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 MEMORANDUM IN OPPOSITION TO RILEY ET AL. PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT RE: INVALID PROCESS

I. INTRODUCTION

Plaintiffs Riley and Dearborn ("Riley Plaintiffs") ask this to Court invalidate the Alaska Redistricting Board's ("Board") entire Proclamation Plan based on the claim that the Board somehow followed an "invalid process" because the Board "failed to attempt to draft a plan that complied with the Alaska Constitution prior to pursuing other alternatives." [Riley Memo. at 1.] The Riley Plaintiffs' Motion is itself "fundamentally flawed" for a number of reasons.

First, the Riley Plaintiffs' Complaint raises no allegations nor makes any claim regarding "flawed process." Having failed to plead any such claim for relief, they are prohibited from attempting to obtain summary judgment on an issue that is not part of this case.

Second, even if it were somehow proper for the Riley Plaintiffs to seek summary judgment on a claim they have not pled, their argument is simply not well taken. The dicta in footnote 22 in the *Hickel* case, on which the Riley Plaintiffs' entire argument is premised, simply does mean what they claim it does. The Board followed the only process practicable under the demographic, geographic, and temporal circumstances it faced that allowed it to accomplish its "leviathanic" task. Accordingly, the Riley Plaintiffs' motion must be denied.

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II.
ARGUMENT

A. The Riley Plaintiffs' Attempt to Litigate a Claim not Raised in their Complaint is Improper and Cannot be Considered by the Court.

It is black letter law that a party is only entitled to litigate claims it has raised in its complaint. *E.g., Redman v. Dept. of Ed.*, 519 P.2d 760, 772 (Alaska 1974) (claims not raised by a party in its complaint may not be considered by the court); *see also Transamerican Title Ins. Co. v. Ramsey*, 507 P.2d 492, 499 (Alaska 1973) (trial court did not err by refusing to give jury instruction on issue not raised by pleadings). Thus, where a party has not raised a claim in its complaint, it cannot be considered by the Court. *Id.*

Here, the Riley Plaintiffs' Complaint contains no allegation of "invalid process" or anything even remotely similar. [*See* Riley Plaintiffs' Complaint, *passim.*] The only claims asserted in their Complaint related to (1) geographic proportionality arguments as to the residents of the City of Fairbanks and the Fairbanks North Star Borough [*Id.* at ¶¶ 16-19]; (2) Proclamation HD-38 does not consist of a relatively integrated socio-economic area [*Id.* at ¶ 20]; and (3) Proclamation HD-1, 2 & 5 are not compact [*Id.* at ¶ 21].[1] Having raised no claim for "invalid process" in their complaint, the Riley Plaintiffs' Motion is obviously improper as it is not possible to obtain summary judgment on a non-existent claim. Accordingly, this Court should not only deny the Riley Plaintiffs' Motion, but strike it as improper.

B. Even if the Riley Plaintiffs had Properly Pled their "Invalid Process" Claim, their Argument is Without Merit.

The Riley Plaintiffs' "invalid process" argument relies entirely on dicta in footnote 22

[1] In their "Prayer for Relief," the Riley Plaintiffs only seek a declaration that "House Districts 1-6 and 38 and Senate Districts A-C violate the principals of the Alaska and/or United States Constitution and remand the matter to the Alaska Redistricting Board with a mandate to make corrections."

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from *Hickel v. Southeast Conference,* 846 P.2d 38 (Alaska 1993). According to the Riley Plaintiffs, the Board used an "erroneous methodology" because the Board never undertook an effort to draw a plan which complied with the Alaska Constitution without regard to its need to comply with the Voting Rights Act. The Riley Plaintiffs' assertion not only misconstrues *Hickel*, but exhibits a complete ignorance of the practical realties faced by the Board.

First, the Riley Plaintiffs take the quote from footnote 22 in *Hickel* out of context. That language does not create a "mandate" that a certain methodology be followed. In fact, the *Hickel* Court itself "emphasized the need to preserve flexibility in the redistricting process." *Id.* at 50 (emphasis added). Moreover, 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). The Court emphasized that "expediency mandated" that "compliance with the Voting Rights Act be ensured." *Id.* The Board in this case faced the same expediency as explained further below.

The importance of *Hickel* Footnote 22 is not, as the Riley Plaintiffs attempt to argue, that the Board is required to engage in the fruitless task of physically drawing a plan that ignores its obligation to comply with the Voting Rights Act, but rather that in constructing its redistricting plan, the Board not give undue weight to the VRA or unnecessarily compromise the Alaska Constitutional requirements. Any other interpretation ignores reality.

Second, in *Hickel*, the Court's discussion of process was premised on completely different time constraints under which the Board was required to operate. As Judge Rindner

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noted in his 2001 decision:

> Another factor that must be considered by this court, especially when analyzing claims concerning the process by which the Board conducted its business and formulated its Final Plan is the limited time in which the Board was required to conduct its business. As amended in 1998, Article VI, Section 10 of the Alaska Constitution required the Board to adopt a proposed plan or plans within thirty days of receiving the official census report, to then hold hearings on those proposed plans, and to adopt a final plan within ninety days of receiving the census reports. Former Article VI, Section 10 required the Board to adopt a proposed plan and submit it to the governor within ninety days of receiving census data; the governor then had an additional ninety days during which he could notify the Board's proposal and issue the final proclamation of redistricting. No public hearings were required. These new constitutional requirements placed extraordinary time constraints upon the Board's ability to work and required extraordinary personal and professional sacrifices from the Board Members, and any review of the process by which the Board conducted its business can fairly be considered only in that context.

[Exhibit A at 40 (emphasis added).][2] Thus, to the extent *Hickel* could somehow be interpreted to mandate that the Board follow the "methodology" described in Footnote 22, it is no longer good law given the 1998 amendments to Article VI, Section 10.

Moreover, as an entity akin to an administrative agency, the Board is free to adopt its own procedures "'capable of permitting them to discharge their multitudinous duties.'" *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Counsel, Inc.*, 534 U.S. 519, 543 (1978) (*quoting FCC v. Schreiber*, 381 U.S. 279, 290 (1965)). While the Board does not have "unfettered discretion," as it must comply with the Open Meetings Act, the Public Records Act, and Article VI, Section 10 of the Alaska Constitution, "[b]eyond that, the Board

[2] Attached hereto as Exhibit A for ease of reference is the relevant page from Judge Rindner's February 1, 2002 Memorandum and Order in the *In re 2001 Redistricting Cases.* A complete copy of Judge Rindner's Order is attached as Exhibit I to the Board's "Memorandum of Points And Authorities in Opposition to Petersburg Plaintiffs' Motion for Partial Summary Judgment on The Issue of Compactness And in Support of The Alaska Redistricting Board's Cross-Motion For Summary Judgment" ("Board Petersburg Memo").

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has freedom to conduct its proceedings in a manner that it believes best facilitates the formulation of a final redistricting plan." [Board Petersburg Memo, Ex. I at 44.][3]

Third, the practical realities of extraordinary time constraints and demographic changes faced by the Board made it not only impracticable, but impossible to follow the process the Riley Plaintiffs claim is mandated by *Hickel*. 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 retrogress Alaska Native voting strength.[4] 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, especially given that fact that due to demographic shifts in the past decade, for the first time population from an urban area had to be added to at least one Alaska Native rural district in order to ensure compliance with the one-person one-vote requirements of the Federal Constitution. [ARB00006024;

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[3] Interestingly, the challengers in the 2001 case raised a myriad of due process issues as to the means by which the Board conducted its business. [*See* Board Petersburg Memo, Exhibit I at 41-44, 48-56.] None of those challenges were based on the "process" language in Footnote 22 in *Hickel*. [*Id.*] Given the shear number of process challenges raised by the nine different challengers in that case, one would expect that if there was any merit at all to the Riley Plaintiffs' argument, someone would have raised that claim ten years ago given the fact that the Board did not follow the *Hickel* "process." In fact, the 2000 Board redistricting guidelines make clear that in drawing its redistricting plans, it prioritized the VRA over the Alaska Constitution. [Exhibit B, 2000 Board's "Directions to Staff For Developing Preliminary Plans".]

[4] 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 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.]

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ARB00013351-ARB000013352; ARB00013482-ARB00013484.]

This point is further highlighted by the fact that none of the groups that submitted statewide plans engaged in the tortured process the Riley Plaintiffs claim is mandated. For example, when AFFR presented their first plan to the Board on March 31, they included their priorities for how their constructed its plan: (1) Federal Constitutional requirements; (2) Section 2 and 5 of the Voting Rights Act and finally; (3) Alaska Constitutional principals. [ARB00006258-ARB00006262.] Moreover, when commenting on their proposed plan at the Public Hearing, the AFFR representative admitted that in drafting their approach, "the Voting Rights Act requirements overrode [socio-economic] considerations and that in order to avoid retrogression we would need to in some cases create districts that might not be perfect under state constitutional standards but would withstand scrutiny under the Voting Rights Act." [ARB00005331 at 29:1-7.] Representatives of the RIGHTS Coalition admitted they also drew districts to comply with the VRA. [ARB00005347 at 92:7-13, 19-23.] Likewise, when AFFER presented its plan, their representative first discussed "the federal voting rights issues." [ARB00005347 at 42:20-43:9.][5]

Fourth, the Riley Plaintiffs' assertion that the Board viewed the VRA as a license to avoid the strictures of Alaska's constitutional protections against gerrymandering" [Riley Memo. at 4], is pure balderdash, unsupported by even an iota of evidence. The Board took its responsibilities extremely seriously and struggled to properly balance the various and often competing legal requirements. The Board record is replete with examples of Board members'

[5] Even third parties that submitted only regional plans, such as the City and Borough of Juneau, recognized that their "charge" and "first challenge" was "could we under the Voting Rights Act avoid retrogression with regard to the house districts. And that was our first big challenge. We had to make a decision early on and it reflected in both our plans." [ARB00005325 at 4:9-22.]

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concerns with protecting the constitutional rights of all the citizens of the State while at the same time meeting its obligations to comply with the Voting Rights Act. [ARB00001583-ARB00001584; ARB00001871-ARB00001875; ARB00001934-ARB00001937; ARB00002266-ARB00002267; ARB00003571-ARB00003573; ARB00003889; ARB00003912-ARB00003916; ARB00004423-ARB00004425; ARB00004448-ARB00004450; ARB00004517; ARB00005049-ARB00005052; ARB00005089-ARB00005091.] The Riley Plaintiffs' allegations to the contrary are nothing more than unsupported speculations of counsel.

Finally, even assuming *arguendo* that the Board was required to follow the so-called "*Hickel*" methodology, its failure to do so under the circumstances does not warrant voiding the entire redistricting plan as the Riley Plaintiffs suggest. At best, any violation by the Board would be technical in nature, akin to a technical Open Meetings Act violation for which no remedy is appropriate because the process violation would "not outweigh the harm that would be caused to the public interest by voiding the entire Redistricting Plan." *In re 2001 Redistricting Cases*, 44 P.3d 141, 147 (Alaska 2002). To hold otherwise makes substance a slave to theoretical form.

III.
CONCLUSION

The Riley Plaintiffs' attempt to have the Board's Proclamation Plan declared invalid because it claims the Board followed an "invalid process" is completely without merit and must be denied. The Riley Plaintiffs' inexplicable attempt to obtain summary judgment on a claim not even raised in their complaint defies reason and logic and must be rejected on those grounds alone. Moreover, as established above, the Riley Plaintiffs' argument has no basis in fact or law and must be rejected even if this Court somehow found that it should be considered.

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The Riley Plaintiffs' argument is the quintessential example of exalting form over substance, the theoretical over practical reality. The process followed by the Board was the most publically open in Alaska redistricting history, and the only process that allowed it to timely accomplish its "leviathanic" task. The Proclamation Plan adopted by the Board reasonably balanced all the various competing interests, factually and legally. The Riley Plaintiffs' Motion is without merit and must be denied.

DATED at Anchorage, Alaska this 16th day of December 2011.

PATTON BOGGS LLP
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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

IN RE 2001 REDISTRICTING CASES,)

)

)

Plaintiffs,)

)

vs.)

) Consolidated Case No. 3AN-01-8914 CI

REDISTRICTING BOARD, et al.,)

)

Defendant.

) **MEMORANDUM AND ORDER**

_____)

I. INTRODUCTION

In accordance with Article VI of the Alaska Constitution, the Alaska Redistricting Board (the "Board") is required to reapportion Alaska's House of Representatives and the Senate immediately following the official reporting of each decennial census of the United States. Under Article VI, Section 8 of the Alaska Constitution, the Board consists of five members, two of whom are appointed by the Governor, one of whom is appointed by the Speaker of the House of Representatives, one of whom is appointed by the Senate President, and one of whom is appointed by the Chief Justice of the Alaska Supreme

> are subdivided by river systems and other geographic factors such as broad expanses of frozen tundra challenging the most advanced roadway engineering.
>
> ...
>
> When confronted with conditions so different from those of any other single state in the continental United States, it is readily apparent that it becomes well nigh impossible to achieve the mathematical precision of equal proportions which is feasible in those other states.

Egan, 502 P.2d at 865-66 (footnotes omitted) (quoted in Groh, 526 P.2d at 875; Kenai Peninsula Borough, 743 P.2d at 1359; and Hickel, 846 P.2d at 50).

Another factor that must be considered by this court, especially when analyzing claims concerning the process by which the Board conducted its business and formulated its Final Plan is the limited time in which the Board was required to conduct its business. As amended in 1998, Article VI, Section 10 of the Alaska Constitution required the Board to adopt a proposed plan or plans within thirty days of receiving the official census reports, to then hold hearings on these proposed plans, and to adopt a final plan within ninety days of receiving the census reports. Former Article VI, Section 10 required the Board to adopt a proposed plan and submit it to the governor within ninety days of receiving census data; the governor then had an additional ninety days during which he could notify the Board's proposal and issue the final proclamation of redistricting. No public hearings were required. These new constitutional requirements placed extraordinary time constraints upon the Board's ability to work and required extraordinary personal and professional sacrifices from the Board members, and any review of the process by which the Board conducted its business can fairly be considered only in that context.

SECTION 9 BOARD ACTIONS. The board shall elect one of its members chairman and may employ temporary assistants. Concurrence of three members of the Redistricting Board is required for actions of the Board, but a lesser number may conduct hearings. The board shall employ or contract for services of independent legal counsel.

SECTION 10. REDISTRICTING PLAN AND PROCLAMATION (a) Within thirty days after the official reporting of the decennial census of the United States or thirty days after being duly appointed, whichever occurs last, the board shall adopt one or more proposed redistricting plans. The board shall hold public hearings on the proposed plan, or, if no single proposed plan is agreed on, on all plans proposed by the board. No later than ninety days after the board has been appointed and the official reporting of the decennial census of the United States, the board shall adopt a final redistricting plan and issue a proclamation of redistricting. The final plan shall set out boundaries of house and senate districts and shall be effective for the election of members of the legislature until after the official reporting of the next decennial census of the United States.
(b) Adoption of a final redistricting plan shall require the affirmative votes of three members of the Redistricting Board.

SECTION 11. ENFORCEMENT Any qualified voter may apply to the superior court to compel the Redistricting Board, by mandamus or otherwise, to perform its duties under this article or to correct any error in redistricting. Application to compel the board to perform must be filed not later than thirty days following the expiration of the ninety-day period specified in this article. Application to compel correction of any error in redistricting must be filed within thirty days following the adoption of the final redistricting plan and proclamation by the board. Original jurisdiction in these matters is vested in the superior court. On appeal from the superior court, the cause shall be reviewed by the supreme court on the law and the facts. Notwithstanding Section 15 of Article IV, all dispositions by the superior court and the supreme court under this section shall be expedited and shall have priority over all other matters pending before the respective court. Upon a final judicial decision that a plan is invalid, the matter shall be returned to the board for correction and development of a new plan. If that new plan is declared invalid, the matter may be referred again to the board.

DIRECTIONS TO STAFF FOR DEVELOPING PRELIMINARY PLANS

(adopted March 26, 2001)

A.) Prepare at least two alternative draft plans for each region listed below, and the state, using the criteria listed in paragraph D.

1.) Southeast Alaska

2.) Municipality of Anchorage/Mat Su Borough

3.) Fairbanks Northstar Borough/Southeast Fairbanks Census Area
4.) Southwest Region/Kodiak Island Borough

5.) Kenai Peninsula/Valdez-Cordova Census Area

6.) Northern Region and Yukon-Koyokuk Census Area

B.) Identify for the Board's consideration problem areas (e.g. excessive deviation, Voting Rights Act conflict or concession, questionable socioeconomic integration, etc.) with each alternative proposed.

C.) Identify possible Senate districts from the House districts proposed.

D.) Utilize the following criteria, in order of priority, in drafting districts. Make no assumption that presently drawn districts satisfy these criteria. Apply criteria equally to all districts, recognizing that some criteria (e.g. contiguity, Voting Rights Act considerations) may pose a problem to some districts and not others.

1.) Federal Constitution Redistricting principles

- districts of as nearly equal size as practicable (maximum overall deviation less than 10%)
- no purposeful discrimination against a group that has been consistently excluded from the political process
- no political or racial gerrymandering

2.) The requirements of Sections 2 and 5 of the Voting Rights Act

3.) State Constitution Redistricting principles

- House districts of as nearly equal size as practicable (no Overall deviation greater than 10% unless based on legitimate considerations that further a rational state policy)
- compact and contiguous House districts
- House districts of relatively integrated socioeconomic areas
- consideration given to local government boundaries, with secondary consideration to local service areas, community council boundaries, REAA and ANCSA regional corporation boundaries
- Senate districts composed of two contiguous House districts
- No purposeful discrimination against a voting group unless it results in greater proportionality of representation.

4.) State Statutory principles (AS 18.10.200 (a)&(b))

Follow ArticleVI, Section 3 of the Alaska Constitution that says redistricting shall be based on the population as reported by the official decennial census of the United States.

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

ORDER DENYING RILEY PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT RE: INVALID PROCESS

Upon careful consideration and review of Plaintiffs George Riley and Ronald Dearborn's ("Riley Plaintiffs") Motion for Summary Judgment: Invalid Process, Defendant Alaska Redistricting Board's Opposition thereto, any reply, and all other Matters in the Record, the Court hereby finds and **ORDERS** as follows:

The Riley Plaintiffs have not raised a claim in their Complaint that the Board followed an invalid process in developing the Proclamation Plan. Having failed to plead such a claim, this issue is not properly before the Court. The Plaintiffs' Motion for Summary Judgment is therefore **DENIED** with prejudice. The Riley Plaintiffs may not present evidence at trial regarding any invalid process claim as no such claim has been raised in their complaint.

Dated at Fairbanks, Alaska this _____ day of _____, 201___.

By:_____
HON. MICHAEL McCONAHY
Superior Court Judge

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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

ORDER DENYING RILEY PLAINTIFFS'
MOTION FOR SUMMARY JUDGMENT RE: INVALID PROCESS
[ALTERNATIVE]

Upon careful consideration and review of Plaintiffs George Riley and Ronald Dearborn's ("Riley Plaintiffs") Motion for Summary Judgment: Invalid Process, Defendant "(Motion") Alaska Redistricting Board's ("Board") Opposition thereto, any reply, and all other Matters in the Record, the Court hereby finds and **ORDERS** as follows:

1. The Riley Plaintiffs' Motion is **DENIED**. The evidence before this Court establishes that there is no merit to the Riley Plaintiff's Claim that the Board failed to follow a valid process in developing and adopting its Proclamation Plan.

2. Rather, the evidence before this further establishes that the process followed by the Board in drafting and adopting its Proclamation Plan was both reasonable and in compliance with Alaska Law.

DATED at Fairbanks, Alaska, this ____ day of _____, 201___.

By:_____
HON. MICHAEL McCONAHY
Superior Court Judge

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