

IN THE SUPREME COURT FOR THE STATE OF ALASKA

In Re 2011 Redistricting Cases.)
) **Supreme Court Case No. S-14721**
) Trial Court Case No. 4FA-11-2209-CI
) (Consolidated Cases)
) 4FA-11-2213 CI
) 1JU-11-782 CI

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

*This petition addresses the Trial Court's order
dated April 20, 2012 re the Hickel Process*

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Filed in the Supreme Court of the State of
Alaska, this ____ day of May, 2012.

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INTRODUCTION

The Alaska Redistricting Board (“Board”) petitions this Court to review and reverse the Trial Court’s decision holding the Board failed to comply with the first step of the “*Hickel* Process” by not making individual specific findings as to the constitutionality of each and every House and Senate district in formulating its *Hickel* Plan, and by not redrawing the Southeast Alaska election districts. The Board also requests this Court assume jurisdiction of this matter and approve the Amended Proclamation Plan.

As established below, the Board went to great lengths in its efforts to comply with the *Hickel* Process. It not only made findings “on the record” as it progressed through each step of the process, but also unanimously adopted exhaustive and detailed “written findings” covering single-spaced pages. The Superior Court’s decision misinterprets the requirements of the *Hickel* Process, placing additional unnecessary restrictions on both the present and future redistricting boards not required by this Court.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Trial Court erred in holding the Board failed to comply with this Court’s order of remand by failing to find each individual House district in the Amended Proclamation Plan was constitutional.

2. Whether the Trial Court erred in holding the Board failed to comply with this Court’s order of remand by failing to redraw Southeast Alaska.

3. Whether, in light of the Trial Court’s failure to determine whether the Amended Proclamation Plan fully complies with this Court’s order of remand, this Court should assume jurisdiction over this matter and approve the Board’s Amended Proclamation Plan.

STATEMENT OF FACTS

On March 14, 2012, this Court remanded the Proclamation Plan to the Board for formulation of a final plan following the process outlined in footnote 22 of *Hickel v. Southeast Conference*, 846 P.2d 38 (Alaska 1993) (“*Hickel* Process”).¹ The *Hickel* Process mandated by this Court required the Board to: (1) design a plan that complies with the requirements of the Alaska Constitution (i.e., develop a “*Hickel* Plan”); (2) measure that plan against the requirements of the federal VRA to determine whether the plan complies with the federal requirements; and if it does not, (3) adopt a final plan that deviates from the requirements of the Alaska Constitution “to the least degree reasonably necessary to ensure compliance with the Voting Rights Act.”² This Court also recommended the Board make findings “in furtherance of the *Hickel* Process” in order to “expedite further judicial review.”³

The Board reconvened on March 26 and met daily through March 31, 2012 to develop a new plan of redistricting following the mandated *Hickel* Process. To facilitate the process, Board Chair John Torgerson directed Board staff to create a “*Hickel*

¹ Supreme Court Order No. 77, March 14, 2012 (“S. Ct. Order”) at ¶¶ 7-11. This Court opined that because the Board did not follow the *Hickel* process, this Court was unable to determine whether departure from strict adherence to the requirements of Article VI, section 6 of the Alaska Constitution in the configuration of Proclamation House Districts 37 and 38 was reasonably necessary in order to comply with section 5 of the federal Voting Rights Act (“VRA”). [*Id.* at ¶ 7.]

² *Id.* at ¶ 11 & n.15. Other than these requirements, this Court provided the Board with no other details or specific guidance on how to comply with the *Hickel* Process. There is nothing in this Court’s 3/14/12 Order that required the Board to make individual findings as to the constitutionality of each of the 40 House and 20 Senate districts. Historically, this Court has never required such findings by any redistricting entity.

³ *Id.* at n.15.

Template” for the Board to use merely as a starting reference point.⁴ This template included the House districts the Board knew were constitutional, and therefore already complied with this Court’s order, because they were either originally drawn without consideration to the VRA, or were neither challenged nor struck down.⁵

On March 26, Executive Director Taylor Bickford presented the *Hickel* Template to the Board who reviewed and discussed it.⁶ Mr. Bickford explained the template consisted of parts of the Proclamation Plan “that were really drawn under a *Hickel* Process to begin with, [because they consist of] parts of the [original] plan that were drawn with only the Alaska Constitution in mind and not the Voting Rights Act.”⁷ This included the House districts in the Municipality of Anchorage, (“Anchorage”), the Matanuska-Susitna Borough (“Mat-Su”), the Kenai Peninsula Borough (“KPB”), the North Slope Borough (“NSB”), and Southeast.⁸

The Board had originally adopted the Anchorage districts as submitted by the Mayor of Anchorage and the City Clerk, with some modifications.⁹ The proponents of the Anchorage plan had made it clear, on the record, that they drew the Anchorage districts with only the constitutional requirements in mind and without regard to the

⁴ Jt. Exc. 131, 132 at 40:15-41:6; 44:25-45:6; Jt. Exc. 26, 27 at ¶ 1; Jt. Exc. 395-401. In this petition, cites to “Org. Bd. Exc.” and “Org. Jt. Exc.” reference the Board’s Excerpts and the Joint Excerpts submitted with the Board’s February 13, 2012 Petition for Review. “Tr. Tran.” refers to the transcript of the trial in this case. “Bd. Rec.” references the Board record. “Jt. Exc.” refers to the Joint Excerpt lodged with this Petition.

⁵ Jt Exc. 131, 132 at 40:20-42:23; Jt. Exc. 27 at ¶¶ 1-3; 386-393.

⁶ *Id.* at ¶ 6; Jt. Exc. 131-133 at 41:2-46:11.

⁷ Jt. Exc. 131 at 40:23-41:1.

⁸ Jt. Exc. 27 at ¶ 1; Jt. Exc. 131, 132 at 41:19-42:11; Jt. Exc. 386-393.

⁹ Jt. Exc. 131 at 41:2-5; Tr. Tran. at 677:5-684:8.

VRA.¹⁰ Thus, the Board was confident these districts already complied with the first step of the *Hickel* Process.¹¹

The *Hickel* Template also included the North Slope district, House District 40, because the Board “never claimed that that was built on Voting Rights Act grounds.”¹² The configuration of House District 40 is also the same as it has been since the 2002 Redistricting Plan. The Mat-Su and KPB districts, also originally configured without reference to the VRA, were constitutional when originally drafted. The Board did not revisit the configuration of the election districts in Southeast Alaska because “Judge McConahy ruled that District 32 was compact enough, period, on Alaska constitutional grounds.”¹³

The Board then considered and discussed the four “*Hickel* Plan” options prepared by Board staff.¹⁴ The various *Hickel* Plans took into account the uncontroverted fact that in order to comply with constitutional equal population requirements “substantial population needed to be added from some urban area of the state to at least one rural district” without considering VRA requirements.¹⁵ Each of the *Hickel* Plans attempted to find a different solution to the rural population shortfall by taking the needed additional population from four different urban areas of the state: Fairbanks (*Hickel_01*), the Mat-Su (*Hickel_02*), Anchorage (*Hickel_03*), and the KPB (*Hickel_04*).¹⁶ The different

¹⁰ Bd. Rec. ARB753-55.

¹¹ Jt. Exc. 131, 132 at 41:2-42:11; Tr. Tran. at 677:5-684:8.

¹² Jt. Exc. 131, 132 at 41:25-42:2. Nor were any of these districts challenged.

¹³ Jt. Exc. 131 at 41:12-14; Jt. Exc. 168 at 33:11-35:15; *see also* Jt. Exc. 38-39 at ¶ 42; Org. Jt. Exc. at 7, 162.

¹⁴ Jt. Exc. 133-143 at 48:11-86:25; Jt. Exc. 161-174 at 5:14-54:7; Jt. Exc. 394-420.

¹⁵ Jt. Exc. 27 at ¶ 3.b.

¹⁶ Jt. Exc. 27 at ¶¶ 4-5; 394-420; 133-143; 161-174.

configurations in each of the four *Hickel* Plans substantially altered portions of the *Hickel* Template, which was used simply as a starting reference point for analysis and comparison.¹⁷ There was nothing sacrosanct about the *Hickel* Template.

After discussing the various options, the Board instructed Board counsel to review the four proposed *Hickel* Plans for compliance with the Alaska Constitution.¹⁸ On March 27, Board counsel presented his analysis to the Board in writing and on the record.¹⁹ Board counsel analyzed the constitutionality of the districts in each of the four *Hickel* Plans, and ultimately advised that in his opinion, only the *Hickel_01* plan complied with the requirements of the Alaska constitution.²⁰ He reasoned the *Hickel_01* plan was the only option that contained 40 House districts that “are contiguous, relatively compact and as nearly as practicable socio-economically integrated . . . [and] [e]ach of the Senate districts is composed of two contiguous House districts.”²¹ After deliberation and discussion, the Board unanimously adopted the *Hickel_01* as the *Hickel* Plan for purposes of the *Hickel* Process.²² In support of this decision, the Board made findings both on the record and in writing that the:

¹⁷ For example, in the *Hickel_03* plan, the Board took the needed urban population from the western edge of the Municipality of Anchorage and included it in a district with Bethel and other small rural villages, stretching across Cook Inlet to the west coast of Alaska. [Jt. Exc. 139, 140 at 70:13-75:24; 384; 408-413.] As a result of this option, the Board had to redraw nearly every district in the Municipality of Anchorage to accommodate the loss of 6,027 people. [Jt. Exc. 139 at 86:1-25; 140 at 73:22-74:24; 408-413.] Similar changes were required to the *Hickel* template in each of the affected areas in the other *Hickel* plans. [*Id.* at 394-408, 417-420.]

¹⁸ Jt. Exc. at 28 ¶ 6; Jt. Exc. 143 at 86:13-18.

¹⁹ Jt. Exc. 28 at ¶ 7; Jt. Exc. 164-170 at 14:3-41:5; Jt. Exc. 381-85.

²⁰ Jt. Exc. 385, ¶ III; Jt. Exc. 170 at 41:2-5.

²¹ Jt. Exc. 382. *See also* Jt. Exc. 28 at ¶ 7.

²² Jt. Exc. 28 at ¶ 8; Jt. Exc. 173-74 at 51:14-54:7.

Hickel plan complies with the requirements of the Alaska Constitution. All forty (40) of the House districts are contiguous, relatively compact and as nearly as practicable, socio-economically integrated. The Plan has an overall deviation of 8.93% which is within the equal population requirements of art. VI, sec. 6 of the Alaska Constitution. Each of the Senate districts is composed of two contiguous House districts.²³

After the adoption of its *Hickel* Plan, the Board proceeded to the next step of the *Hickel* Process: measuring its *Hickel* Plan for compliance with the VRA.²⁴ On March 28, the Board's VRA expert, Dr. Handley advised the Board in writing and on the record that the Board's *Hickel* Plan did not meet the requirements of Section 5 of the VRA because it contained at least one less "ability to elect" House district and one less "ability to elect" Senate district than the Benchmark, and was therefore retrogressive and would not be precleared by the Department of Justice ("DOJ").²⁵ Based on the advise of its VRA expert and counsel, the Board unanimously found that "the Board's *Hickel* Plan is retrogressive and would not be precleared by the DOJ."²⁶ Based on this conclusion, the Board specifically found that (1) it is not possible to construct a redistricting plan that strictly complies with the Alaska Constitution and meets the requirements of the VRA, and (2) under the Supremacy Clause of the U.S. Constitution, the Board was required to depart from strict adherence to the requirements of Article VI, section 6 of the Alaska

²³ Jt. Exc. at ¶ 9; Jt. Exc. 173-74 at 51:14-54:7

²⁴ Jt. Exc. 28 at ¶ 10; Jt. Exc. 174, 175 at 57:8-58:19.

²⁵ Jt. Exc. 28-29 at ¶ ¶ 11-13; Jt. Exc. 201-209 at 40:1-70:6; Jt. Exc. 421-24. Board counsel also advised the Board that based and his understanding of the VRA, the Board's *Hickel* plan was retrogressive and would not be precleared. [Jt. Exc. 29 at ¶ 14; Jt. Exc. 195 at 15:3-22.

²⁶ Jt. Exc. 29 at ¶ 15.

Constitution in order to create a non-retrogressive redistricting plan capable of obtaining preclearance from DOJ.²⁷

Having complied with the first two steps of the *Hickel* Process, the Board then turned to complying with the third. In order to create a redistricting plan that complied with both state and federal law, the Board was required to create one additional “ability to elect” (or effective) Alaska Native House district and one additional “ability to elect” (or effective) Senate district while departing from Alaska constitutional requirements to the least degree reasonably necessary to ensure compliance with the VRA.²⁸

On March 31, 2012, after considering, analyzing, and discussing several different options that borrowed ideas from some of the third-party proposals,²⁹ as well as receiving advice from its VRA expert and Board counsel,³⁰ the Board by unanimous vote, adopted its Amended Proclamation Plan in concept.³¹ The Board made findings on the record as to its compliance with each step of the *Hickel* Process prior to its vote.³² Specifically, the Board expressly found that its Amended Proclamation Plan complied with the *Hickel* Process, met the requirements of the VRA, and deviated from the requirements of the

²⁷ Jt. Exc. 29 at ¶¶ 16-17.

²⁸ Jt. Exc. 29-30 at ¶¶ 18-19.

²⁹ See Jt. Exc. 34-36 at ¶¶ 26-33; Jt. Exc. 190-338 *passim*. The Board received five (5) statewide proposed redistricting plans from third parties, which it analyzed and considered. None of the third-party plans met all the necessary legal requirements for one or more of the following reasons: (a) the plan did not comply with the *Hickel* process; and/or (b) the plan did not meet the requirements of the VRA; and/or (c) the proposal unnecessarily deviated from the requirements set forth in the Alaska Constitution. [Jt. Exc. 30-33 at ¶¶ 22-25; Jt. Exc. 240-252 at 21:20-66:4.]

³⁰ Jt. Exc. 35-36 at ¶¶ 28-32; Jt. Exc. 190-338 *passim*.

³¹ Jt. Exc. 36 at ¶ 33; Jt. Exc. 199-200 at 37:1-38:11.

³² See Jt. Exc. 120-319 *passim*.

Alaska Constitution to the least degree reasonably necessary to ensure compliance with the VRA.³³

After technical corrections and clean up by staff, on April 5, 2012, the Board unanimously adopted its “Written Findings in Support of Alaska Redistricting Board’s Amended Proclamation Plan”³⁴ (“Written Findings”) prior to unanimously adopting its Proclamation of Redistricting.³⁵ The Board Record as summarized in its Written Findings establishes that the Board’s Amended Proclamation Plan, created pursuant to the *Hickel* Process, complies in all respects with the requirements of both this Court’s and the Superior Court’s orders.³⁶ The Amended Proclamation Plan: (a) departs from strict adherence to the Alaska constitutional requirements of Article VI, section 6 only to the least degree reasonably necessary in order to ensure compliance with the requirements of the VRA;³⁷ and (b) rectifies the compactness in House Districts 1 and 2 of the Proclamation Plan.³⁸

On April 10, 2012, the Board filed its “Notice of Compliance and Request for Entry of Final Judgment.”³⁹ On April 12, the Trial Court gave all parties and amicus

³³ Jt. Exc. 36-38 at ¶¶ 33, 35, 39-40; Jt. Exc. 348-350 at 34:21-42:9.

³⁴ Jt. Exc. 24, 26-40; Jt. Exc. 349-50 at 39:12-42:9

³⁵ Jt. Exc. 24-25.

³⁶ Jt. Exc. 1-460.

³⁷ Jt. Exc. at 37-38 ¶¶ 39-40; Jt. Exc. 240-252 at 21:20-66:4. Of all the plans considered, the Amended Proclamation Plan adopted by the Board does the least harm to the Alaska Constitution. [*Id.* at 30-33 ¶¶ 22-25; Jt. Exc. 38 at ¶ 40; Jt. Exc. 240-252 at 21:20-66:4.]

³⁸ Jt. Exc. 36 at ¶¶ 36, 43, 47-52. The Amended Proclamation Plan also moots (1) any remaining proportionality issues with the House districts in the FNSB because the excess population of the FNSB is split only once; and (2) the City of Fairbanks’ proportionality claim because it creates a city Senate district combining the two city House districts. [*Id.* 6; Jt. Exc. 36-37 at ¶¶ 37-38.]

³⁹ Jt. Exc. at 1-460.

curiae involved at the Superior Court and Supreme Court level until April 16, 2012, to file any objection to (1) whether the Board followed the *Hickel* Process as ordered by the Supreme Court; (2) whether deviations from the Alaska Constitution were justified by the VRA; and (3) other matters the parties and amicus felt were appropriate to address.⁴⁰ Seven parties and *amici* lodged objections on April 16.⁴¹ The Board replied to those objections on April 18.⁴²

On April 20, the Superior Court issued an order denying the Board's request for a final order approving the Amended Proclamation Plan, finding the Board failed to comply with this Court's order of remand by "not [making] specific findings, by district, that each of the unchanged Proclamation Plan districts satisfied the requirements of the Alaska Constitution," and by not redrawing Southeast Alaska "based on the requirements of the Alaska Constitution."⁴³ Accordingly, the Superior Court remanded the matter to the Board with the mandate that the Board: (1) draw a redistricting plan solely compliant with the Alaska Constitution and make findings of fact sufficient to allow the Superior Court and this Court to "independently measure *each* district against constitutional standards," and (2) draw house districts in Southeast Alaska without regard to influence districts or any VRA considerations.⁴⁴

The Superior Court went on to add that the "intent" of its order was for the Board to submit to it for approval a *Hickel* Plan that complies with the Alaska Constitution

⁴⁰ 4/12/20 Superior Court "Order Regarding the Board's Notice of Compliance and Adoption of a New Plan" at 1-2.

⁴¹ Jt. Exc. at 461-626.

⁴² *Id.* at 627-684.

⁴³ Jt. Exc. at 687-88.

⁴⁴ *Id.* at 688-89.

before “considering any need to meet any VRA requirements.”⁴⁵ Upon the Trial Court’s approval of the “*Hickel* Plan,” the matter would again be remanded to the Board to adopt a plan in compliance with this Court’s requirements that any departure from Alaska constitutional requirements be to the least degree reasonably necessary to ensure compliance with the federal VRA.⁴⁶ In need of guidance from this Court on the heretofore unexplained *Hickel* Process, this Petition followed.

STANDARD OF REVIEW

This Court gives no weight to the decision of the Trial Court on review of a redistricting plan.⁴⁷ Instead, this Court has indicated that it will review the plan *de novo* upon the record developed in the Superior Court.⁴⁸ *Id.* Whether a lower court on remand correctly applied this Court’s mandate is a question of law also reviewed *de novo*.⁴⁹

STATEMENT OF GROUNDS WHY DECISIONS BELOW ARE ERRONEOUS

A. The Trial Court Erroneously Ruled the Board Did Not Comply with this Court’s Order of Remand By Failing to Make Specific Findings as to the Constitutionality of Each House District.

The Superior Court found the Board did not comply with this Court’s order on remand because the Board did not make specific individual findings that each and every House district complied with the Alaska Constitution, and therefore it could not “reliably

⁴⁵ *Id.* at 689.

⁴⁶ *Id.* The Superior Court did not, however, even address whether the Amended Proclamation Plan complied with the other steps in the *Hickel* Process or this Court’s order.

⁴⁷ *E.g., Groh v. Egan*, 526 P.2d 863, 867 (Alaska 1974).

⁴⁸ *Id.*

⁴⁹ *E.g., Moeller-Prokosch v. Prokosch*, 99 P.3d 531, 534 (Alaska 2004).

decided the preliminary question of state constitutionality on the instant record.”⁵⁰ The Trial Court’s decision misconstrues this Court’s order in a number of respects.

Contrary to the Superior Court’s assertions, the Board did in fact make a specific finding that all 40 House districts as well as all 20 Senate districts in its *Hickel* Plan met Alaska constitutional requirements.⁵¹ The Board expressly found that the

Hickel plan complies with the requirements of the Alaska Constitution. All forty (40) of the House districts are contiguous, relatively compact and as nearly as practicable, socio-economically integrated. . . . Each of the Senate districts is composed of two contiguous House districts.⁵²

No further finding is necessary.

There is nothing in this Court’s 3/14/12 Order or previous redistricting cases that require the Board to make specific individual findings that ‘House District 1 is constitutionally compact, socio-economically integrated, and contiguous; House District 2 is constitutionally compact, socio-economically integrated, and contiguous; *etc.*’ Indeed, such a requirement is the epitome of form over substance, and creates a mandate obviously absent from this Court’s order.

The Board went to great lengths to document how it constructed its *Hickel* Plan.⁵³ Board staff, who was tasked with drawing a *Hickel* Template the Board could use as a starting point in complying with the first step of the *Hickel* Process, explained on the record which districts it used to create this template and why these districts were already

⁵⁰ Jt. Exc. at 686-87.

⁵¹ Jt. Exc. 28 at ¶ 9.

⁵² *Id.* (emphasis added.)

⁵³ Jt. Exc. 27-28 at ¶¶ 1-91; Jt. Exc. 381-385.

constitutional and therefore compliant with this Court’s Order.⁵⁴ The Board considered four different *Hickel* Plans which were all legally analyzed for compliance with the Alaska Constitution.⁵⁵ The Board discussed each of these plans on the record⁵⁶ before unanimously agreeing on which plan to adopt.⁵⁷ The Board made findings both on the record and in writing that its *Hickel* Plan complied with the Alaska Constitution.⁵⁸ Contrary to the Superior Court’s assertion, there is ample evidence in the Board Record and Written Findings to allow for proper legal review of its Amended Proclamation Plan.

The Superior Court’s reliance on the language from this Court’s Order to the effect that the Board has a “duty to independently measure each district against constitutional standards”,⁵⁹ does not support its conclusion that specific individual findings as to every election district are mandatory. This Court mandated the Board follow the *Hickel* Process outlined in its Order.⁶⁰ The first step of the process was for the Board to “first design a plan focusing on compliance with the Article VI, section 6 requirements of contiguity, compactness, and relative socioeconomic integration.”⁶¹ The

⁵⁴ Jt. Exc. 131-133 at 41:2-46:11.

⁵⁵ Jt. Exc. 28 at ¶ 7; Jt. Exc. 133-143 at 48:11-86:25; Jt. Exc. 161-174 at 5:14-54:7; Jt. Exc. 381-85.

⁵⁶ For example, Board member PeggyAnn McConnochie confirmed, on the record, “according to the Alaska Constitution, we have got: District 40 is okay. Anchorage is okay. Mat-Su is okay. Southeast is okay. Kodiak is okay. And Kenai/Soldotna are all okay.” [Jt. Exc. 132 at 44:25-45:5.]

⁵⁷ Jt. Exc. 28 at ¶ 8; Jt. Exc. 173-74 at 51:14-54:7.

⁵⁸ Jt. Exc. at ¶ 9; Jt. Exc. 173-74 at 51:14-54:7.

⁵⁹ Jt. Exc. 687 (*quoting* S. Ct. Order at ¶10, *quoting Hickel*, 846 P.2d at 51 n.22.)

⁶⁰ S. Ct. Order at ¶¶5, 11.

⁶¹ *Id.* at ¶ 5.

Board did just that, fully explaining its process and findings both on the record and in its detailed Written Findings.⁶²

While it is true that in constructing its original Proclamation Plan, the Board first focused on the Alaska Native districts needed for VRA compliance,⁶³ the Board actually adopted the Proclamation Plan in two parts: first, the plan for rural Alaska, and second, the plan for the remaining regional areas of the state – Southeast, the KPB, the Mat-Su, the FNSB and the MOA.⁶⁴ Board members did not take into consideration the VRA when drawing these more urban districts as there was no need to. The Board had already drawn the Alaska Native districts necessary for preclearance, and Dr. Handley had already approved those districts as compliant with the VRA.⁶⁵ The urban districts were essentially isolated from the VRA process.⁶⁶ The Board therefore knew which districts were drawn based on VRA considerations, and which ones were drawn only on state constitutional grounds. It took this undisputed fact into account when drafting its *Hickel* Plan. The Board’s decision makes sense. If districts were drawn without consideration of the VRA and were not legally challenged, there is no legal or practicable need for the Board to “reinvent the wheel” and start from scratch.

In short, the Board complied with the first step of the *Hickel* Process as mandated

⁶² Jt. Exc. 1-460, *passim*.

⁶³ Org. Bd. Exc. 1128-1129. There were only five House districts in the Proclamation Plan whose configuration was effected by VRA concerns – House Districts 34, 36, 37, 38, and 39.

⁶⁴ Org. Bd. Exc. 1130-1144. None of these districts in these areas of the State, outside House District 32 in Southeast, were subject to timely legal challenge under Article VI, section 11 of the Alaska Constitution.

⁶⁵ Org. Bd. Exc. 1128-1144.

⁶⁶ *Id.*

by this Court. It started by adopting a plan that it believed complied with the Alaska Constitution, reviewed that plan for compliance with the VRA, and when its *Hickel* Plan was found to be retrogressive, created its Amended Proclamation Plan that departed from Alaska constitutional requirements to the least degree reasonably necessary to avoid retrogression and obtain preclearance. The Board thoroughly documented its process and made specific findings. No purpose is served by requiring the Board to make individual findings as to the compliance with Alaska constitutional requirements in each separate election district. The Trial Court's finding to the contrary is erroneous and should be overturned.

B. The Superior Court Creates a New Level of Court Review Not Required by This Court and Which Directly Conflicts with the Alaska Constitution.

In addition to erroneously remanding this matter to the Board to make individual specific findings regarding each election district, the Superior Court's order also requires that the Board resubmit a new *Hickel* Plan for approval by the Trial Court before creating its final redistricting plan.⁶⁷ The Superior Court's decision improperly and unnecessarily creates a two-tier standard of review, whereby all redistricting boards must receive prior approval from the Trial Court of its *Hickel* Plan before completing its constitutionally authorized job. Such a process conflicts with the Alaska Constitution and the constitutional authority vested in the Board. Moreover, nothing in this Court's Order requires (or creates) such a two-tiered review process.

The Alaska Constitution grants the redistricting Board the "Herculean" task of redrawing Alaska's House and Senate districts every 10 years.⁶⁸ The Constitution

⁶⁷ Jt. Exc. 688-89.

⁶⁸ Alaska Const. art. VI, § 3.

dictates the House districts must be contiguous, compact, and as nearly as practicable, relatively socio-economically integrated.⁶⁹ The Constitution further dictates the process the Board must follow in creating a new redistricting plan, including timeframes and public input.⁷⁰ The process for challenging redistricting plans is also specifically outlined by the Constitution, requiring any challenges “to compel the Redistricting Board...to perform its duties under this article or to correct any error in redistricting” be filed within thirty days “following the expiration of the ninety-day period specified in this article.”⁷¹ If a plan is deemed invalid, then “the matter shall be returned to the board for correction and development of a new plan.”⁷² In interpreting these provisions, this Court has further mandated that the Board follow the three-step *Hickel* Process.

Nowhere in these detailed constitutional mandates is there any requirement that a redistricting Board submit its *Hickel* Plan (by definition a preliminary plan) for *sua sponte* legal review of all 60 election districts for state constitutional compliance before ultimately drafting and adopting a final plan of redistricting. Nor has this Court ever suggested, let alone required, such a two-tiered review process.

This Court ordered the Board to follow certain procedural steps in adopting its redistricting plan so that courts could adequately carry out their job, and “ensure redistricting satisfies federal law without doing unnecessary violence to the Alaska Constitution.”⁷³ By requiring the Board to first design a *Hickel* Plan that complies with

⁶⁹ *Id.* at § 6.

⁷⁰ *Id.* at § 10.

⁷¹ *Id.* at § 11. If no legal challenges are filed, the redistricting plan goes into legal effect without court review.

⁷² *Id.*

⁷³ S. Ct. Order at ¶ 7.

the Alaska Constitution without regard to VRA requirements, the courts are provided with a “comparison” plan which allows them to determine whether deviation from Alaska constitutional requirements are necessary, and if so, that the *final* proclamation plan deviated from those requirements to the least extent necessary to comply with the VRA. The Superior Court loses sight of this overarching goal, which is the primary purpose of the *Hickel* Process.

Instead, the Superior Court creates a completely new, unprecedented level of court involvement in the redistricting process. Under the Superior Court’s order, a court must pre-approve a Board’s *Hickel* Plan, before the Board can configure and adopt a final redistricting plan.⁷⁴ The Superior Court does not say just how and when this review is supposed to occur in future redistricting cycles. Nor is any such review necessary.⁷⁵

Court review of redistricting plans in Alaska “is meant to ensure that the reapportionment plan is not unreasonable and is constitutional under Article VI, Section 6 of the Alaska Constitution.”⁷⁶ At the same time, this Court has repeatedly “emphasized the need for flexibility so that all constitutional requirements may be satisfied as nearly as practicable.”⁷⁷ The *Hickel* Process mandated by this Court is designed to ensure a proper balance is struck between competing state and federal legal requirements within this flexible framework, not create new and unnecessary court oversight. The Superior

⁷⁴ Jt. Exc. 688-89.

⁷⁵ It is the Board’s final redistricting plan that is subject to challenge, not its *Hickel* Plan. Any state constitutional problems with a *Hickel* Plan would necessarily be reflected in the final plan and subject to review at that time.

⁷⁶ *E.g.*, *Groh*, 526 P.2d at 866-67.

⁷⁷ *In re 2001 Redistricting Cases*, 44 P.3d 141, 149 (Alaska 2002) (Carpeneti, J., dissenting) (*quoting Hickel*, 846 P.2d at 50, *quoting Egan v. Hammond*, 502 P.2d 856, 865-66 (Alaska 1972)). *See also Groh*, 526 P.2d at 875; *Kenai Pen. Borough v. State*, 743 P.2d 1352, 1359 (Alaska 1986).

Court's creation of a two-tier review standard conflicts with both the Alaska Constitution and the constitutional authority vested in the redistricting Board. As such, it is both unnecessary and unwise, and should be reversed.

C. The Trial Court Erroneously Ruled the Board Did Not Comply with this Court's Order of Remand By Failing to Redraw Southeast Alaska.

Without actually reversing its previous decision or finding that House District 32 did not meet the compactness standards of the Alaska Constitution, the Superior Court also found that the Board did not comply with the first step of the *Hickel* Process because it did not redraw the districts in Southeast Alaska.⁷⁸ The Trial Court's decision is erroneous for a number of reasons.

First, the record is clear the districts in Southeast comply with the first step of the *Hickel* Process – to draft a plan that first complies with the Alaska Constitution. The Board specifically found that all of the districts in its Amended Proclamation Plan, including those in Southeast Alaska, met state constitutional requirements.⁷⁹ Accordingly, the Board complied with this Court's Order which made no requirement that the Board redraw districts that already complied with the state constitutional requirements.

Second, the Superior Court misconstrues the record. The Superior Court proceeds from the premise that there were challenges to multiple districts in Southeast Alaska.⁸⁰ Clearly there was not. The only challenge raised regarding any district in Southeast in

⁷⁸ Jt. Exc. at 687-89.

⁷⁹ Jt. Exc. at ¶ 9; Jt. Exc. 31, 173-74 at 51:14-54:7; Jt. Exc. 382-83.

⁸⁰ Jt. Exc. 689 (“This court reiterates that its prior conclusion that the *Southeast districts* were ‘compact enough’ . . . (emphasis added)).

the Proclamation Plan was the City of Petersburg’s challenge to the compactness of House District 32.⁸¹ The Superior Court rejected Petersburg’s challenge via summary judgment, finding the shape of House District 32 was “compact enough” under the constitutional standard for compactness.⁸² While the Superior Court later acknowledged in a footnote in its February 3 Memorandum Decision and Order that it had denied this compactness challenge “in part” based upon the creation of an influence district in Southeast, it also ultimately chose not to disturb its findings on HD-32.⁸³ Nor did this Court find it necessary to take up this issue *sua sponte*, or make any findings that would even suggest the constitutionality of any districts in Southeast are questionable. The Board expressly found its *Hickel* Plan met all Alaska constitutional requirements.⁸⁴ Nothing further is required to comply with the first step of the *Hickel* Process.

Third, the Superior Court did not find that House District 32 (or any other Southeast district) was not compact. Rather, it simply dismissed the Board’s express finding that all the districts in its *Hickel* Plan met state constitutional requirements as “conclusory,” and remanded the plan back to the Board to “draw districts in Southeast Alaska without regard to influence districts or any VRA consideration.”⁸⁵ However, if an election district complies with the requirements of the Alaska Constitution, it is irrelevant whether the Board considered other factors, such as not pairing Native

⁸¹ Org. Jt. Exc. 7, 124-25, 149-163.

⁸² *Id.* In its February 3 Order, the Trial Court summarized its decision as follows: “The Petersburg plaintiffs argued that the Proclamation House 32 was not compact. The Board contended it was compact. The court found that it was compact and granted the Board’s cross motion for summary judgment.” [*Id.* at 7.]

⁸³ *Id.* at 77 n.106, 124-125.

⁸⁴ Jt. Exc. at ¶ 9; Jt. Exc. 173-74 at 51:14-54:7; Jt. Exc. 382-83.

⁸⁵ Jt. Exc. 688-89.

incumbents in the configuration of that district.⁸⁶ It is only when compliance with the VRA requires departure from adherence to Alaska constitutional standards that such considerations become important.

Here, the Board found that all the districts in its *Hickel* Plan complied with the requirements of Article VI, section 6 of the Alaska Constitution. The Superior Court did not conclude otherwise. Its order requiring the Board to redraw Southeast Alaska districts merely to redraw them is without merit and must be reversed.

D. This Court Should Assume Jurisdiction and Approve the Board’s Amended Proclamation Plan as Compliant with the Remaining Steps in the *Hickel* Process.

This Court reviews redistricting plans *de novo* upon the record developed in the Superior Court.⁸⁷ For the reasons outlined above, and as the Board Record makes clear, the Amended Proclamation Plan complies with the first step of the *Hickel* Process as mandated by this Court. The Amended Proclamation Plan also fully complies with the remaining steps in the *Hickel* Process and is otherwise constitutional as established by the record.⁸⁸ The Superior Court never reached this question despite having a complete record before it to make that decision. That same record is before this Court.⁸⁹ Rather than limiting its review to just the Trial Court’s decision on the first step of the *Hickel* Process, the Board requests this Court assume jurisdiction over this matter, review the

⁸⁶ See *e.g.*, *Kenai Pen. Borough*, 743 P.2d at 1358 (court reviews a redistricting plan for reasonableness and constitutionality); *Carpenter v. Hammond*, 667 P.2d 1204, 1214 (Alaska 1983).

⁸⁷ *E.g.*, *Groh*, 526 P.2d at 867.

⁸⁸ Jt. Exc. 1-460, 627-684.

⁸⁹ See Jt. Exc. 1-684; Board Record ARB14793-15389.

objections lodged to the Board's Amended Proclamation Plan, and approve the Amended Proclamation Plan.⁹⁰

As established by the record in this case, the Board adopted its Amended Proclamation Plan, which deviates from the *Hickel* Plan to the least degree reasonably necessary in order to ensure compliance with the VRA, after determining that its *Hickel* Plan was retrogressive⁹¹ and taking a hard look at all its options. The Amended Proclamation Plan, therefore, fully complies with this Court's Order and should be approved by this Court.

1. *The Deviations From The Hickel Plan, Which Resulted In The Amended Proclamation Plan, Were Necessary To Comply With Voting Rights Act Requirements.*

In compliance with this Court's Order, the Board unanimously adopted the Amended Proclamation Plan which is not retrogressive and, to the extent it does not strictly follow the requirements of Article VI, section 6 of the Alaska Constitution, varies to the least degree reasonably necessary to ensure compliance with the VRA.⁹² As set forth in the Board Record and as summarized in its Written Findings, the Amended Proclamation Plan deviates from strict adherence to the Alaska constitutional

⁹⁰ At this juncture, there is no reason for this Court to limit its review to only the first step of the *Hickel* Process. This Court has a complete record before it to decide this matter in its entirety. By reviewing the Board's Amended Proclamation Plan for compliance with the entire *Hickel* Process and adjudicating the various objections lodged against the plan, this Court promotes judicial economy by eliminating the need for additional Superior Court proceedings and additional petitions to this Court.

⁹¹ Jt. Exc. 28-29 at ¶¶ 11-14; Jt. Exc. 201-209 at 40:1-70:6; Jt. Exc. 421-24; Jt. Exc. 195 at 15:3-22.

⁹² Jt. Exc. 37-38 at ¶¶ 39-40; Jt. Exc. 120-366 *passim*.

requirements in the configuration of only two districts: House District 39 and House District 38.⁹³

a. House District 39

In order to create the fifth effective House district required by the VRA, the Board had to relax the compactness and socio-economic integration requirements of the Alaska Constitution in its configuration of House District 39.⁹⁴ The Board had to reconfigure House District 37 in the *Hickel* Plan and unpack the two districts with over 80% Alaska NVAP – House District 39 with 84.22% NVAP – and House District 38 with 82.65% NVAP and spread out the NVAP into other districts in order to meet the requirements of the VRA.⁹⁵ This influenced the resulting configuration of House District 39 in the Amended Proclamation Plan which was created by splitting House District 39 in the *Hickel* Plan and adding the northern portion of that district (including Nome and other traditional Alaska Native villages along the Bering Straits and Norton Sound) with its large concentration of NVAP. The Board then added these areas to a reconfigured *Hickel* House District 37 to create House District 39, an Alaska Native “ability to elect” district with 65.63% NVAP.⁹⁶ In configuring House District 39, the Board departed from Alaska constitutional requirements to the least degree reasonably necessary in order to ensure compliance with the VRA.⁹⁷

⁹³ *Id.* at 38 ¶¶ 39.a & .b; Jt. Exc. 120-366 *passim*.

⁹⁴ *Id.* at ¶ 39.a.

⁹⁵ *Id.* at 30 ¶ 19.a.

⁹⁶ *Compare* Jt. Exc. 395, 399 with Jt. Exc. 41, 89. *See also* Jt. Exc. 14-15. This configuration is very similar to House District 39 in the original Proclamation Plan with some minor population adjustments. [Jt. Exc. 7-8, 14-15; Board Record 6049.]

⁹⁷ Jt. Exc. at 38 ¶ 39.a.

b. House District 38

In order to create the fifth effective House district required by the VRA, the Board also had to relax the socio-economic integration requirements of the Alaska Constitution in its configuration of House District 38.⁹⁸ The resulting configuration of House District 38 in the Amended Proclamation Plan is created by splitting House District 39 in the *Hickel* Plan and adding the southern portion of that district (the Wade-Hampton area), with its large concentration of NVAP, and adding it to the southwest portion of *Hickel* House District 37. This southwest portion includes the Denali Borough and the Ester/Goldstream area of the FNSB.⁹⁹ The resulting district is House District 38, an Alaska Native “ability to elect” district with 45.72% NVAP.¹⁰⁰ In configuring House District 38, the Board departed from Alaska constitutional requirements to the least degree reasonably necessary in order to ensure compliance with the VRA.¹⁰¹

2. *None of the Objections to the Board’s Amended Proclamation Plan Have Merit and Should be Rejected by this Court.*

The various objections filed by the parties and *amici* are meritless and should be

⁹⁸ *Id.* at ¶ 39.b. This required the splitting of House District 39 in the *Hickel* Plan for the same reasons explained above regarding Amended Proclamation Plan House District 39. [*Id.* at 30 ¶ 19.a.]

⁹⁹ The Superior Court held that the Board’s choice of using excess population from the FNSB “was reasonable and could be used in a Native district,” and that “the Board acted reasonably when it selected Fairbanks and specifically Ester/Goldstream as an area from which to take excess population.” [Org. Jt. Exc. at 111 n.164, 132.] This Court did not disturb that ruling.

¹⁰⁰ *Compare* Jt. Exc. 395, 399 with Jt. Exc. 41, 87-88. *See also* Jt. Exc. 15-16. This configuration is very similar to House District 38 in the original Proclamation Plan with some minor population adjustments. [Jt. Exc. 8-9, 15-16; Board Record 6050-51.]

¹⁰¹ Jt. Exc. at 38 ¶ 39.b.

rejected by this Court for the reasons set forth by the Board in the record.¹⁰² The Board has fully complied with all the requirements of this Court’s Order, as established by the Board’s record and findings. Following the mandated *Hickel* Process, the Board (1) designed a *Hickel* Plan that complied with the requirements of the Alaska Constitution;¹⁰³ (2) measured that plan against the requirements of the VRA to determine whether it complies with the VRA, which it did not¹⁰⁴; and thus, (3) adopted a final plan that deviates from the requirements of the Alaska Constitution “to the least degree reasonably necessary to ensure compliance with the Voting Rights Act.”¹⁰⁵ Accordingly, the Board requests this Court reject the filed objections and approve the Board’s Amended Proclamation Plan.

STATEMENT OF RELIEF SOUGHT

The Board respectfully requests this Court grant review and reverse the Superior Court’s decisions that (1) the Board failed to comply with this Court’s Order on remand by not making specific individual findings that each House district complies with the

¹⁰² *Id.* at 627-684.

¹⁰³ *Id.* at 27-28 ¶¶ 1-9.

¹⁰⁴ *Id.* at 28-29 ¶¶ 10-15.

¹⁰⁵ *Id.* at 29-38 at ¶¶ 16-40. While Senate District S in the Amended Proclamation Plan is contiguous by water via Nunivak Island, the Board expressly found that this configuration met the “as nearly as practicable” contiguity requirement of the Alaska Constitution because (1) the absolute contiguity of land masses is impossible in Alaska, considering her numerous archipelagos and islands; and (2) the Article VI, section 6 contiguity requirement for Senate districts is more flexible than for House districts, requiring only that they be “composed as near as practicable of two contiguous House Districts.” [*Id.* at 36 ¶ 32.b; *id.* at 38 ¶ 39.c.] The Board further found that to the extent a court may disagree with the Board’s conclusion, it was required to relax the “as nearly as practicable” contiguity requirement in its configuration of Senate District S to the least degree reasonably necessary to ensure compliance with the VRA. [*Id.* at 38 ¶ 39.c.] No objections were lodged to Senate District S. [*See* Jt. Exc. at 461-626.]

Alaska Constitution; and (2) by not redrawing from scratch the Southeast Alaska election districts. This Court should also reverse the Superior Court's "two-tiered" review process. Based on its *de novo* review of the record, this Court should also reject the lodged objections and find that the Board properly followed the *Hickel* Process and that its Amended Proclamation Plan is constitutional in all respects. Finally, this Court should remand this case to the Superior Court to enter final judgment, affirming the Amended Proclamation Plan.

DATED at Anchorage, Alaska this 1st day of May, 2012.

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CERTIFICATE OF TYPEFACE

Pursuant to Alaska Rule of Appellate Procedure 513.5(c)(2), I hereby certify that the foregoing document was prepared in typeface 13 point Times New Roman.

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of May, 2012, I caused a true and correct copy of the foregoing document to be served via **US Mail and Electronic Mail** on:

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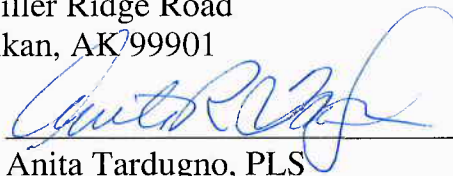
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