IN THE SUPREME COURT FOR THE STATE OF ALASKA

IN RE: 2011 REDISTRICTING CASES	Supreme Court No. S-14721

Trial Court Case # **4FA-11-02209CI**
Consolidated Cases # 4FA-11-2213CI/1JU-11-0782CI

JOINT RESPONSE OF *AMICI CURIAE* ALEUTIANS EAST BOROUGH AND FAIRBANKS NORTH STAR BOROUGH TO THE ALASKA REDISTRICTING BOARD'S PETITION FOR AN ORDER IMPLEMENTING THE PROCLAMATION PLAN (AS AMENDED) AS THE INTERIM REDISTRICTING PLAN FOR THE 2012 ELECTIONS

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

Amici curiae Aleutians East Borough and Fairbanks North Star Borough submit this joint response to the Court's Order to show cause why this Court should not issue "an order requiring that the 2012 elections be conducted using the amended proclamation plan adopted by the redistricting board on 4/5/12 as an interim plan." The Board's Proposed Interim Plan violates the Alaska Constitution and the Board has not demonstrated that deviations from the Alaska Constitution contained in the plan are necessary to comply with the federal Voting Rights Act (VRA). Amici therefore request that this Court either authorize the 2012 elections to be conducted using the 2002 Plan, or appoint Special Masters and adopt an Interim Plan that satisfies state and federal law.

STATEMENT OF FACTS

On March 14, 2012, this Court issued an Order holding that the Board, in drafting its 2011 Initial Plan, failed to employ the methodology for legislative reapportionment prescribed in *Hickel v. Southeast Conference*.[1] The matter was remanded with strict instructions that the Board must reformulate a legislative reapportionment plan according to the *Hickel* process.[2] This Court stated in its Order that, "If the Board is unable to draft a plan that complies with this order in time for the 2012 elections, it may petition this court for an order that the 2012 elections be conducted using the Proclamation Plan as an interim plan."[3] However, this Court indicated that, if the Board did seek implementation

[1] Alaska Supreme Court Order 77, at 3 (quoting *Hickel v. Southeast Conference*, 846 P.2d 38, 51 n.22 (Alaska 1992)).
[2] Alaska Supreme Court Order 77, at 5-6.
[3] Alaska Supreme Court Order 77, at 6.

of its Initial Plan, it "would expect the Board to have modified the Proclamation Plan with respect to House Districts 1 and 2 as ordered by the superior court because those modifications are not contested."[4]

The Board met from March 26–31, 2012 in order to draw a new plan.[5] Staff members were instructed to draft a "*Hickel* Template" that would be the starting point for the creation of a plan that focused only on compliance with the requirements of the Alaska Constitution.[6] Ultimately, the Board adopted its Amended Proclamation Plan ("Amended Plan") in concept on March 31, and formally on April 5, 2012.[7] On March 31, 2012, the Board also adopted a proposed interim plan in the case that litigation prevented implementation of the Amended Plan.[8] That plan is identical to the Board's Initial Plan, except that it purports to correct the constitutional deficiencies that the superior court found in House Districts 1 and 2.[9]

It was not until April 11, 2012 that the Board submitted to the superior court its Notice of Compliance with Order of Remand and Request for Entry of Final Judgment, which asked that the court accept its Amended Plan.[10] The superior court, after considering the various objections filed by the Plaintiffs and amici curiae, issued an order on April 20 holding that the Board did not comply with the letter nor the spirit of the

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[4] Alaska Supreme Court Order 77, at 6, n.16.
[5] Notice of Compliance and Request for Entry of Judgment, at
[6] Written Findings in Support of ARB's Amended Proclamation Plan, at 2.
[7] [Jt. Exc. 36-38 (Written Findings in Support of ARB's Amended Proclamation Plan, at 13, 15).]
[8] [Jt. Exc. 323-324 (Tr. 57:22 – 58:9 (March 31, 2012)).]
[9] [Jt. Exc. 323 (Tr. 54:2 – 57:3 (March 31, 2012)).]
[10] [Jt. Exc. 1-460.]

Hickel process in drawing its Amended Plan, and remanded the matter to the Board with instructions that it must submit to the court a valid *Hickel* plan.[11]

On May 1, 2012 – eleven days following the superior court's April 20, 2012 order –the Board filed a petition with this Court asking it to assume jurisdiction over the matter and to reverse the superior court's decision.[12] On May 3, 2012, the Board filed with this Court an additional petition asking it to accept the Board's proposed interim plan.[13] Consequently, in its Order to Show Cause and Revised Scheduling Order, both dated May 4, 2012, this Court ordered the parties to file memoranda by close of business on May 8, 2012 indicating whether they object to the implementation of the Board's proposed interim plan, and giving the grounds for those objections, if any.[14]

STANDARD OF REVIEW

This Court reviews challenges to legislative reapportionment plans *de novo*,[15] as it would any challenges to regulations promulgated by state administrative agencies,[16] according to the record developed in the superior court.[17] Consequently, this Court's initial inquiries address whether the Board "exceeded the power delegated to it," and whether the Board's actions were "reasonable and not arbitrary."[18] However, this Court has recognized that it has not only the "authority to review the constitutionality of"

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[11] [Jt. Exc. 688-689 (Order Regarding the Board's Notice of Compliance, at 4-5).]
[12] *See* Alaska Redistricting Board's Petition for Review, at 1.
[13] *See* Alaska Redistricting Board's Petition for an Order Implementing the Proclamation Plan (As Amended) as the Interim Redistricting Plan for the 2012 Elections (Petition for Interim Plan).
[14] Order to Show Case, at 1; Revised Scheduling Order, at 1-2.
[15] *Groh v. Egan*, 526 P.2d 863, 867 (Alaska 1974).
[16] *Id.*, 866-67.
[17] *Id.*, at 867.
[18] *Id.*, at 866.

legislative reapportionment plans,[19] but also the "duty to independently measure each district against constitutional standards" when determining whether those plans should be given legal effect.[20]

ARGUMENT

A. This Court Should Not Allow the Board's Proposed Interim Plan or Its Amended Plan to Govern State Elections Because Both Violate the Alaska Constitution, and the Board Cannot Meaningfully Demonstrate That Those Violations Are Made Necessary by the Voting Rights Act.

The gravamen of the Board's argument is that this Court must give legal effect to its proposed Interim Plan because there is at this point "insufficient time before the 2012 election deadlines for the Board to complete the additional work necessary to create a new redistricting plan, obtain judicial approval thereof, and attain Section 5 preclearance of that plan . . . ."[21] However, both law and logic provide that this Court should not give legal effect to any of the Board's plans.

Each of the three plans adopted by the Board violate the requirements of Art. VI, Section 6 of the Alaska Constitution, as well as this Court's decision in *Hickel v. Southeast Conference*, and its Order dated March 14, 2012. This Court has held that the Board's Initial Plan, which was not formulated according to the *Hickel* process, contains constitutional deficiencies that the Board is incapable of defending.[22] Further, this Court has indicated that it is unable to reliably decide whether those constitutional deficiencies

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[19] *Id.*
[20] Alaska Supreme Court Order 77, at 5 (quoting *In re 2001 Redistricting Cases*, 44 P.3d 141, 147 (Alaska 2002) (citations omitted)).
[21] Petition for Interim Plan, at 1.
[22] Alaska Supreme Court Order 77, at 3.

are required by the VRA.[23] This Court has recognized its duty to ensure that government action,[24] as well as legislative reapportionment plans,[25] are constitutional. Because of this duty, the adoption by this Court of any plan with unjustifiable constitutional defects, even if on a temporary basis, would be untenable. This is especially so when there exist other viable options for the implementation of a constitutional plan that involve either zero or minimal risk of disruption to the 2012 elections.

Consequently, this Court should order that the plan currently in place (i.e. the 2002 Plan) must govern Alaska elections until the Board produces a legally enforceable plan. This solution is in accord with recent decisions by courts in other jurisdictions, which have similarly refused to allow unconstitutional plans to govern state elections, and have instead ordered that the current plans shall remain in place until a constitutional final plan is approved. Should this Court decide not to order that the current plan be used for the 2012 elections, it should appoint Special Masters to formulate an interim plan so as to ensure compliance with state and federal law. In both instances in which this Court has substituted a plan of its own as an interim plan, it has produced plans that complied with the requirements of the Alaska Constitution and the VRA within shorter timeframes than those currently faced by this Court.[26]

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[23] *Id.*

[24] *See, e.g., State, Dept. of Health & Social Services v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904, 913 (Alaska 2001).

[25] *In re 2001 Redistricting Cases*, 44 P.3d 141, 147 (Alaska 2002); Alaska Supreme Court Order 77, at 5.

[26] When this Court ordered the drawing of an interim plan as a remedy in *Hickel v. Southeast Conference*, a constitutional interim plan was approved within one month. *Hickel*, 846 P.2d at 62. After this Court found the 1972 Proclamation Plan unconstitutional, a constitutional interim plan was approved within three weeks. *Egan*, 502 P.2d at 865.

1. The Proposed Interim Plan Imports Constitutional Defects from the Initial Plan that the Board Has Not and Cannot Justify.

In its Order dated March 14, 2012, this Court held that the Board failed to follow the process outlined in *Hickel* when drawing its Initial Plan.[27] This Court states in that Order that one consequence of the Board's failure is that it was unable to "meaningfully demonstrate that the Proclamation Plan's Alaska constitutional deficiencies were necessitated by Voting Rights Act compliance . . . ."[28] The Order also makes clear that another consequence of the Board's failure to follow the *Hickel* process was that this Court was rendered unable to "reliably decide" whether the constitutional deficiencies in the Board's plan were justified by the VRA.[29]

Although this Court concluded that the Board was unable to justify the Initial Plan's constitutional deficiencies, it declined to decide the vast majority of the constitutional issues raised by the parties.[30] Instead, it afforded the Board an opportunity to redraw its plan according to the *Hickel* process, reasoning that "the new plan . . . may moot the claims raised in this case . . . ."[31] However, because this Court has indicated that it cannot make a reliable determination as to whether the plan's Alaska Constitutional defects are mandated by the VRA, and has accordingly declined to decide whether the plan is constitutional, the result is that the Initial Plan remains unconstitutional pursuant to the superior court's February 3, 2012 order.[32]

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[27] Alaska Supreme Court Order 77, at 3.
[28] Alaska Supreme Court Order 77, at 3.
[29] *Id.*
[30] *Id.*, at 6.
[31] *Id.*
[32] [Org. Jt. Exc. 1-236.]*See* Memorandum Decision and Order Re: 2011 Proclamation Plan.

The Board admits that its proposed Interim Plan "is essentially the original Proclamation Plan with the same minor adjustments to the House districts within the FNSB as in the Amended Proclamation Plan."[33] The Board states that its proposed Interim Plan differs from the Initial Plan only with respect to the five House Districts contained within the FNSB;[34] therefore, it follows that the remaining 35 House Districts are identical to their counterparts in the Initial Plan.

As such, the proposed Interim Plan is unconstitutional. The Alaska Constitution provides a mandate (i.e. constitutional requirements) for the established size and areas of House Districts during redistricting:

> The Redistricting Board shall establish size and areas of house districts, subject to the limitations of this article. Each house district shall be formed of contiguous and compact territory containing as nearly as practicable a relatively integrated socio-economic area. Each shall contain a population as near as practicable to the quotient obtained by dividing the population of the state by forty. Each senate district shall be composed as near as practicable of two contiguous house districts. Consideration may be given to local government boundaries. Drainage and other geographic features shall be used in describing boundaries wherever possible.[35]

It is well settled that the above referenced constitutional requirements must be met.[36]

Superior Court Judge Michael P. McConahy ruled that certain proposed House Districts established in the Redistricting Board's Initial Plan were not compact, contiguous or relatively integrated socio-economic areas.[37] For instance, Judge

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[33] Petition for Interim Plan, at 8.
[34] *Id.*
[35] Alaska Constitution Art. VI, Sec. 6.
[36] *Hickel v. Southeast Conference*, 846 P.2d 38, 44-45 (Alaska 1992).
[37] Despite finding that the Redistricting Board did not have to follow the *Hickel* mandate, Judge McConahy found substantial and significant violations of Art. VI, Sec. 6. [Org. Jt. Exc. 1-236.]

McConahy determined that proposed House District 37 was neither compact nor contiguous,[38] and that House District 38 was not socio-economically integrated.[39]

The Redistricting Board's newly proposed Interim Plan is, as stated above, the same in every detail as the Initial Plan except for some adjustments and modifications in the Fairbanks area. In other words, Judge McConahy's findings and rulings have not been corrected by the Board, yet the Board seeks this Court's blessing to use an almost identical map in the interim.

Finally, the only argument available to the Board to justify not strictly adhering to the *Hickel* mandate and Art. VI, Sec. 6, is a Voting Rights Act requirement. Unfortunately, because the Board failed to comply with the Hickel mandate and with Art. VI, Sec. 6, there is no possibility of measuring the proposed Interim Plan against the Voting Rights Act.

B. The Court Should Either Order the 2002 Plan be Used for the 2012 Elections or Implement an Interim Plan of its own.

Although the Board has indicated that the need for expediency has made this Court's adoption of the proposed Interim Plan or the Amended Plan the only viable options,[40] that assertion is incorrect. As previously explained, each of the Board's plans contains constitutional deficiencies that, because of the Board's failure to properly follow the *Hickel* process, cannot be justified. Further, the Board's flawed process has

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[38] [Org. Jt. Exc. 165-185; 186-197.]Under the First Proclamation Plan, House District 37 included all of the western Aleutian Islands and Bethel among other Deltas and Islands (interestingly the issue of whether the proposed House District was a relatively integrated socio-economic area was never raised, but obviously remains lurking as an unresolved issue).

[39] [Org. Jt. Exc. 148.]

[40] Petition for Interim Plan, at 8; Petition for Review, at 5-8.

compromised this Court's ability to itself determine whether those constitutional defects are made necessary by federal law, and therefore permissible.

The options that the Board offers this Court amount to nothing more than a Hobson's Choice. According to the Board, this Court must either adopt the Board's unconstitutional and noncompliant proposed Interim Plan, or it must adopt the Board's unconstitutional and noncompliant Amended Plan. This amounts to no choice at all, considering that the implementation of any of the Board's plans would run directly counter to this Court's self-recognized duty to ensure that only constitutional laws are permitted to govern Alaska's people.[41] Further, the implementation of any plan that has never, and can never, be demonstrated to be constitutional would be especially untenable when there exist other viable options that do far less violence to the Alaska Constitution, and do far more to provide for the fair and equal representation of Alaskans.

Because the Board has demonstrated that it is unable to produce a constitutional plan without causing unreasonable disruption to the 2012 election cycle, this Court should relieve the Board of any responsibility for drafting an interim plan, and should instead order the 2012 elections be held using a plan that has been shown to comply with both state and federal law. It is this course that the Court has chosen in each of the two previous instances that it has found itself faced with an unconstitutional plan under essentially identical circumstances. Importantly, both instances resulted in a constitutional solution.

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[41] *State, Dept. of Health & Social Services v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904, 913 (Alaska 2001); *Malone v. Meekins*, 650 P.2d 351, 356 (Alaska 1982).

This Court has at least two choices for the 2012 elections. First, although this Court has typically opted to create a new interim plan using Special Masters, there exist particular factors in this case demonstrating that the easiest would be for this Court to order that the Current Plan in effect shall govern Alaska's 2012 elections. Not only has the Current Plan already been found by this Court to meet the requirements of the Alaska Constitution, the exercise of this option would alleviate any concerns that the interim plan might not obtain Section 5 preclearance; the plan is in effect and has already received DOJ approval. Additionally, it would allow this Court to avoid completely the modification of current elections deadlines and the associated problems outlined by the Division of Elections its April 27, 2012 Notice to the Court, and would thereby best ensure the orderly execution of Alaska's 2012 state elections.

Second, if this Court decides not to implement the Current Plan, it should nonetheless exercise its authority to appoint Special Masters to draw an interim plan. A review of the instances in which this Court has seen fit to do so reveals that special masters have reliably produced reports that are demonstrably constitutional within similar time constraints and with the need for only minimal adjustments to the state election cycle.

1. This Court's Best Option for Ensuring that State Elections Are Not Jeopardized is to Implement the Current Legislative Plan as the Interim Plan.

The best option currently available to this Court is to simply order that the Current Legislative Plan shall be extended through 2012. First, the fact that the Current Plan meets the Art. VI, Section 6 requirements of the Alaska Constitution has already been

confirmed. This is demonstrated by the fact that, after reviewing the Current Plan, this Court affirmed the superior court's determination that it was constitutional.[42]

Second, the Current Plan can be immediately and seamlessly implemented, and therefore provides what may be the only valid option that would allow this Court to leave the 2012 elections schedule fully intact.

Third, because it has already been approved, implementation of the Current Plan would alleviate the need for Section 5 preclearance, and would therefore completely prevent the risk that DOJ might lodge objections, requiring that the plan be modified and resubmitted.

Fourth, use of the Current Plan in the interim accords with recent decisions by courts in other jurisdictions. For example, on January 25, 2012, the Pennsylvania Supreme Court issued an order related to the litigation in *Holt v. 2011 Legislative Reapportionment Com'n* holding that the state's 2011 Reapportionment Plan was "contrary to law," remanding the plan to the state's Legislative Reapportionment Commission, and ordering that the "2001 Legislative Reapportionment Plan . . . shall remain in effect until a revised final 2011 Legislative Reapportionment Plan having the force of law is approved."[43]

Similarly, the Kentucky Supreme Court recently held in *Legislative Research Com'n v. Fischer* that, because the state's proposed legislative reapportionment plan was

[42] *In Re 2001 Redistricting Cases*, 47 P.3d 1089, 1090 (Alaska 2002).
[43] Pennsylvania Supreme Court Order, *Holt v. Legislative Reapportionment Comm'n*, at 5 (January 25, 2012) (quoting *Albert v. 2001 Legislative Reapportionment Comm'n*, 790 A.2d 989, 991 (Pa. 2002)).

unconstitutional, elections must proceed under the previous 2002 reapportionment plan.[44] Although the commission argued that the decennial census data demonstrated that the 2002 districts were malapportioned and did not currently comply with the state constitution, and that the proposed plan should therefore take effect until a constitutional plan could be developed,[45] the court rejected the commission's argument, stating that the 2002 districts were "the only legislative districts capable of implementation at this juncture."[46]

Admittedly, none of the options presented to the Court is perfect; however, the only issue with the 2002 Plan is numerical equality.[47] It is a plan that both this Court and DOJ have approved as assuring that each area of the state is able to elect a legislator representing its interests.[48] It does not have the constitutional questions that the Interim and Amended Plans have; it does not require Division of Elections to redraw districts on short notice; no candidate filing deadlines have to be moved; the campaign season will not be shortened; the Court will not have to move an election deadline (all of which requires preclearance);[49] and, deadlines for the mailing of overseas ballots will be complied with.[50] Importantly because of the outmigration from rural areas, Native representation is actually increased, not decreased, if the Current Plan remains in place;

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[44] *Legislative Research Comm'n v. Fischer*, --- S.W.3d ----, at *7-*10 (Ky. 2012).
[45] *Id.*
[46] *Id.*
[47] [Org. ARB Exc. 1001.]
[48] *In re 2001 Redistricting Cases*, 47 P.3d 1089 (Alaska 2002).
[49] 28 CFR § § 51.2 & 51.13(k).
[50] The Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) and the Military and Overseas Voter Empowerment Act (MOVE) amendments to UOCAVA now require the Division to send ballots to overseas and military voters **45 days prior to an election**. That date falls on July 14 for this year's primary election. (See 42 U.S.C. 1973ff-6 and A.S. 15.15.020).

the Native effective districts are under-populated according to the 2010 U.S. Census data.[51] While it is not a perfectly proportional plan, it is a plan that offers voters appropriate representation as explained by this Court:

> [W]e should not lose sight of the fundamental principle involved in reapportionment—truly representative government where the interests of the people are reflected in their elected legislators. Inherent in the concept of geographical legislative districts is a recognition that areas of a state differ economically, socially and culturally and that a truly representative government exists only when those areas of the state which share significant common interests are able to elect legislators representing those interests. Thus, the goal of reapportionment should not only be to achieve numerical equality but also to assure representation of those areas of the state having common interests.[52]

2. If this Court Declines to Allow the Current Legislative Plan to Govern the 2012 Elections, It Should Order the Creation of an Interim Plan by Special Masters.

This Court's other choice is to order the creation of an interim plan by Special Masters. Although the exercise of this option would likely require that the current 2012 election schedule be altered, in each of the two cases in which this Court has appointed Special Masters for this purpose, that alteration has been minimal. Further, while the interim plan would be subject to Section 5 preclearance requirements, history demonstrates this Court's ability to oversee the production of interim plans that not only comply with the requirements of Alaska law, but also obtain DOJ approval without objections.

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[51] [Org. ARB Exc. 1001.]

[52] *Hickel v. Southeast Conference*, 846 P.2d at 46 (citing *Groh v. Egan*, 526 P.2d 863, 890 (Alaska 1974)(Erwin, J., dissenting)).

In both *Egan*[53] and *Hickel*,[54] this Court rejected the adoption of unconstitutional Proclamation Plans, and instead of remanding the matter to the Governor, ordered the creation of an interim plan overseen by the courts. In addition to showing that this Court's policy has typically been to order the drawing of an interim plan under court oversight under similar circumstances, *Egan* and *Hickel* also demonstrate that this option has always produced constitutional and VRA-compliant plans with minimal disruption to the state election cycle. For example, in *Egan*, this Court Ordered that it would oversee the drawing of an interim plan on May 24,[55] and issued that plan three weeks later on June 14.[56] Because the filing deadline for candidates was May 31, this Court initially extended that deadline to June 15, 1972 and then further extended it to June 30, 1972.[57] Although the State did challenge certain aspects of the interim plan, this Court upheld the plan as constitutional.

Similarly, in *Hickel*, this Court first ordered the superior court to oversee the drawing of an interim plan on May 28, 1992.[58] Because the filing deadline for candidates was set for June 1 of that year, the superior court ordered that the deadline be extended until June 26, and later extended the primary date from August 25 to September 8.[59] The superior court initially approved the Masters' plan three weeks later on June 18 and 19

[53] *Egan v. Hammond*, 502 P.2d 856 (Alaska 1972).
[54] 846 P.2d 38 (Alaska 1992).
[55] *Egan*, 502 P.2d at 865.
[56] *Id.*
[57] *Id.*, at 864 n.6.
[58] *Hickel*, 846 P.2d at 43-44.
[59] *Id.*, at 64.

with modifications.[60] This Court ordered the implementation of the plan, with modifications, on June 25.[61]

Further, history shows that plans created by Special Masters and overseen by the Alaska judiciary are capable of achieving Section 5 preclearance. Alaska was not required to obtain Section 5 preclearance for its legislative reapportionment plans until after *Egan* was decided.[62] However, by the time this Court issued its Opinion in *Hickel*, federal law did include Alaska among those jurisdictions that were subject to the preclearance requirements of the VRA.[63] DOJ appears to have granted preclearance approximately two weeks after this Court's adoption of the 1992 interim plan, on July 8.[64]

While it is true that the 1992 interim plan did not receive Section 5 preclearance until after the filing of declarations of candidacy, what is most important is that the court-overseen interim plan was cleared by DOJ. This confirms that Special Masters are particularly suited for the task of drafting interim plans that satisfy the requirements of all applicable state and federal laws, including the VRA, and that this is especially so when the courts monitor the process from beginning to end. Thus, in overseeing the formulation of an interim plan to govern the 2012 elections, this Court will without question be capable of predicting and preventing any objections by DOJ during the preclearance process.

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[60] *Id.*, at 44.
[61] *Id.*
[62] *See* 40 Federal Register 49422 (October 22, 1975).
[63] *Id.*
[64] *See Voting Rights In Alaska: 1982-2006*, 17 S. Cal. Rev. L. & Soc. Just. 79, 124 (Fall 2007).

a. This Court Has the Authority and the Duty to Reject the Board's Plans and to Adopt an Interim Plan of Its Own.

This Court has on two previous occasions found it necessary to reject unconstitutional Proclamation Plans, and to instead order the implementation of a plan of its own.[65] The reluctance of this Court to substitute its own plan, even if for the interim, was clear in both instances.[66] That reluctance is understandable, given the questions regarding separation of powers attaching to that exercise of judicial power. Superior Court Judge Larry Weeks, who was charged by the *Hickel* Court with the responsibility of overseeing the creation of an interim plan, provided an eloquent description of the tension resulting from judicial involvement in the legislative reapportionment process, as well as the reasons why that involvement is not only authorized, but also at times unavoidable.[67]

Judge Weeks explained that the authors of the Alaska Constitution foresaw the need for court review of legislative reapportionment, and accordingly vested in Alaska's judiciary the authority to compel the correction of flawed proclamation plans.[68] Judge Weeks quoted the chair of the reapportionment committee for the Alaska Constitutional Convention, who reported to the convention that legislative reapportionment provisions in the Alaska Constitution were intended to:

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[65] *See Egan v. Hammond*, 502 P.2d 856 (Alaska 1972); *Hickel v. Southeast Conference*, 846 P.2d 38 (Alaska 1992).
[66] *See Egan*, 502 P.2d at 865; *Hickel*, 846 P.2d at 63 (Justices Burke and Moore, dissenting in part).
[67] *Hickel*, 846 P.2d at 65-66.
[68] *Id.*, at 65-66. *See also* Alaska Const. Art. VI, Sec. 11.

> set up very, very careful standards and limiting factors so that the Governor and the Board will not run away and will be acting within limits–within clear limits–and are not given wide discretion.[69]

Judge Weeks further explained that:

> Judicial review of government action necessarily involves courts making decisions about executive or legislative acts. In many other states, state courts have drafted legislative reapportionment plans. Many federal courts have rewritten plans to meet the requirements of the Voting Rights Act. Federal courts run school districts. In over 40 states, including Alaska, state corrections systems are run by court order. Courts regularly amend or void fish and game regulations and season and bag limits. Courts make detailed changes in utilities regulations and tariffs and a variety of other executive branch matters.
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> Whether or not the above is always good public policy, there is no doubt that it is within the legal power of the court to remedy unconstitutional and illegal situations by framing short-term solutions.
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> Court involvement in an interim reapportionment plan is less intrusive and more naturally a part of the judicial process than court involvement in such areas as running corrections systems. Courts writing an interim reapportionment plan have no day-to-day supervision or control over an on-going process. There is but one decision to make and making that one-time decision is what courts are best able to do.[70]

This explanation, when considered in light of this Court's decisions in *Egan* and *Hickel*, demonstrates that while it is true that Alaska's judiciary may endeavor to refrain from encroaching upon the demesnes of the other branches of state government,[71] the reality is that there exist circumstances in which this Court's direct involvement is unavoidable. As this Court has itself expressly recognized in relation to the Board's

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[69] *Hickel*, 846 P.2d, at 65 (quoting 3 Proceedings, Constitutional Convention, at p. 1839.

[70] *Id.*, at 66 (citations omitted).

[71] *See, e.g., Ship Creek Hydraulic Syndicate v. State, Dept. of Transp. and Public Facilities*, 685 P.2d 715, 717-18 (Alaska 1984) (citing *Dunlop v. Backowski*, 421 U.S. 560 (1975) (Overruled in Part by *Local No. 82, Furniture and Piano Moving, Furniture Store Drivers, Helpers, Warehousemen and Packers v. Crowley*, 467 U.S. 526 (1984)).

Initial Plan,[72] and in other decisions,[73] such circumstances exist when a law or some other form of government action violates the Alaska Constitution.

For example, this Court has stated that, "Under Alaska's constitutional structure of government, 'the judicial branch . . . has the constitutionally mandated duty to ensure compliance with the provisions of the Alaska Constitution, including compliance by the legislature.'"[74] In those instances, Alaska's courts "ha[ve] *not only the power but the duty* to strike" laws or other government actions that are found unconstitutional.[75]

This Court has already held that the Initial Plan contains Alaska constitutional defects, that the Board's failure to apply the *Hickel* process when formulating the plan has made the Board incapable of proving that those defects are justified, and that this Court is itself unable to reliably make that determination.[76] The Board does not contest the fact that it simply imported 35 of the 40 House Districts from its constitutionally defective Initial Plan into its proposed Interim Plan,[77] and 36 of those districts into its Amended Plan.[78] It is similarly uncontested that the proposed Interim Plan was drafted without regard for the *Hickel* process. Both the record on remand and the superior court's recent Order make it clear that the Board did not properly apply the *Hickel* process when drafting its Amended Plan. The result is that neither the Board nor this

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[72] Alaska Supreme Court Order 77, at 5.
[73] *State, Dept. of Health & Social Services v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904, 913 (Alaska 2001); *Malone v. Meekins*, 650 P.2d 351, 356 (Alaska 1982).
[74] *State v. Planned Parenthood of Alaska, Inc.*, 28 P.3d at 913 (quoting *Malone*, 650 P.2d at 356).
[75] *Id.*, at 913 (emphasis added).
[76] Alaska Supreme Court Order 77, at 3.
[77] Alaska Redistricting Board's Petition for Review, at 3
[78] Alaska Redistricting Board's Petition for an Order Implementing the Proclamation Plan (As Amended) As the Interim Redistricting Plan for the 2012 Elections, at 3

Court is capable of justifying the deviations from the Alaska Constitution contained in each of these plans, which were both inherited from the Initial Plan and newly created by the reformation of the FNSB districts.[79]

For these reasons, this Court should reject each of the Board's legislative reapportionment plans, which have not, and cannot, be proven constitutional. Instead, this Court should once again exercise its authority to implement an interim plan of its own.

b. This Court Has Exercised Its Authority to Substitute Its Own Plan When Time Constraints Have Threatened to Unreasonably Disrupt the State Election Schedule.

When time constraints have made it unlikely that the political or administrative process will yield a constitutional reapportionment plan in a time sufficient to prevent the unreasonable disruption of state elections deadlines, this Court has consistently ordered the implementation of an interim plan of its own. For example, in *Egan*, this Court substituted its own interim plan when it found itself faced with looming elections deadlines almost identical to those faced today.[80] There, after the superior court ordered that the 1971 Proclamation Plan must be sent back to the Governor and the Advisory Reapportionment Board to correct its constitutional defects, both the plaintiffs and the defendants petitioned this Court for review on April 26.[81] Mindful that the filing date for candidates that year was May 31,[82] this Court accelerated the briefing schedule, and

[79] Alaska Supreme Court Order 77, at 3.
[80] *Egan*, 502 P.2d at 864.
[81] *Id.*
[82] *Id.*, at 864 n.6.

ordered the scheduling of oral arguments on May 23.[83] With the filing deadline for State elections approximately one week away, this Court, finding the Governor's Proclamation Plan to be unconstitutional, ordered that it would implement its own interim plan.[84]

Similarly, in *Hickel*, the superior court did not hold that portions of the Governor's Proclamation Plan were unconstitutional until May 11.[85] On May 28, less than one week before the June 1 filing deadline, this Court issued its Order rejecting the Proclamation Plan as unconstitutional.[86] In a separate Order issued that same day, this Court "directed the superior court to remand the case to the Board for formulation of a final plan.[87] However, instead of instructing the Governor and the advisory board to formulate an interim plan, this Court ordered that it would implement its own interim plan, and explained that its decision was made necessary "because of time constraints."[88]

As was the case in both *Egan* and *Hickel*, this Court again finds itself faced with a looming filing deadline set for less than one month from the date of this Memorandum.[89] In addition, the Division of Elections has indicated that district boundaries must be in place by May 14, which is less than a week from the date set for oral argument in this matter.[90] Both *Egan* and *Hickel* demonstrate that the noncompliance of proposed plans with Alaska law and the presence of severe time constraints have alone been sufficient to cause this Court to order the implementation of some other interim plan. The

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[83] *Id.*
[84] *Id.*, at 865.
[85] *Hickel*, 846 P.2d at 63.
[86] *Id.*
[87] *Id.*, at 44, 66.
[88] *Id.*, at 44.
[89] AS 15.25.040(a)(1).
[90] *See* Notice to Court Regarding Elections Deadlines (April 27, 2012).

circumstances surrounding the present matter are no exception, and in fact present additional factors that further necessitate the Court's exercise of this option.

In *Hickel*, Justices Burke and Moore, dissenting from this Court's May 28, 1992 Order, stated their opinion that Alaska's courts should not develop interim plans "unless and until it becomes clear that the governor is either unwilling or unable to develop a proper plan within the time that is available."[91] The present circumstances demonstrate that this is now the case. First, the Board has admitted that it is unable to formulate another plan that complies with the Alaska Constitution, the Voting Rights Act, and the *Hickel* process within sufficient time to prevent the unreasonable interference with 2012 state elections.[92] Second, the Board's failure to comply with this Court's Order that it redraw its Proclamation Plan according to the *Hickel* process indicates the Board's unwillingness to do so. It is therefore not merely appropriate, but necessary that this Court reject the Board's plans, and implement an interim plan of its own.

CONCLUSION

The Court must deny the Board's Petition to implement its proposed Interim Plan. The Board's self-induced time crunch does not justify the implementation of a plan that has not been proven to meet state and federal law requirements. The Court should order that the 2012 elections be conducted using a plan that provides the voters with the ability to elect legislators capable of truly representing their respective interests.

DATED at Anchorage, Alaska this 8th day of May, 2012.

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[91] *Hickel*, 846 P.2d at 63.
[92] Petiton for Interim Plan, at 1.

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