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-11-2213 CI) 1JU-11-782 CI

DEFENDANT ALASKA REDISTRICTING BOARD'S REPLY TO PETERSBURG'S OPPOSITION TO BOARD'S CROSS-MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

The Petersburg Plaintiffs' Opposition to the Alaska Redistricting Board's ("Board") Cross-Motion for Summary Judgment does not change the underlying legal question – is House District 32 in the Board's Proclamation Plan relatively compact and therefore constitutional under Article VI, § 6 of the Alaska Constitution. The evidence before this court establishes the answer to this question is yes. Despite the Petersburg Plaintiffs' valiant attempts to cloud this simple issue with discussions of mathematical tests and misconstrued legal opinions, House District 32 is compact enough to meet Alaska's constitutional compactness standard. The Board drew the district as a result of complying with the often-times conflicting federal and state legal requirements. This is the exact reason the Alaska Supreme Court established the "relative" standard for compactness – not the "most" compact standard proposed by the Petersburg Plaintiffs. There were no improper underpinnings for drawing House District 32 the way it is, contrary to the sweeping allegations of the Plaintiffs. The Board drew the best district it could while operating within the constricting parameters of geography and law. The

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Board's choices were reasonable under the circumstances. House District 32 is relatively compact and therefore constitutional.

Moreover, to the extent, if any, House District 32 departs from strict adherence to the compactness standards of Article VI, § 6, such departure is justified by the Board's need to avoid retrogression and obtain preclearance from the Department of Justice under Section 5 of the federal Voting Rights Act. The Petersburg Plaintiffs' attempts to claim otherwise have no basis in fact or law.

II.
ARGUMENT

A. Standard of Review

The Petersburg Plaintiffs are correct that just as a court ensures an agency did not abuse or exceed its authority, so must a court confirm the Board acted within its authority in adopting a plan. *Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1357-1358 (Alaska 1987). Courts also have the authority to ensure the Board's choices did not violate the constitution. *Id.* The Petersburg Plaintiffs are wrong, however, in their legal conclusions that the court must substitute its independent judgment for that of the Board.

The Board has the constitutional authority to reapportion Alaska's House and Senate districts, not the courts. *Groh v. Egan*, 526 P.2d 863, 866 (Alaska 1974). As such, courts do not have the constitutional authority to decide what is preferable between alternative rational plans for legislative reapportionment. *Id.* Instead, the courts view a plan in the same light as it would "a regulation adopted under a delegation

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of authority from the legislature to an administrative agency to formulate policy and promulgate regulations." *Id.*

Here, the Petersburg Plaintiffs have challenged whether Proclamation House District 32 ("HD-32") meets the compactness requirement of Article VI, § 6. Thus, this Court reviews the configuration of HD-32 for constitutional compliance. In doing so, the Court does not have the authority to determine which plan was the best option. The Alaska Constitution authorized the Board to make this decision, and much like an agency, it possesses the specialized knowledge necessary to complete this task. As established in the Board's Memorandum in Support of Opposition to Petersburg Plaintiffs' Motion for Partial Summary Judgment and in Support of the ARB's Cross-Motion for Summary Judgment ("Board Memo."), and further supported below, the Board fulfilled its task. The Board acted reasonably, within its authority, and within the confines of federal law and the Alaska Constitution. The court should therefore give deference to the Board's choice.

B. House District 32 is Relatively Compact and Therefore Constitutional.

1. *The Petersburg Plaintiffs Concede Their Reliance on a Regional Comparison for Compactness Was Ill-Advised.*

The Petersburg Plaintiffs initially compared the entire Southeast region to HD-32 in an attempt to establish that this single challenged district was not compact. The Board pointed out this was not a proper comparison since the compactness of areas outside HD-32 had no bearing on whether or not it was compact. It appears the Petersburg Plaintiffs now realize they were wrong and are attempting to back-track with

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post hoc rationalizations. These untimely efforts do not cure their failed argument, but instead prove the Board was right – the Plaintiffs should have only compared HD-32 to House District 2 and House District 4 in the Modified RIGHTS Coalition Plan ("MRC Plan").

HD-32 in the Board's Proclamation Plan consists of Skagway, Tenakee Springs, Gustavus, downtown Juneau, and Petersburg. MRC Plan HD-2 includes Petersburg, while MRC Plan HD-4 appears to include Skagway, Tenakee Springs, and Gustavus. Thus, a true and accurate comparison should be between MRC Plan HD-2 and HD-4, and HD-32. This type of comparison, between districts that largely encompass the same area, is what Justice Matthews described in his concurring opinion in *Carpenter v. Hammond*. 667 P.2d 1204, 1218-1220 (Alaska 1983) (Matthews, J., concurring). The Petersburg Plaintiffs simply misconstrued his finding to support their incorrect initial approach of comparing the entire Southeast to the single challenged district, HD-32. Having realized their approach was not proper, the Petersburg Plaintiffs now attempt to validate their incorrect analysis by misinterpreting the law. But this does not fix their broken argument – a regional comparison to one district is not an accurate test of compactness.

The Petersburg Plaintiffs also try to distance themselves from their failed argument by now claiming HD-32 is not compact as compared to MRC Plan HD-2 and MRC Plan HD-4. While this is a more proper comparison, the Petersburg Plaintiffs only raised this argument after the Board established that comparing the entire

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Southeast Region to HD-32 was improper. The same can be said for their somewhat disconnected and confusing argument that they did a regional comparison to avoid the argument that they simply shifted the compactness problems from HD-32 to another district in Southeast. Again, this is a *post hoc* rationalization that in no way dissipates the problem that their regional comparison was not a legally accurate or reliable comparison for attacking the compactness of HD-32. The Petersburg Plaintiffs failed to make the proper comparison, and have essentially conceded the Board was correct.

2. *The Petersburg Plaintiffs Not Only Fail to Recognize the Proper Analysis and the Proper Standard for Compactness in Alaska, But They Also Fail to Properly Apply Such Standards.*

a. The Petersburg Plaintiffs Mischaracterize the Definition of Compactness and its Proper Measure in Alaska.

The Petersburg Plaintiffs rely on Justice Matthews' concurring opinion in *Carpenter v. Hammond* to define compactness. 667 P.2d at 1218-1220 (Matthews, J., concurring). While they are correct in how to actually define the word "compactness," they fail to grasp the proper measurement of compactness. They mischaracterize Justice Matthews' opinion, interpreting each sentence separately without considering his analysis as a whole.

The Plaintiffs argue that since Justice Matthews defined "compactness" as having a small perimeter in relation to the area encompassed, and the fact that the most compact shape is a circle, then the compactness of a district must be measured in relation to a perfect circle. [*See* Petersburg Combined Opposition and Reply at p. 15-16 ("Petersburg Opp.").] The Petersburg Plaintiffs' conclusion is simply not an accurate

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reflection of Justice Matthews' opinion.

Justice Matthews did recognize that the most compact shape is a circle; however, he also recognized that Alaska cannot be divided up into circles. *Carpenter*, 667 P.2d at 1218 (Matthews, J., concurring). Accordingly, the Alaska constitution calls only for "relative" compactness, which takes into consideration the impossibility in Alaska of drawing conventionally compact districts *that neatly, approximate regular shapes like squares and circles. Id.* Even though Justice Matthews cited a law review article that proposed using a quantitative measure of compactness, specifically in relation to the perimeter of a circle, he did not adopt such a test. *Id.* at 1219. Instead, he used a visual test to find the challenged district was not compact, specifically holding, "the impossibility of considering District 2 to be relatively compact is evident merely from looking at the map." *Id.* He also recognized it is best to compare those districts that encompass essentially the same area, even if the area covers more than one district. *Id.* This is exactly the comparison made by the Board.

In short, Justice Matthews' opinion in *Carpenter* does not support the Petersburg Plaintiffs' position. To the contrary, it actually supports the Board's argument. Justice Matthews' instruction on use of a visual test for purposes of compactness is exactly what the Alaska Supreme Court has used in every case since *Carpenter. See, e.g., In re 2001 Redistricting Cases*, 44 P.3d 141, 149-150 (Alaska 2002) (Carpeneti, J., dissenting) (finding House District 5 is relatively compact using a physical description of the area versus a quantitative measure); *Hickel v. Southeast Conference*, 846 P.2d 38,

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45 (Alaska 1992) (holding "compactness inquiry thus looks to the shape of a district"). It is also the test Judge Rindner recognized as the proper measure of compactness in Alaska in the 2011 redistricting cases.[1] Given Alaska's geographical vastness and low population density, the Alaska Supreme Court has made it clear that the "visual test" is the only test that can properly be applied in Alaska. Under that test, it is clear that HD-32 is compact enough to comply with Alaska's constitutional compactness standard.

b. The Petersburg Plaintiffs' Proposed Computer Generated Mathematical Tests of Compactness Are Ill-Suited for Alaska.

By their own admissions and arguments, the Petersburg Plaintiffs recognize the mathematical measures of compactness are plagued with ambiguity and inconsistency. [Petersburg Opp. at p. 17.] Despite this admission, they still attempt to convince this Court that the so-called "Reock Test" is the best mathematical measure of compactness because it directly compares the compactness of a district to the ideally compact shape of a circle. [*Id.*] They also offer a handful of other mathematical compactness tests as suitable alternatives because they too measure compactness by comparing the shape of the district to a circle. [*Id.*] However, they reject the other mathematical tests, specifically the ones that find HD-32 more compact than the MRC Plan HD-2, because they are not based on the shape of a circle.[2]

Mathematical tests are not only the improper way to analyze compactness in

[1] *See* Board Memo at pp. 11-16 & Exhibit B.

[2] *See* Board Memo at pp. 22-26 & Exhibit G (establishing that HD-32 is more compact than MRC Plan 2 under the Perimeter, Population Polygon and Population Circle mathematical compactness tests). *See also* Lawson Dep. at 11:7-22; 44:7-25; 124:23-125:15.

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Alaska, but the tests offered by the Petersburg Plaintiffs are not well-suited for the uniqueness of Alaska.

Alaska is made up of a very large, irregular land mass with vast areas that contain little to no population. The Alaska Supreme Court has recognized the difficulty these geographic attributes pose for drawing compact districts. *See In re 2001*, 44 P.3d at 149-150 (Carpeneti, J., dissenting); *Hickel,* 846 P.2d at 45; *Carpenter*, 667 P.2d at 1218-1220 (Matthews, J., concurring). This is the very reason the legal standard in Alaska is "relative" compactness, a standard which recognizes it is impossible to draw Alaska into circles and squares. *Carpenter*, 667 P.2d at 1218 (Matthews, J., concurring). The tests touted by the Petersburg Plaintiffs as the most "proper" mathematical measure of compactness fail to take into consideration the uniqueness of Alaska and the fact that it is impossible to divide Alaska into circles.

Mathematical tests such as the Population Polygon Test and Population Circle Test use the population density of a district to measure compactness versus its relation to a circle. Unlike the Reock Test and others based on the shape of a circle, these population tests compare the ratio of the district population to an approximate population calculated using a base layer, such as Census Blocks. This type of configuration more appropriately reflects Alaska and the challenges the Board faced in trying to find 17,755 people in close enough proximity to draw a contiguous and compact area. Using these tests, HD-32 is actually more compact than MCR Plan HD-2. [*See* Board Memo at p. 24.]

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This disagreement as to which tests are best suited for Alaska further highlights the problem with using mathematical compactness tests – no one can agree which one to use.[3] A party could simply select the tests whose results are most favorable to their argument and ignore the others: exactly what the Petersburg Plaintiffs do here. Again, this is the precise reason the Alaska Supreme Court favors a visual test for compactness, and in fact, has used the visual test in every redistricting opinion since *Carpenter*. It is clear that under the Visual Test, HD-32 is relatively compact and therefore constitutional.

c. The Proper Measure of Compactness in Alaska is the "Visual Test" and House District 32 Passes This Test.

The Petersburg Plaintiffs are correct that when looking at the shape of a district, "odd-shaped districts" with "corridors" of land and strange "appendages" may raise concerns as to the compactness of a district. *Hickel*, 846 P.2d at 45-46. They contend that HD-32 appears to have some of these questionable attributes and therefore is not compact even under a visual test. The Petersburg Plaintiffs' argument in its Opposition is exactly the same raised in their original motion. [*See* Petersburg Opp. at pp. 4-7.] Their argument fails for the same reasons previously noted by the Board. [*See* Board Memo at pp. 16-18.]

First, a visual review of HD-32 shows its shape is not the type that is considered "odd" or "bizarre," thereby requiring "particular scrutiny." Nor does HD-32 contain

[3] *E.g., Matter of Legislative Redistricting*, 805 A.2d 292, 333 (Md. 2002) (recognizing "there is no single practical measure of compactness, in geometric terms, that is generally accepted by social scientists as definitive.") *See also* Board Memo, Exhibit B at 4-5.

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any strange "appendages" to an otherwise compact area, or "corridors" of land that extend to populated areas but do not include the less populated areas around it.

Second, the *Hickel* court made clear that "corridors" of land and "strange appendages" do not automatically mean a district is not compact. Rather, such attributes simply *may* run afoul of or *may* violate the compactness requirement. *Hickel*, 846 P.2d at 45-46. However, if the shape of a district is the natural result of Alaska's irregular geometry or is necessitated by the need to create districts of equal population, then the district may be constitutional. *Id.*[4] Courts look for "bizarre shapes" and "odd extensions" to an otherwise compact district because they may indicate the configuration of an election district was due to partisan gerrymandering or intentional vote dilution, the redistricting ills the compactness requirement is designed to prevent. *Hickel*, 846 P.2d at 45. Here, there is not a single shred of evidence that the Board engaged in partisan gerrymandering or intentional vote dilution. The Petersburg Plaintiffs' arguments to the contrary are nothing more than desperate, unfounded

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[4] *See also*, Board Memo, Exhibit B at 6.

accusations.[5]

Finally, as explained in the Board's opening Memorandum, the configuration of HD-32 was largely driven by equal population considerations as well as the Board's need to create an Alaska Native influence district in Southeast Alaska that included Alaska Native incumbent, Representative Thomas of Haines, within its boundaries, and did not pair him with another incumbent. [Board Memo at pp. 16-19.] Both of these are legitimate redistricting principals that were reasonable for the Board to consider when making line-drawing decisions. While Proclamation HD-32 may not be "ideally" or "absolutely" compact, such compactness is not required. The Alaska Constitution requires only "relative" compactness. *Carpenter*, 667 P.2d at 1218 (Matthews, J., concurring). Under the geographical and legal constraints faced by the Board, Proclamation HD-32 is "relatively compact" and that is "compact enough" to satisfy the requirements of Article VI, § 6 of the Alaska Constitution. Accordingly, the Petersburg Plaintiffs' Motion for Partial Summary Judgment must be denied and the Board's

[5] The Petersburg Plaintiffs' attempt to claim that the Board somehow gerrymandered HD-34 and thus "the Board's gerrymandering purpose in drawing Proclamation District 34 also is implicated in the failure of Proclamation District 32 to meet the compactness requirements" [Petersburg Opp. at pp. 11-13] is nonsensical. First, as this Court is well aware, the only claim that the Petersburg Plaintiffs did not voluntarily dismiss was its compactness claim. The compactness claim, set out in Paragraph 13 of their Amended Complaint, contains no allegations of gerrymander. It simply states that HD-32 is not compact "as demonstrated by the greater compactness achieved in other redistricting plans proposed to the Board." [Petersburg Am. Compl. at ¶ 13.] The fact that the Petersburg Plaintiffs make no compactness comparison to "other redistricting plans proposed to the Board," but instead rely exclusively on the Demonstration Plan speaks volumes. As does the fact that its own Demonstrative Plan contains an Alaska Native influence district. Second, the Petersburg Plaintiffs offer no evidence in support of their unfounded gerrymandering allegations.

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Cross-Motion granted.

B. The Board's Configuration of Proclamation HD-32 Was Necessary Because of the Board's Obligation to Draft a Redistricting Plan That Avoided Retrogression and Provided the Best Opportunity to Obtain Preclearance Under Section 5 of the Federal Voting Rights Act.

1. *Introduction*

In their Opposition, the Petersburg Plaintiffs continue to argue the federal Voting Rights Act ("VRA") did not require the Board to create an influence district in Southeast and that the treatment of Alaska Native incumbents is irrelevant under the VRA. [Petersburg Opp. at pp. 3-11.] Both arguments continue to be wrong and without merit.

As the Board made clear in its Cross-Motion, the Petersburg Plaintiffs simply fail to understand the requirements of the VRA and compliance therewith. For example, the Petersburg Plaintiffs assert, in reliance on a footnote from *Hickel*, that the Board's plan is somehow flawed because the Board failed to follow prescribed procedure by considering "VRA compliance first in redistricting Southeast Alaska, and compliance with the Alaska Constitution only secondarily." [Petersburg Opp. at p. 3.] This assertion exhibits a complete misunderstanding of the requirements of the VRA and the practical demographic realties faced by the Board.

The first time the Board's VRA expert, Dr. Handley, spoke to the Board on April 11, 2011, she "*strongly recommended [the Board] begin drawing with the minority districts.*" [ARB00002201 at 30:18-20 (emphasis added).] Dr. Handley's advice makes perfect sense given the challenges the Board faced in drafting a plan that did not

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retrogress Alaska Native voting strength.[6] A number of complicating factors made this task extraordinarily difficult, including the (1) under-population of Benchmark Alaska Native Districts; (2) lack of Alaska Native population concentrations adjacent to the Benchmark Alaska Native districts; and (3) inability to create minority districts in urban Alaska. [ARB00013482-13483; ARB00013351-13356.] The Board was only able to construct a non-retrogressive plan because, following the advice of its VRA expert, it drew the Alaska Native districts first. It was simply impossible to do otherwise. The twenty-year old dicta from a footnote in *Hickel* may have had relevance under the demographic circumstances that existed in 1991, but it has none in 2011.[7]

Dr. Handley said it best when she characterized redistricting within the confines

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[6] The difficulty of drafting a plan that met the requirements of Section 5 of the VRA is evidenced by the fact that every proposed redistricting plan submitted to the Board by third parties was retrogressive and failed to meet the requirements of Section 5. [ARB00013353-13356.] A fact admitted by the Petersburg Plaintiffs. [Board Memo, Exhibit J (Request for Admission No. 6).] The same is true of the Demonstrative Plan relied upon by the Petersburg Plaintiffs. Both Dr. Handley and the Plaintiffs' own VRA expert, Dr. Ted Arrington, agree that the Demonstrative Plan is retrogressive, and therefore violates Section 5 of the Voting Rights Act. [Exhibit K, (Dr. Lisa Handley's Rebuttal Report to "Expert's Report of Dr. Theodore S. Arrington, PH.D." at p. 1; Exhibit L (Excerpts from November 23, 2011 Deposition Testimony of Theodore S. Arrington, PhD ("Arrington Depo." at 104:22 – 105:10; 107:23 – 108:16; 132:19 – 135:9; 154:9 – 155:25).]

[7] Moreover, the Petersburg Plaintiffs take the quote from footnote 22 in *Hickel*, out of context. In *Hickel*, the Alaska Supreme Court made clear that "compliance with section 5 is a legitimate goal of a Reapportionment Board. 'A state may constitutionally reapportion districts to enhance the voting strength of minorities in order to facilitate compliance with the Voting Rights Act.'" 846 P.2d at 49-50 (*quoting Kenai Peninsula Borough v. State*, 743 P.2d at 1361. Footnote 22 itself recognizes in the Court's "order of June 8, 1992, [the court] directed that the superior court, in drafting an interim plan, *give priority to the Voting Rights Act over the requirements of article VI, section 6 of the Alaska Constitution,*" adding that the Board was to "ensure that the requirements of article VI, section 6 of the Alaska Constitution *are not unnecessarily compromised* by the Voting Rights Act." *Hickel*, 846 P.2d at 50, n. 22 (emphasis added).

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of the VRA as more of an art than a science. [ARB00003879 at 38:5-6.] Because Alaska is a Section 5 "covered" jurisdiction, the Board knew it had to obtain preclearance of its plan from the DOJ and was appropriately concerned with the need to adopt a plan that was likely to be precleared. As established in the Board's Memorandum, the Board did not give undue weight to the VRA, nor compromise Alaska constitutional redistricting principals when drawing its plan, except to the extent it believed it was necessary in order to avoid retrogression and obtain preclearance under Section 5 of the VRA. [Board Memo. at pp. 26-40.] This included drawing an Alaska Native "influence district" in Southeast as well as giving proper consideration to the treatment of Alaska Native incumbents. Nothing in the Petersburg Plaintiffs' Opposition provides any evidence or compelling argument otherwise.

2. *The Voting Rights Act Did Require the Board to Maintain an Influence District in Southeast Alaska.*

The Petersburg Plaintiffs' blanket assertion that an "influence" district was not necessary in Southeast Alaska is flat out wrong. The Board's VRA expert, Dr. Handley, made it clear from the beginning that in order to meet the Benchmark, which is required for Section 5 preclearance, the Board needed to draw a plan that maintained an Alaska Native influence district in Southeast Alaska. [ARB00003881-ARB00003882 at 40:9-41:18; ARB00003896-ARB00003899 at 55:11-58:23; ARB00004191-ARB00004192 at 6:22-7:6; ARB00013329-ARB00013369; Exhibit K at p. 2, n. 3.] Dr. Handley advised the Board that Benchmark District 5 in Southeast was an "influence" House district because both whites and Alaska Natives were currently voting for the same candidate –

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Bill Thomas, an Alaska Native Republican.[8] [ARB0003881 at 40:19-25.] She further advised the Board, however, that without Bill Thomas, the district would probably not perform. [*Id.* at 51:14-20.] Accordingly, based on the advice of its VRA expert, the Board drew a plan that maintained an influence district in Southeast. It was completely reasonable for the Board to follow Dr. Handley's advice.

Despite the fact that Dr. Handley advised the Board it had to maintain an influence district in the Southeast, the Petersburg Plaintiffs attempt to argue that no such district need be maintained. The Petersburg Plaintiffs' arguments are ineffectual.

First, the Petersburg Plaintiffs' Opposition conveniently ignores the fact that (1) every plan submitted to the Board included an Alaska Native "Influence District" in Southeast Alaska, including all six of the RIGHTS Coalition plans [Bickford Aff. at ¶ 8]; and (2) Mr. Lawson, who drew the MRC Plan relied upon by the Petersburg Plaintiffs here, admitted at his deposition that when drawing districts in Southeast Alaska, you had to take the requirements of the Voting Rights Act into account, which he in fact did when drawing the MRC Plan. [Lawson Dep. at 113:15-114:2.] In other words, according to the Petersburg Plaintiffs, everyone actively involved in the Alaska redistricting process, including the Board's VRA expert, their own witness Mr. Lawson, and every third party that submitted a proposed plan, got the Benchmark standard wrong.

[8] Dr. Handley defined an influence district as one that usually has less than 50 percent minority in composition, but is still able to elect the minority-preferred candidate because of white crossover vote, just not on a consistent basis. [ARB0003881 at 39:13-41:2.] It is not disputed that since statehood, there has always been an Alaska Native district of some kind in Southeast.

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Second, the Petersburg Plaintiffs attempt to deflect their admission 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"[9] because their admission related only to statewide redistricting plans, not individual districts. The Board cannot seek preclearance on individual districts. Preclearance is for the plan as a whole, or statewide. Thus, contrary to the Petersburg Plaintiffs' argument, their admission does in fact establish that the MRC Plan on which they rely does not meet the requirements of Section 5 and therefore is retrogressive. As such, it is not a viable alternative to the Board's Proclamation Plan.

Third, the Petersburg Plaintiffs quote from several U.S. Supreme Court cases to support their argument that "it does not appear that VRA §5 presently requires the creation of influence districts." [Petersburg Opp. at pp. 9-11.] Once again, the Petersburg Plaintiffs' argument evidences a fundamental misunderstanding of the VRA. Whether or not Section 5 requires the "creation" of influence districts is irrelevant, because the Board did not "create" an influence district in Southeast. It simply maintained an influence district that was already part of the Benchmark, which the Board was required to meet in order to avoid retrogression and obtain preclearance.

Fourth, the Petersburg Plaintiffs' arguments fail to recognize the practical realties facing the Board. Dr. Handley advised the Board that Alaska was a unique situation, unlike any she had seen before. [ARB00004193 at 8:2-10.] She warned the Board that

[9] Exhibit J at 2 (Response to Request for Admission No. 6).

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the increase in racially polarized voting, along with a decrease in the number of Alaska Native legislators, meant the DOJ was going to pay very close attention to the Board's plan. [ARB00004203 at 18:5-24.] She recognized that meeting the Benchmark was going to be complicated and that if there was any conflicting evidence, DOJ could object because the burden of proof was on the Board. [ARB00004193 at 8:2-10.]

In its Preclearance Guidelines,[10] DOJ makes clear it that under Section 5, a covered jurisdiction has the burden of establishing two necessary components:

> The first is a determination that the jurisdiction has met its burden of establishing that the plan was adopted free of any discriminatory purpose. The second is a determination that the jurisdiction has met its burden of establishing that the proposed plan will not have a retrogressive effect.

DOJ SECTION 5 GUIDANCE at 7471. If a submitting jurisdiction fails to establish "the absence of any discriminatory purpose or retrogressive effect," DOJ "will interpose an objection." *Id.* at 7470. In reviewing plans for discriminatory purpose, the DOJ bases its determination "on a review of the plan in its entirety." *Id.* The DOJ will examine the circumstances surrounding the adoption of the redistricting plan "to determine whether direct or circumstantial evidence exists of any discriminatory purpose." *Id.*

Further complicating matters was the fact that going into this redistricting cycle, it was unclear, even to VRA experts,[11] exactly what position DOJ would take regarding

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[10] Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act; Notice, 76 Fed. Reg. 7470-7471 (Feb. 9, 2011) (hereinafter "DOJ SECTION 5 GUIDANCE").

[11] Dr. Arrington admitted at his deposition that he "was uncertain" whether *Bartlett* applied to Section 5, opining that it could "have implications for Section 5. But who knows." He agreed that reasonable minds differed on the issue. [Arrington Depo. at 198:9-20.]

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the U.S. Supreme Court's decision in *Bartlett v. Strickland*, 556 U.S. 1 (2009). [Affidavit of Dr. Lisa Handley at ¶ 5 ("Handley Aff.").] In that case, the Supreme Court held in a 5-4 plurality opinion that Section 2 of the Voting Rights Act does not require the drawing of a majority-minority district in which the minority group is less than 50 percent of the district's voting age population. *Id.* at 3. The *Bartlett* court, however, cautioned that its ruling concerned only the *Gingles* precondition for considering an "effects" violation of Section 2, insisting that its decision did not add a preconditions to consideration of a discriminatory "purpose" violation. *Id.* at 15. The effects of *Bartlett* on Section 5 preclearance, in light of the 2006 amendments to the VRA emphasizing the "ability to elect" standard, was both confusing and potentially conflicting. This was particularly true in light of Justice Kennedy's caution that *Bartlett* did not apply to an intent analysis.

Faced with these conflicting and confusing legal standards, as well as the burden of establishing that its Proclamation Plan had neither discriminatory intent nor effect in order to obtain preclearance, all of which had to be done in a sixty day time period, it was crucial that the Board present as strong a plan as possible to DOJ.[12] Based on the advice of its VRA expert and its legal counsel, the Board determined that its best chance at preclearance was to present a redistricting plan that (1) avoided any hint of possible discrimination that could be considered by DOJ as evidence that the Board's

[12] Dr. Arrington agrees that when seeking preclearance from DOJ you want to present the strongest plan. [Arrington Depo. at 198:22-199:5.]

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Proclamation Plan had a discriminatory purpose; and (2) met the Benchmark, which included a performing influence district in Southeast with the current Alaska Native preferred candidate of choice as the incumbent. At the same time, in order to avoid any claim of discriminatory intent, the Board determined that it was reasonable to avoid pairing Alaska Native incumbents where possible, especially in light of the input from the Alaska Native community. Under these circumstances, the Board's assessment of what was necessary to meet the requirements of Section 5 and avoid retrogression was not only reasonable, but correct, and therefore should be upheld.

3. *The Department of Justice Does Consider How a Plan Affects Minority Incumbents.*

The Petersburg Plaintiffs continue to insist how a redistricting plan affects Alaska Native incumbents is simply irrelevant to a Voting Rights Act analysis. Once again, their arguments are completely misplaced.

The Petersburg Plaintiffs' attempt to twist Dr. Handley's advice as the last word on minority incumbents is but another example of how the Petersburg Plaintiffs fail to see the big picture. While Dr. Handley did say the Department of Justice focuses on retrogression and not the protection of minority incumbents, this is only a small piece of a much larger puzzle. The Petersburg Plaintiffs simply restate Dr. Handley's comments without any proper context, a tactic they often use. They employ such tactics to hide the fact that the statements are not the damning evidence they make them out to be when considered as a whole.

The discussion cited by the Petersburg Plaintiffs actually started when Board

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Chair Torgerson asked Dr. Handley whether the Board could reshape the current districts and still pass preclearance, so long as the new districts met the Benchmark plan in the number of effective and influence districts. [ARB00003901 at 60:7-15.] The Board and Dr. Handley had been discussing the problem with maintaining Benchmark Senate District C, currently represented by Al Kookesh, an Alaska Native senator in Southeast. [ARB00003899 at 58:25 – ARB00003904 at 62:3.] Chairman Torgerson was wondering if replacing current Senate District C with another effective Senate district in another part of the state, thereby losing an Alaska Native senator, would cause problems with the DOJ. [*Id.*] In response to this particular line of questioning, Dr. Handley advised that the DOJ was most concerned with retrogression and not protecting minority incumbents. [*Id.*] This does not, as the Petersburg Plaintiffs would have the Court believe, mean that the treatment of incumbents is irrelevant to a Section 5 analysis.

In fact, the Petersburg Plaintiffs conveniently fail to mention that at the same public hearing, Dr. Handley opined that the Board should try to protect Alaska Native incumbent, Bill Thomas. [*See* ARB00003892 at 51:10-20; ARB00004218 at 33:11-23.] Even though the district was not a majority-minority district, and had not always elected the Alaska Native preferred candidate, Bill Thomas had become the Alaska Native preferred candidate, thereby making Benchmark District 5 a relatively effective

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district.[13] [ARB00004218 at 33:11-23.] Losing Bill Thomas would mean losing the effectiveness of the district [ARB00003892 at 51:10-20], and possibly resulting in retrogression. So while the DOJ does not specifically focus on protecting minority incumbents, it is a consideration for Section 5 purposes, especially when failing to do so would result in retrogression. [Handley Aff. at ¶ 7.]

Indeed, the Plaintiffs' VRA expert Dr. Ted Arrington admitted in his deposition that the incumbency status of a district affects the ability of a minority to elect their preferred candidate of choice and that pairing minority incumbents should be avoided.[14] Dr. Arrington testified:

> Q: Does the incumbency status of districts have any effect on the Native's ability -- minority ability to elect a preferred candidate of choice?
>
> A. **Yes.**
>
> Q. Can you tell me how?

---

[13] Dr. Handley found Benchmark District 5 in Southeast Alaska actually performed better than an influence district over the last decade. [*See* ARB00004206 at 21:18 – ARB00004207 at 22:2.] The reason being the district, with 35 percent Alaska Native, often elected the Alaska Native preferred candidate, Bill Thomas. [*Id.*] The Alaska Native voters were not just influencing the election results, they were determining them. [*Id.*] And even though Bill Thomas was not always the Alaska Native preferred candidate, a majority of Alaska Natives had supported him in the last few election cycles. [*Id.* at 22:4-25.] Thus, Dr. Handley found Benchmark District 5 in Southeast Alaska "[is] a relatively effective [district] with the incumbent that's in there now." [*Id.* at 33:11-22.]

[14] Prior to dismissing all its claims except the compactness claim, the Petersburg Plaintiffs jointly retained Dr. Arrington as a VRA expert along with the FNSB and the Riley/Dearborn Plaintiffs because "the plaintiffs in the consolidated cases have a common interest in the Voting Rights Act analysis." [Exhibit M at pp. 1, 3.] Accordingly, all the plaintiffs agreed to a cost-sharing arrangement with Dr. Arrington. [Exhibit N at pp. 1-2.]

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A. **Well, generally when you redraw you want to keep Native incumbents who are also Native-preferred candidates of choice, candidates of choice of Native voters, in a district in which they have a chance to win. You don't want to pair them if you can avoid it.** You certainly don't want to pair two Natives if you can avoid it.

Q. But you also don't want to pair a Native incumbent with – [a non-native incumbent?]

A. Well, sometimes you have to. **But you want to avoid that if possible. You want to give some deference to existing minority reps who are candidates of choice.**

[Arrington Depo. at 204:8-205:2 (emphasis added); *see also* Handley Aff. at ¶¶ 6-7.]

Dr. Arrington also agreed that in his expert opinion, the Board's decision to keep Representative Thomas in the Southeast Alaska Native district was a reasonable decision:

Q. So if the Board had a policy or drew plans in order to, one, keep Natives incumbents in the actual Native district, in your opinion would that be reasonable?

A. **Yes**.

[*Id.* at 205:10-14 (emphasis added); Handley Aff. at ¶¶ 6-7.]

The Petersburg Plaintiffs also completely overlook the importance of Alaska Native input into the redistricting process and the extent to which the Board considered their concerns. 28 C.F.R. §§ 51.59 (2011). As explained in the Board's original Memorandum,[15] the Alaska Native community in general, and the Southeast Alaska community in particular, consistently informed the Board that one of their major

[15] Board Memo at pp. 34-37.

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concerns was the importance of protecting Alaska Native incumbents and to avoid pairing them so as not to reduce the Alaska Native influence in the legislature. [Torgerson Aff. at ¶ 9; Greene Aff. at ¶ 7; ARB00012253, ARB00012264-ARB00012266, ARB00012279-ARB00012282.] The Alaska Natives in Southeast Alaska were particularly concerned with protecting Representative Thomas, one of the most influential and powerful House members, and keeping him in the "influence district." [*Id.*] Dr. Handley also advised the Board that the DOJ would be very interested in knowing how the Alaska Native groups felt about particular incumbents, as opposed to the views of the incumbents themselves. [ARB00003902-ARB00003903 at 61:18-62:3.] For these groups better represent the minority voters, and could assist the DOJ in determining whether certain decisions by the Board either protected the Alaska Native voice or had a discriminatory effect. [*Id.*] Once again, the Plaintiffs own VRA expert Dr. Arrington agrees:

> Q. So if the Native groups are coming to you and saying, "Look, don't pair our incumbents, we don't like that, we think that affects us," in your opinion was it reasonable for the Board to say, "Okay, we'll take those concerns into account when we draw our plans"?
>
> A. **It's reasonable for them to say that, and it's also reasonable for them to do it.**

[Arrington Depo. at 200:18-25 (emphasis added).]

Therefore, in order to meet the Benchmark Plan, thereby avoiding retrogression and providing the best opportunity for the Proclamation Plan to obtain preclearance, the Board reasonably determined that it was important to protect the incumbency status of

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the Southeast Alaska Native district, and thereby protecting its ability to elect. This necessarily meant drawing districts in Southeast Alaska so that Representative Thomas would continue as the incumbent in that district. The Board did not *sua sponte* decide to "protect" Representative Thomas. In fact, the Board voted not to adopt incumbent protection as one of its redistricting guidelines. [ARB00003766-ARB00003770 at 180:10-184:17; ARB00003772-ARB00003779 at 186:13-193:5.] The Board felt making these choices was particularly important under the circumstances because (1) Proclamation HD-34 had a slightly lower Alaska Native VAP than some other proposed plans; and (2) the demographic changes in Southeast made the pairing of Alaska Native incumbent Senator Kookesh unavoidable.

The Petersburg Plaintiffs' claim that the Board failed to present any viable legal authority for its argument simply ignores reality. As the Board pointed out in its Memorandum,[16] Judge Rindner in his decision in the 2001 Redistricting Cases, expressly indicated that:

> . . . the Department of Justice considers other factors that are relevant to whether the plan will have a retrogressive effect on minority voting strength, ***including whether minority incumbents were paired against each other or paired against non-Native incumbents,*** whether the percentage of minority voters in an effective Native District has declined significantly, whether minorities favor or disapprove of the plan, and whether minorities had inadequate opportunity to participate in development and comment on the plan.

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[16] Board Memo at pp. 29-30 & Exhibit I.

[Exhibit I at 65-66 (emphasis added).] Moreover, the *Hickel* decision itself attaches Judge Larry Weeks' June 18, 1992 "Memorandum and Order" in which Judge Weeks points out that the Masters appointed to draft the interim plan were instructed as follows:

> Minority "influence" districts and treatment of minority incumbents are part of the "totality of circumstances" which the Justice Department will examine to determine whether a reapportionment plan will be precleared under Section 5 of the Voting Rights Act.

Hickel, 846 P.2d at 67, n. 16.[17] There is ample legal authority supporting the Board's position. The Petersburg Plaintiffs' arguments to the contrary are nothing more than a legal wrangling by counsel born of necessity because the MRC plan on which they rely (1) pairs Senator Kookesh and Senator Stedman in MRC Plan Senate District A; (2) draws Representative Thomas out of the Southeast Alaska Native influence district (MRC Plan HD-2) and places him in MRC Plan HD-4, thereby pairing him with non-Native incumbent Representative Cathy Muñoz of Juneau. [Bickford Aff. at ¶ 7; Lawson Dep. at 129:11-130:17.] These facts are the very type that the DOJ would

[17] Judge Weeks also interestingly notes that DOJ "review is sometimes long and thorough and it is sometimes governed by informal practices of the Department of Justice, as well as by explicit requirements of the statute." *Hickel*, 846 P.2d at 66 (footnotes and citations omitted). Judge Weeks' comments refute the relevance of the Petersburg Plaintiffs' argument that there is nothing explicitly in the DOJ Guidelines regarding the treatment of Alaska Native incumbents. While there may be no explicit reference, it is clear that DOJ considers how Alaska Native incumbents are treated when doing a preclearance analysis. [Handley Aff. at ¶¶ 6-7.]

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closely scrutinize for discriminatory intent.[18] [Handley Aff. at ¶ 7.]

Moreover, if the effect of a redistricting plan on Alaska Native incumbents was irrelevant to Section 5 preclearance, then why were the only substantive questions DOJ asked the Board during their meeting in September of 2011 about how the Proclamation Plan affected Alaska Native incumbents? [Torgerson Aff. at ¶ 4; Greene Aff. at ¶ 3; Bickford Aff. at ¶ 4.] The Petersburg Plaintiffs simply ignore this undisputed fact.

Finally, the Petersburg Plaintiffs' continued attempt to rely on the two federal district court opinions, *Georgia v. Ashcroft,* 195 F. Supp. 2d 25 (D.D.C. 2002) and *Colleton County Council v. McConnell*, 201 F. Supp. 2d 618, 643 (D.S.C. 2002), as persuasive authority for the proposition that DOJ does not consider the effect a redistricting plan has on Alaska Native incumbents, once again misses the mark. Those authorities simply do not hold that "the pairing of minority incumbents does not violate VRA § 5" as the Petersburg Plaintiffs suggest. [Petersburg Opp. at pp. 6-7.] This argument again demonstrates the Petersburg Plaintiffs' complete misunderstanding of Section 5 of the VRA. For example, the quote from Colleton County on page seven of their Opposition clearly relates to the "effect prong" of Section 5. It does not even address the purpose or intent prong. As the Board has established above, DOJ looks at both purpose and effect. It has also shown that the treatment of minority incumbents in a redistricting plan is clearly relevant to and considered by DOJ in undertaking its

[18] This is particularly true since the MRC Plan on which the Petersburg Plaintiffs rely also systematically overpopulates Alaska Native districts, which according to their own expert Dr. Arrington, is also evidence of intentional discrimination that would harm the representation of minority voters. [Arrington Depo. at 146:18-148:21; 227:7-232:3.]

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"purpose" analysis. [Handley Aff. at ¶¶ 6-7.] The Section 2 cases cited by the Plaintiffs are simply not relevant.

As Dr. Handley accurately illustrated, compliance with the VRA is more an art than a science. [ARB00003879 at 38:5-6.] The DOJ does not look at a set list of factors and check which ones have been met or not met. To the contrary, the DOJ looks at all the circumstances, especially when a jurisdiction faces difficult challenges in maintaining the Benchmark because of shifting demographics. Faced with difficult challenges and a extremely short time period to accomplish its tasks, the Board made reasonable decisions on how to comply with the Voting Rights Act. The Department of Justice agreed with those decisions, and precleared the plan. The Petersburg Plaintiffs' arguments to the contrary are without merit.

III.
CONCLUSION

For the reasons set forth in the Board's Opposition/Cross Motion Memorandum, as well as above, the Board is entitled to summary judgment on the compactness of HD-32. The Petersburg Plaintiffs have completely failed to prove that Proclamation HD-32 is not relatively compact. Each and every one of the Petersburg Plaintiffs' arguments is without merit and unsupported by reliable evidence. Thus, they are not entitled to summary judgment. Conversely, as the Board has clearly shown, Proclamation HD-32 is relatively compact and therefore constitutional. The Board acted reasonably in complying with the Voting Rights Act when drawing Proclamation HD-34, whose configuration dictated the boundaries of Proclamation HD-32. Even so, Proclamation

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HD-32 still consists of a "relatively" compact area. The Board is therefore entitled to summary judgment as a matter of law, dismissing the Petersburg Plaintiffs' compactness challenge.

DATED at Anchorage, Alaska this 30th day of November 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of November 2011, a true and correct copy of the foregoing document was served on the following via:

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Rebuttal Report to
"Expert's Report of Theodore S. Arrington, PH.D."

Prepared by Dr. Lisa Handley
Principal, Frontier International Electoral Consulting

1.0 Introduction

I have reviewed the Demonstration Plan proposed by the plaintiffs in the context of this litigation and have determined that this plan is retrogressive and therefore violates Section 5 of the Voting Rights Act. This conclusion is based upon the extensive analyses I performed on behalf of the Alaska Redistricting Board (the Board) during the 2011 redistricting process (and the 2001 redistricting process), as well as a comparison of the Demonstration Plan to the Benchmark and Proclamation Plans.

Scope of Project I was asked by counsel to the Alaska Redistricting Board to review the report of Theodore S. Arrington, PH.D., and the Demonstration Plan proposed by the Riley/Dearborn plaintiffs in this litigation.

Professional Background and Experience My professional experience is summarized in the original report I prepared for the Alaska Redistricting Board (dated July 2011).[1] In addition, it should be noted that I did extensive analyses in order to be able to provide guidance to the Board during this round of redistricting. Included in this work was an analysis of the state House and Senate plan in place prior to adoption of the Proclamation Plan to determine the benchmark any proposed plan must meet. I also evaluated the state House and Senate plans adopted by the Board (Proclamation Plan) to ensure that the proposed plans would satisfy the requirements of Section 5 of the Act.

2.0 Demonstration Plan

As was mentioned in the expert report of Dr. Arrington, the Demonstration Plan is very similar to the "Borough Integrity and Voting Rights Act Plan" presented to the Board by the RIGHTS Coalition on May 24, 2011. I previously reviewed this plan and commented on it to the Board and in the report I prepared for the Board.[2]

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[1] "A Voting Rights Analysis of the Proclamation Alaska State Legislative Plans: Measuring the Degree of Racial Bloc Voting and Determining the Effectiveness of Proposed Minority Districts," July 2011. ("Handley Report") This report was included in the preclearance submission to the US Department of Justice.

[2] Handley Report, pages 25-27.

3.0 Composition of Districts with Significant Minority Populations

The table below provides a comparison of the percentage of Alaska Native voting age populations ("VAP") for the Benchmark, Proclamation and Demonstration Plans for state house and state senate districts with sizeable minority populations.[3]

Table 1 Comparison of Alaska Native Districts in the Benchmark, Proclamation and Demonstration Plan

Benchmark District	Benchmark Plan Percent Alaska Native VAP	***Proclamation and Demonstration District***	Proclamation Plan Percent Alaska Native VAP	Demonstration Plan Percent Alaska Native VAP
6	49.97	***36***	71.45	83.04
37	37.79	***37***	46.63	45.55
38	82.67	***38***	46.36	33.63
39	83.44	***39***	67.09	58.61
40	63.60	***40***	62.22	63.60
C	42.41	***R***	43.75	43.97
S	58.32	***S***	46.85	39.83
T	72.38	***T***	65.05	61.05

As illustrated by Table 1, the Demonstrative Plan has fewer state House and state Senate districts with significant minority population percentages than the Benchmark or the Proclamation Plans. Although some decrease in the Alaska Native population from the Benchmark Plan districts was necessary given the loss of Alaska Native population in the rural area, two districts in the Demonstration Plan have a significantly lower percentage of Alaska Natives than the Proclamation Plan: State House District 38 and State Senate District S.[4] (State House District 39 also has a lower percentage Alaska Native population but this decrease is not likely to adversely affect the electoral performance of the district.)

Paralleling the much lower Alaska Native population in District 38 in the Demonstration Plan compared to the Proclamation Plan is an over-concentration of

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[3] Although I have not included Benchmark District 5 in this table, I advised the Board there was a need to retain the Alaska Native influence district in Southeast Alaska to avoid the possibility of an objection under Section 5 of the Act. The Proclamation Plan and the Demonstration Plan both include an influence district in Southeast Alaska.

[4] State House Districts 37 and 38 are combined in the Demonstration Plan (as in the Proclamation Plan) to produce State Senate District S.

Alaska Natives in District 36 in the Demonstration Plan – a percentage much higher than necessary to elect a minority-preferred candidate to office.

Although a decrease in the number of minority districts with significant Alaska Native populations – specifically the Alaska Native population in Demonstration House District 38 and Senate District S relative to Proclamation Districts 38 and S – does not necessarily mean that the Demonstration Plan offers minorities less of an opportunity to elect candidates of their choice; further analysis indicates that this is in fact the case.

4.0 Percentage of Alaska Native Needed to Elect an Alaska Native-Preferred Candidate[5]

My analysis of voting patterns by race conducted for the Board produced estimates of minority and white turnout rates, as well as the average degree of minority cohesion and white crossover voting that a minority-preferred candidate might expect. Given these percentages, I determined that districts with Alaska Native VAP percentages greater than 41.8% are necessary to provide Alaska Native voters with the ability to elect candidates of their choice to office. [6]

The Proclamation Plan offers five state House districts over 41.8% Alaska Native VAP and three state Senate districts over this target Alaska Native percentage. The Demonstration Plan, however, offers only four state House districts and two Senate districts that meet this threshold target.

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[5]Because the term "effective" is commonly used in the voting rights literature and by the US Department of Justice to indicate a district that provides minority voters with the ability to elect candidates of their choice to office, I use the term "effective district" interchangeably with an "ability to elect district." *See*, for example, "Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence" Bernard Grofman, Lisa Handley, and David Lublin, 79 *North Carolina Law Review* 1383 (2000-2001).

[6]While this is true in general, it is not true in the area of House District 6 or House District 37 in the Benchmark Plan. However, the reconfiguration of the House districts in both the Proclamation and the Demonstration Plan suggest that the higher percentage required for Benchmark House District 6 need not be met to produce an effective minority district in these plans. The best estimate of the percentage Alaska Native voting age population required is therefore 41.8% for all districts in the Proclamation and Demonstration Plans.

The Benchmark Plan contained five state House districts and three state Senate districts that offered Alaska Native voters the ability to elect candidates of choice.[7] Therefore, in order to avoid retrogression, any proposed legislative plan must offer at least five state house and three state senate districts that provide Alaska Native voters with the ability to elect candidates of their choice. The Demonstration Plan does not meet this benchmark and therefore violates Section 5 of the Voting Rights Act.

5.0 Recompiled Election Results to Determine Effectiveness

Another means of determining if proposed minority districts are likely to elect minority-preferred candidates to office is to examine recompiled election results for past primary and general elections that included minority candidates that are preferred by minority voters. The two sets of elections must be examined separately: recompiled primary results will indicate whether the minority-preferred candidate can win the party nomination (in the political party of minority preference) in the district and general election results will determine if the minority-preferred candidate can go on to win the seat.

Although I often use recompiled election results to assist in ascertaining the effectiveness of a proposed district, in Alaska this approach was not possible. This is because in neither of the statewide general elections was the Alaska Native candidate the minority-preferred candidate: the 2006 contest for US Representative included a very popular white Republican incumbent (Don Young) that the majority of both Alaska Native and white voters supported thus the Alaska Native candidate (Diane Benson) was not the candidate of choice of Alaska Native voters; and in the 2002 race for Governor, the Alaska Native candidate (Diane Benson) ran as the Green Party candidate and received very few votes, including very few Alaska Native votes. As I noted in my report:[8]

> The lack of a Native-preferred Alaska Native candidate competing statewide has implications for conducting an analysis of the potential effectiveness of

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[7]Four of the five House districts protected by the Voting Rights Act I referred to as "effective" in my report and the fifth (House District 6) as an "equal opportunity" district because it did not always succeed in electing the minority-preferred candidate. This district did, however, elect the minority-preferred Alaska Native candidate to the state House in three out of the four elections since 2004. (The Alaska Native candidate who ran in 2002 was unopposed and therefore could not be analyzed.) It therefore clearly provides Alaska Native voters with the ability to elect candidates of their choice to office.

[8] Handley Report, page 14, Footnote 10.

proposed minority districts; recompiling election results to determine if the Alaska Native candidate preferred by Alaska Native voters is simply not possible.

Dr. Arrington, however, ignored the fact that there was not a minority-preferred Alaska Native candidate in these two general elections and examined recompiled election results for these contests.

A second problem with his examination of recompiled general election results was that one of the two contests was also not racially polarized: in the 2006 race for US Representative, Don Young was very popular and garnered a majority of both Alaska Native and white votes. Recompiling election results for a contest that is not polarized provides no information about the effectiveness of a proposed minority district in instances when the electoral is racially polarized. (The majority of contests, albeit not all contests, are racially polarized in Alaska).[9]

The third problem with Dr. Arrington's approach is that he appears to have accorded equal weight to all of the election contests – not only polarized and not polarized contests, but Democratic and Republican primaries. Since very few Alaska Natives choose to participate in Republican primaries,[10] it does not inform the analysis to consider these primaries when determining if proposed districts will provide minority voters with the ability to elect minority-preferred candidates to office.

In summary, included in Dr. Arrington's single table of the eight recompiled elections relied on for his conclusions are:

- Two Republican primaries in which very few Alaska Natives participated;
- Two Democratic primaries that were not racially polarized; and
- One general election that was not racially polarized.

In the analysis that follows, I rely upon only the elections that are at least somewhat meaningful in assessing the effectiveness of a proposed district. I examine first the Democratic primary phase of the election process, looking only at the two Democratic primaries that were polarized. I also examine the one general election

---

[9] A candidate preferred by both white and minority voters would, of course, carry every conceivable proposed district – even if there were no minority voters in it at all.

[10]The percentage of Alaska Natives who turned out to cast a vote in the Republican primary was inevitably less than 5% of the voting age population. Alaska Natives, however, cast a vote at considerably higher rates in Democratic primaries – in fact, at rates several times that of white voters.

that was polarized but I do this with the caveat that it cannot be accorded the same weight as an election in which the minority-preferred candidate is an Alaska Native.

Democratic Primary Analysis In my original report I analyzed four statewide Democratic primaries – the only four that included Alaska Native candidates in the past decade. Two of these primaries were not polarized: the candidate of choice of both Alaska Natives and whites in the Democratic primaries for Lieutenant Governor in 2010 and for US Representative in 2006 was Diane Benson (an Alaska Native).[11] The other two contests, however, were racially polarized: the 2008 primary for US Representative (Benson was the Alaska Native-preferred candidate but whites supported Ethan Berkowitz), and the 2006 primary for Lieutenant Governor (Donald Olson, an Alaska Native, was the Alaska Native-preferred candidate but the white-preferred candidate was Berkowitz).

As illustrated in Table 2, below, recompiled election results for the two polarized Democratic primary elections indicate that the Alaska Native-preferred candidate carried each of the eight Benchmark minority districts at least 50% of the time. (The raw data on which this table is based can be found in Appendix A.) The Alaska Native-preferred candidate also carried the eight Proclamation Plan minority districts at least 50% of the time.

The Demonstration Plan, however, includes a district that does not provide Alaska Native voters with an ability to elect candidates of choice in Democratic primary elections. State House District 38 scores a zero – that is, the Alaska Native-preferred candidate was not able to carry this district in either of the racially polarized Democratic primary elections. This indicates that the Alaska-Native preferred candidate would not even make it past the Democratic primary in this proposed district.

Table 2 Percentage of Racially Polarized Primary Election Contests in which the Alaska Native-Preferred Candidate Carried the District: Benchmark, Proclamation and Demonstration Plans

District	Benchmark Plan	*District*	Proclamation Plan	Demonstration Plan
6	50%	*36*	100%	100%
37	50%	*37*	100%	100%
38	100%	*38*	100%	0%
39	50%	*39*	100%	100%
40	50%	*40*	50%	50%

[11]Although Benson won these Democratic primaries, she was defeated in the general election.

District	Benchmark Plan	*District*	Proclamation Plan	Demonstration Plan
C	50%	*R*	50%	50%
S	100%	*S*	100%	50%
T	50%	*T*	50%	50%

General Election Analysis As mentioned above, in neither of the two statewide general elections analyzed was the Alaska Native candidate the minority-preferred candidate. Moreover, only one of these two contests was racially polarized – the 2002 election for governor. In this contest, a clear majority of Alaska Native voters supported Fran Ulmer, the Democratic candidate. A majority of the white voters, however, supported her Republican opponent, Frank Murkowski (who won the contest).

Although the 2002 gubernatorial contest does not include an Alaska Native candidate who was preferred by Alaska Native voters, Table 3, below, presents the recompiled election results for this contest to determine if the Alaska Native-preferred candidate, Ulmer, would have carried Demonstration District 38 in the general election.[12] For comparison purposes, I have also included the recompiled results for Proclamation District 38 and Benchmark District 6 in the table.[13] However, this recompilation of election results differs from Dr. Arrington's in several ways. For example, I recompile results for all of the candidates, not simply the top two candidates. Also, in order to make a direct comparison possible across all three plans, the Absentee/Early/Questioned votes have been removed from the tally for Benchmark District 6 since they cannot appear in the tallies for the Proclamation or Demonstration districts.[14]

As Table 3, below, illustrates, the minority-preferred candidate carries both Benchmark District 6 and Proclamation District 38, but does not win in Demonstration District 38.[15]

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[12] A percentage calculation like the one produced for the primary elections cannot be done for the general election given that there is only one statewide general election that included an Alaska Native candidate and was racially polarized.

[13] As Dr. Arrington indicates in his report, a direct comparison between Benchmark District 6, Proclamation District 38 and Demonstration District 38 is probably the most appropriate district comparison because of the overlap in population in this area across the three plans.

[14] Early/Absentee votes are reported only at the district level, not at the precinct level. These votes cannot, therefore, be reassigned to a proposed district.

[15] The minority-preferred candidate, Ulmer, does carry all of the other proposed minority districts, including Senate District S, in the Demonstration Plan.

Table 3 Recompiled Election Results for 2002 General Election for Governor Benchmark, Proclamation and Demonstration Plans

2002 General Election: Governor	Benchmark District 6		Proclamation District 38		Demonstration District 38	
	Votes	Percent	Votes	Percent	Votes	Percent
Fran Ulmer (Dem)	1915	**47.9**	2835	**58.4**	1988	44.5
Frank Murkowski (Rep)	1880	47.0	1763	36.3	2326	**52.1**
Don Wright (AI)	88	2.2	109	2.2	59	1.3
Diane Benson (GRN)	53	1.3	84	1.7	44	1.0
Billy Toien (LIB)	29	.7	34	.7	21	.5
Raymond Vinzant (MOD)	33	.8	32	.7	28	.6

On the basis of this general election contest, as well as the two primary elections examined, Demonstration District 38 is not comparable to Benchmark District 6. Benchmark District 6 is certainly more than "just barely adequate in providing Native voters with an ability to elect a representative of choice" as Dr. Arrington claims (Arrington report, page 11). Most importantly, Benchmark District 6 elected the Alaska Native-preferred candidate to the state House in 75% of the contests examined in my original report. In addition, the Alaska-Native preferred candidate won 50% of the racially polarized statewide Democratic primaries in which the Alaska Native candidate was the candidate of choice of Alaska Native voters. And although Ulmer did not, in actuality, carry Benchmark District 6 when the early/absentee ballots were included in the recompilation of the 2002 general election for governor, Ulmer did considerably better in Benchmark District that she would do in Demonstration District 38.[16]

Demonstration District 38, on the other hand, is not effective. It does not offer Alaska Native voters the ability to elect candidates of choice to office in any of three racially polarized election contests examined.

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[16] Dr. Arrington also finds that Native-preferred candidate do better in Benchmark District 6 (where they won five out of the eight contests considered) than in Demonstration District 38 (where they would win four out of the eight contests). Of course, I believe that five of the eight contests Dr. Arrington includes in his analysis should not have been included and provide no useful information about the potential effectiveness of proposed Alaska Native districts.

6.0 Conclusion

When analyzed correctly, it is evident that the Demonstration Plan proposed by the plaintiffs is retrogressive. Neither Senate District S nor House District 38 meet the target percentage Alaska Native VAP required to create an effective minority district. Moreover, recompiling election results for the racially polarized Democratic primaries and the polarized general election indicate that the Alaska Native-preferred candidate would not carry Demonstration Plan House District 38 in any of the three contests. I, therefore, conclude that the Demonstration Plan offers at least one, and possibly two fewer districts that offer Alaska Natives the ability to elect candidates of their choice than either the Benchmark or the Proclamation Plan. The Demonstration Plan violates Section 5 of the Voting Rights Act and would not be precleared by the US Department of Justice.

Appendix A

Benchmark Plan: 2006 Democratic Primary for Lieutenant Governor

District	Votes for Berkowitz	Votes for Olson	Votes for Rollins	Votes for Rollison	Percent Berkowitz	Percent Olson (Native-Preferred)	Percent Rollins	Percent Rollinson
6	494	218	188	70	**50.9**	22.5	19.4	7.2
37	456	312	178	84	**44.3**	30.3	17.3	8.2
38	301	624	241	92	23.9	**49.6**	19.2	7.3
39	187	1491	90	44	10.3	**82.3**	5.0	2.4
40	168	1018	84	32	12.9	**78.2**	6.5	2.5
C	1037	473	469	221	**47.1**	21.5	21.3	10.0
S	757	936	419	176	33.1	**40.9**	18.3	7.7
T	355	2509	174	76	11.4	**80.6**	5.6	2.4

Proclamation Plan: 2006 Democratic Primary for Lieutenant Governor

District	Votes for Berkowitz	Votes for Olson	Votes for Rollins	Votes for Rollison	Percent Berkowitz	Percent Olson (Native-Preferred)	Percent Rollins	Percent Rollinson
36	503	555	266	107	35.2	**38.8**	18.6	7.5
37	351	412	139	75	34.0	**40.0**	18.7	7.3
38	624	625	195	77	41.0	**41.1**	12.8	5.1
39	426	1237	140	62	22.8	**66.3**	7.5	3.3
40	159	928	81	31	13.3	**77.4**	6.8	2.6
R	893	693	398	173	**41.4**	32.1	18.5	8.0
S	975	1037	388	152	38.2	**40.6**	15.2	6.0
T	585	2165	221	93	19.1	**70.7**	7.2	3.0

Demonstration Plan: 2006 Democratic Primary for Lieutenant Governor

District	Votes for Berkowitz	Votes for Olson	Votes for Rollins	Votes for Rollison	Percent Berkowitz	Percent Olson (Native-Preferred)	Percent Rollins	Percent Rollinson
36	352	780	229	88	24.3	**53.8**	15.8	6.01
37	484	502	226	97	37.0	**38.3**	17.3	7.4
38	397	305	166	65	**42.6**	32.7	17.8	7.0
39	421	1160	148	62	23.5	**64.8**	8.3	3.5
40	168	1018	84	32	12.9	**78.2**	6.5	2.5
R	930	873	378	161	**39.7**	37.3	16.1	6.9
S	881	807	342	162	**40.2**	36.8	15.6	7.4
T	589	2178	232	94	19.0	**70.4**	7.5	3.0

Benchmark Plan: 2008 Democratic Primary for US House of Representatives

District	Votes for Berkowitz	Votes for Benson	Percent Berkowitz	Percent Benson (Native-Preferred)
6	497	740	40.2	**59.8**
37	458	546	45.6	**54.4**
38	678	1195	36.2	**63.8**
39	798	792	**50.2**	49.8
40	652	645	**50.3**	49.7
C	1208	1429	45.8	**54.2**
S	1136	1741	39.5	**60.5**
T	1450	1437	**50.2**	49.8

Proclamation Plan: 2008 Democratic Primary for US House of Representatives

District	Votes for Berkowitz	Votes for Benson	Percent Berkowitz	Percent Benson (Native-Preferred)
36	659	925	41.6	**58.4**
37	560	942	37.3	**62.7**
38	894	946	48.6	**51.4**
39	910	919	49.8	**50.2**
40	608	589	**50.8**	49.2
R	1350	1406	49.0	**51.0**
S	1454	1888	43.5	**56.5**
T	1518	1508	**50.2**	49.8

Demonstration Plan: 2008 Democratic Primary for US House of Representatives

District	Votes for Berkowitz	Votes for Benson	Percent Berkowitz	Percent Benson (Native-Preferred)
36	679	1274	34.8	**65.2**
37	601	748	44.6	**55.4**
38	714	585	**55.0**	45.0
39	895	901	49.8	**50.2**
40	652	645	**50.3**	49.7
R	1498	2151	41.1	**58.9**
S	1315	1333	49.7	**50.3**
T	1547	1546	**50.0**	50.0

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT

IN RE 2011 REDISTRICTING CASES)

Case No. 4FA-11-1935 CI

DEPOSITION OF THEODORE S. ARRINGTON, Ph.D.

Washington, D.C.

Wednesday, November 23, 2011

Reported by:

John L. Harmonson, RPR

Job No. 43927

T. ARRINGTON

A. Yes.

Q. Okay, good.

Let's assume you have a Native district which is rural in nature, as they tend to be in Alaska, and you have to add population to that district in order to meet the one person, one vote standard. You understand what that is, right, when I say one person, one vote standard?

A. Yes.

Q. What is your understanding? Is there some sort of benchmark or some rule of thumb in that in terms for state districts?

A. There is a rule of thumb that the difference between the largest and the smallest district should be no more than 10 percent. If you stay within that 10 percent, then generally the burden of proof is on the person challenging your plan to say that the deviation was for some inappropriate reason.

If you exceed that 10 percent, then the burden of proof is on you to prove that you didn't do it for some bad reason.

Q. I think what I heard you say, and I've heard it said that if you're within the

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10 percent, I'll call it tolerance, overall range in deviation, there is a presumption that it's constitutional and if you are over, there is a presumption that it's not constitutional. Would that be --

A. That's another way to say it. Semantically, I think that's another way of saying the same thing.

Q. All right, we're saying the same thing.

So back to this district now. You're taking a district, you have to add population to it in order to get within the legal tolerance. It's a rural Alaska district. And you have to add population from an urban area; there is no other choice that you can do.

Does it make a difference who you add to that district in terms of politically?

A. Yeah. You would want to add Democrats.

Q. And that's for the reason we talked about before, minorities vote Democratic, whites generally vote Republican?

A. That's correct.

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Q. If you add more Democrats to the district, that's going to potentially increase the effectiveness of that district?

A. That's correct.

Q. If I could ask you to look back at your report, Doc, and go to page 3 now, Paragraph 8. That's where you talk about your review of Dr. Handley's report and testimony. And there is where you make the comment about regression is a legal term and the semantics that we talked about. I don't want to talk too much about that.

But what I want to ask you is this: Given your opinion that you've stated here, you cannot say, can you, whether or not DOJ would consider the demonstrative plan to be retrogressive?

A. I can say that. Whether it has any probative value or not depends on whether it's a legal term or a semantic difference.

Q. I notice that nowhere in your report do you say that you believe that this plan would be precleared by the Department of Justice. By "this plan," I mean the demonstrative plan.

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A. That's correct.

Q. So you express no opinion on that point?

A. That's correct. I think you're making an assumption that I'm an advocate of the demonstration plan and that I think that the Board should adopt that plan and submit it to DOJ. I'm not saying that. I'm not advocating that.

Q. In fact --

A. Not that anybody cares what I advocate, but I'm not advocating that.

Q. Let me ask you this: If you were in Lisa's position, let's assume you're advising the Board now, would you recommend to them that they submit to the Department of Justice the demonstrative plan?

A. No.

Q. That's because in your opinion you don't believe that it's a strong enough plan to receive preclearance from the Department of Justice?

A. I wouldn't put it that way. I would say that I think a stronger plan could be drawn

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than that plan. And I think a plan could be drawn that would pass DOJ preclearance which would clear up some of the problems in the proclamation plan.

Now, I think that's true, but I have not, as you know, sat down at a map with a GIS system and tried to draw such a plan. But I believe that things could be straightened out in the proclamation plan and still have a plan that would be precleared, such as, for example, more compact districts in areas of the state where in fact there is not a problem with Section 5.

Q. I don't understand what you mean.

A. Well, there are districts in the state that are not compact and are also not minority districts.

Q. Where?

A. Southeast, for example.

Q. You haven't been asked to give any opinions on that?

A. No. But I've looked at the maps. So now I'm giving you an opinion. It's not in my report.

Q. And you're not going to testify to

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that at trial?

A. Well, I will if I'm asked.

Q. Well, you haven't given any opinion in your report on that, correct?

A. Well that's --

Q. Doc, I only get one chance to talk to you, you understand that?

A. I understand. And if you object and the court says Arrington's opinion -- we're in depo. You're trying to find out information about me, and I'm giving you information.

And you asked did I opine in here that the demonstration plan should be sent to the DOJ. And the answer is no, I didn't.

Q. If you were just looking at the demonstrative plan -- the demonstration plan --

A. We've both done that.

Q. I've got that in my brain and it sticks.

MR. WALLERI: And I'm trying to avoid that sticking in everybody's brain.

Q. Let's call it the demo plan.

Purely for DOJ purposes, between the demo plan and the proclamation plan, if those

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were the only two choices, you would recommend to your client in a hypothetical situation that it go with the proclamation plan and not the demonstration plan?

A. Based on the evidence, the numbers that Dr. Handley and I have looked at, the answer to that question is yes.

If I have additional information, which I don't currently have, I might conclude that District 38 is not an effective district. District 38 in the proclamation plan is not an effective district.

But based on the evidence that I have, the numbers that Dr. Handley and I have produced, the answer to your question is yes.

Q. So based upon if you had this other information, you might opine that Proclamation District 38 is not effective, then clearly Demonstrative District 38 is not effective, correct?

A. No, I don't think that that's clear. And let me finish.

Section 5 as amended by the Congress, as I understand it as an expert trying to apply

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the law to what I do, makes it a dichotomy. It is or it isn't. As political scientists, we know that these things are not dichotomies; they vary.

Is 38 in the demo plan a strong district? No.

Based on numbers, is it as strong as 38 in the proclamation plan? No, it isn't.

Is it in fact so weak that it falls down below the reelection? I frankly don't know. Moreover, I'm not sure that we should count 6 in the benchmark as a benchmark minority district.

I have the same problems that Dr. Handley was fighting with when she was trying to evaluate 6, and she came out in the end, after a long series of memos and e-mails in which she was considering it, to say okay, yes, I'm going to count 6 as a minority district in the benchmark. Okay?

I'm saying I'm not certain. And I wouldn't recommend to the Board -- you asked me if I was working for the Board. I wouldn't want to recommend a plan which I wasn't certain had at least as many effective districts as the benchmark.

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who are themselves Natives, more than just a 50/50 chance that would be present at the threshold."

So here you're saying, are you not, Doc, that the benchmark plan has five effective House districts and three effective Senate districts?

A. Yeah, as I say, it's a dichotomy. I came out the same place she did on 6. I have real doubts about it, but you're asking me to make a decision yes or no.

Q. And you said yes?

A. I said yes, in part on the basis of her decision. I have great respect for her work.

Q. You mention here there is more than a 50/50 chance. So in order to be an effective up or down, you have to have more than a 50/50 chance, right. A coin flip doesn't count?

A. No, I'm not sure that that's true. Remember that Dr. Handley as well as I do most of our work in Section 2 where we talk about opportunity. Okay? I think a district which -- Here I can't talk about opportunity anymore like we do in Section 2. It's yes or no.

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But it says in the legislation, as I understand it, that minorities have the ability -- ability -- to elect a candidate of their choice.

And I think that ability may come in where you're just shy of 50/50. Now, if I decide or Dr. Handley decides or DOJ decides that ability means more than 50/50, I'm not aware of anything anywhere that says that. So if it's not quite 50/50 -- it's pretty good but not quite 50/50, that might be a district where I would be willing to say, okay, that's ability to elect.

A better than half chance to elect, the legislation doesn't say that. It says ability to elect. So it's left up to the courts and to experts to figure out what in the hell that means. So I'm not certain what you said is true, that it has to be more than 50/50.

Dr. Handley thinks this is a 50/50 district and she said so several times.

Q. Where did she say that? I know you mentioned that in your report, and we can talk about it later. But where did you see that?

A. I think it's in her testimony, that

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she would characterize it as a 50/50 district.

Q. She doesn't say that in her report, does she?

A. I don't remember whether she says it -- I've read both her testimony and her report.

Q. So your opinion could be based on either one of those?

A. Yeah, it could be based on either one of those.

Q. Okay.

A. But in my view, it's about a 50/50 district. And I would say that a district that is slightly less, not really bad but slightly less than 50/50, might be nevertheless one that I would say okay, that's an ability to elect district.

Q. So in your opinion, does Demonstrative District 38 have the ability to elect?

A. Let me first of all say that I am not certain about it. My understanding of the role of an expert is to testify about what they are at least 50 percent certain of.

Q. Okay.

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A. All right? I mean, that's just my understanding from doing this work.

Q. All right.

A. I can't say that I'm 50 percent certain that the district is a 50/50 district. If you follow that.

Q. All right.

A. I think it is possible that it's a district that would work, but I'm not -- As I sit today and have thought some more about it, I forget what I say in here, think it might be.

Q. But you're not sure?

A. But I'm not sure.

Q. You wouldn't bet the farm on it?

A. Well, as I said to you earlier, if I was recommending to the Board, I would not recommend that they submit the demo district to the Justice Department.

I think it's close, but remember what I'm doing here. I'm not comparing it to the proclamation plan. I'm comparing it to the benchmark, and I'm uncertain about the Benchmark 6 as well. So since I'm uncertain about both of them, do I think they're both pretty crappy iffy

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districts? I think the answer to that is yes.
Q. And you base that pretty crappy on your recompiled election results, correct?
A. That's correct.
Q. Because Benchmark District 6 is over 50 percent, as you heard yesterday when you were here in Dr. Handley's testimony, over 50 percent Native pop and just below 50 percent Native VAP, right?
A. That's correct. And Demo 38 is I think 7 percent or something like that below that.
Q. 17 percent?
A. 17 percent?
Q. 33 percent?
A. I would have to look at my numbers. Whatever it is, it's much below it. That gives me -- that gives me very real pause, yeah.
Q. Let me ask you this just to make sure I clarify. You're not certain on Proclamation House District 38 but you made the choice on Benchmark District 6, you said yes, it's effective? You went up on that, correct?
A. That's correct. But I did that only

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with reservations. Because it's my job to come up yes or no on that. So I did. But it's not --
Q. And it's your job to come up with yes or no on Proclamation 38 as well and you came down?
A. Yeah, I came down.
Q. I'm sorry, Demo 38.
A. Let's stick with demo.
Q. All right, good. We'll do demo and that will help us both.
So let's look at Paragraph 20. You say: "Determining whether proposed districts provide Natives with the ability to elect is difficult, because these districts have not been used in actual elections for the House and Senate."
But you talk about there being several reliable methods for testing potential districts, and then mention that Dr. Handley uses some and one that she does not.
I want to talk about the first ones that she uses. You note them both in your report there.
You say: "First, one can compare the

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geography of proposed and benchmark districts and validly infer that the patterns of voting in the benchmark district will be repeated in a proposed district in the same geographic area."
I think I understand what you're saying there is if -- Do you have the map there? Well, you don't need to look at a map.
Basically, I don't think it's in dispute that House District 40 in the benchmark is essentially almost exactly the same as the House district in the proclamation and in the demo.
So if you have the same area geographically as in the benchmark, you can pretty much use the elections from that benchmark to determine the effectiveness of the proposed district?
A. That's correct.
Q. That's what you're talking about in the geography?
A. That's correct.
Q. And the second one is the necessary concentration of Natives, which for lack of a better term I'm just going to call the threshold

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number because I've seen that done somewhere. And that's the number.
Okay. Do your racial bloc voting analysis, and based upon that you come up with this statewide average of 42, 41.7 percent. That's the second method that are reliable methods for testing effectiveness, right?
A. That's correct.
Q. And you say she does both of those in her opinion?
A. That's correct.
Q. And then the third one you say is this recompiled election results, is what I call them, and that's what you're talking about reconstructed statewide voting returns, right?
A. That's correct.
Q. And you say "provided that few precincts are split between proposed districts." Why is that a proviso to the use of recompiled election results?
A. Well, because generally you don't know how to allocate the vote in the split precincts precisely between the two districts or three that it's split among.

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Q. Certainly.

A. I'm saying that the overlap with 6 isn't the problem. This doesn't mean that the level of minority concentration in that district is not a problem. Is that fair?

Q. Yeah, that's fair. That helps clear it up in my mind. I appreciate that.

So what you're talking about here in terms of the problem disappearing with the overlap is overwhelmingly Native VAP. Do you understand that's essentially what the Board did when it did Proclamation House District 38, that it added Native, nonwhite Natives from House District 6 to Proclamation District 38?

A. I know that they did that. I can't tell you why they did it.

Q. Based upon your experience, which is obviously considerable, do you believe that population deviations can bias a redistricting plan in a racially motivated direction?

A. Yes.

Q. How so?

A. Well, for example, in Georgia ten years ago the Democrats, who controlled the

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process, specifically took districts that were Republican and made them big, deviations were high, and districts for Democrats, particularly in rural areas, they made smaller systematically. And in the Larios district, the Supreme Court said that's not allowed.

Q. And that's because, and just so I can get it clear in my own mind, if you overpopulate a district, meaning it has a positive deviation, that provides for underrepresentation, right?

A. Sure.

Q. Because you have one person representing more people?

A. Right. But remember, it has to be systematic. I mean, there are always going to be some big districts and some small districts. That's the nature of geography.

Q. Right. But if the minority districts are overpopulated, and I think we have called them white, but I think you referred to them before as Anglo districts, are underpopulated, can that have a disproportionate impact on minority representation?

A. If the minority districts are

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overpopulated and the Anglo population are underpopulated, that certainly would harm the -- if it was done systematically, that certainly would harm the representation of minority voters, sure.

Q. For the same reasons you just explained?

A. Oh, sure, absolutely.

Q. You agree, don't you, that demographers -- and in fact I think the U.S. Census claim that the census undercounts minority populations?

A. Yes. And one of the things I criticize Texas for in my report on Texas was that they overpopulated minority districts when they should have been underpopulating them exactly because of that and also because that's where the growth is in Texas. That's not where the growth is in Alaska, but that's where the growth is in Texas.

Q. So at what point does this data provide sufficient evidence of intentional treating minority voters different?

A. What data?

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Q. If you had data that had overpopulated minority districts and underpopulated Anglo districts.

A. Well, you would simply look at and present evidence of the overpopulation in these minority districts and the underpop -- the overpopulation in the minority districts and the underpopulation in the white districts and you would compare those numbers.

As a political scientist you would try to make a judgment as to whether that systematic maldistribution is great enough that it would have a cumulative effect on the representation of minorities in the state as a whole.

Q. What do you use to measure that? Is it mean deviation or is it some other standard?

A. Yes, you would really want to use the mean or the median deviation of the two different kinds of districts rather than extremes, because the extremes really wouldn't tell you what you want to know. Or you could just use the totals.

You could say here are -- here are -- just to give an example, 50 percent of the districts are minority districts and 50 percent

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A. That's correct.

Q. And the proclamation you have at 46 percent?

A. That's correct.

Q. And the demo plan you have at 33 percent?

A. That's correct.

Q. So just doing math, obviously the demo plan is 17 percent lower Native VAP than the benchmark plan and 13 percent lower than the demo plan?

A. That's correct.

Q. You also have, if you look up at the top there, your comparison of Benchmark 38 with Proclamation 36 and Demonstrative 36. And the VAP number in that district is 83 percent.

Did you look for any evidence of packing in the demonstrative plan?

A. Let me briefly make clear what we're talking about here. Packing in the sense that there is a higher concentration of Natives in that district than are necessary for them to elect a candidate of their choice, then the answer is that is true.

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But packing is also used as an active verb, meaning that it was done for a particular nefarious purpose. And I don't think that when Leonard drew the plan he was trying to pack. I think that's the way it fell out in terms of geography and so forth.

Q. Is there any reason that you're aware of why you couldn't take some of the population in House District 38 and put it down into -- excuse me, Demo District 36 and put it into Demonstrative District 38 in order to increase the Native VAP in that district?

A. As I said earlier, I'm not advocating a demo plan. If I were to sit down at a GIS system to draw the districts, that is one thing I would attempt to do.

Q. Because you don't need 83 percent in Demo District 36 in order for it to be effective?

A. You do not. You don't need 71 percent in the proclamation plan.

Q. But in the proclamation plan, all the other districts are effective, correct, and in the demonstrative district they are not, right?

A. I agree.

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Q. All right. I want to talk to you a little bit now about endogenous versus exogenous elections.

Based on endogenous elections, how effective was Benchmark District 6?

A. 50/50. As I remember, there were three in which the candidate of choice won and three in which they didn't.

Q. You base that on recompiled election results, right?

A. No, I based that I thought on what I read in Dr. Handley's report. Maybe I misread.

Q. I just want to make sure. The endogenous elections are the ones that are most probative, those are the actual elections --

A. The elections for the House in that district.

Q. And do you know in fact that in that district there were four elections where you had candidates, the 2002 election there was no opponent for the Native candidate?

A. Four elections.

Q. So you don't count that if there's no opponent, right? You would agree?

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A. Right.

Q. There are four elections and the Native-preferred candidate won three of them?

A. Okay.

Q. So based upon that, and just assume that's true for purposes of this question, how does that affect your analysis of how effective Benchmark District 6 is?

A. Well, I've said that I count it as an election district.

Q. But three out of four is much different than 50/50, isn't it?

A. I was using Dr. Handley's terminology, either in her report or in her testimony.

Q. So you do not actually look at the election results, the endogenous election results for Benchmark District 6?

A. No, I did look at them. I just didn't remember them off the top of my head. I don't have it in front of me, and I don't want to say it's six of one and five of another if I don't have it in front of me. I don't keep numbers in my head very well.

Q. So we can look at Lisa's report and

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you would be able to tell that, right?
A. You say it's three to one. I take your word for it.
Q. Okay.
A. And you're probably going to tell me it was the 2010 where the candidate of choice lost.
Q. You're absolutely correct.
A. That happens all the time across the country.
Q. In fact, you agree with Lisa's statement yesterday that you can't really determine or analyze the effectiveness of a minority district based on one single election, can you?
A. One robin does not make a spring.
Q. I like that. Particularly in Alaska.
So you also agree with her statement, wouldn't you, that the 2010 election was rough on minority districts, right?
A. Indeed.
Q. And in fact, I think in Texas even a lot of the minority districts did not perform in 2010, right?

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A. Indeed.
Q. But that did not change your opinion on the effectiveness of those districts, did it? Some of them?
A. It didn't affect Lisa's opinion, and I took her opinion as the basis for my report.
Q. And you have no reason to dispute her opinion?
A. No, not at all.
Q. So when you talk -- I think you might do it in this report -- about election proximity, that's a relative term as well, right?
I think you go on later to talk in some of the things we'll talk about later on your recompiled election results, that elections more recent to the time you're actually analyzing it tend to have more probative value.
A. That's correct.
Q. But they also can be an anomaly, right?
A. That's correct.
Q. And in 2010, it's fair to say that pretty much across the country there were a lot of anomalies in minority districts given the

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political tenor of the times?
A. I like calling them anomalies, yeah.
Q. Okay. Because they performed the entire decade except in 2010?
A. That's correct.
Q. Can we go to page 10 now, Doc. Just a couple of questions there. Paragraph 27 is the first one.
We've already talked about the fact that the 13 percentage points less concentration of Native VAP in demonstrative -- Demo 38 than Proclamation 38.
You've testified here today that means that demo probably offers Native voters less of an ability to elect representative of their choice than Proclamation 38.
Then you kind of use that as an analysis or a segue into your recompiled election result analysis. You say that endogenous elections are always the best evidence but aren't available in new districts because you don't have actual elections in these new districts.
Is that a fair summary of what you say in Paragraph 27?

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A. Is that a question?
Q. Yeah. Do you think that fairly summarizes? I'm just trying to move this along here.
A. That's what it says, that's right.
Q. And then you go on and you talk about the comparisons that you have in Table 2. You indicate that Proclamation 38 offers a better ability to elect than Demo District 38. It shows that all three districts are unreliable.
That's based on what you told us earlier, that you think that they're crappy, right?
A. Yes, that's correct.
Q. But in your analysis here, you either misinterpreted or didn't know the actual endogenous election results for Benchmark District 6? Or did I misunderstand your testimony?
A. Where did I misrepresent? I may have.
Q. Well, you base it -- We'll get to that.
You said that you thought that Benchmark District 6 -- if you look at

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A. Yes, of course.

Q. But you don't draw any distinction between any probative value between primaries and generals here, do you?

A. And I didn't draw any probative things when I said four to six. I'm telling the reader what it says, and I'm pointing out to you that it's in all three kinds of elections. Because I understand that they have different value.

Q. Okay. But you don't put any quantitative value here?

A. No. I didn't try to do that.

Q. Why didn't you do that?

A. Because all I'm trying to demonstrate there is that despite the low concentration of Native voters, in fact the Native candidate of choice has won some of these elections. That's it, that's all.

Q. It doesn't affect your other conclusions that you gave the thumb down to Demonstrative District 38?

A. I already said that three or four times. It doesn't change that.

Q. Just want to make sure.

T. ARRINGTON

And then you kind of -- Do you agree with Dr. Handley's conclusion that there is no probative value in the examination of elections that are not polarized?

A. Yes.

Q. But you do include in your election results some elections that were not polarized?

A. Yes. I mean, a famous secretary of defense once said you go to war with the army you have, not the army you wish you had. Well, you examine the data you have, not the data you wish you had. And it is the case that the data that I examined here has less probative value than data I wished I had.

Q. But you don't say that anywhere in your report, right?

A. Well, I didn't think it was necessary. I'm not going to argue that demonstration plans should be submitted to the Justice Department or should be adopted by the court or the Board.

Q. And would you agree with Dr. Handley's analysis and conclusions that it's not really probative to consider Republican primaries in Alaska for determining the effectiveness of a

T. ARRINGTON

Native district?

A. Yes. Again, though, I used the data that she had analyzed. And second, as I said before, it's my understanding, not on the basis of my own research but just my understanding that there are pockets of Native Republicans in this Proclamation District 38 and therefore it is useful to have a look at that. Is it the most probative data? No.

Q. I think your quote that you went to war with the Army you had, then you're trying to do the best you can for your client in this analysis; is that --

A. Well, I'm trying to do the best I can to understand the situation. My client is on his own. But I'm trying to do as much as I can to analyze the data I have available.

Q. Okay.

A. If I wanted to please my client, I would say Demonstration 38 is a wonderful district. I can't say that. The data is not there.

Q. 33 percent, right?

A. Well, it's just the 33 percent, and

T. ARRINGTON

then when you look at the reconstructed data, you get some victories and some losses. But that there are some victories says something about a district that is that low. And I will note some victories, in fact, in districts where it's in fact polarized. But now you're talking about a very small number of elections.

Q. We're talking about three, right? You would agree that the most probative elections are the three that Dr. Handley talked about yesterday?

A. Yes. And it would be nice if the candidate of choice were also a Native.

Q. Okay. You said earlier, Doc, that you had some changes to Table 2, right? And I want to go over those on the record now. Let's give you the official Exhibit 2 that we have so that you can make the changes right on there.

A. It was Table 1 that I have --

Q. Oh, it was Table 1?

A. Yeah, it was Table 1.

Q. Okay. Well, then, let's do that later. I don't want to go back there yet, but we'll give you a chance to do that on the record.

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was a Section 2 case, right, whether that actually applied to Section 5 or not. I'm sorry, Bartlett v. Strickland.

A. I knew what you meant.

Q. In fact, you were amicus curiae in that Bartlett case?

A. I was, along with Dr. Handley, yeah.

Q. So you would agree with me, would you not, that reasonable minds differed on whether Bartlett applied to Section 5 or not?

A. Well, assuming that I have a reasonable mind. I mean, I was uncertain about whether it applied or not. And then while you remind me, I did talk with Ms. Dolan about that very question several times on the telephone as to whether that was a relevant case here.

Q. And you told her what?

A. I told her I didn't know, that while it was a Section 2 case, it seems to me it does have implications for Section 5. But who knows.

Q. So if you're going to advise a client on how to effect preclearance, would it be fair to say you would want to go in with a stronger plan than a weaker plan if you're going to seek

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preclearance from the --

A. Well, as I said earlier, yeah, if I'm going to recommend a plan, I want a strong plan rather than a weak one.

Q. And are you aware -- We just talked about DOJ guidelines and a couple of those guidelines -- let me find it so I have them here in front of me -- include whether or not the Natives participated in the -- or had a chance to participate in the redistricting decisions, right?

A. Right. That goes back to questions of intent.

Q. But it's also relevant for purposes of Section 5, is it not?

A. Yeah.

Q. And so the guidelines include -- let me just find them because I have them here somewhere.

A. If you're going to ask me whether the minority representatives had a role to play in this redistricting process, other than what I've read on the web, I don't know. I assume they did. I mean, they made presentations before the

T. ARRINGTON

Board.

Q. And you understand by reading the record that the Board held 30 or 40 public hearings over this process?

A. Yeah.

Q. And do you understand that the Native concerns, which include both Native incumbents or Native electorals and also Native groups provided a significant amount of testimony on what they preferred and what they liked?

A. And submitted plans in some cases.

Q. So the extent to which those concerns of the Natives were taken into account, that's another factor that DOJ looks at for preclearance purposes?

A. That has to do with intent. Sure.

Q. So if the Native groups are coming to you and saying, "Look, don't pair our incumbents, we don't like that, we think that affects us," in your opinion was it reasonable for the Board to say, "Okay, we'll take those concerns into account when we draw our plans"?

A. It's reasonable for them to say that, and it's also reasonable for them to do it.

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Whether they did it or not, I couldn't tell you.

Q. Do you know whether or not any Native groups had any input into the demo plan?

A. No.

Q. Do you know --

A. Wait a minute, though. The basis of the demo plan is the RIGHTS plan which I understand Natives did have in fact a role to play in that.

Q. How do you have that understanding?

A. That's just my understanding on the basis of what that group is.

Q. Do you know who the members of that group are?

A. No.

Q. So you don't know what actual Native groups, if any, actually supported that plan?

A. No.

Q. Do you know what Mr. Lawson's daytime job is?

A. How Mr. --

Q. How he's employed?

A. No.

Q. So you didn't know that he was the

political director of the Alaska Democratic party?

A. No.

Q. Did you understand that the RIGHTS plan and then the various demonstrative plans had any type of partisan agenda?

A. All plans have partisan agendas, some more than others.

Q. And I think you would agree that the redistricting process is inherently a political process?

A. Absolutely.

Q. And I think you've even opined, maybe not to this effect but my words, in some extent to the victor go the spoils. As long as the spoils are legally divided, then there is no issue with that?

A. Right. Let me correct semantics. By definition, it's a political process because it has to do with politics. It is always a partisan process as well, and those things are not the same. People use them interchangeably but they are not the same.

Q. Thank you. I appreciate that. That's

a good definition.

A. I'm sure you don't, but that's okay.

Q. Do you know or did you look at how many pairings there were of incumbents in the demo plan?

A. No.

Q. And as I understand it, these two guidelines, at least the part of the guidelines about the extent to which the jurisdiction afforded minority groups an opportunity to participate and the extent to which those concerns are taken into effect, are both relevant to Section 5 but it can also be relevant to Section 2 intent?

A. Oh, yes.

Q. And that failure to do those things can be evidence of intentional discrimination?

A. Intent analysis is also involved in Section 5.

Q. So it's both?

A. Yeah.

Q. Because you can't have the intent to discriminate or the effect?

A. That's correct. And you can also have

something called intent to retrogress.

Q. That's one of the new standards, right?

A. Yes.

Q. Because the Bartlett case said there's no such thing, I don't think.

Does the incumbency status of districts have any effect on the Native's ability -- minority ability to elect a preferred candidate of choice?

A. Yes.

Q. Can you tell me how?

A. Well, generally when you redraw you want to keep Native incumbents who are also Native-preferred candidates of choice, candidates of choice of Native voters, in a district in which they have a chance to win. You don't want to pair them if you can avoid it. You certainly don't want to pair two Natives if you can avoid it.

Q. But you also don't want to pair a Native incumbent with --

A. Well, sometimes you have to. But you want to avoid that if possible. You want to give

some deference to existing minority reps who are candidates of choice.

Q. Because that can affect the effectiveness of a district, right?

A. Well, it can affect the outcome. But you really should consider the effectiveness of the district regardless of whether an incumbent is running or not.

Q. So if the Board had a policy or drew plans in order to, one, keep Natives incumbents in the actual Native district, in your opinion would that be reasonable?

A. Yes.

Q. And if they had two plans, one of which -- and they're fairly similar, they're roughly similar as to the terms that you assert, you assert that you think both would pass DOJ, one plan paired one of the most powerful Native incumbents with the president of the senate and another plan got rid of that pairing, would you think that would be a reasonable choice made by the Board?

A. All other things being equal, it would be.

should be drawn.
Q. You're entitled to your opinion.
A. That's correct. But as a legal matter, I wouldn't be surprised what the court would do one way or the other.
Q. Then you also have, I think, going back to your report, paragraph --
A. The Aleutians?
Q. The Aleutians. We're coming up to the map again. Let me see if I can just do this. I understand your problem is the fact that the Aleutians down here are connected over water to 37?
A. That's correct. Rather than connecting them to the peninsula of which they are clearly a geographic part.
Q. Well, okay, they're not connected, they're an island, right? You understand that those are islands, they're not part of the actual peninsula?
A. No, I understand that. But they're connected in the obvious geographic sense that they are an extension of that peninsula.
Q. Do you know anything about how the

court has ruled about socioeconomic integration of this portion of the Aleutians as opposed to this portion of the Aleutians?
A. No. But I can tell you that any kind of concern about community of interest to combine these islands out here with a part of the mainland up here is an obvious bad districting practice.
Q. Let me ask you this: If in fact this configuration of House District 37 as represented on Exhibit S, Proclamation House District on the map, was required by the Voting Rights Act, would that in fact trump a state requirement to contiguity?
A. Yes. That is an if statement.
Q. All right. I think the only thing I have left now is to find exhibit -- I need the number. It's the one that's the total pop thing.
There it is. Exhibit M, I'm going to hand you that. And that was in fact some data that was provided to you by Leonard Lawson for the population numbers for the demo districts.
MR. WALLERI: Which one?
MR. WHITE: Exhibit M as in Mike.

A. Yes, I have it in front of me.
Q. And if you look there, it lists the total population and VAP population for various different iterations, ideal value and then the deviations?
A. Yes.
Q. And we know from your report that the Native districts in the demo plan are districts 36, 37 -- 37, 38, 39 and 40.
A. Right.
Q. Is 36 included in there too? Yeah.
And if we look over there and we look at what the deviations are in House District 36, the Native district error had a plus 3.10. You see that there, right?
A. I do.
Q. And then you see House District 38 and it's at a plus 3.39. If you look at -- I'm sorry, 37 is 3.39.
A. That's correct.
Q. House District 38 is a positive 4.95?
A. That's correct.
Q. And House District 39 is at a 4.54.
A. That's correct.

Q. There is the 40 Native district that has a negative 1.35.
A. That's correct.
Q. It's virtually unchanged from the benchmark plan.
If you look at the mean deviation of those districts, it's a plus 2.926 percent and if you look at the mean deviation of the other what you call Anglo districts, excluding of course the Southeast influence district which is not included here, that's at a negative 0.4 percent, rounded up.
Does the fact that all these Native districts overpopulated to this extent cause you any concern from a Voting Rights Act analysis purposes?
A. Concern?
Q. Yes.
A. Yes.
Q. And what is that concern?
A. Well, I would not have drawn them that way. As I said earlier, I would draw Native districts low on the assumption that the census has missed them, which is a well-known fact.

T. ARRINGTON

Q. And do you know what the population deviations are for the Board plan, the proclamation plan?

A. I looked at it at some point, but I don't certainly have those at the top of my head.

Q. What did I do with those? I'm not going to mark this as an exhibit. Oh, do we have them in your report already?

I'm going to ask you to turn to page 29.

A. In Exhibit Q?

Q. In Exhibit Q, correct. Looking for Table 17. Do you see that there?

A. Uh-huh.

Q. And this is the proclamation state House districts with substantial Alaska Native populations. And 34 is the Southeast district, it's at .68.

A. Uh-huh.

Q. Then 36 is a negative 3.72.

A. Uh-huh.

Q. 37 is a 4.82.

A. Uh-huh.

Q. 38 is a 4.90.

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A. 4.10.

Q. I'm sorry, negative 4.10.

39 is a negative 4.86.

And 40 is a negative 4.52.

A. Uh-huh.

Q. So in your expert opinion, is this a better way to draw Native plans in order to effect --

A. All other things being equal, yes.

Q. Do you believe that the deviations in the demo plan being so high, could that be considered evidence of intentional discrimination?

A. Would it be considered evidence? Yes. Would it be sufficient evidence? No. It would be a piece of evidence, yes.

Q. You need other things in order to make that determination?

A. Yeah, you need much more than that.

Q. So if you were doing an expert report analysis on whether the demo plan had intentionally discriminated against the Natives, the fact that all of the Native districts, most of them are highly overpopulated, would be one

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piece of evidence that you would consider?

A. That's correct.

MR. WHITE: Let me take a break and check my notes. We might well be done.

(Recess taken.)

MR. WHITE: Dr. Arrington, I'm done.

(Time noted: 1:15 p.m.)

_____

THEODORE S. ARRINGTON, Ph.D.

Subscribed and sworn to before me this ____ day of _____, 2011.

_____

T. ARRINGTON

CERTIFICATE

DISTRICT OF COLUMBIA

I, JOHN L. HARMONSON, a Notary Public within and for the District of Columbia, do hereby certify:

That THEODORE S. ARRINGTON, Ph.D., the witness whose deposition is hereinbefore set forth, was duly sworn by me and that such deposition is a true record of the testimony given by such witness.

I further certify that I am not related to any of the parties to this action by blood or marriage; and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 28th day of November, 2011.

_____

JOHN L. HARMONSON, RPR

My commission expires: 11/14/15

Fairbanks North Star Borough Department of Law
809 Pioneer Road • PO Box 71267 • Fairbanks, AK 99707 - (907) 459-1318 FAX 459-1156

August 30, 2011

Michael J. Walleri
2518 Riverview Drive
Fairbanks, Alaska 99709

Thomas F. Klinkner
Birch Horton Bittner & Cherot
1127 West Seventh Ave.
Anchorage, AK 99501-3301

Re: In Re: 2011 Redistricting Cases
4FA-11-2209CI

Dear Mr. Walleri and Mr. Klinkner:

This letter is to confirm that the Fairbanks North Star Borough plaintiffs and your clients agree to a cost-share agreement for the retention of certain services to be provided by Theodore Arrington in the above captioned matter, as outlined in the enclosed retention letter to Mr. Arrington.

The parties agree to equally share the costs of Mr. Arrington's services. If any plaintiff ceases to be a party to the litigation, it will be responsible for its proportional share of costs incurred through the date of withdrawal from the litigation only. The Fairbanks North Star Borough agrees to receive billings from Mr. Arrington and promptly forward them to all plaintiffs for processing. Payment will be made to the Fairbanks North Star Borough within thirty (30) days of billing, and the Fairbanks North Star Borough will be responsible for making payment to Mr. Arrington. We further agree that communications with Mr. Arrington will be directed through the Borough Attorney's office unless otherwise agreed to by the parties to this cost-share agreement. If the Fairbanks North Star Borough plaintiffs recover costs against the Defendants specific to this expert retention, and Riley, et.al. and the Petersburg plaintiffs do not because of the cost-share agreement, the Fairbanks North Star Borough plaintiffs agree to reimburse plaintiffs for their proportional share of costs which have been paid to the Fairbanks North Star Borough.

If the above reflects your understanding of our agreement, please indicate your acceptance by signing below.

Sincerely,

FAIRBANKS NORTH STAR BOROUGH

Jill S. Dolan
Assistant Borough Attorney

ACCEPTED BY:

Michael J. Walleri
Attorney for Plaintiffs Riley and Dearborn

9-02-11
Date

Thomas F. Klinkner
Birch Horton Bittner & Cherot
Attorneys for Petersburg Plaintiffs

9-2-11
Date

EXHIBIT 2, Page 2 of 2

Fairbanks North Star Borough
809 Pioneer Road • PO Box 71267 • Fairbanks, AK 99707 - (907) 459-1318
Department of Law
FAX 459-1155

August 30, 2011

Mr. Theodore Arrington
13015 Sandia Point Road NE
Albuquerque, NM 87111-8321

Re: *In Re 2011 Redistricting Cases*, 4FA-11-2209CI (consolidated)

Dear Mr. Arrington:

This letter is to confirm the retention of your services as a consulting expert and expert witness by the Fairbanks North Star Borough plaintiffs, Riley, et.al. and the city of Petersburg, et.al. In the above captioned matter. These services include case evaluation and analysis, written reports, and expert witness testimony. The plaintiffs in the consolidated cases have a common interest in the Voting Rights Act analysis, and have agreed to a cost-share agreement on this basis. Communication with you will be handled by the Fairbanks North Star Borough plaintiffs, unless otherwise agreed by the parties.

It is expected that you will conduct a thorough review and analysis of Dr. Lisa Handley's Voting Rights Analysis of the Proposed Alaska State Legislative Plans. The scope of this analysis should be memorialized in a written report and include a review of Dr. Handley's racial bloc voting analysis; the number of required effective/influence *minority districts* and the percentage of minority population needed to create an effective/influence minority district; whether the Board's plan is retrogressive; and, whether the alternative plans submitted to the Board are retrogressive. Consideration should be given to the 2011 Section 5 Guidance and retrogression factors identified by the Department of Justice.

Pursuant to our agreement, you will provide services as an independent professional. Payment for the services you provide is not dependent upon your findings, nor on the outcome of any legal action, or the amount or terms of any settlement of the underlying litigation.

We agree that you shall be paid at the rate of $250.00 per hour for all tasks performed under this agreement, including but not limited to analysis, calculations, conclusions, preparation of reports, and testimony at deposition or trial. Fees will be billed by the tenth of an hour. We anticipate that the following amounts of time will be required for each stage, and that you will first seek approval for times in excess of these amounts:

Case evaluation and analysis	5 hours
Written report	15 hours
Deposition preparation	8 hours
Trial preparation	8 hours

It is anticipated that your testimony will be required at deposition and at trial, and that this testimony will likely require travel from Albuquerque, New Mexico, to Fairbanks, Alaska. As we discussed, a two week trial is scheduled beginning the week of January 9, 2012. You agree to be available during this time. Deposition testimony is anticipated in October or November, 2011. You agree to be available for deposition testimony upon reasonable advance notice. We agree that you will be reimbursed the cost of a roundtrip airline ticket, coach class, from Albuquerque to Fairbanks, and that you charge 8 hours for each day spent in travel status which includes days you are in Fairbanks for deposition and trial. You agree to discuss travel arrangements in advance of booking, including whether to purchase refundable or nonrefundable fares, whenever possible. You will be reimbursed the cost of lodging and meals related to such travel, with appropriate documentation. You agree to submit bills on a monthly basis, and expenses within thirty days after they are incurred. FNSB will issue payment within thirty days of receipt.

It is understood that (i) you will make a reasonable effort to be available upon reasonable advance notice; (ii) you will keep confidential all information obtained, or analysis developed, in connection with this litigation or any related litigation with respect to which we may seek your advice and counsel; (iii) you will use such confidential information solely in connection with your engagement by us; (iv) you will preserve any written materials, including e-mails, generated or received by you in connection with this engagement, as such materials are potentially discoverable in litigation; (v) you will not in the future consult for, or otherwise represent, any other person or entity with an interest adverse to our interests in or concerning the pending litigation, or the events or occurrences out of which the pending litigation arises; and (vi) you will keep confidential your retention, unless and until you are identified in court papers as a testifying expert or we otherwise authorize you to breach this confidentiality.

It is specifically understood that, if you are later designated a testifying expert, all documents that you create may become discoverable, including drafts and notes prepared prior to the time that your opinion or report is finalized. In our experience, opposing counsel who obtain such documents in discovery often seek to use them in an unfair and misleading way -- for example, to suggest that a change from an earlier draft to a later version has some sinister explanation. This is particularly unfair because you will be learning the case over time, and you may not know all relevant information prior to the time that you finalize your opinion and report. In addition, the preparation of draft opinions and reports is expensive and should not be undertaken

prematurely. Therefore, you agree that: (i) you will not prepare any draft opinion or report without our consent (regardless of whether the draft is for internal purposes or to share with others); (ii) you will not share any draft opinion or report, or any notes, with any other person without our consent; (iii) every draft opinion or report will bear the following legend: "THIS IS A PRELIMINARY DRAFT. IT HAS BEEN PREPARED BASED ON PRELIMINARY INFORMATION AND ON ASSUMPTIONS. NO ONE MAY RELY ON THIS DRAFT. IT IS SUBJECT TO CHANGE AS ADDITIONAL INFORMATION BECOMES AVAILABLE OR IS CLARIFIED"; and (iv) all notebooks or individual pages of notes will bear the following legend: "THESE NOTES ARE INCOMPLETE AND HAVE BEEN PREPARED FOR PERSONAL USE ONLY. NO ONE MAY RELY ON THEM FOR ANY PURPOSE. ALL VIEWS ARE SUBJECT TO CHANGE AS ADDITIONAL INFORMATION BECOMES AVAILABLE OR IS CLARIFIED".

This agreement shall be interpreted under the laws of the State of Alaska. Any dispute under this agreement shall be resolved in the state courts of the 4th Judicial District.

We look forward to working with you on this matter.

Sincerely,

FAIRBANKS NORTH STAR BOROUGH

Jill S. Dolan
Assistant Borough Attorney

Thomas Klinkner
Birch Horton Bittner & Cherot
Attorneys for Petersburg Plaintiffs

Michael Walleri
Attorney for Plaintiffs Riley and Dearborn

AGREED AND ACCEPTED BY:

Theodore S. Arrington
Theodore Arrington

2 Sep 2011
Date

EXHIBIT 3, Page 4 of 4