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IN THE SUPREME COURT OF THE STATE OF ALASKA

In the Matter of the 2021 Redistricting Cases (Matanuska-Susitna Borough, S-18328) (City of Valdez, S-18329) (Municipality of Skagway, S-18330) (Alaska Redistricting Board, S-18332)	Supreme Court No. **S-18332** (S-18328, S-18329, S-18330, & S-18332 consolidated)

Trial Court Case No: 3AN-21-08869CI (Consolidated)

MATANUSKA-SUSITNA BOROUGH AND MICHAEL BROWN'S PETITION FOR REVIEW

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TABLE OF CONTENTS

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I. STATEMENT OF FACTS

Given the breadth of the record in the above-captioned matter, the facts are voluminous. A detailed timeline of events and summaries of the testimony proffered was submitted to the court below by Petitioners Michael Brown and the Matanuska-Susitna Borough (hereinafter collectively referred to as "MSB").[1] Given the constraints of this Petition, the facts contained herein are not meant to be exhaustive but to merely highlight those facts, which are most salient to the numerous legal issues before the Court.

A. Procedural Facts.

In accordance with the Alaska Constitution, the Alaska Redistricting Board (the "Board") was established to reapportion the house and senate district boundaries based on the data form the 2020 census.[2] The Board received the Census data on August 12, 2021, which started the 90-day constitutional time period for the Board to complete its work.[3] Based on the 2020 census, the ideal quotient for Alaska as contemplated by Art. VI, § 6 of the Alaska Constitution is 18,335 residents per house district.[4] According to the 2020 census, the population of Alaska was 733,391.[5] The population of the MSB was 107,081, an increase of 18,086 residents, representing 78 percent of the statewide population

[1] Exc. 362-493.

[2] Exc. 499.

[3] Exc. 502.

[4] Exc. 56-72.

[5] *Id.*

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growth.[6] On November 10, 2021, the Board adopted its Final Plan and Proclamation of Redistricting ("Final Plan").[7] The districts proposed to the Board by the MSB were compact, contiguous and socioeconomically integrated.[8] Every district in the Final Plan within the MSB (Districts 25, 26, 27, 28, 29 and 30) exceeds the quotient for the ideal house district.[9]

Given the treatment of the MSB by the Board, the MSB filed an Expedited Application to Compel Correction of Error in Redistricting Plan.[10] Specifically, the MSB requested that the court declare the Board's Final Plan violates the Alaska Constitution, and is therefore null and void; that the Court remand the Final Plan to the Board for correction and development of a new plan which complies with law under the Alaska Constitution; and that MSB be awarded its attorney's fees and costs as allowed by law as public interest litigants.[11] On January 21, 2021, the court began a 12-day bench trial.[12] On February 15, 2021, the court issued its Findings of Fact and Conclusions of Law.[13]

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[6] *Id*.

[7] *Id*.

[8] Exc. 361.

[9] Exc. 56-72.

[10] *Id*. The Application was amended on December 15, 2021, and therefore, the Amended Complaint is referenced herein.

[11] *Id*.

[12] Exc. 520.

[13] *See generally*, Exc. 494-685.

II. QUESTION PRESENTED

Whether the Superior Court erred in failing to invalidate and remand the redistricting plan to the Board in light of the Board's multiple violations of the Alaska Constitution and Alaska law resulting in errors to its redistricting plan which compel correction.

III. TRIAL DATE

There is no trial date, as trial has already occurred in this matter resulting in partial remand to the Board.

IV. REASONS REVIEW SHOULD NOT BE POSTPONED

Review is proper given the extremely expedited nature of redistricting litigation before the court. Postponement will cause unnecessary delay, expense and hardship, and the potential for incongruous results. This particularly given the necessity for a final redistricting plan for the upcoming 2022 election. Furthermore, the facts underlying this matter demonstrate that when the Board makes a change within one area of the State, there has a tendency to be a ripple effect impacting other areas of the State. Therefore, as the case has been remanded in part, it may result in a change which must be addressed if this court were to reverse the decision of the superior court. Essentially, there could be a situation where multiple maps were before the courts prior to the final redistricting plan map being fully adjudicated. Given the public interest of this matter, all Alaskans stand to suffer harm if this matter is not heard on review.

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V. DISCUSSION

A. The court erred in finding the Board followed the *Hickel*[14] process.

In its decision, the court properly recognized that the *Hickel* process must be followed.[15] However, the court erred in concluding that the Board followed the *Hickel* process as it found that it was abundantly clear, "Board members were actively considering VRA-related issues since the beginning of the process."[16] The court erred, as the Board failed to comply with the process mandated under *Hickel*.[17]

With regard to the *Hickel* process, when the Board proposes a plan for redistricting, the Court has required that the Board first look towards designing the plan by focusing on compliance with Article VI, Section 6 of the Alaska Constitution.[18] Only after this, should the Board determine whether its proposed plan complies with the Voting Rights Act.[19]

The court properly found numerous occasions where the Board considered the Voting Rights Act ("VRA") and "VRA Districts" prior to considering the Alaska constitutional factors.[20] The court found that at the request of Member Bahnke, the Board was considering race data, including the percentage of Alaska Natives in any given district

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[14] *Hickel v. Southeast Conference*, 846 P.2d 38 (Alaska 1992).

[15] Exc. 621.

[16] Exc. 625.

[17] Exc. 626.

[18] *In re 2011 Redistricting Cases*, 274 P.3d 466 (Alaska 2012).

[19] *Id*.

[20] Exc. 622.

as early as August 24, 2021.[21] "Member Bahnke then proceeded to draw what would become Districts 36, 38, 39, and 40, beginning on the North Slope Borough and working down the coast."[22] The court noted but failed to find, "the districts drawn in the August 24 work session were substantially similar to those adopted in the Final Plan, and were "locked in" at a very early stage."[23]

The court found "Member Bahnke's statements throughout the redistricting process evidence a strong preoccupation with both VRA requirements and the percentage of Alaska Natives in rural areas."[24] Further, the court found that "the fact that all four of the Board's proposed plans contained identical versions of Districts 37, 38, 39 and 40 also creates a strong inference that the Board never truly considered available alternatives."[25] Finally, the court found that counsel advised the Board to avoid drastic changes, particularly in Districts 37 through 40, which "may have unnecessarily limited the Board's options."[26]

Despite the court's recognition of facts detailing the violation of *Hickel* and its finding that it could not "definitively state that the Board scrupulously adhered to the *Hickel* process" it failed to find that the Board's violation rose to the level of necessitating a remand.[27] The court instead noted that the Court has not identified a cutoff date where

[21] *Id.*

[22] Exc. 622-623.

[23] Exc. 623.

[24] Exc. 624-625.

[25] Exc. 625.

[26] Exc. 626.

[27] Exc. 625.

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the VRA implications may be considered and its conclusion ultimately ignores its own findings of fact showing the blatant prioritization of the VRA districts over the factors provided for in the Alaska Constitution.

The evidence demonstrates that the Board locked in the VRA Districts 37, 38, 39, and 40 at the outset, thereby ignoring the *Hickel* process and overemphasizing the VRA which set the tone for the remainder of the Board's deliberations. By at least November 2, 2021, the Board was referring to these districts as the four "VRA districts." The court finding that, all of the Board's proposed plans contain "identical" VRA districts, clearly demonstrates that the facts reflect the Board locked in these districts at a very early stage and the courts subsequent findings showed the predilection of the Board to not entertain modifications to the map that would affect those districts.[28] However, the court overlooked these facts and the implications of locking in the VRA districts. This was specifically highlighted on November 2, 2021, at the beginning of the work session, when Executive Director Torkelson indicated that there was consensus regarding the "four VRA districts", and encouraged the Board to finalize those districts to start.[29] Mr. Torkelson realized that those four VRA districts hinged on the premise that District 36 would not change.[30] Chair Binkley pointed out that if the Board added another 4,000 to District 36 from Fairbanks,

[28] *Id*.

[29] Exc. 14 (Nov. 2, 2021 Tr. pg. 55). By this date, the Board specifically begins to refer to the four rural Districts 37, 38, 39, and 40 as the VRA districts. *See also,* Exc. 13 (Nov 2, 2021 Tr. pg. 10).

[30] *Id*.

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the Board will either have to take out Valdez or adjust the population in District 39.[31] Demonstrating the intent to lock in the map region by region, Chair Binkley and Member Simpson went back and forth and indicated that if there was not consensus in a region, the Board would have to vote.[32]

By the foregoing, the Board demonstrated that it had no intent to disturb or even consider changing the VRA districts, thus wholly eliminating any option for Valdez to be paired with those communities with which the Board found it to be socioeconomically integrated. This violation of the *Hickel* process ultimately resulted in Valdez being paired with the MSB, because given its self-imposed restraints the Board could not consider anywhere else to put Valdez. Therefore, the court erred, as the Board failed to follow the proper process, the plan must be remanded for compliance with the proper process.

B. The court erred in finding that the Board complied with the Article VI, Section 6 requirement, of the creation of compact districts, particularly where certain districts created bizarrely shaped appendages.

The court properly found compactness is "defined as having a small perimeter in relation to the area encompassed, such that bizarre designs do not result."[33] The Court has provided examples of potential violations to include "corridors of land that extend to include a populated area or appendages attached to the otherwise compact areas."[34] The court erred as neither Districts 29 nor 36 are compact.

[31] Exc. 15 (Nov. 2, 2021 Tr. pg. 61).

[32] Exc. 16 (Nov. 2, 2021 Tr. pg. 130).

[33] Exc. 572 (internal citations omitted).

[34] *Id*.

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When considering District 29 which pairs Valdez with the MSB, the court failed to recognize that the way this district is drawn is exactly what the court cautioned against - that a district should not include corridors of land that extend to include a populated area. The court ignored the testimony from both MSB Manager Michael Brown and MSB expert Steve Colligan. Mr. Brown highlighted to the Board that partnering with Valdez would fail to meet the constitutional requirements, as it would not be considering the interests of the individuals residing in MSB and would only be taking population from MSB to make another district whole.[35]

The MSB has grown since the last redistricting cycle by over 18,000 people, and that alone changes the dynamic between the regions.[36] Redistricting is not just about comparing one area to another, the real job of the Board is to look at the new data and reassess the associations.[37] Mr. Colligan's analysis was based on looking at the population and census blocks, which paints a completely different picture of connectivity and contiguity.[38] Particularly, the court ignored that District 29 orphans Valdez and merely connects it with corridors of land to include a populated area.[39]

This is evidenced by Mr. Colligan's opinion that the comment from the Board stating District 29 is drawn substantially similar to District 9 from the 2013 Redistricting

[35] Exc. 68, para. 9.

[36] Exc. 355.

[37] *Id*.

[38] Exc. 359.

[39] Exc. 350.

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Proclamation, with respect to its treatment of Valdez, is incorrect, because District 9 was drawn to include communities along the Richardson Highway.[40] When taking a bird's eye view of District 29, it appears to include the road system population, when in fact it does not.[41] This crucial difference between the districts is that in District 9 the transportation connection between MSB and Valdez was included all the way along the Richardson Highway and the Glenn Highway while District 29 has Valdez is completely isolated from the road system and its communities.[42] The cutout of the road system makes the shape of the district less compact and orphans Valdez from its transportation link to the MSB and the communities in its immediate area that it associates with regularly.[43]

With regard to District 36, the court found that the "addition of Cantwell [in District 36] does make the district appear less compact."[44] However, the court erred in failing to find that the "Cantwell cutout" was an unconstitutional appendage. In justification for the same, the court found that there was evidence in the record that Cantwell is socioeconomically integrated with the Ahtna region and should be included in the rural interior district.[45] However when the Board used that evidence to carve out Cantwell, and only for this particular instance, the Board abandoned its position that Boroughs were

[40] Exc. 196, para. 50.

[41] Exc. 354.

[42] *Id*.

[43] Exc. 359.

[44] Exc. 587.

[45] *Id*.

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automatically socioeconomically integrated as a matter of law, and that pulling a community out of its Borough, where it has been historically districted, and creating two districts which are then less compact, was somehow justified by limited testimony about socioeconomic integration by a native corporation.[46] Cantwell has been historically paired with the Denali Borough due to Cantwell's socioeconomic integration with the communities along the Parks Highway and the Denali Borough, and breaking the Denali Borough and MSB boundaries to remove Cantwell into the interior district is not proper.[47] Chair Binkley specifically noted this type of carve out action was improper, as he specifically pointed out that in mapping districts the Board is to "make certain that we don't, for some political purpose, have an appendage that goes out to capture some – some area for strictly political purposes."[48] Finally, there is nothing in case law that provides for a right to be placed together with other socioeconomic areas, even areas in which a location may be *more* socioeconomically integrated, so long as the other area the location is placed with is also socioeconomically integrated.

District 30 is similar where the Board cut both the MSB and Denali Borough boundaries in order to allocate the residents of Cantwell into District 36.[49] Mr. Colligan opined that in order to make the Cantwell appendage less harsh and more geographically acceptable, the Board allocated Census blocks from the MSB into the Cantwell area, as

[46] *Hickel*, 846 P.2d at 52.

[47] Exc. 200, para. 65.

[48] Exc. 79, l.14-18.

[49] Exc. 200, para. 63.

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well as removed the road system and some residents from the northernmost MSB boundary.[50] This Cantwell carve out resulted in a bizarrely shaped appendage based on a failure to follow the constitutional process and instead place more weight on testimony from certain ANCSA regions than the fact Boroughs are considered socioeconomically integrated. Expert Colligan testified that the Board peeled out an appendage through the top of the MSB borough to reach over and grab Cantwell.[51] Mr. Colligan described the strange appendage that he referred to as the "Cantwell carve out" as offensive.[52] Mr. Colligan cannot look at the map with a straight face to see the "Cantwell carve out".[53] Mr. Colligan testified that it is not compact, and it split the boundaries of two boroughs in order to get 200 people.[54] He explained that to go through the MSB to get population actually within the Denali Borough, and to strip that out just for the rural district, and take it off the road system, is over the top.[55]

Because these districts are not compact or contiguous, the plan must be remanded to the Board for correction.

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[50] Exc. 200, para. 63-34.

[51] Exc. 357.

[52] *Id*.

[53] *Id*.

[54] *Id*.

[55] *Id*.

C. The court erred in finding that the Board complied with Article VI, Section 6, particularly in finding that the Board created districts within the MSB that were relatively socioeconomically integrated.

In its findings, court found that "public testimony strongly supported keeping Valdez in its traditional corridor… there was no public testimony from either the Valdez side of the Mat-Su side which favored placement of Valdez with the communities of Palmer and Wasilla."[56] While the court went on to find that purported socioeconomic ties were presented at trial, there is not a single piece of evidence that demonstrates that the Board considered the socioeconomic integration between the MSB and Valdez during its redistricting process. In fact, the evidence demonstrates the decision was purely based on population numbers when the Board "dumped" the population from Valdez into the districts within the MSB.[57] Chair Binkley testified that it was "just math" to move Valdez out of District 36 and combine it with the MSB.[58]

The court improperly found that "none of the other options available to the Board created greater socioeconomic integration."[59] The court's conclusion wholly ignores the Board's resistance to even considering making any change in the VRA districts as set forth above. When the Board locked in the VRA districts and pushed Valdez out of District 36, it never considered the factor of socioeconomic integration between Valdez and the MSB. The evidence demonstrated that Valdez was socioeconomically integrated with either the Richardson Highway or Prince William Sound communities, neither of which it was paired

[56] Exc. 575.
[57] Exc. 597.
[58] Exc. 82.
[59] Exc. 581.

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with. This in stark contrast to the Board feeling it necessary to create the "Cantwell carve out" solely based on testimony regarding socioeconomic integration. Therefore, it cannot be found that the Board complied with the Constitution, because it never weighed the constitutional factor of socioeconomic integration as it pertained to Valdez and the MSB.

At trial, in an attempt to detract from its abuse of the process, the Board tried to place blame on the local communities and the maps presented to the Board as not being constitutional, however, it is the job of the Board to weigh the full 40 map, not the job of each community. It is the job of each community to present its information to the Board and for the Board to treat the areas of the State in an even-handed fashion. The evidence demonstrates that the Board engaged in blame-shifting and provided excuses instead of seriously considering the socioeconomics as it related to Valdez and the MSB.

At a public hearing on September 17, 2021, Board Counsel Singer indicated to MSB Manager Michael Brown that the Board had seen some public plans pairing Valdez with the MSB and asked for this reaction.[60] Mr. Brown indicated that from a socioeconomic perspective there are differences in the things the MSB communities are focused on, particularly as Valdez is a coast community.[61] Mr. Brown testified the portions of the MSB combined with Valdez share no social concerns, political needs, are geographically divided, culturally and historically distinct, have no transportation links, and no shared economic activities, meaning the District ignores logical, municipal, and natural

[60] Exc. 10-11 (Sept. 17, 2021 Tr. pg. 204-205).

[61] *Id*.

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boundaries.[62] The MSB is located on the rail belt and road system unlike Valdez, which is a coastline community that relies heavily on maritime economics and infrastructure including significant interest in the marine highway system that MSB has little to no interest in.[63] Valdez is not on the rail belt.[64] The residents of the suburbs of Wasilla and Palmer do not live, work, or play with the residents of the City of Valdez.[65]

There is also competition for resources from the State between Valdez and the MSB, particularly because they have things like competing ports.[66]

In further support of its findings, the court errantly found that prior District 9 was substantially similar to District 29.[67] The court stretched the interpretation of *Hickel* in relying on "previously existing" districts as a guide to socioeconomic integration. *Id.* Rather, the court in *Hickel* merely provided that in determining if a district is relatively integrated, the court is directed to compare proposed districts to other previously existing and proposed districts as well as principal alternative districts.[68] Thus, the court stopped short and did not complete the analysis, as it did not look to proposed districts or principal alternative districts. Furthermore, it ignored the significant differences between prior District 9 and District 29 as set forth above.

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[62] Exc. 68, Para. 11.

[63] Exc. 68, Para. 12.

[64] Exc. 175.

[65] *Id.*

[66] Exc. 355.

[67] Exc. 577.

[68] *Hickel*, 846 P.2d 38, 47.

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The instant matter is distinguishable from *Kenai Peninsula Borough v. State*, 743 P.2d 1352 (Alaska 1987). In that case, it was found that there was too fine a distinction between North Kenai with Anchorage and that of North Kenai with South Anchorage due to Anchorage being the hub.[69] However, in the instant case, that interconnectivity and sufficiency of contacts between the communities is lacking, particularly given the multiple findings by the Board of the socioeconomic integration of Valdez with the Richardson Highway communities and with the FNSB.[70]

The court erred, as District 29 is not socioeconomically integrated, and the plan must be remanded for compliance with the constitutional mandates.

D. The court erred in finding that the Board complied with Article VI, Section 6, particularly in finding that the Board created districts as near as practicable to the population quotient.

Similar to the quantitative element of an equal protection analysis (discussed below), this provision requires any district formed by the board be "as near as practicable" to the ideal population arrived at when dividing the most recent census numbers of Alaska citizens by the available 40 house districts. Alaska Const., Art. 5, Sect. 6. While analyses under the federal standard and an old iteration of the State Constitution allowed *de minimis* deviations up to 10% without any justification from the board, revisions to Alaska's Constitution have removed such exclusions and require the board to justify any case in which population deviance is not minimized.[71] This requirement is by and large

[69] *Id*. 743 P.2d at 1363.

[70] Exc. 8 (Sept. 7, 2021 Tr. pg. 137).

[71] *In re 2001 redistricting Cases*, 44 P.3d 141, 146 (Alaska 2002).

synonymous with the quantitative analysis under an equal protection argument which protects the right to "one person, one vote" and is discussed further below.

As previously stated, the Board failed to follow the *Hickel* process, and as a result, the Board failed to follow the constitutional mandates. The Board discussed the requirements under the constitution, but then failed to apply the same, or failed to apply them even-handedly. In several instances the Board used the constitutional factors for creating districts as a matter of convenience to appease special interests, but failed to do in an even-handed statewide manner.

The court properly found that the "Mat-Su districts as a whole appear to be overpopulated… particularly... when compared to the average deviation of other districts statewide."[72] The court further found:

> The Board was focused on obtaining small deviations until it waited until the very end to place Valdez. Because they did not place Valdez until the end, they had 4,000 people that had to be placed in a district. Rather than consider evenly distributing this population, as the evidence demonstrates, the Board dumped the population into the Mat-Su, the area that had grown the most since the last census. This area had nearly the population to populate six districts, but the Board made the decision to overpopulate every district within the Mat-Su. The evidence demonstrates there are only seven districts that have a deviation of over 2%, and of those seven, five are within the Mat-Su.[73]

However, the court failed to acknowledge the salient points presented by MSB expert Steve Colligan, who pointed out the example of Anchorage, which has the largest

[72] Exc. 597.

[73] *Id*.

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concentration of districts but was drawn with overall negative deviations, rather than neutral or positive deviations, in comparison to the MSB which had the fastest growing population in the State but was drawn with positive deviations in every district.[74]

The Board's Proclamation Plan overpopulated the MSB by almost 14% across all six districts, or 2.5% in each of the six House Districts, which is further compounded, as each of the related Senate seats are then overpopulated, particularly in urban Wasilla where it is over 5%.[75]

Mr. Colligan opined that the MSB should be treated no different than Anchorage, where deviations should be less than half a percent particularly in the urban core area.[76] He explained that software tools allow you to achieve these type of low deviations.[77] Mr. Colligan testified that when conducting redistricting, and drawing reasonable House District boundaries, overpopulating a district creates an under-influence at the legislative level, and vice versa, if a district is underpopulated there is more undue influence. This dynamic is then doubled, or further complicated, at the senate seat level.[78] Mr. Colligan further testified that the overpopulation of the MSB, when there were at least no less than

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[74] Exc. 192, para. 35.

[75] Exc. 193, para. 36.

[76] Exc. 358.

[77] *Id*.

[78] Exc. 356.

four other plans and ideas submitted to the Board during the process which did not overpopulate the MSB, is a huge disservice to the MSB and also affects Valdez.[79]

In light of its findings of fact, the court erred by not finding that the Board violated its constitutional mandate to create districts as near as practicable to the population quotient. Instead, the court again relied on the Board's self-created crisis. This was evidence when on August 24, 2021, The Board made its first policy decision regarding population when it determined that Cordova is not socioeconomically integrated with the Southeast, and therefore Southeast should be underpopulated.[80] In order to even out the population among the four Southeast districts, the Board determined that the target deviation for the Southeast districts should be set at 18,071.[81] The ripple of locking in regions without further consideration resulted in areas of the State being treated in disparate fashion. This was further evidenced by the Board exacting out 4,000 people out of the FNSB in order to meet precisely with the request from the FNSB assembly. R. at ARB007597. (Nov. 3, 2021 Tr. pg. 237).

Ultimately, the Board failed to create districts as near as practicable to the population quotient, and therefore, the plan must be remanded for correction.

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[79] *Id*.

[80] Exc. 2-3 (Aug. 24, 2021 Tr. pg. 105-106); Exc. 4-5 (Aug. 24, 2021 Tr. pg. 108-109). (Chair Binkley also clarifies for the record once again that the board is just engaged in a mapping exercise and the board will revisit the Cordova question at a later date.)

[81] Exc. 6 (Aug. 24, 2021 Tr. pg. 117).

E. The court erred in finding that the Board did not violate the quantitative element of equal protection of "one person, one vote".

In its decision, rather than look at the Board's treatment of the State as a whole and its failure to treat the State in an even-handed manner, the court erred in solely relying on precedent to find that the Board did not violate equal protection.[82]

Applied to the actions of the Board, the quantitative analysis under both federal and state analyses require that a State "make an honest and good faith effort to construct districts . . . as nearly of equal population as is practicable."[83] The "overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State."[84] Article VI, Section 6 of the Alaska Constitution was amended in 1998, changing the requirement to make equality of population "as near as practicable," requiring the State to justify any failure to reduce population deviance.[85] Therefore, the Alaska Constitution provides for a stricter standard, requiring population equality to be "as near as practicable," and therefore, the State must justify any failure to reduce population deviance across districts.[86] This particularly as technology continues to improve, and technological advances "have streamlined the redistricting process and reduced the burden felt by the

[82] Exc. 600.

[83] *Hickel*, 846 P.2d at 47.

[84] *Id.*

[85] 44 P.3d 141, 146 (2002).

[86] *Id*.

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Board in past cycles."[87] To justify population deviance, the State must offer a legitimate, non-discriminatory motivation for its actions.[88] Failure to reduce deviations shifts the burden to the board to "demonstrate that further minimizing the deviations would have been impracticable in light of competing requirements imposed under either federal or state law."[89]

The Court analyzed this issue when reviewing the Redistricting Board's proposed redistricting plan in 2001.[90] When the board proposed its initial plan, it was rejected, because the board (under a mistaken belief that any maximum deviation under 10% automatically satisfied constitutional requirements) made no effort to reduce deviations below 10%.[91] Its failure to do so shifted the burden to the board to "demonstrate that further minimizing the deviations would have been impracticable in light of competing requirements imposed under either federal or state law."[92] In so finding, the Court noted that the board's rationale for rejecting other plans with significantly lower maximum deviations stemmed from the board's intention to maintain neighborhood patterns, but held that such patterns cannot justify "substantial disparities" in population equality, particularly in boroughs such as Anchorage that are by definition socioeconomically

[87] 274 P. 3d at 468.

[88] *Id.* 274 P.3d at 145.

[89] *Id.* at 146.

[90] 44 P.3d 141.

[91] *Id*. 44 P.3d at 146.

[92] *Id*.

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integrated, allowing multiple combinations of compact, contiguous districts with minimal population deviations.[93] Only after the board restructured its plan and made the requisite good faith effort to reduce population deviations in Anchorage, ultimately reducing the maximum deviation from 9.5% to 1.35%,[94] was the board's plan approved by the Court.[95] In doing so, the Court recognized the ease at which districts formed within an urban, individual borough may be structured to more closely comply with smaller population deviations, and the implied higher standard attendant to forming such districts.[96]

The evidence demonstrates that when it came to the MSB, the Board failed to honor the maxim of "one person, one vote." The Board failed to accomplish equal population among the districts statewide without justification. Technology has continued to improve, and if the Board had made adequate considerations of population, had the proper training, and had the proper expertise available to it, the Board could have reduced the deviations. The Board has not proffered any justification, let alone legitimate non-discriminatory motivation for its actions. The Board has a duty to demonstrate that the lower deviations before the Board in several other plans were impracticable in light of competing requirements. However it cannot do so, as the Board improperly prioritized the considerations before it, resulting in the last minute consideration of Valdez and the

[93] *Id.*

[94] 47 P.3d at 1095 n.4.

[95] *Id*. 47 P.3d at 1092.

[96] *Id.* 47 P.3d at 1094-1095.

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MSB.[97] This last minute consideration turned only on population, and the Board discussing where to put Valdez. The Board made the policy decision to overpopulate the MSB far greater than any other region in the state, intentionally diluting the voice of the voters within the MSB. As a result, the Board deprived the MSB voters of the equal protection of the law, and the plan must be remanded for correction.

F. The court erred in finding that the Board did not violate the qualitative element of equal protection by denying the MSB fair and effective representation.

The court erred the error in finding that the MSB and its citizens were treated equally and proportionately as compared to citizens across the State, and the Board failed to apply an even keel in respecting the MSB voters in fashioning their final plan. Specifically, the court erred in finding that the Board did not discriminate against the MSB and its citizens and did not accurately find that any such discrimination was justified by a demonstration of non-discriminatory motives and adequate compliance with the Alaska constitutional requirements.

The qualitative analysis of an equal protection argument under a redistricting framework will invalidate a plan which "systematically circumscribes the voting impact of specific population groups."[98] Again the burden is on the Board to demonstrate that its plan leads to a greater proportionality of representation if there is evidence of intentional discrimination.[99] An inference of intentional discrimination is raised "when a

[97] Exc. 597.
[98] *Hickel*, 846 P.2d at 49.
[99] *Id*.

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reapportionment plan unnecessarily divides a municipality in a way that dilutes the effective strength of municipal voters."[100] Under the State's equal protection clause, the Court does not require that a pattern of discrimination must be shown, as no effect of disproportionality is considered de minimis.[101] Valid non-discriminatory motives must be shown when for example, a Board fails to keep all of a borough's excess population in the same house district,[102] or the Board fails to follow logical and natural or local government boundaries.[103] While retention of political boundaries has been found to be a legitimate justification for deviation from ideal district population size, it must be applied consistently to the State as a whole.[104]

The Board purposefully discriminated against the MSB. The inference of intentional discrimination is raised in this case, as the effective strength of the MSB voters is diluted by the fact that five of the seven districts within the State that have a deviation of 2% or greater are within the MSB. The treatment of the MSB was not the same as other Boroughs within the State, and the Board failed to apply its process consistently to the State as a whole. This was demonstrated by the MSB being treated differently than areas such as Anchorage and the FNSB.

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[100] 44 P.3d at 144.

[101] *Hickel*, 846 P.2d at 49.

[102] 44 P.3d at 146-147.

[103] *Hickel*, 846 P.2d at 51.

[104] *Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1360 (1987).

With regard to Anchorage, on November, 3, 2020, despite the fact the ideal quotient was established at 18,335, members and staff discussed that the population number they were aiming for in the Anchorage districts was 18,202.[105] The Board relied on Mr. Torkelson who explained, Anchorage only had the population for 15.88 districts, to not break the municipal boundary and keep the Municipality of Anchorage whole, all the districts in Anchorage would need to be underpopulated.[106]

With regard to the FNSB, Chair Binkley stated, "if you read the resolution from the Fairbanks North Star Borough, ***and I give a lot of weight to that***, they want the ideal size."[107] The Board subsequently agreed that they would try to find a way to move all 4,000 people and if it cannot be done they will consider a lower amount.[108] In later meetings, Chair Binkley reiterated that to respect the work and statement of the FNSB, then it is best for the Board to take 4,000 people out of the current FNSB districts and place them into District 36.[109] The Board then discussed the goal deviation for the FNSB districts and the deviations as they currently stood in the adopted maps, but Member Bahnke clarified that by driving these deviations lower it was to the detriment of the MSB and Valdez not desiring to be paired together.[110]

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[105] Exc. 18 (Nov. 3, 2021 Tr. pg. 6).

[106] *Id.*

[107] Exc. 19 (Nov. 3, 2021 Tr. pg. 237) (emphasis added).

[108] Exc. 20 (Nov. 3, 2021 Tr. pg. 238).

[109] Exc. 21-30 (Nov. 3, 2021 Tr. pg. 243-252).

[110] Exc. 31 (Nov. 3, 2021 Tr. pg. 260).

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The Board never considered moving less than the exact population amount required to equalize the FNSB districts due to its heavy consideration of the FNSB resolution, while at the same time had no issue overpopulating the MSB and even made a joke out of dumping Valdez with it. On November 3, 2021, Member Borromeo was asked how her map aligns with what was requested by the MSB, Member Borromeo responds that she hit every target and "gave them a little extra."[111] When Chair Binkley sought clarification about her prior response concerning how her plan aligned with the request from the MSB, particularly that the MSB specifically requested not to be paired with Valdez, Member Borromeo responded, "Yeah. Like I said, I gave them everything they wanted plus a little more. I aim to please."[112] Following her comments, the Board erupted in laughter.[113] Member Borromeo's flippant remark turns into a running joke. This is demonstrated when Member Bahnke voices her support for Member Borromeo's map and in ending her comments she indicates that it appears Member Borromeo's map gives the MSB most of what it asked for, and Chair Binkley chimes in "plus more", resulting in more laughter.[114]

The MSB simply was not given the same consideration as Anchorage or the FNSB. Chair Binkley testified that when the Fairbanks North Star Borough passed its resolution,

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[111] Exc. 32-33 (Nov. 3, 2021 Tr. pg. 324-325); Video R. at GMT20211103-170718 at. 6:24:27 to 6:25:03 (See Excerpt of Record, Volume 2 at footnote 248).

[112] Exc. 34-35. (Nov. 3, 2021 Tr. pg. 326-327); Video R. at GMT20211103-170718 at. 6:26:35 to 6:26:55 (See Excerpt of Record, Volume 2 at footnote 250).

[113] *Id.*

[114] Exc. 36 (Nov. 3, 2021 Tr. pg. 331); Video at R. GMT20211103-170718 at. 6:30:57 to 6:31:33 (See Excerpt of Record, Volume 2 at footnote 252).

the resolution was significant and given a lot of weight, and as a result, the Board exported population from Fairbanks into District 36.[115] Chair Binkley testified that the resolution was taken so seriously because it was passed by the people who represent the Borough, a socioeconomically integrated unit as elected by the people of that area.[116] Chair Binkley indicated that the resolution from the North Star Borough suggested not overpopulating the districts within the Borough, and instead transferring the population out into a single district, which is what the Board did with the final map.[117] Despite the weight afforded the resolution from the Fairbanks North Star Borough, Chair Binkley only "vaguely" recalled the presentation by the MSB Manager which included the resolution from the MSB.[118] Finally, Chair Binkley testified he was not surprised that the record is basically devoid of any conversation about the resolution presented to the Board by the MSB.[119]

The effect of disproportionality cannot be considered de minimis. The Board must weigh the factors before it equally statewide, but by prioritizing under-populating Anchorage, affording significantly greater weight to the resolution of the FNSB, and improperly prioritizing the VRA districts, the Board violated equal protection.

[115] Exc. 80.

[116] Exc. 84.

[117] Exc. 82.

[118] Exc. 83.

[119] Exc. 85.

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G. The court erred in failing to find that the now perpetual and blatant violations by the Board of the Open Meetings Act do not result in a plan that is void requiring remand.

The court properly found that the Board is subject to the Open Meetings Act.[120] Specifically, the court found that "in order to enter an executive session… the motion to convene… must clearly and with specificity describe the subject of the proposed executive session without defeating the purpose of addressing the subject in private."[121] Where a meeting subject to the OMA violates the statute, any action taken during that meeting is voidable.[122]

The court properly indicated that the MSB challenged the Board's use of executive sessions, as they were improperly noticed or used for improper purposes.[123] However, the court erred in failing to find that such action rendered the actions of the Board void. Instead, the court noted that it is "limited in its ability to analyze whether a particular executive session was held in accordance with the law, as the court [sic] pull back the curtain entirely and understand exactly what happened during these sessions."[124] This particularly as the Board failed to make a specific motion to enter executive session, and instead merely relied on the statutory language.[125]

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[120] Exc. 652.

[121] Exc. 652-653.

[122] Exc. 653 *citing* AAS 44.62.310(f).

[123] Exc. 654.

[124] Exc. 655.

[125] *Id.*

If the court cannot discern after review of volumes of the record and significant testimony at trial as to whether or not the Board properly convened to executive session, and what was discussed that likely should have been discussed in public, then there undoubtedly must be material that was improperly hidden from the public eye by the misuse of executive session. While the court noted that this Court has never made voidable the redistricting plan based on the OMA, the facts in this case demonstrate that is what must be done here. The Board has been empowered by the Court's prior rulings stating that no remedy is appropriate for violations of OMA during redistricting, even to go so far and argue in the lower court that the OMA does not apply.[126] The OMA was specifically crafted to require the transparency of government deliberations and proceedings by recognizing that, "the people of this state do not yield their sovereignty to the agencies that serve them,"[127] and "do not give their public servants the right to decide what is good for the people to know and what is not good for them to know."[128] Without enforcement or consequences for OMA violations during redistricting, the Board can't be held accountable for its actions and the entire purpose of the Act is essentially void which directly violates the public interest it was drafted to protect. Therefore, the court erred, and the plan must be found void and remanded for correction.

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[126] In re 2001 Redistricting Cases, 44 P.3d 141, 147 (Alaska 2002). Exc. 97, Board Opposition to East Anchorage Motion for Rule of Law, p. 2.

[127] AS 44.62.312(3)

[128] AS 44.62.312(a)(2), (a)(4)

H. The court erred in failing to address the Open Meetings Act violation set forth by the MSB.

The court erred by failing to address the OMA violation set forth by the MSB, as it never addressed the same in the Findings of Fact and Conclusions of Law. Specifically, the court failed to address the following OMA violations.

On November 3, 2021, the Board was finally forced to confront the issue of where to place Valdez when it realized that moving 4,000 people out of FNSB would necessitate changing the VRA districts or moving Valdez out of District 36. At the end of the meeting Counsel Singer posed the question to the Board that if it honored the request by Valdez and MSB not to be paired, and honored the FNSB resolution to get to one person, one vote, had the Board explored another solution for Valdez?[129] The board then engaged in discussion and concluded that it would be worthwhile to go back to the maps and explore options for pairing Valdez with the Prince William Sound communities.[130]

The transcript on page 337 then reflects the following discussion:[131]

1· · · · · CHAIR BINKLEY:· Yeah.· Let's take a break,
2· ·and then we'll come back and decide how we want to
3· ·finish out the day.· How's that sound?
4· · · · · (Indiscernible - multiple speakers.)
5· · · · · MR. SINGER:· I think (indiscernible) was
6· ·kind of discussing (indiscernible).
7· · · · · (Indiscernible - multiple speakers.)

[129] Exc. 37 (Nov. 3, 2021 Tr. pg. 334).

[130] Exc. 37-39 (Nov. 3, 2021 Tr. pg. 334-336); Video R. at GMT20211103-170718 at. 6:34:06 to 6:36:58 (See Excerpt of Record, Volume 2 at footnote 256).

[131] Recording of Page 337: Video R. at GMT20211103-170718 at. 6:37:08 to 6:38:15 (See Excerpt of Record, Volume 2 at footnote 257).

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The sections where the transcript states the audio is "indiscernible," is actually fairly clear when listening to the meeting. It is a discussion among the board members about whether they should go into executive session to see if there are legal implications to pairing Mat-Su with Valdez. Specifically, the members have the following exchange:

> MEMBER 1: Has he opined on Valdez --
> MEMBER 2: (Speaking over Member 1) Yeah I would like to hear that too.
> MEMBER 1: -- with the Mat-Su, if it could become a legal issue for us or not?"
> MEMBER 2/3: (Speaking at the same time as Singer) That would be an executive session.
> MR. SINGER: So I think that would kind of…discuss in executive session.
> MEMBER 2/3: I was going to say, that might be an executive session discussion...
> MEMBER 1: That's why I asked 'have you opined on that or not.'
> (Indiscernible)
> MEMBER 1: I didn't say 'what's your opinion on it.'
> MEMBER 2/3: Right, right.[132]

Then transcript page 337 picks back up:

> 8· · · · · MEMBER MARCUM:· Do we want to do that before
> ·9· ·our drawing exercise or not?
> 10· · · · · MR. SINGER:· If folks have those kinds of
> 11· ·questions, that's one way we could finish the day.
> 12· · · · · MEMBER MARCUM:· I think it would be
> 13· ·(indiscernible).
> 14· · · · · CHAIR BINKLEY:· (Indiscernible.)
> 15· · · · · MEMBER SIMPSON:· (Indiscernible) with the
> 16· ·amount of time we have left.
> 17· · · · · MR. PRESLEY:· So it's basically
> 18· ·(indiscernible).
> 19· · · · · MEMBER MARCUM:· (Indiscernible) it may
> 20· ·affect --

[132] Recording of Page 337: Video R. at GMT20211103-170718 at. 6:37:08 to 6:38:15 (See Excerpt of Record, Volume 2 at footnote 257).

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21· · · · · (Indiscernible - multiple speakers.)

Transcript page 337 then concludes:

22· · · · · CHAIR BINKLEY:· So let's take a little
23· ·break, five-minute break, and then we'll come back
24· ·in.· And if it's desired, the board will go into
25· ·executive session with some legal issues to address.

When the Board comes back on record, it immediately goes into executive session closing the public meeting at approximately 4:45 PM.[133] Then at 5:02 PM Member Borromeo texts counsel for the Doyon Coalition, Nathaniel Amdur-Clark, and Tom Begich, representative of the Senate Minority Caucus map, separately, asking them to help her find case law supporting joining MSB and Valdez into one district.[134]

The Board never engages in a mapping session of Valdez with the Prince William Sound communities. Instead, on the following day, November 4, 2021, when the Board returns to the Valdez issue there are repeated references made by members stating that there is precedent for including Valdez with MSB on the advice of counsel.[135] When Member Marcum repeatedly tried to get the Board to discuss Valdez, the other members consistently told her that they were comfortable putting Valdez with MSB and took the

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[133] Exc. 41 (Nov. 3, 2021 Tr. pg. 338). Earlier in the day, the Board came back on the record at 1:00 PM at pg. 159, video mark 3 hours and 4 minutes. The meeting ends at pg. 339, video mark 6 hours and 49 minutes. The board therefore adjourned at approximately 4:46 PM.

[134] Exc. 43-47.

[135] Exc. 49 (Nov. 4, 2021 Tr. pg. 37); Exc. 50 (Nov. 4, 2021 Tr. pg. 38); Exc. 51 (Nov. 4, 2021 Tr. pg. 80); Exc. 52-53 (Nov. 4, 2021 Tr. pg. 161).

option of including it in District 36 off the table.[136] Member Marcum's insistence that the Board consider other options for Valdez even resulted in members accusing her of holding the VRA districts hostage. To which Member Marcum noted it is not holding a district hostage if changes there are necessary to make other parts of the state compact, contiguous and socioeconomically integrated.[137]

The court failed to address the evidence that the Board clearly went into executive session in the evening of November 3 and deliberated where to place Valdez out of the public eye. Further, by communicating with third parties during executive session, soliciting information pertinent to the discussion, and essentially further developing testimony, the Board engaged in a significant violation of the OMA and waived any claim of privilege it may have as to the discussions that took place.

The facts demonstrate that in the November 3 and 4, 2021 meetings, when the Board discussed drawing Valdez with the Prince William Sound communities it adjourned to executive session, and made a determination to pair Valdez with the MSB without further discussion the record. In further violation, during executive session, at least one Board member was texting individuals to solicit specific testimony and texting people who

[136] Exc. 53 (Nov. 4, 2021 Tr. pg. 168); Video R. at JRDB-20211104-0900 at. 01:27:23 to 01:28:28 (See Excerpt of Record, Volume 2at footnote 319).

[137]Exc. 54 (Nov. 4, 2021 Tr. pg. 172); Video R. at JRDB-20211104-0900 at. 01:31:13 to 01:32:32 (See Excerpt of Record, Volume 2 at footnote 325); Exc. 55 (Nov. 4, 2021 Tr. pg. 175); Video R. at JRDB-20211104-0900 at. 01:33:28 to 01:34:33 (See Excerpt of Record, Volume 2 at footnote 332).

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had testified for a specific position.[138] Member Borromeo testified that on Wednesday, November 3, 2021 at 5:02 PM, she was texting with Nathaniel Amdur-Clark, an attorney with the law firm of Sonosky Chambers representing the Doyon Coalition.[139] Member Borromeo was asking Mr. Amdur-Clark if there was case law stating the Board can put Valdez with MSB.[140]

The egregious actions by the Board to hide the process from the public require the plan to be remanded to the Board with regard to the pairing of Valdez and the MSB, and for the Board to go through the *Hickel* process in open session.

I. The court erred in finding that the Board took a "hard look" at the MSB/Valdez pairing, particularly as the court found that the Board addressed and locked in certain regions on the map first, thus not keeping all of its options open.

The Court properly found that constitutional compliance requires a "good-faith effort" on the part of the board to present the public with a number of plans and let the people have a say about which plan they prefer.[141] "The Board must make a good-faith effort to consider and incorporate the clear weight of public comment, unless state or federal law requires otherwise."[142] "If the Board adopts a final plan contrary to the preponderance of public testimony, it must state on the record legitimate reasons for its decision."[143] The court noted the issues and impact of the Board's regional mapping

[138] Exc. 77, l. 10-25.
[139] *Id.*
[140] *Id.*
[141] Exc. 640.
[142] *Id.*
[143] *Id.*

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process, and that such was discouraged early on in the Board's process.[144] The court pointed out that the "whole purpose of public hearings is to found out what the people prefer—it should not be a meaningless exercise."[145]

Despite the court's findings to the contrary, the court erred when it found that the Board took a "hard look" at testimony offered by Valdez and the MSB. There was no testimony in support of such pairing, and in fact, the same became a joke for the board. Furthermore, this was the result of the Board's *Hickel* violation, as the court found the MSB and Valdez pairing, "may have been effected by the order in which [the Board] addressed certain regions on the map first, thus not keeping all of its options open." The Board failed to take a "hard look" and ignored the testimony of Valdez and the MSB, and therefore the plan must be remanded for correction.

VI. RELIEF REQUESTED

Petitioner requests that the Court reverse the decision of the superior court and order that the matter be remanded to the Board to compel correction of the errors in its redistricting plan in compliance with the constitutional mandates.

DATED this 2nd day of March 2022, at Anchorage, Alaska.

HOLMES WEDDLE & BARCOTT, P.C.
Attorneys for Matanuska-Susitna Borough
and Michael Brown

By: */s/ Stacey C. Stone*
Stacey C. Stone
Alaska Bar No. 1005030

[144] Exc. 643.

[145] *Id.*

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