(21)

IN THE SUPREME COURT OF THE STATE OF ALASKA

In re 2011 Redistricting Cases	)	Supreme Court No. **S-14441**

Trial Court Case No. **4FA-11-02209CI**

MEMORANDUM OF AMICI CURIAE

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I. INTRODUCTION

Pursuant to Alaska Appellate Rule 212(c)(9) and this Court's order of February 8, 2012, Amici AHTNA, INC.; ALASKA FEDERATION OF NATIVES; THE ALEUT CORPORATION; BERING STRAITS NATIVE CORPORATION; BRISTOL BAY NATIVE CORPORATION; FIRST ALASKANS INSTITUTE; KONIAG, INC.; MTNT, LTD. (McGRATH, TAKOTNA, NICOLAI and TELIDA VILLAGE CORPORATIONS); and TANANA CHIEFS CONFERENCE hereby submit this brief in response to the Petitions for Review filed by the parties. Amici submit this brief because the parties have failed to address adequately a very significant legal error in the superior court's order of February 3, 2012. Specifically, in conclusions 7 and 8 the court erroneously rejected the legitimate interest of providing Native voters with continued equal opportunities to reelect their candidates of choice under the new redistricting plan. Failing to vindicate that interest places any plan that is ultimately adopted in direct conflict with the Voting Rights Act of 1965, 42 U.S.C. §§ 1973, *et seq.*, as amended ("VRA").

Before addressing that issue, it is important to clarify what this brief is not. Amici do not support any one particular plan nor advocate for any one result, other than to correct the distinct legal error identified herein. That error requires that the superior court be overturned at least in part. Amici respectfully provide this

information in support of maintaining the integrity of the VRA and its foundational principles, as well as the application of the VRA to Alaska's redistricting process.

In rejecting Districts 37 and 38, the superior court held that trying to avoid pairing a powerful Native incumbent was not "necessary" to comply with the VRA, and thus justify a departure from the strictures of the Alaska Constitution. The court further held with respect to these same two districts that incumbency pairing concerns were "too speculative" to serve as the basis for choosing one plan over another:

> The Board's contention that this district needed to reach from the Bering Sea to Fairbanks in order to take excess Democratic population from Fairbanks is not in harmony with the Alaska Constitution, in light of excess Native population in other effective districts and the speculative nature of pairing concerns for Senator Hoffman.

Decision and Order at 135 (conclusion 8). The court reached the same conclusion, using the same rationale, with respect to District 37 in conclusion 7. Both of these holdings are incorrect.

State law must yield where it is on a collision course with the VRA's mandate to ensure that minority voters have equal opportunities to participate in

the political process. [1] As a federal appellate court explained less than a month ago:

> [I]t must surely be appropriate for a state legislature to take into account the effect that its new districts will have on racial and language minorities. The federal Voting Rights Act prohibits voting practices that deny or abridge the right of any citizen to vote on account of membership in a racial or language minority group. To argue that [the State] may not consider a factor that it is otherwise obliged to consider under the Supremacy Clause has no persuasive force.

Brown v. Secretary of State of Florida, 2012 WL 264610 at *10 (11th Cir. Jan. 31, 2012). That is especially true in Alaska, where the current Native candidates of choice are incumbents elected under a redistricting plan adopted to ensure that Native voting strength was not diluted, as it had been under the initial plan that had been denied Section 5 preclearance.[2] *See generally Bush v. Vera,* 517 U.S. 952, 1061 (1996) (Souter, joined by Breyer and Ginsberg in dissent) (describing the "sheer incoherence" of finding that a district that remedies "vote dilution

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1 This is also a longstanding principle of Alaska law. *See In re 2001 Redistricting Cases,* 44 P.3d 141, 143 n.2 (Alaska 2002) (citing *Hickel v. Southeast Conference,* 846 P.2d 38, 62 (Alaska 1992) which specified that priority must be given first to the federal Constitution, then the Voting Rights Act, and then the Alaska Constitution).

2 For a description of the redistricting after the 1990 census which was dogged by accusations of vote dilution and resulted in the plan being declared unenforceable by the Department of Justice, *see* Natalie Landreth and Moira Smith, *Voting Rights in Alaska: 1982-2006,* 17 S. CAL. REV. L. & SOC. JUST. 79, 123, 125 (Fall 2007).

somehow becomes unconstitutional when aimed at protecting the incumbent the next time the census requires redistricting").

Not only is incumbency protection a legitimate goal in general, but failure to avoid pairing *minority* incumbents can be actionable under Sections 2 and 5 of the VRA. Indeed, if a Redistricting Board is presented with several options, only one or two of which pair minority incumbents (either with each other or in a race with a non-minority who is likely to win), and it chooses the one that *does* pair them, it is likely to face objections and court challenge from the Department of Justice and Native community, many of which are represented here by Amici. This is because deliberate pairing of minority incumbents gives rise to claims of voting discrimination under Section 2 and retrogression of the electoral franchise under Section 5. Contrary to the superior court's holding, compliance with these laws is indeed "necessary." Moreover, in so holding, the superior court has subordinated the VRA to the Alaska Constitution and thereby violated the Supremacy Clause of the United States Constitution. *See Brown*, 2012 WL 264610 at 10. Therefore, to the extent the superior court's holdings 7 and 8 suggest that trying to avoid pairing minority incumbents is not "necessary" under the VRA, or that such concerns should be secondary to the Alaska Constitution, they must be overturned.

II. INCUMBENCY PROTECTION IS VOTER PROTECTION AND IT IS THEREFORE A LEGITIMATE GOAL.

As a threshold matter, incumbency protection is an entirely legitimate goal in formulating a redistricting plan. Although the superior court seemed to exhibit some distaste for it, Decision at 125-26, and the Board denies engaging in it, ARB Petition for Review at 27-8, the United States Supreme Court has long recognized that in the context of legislatively drawn plans, "incumbency protection, at least in the limited form of avoiding contests between incumbents, is a legitimate state goal." *Bush v. Vera*, 517 U.S. at 964 (reiterating this rule despite the fact that "incumbency protection influenced the redistricting plan to an unprecedented extent" in that legislators carved out districts of supporters and simply attached their homes to them). *See also Easley v. Cromartie*, 532 U.S. 234, 248 (2001) (incumbency protection is "a legitimate political goal"). Indeed, the Supreme Court has held that incumbency protection is an important enough interest to justify departures from the constitutional principle of "one person, one vote," or equal population requirements. *See Karcher v. Daggett*, 462 U.S. 724, 740 (1983) ("avoiding contests between incumbent Representatives" is a legitimate policy).

This rule developed not to protect the careers of the incumbents themselves but to protect his or her constituency's interest in "maintaining existing relationships between incumbent legislators" and "preserving the seniority" that they may have achieved. *White v. Weiser*, 412 U.S. 783, 791 (1973). These are of

course extremely powerful attributes in a politician, and are likely to make him or her more effective at their job. When faced with allegations of race-based redistricting, the State of New York claimed that its motivation was instead the protection of powerful incumbent legislators. The court not only found this wholly proper, but also explained that "the powerful role that seniority plays in the functioning of [a legislative body] makes incumbency an important and legitimate factor for a legislature to consider." *Diaz v. Silver*, 978 F. Supp. 96, 123 (E.D.N.Y. 1997), *aff'd*, 522 U.S. 801 (1997).

The true beneficiaries of incumbency protection are therefore not incumbents but the voters:

> we view the purpose [of incumbency protection] as more accurately protecting the core constituency's interest in reelecting, if they choose, an incumbent representative in whom they have placed their trust. Provided it does not conflict with other nonpolitical considerations . . . it is one worthy of consideration by this court.

Colleton County Council v. McConnell, 201 F.Supp.2d 618, 647 (D. So. Ca. 2002). In *Robertson v. Bartels*, 148 F. Supp.2d 443 (D.N.J. 2001), the court upheld a redistricting plan in the face of 14th and 15th Amendment challenges even though the plan's primary author admitted one of his goals was "minimizing voter disruption, so as not to deny too many New Jersey citizens the opportunity to vote for incumbents who had served them well or against incumbents who had not done so." *Id.* at 455. *See also LaComb v. Growe*, 541 F. Supp. 160, 165 n.13 (D. Minn.

1982) (incumbency protection is "an attempt to maintain existing relationships between incumbent legislators and their constituents") (citing *Burns v. Richardson*, 384 U.S. 73, 89 n. 16 (1966)). As long as incumbency protection does not cross the line so that it is used as a vehicle for diluting the voting power of minorities, it is proper. After all, "relationships among incumbents and their constituents, and the benefits accruing" to the district "from the seniority its delegation may have achieved" are "pragmatic considerations which often figure prominently" in redistricting. *Major v. Treen*, 574 F. Supp. 325, 355 (E.D. La. 1983).

These holdings have been reinforced by the research of several commentators, one of whom thoroughly explains the advantages from the perspective of the voters: "Voters develop relationships with their representatives. Long-term representatives have a chance to learn about and understand the unique problems of their districts and to pursue legislation that remedies those problems." Dr. Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders,* 116 HARV. L. REV. 649, 671 (2002). Incumbents are more likely, in his opinion, "to render effective representation of their constituents views" than "novice representatives." *Id.* The Amici urge the court to consider that incumbency protection is not only legitimate but that it is actually extremely important to the voters themselves.

This is especially true in Alaska, where the unique needs of the population – particularly the rural population – is best served by strong and experienced leadership. Alaska Native incumbent legislators have over the years been able to secure many, many necessary projects and critical services to rural Alaska. The following list is but a tiny snapshot of achievements in which a Native legislator was instrumental to passage:

- 2001: Togiak/ Southwest Region school replacement ($29,182,163)
- 2002: pilot project initiative Therapeutic Courts in Anchorage and Bethel
- 2003: Pilot Station/ Lower Yukon school replacement ($16,654,000); Chevak school replacement ($28,273,000)
- 2004: SB 283, which requires the Legislature to replay the Constitutional Budget Reserve
- 2005: complete funding of entire list of school district major maintenance projects ($141,800,817)
- 2007: formation of Bi-Partisan Working Group; Unalaska landfill ($2 million)
- 2008: SB73, which provided for revenue sharing of $60 million annually to municipalities, boroughs and unincorporated communities; energy relief for school districts ($20.7 million); Low Income Heating Program ($10 million); Tundra Women's Coalition ($1.5 million); school replacement in Chefornak ($44.2 million)
- 2009: complete funding of the AEA – Renewable Energy Program for first two years ($100 million); Kalskag school replacement ($18.7 million)
- 2010: $260,000 to ADF&G to research Yukon salmon disaster; establishment of REAA school construction fund; additional ferry runs to the Aleutian Chain ($3.6 million)
- 2011: $400 million to the Power Cost Equalization Fund

Even this very abbreviated list demonstrates just how important incumbents can be to the voters they represent.

There can be little doubt that some attention was paid to incumbency protection here. Although the Board did not formally include it as one of their guiding principles, they nonetheless engaged in it, as evidenced by the testimony of Board Member Jim Holm. During trial, Mr. Holm testified that he specifically asked to know the residences of Representative Tammie Wilson and Senator John Coghill in order "to make sure we didn't draw them out of their districts."[3] That is incumbency protection. Strangely, however, Mr. Holm seemed not to want to admit it and the superior court seemed bothered by it as well. Nevertheless, it is an entirely proper course to pursue, provided it does not trump other obligations imposed by federal law, because the basis for it is actually the protection of the interests of the voters themselves.

The problems can arise, and indeed threaten to arise in this very case, when a jurisdiction *fails* to protect minority incumbents. Depending on the facts surrounding the failure, this can give rise to claims of voter discrimination and retrogression of the electoral franchise as described in the sections that follow.

III. UNNECESSARY PAIRING OF MINORITY INCUMBENTS GIVES RISE TO CLAIMS OF VOTING DISCRIMINATION UNDER SECTION 2 OF THE VRA.

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3 Testimony of Jim Holm, Day 4, cross-examination. Amici apologize for the imprecision of their citations to testimony, but they do not have access to a trial transcript and in fact are unaware of whether one exists.

Section 2 of the VRA prohibits all forms of voting discrimination that result "in a denial or abridgment of the right of any citizen of the United States to vote" on account of their race or language minority status. 42 U.S.C. § 1973. By its express terms, the statute guarantees the equal right of Alaska Natives "to participate in the political process and to elect representatives of their choice." *Id.* Proof of a discriminatory purpose is *not required* to establish a violation of Section 2, but a violation of the statute can be shown where an electoral law or plan "results" in "an inequality in the opportunities enjoyed by [minority] and white voters to elect their preferred representatives." *Thornburg v. Gingles,* 478 U.S. 30, 47 (1986). This is known as the "effects test" or "results test" and it generally means the plaintiffs only have to show a discriminatory result.[4]

In the seminal case of *Thornburg v. Gingles,* the Supreme Court succinctly described the nature of Section 2 claims:

> The essence of a § 2 claim is that a certain electoral law, practice or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by [minority] and white voters to elect their preferred representatives.

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4 Previously, plaintiffs had to show a discriminatory purpose and discriminatory effect, just as they would to establish a violation of the 14th or 15th Amendments. *See Mobile v. Bolden,* 446 U.S. 55 (1980). However, Congress amended the VRA in 1982 to clarify that "a violation could be proved by discriminatory effects alone" as set forth in *White v. Regester,* 412 U.S 755 (1973). *See Thornburg,* 478 U.S. at 44 n. 8 (citing S. Rep. No. 97-417, 97th Cong., 2nd Sess. at 15-16 (1982)).

Id. at 47. In *Johnson v. Miller,* 922 F. Supp. 1556, 1566 (S.D. Ga. 1995) (three-judge court), the Southern District of Georgia added that states violate Section 2 when they "draw district lines which have the 'effect of denying a protected class the equal opportunity to elect its candidate of choice.' "

Although Section 2 is generally used as the basis for vote dilution claims, it "prohibits all forms of voting discrimination, not just vote dilution." *Id.* at 45 n.10 (citing S. Rep. at 30). The Senate Report added a non-exhaustive list of some of the factors to be considered in a Section 2 claim. One of those factors provides for consideration of whether a jurisdiction uses "voting practices or procedures that may enhance the opportunity for discrimination against the minority group." S. Rep. at 28-29. Deliberate placement of two or more incumbents who are the Native voters' candidates of choice into the same district obviously enhances the opportunity for discrimination against Native voters. That is especially true if a redistricting plan avoids a similar pairing of non-minority incumbents. *See generally Garza v. County of Los Angeles,* 917 F.2d 763, 778 (9th Cir. 1990) (Kozinski, concurring and dissenting in part) ("incumbents who take advantage of their status so as to assure themselves a secure seat at the expense of emerging minority candidates may well be violating the Voting Rights Act"). Disparate treatment between Native and non-Native incumbents or other efforts to protect non-Native incumbents at the expense of Native candidates of choice may go even

further than what is necessary to establish a Section 2 violation; it may be evidence that a discriminatory intent is at work. *See id.* at 779; *Ketchum v. Byrne*, 740 F.2d 1398, 1408 (7th Cir. 1984); *Rybicki v. State Bd. of Elections*, 574 F. Supp. 1082, 1109 (N.D. Ill. 1982).

Finally, the terms "candidate of choice" and "representatives of their choice" clearly indicate that the voters have a right to elect – or re-elect in this case – a particular candidate, not just a minority candidate in general. This strongly suggests that, particularly when there are other plans that also comply with federal law, selecting the one plan that deprives a constituency of a powerful and knowledgeable legislator may give rise to a Section 2 claim. *See generally Terrazas v. Slagle*, 789 F. Supp. 828, 841 (W.D. Tex. 1991) (rejecting a state's proposed remedial plan for a Section 2 violation because it "better protects certain Anglo incumbents at the expense of minority voters' ability to elect candidates of their choice").

Naturally, the viability of such a claim depends of the facts and circumstances surrounding the situation. Nonetheless, regardless of whether influential Native incumbents are targeted by placing them in the same districts or they are treated less favorably from non-Native incumbents, both are strong evidence supporting a Section 2 violation. That is especially true because the electoral success that Native candidates of choice have achieved in Alaska is

recent and fragile and is the direct product of past remedial measures to cure established discrimination.[5] Accordingly, preservation of districts that continue to provide Native voters with equal opportunities to reelect their candidates of choice is in fact necessary under the VRA.

IV. UNNECESSARY PAIRING OF MINORITY INCUMBENTS GIVES RISE TO CLAIMS OF RETROGRESSION OF THE ELECTORAL FRANCHISE UNDER SECTION 5 OF THE VRA.

Alaska is also covered by Section 5 of the VRA.[6] 28 C.F.R. 51 (Appendix), citing 40 Fed. Reg. 49422 (Oct. 22, 1975). As a covered jurisdiction, Alaska must obtain a determination from either the Attorney General of the United States or the United States District Court for the District of Columbia that any change affecting voting which they seek to enforce neither has a discriminatory purpose nor a discriminatory effect. 76 Fed. Reg. 27 at 7470 (Feb. 9, 2011). Section 5 prevents

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5 For an extensive review of past discrimination, including specific discriminatory practices in voting, see JAMES THOMAS TUCKER, THE BATTLE OVER BILINGUAL BALLOTS 235-57 (2009).

6 Alaska is one of only three states covered statewide for Section 5 as a result of language coverage under Section 4(f)(4) and *it is the only state covered statewide for Native voters.* Alaska's coverage was triggered by the fact that it had enacted a constitutional requirement that a citizen must be "able to read or speak the English language" in order to vote. Alaska Const. art. V, § 1 (1959). Alaska was one of the very few states to retain a literacy test at that time. It was not repealed until August 25, 1970 when it barely passed with 51.1% of the vote. See H.J. Res. 51, 6th Leg., Reg. Sess. (Alaska 1970); State of Alaska, Office of the Lt. Gov., Alaska Constitutional Amendment Summary, available at http://ltgov.state.ak.us (providing the total vote on H.J. Res. 51). When the VRA was extended to language minorities in 1975, Alaska was included because of this discriminatory literacy test.

"backsliding" in covered jurisdictions like Alaska by prohibiting the actual implementation of any proposed voting change that runs afoul of either of those two criteria. *See Reno v. Bossier Parish School Board*, 528 U.S. 320, 335 (2000); *Beer v. United States,* 425 U.S. 130, 141 (1976). A change is considered discriminatory under these criteria if it "makes the members of the minority group worse off than they had been before the change." 28 C.F.R. 51.54(b) (July 1, 2011).

Although in the context of this case Section 5 refers to the "preclearance" of the entire redistricting plan, in practice the retrogression standard of Section 5 applies to all changes in voting, not just the number of minority seats in the new plan versus the benchmark. The standard is broader in that it "mandates that the minority's *opportunity* to elect representatives of its choice not be diminished, directly or indirectly, by the State's actions." *Bush v. Vera*, 517 U.S. at 983. The Supreme Court has even described the standard as "simple": "[W]hether the new plan 'would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.' " *Georgia v. Ashcroft,* 539 U.S. 461, 481 (2003) (citing *Beer*, 425 U.S. at 141). As a result, covered jurisdictions must submit all voting changes for preclearance, not just new redistricting plans. 28 C.F.R. § 51.13 (July 1, 2011) (listing twelve different examples of covered changes).

The Supreme Court has recognized that the ability of minorities to elect candidates of their choice is "an integral feature in any § 5 analysis." *Georgia,* 539 U.S. at 484. The Court has gone so far as to indicate that the position of minority incumbents is highly relevant to a Section 5 inquiry:

> [O]ne other method of assessing the minority group's opportunity to participate in the political process is to examine the comparative position of legislative leadership, influence, and power for representatives of the benchmark majority-minority districts. A legislator, no less than a voter, is "not immune from the obligation to pull, haul and trade to find common political ground." Indeed, in a representative democracy, the very purpose of voting is to delegate to chosen representatives the power to make and pass laws. The ability to exert more control over that process is at the core of exercising political power. A lawmaker with more legislative influence has more potential to set the agenda, to participate in closed-door meetings, to negotiate from a stronger position, and to shake hands on a deal. Maintaining or increasing legislative positions of the power for minority voters' representatives of choice, while not dispositive by itself, can show a lack of retrogressive effect under § 5.

Georgia v. Ashcroft, 539 U. S. at 483-84 (internal citation omitted). Just as the Court recognizes that having minorities in positions of power may indicate lack of retrogressive effect, decreasing legislative positions of power for minority voters' representatives of choice would show the *presence* of retrogressive effect under Section 5.

This analysis applies not just to the plan as a whole, but also to the analysis of a particular district:

> [T]he standard of nonretrogression prohibits our implementation of a plan that will diminish the existing opportunity for minority voters to elect the candidate of their choice in a particular district if a fairly-drawn alternative exists that would not have that effect.

Colleton County Council v. McConnell, 201 F.Supp.2d 618, 645-46 (D. So. Ca. 2002). Thus, retrogression is more than just the number of minority seats in the benchmark versus the number of minority seats in the new plan. It includes the actual ability to elect whom the people choose to elect in a particular district.

Based on these and other cases, the U.S. Department of Justice has set forth specific criteria to provide examples of what they look for when a redistricting plan is submitted. Although lengthy, the list is by its own terms not exhaustive, but it includes:

> The extent to which a reasonable and legitimate justification for the change exists . . .
> The extent to which the jurisdiction took the concerns of members of racial and language minority groups into account in making the change . . .
> Whether the official action bears more heavily on one race more than another . . .
> The extent to which minority voting strength is reduced by the proposed redistricting . . .
> The extent to which available alternative plans satisfying the jurisdiction's legitimate governmental interests were considered.

28 C.F.R. §§ 51.57, 51.58 and 51.59 (July 1, 2011). Taken together, it is clear that – again, depending upon the circumstances of a particular case – a redistricting plan that either disproportionately affects the minority group or targets particularly powerful minority incumbents so as to reduce the overall strength of the minority

vote would be actionable under Section 5. Such a claim would be particularly powerful if where, as seems to be the case here, there are available alternative plans.

In fact, the Board Members who testified during trial stated that the Department of Justice's only question to the Board during their meeting was how the plan impacted minority incumbents. ARB Petition for Review at 16-17. The Board responded that no minority incumbents were paired with one exception that they described as completely "unavoidable" in the Southeast due to population loss. ARB Petition for Review at 35. It is fair to say that this inquiry by the Justice Department comes directly from the above statements in *Georgia v. Ashcroft.* As a result, it not only was it entirely proper for the Redistricting Board to consider minority incumbent pairings, it is required by Section 5 of the VRA.

In summary, if the result of a plan is that it would eliminate powerful Native incumbents, or it would disproportionately affect Native incumbents in general, even though alternative plans were available, it would create a discriminatory result within the meaning of Section 2 and cause a retrogression in minority voting strength within the meaning of Section 5. To the degree the superior court held these concerns were "speculative" or not "necessary," the court must be overturned on this point. The rule of law set forth by the superior court is not only overbroad but wrong in that it places this Board and future Boards in the