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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

PETERSBURG PLAINTIFFS' COMBINED OPPOSITION TO ALASKA REDISTRICTING BOARD'S CROSS-MOTION FOR SUMMARY JUDGMENT, AND REPLY TO BOARD'S OPPOSITION TO PETERSBURG PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE ISSUE OF COMPACTNESS

Plaintiffs City of Petersburg, Mark L. Jensen, Nancy C. Strand, and Brenda L. Norheim ("Petersburg Plaintiffs") oppose the cross-motion of the Alaska Redistricting Board ("Board") for summary judgment on the issue of compactness for the reasons stated below, and in the Petersburg Plaintiff's opening memorandum in support of their motion for summary judgment on the issue of compactness.

I. Introduction and Summary.

The Petersburg Plaintiffs' compactness claim raises only questions of law, and the Court will exercise its independent judgment in resolving those questions. Contrary to the Board's arguments, the Voting Rights Act of 1965, as amended ("VRA"),[1] did not require the Board to deviate from the compactness requirement of Alaska Constitution art. VI, §6 in districting Southeast Alaska. The Petersburg

[1] 42 U.S.C. §1973c.

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Plaintiffs are entitled to summary judgment that Proclamation House District 32 is not relatively compact as required by Alaska Constitution art. VI, §6.

II. Standard of Review.

The Board correctly refers to *Kenai Peninsula Borough v. State*[2] for the standard of review of a redistricting plan.[3] However, the Board's description of that standard of review is incomplete, omitting this following essential passage:

> We view a plan promulgated under the constitutional authorization of the governor to reapportion the legislature in the same light as we would a regulation adopted under a delegation of authority from the legislature to an administrative agency to formulate policy and promulgate regulations. We have stated that we shall review such regulation ***first to insure that the agency has not exceeded the power delegated to it***, and second to determine whether the regulation is reasonable and not arbitrary. ***Of course, additionally, we always have authority to review the constitutionality of the action taken***, but we have stated that a court may not substitute its judgment as to the sagacity of a regulation for that of the administrative agency, and that the wisdom of a given regulation is not a subject for review.[4]

The Petersburg Plaintiffs claim that the Board exceeded the authority delegated to it under art. VI, §6 of the Alaska Constitution by creating a House district, Proclamation House District 32, that is not compact. On this constitutional issue, *Kenai Peninsula Borough* indicates that the Court will not defer to the Board, but will exercise its independent judgment.

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[2] 743 P.2d 1352 (Alaska 1987).

[3] Memorandum of Points and Authorities in Opposition to Petersburg Plaintiffs' Motion for Partial Summary Judgment on the Issue of Compactness and in Support of the Alaska Redistricting Board's Cross-Motion for Summary Judgment, dated November 4, 2011 ("Board Memorandum"), 9.

[4] 743 P.2d at 1357-1358 (*quoting Carpenter v. Hammond*, 667 P.2d 1204, 1214 (Alaska 1983); emphasis added).

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III. The Proclamation Plan's Districting of Southeast Alaska Is Not Required by the Voting Rights Act.

A. Introduction.

While compliance with VRA §5 must take precedence over compliance with the compactness standard of art. VI, §6 of the Alaska Constitution,[5] no deviation in Southeast Alaska from the compactness standard was necessary to the preclearance of the Proclamation Plan under VRA §5. Nothing in VRA §5 requires the protection of Native incumbents, so it was not necessary to avoid pairing a Native incumbent with another incumbent in Southeast. Neither was it necessary to establish an "influence district," in Southeast—and, even if an influence district was required, the Petersburg Plaintiffs' relatively more compact districting of Southeast included such a district. Moreover, the Board clearly failed to follow the procedure prescribed to minimize a redistricting plan's deviation from the requirements of Alaska Constitution art. VI, §6 while complying with the VRA:

> 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.[6]

The Board clearly considered VRA compliance first in redistricting Southeast Alaska, and compliance with the Alaska Constitution only secondarily.[7]

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[5] *In re 2001 Redistricting Cases*, 44 P.3d 141, 143 n. 2 (Alaska 2002), *quoting Hickel v. Southeast Conference*, 846 P.2d 38, 62 (Alaska 1992).
[6] *Hickel,* 846 P.2d at 52 n. 22.
[7] ARB00006024–ARB00006025.

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B. VRA §5 Does Not Protect Native Incumbents.

VRA §5 does not require the districting of Southeast Alaska to avoid pairing the Native incumbent in Benchmark House District 5 with another incumbent.[8] Indeed, the Board's assertion of this requirement flies in the face of the contrary advice that it received from its VRA expert, Dr. Lisa Handley. As it directly contradicts the Board's position, that advice warrants quotation at length:

> CHAIRMAN TORGERSON: So along that lines, as long as we make the benchmark, we're not trying to protect any current district as it stands today. Is that a true statement?
>
> MR. WHITE: Mr. Chairman, the Department of Justice...
>
> DR. HANDLEY: You can get there any way you want to get there. ***I don't think the justice department cares if you try and save incumbents or not. All they're going to look at is have you retrogressed or not.***
>
> CHAIRMAN TORGERSON: Well, by saying incumbents, I'm not meaning by name. I'm talking about existing C, for example. If we rearrange that – and you just said we could make others combinations for influence districts – and we had the same – we met the benchmark but there was not senator out of Southeast that – that was in District C, then as long as we meet the benchmark, we have no other – other issues associated with that.
>
> DR. HANDLEY: ***Not as far as the justice department is concerned. They're – I mean, they are just going to look and see if this is retrogressive.*** Now in terms of a Section 2 voting rights case, well, there's a possibility – let's say, for example, your benchmark was five Native districts and you went – you drew five completely new Native districts in which you can run incumbent out of every seat, well that would be, you know, maybe evidence in a Section 2 case of intentional discrimination, but...
>
> CHAIRMAN TORGERSON: Well, I bring that up because apparently in one of the – or at least my understanding was from one of the conversations with Taylor, we were – we were required to protect that senate seat because it has a Native in it. But that's why I asked the question. It seems like a moving target. I mean...

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[8] Preclearance Submission of the 2011 Alaska State House and Senate Redistricting Plan by the Alaska Redistricting Board under Section 5 of the Voting Rights Act, August 9, 2011, 12 (ARB00013486).

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> DR. HANDLEY: Well – what?
> CHAIRMAN TORGERSON: I said it seems like a...
> DR. HANDLEY: (Indiscernible).
> CHAIRMAN TORGERSON: ...moving target.
> DR. HANDLEY: What are the Native groups doing with that particular senate seat? If, for example, the AFFR is supported by the Natives, they – they're not protecting that district. ***So, I mean, what the justice department is going to do,*** is they're going to talk to not just the incumbents, they're going to talk to – in fact, they're not – they're not particularly interested in talking to a single incumbent. ***They're much more interested in talking to the Native groups that are more representative of voters rather than incumbents.*** No incumbent wants to lose a seat, but you know, a pattern of drawing incumbents out of their seats would not look good.[9]

Dr. Handley's advice that the Department of Justice is not concerned with protecting Native incumbents is supported by the Justice Department's own publications on this subject.[10] Neither its preclearance regulations[11] nor its Guidance Concerning Redistricting under VRA §5[12] identifies the pairing of minority incumbents as a factor that it will consider in determining whether to preclear a redistricting plan.

The Board fails to present any viable legal authority for its argument that "whether minority incumbents were paired against each other or paired against non-Native incumbents" is a factor "relevant to the DOJ's preclearance analysis."[13] The only authority that the Board cites for this assertion is a reference to *Thornburg v. Gingles*[14] in the opinion of Superior Court Judge Larry Weeks appended to the

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[9] Transcript of May 17, 2011 Board meeting, ARB 00003901, line 7-ARB 00003903, line 3 (emphasis added).
[10] It also is noteworthy that Dr. Handley's final report to the Board makes no reference to the protection of Native incumbents as a VRA requirement. ARB00013329–ARB00013369.
[11] 28 C.F.R. Part 51.
[12] 79 Federal Register 7470 (February 9, 2011) ("DOJ Guidelines").
[13] Board Memorandum, 34.
[14] 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986).

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decision in *Hickel*.[15] In fact, nowhere in the entire *Thornburg v. Gingles* opinion is there a single reference to the pairing of minority incumbents. Moreover, rather than addressing claims under VRA §5, *Thornburg v. Gingles* concerned a claim under VRA §2 that the use of multi-member districts in North Carolina resulted in the dilution of black citizens' votes.[16] With respect to a requirement to protect minority incumbents under VRA §5, the Board's citation of Judge Weeks' decision leads to a dead end.

The authorities cited by the Petersburg Plaintiffs actually do demonstrate that the pairing of minority incumbents does not violate VRA §5. In *Georgia v. Ashcroft,*[17] an action brought under §5 to preclear a redistricting plan, the court declined to credit the testimony of an African-American legislator regarding her prospects for success under the plan because VRA §5 did not protect her status as a minority incumbent.[18]

In *Colleton County Council v. McConnell,*[19] the plaintiffs sought a judicial redistricting of South Carolina after the legislative redistricting process reached an impasse.[20] In fashioning a redistricting plan, the court acknowledged that it was required to comply with both VRA §2 and VRA §5.[21] It is true that in stating, "In sum, the Voting Rights Act protects the minority voters' opportunity to elect their candidate of choice, not just a minority incumbent and not just the minority's opportunity to elect

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[15] 846 P.2d 38, 97 (Alaska 1992).
[16] 478 U.S. at 34, 106 S.Ct. at 2758.
[17] 195 F. Supp. 2d 25 (D.D.C. 2002), judgment vacated on other grounds, 539 U.S. 461, 123 S. Ct. 2498, 156 L. Ed. 2d 428 (2003).
[18] 195 F.Supp.2d at 101.
[19] 201 F.Supp.2d 618 (D.S.C. 2002).
[20] 201 F.Supp.2d at 625.
[21] 201 F.Supp.2d at 627-628.

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an incumbent of any race,"[22] the court was addressing the requirement for minority voters to have "an equal opportunity to participate in the political process and to elect representatives of their choice"[23] under VRA §2. However, protection of the rights of minority voters to elect representatives of their choice also is the purpose of VRA §5:

> A proposed plan is retrogressive under the Section 5 "effect" prong if its net effect would be to reduce minority voters' "effective exercise of the electoral franchise" when compared to the benchmark plan. *The effective exercise of the electoral franchise usually is assessed in redistricting submissions in terms of the opportunity for minority voters to elect candidates of their choice.*[24]

While VRA §5 and VRA §2 "combat different evils, and, accordingly, [ ] impose very different duties upon the States,"[25] they share the same focus on the interests of minority voters, rather than on the interests of minority incumbents. Thus, *Colleton County* also is persuasive on the point that VRA §5 did not require the Board to protect the Native incumbent in Benchmark House District 5.

C. Proclamation House District 34 Need Not Be an "Influence District."

Contrary to the Board's assertion,[26] it was not required to draw Proclamation House District 34 as an influence district to obtain preclearance from the Department of Justice. Indeed, the Board acknowledges that the Petersburg Plaintiffs' assertion that there could be an influence district in Southeast Alaska other than Proclamation

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[22] 201 F.Supp.2d at 643 (citation and internal quotation marks omitted).
[23] *Id.*
[24] 201 F.Supp.2d at 645 (emphasis in original); See also, discussion of retrogressive effect in the DOJ Guidelines, 76 F.R. 7401.
[25] *Georgia v. Ashcroft,* 539 U.S. 461, 478, 123 S. Ct. 2498, 2510, 156 L. Ed. 2d 428 (2003).
[26] Board Memorandum, 30.

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House District 34 is "technically correct."[27] Dr. Handley, the Board's VRA expert, testified that a district must have at least 30% Alaska Native voting age population to be an influence district. Modified RIGHTS Plan House District 2 contains 32.45% Alaska Native voting age population,[28] handily exceeding that 30% minimum and varying by only a *de minimis* amount from the 35.14% Alaska Native voting age population in Proclamation House District 34.[29]

The Board's attempt to avoid this fact by relying on the Petersburg Plaintiffs' responses to its requests for admissions fails. The Petersburg Plaintiffs did indeed admit that "no redistricting plan provided to the Board by any third party met the requirements of Section 5 of the federal Voting Rights Act of 1965, as amended." However, the Board seeks to prove too much by asserting that "this admission is fatal to the...argument that MRC Plan HD-2 is a viable option for an 'influence' district in Southeast"[30]. The Petersburg Plaintiffs' actual admission, that no redistricting ***plan***—*i.e.,* no ***statewide*** redistricting plan—met the requirements of VRA §5 is not an admission that none of the individual districts within those plans met the requirements of VRA §5. Thus, the Petersburg Plaintiffs' admission regarding the conformity of other redistricting plans to VRA §5 does not make their reliance on Modified RIGHTS Plan House District 2 "unavailing."

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[27] Board Memorandum 32.
[28] Handley Report, 27 (ARB00013355).
[29] Handley Report, 22 (ARB00013350).
[30] Board Memorandum 33.

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Moreover, it does not appear that VRA §5 presently requires the creation of influence districts.[31] Under VRA §5, the U.S. Supreme Court identified influence districts only as alternatives to "majority-minority" districts:

> The ability of minority voters to elect a candidate of their choice is important but often complex in practice to determine. In order to maximize the electoral success of a minority group, a State may choose to create a certain number of "safe" districts, in which it is highly likely that minority voters will be able to elect the candidate of their choice. Alternatively, a State may choose to create a greater number of districts in which it is likely—although perhaps not quite as likely as under the benchmark plan—that minority voters will be able to elect candidates of their choice.[32]

Following this analysis, the court in 2006 specifically held that a diminution in the number of influence districts was retrogressive under §5:

> It is indisputable that, at the very least, Balderas District 24 was a strong influence district for black voters, that is, a district where voters of color can "play a substantial, if not decisive, role in the electoral process." Accordingly, by dismantling Balderas District 24, and by failing to create a strong influence district elsewhere, Plan 1374C was retrogressive.[33]

However, in its 2006 amendment of VRA §5 Congress clarified that the statute focuses on effective districts, rather than influence districts:

> A proposed plan is retrogressive under Section 5 if its net effect would be to reduce minority voters' "effective exercise of the electoral

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[31] It is even clearer that VRA §2 does ***not*** require the creation of influence districts. *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 445; 126 S.Ct. 2594, 2625-2626; 165 L.Ed.2d 609 (2006) (opinion of Kennedy, J.): "The failure to create an influence district in these cases thus does no run afoul of §2 of the Voting Rights Act."

[32] *Georgia v. Ashcroft*, 539 U.S. 461, 480; 123 S.Ct. 2498, 2511; 156 L.Ed.2d 428 (2003) (citations omitted).

[33] *League of United Latin American Citizens*, 548 U.S. at 480, 126 S. Ct. at 2645, 165 L. Ed. 2d 609 (citations omitted). This case was decided about a month before the enactment of the 2006 amendment to VRA §5, discussed below.

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> franchise" when compared to the benchmark plan. *Beer v. United States* at 141. In 2006, Congress clarified that this means the jurisdiction must establish that its proposed redistricting plan will not have the effect of "diminishing the ability of any citizens of the United States" because of race, color, or membership in a language minority group defined in the Act, "to elect their preferred candidate of choice."[34]

The U.S. District Court for the District of Columbia has elaborated on this interpretation as follows:

> In a similar vein, Congress also responded to the Supreme Court's decision in *Georgia v. Ashcroft*, 539 U.S. 461 (2003), which had altered the preexisting standard for determining whether a voting change had a prohibited retrogressive effect under Section 5's "effects" prong. Prior to *Georgia v. Ashcroft*, the standard for assessing whether an electoral change violated the Section 5 "effects" test was "whether the ability of minority groups to participate in the political process and to elect their choices to office is...diminished...by the change affecting voting." In *Georgia v. Ashcroft*, however, the Court endorsed a less rigid, "totality of the circumstances" analysis for examining retrogressive effects, explaining that "any assessment of the retrogression of a minority group's effective exercise of the electoral franchise depends on an examination of all the relevant circumstances, such as the ability of minority voters to elect their candidate of choice, the extent of the minority group's opportunity to participate in the political process, and the feasibility of creating a nonretrogressive plan." In reauthorizing the Act in 2006, Congress expressed concern that the *Georgia v. Ashcroft* framework had introduced "substantial uncertainty" into the administration of a statute that was "specifically intended to block persistent and shifting efforts to limit the effectiveness of minority political participation." Hence, in an attempt to restore the simpler, "ability to elect" analysis articulated in *Beer*, Congress added new language to the Act, stating that all voting changes that diminish the ability of minorities "to elect their preferred candidates of choice" should be denied preclearance under Section 5.[35]

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[34] DOJ Guidelines, 76 F.R. at 7471.

[35] *Shelby County, Ala. v. Holder*, CIV.A. 10-0651 JDB, 2011 WL 4375001, 11 (D.D.C. Sept. 21, 2011).

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In the face of Congress' direction that the Department of Justice focus its preclearance analysis on retrogression in the ability of Natives "to elect their preferred candidates of choice," i.e., on retrogression in the number of effective districts, the Board's concern about influence districts did not justify deviation from the compactness standard in the Alaska Constitution.

IV. Proclamation House District 32 Does Not Meet the Alaska Constitution's Compactness Standard.

A. Introduction.

The purpose of the compactness requirement is to prevent gerrymandering, and gerrymandering is directly implicated in the Board's creation of non-compact Proclamation House District 32. Because the Board's gerrymandering of Proclamation House District 34 led directly to the creation of non-compact Proclamation House District 32, it was appropriate for the Petersburg Plaintiffs' compactness argument to address the districting of Southeast Alaska as a whole. Proclamation House District 32 fails the "visual" test for compactness advocated by the Board, as well as the quantitative test for compactness presented by the Petersburg Plaintiffs. Moreover, each of the relevant quantitative tests demonstrates that Proclamation House District 32 is not relatively compact.

B. Gerrymandering Is Implicated in the Establishment of Proclamation of House District 32.

The Board Memorandum's justification for the districting of Southeast Alaska,[36] as well as its Preclearance Submission to the Department of Justice,

[36] Board Memorandum, 5-7, 34-37.

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acknowledge that Proclamation House District 34 was drawn explicitly for the purpose of gerrymandering—to "keep the incumbent Alaska Native Legislator from the Benchmark Alaska Native District in the Proclamation Alaska Native District and avoid pairing him with a non-Alaska Native incumbent."[37] This fits precisely the definition of gerrymandering in *Hickel*, "the dividing of an area into political units 'in an unnatural way with the purpose of bestowing advantages on some and thus disadvantaging others:"

> The requirements of contiguity, compactness and socio-economic integration were incorporated by the framers of the reapportionment provisions to prevent gerrymandering. 3 PACC 1846 (January 11, 1956) ("[The requirements] prohibit[ ] gerrymandering which would have to take place were 40 districts arbitrarily set up by the governor.... [T]he Committee feels that gerrymandering is definitely prevented by these restrictive limits."). Gerrymandering is the dividing of an area into political units "in an unnatural way with the purpose of bestowing advantages on some and thus disadvantaging others." *Carpenter v. Hammond*, 667 P.2d 1204, 1220 (Alaska 1983) (Matthews, J., concurring). The constitutional requirements help to ensure that the election district boundaries fall along natural or logical lines rather than political or other lines.[38]

"The Board drew Proclamation HD-32 after having drawn Proclamation HD-34..."[39] "The configuration of Proclamation HD-34, in turn, affected the configuration of the other House districts in Southeast, including Proclamation HD-32."[40] Thus the Board's gerrymandering purpose in drawing Proclamation District 34 also is

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[37] Preclearance Submission of the 2011 Alaska State House and Senate Redistricting Plan by the Alaska Redistricting Board under Section 5 of the Voting Rights Act, August 9, 2011, 12 (ARB00013486).
[38] *Hickel,* 846 P.2d at 45 (footnote omitted).
[39] Board Memorandum 38.
[40] *Id.* The Board nevertheless argues that the compactness of other Southeast House districts is not relevant. Board Memorandum 19-22.

implicated in the failure of Proclamation District 32 to meet the compactness requirement.

C. The Districting of Southeast Alaska Should Be Considered as a Whole.

Because of the interdependence among Southeast House districts that the Board acknowledges, it was appropriate for the Petersburg Plaintiffs to compare the compactness of more than one Proclamation House district in Southeast Alaska with the compactness of alternatives. There are two other related reasons for undertaking this comparison. First, if the Petersburg Plaintiffs' proposed alternative districting for Southeast Alaska was not more compact overall than the Proclamation Plan's districting of Southeast Alaska, it would have been subject to the challenge that a more compact district for Petersburg merely shifted the compactness issue to another part of the region. Second, because the Petersburg Plaintiffs presented two house districts that each contained part of Proclamation House District 32, it was appropriate for them to demonstrate that each of those districts—Modified RIGHTS House Districts 2 and 4—was more compact than Proclamation House District 32. The Petersburg Plaintiffs' comparison of multiple house districts also is consistent with Justice Matthews' statement that "[w]here there are two or more districts in a given area they can be compared on compactness grounds with other possible districts encompassing the same area."[41]

[41] *Carpenter*, 667 P.2d at 1218 (Matthews, J., concurring).

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D. Proclamation House District 32 also Fails the Board's "Visual" Compactness Test.

In addition to not being relatively compact under an appropriate quantitative comparison, Proclamation House District 32 fails the "visual" test for compactness advocated by the Board.[42] While necessarily subjective, this test includes at least the following elements:

> Odd-shaped districts may well be the natural result of Alaska's irregular geometry. However, "corridors" of land that extend to include a populated area, but not the less-populated land around it, may run afoul of the compactness requirement. Likewise, appendages attached to otherwise compact areas may violate the requirement of compact districting.[43]

Proclamation House District 32 has both of the described attributes. Moving from southeast to northwest, the district extends from Petersburg into the southern part of the City and Borough of Juneau. It then detours around downtown Juneau with a corridor of relatively unpopulated territory to the west of Juneau that connects with Skagway to the north, but excludes Haines. In between, it includes two narrowly attached appendages that incorporate Gustavus and Tenakee Springs. The district selectively collects isolated pockets of population, while excluding other adjacent populated areas, resulting in a district with an unnecessarily elongated and irregular, indeed serpentine, shape.

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[42] Board Memorandum, 11-16.
[43] *Hickel,* 846 P.2d at 45-46.

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E. The Petersburg Plaintiffs' Quantitative Compactness Analysis Conforms to Governing Precedent.

The controlling description of the compactness requirement for redistricting under the Alaska Constitution remains that in Justice Matthews' concurring opinion in *Carpenter:*

> Article VI, section 6 provides that each new election district
>
> shall be formed of contiguous and compact territory containing as nearly as practicable a relatively integrated socio-economic area.
>
> "Compact" in the sense used here means having a small perimeter in relation to the area encompassed. Black's Law Dictionary 351 (4th ed. 1968). The most compact shape is a circle. Since it is not possible to divide Alaska into circles, it is obvious that the constitution calls only for relative compactness. But this does not mean that the compactness requirement is without substantive content. Where there are two or more districts in a given area they can be compared on compactness grounds with other possible districts encompassing the same area.[3] A New Jersey court has stated:
>
> > Although the impact of the compactness directive cannot be precisely stated, we believe that the word itself can be given meaningful content. Webster's Third New International Dictionary (1966) defines "compact" as "marked by concentration in a limited area." Technically, we interpret the requirement of compactness to mean that between two districts of equal area the one with the smaller perimeter is the more compact. A somewhat similar idea was projected by counsel for the Apportionment Commission at the oral argument-that the objective of compactness could be determined by drawing a circle around each of the proposed districts. Those districts which occupy relatively greater areas within the circle could be said to be more compact....
> >
> > We recognize that the constitutional mandate to draw districts equal in their number of inhabitants may conflict with the mandate for compactness and that the former is paramount. Compactness is undoubtedly a material factor, however, when the choice of districting plans includes one yielding bizarre

> designs.... This is particularly so where compact districts may be drawn with a minimal increase in population deviation.[44]

Justice Matthews' concurring opinion in *Carpenter* thus prescribed a geometric definition of compactness.

The compactness standard that Justice Matthews called for flows logically from his observation that "it is impossible to divide Alaska into circles."[45] Yet, as he pointed out immediately after that observation, "this does not mean that the compactness requirement is without substantive content."[46] The standard's substantive content is comparative: "[w]here there are two or more districts in a given area they can be compared on compactness grounds with other possible districts encompassing the same area."[47]

Significantly, Justice Matthews accompanied this reference to comparison on compactness grounds with a citation to a law review article that describes a quantitative method for comparing compactness.[48] Quantitative comparisons of compactness avoid the arbitrariness inherent in the visual approach that the Board

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[44] 667 P.2d at 1218-1219 (Matthews, J. concurring) (bracketed footnote in original), *quoting Davenport v. Apportionment Commission of the State of New Jersey*, 124 N.J.Super. 30, 304 A.2d 736, 743 (App.Div.1973). Justice Matthews' discussion of compactness in *Carpenter* was adopted by the full court in *Kenai Peninsula Borough*, 743 P.2d at 1361 & n. 13.

[45] *Carpenter,* 667 P.2d at 1218 (Matthews, J. concurring).

[46] *Id.*

[47] *Id.*

[48] Schwartzenberg, Reapportionment, Gerrymanders, and the Notion of "Compactness," 50 Minn.L.Rev. 443-446 (1966), *Carpenter*, 667 P.2d 1218 n. 3 (Matthews, J. concurring). The cited pages of this article are attached hereto as Exhibit A.

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advocates.[49] As the Board acknowledges, the Alaska Supreme Court has not rejected the use of quantitative methods to address a district's relative compactness, even after being invited to do so by Judge Rindner in the 2001 redistricting cases.[50]

While there may be conflicts among the proponents of different quantitative measures of compactness[51] that does not mean that all of those measures should be disregarded. Certain tests of compactness closely follow Justice Matthews' geometric definition of compactness: (1) compact means having a small perimeter in relation to the area encompassed, and (2) the most compact shape is a circle. The following tests directly compare the compactness of a district to the ideally compact shape of a circle, and thus measure compactness in a manner consistent with the definition of compactness under the Alaska Constitution:[52] (1) the Roeck Test,[53] (2) the Schwartzberg test,[54] (3) the Polsby-Popper test,[55] and (4) the Ehrenburg Test.[56] These tests consistently show that each of Modified RIGHTS Plan House Districts 2 and 4 is more compact than Proclamation House District 32. A table displaying the

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[49] "Order Granting Ruedrich Plaintiffs Motion for Summary Judgment Re: Compactness of House District 16," Exhibit B to Board Memorandum, 5-6.
[50] Board Memorandum, 13-14 and 13 n. 5.
[51] "Order Granting Ruedrich Plaintiffs Motion for Summary Judgment Re: Compactness of House District 16," Exhibit B to Board Memorandum, 4-5.
[52] Each of these tests is described in Exhibit G to Board Memorandum, 2-3.
[53] The Roeck Test computes the ratio of the area of a district to the area of the smallest circle that encompasses the district.
[54] The Schwartzberg test (described in the article cited by Justice Matthews in his concurring opinion in *Carpenter*) computes the ratio of a simplified perimeter of a district to the perimeter of a circle having the same area as that which is encompassed by the simplified perimeter.
[55] The Polsby-Popper Test computes the ratio of the area of a district to the area of a circle with the same perimeter.
[56] The Ehrenburg Test computes the ratio of the largest inscribed circle divided by the area of the district.

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results of each test for each of these districts is attached to this memorandum as Exhibit B.[57]

In contrast, the other tests that the Board relies on in an effort to refute the Petersburg Plaintiffs' analysis[58] are irrelevant because they do not compare the shape of a district to that of a circle, and thus do not reflect the definition of compactness under the Alaska Constitution.[59] The Perimeter Test computes the sum of the perimeters of all districts in a plan.[60] It thus is a tool for comparing plans rather than for comparing individual districts, and in any case does not compare a district's compactness to an ideally compact circle. The Population Polygon Test computes the ratio of the population of a district to the population of a polygon containing the district.[61] In contrast to the test for compactness under the Alaska Constitution, it is based on the distribution of a district's population rather than its geometric compactness. The Population Circle Test computes the ratio of the population of a district to the population of the minimum circle enclosing the district.[62] Again, in contrast to the test for compactness under the Alaska Constitution, it is based on the distribution of a district's population rather than its geometric compactness.

In addition to failing the "visual" test for compactness, Proclamation House District 32 is not compact relative to either of Modified RIGHTS House Districts 2 or 4

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[57] The test results shown in Exhibit B come from Exhibit G to Board Memorandum, 4 and 6.
[58] Board Memorandum, 24-25.
[59] Each of these tests also is described in Exhibit G to Board Memorandum, 2-3.
[60] Exhibit G to Board Memorandum, 2.
[61] Exhibit G to Board Memorandum, 3.
[62] *Id.*

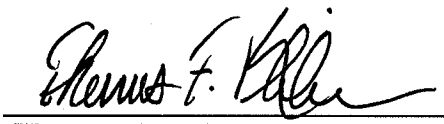
under each of the relevant quantitative tests for compactness. Thus, Proclamation House District 32 is not relatively compact as required by Alaska Constitution art. VI, §6.

V. Conclusion.

The Petersburg Plaintiffs have demonstrated that Proclamation Plan House District 32 does not meet the relative compactness standard in Alaska Const. art. VI, §6. No requirement under VRA §5 justified any deviation from that compactness standard in the districting of Southeast Alaska. Therefore, in creating Proclamation Plan House District 32, the Board committed an error in redistricting. The Petersburg Plaintiffs should be granted summary judgment on these issues, and the Board's cross-motion for summary judgment should be denied.

DATED this 18th day of November 2011.

BIRCH HORTON BITTNER & CHEROT
Attorneys for Petersburg Plaintiffs

By: 

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 18th day of November, 2011, at 3:45 p.m. a true and correct copy of the foregoing was served on the following in the manner indicated:

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BIRCH HORTON BITTNER & CHEROT

By: Christine Manson
Christine Manson

Reapportionment, Gerrymanders, and the Notion of "Compactness"

Joseph E. Schwartzberg*

The frequency of recent reapportionment decisions has increased public concern for voting equality.[1] As legislative districts become more equally populated within a state through legislative and judicial action, attention will likely turn to combating the gerrymander.[2] Antigerrymandering prohibitions have been on the books, at both federal[3] and state[4] levels, for well over a century; but enforcement has generally been lax or nonexistent.[5] A bill introduced in the 89th Congress attempting to curtail use of the

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1. See, *e.g.*, Silva, *Apportionment in New York*, 30 FORDHAM L. REV. 581 (1962). See also McCloskey, *The Supreme Court, 1961 Term, Foreword: The Reapportionment Case*, 76 HARV. L. REV. 54 (1962).

2. The abuse appears to be much older than the term. The device apparently was first used in America in 1705. GRIFFITH, THE RISE AND DEVELOPMENT OF THE GERRYMANDER 21, 26–27 (1907). The gerrymander still exists. Despite numerous reapportionment decisions since 1962, the latest map of congressional districts depicts numerous examples. See the map published by the United States Department of Commerce, Bureau of the Census, entitled "Congressional Districts for the 89th Congress" (1962).

3. From 1842 to 1929 "Congress set varying requirements for . . . contiguity and compactness of district territory and equal populations 'as nearly as practicable'. . . . But in effect, the antigerrymandering requirements had never been enforced." Congressional Quarterly Weekly Report, Vol. XXIII, No. 12, March 19, 1965, p. 420.

4. *E.g.*, ILL. CONST. art. 4, § 6 provides: "All senatorial districts shall be formed of contiguous and compact territory." Section 7 provides: "Representative districts shall be formed of contiguous and compact territory. . . ."; MO. CONST. art. 3, § 3 provides: "When any county is entitled to more than one representative . . . the body authorized . . . shall divide the county into districts of contiguous territory, as compact and nearly equal in population as may be. . . ." Section 5 provides: "For the election of Senators, the state shall be divided into convenient districts of contiguous territory, as compact, and nearly equal in population as may be."

5. BROOKS, POLITICAL PARTIES AND ELECTORAL PROBLEMS 476 (1923).

gerrymander requires, among other things, that congressional districts be composed of contiguous territory in compact form.[6] Such a districting requires objective standards based in part on a meaningful definition of "compactness." Present and proposed legislative definitions of compactness are generally nothing more than definitions of fairness.[7] This comment presents a simple, objective, and workable definition of compactness and a reasonable standard for its application. This definition and this proposed standard are suitable for guiding legislatures in the districting process or for assisting courts in adjudicating disputes arising from alleged abuses under existing districting statutes. If used they would greatly reduce gerrymanders and place the burden of justifying a noncompact district on the legislature.

For any given two dimensional area the most compact shape is a circle. No other geometric figure has as low a ratio between its perimeter and area. The relative compactness of any other figure may be determined by finding the ratio of its perimeter to the perimeter of a circle of equal area. The ratio serves as an index of compactness. The index number of a circle is taken to be one. All other indices are higher and represent varying degrees of departure from perfect compactness. Thus, the index number of a perfect square is 1.13, of an equilateral triangle 1.29, and of a perfect five point star 1.95.[8]

While determining the index of compactness for simple geometric figures is easy, the complex, irregular figures formed by actual electoral districts normally present greater problems. Cur-

6. H.R. 5505, 89th Cong., 1st Sess. (1965). This was one of four main sections of the bill. The others provided for a maximum population deviation of 15% from the mean population of all the districts in the state; prohibited at large elections in all states having more than one representative; and forbade redistricting more than once each decade. See Congressional Quarterly Weekly Report, Vol. XXIII, No. 11, March 12, 1965, p. 404.

7. The House Judiciary Committee Report on the Celler Bill found compactness to be the absence of any attempt:

> 1. To divide (a territorial unit) into election districts in an unnatural and unfair way with the purpose of giving one political party an electoral majority in a large number of districts while concentrating the voting strength of the opposition in as few districts as possible. 2. To divide (an area) into political units in an unnatural and unfair way with the purpose of giving special advantages to one group.

H.R. REP. No. 140, 89th Cong., 1st Sess. 2 (1965).

8. Thus, for example, a square with sides of 6 inches would have a perimeter of 24 inches and an area of 36 square inches. A circle of the same area (36 square inches) would have a circumference of 21.28 inches. The ratio of the 24 inch perimeter of the square to the 21.28 inch perimeter of the circle of equal area is 1.13.

vatures or extensions created by natural boundaries such as meandering streams may make it exceedingly difficult to determine the compactness of a district. For example, a basically square district, appearing on a small scale map to have twenty-five mile sides, might on one side have a tortuous riverine boundary well over one hundred miles long. Thus, its measurable perimeter would be closer to two hundred than to one hundred miles, and its index of compactness would be almost doubled. In order to avoid such spurious findings, it is necessary in practice to focus upon the gross dimension of shape, not on the minute irregularities.

There are a number of ways to determine the gross perimeter of an electoral district and thus determine its index of compactness. The method put forward here involves first determining the constituent units forming the district. They may be city blocks, wards, townships, counties, or areas arbitrarily bounded by highways, natural boundaries, and so forth. Next the "trijunctions"[9] of those constituent units lying along the perimeter of the district are marked on a map of suitable scale for accurate measurement of the intervening distances.[10] The distances along straight lines connecting adjacent trijunctions are then measured. Their total length constitutes the gross perimeter of the district.

Examination of the congressional districts of North Carolina as apportioned for the 89th Congress illustrates the proposed method.[11] Figure 1 (see Appendix) shows the state with its congressional districts and constituent counties. Figure 2 illustrates the 382 mile gross perimeter of the First Congressional District of North Carolina. When this perimeter is compared with the circumference of a circle of the same area as the true area of the district,[12] the ratio of the perimeters of the two figures is 1.14.

9. A "trijunction" is defined as a point at which any three given areas meet. A perimeter trijunction is normally the point at which two constituent units of a district meet an adjoining district, or another state, or territorial water, or a foreign county. But a trijunction exists also where one county meets territorial water and a state, or two states.

10. The smaller the districts the larger the requisite map scale. For most congressional districts, except in urban or suburban areas, a scale of 1:1,000,000 (roughly 16 miles to the inch) will suffice. For districts formed in urban areas a scale of 1:25,000 (roughly two-fifths of a mile to the inch) may be required.

11. North Carolina is a good example because it has a fairly large number of attenuated districts; furthermore, being a coastal state, it affords an opportunity to demonstrate the mechanics of the system in such a situation.

12. The area within the gross perimeter, the gross area, will deviate somewhat from the actual area of the district. Since the gross area in most instances will closely approximate the true area, which is already available, it seems

This index number as shown in Table A is smaller than the index of compactness of any other district in the state.[13] Figure 3 shows the gross perimeter of all eleven districts.[14]

TABLE A

Area, Gross Perimeter, Index of Compactness, Population and Deviation from Mean Population of Congressional Districts of North Carolina as Apportioned for the Eighty-Ninth Congress

No. of District	Total Area (Sq. Mi.)*	Gross Perimeter (Mi.)	Index of Compactness	1960 Population (1,000's)	% Deviation from Mean Population
1	8,909	382	1.14	278	−32.9
2	3,991	429	1.92	350	−15.5
3	7,561	519	1.68	430	+ 3.9
4	4,265	431	1.86	461	+11.4
5	4,134	453	1.97	454	+ 9.7
6	1,782	190	1.27	487	+17.6
7	5,231	330	1.29	449	+ 8.5
8	4,006	446	1.99	491	+18.6
9	4,174	439	1.91	404	− 2.4
10	2,769	380	2.04	390	− 5.8
11	5,890	393	1.46	361	−12.8
Total	52,712			4,556	
Average	4,792		1.68	414	12.7**

*Land plus inland water

**+ or − sign ignored in computing this average

Having a means of measuring compactness, we can turn to the problem of determining a maximum acceptable deviation from perfect compactness. Of course, any maximum figure chosen will be arbitrary, just as the often proposed figure of fifteen per cent maximum deviation from average population for congressional districts[15] is arbitrary. Inspection of the map of congressional districts for the 89th Congress in general, and of the districts of North Carolina in particular, plus experimentation with various index numbers (1.5, 1.75, and 2.0) leads me to suggest that indices of compactness up to 1.67 should be considered reasonable. Dis-

reasonable when determining compactness to use the gross perimeter with the true area. But, should it be desired, the gross area could be computed trigonometrically.

13. Table A also shows the populations of the several districts and their departure from the state average. It is evident that the oddly-shaped districts were not generally created to achieve equal populations.

14. A larger map at a scale of 23.6 miles to the inch was used for the measurements in Table A. For official purposes a still larger scale would be recommended.

15. See, *e.g.*, H.R. 5505, 89th Cong., 1st Sess. (1965).

tricts with higher indices would then be classified as "noncompact" and unsatisfactory.[16] A state may, however, choose a different maximum index of campactness.

Figure 4 presents a possible redistricting of North Carolina in such a way as to obtain districts having (1) deviations of not over 15 per cent from the average district population and (2) indices of compactness not over 1.67. This redistricting manages, additionally, to retain the largest town presently in each district. To achieve the result depicted it was necessary to reassign only twelve of the state's one hundred counties. Probably no smaller shift of territory could have achieved these results. Table B shows the index of compactness and the deviation from mean population for the districts of Figure 4. The average index is reduced from 1.68 to 1.45 and the average population deviation from 12.7 per cent to 8.3 per cent.[17] Presumably comparable results could be obtained by any state legislature where the need for redistricting arises.

TABLE B

Area, Gross Perimeter, Index of Compactness, Population and Deviation from Mean Population of Congressional Districts of North Carolina as Per Suggested Reapportionment with Minimal Boundary Shifts

No. of District	Total Area (Sq. Mi.)*	Gross Perimeter (Mi.)	Index of Compactness	1960 Population (1,000's)	% Deviation from Mean Population
1	10,587	432	1.18	377	— 8.7
2	5,085	373	1.48	444	+ 7.2
3	6,678	406	1.40	394	— 5.1
4	3,472	340	1.63	476	+15.0
5	2,827	312	1.66	356	— 9.2
6	1,483	177	1.30	375	— 9.4
7	5,231	330	1.29	449	+ 8.5
8	3,842	347	1.58	476	+15.0
9	4,540	340	1.44	363	— 1.4
10	2,857	295	1.56	405	— 2.2
11	6,110	389	1.40	375	— 9.4
Total	52,712			4,556	
Average	4,792		1.45	414	8.3**

*Land plus inland water
**+ or — sign ignored in computing this average

Creating a maximum index of compactness transfers the burden of proof in a dispute over the legality of district bound-

16. The North Carolina districts so classified, 2, 3, 4, 5, 8, 9, and 10, are shaded in a dark tone in Figure 3.
17. See Table A.

Exhibit B

District	Measures of Compactness			
	Reock Test (Range 0-1, with 1 most compact)	Schwartzenburg Test (Range greater than 1, with 1 most compact)	Polsby-Popper Test (Range 0-1, with 1 most compact)	Ehrenburg Test (Range 0-1, with 1 most compact)
Proclamation 32	0.18	2.71	0.09	0.17
Mod. Rights 2	0.32	2.34	0.13	0.38
Mod. Rights 4	0.53	1.64	0.26	0.40