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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