

SUPREME COURT OF ALASKA

In re 2011 Redistricting Cases

294 P.3d 1032 (Alaska 2012) · Decided December 28, 2012

OPINION

CARPENETI, J.

OPINION CARPENETI, Chief Justice. I. INTRODUCTION Earlier in the current redistricting cycle, we issued an order remanding to the superior court with instructions to remand to the redistricting board to formulate a new plan in compliance with our case law.

We agreed with the superior court that, in drafting its plan, the board failed to follow the process we mandated in order to ensure that the redistricting plan would comply with the Alaska Constitution and thus may have unnecessarily violated the Alaska Constitution. Upon remand, the board was instructed to follow this process so that we could appropriately judge whether its violations of the Alaska Constitution were absolutely necessary for compliance with federal law.

The board then submitted a modified plan to the superior court that changed only four out of forty house districts from the original plan; this amended plan was similarly rejected by the superior court because, among other reasons, the board failed to follow the process that we required in order to ensure compliance with the Alaska Constitution.

The board petitions for review of the superior court's decision. We accept the petition for review and, because the board failed to follow the process that we ordered upon remand, we affirm the decision of the superior court and require the board to draft a new plan for the 2014 elections.

We agree with the board that it is not required to make specific findings about each individual district relating to the requirements of the Alaska Constitution nor to submit a plan to the superior court at each stage of drafting. II. FACTS AND PROCEEDINGS Article VI, section 3 of the Alaska Constitution requires reapportionment of the Alaska Legislature every ten years.

Under article VI, section 10 of the Alaska Constitution, the Alaska Redistricting Board (the Board) must adopt one or more proposed redistricting plans within 80 days after receiving official census data from the federal government.

The Board must then hold public hearings on the proposed plans and adopt a final plan within 90 days of the census reporting. Because Alaska is covered by section 5 of the federal Voting Rights Act (VRA),¹ the Board must also submit its final plan to the U.S. Department of Justice (DOJ) for preclearance to ensure that any voting changes do not diminish minorities' ability to "elect their preferred candidates of choice."

2 Following the 2010 census, the Board received the official census data on March 13, 2011. On April 8, 2011, the Board hired Dr. Lisa Handley, a VRA expert. Dr. Handley strongly recommended that the Board begin its redistricting process by focusing on creating effective Native districts,³ given the difficulties posed by VRA compliance in Alaska.

On June 13, 2011, the Board formally adopted its final Proclamation Plan. This plan received preclearance from the DOJ on October 11, 2011. Three separate lawsuits were initially filed in superior court challenging the Board's final plan by four plaintiffs: the Fairbanks North Star Borough (FNSB), the City of Petersburg, and George Riley and Ronald Dearborn, residents of Ester and the Gold-stream Valley (collectively Riley).

These cases were later consolidated. The FNSB then moved to dismiss its action, which the court granted with the proviso that the Riley plaintiffs could pursue the FNSB claims. The City of Petersburg also dropped out of the suit after the superior court granted summary judgment to the Board on the issue that Petersburg had raised; Petersburg did not ask for reconsideration from the superior court or file a petition for our review.

Before trial, the superior court denied Riley's claim challenging the process used by the Board to formulate its proclamation plan, and on February 8, 2012, the superior court issued its opinion denying Riley's claims alleging unconstitutional vote dilution.

In its opinion, however, the superior court also concluded that Proclamation House Districts 1, 2, 37, and 88 unnecessarily deviated from the requirements of the Alaska Constitution. Both the Board and Riley filed petitions for review. Several entities also filed amicus briefs, including the FNSB, the Aleutians East Borough, Calista Corporation, and a coalition of several Alaska Native groups.

On March 14, 2012, we issued an order holding that the Board's Proclamation Plan did not comply with the process mandated in *Hickel v. Southeast Conference 4* (the Hickel process), and we remanded the case accordingly.⁵ In our order, we gave the Board explicit instructions and specified a process that the Board must follow to ensure that our constitutional redistricting principles are adhered to as closely as possible. After receiving the decennial census data, the 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.^[6] After setting forth the correct process for the Board to follow in order to comply with the Alaska Constitution, we concluded that it was "undisputed that the Board began redistricting in March and April of 2011 by focusing on complying with the Voting Rights Act, thereby ignoring the process we mandated."

7 Thus, we found the Board erred by reversing steps one and two of the Hickel process. Additionally, we explained why failure to follow the Hickel process was fatal to the Board's plan: The failure prevented meaningful judicial review because we could not discern whether the Board's deviations from Alaska constitutional requirements were actually necessary.

We stated: Because it did not follow the Hickel process, the Board cannot meaningfully demonstrate that the Proclamation Plan's Alaska constitutional deficiencies were necessitated by Voting Rights Act compliance, nor can we reliably decide that question.

The Hickel process provides the Board with defined procedural steps that, when followed, ensure redistricting satisfies 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 socioeconomic integration; it may consider local government boundaries and should use drainage and other geographic features in describing boundaries 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 noncompliant, make revisions that deviate from the Alaska Constitution when deviation is "the only means available to satisfy Voting Rights Act requirements."

[8] The Board was left with clear instructions to fulfill its constitutional mandate and we further elaborated on the importance of the Hickel process in redistricting: The Hickel process assures compliance with the Alaska Constitution's requirements concerning redistricting to the greatest extent possible.

The Hickel process also diminishes the potential for partisan gerrymandering and promotes trust in government.... A redistricting plan that substantially deviates from these constitutional requirements undermines trust in the process.[9] Thus, we held the Board erred by using its own method and ignoring Hickel.

For the sake of absolute clarity, we also rearticulated the Board's duties and our own role in the admittedly difficult process of redistricting: We recognize that the Board is faced with a difficult task in attempting to harmonize the requirements of the Alaska Constitution and the Voting Rights Act.... But these difficulties do not limit the Board's responsibility to create a constitutionally compliant redistricting plan, nor do they "absolve this court of its duty to independently measure each district against constitutional standards."...

The Hickel process is designed to "ensure that the requirements of article VI, section 6 of the Alaska Constitution are not unnecessarily compromised by the Voting Rights Act"; it may not be disregarded for reasons of expediency when drafting a permanent plan.[10] In our order, we explicitly stated that reasons of difficulty or expediency do not justify deviating from the requirements of the Alaska Constitution.

Consequently, the Board was ordered to follow the Hickel process upon remand.¹¹ 'We also acknowledged that time constraints may have complicated compliance with our order, and we approved the use of an interim plan if necessary: If the Board is unable to draft a plan that complies with this order in time for the 2012 elections, it may petition this court for an order that the 2012 elections be conducted using the Proclamation Plan as an interim plan.

But legislative districts for subsequent elections will be defined by the plan ultimately arrived at by the Board after following the Hickel process." [12] Thus, we notified the Board that we would not approve any final plan unless it was drafted according to the Hickel process.

The Board met from March 26 to March 31 to develop a new plan based on our order. The Board worked from what it termed a "Hickel template" that kept the unchallenged districts from its original Proclamation Plan because the Board claimed those districts "were drawn with only the Alaska Constitution in mind" and thus they complied with the Hickel process.¹³ The Board's template omitted regions from the original Proclamation Plan that had been challenged, including House Districts 1-5 (Fairbanks City and FNSB); 36 (Bristol Bay and Aleutians East Borough); 37 (Bethel and Aleutians West Borough); 38 (Wade Hampton and Denali); and 89 (Bering Straits and Interior Villages).

After developing the template, the Board created four plans using that template and reviewed each for compliance with the Alaska Constitution. The Board adopted one of these plans, finding that each house district within was "contiguous, relatively compact and socio-economically - integrated." While the Board undertook this process and discussed its chosen plan with its VRA expert, third-party organizations submitted five alternative plans.

The Board discussed each of these third-party plans and rejected them; it then adopted an amended version of its chosen plan. Eventually, the Board's modified plan became the Amended Proclamation Plan, and the Board unanimously adopted its written findings in support of this plan on April 5, 2012. This plan was then submitted to the superior court for approval as a final redistricting plan.

On April 16, 2012, seven parties and amici filed objections to the Board's Amended Proclamation Plan; among other deficiencies, each objector argued the Board ignored the Hickel process by maintaining the original Proclamation Plan's unchallenged districts when creating its template instead of beginning with a clean slate.

In response to this objection, the Board argued that it was "under no obligation to redraw every House district, especially ones that already complied" with the Alaska Constitution. On April 20, 2012, the superior court issued an order denying the Board's request for approval of the Amended Proclamation Plan; among other issues, the superior court found that the Amended Proclamation Plan violated Hickel because the Board assumed that its unchallenged districts were

constitutional, and it failed to redraw Southeast Alaska even though these districts were created to comply with the Board's assumption that it had to maintain a Native influence district.¹⁴ The superior court declared: Instead of redrawing a new plan that focused on the Alaska Constitution, there is no dispute that the Board used most of the districts from the [original] Proclamation Plan, with the exception of the districts in Fairbanks and districts that were created to satisfy the Voting Rights Act....

The court finds that the Board's method did not comply with either the spirit or the letter of the Alaska Supreme Court's order and the Hickel process. The superior court also concluded that the Board first had to submit a plan to the court that complied with the Alaska Constitution without regard for the VRA, and only after the superior court evaluated and approved this Hickel plan would it then be remanded to the Board to make modifications necessary for VRA compliance.

The Board asked us to review the superior court's decision, but due to pending election deadlines, it also asked us to approve an interim plan for the 2012 elections. Extensive litigation ensued regarding the Board's interim plan, and we ultimately issued two orders adopting the Board's Amended Proclamation Plan as the interim plan. Our order approving this interim plan once again reiterated that the Board would have to follow the Hickel process before we would approve a final plan: The Board's petition for review from the superior court's order of April 20, 2012, has been submitted to this court and remains under advisement.

One of the issues raised by the petition for review is whether the Redistricting Board failed to comply with the Hickel process as mandated by this court's order of March 14, 2012, with respect to the Southeast Alaska districts. Our order of May 10, 2012 is premised on the conclusion that the Board did not so comply.

We now address the Board's petition for review from the superior court's order rejecting the Amended Proclamation Plan as a final redistricting plan. III. STANDARD OF REVIEW Under article VI, section 11 of the Alaska Constitution, the superior court has original jurisdiction over lawsuits to "compel correction of any error in redistricting" and, on appeal, "the cause shall be reviewed by the supreme court on the law and the facts."

¹⁵ We review redistricting plans "in the same light as we would a regulation adopted under a delegation of authority from the legislature to an administrative agency to formulate policy and promulgate regulations." ¹⁶ We review the plan to ensure that the Board did not exceed its delegated authority and to determine if the plan is "reasonable and not arbitrary."

¹⁷ We may not substitute our judgment as to the sagacity of a redistricting plan for that of the Board, as the wisdom of the plan is not a subject for review.¹⁸ Our review is meant to ensure that the Board's Proclamation Plan is not unreasonable and is constitutional under article VI, section 6

of the Alaska Constitution.¹⁹ IV. DISCUSSION A. The Board Did Not Comply With The Hickel Process When Formulating Its Amended Proclamation Plan.

The Board claims that it has followed our instructions to use the Hickel process upon remand and asks us to approve its Amended Proclamation Plan as the final redistricting plan. But it is undisputed that the Board began formulating its original proclamation plan by focusing exclusively on race and creating the correct number of effective Native districts.

Thus, upon remand, the Board was instructed to consider the requirements of the Alaska Constitution first when constructing districts.²⁰ - However, what the Board actually did upon remand was to create a Hickel template that maintained the boundaries of unchallenged districts from the original Proclamation Plan, resulting in 22 unchanged house districts.

The Board asserts that these districts "were drawn with only the Alaska Constitution in mind" and thus they complied with the Hick-el process.²¹ The superior court interpreted our March 14, 2012 order as an instruction to the Board to begin its drafting process anew.

The superior court found that "(instead of redrawing a new plan that focused on the Alaska Constitution, there is no dispute that the Board used most of the districts from the [original] Proclamation Plan" and that this "method did not comply with either the spirit or the letter of the Alaska Supreme Court's order and the Hickel process."

We agree with the superior court that FHickel and our order mandated that the initial map drawn by the Board should not be affected by VRA considerations in any way, and therefore, the Board's Amended Proclamation Plan was noncompliant. We have already held that the Board began drawing its original Proclamation Plan by creating VRA-compliant districts, a process that necessarily affected the contours of the entire *1038map.²² By adopting districts affected by the Board's initial VRA considerations, the Board's Hickel template limited its available options.

As the amici usefully put it, on remand the Board "painted itself into a corner" by leaving only a few blank areas on the map. This structure limited the Board's ability to consider a wide range of plans to achieve maximum constitutional compliance; notably, each of the Board's four Hickel options was aimed at addressing the same population shortfall issue in a single rural district.

Moreover, when the Board first created these 22 districts, it did so in order to comply with the VRA; this is a clear violation of Hickel's plain language. Although these districts went unchallenged, that does not change the fact that they were drawn with VRA considerations as the first priority.

We do not know if these districts will meet the Alaska Constitution's requirements of compactness, contiguity, and socio-economic integration, but they were not drawn with this purpose as the primary consideration. Without a plan that does so, it is impossible to measure if

deviations from Alaska constitutional requirements were necessary. Consequently, there is nothing to show that if the Board had considered the Alaska constitutional requirements first, as instructed, these districts would have remained the same.

The Board's failure to follow the Hickel process has therefore precluded meaningful judicial review. B. The Board Does Not Need To Make Specific Findings About Each Individual District Relating To The Requirements Of The Alaska Constitution.

The Board challenged the superior court's ruling that required the Board to make specific findings regarding each individual house district. The superior court seemed to derive its conclusion from the following passage of our March 14 order: "[T]hese difficulties do not limit the Board's responsibility to create a constitutionally compliant redistricting plan, nor do they 'absolve this court of its duty to independently measure each district against constitutional standards'" 23 Based on this language, the superior court reasoned that the Board was required to submit district-specific findings so that we could measure the constitutionality of each district.

The Board argues that this ruling is the "epitome of form over substance, and creates a mandate obviously absent from [our] order." The Board also highlighted its express finding that all 40 house districts in the Amended Proclamation Plan were constitutionally compliant. There is no indication in the 2001 Redistricting order or in our March 14 order that our duty to measure each district for constitutional compliance creates a corresponding requirement that the Board make individual findings regarding each district's constitutionality.

In our March 14 order we "recommend(ed) that the Board make findings, in furtherance of the Hickel process, that the initially designed plan complies with the requirements of the - Alaska - Constitution...." 24 Our recommendation did not extend to findings about each district. The Board is not required to specifically find that each district in its Hickel plan complies with the Alaska Constitution.

C. The Board Need Not Submit A Plan To The Superior Court At Each Stage Of Drafting. The Board also challenged the superior court's ruling that it must submit a Hickel plan to that court for approval before creating a final plan.

The superior court stated in its April 20, 2012 order that it must "receive a plan from the Board that complies with the Alaska Constitution before considering any need to meet any VRA requirements." Once the superior court approved the plan, "the matter will be remanded again to the Board" to develop a plan that deviates from the requirements of the Alaska Constitution only *1039when necessary for VRA compliance.

The Board argues that this ruling has no support in the detailed mandates of the Alaska Constitution and our prior case law. It also contends that the superior court created "a completely

new, unprecedented level of court involvement in the redistricting process" without establishing "just how and when this review is supposed to occur in future redistricting cycles."

Neither FHickel nor the March 14 order expressly or impliedly requires the Board to submit its Elickel plan for superior court ratification before proceeding to weigh VRA compliance. Article VI, sections 10 and 11 of the Alaska Constitution delineate the process the Board must follow in developing a proclamation plan and the contours of judicial review, and nowhere do these provisions suggest a two-stage review is required.

Therefore, we hold that the Board is not required to submit its initial Hickel plan to the superior court for ratification. D. All Other Claims Raised In This Petition for Review Are Moot. The Board also challenged the superior court's rulings that the configuration of certain house districts that deviated from the requirements of the Alaska Constitution were not necessary for compliance with the VRA.

Since we find the Board did not comply with the Hickel process in formulating its plan, we need not reach these claims as these districts may have a completely different configuration in the new plan the Board will have to create, and therefore, these claims are moot. Vv. CONCLUSION Because the Board failed to follow the Hickel process when drafting its Amended Proclamation Plan, we AFFIRM the superior court's ruling invalidating that plan and REMAND this case to the Board to draft a new plan based on strict adherence to the Hickel process. - We REVERSE the superior court's rulings that the Board must make specific findings on the constitutionality of each house district and that the Board must submit the plan to the court for approval at each stage of drafting.

WINFREE, Justice, with whom STOWERS, Justice, joins, dissenting in part. MATTHEWS, Senior Justice, with whom FABE, Justice, joins, dissenting.. Fannie Lou Hamer, Rosa Parks, & Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub.L. No. 109-246, § 5, 120 Stat. 580 (2006) (codified at 42 U.S.C. § 1973c (2006)).. 42 U.S.C. § 1973c(d) (2006)..

The superior court defined "effective Native districts" as "districts where Natives have an ability to elect a candidate of their choice." See also *Corbett v. Sullivan*, 202 F.Supp.2d 972, 984 (E.D.Mo.2002) (defining "effective minority district" as one where minority had "opportunity to elect candidates of their choice").. 846 P.2d 38, 51 n. 22 (Alaska 1992)..

See *In re 2011 Redistricting Cases*, 274 P.3d 466 (Alaska 2012).. *Id.* at 467 (quoting Hickel, 846 P.2d at 51 n. 22 (internal quotation marks and formatting omitted)).. *Id.* *Id.* at 467-68 (quoting Hickel, 846 P.2d at 51 n. 22).. *Id.* at 468.. *Id.* (quoting *In re 2001 Redistricting Cases*, 44 P.3d 141, 147 (Alaska 2002); Hickel) (footnotes omitted).. *Id.* *Id.* at 468-69 (emphasis added)..

But in describing the process used to construct the Proclamation House Plan-which served as the template for the Amended Proclamation Plan-the Board began its explanation with the following language: "In order to maintain the requisite number of Alaska Native districts,...".

Thus, it appears that at least three of these template districts were drawn with or *1036approved with VRA requirements in mind: House District 40, which was intended to be one of the five effective Native districts, and House Districts 32 and 34, which were drawn under the assumption that a Native influence district had to be maintained in Southeast Alaska.

(See *infra* n. 14 for a definition of "Native influence district.") The Board claims that while House District 40 is a Native district, it was not "built on Voting Rights Act grounds" because it was unchanged from the 2002 redistricting plan..

The superior court defined a "Native influence district" as a district "where Natives are able to influence the election but cannot elect a candidate of their choice without the help of crossover votes" from non-Natives. See also *Bartlett v. Strickland*, 556 U.S. 1, 13, 129 S.Ct. 1231, 173 L.Ed.2d 173 (2009) (defining "influence district" as "one in which a minority group can influence the outcome of an election even if its preferred candidate cannot be elected")..

As to "the weight to be given to the decision of the superior court," we said in *Groh v. Egan*, 526 P.2d 863, 867 (Alaska 1974), that we review redistricting plans "de novo upon the record developed in the superior court.". *Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1357 (Alaska 1987) (quoting *Carpenter v. Hammond*, 667 P.2d 1204, 1214 (Alaska 1983)).. *Id.* (quoting *Carpenter*, 667 P.2d at 1214).. - *Id.* at 1357-58 (quoting *Carpenter*, 667 P.2d at 1214)..

Id. at 1358 (quoting *Carpenter*, 667 P.2d at 1214).. In *re* 2011 Redistricting Cases, 274 P.3d 466, 467 (Alaska 2012).. At least three of these template districts were drawn or approved with VRA requirements in mind. See *supra* note 13..

In *re* 2011 Redistricting Cases, 274 P.3d at 467.. *Id.* at 468 (quoting In *re* 2001 Redistricting Cases, 44 P.3d 141, 147 (Alaska 2002)).. *Id.* at 468 n. 15.