In the Supreme Court of the State of Alaska

In the Matter of the 2021 Redistricting Cases
(Alaska Redistricting Board/Girdwood Plaintiffs/East Anchorage Plaintiffs)

Supreme Court No. **S-18419**

Order
Petition for Review

Date of Order: **5/24/2022**

Trial Court Case No. **3AN-21-08869CI**

Before: Winfree, Chief Justice, Borghesan and Henderson, Justices, and Matthews and Eastaugh, Senior Justices.[*]

On February 15, 2022 the superior court remanded the 2021 Proclamation of Redistricting to the Alaska Redistricting Board for further proceedings on, *inter alia*, the Board's proposed Senate District K.[1] After considering four petitions for review[2] on an expedited basis[3] we issued an order affirming the superior court's conclusion that Senate District K was an unconstitutional political gerrymander and remanding to the

[*] Sitting by assignments made under article IV, section 11 of the Alaska Constitution and Alaska Administrative Rule 23(a).

[1] *See generally* Alaska Const. art. VI (providing for creation of redistricting board, redistricting process leading to redistricting proclamation, and challenges to proclamation in superior court and then this court).

[2] *See* Alaska R. App. P. 216.5(h) (providing for petitions for review of superior court decision remanding redistricting case to the Redistricting Board).

[3] *See* Alaska Const. art. VI, § 11 (providing that redistricting matter "shall have priority over all other matters pending before the . . . court"); Alaska R. App. P. 216.5(i) (same).

superior court to remand to the Board for further proceedings to correct the unconstitutional proclamation plan.[4]

After remand the Board approved an amended proclamation plan on April 13, 2022. The amended plan was challenged in superior court by both the original East Anchorage Plaintiffs and three Alaska residents referred to as the Girdwood Plaintiffs. On May 16, 2022 the superior court decided, in relevant part, that the Board's Senate Districts E and L were a continuing unconstitutional political gerrymander, that the matter be remanded to the Board to correct the constitutional deficiency, and that the Board adopt a specified interim proclamation plan for the 2022 elections in light of the upcoming June 1 candidate filing deadline and the inability to have a new final proclamation plan approved before that date.[5]

The Board petitioned for review of the superior court's decision, challenging both the ruling on the amended proclamation plan's unconstitutionality and the specified interim plan for the 2022 elections. As with the earlier petitions for review, we ordered expedited briefing;[6] we also entered a stay of the superior court's May 16, 2022 order pending further order of this court.[7]

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[4] *In re 2021 Alaska Redistricting Cases*, No. S-18332 (Alaska Supreme Court Order, March 25, 2022).

[5] *See* AS 15.25.040(a) (setting date for candidate filings).

[6] *In re 2021 Alaska Redistricting Cases*, No. S-18419 (Alaska Supreme Court Order, May 18, 2022).

[7] *In re 2021 Alaska Redistricting Cases*, No. S-18419 (Alaska Supreme Court Order, May 19, 2022).

Having considered the parties' briefing, we GRANT review of the Board's petition.[8] To now further expedite the redistricting process, and without seeing the need for oral argument, we set out in summary fashion our decision on the Board's petition for review with a formal opinion explaining our reasoning to follow:

Overview

As presented to us for appellate review, this matter does not involve a challenge to the Board's compliance with article VI, section 6 of the Alaska Constitution.[9] Nor does this matter involve a claim of improper house district population

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[8] Alaska Appellate Rule 403(a)-(g) governs petitions for review and generally contemplates a process of a party petitioning for review of a trial court ruling, describing why the ruling is incorrect and why immediate review is necessary, and opposing parties then filing responses; the appellate court has an opportunity to consider whether immediate review is warranted and may order full briefing and oral argument on legal issues presented if appropriate. Given the expedited and weighty nature of redistricting matters, we allowed full briefing on the merits of the Board's challenges to the superior court's order in about two days' time for each side. We thank the parties and counsel for their cogent presentation of arguments in such an expedited fashion.

[9] Article VI, section 6 instructs:

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

deviations.[10] The issue before us is whether the Board's pairing of certain house districts in senate districts[11] violates the Alaska Constitution's equal protection guarantee, specifically the right to fair and effective representation.[12]

Senate Districts E and L

The superior court concluded that the Board's amended proclamation plan reflected the Board's continued intent to discriminate — on a partisan basis — in favor of Eagle River voters by selectively pairing two Eagle River house districts with non-Eagle River house districts, giving Eagle River voters an opportunity to elect two senators in Senate Districts E and L, to the detriment of voters in the non-Eagle River

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See Hickel v. Se. Conf., 846 P.2d 38, 45 & n.11 (Alaska 1992), *as modified on denial of reh'g* (Mar. 12, 1993) (explaining Constitution's contiguity, compactness, and socio-economic integration requirements "were incorporated by the framers of the reapportionment provisions to prevent gerrymandering," including political gerrymandering).

[10] The federal "Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable," though some deviation is expected and permissible. *Reynolds v. Sims*, 377 U.S. 533, 577, 579-81 (1964); U.S. Const. amend. XIV, § 1.

[11] *See* Alaska Const. art. VI, § 4 (requiring redistricting board to create 20 senate districts, each composed of two house districts).

[12] *See* Alaska Const. art. I, § 1; *Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1366 (Alaska 1987) ("In the context of voting rights in redistricting and reapportionment litigation, there are two basic principles of equal protection, namely that of 'one person, one vote' — the right to an equally weighted vote — and of 'fair and effective representation' — the right to group effectiveness or an equally powerful vote." (quoting John R. Low-Beer, *The Constitutional Imperative of Proportional Representation*, 94 YALE L.J. 163, 163-64 (1984))).

house districts. The Board offers several arguments challenging the superior court's decision.

1. Burden of persuasion

The Board contends that the superior court erred as a matter of law by placing the burden of persuasion on the Board to prove it was not illegally discriminating in favor of Eagle River voters and against other voters. This argument is specious. The superior court expressly and clearly stated that it was not placing the burden of persuasion on the Board, but rather on the proclamation plan challengers. The court stated that it was a matter of first impression whether the burden of persuasion should shift after a prior determination of illegal discrimination by the Board, but the court declined to take that step, leaving the question for us to decide if appropriate. The superior court's (1) considering the previous determination of illegal discrimination as a factor in the multi-factor legal test for an equal protection claim, and (2) deciding the East Anchorage and Girdwood Plaintiffs met their burden of persuasion, does not mean the court wrongly placed the burden of persuasion on the Board.

2. Hard look analysis

The Board argues that the superior court erred as a matter of law by continuing to use the "hard look" analysis we rejected in our earlier order.[13] After

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[13] The hard look doctrine, which we previously have applied to the Board, determines whether a proclamation plan — like a regulation — is reasonable and primarily concerns whether the Board "has taken a hard look at the salient problems and has genuinely engaged in reasoned decision making." *See In re 2001 Redistricting Cases*, 44 P.3d at 143-44, 144 n.5 (quoting *Interior Alaska Airboat Ass'n v. State, Bd. of Game,* 18 P.3d 686, 690 (Alaska 2001)) (applying hard look analysis to Board and remanding house districts for reconsideration because Board had not considered certain salient issues).

carefully reviewing the superior court's decision, we conclude that the superior court examined whether the Board took a hard look at salient problems raised by public comments rather than merely counting comments and determining whether the Board followed the majority view. This is in line with the hard look doctrine, and we see no legal error.

3. Equal protection test/conclusion

The Board argues that the superior court wrongfully added a federal law overlay to the multi-factor test used to determine whether redistricting violates equal protection in this context.[14] We disagree. The superior court looked to federal law to assist in determining, as a matter of first impression, whether a prior illegal redistricting discrimination finding may be relevant to determining whether subsequent illegal redistricting discrimination occurred. We see no legal error in the superior court's determination that prior illegal redistricting discrimination may be a relevant factor when, as in this matter, the challenge to the subsequent redistricting plan is based on the

[14] *See Kenai Peninsula*, 743 P.2d at 1372 ("Under such a test we look both to the process followed by the Board in formulating its decision and to the substance of the Board's decision in order to ascertain whether the Board intentionally discriminated against a particular geographic area. Wholesale exclusion of any geographic area from the reapportionment process and the use of any secretive procedures suggest an illegitimate purpose. District boundaries which meander and selectively ignore political subdivisions and communities of interest, and evidence of regional partisanship are also suggestive. The presentation of evidence that indicates, when considered with the totality of the circumstances, that the Board acted intentionally to discriminate against the voters of a geographic area will serve to compel the Board to demonstrate that its acts aimed to effectuate proportional representation. That is, the Board will have the burden of proving that any intentional discrimination against voters of a particular area will lead to more proportional representation.").

same contextual framework and house district pairing for senate districts.

The Board also contends that the superior court came to the wrong conclusion after applying its equal protection analysis, but we disagree. We AFFIRM the superior court's determination that the Board again engaged in unconstitutional political gerrymandering to increase the one group's voting power at the expense of others.

Interim Plan

The Board adopted two potential proclamation plans for public presentation and comment and for adoption as the amended proclamation plan, referred to as Option 2 and Option 3B. The Board adopted Option 3B. After ruling that the Board-adopted Option 3B was unconstitutional, the superior court ordered the Board to implement Option 2 as the interim plan for the upcoming 2022 elections to enable legislative candidates to file for office by the June 1 deadline. Because we agree with the superior court that the Board's proclamation plan — Option 3B — is unconstitutional, the issue of an interim plan remains.

The Board seemingly argues that the superior court had no authority to order the Board to adopt Option 2 as the interim proclamation plan. The Board presumably believed Option 2 fulfilled constitutional requirements, or it would not have adopted it for public presentation and consideration for a proclamation. We are about a week short of June 1 and the Board has made no known effort to prepare or present to us an interim plan other than Option 2.[15] We therefore AFFIRM the superior court's

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[15] *Cf. In re 2011 Redistricting Cases*, 274 P.3d 466, 468-69 (Alaska 2012) (inviting board to submit proposed interim plan for our approval in light of upcoming election deadlines when remanding final plan to board for further proceedings).

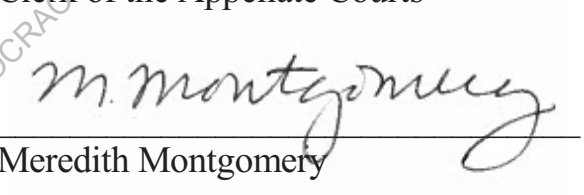
order that the Board adopt the Option 2 proclamation plan as an interim plan for the 2022 elections.

Conclusion

We DISSOLVE THE STAY of the superior court's rulings that (1) the Board's amended proclamation is unconstitutional and (2) the Board adopt the specified interim plan for the 2022 elections. The superior court's remand to the Board for further proceedings on a new proclamation plan for elections after 2022 REMAINS STAYED.

Entered at the direction of the court.

Clerk of the Appellate Courts



Meredith Montgomery

cc: Supreme Court Justices
Judge Matthews
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