A.2d 989, 994-95 (Pa. Super. Ct. 2002)("it is the right to vote and the right to have one's vote counted that is the subject matter of a reapportionment challenge.").

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politics from the redistricting process and return to its true purpose – to protect an individual's right to vote.

Under no traditional standing test does a municipality meet the interest at stake element. Both the City and the FNSB admit their only interest is in funding. Yet the true interest at stake is the individual right to vote. A municipality does not possess the right to vote. Therefore, a redistricting plan cannot adversely affect a municipality's interest and therefore they lack "interest-injury" standing.

The City alternatively argues it "undoubtedly" has "associative standing." Once again the City's argument is misplaced. First, the City is not an "association" it is a governmental entity. It does not have members, it has residents; residents who all possess the individual personal right to vote. Thus the rationale behind "association" standing is inapplicable to this case.

Second, even assuming *arguendo* that somehow the concept of "associative standing" is applicable to the City, under the circumstances of this case the City fails to meet two of the three elements: the germane purpose and individual member participation elements. *See* Alaskans for Common Language, 3 P.3d at 915.

As to the "germane purpose" element, while a resident of the City who is a qualified voter would otherwise have standing to sue in their own right, the interests the City seeks to protect are not germane to the City's purpose. The City explains its purpose is to provide services to its residents. It claims it is only able to achieve this purpose by securing funding from the state legislature. While the Board does not

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dispute the City's claims of its purpose, the flaw in their argument is that "securing funding" **is not** the purpose behind redistricting. The purpose of redistricting is to protect an individual's right to vote and have that voted counted. E.g. *Reynolds*, 377 U.S. at 554-555; *In re 2001 Redistricting*, 44 P.3d at 147; *Groh*, 526 P.2d at 890; *Albert*, 790 A.2d at 994-95.

The City also fails to meet the third element that requires that "neither the claim asserted nor the relief requested required participation of individual members in the law suit." *Alaskans for Common Language, Inc.*, 3 P.3d at 915. To the contrary, participation of individual "members" is expressly required by the Alaska Constitution. Under Article VI, section 11 only "qualified voters" may challenge a redistricting plan. Thus, only the properly qualified individual residents of the City have standing to challenge a redistricting plan.

Finally, the FNSB claims it has standing as a "taxpayer-citizen" who has raised an issue of public significance. This particular standing test is applied when challenges to certain government activity would be foreclosed if such actions were not allowed. *Trustees for Alaska v. State*, 736 P.2d 324, 328 (Alaska 1987). First, the question must be of public significance, such as specific constitutional limitations. *Id.* at 329. Second, the plaintiff must be an appropriate plaintiff; "[f]or example, standing may be denied if there is a plaintiff more directly affected by the challenged conduct in question who has or is likely to bring suit." *Id.*

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It is obvious that the FNSB fails to qualify for "taxpayer-citizen" standing. Even Mr. Walleri's "blind man in the snow" would recognize that the FNSB is neither a citizen nor taxpayer. Moreover, while redistricting is without question a matter of public significance whose purpose is to protect one of the most cherished constitutional rights – the right to cast a meaningful vote, the FNSB is not an appropriate party in this case. The FNSB itself acknowledges there is a better plaintiff more directly affected by the challenged conduct who has brought suit – Tim Beck. In fact, the FNSB argues that even if the Board is dismissed for lack of standing, the "FNSB has a representative party that is a qualified voter in this suit."[5] As such, Tim Beck is a plaintiff who is "more directly affected by the challenged conduct" who as actually brought suit. Accordingly, even if the FNSB was able to claim "taxpayer-citizen" applied, it fails to meet that standard because there is plaintiff who has filed suit who is more directly affected. The FNSB also lacks standing under the "taxpayer-citizen" standing test and therefore must be dismissed from the case.[6]

[5] See FNSB Opposition at p. 2.

[6] The FNSB assertion that they have standing because "no other suit includes a challenge to house district 37 or senate district S" and "the deadline for filing actions has long since passed" [FNSB Opposition at p. 6] is a red herring. The Board is not seeking to have the claims set forth in the FNSB/Beck complaint dismissed for lack of standing, merely the FNSB. Dismissal of the FNSB as a party does not affect Mr. Beck's ability to continue with the claims set forth in the complaint.

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III.
CONCLUSION

Despite the City and the FNSB's valiant attempts to misdirect this court from the real issue, the conclusion remains the same. The City and the FNSB are not qualified voters. Under the Article VI, section 11 of the Alaska Constitution, only a "qualified voter" may challenge a redistricting plan. Thus, they lack standing to challenge the Board's plan under Article VI, Section 11 of the Alaska Constitution and must be dismissed as parties to this lawsuit. Moreover, even if traditional standing principals are considered, the City and the FNSB still lack standing and therefore are not proper parties to this case.

DATED at Anchorage, Alaska this 21st day of September 2011.

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CERTIFICATE OF SERVICE

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