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In Re 2011 REDISTRICTING CASES:

Supreme Court No. S-14721
CLERK, APPELLATE COURTS

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Superior Court Case No. 4FA-11-2209 CI
Consolidated Cases
4FA-11-2213 CI
1JU-11-0782 CI

PETITIONS FOR REVIEW FROM THE SUPERIOR COURT,
FOURTH JUDICIAL DISTRICT AT FAIRBANKS
THE HONORABLE MICHAEL P. MCCONAHY, PRESIDING

**RESPONSE BRIEF OF AMICUS CURIAE ALEUTIANS EAST BOROUGH
RE: SUPERIOR COURT'S REMAND ORDER OF
APRIL 20, 2012**

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ALASKA CONSTITUTION

Alaska Const. art. VI, § 6

The Redistricting Board shall establish the size and area 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.

INTRODUCTION

Amicus Curiae Aleutians East Borough (“AEB” or “the Borough”), through its attorneys, LEVESQUE LAW GROUP, L.L.C.,¹ pursuant to this Court’s Corrected Revised Scheduling Order dated May 7, 2012, responds to the Alaska Redistricting Board’s (“the Board” or “2011 Board”) Petition for Review dated May 1, 2012 (“Petition”) of the Superior Court’s Order of April 20, 2012 (“Order”). In its response, the Borough incorporates by reference as if fully stated herein objections filed with the Superior Court on April 16, 2012.²

ARGUMENT

The focus of the Board’s argument in its Petition for Review is that the superior court erroneously held that “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 election districts.”³ However, the Board appears to miss the central component of the Superior Court’s Order, which is that the Board failed to comply with the *Hickel* Process on remand because it did not begin by drawing a plan focused solely on compliance with the Alaska Constitution.⁴

¹ Filed concurrently is AEB’s Notice of Change of Law Firm and Address.

² See “Amicus Curiae Aleutians East Borough’s Objections to Alaska Redistricting Board’s April 5, 2012 Proclamation Plan,” dated April 16, 2012, Jt. Exc. 615. A copy is attached hereto for ease of reference.

³ Petition for Review, at 1.

⁴ Jt. Exc. 686-87; 689.

Each of the Plaintiffs and amici curiae argued in their objections to the Board’s April 10, 2012 Notice of Compliance With Order of Remand and Request for Entry of Final Judgment, that the Board did not in fact comply with the *Hickel* Process in the formulation of its Amended Proclamation Plan.⁵ As AEB explained to the Superior Court in its own objections, this is because the Board did not comply with this Court’s instruction that, on remand, the Board was to “first design a plan focusing on compliance with the article VI, section 6 requirements of contiguity, compactness, and relative socio-economic integration”⁶ Instead, the Board simply transcribed into its “*Hickel* Plan” all but four of the districts contained in its unconstitutional Initial Plan.⁷ Because those 36 districts were drawn only after the Board had already claimed population and territory for the districts that were drawn for the sole purpose of VRA compliance, it follows that each of those districts was “necessarily influenced by and subject to the shape and composition of those districts created” to satisfy the VRA.⁸

Although the Superior Court did order the Board to submit to it a redistricting plan that has been drawn solely for the purposes of the Alaska Constitution, as well as more detailed findings of fact supporting that plan,⁹ that order was made necessary in order to prevent further situations in which the Board submits a plan that cannot be demonstrated to constitutional. The making of specific findings is itself not required under *Hickel* or by this Court’s Order. This portion of the superior court’s order was almost certainly

⁵ Jt. Exc. 685-86.

⁶ Alaska Supreme Court Order 77, at 3-4.

⁷ See Jt. Exc. 619-20; Tr. 40:11 – 46:22 (March 26, 2012).

⁸ Jt. Exc. 619-20.

⁹ Jt. Exc. 688-89.

meant to address the fact that, as a consequence of the Board's failure to produce a plan according to the process outline in *Hickel*, both the Superior Court and this Court have been unable to "reliably decide the preliminary question of state constitutionality on the instant record."¹⁰ That inability has been exacerbated by the fact that the Board's findings in each case have made it even more difficult to determine whether its plans "compl[y] with the Alaska Constitution's requirements . . . to the greatest extent possible."¹¹

Further, the Board is incorrect in its claim that the Superior Court's Order "creates a new level of court review" that, if allowed to stand, will require every subsequent redistricting board to receive prior approval of its *Hickel* Plan from the Superior Court.¹² There is simply nothing in the Superior Court's Order that even remotely indicates that its instructions on remand are intended to apply to any Board other than the current one.

In addition, the Superior Court's Order was in all respects proper. The Alaska Constitution vests the superior court with not only the authority, but also the duty to review and make corrections to the reapportionment process when it is conducted in error.¹³ In light of the fact that the Board has now adopted two Proclamation Plans under an erroneous methodology that cannot be demonstrated to comply with the Alaska Constitution, it was proper for the Superior Court to order modifications to the Board's

¹⁰ Jt. Exc. 687; Alaska Supreme Court Order 77, at 3

¹¹ Alaska Supreme Court Order 77, at 4.

¹² Petition for Review, at 14.

¹³ Alaska Constitution, article VI, section 11; *Hickel*, 846 P.2d at 65-66; *In re 2001 Redistricting Cases*, 44 P.3d 141, 147 (Alaska 2002) (citations omitted).

¹³ Petition for Interim Plan, at 1.

process in order to increase the chance that the next plan will meet the requirements of state and federal law.

Conclusion

For the foregoing reasons, the Borough respectfully requests that this Court deny the Board's Petition and affirm Superior Court Judge McConahy's Order remanding this matter back to the Board.

DATED this 8th of May, 2012.

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APR 17 2012

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

PATTON BOGGS LLP

FOURTH JUDICIAL DISTRICT AT FAIRBANKS

IN RE: 2011 REDISTRICTING CASES

Case No. 4FA-11-2209CI (consolidated)

4FA-11-2213CI

1JU-11-00782CI

AMICUS CURIAE
ALEUTIANS EAST BOROUGH'S
OBJECTIONS TO ALASKA REDISTRICTING BOARD'S
APRIL 5, 2012 PROCLAMATION PLAN

The Aleutians East Borough ("the Borough"), through its attorneys, WALKER & LEVESQUE, L.L.C., hereby submits its objections to the Alaska Redistricting Board's ("the Board" or "2011 Board") April 5, 2012 Proclamation Plan. The Borough's objections are submitted pursuant to this Court's Order dated April 12, 2012.

Factual and Procedural Background

When the Borough first made submissions to this Court as amicus curiae in the litigation surrounding the Board's initial 2011 Proclamation Plan ("Initial Plan"), its primary concern was that the plan fractured the Borough's municipal boundaries by removing the City of Akutan ("Akutan") from the legislative district in which the rest of the Borough is situated. The result of that fracture was that Akutan and the remainder of the Borough were not united within the same House and Senate districts, as they had been since the Borough's incorporation.

Following the January 2012 trial, this Court held that portions of the Board's Initial Plan violated the Alaska Constitution, and in regard to some

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districts, that those violations were not made necessary by the requirements of the federal Voting Rights Act ("VRA").¹ The Board and other parties appealed this Court's decision to the Alaska Supreme Court, which held, inter alia, that the Board failed to apply the methodology that the Supreme Court prescribed for the redistricting process in *Hickel v. Southeast Conference*.² The Supreme Court further found that, "Because it did not follow the *Hickel* process, the Board cannot meaningfully demonstrate that the Proclamation Plan's constitutional deficiencies were necessitated by VRA compliance, nor can we reliably decide that question."³ Consequently, the Supreme Court remanded the issue with instructions for the Board to produce a Proclamation Plan using the methodology outlined in *Hickel*.⁴

On April 5, 2012, the Board issued a new Proclamation Plan ("Amended Plan"),⁵ and filed with this Court its Notice of Compliance and Request for Entry of Judgment.⁶ Although the Amended Plan does reunite the Aleutian Chain, and does resituate Akutan within the same House and Senate districts as the remainder of the Borough, the Amended Plan has raised new issues. Foremost among these is the fact that the Amended Plan pairs the Aleutian Chain with the City of Bethel ("Bethel"), an area with which the Borough has little or no socio-economic integration, in order to create a new House District 37. Furthermore,

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¹ Memorandum Decision and Order Re: 2011 Proclamation Plan, at 134-36.

² 846 P.2d 38 (Alaska 1992).

³ Alaska Supreme Court Order 77, at ¶ 7.

⁴ *Id.*, at ¶ 11.

⁵ See Proclamation of Redistricting, April 5, 2012.

⁶ See *In Re 2001 Redistricting Cases*, Notice of Compliance With Order of Remand and Request for Entry of Final Judgment, April 10, 2012.

the pairing under the Amended Plan is neither compact nor contiguous. Consequently, District 37 does not meet Alaska constitutional standards, and the VRA does not justify its variance from the Alaska Constitution, because the deviations resulting in District 37 are greater than that reasonably required to comply with the VRA. The Amended Plan does not comply with the Supreme Court's direction that the Board "adopt a redistricting plan that includes the *least* deviation reasonably necessary to satisfy the Act, thereby preserving the mandates of the Alaska Constitution to the greatest extent possible."⁷

The Amended Plan's unjustifiable constitutional defects are a result of the Board's failure to properly apply the methodology prescribed by the Alaska Supreme Court in *Hickel* and reiterated in the Supreme Court's recent Order. Because the *Hickel* methodology was not properly followed, the Amended Plan does not meet the standards of the Alaska Constitution and applicable case law, and does not comply with the Supreme Court's direction that redistricting plans must "preserv[e] the mandates of the Alaska Constitution to the greatest extent possible."⁸

A. The Record on Remand Demonstrates that the Board Failed to Properly Apply the Methodology Outlined in *Hickel*, and Further Explained by the Alaska Supreme Court's Order.

In its recent Order dated March 14, 2012, the Alaska Supreme Court explained that in *Hickel*, the Court

⁷ Alaska Supreme Court Order 77, at ¶ 11 (emphasis added).

⁸ *Id.*

cautioned that while compliance with the Voting Rights Act takes precedence over compliance with the Alaska Constitution, "[t]he Voting Rights Act need not be elevated in stature so that the requirements of the Alaska Constitution are unnecessarily compromised."⁹

The Supreme Court further explained that in *Hickel* it "described the process the Board must follow to ensure that our constitutional redistricting principles are adhered to as closely as possible."¹⁰ That process is as follows:

After receiving the decennial census data, "[t]he Board must first design a reapportionment plan based on the requirements of the Alaska Constitution. That plan then must be tested against the Voting Rights Act. A reapportionment plan may minimize article VI, section 6 requirements when minimization is the only means available to satisfy Voting Rights Act requirements."¹¹

In its Order the Court described the Board's process, and the procedural errors that led to the Initial Plan's noncompliance with Alaska law. The Court noted that the Board "began redistricting . . . by focusing on complying with the Voting Rights Act, thereby ignoring the process we mandated in *Hickel*."¹² The Court held that, in order to comply with Alaska law:

The Board must first design a plan *focusing on compliance with the article VI, section 6 requirements of contiguity, compactness, and relative socio-economic integration*; it may consider local government boundaries and should use drainage and other geographic features in describing boundaries whenever possible. Once such a plan is drawn, the Board must determine whether it complies with the Voting Rights Act and, to the extent it is noncompliant, make revisions that deviate from the Alaska

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⁹ Alaska Supreme Court Order 77, at ¶ 5 (quoting *Hickel*, 846 P.2d at 51 n.22).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*, at ¶ 6.

Constitution when deviation is "the only means available to satisfy Voting Rights Act requirements."¹³

The record of the Board's proceedings on remand demonstrates that, although it did appear to make significant efforts to follow the *Hickel* process when creating its Amended Plan, it failed to successfully do so because of a fundamental error made in the first step of that process. The Board began designing its "*Hickel* Plans" by accepting as its starting point a map that included the 36 districts from its Initial Plan that had not previously required any VRA analysis.¹⁴ The Board's assumption seems to have been that, because those districts did not implicate the VRA, and because the Board believed that those districts were constitutional, the importation of those previously drawn districts into their *Hickel* plans complied with the first step of the *Hickel* process.¹⁵

However, the adoption of those previously established districts does not comply with the *Hickel* mandate, or the Alaska Supreme Court's recent Order. This is because those 36 districts were the product of the Board's Initial Plan, which began by drawing the districts that the Board felt would be necessary to comply with the VRA.¹⁶ The result of focusing first on satisfying the VRA was that the shape and composition of districts that were subsequently drawn was necessarily influenced by and subject to the shape and composition of those districts created for VRA compliance.

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¹³ *Id.*, at 7 (quoting *Hickel*, 846 P.2d at 51 n.22) (emphasis added).

¹⁴ Tr. 40:11 – 46:22 (March 26, 2012).

¹⁵ *Id.*; Written Findings in Support of ARB's Amended Proclamation Plan, at ¶2.

¹⁶ Alaska Supreme Court Order 77, at ¶ 6.

As the Borough explained in its brief as amicus curiae to the Alaska Supreme Court, compliance with the Alaska Constitution and the VRA fails somewhere within a spectrum.¹⁷ The *Hickel* process is intended to ensure that legislative redistricting plans not only satisfy the requirements of federal law, but also that they comply with the Alaska Constitution to the greatest degree possible.¹⁸ This is accomplished by beginning the redistricting process with the development of a plan by means of a process which focuses solely on the establishment of legislative districts that not only comply with, but seek to maximize the article VI, section 6 requirements of contiguity, compactness and relative socio-economic integration.¹⁹ Because the 36 districts that were imported from the Initial Plan into the Board's *Hickel* Plan were the result of a process that had as its starting point a focus on VRA compliance, it follows that those districts were not the product of a process that focused only on giving maximum effect to the requirements of the Alaska Constitution. Therefore, the use of those districts in the Board's *Hickel* Plan does not satisfy the *Hickel* mandate or the Supreme Court's Order.

Moreover, by importing the 36 existing House Districts from the original Proclamation Map, the Board had to wrestle to find a way to draw the remaining House Districts. In other words, the Board painted itself into a corner. This left

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¹⁷ See Brief of the Aleutians East Borough as Amicus Curiae, at 11.

¹⁸ Alaska Supreme Court Order 77, at ¶ 5

¹⁹ *Id.*

the Board trying desperately to pair Bethel with 1) Fairbanks; 2) Mat-Su; 3) Anchorage; 4) Kenai; and finally the Aleutians.

Because the Board's Initial Plan was fundamentally flawed as a result of its failure to adhere to the *Hickel* process, it should not have adopted any districts from its Initial Plan, and should have instead started with a blank slate, redrawing Alaska's legislative districts according to the requirements and standards set forth in art. VI, section 6. The Borough respects the fact that the Board enjoys considerable discretion in exactly how these districts are drawn within the *Hickel* framework. However, the Borough believes that municipal boundaries provide one logical beginning point, since prospective municipalities are as a condition of incorporation required by law to exhibit analogous qualities, such as contiguity, socio-economic integration, and other indicators of cohesiveness.²⁰ Indeed,

By definition, a borough is socio-economically integrated. That integration, the contiguous, and often compact, nature of boroughs, and the significant constitutional interest in protecting the equally effective votes of residents of an organized geographic area requires the board to attempt to draw districts that allow communities to control the whole number of seats to which they are entitled.²¹

Additionally, the Borough is concerned with the fact that the Board on remand initially indicated that it would not consider third-party input when redrafting its Proclamation Plan.²² Despite the Board's decision, it did receive

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²⁰ See, e.g., 3 AAC 110.045; 3 AAC 110.060(d). Importantly, the Alaska Constitution expressly states that when drawing legislative districts, "Consideration may be given to local government boundaries." Alaska Const. art. VI, § 6.

²¹ *In re 2001 Redistricting Cases*, 44 P.3d 141, 150 (Alaska 2002).

²² Tr. 21:18 – 22:4 (March 26, 2012).

unsolicited plans from several third-party groups.²³ However, the sponsoring party was not provided an opportunity to make a presentation to explain to the Board why it felt that its proposed plan satisfied both Alaska law and the VRA.²⁴

The Alaska Constitution mandates that, "The Board shall hold public hearings on the proposed plan, or, if no single proposed plan is agreed on, on all plans proposed by the Board."²⁵ The Borough believes that, because the Board was ordered on remand to formulate a new Proclamation Plan, that order triggered the constitutional requirement that Alaska's citizens be given an opportunity to comment on that new plan in a public hearing. The Borough finds support for its position in the fact that, during the last redistricting cycle, the Board on remand did allow third parties to submit plans and commentary to the Board for consideration.²⁶

B. The Aleutians Islands (including the Aleutian East Borough) are not socio-economically integrated with the City of Bethel.

In the Board's Amended Plan, the Board places the population of the Aleutians Islands in the same House District as the City of Bethel. The Borough believes that such a House District violates article 6, section 6 of the Alaska Constitution.²⁷

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²³ Tr. 90:1 – 94:8 (March 28, 2012); Written Findings In Support of ARB's Amended Proclamation Plan, at 22.

²⁴ Written Findings In Support of ARB's Amended Proclamation Plan, at 22.

²⁵ Alaska Const. art. VI, § 10(a).

²⁶ *In Re 2001 Redistricting Cases*, Notice of Compliance With Order of Remand and Request for Entry of Final Judgment, at 2-3.

²⁷ Alaska Const. art. VI, § 6.

The Borough does not have connections with the City of Bethel or its surrounding communities ("Bethel"). Bethel is not a hub for the Aleutian Islands; there are no air flight connections, marine link connections or even road connections between the Aleutian Islands and the Bethel Area. Furthermore, commercial fishing is the primary source of income for residents of the Aleutian Islands, whereas, Bethel does not maintain a commercial fishing fleet. Moreover, Bethel has historically attacked the Aleutian Island fishermen for allegedly intercepting Bethel's salmon run. This political controversy, which is commonly referred to as the "Area M" issue, is but one illustration of the political divide between the two communities. Put simply, the two communities have no shared common interests and actually have adversarial interests.

This is not just a violation of the principle that districts must be comprised of relatively integrated socio-economic areas, but also denies voters of the right to an equally powerful vote:

In addition to prevent gerrymandering, the requirement that districts be composed of relatively integrated socio-economic areas helps to ensure that a voter is not denied his or her right to an equally powerful vote.

[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

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numerical equality but also to assure representation of those areas of the state having common interests.²⁸

C. The Board's Amended Plan, which pairs the Aleutians with Bethel, violates both the compact and contiguity requirements under the Alaska Constitution.

Under the Board's Amended Plan, its new House District 37 combines the City of Bethel in the Aleutian District.²⁹ Such a pairing violates both the compact and contiguous requirements under article 6 section 6 of the Alaska Constitution.

This Court need only review its Order on the Compactness of Districts 1, 2 and 37 to confirm that House District 36 is not compact.³⁰ In the above-referenced Order, this Court found that House District 37 (under the Board's first Plan) ". . . divides the geographic and cultural unity of the Aleutians by combining the western Aleutians with Bethel – area communities hundreds of miles north."³¹

Under its Amended Plan, the Board once again tries to pair the Aleutians with the Bethel area. Consequently, once again House District 36 is separated "nearly 800 miles over the Bering Sea between Nunivak Island and Attu and expanses 500 miles between the Kuskokwim delta and Unalaska."³²

As for the contiguity of House District 36, although the Board brought the Aleutians Islands together, the pairing of the Aleutians with the Bethel area creates the same contiguity issue found in the Board's original Plan. That is, the same hundreds of miles of open water across the Bering Sea exists. Attu is still

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²⁸ *Groh v. Egan*, 526 P.2d 863, 890 (Alaska 1974) (Erwin, J., dissenting).

²⁹ Written Findings In Support of ARB's Amended Proclamation Plan at. 9.

³⁰ Order on the Contiguity of House District 37, December 23, 2011.

³¹ *Id.* at p. 19.

³² *Id.*