(16)

IN THE SUPREME COURT FOR THE STATE OF ALASKA

In re 2011 REDISTRICTING CASES:	Supreme Court No. S-14441 Superior Court Case No. 4FA-11-2209CI Consolidated Cases 4FA-11-2213CI 1JU-11-0782CI

ALASKA REDISTRICTING BOARD'S RESPONSE TO RILEY PLAINTIFFS' PETITION FOR REVIEW FROM THE SUPERIOR COURT OF THE STATE OF ALASKA FOURTH JUDICIAL DISTRICT AT FAIRBANKS, THE HONORABLE MICHAEL P. MCCONAHY, PRESIDING

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INTRODUCTION

The Trial Court properly rejected each of the three challenges raised by Plaintiffs in their Petition for Review. A review of the record and applicable law will lead this Court to the same conclusion.

ARGUMENT

A. The Trial Court Correctly Held the Board Did Not Follow an Invalid Process, and Should Therefore Be Affirmed.

Plaintiffs ask this Court to reverse the Trial Court's pre-trial order [Jt. Exc. 205-208] denying their motion for summary judgment seeking to invalidate the Board's entire Proclamation Plan because "the Board did not attempt to draft a plan that complied with the Alaska Constitution prior to pursuing other alternatives." [Plt. Pet. at 3.] Plaintiffs' arguments are without merit and the Trial Court's decision should be affirmed.

1. Plaintiffs Did Not Plead Invalid Process In Their Complaint and Their Petition for Review on the Issue Is Untimely.

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, Plaintiffs' Complaint contains no allegation of "invalid process" or anything even remotely similar. [Bd. Exc. 1201-1205.] The FNSB's Complaint also contains no

such allegations.[1] [Bd. Exc. 1206-1214.] The Board properly raised this objection with the Trial Court [Bd. Exc. 1382], although it was not addressed in the Court's Invalid Process Order. [Jt. Exc. 205-209.] Having raised no claim for "invalid process" in their complaint, Plaintiffs should have been precluded from raising that issue below and thus seeking review of that issue now.[2]

2. The Trial Court Correctly Denied Plaintiffs' Invalid Process Claim.

The Plaintiffs' "invalid process" argument relies entirely on dicta in footnote 22 from *Hickel v. Southeast Conference,* 846 P.2d 38, 51 n.22 (Alaska 1993). According to Plaintiffs, the Board used an "erroneous methodology" because it never undertook an effort to first draw a plan which complied with the Alaska Constitution without regard to its need to comply with the federal Voting Rights Act ("VRA"). The Trial Court correctly found that the Plaintiffs' assertion not only misconstrues *Hickel*, but ignores the practical realties faced by the Board. [Jt. Exc. 203-204.]

As the Trial Court correctly recognized, Plaintiffs take the quote from footnote 22 in *Hickel* out of context. The "footnote in *Hickel*" did not create a "mandate" that a

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[1] As a condition of dismissal of the FNSB claims, the Trial Court allowed Plaintiffs to raise any claims asserted by the FNSB. [Jt. Exc. 166 n.2.]

[2] This Court must also deny Plaintiff's Invalid Process because its petition for review is untimely. A petition for review must be filed "within 10 days after the date of notice of the order or decision appealed from." Alaska R. App. P. 403(a). Here, Plaintiffs petition this Court to review the Trial Court's December 23, 2011 "Order on the Plaintiffs' Motion Summary Judgment: Invalid Process" ("Invalid Process Order") denying their summary judgment motion. [Jt. Exc. 205-208.] Any petition for review on the Invalid Process Order was due, accounting for holidays, no later than January 4, 2012 - over five weeks ago. Having failed to timely seek interlocutory review of the Trial Court's pre-trial Invalid Process Order, Plaintiffs are prohibited from seeking to review of that issue now.

certain methodology be followed "or a claim for invalid process." [Jt. Exc. 207.] Indeed, this Court in *Hickel* "emphasized the need to preserve flexibility in the redistricting process. . .." *Id.* at 50 (emphasis added). The importance of Footnote 22 in Hickel is not, as the Plaintiffs 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 VRA. Rather, as noted by the Trial Court, that in constructing its redistricting plan the Board not give undue weight to the VRA or unnecessarily compromise the Alaska constitutional requirements. [Jt. Exc. 208.] Any other interpretation ignores reality.

Moreover, in *Hickel*, the Court's discussion of process was premised on completely different time constraints under which the Board was required to operate.[3] The 1998 amendments to Article VI, Section 10 of the Alaska Constitution placed extraordinary time limits on the Board's work. Any review of the Board's process can only be considered fairly be considered only in that context. 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.

The extraordinary time constraints faced by the Board made it not only impracticable, but impossible to follow the process the Plaintiffs claim is mandated by

[3] Former Article VI, Section 10 only 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. [Jt. Exc. 206 n.3.] No public hearings were required. [*Id.*] In 1998, the legislature amended Art. VI, Section 10 to require the Board 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. [*Id.*]

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.*" [Bd. Exc. 1376 at 30:18-20 (emphasis added).] As noted by the Trial Court, Dr. Handley "strongly urged the Board to draft the Native districts first given the demographic difficulties with which the Board was faced." [Jt. Exc. 97; *see also* Jt. Exc. 85, 206; TT 763:7-17.] 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. 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.[4]

Plaintiffs' claim that the language from *Hickel* is designed to serve as some sort of "powerful prophylactic to racial gerrymander claims" is supercilious. [Plt. Pet. at 8.] Plaintiffs themselves admit *Hickel* was decided several years before the United States Supreme Court's line of racial gerrymandering cases, and thus could not have been designed to "insulate [ ] Alaska [sic] process from racial gerrymander claims." [*Id.*]

As a covered jurisdiction, Alaska is mandated by law to obtain preclearance under Section 5. This Court has made clear that a "state may constitutionally reapportion districts to enhance the voting strength of minorities to facilitate compliance with the Voting Rights Act." *Hickel*, 846 P.2d at 49-50 (*quoting Kenai Peninsula Borough v.*

[4] This point is further highlighted by the fact that none of the groups that submitted statewide plans engaged in the tortured process the Plaintiffs claim is mandated. [*E.g.*, Bd. Exc. 1374 at 4:9-22; 1009:1-7; 1375 at 42:20-43: 1369-1373.]

State, 743 P.2d 1352, 1361 (Alaska 1987)). In other words, compliance with Section 5 is a compelling state interest. *Id.* Moreover, no racial gerrymandering claim has been raised in this case [Bd. Exc. 1201-1214.] There is also absolutely no evidence in the record that the Board engaged in racial gerrymandering. The undisputed evidence in this case establishes (1) it was not possible to draw a plan in Alaska that exceeds the benchmark [Jt. Exc. 88; TT 763:7-21, 795:11-796:14]; and (2) rather than maximize Alaska Native representation, the Board was required to unpack two heavily Alaska Native populated benchmark House districts in order to avoid retrogression. [Bd. Ex. 1084, 1240-1241; TT 919:10-920:8, 924:10-20.] Plaintiffs' gerrymandering argument is nothing more than unsupported speculations of counsel.[5]

In sum, the Trial Court correctly found "Plaintiffs' request to remand the entire plan back to the Board to start over is impracticable and unnecessary." [Jt. Ex. 208.] The Trial Court's decision should be affirmed.

B. The Trial Court Correctly Denied Plaintiffs' Geographic Proportionality Challenge Regarding the City of Fairbanks Senate Pairings.

Plaintiffs contend the Board violated the geographic proportionality rights of the voters of the City of Fairbanks ("City) because "City voters do not compromise a majority of voters" in any Senate district. [Plt. Pet. at 9.] The Trial Court, in rejecting

[5] 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 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.

Plaintiffs' claim, held "there is no right to strict proportionality, [and] the anti-dilution rule cannot be violated if the City cannot support a Senate district based on its population." [Jt. Exc. 113.] In their Petition, Plaintiffs offer a hodgepodge of arguments as to why the Trial Court's decision was incorrect. [Plt. Pet. at 9-14.] A review of these arguments establishes they are primarily the same unpersuasive arguments proffered below which should be rejected by this Court just as they were by the Trial Court.

1. The City Has No Right to Strict Proportionality, Nor Does It Have Sufficient Population To Support A Senate District.

A voter's right to an equally geographically effective or powerful vote is a significant constitutional interest, although not a constitutional right. *Kenai,* 743 P.2d at 1371-72. As a significant constitutional interest, a voter's right to an equally geographically effective vote is protected by the Equal Protection Clause. *Id.* The right to geographic equal protection does **not**, however, entitle members of a political subdivision to control a particular number of seats based upon their population, or proportional representation. *In re 2001*, at 143-44 & n.7, 146-47. There is simply no requirement of "strict" proportionality. *Id.* It merely means a redistricting board "cannot intentionally discriminate against a borough or any other 'politically salient class' of voters by invidiously minimizing that class's right to an equally effective vote." *Id.* at 144. In other words, groups of voters are not entitled to proportionality absent invidious discrimination. *Id.* Absent such discrimination, there can be no anti-dilution violation when the complaining group of voters falls short of having enough population to support an election district. *Id.* at 144 & n.8, 145.

It is undisputed the City does not contain sufficient population to support an entire Senate district on its own, "being approximately 11% short of the population for an ideal district, and over 6% short of having enough population to constitute a senate seat that met the population equality requirements of the federal and state constitutions."[6] [Jt. Exc. 113 n.173.] The record in this case is also devoid of any evidence that the Board invidiously discriminated against the voters of the City in its Senate pairings.[7] Under these circumstances, the Trial Court correctly found that "no further analysis is necessary" because the anti-dilution rule does not apply as a matter of law.

Relying on this Court's opinions in *Kenai* and *In Re 2001,* Plaintiffs argue the Trial Court's analysis is wrong because this Court has previously found the proper test for anti-dilution rule application is "majority control." [Plt. Pet. at 11-14.] Plaintiffs' argument is misplaced.

Unlike here, *Kenai* involved undisputed intentional discrimination. 743 P.2d at 1372-73. In that case, this Court found "the Board's intent was discriminatory on its face." *Id.* at 1372. Accordingly, it held the Board had "the burden of proving that it intentionally discriminated in order to increase the proportionality of geographic representation in the legislature." *Id.* at 1373. The *Kenai* Court did not, as Plaintiffs

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[6] The total population of the City is 31,535, which is roughly equal to 89% (88.8%) of an ideal Senate district. [Jt. Exc. 112.]

[7] In regard to Plaintiffs' FNSB proportionality challenges, the Trial Court found "there is no evidence that the Board had any intent to discriminate against the residents of the FNSB." [Jt. Exc. 110 (excess population split); 111 (FNSB senate pairings).] This finding was based on the undisputed testimony of the Board's witnesses. The same witnesses' unchallenged testimony establishes that there was no intent by the Board to discriminate against the voters of the City by virtue of its Senate pairings. [TT 258:25-259:6, 269:18-21; 393:21-394:6, 394:16-23; 625:1-9.]

allege, adopt a "majority control test." Rather, it found where there is invidious discrimination, this Court would "not consider any effect of disproportionality *de minimus*." *Id.* at 1372.

Likewise, no such test was adopted by the *In Re 2001* Court. In fact, in that case this Court expressly rejected the Board's "control theory" argument holding that contrary to the Board's assertion, *Kenai* "does not entitle political subdivisions to control a particular number of seats based upon their populations." *In Re 2001*, 44 P.3d at 144 (emphasis added).

Similarly misplaced is Plaintiffs' attempt to distinguish this Court's rejection of the Lake and Peninsula Borough's claim from ten years ago that its equal protection rights were violated because it was split between two House districts. *In re 2001*, 44 P.3d at 145. In rejecting the Borough's anti-dilution claim, this Court opined:

> Further, there is no equal protection violation. In *Hickel* . . ., we stated: 'The division of a borough which otherwise has enough population to **support** an election district will be an indication of gerrymandering.' But this statement does not apply to this case because the Lake and Peninsula Borough falls far short of having enough population to **support** an election district.

Id. (footnote omitted, emphasis added). The language used by this Court is highly instructive. The terminology used was enough population to **support** an election district, not to "control" an election district. If "control" were in fact the standard, this Court surely would have used such language. The fact that it did not was correctly recognized by the Trial Court when it found that "the anti-dilution rule cannot be violated if the City cannot **support** a Senate district based on its population." [Jt. Exc. 113 (emphasis

added)[8]].

The Plaintiffs' "control" theory also makes no sense where, as here, the boundaries of a smaller political subdivision without enough population to encompass an entire election district (the City), whose voters are alleging vote dilution, are completely encompassed within the boundaries of a larger political subdivision (the FNSB) who is allegedly diluting the first groups vote. Under such circumstances, voters from the smaller political subdivision will always be voters of both political subdivision with absurd results under Plaintiffs' theory.

The constitutional interest impaired by vote dilution "is not the right to vote per se, but the interest of individual members of a geographic group or community in having their votes protected from disproportionate dilution by the votes of another geographic group or community." *Kenai*, 743 P.2d at 1371 (emphasis added). Here, the City boundaries are completely within the boundaries of the FNSB. [Bd. Exc. 1127, 1377.] Both Senate districts that contain City voters, Senate Districts A and B, are also contained wholly within the boundaries of the FNSB. [Bd. Exc. 1127, 1197-1120, 1377.] As a result, every City resident is also a resident of the FNSB and every City voter is also a voter of the FNSB. Under these circumstances, Plaintiffs' control theory results in an "anti-dilution" claim that the voters of the City are having their votes diluted by the voters of the FNSB. As a result, City voters are members of both the geographic

[8] Plaintiffs' assertion that *Beer v. United States*, 425 U.S. 130, 141 (1976) supports its claim that there is "established presidence [sic]" that a majority is presumed as a matter of law to constitute effective control is also unfounded. There is no such statement on the page from *Beer* cited by Plaintiffs, nor anywhere else in the opinion. The Court in *Beer* does, however, make clear that it, like this Court, has clearly rejected the proposition of strict proportionality. *Id.* at 136 n.8.

group/community who are alleging vote dilution as well as the geographic group/community who they allege are diluting their votes. Obviously, a group of voters cannot dilute their own voting strength. The only logical rule is a group/community of voters cannot be a "politically salient class" to which the anti-dilution rule applies unless that group of voters comprises enough population on their own to populate an entire election district. The Trial Court's ruling implicitly recognizes this point and correctly rejects Plaintiffs' argument.

In sum, the Trial Court properly interpreted this Court's teachings on the anti-dilution rule to mean there can be no anti-dilution violation unless the voters of a politically salient class have sufficient population to support an entire election district. Its decision on the City Senate pairings should therefore be affirmed.[9]

2. Even If "Control" Is the Threshold for Anti-Dilution Rule Violations, the Voters of the City Effectively Control One Senate District.

Under Plaintiffs' "control theory," the City's population allows it to control only one Senate district. Accordingly, even if Plaintiffs' argument that the proper anti-dilution standard is "ability to control" was somehow correct, their anti-dilution claim still fails

[9] Plaintiffs' attempt to continually infuse this case with partisan gerrymandering allegations grows weary. Despite having pled no partisan gerrymandering claim, Plaintiffs spent considerable time at trial, over the Board's objections, presenting circumstantial evidence related to that claim. The Trial Court considered Plaintiffs' evidence and found it wanting. [Jt. Exc. 91-95.] In fact, the Trial Court specifically found "the plaintiffs' claims alleging [partisan] gerrymandering are unpersuasive and were not properly pled." [Jt. Exc. 96.] The Courts conclusion was based, in part, on its finding that the testimony of the Board's witnesses that "they were not influenced by their partisan affiliation" to be "credible." [Jt. Exc. 96.] Plaintiffs' assertion that "there was uncontroverted testimony that Chairman Torgerson intended to 'pay back' the Democrats for the 2000 redistricting" is simply wrong. The Trial Court specifically found it "did not find Hardenbrook credible on this point." [Jt. Exc. 93.]

because the City does in fact effectively "control" one Senate district

Senate District B, comprised of House District 3 and 4, has a total population of 36,219. [Bd. Exc. 1145.] Of this total population, 17,522 reside within the City of Fairbanks. [Jt. Exc. 113 n.174.] Thus, 48.36% of the total population in Senate District B is comprised of City residents. [*Id.*] The total voting age population of City residents in Senate District B is even higher at 49.29%. [*Id.*] The remaining 50.81% of the population is spread out among a number of small, unorganized areas such as Fox, Two Rivers, and Pleasant River. [*Id.*] In fact, the community with the second largest number of voters in Senate District B is Steele Creek, with 14.06% of the district's VAP. [*Id.*]

These statistics reveal the Senate pairings for the City in the Proclamation Plan do not minimize – much less *invidiously* discriminate against – the City voters' right to an equally effective vote. The plan does not in any way dilute their vote, for the City voters effectively "control" the vote in Senate District B. The voters within the City are far and away the largest organized voting bloc in Senate District B, comprising 49.29% of the VAP. The area outside of the City of Fairbanks, on the other hand, is entirely made up of smaller, unorganized communities in which it is much more difficult to campaign. Clearly, as goes the voters of the City, so goes the Senate district in any given election.[10] [TT 622:20-624:19.]

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[10] City voters, also comprise the largest class of voters in Senate District A, with 38.66% of the districts VAP. [Bd. Exc. 113 n.175.] As in Senate District B, the remaining VAP is spread out among small unorganized areas. [*Id.*] The fact that the residents of the City constitute the largest voting bloc in two Senate seats means its residents have the opportunity to be represented by two Senators, rather than one. How more representation in the legislature would dilute the voting strength of City voters is hard to fathom.

Contrary to Plaintiffs' assertion, the effect of a .82% difference between making up 49.29% of a district's VAP and 50.1% is *de minimus* and not constitutionally significant "in a system of winner-take all representation." *Kenai*, 743 P.2d at 1370 (difference between Anchorage having 42.6% of State population and 40% of Senate seats is *de minimus*). Requiring the Board to raise the VAP of Senate District A by less then one percent (a few hundred people) to reach a numerical majority makes substance a slave to form. "Strict" proportionality is not and never has been required by this Court absent invidious discrimination. *E.g., In re 2001*, 44 P. 3d at 143-44 & n.7, 146-47. As there is absolutely no evidence of invidious discrimination in this case, strict proportionality is not required. In short, the Trial Court correctly rejected Plaintiffs' anti-dilution rule challenge as to the City's Senate pairings. The Trial Court's decision should therefore be affirmed.[11]

C. The Trial Court Correctly Found the Board Had Legitimate, Non-Discriminatory Reasons for Splitting the Excess Population of the FNSB, and Therefore Plaintiffs' Geographic Proportionality Challenge Is Without Merit.

It is undisputed the Board split the excess population of the FNSB between two House districts – House District 38 and House District 6. It was also undisputed that the burden of proof was on the Board to provide legitimate, non-discriminatory reasons for

[11] Even if this Court determines the City is entitled be a numerical VAP majority in one Senate district, the Board should not be required to redraw the City Senate districts because any effect of the disproportionality is *de minimus*." *Kenai*, 743 P.2d at 1373. In *Kenai*, this Court made clear that "the degree of disproportionality will be considered in determining the appropriate relief to be granted." *Id.* Because the effect of the disproportionality in Kenai was *de minimus,* the Court found a declaration that the Board's purpose in fashioning the affected election district was "illegitimate under Alaska's equal protection clause" was "an adequate remedy" and did not require the district to be redrawn. *Id.* The same rationale applies with equal force here.

its choice. [Jt. Exc. at 209-213.] After careful review of the evidence in this case the Trial Court correctly held the Board had met its burden. [Jt. Exc. at 110.]

The Plaintiffs' rambling, often-times confusing arguments boil down to three main points: (1) because the Trial Court concluded House District 38 was not necessary under the VRA, the Board had no legitimate, non-discriminatory reasons for splitting the excess population; (2) the FNSB had enough population to "effectively control" 5.49, or 5.50 House districts and should therefore have been awarded strict proportional representation; and (3) the Board intentionally discriminated against the voters of the FNSB by placing Goldstream and Ester in a rural Alaska Native district simply because they were non-Native. [Plt. Pet. at 15-25.]

None of the Plaintiffs' arguments are supported by any evidence in the record. Thus, this Court should affirm the Trial Court's legally sound and factually supported conclusion that the Board did not intend to discriminate against the voters of the FNSB and had legitimate, non-discriminatory reasons for splitting the excess population of the FNSB.

1. The Board Had Legitimate, Non-Discriminatory Reasons for Splitting the Excess Population of the FNSB.

This Court has identified the proper legal standard for analyzing this issue. Intentional discrimination for purposes of anti-dilution can be inferred where a redistricting plan "unnecessarily divides a municipality in a way that dilutes the effective strength of municipal voters." *In re 2001*, 44 P.3d at 144. Thus, "failure to keep all of a borough's excess population in the same House district" provides "some evidence of

discriminatory intent." *Id.* at 146-47. An inference of intentional discrimination, however, can be rebutted by valid non-discriminatory justifications. *Id.* at 144. Such justifications may include the necessity of complying with federal and/or state law, such as one-person/one-vote, the VRA, the Article VI, Section 6 requirements of compactness, contiguity, and socio-economic integration, or "the need to accommodate excess population." *Id.* at 144 & n.7. Moreover, as this Court made clear in its last guidance on redistricting, the "need to accommodate excess population would be sufficient justification to depart from the anti-dilution rule." *Id.*

The Board does not dispute it split the excess population of the FNSB between two House districts. Nor does the Board dispute that under this Court's precedent, the burden of proof was on the Board to show it had legitimate, non-discriminatory reasons for doing so. Contrary to Plaintiff's assertions, the evidence in this case as found by the Trial Court establishes the Board in fact met this burden. [Jt. Exc. 108-109.]

Plaintiffs conveniently ignore the fact that the Board disproved the inference of discrimination by splitting the excess population of the FNSB with a number of legitimate, non-discriminatory reasons such as compliance with "one-person/one-vote" and accommodation of the excess population, as well as compliance with the VRA. [Jt. Exc. 108-110.] Thus, Plaintiffs' claim that other than compliance with the VRA, "no other excuse was offered to justify the violations" [Plt. Pet. at 16] is disingenuous, and wholly rebutted by the undisputed evidence in the record. [Jt. Exc. 110; Bd. Exc. 1312-1313; TT 257:21-264:11; 392:14-393:20; 616:8-624:25.] The Trial Court correctly found "the evidence establishes the Board had valid, non-discriminatory reasons for splitting the

excess population between two districts...," and that there was "no evidence that the Board had any intent to discriminate against the residents of the FNSB." [Jt. Exc. 110.] The Trial Court's decision was factually correct and legally sound.

a. The Board Split the Excess Population In Order to Comply with the One-Person/One-Vote Requirement of the Federal Constitution.

Rural communities in Alaska experienced an out-migration of population over the last decade, leaving a majority of the Alaska Native districts severely under-populated. [Jt. Exc. 121 n.193; Bd. Exc. 1001-1002, 1078-1079, 1135, 1237-1238.] As a result, the Board needed to combine urban population with rural, Alaska Native population in at least one Alaska Native district in order to bring that district within constitutional tolerance of an ideal district size. [Jt. Exc. 129; Bd. Exc. 1079, 1135-1136, 1283-1285.] The Plaintiffs, both VRA experts, and the Trial Court all agreed with the Board "it was not a matter of whether excess population needed to be added to rural Native districts but only a matter of where to access this excess urban population." [Jt. Exc. 129.] In fact, every third party plan submitted to the Board combined urban and rural population, and a majority of those plans took the needed urban population from the FNSB. [Jt. Exc. 129-131; Bd. Exc. 1023-1055.]

The Board took a "hard look" at all of the alternative configurations to help it solve this dilemma. [Jt. Exc. 43, 129-131.] It eventually determined that the best and most reasonable alternative was to pick up the needed population from the Ester/Goldstream areas of the FNSB for a number of reasons. Such reasons included the fact that Fairbanks had approximately 8,806 in excess population (the largest excess

population in the state), the Ester/Goldstream area was directly adjacent to the rural areas, and Fairbanks had significant historical, economic, cultural, and social ties with rural Alaska.[12] [Jt. Exc. 130; TT 245:5-25, 600:1-604:5.] These reasons, as well as the significant fact the voters in these areas historically voted Democratic, led the Board to combine the Ester/Goldstream areas with rural, Alaska Native communities to create House District 38. [Jt. Exc. 130; Bd. Exc. 1085, 1135-1136, 1305-1309.] Unfortunately, House District 38 could not absorb all the excess population without jeopardizing its effectiveness. [Jt. Exc. 109; Bd. Exc. 1135-1136, 1309, 1311-1312.] The Board therefore took the maximum amount of the excess population it could while still maintaining an effective district. [*Id.*]

The Trial Court correctly found the Board's choice was a legitimate, non-discriminatory reason for splitting the excess population of the FNSB. [Jt. Exc. 109-110.] Its decision is completely in line with this Court's previous rulings that an inference of intentional discrimination can be rebutted by "legitimate nondiscriminatory policies." *In re 2001*, 44 P.3d at 144. Compliance with the one-person/one-vote requirement, the ultimate goal of redistricting, is such a valid justification. *Id.* at 145.

Plaintiffs' failure to even acknowledge this as a valid justification offered by the Board can only be explained as deliberate. Plaintiffs argued at trial (as well as in their Petition) that the Board should have taken the needed urban population from other areas

[12] Several of the Plaintiffs' witnesses testified Fairbanks serves as a hub for rural Alaska. [Jt. Exc. 130 n.224.] In fact, the Trial Court itself noted, "anyone would be hard pressed to assert Fairbanks is not a hub for rural Alaska." [*Id.*]

of the state rather than Fairbanks. [Jt. Exc. 129, 130-131; Plt. Pet. at 22-24.] The Trial Court properly characterized Plaintiffs' argument as nothing more than a "not in my backyard" protest. [Jt. Exc. 131.] It is undisputed that the Board had to combine urban population with rural population to comply with the talisman of equal protection – one-person/one-vote, and the Trial Court correctly held the Board acted reasonably when it selected Fairbanks, "specifically Ester/Goldstream, as an area from which to take excess population." [Jt. Exc. 110, 111, 132.] The Trial Court's decision was correct and should be affirmed.

b. The Board Split the Excess Population In Order to Comply with the Federal Voting Rights Act.

As explained above, House District 38 needed population to comply with the one-person/one-vote standard. However, because House District 38 is an effective district under the VRA, it could not absorb all the excess population of the FNSB without jeopardizing its effectiveness. [Jt. Exc. 109.] Thus, the Board split the excess population, placing the majority of the remaining excess in House District 6 and spreading the small remainder throughout the five House districts wholly contained in the FNSB. [Jt. Exc. 110; TT 245:5-25, 600:1-604:5.] The Trial Court correctly found adding 5,500 of the FNSB's excess population to House District 38 "was required...in order to comply with the federal VRA." [Jt. Exc. 110.]

Besides the geographic, historical, cultural, and economic ties between Fairbanks and rural Alaska, the communities of Goldstream and Ester historically tend to vote Democratic, as do Alaska Natives. [Jt. Exc. 130-132; TT 796:8-14, 84:25-85:3; Bd. Exc.