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

BRIEF OF THE FAIRBANKS NORTH STAR BOROUGH
AS AMICUS CURIAE

FROM THE SUPERIOR COURT OF THE STATE OF ALASKA,
FOURTH JUDICIAL DISTRICT AT FAIRBANKS,
THE HONORABLE MICHAEL P. MCCONAHY, PRESIDING

FAIRBANKS NORTH STAR BOROUGH

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

Clerk Marilyn May

By:_____
Deputy Clerk

Table of Contents

Table of Authorities

CASES

STATUTES

OTHER AUTHORITIES

I. Introduction: Interest of the Fairbanks North Star Borough.

The Fairbanks North Star Borough (FNSB) submits this brief as *amicus curiae* with respect to the petition for review filed by the Alaska Redistricting Board (Board) addressing the April 20, 2012 superior court order regarding the *Hickel* process. The trial court properly ruled that the Board has once again failed to design a plan that complies with the Alaska Constitution, and therefore there is still not an adequate record for this Court to review the Amended Proclamation Plan to determine whether the constitutional deviations were the only means available to comply with the Voting Rights Act.

II. Standard of Review.

In reviewing a redistricting plan, the Court considers the matter *de novo* based on the record developed in the superior court.[1]

In determining whether a plan is "reasonable and not arbitrary", the court employs the "hard look" test:[2] the court examines the process and then determines whether the board has failed to consider an important factor or whether the Board has not really taken a "hard look" at the salient problems or has not genuinely engaged in reasoned decision making.[3] This Court, while recognizing the short time-frames in redistricting, made clear

[1] *In re 2001 Redistricting Cases*, 47 P.3d 1089, 1090 (Alaska 2002)(citing *Groh v. Egan*, 526 P.2d 863, 867 (Alaska 1974)); *see also* Alaska Constitution article VI, section 11, which provides that claims of errors in redistricting "shall be reviewed by the supreme court on the law and the facts."
[2] *Hickel v. Southeast Conference*, 846 P.2d 38, 55 (Alaska 1992).
[3] *Interior Alaska Airboat Association, Inc. v. State*, 18 P.3d 686, 693 (Alaska 2001).

"...these great difficulties do not absolve this court of its duty to independently measure each district against constitutional standards."[4]

III. Summary of Argument.

FNSB principally relies on the Objection of *Amicus Curiae* Fairbanks North Star Borough to the Amended Proclamation Plan that it submitted to the superior court.[5] Specifically, the Board again placed erroneous, self-imposed limitations on its process resulting in a plan that has fatal procedural flaws as well as constitutional infirmities.

The Board failed to comply with the *Hickel* process by retaining 36 of the 40 House Districts from the original Proclamation Plan when it began drafting a plan on remand, thereby necessarily limiting the Board's ability to shape the remaining districts and guaranteeing the dilution of the effectiveness of FNSB voters. The Board additionally did not comply with the public hearing requirements in the Alaska Constitution and the Open Meetings Act, and failed to promulgate sufficient findings to allow this Court meaningful review of the Amended Proclamation Plan.

In the Amended Proclamation Plan, the Board again places 5,756 FNSB residents, the majority of which are in Ester and Goldstream, in a house district that extends to the Wade-Hampton communities on the Bering Sea.[6] The balance of the excess population is then distributed among the 5 remaining FNSB house districts.[7] Instead of correcting errors, the Board repeats the same constitutional violations, and adds new ones: the

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[4] *In Re 2001 Redistricting Cases*, 44 P.3d 141, 147 (Alaska 2002).
[5] [Jt. Exc. 543-555.]
[6] [Jt. Exc. 543-544.]
[7] *Id.*

excess population of FNSB is not placed into a single district, Ester and Goldstream residents are separated from FNSB and placed into a district that is not socio-economically integrated, the FNSB districts are intentionally overpopulated, and incumbents that represent FNSB voters are paired when the Board specifically worked to ensure incumbents in other areas of the state were not, all of which works to dilute the effectiveness of FNSB voters.

A. The Board failed to comply with the *Hickel* process set forth by the Alaska Supreme Court.

In its Order dated March 14, 2012, this Court provides:

> "The *Hickel* process provides the Board with defined procedural steps that, when followed, ensure redistricting follows federal law without doing unnecessary violence to the Alaska Constitution. 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 wherever 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 non-compliant, make revisions that deviate from the Alaska Constitution when deviation is 'the only means available to satisfy the Voting Rights Act requirements.'"

The record indicates that the Board never intended to fully comply with the *Hickel* process[8] that the Court requires. The Board's attorney described the Supreme Court's requirement that it comply with *Hickel* mandate as "form over substance."[9] The Board did not sit down and attempt to draw all 40 house districts in compliance with Art. VI, section 6, which is what the Court in fact ordered. Instead, the Board started with 36 of

[8] *Hickel v. Southeast Conference*, 846 P.2d 38 (Alaska 1992).
[9] *See* video of Michael White, March 27, 2012, retrieved from http://whatdoino-steve.blogspot.com/2012/03/redistricting-board-attorney-responds.html.

the districts it had previously drawn and which were part of the Proclamation Plan which was invalidated because it focused on VRA requirements when it was drafted.[10] The Board called these 36 districts the "*Hickel* template" and judged all other plans by its template.[11] The Board therefore focused on four undrawn election districts that needed to be created.[12] By doing some fuzzy math and determining that it did not therefore have enough population to draw these four districts, it determined it needed to take population from an urban area of the state.[13] In other words, the Board backed itself into the corner of having limited options available to create a constitutional plan. The fundamental flaw here is that the Board assumed that if a district was unchallenged and not invalidated by the court, that it was constitutional, and that it did not have to make any efforts to create a plan from the inception that considered only Alaska Constitutional requirements. This narrow view of the process flat out ignores that other configurations are possible, and that most of these districts were originally drawn with a focus on the Voting Rights Act, not the Alaska Constitution.

The flawed process followed by the Board led it to its self-fulfilling prophecy that only the plan which took population from FNSB was constitutionally compliant. The other plans arguably look as if they were drawn to prove a point rather than a good faith effort at compliance; for example, Hickel 003 took population from the very urban areas of Anchorage (Kincaid, Lake Spenard, and Inlet View) and put it in with the Bering Sea

[10] Alaska Supreme Court Order 77, 3/14/12.
[11] [Jt. Exc. 27.]
[12] *Id.*
[13] *Id.*

communities, ignoring that there were more rural options available even in the Anchorage area.[14]

The result of the Board not following the *Hickel* process is that it still cannot show that serious violations of the Alaska Constitution are "the only means available" to comply with the Voting Rights Act (VRA). The Board cannot meet its burden of proof to show the violations were for legitimate, nondiscriminatory purposes.

B. The superior court correctly determined that the Board failed to comply with the *Hickel* process and did not adopt findings that allow meaningful judicial review.

The Board did not promulgate a record nor did it adopt sufficient findings of fact to allow the superior court and this Court to conduct meaningful review of its Amended Proclamation Plan. The superior court correctly remanded the matter to the Board to draw a redistricting plan solely compliant with the Alaska Constitution and to make findings of fact sufficient to allow the superior court and this Court to independently measure each district against constitutional standards.[15]

Instead of actual findings, the Board instead adopted the legal conclusion that "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."[16] The Board construes the superior court's order as meaning it had to make specific individual conclusory findings such as "House District 1 is constitutionally compact, socio-economically integrated, and contiguous..."

[14] [Jt. Exc. 378.]
[15] [Jt. Exc. 688-689.]
[16] [Jt. Exc. 28.]

The more logical interpretation of the superior court's order is that it was requiring the Board to create a record that "sufficiently reflects the basis for the [agency's] decision so as to enable meaningful judicial review."[17] In determining whether a record enables meaningful judicial review, "the test of sufficiency is...a functional one: do the [agency's] findings facilitate this court's review, assist the parties and restrain the agency within proper bounds?"[18] "Findings are adequate to permit appellate review when 'at a minimum, they show that the Board considered each issue of significance, demonstrate the basis for the Board's decision, and are sufficiently detailed.'"[19]

The Board here issued nothing more than "conclusory assertions", which is wholly inadequate to permit meaningful review. Where an agency has failed to make adequate findings, the court typically remands the case to the superior court with directions to remand the matter to the agency for additional proceedings.[20] The superior court was simply following this Court's guidance when it issued its order, and the superior court's retention of jurisdiction in order to review the adequacy of the *Hickel* plan, once promulgated, is justified by the Board's repeated failure to comply with the law.

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[17] *Fields v. Kodiak City Council*, 628 P.2d 927, 932 (Alaska 1981).
[18] *Faulk v. Bd. Of Equalization, Kenai Peninsula Borough (Faulk I)*, 934 P.2d 750, 751 (Alaska 1997)(citing *South Anchorage Concerned Coalition, Inc. v. Coffey*, 862 P.2d 168, 175 (Alaska 1993)).
[19] *Lindhag v. State, Dep't of Natural Res.*, 123 P.3d 948, 953 (Alaska 2005)(*quoting Stephens v. ITT/Felec Servs.*, 915 P.2d 620, 629 (Alaska 1996)(Matthews, J., dissenting in part)).
[20] *Kenai Peninsula Borough v. Ryherd*, 628 P.2d 557, 563 (Alaska 1981).

C. The failure of the Board to conduct public hearings deprives this Court of the ability to meaningfully review the record for compliance with the *Hickel* process.

The Board candidly admits that it "did not reopen the public hearing process" in the course of its proceedings leading up to, and adopting, an amended proclamation plan.[21] The Board's actions were in violation of Art. VI, section 10 and the Open Meetings Act (OMA), and deprive this Court of a record upon which it can meaningfully review the Board's processes.

Article VI, section 10 of the Alaska Constitution includes the requirement 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." The "public hearings" requirement includes, at a minimum, public notice of the hearing(s), the opportunity for the public to attend the hearing(s), and an opportunity for the public to be heard at the hearing(s). The Board instead offered the public nothing more than an opportunity to be present for a portion of the Board's process. The public hearing requirement was not optional. The actual impact of the remand is that the Board was returned to the beginning of the process set forth in Art. VI, section 10(a), and was required to adopt proposed plans and hold public hearing on them.

At one point during its remand meetings, the Board broke into two workgroups, and went off the record for three hours.[22] Immediately prior to doing this, the Board chair specifically referenced the Open Meetings Act, believing that if the public who was

[21] [Jt. Exc. 30.]
[22] [Jt. Exc. 196, Tr. 3/28/12 p. 21, l. 12-20.]

physically present was able to watch the Board members work that this constituted compliance with the Open Meetings Act.[23]

During all of its prior meetings, the Board provided a teleconference number or weblink that allowed any person to call in and listen to its proceedings.[24] The Board even provided a web-based option that allowed the public in other locations to see the draft plans the Board was discussing during the drafting of the original Proclamation Plan.[25] The Board failed to follow its own established procedure for full access to its meetings when it departed from this past practice during the formulation of the Amended Proclamation Plan.

The Board did not have public comment at any of its meetings on remand.[26] The Board did not allow the public to participate in the drawing process, and only allowed them "to speak to individual board members if they so desired."[27] The effect of this is that certain board members may have received information that other board members did not receive, and the public was deprived the opportunity to meaningfully participate in the process. There is nothing on the record to indicate what information members of the public may or may not have given the Board members that may have influenced their decisions, thereby depriving the public of its right to be informed.

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[23] [Jt. Exc. 196, Tr. 03/28/12, p. 19.]
[24] [Excerpt of Record by Alaska Redistricting Board from Case No. S-14441 ("Org. ARB Exc.") 1130-1131.]
[25] [Org. ARB Exc. 1131.]
[26] [Jt. Exc. 30.]
[27] *Id.*

Chair Torgeson's assumption that breaking into workgroups thwarted an Open Meetings Act violation was fundamentally incorrect. AS 44.62.310(h) defines "governmental body" to include the "members of a subcommittee or other subordinate unit of a governmental body if the subordinate unit consists of two or more members". "[A] 'meeting' includes every step of the deliberative and decision-making process when a governmental unit meets to transact public business."[28] Also it is clear that anything done to circumvent the requirements of OMA is itself a violation of OMA: "Given the strong statement of public policy in AS 44.62.312, the question is not whether a quorum of a governmental unit was present at a private meeting. Rather, the question is whether activities of public officials have the effect of circumventing the OMA."[29] Indeed, *Hickel*[30] specifically discusses a similar violation:

> The superior court found that Board members had one-on-one conversations with each other, in which they discussed reapportionment affairs and districting preferences, and solicited each other's advice. It also found that the "dearth of [substantive] discussion on the record, combined with the manner of some Board members at trial, as well as other evidence presented at trial, convinces this court that important decision making and substantive discussion took place outside the public eye." Our review of the record indicates support for the factual finding that the Board conducted some of its reapportionment business outside scheduled public meetings. Based on this finding, we agree with the superior court that the Board violated the Open Meetings Act.

[28] *Brookwood Area Homeowners Ass'n, Inc. v. Municipality of Anchorage*, 702 P.2d 1317, 1323 (Alaska 1985).
[29] *See Brookwood*, 702 P.2d 1317, 1323, fn 6 (Alaska 1985).
[30] *Hickel v. Southeast Conference*, 868 P.2d 919, 929 -930 (Alaska 1994).

The reason that public access is required during each step is that without it, the "people's right to be informed" under the OMA is severely limited[31]:

> The likelihood that the public and those members of the governmental body excluded from the private conference may never be exposed to the actual controlling rationale of a government decision thus defines such private quorum conferences as normally an evasion of the law. The possibility that a decision could be *influenced* dictates that compliance with the law be met. (Emphasis in original).

As Chair Torgeson stated, the reason the Board went off the record and broke into work groups was to avoid the Open Meetings Act. The result is that the record is lacking evidence of the actual controlling rationale of the Board.

The process the Board followed precludes the ability of the Court to make a reliable determination as to whether the plan's Alaska Constitutional defects are mandated by the VRA. The superior court properly determined the Board failed to create a record sufficient to allow it to reach the merits of the constitutional challenges, and the Board cannot meet its burden of justifying its deviations from the Alaska Constitution.

IV. The Amended Plan unnecessarily dilutes the effectiveness of FNSB voters.

Even if the Board is found to have complied with the *Hickel* mandate, the Amended Plan still unnecessarily dilutes the effectiveness of FNSB voters. The Amended Plan promulgated by the Board repeats the same pattern of targeting FNSB and diluting the effectiveness of FNSB voters, including the following errors:

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[31] *Brookwood Area Homeowners Ass'n, Inc. v. Municipality of Anchorage*, 702 P.2d 1317, 1323 (Alaska 1985)(citing *State ex rel. Lynch v. Conta*, 71 Wis.2d 662, 239 N.W.2d 313, 330–331 (1976)).

1. House Districts 1 through 5 range in percent deviation from ideal from 3.12% to 3.72%.[32] Comparably, deviations in Anchorage districts range from 0.64% to 1.82%, with only two of the districts actually over 0.99%.[33] In the Mat-Su region, deviations range from -4.95% to 0.4%.[34] The Board intentionally overpopulated the Fairbanks' districts based on its erroneous belief that this meant it only split the excess population of FNSB once.[35] The Board therefore failed to make any attempt to minimize deviations, which was clear error.[36] The result is that FNSB residents comprise a total of 5.3 house districts instead of the 5.5 districts to which they are entitled.

2. It is plainly obvious that FNSB does not have connections with communities on the Bering Sea. In fact, there are not even air connections between FNSB and the majority of the communities in new HD 38.[37] It is impossible for a legislator to represent the interests of both groups. The votes of the Goldstream and Ester residents have essentially been thrown out. This same problem exists in the new HD 37 by combining the Aleutians with Bethel.[38] 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:[39]

> In addition to preventing 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.

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[32] [Jt. Exc. 91.]
[33] *Id.* See also [Jt. Exc. 42.]
[34] *Id.* See also [Jt. Exc. 44.]
[35] [Jt. Exc. 37.]
[36] *In Re 2001 Redistricting Cases*, 44 P.3d 141, 146 (Alaska 2002).
[37] [Jt. Exc. 87.]
[38] [Jt. Exc. 86.]
[39] *Hickel v. Southeast Conference*, 846 P.2d at 46.

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

3. The conclusion that "using population from the FNSB creates no proportionality issues" is patently wrong.[40] The Board still splits the excess population of the FNSB. Instead of breaking the excess into two districts, it just distributed a portion of the excess throughout the five remaining districts. This still does not place the excess population into a single district and violates the anti-dilution rule in *Hickel*:[41]

> Dividing the municipality's excess population among a number of districts would tend to dilute the effectiveness of the votes of those in the excess population group. Their collective votes in a single district would speak with a stronger voice than if distributed among several districts.

Here, the excess group was not only divided, but a portion was put in a district with which it does not, as a matter of law, share similar political and social concerns.[42]

4. The residents of FNSB are clearly a politically salient class of voters, and the Board has intentionally discriminated against them. The Board protected incumbents in other areas of the state, but on information and belief, again specifically failed to do so

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[40] [Jt. Exc. 383.]
[41] *Hickel*, 846 P.2d at 52, n. 26.
[42] [Joint Excerpt of Record from Case No. S-14441 ("Org. Jt. Exc.") 148.]. The superior court ruled on October 25, 2011 that Proclamation HD 38, which is substantially similar to Amended HD 38, is not socio-economically integrated.

in Fairbanks and paired two sets of incumbents: Senator Joseph Thomas and Senator John Coghill, and Representative Tammie Wilson and Representative Robert Miller.[43]

In order to negate the inference of intentional discrimination raised by these actions, the Board must justify its actions by proof of a legitimate, non-discriminatory purpose.[44] The Board cannot meet its burden of proof because it has failed to comply with the *Hickel* process, but also, because the Amended Plan is not required by the VRA.

V. The Amended Plan is not required by the VRA.

FNSB again disputes that the Board was required to extend a Native district hundreds of miles to an urban, non-Native area;[45] to combine the Aleutian Islands with Bethel, a non-contiguous house district;[46] and, to combine these two constitutionally infirm house districts to form a Native senate district[47] in order to comply with the VRA.

The Board again fails to recognize that the VRA does not require it to violate the Alaska Constitution in the manner it has done so in its Proclamation Plan and in its Amended Plan. It summarily finds, "Because plans exist, including the Proclamation Plan, that are not retrogressive, there is no unavoidable retrogression."[48] While plans may exist that, by the numbers, are not retrogressive, these plans contain substantial deviations from the traditional redistricting criteria embodied in the Alaska Constitution.

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[43] Counsel is unable to cite to the record on this issue because no hearing was held before the superior court.
[44] *In re 2001 Redistricting Cases*, 44 P.3d at 144.
[45] Amended HD 38. [Jt. Exc. 87.]
[46] Amended HD 37. [Jt. Exc. 86.]
[47] Amended SD S. [Jt. Exc. 91.]
[48] [Jt. Exc. 29.]

The VRA does not require this, and the Court has advised that deviations may only occur if they are absolutely required by the VRA.

DOJ recognizes that there may be circumstances where retrogression may be unavoidable because of shifts in population or other significant changes.[49] The Alaska Supreme Court's March 14, 2012 Order recognizes that, "[T]he Supreme Court has established that under the Voting Rights Act, a jurisdiction cannot unnecessarily depart from traditional redistricting principles to draw districts using race as 'the predominant, overriding factor.'"[50] Consistent with these cases, DOJ has issued guidance on how it analyzes plans for VRA compliance.

DOJ considers whether plans require highly unusual features to link together widely separate minority concentrations in order to meet the benchmark.[51] Preventing retrogression under Section 5 does not require jurisdictions to violate the one-person, one-vote principle, which most commonly arises from substantial demographic changes.[52] Redistricting criteria that a jurisdiction may be required to depart from to create a nonretrogressive plan are those that "require the jurisdiction to make the least possible change to existing district boundaries, to follow county, city or precinct boundaries, protect incumbents, preserve partisan balance, or in some cases, require a certain level of compactness of district boundaries."[53] Notably absent from the list are

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[49] Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 76 Fed. Reg. 7470, 7472 (Feb. 9, 2011) ("2011 DOJ Guidance").
[50] Citing *Bush v. Vera*, 517 U.S. 952, 959-60 (1996); *Miller v. Johnson*, 515 U.S. 900, 920 (1995).
[51] 2011 DOJ Guidance at 7472.
[52] *Id.*
[53] *Id.*

two requirements in the Alaska Constitution designed to prevent gerrymandering: socio-economic integration and contiguity.[54] Combining urban areas such as Ester and Goldstream with the extremely rural Bering Sea communities over 600 miles away is the epitome of a plan that requires "highly unusual features" to meet the Benchmark.[55]

Instead of taking a hard look at the flexibility afforded by the VRA, the Board just assumes that it must take drastic measures such as combining urban areas of FNSB with some of the most rural areas of the state on the Bering Sea. The result is that effectiveness of both groups is diluted. Further, the Board's flawed *Hickel* process prevented it from looking at other areas of the state with Native populations that could have been used to create VRA districts that did not ignore logical and natural boundaries.[56] The Board has other options available, and was even presented with a plan that an expert has opined was VRA compliant that did not combine entirely illogical areas of the state.[57] Even assuming the Board has followed the *Hickel* process, its Amended Plan is still not justified by VRA requirements.

VI. Conclusion.

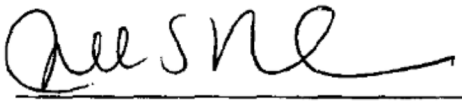
The Board has not demonstrated that the "only means available" to satisfy the Voting Rights Act was to depart from and disregard the Alaska Constitution's traditional redistricting principles of contiguity, compactness, and relative socio-economic

[54] *Hickel v. Southeast Conference*, 846 P.2d 38 (Alaska 1992)(constitutional requirements ensure that district boundaries fall along natural or logical lines rather than political or other lines).
[55] [Jt. Exc. 87.]
[56] Amended HD 35, for example, appears to draw Native villages out of an influence district [Jt. Exc. 84]; Amended HD 34 contains 33.90% NVAP but no modifications were considered [Jt. Exc. 91].
[57] [Jt. Exc. 32]; [Jt. Exc. 451-454].

integration, and to divide FNSB's excess population group, because it still has not complied with this Court's mandate to follow the process set forth in *Hickel*. Based on the foregoing, FNSB respectfully asks this Court uphold the trial court's order.

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

FAIRBANKS NORTH STAR BOROUGH



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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

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