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PATTON BOGGS LLP

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

IN RE: 2011 REDISTRICTING CASES:)

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Case No. 4FA-11-2209CI

Order on Motion to Dismiss for Lack of Standing

The Board moves to dismiss the Fairbanks North Star Borough [FNSB] and the City of Petersburg [Petersburg] Plaintiffs on the grounds that they are not qualified voters and therefore lack standing. The Plaintiffs oppose the motion.

I. The Precedence Afforded Voting in Our Society

The evolution of the governance of human affairs has proceeded apace from the ancient Greeks to modern times. The advent of a stable agricultural system allowed a taxation base that sustained an ordered society under the Romans, particularly during the time of the Antonine Dynasty from 138 A.D. to 193 A.D. as documented by Gibbon.¹ This evolution reached its apotheosis in America in 1776 whereby citizens created a new nation, as aptly described several score years later, as "a government of the people, by the people, for the people. . ."²

The defining principles of this democracy were ultimately incorporated into the U. S. Constitution.³ It addressed fundamental issues regarding the relationship of a citizen to his government. The most fundamental elements of citizen participation in government are the right to vote and the right to serve on a jury. John Adams, a founding father and second president of the United States, viewed these twin rights as the

¹ Edward Gibbon, *Decline and Fall of the Roman Empire*, published in six volumes between 1776 and 1788.

² Gettysburg Address, 1863.

³ Adopted 1787.

animating source of the body politic. In his third “Clarendon” letter, which appeared in the Boston Gazette in the midst of the Stamp Act crisis,⁴ Adams wrote,

“thus, it seems to appear, that two branches of popular power, voting for members of the house of commons, and trials by juries, the one in the legislative and the other in the executive part of the constitution, are as essential and fundamental to the great end of it, the preservation of the subject’s liberty, to preserve the balance and mixture of the government, and to prevent its running into an oligarchy or aristocracy, as the lords and commons are to prevent its becoming an absolute monarchy. These two popular powers, therefore, are the heart and lungs, the mainspring and the center wheel, and without them the body must die, the watch must run down, the government must become arbitrary, and this our law books have settled to be the death of the laws and constitution. **In these two powers consist wholly the liberty and security of the people.**” [Emphasis added].

Alaska benefited from the bright minds of practical citizens in creating its own constitution,⁵ a constitution that was chaired by a grocer from Valdez⁶ and produced one of the touchstone documents of governance found in any constitution. Alaska stands at the forefront of individual rights by placing its Declaration of Rights⁷ first in the document.

⁴ <http://www.commonwealthbooks.org/John-Adams.html>

⁵ Ratified in 1956; effective upon statehood on 1.03.59.

⁶ The names of Egan, Bartlett, Doogan, and Coghill may not come as well to the tongue of non-Alaskans as Washington, Franklin, Jefferson, and Adams, but their work is the basis for the scrutiny that brings us together in this action.

⁷ Article I.

The instant action brings together the executive, legislative, and judicial branches of government in an earnest endeavor to determine whether the redistricting plan proposed by the Board meets the vital, organic needs of citizens to vote under terms and conditions of the U.S Constitution, complies with the Alaska Constitutional requirements under Article 6, and otherwise is consistent with the Federal Voting Rights Act. The mechanism for review of a proposed redistricting plan requires an expedited procedure, consistent with due process, designed to resolve any differences within a time frame that preserves voting rights but does not delay elections. A trial on the merits is scheduled to commence the week of 9 January 2011.

The instant motion is not focused on the merits of the redistricting plan, but rather on the issue of whether the two municipal plaintiffs have standing under either Article 6 of the Alaska Constitution or otherwise have standing under generally accepted principles of Alaska case law. Judge Rindner found at the trial level in the 2001 case that municipalities could prosecute redistricting claims. The Board contends Judge Rindner's finding is neither binding nor correct.

Form will not displace substance on such a fundamental issue as voting rights. Both FNSB and Petersburg have made cogent arguments why they have standing to prosecute this action. For the reasons noted below, the court finds Judge Rindner's conclusion is correct and therefore the Board's motion to dismiss the municipalities for lack of standing is DENIED.

II. Procedural Redistricting Litigation Context

This matter originated as three separate cases: the case filed by the *Riley* plaintiffs in Fairbanks [4FA-11-2209 CI], the case filed by the *Petersburg* Plaintiffs in Juneau

[1JU-11-00782CI], and the case filed by the Fairbanks North Star Borough in Fairbanks [4FA-11-2213]. The *Riley* and *Petersburg* cases were consolidated on 22 July 2011. A scheduling conference was held on 22 July 2011. On 26 July 2011 all three cases were consolidated as 4FA-11-2209CI. The electronic filing of pleadings was established to accommodate the expedited nature of the case. Status hearings were also held on 5 August 2011, 26 August 2011, and 20 September 2011. The Board filed their answer on 10 August 2011 which listed the Plaintiffs' lack of standing as an affirmative defense. The Board filed the current Motion to Dismiss for Lack of Standing on 9 September 2011.

III. Standing

“Standing questions are limited to whether the litigant is a ‘proper party to request an adjudication of a particular issue....’ ”⁸ Standing in our state courts is not a constitutional doctrine; rather, it is a rule of judicial self-restraint based on the principle that courts should not resolve abstract questions or issue advisory opinions.⁹ The basic requirement for standing in Alaska is adversity.¹⁰

The concept of standing has been interpreted broadly in Alaska. We have “departed from a restrictive interpretation of the standing requirement,”¹¹ adopting instead an approach “favoring increased accessibility to judicial forums.”¹² (and cases cited therein), *cert. denied*.¹³

⁸ *Moore v. State*, 553 P.2d 8, 24 n. 25 (Alaska, 1976) (quoting *Flast v. Cohen*, 392 U.S. 83, 100–01(1968)).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Coghill v. Boucher*, 511 P.2d 1297, 1303 (Alaska, 1973).

¹² *Moore v. State*, 553 P.2d 8, 23 (Alaska 1976); see also *State v. Lewis*, 559 P.2d 630, 634 n. 7 (Alaska, 1977).

¹³ 432 U.S. 901 (1977).

Under the Alaska Constitution **any qualified voter** may apply to the superior court to compel the Redistricting Board, by mandamus or otherwise, to perform its duties under this article or to correct any error in redistricting.¹⁴ Herein, as noted by the Board, lays the rub.

There are also traditional tests to qualify for standing. Under the interest-injury approach, a plaintiff must have an interest adversely affected by the conduct complained of. Such an interest may be economic,¹⁵ or it may be intangible, such as an aesthetic or environmental interest.¹⁶ The degree of injury to the interest need not be great: “ ‘[t]he basic idea ... is that an identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation.’ ”¹⁷

Under the citizen-taxpayer approach the party must be a citizen or a taxpayer and raise an issue of public significance.¹⁸

Under the association standing approach, an association has standing to bring suit on behalf of its members when: (1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.¹⁹

The Board argues that a qualified voter must be a citizen, not a government entity. The Board cites minutes from the Alaska Constitutional Convention and House Judiciary

¹⁴ Alaska Const. Art 6 Sec. 11.

¹⁵ *Moore v. State*, 553 P.2d 8, 24 (Alaska, 1976); *Wagstaff v. Superior Court, Family Court Division*, 535 P.2d 1220, 1225 (Alaska, 1975).

¹⁶ *State v. Lewis*, 559 P.2d 630, 635 (Alaska, 1977).

¹⁷ *Wagstaff v. Superior Court, Family Court Division*, 535 P.2d 1220, 1225 & n. 7 (Alaska, 1975). (quoting Davis, *Standing: Taxpayers and Others*, 35 U.Chi.L.Rev. 601, 613 (1968)).

¹⁸ *Trustees for Alaska v. State*, 736 P.2d 324, 329-330 (Alaska, 1987).

¹⁹ *Alaskans for a Common Language, Inc. v. Kritz*, 3 P.3d 906, 915 (Alaska, 2000).

Committee which refer to a qualified voter as a citizen. The Board also cites Pennsylvania case law, as Pennsylvania only allows individual voters to bring reapportionment challenges: “It is the right to vote and the right to have one’s vote counted which is the subject of reapportionment challenges”²⁰, citing the U.S. Supreme Court, “the right to vote is personal and the rights sought to be vindicated in a suit challenging an apportionment scheme are personal and individual.”²¹ The Board additionally argues that the government entities do not meet traditional standing tests, as they do not have a “sufficient personal stake in the outcome of the controversy.”

Petersburg argues that they meet the traditional criteria for standing and nothing under the Alaska Constitution excludes parties with traditional standing from challenging the Board’s redistricting decision. Petersburg argues that they have “interest-injury” standing as Petersburg has an economic and intangible interest in sufficient legislative representation, which is injured by district boundaries adopted in the redistricting plan.

Petersburg argues in the alternative that if the court finds that they do not have “interest-injury” standing, they then have “associative standing” as (1) their residents have the ability to sue in their own right; (2) Petersburg’s ability to represent its municipal interests and its ability to obtain funding and legislative support is germane to the city’s purpose; and (3) the participation individual voters is wholly unnecessary to the claims asserted or the relief sought. Petersburg additionally argues (1) *Carpenter* supports their position; (2) redistricting challenges in Alaska have categorically included municipal parties, citing the *In re 2001 Redistricting Cases*²², *Hickel v. Southeast Conference*²³,

²⁰ *Albert v. 2001 Legislative Reapportionment Com'n*, 567 Pa. 670, 679 (Pa., 2002).

²¹ *Reynolds v. Sims*, 377 U.S. 533, (1964).

²² 47 P.3d 1089 (Alaska, 2002).

²³ 868 P.2d 919 (Alaska, 1994).

*Kenai Peninsula Borough v. State*²⁴, Petersburg specifically points to Judge Rindner's denial of the Board's Motion to Dismiss for Lack of Standing²⁵; and (3) the Board's citation to the Alaska Constitution and Legislative History merely discusses the qualifications for voters and do not refer to redistricting.

The Fairbanks North Star Borough makes many of the same arguments and additionally argues (1) it has standing under traditional criteria for standing under the case law (they claim they meet the interest-injury and citizen-taxpayer test); (2) standing has been given to municipal entities before; (3) the Pennsylvania cases cited by the Board are distinguishable because the Pennsylvania Constitution uses the words "any person aggrieved"; (4) even if municipalities are not granted standing, the FNSB has a representative party that is a qualified voter (Timothy Beck). The FNSB also has attached exhibits which demonstrate the support of its citizens to protest the reapportionment either by comments at an assembly meeting or by e-mail.

The Board replies (1) the Plaintiffs are ignoring the issue whether they are qualified voters under the Alaska Constitution and reiterates that they are not; (2) the plaintiffs are misconstruing *Carpenter* and reiterates that Carpenter was a qualified voter; (3) the fact that municipalities have been allowed to bring suits before has no precedential value because the Supreme Court has not decided the issue, argues that past practice does not trump the law and this issue needs to be decided; (4) the Alaska Constitution is plain and unambiguous and it does not matter that it does not specifically bar municipalities;

²⁴ 743 P.2d 1352 (Alaska, 1987).

²⁵ Citing a footnote in Rindner's decision, "The Alaska Supreme Court has broadly interpreted the concept of standing, favoring the increased accessibility to judicial forums. Accordingly, "any qualified voter" is authorized to institute and maintain a reapportionment suit seeking to correct any errors in redistricting. *Carpenter*, 667 P.2d at 1209-10. In a pretrial decision, this court held that the right to bring such a suit was not limited to individuals but included governmental entities and certain organizations as well."

(5) the Plaintiffs do not have standing under traditional standing principals; (6) the Plaintiffs do not qualify under an interest-injury analysis because the true purpose behind redistricting is to protect an individual's personal constitutional right to vote and not for a municipality to effectively advocate for more funding; (7) the Plaintiffs do not have associative standing because the Plaintiffs are not associations, but are entities and the purpose of redistricting is voting, not securing funding; and standing does require participation of individual members in the lawsuit; and (8) the Plaintiffs do not qualify as tax-payer citizens because they are not citizens or taxpayers and they are not appropriate parties in this case.

The Board's Motion to Dismiss for lack of Standing is denied for the following reasons. First, the concept of standing is interpreted broadly in Alaska. The basic requirement is adversity and it is clear the Plaintiffs and the Board have adverse interests in this case. Second, while the Plaintiffs do not qualify as voters in their respective entities as a city and borough, they consist of assembly and council members who are qualified voters and represent qualified voters. Third, in Alaska's redistricting history municipalities have been allowed to participate as Plaintiffs. While the Board is correct that this issue has not been decided by a court with precedential authority, it does raise a due process issue of which the Plaintiffs were not put on notice that they could not file suits themselves and needed to do so under the name of a qualified voter. This point alone demonstrates this is really a form over substance issue.²⁶ Fourth, the court finds that the Plaintiffs otherwise have traditional interest-injury standing to prosecute their claims. And fifth, the court agrees with the Plaintiffs that *Carpenter* supports a broad

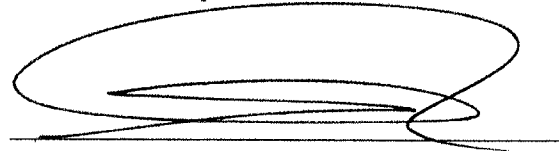
²⁶ An individual voter [Beck] is joined in the FNSB action. City has not joined an individual voter; that decision is left to City.

view of standing in redistricting cases. The Board is correct that in *Carpenter* the plaintiff was a qualified voter, but determinative for our purposes is the fact she was given very broad standing to raise issues that extended beyond her own district; she was allowed to seek to correct any error, including addressing military exclusions and the Cordova inclusion issues.

IV. Conclusion.

The liberty and security of the people is best served by vigorous scrutiny of any redistricting plan. The Plaintiffs in this case do have standing to advance this scrutiny consistent with Alaska case law. Therefore, based on the foregoing facts and authorities, the Board's Motion to Dismiss the Plaintiffs for Lack of Standing is DENIED.²⁷

DATED at Fairbanks, Alaska, this 22nd of September 2011.



Michael P. McConahy
Superior Court Judge

²⁷ Consistent with the expedited nature of this action, any motion for reconsideration must be served and filed no later than 9.27.11. Oppositions to any such motion for reconsideration are allowed and must be served and filed no later than 9.29.11. Any such pleadings are limited to 5 pages. Additionally this court will not issue a stay in the event a party wants to seek extraordinary review. Any stay must issue from the Alaska Supreme Court.