

Robin O. Brena, Esq.  
Jake W. Staser, Esq.  
Laura S. Gould, Esq.  
Jon S. Wakeland, Esq.  
Brena, Bell & Walker, P.C.  
810 N Street, Suite 100  
Anchorage, Alaska 99501  
Telephone: (907) 258-2000  
E-Mail: [rbrena@brenalaw.com](mailto:rbrena@brenalaw.com)  
[jstaser@brenalaw.com](mailto:jstaser@brenalaw.com)  
[lgould@brenalaw.com](mailto:lgould@brenalaw.com)  
[jwakeland@brenalaw.com](mailto:jwakeland@brenalaw.com)

Attorneys for the City of Valdez and Mark Detter

**IN THE SUPERIOR COURT FOR THE STATE OF ALASKA**  
**THIRD JUDICIAL DISTRICT AT ANCHORAGE**

In the Matter of the )  
2021 Redistricting Plan. ) Case No. 3AN-21-08869 CI  
(Consolidated Cases)  
\_\_\_\_\_)  
Case No. 3VA-21-00080 CI  
Case No. 1JU-21-00944 CI

**CITY OF VALDEZ AND MARK DETTER'S**  
**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

**February 9, 2022**

**BRENA, BELL &  
WALKER, P.C.**  
810 N Street, Suite 100  
Anchorage, Alaska 99501  
Phone: (907) 258-2000  
Facsimile: (907) 258-2001

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**BRENA, BELL & WALKER, P.C.**  
810 N Street, Suite 100  
Anchorage, Alaska 99501  
Phone: (907) 258-2000  
Facsimile: (907) 258-2001

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Abbreviation	Description
2002 Plan	Amended Final Plan
AFFR	Alaskans for Fair Redistricting
AFFER	Alaska for Fair and Equitable Redistricting
ANCSA	Alaska Native Claims Settlement Act
AutoBound	Board’s redistricting program, AutoBound Edge
Board	Alaska Redistricting Board
Doyon Coalition	Doyon, Tanana Chiefs Conference, Fairbanks Native Association, Sealaska, and Ahtna
Final Plan	Final Redistricting Plan for 2021
FNSB	Fairbanks North Star Borough
HJR	House Joint Resolution
Mat-Su	Matanuska-Susitna
NCSL	National Conference of State Legislatures
OMA	Open Meetings Act
REAA	Regional Educational Attendance Area
TAPS	Trans-Alaska Pipeline System
TIGER	Topologically Intergraded Geographic Encoding and Reference
Valdez Plan	The alternative redistricting plan advanced by Mr. Brace at trial
VRA	Voting Rights Act

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Anchorage, Alaska 99501  
Phone: (907) 258-2000  
Facsimile: (907) 258-2001

## I. INTRODUCTION

1. This case involves five consolidated complaints against the Alaska Redistricting Board (“Board”) with regard to its redistricting process and/or its Final Redistricting Plan (“Final Plan”) for 2021. The specific claims against the Board vary among the plaintiffs.

2. An amendment to article VI of the Alaska Constitution in 1998 created the Board and set forth the procedures and deadlines for the redistricting process as well as requirements for the Final Plan.<sup>1</sup> The legislative history of that amendment includes comments from an aide to one of the Resolution’s sponsors, who explained: “It’s not supposed to be an adversary system. It’s a system of cooperation.”<sup>2</sup>

3. Under article VI, section 8, the Board shall consist of five members, all of whom must be residents of the state for at least one year, and none of whom may be public employees or officials at the time of their appointment or during their tenure on the Board.<sup>3</sup> Appointments are to be made without regard to political affiliation.<sup>4</sup> The chair is selected

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<sup>1</sup> See 1998 Legis. Res. 74 (House Joint Resolution (“HJR”) 44) approved Nov. 3, 1998, eff. Jan. 3, 1999. See *In re 2001 Redistricting Cases*, 44 P.3d 141, 151 n.17 (Alaska 2002) (*2001 Redistricting Cases*).

<sup>2</sup> Minutes from House Judiciary Comm. Meeting on HJR 44 at 1:13 PM (Feb. 6, 1998). The speaker was Mr. Jim Sourant, Legislative Aide to Representative Brian Porter, the main sponsor of the Resolution.

<sup>3</sup> Alaska Const., art. VI, § 8.

<sup>4</sup> Alaska Const., art. VI, § 8.

by a majority of the other Board members and “is to be as politically neutral and independent as possible.”<sup>5</sup>

4. Under article VI, section 3, the Board is required to reapportion the state legislature every ten years following the official reporting of each decennial census.<sup>6</sup> The Board must create 40 house districts and 20 senate districts.<sup>7</sup> The ideal population for each house district is achieved by dividing the population of the entire state by 40.<sup>8</sup> Each senate district is composed “as near as practicable of two contiguous house districts.”<sup>9</sup>

5. The requirements for the redistricting process are set forth in article VI, section 10. The Board must adopt one or more proposed redistricting plans within 30 days of the reporting of the decennial census. The Board must then hold public hearings to obtain public comments on the proposed plans. Finally, the Board must adopt a final plan no later than 90 days after the reporting of the census.<sup>10</sup>

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<sup>5</sup> Minutes from House Judiciary Comm. Meeting on HJR 44 at 1:13 PM (Feb. 6, 1998). This comment was by Mr. Sourant.

<sup>6</sup> Alaska Const., art. VI, § 3.

<sup>7</sup> *In re 2011 Redistricting Cases* at 3 (Alaska Super. Ct., Feb.3, 2012).

<sup>8</sup> *In re 2011 Redistricting Cases* at 3 (Alaska Super. Ct., Feb 3, 2012).

<sup>9</sup> Alaska Const., art. VI, § 6.

<sup>10</sup> Alaska Const., art VI, § 10.

6. In addition, the Board is subject to the constitutional requirement of due process under article I, section 7.<sup>11</sup> The Board is also subject to the Open Meetings Act (“OMA”).<sup>12</sup>

7. The requirements for the Final Plan are set forth in article VI, section 6.

8. In 1992, the Alaska Supreme Court ruled as follows with respect to the redistricting process:

*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.*<sup>13</sup>

9. Twenty years later, the supreme court reiterated that “[t]he Voting Rights Act need not be elevated in stature so that the requirements of the Alaska Constitution are unnecessarily compromised.”<sup>14</sup>

10. In addition to the constitutional requirements of article VI, section 10, the Board is subject to the constitutional requirement of equal protection under article I, section 1.<sup>15</sup>

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<sup>11</sup> Alaska Const., art. 1, § 7.

<sup>12</sup> AS 44.62.310-.312. *See also Hickel v. Southeast Conference*, 846 P.2d 38, 57 (Alaska 1992).

<sup>13</sup> *Hickel*, 846 P.2d at 51, n.22 (emphasis added).

<sup>14</sup> *In re 2011 Redistricting Cases*, 274 P.3d 466, 467 (Alaska 2012) (citing *Hickel*, 846 P.2d at 51, n.22).

<sup>15</sup> Alaska Const., art. I, § 1.

11. With the Board’s Final Plan for 2021, City of Valdez and Mark Detter (“Plaintiffs”) maintain that the Board violated the constitutional requirements of article VI, section 6 and article I, section 1, violated article VI, section 7, violated article I, section 7, violated the OMA, and violated the *Hickel* process

12. Under article VI, section 11, any qualified voter may apply to the superior court to compel the Board to correct any errors in redistricting. Original jurisdiction in these matters is vested in the superior court.

## **II. WORK OF THE BOARD**

13. The five members of the Board were appointed as follows: Governor Mike Dunleavy appointed Budd Simpson of Juneau and Bethany Marcum of Anchorage on July 28, 2020; Senate President Cathy Giessel appointed John Binkley of Fairbanks on July 29, 2020; the Speaker of the House of Representatives, Bryce Edgmon, appointed Nicole Borromeo of Anchorage on July 30, 2020; and Chief Justice Joel Bolger appointed Melanie Bahnke of Nome on August 7, 2020.<sup>16</sup> Below is a summary of significant dates related to the work of the Board and this litigation.

14. **December 12, 2020.** Mr. Peter Torkelson was retained as Executive Director.<sup>17</sup>

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<sup>16</sup> Redistricting Process Report at 1 (Nov. 10, 2021) [ARB000005].

<sup>17</sup> Redistricting Process Report at 1 (Nov. 10, 2021) [ARB000005].



15. **January 6-8, 2021.** Mr. Torkelson, Deputy Director TJ Presley, and Board members attend a virtual “Ready to Redistrict” seminar presented by the National Conference of State Legislatures (“NCSL”).<sup>18</sup>

16. **March 12, 2021.** Matthew Singer and Lee Baxter of Schwabe, Williamson, & Wyatt were retained as counsel for the Board.<sup>19</sup>

17. **June 21, 2021.** Voting Rights Act (“VRA”) consultants Bruce Adelson and Dr. Jonathon Katz are retained by the Board.<sup>20</sup>

18. **July 14-16, 2021.** Mr. Torkelson attended “the final [NCSL] “Ready to Redistrict” training conference and learned at that time that while “legacy formatted data” would be published by August 16, 2021, “official” data delivery—the physical media—would be “no later than” September 30, 2021.”<sup>21</sup>

19. **August 5, 2021.** “[T]he U.S. Census issued a statement via Twitter that they were moving up the “legacy formatted” data delivery date from August 16 to August 12.”<sup>22</sup>

20. **August 12, 2021.** The Board received the census data. Article VI, section 10 requires the Board to adopt one or more proposed plans within 30 days of receiving the census data, making September 11, 2021, the deadline to adopt any proposed plan.<sup>23</sup>

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<sup>18</sup> Torkelson Aff. at 4, ¶ 12.

<sup>19</sup> ARB000006.

<sup>20</sup> ARB000006.

<sup>21</sup> Torkelson Aff. at 4, ¶ 15.

<sup>22</sup> Torkelson Aff. at 4, ¶ 16.

<sup>23</sup> Torkelson Aff. at 5, ¶ 18; ARB000007.

21. **August 23, 2021.** The Board met for a total of six hours and thirty-eight minutes.<sup>24</sup> The Board adopted a revised travel and per diem policy and a public testimony policy. The Board received public comment from the Alaskans for Fair Redistricting (“AFFR”), the Doyon Coalition, Senator Tom Begich, Yarrow Silvers, Felicia Wilson, and other individuals.<sup>25</sup> Eric Sandberg<sup>26</sup> and Mr. Torkelson presented a census data overview.<sup>27</sup> The Board then entered executive session and spent one hour and twenty-two minutes in executive session.<sup>28</sup> After executive session, the Board discussed the timeline for redistricting and a schedule for adopting draft and final maps.<sup>29</sup> “Mr. Torkelson noted that a single final plan must be adopted by November 10<sup>th</sup> and recommended to the board that a draft plan be adopted by September 11<sup>th</sup> and to allow any third parties that may wish to bring plans an additional week to work on their plans, giving them a delivery date of September 17<sup>th</sup>.”<sup>30</sup> Mr. Sandberg and Mr. Torkelson proposed that the Board engage in a

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<sup>24</sup> ARB000153-000157.

<sup>25</sup> ARB000154-000155.

<sup>26</sup> Mr. Sandberg is the State Demographer with the Department of Labor and Workforce Development [ARB000005].

<sup>27</sup> ARB000155.

<sup>28</sup> ARB000155.

<sup>29</sup> ARB000156.

<sup>30</sup> ARB000156.

regionalization process, and the Board discussed various regionalization configurations.<sup>31</sup>

Ms. Borromeo expressed her preference that the Board draft a redistricting plan together.<sup>32</sup>

22. **August 24, 2021.** The Board met for a total of seven hours and eight minutes.<sup>33</sup> Mr. Torkelson noted that the public map drawing tool is live and stated that the tool “gives a member of the public the same level of precision and control that the board has in its professional software when drawing a district.”<sup>34</sup> Mr. Torkelson gave a demonstration of the public mapping tool and provided guidance regarding the constitutional redistricting requirements as he viewed them.<sup>35</sup> Mr. Presley suggested that the Board work together in Anchorage but work in subcommittees with regard to other regions, and the Board discussed this proposal.<sup>36</sup> The Board’s laptops were configured to display racial data and the Board discussed percentages of Alaska Natives included in the VRA Districts.<sup>37</sup> Mr. Torkelson informed the Board that the threshold percentage for VRA Districts in the last redistricting cycle was 45.2 percent Alaska Native voting age population.<sup>38</sup> The Board began some limited mapping exercises during which a member of the Doyon coalition made suggestions

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<sup>31</sup> ARB000156-000157.

<sup>32</sup> ARB000157.

<sup>33</sup> ARB000157-000158.

<sup>34</sup> ARB000157.

<sup>35</sup> ARB000157.

<sup>36</sup> ARB000157-000158.

<sup>37</sup> Board Meeting Tr. 204:4 -10 (Aug. 24, 2021) [ARB001475].

<sup>38</sup> Board Meeting Tr. 337:17-2010 (Aug. 24, 2021) [ARB0011608].

to the Board .<sup>39</sup> The Board further discussed the mapping process and agreed that individual Board members would have the opportunity to work with staff to create plans for discussion by the full Board during the week of September 7, 2021.<sup>40</sup> Third-party plans were again discussed, and the Board agreed that the deadline for such plans would be in advance of September 17, 2021. The Board decided that they would schedule a meeting on September 21 or 22, 2021 “to finalize the plans they would like to present to the state.”<sup>41</sup> The Board appears to have been considering the adoption of plans outside of the 30-day period for adopting proposed plans, even before the 30-day period had run.

23. **September 7, 2021.** The Board met for a total of six hours and ten minutes.<sup>42</sup> Sarah Obed of the Doyon Coalition provided public comment regarding its maps, which she stated satisfy constitutional criteria and address concerns raised in the last redistricting process.<sup>43</sup> Mr. Torkelson provided a report on mapping processes, mapping challenges, and legal criteria for redistricting.<sup>44</sup> Mr. Torkelson also stated that “staff realized that if the Board chose to focus its attention on a few key questions before diving into smaller details, that would reduce the total number of possible maps from potentially thousands down to

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<sup>39</sup> ARB000158.

<sup>40</sup> ARB000158.

<sup>41</sup> ARB000158.

<sup>42</sup> ARB000159-000162.

<sup>43</sup> ARB000160.

<sup>44</sup> ARB000160.

relatively few, to a manageable amount.”<sup>45</sup> Mr. Torkelson requested that the Board focus on some “key challenge questions” and “find a consensus on as many of these known challenges as possible” in order to reduce the possible redistricting options that the Board considers.<sup>46</sup> The Board then convened in executive session for one hour and forty-eight minutes.<sup>47</sup> This was followed by Board member presentations of draft plans and public testimony.<sup>48</sup> The Board then spent one hour and thirty-seven minutes in the first group map-drawing work session.<sup>49</sup> The Board spent more time in executive session than in a map-drawing work session.

24. **September 8, 2021.** The Board met for a total of five hours and thirty-four minutes.<sup>50</sup> Of that total time, the Board spent five hours and nineteen minutes in a map-drawing work session, and fourteen minutes hearing public testimony.<sup>51</sup>

25. **September 9, 2021.** The Board met for a total of five hours and fifty-two minutes.<sup>52</sup> The Board entered into a map-drawing work session eight minutes after it convened.<sup>53</sup> Ms. Borrromeo voiced several concerns including disparate treatment of public

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<sup>45</sup> Board Meeting Tr. 19:7-13 (Sept. 7, 2021) [ARB009548].

<sup>46</sup> Board Meeting Tr. 17:1 – 25:1 (Sept. 7, 2021) [ARB009546-009554].

<sup>47</sup> ARB000161.

<sup>48</sup> ARB000161.

<sup>49</sup> ARB000161.

<sup>50</sup> ARB000162.

<sup>51</sup> ARB000162.

<sup>52</sup> ARB000162-000165.

<sup>53</sup> ARB000162-000163.

testimony, the scope of discussions in executive session, her desire for the Board to do the actual map drawing rather than providing broad policy direction to staff and allowing staff to draw maps, and her desire that the map-drawing process be conducted by the Board as a group rather than by individual Board members.<sup>54</sup> At the end of the work session, the Board settled on two draft plans to present to the public: Board Composite Version 1 (V.1) and Board Composite Version 2 (V.2).<sup>55</sup> V.2. was drafted over a lunch hour and the drafter only focused on it for only an hour.<sup>56</sup> V.2 was an exercise and was never a complete full-40 plan.<sup>57</sup> The Board then heard public testimony and adopted V.1 and V.2.

26. **September 11, 2021.** This was the end of the 30-day period within which the Board was required to adopt proposed plans pursuant to article VI, section 10 of the Alaska Constitution and the beginning of the 60-day public-comment period within which the Board is required to receive public comments and adopt a final plan. The Board did not meet on September 10 or September 11. Thus, the only two plans developed and adopted within the 30-day period for adopting proposed plans were V.1 and V.2. The Board did not meet again until September 17, 2021.

27. **September 17, 2021.** The Board met for a total of six hours and twelve minutes.<sup>58</sup> Following a presentation by the Executive Director, the Board took public

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<sup>54</sup> Board Meeting Tr. 113:12 – 118:12 (Sept. 9, 2021) [ARB009937-009941].

<sup>55</sup> ARB000164.

<sup>56</sup> Borromeo Depo. Tr. 170:2-12.

<sup>57</sup> Borromeo Depo. Tr. 166:20 – 167:8.

<sup>58</sup> ARB000166; ARB000174.

testimony and received presentations from five third-party groups that each offered a proposed redistricting plan, and the Board took public testimony related to those plans.<sup>59</sup>

28. **September 20, 2021.** The Board met for a total six hour and six minutes.<sup>60</sup> This was the last meeting prior to the public outreach phase of the redistricting process.<sup>61</sup> The Board introduced Version 3 (V.3) and V.2 with Version 4 (V.4) and moved to replace V.1 with V.3 and V.2 with V.4 without taking any public comment on V.3 and V.4.<sup>62</sup> Prior to their adoption, V.3 and V.4 were never made available for public review or comment nor had V.4 been shared with other members of the Board.<sup>63</sup> V.4 which replaced V.2 was not a updated draft of V.2, but an entirely new full 40 plan with radically different districts than those in either V.1 or V.2.<sup>64</sup> This was the first Board plan in which Valdez was not districted with Richardson Highway communities. The Board adopted V.3 and V.4 after the 30-day period within which the Board was constitutionally required to adopt one or more proposed plans. In doing so, the Board rendered obsolete V.1 and V.2 that the Board properly adopted during the 30-day period. The Board also adopted four of the five third-party plans.<sup>65</sup> Those

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<sup>59</sup> ARB000170-000173.

<sup>60</sup> ARB 000175; ARB000192.

<sup>61</sup> ARB000173.

<sup>62</sup> Redistricting Process Report at 3 (Nov. 10, 2021) [ARB000007].

<sup>63</sup> Borromeo Depo. Tr. 50:8-21.

<sup>64</sup> See ARB000618-000855 (Board Packet for Sept. 17-19, 2021 Board meetings omitting any mention of revisions to V.1 or V.2 or proposed revisions to Board drawn maps); ARB000856-000943 (Board Packet for Sept. 20, 2021 omitting any proposed revisions to Board drawn maps or revised Board drawn maps).

<sup>65</sup> ARB000190-000192.

plans were from Coalition of Doyon, Tanana Chiefs Conference, Fairbanks Native Association, Sealaska, and Ahtna (“Doyon Coalition”); AFFR; Alaska for Fair and Equitable Redistricting (“AFFER”) and the Alaska Senate Minority Caucus. The Board adopted and then rescinded the plan proposed by the Alaska Democratic Party, making it the only third-party plan the Board did not adopt at that time.<sup>66</sup>

29. **October 19, 2021.** Valdez submitted a resolution, which included Valdez Option 1, to the Board.

30. **November 1, 2021.** Valdez submitted extensive comments to the Board regarding the redistricting process, including an alternative map, for the Board’s consideration.<sup>67</sup>

31. **November 2, 2021.** The Board met for a total of six hours and fifty-five minutes.<sup>68</sup> Of that total time, the Board spent two hours and twenty-three minutes in executive session.<sup>69</sup> In addition, the Board spent two hours and forty-eight minutes in a mapping work session.<sup>70</sup>

32. **November 3, 2021.** The Board met for a total of seven hours, during which it entered a mapping work session.<sup>71</sup>

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<sup>66</sup> ARB000190-000191.

<sup>67</sup> ARB004074-004105.

<sup>68</sup> ARB000193; ARB000199.

<sup>69</sup> ARB000196.

<sup>70</sup> ARB000199.

<sup>71</sup> ARB000200.



33. **November 4, 2021.** The Board met for a total of seven hours, during which it entered a mapping work session.<sup>72</sup>

34. **November 5, 2021.** The Board met for a total of ten hours and nine minutes.<sup>73</sup> During that time, the Board met in executive session twice. The first executive session lasted one hour and thirty-five minutes.<sup>74</sup> This was followed by a mapping work session that lasted one hour and forty-six minutes.<sup>75</sup> Following public testimony, the second executive session lasted fifty-five minutes.<sup>76</sup> The Board thus met in executive session for a total of two and a half hours. The Board adopted a plan substantially similar to V.4, which was labeled “Board Consensus v.7” as the “final redistricting map with the allowance that staff may make minor changes to facilitate metes and bound, and will return a report with recommended changes to the Board for review prior to final proclamation adoption.”<sup>77</sup>

35. **November 10, 2021.** The Board adopted a Final Proclamation of Redistricting, including senate pairings. This is the Board’s Final Plan.<sup>78</sup>

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<sup>72</sup> ARB000200.

<sup>73</sup> ARB00201; ARB000209.

<sup>74</sup> ARB000202.

<sup>75</sup> ARB000202.

<sup>76</sup> ARB000208.

<sup>77</sup> ARB000208.

<sup>78</sup> ARB000002-000115.

### III. STANDARD OF REVIEW

36. 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.”<sup>79</sup> The Alaska Supreme Court has established the general standard of review to be applied by the courts when exercising jurisdiction under article VI, section 11:

We view a plan promulgated under the constitutional authorization of the governor to reapportion the legislature 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. We have stated that we shall review such regulations first to insure [sic] that the agency has not exceeded the power delegated to it, and second to determine whether the regulation is reasonable and not arbitrary.<sup>80</sup>

37. In determining whether a regulation (or plan) is reasonable and not arbitrary, a court must examine not policy but process and must ask whether the agency (or Board) “has failed to consider an important factor or whether it has “not really taken a ‘hard look’ at the salient problems and has not generally engaged in reasoned decision making.”<sup>81</sup>

38. The U.S. Supreme Court noted as follows with respect to “reasoned decision-making” in the context of administrative appeals:

Not only must an agency’s decreed result be within the scope of its lawful authority, but the process by which it reaches its decision must be logical and rational. Courts enforce this principle with regularity when they set aside

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<sup>79</sup> *In re 2011 Redistricting Cases*, 294 P.3d 1032, 1037 (Alaska 2012).

<sup>80</sup> *Carpenter v. Hammond*, 667 P.2d 1204, 1214 (Alaska 1983) (quoting *Groh v. Egan*, 526 P.2d 863, 866 (Alaska 1974); see also *In re 2001 Redistricting Cases*, 2002 WL 34119573 at 19 (Alaska Super. Ct. (Feb. 1, 2002)) (citing *Carpenter*, 667 P.2d at 1214).

<sup>81</sup> *Interior Alaska Airboat Ass’n, Inc. v. State*, 18 P.3d 686, 693 (Alaska 2001). See also *In re 2001 Redistricting Cases*, 2002 WL 34119573 at 19 (citing *Interior Alaska Airboat*, 18 P.3d at 693).

agency regulations which, though well within the agencies' scope of authority, are not supported by the reasons that the agencies adduce.<sup>82</sup>

39. The U.S. Supreme Court has also found “reasoned decision-making” when an agency weighed competing views, selected a formula (or plan) with adequate support in the record, provided a detailed explanation of its choice, and responded at length to contrary views.<sup>83</sup>

40. The D.C. Circuit, which regularly makes determinations with respect to “reasoned decision-making” in the extensive administrative appeals that come before it, has indicated that “reasoned decision-making” includes “an examination of the relevant data and a reasoned explanation supported by a stated connection between the facts found and the choice made.”<sup>84</sup>

41. The D.C. Circuit has also identified four principles to guide the inquiry regarding “reasoned decision-making:” deliberation, transparency, rationality, and evidentiary propriety.<sup>85</sup> Regarding deliberation, “[T]he agency must ‘engage the arguments raised before it.’ . . . It follows that an agency’s decision is not deliberative if it fails to ‘respond meaningfully to objections raised by a party.’”<sup>86</sup> Regarding transparency,

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<sup>82</sup> *Allentown Mack Sales and Service, Inc. v. N.L.R.B.*, 522 U.S. 359, 374 (1998).

<sup>83</sup> *Fed. Energy Regulatory Comm’n v. Elec. Power Supply Ass’n*, 577 U.S. 260, 289-95 (2016).

<sup>84</sup> *Elec. Consumers Res. Council v. Fed. Energy Regulatory Comm’n*, 747 F.2d 1511, 1513 (D.C. Cir. 1984).

<sup>85</sup> *Sierra Club v. Salazar*, 177 F.Supp. 3d 512, 532 (D.C. Cir. 2016) (internal citations omitted).

<sup>86</sup> *Sierra Club v. Salazar*, 177 F.Supp. 3d at 532.

“[T]he agency ‘must, of course, reveal the reasoning that underlies its conclusion.’”<sup>87</sup>

Regarding rationality, “If an agency’s interpretation of a regulation [or constitutional provision] shifts such that the agency is treating like situations differently without sufficient reason, the court may reject the agency’s interpretation as arbitrary.”<sup>88</sup> And regarding evidentiary propriety, “[R]easoned decision-making also precludes the agency from offering ‘an explanation . . . that runs counter to the evidence before the agency.’”<sup>89</sup>

42. The D.C. Circuit has also explained that “[a]rbitrary and capricious review demands evidence of reasoned decision making *at the agency level*; agency rationales developed for the first time during litigation do not serve as adequate substitutes.”<sup>90</sup>

43. Courts regularly enforce the standard of “reasoned decision-making” when they remand cases because the agency fell short of “reasoned decision-making,” which includes an adequate explanation of the agency’s reasoning and adequate support in the record for the agency’s decision. By way of example, the U.S. Supreme Court regularly

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<sup>87</sup> *Sierra Club v. Salazar*, 177 F.Supp. 3d at 532.

<sup>88</sup> *Sierra Club v. Salazar*, 177 F.Supp. 3d at 532-33.

<sup>89</sup> *Sierra Club v. Salazar*, 177 F.Supp. 3d at 533.

<sup>90</sup> *Williams Gas Processing – Gulf Coast Co., L.P. v. Fed. Energy Regulatory Comm’n*, 475 F.3d 319, 327 (D.C. Cir. 2006).

remands cases for failure to engage in “reasoned decision-making,”<sup>91</sup> as does the D.C. Circuit.<sup>92</sup>

44. With respect to judicial review in redistricting cases in particular, the Alaska Supreme Court has stated that “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.”<sup>93</sup> The Board’s redistricting process must also be constitutional under article VI, section 10.

45. In applying this standard to the Board’s Final Plan, the Alaska Supreme Court considers the evidence before it to ascertain whether the Final Plan is both reasonable and constitutional. The inquiry is fact-specific.

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<sup>91</sup> See *Motor Vehicle Mfrs. Ass’n of the U.S. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 51-57 (1983) (remanded due to lack of reasoned decision-making, particularly a failure to offer a rational connection between facts and decision made); *Allentown Mack Sales and Service, Inc. v. Nat’l Labor Relations Bd.*, 522 U.S. 359, 375-80 (1988) (remanded due to lack of record evidence and reasoned decision-making); *Judulang v. Holder*, 565 U.S. 42, 63-64 (2011) (remanded due to lack of reasoned decision-making, particularly inadequate rationale without support for decision); *Dep’t of Commerce v. N.Y.*, 139 S. Ct. 2551, 2575-76 (2019) (remanded due to lack of reasoned decision-making, particularly inadequate explanation for agency action).

<sup>92</sup> See *Elec. Consumers Res. Council*, 747 F.2d at 1518 (remanded due to lack of record evidence and reasoned decision-making); *Colo. Interstate Gas Co. v. Fed. Energy Regulatory Comm’n*, 850 F.2d 769, 773-75 (D.C. Cir. 1998) (remanded due to lack of reasoned decision-making); *Williams Gas*, 475 F.3d at 330 (remanded for lack of reasoned decision-making at the agency level); *Tarpon Transmission Co. v. Fed Energy Regulatory Comm’n*, 860 F.2d 439, 445-46 (D.C. Cir. 1988) (remanded for want of reasoned decision-making).

<sup>93</sup> *In re 2011 Redistricting Cases*, 294 P.3d at 1037.

46. For example, the court in *Hickel* carefully considered facts specific to various regions and communities in Alaska in determining whether various districts passed constitutional muster. In its analysis of districts in Southeast Alaska, the court concluded “[l]ogical and natural boundaries cannot be ignored without raising the specter of gerrymandering.”<sup>94</sup> The court explained:

The trial court agreed [that Districts, 1, 2, and 3 violated article VI, section 6], finding specifically that “The districts of Southeast are not socio-economically integrated and they easily could have been.” We affirm this conclusion.

....

These districts do not contain, as nearly as practicable, relatively integrated socio-economic areas, identified with due regard for local governmental and geographic boundaries.<sup>95</sup>

47. The court in *Hickel* went through a similar fact-based review for the Mat-Su Borough:

District 6 merges Palmer with the Prince William Sound communities. Palmer is the governmental center of the Mat-Su Borough, an established agricultural area. In contrast, the Prince William Sound communities are oriented toward commercial fishing and maritime activities. The record does not establish any significant interaction or interconnectedness between these areas.

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District 28 also does not contain relatively socio-economically integrated areas. As above, the record simply does not establish significant social or economic interaction between the connected areas.<sup>96</sup>

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<sup>94</sup> *Hickel*, 846 P.2d at 51.

<sup>95</sup> *Hickel*, 846 P.2d at 50.

<sup>96</sup> *Hickel*, 846 P.2d at 52-53.

48. The court then went through a fact-based review for Election District 35, which encompassed a vast part of interior and northern Alaska, and “[b]ased on the record” concluded that District 35 was unconstitutional.<sup>97</sup> The court even addressed the issue of the division of the Aleutian Islands into two districts *sua sponte*, because the division was “so plainly erroneous.”<sup>98</sup>

49. Reviewing courts “always have authority to review the constitutionality of the action taken.”<sup>99</sup> For judicial review to be meaningful, the court must be able to discern from the evidence whether the requirements of the Alaska Constitution were actually met.<sup>100</sup> This is not a deferential standard of review, nor should it be when the issues before the Court are issues of constitutional compliance.

50. The Alaska Supreme Court has noted the difficulties in the redistricting process, and added: “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.*’”<sup>101</sup> This Court

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<sup>97</sup> *Hickel*, 846 P.2d at 52-53.

<sup>98</sup> *Hickel*, 846 P.2d at 54.

<sup>99</sup> *Carpenter*, 667 P.2d at 1214; see also *In re 2001 Redistricting Cases*, 2002 WL 34119573 at 19 (citing *Carpenter*, 667 P.2d at 1214).

<sup>100</sup> *In re 2011 Redistricting Cases*, 294 P.3d at 1034 (citing *In re 2011 Redistricting Cases*, 274 P.3d at 467-68).

<sup>101</sup> *In re 2011 Redistricting Cases*, 294 P.3d at 1035 (quoting *In re 2001 Redistricting Cases*, 44 P.3d at 147) (emphasis added).

similarly has a duty to independently measure each district against constitutional standards, and to ensure the Board engaged in reasoned decision-making.

#### **IV. ISSUES FOR TRIAL**

51. There was significant pretrial motion practice in this litigation. Included in that motion practice was the Board's motion to dismiss Plaintiffs' claim regarding article VI, section 10, and House Districts 3 and 4, which was denied,<sup>102</sup> none of which disposed of any of Plaintiffs' claims. Following the motion practice, the issues remaining for trial were as follows:

- Did the Board violate article VI, section 10 of the Alaska Constitution (Redistricting Process) in the redistricting process used in reaching the Final Plan?
- Did the Board violate article I, section 7 of the Alaska Constitution (Due Process) in the redistricting process the Board used in reaching its Final Plan?
- Did the Board violate the Open Meetings Act (OMA) (AS 44.62.310-.312) in the redistricting process the Board used in reaching its Final Plan?
- Did the Board violate article VI, section 6 of the Alaska Constitution (District Boundaries) with the Final Plan?
- Did the Board violate the *Hickel* Process by considering racial data and VRA compliance prior to drafting a redistricting plan based upon the constitutional criteria for redistricting?

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<sup>102</sup> Order Re: Motion to Dismiss (Jan. 12, 2022).



- Did the Board violate article I, section 1 of the Alaska Constitution (Equal Protection) with the Final Plan?

## V. APPLICABLE LAW

### A. Article VI, Section 10 of the Alaska Constitution.

52. The redistricting process set forth in article VI, section 10 mandates:

Within thirty days after the official reporting of the decennial census of the United States or thirty days after being duly appointed, whichever occurs last, the board shall adopt one or more proposed redistricting plans. The board shall hold public hearings on the proposed plan, or, if no single proposed plan is agreed on, on all plans proposed by the board. No later than ninety days after the board has been appointed and the official reporting of the decennial census of the United States, the board shall adopt a final redistricting plan and issue a proclamation of redistricting.<sup>103</sup>

53. In his Memorandum and Order on the 2001 redistricting cases, Judge Rindner held that “Article VI, Section 10 requires that public hearings be held only on the plan or plans adopted by the Board within thirty days of the reporting of the census.”<sup>104</sup> The Alaska Supreme Court affirmed this holding.<sup>105</sup>

54. The legislative history of HJR 44, which amended section 10 to read as it does today, supports Judge Rindner’s interpretation of section 10. In the minutes of the House Judiciary meeting on February 11, 1998, regarding HJR 44, Representative Porter explained that “the board is required to come up with a plan in 30 days and then have hearings on the

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<sup>103</sup> Alaska Const., art. VI, § 10.

<sup>104</sup> *In re 2001 Redistricting Cases v. Redistricting Board et al.*, 2002 WL 34119573 at 24.

<sup>105</sup> *In re 2001 Redistricting Cases*, 44 P.3d at 143 (“Except insofar as they are inconsistent with this order, the orders of the superior court challenged by the petitioners are AFFIRMED.”).

plan or plans that they have developed, and to present a proclamation at the end of 90 days, which would constitute their reapportionment plan.”<sup>106</sup>

55. Public hearings are thus to be held on the plans the Board developed and adopted within the 30-day period, after which there are 60 days for public comment and for the Board adopt a final redistricting plan. Article VI, Section 6, of the Alaska Constitution

56. The requirements regarding district boundaries are set forth in article VI, section 6, which provides:

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.<sup>107</sup>

57. The term “relatively” in this context means that “we [the courts] compare proposed districts to other previously existing and proposed districts as well as principal alternative districts to determine if socio-economic links are sufficient.”<sup>108</sup> The term “relatively” in this context does not mean “minimally,” and it does not weaken the constitutional requirement of socio-economic integration.<sup>109</sup>

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<sup>106</sup> Minutes from House Judiciary Comm. Meeting on HJR 44 at 1:10 PM (Feb. 11, 1998). Comments by Representative Porter.

<sup>107</sup> Alaska Const., art. VI, § 6.

<sup>108</sup> *Hickel*, 846 P.2d at 47.

<sup>109</sup> *Hickel*, 846 P.2d at 47.

58. The requirements of contiguity, compactness, and socio-economic integration were incorporated by the framers of the reapportionment provisions to prevent gerrymandering—which is the “dividing of an area into political units ‘in an unnatural way with the purpose of bestowing advantages on some and thus disadvantaging others.’”<sup>110</sup>

59. The “requirements for contiguity and compactness are meant to be read to avoid geographic manipulation of districts for voter dilution or enhancement.”<sup>111</sup>

60. The Board “must consistently enforce the constitutional requirements of contiguity, compactness, and relative integration of socio-economic areas in its redistricting.”<sup>112</sup>

### **1. Contiguity.**

61. Contiguous territory is “territory which is bordering or touching.”<sup>113</sup> The court in *Hickel* noted that “[a] district may be defined as contiguous if every part of the district is reachable from every other part without crossing the district boundary (i.e. the district is not divided into two or more discrete pieces).”<sup>114</sup>

62. Absolute contiguity of land masses is not possible in Alaska, given its numerous archipelagos.<sup>115</sup> As a result, a contiguous district may contain some amount of

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<sup>110</sup> *Hickel*, 846 P.2d at 45 (quoting *Carpenter*, 667 P.2d at 1220).

<sup>111</sup> *Hickel*, 846 P.2d 38, n.25.

<sup>112</sup> *Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1360 (Alaska 1987) (*Kenai*).

<sup>113</sup> *Hickel*, 846 P.2d at 45.

<sup>114</sup> *Hickel*, 846 P.2d at 45 (quoting Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L. Rev. 77, 84 (1985)).

<sup>115</sup> *Hickel*, 846 P.2d at 45.

open sea, but the extent to which a redistricting board may include open sea in an election district is not without limits.<sup>116</sup>

63. The court in *Hickel* explained: “If it were [without limits], then any part of coastal Alaska could be considered contiguous with any other part of the Pacific Rim. To avoid this result, the constitution provides for the additional requirements of compactness and socio-economic integration.”<sup>117</sup>

64. The constitutional requirement for contiguity does not stand alone, but must be considered in conjunction with the constitutional requirements for compactness and relative socio-economic integration -- as indicated by the mandatory language of article VI, section 6.

## 2. Compactness.

65. In the context of redistricting “compact” means “having a small perimeter in relation to the area encompassed.”<sup>118</sup> The requirement of compactness thus means that “between two districts of equal area the one with the smaller perimeter is the more compact.”<sup>119</sup>

66. The most compact shape is a circle, but “[s]ince it is not possible to divide Alaska into circles, it is obvious that the constitution calls only for relative compactness.”<sup>120</sup>

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<sup>116</sup> *Hickel*, 846 P.2d at 45.

<sup>117</sup> *Hickel*, 846 P.2d at 45.

<sup>118</sup> *Hickel*, 846 P.2d at 45 (citing *Carpenter*, 667 P.2d at 1218).

<sup>119</sup> *Carpenter*, 667 P.2d at 1219.

<sup>120</sup> *Carpenter*, 667 P.2d at 1218.

The relative compactness of proposed districts could be determined by drawing a circle around each proposed district, and the districts that occupy relatively greater areas within the circle are considered more compact.<sup>121</sup>

67. The court in *Carpenter* noted:

We recognize that the constitutional mandate to draw districts equal in their number of inhabitants may conflict with the mandate for compactness and that the former is paramount. Compactness is undoubtedly a material factor, however, when the choice of districting plans includes one yielding bizarre designs.... This is particularly so where compact districts may be drawn with a minimal increase in population deviation.<sup>122</sup>

68. The requirement for compactness also should not result in “corridors” of land.<sup>123</sup> The court in *Hickel* explained:

The compactness inquiry thus looks to the shape of a district. Odd shaped districts may well be the natural result of Alaska’s irregular geometry. However, “corridors” of land that extend to include a populated area, but not the less-populated land around it, may run afoul of the compactness requirement. Likewise, appendages attached to otherwise compact areas may violate the requirement of compact districting.”<sup>124</sup>

69. The court will look to the relative compactness of proposed and potential districts in determining whether a particular district is sufficiently compact to satisfy the constitutional requirement for compactness.<sup>125</sup>

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<sup>121</sup> *Carpenter*, 667 P.2d at 1219.

<sup>122</sup> *Carpenter*, 667 P.2d at 1219.

<sup>123</sup> *Hickel*, 846 P.2d at 45.

<sup>124</sup> *Hickel*, 846 P.2d at 45-46.

<sup>125</sup> *Hickel*, 846 P.2d at 45 (citing *Carpenter*, 667 P.2d at 1218).

### 3. Socio-Economic Integration.

70. The delegates to the Constitutional Convention explained the “socio-economic principle” as follows:

[W]here people live together and work together and earn their living together, where people do that, they should be logically grouped that way.<sup>126</sup> [In addition,] the delegates define an integrated socio-economic unit as “an economic unit inhabited by people. In other words, the stress is placed on the canton idea, a group of people living within a geographic unit, socio-economic, following if possible, similar economic pursuits.”<sup>127</sup>

71. This description supports the concept that election districts were intended to be comprised of socially and economically interactive people in a common geographic area.<sup>128</sup>

72. Article VI, section 6 does not require that districts be drawn along municipal boundaries, but “local boundaries are significant in determining whether an area is relatively socio-economically integrated.”<sup>129</sup> A borough is by definition socio-economically integrated<sup>130</sup> but some areas within a borough may be more socio-economically integrated than others particularly where they are in close geographic proximity with one another.

73. To satisfy the constitutional requirement of socio-economic integration, there must be “sufficient evidence of socio-economic integration of the communities linked by

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<sup>126</sup> *Hickel*, 846 P.2d at 46.

<sup>127</sup> *Hickel*, 846 P.2d at 46.

<sup>128</sup> *Carpenter*, 667 P.2d at 1215.

<sup>129</sup> *Hickel*, 846 P.2d at 51.

<sup>130</sup> *Hickel*, 846 P.2d at 52.

the redistricting, proof of actual interaction, and interconnectedness rather than mere homogeneity.”<sup>131</sup>

74. In his concurring opinion in *Carpenter*, Justice Matthews explained that “[i]ntegration connotes interaction and connectedness, while homogeneity refers to similarity or uniformity.”<sup>132</sup>

75. In previous reapportionment decisions, the Alaska Supreme Court has identified specific characteristics of socio-economic integration. For example, in *Kenai Peninsula Borough* the court found that service by the state ferry system, daily local air taxi service, a common major economic activity, shared fishing areas, and historical links evidenced socio-economic integration of Hoonah and Metlakatla with several other southeastern communities.<sup>133</sup>

76. The Board should seek to maximize socio-economic integration within districts.<sup>134</sup> Consistent with the Court’s approach of maximizing socio-economic integration to the degree practicable in *Hickel*,<sup>135</sup> the superior court in *Hickel* noted the supreme court’s agreement with its holding that “the Alaska constitution requires maximizing socio-economic integration” within districts.<sup>136</sup>

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<sup>131</sup> *Hickel*, 846 P.2d at 46 (citing *Kenai*, 743 P.2d at 1363).

<sup>132</sup> *Carpenter*, 667 P.2d at 1218.

<sup>133</sup> *Hickel*, 846 P.2d at 46 (citing *Kenai*, 743 P.2d at 1361).

<sup>134</sup> *Hickel*, 846 P.2d at 73.

<sup>135</sup> *Hickel*, 846 P.2d at 50-52, 58.

<sup>136</sup> *Hickel*, 846 P.2d at at 70.

77. Redistricting decisions that reduces socio-economic integration may not be made except for purposes of maximizing the other constitutional requirements and contiguity and compactness.<sup>137</sup> The Board “is not permitted to diminish the degree of socio-economic integration in order to achieve other policy goals.”<sup>138</sup>

78. In addition to preventing gerrymandering, the requirement that districts be composed of relatively integrated socio-economic areas helps to ensure that a voter is not denied his or her right to an equally powerful vote.<sup>139</sup> The Alaska Supreme Court has commented on the significance of the constitutional requirement for socio-economic integration:

In addition to preventing gerrymandering, the requirement that districts be composed of relatively integrated socio-economic areas helps to ensure that a voter is not denied his or her right to an equally powerful vote.<sup>140</sup>

[W]e should not lose sight of the fundamental principle involved in reapportionment – truly representative government where the interests of the people are reflected in their elected legislators. Inherent in the concept of geographical legislative districts is a recognition that areas of a state differ economically, socially and culturally and that a truly representative government exists only when those areas of the state which share significant common interests are able to elect legislators representing those interests. Thus, the goal of reapportionment should not only be to achieve numerical equality but also to assure that representation of those areas of the state having common interests.<sup>141</sup>

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<sup>137</sup> *Hickel*, 846 P.2d at 45, n.10.

<sup>138</sup> *Hickel*, 846 P.2d at 45, n.10.

<sup>139</sup> *Hickel*, 846 P.2d at 46.

<sup>140</sup> *Hickel*, 846 P.2d at 46.

<sup>141</sup> *Hickel*, 846 P.2d at 46 (citing *Groh v. Egan*, 526 P.2d at 890).



#### 4. Local Government Boundaries.

79. Article VI, section 6 of the Alaska Constitution states that “[c]onsideration may be given to local government boundaries” when establishing district boundaries. The reference to “local government boundaries” is the only reference in article VI, section 6 to a man-made boundary. The constitutional framers use of the permissive words “consideration may be given” permits local government boundaries to be considered but does not mandate they be considered.

80. Article X of the Alaska Constitution provides the constitutional framework for “local government” within Alaska. Article X, section 2, establishes two forms of local government for Alaska, boroughs and cities, and provides that the exercise of “all local government powers shall be vested” in those two forms of local government. Consistent with article X, Alaska statutes AS 29.04.010-.020 provide that boroughs and cities are municipal corporations and political subdivisions of the State of Alaska. In context, the reference to “local government” in article VI is a reference to boroughs and cities.

81. This definition of “local government” for the purposes of article VI is consistent with its common definition. Merriam Webster<sup>142</sup> defines local government as “the government of a specific local area constituting a subdivision of a major political unit (such as a nation or state).”

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<sup>142</sup> “Local government.” *Merriam-Webster.com Dictionary*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/local%20government>. Accessed 9 Feb. 2022.

82. Similarly, article X, section 12 of the Alaska Constitution provides the constitutional framework for the “boundaries” for local government in Alaska. It provides for the establishment of a local boundary commission and permits the commission to consider “any proposed local government boundary change.” In context, the reference to local government “boundaries” in article VI is a reference to the “boundaries” of boroughs and cities.

83. The Court has held that while local government boundaries are not required to be used, they are a significant indication of socio-economic integration. In *Hickel*, in part, the Court addressed whether districts in Southeast Alaska were constitutional.<sup>143</sup> The Court affirmed the trial court’s holding that “[t]he districts of Southeast are not socio-economically integrated and they easily could have been.”<sup>144</sup> Among the Court’s concerns was the plan’s disregard for the socio-economic integration within local municipal boundaries, the separation of socio-economically integrated municipalities, and the splitting of closely interrelated cities.<sup>145</sup>

84. The Court ultimately ruled that three of the districts “do not contain, as nearly as practicable, relative socio-economic areas, identified with due regard for local government and geographic boundaries.”<sup>146</sup> The Court also affirmed that “[a]though these

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<sup>143</sup> *Hickel*, 846 P.2d at 50.

<sup>144</sup> *Hickel*, 846 P.2d at 50.

<sup>145</sup> *Hickel*, 846 P.2d at 50-51.

<sup>146</sup> *Hickel*, 846 P.2d at 52.

boundaries need not necessarily be followed in creating election districts, they must be considered by the Board in so far as they indicate the true socio-economic integration of several areas.”<sup>147</sup>

85. The *Hickel* Court first held that article VI, section 6 does not require that districts be drawn along municipal boundaries, “[r]ather, the provision states only that “consideration may be given to local government boundaries.”<sup>148</sup> Nonetheless, the Court held that “local boundaries are significant in determining whether an area is relatively socio-economically integrated,”<sup>149</sup> and noted that AS 29.05.031 provides, in part, that boroughs and municipalities are required to be “interrelated and integrated as to its social, cultural, and economic activities” in order to incorporate.<sup>150</sup>

86. The Court has also held local government boundaries may be considered when ensuring proportional representation. In *Hickel*, the Court also addressed whether the division of the Matanuska-Susitna (“Mat-Su”) Borough into five different districts, four of which included land not wholly within the Borough, was constitutional.<sup>151</sup> The Court ultimately held dividing the Mat-Su Borough into five districts unfairly dilutes proportional representation, and that “[a] municipality should not be made to contribute so much of its

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<sup>147</sup> *Hickel*, 846 P.2d at 52.

<sup>148</sup> *Hickel*, 846 P.2d at 51.

<sup>149</sup> *Hickel*, 846 P.2d at 51.

<sup>150</sup> *Hickel*, 846 P.2d at 51.

<sup>151</sup> *Hickel*, 846 P.2d at 52.

population to districts *centered elsewhere* that it is deprived of representation which is justified by its population.”<sup>152</sup>

87. In reaching this conclusion, the Court first recognized “[i]t is axiomatic that a district composed wholly of land belonging to a single borough is adequately integrated.” On that basis, the Court upheld the single district that was wholly composed of land within the Mat-Su Borough as socio economically integrated.

88. With regard to the other four districts composed of land not wholly within the Mat-Su Borough, the Court noted those resulting districts “have serious shortcomings in their resulting relative socio-economic integration.”<sup>153</sup> The Court’s analysis of whether districts composed of land not wholly within the Borough were socio-economically integrated was a fact specific inquiry based on the record before the Court in which it evaluated the socio-economic integration within each of the four districts.<sup>154</sup> The Court found (1) for District 6 with Palmer and the Prince William Sound communities (which included Valdez), the record did “not support any significant interaction or interconnectedness between these areas” and they were not socio-economically integrated, (2) for District 26 with the Mat-Su Borough and Anchorage, the record indicated that Mat-Su Borough residences were “more naturally linked” to Palmer and Wasilla than to Anchorage and they were not socio-economically integrated, (3) for District 28 stretching to the Canadian border, the interior Ahtna areas as well as Glennallen, Tok, and Delta

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<sup>152</sup> *Hickel*, 846 P.2d at 53 (emphasis added).

<sup>153</sup> *Hickel*, 846 P.2d at 52.

<sup>154</sup> *Hickel*, 846 P.2d at 52-53.

Junction, the record simply did “not establish significant social or economic interaction between the connected areas,” and (4) for District 34 which combined the Mat-Su Borough with the Denali Borough and parts of the Fairbanks North Star Borough (“FNSB”), failed due to both lack of compactness and lack of relative socio-economic integration.<sup>155</sup>

89. Further, the Court in *Hickel* acknowledged “that it may be necessary to divide a borough so that its excess population is allocated to a district situated elsewhere.”<sup>156</sup> In such an instance, however, the Court held that, “where possible, all of the municipalities’ excess population should go to one other district in order to maximize effective representation of the excess group.”<sup>157</sup>

90. The Court’s fact-specific approach when determining the degree to which local government boundaries should be relied upon when establishing a district not wholly within one borough is also apparent in *Kenai*.<sup>158</sup> In *Kenai*, the Court was considering whether District 7, which districted South Anchorage and North Kenai (Nikiski) in the same district,<sup>159</sup> violated article VI, section 6.<sup>160</sup> In *Kenai*, the Court first noted the State’s arguments that there was “no constitutionally permissible alternatives to joining North Kenai with South Anchorage,” and the result of not joining them would be a population

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<sup>155</sup> *Hickel*, 846 P.2d at 52-53.

<sup>156</sup> *Hickel*, 846 P.2d at 52.

<sup>157</sup> *Hickel*, 846 P.2d at 52.

<sup>158</sup> *Kenai*, 743 P.2d. at 1361-62.

<sup>159</sup> *Kenai*, 743 P.2d. at 1361-62.

<sup>160</sup> *Kenai*, 743 P.2d. at 1361-62.

deviation “in excess of the 16.4% maximum deviation permitted under the Federal Constitution.”<sup>161</sup>

91. In *Kenai*, the State invited the Court to consider South Anchorage and Anchorage “an indivisible area for the purpose for determining North Kenai’s socio-economic ties with South Anchorage.”<sup>162</sup> Instead of accepting the State’s invitation to consider Anchorage “indivisible,” the Court thoroughly evaluated multiple socio-economic factors (interaction, economic, social, transportation, and geographic factors) for North Kenai and South Anchorage both as hub communities of broader communities and as separate communities.<sup>163</sup> Ultimately, the Court compared the level of socio-economic integration to other cases in which it has rejected or accepted the integration as sufficient and held, “Kenai draws too fine a distinction between the interaction of North Kenai with Anchorage *and* that of North Kenai with South Anchorage.”<sup>164</sup>

92. Similarly, the Court’s fact-specific approach to the circumstances under which it will consider local boundaries is also apparent in *In re 2001 Redistricting Cases*. In the *2001 Redistricting Cases*, the Court noted that concerns it may have when a reapportionment plan “unnecessarily” divides a municipality in a way that dilutes the effective strength of municipal votes. However, the Court stated that these concerns “may be negated by a

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<sup>161</sup> *Kenai*, 743 P.2d. at 1362.

<sup>162</sup> *Kenai*, 743 P.2d. at 1362.

<sup>163</sup> *Kenai*, 743 P.2d at 1362-63.

<sup>164</sup> *Kenai*, 743 P.2d at 1263 (emphasis added).

demonstration that the challenged aspects of a plan resulted from legitimate nondiscriminatory policies such as the article VI, section 6 requirements of compactness, contiguity, and socio-economic integration.”<sup>165</sup> Specifically, the Court held:

House Districts 12 and 32 must be reconsidered on remand because they are based on a mistaken legal premise that constrained the board’s view of the permissible range of constitutional options for these areas. The board interpreted this court’s decision in *Kenai Peninsula Borough v. State* to preclude the board from pairing population from the Matanuska-Susitna Borough with the Municipality of Anchorage because both Anchorage and the borough had sufficient excess population to “control” an additional seat. But *Kenai Peninsula Borough* does not entitle political subdivisions to control a particular number of seats based upon their populations. *Kenai Peninsula Borough* simply held that the board cannot intentionally discriminate against a borough or any other “politically salient class” of voters by invidiously minimizing that class’s right to an equally effective vote. *Kenai Peninsula Borough* recognizes that when a reapportionment plan unnecessarily divides a municipality in a way that dilutes the effective strength of municipal voters, the plan’s provisions will raise an inference of intentional discrimination. But an inference of discriminatory intent may be negated by a demonstration that the challenged aspects of a plan resulted from legitimate nondiscriminatory policies such as the article VI, section 6 requirements of compactness, contiguity, and socio-economic integration.

Because the board was mistaken in its interpretation of the doctrine of proportionality, the board’s range of choices was unduly limited. We therefore remand so the board can revisit the question of redistricting Southcentral Alaska unencumbered by this mistaken assumption.<sup>166</sup>

93. While the “board cannot intentionally discriminate against a borough or any other “politically salient class” of voters by invidiously minimizing that class’s right to an equally effective vote,”<sup>167</sup> strict adherence to borough boundaries to the detriment of

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<sup>165</sup> *In re 2001 Redistricting Cases*, 44 P.3d at 144.

<sup>166</sup> *In re 2001 Redistricting Cases*, 44 P.3d at 143-44 (internal citations omitted).

<sup>167</sup> *In Re 2001 Redistricting Cases*, 44 P.3d at 144 (Alaska 2002).

consideration of viable redistricting alternatives is not required under the Alaska Constitution.

### 5. ANCSA Regional Corporate Boundaries.

94. While article VI, section 6 does expressly permit, but not require, consideration be given to “local government boundaries” when establishing district boundaries, it does not contain similar language permitting the boundaries of privately-held, for-profit, ANCSA regional corporations to be considered when establishing district boundaries.

95. In 1971, the Alaska Native Claims Settlement Act (“ANCSA”) created 12 privately-held, for-profit, regional corporations.<sup>168</sup> The boundaries for these 12 regional corporations were originally established based upon “common heritage and sharing common interests” of the Native Alaskans. As the Alaska Supreme Court has explained:

Under that Act, the state was divided into 12 regions, and separate corporations were established for each region. By the division it was sought to establish homogeneous grouping of Native<sup>169</sup> peoples having a common heritage and sharing common interests.<sup>170</sup>

96. As noted by the Court, the purpose for the private-regional boundaries was to establish “homogeneous groupings” of Native Alaskans “having a common heritage and

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<sup>168</sup> A 13th private, for-profit regional corporation headquartered in Seattle was established for Alaska Natives who lived outside of Alaska and did not receive land.

<sup>169</sup> *In Re 2001 Redistricting Cases*, 44 P.3d at n.58 (“Native” is basically defined in the Act as a citizen of the United States who is 1/4th degree or more Alaska Indian, Eskimo or Aleut, or combination thereof.”) (citing 43 U.S.C.A. § 1602(b)).

<sup>170</sup> *In Re 2001 Redistricting Cases*, 44 P.3d at n.59 (citing 43 U.S.C.A § 1606).



sharing common interests” as of the 1970 census date.<sup>171</sup> This purpose concerns the “homogeneous grouping” of Alaskans who were Native in 1970. This purpose does not concern the homogeneous grouping of the roughly 15 percent of Alaskans who are Natives in 2021.<sup>172</sup> This purpose does not concern the homogeneous grouping of the roughly 85 percent of Alaskans who are *non-Native* in 2021.<sup>173</sup> Perhaps most importantly, this purpose does not concern the article VI, section 6 constitutional standards for contiguity, compactness, or socio-economic integration (as opposed to homogeneous grouping) required to be considered in forming house districts in 2021.

97. The use of the boundaries for these privately-held, regional corporations was addressed by the Court in *Groh v. Egan*,<sup>174</sup> just three years after they were established. The Court in *Groh* held that the reasons given for the population disparities in the final plan “do not withstand close scrutiny under the standards enunciated by the United States Supreme Court.”<sup>175</sup> It also noted that “one of the principal reasons advanced by the Board [for population disparities among districts] was the preservation of the boundaries of regional corporations established under the Alaska Native Claims Settlement Act.”<sup>176</sup>

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<sup>171</sup> 43 U.S.C.A. 1604(b).

<sup>172</sup> VDZ-3003 at 1216.

<sup>173</sup> VDZ-3003 at 1216.

<sup>174</sup> *Groh v. Egan*, 536 P.2d 863 (Alaska 1974) (*Groh*).

<sup>175</sup> *Groh*, 526 P.2d at 877.

<sup>176</sup> *Groh*, 526 P.2d at 877 (bracketed material added).

98. In responding to the Board’s focus on preserving the boundaries of the privately held regional corporations under ANSCA, the Court first acknowledged that while such boundaries “might” provide some justification for population disparities among districts, “none of those districts has the boundaries of a native corporation,” and, instead, “[e]ach included substantial portions of more than one corporate region.”<sup>177</sup>

99. In *Hickel*, the Court later characterized its holding in *Groh* as: “we implied that adherence to Native corporate boundaries *might* also provide justification [for population disparities], *as long as the boundaries were adhered to consistently.*”<sup>178</sup>

100. Setting aside the implication in *Groh* later summarized in *Hickel* that the boundaries for the privately-held regional corporations “might” “if adhered to consistently” be used to justify minor population deviations, the Court has never approved the use of the boundaries for the privately-held regional corporations for establishing districts.

## **6. Drainage and Geographic Features.**

101. As set forth in article VI, section 6, “[d]rainage and other geographic features shall be used in describing boundaries whenever possible.”

### **B. Article I, Section 1 of the Alaska Constitution (Equal Protection).**

102. Article I, section 1 of the Alaska Constitution provides for equal rights, opportunities, and protections under the law:

This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards

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<sup>177</sup> *Groh*, 526 P.2d at 877.

<sup>178</sup> *Hickel*, 846 P.2d at 48 (emphasis added).

of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protections under the law; and that all persons have corresponding obligations to the people and to the State.<sup>179</sup>

103. With respect to voting rights and redistricting litigation in particular, the Alaska Supreme Court has held:

“In the context of voting rights in redistricting and reapportionment litigation, there are two 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.” The former is quantitative, or purely numerical, in nature; the latter is qualitative.<sup>180</sup>

104. The first principle, “one person, one vote” has mirrored the federal requirement, but the second principle, “fair and effective representation” has been interpreted more strictly than federal requirement.<sup>181</sup> The Alaska Supreme Court has noted that achieving fair and effective representation for all citizens is concededly the basic aim of legislative apportionment.<sup>182</sup>

## **VI. THE BOARD’S REDISTRICTING PROCESS**

105. Plaintiffs maintain that the Board violated the constitutional requirements of article VI, section 10, and article I, section 7, as well the requirements of the OMA in the redistricting process for 2021.

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<sup>179</sup> Alaska Const., art. I, § 1.

<sup>180</sup> *Hickel*, 846 P.2d at 47 (citing *Kenai*, 743 P.2d at 1366 (Alaska 1987) (internal citation omitted)).

<sup>181</sup> *Hickel*, 846 P.2d at 47.

<sup>182</sup> *Kenai*, 743 P.2d at 1367 (citing *Reynolds v. Sims*, 377 U.S. 533, 565-66 (1964)).

**A. The Board’s Delay in the Redistricting Process.**

106. The Board’s staff did not take preliminary steps necessary to facilitate the redistricting process prior to receiving the census data.<sup>183</sup> For example, the geography for the 2020 census blocks was available well before delivery of the actual census data. Specifically, the Topologically Intergraded Geographic Encoding and Reference system (“TIGER”) file, which contains the geography for the census blocks, was available in February 2020.<sup>184</sup> The Board’s staff should have configured AutoBound with the available geography data and incorporated existing district boundaries into AutoBound.<sup>185</sup>

107. The Board received the 2020 census data on August 12, 2021, after which the Board had 30 days to prepare and adopt proposed redistricting plans. The Board, however, did not meet for purposes of joint mapping until August 23, 2021 at which point the Board received training and began some regional mapping exercises. On August 24, the Board engaged in some limited mapping exercises but did not produce a statewide redistricting plan. The first time the Board met to draft a statewide redistricting plan was September 7, 2021 —twenty-six days after the census data was released.<sup>186</sup> This left only five days for the Board to adopt proposed plans, which must be made available for public comment, within the constitutionally mandated time period.

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<sup>183</sup> Trial Tr. 592:24 – 595:5 (Brace).

<sup>184</sup> Trial Tr. 593:18 – 594:3 (Brace).

<sup>185</sup> Trial Tr. 595:10 – 597:14 (Brace).

<sup>186</sup> Trial Tr. 362:14 – 363:10 (Brace); Marcum Depo. Tr. 12:15 – 13:8; Binkley Depo. Tr. 26:12-16.

108. Although the delivery of the 2020 census data was delayed by approximately four months, the Board's deadlines begin to run from the date the data is delivered or the date the Board is appointed, whichever is later. Accordingly, the Board's delay in beginning joint mapping exercises is not attributable to the delay in the delivery of the census data.

109. After receipt of the 2020 census data, the Board's staff undertook an effort to verify and upload the data into the Board's redistricting program AutoBound Edge ("AutoBound").

110. Mr. Torkelson agreed that one of the key mapping challenges was his learning about the way that census blocks worked for mapping purposes. At his deposition, Mr. Torkelson testified:

Q: Okay. And one of the key mapping challenges was your learning about the way that these census blocks worked for mapping purposes, is that fair?

A: Yeah, that's -- that's fair. And I -- I don't know if you've read all my e-mail or not, but here are certainly -- I had exchanges with -- how do I say this? The census block shapes were a severe limitation on our ability to draw districts that were -- appeared compact, that didn't appear to have bizarre protrusions or odd shapes to them. So when we kept hitting these problems, I naturally thought, well, are we bound to census blocks? Like, could we draw another line? And I chased that one down with the Department of Labor, you know, saying, hey, I know autoBound just lets us pick blocks, but you guys have GIS software. You can draw a shapefile any shape you want, right? Yes. You know, could we do that? And the answer was just no.<sup>187</sup>

111. At the time the census data was received, the Board's staff was underprepared and did not understand basic elements of the redistricting process and the functionality of AutoBound. As a result, the map-drawing process was impeded because issues that could

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<sup>187</sup> Torkelson Depo. Tr. 51:2-20.

have been explored and resolved prior to receiving the census data were instead being discussed during the limited time period for mapping.<sup>188</sup>

112. The Board was also making fundamental decisions regarding the mapping process during the September 7 through 9, 2021, meetings that should have been decided well in advance. For example, by September 9, 2021, the Board had not decided whether the Board should control the mapping efforts or whether staff should take policy direction from the Board and do the mapping.<sup>189</sup>

113. The Board also was debating whether to draw maps jointly or individually.

Ms. Borromeo stated on September 9:

There's also been -- my third point is, you know, several comments disparaging the group process as being tedious or taking too long or not efficient or not effective and a waste of time even, it's been said. If that's the case, Mr. Chairman, there's no need to convene this board. We can just continue to work individually and bring different maps to the process. The benefit of us working together as a board is to have input on where these lines should be, because we have different expertise and different ties to different areas of the state. And I would respectfully ask that comments that the group process is negative anyway be held back from certain members as we move forward. Thank you.<sup>190</sup>

114. Despite this concern that the mapping process should be an effort by the Board as a whole, V.4, which was largely adopted as the Final Plan, was the result of Ms. Borromeo's individual mapping efforts and was never shared with any other Board

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<sup>188</sup> Trial Tr. 596:16 – 597:14 (Brace).

<sup>189</sup> Board Meeting Tr. 117:2-21 (Sept. 9, 2021) [ARB009941].

<sup>190</sup> Board Meeting Tr. 117:22 – 118:12 (Sept. 9, 2021) [ARB009941-009942].

member prior to its introduction and adoption without public comment during the September 20, 2021, meeting. Ms. Borrromeo testified:

Q: Is it fair to say that you spent considerable time with staff and other board members building out maps that were presented to the Board?

A: No. I think it would be fair to say that I spent considerable time with staff, not necessarily with my colleagues on the Board, building out maps.<sup>191</sup>

115. The Board spent very little time in joint-mapping work sessions and proposed plans were drawn and adopted hastily, with little joint participation among the Board members. For example, V.2 was the result of Ms. Borrromeo working through lunch to show that “that we didn’t have to cherry-pick which boundaries were more important than others.”<sup>192</sup> Similarly, FNSB districts as they appear in the Final Plan were drafted by Chairman Binkley the morning of November 4, 2021, before that meeting began and was adopted the next day.<sup>193</sup>

116. The Court finds that the Board’s lack of preparation prior to receipt of the 2020 census data, general unfamiliarity with basic redistricting concepts and AutoBound, and limited time spent jointly preparing redistricting maps unnecessarily constrained the range of options considered by the Board and facilitated the advancement of the individual Board Member priorities. Those priorities are discussed later in this decision.

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<sup>191</sup> Borrromeo Depo. Tr. 165:11-16.

<sup>192</sup> Borrromeo Depo. Tr. 117:6-11.

<sup>193</sup> Board Meeting Tr. 41:7-25 (Nov. 4, 2021) [ARB0009211].

**B. The Board’s Failure to Satisfy the Requirements of Article VI, Section 10 in the Redistricting Process.**

117. Under article VI, section 10, public hearings are to be held on the plans the Board developed and adopted within the 30-day period, after which there are sixty days for public comment and for the Board to make modifications to those plans and adopt a final redistricting plan.<sup>194</sup> This interpretation is supported by the plain language of article VI, section 10, the legislative history, and Judge Rindner’s Order that the Alaska Supreme Court affirmed on this issue.

118. The Board’s joint drafting efforts within the 30-day period for adopting proposed plans was limited to less than three full days. Joint drafting on V.1 and V.2 began on September 7, 2021, and those plans were subsequently adopted by the Board on September 9, 2021.<sup>195</sup> V.2 was drafted in an hour over lunch by Board Member Borromeo and was considered by even her to be an incomplete exercise.<sup>196</sup>

119. V.1 and V.2 were the only two plans adopted by the Board within the 30-day constitutionally mandated period for adopting proposed plans. Both were subsequently abandoned by the Board a mere eleven days later, on September 20, 2021, without the benefit of any apparent public hearings.<sup>197</sup>

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<sup>194</sup> Alaska Const., art. VI, § 6.

<sup>195</sup> Board Meeting Tr. 177:22 – 178:10 (Sept. 9, 2021) [ARB010001-2].

<sup>196</sup> Borromeo Depo. Tr. 168:14-20.

<sup>197</sup> Board Meeting Tr.147:2-19 (Sept. 20, 2021) [ARB010290].



120. By developing and adopting V.1 and V.2 over three days (September 7 through 9, 2021) and replacing both plans eleven days later (September 20, 2021), there was no meaningful public comment period for the only two plans adopted by the Board within the constitutionally mandated 30-day adoption period for proposed plans. The constitutional process does not anticipate the Board adopting proposed plans throughout the public comment period.

121. One can ill imagine a more confusing process for presenting adopted proposed plans to the public than the Board abandoning adopted plans days or minutes after adoption and then adopting new plans throughout the public comment period. Under both sets of circumstances, the public's ability to comment on a stable set of adopted plans by the Board is constitutionally compromised.

122. After presentation of V.3 and V.4, the Board voted to adopt those proposed plans without receiving public comment on them.<sup>198</sup> V.4, which was created by Ms. Borromeo after the 30-day period for adoption of proposed plans and was not even made available to other Board Members until the end of the September 20, 2021, meeting.<sup>199</sup>

123. The Board also adopted five third-party plans and then promptly rescinded one it had just adopted.<sup>200</sup> By adopting V.3, V.4, and four third-party plans on September 20, nine days after the end of the 30-day period for adopting of proposed plans, the Board truncated the 60-day period for public comment on those plans. Not a single

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<sup>198</sup> Board Meeting Tr. 147:2 – 196:22 (Sept. 20, 2021) [ARB10290-010339].

<sup>199</sup> Borromeo Depo. Tr. 50:2-21.

<sup>200</sup> Redistricting Process Report at 3-4 (Nov. 10, 2021) [ARB000007-000008].

redistricting plan was available for public comment for the full 60-day period, as anticipated by article VI, section 10.

124. The Board adopted an interpretation of article VI, section 10 that allowed the Board to develop and adopt new redistricting plans at any time after the 30-day period had passed. That interpretation, however, is not supported by the plain language of article VI, section 10; it is not supported by legislative history; and it is not supported by Judge Rindner's Order that the supreme court affirmed on this issue.

125. Article VI, section 10 does not anticipate that the Board will develop and adopt radically different plans after the 30-day period with inadequate notice and no meaningful opportunity for a public comment period.

126. Adoption of a proposed plan is an act of legal significance. Once proposed plans are adopted by the Board within the constitutionally mandated 30-day adoption period, the Board is constitutionally obligated to hold public hearings on those adopted plans. This Board did not.

127. There is no constitutional language anticipating that the public-comment period may be truncated by the adoption of multiple plans throughout the public-comment period. In this case, there was not a single proposed plan by the Board that was afforded the full opportunity for public comment anticipated in article VI, section 10.

128. The Board is entitled to modify parts of the redistricting plans it adopted within the 30-day period to arrive at a final redistricting plan within the 60-day period that follows. The Board is not entitled to replace plans it adopted within the 30-day period with radically new plans outside the 30-day period.

129. All six of the proposed plans that framed public comment for the redistricting process were adopted after the constitutional deadline for adopting proposed plans. As noted above, V.3 and V.4 were not subject to public comment before their adoption.

130. The Court concludes that the Board failed to satisfy the requirements of article VI, section 10 in its redistricting process. If the Board could simply develop and adopt radically new plans outside the 30-day period and thereby avoid the constitutional requirement for public hearings on plans it developed and adopted within the 30-day period, the redistricting process would defeat the public process that the constitution and legislature envisioned, that Judge Rindner recognized, and that the supreme court affirmed.

### **C. Due Process Issues.**

131. Plaintiffs contend the following actions of the Board violated due process: (1) adopting two plans over the course of three days within the 30-day period without adequate notice or public testimony; (2) replacing those two plans with two different plans, one of which became the basis for the adopted Final Plan that was radically different from the previous plan, and outside of the 30-day period without adequate notice or public testimony; (3) adopting four third-party plans outside of the 30-day period without adequate notice or public testimony; (4) having substantive discussions and making important decisions behind closed doors with no opportunity for public participation; (5) making critical decisions with regard to house district boundaries without offering an adequate opportunity for public comment; and (6) adopting a Final Plan that was not one of the plans published by the Board, without adequate notice, or public testimony.

132. The concept of due process stems from the idea of fairness.<sup>201</sup> The Alaska Supreme Court has stated that, “[w]hat procedural due process may require under any particular set of circumstances depends on the nature of the governmental function involved and the private [or public] interest affected by the governmental action.”<sup>202</sup>

133. On September 9, 2021, the Board adopted V.1 and V.2 within the 30-day period as required. As set forth above, the Board was then required to hold public hearings on those plans. The Board did not meet again until September 17, 2021. The vast majority of that meeting was spent receiving presentations for third-party redistricting plans.

134. On September 20, 2021, nine days after the end of the 30-day period for adopting proposed plans and eleven days after adopting V.1 and V.2, the Board replaced V.1 and V.2 with V.3 and V.4.<sup>203</sup> The radical differences between V.2 and V.4 are apparent in the minutes from the Board meeting held on September 20, 2021.<sup>204</sup> The late introduction and adoption of V.3 and V.4 precluded Plaintiffs from any meaningful opportunity to be heard on those plans. The Board also adopted four of five third-party plans. The Board did not meet again until November 2, 2021, and adopted its Final Plan for House districts on November 5, 2021.

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<sup>201</sup> *In re 2001 Redistricting Cases*, 2002 WL 344119573 at 21.

<sup>202</sup> *In re 2001 Redistricting Cases*, 2002 WL 344119573 at 21.

<sup>203</sup> Board Meeting Tr. 196:14-22 (Sept. 20, 2021) [ARB000190].

<sup>204</sup> *See* ARB000186-000192.

135. The Board is not afforded unfettered discretion during the redistricting process.<sup>205</sup> The Board's redistricting process did not afford Plaintiffs a meaningful opportunity to be heard on the Board's plans developed and adopted within or after the 30-period.

136. The Court thus concludes that the Board denied Plaintiffs due process under article I, section 7 as a result of its failure to satisfy the requirements of article VI, section 10 in the redistricting process.

**D. The Open Meetings Act.**

137. Plaintiffs contend that the following actions of the Board violated the OMA: (1) improperly meeting in executive session multiple times during a three-day period from September 7, 2021 through September 9, 2021; (2) adopting two plans over the course of that three-day period, within the 30-day period, without adequate notice or public testimony; (3) replacing those two plans with two different plans outside the 30-day period without adequate notice or public testimony; (4) having substantive discussions and making important decisions behind closed doors after the 30-day period; (5) using email among three or more Board members to discuss Board business; and (6) adopting a Final Plan that was not one of the plans published by the Board without adequate notice or public testimony.

138. The Alaska Supreme Court has expressly stated:

Open decision-making is regarded as an essential aspect of the democratic process. It is believed that public exposure deters official misconduct, makes government more responsive to its constituency, allows for greater public provision of information to the decision-maker, creates greater public

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<sup>205</sup> See *In re 2001 Redistricting Cases*, 2002 WL 344119573 at 21.

acceptance of government action, and promotes accurate reporting of governmental processes.<sup>206</sup>

While the mandates of the OMA are not constitutional mandates, they nonetheless go to an essential aspect of the democratic process.

139. The OMA provides that “all meetings of a governmental body of a public entity of the state are open to the public except as otherwise provided by this section or another provision of law.”<sup>207</sup> As a governmental body of a public entity of the State, the Board is subject to the requirements of AS 44.62.310-.312.<sup>208</sup> The OMA also provides that “[r]easonable public notice shall be given for all meetings required to be open under this section.”<sup>209</sup>

140. The Board failed to properly notice the proposed actions to be taken at public meetings. A salient example of this failure is the agenda for the meeting on September 20, 2021, which included an item regarding “improvements to Board proposed plans V.1 and V.2.”<sup>210</sup> Under that agenda item, the Board presented and adopted V.3 and V.4 to replace V.1 and V.2 without taking public comment. In addition, V.4 is radically different than both V.1 and V.2 and cannot be considered a mere “improvement.”

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<sup>206</sup> *Alaska Cmty. Colleges’ Fed’n of Teachers, Local No. 2404 v. Univ. of Alaska*, 677 P.2d 886, 891 (Alaska 1984).

<sup>207</sup> AS 44.62.310(a).

<sup>208</sup> *See also Hickel*, 846 P.2d at 57 (“[W]e affirm the trial court’s determination that the Open Meetings Act and Public Records Act apply generally to the activities of the Reapportionment Board.”).

<sup>209</sup> AS 44.62.310(e).

<sup>210</sup> Board Meeting Agenda (Sept. 20, 2021) [ARB001174].

141. With regard to meeting in executive session, the OMA provides:

The motion to convene in executive session must clearly and with specificity describe the subject of the proposed executive session without defeating the purpose of addressing the subject in private. Subjects may not be considered at the executive session except those mentioned in the motion calling for executive session unless auxiliary to the main question. Action may not be taken at an executive session, except to give direction to an attorney or labor negotiator regarding the handling of a specific legal matter or pending labor negotiations.<sup>211</sup>

142. The pertinent question with regard to whether private meetings of a governmental unit violate the OMA “is whether activities of public officials have the effect of circumventing the OMA.”<sup>212</sup> Important decision-making and substantive discussion that takes place outside the public eye constitutes a violation of the OMA.<sup>213</sup>

143. The Board’s public meetings policy adopts the OMA standards and expressly states that public notice shall be given seventy-two hours in advance, with twenty-four hours being allowable.<sup>214</sup> The Board failed to properly notice executive sessions on numerous occasions and instead added executive sessions to agendas during meetings or *sua sponte* entered executive session for nebulous reasons, such as the broad purpose of obtaining

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<sup>211</sup> AS 44.62.310(b).

<sup>212</sup> *Hickel v. Southeast Conference*, 868 P.2d 919, 929 (quoting *Brookwood*, 702 P.2d at 1323, n.6).

<sup>213</sup> *Hickel*, 868 P.2d at 930.

<sup>214</sup> Board Public Meeting & Notice Requirement Policy [ARB000422-000423].

“legal advice” without providing any description of the subject matter to be discussed in executive session.<sup>215</sup>

144. The Board paid little regard to the narrow scope of exceptions to the OMA. The Board engaged in substantive deliberations and decision-making in executive session, thereby shielding what is required to be a public process from public scrutiny. The Board is not permitted to make substantive decisions or engage in deliberations regarding how to draw district boundaries in executive session.<sup>216</sup>

145. The scope of discussion in executive session often exceeded the scope of the subjects mentioned in the motion calling for executive session or auxiliary subjects.<sup>217</sup> In doing so, the Board failed to meet the requirement that “the motion to convene in executive session must clearly and with specificity describe the subject of the proposed executive session without defeating the purpose of addressing the subject in private.”<sup>218</sup>

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<sup>215</sup> See, e.g., Board Meeting Tr. 3:9-11 (Sept. 7, 2021) [ARB009532] (“Mr. Chairman, I move to amend the agenda to add an Executive Session for the purpose of receiving legal advice.”).

<sup>216</sup> *Hickel*, 868 P.2d at 929; AS 44.62.310(b) (“Action may not be taken at an executive session, except to give direction to an attorney or labor negotiator regarding the handling of a specific legal matter or pending labor negotiations.”).

<sup>217</sup> AS 44.62.310(b).

<sup>218</sup> AS 44.62.310(b).



**E. Specific OMA and Due Process Violations.**

146. In the same way that there is overlap between article VI, section 10 violations and due-process violations, there is overlap between OMA violations and due-process violations.

147. By engaging in deliberations and making substantive, behind-closed-doors decisions, the Board not only violates the OMA—the Board also violates the Alaska Constitution.

148. The September 7-10, 2021, Board meeting agenda did not include executive session as an agenda item, and there was otherwise no public notice of executive session. Yet, the Board entered executive session on September 7, 2021.<sup>219</sup>

149. During the September 7, 2021, meeting the Board added executive session to the agenda during the meeting without providing public notice of their intention to do so,<sup>220</sup> failed to state clearly and with specificity the topic of executive session,<sup>221</sup> changed the time for the executive session from after presentation of Board drawn maps to before presentation

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<sup>219</sup> Board Meeting Agenda (Sept. 7-10, 2021) [ARB000537].

<sup>220</sup> Board Meeting Tr. 3:9-11 (Sept. 7, 2021) [ARB009532] (“Mr. Chairman, I move to amend the agenda to add an Executive Session for the purpose of receiving legal advice.”).

<sup>221</sup> Board Meeting Tr. 29:17-22 (Sept. 7, 2021) [ARB0009558] (“So, Mr. Chairman, I move the Board enter Executive Session for the purposes of receiving legal advice under Alaska Statute 44.62.310(c)(4) for matters involving consideration of government records set by a [sic] law are not subject to public disclosure.”).

of Board drawn maps,<sup>222</sup> entered executive session for the purpose of obtaining general legal advice prior to presenting the Board drawn plans to the public,<sup>223</sup> and counsel for the board provided a summary of the executive session thereby filtering the Board’s discussion of its “constitutional mandate,” through the Board’s counsel.<sup>224</sup>

150. Concerns regarding executive session were raised early on in the redistricting process,<sup>225</sup> but the Board dismissed those concerns without substantive discussion regarding the proper scope of executive session or the process the Board should implement for purposes of entering executive session.<sup>226</sup> The Board did not employ a uniform practice

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<sup>222</sup> Board Meeting Tr. 28:1 – 30:22 (Sept. 7, 2021) [ARB009557-009559] (moving executive session initially scheduled for after review of Board drawn maps to before review of Board drawn maps.).

<sup>223</sup> Board Meeting Tr. 26:6 – 27:5 (Sept. 7, 2021) [ARB009555-009556].

<sup>224</sup> Board Meeting Tr. 31:1 – 34:2 (Sept. 7, 2021) [ARB009560-009564] (public discussion of “constitutional mandate” that the Board discussed in executive session); *Id.* at 31:1-5 [ARB009560] (“We had an opportunity in Executive Session to hear from legal counsel regarding a discussion on some of the previous opinions when it comes to the different criteria for the Board to consider in drawing the District boundaries.”); *Id.* at 31:10-13. (“So the Board has asked -- has asked me to make a public presentation to explain the Board’s thinking with regard to its constitutional mandate.”).

<sup>225</sup> *See* Native American Rights Fund Letter at 12-13 [ARB000600-000601].

<sup>226</sup> Board Meeting Tr. 8:25 – 9:4 (Sept. 8, 2021) [ARB010503-010504] (“And six, the accusation that we are abusing the executive session process. I, again, dispute that. The executive session process is appropriate for receiving advice from our attorney, which we have done, and we will continue to do as a Board.”); *Id.* at 11:11-18 [ARB010506] (“And, you know, the – I’ve represented public entities for over 20 years. This Board’s use of executive session doesn’t come anywhere close to the line. The -- I think the Board has had 25, 30 hours of public meetings, and maybe two or three of exec- -- have been executive session. And so I just don’t -- there’s just nothing – there’s just -- we’re not – it’s not even a concern.”).

with regard to executive sessions and appears to have been generally unconcerned with limiting executive sessions in a manner that complied with the OMA.

151. During the September 9, 2021, Board meeting, Ms. Borromeo raised concerns regarding the use of executive session.<sup>227</sup>

152. Thus, even members of the Board had concerns with the use of executive sessions and opined that procedural topics were discussed in executive session that should have been discussed in public.

153. Ms. Borromeo also stated that she was concerned about legal counsel for the Board meeting with staff and Chairman Binkley outside the presence of other Board members and that “it’s the advice and counsel of our attorney and the appearance that there are small group discussions going on I think should be avoided.”<sup>228</sup> It is readily apparent that the Board continued to have small group discussions among themselves, with counsel, and with staff. This practice implicates decision-making by virtue of serial communications

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<sup>227</sup> Board Meeting Tr. 115:12 – 116:4 (Sept. 9, 2021) [ARB009939-009940] (“My second point is about executive session, where I feel as though some board members are allowed to have the benefit of our counsel and others were not. And I’ll give an example. Yesterday, we wasted -- maybe not wasted. We ate up a lot of time in executive session talking about procedural issues that maybe didn’t need to be done in executive session and eating lunch. I wanted to have the benefit of having discussions with our counsel about our map, and I was told, no, we have to come out of executive session to come back on the record. This is important for public confidence, which I totally agree. And then on the other side, yesterday our lunch was extended for 15 minutes because it was late. I wasn’t asking for another two hours in executive session. 15 minutes would have been more than sufficient.”).

<sup>228</sup> Board Meeting Tr. 120:21 – 121:20 (Sept. 9, 2021) [ARB009944-009945].

whereby decisions are made by relaying discussions among small groups to other members of the Board outside of the public eye and in violation of the OMA.

154. During the November 2, 2021, meeting, the Board entered into executive session for purposes of receiving a presentation from their VRA experts. The Board merely recited the statutory language of the OMA for the motion to enter into executive session.<sup>229</sup> After the executive session, the Board's counsel provided a summary of the discussion that was conducted in executive session, which suggests the discussion that occurred in executive session was not subject to an exception to the OMA.<sup>230</sup> Again, the Board's discussion of what appear to be subjects that are not appropriate for executive session was filtered through the Board's counsel for presentation to the public. The public was not provided with any materials presented during the executive session, and the Board's VRA experts did not participate in any public discussions or deliberations.

155. The agenda for the November 2, 2021, meeting identified that executive session would be held at 10:30 a.m. prior to discussion of the VRA.<sup>231</sup> There was no agenda published for the November 3-5 meetings, and no public notice was provided regarding the executive sessions that took place during this time period.

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<sup>229</sup> Board Meeting Tr. 68: 23 – 69: 4 (Nov. 2, 2021) [ARB008998-008999].

<sup>230</sup> Board Meeting Tr. 69:21 – 78:3 (Nov. 2, 2021) [ARB008999-009008].

<sup>231</sup> Board Meeting Agenda (Nov. 2, 2021) [ARB000944].

156. On November 3, 2021, the Board began exploring where to place Valdez.<sup>232</sup> In the midst of this discussion, the Board decided to enter into executive session despite the fact that no public notice of the executive session was provided.<sup>233</sup> The subject of the executive session appears to be whether to place Valdez in District 36 or whether to place Valdez with the Mat-Su Borough. The Board described this decision as a “binary choice”<sup>234</sup> and wanted to explore options for Valdez. Counsel for the Board stated that “[i]f folks want to have those kinds of questions, that’s one way to we could finish the day.”<sup>235</sup> After taking a five-minute break, the Board reconvened and entered into executive session.<sup>236</sup> Again, the Board merely recited the OMA statutory language rather than specifically and clearly identifying the topic of executive session.<sup>237</sup> After entering executive session the Board did not reconvene in public session on November 3, 2021.<sup>238</sup> As a result, the duration of the executive session is unclear.

157. The next day on November 4, 2021, the Board came back on the record in public session. At the outset of the meeting, Ms. Borrromeo stated that “I do believe that we

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<sup>232</sup> Board Meeting Tr. 326:13 – 337:20 (Nov. 3, 2021) [ARB007686 -007697].

<sup>233</sup> Board Meeting Tr. 337:5 – 338:23 (Nov. 3, 2021) [ARB007697-007698].

<sup>234</sup> Board Meeting Tr. 330:12-17 (Nov. 3, 2021) [ARB007690] (“I mean, it seems like the -- a binary choice here is based on what we do with Valdez. We decided to go this way. We found a map we can use. If we keep it on the Richardson, we have a different version.”).

<sup>235</sup> Board Meeting Tr. 337:10-11 (Nov. 3, 2021) [ARB007697].

<sup>236</sup> Board Meeting Tr. 337:22 – 338:23 (Nov. 3, 2021) [ARB007697-007698].

<sup>237</sup> Board Meeting Tr. 337:22 – 338:23 (Nov. 3, 2021) [ARB007697-007698].

<sup>238</sup> Board Meeting Tr. 338:24 – 339:1 (Nov. 3, 2021) [ARB007698-007699].

have reached consensus or close to in a couple of districts and regions, and so it would be appropriate to start putting that final map together.”<sup>239</sup> Ms. Bahnke stated in the opening minutes of the meeting: “In terms of process, I’d like to also ask our counselor if we need to be prepared to have any kind of discussions that would require us to go into executive session today or not, based on what you observed yesterday, or -- or is it premature?”<sup>240</sup> In response Mr. Singer stated:

It’s premature. If I see a decision on which I would like to share legal advice with you, I’ll suggest that we have an executive session. And if you reach a point for a decision where you’d like some input from counsel, the – as we discussed, there are -- there are VRA implications or analyses that need to be done with regard to districts that -- the districts you have heretofore labeled 37 through 40 and potentially districts in Anchorage. And so if there’s going to be drastic changes from board-adopted or -- six board-adopted plans, if you have a new solution, after the board engages in the Hickel process and comes up with a proposed idea, there’s a second piece, which is a legal analysis with the VRA. And so some of that we can do on the fly in executive session. Some of that will require input from our experts, and they’re standing by. So -- (indiscernible) way of saying ---- it depends.<sup>241</sup>

158. Mr. Simpson then stated:

Mr. Chair, I mean, I have maybe a little bit different take on that. If -- if we wait for counsel to, you know, throw up a red flag and say I need to talk to you guys, that kind of implies something’s about to go sideways. I would rather that we just sort of have some ordinary scheduled executive sessions where we could talk candidly to counsel without throwing up a red flag, just talk through – where we’re at, at any given time.<sup>242</sup>

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<sup>239</sup> Board Meeting Tr. 4:23 – 5:1 (Nov. 4, 2021) [ARB009174-009175].

<sup>240</sup> Board Meeting Tr. 7:4-9 (Nov. 4, 2021) [ARB009177].

<sup>241</sup> Board Meeting Tr. 7:10 – 8:7 (Nov. 4, 2021) [ARB009177-009178].

<sup>242</sup> Board Meeting Tr. 8:15 – 9:1 (Nov. 4, 2021) [ARB009178-009179].

159. After this exchange and contrary to his statement that it was premature to schedule an executive session, Mr. Singer suggested that the Board schedule executive session for 11:30 a.m. that day for 30 minutes.<sup>243</sup>

160. This exchange among the Board and counsel exemplifies the Board's practice of treating executive session in an inconsistent manner and paying little regard for compliance with the OMA. The Board anticipated that it may need executive session for some then unknown reason rather than ensuring that the issues to be discussed at 11:30 a.m. were properly within the narrow exceptions to the OMA. There was no agenda for the November 4, 2021, meeting, and no public notice of executive session was provided.

161. The Board discussed the creation of a Doyon–Ahtna district that would result in the FNSB shedding population to District 36 in order to replace the population of Valdez, which would then be placed in a district with the Mat-Su Borough.<sup>244</sup> Shortly before entering executive session, the Board was engaged in substantive discussions regarding what district Valdez should be placed in and had yet to reach consensus.<sup>245</sup> The Board entered executive session without specifically and clearly identifying the topic for discussion or the reason executive session was required.

162. After reconvening in open session at approximately 1:00 p.m., the Board immediately began discussing areas of consensus and indicated they had reached consensus

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<sup>243</sup> Board Meeting Tr. 9:2-6 (Nov. 4, 2021) [ARB009178].

<sup>244</sup> Board Meeting Tr. 72:1 – 74:6 (Nov. 4, 2021) [ARB009243-009245].

<sup>245</sup> Board Meeting Tr. 80:2 – 82:22 (Nov. 4, 2021) [ARB009250-009251].

on Valdez.<sup>246</sup> Thus, it appears that the Board reached consensus during the executive session that Valdez would not be paired with Richardson Highway communities, which were included in District 36.

163. During the November 5, 2021, Board meeting, Ms. Marcum recited the process by which the Board foreclosed any possible pairing of Valdez with Richardson Highway communities or Prince William Sound communities.<sup>247</sup>

164. This statement combined with the lack of any substantive discussion regarding pairing Valdez with Richardson Highway or Prince William Sound communities after the Board entered executive session on November 4, 2021, makes clear that the Board reached consensus on this issue during the executive session. After the executive session the Board's deliberations turned on choosing whether to pair Valdez with Anchorage or the Mat-Su Borough.

165. During the November 5, 2021, meeting the Board entered into executive session twice, there was no Agenda for the November 5, 2021, meeting, and no public notice of executive session was provided. First, the Board entered executive session at the outset

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<sup>246</sup> Board Meeting Tr. 102:25 – 104:6 (Nov. 4, 2021) [ARB009272-009274].

<sup>247</sup> Board Meeting Tr. 5:2-16 (Nov. 5, 2021) [ARB007862] (“I have concerns about Valdez and, you know, so I had offered yesterday to - to try to find another solution to Valdez. They’ve been really clear about their desire to be with Richardson Highway, and that was taken off the table yesterday. There are other solutions that they proposed for coastal, and that was also not a possibility. It was taken off the table. And so what -- you know, that kind of left them with Anchorage or the Mat-Su. They’ve testified that they do not want to be with the Mat-Su -- official resolutions and such -- the Mat-Su has testified they don’t want Valdez with them, so I wanted to -- to look at really the only other opportunity to pair them with another area, and that would be with Anchorage.”).



of its meeting to receive VRA analysis by reciting the statutory language of the OMA without identifying why the executive session was required. Second, the Board entered executive session to receive legal advice without identifying the specific topic for executive session or the reason why the executive session was required.<sup>248</sup> The Board’s discussion regarding the second executive session reveals a general disregard for OMA compliance, including limiting the scope of discussion to subjects that properly fall within exception to the OMA.<sup>249</sup>

166. Immediately after returning to public session, the Board began analyzing two maps that placed Valdez with the Mat-Su Borough.<sup>250</sup> Thus, it appears that further consensus regarding how to pair Valdez with the Mat-Su Borough was reached in executive session out of the public eye.

**F. Data Anomalies and Persistent Confusion.**

167. The Board’s practice of renumbering districts in various redistricting plans on numerous occasions and in the Final Plan undermined the ability of the public to provide meaningful input on proposed plans or other draft plans created by the Board. Mr. Torkelson described the renumbering practices of the Board and testified that

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<sup>248</sup> Board Meeting Tr. 184:8 – 185:16 (Nov. 5, 2021) [ARB008041-008042].

<sup>249</sup> Board Meeting Tr. 184:8 – 185:16 (Nov. 5, 2021) [ARB008041-008042].

<sup>250</sup> Board Meeting Tr. 186:24 – 187:2 (Nov. 5, 2021) [ARB008043-008044] (“Both of them bring Valdez into the Mat-Su, which I know has been a point of, you know, considerable conversation, but they are somewhat different).

renumbering resulted in “persistent confusion” regarding what districts were being discussed during public meetings.<sup>251</sup>

168. As a result of the Board’s renumbering practices, the deviation table for the Final Plan, which was presented on the Board’s website under the 2021 Redistricting Proclamation section, contained erroneous population data for 23 of the 40 districts.<sup>252</sup> These errors were also included in the interactive version of the final plan contained on the Board’s website.<sup>253</sup> This error was not corrected until January 13, 2022. The publicly accessible population data for the 2021 Redistricting Plan was incorrect for over two months after the adoption of the Final Plan. These errors undermined the ability of the public to analyze the Board’s Final Plan and reflect the confusion caused by repeatedly renumbering districts.

## **VII. THE BOARD WAS IMPROPERLY MOTIVATED BY THE ADVANCEMENT OF INDIVIDUAL PRIORITIES**

169. Rather than fulfill its mandate to create a redistricting plan based upon the constitutional criteria for redistricting set forth in article VI, section 6 of the Alaska Constitution, the Board instead focused on other priorities, which resulted in a Final Plan that fails to satisfy the constitutional criteria. The Board was improperly motivated by the advancement of individual Board members’ interest or the interests of Board member’s employers, communities, or their constituents. As a result, the Board failed to consider

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<sup>251</sup> Torkelson Depo. Tr. 110:14 – 114:21 (Jan. 12, 2022).

<sup>252</sup> ARB007234; Ex. VDZ-3003 at 759 [ARB000117] (Population Deviation Charts).

<sup>253</sup> Ex. VDZ-3003 at 14 (Brace).

viable redistricting options that better satisfy the constitutional criteria for redistricting and developed a Final Plan that fails to comport with Alaska law. The Supreme Court has expressly prohibited diminishing the constitutional criteria in order to achieve other policy goals.<sup>254</sup>

170. First, the Board focused on ANCSA-related priorities including drawing Districts 36-40 in a manner that satisfied the priorities of Ms. Bahnke<sup>255</sup> and Ms. Borromeo.<sup>256</sup> Second, Chairman Binkley<sup>257</sup> prioritized maintaining the boundaries of FNSB despite the fact that FNSB was overpopulated and needed to shed excess population into another district to reach reasonable deviations. Third, Mr. Simpson prioritized pairing Mendenhall Valley with Skagway and Haines despite the voluminous amount of public testimony to the contrary and the fact that his proposal splits the Mendenhall Valley

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<sup>254</sup> See *Hickel*, 846 P.2d 38, 45, n.10.

<sup>255</sup> Trial Tr. 974:23 – 975:2 (Jan. 27, 2021) (Bahnke) (“I am the president of Kawerak, which is a regional tribal consortium in the Bering Straits? region of Alaska. I also am a board member for the Alaska Federation of Natives. I am involved with the National Congress of American Indians.”).

<sup>256</sup> Borromeo Aff. at 1-2, ¶¶ 4-5 Borromeo Depo. Tr. 14:2-3 (Ms. Borromeo is Executive Vice President and General Counsel for the Alaska Federation of Natives, the Board Chairman for MTNT, Ltd., a board member for the Alaska Native Justice Center, a committee member of the United States Census Bureau National Advisory Committee on Racial, Ethnic, and Other Populations, and a shareholder of Doyon Limited.).

<sup>257</sup> Binkley Depo. Tr. 17:12 – 24:14 (Mr. Binkley is a lifelong Alaskan from Fairbanks, operated a tug and barge business on the Yukon River and the Y-K Delta, and former representative for the Bethel area and senator for the Bethel area and interior rural communities and villages.).

community.<sup>258</sup> Fourth, Mr. Singer<sup>259</sup> who serves as counsel for the Board appears to have supported pairing Valdez with Mat-Su in order to maintain Doyon and Ahtna’s ANCSA boundaries. The record reflects that Board members advocated for specific districts based upon their personal priorities rather than focus on the constitutional redistricting criteria or respecting the wishes of the public as expressed during the public comment period.

**A. Protection of Doyon, Ahtna, and Bering Straits ANCSA Regional Corporation Boundaries.**

171. At the outset of the redistricting process, the Board focused on historical VRA Districts, sought to maintain ANCSA boundaries, and prioritized socio-economic integration among Native groups. In so doing, the board sacrificed maintaining borough boundaries and satisfying the constitutional criteria of compactness and socio-economic integration.

172. The Board’s process of creating District 36 reflects that the Board was improperly motivated by a desire to advance the interests of Doyon, Ahtna and Bering Straits over the interests of other communities.

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<sup>258</sup> Simpson Depo. Tr.16:3 – 18:3 (Mr. Simpson lives in Douglas and is an attorney in private practice in Juneau. His practice focuses particularly on Native Corporation, and he has served as principal outside counsel for Sealaska since the 1970s.).

<sup>259</sup> Ex.VDZ-3007 (Mr. Singer serves as Ahtna’s Attorney in two cases pending before the Alaska Supreme Court: *James Caswell v. Ahtna, Inc.* (S-18005) and *State of Alaska, Dep’t of Transp. & Pub. Facilities, et al. v. Ahtna, Inc.* (S-17526)).

173. The Board improperly prioritized maintaining the ANCSA boundaries of Doyon, Ahtna, and Bering Straits to the detriment of constitutionally mandated redistricting criteria.

174. The Board openly acknowledged the Doyon Coalition’s goal of keeping interior Doyon and Ahtna villages together in one District<sup>260</sup> and endeavored to create a Doyon-Ahtna district.<sup>261</sup>

175. The Board received a presentation from the Doyon Coalition early on in the redistricting process in a private meeting that was not a matter of public record.<sup>262</sup> Ms. Bahnke testified that this meeting with the Doyon Coalition was the only private meeting that concerned substantive redistricting issues that she could recall.<sup>263</sup> Chairman

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<sup>260</sup> Board Meeting Tr. 196:8 -13 (Nov. 4, 2021) [ARB009366] (“Doyon didn’t seem to be - - in terms of what happened in the borough, it didn’t seem to be -- and again, this was informally, but they didn’t seem to be that concerned about it. Their primary mission, keep Doyon villages together, keep Ahtna region villages together.”); Board Meeting Tr. 161:14-25 (Nov. 4, 2021) [ARB009331] (“MEMBER BAHNKE: We’ve also heard perspective from Doyon. The whole reason they formed their coalition was to preserve the socioeconomic integrity of those rural Interior communities. So everyone’s got their preference, but what litmus test -- which -- which of the two pairings of Valdez, either in that rural Interior District versus where it has already been established by the courts that it has socioeconomic ties to the Mat-Su Valley. In my mind we’ve got court precedence and then the constitutional requirement of trying to do the best that we can socioeconomically.”).

<sup>261</sup> Trial Tr. 1158:15 – 21 (Jan 27, 2022); Borromeo Depo. Tr. 135:24 – 136:12 (Jan. 10, 2022); Binkley Depo. Tr. 154:25 – 155:18 (Jan. 11, 2022); Board Meeting Tr. 253:20-25 (Nov. 5, 2021) [ARB008110] (“you’ve heard testimony, and a specific request from the ANCSA Regional Corporation to include Cantwell with the other Ahtna villages, and the Board has -- with District 36, it’s really sought to create a Doyon district. So it’s -- it’s consistent, and I think it’s within your discretion.”).

<sup>262</sup> Bahnke Depo. Tr. 87:6 – 89:22.

<sup>263</sup> Bahnke Depo. Tr. 89:12-21.

Binkley had a private conversation with Doyon’s CEO, Mr. Schutt, regarding Doyon’s priorities prior to any presentation by Doyon to the Board and before the Board started drawing maps.<sup>264</sup> The Board was well aware of the Doyon Coalition’s objectives from the outset of the redistricting process.<sup>265</sup>

176. Counsel for the Doyon Coalition actively participated in the Board’s initial training and mapping exercises on August 23, 2021, and presented the Doyon Coalition’s proposed map at that time.<sup>266</sup> Ms. Borromeo requested that the map be sent to the Board that night.<sup>267</sup> Counsel for the Doyon Coalition also participated in the Board’s mapping of the VRA districts and what would become District 36 during the August 24, 2021 meeting.<sup>268</sup>

177. Legal counsel for the Board represented Ahtna in two pending supreme court cases at the time the Board was engaged in the redistricting process.<sup>269</sup> However, this potential conflict was not expressly disclosed to the Board, and Chairman Binkley was unaware that Mr. Singer represented Ahtna.<sup>270</sup>

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<sup>264</sup> Binkley Depo. Tr. 53:1-17; 55:5-22.

<sup>265</sup> Binkley Depo. Tr. 52:2-25.

<sup>266</sup> Board Meeting Tr. 186:24 – 194:14 (Aug. 23, 2021) [ARB011225 – 011233].

<sup>267</sup> Board Meeting Tr. 190:19-20 (Aug. 23, 2021) [ARB011229].

<sup>268</sup> Board Meeting Tr. 260:3 – 262:23 (Aug. 24, 2021) [ARB011531 – 011533].

<sup>269</sup> Ex. VDZ-3007.

<sup>270</sup> Binkley Depo. Tr. 60:5 – 62:11.

178. The Doyon Coalition articulated their desire to maximize electoral influence of interior Athabascan communities’ numerous times throughout the redistricting process<sup>271</sup> and the Board articulated its desire to maximize the percentage of Native voters in District 36.<sup>272</sup>

179. The Board consistently referred to District 36 the “Doyon district” or the “Doyon-Ahtna district” throughout the redistricting process. The Final Plan satisfies the Doyon Coalition’s priorities and creates a Doyon-Ahtna district in District 36.<sup>273</sup>

180. Despite the fact that the majority of the population in District 36 does not reside in Doyon or Ahtna Native villages, the Board prioritized creating a district that included all Doyon and Ahtna villages together and avoided combining any Bering Straits or Calista communities with Doyon communities.

181. The record establishes a pattern of deference to the preferences of the Doyon Coalition and Board Members Borrromeo and Bahnke<sup>274</sup> at the expense of breaking borough

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<sup>271</sup> See e.g. ARB004041; ARB002331; ARB002087; ARB002257; ARB002261-002264.

<sup>272</sup> Board Meeting Tr. 243: 9 – 245:22 (Nov. 3, 2021) [ARB007603-007605].

<sup>273</sup> Binkley Depo. Tr. 159:4-7 (“Q: So I’m wondering if you have, for example, House District 36 isn’t just the Doyon district, it’s the Doyon-Ahtna district; right? A: Correct”).

<sup>274</sup> Simpson Depo Tr, 47:12-15 (“I think, in many cases, the member from a particular region received deference from the other members as to that region.”); Bahnke Depo Tr. 53:18-19 (“I felt like I had certain expertise and that should be given some deference.”); Simpson Depo Tr. 172:15-22 (“Yes. And in terms of the big rural districts, in northern -- well, like the big horseshoe district and the western districts that are definitely indigenous language groups that were considered, it was not anything I particularly knew about, so there was deference, I think, given to board members who did have that knowledge, but yes, that could be an issue.”); Simpson Depo Tr. 14:1-5 (“I think most of the board gave quite a bit of

boundaries and creating districts that are not compact or socio-economically integrated.<sup>275</sup>

182. Ms. Borrromeo’s text messages with Mr. Amdur-Clark and Ms. Sanford during Board meetings reflects both her and Ms. Bahnke’s alignment with the priorities of the Doyon Coalition.<sup>276</sup> Towards the end of the redistricting process on November 8, 2021, Ms. Sanford texted Ms. Borrromeo “We are poised to help defend this map if Budd doesn’t

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deference to Melanie Bahnke, who was from Nome, and kind of took the lead as far as, you know, the socioeconomic issues for those western Alaska districts.”).

<sup>275</sup> Board Meeting Tr. 19:3-9 (Sept. 8, 2021) [ARB010514] (“MEMBER BAHNKE: This actually leads nicely into what I was reflecting on last night. You know, we got the testimony from Doyon because the Interior villages had been kind of adopted out to different regions the last cycle, and I feel like -- I was feeling like at the -- the Bethel region was -- we’re basically doing the same thing to them to spare the Doyon region from that.”); Board Meeting Tr. 178:24 – 183:9 (Nov. 3, 2021) [ARB007538-007543] (“MEMBER BAHNKE: John, one thing I’d like to point out is beyond Calista’s testimony, outside of my region, there is a coalition of Doyon, Sealaska -- ... TCC, and maybe Ahtna ... that has clearly indicated their preference for a rural Interior district. That is comprised of Athabascan Native communities, or that they’re not pushed off into various other socioeconomically non-compatible sections of the state.”); Board Meeting Tr. 196:18 – 197:15 (Sept. 7, 2021) [ARB007556-007557] (“MEMBER BAHNKE: So for 39, which was breaking an ANCSA boundary once, it’s now breaking it twice. You’re adding the number of breaks to the Doyon region. So for – CHAIR BINKLEY: I think what Bethany was saying, that’s -- MEMBER BAHNKE: For the Bering Straits region, for the Doyon region. CHAIR BINKLEY: -- an improvement, though. MEMBER BAHNKE: It’s not an improvement to the ANCSA (indiscernible). CHAIR BINKLEY: For Doyon. For Doyon it is. MEMBER BAHNKE: How? CHAIR BINKLEY: Because now they’re in four different districts, and this would just allow them to be in two different districts. MEMBER BORROMEO: This also is not what they requested. MEMBER BAHNKE: Yeah, this is not what they requested. CHAIR BINKLEY: This is what Calista had requested, and it gives Doyon much of what they requested.”); Board Meeting Tr. 52:4-13 (Nov. 4, 2021) [ARB000922] (“MEMBER BAHNKE: I do think, though, socioeconomically, it makes more sense to do that as opposed to pulling rural Interior Athabascan communities and pushing them into a whole other ANCSA -- ANCSA region, which ANCSA regions were defined -- were established based on socioeconomic connectivity and where there are no boroughs identified. To me it’s closest thing that you can have to a borough that delineates socioeconomic integration.”).

<sup>276</sup> Ex. VDZ-3010 [ARB00155140-00155159].



completely f[] up the senate pairings. Not sure we can defend some of what I am hearing discussed.”<sup>277</sup> On November 9, 2021, Ms. Borromeo texted Ms. Sanford “I’m sorry I left it all on the table.” To which Ms. Sanford responded “you made an excellent record you and Melanie are heroes.”<sup>278</sup>

183. Ms. Borromeo appears to have coordinated her efforts with the Doyon Coalition and advanced the agenda of the Doyon Coalition through her position as a member of the Board. The Doyon Coalition worked in concert with Ms. Borromeo to actively solicit public comment that advanced their priorities, including the priority of taking excess population from FNSB in order to remove Valdez from District 36, and maintaining Ahtna’s ANCSA boundaries by placing Cantwell in District 36.

184. Ms. Sanford utilized her position as a member of the FNSB assembly caused the FNSB assembly to pass a resolution supporting the concept of shedding population from FNSB. Text messages between Ms. Borromeo and Ms. Sanford reveal their apparent involvement in procuring the resolution.<sup>279</sup> Ms. Sanford stated that it was her last night on the FNSB assembly and that “We got it passed. And even the mayor finally got it. A day late and a dollar short. But still.”<sup>280</sup> Ms. Borromeo responded “Going out with a bang I see, LOL” and stated that “It’s good timing. Fresh.”<sup>281</sup> The resolution resulted in Chairman

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<sup>277</sup> Ex. VDZ-3010 [ARB00155153].

<sup>278</sup> Ex. VDZ-3010 [ARB00155155].

<sup>279</sup> Ex. VDZ-3010 [ARB00155141].

<sup>280</sup> Ex. VDZ-3010 [ARB00155141].

<sup>281</sup> Ex. VDZ-3010 [ARB00155141].

Binkley’s change of position with regard to breaking the FNSB boundary and shedding population from FNSB.<sup>282</sup> While Ms. Borromeo was aware that the Doyon Coalition was involved in procuring the resolution, Chairman Binkley was not.<sup>283</sup>

185. It is apparent that Ms. Borromeo coordinated with the Doyon Coalition to influence the type of information received by the Board to advance the Doyon Coalition’s priorities. For example, Ms. Borromeo and Ms. Sanford coordinated “to make sure that Sealaska’s written comments make it to Budd’s eyes.”<sup>284</sup> During the November 2, 2021, Board meeting Ms. Borromeo texted Ms. Sanford that “Budd appears to have the votes” and “you guys gotta weigh in ASAP.”<sup>285</sup> Ms. Borromeo also solicited public comment from Ahtna, a member of the Doyon Coalition, in support of placing Cantwell in District 36.<sup>286</sup>

186. Both Ms. Sanford and Mr. Amdur-Clark provided Ms. Borromeo information during Board meetings that Ms. Borromeo subsequently relayed to the Board. During the November 3, 2021, Board meeting Ms. Sanford texted Ms. Borromeo regarding arguments against including Scammon Bay and Hooper Bay in District 38, that would necessitate combining some Doyon communities with communities in the Bering Straits region. Ms. Sanford texted Ms. Borromeo that “You heard from Calista and not the Tribe’s.”<sup>287</sup>

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<sup>282</sup> Board Meeting Tr. 40:2 – 41:22 (Nov. 4, 2021) [ARB009210-009211].

<sup>283</sup> Trial Tr. 1149:16 – 1150:12 (Jan. 27, 2022).

<sup>284</sup> Ex. VDZ-3010 [ARB00155141].

<sup>285</sup> Ex. VDZ-3010 [ARB00155143].

<sup>286</sup> ARB001795-001796 (Ahtna Letter to Binkley (Nov. 3, 2021)).

<sup>287</sup> Ex. VDZ-3010 [ARB00155146].

Ms. Borrromeo repeated this information on the record shortly thereafter.<sup>288</sup> During this same discussion by the Board, Mr. Amdur-Clark also texted Ms. Borrromeo with arguments against including any Doyon villages with Bering Straits villages. During this exchange Ms. Borrromeo responded “We have it.”<sup>289</sup> Ms. Borrromeo also relayed the preferences of the Doyon Coalition as expressed by Ms. Sanford via text message with regard to Southeast Alaska, Anchorage, FNSB, and senate pairings to the Board.<sup>290</sup> Thus, Ms. Borrromeo was receiving information from the Doyon Coalition during Board meetings and relaying that information to the Board.

187. On November 3, 2021, Ms. Borrromeo also texted Mr. Amdur-Clark requesting case law supporting her proposal to pair Valdez exclusively with the Mat-Su Borough. Mr. Amdur-Clark provided the case law and responded that “it’s not super strong but the current district with Valdez and the Mat Su was litigated.”<sup>291</sup>

188. Ms. Borrromeo and Ms. Bahnke strongly opposed any variation to Districts 36-40 that would impact their priorities of separating Doyon villages from Bering Straits and Calista communities, keeping Doyon and Ahtna whole, and keeping Doyon and Ahtna separate from Valdez.

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<sup>288</sup> Board Meeting Tr. (Nov. 3, 2021) 228:12-14 (“We haven’t even heard from the other majority of the tribes, village corporations in that region.”).

<sup>289</sup> Ex. VDZ-3010 [ARB00155157].

<sup>290</sup> Ex. VDZ-3010 [ARB00155140-00155159].

<sup>291</sup> Ex. VDZ-3010 [ARB00155157-00155158].

189. There are numerous examples of Board members refusing to consider alternative configurations for Districts 36-40 that did not maintain the ANCSA boundaries of Doyon and Ahtna or that resulted in the combination of Bering Straits communities with any Doyon communities.

190. When discussing the possibility of altering District 39 to place Scammon Bay, Hooper Bay, and Chevak in District 38 with Bethel as requested by Calista, Ms. Bahnke strongly opposed that proposition.<sup>292</sup> Regarding the same proposal—to place Scammon Bay, Hooper Bay, and Chevak in District 38, Ms. Borrromeo stated:

But that’s not what [the Doyon Coalition] said they want. I’m very uncomfortable as an Alaska Native leader saying that one ANC’s voice is more important than another at the regional level. I respect Calista and I appreciate that they went on record for this. I also respect the fact that Doyon, Sealaska, TCC, Ahtna, FNA have been at this table since day one presenting testimony, drawing maps, presenting new ideas of maps, as well. And this weighted preference to Calista is very uncomfortable for me.<sup>293</sup>

191. Board Members Borrromeo and Bahnke also refused to include Valdez in District 36 with Ms. Bahnke stating it was off the table.<sup>294</sup> As a result of Board Members Bahnke and Borrromeo’s refusal to place Bering Straits or Calista communities with Doyon communities and insistence on keeping Doyon and Ahtna communities together in one district, the Board was bound to create a large non-compact and non-socio-economically integrated horseshoe shaped district, District 36, that stretches from Holy Cross on the

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<sup>292</sup> Board Meeting Tr. 174:13 – 175:25 (Nov. 3, 2021) [ARB007534-007535].

<sup>293</sup> Board Meeting Tr. 182:1-12 (Nov. 3, 2021) [ARB007542].

<sup>294</sup> Board Meeting Tr. 168:2-11 (Nov. 4, 2021) [ARB009338].

Yukon to Glennallen on the intersection of the Glenn and Richardson Highways down to the outskirts of Valdez.

192. Ms. Borromeo drafted V.4, which closely resembles the Doyon Coalition map, was the basis for the Final Plan.<sup>295</sup> Ms. Borromeo’s preferences were adopted by the Board to the extent that Chairman Binkley felt that Ms. Borromeo had “won too much” because the Final Plan so closely resembled her proposed plan.<sup>296</sup> This sentiment reflects Ms. Borromeo’s advocacy for the advancement of her priorities over the constitutionally mandated redistricting criteria.

193. The Board acknowledges that it is “fundamentally wrong to give one community undue influence over another”<sup>297</sup> and that extending electoral influence of one community is “outside the constitutional parameters by which we are guided in redistricting.”<sup>298</sup> Board Member Borromeo testified that “[t]aking things into consideration, such as giving a particular part of the state more influence is not listed in our constitution, and it’s irrational there to me, then”<sup>299</sup> and agreed that “it would be a constitutional concern anytime that one groups’ vote is diluted for the benefit of another.”<sup>300</sup>

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<sup>295</sup> Borromeo Depo. Tr. 48:2 – 49:9.

<sup>296</sup> Borromeo Depo. Tr. 48:2 – 49:9; *Id.* at 35:24 – 36:3.

<sup>297</sup> Borromeo Depo. Tr. 58:22 – 59:1.

<sup>298</sup> Borromeo Depo. Tr. at 57:19-24.

<sup>299</sup> Borromeo Depo. Tr. at 58:8-11.

<sup>300</sup> Borromeo Depo. Tr. at 61:9-14.

194. Despite apparent recognition of the underlying intention of article VI, which is to prevent gerrymandering and the dilution of voting power,<sup>301</sup> the Board improperly prioritized giving Doyon and Ahtna villages more influence by keeping them united in one district.

195. Board members have also acknowledged that the Board is obligated to consider all viable options and that “[i]f there’s a situation in which viable options are not considered, then that represents a challenge to the Board to fulfill its constitutional mandate.”<sup>302</sup> However, the Board did not seriously consider viable alternatives that did not accomplish the priorities of creating a Doyon-Ahtna district and segregating Bering Straits communities from Doyon communities.

196. The Board improperly focused on homogeneity among Native populations without adequate consideration of socio-economic integration of population in District 36 as a whole.

197. The Court finds that the Board’s creation of District 36 was motivated by the Board’s desire to maximize the electoral influence of Doyon and Ahtna villages to the detriment of other communities including Valdez. District 36 is, thus, the result of gerrymandering, which is defined as “dividing of an area into political units in an unnatural way with the purpose of bestowing advantages on some and thus disadvantaging others.”<sup>303</sup>

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<sup>301</sup> *Hickel*, 846 P.2d at 45 (Mar. 12, 1993) (citing 3 PACC 1846 (January 11, 1956)).

<sup>302</sup> *Borromeo Depo. Tr.* at 35:24 – 36:3.

<sup>303</sup> *Hickel*, 846 P.2d at 45 (quoting *Carpenter*, 667 P.2d at 1220).

**B. Protection of FNSB’s Borough Boundaries.**

198. Chairman Binkley advocated for maintaining the integrity of FNSB boundaries throughout the redistricting process. Only on November 4, 2021, just one day before the adoption of the final house district plan, did Chairman Binkley concede that FNSB should shed population.

199. As a result of Chairman Binkley’s prioritization of protecting the borough boundaries of FNSB where he lives,<sup>304</sup> the Board did not consider a full range of redistricting options. At the November 4, 2021, Board meeting Chairman Binkley stated:

You know, the premise that I looked at for Fairbanks was keeping the borough whole, because I thought there was definitely a – we lost population. We came down from 5.6, I believe it was, or thereabouts to 5.2, and that that then brought it into the reasonable age, excuse me, of keeping the borough whole and slightly overpopulating each of the five districts within the borough. . . . Again, I felt that that was within the legal bounds, and I think our counsel wore that out, that that would be perfectly defensible. But then we had the borough assembly that weighed in on that. . . . And that’s significant. And I gave that a lot of weight. Even though it wasn’t a unanimous decision on the part of the borough, it was significant that the elected body from the entire borough said you should push out people from the borough to the broader District 36 -- to try and achieve the ideal -- to achieve the ideal district size, and that if you do take that group, put them into one district. So those were the major takeaways that I got from the borough’s resolution.

So I -- I really view that -- I take that seriously and respect that. So I worked with Peter on -- we were just working on it before the meeting started, to try to look at that to see how close we could get to ideal district size and still take into account some of the other factors that I heard in Fairbanks, as well, some of which were keep the city intact, the City of Fairbanks, put it into two

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<sup>304</sup> Binkley Depo. Tr. 17:12-22 (“Q: Okay. I’m going to start out by asking you some questions about your background. You were born and raised in Fairbanks; right? A: That’s correct. Q: Graduated from Lathrop? A: Yes. Q: Fairbanks boy through and through; right? A: Well, they say that you can take the boy out of Fairbanks but not Fairbanks out of the boy.”).

legislative districts, keep it to the city limits the best you can, and have two legislative districts in the City of Fairbanks and one Senate district.<sup>305</sup>

200. Chairman Binkley’s desire to maintain FNSB’s boundaries foreclosed consideration of numerous viable redistricting options including districting Valdez with Richardson Highway communities and the FNSB. Ms. Borromeo testified that it would be “fundamentally wrong to ask of the Board to protect the boundaries of Fairbanks to a greater degree than the borough boundaries for other boroughs.”<sup>306</sup> However, Chairman Binkley sought to protect FNSB boundaries at the expense of breaking other borough boundaries and creating districts that fail to satisfy the constitutionally mandated redistricting criteria. Chairman Binkley’s statements during Board meetings make clear that he was attempting to protect FNSB’s boundaries while ignoring borough boundaries for other boroughs including the Mat-Su Borough, Denali Borough, Kodiak Island Borough, and Kenai Peninsula Borough.

201. Ms. Borromeo testified that it was “painfully obvious” that FNSB boundaries had to be broken.<sup>307</sup> However, Chairman Binkley continued advocating for maintaining the boundaries of the FNSB as late as the November 3, 2021, Board meeting. Chairman Binkley did not concede that the FNSB should shed some population until the evening of November 3, 2021. By that time the Board could not consider viable redistricting alternatives that were

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<sup>305</sup> Board Meeting Tr. 40:2 – 41:22 (Nov. 4, 2021) [ARB009210-9211].

<sup>306</sup> Borromeo Depo. Tr. 117:12-16.

<sup>307</sup> Borromeo Depo. Tr. 115:13-15.



not previously considered due to Chairman Binkley’s prioritization of protecting FNSB boundaries.

202. As a result of the Board’s prioritization of personal goals the Final Plan fails to satisfy constitutional criteria.

203. On November 3, 2021, after the Board finalized Districts 37-40 and gained consensus on separating Doyon and Ahtna from the Bering Straits region. After finalizing Districts 37-40 there was a “binary choice” between placing Valdez with the Richardson Highway communities in District 36 or placing Valdez with the Mat-Su Borough.<sup>308</sup> Subsequently, as a result of Chairman Binkley’s refusal, until the evening of November 3, 2021, to concede that FNSB boundaries could be broken, the Board was faced with only one real option—pairing Valdez with the suburbs of Wasilla and Palmer.

204. On the evening of November 3, the Board’s discussion shifted from whether to pair Valdez with District 36, thereby protecting FNSB’s boundaries, to what portion of FNSB should shed population into District 36.<sup>309</sup> This shift in Chairman Binkley’s position appears largely based upon his desire to satisfy the requests of the FNSB assembly as communicated via a resolution that was transmitted to the Board shortly before the

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<sup>308</sup> Board Meeting Tr. 330:12-17 (Nov. 3, 2021) [ARB007690] (“I mean, it seems like the -- a binary choice here is based on what we do with Valdez. We decided to go this way. We found a map we can use. If we keep it on the Richardson, we have a different version.”).

<sup>309</sup> Board Meeting Tr. 252:8-21 (Nov. 3, 2021) [ARB007612] (“CHAIR BINKLEY: Well, I think, just my opinion, that -- you know, and the way I look at it if I want to respect what the borough assembly did then I think it would be best, in my opinion, to respect what they’re saying and take the 4,000 people out of the borough and put into District 36.”).

November 3 Board meeting.<sup>310</sup> Chairman Binkley stated that he gave the resolution “a lot of weight . . . [e]ven though it wasn’t unanimous.”<sup>311</sup> After receipt of this resolution Chairman Binkley undertook an effort to create a new map that shed FNSB population into District 36 and redrew boundaries within the FNSB. This mapping effort occurred in the morning before the beginning of the November 4 meeting.<sup>312</sup> This new map was presented to the Board during the November 4 meeting.<sup>313</sup>

205. After further discussion regarding where to shed population from the FNSB into District 36, three of the five Board members stated that they would not vote for including Valdez in District 36.<sup>314</sup> Thus, the Board placed Valdez in District 29, which is dominated by Palmer and Wasilla suburb residents, without any consideration of socio-economic integration of that District.

206. The Court finds that the Board improperly constrained the viable redistricting options it considered by focusing on maintaining FNSB’s boundaries until just two days before the Board finalized house districts for the Final Plan.

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<sup>310</sup> ARB0075592-0075593.

<sup>311</sup> Binkley Depo. Tr. 132:25 – 133:7.

<sup>312</sup> Binkley Depo. Tr. 41:7-25.

<sup>313</sup> Board Meeting Tr. 47:15 – 48:14 (Nov. 4, 2021) [ARB009217-009218].

<sup>314</sup> Board Meeting Tr. 168:2-11 (Nov. 4, 2021) [ARB009338] (“MEMBER BAHNKE: I -- I already feel like I’m comfortable with where we need to put Valdez. MEMBER SIMPSON: I’m not voting to put Valdez in 36, so -- MEMBER BORROMEO: And neither am I. MEMBER BAHNKE: So that’s off the -- and -- MEMBER BORROMEO: And neither is she. MEMBER BAHNKE: It’s off the table, as far as I’m concerned.”).

## **VIII. THE BOARD MISAPPLIED AND INCONSISTENTLY APPLIED REDISTRICTING CRITERIA**

207. The Board has misapplied Alaska law with regard to redistricting criteria and applied redistricting criteria in a wholly inconsistent manner. The Board “must consistently enforce the constitutional article VI, section 6 requirements of contiguity, compactness, and relative integration of socio-economic areas in its redistricting.”<sup>315</sup> The record reflects that particular redistricting criteria that aided the Board in achieving its priorities were stringently enforced when they advanced the Board’s underlying priorities but were ignored or minimized when such enforcement undermined the ability of the Board to achieve its priorities.

208. The Board misapplied and/or inconsistently applied fundamental redistricting criteria including compactness, socio-economic integration, the proportionality doctrine, the use of local government boundaries, the use of ANCSA boundaries, the use of historical house districts, the use of public testimony, and concepts of connectivity via transportation corridors.

### **A. Inconsistent Application of the Compactness Requirement.**

209. The Board inconsistently defined and applied the compactness requirement during the redistricting process and gave compactness varying degrees of weight depending upon whether compactness advanced or justified other underlying priorities.

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<sup>315</sup> *Kenai*, 743 P.2d at 1360.

210. Taking the requirement of compactness into account in the redistricting process should not yield “bizarre designs”<sup>316</sup> and “corridors” of land that extend to include a populated area, but not the less-populated land around it, may run afoul of the compactness requirement . . . appendages attached to otherwise compact areas may violate the requirement of compact districting.”<sup>317</sup> The court will look to the relative compactness of proposed and potential districts in determining whether a particular district is sufficiently compact to satisfy the constitutional requirement for compactness.<sup>318</sup>

211. In District 36, for example, the Board paid virtually no regard to compactness and made decisions that negatively impacted compactness for the sake of creating a Doyon-Ahtna district.<sup>319</sup>

212. During the course of this litigation, the Board used compactness as justification for ignoring redistricting alternatives that included Valdez with Prince William Sound and Richardson Highway communities, which could improve overall compactness

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<sup>316</sup> *Hickel*, 846 P.2d at 45 (citing *Davenport v. Apportionment Comm’n of New Jersey*, 124 N.J. Super. Ct. 30, 304 A.2d 736, 743 (N.J. Super. Ct. App. Div. 1973) (quoted in *Carpenter*, 667 P.2d at 1218-19)).

<sup>317</sup> *Hickel*, 846 P.2d at 45-46.

<sup>318</sup> *Hickel*, 846 P.2d at 45 (citing *Carpenter*, 667 P.2d at 1218).

<sup>319</sup> Meeting Tr. 198:9-12 (Nov. 3, 2021) [ARB007558] (“if you want to talk about compact, look at the Doyon region in version 3 and 4. That wouldn't be compact by any stretch of the imagination.”); Board Meeting Tr. 253:8-10 (Nov. 5, 2021) [ARB008110] (“in the light of the fact that we have noted the socioeconomic reasons for taking Cantwell out. Obviously it is not a compact change, right, so do you have any concerns about the compactness.”); Board Meeting Tr. 253:15-17 (Nov. 5, 2021) [ARB008110] 36 becomes a little less compact as a result of putting Cantwell in, and it’s sort of a coin toss as to whether that makes sense.”).

of the plan as a whole.<sup>320</sup> The Board’s reliance on compactness as a justification for districting Valdez exclusively with the Mat-Su Borough reflects an inconsistent application of the compactness requirement.

213. The Affidavit of Chairman Binkley states that “Valdez’s option was not satisfactory to me because it spans from Valdez northward reaching into the Fairbanks North Star Borough with an odd appendage that grabs Eielson Air Force Base.”<sup>321</sup> However, the Board paid no regard to the strange appendages extending from District 36 into Cantwell or the appendage extending into Glennallen and neighboring communities along the Glenn Highway.

214. In Districts 3 and 4, compactness was relied upon as a primary justification for districting Skagway and Haines with a portion of the Mendenhall Valley despite the abundance of public testimony supporting a district that paired Skagway and Haines with downtown Juneau.<sup>322</sup>

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<sup>320</sup> Torkelson Aff. at 32:1-2 (“In my opinion, the Board’s adopted District 29 in the Final Proclamation Plan is substantially more compact than Valdez’s Option 1 district.”); Bahnke Aff. at 15:26 – 16:2.

<sup>321</sup> Binkley Aff. at 12, ¶ 34.

<sup>322</sup> Simpson Aff. at 12:13-16 (“The Skagway plaintiffs want to keep Skagway’s current pairing with downtown Juneau but that pairing results in a much-less compact house District for this area of Southeast Alaska.”).

215. Similarly, in District 39, compactness was used as justification for maintaining the Bering Straits Regional Corporation boundary even though it necessitated drawing District 36 in a much less compact manner than would otherwise be possible.<sup>323</sup>

216. The Alaska Supreme Court has mandated that the Board apply the constitutional redistricting criteria including compactness consistently.<sup>324</sup> The Board failed to do so.

217. The Court finds that the compactness requirement was applied inconsistently. The Board used compactness as justification for ignoring public comment and alternatives that provided relatively greater socio-economic integration only where increased compactness served some other underlying purpose unrelated to the constitutional redistricting criteria. The Board ignored or minimized the compactness requirement and made redistricting decisions that yielded non-compact districts where doing so advanced the Board's priority of creating a Doyon-Ahtna district.

**B. Misapplication of the Socio-economic Integration Requirement.**

218. The Board misapplied the concept of socio-economic integration by relying on evidence of homogeneity rather than actual socio-economic integration and inconsistently relied upon socio-economic integration to justify underlying redistricting goals. The Alaska Supreme Court has held that the concepts of socio-economic integration

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<sup>323</sup> Board Meeting Tr. 194:16 – 199:2 (Nov. 3, 2021) [ARB007554-007559].

<sup>324</sup> *Kenai*, 743 P.2d at 1360 (“The state must consistently enforce the constitutional article VI, section 6 requirements of contiguity, compactness, and relative integration of socio-economic areas in its redistricting.”).

and socio-economic homogeneity “are by no means synonymous.”<sup>325</sup> “Integration connotes interaction and connectedness, while homogeneity refers to similarity or uniformity.”<sup>326</sup>

219. Socio-economic integration “requires proof of actual interaction, and interconnectedness rather than mere homogeneity.”<sup>327</sup>

220. With regard to socio-economic integration in Districts 29 and 36, the only evidence proffered or considered by the Board is evidence of homogeneity rather than integration. The record does not establish any significant interaction or interconnectedness among the communities included in Districts 29 and 36. Analysis of specific socio-economic factors considered by the Board is provided later herein.

221. The Board relied heavily on evidence of homogeneity or similarities between communities rather than evidence of actual interaction as justification for Districts 36 and 29 in particular. The dearth of evidence supporting a determination that District 36 and 29 contain socio-economically integrated communities did not deter the Board from adopting these districts. However, the Board refused to consider viable alternatives that included Doyon communities in District 39 based upon the false premise that no socio-economic integration exists between these communities.

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<sup>325</sup> *Carpenter*, 667 P.2d at 1218.

<sup>326</sup> *Carpenter*, 667 P.2d at 1218.

<sup>327</sup> *Hickel*, 846 P.2d at 46 (Mar. 12, 1993) (citing *Kenai*, 743 P.2d at 1363).

222. The record establishes socio-economic integration between Doyon communities and communities within the Calista and Bering Straits regions.<sup>328</sup> There are historical ties regarding regional interaction among native communities located within these regional corporation boundaries. Communities along the Yukon River share both a transportation corridor and common interests with regard to the Yukon River as a fishery and the management of the Yukon River. Indeed, socio-economic integration associated with the Yukon River is evidenced by the Emergency Bycatch Petition submitted to the Secretary of Commerce on December 21, 2021, by Native organizations from several different ANCSA regions including Calista, Bering Straits, and Doyon.<sup>329</sup> Socio-economic ties between these communities are also established by historical redistricting plans including the 2013 Proclamation plan, which combines populations from Bering Straits and the Doyon regions.<sup>330</sup>

223. There is relatively more socio-economic integration between Doyon communities and neighboring Calista or Bering Straits communities than there is between Valdez and the Palmer area included in District 29, and the Yukon River and road communities included in District 36.

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<sup>328</sup> Trial Tr. 1164:1-9 (“Q: Do you think St. Mary’s or Glennallen is more socioeconomically integrated with Anvik? Which one? A: I mean, I would say St. Mary’s and Anvik probably have more in common. They’re both on the Yukon River. One is primarily Yup’ik and in the AVCP region. Anvik is in the Tanana Chiefs region and Athabascan, but, you know, they are certainly geographically closer.”) (Binkley); Board Meeting Tr. (Sept. 20, 2021) 22:10 – 23:20 [ARB010165-010166]; ARB002046-002047.

<sup>329</sup> Ex. VDZ-3027.

<sup>330</sup> Ex. VDZ-3005 at 6 [ARB001581].



224. Despite evidence of socio-economic integration among Doyon, Calista, and Bering Straits communities, the Board refused to consider redistricting alternatives that combined Doyon with ANCSA regions to the west.. The Board’s failure to properly consider relative socio-economic integration based upon the evidence presented to the Board is reflected in Board member testimony regarding socio-economic integration within District 36.<sup>331</sup>

225. The Court finds that the Board misapplied Alaska law by relying on evidence of homogeneity to establish socio-economic integration.

226. The Court finds that the Board inconsistently applied the requirement for relative socio-economic integration and failed to seriously consider redistricting alternatives that provided greater relative socio-economic integration for Districts 29 and 36.

**C. Inconsistent Use of Historical Districts.**

227. The Board used historical house district boundaries as support for their priorities while ignoring historical boundaries that did not advance their goals. For example, the historical districting of Skagway and Haines with downtown Juneau was entirely ignored

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<sup>331</sup> Trial Tr. 998:6-17 (Bahnke) (“It’s your position that Holy Cross and Anvik and Russian Mission and Marshall and St. Mary’s, all along the Yukon waterway, major corridor, are not sufficiently socioeconomically integrated to be within the same district, correct? A: Correct. Q: Okay. It’s also your testimony or your position, is it not, that Holy Cross and Anvik are sufficiently socioeconomically integrated with Glennallen to be included in the same district, correct? A: Yes.”).

while the sole justification for pairing Valdez with the Mat-Su Borough in District 29 was historical districts that had done so to a much lesser extent.<sup>332</sup>

228. The record establishes that the Board relied exclusively on historical districts that paired Valdez with some Mat-Su Borough communities in the past and did not engage in any substantive analysis of socio-economic integration within District 29.

229. The Board's reliance on historical redistricting plans as the sole justification for pairing Valdez exclusively with the Mat-Su Borough is misplaced. Never before has Valdez been entirely separated from both Richardson Highway communities and Prince William sound communities. The Board appears to have ignored the fact that the 1994, 2002 and 2013 redistricting plans, which included Valdez with a portion of the Mat-Su Borough, also included Richardson Highway communities.<sup>333</sup>

230. Similarly, the Board ignored the fact that Bering Straits communities and Doyon communities are included together in District 39 under the 2013 Proclamation<sup>334</sup> and

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<sup>332</sup> See e.g., Borromeo Aff. At 12:17-18 (“House District 29 of the Board’s Final Plan is substantially similar to the 2013 House District 9.”); Binkley Aff. At 10:10-11 (“I also found it persuasive that House District 29 of the Final Plan is largely similar to the current Valdez house district.”); Board Meeting Tr. 161:14-25 (Nov. 4, 2021) [ARB009331] (“MEMBER BAHNKE: We’ve also heard perspective from Doyon. The whole reason they formed their coalition was to preserve the socioeconomic integrity of those rural Interior communities. So everyone’s got their preference, but what litmus test -- which -- which of the two pairings of Valdez, either in that rural Interior District versus where it has already been established by the courts that it has socioeconomic ties to the Mat-Su Valley. In my mind we’ve got court precedence and then the constitutional requirement of trying to do the best that we can socioeconomically.”).

<sup>333</sup> Ex. VDZ-3005.

<sup>334</sup> *Id.* at 3.

refused to combine these communities even though it would have allowed Chevak, Scammon Bay, and Hooper Bay to be included with Bethel as requested by Calista.

231. This Court finds that the Board inconsistently relied upon historical redistricting plans in a manner that resulted in a Final Plan that fails to satisfy the socio-economic integration requirement for District 29 and District 36.

**D. ANCSA Boundaries.**

232. The Board relied upon ANCSA boundaries to support the creation of District 36 and justify keeping Bering Straits communities separate from Doyon communities. There is no legal authority specifically identifying ANCSA boundaries as an indicator of socio-economic integration nor is there authority suggesting that breaking ANCSA boundaries should be avoided.

233. The Board is not required to adhere to ANCSA boundaries or even consider ANCSA boundaries during the redistricting process. Contrary to testimony from members of the Board,<sup>335</sup> ANCSA boundaries alone do not provide evidence of socio-economic integration within a district. The Board must engage in fact specific analysis of socio-economic integration among the communities included in a proposed district.

234. The boundaries of regional corporations were established under ANCSA<sup>336</sup> as follows:

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<sup>335</sup> Bahnke Depo. Tr. 56:11-15 (“And the ANCSA regions are socioeconomically integrated. The -- you know, the corporations are major economic engines in the state, and they have shareholders that are predominantly from specific geographic parts of our state.”).

<sup>336</sup> *Groh v. Egan*, 526 P.2d 863, 877 (Alaska 1974).

Under the Act, the state was divided into 12 regions, and separate corporations were established for each region. By the division it was sought to establish homogeneous grouping of Native<sup>337</sup> peoples having a common heritage and sharing common interests.<sup>338</sup> The use of such corporate boundaries in districting might constitute justification for some population deviation.<sup>339</sup>

235. ANCSA corporations are private for-profit corporations<sup>340</sup> and, therefore, are not entitled to control a house or senate district under the proportionality doctrine or otherwise.

236. Enrollment of ANCSA members was based primarily upon the place of residence for Alaska Natives “on the date of the 1970 census enumeration.”<sup>341</sup> ANCSA further provides:

[A] Native eligible for enrollment who is not, when the roll is prepared, a permanent resident of one of the twelve regions established pursuant to section 1606(a) of this title shall be enrolled by the Secretary in one of the twelve regions, giving priority in the following order to--

- (1) the region where the Native resided on the 1970 census date if he had resided there without substantial interruption for two or more years;
- (2) the region where the Native previously resided for an aggregate of ten years or more;
- (3) the region where the Native was born; and
- (4) the region from which an ancestor of the Native came.

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<sup>337</sup> *Id.* at n.2 (“Native” is basically defined in the Act as a citizen of the United States who is 1/4th degree or more Alaska Indian, Eskimo or Aleut, or combination thereof.”) (citing 43 U.S.C.A. § 1602(b).

<sup>338</sup> 43 U.S.C.A § 1606.

<sup>339</sup> *Groh*, 526 P.2d at 877.

<sup>340</sup> Binkley Depo. Tr. 154:5-7; Trial Tr. 975:19-23.

<sup>341</sup> 43 U.S.C.A. § 1604(b).

The Secretary may enroll a Native in a different region when necessary to avoid enrolling members of the same family in different regions or otherwise avoid hardship.<sup>342</sup>

237. Thus, ANCSA enrollment resulted in intermingling of distinct Native populations in various regional corporations. For example:

CIRI is known as the “melting pot” of Alaska Native regional corporations, and virtually every Alaska Native group is featured among our nearly 9,100 shareholders-Aleut/Unangax, Alutiiq/Sugpiaq, Athabascan, Haida, Inupiat, Tlingit, Tsimshian and Yup’ik. The diversity of CIRI’s shareholders is a key to the company’s success.<sup>343</sup>

238. A homogenous group of Alaska Native peoples having a common heritage and sharing common interests in 1970 is distinct from a group of people “living within a geographic unit, socio-economic, following if possible, similar economic pursuits.”<sup>344</sup>

239. While ANCSA regional corporation boundaries may reflect some homogeneity among Native populations in 1970, socio-economic integration “requires proof of actual interaction, and interconnectedness rather than mere homogeneity.”<sup>345</sup>

240. ANCSA boundaries do not provide evidence of socio-economic integration among *non-Native* populations, which were not considered during the process of establishing ANCSA regional corporation boundaries. Analysis of socio-economic integration must consider all population within a district regardless of whether the population is predominantly Native.

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<sup>342</sup> 43 U.S.C.A. § 1604(b).

<sup>343</sup> Ex. VDZ-3023.

<sup>344</sup> *Hickel*, 846 P.2d at 46.

<sup>345</sup> *Hickel*, 846 P.2d at 46 (citing *Kenai*, 743 P.2d at 1363).

241. Standing alone ANCSA boundaries are of dubious value for determining socio-economic integration within a specific house district. Ms. Otte testified at trial that you do not have to be Athabascan in order to be a shareholder, that Doyon has Yup'ik shareholders and that she assumed Doyon has Inupiaq shareholders, and that Yup'iks and Cup'iks live in her village of McGrath.<sup>346</sup> When asked whether she was aware that less than twenty percent of Doyon shareholders live in traditional Doyon villages, Ms. Otte replied that "I would say that that is probably pretty common with all of the regions."<sup>347</sup> Ms. Wright testified that "[e]ach region, I don't think, consists of just one Native American group. We have many people like, you know, Doyon region as an example, some of our boundaries go further north, that have some Inupiaq people."<sup>348</sup>

242. The record establishes that ANCSA boundaries do not necessarily connote socio-economic integration of the communities contained therein or the lack of socio-economic integration among communities located in different ANCSA regions.

243. ANCSA boundaries offer very little utility for purposes of analyzing socio-economic integration in areas where the population is not predominantly Native. For example, Ms. Wright also testified that Doyon has "a large non-native population"<sup>349</sup> and evidence presented at trial established that District 36 contains less than 30 percent Native

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<sup>346</sup> Trial Tr. 900:15 – 903:4.

<sup>347</sup> Trial Tr. 901:21-25.

<sup>348</sup> Trial Tr. 926:3-7.

<sup>349</sup> Trial Tr. 927:12-14.

population.<sup>350</sup> Reliance on ANCSA native corporation boundaries for redistricting is improper where the majority of the population within the regional corporation boundaries is non-Native. Non-Native populations were not considered during the creation of the ANCSA regional corporations and, therefore, regional corporation boundaries do not reflect socio-economic integration of non-Native populations.

244. Accordingly, ANCSA boundaries have little value for purposes of redistricting without a fact specific inquiry regarding socio-economic integration of specific communities contained within each house district.

245. Counsel for the Board provided inconsistent interpretations of Alaska law regarding the use of ANCSA boundaries in the redistricting process. On September 17, 2021, Mr. Singer advised the Board that “Alaska’s Supreme Court has recognized ANCSA boundaries as a -- one way to look at socioeconomic integration”<sup>351</sup> and stated that prioritizing ANCSA boundaries over borough boundaries was an open question under Alaska law.<sup>352</sup> Subsequently, on September 20, 2021, Mr. Baxter advised the Board as follows:

Member Bahnke, we have precedent on -- we have precedent on this, that local political boundaries. So borough -- borough’s municipalities are, by definition, socioeconomically integrated. We do not have that for ANCSA boundaries. So ANCSA boundaries can provide a -- a way of looking at an area and determining whether it’s socioeconomically integrated. Obviously, the people of the NANA region have that in common, that many of them are shareholders in the NANA Corporation, but there is not any Supreme Court

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<sup>350</sup> Ex. VDZ-3003 at 1 (Brace).

<sup>351</sup> Board Meeting Tr. 164:16-21 (Sept. 17, 2021) [ARB008466].

<sup>352</sup> Board Meeting Tr. 177:17 – 178:6 (Sept. 17, 2021) [ARB008479-008480].

precedent telling us that ANCSA boundaries are more predominant than local political boundaries.<sup>353</sup>

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Member Bahnke, I would just say that because we know that local political boundaries are, by definition, socioeconomically integrated, they are a -- a -- something that should be followed by the Board. *With ANCSA boundaries, it should be an analysis of whether that area, whether the specific town, village we are talking about is economically integrated, sufficiently, relatively economically integrated to pair it together.* And I know I'm not giving you a precise answer, and the reason for that is we don't have one on the specific question you're asking.<sup>354</sup>

246. While the Alaska Supreme Court has “implied that adherence to Native corporation boundaries might also provide justification [for a population deviation greater than ten percent], as long as the boundaries were adhered to consistently,”<sup>355</sup> the court has never endorsed the use of ANCSA boundaries in redistricting and has not analyzed the utility of using ANCSA boundaries as evidence of socio-economic integration.

247. ANCSA regional corporation boundaries should not be afforded the same status as local government boundaries, which are specifically mentioned in article VI, section 10.<sup>356</sup> There is no legal authority suggesting that the Board should consider ANCSA boundaries, avoid breaking ANCSA boundaries, or rely on ANCSA boundaries as evidence of socio-economic integration.

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<sup>353</sup> Board Meeting Tr. 35:3-15 (Sept. 20, 2021) [ARB010178].

<sup>354</sup> Board Meeting Tr. 36:4-15 (Sept. 20, 2021) [ARB010179].

<sup>355</sup> *Hickel*, 846 P.2d at 48 (citing *Groh*, 526 P.2d at 877-78).

<sup>356</sup> Alaska Const., art. VI, § 10 (“Consideration may be given to local government boundaries.”).



248. The Board did not receive clear guidance regarding the legal standards for the use of ANCSA boundaries in redistricting. As a result, the Board improperly prioritized maintaining certain ANCSA boundaries throughout the redistricting process and sought to maintain such boundaries to the detriment of constitutionally mandated redistricting criteria. The Board’s focus on maintaining ANCSA boundaries improperly constrained consideration of viable redistricting alternatives.

249. Despite the lack of legal authority supporting the use of ANCSA boundaries as evidence of socio-economic integration, the Board repeatedly expressed concerns with breaking ANCSA boundaries and compared breaking ANCSA boundaries to breaking borough boundaries.<sup>357</sup> The Board’s focus on maintaining ANCSA boundaries began early on in the redistricting process and was apparent throughout the process.<sup>358</sup>

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<sup>357</sup> Board Meeting Tr. 78:8-15 (Sept. 20, 2021) [ARB010221] (“On this District 39, not only is it breaking a borough boundary, but now it’s comprised of communities that are located within four different ANCSA boundaries. I know Counsel has advised that ANCSA boundaries versus borough boundaries, there’s not necessarily a hierarchy, but there are things that we should consider.”).

<sup>358</sup> Board Meeting Tr. 227:2-10 (Aug. 24, 2021) [ARB011498]; Board Meeting Tr. 164:16-21 (Sept. 17, 2021) [ARB008466]; Board Meeting Tr. 176:25 – 178:6 (Sept. 17, 2021) [ARB008478-008480]; Board Meeting Tr. 214:12-24 (Sept. 17, 2021) [ARB008516]; Board Meeting Tr. 34:21 – 36:18 (Sept. 20, 2021) [ARB010177-010179]; Board Meeting Tr. 51:19 – 52:7 (Sept. 20, 2021) [ARB010194-010195]; Board Meeting Tr. 78:8 – 79:2 (Sept. 20, 2021) [ARB010221-010222]; Board Meeting Tr. 134:4-15 (Sept. 20, 2021) [ARB010277]; Board Meeting Tr. 134:4-16 (Sept. 20, 2021) [ARB010277]; Board Meeting Tr. 156:21 – 23 (Nov. 3, 2021) [ARB007516]; Board Meeting Tr. 178:22-23 (Nov. 3, 2021) [ARB007538]; Board Meeting Tr. 196:2 – 198:25 (Nov. 3, 2021) [ARB007556-007558]; Board Meeting Tr. 227:3-14 (Nov. 3, 2021) [ARB007587]; Board Meeting Tr. 38:6-10 (Nov. 4, 2021) [ARB009208]; Board Meeting Tr. 52:4 – 53:7 (Nov. 4, 2021) [ARB009222-009223].

250. Ms. Bahnke described ANCSA boundaries as “the closest thing that you can have to a borough that delineates socioeconomic integration”<sup>359</sup> and considered ANCSA boundaries to carry similar weight to borough boundaries.<sup>360</sup>

251. The Board’s discussion of ANCSA boundaries during the redistricting process confirms the prioritization of protecting these boundaries to the detriment of constitutionally mandated redistricting criteria.

252. The Board acknowledged that maintaining ANCSA boundaries resulted in less compactness as early as September 7, 2021.<sup>361</sup> During the redistricting process the Board acknowledged that creating a Doyon-Ahtna district was detrimental to the constitutional requirements of compactness and socio-economic integration. Chairman Binkley stated “if you want to talk about compact, look at the Doyon region in version 3 and 4. That wouldn’t be compact by any stretch of the imagination.”<sup>362</sup> This opinion was based upon District 36 as it appeared in V.3 and V.4, neither of which included the strange

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<sup>359</sup> Board Meeting Tr. 52:8-13 (Nov. 4, 2021) [ARB009222].

<sup>360</sup> Board Meeting Tr. 78:12-14 (Sept. 20, 2021) [ARB010221] (“I know Counsel has advised that ANCSA boundaries versus borough boundaries, there’s not necessarily a hierarchy.”).

<sup>361</sup> Board Meeting Tr. 139:21 – 140:3 (Sept. 7, 2021) [ARB009668-009669] (“BOARD MEMBER NICOLE BORROMEO: I think how you do that is to take Valdez out and then move down, and in -- in a perfect world, we would be able to keep the YK and Doyon regions intact. The problem that I’m personally running into is that they’re geographically large and population small. So you -- you really [can’t] see on the compactness too with these huge, huge districts.”).

<sup>362</sup> Board Meeting Tr. 198:9-12 (Nov. 3, 2021) [ARB007558].

appendage extending into the Mat-Su Borough and Denali Boroughs to reach Cantwell's population.

253. The Board's focus on creating a Doyon-Ahtna district resulted in bizarre appendages to District 36 that run afoul of the compactness requirement and break borough boundaries. During the November 5, 2021, meeting the Board decided to add an appendage to District 36 to subsume Cantwell's population without including adjacent nonpopulated areas. This decision was based upon the Board's desire to maintain Ahtna's boundaries. The Board justified its decision to include Cantwell in District 36 by relying on public comment from Ahtna employees and members including testimony solicited by Ms. Borromeo.<sup>363</sup> Cantwell's population is only 27.5 percent Native<sup>364</sup> and only 30 Ahtna shareholders live in Cantwell,<sup>365</sup> yet the Board broke both the Denali Borough and the Mat-Su Borough boundaries in order to keep Ahtna whole.

254. Counsel for the Board appeared to encourage the decision to keep Ahtna whole by adding Cantwell. Mr. Singer stated that "you've heard testimony, and a specific request from the ANCSA Regional Corporation to include Cantwell with the other Ahtna villages, and the Board has -- with District 36, it's really sought to create a Doyon district. So it's -- it's consistent, and I think it's within your discretion."<sup>366</sup> At the same time, the

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<sup>363</sup> ARB001795-001796 (Ahtna Letter to Binkley (Nov. 3, 2021)).

<sup>364</sup> Ex. VDZ-3008 at 3.

<sup>365</sup> Trial Tr. 942:18-21 (Jan. 26, 2021) (Anderson).

<sup>366</sup> Board Meeting Tr. 253:20-25 (Nov. 5, 2021) [ARB008110].

Board openly acknowledged that adding Cantwell was detrimental to the compactness requirement<sup>367</sup> and ignored comment from the Denali Borough opposing “having Cantwell carved out.”<sup>368</sup>

255. In order to include adequate population in the Doyon-Ahtna district, the Board drew District 36 in a manner that places all Richardson Highway communities south of FNSB in District 36 with the exception of Valdez. In addition, District 36 includes an appendage that carves out population from Glennallen and surrounding communities along Glenn Highway without including adjacent unpopulated areas.

256. The Board’s creation of a Doyon-Ahtna district not only resulted in the creation of District 36, but also resulted in the Board’s decision to pair Valdez exclusively with the Mat-Su Borough in District 29.

257. By prioritizing the creation of a Doyon-Ahtna district, the Board ignored the lack of socio-economic integration within both District 29 and District 36. With regard to socio-economic integration in District 36, Chairman Binkley stated:

But as I said, there’s -- you know, when you look at 36, it’s very – even without any of the Fairbanks North Star Borough, when you look at Valdez and, you know, all those areas along the Richardson Highway, compared to all the rural villages out west along the Yukon River, there’s a huge difference in socio-economic integration between those areas.<sup>369</sup>

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<sup>367</sup> Board Meeting Tr. 253:14-19 (Nov. 5, 2021) [ARB008110].

<sup>368</sup> Board Meeting Tr. 188:15-20 (Nov. 5, 2021) [ARB008045].

<sup>369</sup> Board Meeting Tr. 251:15-22 (Nov. 3, 2021) [ARB007611].

Chairman Binkley further stated that communities on the highway system such as Glennallen were completely different than other rural communities in District 36 and that “it’s difficult to say, socio-economically that, you know that 36 is homogenous.”<sup>370</sup> Despite the absence of evidence establishing socio-economic integration within District 36 and District 29, the Board adopted District 36 in order to create a Doyon-Ahtna district.

258. The Board failed to adequately consider the absence of socio-economic ties among the communities within District 36 as a whole, including the lack of integration between predominantly non-Native communities such as Glennallen and predominantly Native communities such as Holy Cross. Instead, the Board improperly focused on homogeneity among the Alaska Native communities within District 36, that constitute less than 30 percent of the population within District 36.<sup>371</sup>

259. The result of the Board prioritization of protecting the Bering Straits, Doyon, and Ahtna boundaries, District 39 has the highest deviation of any district at negative 4.81 percent and is under populated by 882 people.<sup>372</sup> The underpopulation of District 39 to this extent reflects the result of the Board’s refusal to include any Bering Straits region population with population from the Doyon or NANA regions.<sup>373</sup> The region within which

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<sup>370</sup> Board Meeting Tr. 242:15 – 243:3 (Nov. 5, 2021) [ARB008099-008100].

<sup>371</sup> Trial Tr. 1294:15 – 1295:1 (Brace).

<sup>372</sup> Trial Tr. 1294:15 – 1295:1 (Brace).

<sup>373</sup> Trial Tr. 1294:15 – 1295:1 (Brace).

NANA is located has the second highest deviation at 2.67 percent and is overpopulated 489 people.<sup>374</sup>

260. Regional corporation boundaries may provide justification for some population deviations, but only if the boundaries were adhered to consistently.<sup>375</sup> For example, the Alaska Supreme Court has held that the utilization of a part of the Calista corporate boundary as a district boundary was not a legitimate justification when the Calista region was otherwise broken up by the reapportionment plan.<sup>376</sup> Regional corporation boundaries do not justify high population deviations in the Final Plan including in District 39 and 40 because they were not applied consistently. Thus, the Board diminished the constitutional criteria that districts be drawn as nearly as practicable to allow one person one vote in order to maintain some ANCSA boundaries.

261. In order to preserve the ANCSA boundaries for Doyon and Ahtna the Board improperly broke borough boundaries, ignored the lack of socio-economic integration within Districts 29 and 36, ignored the compactness requirement for District 36, and unnecessarily underpopulated District 39 while overpopulating District 40, which abuts District 39.

262. The Court finds that the Board improperly prioritized the protection of ANCSA corporation boundaries over constitutionally mandated redistricting criteria and misapplied Alaska law regarding the use of ANCSA boundaries in the redistricting process.

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<sup>374</sup> Trial Tr. 1294:15 – 1295:1 (Brace).

<sup>375</sup> *Hickel*, 846 P.2d at 48.

<sup>376</sup> *Hickel*, 846 P.2d at 48.

263. The Board gave undue weight to ANCSA boundaries during the redistricting process and improperly constrained the viable redistricting alternatives it considered by focusing on maintaining ANCSA boundaries.

264. The Court finds that the Board improperly prioritized maintaining ANCSA regional corporation boundaries and the creation of a Doyon-Ahtna district over the constitutionally mandated redistricting criteria set forth in article VI, Section 6.

265. The Court finds that the Board's prioritization of creating a Doyon-Ahtna district improperly constrained its consideration of viable redistricting alternatives that better satisfy constitutionally mandated redistricting requirements set forth.

266. The Court finds that the Board's prioritization of creating a Doyon-Ahtna district despite resulted in the creation of districts that are substantially less compact and less socio-economically integrated than other viable alternatives.

267. In addition to the inconsistent legal advice the Board received regarding the use of ANCSA boundaries in the redistricting process, the Board also inconsistently relied upon such boundaries as justification for redistricting decisions.

268. The Board refused to seriously consider any redistricting alternative that broke the Bering Straits boundary by adding population from Doyon communities. Board Members Borromeo and Bahnke were adamant in their opposition to any redistricting alternative that did not segregate Bering Straits communities from Doyon communities or create a Doyon-Ahtna district.<sup>377</sup>

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<sup>377</sup> Board Meeting Tr. 167:3 – 231:25 (Nov. 3, 2021) [ARB007527-007591].

269. While the Board strictly adhered to ANCSA boundaries for the Doyon-Ahtna district, the Board inconsistently applied ANCSA boundaries throughout the rest of the districts. The Board broke the Calista region into three districts, the Chugach region into two districts, broke the Koniag region for no apparent purpose, and combined a portion of Calista with the Bristol Bay region, and Aleut region along with a portion of Koniag and CIRI regions. The Board's decisions to maintain, combine, or break ANCSA-region boundaries were inconsistent aside from when protecting such boundaries served their primary goal of keeping Doyon and Ahtna whole and separating those communities from Bering Straits communities.<sup>378</sup>

270. The Court finds that the Board did not use ANCSA boundaries consistently during the 2021 redistricting process.

271. The Court finds that the Board improperly prioritized protecting ANCSA boundaries over constitutionally mandated redistricting criteria.

272. The Court finds that the Board improperly constrained the consideration of viable redistricting alternatives that better satisfy the constitutionally mandated redistricting criteria by virtue of rigidly adhering to Doyon and Ahtna's boundaries.<sup>379</sup>

273. The Court finds that the Board's reliance on ANCSA boundaries to create a Doyon-Ahtna district resulted in a Final Plan that fails to satisfy the constitutional requirement of compactness and socio-economic integration. Specifically, District 36 fails

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<sup>378</sup> Board Meeting Tr. 157:15-20 (Nov. 3, 2021) [ARB007517].

<sup>379</sup> Ex. D (Final Plan with ANCSA Overlay), Valdez-Detter Pre-Trial Brief (Jan. 18, 2022).



to satisfy the compactness and socio-economic integration requirements and District 29 fails to satisfy the socio-economic integration requirement.

**E. Misapplication of the Proportionality Doctrine.**

274. The Board misapplied Alaska law regarding borough boundaries and the proportionality doctrine.

275. The Board improperly constrained the redistricting alternatives it considered by misapplying Alaska law regarding how population from within borough boundaries may be included in districts with population from outside borough boundaries. For example, the Board refused to consider redistricting alternatives such as Valdez Option 1 that combined population from FNSB with population from communities outside of FNSB in more than one district.<sup>380</sup>

276. At trial, counsel for the Board suggested that breaking FNSB boundaries twice would require the Board to “go to the Alaska Supreme Court and convince it that it wasn’t possible to put those excess population for Fairbanks in just one rural district.”<sup>381</sup> The Board appears to have operated under the assumption that it was bound to only break FNSB’s boundaries once regardless of whether breaking the boundaries more than once would facilitate a redistricting plan that better satisfies the constitutional redistricting criteria.<sup>382</sup>

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<sup>380</sup> Bahnke Depo. Tr. 102:17-19 (“I also remember that that map that Valdez presented as their preferred map would have broken the Fairbanks Borough boundaries twice.”).

<sup>381</sup> Trial Tr. 667:20-23.

<sup>382</sup> Borromeo Supp. Aff. at 6-7, ¶ 19; Bahnke Aff. at 15, ¶ 24; Binkley Aff. at 12, ¶ 34 (“Valdez’s approach also required splitting the Fairbanks North Star Borough twice, which

277. Prioritizing the protection of borough boundaries over compactness, contiguity, and socio-economic integration is contrary to Alaska law. The Alaska Constitution states that “consideration *may* be given to local government boundaries.”<sup>383</sup>

278. In *Hickel* the Alaska Supreme Court held that *excess* population within a borough should, where possible, be placed in one other district<sup>384</sup> and “[a] municipality should not be made to contribute so much of its population to districts centered elsewhere that it is deprived of representation which is justified by its population.”<sup>385</sup> The plan being reviewed in *Hickel* divided the Mat-Su Borough into five districts only one of which was wholly composed of land within the Mat-Su Borough.<sup>386</sup> On those facts, the Court held that the “plan unfairly diluted the proportional representation the residents of the Mat-Su Borough are guaranteed.”<sup>387</sup>

279. In the 2001 Redistricting Cases litigation, the Supreme Court found that the Board unduly limited the range of choices it considered by virtue of a misinterpretation of Alaska law.<sup>388</sup> The Board interpreted *Kenai Peninsula Borough* “to preclude the board from pairing population from the Matanuska-Susitna Borough with the Municipality of

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was contrary to what we understood to be the instructions of the court as to how to handle excess population from a borough.”); Torkelson Aff. at 32, ¶ 55.

<sup>383</sup> Alaska Const., article VI, section 6 (emphasis added).

<sup>384</sup> *Hickel*, 846 P.2d at 52 (citing *Kenai*, 743 P.2d at 1369, 1372-73).

<sup>385</sup> *Hickel*, 846 P.2d at 53 (Mar. 12, 1993)

<sup>386</sup> *Hickel*, 846 P.2d at 52 (Mar. 12, 1993).

<sup>387</sup> *Hickel*, 846 P.2d at 53 (Mar. 12, 1993).

<sup>388</sup> In re 2001 Redistricting Cases, 44 P.3d at 144.

Anchorage because both Anchorage and the borough had sufficient excess population to “control” an additional seat.”<sup>389</sup> The Supreme Court held:

*Kenai Peninsula Borough* does not entitle political subdivisions to control a particular number of seats based upon their populations. *Kenai Peninsula Borough* simply held that the board cannot intentionally discriminate against a borough or any other “politically salient class” of voters by invidiously minimizing that class's right to an equally effective vote.<sup>8</sup> *Kenai Peninsula Borough* recognizes that when a reapportionment plan unnecessarily divides a municipality in a way that dilutes the effective strength of municipal voters, the plan's provisions will raise an inference of intentional discrimination. But an inference of discriminatory intent may be negated by a demonstration that the challenged aspects of a plan resulted from legitimate nondiscriminatory policies such as the article VI, section 6 requirements of compactness, contiguity, and socio-economic integration.<sup>390</sup>

280. Thus, it is improper to constrain the scope of redistricting alternatives considered based upon the premise that boroughs are entitled to control a specific number of house districts.

281. The Board interprets *Hickel* as precluding consideration of options that break FNSB boundaries more than once based upon the premise that FNSB is entitled to full control of five house districts.<sup>391</sup> This is a misinterpretation of Alaska law. A redistricting plan does not run afoul of the legal requirement that geographic areas be afforded proportional representation merely because population from within a borough is joined with population outside of a borough in more than one district. Accordingly, it is improper to foreclose consideration of such redistricting alternatives.

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<sup>389</sup> In re 2001 Redistricting Cases, 44 P.3d at 144.

<sup>390</sup> In re 2001 Redistricting Cases, 44 P.3d at 144.

<sup>391</sup> Trial Tr. 662:15 – 667:23.

282. The Board must conduct a fact specific analysis of redistricting options based upon the constitutional redistricting criteria and determine whether specific alternatives satisfy the proportionality requirement in the context of the specific alternative being considered.

283. The Court finds that the Board misapplied Alaska law by limiting the range of viable redistricting options it considered based upon the assumption that FNSB boundaries could only be broken once. The Board must take a hard look at options that it may have ignored based upon its misinterpretation of the law.

**F. Inconsistent Use of Borough Boundaries.**

284. In addition to the Board’s misinterpretation of the proportionality doctrine, the Board, and Chairman Binkley in particular, focused heavily on maintaining borough boundaries for the FNSB but ignored maintaining borough boundaries for other boroughs including the Mat-Su Borough, Denali Borough, Kodiak Island Borough, and Kenai Peninsula Borough. Ms. Borrromeo testified that “[i]t would be fundamentally wrong to task of the Board to protect the boundaries of Fairbanks to a greater degree than the borough boundaries for other boroughs,”<sup>392</sup> yet the Board prioritized which borough boundaries it should focus on maintaining.

285. The Supreme Court has held that “the retention of political boundaries is a legitimate justification for a deviation from ideal district population size in excess of ten

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<sup>392</sup> Borrromeo Depo. Tr. 117:12-16.

percent, but this policy must be consistently applied to the state as a whole.”<sup>393</sup> Where maintaining borough boundaries is a policy used by the Board to justify deviations from other redistricting criteria, the policy must be applied consistently.

286. District 36 reflects the Board’s disregard for borough boundaries. District 36 in the Final Plan seeks to protect the Ahtna and Doyon ANCSA boundaries at the expense of breaking borough boundaries. In order to create District 36, the Final Plan breaks borough boundaries four times. First, the Board added an appendage to include Cantwell in District 36 that broke the boundaries of both the Denali Borough and the Mat-Su Borough. Second, the Board took population from the Goldstream area of the FNSB. Third, the Board combined Valdez, which is outside of the Mat-Su Borough, exclusively with population from within the Mat-Su Borough.

287. The Board refused to consider alternative redistricting plans that included FNSB population in more than one district with population outside the FNSB while simultaneously breaking borough boundaries in order maintain the integrity of ANCSA districts or advance other board priorities.

288. The Board has criticized Valdez Option 1 and the alternative redistricting plan advanced by Mr. Brace at trial (“Valdez Plan”) for including FNSB population in two districts with population from communities outside the FNSB. However, the Board has failed to acknowledge that under Valdez’s proposed plans, FNSB would still maintain

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<sup>393</sup> *Kenai*, 743 P.2d at 1360.

control over five districts and would have a good chance of having an FNSB resident elected in a sixth district. The Valdez Plan does not run afoul of the proportionality doctrine in light of the fact that it maintains the number of districts controlled by FNSB residents, increases the likelihood of an FNSB resident being elected in a sixth District, and is motivated by the legitimate non-discriminatory purpose of creating a redistricting plan that better satisfies the constitutional redistricting criteria.

289. In District 37, the Board decided to cross Cook Inlet in order to add the Native communities of Port Graham and Nanwalek to District 37. These communities combined have a population of 623 people. The Board's decision to combine the populations of Nanwalek and Port Graham with District 37 broke both the Kodiak Island Borough boundary and the Kenai Peninsula Borough boundary.

290. The record establishes that the Board failed to consistently consider local government boundaries as a criterion for redistricting and used the maintenance of borough boundaries a justification for redistricting decisions only when doing so advanced other underlying priorities of the Board.

**G. Inconsistent Use of Public Testimony.**

291. The Board selectively relied on public testimony to support its redistricting priorities and in some cases solicited testimony to support its goals. The great weight of public testimony regarding Valdez and the Mat-Su Borough's opposition to being paired in a District was ignored. Both of these communities provided unanimous public comment from their respective governing bodies opposing pairing Valdez and the Mat-Su Borough in a district. The Board ignored this public comment and did the exact opposite of what the

citizens and governing bodies of Valdez and the Mat-Su Borough requested and paired Valdez in a district exclusively with the Mat-Su Borough.

292. By contrast, the Board gave much greater weight to public comments that aligned with their underlying priorities and solicited public comment that advanced those priorities. For example, the Board prioritized the creation of a Doyon-Ahtna district and based upon a letter from Ahtna solicited by Ms. Borromeo<sup>394</sup> decided to break both the Mat-Su and Denali Boroughs to include Ahtna in district 36.<sup>395</sup> The Board made this decision despite the fact that it recognized that adding the Cantwell appendage to District 36 was detrimental to compactness<sup>396</sup> and that it was contrary to the request of the Denali Borough, within which Cantwell is located.<sup>397</sup> Mr. Singer advised the Board that in light of the specific request from the ANCSA regional corporation the decision to add Cantwell to District 36 was within the Board’s discretion.<sup>398</sup> Thus, the Board gave more weight to testimony from Ahtna than testimony from the Denali Borough and based upon Ahtna’s

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<sup>394</sup> ARB00050122-00050123 (Ahtna letter to Binkley (Nov. 3, 2021).

<sup>395</sup> Board Meeting Tr. 188:15-20 (Nov. 5, 2021) [ARB008045] (“I will say for the record that we should all probably just acknowledge the fact that the Denali Borough has weighed in, and they were not in favor of having Cantwell carved out of the Denali Borough, so I just want to make sure we recognize that that is a concern that they had.”).

<sup>396</sup> Board Meeting Tr. 253:6-13 (Nov. 5, 2021) [ARB008110] (“Obviously it is not a compact change, right, so do you have any concerns about the compactness, or do you believe that in this instance, for socioeconomic reasons that we took Cantwell out of the borough probably are sufficient to overcome the compact -- the loss of compactness with that removal?”).

<sup>397</sup> Board Meeting Tr. 79:16 – 80:7 (Nov. 4, 2021) [ARB009249-009250].

<sup>398</sup> Board Meeting Tr. 253:14 – 25 (Nov. 5, 2021).

request the Board ignored borough boundaries and compactness in order to satisfy that request.

293. The Board also gave much more weight to the resolution of the FNSB, which was not unanimous, than to the public comments it received from Valdez and the Mat-Su Borough communities and the unanimous resolutions passed by their respective local governments.<sup>399</sup> Chairman Binkley stated that he gave the FNSB resolution “a lot of weight . . . [e]ven though it wasn’t unanimous.”<sup>400</sup> The resolution was given so much weight by Mr. Binkley that he changed his position regarding maintaining FNSB’s boundaries, which he had held since the outset of the redistricting process. The Board gave no such weight to the resolutions passed by the Mat-Su Borough and Valdez.

#### **H. Inconsistent Use of Transportation Corridors.**

294. The Board expressed significant concern over South Muldoon’s senate pairing with Eagle River to the extent that Ms. Borromeo and Ms. Bahnke refused to sign the 2021 Proclamation. One of the primary reasons this pairing was offensive to Ms. Bahnke and Ms. Borromeo was the fact that residents in District 21 would “have to drive almost four miles down Muldoon Road, through District 20, before even reaching the Glenn Highway and then drive another 12 miles north before they can exit into Eagle River.”<sup>401</sup> The Board

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<sup>399</sup> ARB002011; ARB004074-004212; Binkley Depo. Tr. 139:14-18 (“it was significant that the elected body from the entire borough said you should push out people from the borough to the broader District 36; correct? A: Correct.”).

<sup>400</sup> Binkley Depo. Tr. 40:22 – 41:2.

<sup>401</sup> Borromeo Depo. Tr. 40:25 – 41:4.



entirely disregarded a much more extreme example of this issue with regard to District 29.

As Mr. Nathan Duval testified:

Under District 29, when making my drives to Fairbanks, I would leave my house district approximately 45 miles from Valdez's city center and drive through District 36 for approximately 300 miles before reaching the FNSB boundary. When making a drive to Anchorage, I would leave District 29 and have to drive approximately 120 road miles on the Richardson and Glenn Highways through District 36 before re-entering District 29 near Glacier View.<sup>402</sup>

295. While Ms. Borromeo was extremely concerned about pairing house districts that required a citizen from South Muldoon to drive 16 miles through other districts before reaching Eagle River, she drew District 29 in a manner that entirely ignores this same concern. District 29 separates Valdez from all Richardson Highway communities and the Richardson Highway itself so that 120 miles of the only transportation corridor linking Valdez with the Palmer and Wasilla suburbs is outside the district.

## **IX. THE HICKEL PROCESS AND THE VRA**

296. The Alaska Supreme Court elaborated on the requirements of article VI, section 6 in *Hickel v. Southeast Conference*:

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 [sic] integration; it may consider local government boundaries and should use drainage and 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

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<sup>402</sup> Duval Aff. at 6, ¶ 28.

from the Alaska constitution when deviation is “the only means available to satisfy Voting Rights Act requirements.”<sup>403</sup>

297. The initial map drawn by the Board should not be affected by VRA considerations in any way.<sup>404</sup> If the initial map is affected by VRA considerations, it is noncompliant.<sup>405</sup>

298. 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.”<sup>406</sup>

299. On August 23, 2021, Ms. Bahnke requested access to Alaska native population data and Executive Director Torkelson stated that “I do know our deputy director's been working late into the hours last night to upgrade the active matrix in our professional software to have that information for you.”<sup>407</sup> Mr. Torkelson went on to state:

[W]e will have that -- that data loaded in the professional software and be able to -- if you draw districts here, we can load them there and then give you a full report on what the -- what the Alaska Native percentages are in every one of your proposed districts. That's absolutely -- has to happen, and we've made good headway on that with the professional software.<sup>408</sup>

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<sup>403</sup> *In re 2011 Redistricting Cases*, 294 P.3d at 1035 (citing *In re 2011 Redistricting Cases*, 274 P.3d at 467-68 (quoting *Hickel*, 846 P.2d at 51, n.22)).

<sup>404</sup> *In re 2011 Redistricting Cases*, 294 P.3d at 1037.

<sup>405</sup> *In re 2011 Redistricting Cases*, 294 P.3d at 1037 (“We agree with the superior court that *Hickel* 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.”).

<sup>406</sup> *In re 2011 Redistricting Cases*, 274 P.3d at 468 (quoting *Hickel*, 846 P.2d at 51 n.22).

<sup>407</sup> Board Meeting Tr. 18:15 – 19:4 (Aug. 23, 2021) [ARB011289 – 011290].

<sup>408</sup> Board Meeting Tr. 19:23 – 20:4 (Aug. 23, 2021) [ARB011290 – 011291].

300. On August 24, 2021, the Board considered racial data and discussed racial data within the VRA districts as they drew them. Member Bahnke's Board issued laptop was configured to reflect racial data and Mr. Presley indicated that he would configure all every Board member's laptop to display racial data.<sup>409</sup> Mr. Presley described this configuration as allowing the Board to see what percentage of the selection that we've made is Alaska Native.<sup>410</sup> Mr. Torkelson informed the Board that the threshold percentage for VRA districts in the last redistricting cycle was 45.2 percent Alaska Native voting age population.<sup>411</sup>

301. During the August 24, 2021, meeting the Board focused largely on drawing the districts that would become Districts 36 – 40. The Board labeled these districts one through five starting on the North Slope and working down the coast and adjourned the meeting with these districts drawn in a manner substantially similar to those adopted in the Final Plan. The Board discussed Native populations percentages within these districts throughout their mapping exercise with a focus on maintaining high percentages of Native populations.<sup>412</sup>

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<sup>409</sup> Board Meeting Tr. 203:12 – 204:10 (Aug. 24, 2021) [ARB011474 – 001475].

<sup>410</sup> Board Meeting Tr. 204:4 -10 (Aug. 24, 2021) [ARB001475].

<sup>411</sup> Board Meeting Tr. 337:17-2010 (Aug. 24, 2021) [ARB0011608].

<sup>412</sup> Board Meeting Tr. 204:11-15 (Aug. 24, 2021) [ARB0011475]; Board Meeting Tr. 266:12-15 (Aug. 24, 2021) [ARB011537]; Board Meeting Tr. 287:20-23 (Aug. 24, 2021) [ARB011558]; Board Meeting Tr. 296:7-10 (Aug. 24, 2021) [ARB011567]; Board Meeting Tr. 307:19-20 (Aug. 24, 2021) [ARB011578]; Board Meeting Tr. 331:7-10 (Aug. 24, 2021) [ARB011602].

302. As of September 8, 2021, the active matrix in AutoBound included racial data.<sup>413</sup> By that time individual Board members had already drawn proposed VRA Districts. The Board gained general consensus on the VRA Districts prior to adopting V.1 and V.2 on September 9, 2021. V.1 and V.2 contained identical VRA Districts. Ms. Bahnke requested that the Board “engage our VRA experts as soon as practicable after we adopt a draft proposed plan.”<sup>414</sup>

303. Mr. Torkelson testified that the Board was fully aware of the historic VRA Districts when it began the redistricting process and took steps to avoid retrogression in Districts 37-40. Specifically, Mr. Torkelson testified:

Q: Now, what were the VRA protected districts?

A: So in the 2013 cycle and for the last decade, effectively, Districts 37, 38, 39, and 40 of the 2013 plan, and we retained those numbers in the 2021 plan because we started numbering at the south, so it was natural to end in District 40 in the north. So 37, 38, 39, 40 have successfully elected candidates of the minority’s choice for the last election cycles, and my understanding was that those needed to be -- retrogression to those districts would be something we had to look very closely at.

Q: Okay. And there’s no -- there’s no secret that 37, 38, 39, and 40 are VRA protected districts for the last decade, is there?

A: Oh, no. *I mean, it’s widely known and, you know, we were all certainly aware from the beginning that those previous districts had been under the protection of the VRA.*<sup>415</sup>

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<sup>413</sup> Board Meeting Tr. 9:6-15 (Sept. 8, 2021) [ARB0010504].

<sup>414</sup> Board Meeting Tr. 108:9-16 (Sept. 9, 2021) [ARB009932].

<sup>415</sup> Torkelson Depo. Tr. 124:13 – 125:5.

304. The VRA Districts in V.3 and V.4 adopted on September 20, 2021, are identical to the VRA Districts in V.1 and V.2 with the exception that V.4 does not place the portion of the Kodiak Island Borough located on the Alaska Peninsula, which is unpopulated, in District 37. The populations for the VRA Districts in V.1 to V.4 are identical. Thus, the Board reached general consensus on its VRA Districts on September 9, 2021 when it adopted two proposed plans containing identical VRA Districts.

305. The Final Plan makes only minor changes to the VRA Districts by appending Port Graham and Nanwalek, which are located on the east side of Cook Inlet, to District 37, extending the boundary of District 37 slightly north to include Platinum and Goodnews Bay, and extending the Northern Boundary of District 38 to include Chevak.<sup>416</sup>

306. Ms. Borromeo testified that the Board considered Native populations in drafting Districts 37-40 in order to ensure compliance with the VRA.<sup>417</sup>

307. VRA analysis was conducted on V.3 and/or V.4 shortly after the adoption of those plans on September 20, 2021. Mr. Torkelson testified that by September 29 he had “handed the baton, so to speak to our VRA consultants and gotten them all the information I think they need to analyze our v3 and v4 and see if there’s any concerns” and “I think we had them look at all of -- all of the plans, actually.”<sup>418</sup>

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<sup>416</sup> Ex. B (VRA Districts Maps, Board V.1 - V.4 and Final), Valdez-Detter Pre-Trial Brief (Jan. 18, 2022).

<sup>417</sup> Borromeo Depo. Tr. 216:7 – 218:13.

<sup>418</sup> Torkelson Depo. Tr. 122:15-21.

308. It thus appears that the Board knew that Districts 37-40 were VRA compliant in September. Mr. Torkelson went on to testify: “And so if a VRA protected district had changed in the last week, November 2, 3, 4 or 5, then we would have to circle back to our Voting Rights Act team to have them check and be sure that we hadn’t made any changes that would have impact – Voting Rights Act implications.”<sup>419</sup>

309. By including in the Final Plan the VRA Districts that the Board drew and gained consensus on in September, the Board avoided any doubt regarding VRA compliance and eliminated the need for any additional VRA analysis for those Districts. While this may appear like a legitimate course of action, the *Hickel* process precludes the Board from considering the VRA prior to drafting districts that best satisfy the constitutional redistricting criteria in article VI, section 10.

310. During the November 2, 2021, Board meeting, counsel for the Board stated that VRA Analysis had been conducted for V.3 and informed that the Board that no modifications were required to Districts 37, 38, 39, and 40 to satisfy the VRA.<sup>420</sup> This appears to have reinforced the Board’s intransigence with regard to any significant modification of the VRA Districts, which were originally adopted on September 9.

311. The Court finds that the Board failed to abide by its mandate to abstain from consideration of the VRA prior to drafting a plan pursuant to the constitutional redistricting requirements and, instead, drafted a plan that focused on protecting VRA districts as its first

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<sup>419</sup> Torkelson Depo. Tr. 124:7-12.

<sup>420</sup> Board Meeting Tr. 72:20 – 73:9 (Nov. 2, 2021) [ARB009002-009003].

priority. The Board’s VRA considerations resulted in the Board’s creating Districts 37-40 first, gaining consensus on those districts early in the process, and declining to consider options that required any substantial modification to those VRA Districts.

312. Ms. Borromeo stated, during the November 2, 2021, Board meeting, that the “number one” justification for including Port Graham and Nanwalek was because “it helps with VRA deviations in 37, which was our lowest overall.”<sup>421</sup> The inclusion of Nanwalek and Port Graham in District 37 was not required by the VRA, yet the Board elected to break the Kenai Peninsula Borough boundary to add these two communities located on the east side of Cook Inlet in District 37, which includes the west side of Cook Inlet, the Bristol Bay region, the Alaska Peninsula and the Aleutian chain.

313. The Court finds that the addition of Port Graham and Nanwalek to District 37 based upon VRA considerations violated the *Hickel* process.

314. The Court thus concludes that the Board failed to comply with the *Hickel* process because it considered VRA compliance from the outset of the redistricting process. The Board’s decision to focus on VRA districts from the outset resulted in districts that do not best satisfy the constitutional criteria for redistricting set forth in article VI, section 6.

## **X. SPECIFIC ARTICLE VI, SECTION 6 VIOLATIONS**

315. The Board failed to observe the constitutional redistricting requirements set forth in article VI, section VI of the Alaska constitution with regard to Districts 29 and 36.

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<sup>421</sup> Board Meeting Tr. 65:11-15 (Nov. 2, 2021) [ARB008762].

**A. District 29.**

316. District 29 pairs Valdez exclusively with the Mat-Su Borough to the exclusion of all Richardson Highway and Prince William Sound communities.

317. District 29's population base is heavily concentrated in two relatively small geographic areas – the suburbs of Palmer and Wasilla (673 sqm) and the City of Valdez (272 sqm).<sup>422</sup> Population from Palmer and Wasilla suburbs accounts for 14,306 of the total population of 18,773 or 76.2 percent of District 29's population.<sup>423</sup> Valdez accounts for 3,985 of District 29's population or 21.3 percent of the total population.<sup>424</sup> Together Palmer and Wasilla areas account for over 97 percent of the population in District 29 but only 5.9 percent of the geographic area contained within District 29.<sup>425</sup> The remaining 15,230 square miles of District 29 contain only 482 people.<sup>426</sup> Valdez is over 240 road miles away from the Palmer and Wasilla areas where 76.2 percent of District 29's population resides.<sup>427</sup>

318. The Board's pairing of citizens from Valdez with citizens from the Palmer and Wasilla is the result of the Board's focus on other areas of the state and locking in those districts prior to determining how the eastern Mat-Su Borough and Valdez should be districted.

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<sup>422</sup> Ex. VDZ-3003 at 31, ¶ 99 (Brace)

<sup>423</sup> Ex. VDZ-3003 at 1221-22; Ex. VDZ-3003 at 31, ¶ 101.

<sup>424</sup> Ex. VDZ-3003 at 31, ¶ 102 (Brace).

<sup>425</sup> Ex. VDZ-3003 at 31, ¶ 103 (Brace).

<sup>426</sup> Ex. VDZ-3003 at 31, ¶ 107 (Brace).

<sup>427</sup> Ex. VDZ-3003 at 32, ¶ 107-108 (Brace).



319. The record establishes that the Board constrained the redistricting options available for consideration by virtue of focusing on individual Board member priorities before determining whether the Palmer and Wasilla areas and Valdez could constitutionally be paired together. Ms. Borromeo articulated how the Board settled on pairing Valdez exclusively with the Mat-Su Borough communities in District 29 as follows:

So when I'm looking at Fairbanks North Star Borough and I see them with a population excess of 20 percent and I see their neighboring regional rural villages with a decrease of 20 percent, it's a natural fit for me to make that jump, being from the region, growing up in McGrath, spending a lot of time in Fairbanks, that they would share population. And then we -- we come down and we do have to deal with the Valdez question. And at this point, if -- if we keep Southeast like we're thinking and Cordova like we're thinking, Valdez is either a district of 5,000 or 3,500 or 4,000 residents or they're going to have to go to the next neighboring borough that they'll fit in.<sup>428</sup>

320. The record establishes that the Board did not engage in reasoned decision-making regarding District 29. Instead, the Board's decisions with regard to other districts including Districts 37-40 and District 36 necessitated the pairing of Valdez with the Palmer and Wasilla areas. In order to maintain a Doyon-Ahtna district with sufficient population, the Board drew District 29 in a manner that segregates Valdez from all Richardson Highway and all Prince William Sound communities with which it has socio-economic ties.

**1. Compactness.**

321. District 29 appears relatively compact. However, District 29 encompasses a vast amount of unpopulated land. The Board discussed revisions to District 29 that would have removed "a big chunk" of District 29 containing only four people for the sake of

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<sup>428</sup> Board Meeting Tr. 240:10-23 (Nov. 3, 2021) [ARB007600].

compactness, which would have created a “coastal strip that includes Valdez and goes up to the non-incorporated parts of the Mat-Su Borough, but doesn’t put Valdez in with Palmer or anyplace like that, which I hope will be more palatable for them.”<sup>429</sup> Ultimately the Board decided not to remove this area from District 29 because “it looks better.”<sup>430</sup> The Board’s decision to include this area in District 29 creates the appearance that District 29 goes up the Richardson Highway, when in reality it does not.<sup>431</sup> District 29 is the result of the Board’s prioritization of creating a Doyon-Ahtna district, District 36, which does not satisfy the compactness requirement. Because District 29 and District 36 are interlinked the Board must explore options that increase the relative compactness of both Districts.

## 2. Socio-Economic Integration.

322. Socio-economic integration requires proof of actual interaction and interconnectedness rather than mere homogeneity.<sup>432</sup>

323. The record is devoid of evidence of socio-economic integration between the Mat-Su Borough communities included in District 29 and Valdez and establishes that the Board did not engage in any fact-specific analysis during the redistricting process regarding whether District 29 is sufficiently socio-economically integrated.

324. A review of Board meeting transcripts reveals that the Board did not discuss any specific evidence of socio-economic integration between Valdez and the Mat-Su

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<sup>429</sup> Board Meeting Tr. 34:6 – 35:7 (Nov. 4, 2021) [ARB009204-009205].

<sup>430</sup> Board Meeting Tr. 36:5-8 (Nov. 4, 2021) [ARB009206].

<sup>431</sup> Board Meeting Tr. 37:10-13 (Nov. 4, 2021) [ARB009207].

<sup>432</sup> *Hickel*, 846 P.2d at 46 (citing *Kenai*, 743 P.2d at 1363).

Borough during any public meeting let alone seek to maximize socio-economic integration in the District.

325. The only rationale provided by the Board regarding the constitutionality of pairing Valdez with the Mat-Su Borough was the fact that Valdez and portions of the Mat-Su Borough have been included in the same district in the past.<sup>433</sup> Board Member Borromeo sought legal authority from both the Board’s counsel and third parties, including Mr. Nathaniel Amdur-Clark who advocated on behalf of the Doyon Coalition throughout the redistricting process. Upon delivery of the legal authority requested by Ms. Borromeo via text message, Mr. Amdur-Clark stated “It’s not super strong, but the current district with Valdez and the Mat-Su was litigated.”<sup>434</sup>

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<sup>433</sup> Bahnke Depo. Tr. 82:4-6 (“I have been told now that the map -- adopted map is consistent with the current 2013 proclamation plan for Valdez.”); Board Meeting Tr. 161:14-25 (Nov. 4, 2021) [ARB009331] (“So everyone’s got their preference, but what litmus test -- which -- which of the two pairings of Valdez, either in that rural Interior District versus where it has already been established by the courts that it has socioeconomic ties to the Mat-Su Valley. In my mind we’ve got court precedence and then the constitutional requirement of trying to do the best that we can socioeconomically.”); Board Meeting Tr. 31:1-9 (Nov. 4, 2021) [ARB009207] (“MEMBER BAHNKE: So, Mr. Chair, I’d like to speak in favor of this. And I think it’s already been established that Valdez is socioeconomically compatible with the Mat-Su or with Anchorage, and geographically for compactness sake, I believe it makes more sense to connect them to the Mat-Su than it would to connect them to Anchorage. But I do believe counsel advised us there is precedence for including Valdez in the Mat-Su.”); Board Meeting Tr. 106:24 – 107:4 (Nov. 4, 2021) [ARB009276] (“MR. SINGER: And then there was litigation about the current pairing of Valdez with Mat-Su, mostly focused on issues of compactness, and the Court affirmed -- the Superior Court affirmed the current District in which Valdez and Mat-Su are paired.”).

<sup>434</sup> Ex. VDZ-3010 at 129 [ARB00155158].

326. Nevertheless, the Board relied exclusively on the 2013 redistricting plan as support for the premise that Valdez is socio-economically integrated with the Palmer and Wasilla areas, within which 76.2 percent of District 29's population resides.

327. The Board did not engage in any substantive discussion regarding the nature of historic house districts that included Valdez with the Mat-Su Borough including the fact that the 1994, 2002, and 2013 districts all paired Valdez with Richardson Highway communities and/or Prince William Sound Communities.<sup>435</sup> The Mat-Su Borough and Valdez have never before been paired exclusively with one another in a house district.

328. The 1994 Final Reapportionment Plan included Valdez in District 35-R, which was comprised of all Prince William Sound communities and Richardson Highway communities including Glennallen, Paxson, Delta Junction, and Big Delta. The 1994 Plan did not include any Mat-Su Borough communities in District 35-R.<sup>436</sup>

329. The 2002 Amended Final Redistricting Plan included Valdez in District 12-F, which was comprised of Valdez, Richardson Highway communities including Glennallen, Paxson, Delta Junction, Big Delta, and Eielson, and some Mat-Su communities including Glacier View, Chickaloon, and Sutton.<sup>437</sup>

330. The 2013 Proclamation Plan included Valdez in District 9-E, which was comprised of Valdez, Richardson Highway communities including Glennallen, Paxson, Fort

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<sup>435</sup> Ex. VDZ-3005 at 1[ARB010411A], 4-5, 6-7 [ARB001581, 001590].

<sup>436</sup> Ex. VDZ-3005 at 1 [ARB010411A].

<sup>437</sup> Ex. VDZ-3005 at 5.

Greely, Delta Junction and Big Delta, and some Mat-Su Borough communities including Eureka, Glacier View, Chickaloon, Sutton, and portions of Fishhook and Lazy Mountain.<sup>438</sup>

331. The record does not reflect Board discussion of the fact that District 29, unlike the historic 1994, 2002, and 2013 districts, is an exclusive pairing of the Mat-Su Borough and Valdez and separates Valdez from all Richardson Highway communities and all Prince William Sound communities.

332. The record does not reflect Board discussion regarding the holding in *Hickel*, which invalidated a district pairing Prince William Sound communities including Valdez with Palmer and the surrounding areas for lack of socio-economic integration.<sup>439</sup>

333. The Court finds that the record does not establish any significant interaction or interconnectedness between Valdez and the Palmer and Wasilla areas, which constitute 76.2 percent of the population in District 29.

334. The Mat-Su Borough Assembly and Valdez City Council unanimously passed resolutions opposing pairing Mat-Su Borough communities with Valdez<sup>440</sup> and the Board

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<sup>438</sup> ARB001590.

<sup>439</sup> *Hickel* 846 P.2d at 52-53 (“District 6 merges Palmer with the Prince William Sound communities. Palmer is the governmental center of the Mat-Su Borough, an established agricultural area. In contrast, the Prince William Sound communities are oriented toward commercial fishing and maritime activities. The record does not establish any significant interaction or interconnectedness between these areas.”).

<sup>440</sup> ARB002011; ARB004074-004212.

recognized that public comment from Valdez and Mat-Su Borough residents was overwhelmingly opposed to pairing these communities in a house district.<sup>441</sup>

335. Public comment received by the Board overwhelmingly supported the inclusion of Valdez in a district with Richardson Highway communities and opposed combining Valdez with the Palmer and Wasilla areas.<sup>442</sup>

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<sup>441</sup> Board Meeting Tr. 240:3-6 (Nov. 3, 2021) [ARB007600] (“Okay. I’m going to speak up here now. Because first of all, Mat-Su was (indiscernible). They didn’t want Valdez. Valdez was exceptionally clear, to a hundred and however many pages, that they don’t want Mat-Su either. So I think that’s important for us to keep in mind.”); Board Meeting Tr. 240:24 – 241:22 (Nov. 3, 2021) [ARB007600-007601] (“MEMBER MARCUM: I think that taking 4,000 -- in addition to, you know, what I just mentioned about what Valdez (indiscernible) or what the borough said they wanted. Again, and they’ve cited very clear socioeconomic reasons why. You all heard from Valdez when we were there, the socioeconomic ties that they cited. What was it, half of the boat slips in Valdez are reserved for Fairbanks residents. They were very clear about that. They are tied to that Richardson Highway corridor. But in addition to that, I think it’s worth considering that the Mat-Su Borough has expressed on the record their ties to Denali Borough, and we know that when you put those populations together, you get nearly the ideal population that you need for the Mat-Su Borough, and that to take the region of the state that has grown the most, that has increased their population the most, and then to dump another 4,000 voters from Valdez in there, when, in fact, they – we’ve got them right now at the numbers they need to be, is really diluting their -- their growth that they have had. And we’ve heard testimony to that effect, as well. I was just reiterating what the public has said to some degree.”); Board Meeting Tr. 5:2-16 (Nov. 5, 2021) [ARB007862] (“I have concerns about Valdez and, you know, so I had offered yesterday to - to try to find another solution to Valdez. They’ve been really clear about their desire to be with Richardson Highway, and that was taken off the table yesterday. There are other solutions that they proposed for coastal, and that was also not a possibility. It was taken off the table. And so what -- you know, that kind of left them with Anchorage or the Mat-Su. They’ve testified that they do not want to be with the Mat-Su -official resolutions and such -- the Mat-Su has testified they don’t want Valdez with them, so I wanted to -- to look at really the only other opportunity to pair them with another area, and that would be with Anchorage.”).

<sup>442</sup> Ex. VDZ-3009 [ARB001728; ARB001788-001790; ARB001809-001811; ARB001839; ARB002011; ARB002060-002061; ARB002062; ARB002184; ARB002240; ARB002248; ARB002293-002294; ARB002316; ARB002374; ARB002404; ARB002456; ARB002461;

336. The Board drew District 29 in a manner that is directly contradictory to the public testimony provided.

337. Mayor Scheidt, Ms. Pierce, and Mr. Duval persuasively testified regarding the lack of socio-economic integration between Valdez and the Mat-Su Borough communities included in District 29. Testimony from these witnesses established that indicia of socio-economic integration relied upon by the Alaska Supreme Court as establishing such integration do not exist between Valdez and the Mat-Su Borough.

338. The trial testimony, deposition testimony, and the affidavits of the Board members identify the *de minimis* evidence of socio-economic integration between Valdez and the Wasilla and Palmer areas.

339. The evidence of socio-economic integration provided by the Board is limited to: (1) the Palmer and Wasilla areas included in District 29 are connected to Valdez via the Richardson and Glenn Highways and the communities share an interest in the maintenance and development of state highways;<sup>443</sup> (2) Valdez citizens purported use of Mat-Su

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ARB002476; ARB002494; ARB002530; ARB002552; ARB002569; ARB002602; ARB002900; ARB002957; ARB002958; ARB003045; ARB003050-003051; ARB003103; ARB003194; ARB003226; ARB003234; ARB003240-003243; ARB003256; ARB003306; ARB003330-003331; ARB003414; ARB003438; ARB003442; ARB003449; ARB003458; ARB003482; ARB003483; ARB003512-003516; ARB003582; ARB003590; ARB003597-003598; ARB003609; ARB003857-003865; ARB003966; ARB003988; ARB003992; ARB004020; ARB004033; ARB004071-ARB004212; ARB004214; ARB004259; ARB004271; ARB004297-004298].

<sup>443</sup> Trial Tr. 858:7-8 (Jan. 26, 2022) (Borromeo) (“You can commute between both of those parts of the state, in a car, relatively easily.”); Trial Tr. 1022:5-9 (Marcum) (“You also have some of the situation with the road system itself there. The primary linkage of Valdez with the rest of Alaska is through the highway that runs directly into the Mat-Su. So that

hospitals;<sup>444</sup> (3) Valdez and the Mat-Su Borough’s locally funded school districts as opposed to Regional Educational Attendance Area (“REAA”) schools;<sup>445</sup> (4) historical districts that combined some population from the Mat-Su Borough and Valdez;<sup>446</sup> (5) connections to the oil and gas industry because Valdez is the terminus for the Trans-Alaska Pipeline System (“TAPS”) and the Mat-Su Borough is a place of residence for oil field

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transportation corridor is very important.”); Bahnke Depo. Tr. 91:7-8 (“They are connected by road. They share for highway funding and maintenance.”); Binkley Aff. at 9, ¶ 26 (“Valdez and the communities of the eastern Mat-Su Borough with which it is paired are connected via the state highway system, such that one can drive from one community in the District to another. As such, all of the communities will share an interest in maintenance and development of the state highway system and can reasonably expect a house representative to appreciate this concern.”).

<sup>444</sup> Bahnke Depo. Tr. 80:18-21 (“Valdez, the closest hospital to Valdez is Mat-Su Regional. All the communities are – Valdez is, to me, basically an excerpt of Anchorage area, and so is Mat-Su.”).

<sup>445</sup> Bahnke Depo. Tr. 91:8-9 (“All the communities are urban, local tax-based schools, versus REAA schools found in more rural communities”); Binkley Aff. at 9-10, ¶ 27.

<sup>446</sup> Binkley Aff. at 10, ¶ 28 (“I also found it persuasive that House District 29 of the Final Plan is largely similar to the current Valdez house district. In evaluating relative socio-economic integration, the fact that we are maintaining the continuity of a District similar to the one adopted and approved by the courts in the 2013 Proclamation Plan was an additional reason why I felt that the District evidenced a relative pattern of socioeconomic integration.”).

**BRENA, BELL &  
WALKER, P.C.**  
810 N Street, Suite 100  
Anchorage, Alaska 99501  
Phone: (907) 258-2000  
Facsimile: (907) 258-2001



workers;<sup>447</sup> (6) recreation on Lake Louise;<sup>448</sup> (7) “some common hunting and fishing grounds;”<sup>449</sup> and (8) sports competition between high school students within the communities.<sup>450</sup>

340. The record establishes that the Board did not discuss any of these factors in any public meeting or mapping work session.

341. The evidence of socio-economic integration proffered by the Board may establish some homogeneity between Valdez and the Mat-Su Borough communities included in District 29, but it fails to establish sufficient evidence of socio-economic integration, which requires “proof of actual interaction, and interconnectedness rather than mere homogeneity.”<sup>451</sup>

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<sup>447</sup> Trial Tr. 858:1-10 (Jan. 26, 2022) (Borromeo) (“Again, both of those parts of the state are, I believe, reliant, perhaps more than others, on the oil industry, Valdez being the end of the pipeline and Mat-Su being a place of residents for many who are working in the oil fields.”); Trial Tr. 1021:20 – 1022:4 (Marcum) (“But some of those are -- have to do with the oil industry and the commuters that live in Mat-Su that work on the Slope and, you know, do their two weeks going to the Slope and their two weeks when they live someplace where they don’t have to be as near to the airport such as the Mat-Su. Then you have that oil industry tie with the City of Valdez, as well, of course.”).

<sup>448</sup> Borromeo Depo. Tr. 150:12-17 (“Q: What are the ties between Wasilla and Valdez that make it socio-economically integrated at all? A: The oil and gas industry, the winter caribou hunting that happens with the Nelchina herd, the fishing and other recreating around Lake Louise. Those are some that come to mind.”).

<sup>449</sup> Trial Tr. 858:8-9 (Jan. 26, 2022) (Borromeo) (“And then, they do share some common hunting and fishing grounds.”).

<sup>450</sup> Torkelson Aff. at 31, ¶ 53 (“In addition to current legislative District connections, Valdez sports teams routinely travel to sports competitions in the Mat-Su Borough.”).

<sup>451</sup> *Hickel*, 846 P.2d at 46 (citing *Kenai*, 743 P.2d at 1363).

342. The Board’s reliance on shared interests in highway maintenance and locally funded schools is misplaced. These factors can be applied to a variety of communities throughout the state. Fairbanks and Homer are linked by state highways and share an interest in highway maintenance, but they are not socio-economically integrated. Similarly, FNSB and Juneau both operate locally funded schools rather than REAA schools, yet these communities are not socio-economically integrated. Thus, these factors establish homogeneity not socio-economic integration.

343. The Board’s reliance on Mat-Su hospitals as evidence of socio-economic integration in District 29 is also unavailing. Ms. Bahnke is the only member of the Board that advanced Mat-Su hospitals as evidence of socio-economic integration between the Palmer/Wasilla areas and Valdez. However, Ms. Bahnke testified that she was not aware of any connection between Valdez’s hospital and Mat-Su’s hospital and that she assumed Valdez residents would be evacuated to Anchorage or Mat-Su hospitals, but she did not know whether that was true.<sup>452</sup> The record does not establish socio-economic integration between Valdez and the Mat-Su Borough by virtue of the hospitals in these communities. To the contrary, the record suggests that Valdez’s hospital is connected to Anchorage not the Mat-Su Borough.<sup>453</sup>

344. The Board also advanced connections to the oil and gas industry as evidence of socio-economic integration between the Mat-Su Borough communities included in

**BRENA, BELL &  
WALKER, P.C.**  
810 N Street, Suite 100  
Anchorage, Alaska 99501  
Phone: (907) 258-2000  
Facsimile: (907) 258-2001

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<sup>452</sup> Bahnke Depo. Tr. 91:17 – 92:21.

<sup>453</sup> Trial Tr. 1279:4-7 (“Q: Ms. Pierce, if somebody in Valdez gets injured far be it is there an emergency medivac, where do they go? A: The medivac is to Anchorage, sir.”).

District 29 and Valdez. The oil and gas industry is of statewide concern, and oil and gas workers live in many communities throughout the Alaska. Ms. Scheidt, Ms. Pierce, and Mr. Duval provided persuasive testimony regarding the differences between Valdez’s relationship to the oil and gas sector and the Mat-Su Borough’s connection to the oil and gas sector.<sup>454</sup> Valdez is heavily reliant on oil and gas property taxes while the Mat-Su Borough is not. TAPS and the Valdez Marine terminal are fixtures in Valdez, but they do not traverse the Mat-Su Borough. As a result, the Mat-Su Borough does not share Valdez’s economic or environmental concerns related to TAPS. The nature of oil and gas employment in Valdez and in the Mat-Su Borough communities within District 29 are substantially different as established in communications between Mr. Torkelson and Mr. Sandberg who stated “[t]he economist told me that the Valdez-Cordova Census Area (which included Prince William Sound and the Copper River Basin) did not have many oil and gas workers, so their number is nearly all oil pipeline transportation.”<sup>455</sup> The fact that some Mat-Su Borough residents and some Valdez residents work in the oil and gas sector may be some evidence of homogeneity but it does not establish socio-economic integration.

345. Recreation on Lake Louise was advanced by the Board as evidence of socio-economic integration of the communities in District 29 but did not advance any evidence of

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<sup>454</sup> Trial Tr. 334:9 – 335:8 (Scheidt); Trial Tr. 469:22 – 471:17; 492:22 – 493:5; 502:1 – 503:22 (Duval); Trial Tr. 513:

<sup>455</sup> Ex. VDZ-3014 at 18 [ARB00128594].

any individual from Valdez or the Mat-Su actually doing so. Mr. Duval testified that he had never even been to Lake Louise.<sup>456</sup> There is no evidence to suggest that recreation on Lake Louise is a significant socio-economic tie between the Mat-Su Borough and Valdez.

346. Sharing some common fishing and hunting grounds including hunting the Nelchina caribou herd is insufficient evidence to establish socio-economic integration among the communities included in District 29. The Nelchina caribou herd is utilized by residents throughout Alaska including FNSB, Anchorage, and the Kenai Peninsula Borough. Mr. Duval testified “I guess when I look at the, quote unquote, live together, work together, play together, hunt together philosophy, just because I hunt in Unit 13, the people I go hunting with are from Valdez and the Richardson Highway.”<sup>457</sup> The record does not establish that there is any significant socio-economic interaction among the residents of Valdez and the Mat-Su Borough by virtue of shared hunting and fishing areas.

347. The Board suggests that because some Valdez students travel to some athletic events in the Mat-Su Borough, Valdez is socio-economically integrated with the Palmer and Wasilla suburbs included in District 29. Mr. Duval testified at trial that “None of the athletic teams that we participate against, those schools are not in District 29.”<sup>458</sup> Indeed, the only schools included in District 29 are Glacier View School and Sutton Elementary School.<sup>459</sup>

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<sup>456</sup> Trial Tr. 481:13-14.

<sup>457</sup> Trial Tr. 500:18-25.

<sup>458</sup> Trial Tr. 493:7-9.

<sup>459</sup> Duval Aff. at 17.

While Valdez students occasionally compete against Mat-Su Borough students Valdez is in the Aurora conference with includes Richardson Highway schools Monroe Catholic, Hutchison, Eielson, Delta, and Galena.<sup>460</sup> The sports schedules produced by the Board reveal that the great majority of high school sports competition for Valdez occurs in areas other than the Mat-Su Borough primarily in Fairbanks or Valdez.<sup>461</sup> The sports competitions that do occur in the Mat-Su Borough are generally tournaments where teams from across the state participate. In addition, these sports schedules reveal that Valdez students compete with students from Seward and Ketchikan as frequently as they do with the Mat-Su Borough schools. Interscholastic sports do not establish socio-economic integration between Valdez and the Mat-Su Borough.

348. The Court finds District 29 fails to satisfy the constitutional requirement of socio-economic integration and that the Board did not attempt to maximize socio-economic integration in the District. Substantial evidence regarding the lack of socio-economic integration between Valdez and the Mat-Su Borough is included in the record. The vast majority of citizens from both of these communities that provided public comment voiced their opinions that Valdez and the Palmer and Wasilla areas are not socio-economically integrated. The evidence proffered by the Board in an attempt to establish socio-economic integration is *de minimis* and establishes some homogeneity rather than actual socio-economic integration.

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<sup>460</sup> Duval Aff. at 17.

<sup>461</sup> Ex. ARB-1002.

349. The record establishes that Mat-Su Borough citizens are substantially more socio-economically integrated with other Mat-Su Borough residents and Denali Borough residents than they are with Valdez. Similarly, the record contains abundant evidence establishing that Valdez has substantially greater socio-economic integration with Richardson Highway communities, FNSB, and Prince William Sound communities than it does with the Mat-Su Borough communities included in District 29. The Board was presented with and could have easily drawn a redistricting plan that provides greater socio-economic integration and better satisfies other redistricting criteria by keeping the Mat-Su Borough whole and pairing Valdez with the communities with which it is socio-economically integrated.

350. The Board failed to establish that pairing Valdez with the Mat-Su Borough was the only viable redistricting option and, therefore, the lack of socio-economic integration within District 29 is not justifiable. Indeed, the Board appears to have paired Valdez with the Mat-Su Borough as a function of prioritizing the interests of other geographic areas and constituents over the interests of the citizens of Valdez and the Mat-Su Borough. Further, there is no evidence to suggest the lack of socio-economic integration in District 29 is the result of seeking to maximize the constitutional criteria of compactness and contiguity.

351. The Board left the decision of what district Valdez should be placed in to the very end of the redistricting process and improperly left itself with a “binary choice”

regarding where Valdez should be placed.<sup>462</sup> After the Board decided to break the FNSB Borough boundary, Valdez was bound to be paired exclusively with the Mat-Su Borough and the Board based upon the Board’s prior redistricting decisions. The Board failed to engage in any substantive analysis of socio-economic integration among the communities in District 29 and instead paired Valdez and the Mat-Su Borough together as a matter of convenience.

**B. District 36.**

**1. Compactness.**

352. District 36 encompasses a 198,605 square mile area and stretches from the Yukon River village of Holy Cross to the Copper River Valley community of McCarthy. District 36 combines 35 percent of Alaska’s geographic area into only one of the forty house districts. The Board was apparently unaware of the actual size of the districts they drew because they did not measure the square mileage the districts.<sup>463</sup>

353. Chair Binkley stated on the record that District 36 as it appeared in V.3 and V.4, which are more compact than District 36 in the Final Plan, are not compact. In the context of comparing the compactness of a proposed District 39 that included some Doyon villages specifically, Chair Binkley stated “if you want to talk about compact, look at the Doyon region in version 3 and 4. That wouldn’t be compact by any stretch of the

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<sup>462</sup> Board Meeting Tr. 330:12-17 (Nov. 3, 2021) [ARB007690] (“I mean, it seems like the -- a binary choice here is based on what we do with Valdez. We decided to go this way. We found a map we can use. If we keep it on the Richardson, we have a different version.”).

<sup>463</sup> Binkley Depo. Tr. at 121, lines 16-25.

imagination.”<sup>464</sup> Thus, just two days before adopting the Final Plan, Chair Binkley’s opinion was that District 36 was not compact by any stretch of the imagination. This opinion was based upon proposed districts that did not include the Cantwell appendage, which the Board openly acknowledged was detrimental to compactness.<sup>465</sup>

354. The Alaska Supreme Court has expressly held that “corridors of land that extend to include a populated area, but not the less-populated land around it, may run afoul of the compactness requirement” and “appendages attached to otherwise compact areas may violate the requirement of compact districting.”<sup>466</sup> The compactness requirement should not result in “bizarre designs” for districts.<sup>467</sup>

355. The Board considered factors that have no bearing on compactness in analyzing whether District 36 was sufficiently compact. When asked what measures of compactness the Board applied before adopting District 36, Ms. Borromeo answered “we looked at the district – district’s water tributaries, mountain ranges, regions from an Alaska Native perspective. Those were the type of things that I remember considering.”<sup>468</sup> Thus,

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<sup>464</sup> Nov. 3, 2021, Board Meeting Tr. at 198, lines 9-12 (ARB007558).

<sup>465</sup> Board Meeting Tr. 253:8-10 (Nov. 5, 2021) [ARB008110] (“in the light of the fact that we have noted the socioeconomic reasons for taking Cantwell out. Obviously it is not a compact change, right, so do you have any concerns about the compactness.”); Board Meeting Tr. at 253, lines 14-15 (Nov. 5, 2021) [ARB008110] (“I agree that it’s -- it is -- 36 becomes a little less compact as a result of putting Cantwell in, and it’s sort of a coin toss as to whether that makes sense.”)<sup>465</sup>

<sup>466</sup> *Hickel*, 846 P.2d at 45-46.

<sup>467</sup> *Hickel*, 846 P.2d at 45 (citing *Davenport v. Apportionment Comm’n of New Jersey*, 124 N.J. Super. 30, 304 A.2d 736, 743 (App. Div.1973) (citations omitted) (quoted in *Carpenter*, 667 P.2d at 1218-19).

<sup>468</sup> Borromeo Depo. Tr. at 120, lines 6-12.



the Board applied factors entirely unrelated to compactness when analyzing whether District 36 satisfied the constitutional requirement of compactness.

356. District 36 is both a bizarre horseshoe shape and includes two appendages that protrude into populated areas without subsuming adjacent unpopulated areas – one that carves out Glennallen and neighboring population along the Glenn Highway and one that carves out a portion of the Denali Highway in order to reach Cantwell and preserve Ahtna’s ANCSA boundary.

357. The Court finds that District 36 is not sufficiently compact. The Board was presented with redistricting alternatives that provided greater relative socio-economic integration and better satisfied other redistricting criteria.

358. The Board utilized the eye test to determine compactness rather than objectively measuring the districts. District 36 simply does not pass the eye test with regard to compactness.

## **2. Socio-Economic Integration.**

359. The record reflects no evidence of socio-economic ties among Native Alaskan villages along the Yukon River such as Holy Cross and predominantly non-Native communities accessible by road such as Glennallen. The only evidence provided by the Board in support of socio-economic integration among these communities is evidence of homogeneity rather than socio-economic integration. The same is true for rural Doyon

villages which are generally not on the highway system and rural Ahtna villages which are.<sup>469</sup>

360. At trial the evidence proffered by the Board to establish socio-economic integration among road communities and Yukon River communities established some homogeneity but virtually no actual interaction or interconnectedness. The Board offered testimony that some people from Richardson Highway communities may work with some people from Yukon River villages on the North slope. In addition, the Board offered testimony that people in the Doyon and Ahtna regions “share some socioeconomic similarities” because they engage in subsistence, access similar types of healthcare, face similar challenges with regard to access to utilities, and have similar concerns with regard to the quality of rural schools.<sup>470</sup> These socio-economic factors could be applied to nearly any rural community in Alaska. As such, all of these socio-economic factors represent homogeneity or similarities rather than interconnectedness or interaction.

361. The primary evidence provided regarding socio-economic integration in District 36 provided by the Board was the fact that both Doyon and Ahtna have primarily Athabascan shareholders.<sup>471</sup> However, District 36 is less than 30 percent Native<sup>472</sup> and only 19 percent of Doyon shareholders live in traditional Doyon villages.<sup>473</sup> Far more Doyon

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<sup>469</sup> Trial Tr. 944:17-20.

<sup>470</sup> Trial Tr. 888:6 – 889:6.

<sup>471</sup> Trial Tr. 888:6-9.

<sup>472</sup> VDZ 3003 at 1216.

<sup>473</sup> Trial Tr. 777:19-23.

shareholders live in communities outside of District 36 than live inside of District 36.<sup>474</sup>

The Board's focus on homogeneity integration among Alaska Native communities in District 36 improperly ignores socio-economic integration among both the Native communities in the Ahtna and Doyon regions and the remaining 70 percent of the population that is non-Native.

362. Chairman Binkley specifically articulated the lack of socio-economic integration among Yukon River communities and communities accessible by road on more than one occasion during the redistricting process.<sup>475</sup>

363. The Board did not proffer or consider evidence sufficient to establish socio-economic integration between Native villages along the Yukon and road accessible communities along the Alaska, Richardson, and Glenn Highways. With regard to the residents of Holy Cross and Glennallen, Board Member Borromeo testified that residents of Glennallen do not live with residents of Holy Cross, that they potentially work together

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<sup>474</sup> Trial Tr. 777:19 – 779:5.

<sup>475</sup> Board Meeting Tr. (Nov. 5, 2021) 242:15-25 (“when you look at the -- 36, it’s very diverse as well; you know, there’s a lot of differences between Glennallen versus some of their remote villages on the (indiscernible), or you look at Tok that’s on the highway system or Delta on the highway system. Those are different communities, completely, in many of the rural communities out north and -- and out west. And so it’s difficult to say, socioeconomically, you know, that 36 is homogeneous. It’s very different.”); Board Meeting Tr. (Nov. 3, 2021) 251:15-25 (“But as I said, there’s you know, when you look at 36, it’s very – even without any of the Fairbanks North Star Borough, when you look at Valdez and, you know, all those areas along the Richardson Highway, compared to all the rural villages out west along the Yukon River, there’s a huge difference in socioeconomic integration between those areas. So when you’re trying to pick who from the borough is going to fit into District 36, who are you going to try and compare them to?”).

although she was not personally aware of any people that do, and agreed that they do not play together.<sup>476</sup> Ms. Borromeo also agreed that “road communities are significantly different than river communities”<sup>477</sup> and testified that she could not recall a single conversation in which a single economic factor linking Glennallen and Holy Cross was discussed by the Board.<sup>478</sup>

364. The record establishes that the Board did not discuss socio-economic integration among the communities along the road system and the Yukon River Communities included in District 36. Chairman Binkley testified that he was unaware of any place in the record where the Board discussed anything besides the differences among these communities.<sup>479</sup>

365. The Court finds that District 36 fails to satisfy the constitutional requirement of relative socio-economic integration. The record is devoid of evidence of any significant socio-economic integration among Richardson Highway communities and Yukon River communities. The Richardson Highway communities in District 36 are substantially more socio-economically integrated with FNSB and Valdez. The lower Yukon River communities included in District 36 are substantially more socio-economically integrated with neighboring communities in the Calista and Bering Straits regions. Upper Yukon River Communities are substantially more socio-economically integrated with FNSB. The Board

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<sup>476</sup> Trial Tr. 836:8 – 838:24.

<sup>477</sup> Trial Tr. 835:22-25.

<sup>478</sup> Trial Tr. 839:23 – 840:4.

<sup>479</sup> Binkley Depo. Tr. 111:18 – 112:1.

was presented with viable redistricting options that provided greater relative socio-economic integration and better satisfied the compactness requirement.

366. The Board failed to provide any evidence that the lack of socio-economic integration in District 36 was the result of seeking to maximize the constitutional redistricting criteria of compactness and contiguity. Instead, it is apparent the Board diminished constitutional redistricting criteria in favor of creating a Doyon-Ahtna district.

## **II. FAIR AND EFFECTIVE REPRESENTATION**

367. The Board’s failure to satisfy the socio-economic integration requirement implicates fair and effective representation for the citizens residing within Districts 29 and 36. “In addition to preventing gerrymandering, the requirement that districts be composed of relatively integrated socio-economic areas helps to ensure that a voter is not denied his or her right to an equally powerful vote.”<sup>480</sup>

368. The State’s equal protection clause guarantees the right to proportional geographic representation.<sup>481</sup> The Alaska Supreme Court “consider[s] a voter’s right to an equally geographically effective or powerful vote, while not a fundamental right, to represent a significant constitutional interest.”<sup>482</sup>

369. In the context of reapportionment, the supreme court has held that “upon a showing that the Board acted intentionally to discriminate against the voters of geographic

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<sup>480</sup> *Hickel*, 846 P.2d at 46.

<sup>481</sup> *Hickel*, 846 P.2d at 52.

<sup>482</sup> *Kenai*, 743 P.2d at 1372.

area, the Board must demonstrate that its plan will lead to greater proportionality of representation.”<sup>483</sup>

370. The supreme court does not require a showing of a pattern of discrimination, nor does the court consider any effect of disproportionality *de minimis* when determining the legitimacy of the Board’s purpose.<sup>484</sup> More specifically:

The legitimacy of this purpose hinges on whether the Board intentionally sought to dilute the voting power of Anchorage voters disproportionately. Thus, if the Board sought to denigrate the voting power of Anchorage voters systematically by reducing their senate representation below their relative strength in the state’s population, then such a purpose would be illegitimate.<sup>485</sup>

371. Based upon the principle for fair and effective representation, “certain mathematically palatable apportionment schemes will be overturned because they systematically circumscribe the voting impact of specific population groups.”<sup>486</sup> The question is whether a particular group has been unconstitutionally denied its chance to effectively influence the political process.<sup>487</sup>

372. Under Alaska law, the citizens of Valdez are legally entitled to “‘fair and effective representation’—the right to group effectiveness or an equally powerful vote.”<sup>488</sup> District 29 fails to provide fair and effective representation for the citizens of Valdez.

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<sup>483</sup> *Hickel*, 846 P.2d at 49 (citing *Kenai*, 743 P.2d at 1372).

<sup>484</sup> *Hickel*, 846 P.2d at 49 (citing *Kenai*, 743 P.2d at 1372).

<sup>485</sup> *Kenai*, 743 P.2d at 1372.

<sup>486</sup> *Hickel*, 846 P.2d at 49.

<sup>487</sup> *Kenai*, 743 P.2d at 1368.

<sup>488</sup> *Hickel*, 846 P.2d at 47 (quoting, *Kenai*, 743 P.2d at 1363).

Citizens of the Mat-Su Borough dominate District 29 and constitute 78.5 percent of the population in District 29. The population of District 29 is highly concentrated in the Palmer and Wasilla areas. Population from Palmer and Wasilla suburbs accounts for 14,306 of the total 18,773 or 76.2 percent of District 29's population.<sup>489</sup> Valdez accounts for 3,985 of District 29's population or 21.3 percent of the total population.<sup>490</sup> Thus, the population centers of the Palmer and Wasilla suburbs and Valdez constitute 97.5 percent of the population in District 29. District 29 is effectively a pairing of Valdez with Wasilla and Palmer suburbs despite the fact the residents of these communities live over 240 road miles apart. Outside the City of Valdez and the Wasilla and Palmer suburbs, there are 45 people located in the Chugach Census Area, 430 people in the Mat-Su Borough, and just 7 people in the Copper River Census Area.

373. The lack of population from the Copper River Census Area reflects the Board's decision to separate Valdez from all communities along the Richardson Highway including Glennallen. District 29 is 16,175 square miles, yet in 15,230 square miles of the district there are only 482 people. The Palmer and Wasilla suburb populations that constitute 76.2 percent of District 29's population is located in a 673 square-mile area, which is 4.2 percent of the total geographic area. Valdez, where 21.3 percent of District 29's population resides, is 272 square miles or 1.7 percent of the geographic area of District 29. The remaining 94 percent of District 29 contains only 2.5 percent of the District's

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<sup>489</sup> Ex. VDZ-3003 at 31, ¶ 101 (Brace).

<sup>490</sup> Ex. VDZ-3003 at 1221-22.

population. The Board has paired population centers separated by over 240 road miles and massive geographic features (the Chugach Range) in order to create District 29 in a manner that results in 97.5 percent of the District 29's population being located in just 6 percent of its geographic area.

374. As Ms. Sheri Pierce testified, Valdez's vote has been incrementally diluted, and the Final Plan entirely overwhelms the vote of Valdez citizens with the votes of Mat-Su Borough citizens that have entirely different interests. Specifically, Ms. Pierce, who has been a resident of Valdez for 34 years, testified:

Under the Amended Final Plan ("2002 Plan") District 12-F included Valdez in a district with nearly all Richardson Highway communities and portions of FNSB. While portions of the Mat-Su Borough were included in District 12-F, the population from Mat-Su Borough communities constituted a far smaller percentage of the District. In particular, population from Wasilla and Palmer suburbs constituted a much smaller percentage of the district. The 2002 Plan also paired Valdez's house district with District 11-F, which was comprised entirely of FNSB citizens including those in North Pole. Under the 2002 Plan, Valdez generally received fair representation in both the house and senate because the districts included communities with which Valdez has close socioeconomic ties.

District 9-E in the 2013 Plan incorporates Valdez with at least some Richardson Highway communities including Glennallen, Delta Junction, Big Delta, Deltana, and Fort Greely. However, District 9-E increased the percentage of Mat-Su Borough citizens within the district including those from Wasilla and Palmer suburbs. Under the 2013 Plan, which pairs Valdez with the Houston/Big-Lake/Western Mat-Su house district to form a senate district, the citizens of Valdez have struggled to receive fair representation of their interests in the Alaska legislature.

To my knowledge Valdez's Senator has never visited Valdez or attended any City of Valdez Meetings, there has been no outreach from his office to my office, the City Council, or to the City Manager that I am aware of.<sup>491</sup>

**BRENA, BELL &  
WALKER, P.C.**  
810 N Street, Suite 100  
Anchorage, Alaska 99501  
Phone: (907) 258-2000  
Facsimile: (907) 258-2001

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<sup>491</sup> Pierce Aff. at 5-6, ¶¶ 17-18.



375. District 29 in the 2021 Final Plan orphans Valdez from all Richardson Highway and Prince William Sound communities, with which Valdez is socio-economically integrated, and replaces that population with residents of Wasilla and Palmer suburbs, with which Valdez is not socio-economically integrated.<sup>492</sup> District 29 ensures that Valdez will not receive fair representation in the House, and pairing District 29 with District 30 ensures that Valdez will not receive fair representation in the Senate either. The Final Plan disenfranchises Valdez from its neighboring communities, which share commonalities with regard to numerous interests. As a result, both Valdez and the residents of its neighboring communities are deprived of fair representation

376. According to Ms. Pierce, “[t]he chances of having a house representative or senator who actually provides representation that advances the interests of Valdez have gone from good under the 2002 Plan, to bad under the 2013 Plan, to much worse under the 2021 Final Plan.” Valdez has been incrementally isolated from the communities with which it has socio-economic ties. Population that was once derived from Richardson Highway communities and FNSB has been entirely replaced with population from Wasilla and Palmer suburbs.<sup>493</sup>

377. At trial witnesses from both the Mat-Su borough and Valdez provided persuasive testimony regarding the effect of District 29 diluting the vote of both communities. Regarding District 29, Mayor Scheidt testified:

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<sup>492</sup> *Id.* at 6.

<sup>493</sup> Pierce Aff. at 6, ¶ 20.

I believe that will significantly dilute Valdez votes. I believe with the -- the way the district is set up right now, the suburbs of Palmer and Wasilla would be over 75 percent, I believe I was told last night, 76.5 percent of the vote would come from that area. And I don't believe we share a socioeconomic issues or concerns. We just don't have things in common. So I feel that the decisions that are made and the elections that take place will be ultimately primarily decided by representatives from the Mat-Su Borough who don't share concerns or common interests with Valdez and are not even likely aware of many of our issues.<sup>494</sup>

Mayor Scheidt also testified that she had never worked with the state delegation on any projects in conjunction with the Mat-Su government.<sup>495</sup>

378. When asked why the differences between Valdez's current district and District 29 mattered, Mr. Duval testified:

So, again, as -- as it relates to dilution or effective representation, having a bulk of people in the Mat-Su suburbs is not the same as having people with -- I believe have common interests in the Glennallen and Copper Center and Delta pipeline communities, especially as it relates to that specific area. So there is a common interest with those communities that have -- again, more numbers equals more percentage of voice and vote. And if you completely exclude those people who I think we have common interests with, and you add people who have a competing interest, as it is in 29, I think there is a drastic difference.<sup>496</sup>

379. Ms. Pierce provided similarly convincing testimony regarding the impact of District 29 on fair representation for Valdez.<sup>497</sup>

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<sup>494</sup> Trial Tr. 251:18 – 252:6.

<sup>495</sup> Trial Tr. 251:7-10.

<sup>496</sup> Trial Tr. 499:20 – 500: 12.

<sup>497</sup> Trial Tr. 1242:10 – 1245:9.

380. Mr. Duval and Ms. Pierce also provided persuasive testimony regarding the competing interests of Valdez and the Mat-Su Borough.<sup>498</sup> Valdez and the Mat-Su have opposing interests with regard to numerous major issues that are of great importance to their respective communities. Accordingly, districting the Mat-Su Borough and Valdez exclusively together dilutes the vote of both communities and substantially undermines the ability of these communities to obtain fair representation. As Ms. Pierce explained, districting Valdez exclusively with the Mat-Su Borough deprives Valdez of the cumulative voice it would otherwise have if paired with Richardson Highway communities or Prince William Sound communities.<sup>499</sup>

381. The record establishes that District 29 will result in the dilution of Valdez’s vote by virtue of the extent to which it is paired with the Mat-Su Borough, which has significant competing interests with Valdez. As District 29 is configured, it is highly unlikely that citizens of Valdez will have any significant influence on the election of their representative or have fair representation in the Alaska legislature. To the contrary, the representative for District 29 will be obliged to advance the interests of the Mat-Su Borough over the interests of Valdez.

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<sup>498</sup> Trial Tr. 498: 1-12; Trial Tr. 553:4 – 554:18.

<sup>499</sup> Trial Tr. 1243:19 – 1244:3 (“So we -- we are -- basically, we're left out. And we have no affiliation with the Prince William Sound communities, which we have socioeconomic ties with, we have no cumulative voice with other communities that are along the Richardson Highway, that we live and work and play with, and have similar interests. So we -- we -- basically, we're orphaned. We are -- we're just basically an island unto ourselves with no voice.”).

382. Depriving Valdez of fair and effective representation is not some amorphous or speculative concept. It is a reality. Fair representation, including the right to group effectiveness and an equally powerful vote, is required under Alaska law. Placing Valdez in a district that is utterly dominated by citizens residing in Palmer and Wasilla suburbs, while also segregating Valdez from nearly all populated areas along the transportation corridor that connects the population centers unquestionably will deprive citizens of Valdez of fair and effective representation in the legislature. District 29's house representative will undoubtedly be determined by the 76.5 percent of the District 29 population residing in the Palmer and Wasilla area. Valdez has entirely distinct interests from the citizens, who will control elections in District 29. Moreover, District 29 was drawn for the purposes of protecting the vote of Doyon and Ahtna village residents at the expense of providing Valdez any opportunity for fair representation. The Board's preferential treatment of Doyon and Ahtna villages over the citizens of Valdez is patently unconstitutional.<sup>500</sup> District 29 and its pairing with District 30 for the creation of a senate district improperly deprives Valdez citizens of any meaningful vote in the legislature.

## **XI. CONCLUSION**

383. The Final Plan's formulation of Districts 29 and 36 violates article VI, section 6 of the Alaska Constitution because those Districts are not socio-economically integrated when they easily could have been. District 36 also fails to satisfy the constitutional

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<sup>500</sup> *Carpenter*, 667 P.2d at 1220 (Alaska 1983) (defining gerrymandering as “dividing of an area into political units in an unnatural way with the purpose of bestowing advantages on some and thus disadvantaging others.”).

requirement of compactness. The Board failed to engage in reasoned decision-making and has provided insufficient evidence to support the Board decision to diminish the constitutional criteria of socio-economic integration and compactness in Districts 29 and 36.

384. The Court finds that the Board’s process was flawed in several regards. The Board failed to adequately prepare for the redistricting process and unnecessarily limited the amount of time the Board spent mapping together. Individual mapping exercises appear to have dominated the redistricting process. This facilitated the ability of individual Board members to advance their priorities to the detriment of the constitutional redistricting criteria set forth in article VI, section 6.

385. The Court finds that the Board improperly advanced policies unrelated to the constitutional redistricting criteria. These policies resulted in a Final Plan that fails to maximize compliance with the constitutional criteria of compactness and socio-economic integration. Further, the Board’s improper motivations in creating the Final Plan constrained the range of viable alternatives considered by the Board.

386. Specifically, the Board improperly prioritized creating a district that unified Doyon and Ahtna villages and protecting FNSB’s boundaries to the detriment of constitutional redistricting criteria.

387. The Board violated article VI, section 10 by adopting proposed plans outside of the 30-day period set forth in the constitution. This unduly limited the opportunity for public comment on the proposed plans and created confusion among the public. These procedural defects implicate due process as does the Board’s violation of the OMA.

**BRENA, BELL &  
WALKER, P.C.**  
810 N Street, Suite 100  
Anchorage, Alaska 99501  
Phone: (907) 258-2000  
Facsimile: (907) 258-2001

388. The record establishes that the Board repeatedly violated the OMA and reached consensus on critical redistricting decisions in executive session when such decisions must be the subject of public deliberation and decision-making. This alone is grounds for voiding the Final Plan.

389. The Board also inconsistently applied redistricting criteria in a manner that resulted in unfair treatment of some geographic areas for the benefit of other geographic areas. The constitutional redistricting criteria must be applied consistently in order to effectuate their underlying purpose of preventing gerrymandering and ensuring that voters are not denied their right to an equally powerful vote.

390. The Board improperly foreclosed consideration of viable redistricting alternatives that otherwise could have been considered based upon a misunderstanding or misapplication of Alaska law regarding the proportionality doctrine and the use of ANCSA regional corporation boundaries in the redistricting process.

391. The Board's practice of prioritizing policies unrelated to the constitutional redistricting criteria, making critical redistricting decisions in executive session or otherwise outside of the public eye, inconsistently applying redistricting criteria, and misapplication of Alaska law violated article I, Section 7 of the constitution by depriving interested parties of due process.

392. The result of the Board's improper motivations and flawed process in a Final Plan that not only fails to satisfy article VI, section 6 but also violates article I, section 1, which ensures equal and fair representation among geographical areas. By failing to satisfy the socio-economic integration requirement in Districts 29 and 36, the Board created

districts that unnecessarily dilute the vote of communities included in those districts including the City of Valdez.

393. The Board was presented with redistricting alternatives that better satisfy the constitutional redistricting criteria and easily could have created a Final Plan that complies with the Board's constitutional mandate. The Board's improper motivations and misapplication of Alaska law appears to have constrained the range of redistricting alternatives the Board considered.

394. The Court orders that the 2021 proclamation be remanded to the Board for reformulation consistent with this Order.

DATED this 9<sup>th</sup> day of February, 2022.

BRENA, BELL & WALKER, P.C.  
Attorneys for the City of Valdez and Mark Detter

By //S// Jake W. Staser  
Robin O. Brena, ABA No. 8511130  
Jake W. Staser, ABA No. 1111089  
Laura S. Gould, ABA No. 0310042  
Jon S. Wakeland, ABA No. 0911066

**BRENA, BELL &  
WALKER, P.C.**  
810 N Street, Suite 100  
Anchorage, Alaska 99501  
Phone: (907) 258-2000  
Facsimile: (907) 258-2001

**Certificate of Service**

The undersigned hereby certifies that a copy of the foregoing document was e-mailed to the following attorneys/parties of record on February 9, 2022.

**Attorneys for Alaska Redistricting Board**

Matt Singer, Esq.  
Lee Baxter, Esq.  
Schwabe, Williamson & Wyatt  
E-Mail: [msinger@schwabe.com](mailto:msinger@schwabe.com)  
[lbaxter@schwabe.com](mailto:lbaxter@schwabe.com)

**Attorneys for Matanuska-Susitna Borough and Michael Brown**

Stacey C. Stone, Esq.  
Gregory Stein, Esq.  
Holmes Weddle & Barcott, P.C.  
Email: [sstone@hwb-law.com](mailto:sstone@hwb-law.com)  
[gstein@hwb-law.com](mailto:gstein@hwb-law.com)

**Attorneys for Felisa Wilson, George Martinez, and Yarrow Silvers**

Holly C. Wells, Esq.  
Mara E. Michaletz, Esq.  
William D. Falsey, Esq.  
Zoe A. Danner, Esq.  
Birch Horton Bittner & Cherot  
Email: [hwells@bhb.com](mailto:hwells@bhb.com)  
[mmichaletz@bhb.com](mailto:mmichaletz@bhb.com)  
[wfalsey@bhb.com](mailto:wfalsey@bhb.com)  
[zdanner@bhb.com](mailto:zdanner@bhb.com)

**Attorneys for Calista Corporation, William Naneng, and Harley Sundown**

Eva R. Gardner, Esq.  
Michael S. Schechter, Esq.  
Benjamin J. Farkash, Esq.  
Ashburn & Mason, P.C.  
Email: [eva@anchorlaw.com](mailto:eva@anchorlaw.com)  
[mike@anchorlaw.com](mailto:mike@anchorlaw.com)  
[ben@anchorlaw.com](mailto:ben@anchorlaw.com)

**Attorneys for Intervenor Doyon Limited et al.**

Nathaniel Amdur-Clark, Esq.  
Whitney A. Leonard, Esq.  
Sonosky, Chambers, Sachse, Miller & Monkman, LLP  
Email: [nathaniel@sonosky.net](mailto:nathaniel@sonosky.net)  
[whitney@sonosky.net](mailto:whitney@sonosky.net)

**Attorney for the State of Alaska**

Thomas. S. Flynn, Esq.  
State of Alaska Department of Law  
Email: [thomas.flynn@alaska.gov](mailto:thomas.flynn@alaska.gov)

**Attorneys for Witness Vicki Otte**

Michael Grisham, Esq.  
Dorsey & Whitney, LLP  
Email: [grisham.michael@dorsey.com](mailto:grisham.michael@dorsey.com)  
[smith.holly@dorsey.com](mailto:smith.holly@dorsey.com)

By  //s// Mary G. Hodsdon  
Mary G. Hodsdon

BRENA, BELL & WALKER, P.C.  
810 N Street, Suite 100  
Anchorage, Alaska 99501  
Phone: (907) 258-2000  
Facsimile: (907) 258-2001