

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-21-08869CI

EAST ANCHORAGE PLAINTIFFS' PROPOSED FINDINGS OF FACT

I. RELEVANT BACKGROUND

1. The Alaska Redistricting Board (“Board”) members were appointed in late July, 2020.¹

2. Republican Governor Michael Dunleavy appointed Budd Simpson (“Simpson”) and Bethany Marcum (“Marcum”), both registered Republicans, on July 29, 2020.²

3. Marcum is a resident of Anchorage and Simpson is a resident of Juneau.³

4. Former Senate President Cathy Giesel appointed John Binkley (“Binkley”) on July 29, 2020.⁴

¹ Board 2021 Process Report, p. 1, ARB000005.

² Board 2021 Process Report, p. 1, ARB000005; Deposition of Budd Simpson (“Simpson Depo.”) at 209:5-16; Deposition of Bethany Marcum (“Marcum Depo.”) at 179:9-15.

³ Board 2021 Process Report, p. 1, ARB000005.

⁴ Board 2021 Process Report, p. 1, ARB000005.

5. Binkley is a registered Republican and has held office as a Republican in the past.⁵

6. The Democratic Speaker of the House of Representatives, Bryce Edgmon, appointed Nicole Borromeo (“Borromeo”) on July 30, 2020.⁶

7. Borromeo is a resident of Anchorage.⁷

8. Former Alaska Supreme Court Chief Justice Joel Bolger appointed Melanie Bahnke (“Bahnke”) on August 7, 2020.⁸

9. In December, 2020, the Board retained Peter Torkelson (“Torkelson”) to serve as the Board’s Executive Director and TJ Presley (“Presley”) to serve as its Deputy Executive Director.⁹

10. The State of Alaska Department of Labor agreed to provide “technical expertise” of the State Demographer, Eric Sandberg (“Sandberg”), who had assisted the Board in 2011 through 2013.¹⁰

11. On January 21, 2021, Torkelson sent an email to Binkley and Presley noting that through the archive review, they found the 2010 full formal request for proposal to retain Dr. Lisa Hanley. Torkelson noted that “much like the legal counsel choice, it strikes me that personality and difficult-to-quantify measures of experience or approach would

⁵ Board 2021 Process Report, p. 1, ARB000005; Deposition of John Binkley (“Binkley Depo.”) at 24:18-25:2.

⁶ Board 2021 Process Report, p. 1, ARB000005.

⁷ Board 2021 Process Report, p. 1, ARB000005.

⁸ Board 2021 Process Report, p. 1, ARB000005.

⁹ Board 2021 Process Report, p. 1, ARB000005.

¹⁰ Board 2021 Process Report, p. 1, ARB000005.

bear most heavily on the Board's selection of an expert in the VRA arena. Because of these non-tangible factors, and[sic] RFI might make the most sense."¹¹

12. In the January 21, 2021 email correspondence from Torkelson to Binkley and Presley, Torkelson recommended the use of a Request for Information instead of a Request for Proposals in part because "if a computer generated 1 million plans, 95% of them would be more 'balanced' using whatever hot button point the plaintiff was trying to make: partisan divide, racial divide, etc."¹²

13. In the January 21, 2021 email from Torkelson to Binkley and Presley, Torkelson advocated for a "VRA+ Ensemble expert." According to Torkelson, "this person would not only run the traditional VRA analysis, but could also develop and run an ensemble analysis of the Board's plan. This is a natural fit because the VRA person must have racial and partisan voting data to build their VRA analysis in the first place. The consultant would then be able to defend against an ensemble challenge during the litigation phase. In this way the consultant will have seen all the forbidden fruit data so that we aren't blindsided in a court room, and be prepared to defend out[sic] plan against a hostile ensemble style attack."¹³

14. On March 12, 2021, the Board retained Matt Singer and Lee Baxter of the Schwabe Williamson & Wyatt to "advise and represent the Board in legal matters."¹⁴

¹¹ January 21, 2021 email correspondence from Torkelson to Binkley and Presley, ARB00111034; Ex. 6011, p. 1.

¹² January 21, 2021 email correspondence from Torkelson to Binkley and Presley, ARB00111035; Ex. 6011, p. 2.

¹³ January 21, 2021 email correspondence from Torkelson to Binkley and Presley, ARB00111035; Ex. 6011, p. 2.

¹⁴ Board 2021 Process Report, p. 2, ARB000006.

15. On March 2, 2021, Torkelson sent an email to Legislative Affairs Agency attorney Emily Nauman (“Nauman”) asking her if the Board’s interviewing of law firms privately rather than in public was appropriate. In response, Nauman asked Torkelson if the Board “decide it was covered by the general open meetings act (AS 44.62.310). Torkelson replied “Yes. We adopted the standard SOA open meetings law that applies to all boards and commissions.”¹⁵ The Board did not alter its process regarding request for proposals for legal services despite its adoption of the Open Meetings Act.

16. On April 19, 2021, the Board issued a Request for Information for a Voting Rights Act (“VRA”) Consultant and on June 21, 2021 the Board executed a contract with Bruce Adelson and Dr. Jonathan Katz of Federal Compliance Consulting, LLC.¹⁶

II. THE WORK OF THE BOARD

17. On August 12, 2021, the U.S. Census Bureau released the results of the 2020 US Census regarding Alaska’s population. The release of the U.S. Census Bureau’s results obligated the Board to adopt a proposed plan(s) within 30 days of the August 12, 2021 release date.¹⁷

18. On September 9, 2021, the Board adopted “Board Composite v.1” and “Board Composite v.2” proposed redistricting plans, neither of which contained proposed senate pairings.¹⁸

¹⁵ March 2, 2021 email correspondence between Torkelson and Neuman, ARB00130626, Ex. 6010.

¹⁶ Board 2021 Process Report, p. 2, ARB000006.

¹⁷ Board 2021 Proclamation of Redistricting, p. 1, ARB000002.

¹⁸ ARB10708-ARB10765 (Board Composite v.1); ARB 10766-ARB10821 (Board Composite v.2).

19. September 11, 2021, marked the end of the 30-day period within which the Board was required to adopt its proposed plans. The Board did not meet on September 10 or September 11. Thus, the only two plans developed and adopted with the 30-day period were Versions 1 and 2 (V.1 and V.2). Neither V.1 nor V.2 included proposed senate pairings. The Board did not meet again until September 17

20. On September 17, 2021, The Board met for a total of six hours and 12 minutes to review the draft maps.¹⁹ After hearing two hours of public testimony, the Board moved to replace V.1 and V.2 with Version 3 (V.3) and Version 4 (V.4).²⁰ Prior to this time, V.3 and V.4 had never been made available for public review or comment, and both maps differed substantially from the maps previously drawn by the Board.²¹ The Board then received presentations from five third-party groups that each offered a proposed redistricting plan, and the Board took public testimony related to those plans.²² Again, none of the Board's proposed plans included senate pairings, and members of the public were not able to testify about senate pairings.

21. On September 20, 2021, the Board met for a total of six hours and six minutes. This was the last meeting before the Board commenced the "road show" phase of its process. 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. The Board also

¹⁹ ARB000166 - ARB000174.

²⁰ Board 2021 Process Report, p. 3 (Nov. 20, 2021), ARB000007.

²¹ See ARB000618-000855 (Board Packet for Sept. 17-19, 2021 Board meetings, which did not contain 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).

²² ARB000170-000173.

adopted four of the five third-party plans. Those plans were from a coalition of Doyon, Tanana Chiefs Conference, Fairbanks Native Association, Sealaska, and Ahtna (the “Doyon Coalition”); Alaskans for Fair Redistricting (“AFFR”); Alaska for Fair and Equitable Redistricting (“AFFER”) and the Alaska Senate Minority Caucus (“Senate Minority”). The Board adopted and then rescinded the plan proposed by the Alaska Democratic Party, making it the only proffered third-party plan the Board did not adopt. It was at this meeting that the Board contends it adopted proposed senate pairings through the AFFER proposed plan; however, this was never announced to the public; members of the public were not permitted to testify about senate pairings; and the AFFER proposed plan does not resemble any proposal discussed by the Board during its senate pairing proceedings on November 8-10, 2021.

22. The Board also adopted four third-party redistricting plans, on September 20, 2021, which did include senate pairings. However, none of the senate pairings proposed in the third-party plans paired a house district containing North or South Muldoon, Government Hill or portions of Downtown Anchorage with Eagle River.²³

23. In its announcement regarding the adopted plans, the Board referenced only the map components of each plan — the announcement included a quotation from Member Nicole Borromeo, which stated “[w]e look forward to hearing feedback from Alaskans on our new draft maps, as well as the four adopted third-party maps, as we present them in public meetings in communities across the state.”²⁴ The announcement

²³ Third Party Proposed Plans, ARB001388-ARB001424.

²⁴ See ARB00063071 (“Alaska Redistricting Board Approves Proposed Redistricting Plans” press release).

was devoid of any mention of senate pairings, televising to the public that no proposed senate pairings had been adopted.

24. On that same day, the Board unanimously approved the purchase of items in the managed services proposal and permitted each Board member to work directly with JC Kestel, Procurement Officer of Legislative Affairs Agency, to obtain cell phone service.²⁵

25. During depositions, Board members confirmed they were offered a lap top computer, cellular telephone, and dedicated Board email account.²⁶ Several Board members also confirmed the use of their personal cell phones for Board work and that they produced text messages and emails from their personal accounts relevant to the Board's work.²⁷

26. After the road show was concluded, the Board reconvened in Anchorage to finalize its house district map. On November 2, 2021, the Board met for a total of six hours and 55 minutes.²⁸ Of that total time, the Board spent two hours and 23 minutes in executive session.²⁹ In addition, the Board spent two hours and 48 minutes in a mapping work session.³⁰

²⁵ September 10, 2021 Board Meeting Minutes; ARB000119 – ARB000120.

²⁶ Deposition of Nicole Borrromeo (“Borrromeo Depo.”) at 160:12-25; Deposition of Melanie Bahnke (“Bahnke Depo.”) at 152:14-23, 153:18.

²⁷ Borrromeo Depo. at 160:12-25; Bahnke Depo. at 152:18-155:9, Marcum Depo. at 104:25-105:11.

²⁸ ARB000193; ARB000199.

²⁹ ARB000196.

³⁰ ARB000199.

27. On November 3, 2021, the Board met for a total of seven hours, most of which took the form of a mapping work session.³¹

28. On November 4, 2021, the Board met for a total of seven hours, most of which took the form of a mapping work session.³²

29. On November 5, 2021, the Board met for a total of 10 hours and nine minutes.³³ During that time, the Board met in executive session twice. The first executive session lasted one hour and 35 minutes.³⁴ This was followed by a mapping work session that lasted one hour and 46 minutes.³⁵ Following public testimony, the second executive session lasted 55 minutes.³⁶ The Board thus met in executive session for a total of two and one-half hours. The Board adopted V.4, as well as a redistricting map labeled “Board Consensus v.7” that was labeled the “Final Map” as the “final redistricting map with the allowance that staff may make minor changes to facilitate metes and bounds, and will return a report with recommended changes to the board for review prior to final proclamation adoption.”³⁷

30. On November 8, 2021, having finalized its house district map, the Board reconvened to begin its work regarding senate districts. That day, the Board met for a total of nine hours and 25 minutes, during which time it took two hours of public testimony

31 ARB000200.

32 ARB000200.

33 ARB00201; ARB000209.

34 ARB000202.

35 ARB000202.

36 ARB000208.

37 ARB000208.

regarding senate pairings. This was the only public testimony that was ever taken regarding senate pairings. After taking this testimony, the Board entered executive session “for legal and other purposes related to receiving legal counsel for the Board.”³⁸ The Board remained in executive session for one hour, and then took a lunch break. After lunch, the Board entered a senate pairings work session at 1:21 p.m., which lasted until 5:00 p.m.³⁹

31. In review of a video recording of the work session, Marcum and Simpson can be seen and heard consulting and discussing an unredacted chart received from Randy Ruedrich (“Ruedrich”) providing incumbent information for house districts statewide.⁴⁰

32. After the work session, Marcum moved for the Board to enter executive session “for legal advice with regard to the proposed Senate pairings” — though no senate pairings had been proposed at that time. That executive session lasted until the Board recessed at 6:25 p.m.⁴¹

33. On November 9, 2021, the Board reconvened at 9:00 a.m. in executive session. The Board exited executive session at 10:30 a.m.⁴² Marcum moved to accept the following Senate pairings for Anchorage: Districts 9 and 10, Districts 11 and 12,

³⁸ ARB000208.

³⁹ ARB000208.

⁴⁰ Marcum Depo. at 206:21-218:25 (identifying Ex. 6005 as a chart received from Randy Ruedrich containing incumbent information and stating that she pulled up on her computer “the version that [she] had, which was the unredacted version” to show Simpson); video recording of November 8, 2021 Board Meeting at 2:52:00-2:55:30.

⁴¹ ARB000208.

⁴² ARB000215.

Districts 13 and 14, Districts 15 and 16, Districts 19 and 20, Districts 17 and 23, Districts 18 and 24, and Districts 21 and 22.⁴³ Simpson seconded the motion. Bahnke opposed the motion and requested a roll call vote. The motion passed 3-to-2, with Binkley, Marcum, and Simpson in favor, and Bahnke and Borromeo against.⁴⁴

34. Borromeo moved to reconsider the vote, with Bahnke seconding the motion. Borromeo expressed strong opposition against pairing East Anchorage district with the Eagle River districts, noting that “it opens the Board up to an unfortunate and very easily winnable argument [of] partisan gerrymandering.”⁴⁵ Borromeo noted that Marcum stated the previous day that this pairing “gives Eagle River the opportunity to ... have more representation, so they’re certainly not going to be disenfranchised by the process,”⁴⁶ and stated that the pairing “defies logic” and is contrary to “the sound, sound legal advice [the Board] got from counsel in executive session.”⁴⁷

35. However, before Borromeo had finished speaking, Binkley and Marcum called the question — a violation of Robert’s Rules of Order, by which the members of the Board had previously agreed to abide.⁴⁸ The motion to reconsider the vote on adoption of the Anchorage senate pairings failed, with only Bahnke and Borromeo in favor of reconsideration.⁴⁹

43 ARB000215.

44 ARB000215.

45 ARB007040.

46 ARB007041.

47 ARB007041.

48 ARB007043; Binkley Depo. at 198:25-199:9.

49 ARB000215.

36. After a lunch break, the Board then met to consider the senate truncation cutoff. Borrromeo moved that any legislator with a percentage of voter change 16.3 percent and below is not up for truncation; the motion passed unanimously.⁵⁰

37. Then, the Board pivoted to consider whether it should set the terms of the senate election cycles. Bahnke suggested that, to avoid the appearance of partisanship or knowledge as to which seats would be truncated, the Board should flip a coin to make the decision. In contrast, Binkley suggested that there should be some rationale for the decision, and proposed alternating between the 2024 and 2022 cycles beginning with Senate District T. Simpson and Marcum supported Binkley's proposal, with Marcum specifically noting that the Board had not been presented with any incumbent information.⁵¹ A vote was held, and Binkley's method passed. Borrromeo then moved to determine the sequencing for truncations beginning with Senate District A going in the 2024 cycle, but the majority board members voted against this motion.⁵² Marcum then moved to alternate by numerical order with District A going in the 2022 cycle, and the motion passed. It appears that the majority board members had a preference for this configuration, despite their purported neutrality and ignorance of incumbents.⁵³ After this decision, the Board entered a recess at 4:30 p.m. The Board did not take any public testimony on November 9, 2021.

⁵⁰ ARB000217.

⁵¹ ARB000217.

⁵² ARB000217.

⁵³ ARB000217.

38. On November 10, 2021, the Board adopted a Final Proclamation of Redistricting, including senate pairings. This is the Board's Final Plan.⁵⁴

39. Borromeo and Bahnke initially refused to sign the Proclamation as a direct result of the arbitrary East Anchorage/Eagle River pairings and the dilution that these pairings may cause, specifically, in House District 21-South Muldoon.⁵⁵ Ultimately, they signed the Proclamation, noting their dissent.⁵⁶ Both Members' closing statements are contained in the Board's minutes in their entirety at ARB000219-ARB000221.

III. INTENTIONAL VIOLATION OF BOARD-ACCEPTED PARLIAMENTARY RULES OF ORDER

40. During his deposition, Binkley stated that, although the Board did not officially adopt any formal conduct, ethics, or decorum rules, all members agreed early on in the procedure that they would comply with Robert's Rules of Order during their public meetings.⁵⁷

41. Yet, at the November 9, 2021 Board meeting, the Board violated Robert's Rules, through its Chair, when Binkley shut down debate regarding senate pairings without a 2/3 vote as required by Article VII, section 44 of Robert's Rules.⁵⁸

⁵⁴ Board 2021 Proclamation of Redistricting, ARB000002-000115.

⁵⁵ November 10, 2021 Board Meeting Minutes, ARB000219.

⁵⁶ Board 2021 Proclamation of Redistricting, ARB000003.

⁵⁷ Binkley Depo. at 198:25-199:9.

⁵⁸ November 9, 2021 Board Meeting Tr., p. 11, ARB007043; Article VII, section 44 of Robert's Rules of Order.

42. Although Bahnke and Borrromeo vehemently objected to the majority members' attempt to call the question while debate was ongoing, the other Board members steadfastly refused to continue debate.⁵⁹

43. Bahnke remarked in her closing comments on November 10, 2021 that "the Board took action to end discussion and debate [November 9, 2021], which I think procedurally and technically, was contrary to Robert's Rules of Order." While Bahnke recognized she was not an expert on Robert's Rules, she did not "think that [the Robert's Rules violation] was unintentional, because as a former legislator, [Binkley was] very well versed in Robert's Rules of Order."⁶⁰

IV. OPEN MEETINGS ACT

44. The Board's use of executive sessions violated the Open Meetings Act and led to violations of the due process clause of the Alaska Constitution.

45. September 7, 2021, the Board entered executive session at 11:18 a.m. with a motion to enter executive session for the purposes of receiving legal advice under AS 44.62.310(c)(4) for matters involving consideration of government records that are not subject to public disclosure. The executive session lasted approximately one hour and 48 minutes.⁶¹

46. November 2, 2021, the Board entered executive session at 10:48 a.m. with a motion to enter executive session under AS 44.62.310(c)(3) and AS 44.62.310(c)(4) respectively involving matters which by law, municipal charter or ordinance are required

⁵⁹ November 9, 2021 Board Meeting Tr., p. 11, ARB007043 - ARB007044.

⁶⁰ November 10, 2021 Board Meeting Tr., p.21, lines 6-25, ARB007192.

⁶¹ September 7, 2021 Minutes at ARB000160 - ARB000161.

to be confidential and matters involving consideration of government records that by law are not subject to public disclosure. The executive session lasted approximately two hours and 23 minutes.⁶²

47. November 5, 2021, the Board entered executive session at 9:05 a.m. with a motion to enter executive session for the purpose of receiving legal advice under AS 44.62.310(c)(3) and AS 44.62.310(c)(4) respectively involving matters which by law, municipal charter, or ordinance are required to be confidential and matters involving consideration of government records that by law are not subject to public disclosure. The executive session lasted approximately one hour and 35 minutes.⁶³

48. November 5, 2021, the Board entered executive session at 4:05 p.m. with a motion to enter executive session for the purpose of receiving legal advice under AS 44.62.310(c)(3) and AS 44.62.310(c)(4) respectively involving matters which by law, municipal charter, or ordinance are required to be confidential and matters involving consideration of government records that by law are not subject to public disclosure. The executive session lasted approximately 55 minutes.⁶⁴

49. November 8, 2021, the Board entered executive session at 11:00 a.m., with a motion enter executive session for legal and other purposes related to receiving legal counsel for the board. The executive session lasted approximately one hour.⁶⁵

50. November 8, 2021, the Board entered executive session at 5:01 p.m. with a motion for the Board to enter executive session for legal advice with regard to the

⁶² November 2, 2021 Minutes at ARB000196.

⁶³ November 5, 2021 Minutes at ARB000201 - ARB000202.

⁶⁴ November 5, 2021 Minutes at ARB000208.

⁶⁵ November 8, 2021 Minutes at ARB000213.

proposed senate pairings. The executive session lasted approximately one hour and 24 minutes.⁶⁶

51. November 9, 2021 meeting began with an extended executive session from the day before, resulting in an “overnight executive session” which is not permitted under the OMA.⁶⁷ The executive session that morning lasted approximately one hour and 30 minutes.⁶⁸

V. ARTICLE VI, SECTION 10 OF THE ALASKA CONSTITUTION

52. Art. VI § 10 of the Alaska Constitution provides that the “[B]oard shall hold public hearings on the proposed plan, or, if no single proposed plan is agreed on, on all plans proposed by the [B]oard.”

53. While the Board plan complied with this provision with regard to the house districts, no proposed plan including the East Anchorage/Eagle River Pairings was properly and timely presented to the public before its adoption, which resulted in a violation of this constitutional provision.

54. Instead, the Board exited executive session on November 9, 2021 and, without discussion adopted new pairings proposed by Marcum that changed every one of the pairings in Marcum’s previous proposal but three. In other words, five of the eight Anchorage pairings were changed without public input, notice or discussion.⁶⁹

⁶⁶ November 8, 2021 Minutes at ARB000214 - ARB000215.

⁶⁷ See *Dunsmore Aff.*, ¶ 20; November 8, 2021 Tr. pp. 217 – 218 at ARB006713 - ARB006714; November 9, 2022 Tr. p. 2 at ARB007034.

⁶⁸ November 9, 2021 Minutes at ARB000215.

⁶⁹ November 9, 2021 Tr., pp. 2-4, at ARB007034 – ARB007036.

55. The failure to comply with this constitutional mandate precluded the public from effectively and meaningfully informing or challenging the Board’s proposed pairings before they were adopted and the Board from curing the violations of procedural and process requirements that occurred during the meetings and work sessions held by the Board on senate pairings.

56. Because no plan adopted or considered by the Board during its public hearing process paired Eagle River with either North or South Muldoon, the Board violated the procedural requirements of Art. VI, § 10 of the Alaska Constitution.

57. The Board failed to hold public hearings on the proposed senate pairings.⁷⁰

58. When the Board adopted six proposed redistricting plans on September 20, 2021, the Board issued an announcement presenting the plans it adopted to the general public.⁷¹

59. The announcement included a statement by Borromeo that “[w]e look forward to hearing feedback from Alaskans on our new draft maps, as well as the four adopted third-party draft maps, as we present them in public meetings in communities across the state.”⁷²

60. The announcement was devoid of any mention of proposed senate pairings, emphasizing instead that the Board was only adopting proposed maps for house districts.

⁷⁰ See *generally* September 9, 2021, at ARB009985 - ARB009988; ARB010013 and September 20, 2021 Board Meeting Tr. at ARB010143 - ARB010411 (Board does not present any senate pairings).

⁷¹ See ARB00063071 (“Alaska Redistricting Board Approves Proposed Redistricting Plans” press release).

⁷² See ARB00063071 (“Alaska Redistricting Board Approves Proposed Redistricting Plans” press release).

Consistent with this focus on house district maps, the announcement stated that ‘detailed maps will be posted on the Alaska Redistricting Board’s website at <https://www.akredistrict.org/map-gallery> when they are available.’ (emphasis added).⁷³

61. The Senate Minority Caucus Map Comments noted that “[t]he Board’s maps did not offer Senate Districts while preparing our map, nor can Senate Districts be assumed by reviewing the sequential numbers on the Board maps as some are not contiguous. This has impaired our Caucus’ ability to comment on those maps in regard to Senate Districts.”⁷⁴

62. Steve Colligan responded to an email from Board Staff member Juli Lucky that “Senate Pairing are part of the future process after drawing District boundaries, except for the 2 Fairbanks districts which were determined in court during the last redistricting process.” He replied that “AFFER may have some inferred pairings in our plan submittal but through public testimony there may be better solutions.”⁷⁵

63. On September 17, 2021, Lea Filippi, an Anchorage resident, encouraged the Board to disclose its senate pairings.⁷⁶

64. On September 18, 2021, Katherine Tompkins, another Anchorage resident, submitted testimony urging the Board to propose senate pairings, stating “[t] he most important point I want to make is I believe the Senate districts need to be proposed and

⁷³ See ARB00063071 (“Alaska Redistricting Board Approves Proposed Redistricting Plans” press release).

⁷⁴ Senate Minority Caucus Map Comments, ARB003695.

⁷⁵ Email correspondence between Steve Colligan and Board Staff Member Juli Lucky, ARB00059806 - ARB00059809; Ex. 6012.

⁷⁶ Filippi Written Testimony, September 17, 2021, ARB0002357.

included for public comment. Without noting Senate districts for public comment, it prevents individuals from commenting on one half of the Legislature.”⁷⁷

65. As Plaintiff Yarrow Silvers (“Silvers”) remarked in her October 4, 2021 online public testimony, the Board did not publish any proposed senate pairings together with the proposed house district maps or provide the public with any meaningful opportunity to provide input as to senate pairings.⁷⁸

66. Silvers wrote “I have concerns that the board maps do not show senate pairings and I would like to request that the board allow public testimony on these pairings before adopting a map.”⁷⁹

67. In response to a question posed by a member of the public regarding the inclusion of senate pairings in the preliminary plans, Matt Singer responded that the constitution “indicates that the final plan shall include the senate districts” and therefore, “the board has some discretion or does not have clear guidance from the constitution” on whether to include the senate districts in the preliminary plans. Additionally, Singer noted that “Certainly you’re going to hear from the public, and that – and that public input may be helpful to the board as it thinks about Senate pairings.” Eric Sandberg recalled that in the last cycle, senate pairings were not made in the draft plans, but were made in the final plan. Binkley noted that it would be instructive to review the third-party plans that will be presented on September 17, 2021.”⁸⁰

⁷⁷ Tompkins Written Testimony, September 18, 2021, ARB003172.

⁷⁸ Silvers Written Testimony, October 4, 2021, ARB003890.

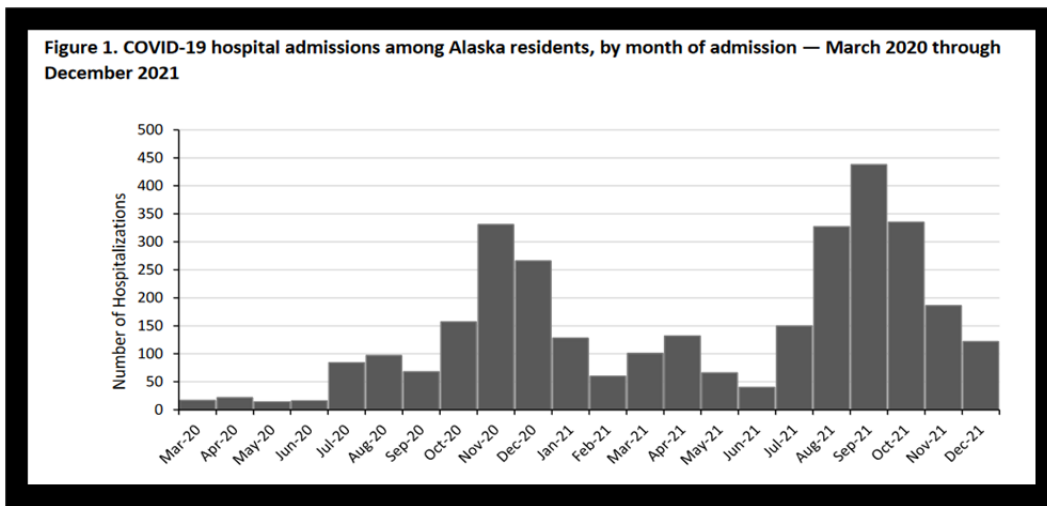
⁷⁹ Silvers Written Testimony, October 4, 2021, ARB003890.

⁸⁰ September 7-9, 2021 Board Meeting Tr., ARB009985 – ARB009988.

68. The Board argues that the Board proposed senate pairings on November 8, 2021 during the Board’s meeting but the Board, as an entity, never adopted preliminary senate pairings for consideration nor were such pairings presented for public hearing.⁸¹

VI. INSUFFICIENT PUBLIC HEARINGS UNDER ALASKA CONSTITUTIONAL PROVISIONS

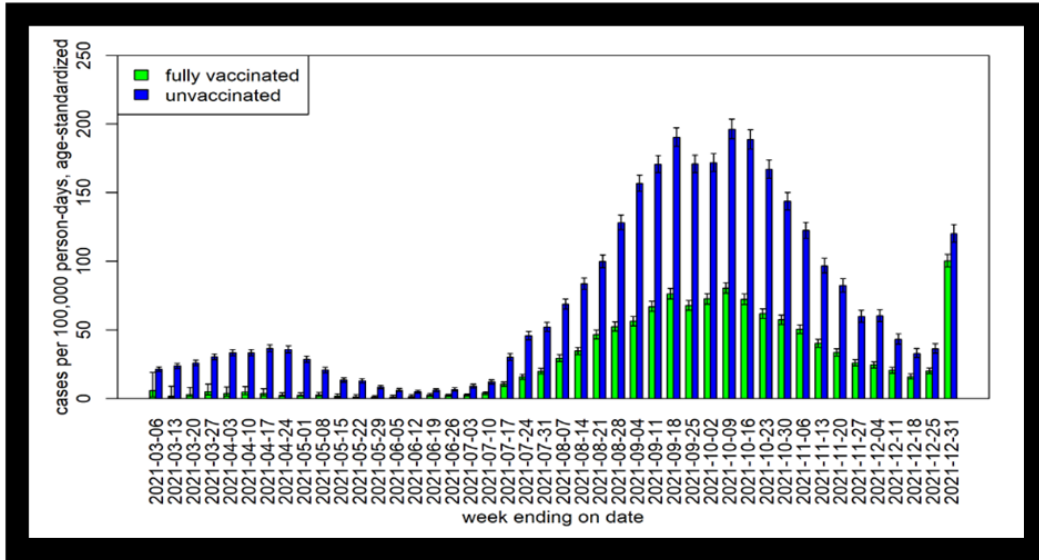
69. The state of Alaska was experiencing all-time highs for both infection rates and hospitalizations related to COVID-19 pandemic during the redistricting process.⁸²



Alaska Division of Public Health Covid-19 Update, December 2021, p. 1, Figure 1.

⁸¹ November 8, 2021 Board Meeting Tr., ARB006496 – ARB006748.

⁸² Alaska Division of Public Health Covid-19 Update, December 2021, Available at: https://dhss.alaska.gov/dph/Epi/id/siteassets/pages/HumanCoV/COVID_monthly_update.pdf



Alaska Division of Public Health Covid-19 Update, December 2021, p. 8, Figure 3.

70. Both state and local government entities across the state of Alaska adopted laws and policies permitting or requiring virtual hearings and meetings.⁸³

71. The Alaska Division of Elections was ordered by the Alaska Supreme Court to waive witness signature requirements on election ballots because requiring voters to secure such signatures may unnecessarily expose them to increased COVID-19 exposure or require them to violate local laws to secure a witness signature during community lockdowns.⁸⁴

72. On October 1, 2021, the Native American Rights Fund sent a letter to the Board encouraging it to hold hearings accessible to the public.⁸⁵

⁸³ State of Alaska Health Advisory No. 1, issued 2/14/2021; <https://covid19.alaska.gov/wp-content/uploads/2021/02/02.14.21-Health-Advisory-1-Recommendations.pdf>; Fairbanks North Star Borough Assembly Adopted Memorandum Approved May 6, 2021 with an Effective Date of November 10, 2021.

⁸⁴ See *State v. Arctic Village*, 495 P.3d 313 (2021).

⁸⁵ ARB002363 - ARB002366.

73. On October 26, 2021, the Alaska Democratic Party sent a letter to the Board encouraging it to hold virtual hearings accessible to the public.⁸⁶

74. Despite the pandemic, the Board continued to conduct in-person meetings throughout the State with intermittent teleconferences to take statewide public comments.⁸⁷

75. On September 7, 8, and 9, 2021, the Board met in a “webcast and teleconferenced series of meetings” in Anchorage, which allowed the public to watch and to call in to testify.⁸⁸

76. On October 1 and 15, 2021, the Board presented one hour “Meet the Maps” statewide zoom webinars during which Board staff walked through the proposed plans and “demonstrated interactive map tools, hi-res PDF download options and public comment submission pages.”⁸⁹

77. Unlike the public virtual meetings held by other State of Alaska entities, the Board purchased and used an “Owl Video System.” This system reportedly picked up the audio of the speaker and then focused the main camera on the speaker. The system then displayed essentially a spliced reel of videos of other areas of the meeting room with the conversations in each of those locations interspersed with the main audio.⁹⁰

⁸⁶ ARB001798 - ARB001800.

⁸⁷ Board 2021 Process Report, ARB000008 - ARB000009.

⁸⁸ Board 2021 Process Report, ARB000007.

⁸⁹ Board 2021 Process Report, ARB000008 - ARB000009.

⁹⁰ Board 2021 Process Report, ARB000010; see *also* Torkelson Aff., ¶¶ 47-49; Marcum Depo. at 220:11-221:22 (comments by Board attorney Matthew Singer conceding the Owl video recording produced a “confusing image.”).

78. The Owl System resulted in virtual hearings with substantial portions of the video inaudible and the images on the video obscured by the constant movement of the cameras and the lack of focus on Board members.⁹¹

79. At least one Board member recognized during their deposition testimony that they could not hear or clearly identify what they were seeing when observing the official hearing videos included in the record.⁹² Additionally, a member of the public who attended the meetings – Randy Ruedrich – was unable to hear anything said on the video record when it was later played to him.⁹³

80. On March 2, 2021, Torkelson confirmed to Legislative Affairs Agency attorney Nauman that “We adopted the standard SOA open meetings law that applies to all boards and commissions.”⁹⁴ This position was confirmed during her deposition by Marcum, who testified the Board was “always” under the Open Meeting Act.⁹⁵

81. Borromeo noted in September 2021 that “there have been allowances and disallowances on the time given for public testimony and the amount of time given to public members has not consistently been adhered to.”⁹⁶

⁹¹ See App. A, Affidavit of Jeanette Starr, dated January 10, 2022, filed with the Court on January 12, 2022 as Exhibit A to East Anchorage Plaintiffs’ Response to Board’s Objections to Pre-Filed Direct Testimony (noting that despite her best efforts, Ms. Starr, owner of Pacific Rim Reporting, was unable to transcribe portions of the ARB meeting work session which was played at the deposition of Bethany Marcum).

⁹² Marcum Depo., p. 213: p. 217:10-14.

⁹³ Ruedrich Depo. at p. 40:18-41:9.

⁹⁴ March 2, 2021 email correspondence between Torkelson and Neuman, ARB00130626, Ex. 6010.

⁹⁵ Marcum Depo., p. 213:20-214:10.

⁹⁶ September 7-9, 2021 Board Meeting Minutes, ARB000163.

82. Borromeo noted in September 2021 that “unilateral decisions have been made on allowing work sessions individually and with other board members.”⁹⁷

83. Borromeo noted in September 2021 that “map drawing should be the board’s responsibility; staff should not be doing this as the lines in the map must be defended by the board.”⁹⁸

84. Borromeo noted in September 2021 that “there have been comments disparaging the joint work sessions as being tedious. The benefit of joint work sessions is for each board member to give input on where the lines should be drawn as every board member has different expertise and connections to various areas of the state.”⁹⁹

85. Borromeo noted in September 2021 that “some board members are not included and are not getting the benefit of the board’s counsel.” Borromeo proposed that “[i]f a meeting is held where staff and Mr. Singer are present, the full board should be given notice even if it is solely an administrative meeting.”¹⁰⁰

86. In September 2021, Borromeo requested “more consistent actions from the board” and Binkley agreed that it is the board’s responsibility to draw the map lines.¹⁰¹

87. In early September 2021, Bahnke requested that “any [Board] deliberations must be on the record and that no side conversations between board members should

⁹⁷ September 7-9, 2021 Board Meeting Minutes, ARB000163.

⁹⁸ September 7-9, 2021 Board Meeting Minutes, ARB000163.

⁹⁹ September 7-9, 2021 Board Meeting Minutes, ARB000163.

¹⁰⁰ September 7-9, 2021 Board Meeting Minutes, ARB000163.

¹⁰¹ September 7-9, 2021 Board Meeting Minutes, ARB000163.

take place that consist of map drawing and could impact the outcome of the overall map.”¹⁰²

VII. PUBLIC TESTIMONY

88. Applicant and Joint Base Elmendorf-Richardson (JBER) resident Major (ret.) Felicia Wilson first testified before the Board regarding the JBER community, stating that JBER is not monolithic and that JBER residents tend to do community service around the gates they live near. Major Wilson encouraged the board to reapportion JBER around the gates by which they are located.¹⁰³

89. As early as September 7-9, 2021, Anchorage resident, Yarrow Silvers, voiced concerns about a version of a map presented by the board where part of East Anchorage was pushed into Eagle River while another part of East Anchorage was pushed into South Anchorage. East Anchorage includes some of the lowest income neighborhoods in Anchorage whereas South Anchorage has some of the highest, showing clear socio-economic factors which should preclude East Anchorage from being pushed into South Anchorage and Eagle River. Silvers reiterated her request to consider East Anchorage as a defined socio-economic part of Anchorage to give fair representation.¹⁰⁴

90. On September 17, 2021, Anchorage resident, Lynette Pham, noted that East Anchorage and Eagle River are two distinct communities and grouping these two communities together takes away from the voices of the two communities.¹⁰⁵

¹⁰² September 7-9, 2021 Board Meeting Minutes, ARB000163.

¹⁰³ August 24, 2021 Board Meeting Minutes, ARB000154.

¹⁰⁴ September 7-9, 2021 Board Meeting Minutes, ARB000168.

¹⁰⁵ September 17, 2021 Board Meeting Minutes, ARB000168.

91. On November 2-4, 2021, the Board “observed that Anchorage has neighborhoods that are increasingly diverse with non-white voters.” The minutes summarized the Board’s observations regarding this diversity, recognizing the “emerging trend” of increased diversity in Anchorage. According to the minutes, “[t]he distribution of population in Anchorage was reviewed. For example, in House District 19, 33.4% of voters identify as White, 9% identify as two or more races, 14.2% identify as Asian, 12.5% identify as Hispanic, 12.4% identify as Alaska Native or Indian, 9% identify as Black or African American, and 9% identify as Hawaiian or Pacific Islander, .4 or .5% identify as some other race. Therefore, there is a very diverse population of voters in this community and in several other neighborhoods particularly in Northeast Anchorage. Observing this, a Voting Rights Act analysis was done to determine if the ‘Gingles factors’ are met, which means that the minority coalition has a 50 percent or greater voting age population, is politically cohesive, and practices racial block voting. In conclusion, there was no statistical evidence to support that there is political cohesion among the diverse neighborhoods in Anchorage or that there is racial block voting.”¹⁰⁶

92. On November 5, 2021, Silvers, a Scenic Foothills Community Council member and representative, read a resolution that was passed by the Scenic Foothills Community Council: “Now therefore it be resolved that the Scenic Foothills Community Council recommends that the redistricting board bring the new state redistricting plan into closer alignment with local neighborhood boundaries, including East Anchorage, and not split off part of the socioeconomically distinct East Anchorage neighborhoods, including the Scenic Foothills Community Council neighborhood, Eagle River, or a South

¹⁰⁶ November 2-4, 2021 Board Meeting Minutes, ARB000197.

Anchorage district which are socioeconomically distinct from East Anchorage especially done in the current proposed Board Map v.3 around the Muldoon curve.” This resolution passed on November 4, 2021, with 18 votes in favor and 0 opposed. It was reported that although it was too late to make changes to the recently passed resolution the night before, the Council was shown the newly revised working maps and many Council members spoke strongly in favor of Board Map v.4 Best.¹⁰⁷

93. Silvers spoke in favor of Board Map v.4 Best, on the bases that it was more compact, respects socioeconomic boundaries, has acceptable deviations, considers public testimony, unlikely to violate the VRA, and preserves the voices of racially diverse communities in East Anchorage. Silvers expressed concerns about Board Map v.1 being analyzed for VRA violations in the last mapping work session but was still “on the table” this morning with changes being made to the map. Although the map was adjusted during the current date’s mapping work session, she stated that much of Anchorage was “still chopped up”, districts have been created that “look like snakes”, and natural socioeconomic boundaries are not respected. In particular, she observed that District 20 remains strangely divided with part of the district in a South Anchorage district, and characterized that option as “disingenuous” which “raises many questions.”¹⁰⁸

94. Major Wilson expressed concern about last minute changes being made to the maps about one hour prior to public testimony taking place and expressed that the integrity of Joint Base Elmendorf-Richardson (JBER) and the minority districts around

¹⁰⁷ November 5, 2021 Board Meeting Minutes, ARB000202.

¹⁰⁸ November 5, 2021 Board Meeting Minutes, ARB000202.

Muldoon, Northeast Anchorage, and Mountain View were best represented in Board Map v.4 Best.¹⁰⁹

95. Alaskans for Fair Redistricting (AFFR) representative, Joelle Hall, spoke in favor of Board Map v.4. Additionally, Hall suggested that a record be made on what did and did not work well in this process so that participants of the next redistricting cycle can benefit from the experiences of those who worked in this redistricting cycle.¹¹⁰

96. Northeast Community Council member and representative, Donna Mears, read the following statement: “Although my understanding is that community council boundaries are not necessarily a consideration for district boundaries, we believe they should be. Particularly in the case of Northeast Community Council where multiple map versions have and continue to split the north and eastern portions of our community, and Bartlett High School into an Eagle River district. My experience as a Northeast Community Council board member over the last couple years is that state and local representatives are very small portions of our council district rarely, if ever, show up. This is important. In Anchorage, the most consistent and accessible opportunity for constituents to interact with the representatives is at community council meetings; this is the place where our work is done both for representatives and the community. From our perspective, in Northeast Anchorage, community boundaries are more important than a slightly larger population deviation as it provides better access to our representatives. Again, Bartlett should be in a district with families it serves and Northeast Anchorage

¹⁰⁹ November 5, 2021 Board Meeting Minutes, ARB000202.

¹¹⁰ November 5, 2021 Board Meeting Minutes, ARB000202.

residents should be paired with their neighbors.” Mears stated that the Northeast Community Council met on October 21, 2021, and that while they did not have a statement on the most current maps, from Mears’ personal perspective, Board Map v.4 Best reflected the Northeast Community Council’s.¹¹¹

97. Anchorage Community Land Trust Executive Director, Kirk Rose, stated he participates in many activities in Mountain View and Fairview and spoke in favor of these communities remaining whole and cohesive. He observed “[T]here have been issues of representation impacting these communities for many years. For many years, both districts have only been represented by one Assembly member while other districts have been represented by two. Any maps that divide these communities is problematic for representation for these low-income and diverse communities.”¹¹²

98. The Board received consistent input as to the senate pairings. On November 8, 2021, Anchorage resident Alex Baker spoke in favor of combining Districts 20 and 21 together because all of Downtown Anchorage should remain in one senate district. Baker opined that Fairview is geographically blended with Downtown Anchorage and is where many of his community members recreate, walk, drive, and frequent businesses. Baker requested that the Board combine Districts 20 and 21 together as a senate pairing.¹¹³

99. On November 8, 2021, Silvers spoke against pairing East Anchorage with Eagle River or South Anchorage, and in favor of pairing Districts 18 and 23 together. She

¹¹¹ November 5, 2021 Board Meeting Minutes, ARB000203.

¹¹² November 5, 2021 Board Meeting Minutes, ARB000207.

¹¹³ November 8, 2021 Board Meeting Minutes, ARB000211.

commented that if this pairing is not practical, “Districts 17 and 18 would be an alternative pairing. Eagle River and the suburb towns north of Eagle River should be paired together as they are socioeconomically integrated and should remain together for better representation. South Anchorage is a poor pairing for District 18 as it is separated by miles and results in poor representation.”¹¹⁴

100. Eagle River resident Roger Branson spoke in favor of pairing Districts 22 and 24 together as Chugiak/Eagle River has long identified as its own socioeconomic area.¹¹⁵

101. Mears stated that the Northeast Community Council area is represented in the map by four House districts. According to Board minutes, Mears spoke in favor of pairing Districts 18 and 23.¹¹⁶

102. Anchorage resident Jeremy Houston spoke in favor of pairing Districts 21 and 20 in the Downtown Area. He observed that “since he has moved to the area, it has become apparent that the two areas are socioeconomically integrated. He does most of his shopping, working, and recreating in the downtown area. Additionally, many JBER military members use the downtown area to recreate as well.”¹¹⁷

103. All together there were 196 testimonial statements related to the senate pairings. Of those, 108 were in opposition to an Eagle River/East Anchorage pairing; only six were in support of the pairing.¹¹⁸

¹¹⁴ November 8, 2021 Board Meeting Minutes, ARB000211.

¹¹⁵ November 8, 2021 Board Meeting Minutes, ARB000211.

¹¹⁶ November 8, 2021 Board Meeting Minutes, ARB000212.

¹¹⁷ November 8, 2021 Board Meeting Minutes, ARB000211.

¹¹⁸ See *generally* App. B.

VIII. SENATE PAIRING CONSIDERATIONS, JUSTIFICATIONS, AND ABSENCE THEREOF

104. According to the depositions of the Board, when developing the senate pairings, the Board members generally identified the primary requirement for senate districts that they share a border.¹¹⁹ According to Marcum, while the senate pairings did not have to reflect socioeconomic integration,¹²⁰ the Board nonetheless “considered socioeconomic considerations” when pairing senate districts but deferred questions about further pairing considerations to legal counsel.¹²¹

105. Binkley further confirmed during his deposition that the Board considered “a lot of different considerations” during the senate pairings deliberations, including “different information, different combinations, different proposals,” and that the primary consideration was contiguity, but thereafter considered what was “reasonable.”¹²² Binkley testified that the most of the work regarding dilution considerations was left to “counsel and staff.”¹²³ Binkley confirmed that the Board discussed the pairing of the senate districts and that there was advice given by the experts regarding the senate pairings.¹²⁴

106. Despite clear constitutional mandates to do so, Binkley testified that he had never heard of the term “as near as practically contiguous” in the context of the contiguity requirement.¹²⁵ Binkley confirmed that the Board was conscious of the necessity of

¹¹⁹ Marcum Depo., pp. 171:17-22, 156:3-8; Borromeo Depo., pp. 43:2-9, 185:6-22.

¹²⁰ Marcum Depo. at 155:5-9.

¹²¹ Marcum Depo., pp. 155:12-156:2.

¹²² Binkley Depo. at 267:21-268:14.

¹²³ Binkley Depo., p. 269:1-7.

¹²⁴ Binkley Depo. pp. 280:11-281:5.

¹²⁵ Binkley Depo., p 268:15-25.

considering how the Board’s pairings may dilute the voice of the voters in the Anchorage senate districts in its decision, but denied that he could recall what factors the Board considered.¹²⁶ However, other Board members clearly understood the concept. At trial, Board Chair Binkley testified that districts which encompass uninhabited areas are not contiguous: “And so I could not ever describe 33 as compact. It’s barely contiguous. And by barely I mean the part that connects the northern part of that to the southern part basically has almost no people in it, so it’s just – it’s basically a fiction, in my mind.”¹²⁷

107. Simpson confirmed at his deposition that the Board requested an executive session to discuss the “litigation exposures” relating to the senate pairings discussion in order to discuss with the Board’s “voting rights expert,” and that subsequent to receiving that advice, the Board continued with the development of senate pairings and that he ultimately understood that the pairings he supported would be consistent with the law and constitutional requirements.¹²⁸ Simpson also confirmed the fact that the Board used the term “VRA” as shorthand for not only the Voting Rights Act, but any constitutional issues relating to voting rights.¹²⁹

108. After adoption of both house and senate districts, Borrromeo stated the following during the November 10, 2021 Board meeting: “I want to begin by reminding Alaskans here today and listening across the state what the goal of redistricting is as defined by the framers of our constitution and instructed by the Court in Hickel. The goal

¹²⁶ Binkley Depo., pp. 284:14-285:8.

¹²⁷ February 3, 2022 Trial Tr. at 1850-1851.

¹²⁸ Simpson Depo., p. 226:3-10

¹²⁹ Simpson Depo., pp. 229:24-230:5.

of all apportionment plans is simple: a true, just, and fair representation. Regretfully, the Board lost sight of this goal yesterday and in the process, we have failed Alaskans and we abused the public's trust and state government."¹³⁰

109. Borromeo observed on November 10, 2021 that "Member Marcum failed to offer a compelling reason not to pair the two Eagle River districts or the two Muldoon districts, besides for her subjective belief that the board failed to consider pairing JBER and Eagle River into a single House seat. We did, we considered it, and we firmly rejected it on two grounds: compactness and public testimony. Moreover, there was limited – almost no debate or justification really – for drawing these Senate districts this way on the record, and I apologize to Alaskans for that."¹³¹

110. Borromeo stated during the November 10, 2021 Board meeting "that the now paired South Muldoon and Eagle River, through Senate Seat K, do not have a single road connected meaning the residents in District 21 have to drive almost four miles down Muldoon Road through District 20 before even reaching the Glenn highway and then having to drive another twelve miles north before they can exit into Eagle River."¹³²

111. Borromeo also acknowledge the differences between the residential South Muldoon neighborhood and comments by Borromeo suggesting it was relied upon by Eagle River residents for its commercial offerings, stating in part: "This part of Muldoon (the southern part) is not a bustling hot bedded economic enterprise. It's almost entirely

¹³⁰ November 10, 2021 Board Meeting Minutes, ARB000219; November 10 Board Meeting Tr., p. 16, lines 19-25; p. 17, lines 1-25, ARB 007187 - ARB007188.

¹³¹ November 5, 2021 Board Meeting Minutes, ARB000219; November 10 Board Meeting Tr. p. 16, lines 19-25; p. 17, lines 1-25, ARB 007187-ARB007188.

¹³² ARB007189-007190, November 10, 2021 Board Meeting Tr.

residential and for us to pull the wool over the state’s eyes and believe that this part of Muldoon is traveling this far to shop, play, and recreate is absurd.”¹³³

112. These sentiments were confirmed again at the depositions of Bahnke and Borromeo. Borromeo testified at her deposition that she did not believe the Anchorage senate pairings were fair or that they had been sufficiently discussed on record.¹³⁴ She stated her description of the pairings as “nonsensical” was based on the fact there were better options that would have paired the Eagle River house districts together.¹³⁵ Additionally, she considered the fact that Eagle River has been historically trying to exit the Municipality of Anchorage, along with the community sentiment that accompanied that movement.¹³⁶ Bahnke further testified at her deposition that she found evidence of “naked partisan gerrymandering” based on Marcum’s comments, based on the fact that she stated that Marcum’s proposed Senate pairing plan gave “more representation” to the Eagle River constituency.¹³⁷

113. Borromeo testified that she did not believe the Board considered the best option – pairing the Eagle River house districts together – because Marcum did not present it as an option.¹³⁸ Further, the two Board members who wanted to discuss the

¹³³ *Id.*

¹³⁴ Borromeo Depo., pp. 20:23-21:6.

¹³⁵ Borromeo Depo., p. 21:17-21.

¹³⁶ Borromeo Depo., p. 28:5-23.

¹³⁷ Bahnke Depo., pp. 17:6-18:11.

¹³⁸ Borromeo Depo., pp. 31:14-32:14.

non-Marcum options were precluded from doing so by Binkley, who did not allow for such discussion, or even any on Marcum’s proposals.¹³⁹

114. During the November 8 meeting, Simpson responded to criticism from Bahnke and Borromeo against Marcum’s pairings by defending Marcum’s pairings and stating “Bethany has articulated a number of reasonable, logical connections in support of the pairings she’s suggesting. Certainly they’re not the only ones, and they are things about which reasonable people could differ . . . in the end we have to pick one or two or whatever and – make a decision. But I don’t think it’s right to say that there’s no reasonable basis for those. There’s reasons, and she’s articulated them.”¹⁴⁰ Simpson confirmed his opinion of what is “reasonable” being defined at least in part as having a reason at his deposition.¹⁴¹

115. Binkley expressly stated to Borromeo, in response to the Eagle River/East Anchorage pairings that, according to Borromeo, she “had already ‘won too much’ and now it was time that I step aside and I allow others to get some wins. This isn’t about me as an individual, this is about fair maps for our state. I didn’t win anything; Alaska lost. I presented and I defended fair maps that stand on their own merit because I put in the time and energy, and I can defend my maps and will defend my maps in the next round of litigation. I thank Member Bahnke for standing alongside and accepting natural pairings of these districts. And second, even if it’s true – whatever that means – that I had already

¹³⁹ Borromeo Depo., pp. 32:15-21, 37:17-38:2.

¹⁴⁰ November 10 Board Meeting Tr. p. 201:4-18; ARB006697.

¹⁴¹ Simpson Depo., pp. 239:8-240:14.

won too much, it's hardly a reason for rejecting the natural pairings of Eagle River as a Senate district and North and South Muldoon themselves as a Senate district.¹⁴²

116. Borromeo further testified during her deposition that when she was told by Binkley that she had already “won too much” during the redistricting process, he appeared to signal that he and Borromeo had come to an impasse on the subject.¹⁴³

117. Bahnke stated the following on November 10, 2021, after the adoption of the house districts and the controversial adoption of the Anchorage senate pairings:

As I reflect on the process – it's been 15 months of us putting our heads together. In terms of the process, I think what we saw throughout the process, for example, I started mentioning the way that the board took action to end discussion and debate yesterday which I think, procedurally and technically, was contrary to Robert's Rules of Order and I'm not expert on Robert's Rules of Order, but I don't think that was unintentional because as a former legislator, you're very well versed in Robert's Rules of Order. I'm not going to challenge that. It is symbolic of the greater issue that is our end outcome. Our outcome has resulted in the silencing or muzzling or muffling – whatever term you want to use – a particular segment of Alaskan voters. Again, throughout the process there was even at one point where the legitimacy of my authority to speak on behalf of Alaska Natives in my own district was at play and I've attempted to walk through this process in a manner that maintains decorum in order to get us moving along. I thought the ends would justify the means, so I put up with a lot in terms of where I felt I was being silenced. The process played out on a micro level of the silencing of a particular segment of our population. I was discouraged yesterday, but I'm actually encouraged today. Had we adopted Senate pairings that were just, that would have been a great victory for the state, but I think the greater victory that I see playing out here is that it is shining the light of the need for Alaskans to expect and deserve better from, not only our elected officials, but also our appointed officials. Alaskans are now witnessing, on a micro level, what is happening at a statewide level. We deserve better as Alaskans whether we're Republicans, Democrats, Independents, Undeclared, rural Alaskans, urban Alaskans, brown, black, yellow, white – at the end of the day we're all Alaskans and I'm not going to end on a discouraged note. If anything, this has bolstered, not just me – because this is happening to me on a micro level, - but I think that it is going

¹⁴² November 10, 2021 Board Meeting Minutes, ARB000220; November 10 Board Meeting Tr. p. 16, lines 19-25; p. 17, lines 1-25, ARB 007187 - ARB007188.

¹⁴³ Borromeo Depo. at 45:21-48:18.

to shed a bigger light and motivate people on a statewide level to expect fairness and uphold the tenants of our democracy.¹⁴⁴

118. Substantial testimony was submitted before the Board demonstrating the continued and persistent movement in Eagle River to detach from the Municipality of Anchorage.¹⁴⁵

119. On January 11, 2022, Municipality of Anchorage Assembly members Jamie Allard and Crystal Kennedy, both representatives of the Eagle River/Chugiak Assembly District 2, introduced Ordinance 2022-18. If adopted, this ordinance would have placed an advisory ballot before Birchwood, Chugiak, Eagle River, Eklutna, and Peters Creek area voters “an advisory ballot proposition on whether the area should research and study the potential to detach from the municipality of Anchorage and establish a separate local government unit.”¹⁴⁶

120. Despite testifying in favor of the Eagle River/East Anchorage pairings, Assembly member Allard’s memorandum accompanying Anchorage Ordinance 2022-18 requested support for that ordinance, which if adopted would take the first step for exploring voter support detachment and the fiscal implications of such detachment.¹⁴⁷

121. Anchorage Ordinance 2022-18 acknowledged that Eagle River groups since the 1970s have been promoting the detachment of Eagle River from the Municipality of Anchorage.¹⁴⁸

¹⁴⁴ November 8-10, 2021 Board Meetings Minutes, ARB000220 – ARB000221; November 10, 2021 Board Meeting Tr. pp.21-23.

¹⁴⁵ See, e.g., ARB00051102, ARB00058323, ARB00063567-00063568.

¹⁴⁶ Municipality of Anchorage Ordinance 2022-18, Ex. 6019, p. 6-10.

¹⁴⁷ Assembly Memorandum Regarding AO Ordinance 2022-18, Ex. 6019, p. 9.

¹⁴⁸ Municipality of Anchorage Ordinance 2022-18, Ex. 6019, p. 6-10.

122. On August 27, 1974, voters in the Birchwood, Chugiak, Eagle River, Eklutna, and Peters Creek area voted to detach from what was, at the time, the Greater Anchorage Borough. The Alaska legislature approved the detachment and the Eagle River-Chugiak Borough was formed until the Alaska Supreme Court overturned the legislative approval, finding that the detachment constituted unlawful special legislation.¹⁴⁹

123. In the 2021 Proclamation, the Board disclosed that “it was further advised that while diverse minority populations exceeded 50% in some Anchorage districts, there was no available evidence to suggest that these minorities were voting as a bloc, or being opposed by a bloc of white voters” and concluded that “[w]ithout these legal preconditions being met, counsel advised the Board to avoid subordinating traditional redistricting criteria to racial considerations.”¹⁵⁰

IX. PARTISAN GERRYMANDERING

124. Marcum testified that the Board members “would not have access to political data, that we would not have it on our computers, that we would not access it.”¹⁵¹ On November 7, 2021 at 6:47pm, the night before the scheduled Board meeting regarding senate pairings, Ruedrich emailed the Board at its designated email address as well as Marcum and Simpson separately, incumbent information for each of the house districts.¹⁵²

¹⁴⁹ Municipality of Anchorage Ordinance 2022-18, Ex. 6019, p. 8; *Abrams v. State*, 534 P.2d 91 (Alaska 1975).

¹⁵⁰ Board 2021 Proclamation, pp. 5-6, ARB000009-ARB000010.

¹⁵¹ Marcum Depo., p. 198, lines 1-21.

¹⁵² Ruedrich Depo., p. 14:19-15:10; November 7, 2021 email correspondence from Ruedrich to Board, Ex. 6005.

125. At the November 8, 2021 Board meeting, Board Staff member Juli Lucky informed the Board and Ruedrich that the incumbent information had been redacted from the email correspondence before its presentation to the Board and public.

126. Neither Marcum nor Simpson acknowledged their personal receipt of the email correspondence from Ruedrich. When asked about her receipt of the email, Marcum responded that she did not recall receiving the document on the night it was purportedly emailed but that it could have been provided to Board members in a compilation or at a later date.¹⁵³

127. Marcum testified that while she had access to incumbent information provided to the Board by Ruedrich, she “didn’t bother looking at the incumbent information,” and explained that such information was “irrelevant to the process that we were tasked with, and it just muddied the waters...”¹⁵⁴

128. When the unredacted incumbent information document was presented to Marcum in her deposition, she claimed she did not know what the information on the document proposed and that she could “honestly say this is the first time that I have looked at any of the names that are on [the] document.”¹⁵⁵

129. Despite Marcum’s representations to the contrary, the November 8, 2021 hearing depicts Marcum and Simpson having a conversation during the work session expressly referencing the unredacted version of the incumbent information provided by Ruedrich. While Marcum could not hear her comments or those of Simpson when

¹⁵³ Marcum Depo., Ex. 11; Marcum Depo., p. 202, lines 7-25.

¹⁵⁴ Marcum Depo., Ex. 11; Marcum Depo., p. 200, lines 11-14.

¹⁵⁵ Marcum Depo., p. 206, lines 21-25; p. 207-211.

watching the November 8, 2021 hearing, she conceded when watching that video that she had a conversation with Simpson during which the incumbent information was referenced, and in deposition did not deny the two used the word “incumbent” during their discussion.¹⁵⁶

130. Marcum admitted that she went to her computer to pull up the unredacted version of the incumbent information but when asked why she pulled up that version when Simpson was holding the unredacted version, as opposed to just looking over Simpson’s shoulder at that redacted version, Marcum responded, in part that she looked at it electronically because that is “her preferred way of reading.”¹⁵⁷ In depositions, Marcum further confirmed she reviewed the unredacted materials sent by Ruedrich containing the incumbent information on November 8, 2021, during her conversation with Simpson during the senate pairing deliberations.¹⁵⁸

131. Marcum stated during the November 8, 2021 meeting that “Eagle River has its own two separate House districts. This actually gives Eagle River the opportunity to have more representation, so they’re certainly not going to be disenfranchised by this process.” Bahnke expressed incredulity at this statement, asking “[s]o you’re saying that by splitting Eagle River, they would have more representation?” Marcum was evasive in her answer, causing Bahnke to clarify “we’re talking about Senate seats here.”¹⁵⁹

132. Across all four versions of Anchorage senate pairings that Marcum proposed, Eagle River and East Anchorage were paired each time. She noted at the

¹⁵⁶ Marcum Depo., p. 215:6-217:5; 217:15-25; p. 218:1-3, 10-22.

¹⁵⁷ Marcum Depo., p. 217, lines 1-5.

¹⁵⁸ Marcum Depo. at 215:6-217:5.

¹⁵⁹ November 8, 2021 Board Meeting Tr., ARB006672 – 006673.

November 8, 2021 Board Meeting: “And I will say that I started with one premise that I think is one of the most important premises that we have ignored throughout this process. . . . And that is the very natural both physical, as well as socioeconomic connection between JBER and Eagle River. . . . So that is the one thing that’s common in all four of these maps.”¹⁶⁰

133. On November 8, 2021, Marcum repeatedly referred to the testimony supporting the pairing of Eagle River with Muldoon.

134. However, the support for these pairings specifically referenced by Marcum included a letter from Dan Saddler she read into the record and partial statements by East Anchorage Plaintiff Major (ret.) Felisa Wilson.

135. In supporting her decision to pair Eagle River with East Anchorage districts, Marcum relied on a letter from Dan Saddler.

136. Dan Saddler is a former Republican representative for the Eagle River/Chugiak district.

137. Despite Marcum’s reliance on her testimony, Felisa Wilson testified against pairing Eagle River with East Anchorage districts.

138. Aside from Saddler’s testimony, only five other members of the public testified in favor of any version of Marcum’s pairings.¹⁶¹

¹⁶⁰ November 8, 2021 Board Meeting Tr., p. 174, ARB006670.

¹⁶¹ See generally App. B, Senate Pairings Testimony Compilation, p. 102 at ARB002589; p. 108 at ARB003249; p. 120 at ARB002415; p. 121 at ARB002430 and November 5, 2021 Board Meeting Minutes at ARB000206.

139. Jamie Allard, a Republican Municipality of Anchorage Assembly Member was among the six who testified in support of pairing Eagle River and East Anchorage.¹⁶² Allard filed a Letter of Intent with the Alaska Public Offices Commission indicating her intent to run for the State House district on December 2, 2021.

140. Marcum stated during her deposition that she “would not deny using the word incumbents as part of discussing the fact that we are not wanting to see the incumbents,” though she could not understand her own conversation as depicted on the public hearing recording.¹⁶³

141. Despite admitting to viewing the unredacted version of incumbent information on November 8th, Marcum testified on November 9 that “I’d just state for the record, we have not been provided with any incumbent information. And in addition, we don’t know who’s been truncated, so I mean, I think that the proposal that you put forward is logical because we—we know that this information has not been presented to us.”¹⁶⁴

142. The Municipality of Anchorage Assembly submitted written testimony to the Board on November 4, 2021, urging the Board “to reject any proposals that could be perceived as placing partisan objectives ahead of Constitutional guidelines for districts, are particularly concerned about the Marcum proposal to create an East Anchorage/Eagle River district.”¹⁶⁵

¹⁶² November 5, 2021 Board Meeting Minutes at ARB000206.

¹⁶³ Marcum Depo., p. 218, lines 10-16.

¹⁶⁴ November 9, 2021 Board Meeting Tr., p. 33, lines 19-25; Marcum Depo., p. 225; Marcum Depo., p. 225:11-23.

¹⁶⁵ November 4, 2021 letter from Anchorage Assembly Leadership, Ex. 6002.

143. The Assembly warned “[g]errymanders produce legal uncertainty, confusion among voters, and undermine faith in our democracy. The Northeast Community Council has urged that East Anchorage neighborhoods not be gerrymandered in Eagle River districts, and we ask that you honor the request of local voters and their community council.”¹⁶⁶

144. The Northeast Community Council adopted Resolution 2021-5, which urged the Board to “protect our neighborhoods and maintain our neighborhood ties by including the entire NECC boundaries within one senate district.”¹⁶⁷

145. Borromeo noted Marcum’s express comments observing that “splitting Eagle River into two Senate seats would extend the electoral influence of the community resulting in ‘more representation’,” arguing on November 10, 2021 that “far from being compelling rationale, [Marcum’s] observation exposes the board to claims of racial and partisan gerrymandering in North and South Muldoon which contains some of the highest minority voting age population concentrations in Anchorage, and one of the most diverse neighborhoods in our country. The publicly stated goal of expanding Eagle River’s influence into the legislature is not only an example of partisan gerrymandering, it is a direct path for future litigants to take us on in suing us.”¹⁶⁸

X. ART. VI, SECTION 6: CONTIGUITY

146. Eagle River and Anchorage are in separate watershed districts.¹⁶⁹

¹⁶⁶ November 4, 2021 letter from Anchorage Assembly Leadership, Ex. 6002.

¹⁶⁷ Closing Brief, App. B “East Anchorage Senate Testimony Compilation”, p. 32; Resolution 2021-5, ARB 003202-ARB003203.

¹⁶⁸ November 5, 2021 Board Meeting Minutes, ARB000220; November 10 Board Meeting Tr., p. 19, lines 18-25; p. 20, lines 1-8, ARB 007190-ARB007191.

¹⁶⁹ Municipality of Anchorage Watershed District Map, Ex. 6015.

147. The state of Alaska acknowledged the separation between East Anchorage and Eagle River communities of interest in Health Mandate 12, which took effect on March 28, 2020 and remained enforceable until remanded by Governor Dunleavy. Health Mandate 12 “limited travel between communities to critical infrastructure or critical personal needs.”¹⁷⁰

148. In the COVID-19 Health Mandate FAQs defining “community” for purposes of Health Mandate 12, the State reminded the public that “Common sense applies-normal usage of location names and understanding of geographic separation applies when asking community boundaries. For instance, Eagle River, Palmer, Wasilla, and Anchorage are all separate communities.”¹⁷¹

XI. ARTICLE VI, SECTION 10

149. The Board did not hold public hearings on its Proposed Plan v.1 or Proposed Plan v.2, which were the only plans adopted by the Board during the 30-day window provided by the Alaska Constitution.

150. Proposed Plan v.3 and Proposed Plan v.4, which were adopted by the Board on September 20, 2021, were not adopted within the 30-day window.

151. Likewise, the third-party plans adopted by the Board — proposed by AFFER, AFFR, the Doyon Coalition, and the Senate Minority Coalition — were not adopted within the 30-day window.

152. Proposed Plan v.3 and Proposed Plan v.4 did not include senate pairings.

¹⁷⁰ See *generally* State of Alaska Health Mandate 12 Frequently Asked Questions, Ex. 6014.

¹⁷¹ State of Alaska Health Mandate 12 FAQ “How is ‘community’ defined?”, Ex. 6014, p. 7.

153. The third-party proposed plans did include senate pairings; however, none of these pairings combined East Anchorage house districts with Eagle River house districts to form senate districts. The senate pairings suggested by AFFER did not propose a senate pairing which combined South Muldoon with East Anchorage—rather, the AFFER suggested senate pairings appeared to largely preserve the East Anchorage Community of Interest.

154. The Board’s public announcement regarding its adopted plans did not include any mention of senate pairings.¹⁷² Likewise, senate pairings were not published to communities across the state during the Board’s road show.

155. The public was never given an indication of which, if any, senate district plan or plans had been adopted by the Board.

156. The public repeatedly expressed its confusion regarding this absence of a proposed senate district plan — members of the public wrote to and orally requested the Board to disclose its senate pairing proposals to the public.¹⁷³

157. No hearing was every held on any senate pairing plan adopted by the Board.

158. The Board allowed the public only two hours to testify regarding senate pairings. This testimony took place on a single day — November 8, 2021.¹⁷⁴ As of that

¹⁷² See ARB00063071 (“Alaska Redistricting Board Approves Proposed Redistricting Plans” press release).

¹⁷³ See ARB003541, ARB003542, ARB003554, ARB003973, ARB008190, ARB008207, ARB008224, ARB002357, ARB003172, ARB003231, ARB002367, ARB002369, ARB003592, ARB007764 (public testimony submitted to the Board, all requesting disclosure of Board’s proposed senate pairings to the public).

¹⁷⁴ ARB006691, November 8, 2021 Board Meeting Tr.

date, the Board had not announced its intent to pair Anchorage house districts with Eagle River house districts.

159. David Dunsmore details flaws in this approach to public testimony in his affidavit as follows: “In contrast to the house portion of the redistricting process, there was very limited opportunity for public input on senate pairings, truncation, or term assignments. The Board never adopted senate pairings for any of the Board options made available for public testimony on the road show, and the public testimony taken at the beginning of the November 8 meeting was the only testimony taken after the adoption of the house map. There was no public testimony taken on the specific proposed senate pairings before they were adopted, truncation, term assignment, or the final redistricting proclamation ... Throughout the redistricting process, the Board had a policy of taking public testimony at the beginning and end of every meeting day. During the November 8 meeting, I asked Deputy Director T.J. Presley to confirm that the Board would be continuing this practice but he referred me to the Board. I did not have an opportunity to ask the Board, through its chair or otherwise, before the pairings were adopted.”¹⁷⁵

160. In her affidavit testimony, Major Wilson states that she testified to the Board regarding senate pairings and her belief that Eagle River house districts should be paired together into a single senate district.¹⁷⁶ However, member Marcum took her comments out of context and “misconstrued the words of [Wilson’s] testimony to misrepresent it as in favor of pairing Eagle River house districts with JBER or Northeast Anchorage

¹⁷⁵ Dunsmore Aff. at ¶¶ 24-25.

¹⁷⁶ Wilson Aff. at ¶ 19.

districts.”¹⁷⁷ Wilson testified that “[t]here was no opportunity for the public to rectify this misrepresentation of [her] testimony, nor to give further comment on the senate pairings as selected by the Board.”¹⁷⁸

161. Silvers testified in her affidavit that “[t]he Board did not provide the public with any proposed senate pairings for its consideration before the November 8, 2021 meeting, and only permitted public testimony before revealing the Board’s pairing proposals, unlike the house map process which allowed testimony before the adoption of the final house map.”¹⁷⁹

162. The Board did not cross-examine Wilson or Silvers as to this testimony.

XII. EQUAL PROTECTION

163. The Board proclaimed early on in its process that it would not be considering political information in its decision-making.¹⁸⁰ The Board made this statement repeatedly, and publicly.¹⁸¹

164. At depositions, Marcum and Simpson both admitted to receiving a spreadsheet from Randy Ruedrich, former chair of the Alaska Republican Party, which

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at ¶ 21.

¹⁷⁹ Silvers Aff. at ¶ 36.

¹⁸⁰ Binkley Depo. at pp. 185-188 (explaining that Board decided it would not be considering political information early on in its process and desired “to follow the constitution and do it, to the greatest extent that we could, apolitically”).

¹⁸¹ *Id.* at 185; see also Simpson Depo. at pp. 210-211 (Q: “... I’ve read e-mails from the staff to the public saying we invite your testimony but please don’t include political information. Is that consistent with what you understand the board to have solicited and invited from the public?” A: “It is, yes, we were all, at least as far as I was aware, doing our best to maintain a nonpartisan approach. We all understood the constitutional requirements and that’s what we were trying to do”).

provided incumbent information for the Board’s final house districts, suggested senate pairings, and a column indicating whether an incumbent could be reelected from the new districts selected by the Board.¹⁸²

165. Marcum’s deposition testimony demonstrates that she and Simpson viewed this information during the senate pairings work session in which Marcum apparently developed her proposals pairing Eagle River house districts with those in East Anchorage.¹⁸³

166. This fact was never revealed to the public: indeed, later in the Board’s process, when discussing the senate term truncation cutoff, Marcum took it upon herself to “just state for the record [the Board has] not been provided with any incumbent information.”¹⁸⁴

167. The Board’s actions result in a reduction of proportionality of representation to East Anchorage voters from partisan, community of interest, and racial perspectives. As East Anchorage Plaintiffs’ expert witness Dr. Chase Hensel testified in his affidavit, in East Anchorage — particularly in House District 20 (N. Muldoon) and 21 (S. Muldoon), “multiple minorities live together in an urban setting with the employment and living conditions that accompany poverty and low educational attainment.”¹⁸⁵

¹⁸² Marcum Depo. at pp. 197-201, 206-229 (testifying that she received and viewed incumbent information despite stating on the record that the Board had “not been provided with any incumbent information”); Simpson Depo. at pp. 218-223, 233-239 (denying reviewing incumbent information despite Marcum deposition testimony that she showed Simpson the unredacted document); see *also* Ex. 6005 (email from Randy Ruedrich to Simpson providing incumbent information).

¹⁸³ *Id.*

¹⁸⁴ Marcum Depo. at p. 225.

¹⁸⁵ *Id.* at ¶ 61.

168. In contrast, Eagle River resident Sean Murphy testified that “Eagle River commerce continues to grow and thrive, even during the pandemic” and “Eagle River residents are generally more affluent and educated per capita than East Anchorage and ... Eagle River residents have the same or very similar religious beliefs”¹⁸⁶ compared to the diverse origins and beliefs of East Anchorage residents.

169. On October 4, 2021, NAACP Anchorage president Kevin McGee (“McGee”) wrote to the Board, encouraging the Board to “protect[] every Alaskan’s vote, with low population deviation, compactness, socioeconomic integration, and contiguity.”¹⁸⁷ McGee drew the Board’s attention to the import of “protect[ing] minority voters’ franchise in Southcentral Alaska,” as “attempts at partisan gerrymandering would come at the expense of meeting Constitutional obligations.”¹⁸⁸ By way of example, McGee noted that “attempts to ... add Eagle River population to an East Anchorage House seat, or to pair a Government Hill House seat with an Eagle River House seat, are clearly motivated by partisanship but disenfranchise minority voters who make up a large percentage of Government Hill, JBER, and East Anchorage voters.”¹⁸⁹

170. On November 8, 2021, McGee again submitted written testimony to the Board, writing that Eagle River house districts should not be paired with those in East Anchorage.¹⁹⁰ In this written testimony, McGee provided two alternate pairing proposals

¹⁸⁶ Murphy Aff. at ¶¶ 5-16 (explaining differences between Eagle River and Anchorage communities of interest).

¹⁸⁷ October 4, 2021 McGee Written Testimony, ARB00056511-00056512.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ November 8, 2021 McGee Written Testimony, ARB ARB00050920-ARB00050921.

for the East Anchorage community of interest, both of which would have maintained the integrity of existing communities and complied with constitutional mandates while maximizing the minority populations within senate districts:

One Senate pairing configuration is visually obvious: Take the four House seats in East Anchorage (HDs 17, 18, 19, 23), and pair them into two Senate seats. Pair Downtown (HD 20) with Government Hill/JBER (HD 21), which is logical since it unites Downtown into a Senate seat, and protects minority voters' voice.

Though less visually obvious, another pairing configuration also can ensure minorities' vote, and voice in the electoral process is protected. Pair HD 21/HD 19, HD 16/HD 17, and HD 23/HD 18. This configuration protects minority voters' voice at the Senate level, and logically links adjacent neighborhoods with JBER. Effectively, it ensures our most diverse neighborhoods have a real voice in three Senate districts.¹⁹¹

171. In his affidavit in this case, McGee provides additional testimony about his background, the work and history of the NAACP, and his observations regarding the redistricting process. McGee testifies that the senate pairings adopted by the Board “established a clear disadvantage to the Northeast Anchorage community of color by the senate pairings of the Muldoon community with that of Eagle River.”¹⁹²

172. The affidavit testimony of Silvers, and Wilson provides additional evidence of the unique community character of the East Anchorage community of interest as distinct from Eagle River.

173. Bahnke testified at deposition that the Board was not aware of the racial composition of specific communities while mapping, as it was the Board's understanding that “[w]e weren't supposed to factor in race.”¹⁹³ However, the Board had the ability to

191

Id.

192

McGee Aff. at ¶ 23.

193

Bahnke Depo. at pp. 77-78.

access racial data through its AutoBound Edge software throughout its mapping process.¹⁹⁴

174. As the Board’s executive director Peter Torkelson testified in his January 27, 2022 supplemental affidavit, the Board’s AutoBound Edge software’s “default matrix” undercounted minority voters by excluding those who self-identified as “white with Hispanic heritage” from its calculation of the minority composition of a particular area.¹⁹⁵ Although some limited information about minority populations in Anchorage was released to the public,¹⁹⁶ demonstrating that the Board did, in fact, receive and consider race information during its redistricting process, the vast majority of the Board’s deliberations regarding senate pairings were shielded from the public through executive sessions.¹⁹⁷

175. When the Board’s “default matrix,” Exhibit 6004, is compared with the more inclusive calculation provided in Exhibit 1007, it becomes apparent that Anchorage house districts were depicted as approximately two percent less diverse than they actually are.¹⁹⁸ As Erin Barker testified in her affidavit, using the data from the Board’s default matrix suggests that when Districts 20 and 21 — North and South Muldoon — are combined into one senate district, the district would only have 49.31 percent minority

¹⁹⁴ January 27, 2022 Torkelson Aff. at ¶ 5.

¹⁹⁵ *Id.*

¹⁹⁶ See ARB000113, Supplemental Alaska Racially Polarized Voting Analysis for 2021 Redistricting (stating that an analysis of voting patterns on minority individuals in the Anchorage area is “not possible” because there are “no precincts that are anywhere close to homogeneous”).

¹⁹⁷ ARB00163257-ARB00163264 (correspondence among Board staff and Board’s experts regarding a VRA compliance report “which includes a detailed discussion of Anchorage and its increasing minority VAP” for discussion in executive session).

¹⁹⁸ Barker Aff. at ¶¶ 11-28.

voting age population.¹⁹⁹ Using the more inclusive senate data unavailable through the Board’s default matrix, it becomes apparent that the combined district would, in fact, have a minority voting age population of 51.12 percent, rendering it a minority-majority district.²⁰⁰ In contrast, when these diverse house districts are paired with Eagle River districts, their minority population plummets.²⁰¹

176. The Board received 196 pieces of written testimony relating to senate pairings — of which 32 specifically objected to Marcum’s proposed pairings, while only six supported such pairings. This testimony provided myriad examples of the separate and distinct nature of the East Anchorage and Eagle River communities of interest.²⁰²

177. The record does not reflect that the Board perceived its East Anchorage senate pairings as appropriate and lawful. Bahnke and Borromeo were outspoken in their impression that not only were the East Anchorage/Eagle River pairings inequitable, non-contiguous, and discriminatory against the East Anchorage community of interest, but they were also chosen “against the sound, sound advice ... from counsel in Executive Session”²⁰³

178. Even Board Chairman Binkley never stated that he believed the Board’s final senate pairings were the best option — he simply stated, at the November 8, 2021 meeting, that “[t]here’s good justification from all different ways ... all of these [senate

¹⁹⁹ *Id.* at ¶ 30.

²⁰⁰ *Id.*

²⁰¹ See, e.g., January 27, 2021 Torkelson Aff. at Table 2, depicting minority voting age population of Alaska house districts with both inclusive and default formulae.

²⁰² See generally App. B: November 7-10 Senate Pairing Testimony.

²⁰³ ARB007041, November 9, 2021 Board Meeting Tr.

pairing plans] are very justifiable, in my opinion. It's a question of what you think is the most reasonable... ”²⁰⁴

179. Only Marcum and Simpson — both of whom had access to incumbent information, which was concealed from the public — were openly in support of the Board’s adopted senate pairings.

180. Dr. Hensel testified that “the pairing of PD 21 and PD 22 and the pairing of PD 23 and 24 will substantially dilute the voting power of voters in PD 21(South Muldoon) and significantly dilute the voting power of voters in PD 23 (Gov’t Hill/JBER/Northeast Anchorage).²⁰⁵ This is because the Muldoon districts are “swing districts” whereas “PD 22... has a solidly Republican voting pattern.”²⁰⁶ The “united Republican voice,” when paired with East Anchorage districts, “would dominate and dilute the more economically, ethnically, educationally, and politically diverse PD 21 and eclipse the urban concerns that derive from its own sense of place.”²⁰⁷

181. Dr. Hensel also testified that “the largely White district PD 22 (Eagle River Valley) will dilute the political voice of PD 21’s Minority voters. This is because the distinctions rich vs. poor, exurban vs. urban, and high vs. low educational attainment, in the respective districts, map with White vs. Minority. These categorical differences underlie different political choices.”²⁰⁸ In short, “the promulgated senate pairing of PD 21 and PD 22 groups together House districts that are not similar enough to be deemed a

²⁰⁴ ARB006691, November 8, 2021 Board Meeting Tr.

²⁰⁵ Hensel Aff. at ¶¶55.

²⁰⁶ *Id.* at ¶¶ 69-72

²⁰⁷ *Id.* at ¶¶ 73-76.

²⁰⁸ *Id.* at ¶ 76.

single community of interest. PD 22 and PD 24 (Eagle River Valley and Eagle River/Chugiak) also constitute a single community of interest.”²⁰⁹

182. In light of this totality of circumstances, the burden of proof shifts to the Alaska Redistricting Board to justify its decision as having been taken to ensure proportionate representation.²¹⁰ The Board has taken no steps to supplement or clarify its record to provide additional evidence in support of the East Anchorage/Eagle River pairings.

DATED this 9th day of February, 2022.

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²⁰⁹ *Id.* at ¶ 73.

²¹⁰ *See Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1372 (Alaska 1987).

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 9th day of February, 2022, a true and correct copy of the foregoing document was served electronically on the following:

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1. A bench trial in the above-captioned matter was held between January 21, 2022 and February 6, 2022. While this was a consolidated case, the case in chief in *Felisa Wilson v. Alaska Redistricting Board*, Case No. 3AN-21-08869CI, was held primarily on January 21, 2022. In accordance with the Superior Court's order, this closing brief includes the final arguments of the East Anchorage Plaintiffs as well as their proposed findings of fact and conclusions of law. Additionally, in an effort to assist the Court in navigating the administrative record, Appendices A-C include compilations of documents admitted into the record and direct affidavit testimony.

I. THE CIVIL RULE 90.8 ADMINISTRATIVE RECORD

2. This trial is unique in several respects that impact the presentation of evidence and matters of law. Generally, the appeal of the decision of an administrative body is limited to review of that body's record. Here, as recognized in Alaska Civil Rule 90.8(a), the Superior Court has discretion to supplement the agency record with witness testimony, deposition testimony or other documents. Specifically, Rule 90.8 states:

The record in the superior court proceeding consists of the record from the Redistricting Board (original papers and exhibits filed before the board and the electronic record or transcript, if any, of the board's proceedings), as supplemented by such additional evidence as the court, in its discretion, may permit. *If the court permits the record to be supplemented by the testimony of one or more witnesses, such testimony may be presented by deposition without regard to the limitations contained in Civil Rule 32(a)(3)(B).* A paginated copy of the record from the Redistricting Board shall be filed in the supreme court at the same time it is filed in the superior court. (Emphasis added.)

This is only the second redistricting cycle applying Civil Rule 90.8 from the start to finish of redistricting litigation.¹ The hybrid nature of the proceedings has resulted in disputes amongst the parties regarding the scope of the Board's record, the nature of the trial, and the rights and obligations of the parties during the proceedings.

3. For context, in 2011, the redistricting board initially submitted a record consisting of 23 volumes and 13,474 pages.² The record was later supplemented by an additional volume consisting of 1,318 pages.³ The record was supplemented by the testimony of ten witnesses at trial and by way of designated deposition testimony.⁴ In addition to the record submitted by the Board, the parties agreed upon 69 joint exhibits, which were all admitted.⁵ The parties sought and were granted admission of an additional 12 exhibits.⁶

4. By comparison, in 2021 the Board submitted several tranches of the record over the course of this litigation, totaling 11,662 pages. More than 200 pages of those files were corrupted or contained no data and have never been provided to the parties in

¹ The Alaska Supreme Court adopted Civil Rule 90.8 on November 15, 2021, after litigation of the 2001 Redistricting Plan had commenced. Judge Rindner truncated the proceedings accordingly, but the Rule did not govern discovery. The Court noted in that case that “[t]he parties began extensive discovery and multi-track depositions were taken of the approximately 160 witnesses initially identified” before Rule 90.8 was adopted. *In re 2001 Redistricting Cases*, 2003 WL 34119573, February 2, 2002.

² Memorandum Decision and Order Re: 2011 Proclamation Plan, Alaska Superior Court, Case No. 4FA-11-02209CI, February 3, 2012 Slip Op. at 47.

³ *Id.*

⁴ *Id.* at 47, 51.

⁵ *Id.* at 51.

⁶ *Id.*

usable form.⁷ Emails were “broken” from their attachments, making it impossible for a reader to identify what documents were attached, if any, to Board correspondence.⁸ The documents were provided electronically and the files were only named with Bates numbers, making the record difficult to navigate.⁹

5. The low quality of the record is indicative of the Board’s broader approach to this litigation. Motion practice and extensive argument was devoted to the Board’s objections to parties’ exhibits, most of which in the case of East Anchorage Plaintiffs, were publicly available self-authenticating documents from government sources that should have been subject to strict judicial notice.¹⁰ Ultimately, the Board has behaved as though this litigation were a criminal proceeding in which the defendant is not obligated to produce evidence or put on its own case. The Board’s strategy and behavior are the antithesis of an administrative proceeding in which a government entity’s decision-making

⁷ See East Anchorage Plaintiffs’ Third Notice Regarding Status of Discovery and Anticipated Procedural Requests, January 6, 2021, pp. 2-3 (observing that approximately 7,400 pages of discovery were received on December 31, 2021, many of which were documents already included in the administrative record. “These records were not identified, and forced Plaintiffs’ counsel and staff to sort through thousands of redundant, duplicitous documents. Additionally, emails and attachments to emails were separated from each other, which prohibits Plaintiffs from understanding and evaluating what materials the Board received, transmitted, and considered, and using this information to depose Board members or otherwise prosecute their cases. Lastly, these batches of production included dozens of “0kb” or “empty” files, suggesting that materials may have been withheld without an assertion of privilege”).

⁸ *Id.* at 3, noting that “[t]he Board’s intentional conduct in producing material to Plaintiffs in an unusable format, without any chronological or logical order, and detaching attachments from emails, has substantially prejudiced Plaintiffs and would be clear grounds for sanctions and the ordered reproduction of discovery in any other suit.”

⁹ See generally *id.* at 2-5.

¹⁰ See generally East Anchorage Plaintiffs’ Ex. 6000-6044.

is challenged, particularly where, as here, the Board's decision is so fundamental to the representative democracy rights of East Anchorage Plaintiffs.

II. STANDARD OF REVIEW

6. The general standard of review applied by the courts in exercising jurisdiction under Article VI, Section 11 of the Alaska Constitution involves a careful balance between deference and protection. While the standard of review was established before the law transferred the responsibility of redistricting from the executive branch to an independent body, it remains unchanged. The court reviews the Board's decisions to "ensure that the reapportionment plan is not unreasonable and is constitutional under article VI, section 6 of Alaska's constitution."¹¹ It examines the Board's decision to determine if it has taken "a hard look at the salient problems and has generally engaged in reasoned decision making."¹² In determining if a "hard look" has been taken by the Board, the court analyzes the Board's *process* rather than its policy and is tasked with asking whether the Board failed to consider an important factor, take a "hard look" at the salient problems or generally engage in reasoned decision-making.¹³

7. The court also considers the challenges posed by Alaska's unique geographic and cultural characteristics and the extremely expedited time period in which

¹¹ *Kenai Peninsula Borough v. State*, 743 P.2d at 1358 (quoting *Carpenter*, 667 P.2d at 1214, quoting *Groh*, 526 P.2d at 866-67).

¹² *Id.* at 693; see also *Alpine Energy, LLC v. Matanuska Elec. Ass'n*, 369 P.3d 245, 251 (Alaska 2016) (explaining that appellate courts considering an agency's decision on issues within its area of expertise must determine whether the agency's decision was "arbitrary, capricious, or unreasonable" and whether the agency "[took] a hard look at the salient problems and ... genuinely engaged in reasoned decision making").

¹³ *Id.*

redistricting must be completed when reviewing the Board's actions.¹⁴ The court has repeatedly acknowledged, however, that these challenges "do not absolve th[e] court of its duty to independently measure each district against constitutional standards."¹⁵

8. Alaska courts have repeatedly held that the standard of review in redistricting cases is to "ensure that the reapportionment plan under review is not unreasonable and is constitutional under Art. VI, Section 6 of Alaska's Constitution." In determining if a plan or portion of a plan is unreasonable, the "Court must examine not policy *but process* and must ask whether the agency has not really taken a 'hard look' at the salient problems or has generally engaged in reasoned decision making."¹⁶

III. STATEMENT OF THE CASE

9. Redistricting in the State of Alaska has been riddled with unique challenges since its inception, with redistricting Board members struggling to balance loyalties to political parties, communities, and the public at large as they take on what the courts have recognized as a "Herculean feat of public service."¹⁷ At first glance, it appeared the 2021 Board would follow its predecessors, inadvertently violating process on occasion but curing missteps through public deliberations and lawful decision-making before promulgation. As the Board delved into drawing new house districts, its members fiercely

¹⁴ *In re 2011 Redistricting Cases*, 274 P.3d 466, 468 (Alaska 2012) (recognizing that the Board is "faced with a difficult task in attempting to harmonize the requirements of the Alaska Constitution" and federal law, but emphasizing that "these difficulties do not limit the Board's responsibility to create a constitutionally compliant plan ...").

¹⁵ *In re 2001 Redistricting Cases*, 44 P.3d 141, 147 (Alaska 2002).

¹⁶ *In Re 2011 Redistricting, Order regarding Summary Judgment Motions*, 7, citing to Superior Court's February 1 Order.

¹⁷ *In re 2001 Redistricting Cases*, 44 P.3d 141, 147 (Alaska 2002) (*quoting Egan v. Hammond*, 502 P.2d 856, 865–66 (Alaska 1972)).

debated the relevant constitutional criteria and absorbed days of public testimony from across Alaska. Ultimately, Board members Budd Simpson, Nicole Borrromeo, and Melanie Bahnke voted for a map based, first and foremost, on the constitutional requirements.

10. It appeared that the 2021 Redistricting Board would be the first to curb partisan efforts and political pressures to adopt a constitutional map out the gate. Unfortunately, the adoption of a lawful and somewhat nonpartisan house map came at a severe cost; a cost born by the voters of Anchorage's diverse East Anchorage community.

11. The Board systemically deprived the voters in the East Anchorage communities of interest paired with Eagle River districts of adequate and true representation in the Alaska State Senate in direct contravention of Alaska's redistricting goals. Unexpectedly and with little explanation, the Board abandoned its process and transparency during the senate pairings meetings, and ultimately adopted, without public input, pairings that unconstitutionally divided one of the most diverse communities of interest in Alaska, and perhaps the country, to increase Eagle River's senate representation from one to two seats. The Board's actions shocked not only the public, but members of the Board itself, as the majority of Board members silently approved districts that split "Eagle River" from "Eagle River," and "Muldoon" from "Muldoon". The fracture of the Muldoon community of interest and the Board's lack of rationale for such fracture was exacerbated by the Board's sudden refusal to follow its own policies and procedures with the public, and even among its own members.

12. Ultimately, the Board failed to take a "hard look" at the pairing of House District 21-S. Muldoon with House District 22-Eagle River Valley and House District 23-

Government Hill/JBER/Northeast Anchorage with House District 24-North Eagle River/Chugiak, which are arbitrary and wholly unreasonable in violation of the substantive due process clause of the Alaska Constitution. The Board's errors in procedure and process regarding the senate pairings directly violated numerous provisions of the Due Process Clause of the Alaska Constitution and with it the Alaska Open Meetings Act ("OMA" or "Open Meetings Act") and Article VI, Section 10 of the Alaska Constitution. Additionally, and perhaps most egregiously, the Board violated the Equal Protection Clause of the Alaska Constitution. Board members intentionally misrepresented their considerations of partisan motivations, misrepresented their use of partisan data to select their pairings to even their own Board members, concealed their analysis of the risk of dilution in the districts at issue, misconstrued testimony by East Anchorage community members to serve their impermissible objective, and held secret deliberations and meetings to veil their partisan and discriminatory goals. While these actions undoubtedly violate the core principles guiding the redistricting process, it is, in some ways, the Board's seemingly calculated use of the highly discretionary senate pairing process to veil its discriminatory conduct and the extreme resulting erosion of public trust that is most alarming.

IV. ARGUMENT

A. THE BOARD EMPLOYED UNLAWFUL PROCESS AND PROCEDURES RESULTING IN ADOPTION OF SENATE PAIRINGS THAT VIOLATED THE DUE PROCESS CLAUSE OF THE ALASKA CONSTITUTION

13. While the court appropriately affords the Board flexibility in redistricting, this flexibility only works where the Board's process is lawful and its deliberations are rooted in the overarching purpose of redistricting in Alaska and the goals iterated by the Alaska

legislature. “The goal of an apportionment plan is simple: the goal is adequate and true representation by the people in their elected legislature, true, just, and fair representation.”¹⁸ The Alaska Supreme Court in *Hickel v. Southeast Conference* reminded Alaska’s leaders:

in deciding and in weighing this plan, never lose sight of that goal, and keep it foremost in your mind; and the details that we will present are merely the details of achieving true representation, which, of course, is the very cornerstone of a democratic government.¹⁹

14. Here, the majority of the Board lost sight of this overarching purpose when adopting the East Anchorage/Eagle River Pairings, drastically shifting away from their purpose-grounded considerations during the house district process. Instead of looking to create “true, just, and fair” pairings, the majority members sought to create pairings that served their partisan interests and personal objectives, so long as they were not outright illegal. This reactive shift in purpose by the Board led to distorted decision-making riddled with fallacies and bias and in direct violation of the due process clause of the Alaska Constitution. The degradation of the decision-making process was so palpable it showed up in the Board’s interactions with the public and with one another. Unfortunately, it also showed up in the Board’s final decision, which led to tangible harm for voters in the Muldoon community of interest and the East Anchorage voters. This decision was ultimately wholly irrational, arbitrary, and without reason.

¹⁸ *Hickel v. Southeast Conference*, 846 P.2d 38 (Alaska 1992) as modified on reh'g. (Mar. 12, 1993).

¹⁹ *Hickel*, quoting from 3 Proceedings of the Constitutional Convention (PACC) 1835 (January 11, 1956).

15. Unlike the cases that came before it, the fundamental failures in the process of this Board during its senate pairing proceedings directly resulted in its unreasonable and arbitrary decision-making regarding such pairings. The Board's deviations from lawful procedures and process created, at best, the appearance of improper efforts to increase the strength of the majority at the cost of the minority. At worst, the Board's actions appear calculated, with members intentionally using the less-scrutinized senate pairings process and violating the OMA to sneak senate pairings past the public for the express purpose of diluting votes from residents in one of Alaska's most ethnically, racially, and economically diverse neighborhoods in order to amplify the power of votes in one of the most fiercely unified and autonomous house districts in Alaska.²⁰

16. Despite the court's repeated application of the "hard look" standard to Board proceedings, it has not yet rejected a redistricting plan or portion of a plan based upon an error in "process." Arguably, it was precisely the court's hesitance to void an action by the Board under the laws governing process that has emboldened the Board to disregard these laws entirely in its 2021 redistricting process. But, in the absence of adequate process, the Board's arbitrary and capricious East Anchorage/Eagle River Pairings are unsupportable and must be corrected.

17. Further, any expectation that the Board may have had that its process errors were without consequence ignores the substantial shift in public interest when correcting

²⁰ Prior to the commencement of this practice, the ADP, proactively and out of an abundance of caution, sent a letter to the Board to alert it to the possibility that its practices were violating the OMA. After receiving this letter, the Board deliberately disregarded its cautionary message and instead began engaging in even more dramatic OMA violations — namely, repeated and prolonged executive sessions began replacing public deliberation as a matter of course.

senate pairings as opposed to house districts. Just as it took the Board less than 24 hours to err in its pairings, it would take no more than a week to correct that error. Unlike the house redistricting plans, the Board can provide public notice and hold a senate pairing hearing to correct the impacted districts within a week and still afford the public the right to participate. As a consequence, the public interest in this case, unlike those that came before it, weighs heavily in favor of correcting the intentional, blatant, and directly harmful procedural errors of the Board.

18. The Board's record, the deposition testimony of its Board members, and the testimony submitted by its members and staff all demonstrate numerous and sometimes intentional violations of due process. The Board's violations involved both the procedural and substantive due process requirements imposed upon redistricting boards during the redistricting process. More specifically, the Board engaged in the following impermissible Board actions:

- a. Holding executive sessions and work sessions that are not permitted under the Open Meetings Act (AS 44.62.310, *et seq.*);
- b. Adopting final senate pairings that were not presented to the public during the public hearing process in violation of Article VI, Section 10 of the Alaska Constitution;
- c. Adopting final senate pairings that violated the Board's own adopted policies and procedures;
- d. Adopting senate pairings which the public did not have access to view;
- e. Adopting final senate pairings that were not one of the senate pairings options published by the Board for public comment and testimony;
- f. Adopting pairings without regard to public testimony or relying upon misrepresentation of public testimony to justify pairings;
- g. Failing to maintain and produce an administrative record that would aid in judicial and public review and assessment; and

- h. Failing to adopt findings that would permit judicial and public review and assessment.

19. According to the Alaska Supreme Court, “[t]he crux of due process is opportunity to be heard and the right to adequately represent one’s interests.” In order to determine what procedural process is due, the Alaska Supreme Court has generally considered three factors:

- a. “[T]he private interest affected by the official action;”
- b. “[T]he risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and”
- c. “[T]he government’s interest, including the fiscal and administrative burdens that additional or substitute procedural requirements would entail.”

20. While the Board certainly has authority to adopt its own policies and procedures, it still must comply with the OMA, the Public Records Act, and Article VI, Section 10 of the Alaska Constitution.

21. The Court has also recognized that due process entails not only a procedural component, but also a substantive one. Substantive due process protections insulate the public from unfair or unfounded state action: “A due process claim will stand if the state's actions ‘are so irrational or arbitrary, or so lacking in fairness, as to shock the universal sense of justice.’” While the Board is free to adopt its own procedures, it is not afforded unfettered discretion during the redistricting process. The Board must comply with the OMA, the Public Records Act, and Article VI, Section 10 of the Alaska Constitution.

22. Due process involves both the public's ability to observe and participate in government process as well as the public's ability to trust government's representations in that process. The Board's procedural errors were magnified by the Board's direct and express misrepresentations to the public during the Senate District Hearings and the public's perception of the Board's sudden refusal to engage the public in the redistricting process. Board members Marcum and Simpson both expressly and repeatedly represented on November 9, 2021 that they did not have knowledge regarding incumbents and yet a careful review of the video of the meeting and direct admissions by Marcum herself demonstrate that these representations were patently false.²¹ These misrepresentations, combined with the Board's excessive use of executive sessions to mask the Board's consideration, magnified by the Board's ultimately unreasonable East Anchorage/Eagle River senate pairings with total disregard for public comment, warrants a finding that these pairings were, as a matter of fact, law, and policy, wholly unreasonable and the procedures and process used to adopt them directly violates the due process clause of the Alaska Constitution.

1. Holding Executive Sessions and Work Sessions that are Not Permitted Under the Open Meetings Act

23. In its attempt to conceal its rationale and protect itself from scrutiny, the Board engaged in numerous violations of the Open Meetings Act throughout the redistricting process.²² The Open Meetings Act is a state law requiring that meetings held

²¹ See Findings of Fact at ¶¶ 124-130, 140-141.

²² East Anchorage Plaintiffs incorporate into this brief the pleadings filed in its Motion for Rule of Law and Motion to Separately Consider Board's Process and Procedure Allegations at Closing Argument and the statements of law and fact in that pleading practice.

by a government body be properly noticed and open to the public. According to AS 44.62.312, while a government unit's purpose is to "aid in the conduct of the people's business," this purpose does not result in a forfeiture of the people's sovereignty or right to determine what information they can access. Further, the people have a right to be informed so that they have the power to "control...the instruments they have created."²³ engaged in numerous violations of the Open Meetings Act, including holding meetings subject to the OMA without affording the public to meaningfully view these meetings and unlawfully using executive sessions to conceal the Board's deliberations from the public. The OMA provides that the meetings of a government body are open to the public unless the meeting falls within certain exceptions.²⁴

24. The Board held "work sessions" during the November 8, 2021 senate pairing meeting that the Board advertised as "open to the public" but in reality, the public could not meaningfully hear or see view this work session because of the use of a visual system that obscured both the audio and visual appearance of the meeting.²⁵ While virtual meetings may not be a necessity in most redistricting cycles, the existence of a global and active pandemic during this redistricting cycle necessitated a virtual meeting option that the public could see, hear, and participate. The Alaska Supreme Court has previously acknowledged the importance of protecting the public from increased exposure to COVID-19 when exercising important voting rights. The Alaska Division of Elections was ordered by the Alaska Supreme Court to waive witness signature requirements on

²³ See AS 44.62.312.

²⁴ Alaska Statute 44.62.310, *et seq.*

²⁵ See generally, Findings of Fact, ¶¶ 69-87.

election ballots because requiring voters to secure such signatures may unnecessarily expose them to increased COVID-19 exposure or require them to violate local laws to secure a witness signature during community lockdowns.²⁶

25. In addition to the insufficiencies of the hearing in light of the pandemic, the Board's deviation from past procedures solely for the senate pairing meetings was also suspect under the OMA and contributed to the due process clause violation resulting from the Board's conduct. David Dunsmore has testified to the shift in transparency from house district meetings to those on senate pairings.²⁷ Instead of considering expressly identified and circulated senate plans, Board members entered into pairings sessions riddled with hour-long executive sessions.²⁸ After reviewing the facts and relevant case precedent, our team has determined that while the house districts were drawn with little room for challenge, there is a colorable argument.

26. In contrast to the Board's largely public discussions regarding House districts (with the exception of extended executive sessions to discuss VRA compliance

²⁶ See *State v. Arctic Village*, 495 P.3d 313 (2021)

²⁷ See Finding of Fact ¶ 59; see also Dunsmore Aff., ¶¶ 24-25 ("In contrast to the house portion of the redistricting process, there was very limited opportunity for public input on senate pairings, truncation, or term assignments. The Board never adopted senate pairings for any of the Board options made available for public testimony on the road show, and the public testimony taken at the beginning of the November 8 meeting was the only testimony taken after the adoption of the house map. There was no public testimony taken on the specific proposed senate pairings before they were adopted, truncation, term assignment, or the final redistricting proclamation ... Throughout the redistricting process, the Board had a policy of taking public testimony at the beginning and end of every meeting day. During the November 8 meeting, I asked Deputy Director T.J. Presley to confirm that the Board would be continuing this practice but he referred me to the Board. I did not have an opportunity to ask the Board, through its chair or otherwise, before the pairings were adopted.")

²⁸ See Findings of Fact, ¶¶ 44-51.

with counsel as well as “other lawful purposes”), the Board deliberated almost entirely in executive session and off the record regarding senate pairings. Even Board Members Borromeo and Bahnke appeared to be taken by surprise when the Board reconvened on November 9, 2021 to adopt senate pairings and the other three members of the Board indicated that they had changed their approach since the previous day.

27. These failures of process are pervasive throughout the Board’s proceedings, and are not limited to those raised in East Anchorage Plaintiffs’ Application. For example, during his deposition, Board Chair Binkley stated that, although the Board did not adopt any formal conduct, ethics, or decorum rules, all members agreed early on in the procedure that they would comply with Robert’s Rules of Order during their public meetings.²⁹ Yet, at the November 9, 2021 Board meeting, the majority board members violated Robert’s Rules by shutting down debate regarding senate pairings without a 2/3 vote (i.e., four board members), as Article VII, Section 44 of Robert’s Rules requires.³⁰ Although Board members Bahnke and Borromeo vehemently objected to the majority members’ attempt to call the question while debate was ongoing, the other Board members steadfastly refused to continue debate.³¹ As Board member Bahnke remarked in her closing comments on November 10, 2021, this procedural violation “resulted in a

²⁹ See Findings of Fact ¶¶ 35, 40-41. Board Chair Binkley testified in his deposition that the Board “determined we were going to operate under Robert’s Rules of Order” but did not adopt any other ethical rules, stating that “we left that up to each board member, individually ... hopefully they were all ethical and conducted themselves in that manner. J. Binkley Dep., at 198:25-199:24.

³⁰ ARB007044.

³¹ ARB007044.

silencing or muzzling or muffling" not only of minority members of the Board, but also "of a particular segment of Alaska voters."³²

28. The Board's use of work sessions to permit Board members to congregate outside the view of the public, both when attending in-person and virtually, constitutes a violation of the public's right to be present at a meeting.³³

29. The Board's overuse of executive sessions also violated the OMA. The Board was often vague about the purpose and scope of its executive sessions and failed to provide reasons justifying the use of the executive sessions to select senate pairings or house districts outside the public purview. While the East Anchorage Plaintiffs recognize that the Board generally cured its unlawful executive sessions regarding the house districts through its discussions on the record and exhaustive public testimony, the Board wholly failed to extend or apply any cures during the senate pairing proceedings. Further, attorney-client written advice impacting the Board's deliberations on senate pairings were unlawfully protected by misapplication of the attorney-client privilege.³⁴

30. The use of an executive session will be strictly construed by the courts in favor of open sessions. Further, the use of executive sessions is both limited to a discrete set of exemptions under the Act, and those exemptions "shall be construed narrowly in order to effectuate" the broader policy of the Act, which is the people's access to the

³² See Findings of Fact at ¶ 117.

³³ See *Dunsmore Aff.* at ¶¶ 9-10.

³⁴ East Anchorage Plaintiffs incorporate into this brief, the statements of facts and law as well as the arguments contained in its Motion to Amend its Application and related pleadings.

people's business as done by these governmental bodies.³⁵ Distilled, the OMA directs that all of the Board's meetings should be open, except under the limited circumstances where executive sessions are allowed.

31. The subjects that may be considered in executive sessions, per the OMA are: (1) information which could have an immediate adverse impact on the finances of the public entity; (2) information that could prejudice the reputation and character of a person; (3) information required to be confidential by law; and (4) information involving consideration of government records that are not subject to disclosure (i.e., confidential information).³⁶

32. The attorney-client privilege certainly exists and "operates concurrently with the OMA although it is not an expressed exception."³⁷ It is, however, a narrower privilege in the OMA context and cannot be used as a blanket protection to discuss legislative matters. This is especially true here where the Alaska Constitution expressly protects the public's right to participate in the redistricting process.³⁸ A broader application of the attorney-client privilege to cloak the Board's unvetted decision-making would violate the policies codified in the purpose of the Act.³⁹ One of the most basic tenets of the OMA, as expressly acknowledged by the legislature, is that "the people's right to remain

³⁵ See AS 44.62.312.

³⁶ Alaska Statute 44.62.310(c).

³⁷ *Cool Homes, Inc. v. Fairbanks N. Star Borough*, 860 P.2d 1248, 1260 (Alaska 1993).

³⁸ Article IV, Section 10 of the Alaska Constitution.

³⁹ Alaska Statute 44.62.312.

informed shall be protected so that they may retain control over the instruments they have created.”⁴⁰ The Alaska Supreme Court has determined that:

It is not enough that the public body be involved in litigation. Rather, the rationale for the confidentiality of the specific communication at issue must be one which the confidentiality doctrine seeks to protect: candid discussion of the facts and litigation strategies.⁴¹ The principles of confidentiality in the lawyer-public body relationship should not prevail over the principles of open meetings unless there is some recognized purpose in keeping the meeting confidential.⁴²

The Court goes on to state that:

[p]ublic board members, sworn to uphold the law, may not arbitrarily or unnecessarily inflate confidentiality for the purpose of deflating the spread of the public meeting law. Neither the attorney’s presence nor the happenstance of some kind of lawsuit may serve as the pretext for secret consultations whose revelation will not injure the public interest.⁴³ ... The exception is not appropriate for ‘the mere request for general legal advice or opinion by a public body in its capacity as a public agency.’⁴⁴

33. On November 8, 2021, the Board convened to consider senate pairings for the first time in the redistricting process. Unlike meetings on the house districts, the Board abandoned its practice of presenting its proposed plan to the public for comment before

⁴⁰ Alaska Statute 44.62.312(a)(5).

⁴¹ *Channel 10*, 215 N.W.2d at 825–26. See also *City of San Antonio v. Aguilar*, 670 S.W.2d 681, 686 (Tex.App. 1984) (holding that a conference on decision to appeal deserves confidentiality); *Hui Malama Aina O Ko’olau v. Pacarro*, 4 Haw.App. 304, 666 P.2d 177, 183–84 (1983) (holding that a settlement conference deserves confidentiality).

⁴² *Channel 10*, 215 N.W.2d at 825.

⁴³ *Smith County Educ. Ass’n v. Anderson*, 676 S.W.2d 328, 334 (Tenn.1984) (would impair the attorney’s ability to fulfill ethical duties as an adjunct of the court); *Oklahoma Ass’n of Mun. Attorneys v. State*, 577 P.2d 1310, 1315 (Okla.1978) (might seriously impair the ability of the public body to process a claim or conduct pending litigation); *Channel 10, Inc. v. Independent School Dist. No. 709, St. Louis County*, 298 Minn. 306, 215 N.W.2d 814, 825–26 (1974) (the machinery of justice would be adversely affected if clients were not free to discuss legal matters with their attorneys without fear of disclosure).

⁴⁴ *Minneapolis Star & Tribune Co. v. The Housing & Redevelopment Authority in and for Minneapolis*, 246 N.W.2d 448, 454 (Minn.1976).

adoption.⁴⁵ It appears from the evidence that Marcum was so eager to ensure additional Republican seats in the senate and the increased representation of Eagle River, a longstanding Republican stronghold, that she misrepresented testimony by East Anchorage voter, Major (Ret.) Felisa Wilson, to further her partisan objectives. Unlike house district sessions where public testimony was provided before and after each session and most meetings were presented via functional virtual outlets, Board members foreclosed public testimony on the senate pairings before their adoption and used a virtual streaming system that prevented the public from fully seeing or hearing the Board members' discussions during its work sessions.⁴⁶

(a) *The Appropriate OMA Remedy is Remand for Correction of Error in Eagle River/East Anchorage Senate Pairings*

34. While actions taken contrary to the Open Meetings Act are voidable under Alaska law, Alaska courts have been reticent to declare a redistricting plan void on the basis of an OMA violation. The courts have, when faced with missteps by previous redistricting boards, weighed the harm to the public of a voided plan against the nature and scope of the violation and determined instead that the mere declaration of the violation and direction to the offending board to correct the improper conduct was sufficient.

35. The court considers the following when determining whether or not to void Board action due to an OMA violation:

- a. the expense that may be incurred by the public entity, other governmental bodies, and individuals if the action is voided;

⁴⁵ See *generally* Findings of Fact at ¶¶ 52-57.

⁴⁶ *Id.*

- b. the disruption that may be caused to the affairs of the public entity, other governmental bodies, and individuals if the action is voided;
- c. the degree to which the public entity, other governmental bodies, or individuals may be exposed to additional litigation if the action is voided;
- d. the extent to which the governing body, in meetings held in compliance with the Open Meetings Act, has previously considered the subject;
- e. the amount of time that has passed since the action was taken;
- f. the degree to which the public entity, other governmental bodies, or individuals have come to rely on the action;
- g. whether and to what extent the governmental body has, before or after the lawsuit was filed to void the action, engaged in or attempted to engage in the public reconsideration of matters originally considered in violation of the Open Meetings Act;
- h. the degree to which violations of the Open Meetings Act were willful, flagrant, or obvious; and
- i. the degree to which the governing body failed to adhere to the policy under AS 44.62.312(a).⁴⁷

36. The Board, and its counsel, appear to take great solice in the presumption that the public interest will here, as always in redistricting cases, weigh in favor of excusing the violation without consequence. This presumption ignores the narrow scope of the action challenged by East Anchorage Plaintiffs and the Board's ability to cure its procedural and process violations in a very short time period that would not interfere with redistricting or disturb the house district maps. It ignores the ability to revisit the East Anchorage/Eagle River Senate Pairings within in a short time period. The Board also forgets that it's willful, flagrant, and obvious violations weigh in favor of voiding its action along with its blatant violation of the stated purpose of the OMA.

⁴⁷ Alaska Statute 44.62.310(f).

2. The Board Violated Article VI, Section 10 of the Alaska Constitution by Failing to Adopt Senate Pairings Within 30 Days of Receiving Census Data and Failing to Hold Public Hearings on Such Pairings

37. Article VI, Section 10 of the Alaska Constitution provides that the Board must adopt a proposed redistricting plan within 30 days of receipt of census data. This constitutional provision also mandates that the Board hold public hearings on the proposed plan or, if no single proposed plan is agreed upon, on all plans proposed by the Board. The evidence presented in the record, and at trial, demonstrates that although the Board did so with regard to its house districts, no proposed plan for senate pairings was properly and timely presented to the public before its adoption. In failing to adopt proposed senate pairings within the required 30-day window, and in failing to hold any hearings on any senate pairing plan, the Board violated this constitutional provision.

38. Rather than complying with this constitutionally-imposed procedure, which emphasizes the importance of public hearings in formulating the Board's final proclamation plan, the Board failed to adopt senate pairing proposals in the same manner it did house maps, failed to hold any hearings regarding any specified senate pairings proposal, and actively shut down discussion and testimony at its public meetings before November 8 regarding senate pairings. Likewise, rather than holding its deliberations regarding senate pairing proposals in public, the Board appears to have deliberated upon and received advice from counsel regarding proposed pairings that had not yet been submitted to the public in executive session.

39. After the Board received census data on August 12, 2021, it invited members of the public to provide proposed redistricting plans. Several groups provided the Board with proposed house district maps, among them AFFER, AFFR, the Senate

Minority Coalition, the Doyon Coalition, and the Alaska Democratic Party. The Board adopted each of these maps but that proposed by the Alaska Democratic Party, in addition to two maps created by the Board itself: “Proposed Plan v.3” and “Proposed Plan v.4.”⁴⁸ The Board announced the adoption of these proposed plans on September 20, 2021.⁴⁹ Although the Board’s own plans did not include suggested senate pairings, the third-party plans did. However, in the announcement regarding the adopted plans, the Board referenced only the map components of each plan — the announcement included a quotation from Member Nicole Borromeo, which stated “[w]e look forward to hearing feedback from Alaskans on our new draft maps, as well as the four adopted third-party maps, as we present them in public meetings in communities across the state.”⁵⁰ The announcement was devoid of any mention of senate pairings, televising to the public that no proposed senate pairings had been adopted.

40. Indeed, at the Board’s “road show” across the state, senate pairings were not discussed, and proposed senate pairing charts were not printed and posted on the wall as house district maps were. Testimony submitted to the Board is riddled with references to this significant omission: as early as September 16, 2021, and as late as November 5, 2021, members of the public repeatedly wrote to and orally requested the Board to disclose its senate pairing proposals to the public.⁵¹ Yet, despite these repeated requests, the Board never issued a corresponding announcement providing the public

⁴⁸ Findings of Fact at ¶ 21.

⁴⁹ Findings of Fact at ¶¶ 21-23.

⁵⁰ Findings of Fact at ¶ 23.

⁵¹ See, e.g. Findings of Fact at ¶ 66.

with any indication that it had adopted any proposed plan for senate districts as the Constitution requires.⁵²

41. Likewise, the Board never offered an opportunity for the public to comment on its senate pairings proposal that paired East Anchorage with Eagle River. While the public was permitted to testify while the Board was in the process of “workshopping” senate pairings, it did so blind, without any direction as to what the Board was considering.⁵³ Not only did this error in process preclude the public from meaningful involvement in the Board’s decision-making process, but it also prevented the public from reacting to the work of the Board and correcting its errors before the final proclamation plan was adopted. For example, in her affidavit, Felisa Wilson states that she testified to the Board regarding senate pairings and her belief that Eagle River house districts should be paired together into a single senate district. However, Member Marcum took her comments out of context and “misconstrued the words of [Wilson’s] testimony to misrepresent it as in favor of pairing Eagle River house districts with JBER or Northeast

⁵² The Board has previously argued that the trial court’s decision in the *In re 2001 Redistricting Cases* litigation is determinative of East Anchorage Plaintiffs’ Article VI, Section 10 claims because the court opined that this constitutional provision does not mandate that the Board must hold hearings regarding its final proclamation plan. Not only is this statement dicta from a trial court without binding force or precedential effect (see *United States v. K.A. Tucker Truck Lines, Inc.*, 344 U.S 33, 38 (1952) (concluding that an issue not raised or discussed in an appellate opinion is not binding precedent on that point); see also 21 C.J.S. Courts § 206 (explaining that a court’s prior decision is not a binding precedent on points or propositions that were not raised in briefs or argument, considered by the court, or discussed in the opinion)), but it is also inapposite where, as here, the Board failed to hold public hearings on *any* senate pairing plan.

⁵³ See generally ARB006496; ARB007032 (transcripts of Board meetings on November 8-9, 2021).

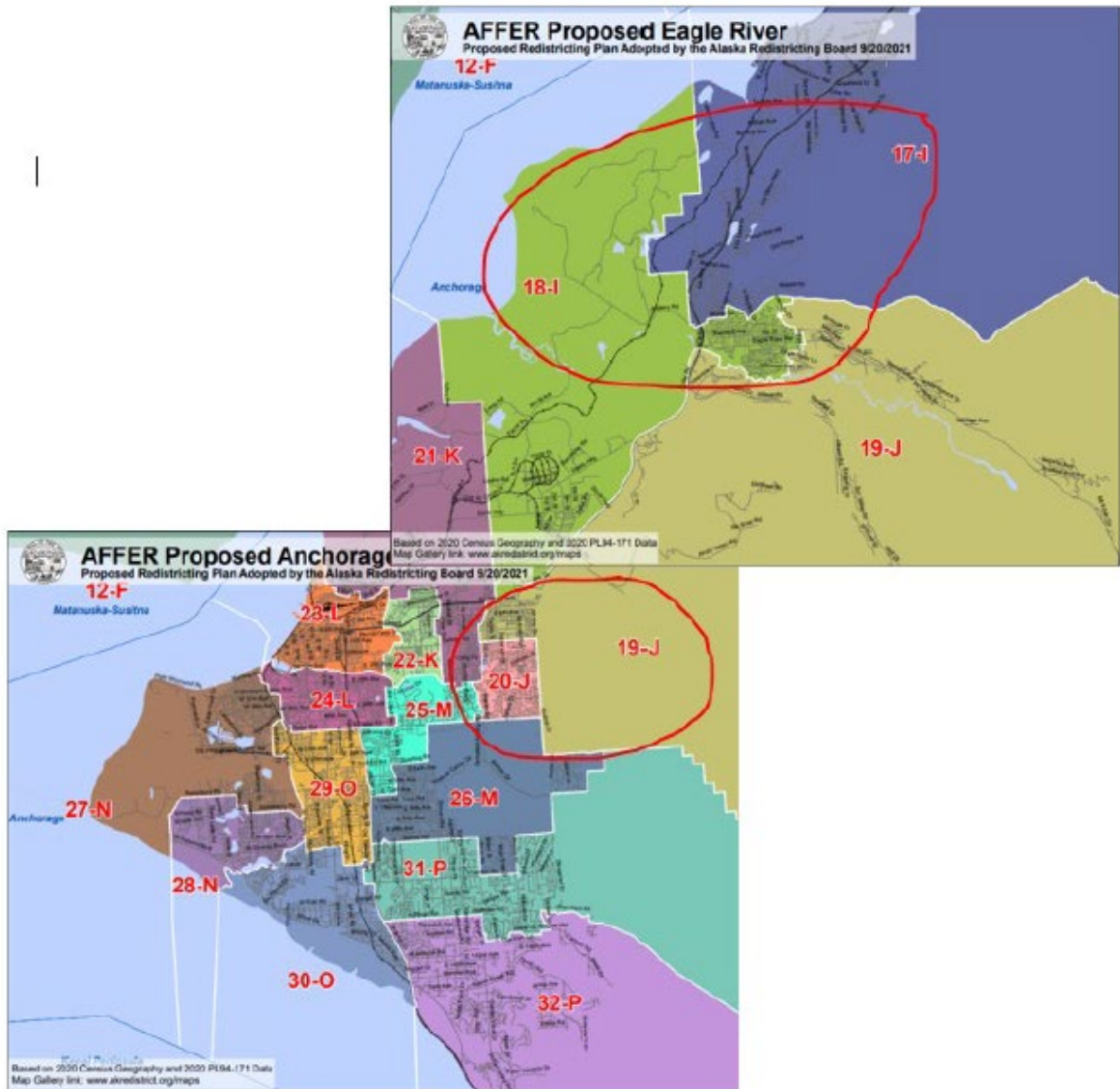
Anchorage districts.”⁵⁴ Wilson testified that “[t]here was no opportunity for the public to rectify this misrepresentation of [her] testimony, nor to give further comment on the senate pairings as selected by the Board.”⁵⁵ Likewise, Yarrow Silvers testified in her affidavit that “[t]he Board did not provide the public with any proposed senate pairings for its consideration before the November 8, 2021 meeting, and only permitted public testimony before revealing the Board’s pairing proposals, unlike the house map process which allowed testimony before the adoption of the final house map.”⁵⁶ The Board did not cross-examine with Ms. Wilson or Ms. Silvers as to this testimony; it therefore remains unrebutted and conclusive.

42. This absence of a meaningful public hearing process is especially egregious because the Board failed to provide the public with any indication that the Board was contemplating splitting the East Anchorage and Eagle River communities of interest before the November 8 meeting. This arrangement was not reflected in any of the senate pairings provided to the Board by third parties at the beginning of its process, and was not discussed at any public hearing prior to November 8. Although the Board previously argued in its Motion to Dismiss East Anchorage Plaintiffs’ Article VI, Section 10 Claim Pursuant to Civil Rule 12(b)(6) that such a pairing was submitted with AFFER’s proposed plan, the Board is mistaken. As the following graphic demonstrates, AFFER’s proposal “carves out” the vast majority of Eagle River, places it with JBER, and pairs the resulting house district north into a senate district with the Chugiak/Birchwood/Peters Creek area:

⁵⁴ F. Wilson Aff., ¶ 19.

⁵⁵ *Id.* at ¶ 21.

⁵⁶ Y. Silvers Aff., ¶ 36.



43. In short, not one piece of evidence exists in the record which supports the notion that the Board complied with the mandates of Article VI, Section 10 of the Alaska Constitution and provided the public with an adopted senate district plan within 30 days of receipt of census data — in fact, the overwhelming evidence demonstrates that the Board never adopted any such plan, and further never held a single public hearing on any senate district plan. The total absence of any attempt at complying with this constitutional

mandate deprived the public of any opportunity to meaningfully inform the Board's senate pairing process, which appears to have directly led to the Board's uninformed decision to pair East Anchorage house districts with those in Eagle River. Thus, this procedural error mandates correction of the resulting substantive error in the Board's Anchorage senate pairings.

3. The Board Violated Its Own Policies and Procedures During the Senate Pairing Adoption

44. While the Board's violation of the OMA and the application of the OMA to the Board is irrefutable under current Alaska law, the Board's adoption of the OMA through its own policies and the publication of those policies on its website also obligate the Board to follow the OMA. Further, the Board Chair admitted to the adoption of Robert's Rules of Order.⁵⁷ During his deposition, Board Chair John Binkley stated that, although the Board did not adopt any formal conduct, ethics, or decorum rules, all members agreed early on in the procedure that they would comply with Robert's Rules of Order during their public meetings.⁵⁸

45. Yet, at the November 9, 2021 Board meeting, the Board violated Robert's Rules, through its Chair, when Binkley shut down debate regarding senate pairings without a 2/3 vote as required by Article VII, section 44 of Robert's Rules.⁵⁹ Although Bahnke and Borromeo vehemently objected to the majority members' attempt to call the question while debate was ongoing, the other Board members steadfastly refused to

⁵⁷ See Findings of Fact at ¶¶ 69-87.

⁵⁸ See Findings of Fact at ¶¶ 35, 40-41.

⁵⁹ November 9, 2021 Board Meeting Tr. p. 11, ARB007043; Article VII, section 44 of Robert's Rules of Order.

continue debate.⁶⁰ Bahnke remarked in her closing comments on November 10, 2021 that “the Board took action to end discussion and debate [November 9, 2021], which I think procedurally and technically, was contrary to Robert’s Rules of Order.” While Bahnke recognized she was not an expert on Robert’s Rules, she did not “think that [the Robert’s Rules violation] was unintentional, because as a former legislator, [Binkley was] very well versed in Robert’s Rules of Order.”⁶¹ Further, the Board adopted the Open Meetings Act and yet implemented a Request for Proposal process in retaining legal counsel that unlawfully excluded the public.⁶²

46. The Board’s adoption of policies and procedures and then wholesale abandonments of those procedures when they no longer suit their needs constitutes a violation of due process.

4. Failing to Maintain and Produce an Administrative Record that Would Aid in Judicial and Public Review and Assessment

47. The application process to correct an error is an administrative appeal process. While the Board is given the opportunity to advocate for and defend its redistricting plan, the Board does not have the authority or right to interfere with the creation of the administrative record and disclosure of administrative documents to thwart the efforts of applicants. The Board’s obligations under the Alaska Constitution and due process do not disappear solely because the Board issued a decision. It remains a government body subject to the obligations of due process, equal protection, and various

⁶⁰ See Findings of Fact at ¶¶69-87.

⁶¹ *Id.*

⁶² *Id.*

other constitutional and statutory provisions. Thus, while it certainly has a right to fiercely advocate for its findings, it does not have the right to obscure the administrative record to interfere with the right of the applicants to participate in the application process. As the Court is aware, the applicants in this case have been attempting to discover information and documents relating to the Board's decision-making process since the inception of the application process. The Board has consistently refused to provide the information requested in a usable form or in any form at all. There are substantive and necessary documents still at large and no time given the current structure to engage in the additional motion practice necessary to receive those documents and certainly no time to process the importance of them.⁶³ This obstructive conduct included failing to respond appropriately to East Anchorage Plaintiffs' discovery requests, precluding counsel from inquiring as to non-privileged topics at Board member depositions, and withholding from production on attorney-client privilege grounds numerous documents which the Court later found to be non-privileged.

48. After trial began, pursuant to an order following this Court's in camera review of these withheld documents, relevant and discoverable email correspondence among Board staff members and counsel was produced to East Anchorage Plaintiffs. This correspondence provided evidence, despite representations by the Board suggesting otherwise, that the Board relied on and had access to minority race data when conducting its Anchorage pairings and may have relied on incorrect data in doing so.

⁶³ *E.g.* East Anchorage Plaintiffs have been unable to find the Redistricting Planning Committee Report in the production, the finalized Board policies and procedures are not in the record, and the Board produced documents in its exhibits that were not produced during production.

Throughout these proceedings, the Board appears to have made every effort to obfuscate efforts by the applicants to get basic information regarding the Board's rationale underlying its decision and its findings, or rather its lack thereof. East Anchorage Plaintiffs recognize that the Board faces extremely challenging time constraints in completing its mapping duties. However, in this election cycle, the substantial delay in the release of the census data in many ways substantially burdened the court and the application for correction of error process. The Board, through its legal counsel, capitalized on this burden, aggressively engaging in adversarial tactics that required applicants to repeatedly move for access to records and documents even where such documents were clearly subject to disclosure as a matter of law. The Board had over a year to develop, finalize and preserve the vast majority of its documents. The court and the applicants had only weeks to review and process this data. The Board's failure to prepare, retain, and preserve an administrative record extremely burdened the applicants and the court.⁶⁴ A superior court judge or a decision maker in a quasi-judicial hearing before a government body cannot, under any circumstances, muddle the record on appeal to increase its chances of surviving remand. The Board, as a government body with a decision before this court on appeal, should be held to the same standard.

49. Unlike a standard court proceeding, the application of error process is but a component of the redistricting process as a whole. Thus, intentional and bad faith efforts by the Board to derail that process, especially in a cycle like this where the court

⁶⁴ See Motion to Supplement Record; Motion for Rule of Law; Mat-Su Borough Motion Joining in Motion for Rule of Law; Motion

has closer to two rather than six months to issue a decision, constitutes an independent procedural due process violations by the Board.

50. Similarly, the Board's efforts to withhold documents that are, as a matter of law, subject to disclosure and continued refusal to produce the most basic requested documents, such as email correspondence between and by Board members *with* attachments also interfered with East Anchorage Plaintiffs' ability to present its case. Again, the Board had over a year to develop a process for preserving and preparing Board correspondence for disclosure. Past redistricting boards have, for example, prepared, maintained, and disclosed a reading file containing such email correspondence to the public. The Board however, not only failed to create a reading file, it denied its record retention duties when the applicants requested that it, at the least, produce an administrative record documents as mandated by the State's statutory retention requirements.⁶⁵

5. The Board Failed to Adopt Findings Regarding Senate Pairings Necessary to Judicial Review

51. While the Alaska Supreme Court does not require the Board to issue findings for each election district, the Alaska Supreme Court has repeatedly recognized the value and need of findings in the redistricting process. Like the hybrid administrative appeal/trial model imposed by Alaska Civil Rule 90.8, the court creates a hybrid process model for the redistricting board, which includes some of the fundamental procedural due process protections afforded the public in quasi-judicial proceedings as well as the

⁶⁵ See *generally* Joint Motion to Include Certain Categories of Documents in Administrative Record, filed December 17, 2021, and related pleadings.

substantive due process protections imposed upon legislative bodies. Unfortunately, the Board failed to comply with both the procedural and substantive due process requirements imposed upon it, ultimately resulting in the irrational Eagle River/East Anchorage Pairings and the substantial loss of the public's trust in the Board and the integrity of the redistricting process.

52. Well-made findings are necessary. They benefit the body making them, the appellate body reviewing them and the parties to the action in which they are made. Findings ground a body, helping it to avoid making decisions based on irrelevant or unsubstantiated factors. The act of making findings requires a body to focus its attention on the evidence presented and how this evidence reflects on each of the elements required in an ordinance or statute. The act of making findings not only helps a body formulate the basis for its decision but also helps the body communicate that basis to an appellate body. Well-drafted findings allow a reviewing court to understand why a body made a certain decision rather than having to guess as to the basis for a certain ruling. Findings also provide the parties to an action with guidance, giving these parties insight into the basis for the body's decision, which in turn allows them to make strategic decisions about whether or not to appeal the body's action. *Mobile Oil Corp. v. Local Boundary Commission*, 518 P.2d 92 (Alaska 1974); see also *Faulk v. Board of Equalization*, 934 P.2d 750 (Alaska 1997).

53. While there has been little discussion of what constitutes sufficient findings in redistricting actions, the importance of findings and standard of review applied to them

is evident in laws governing quasi-judicial bodies, which requires such bodies to issue findings.⁶⁶

54. In *Fields v. Kodiak City Council*, the court required findings in a variance action, stating that:

The statute requires an aggrieved party seeking review to specify the grounds for the appeal. AS 29.33.130(b) [now, AS 29.40.040(b)]. This requirement is also found in the governing local ordinance. KIBC 17.69.030. A board's failure to provide findings, that is, to clearly articulate the basis of its decision, precludes an applicant from making the required specification and thus can deny meaningful judicial review. We believe that implicit in AS 29.33.130(b) is the requirement that the agency rendering the challenged decision set forth findings to bridge the analytical gap between the raw evidence and the ultimate decision or order. Only by focusing on the relationship between evidence and findings, and between findings and ultimate action, can we determine whether the board's action is supported by substantial evidence. Thus we hold that regardless of whether a local ordinance requires findings, a board of adjustment ruling on a variance request must render findings "sufficient both to enable the parties to determine whether and on what basis they should seek review and, in the event of review, to apprise a reviewing court of the basis for the board's action."⁶⁷

55. According to the court in *Fields*, "[a]bsent findings, a court is forced into 'unguided and resource-consuming explorations,' groping through the record to determine 'whether some combination of credible evidentiary items which supported some line of factual and legal conclusions supported the ultimate order and decision' of the board."⁶⁸

⁶⁶ See *South Anchorage Concerned Coalition, Inc. v. Coffey*, 862 P.2d 168 (Alaska 1993), quoting from *Kenai Peninsula Borough v. Ryherd*, 628 P.2d 557, 562 (Alaska 1981).

⁶⁷ *Fields v. Kodiak City Council*, 628 P.2d 927, 933 (Alaska 1981) (citations omitted).

⁶⁸ *Fields*, 628 P.2d at 934 (citations omitted).

56. Despite the court's general requirement of findings, there are cases in which the court determines that findings are unnecessary to decipher a board or commission's decision and upholds the decision in question despite the lack of findings.⁶⁹ However, even in the cases where the court upholds a commission or board's decision without adequate findings, the court invariably reiterates the general findings requirement.

B. THE BOARD'S EAST ANCHORAGE/EAGLE RIVER PAIRINGS VIOLATE THE EQUAL PROTECTION CLAUSE OF THE ALASKA CONSTITUTION

57. Senate District K cannot withstand scrutiny under the Equal Protection Clause of the Alaska Constitution. The Equal Protection Clause provides that "all persons are equal and entitled to equal rights, opportunities, and protection under the law."⁷⁰ "In the context of voting rights in redistricting and reapportionment litigation," the Alaska Supreme Court has held that "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."⁷¹ The former is quantitative, or purely numerical, in nature; the latter is qualitative.⁷²

⁶⁹ See *Alvarez v. Ketchikan Gateway Borough*, 28 P.3d 935, 940 (Alaska 2001). See also *Fields*, 628 P.2d at 932; *Galt v. Stanton*, 591 P.2d 960, 962-965 (Alaska 1979).

⁷⁰ Alaska Constitution, Article 1, Section 1. This constitutional provision has been interpreted by courts along lines which "resemble, but do not precisely parallel the interpretation given the federal clause." See *Hickel*, 846 P.2d at 47. The Federal Equal Protection clause provides that "[n]o state shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, § 1.

⁷¹ *Kenai Peninsula Borough*, 743 P.2d at 1366.

⁷² *Hickel*, 846 P.2d 38 (Alaska 1992) (citing *Kenai Peninsula Borough*, 743 P.2d at 1366-1367).

58. Both the Alaska and federal due process clauses impose a guarantee of fair representation which mandates overturning certain apportionment schemes that “systematically circumscribe the voting impact of specific voter groups” even where these schemes would otherwise be “mathematically palatable.”⁷³ This principle recognizes the danger that certain groups – community, political, racial, or of other varieties – may be “fenced out of the political process and their voting strength invidiously minimized” by redistricting and reapportionment schemes which violate the Equal Protection Clause.⁷⁴

59. While the United States Supreme Court has indicated that “a mere lack of proportional representation will be insufficient to support a finding of unconstitutional vote dilution,”⁷⁵ and that Plaintiffs must prove a pattern of intentional discrimination against a group and discriminatory effect on that group,⁷⁶ the Alaska Equal Protection Clause imposes a stricter and more protective standard than its federal counterpart.⁷⁷

60. To determine whether a redistricting plan runs afoul of Alaska’s guarantee of equal protection, courts look to the Alaska Supreme Court’s three-step equal protection analysis.⁷⁸ The first step of this analysis is to determine the weight of the constitutional interest that is impaired by the challenged state action. Guidance from the high court is

⁷³ *Id.* at 48-49.

⁷⁴ *See, i.e., Gaffney v. Cummings*, 412 U.S. 735, 754 (1973).

⁷⁵ *Davis v. Bandemer*, 478 U.S. 109, 127 (1986).

⁷⁶ *Id.* at 133.

⁷⁷ *Kenai Peninsula Borough*, 743 P.2d at 1371; *Isakson v. Rickey*, 550 P.2d 359, 362–63 (Alaska 1976) (requiring a more flexible and demanding standard and noting that the court “will no longer hypothesize facts which would sustain otherwise questionable legislation as was the case under the traditional rational basis standard”).

⁷⁸ *See Kenai Peninsula Borough*, 743 P.2d at 1370-72.

clear: the right to a geographically equally effective vote, while not a fundamental right, is “a significant constitutional interest.”⁷⁹ Where a governmental action impairs a significant individual right, the second step of the equal protection analysis requires the court to determine whether the action was taken in order to serve a legitimate and important governmental interest — in other words, where a threshold showing of impairment of a right is made, the burden shifts to the government to demonstrate that there was some legitimate and important policy consideration which necessitated the impairment of that right.⁸⁰ In the voting context, if the record demonstrates that the Board’s intent was to dilute the voting power of a geographic group compared to another, that is a per se illegitimate purpose, and the equal protection challenge prevails.⁸¹ In light of Alaska’s protective equal protection jurisprudence, the Court deliberately does not require a showing of a pattern of discrimination, and does not consider *any* effect of disproportionality *de minimis* when determining the legitimacy of the Board’s purpose.⁸²

61. Actual discriminatory intent need not be directly proven — rather, if there is even an appearance of an intent to dilute the voting strength of one group compared to

⁷⁹ *Braun v. Borough*, 193 P.3d 719, 731 (Alaska 2008) (citing *Kenai Peninsula Borough*, 743 P.2d at 1372).

⁸⁰ *See, e.g., Malabed v. North Slope Borough*, 70 P.3d 416, 421 (Alaska 2003) (where an important interest is implicated, the State’s interest must be “not only legitimate but important” and “the nexus between the enactment and the important interest it serves [must] be close”).

⁸¹ *Kenai Peninsula Borough*, 743 P.2d at 1371-72 (finding a senate district unconstitutional where it was the product of “intentional geographic discrimination” such that the district “tend[ed] toward disproportionality of representation and its purpose [was] therefore illegitimate”).

⁸² *Id.*

another, then the burden will also shift to the Board to prove it had a proper purpose.⁸³ For example, in *Kenai Peninsula Borough v. State*, the Alaska Supreme Court expressly held that “Senate districts which meander and ignore political subdivision boundaries and communities of interest will be suspect under the Alaska Equal Protection clause.”⁸⁴ Similarly, the Court has approved of and incorporated trial court dicta explaining that “[t]here is an Alaska equal protection guarantee against hodge-podge senate pairings.”⁸⁵

62. Discriminatory intent may also be inferred from the process followed by a governmental entity. In *Kenai Peninsula Borough*, looking to both “the process followed by the Board in formulating its decision” and to “the substance of the Board’s decision,” the Court found that “it [was] evident that the Board sought to prevent another Anchorage senate seat in the state legislature,” thereby demonstrating that the Board impermissibly acted against “the interest of individual members of a geographic group or community in having their votes protected from disproportionate dilution by the votes of another geographic group or community.”⁸⁶

63. While federal courts require proof of both intentional discrimination against a politically salient group and demonstration of an actual discriminatory effect upon that group to prove a prima facie equal protection violation, Alaska courts do not. Instead, the Alaska Supreme Court opted to adopt the “neutral factors test” propounded by Justice

⁸³ *Id.* at 1372.

⁸⁴ *Kenai Peninsula Borough*, 743 P.2d at 1365, n.21 (Alaska 1987).

⁸⁵ *Hickel*, 846 P.2d at 73.

⁸⁶ *Id.*

Powell in *Davis v. Bandemer*.⁸⁷ Under this standard — black letter law in Alaska — “district lines should be determined in accordance with neutral and legitimate criteria. When deciding where those lines will fall, the State should treat its voters as standing in the same position, regardless of their political beliefs or party affiliation.”⁸⁸ Therefore, Alaska law, by design, does not require that challengers to a redistricting plan demonstrate that a plan has a discriminatory impact on a particular class of voters in order to succeed on the merits — discriminatory intent is enough.

64. This precedent creates protection for the interest of communities in their “right to an equally powerful and geographically effective vote in the state legislature.”⁸⁹ Notably, this right protects *community interests* — not merely interests stemming from race, political affiliation, or other suspect classes. Again, “upon a showing that the Board acted intentionally to discriminate against the voters of a geographic area, the Board must demonstrate that its plan will lead to greater proportionality of representation.”⁹⁰

65. The Board will no doubt assert, with reference to federal law, that an equal protection violation cannot exist without evidence that the minority which has been discriminated against votes in a predictable, uniform manner. The Board is mistaken as a matter of law: in Alaska, geographic discrimination claims may involve racial and partisan aspects — as here — but are justiciable in their own right as a consequence of Alaska’s non-partisan redistricting process.

⁸⁷ *Kenai Peninsula Borough*, 743 P.2d at 1372 (citing *Davis*, 478 U.S. 109, 161-162 (1986) (Powell, J., concurring and dissenting).

⁸⁸ *Id.*, see also *Davis*, 478 U.S. at 167 (Powell, J., concurring and dissenting).

⁸⁹ *Id.*

⁹⁰ *Hickel*, 846 P.2d at 49 (citing *Kenai Peninsula Borough*, 743 P.2d at 1372).

66. Partisan gerrymandering is a redistricting process and outcome which “operates through vote dilution — the devaluation of one citizen’s vote as compared to others.”⁹¹ Mapmakers draw district lines to “pack” and “crack” voters likely to support the disfavored party.⁹² Supermajorities of the disfavored party are “packed” into relatively few districts in far greater numbers than needed for preferred candidates to prevail, and the remaining voters from the disfavored party are “cracked” among remaining districts. Regardless of whether an individual voter has been “packed” or “cracked,” his or her vote carries less weight, and less consequence, than it would under a non-partisan, neutrally-drawn map.⁹³ In short, “the mapmaker has made some votes count for less, because they are likely to go for the other party.”⁹⁴ This vote dilution inherently presents an equal protection problem, though it is perhaps more subtle than the equal protection problem presented by violations of the “one person, one vote” requirement.

67. In 2019, the United States Supreme Court decided *Rucho v. Common Cause*,⁹⁵ a landmark decision which held that claims of partisan gerrymandering presented a non-justiciable question beyond the reach of the federal courts. In so holding, the Court carefully distinguished among various impermissible actions by redistricting entities, and carefully clarified the role of federal courts in the redistricting process. The Court wrote:

⁹¹ *Rucho v. Common Cause*, 139 S.Ct. 2484, 2514 (2019) (Kagan, J., dissenting).

⁹² *Gill v. Whitford*, 138 S.Ct 1916, 1929-31 (2018).

⁹³ *Id.* at 1924 (Kagan, J., concurring).

⁹⁴ *Rucho v. Common Cause*, 139 S.Ct. 2484, 2514 (2019).

⁹⁵ *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

Aware of electoral districting problems, the Framers chose a characteristic approach, assigning the issue to the state legislatures, expressly checked and balanced by the Federal Congress, with no suggestion that the federal courts had a role to play.

Courts have nonetheless been called upon to resolve a variety of questions surrounding districting. The claim of population inequality among districts in *Baker v. Carr*, for example, could be decided under basic equal protection principles. 369 U.S. at 226. Racial discrimination in districting also raises constitutional issues that can be addressed by the federal courts. See *Gomillion v. Lightfoot*, 364 U.S. 339, 340. Partisan gerrymandering claims have proved far more difficult to adjudicate, in part because ‘a jurisdiction may engage in constitutional political gerrymandering.’ *Hunt v. Cromartie*, 526 U.S. 541, 551. To hold that legislators cannot take their partisan interests into account when drawing district lines would essentially countermand the Framers’ decision to entrust districting to political entities...⁹⁶

Thus, in the aftermath of *Rucho*, resolution of the equal protection problem presented by partisan gerrymandering has been left to the province of the state courts. And in Alaska, the problems identified by the *Rucho* court as weighing against justiciability are simply not present. Where, in other jurisdictions, redistricting is an inherently political process, the Alaska redistricting board is, by design, a non-partisan entity. Article VI, Section 8 of the Alaska Constitution states that appointments to the Board shall be made “without regard to political affiliation,” and mandates that none of the members of the Board “may be public employees or officials at the time of or during the tenure of appointment.” There is simply no barrier – legal, jurisdictional, or otherwise — to Alaska courts exercising their authority to identify and correct errors by the Alaska Redistricting Board which constitute partisan gerrymandering.

⁹⁶

Id.

68. Here, the Board’s decision to pair Eagle River house districts with East Anchorage districts constitutes a geographic gerrymander (with partisan and racial undertones) in violation of the Alaska Constitution. These pairings impermissibly divide the discrete, diverse, and issue-driven East Anchorage community of interest for senate pairing purposes, pairing its component parts with the predominately white, majority conservative Eagle River. The impact of this pairing is to “crack” issue-driven East Anchorage voters among multiple districts, ensuring that Eagle River voters will be able to dominate elections in not one senate district — as would occur if the two Eagle River districts are paired together — but in two senate districts.

69. Consistent with its constitutionally-mandated nonpartisanship, the Board began its work by proclaiming that it would not be considering political information in its decision-making process.⁹⁷ The Board made this statement repeatedly, and publicly.⁹⁸ Yet, at deposition, Board members Marcum and Simpson both admitted to receiving a spreadsheet from Randy Ruedrich which provided incumbent information for the Board’s final house districts, suggested senate pairings, and a column indicating whether an incumbent could be reelected from the new districts selected by the Board.⁹⁹ Marcum’s deposition testimony demonstrates that she and Simpson viewed this information during the senate pairings work session in which Marcum apparently developed her proposals pairing Eagle River house districts with those in East Anchorage. This fact was never revealed to the public: indeed, later in the process, when discussing the senate term

⁹⁷ See Findings of Fact ¶ 163.

⁹⁸ See Findings of Fact ¶ 163.

⁹⁹ See Findings of Fact ¶ 164; see *also generally* B. Marcum Dep; B. Simpson Dep.

truncation cutoff, Marcum took it upon herself to “just state for the record [the Board has] not been provided with any incumbent information.”¹⁰⁰ When placed in this context — particularly in light of the Board’s failures in process — Marcum’s statement that her pairings would provide Eagle River with the opportunity for more representation makes clear that her senate pairings were engineered as a partisan gerrymander to dilute the efficacy and strength of East Anchorage voters’ community voice.

70. Having shown that the Board intentionally acted to dilute the efficacy of East Anchorage voters, the onus shifts to the Board to show that “its plan will lead to greater proportionality of representation.”¹⁰¹ The Board cannot do so. The Board has not offered the testimony of any expert witness in this proceeding, and has not otherwise attempted to meaningfully rebut or engage with East Anchorage Plaintiffs’ equal protection arguments. Instead, throughout its substantive filings in this matter, the Board has attempted to undermine the credibility of the East Anchorage Plaintiffs’ equal protection claims by misleadingly and inaccurately characterizing them as alleged violations of the “one person, one vote” requirement.¹⁰² The Board’s position ignores every Alaska and

¹⁰⁰ See Findings of Fact ¶ 166.

¹⁰¹ *Hickel*, 846 P.2d at 49 (citing *Kenai Peninsula Borough*, 743 P.2d at 1372).

¹⁰² See Alaska Redistricting Board’s Trial Brief at pp. 83-84 (stating without citation to law or authority that “... East Anchorage’s arguments do not make sense. If they believe that pairing South Muldoon with Eagle River gives Eagle River the chance to elect another senator, that logic applies to South Muldoon as well. House districts of equal population do not have advantages over other house districts with equal population. By the plaintiffs’ logic, the Final Plan gives the residents along Muldoon three senators who represent their interests: Senate Districts J, K, and L. Thus, East Anchorage’s equal protection claim fails as a matter of law”).

federal case to have ever considered qualitative theories of equal protection in the redistricting context.

71. Indeed, an analysis of the testimony presented to the Court demonstrates that the Board's actions result in a reduction of proportionality of representation to East Anchorage voters from partisan, community of interest, and racial perspectives. As East Anchorage Plaintiffs' expert witness Dr. Chase Hensel testified, "[b]ecause peoples' needs arise in specific settings and must be addressed in ways that suit those settings, political representation is most effective where constituents share a sense of place."¹⁰³ This is because, as Dr. Hensel describes, discrete communities have different needs which are not interchangeable with those of other communities. This dichotomy is particularly evident when one contrasts Muldoon/Northeast Anchorage communities with Eagle River:

Muldoon/Northeast Anchorage areas self-represent and are referred to in the language of urban community. Neighborhoods are the common socio-geographic expression of diversity in urban spaces. Cities are typically described as having a particular character; so are the neighborhoods that constitute them, wherever populations, activities, and structures make such areas distinctive. An urban sense of place is often rooted in one's neighborhood. The experience of living in an urban neighborhood closely bordered by other neighborhoods differs from living in a discretely bounded and more rural town; Muldoon, unlike Eagle River, has an integral relationship with the rest of Anchorage.¹⁰⁴

Likewise, Muldoon/Northeast Anchorage is astonishingly diverse in a way that Eagle River simply is not. As Dr. Hensel remarked, in East Anchorage — particularly in House District 20 (N. Muldoon) and 21 (S. Muldoon), "multiple minorities live together in an urban

¹⁰³ See generally *C. Hensel Aff.*; see also Findings of Fact ¶¶ 167, 180-181.

¹⁰⁴ *Id.* See *C. Hensel Aff.* At ¶ 48.

setting with the employment and living conditions that accompany poverty and low educational attainment.”¹⁰⁵ In contrast, as Eagle River resident Sean Murphy testified, “Eagle River commerce continues to grow and thrive, even during the pandemic” and “Eagle River residents are generally more affluent and educated per capita than East Anchorage and ... Eagle River residents have the same or very similar religious beliefs”¹⁰⁶ compared to the diverse origins and beliefs of East Anchorage residents.

72. Recognizing the notably diverse composition of East Anchorage districts, NAACP Anchorage, through its president Kevin McGee, took an interest in the Board’s work early on. On October 4, 2021, Mr. McGee wrote a letter to the Board encouraging the Board to “protect[] every Alaskan’s vote, with low population deviation, compactness, socioeconomic integration, and contiguity.”¹⁰⁷ Mr. McGee drew the Board’s attention to the import of “protect[ing] minority voters’ franchise in Southcentral Alaska,” as “attempts at partisan gerrymandering would come at the expense of meeting Constitutional obligations.”¹⁰⁸ By way of example, Mr. McGee noted that “attempts to ... add Eagle River population to an East Anchorage House seat, or to pair a Government Hill House seat with an Eagle River House seat, are clearly motivated by partisanship but disenfranchise minority voters who make up a large percentage of Government Hill, JBER, and East Anchorage voters.”¹⁰⁹ Later, on November 8, 2021, Mr. McGee again

¹⁰⁵ *Id.* at ¶ 61.

¹⁰⁶ See generally *S. Murphy Aff*; see also Findings of Fact ¶ 168.

¹⁰⁷ Findings of Fact ¶ 169

¹⁰⁸ Findings of Fact ¶ 169.

¹⁰⁹ Findings of Fact ¶ 169.

testified against pairing Eagle River House districts with those in East Anchorage to protect the voting rights of East Anchorage.¹¹⁰ In this written testimony, Mr. McGee provided two alternate pairing proposals for the East Anchorage community of interest, both of which would have maintained the integrity of existing communities and complied with constitutional mandates while maximizing the minority populations within senate districts:

One Senate pairing configuration is visually obvious: Take the four House seats in East Anchorage (HDs 17, 18, 19, 23), and pair them into two Senate seats. Pair Downtown (HD 20) with Government Hill/JBER (HD 21), which is logical since it unites Downtown into a Senate seat, and protects minority voters' voice.

Though less visually obvious, another pairing configuration also can ensure minorities' vote, and voice in the electoral process is protected. Pair HD 21/HD 19, HD 16/HD 17, and HD 23/HD 18. This configuration protects minority voters' voice at the Senate level, and logically links adjacent neighborhoods with JBER. Effectively, it ensures our most diverse neighborhoods have a real voice in three Senate districts.¹¹¹

When the Board disregarded this sound testimony, and Mr. McGee was forced to participate in this litigation to protect the rights of East Anchorage communities of color, he provided, thorough thoughtful testimony about his own background, the work and history of the NAACP, and his observations regarding the redistricting process. This testimony demonstrates, like the testimony of Dr. Hensel and others, that the senate pairings adopted by the Board “established a clear disadvantage to the Northeast

¹¹⁰ Findings of Fact ¶ 170..

¹¹¹ *Id.*

Anchorage community of color by the senate pairings of the Muldoon community with that of Eagle River.”¹¹²

73. Consistent with Member Marcum’s stated intent to disenfranchise East Anchorage voters for the benefit of those residing in Eagle River, the Board remarkably sought to exclude Mr. McGee’s affidavit in its entirety, and characterized his statements regarding the work and history of the NAACP as somehow “prejudicial to the Board.”¹¹³ The Court denied these baseless objections, and is entitled to consider Mr. McGee’s testimony regarding the impact of the Board’s plan on minority voters in East Anchorage. But this attempt by the Board to shield information regarding the racial impact of its proclamation plan from the public is not an isolated incident: rather, it is reflective of the Board’s larger, and more pervasive, aggressive position that racial information and legal discussions regarding race are subject to carte blanche protection from disclosure to the public by virtue of the attorney-client privilege. The Board asserted this position in response to the East Anchorage Plaintiffs’ Motion for Rule of Law Regarding Scope of Attorney-Client Privileged Communications with Government Entities, and that position was rejected by the Court.

74. The harm McGee alludes to in his affidavit is not speculative. As discussed extensively in the Brief in Amici filed by Amici, the Alaska Black Caucus, National Association for the Advancement of Colored People Anchorage, Alaska Branch #1000, Enlaces, and the Korean American Community Association, and joined by

¹¹² Findings of Fact ¶ 171.

¹¹³ Alaska Redistricting Board’s Objections to Plaintiffs’ Pre-Filed Direct Testimony at pp. 32-34.

Native Movement, East Anchorage voters have experienced the very real impact of the dilution resulting from an Eagle River/East Anchorage pairing. Senator Bettye Davis, Alaska's first Black woman senator, was elected in 2001 to serve as Senator in Senate District K, which covered neighborhoods in central and East Anchorage as well as parts of the Chugach State Park. When Senator Davis' district was paired with Eagle River under the 2011 interim plan, Senator Davis lost her seat. Numerous residents of East Anchorage communities of interest submitted comments to the Board warning of the impact resulting from Senator Davis' defeat.¹¹⁴

75. But even if it was not the Board's conscious intent to conceal its consideration of racialized aspects of the East Anchorage community of interest from the public, the Board did so inadvertently, contributing to the inequitable outcome of its senate pairings. Although, as Member Bahnke testified at deposition, the Board was not aware of the racial composition of specific communities while mapping, as it was the Board's understanding that "[w]e weren't supposed to factor in race,"¹¹⁵ the Board had the ability to access racial data through its AutoBound Edge software throughout its mapping process.¹¹⁶ However, as the Board's executive director Peter Torkelson testified in his January 27, 2022 supplemental affidavit, the software's "default matrix" undercounted minority voters by excluding those who self-identified as "white with Hispanic heritage"

¹¹⁴ Findings of Fact ¶ 171.

¹¹⁵ M. Bahnke Dep., pp. 77-78.

¹¹⁶ Findings of Fact ¶ 174.

from its calculation of the minority composition of a particular area.¹¹⁷ Although some limited information about minority populations in Anchorage was released to the public,¹¹⁸ demonstrating that the Board did, in fact, receive and consider race information during its redistricting process, the vast majority of the Board's deliberations regarding senate pairings were shielded from the public through executive sessions.¹¹⁹

76. Thus, although the Board received 196 pieces of written testimony relating to senate pairings — of which 32 specifically objected to Marcum's proposed pairings, while only six supported such pairings — providing myriad examples of the separate and distinct nature of the East Anchorage and Eagle River communities of interest, it is possible that the Board's misunderstanding of the statistical diversity of Anchorage neighborhoods contributed to its mistaken conclusion that it was appropriate to pair East Anchorage house districts with those in Eagle River when crafting senate districts. This confusion is reflected in the record — when the Board's "default matrix," Ex. 6004, is compared with the more inclusive calculation provided in Ex. 1007, it becomes apparent that Anchorage house districts were depicted as approximately 2 percent less diverse than they actually are.¹²⁰ As Erin Barker testified in her affidavit, using the data from the Board's default matrix suggests that when Districts 20 and 21 — North and South Muldoon — are combined into one senate district, the district would only have

¹¹⁷ Findings of Fact ¶ 174.

¹¹⁸ Findings of Fact ¶ 174.

¹¹⁹ Findings of Fact ¶ 174.

¹²⁰ Findings of Fact ¶ 175.

49.31 percent minority voting age population.¹²¹ Using the more inclusive senate data unavailable through the Board’s default matrix, it becomes apparent that the combined district would, in fact, have a minority voting age population of 51.12 percent, rendering it a minority-majority district.¹²² In contrast, when these diverse house districts are paired with Eagle River districts, their minority population plummets.¹²³

77. Although it is possible that this under-reporting of diversity information contributed to a misunderstanding as to the impact of the Board’s adopted senate pairings, the record does not reflect that the Board believed these pairings were appropriate and legal. Rather, Members Bahnke and Borromeo were outspoken in their impression that not only were the East Anchorage/Eagle River pairings inequitable, non-contiguous, and discriminatory against the East Anchorage community of interest, but they were also chosen “against the sound, sound advice ... from counsel in Executive Session”¹²⁴ — in other words, the majority Board members, in adopting these senate pairings, were doing so against the advice of their retained independent counsel. Likewise, Member Binkley — one of the majority Board members who voted in favor of the Marcum proposed pairings — never made any statements indicating why he believed Marcum’s pairings were more lawful or correct than those proposed by member Bahnke. He simply stated, at the November 8, 2021 meeting, that “[t]here’s good justification from all different ways ... all of these [senate pairing plans] are very justifiable, in my opinion.

¹²¹ Findings of Fact ¶ 175.

¹²² Findings of Fact ¶ 175.

¹²³ Findings of Fact ¶ 175.

¹²⁴ Findings of Fact ¶ 177.

It's a question of what you think is the most reasonable..."¹²⁵ In short, only Members Marcum and Simpson — both of whom had access to incumbent information, which was concealed from the public — were openly in support of the Board's adopted senate pairings. The Board has taken no steps to supplement or clarify its record to provide additional evidence in support of the East Anchorage/Eagle River pairings.

78. The overwhelming evidence presented at trial demonstrates that, by fragmenting the East Anchorage community of interest for senate pairing purposes, the Board acted intentionally to dilute the voting power of this geographic group in favor of voters in Eagle River. Under the Alaska Supreme Court's guidance in *Kenai Peninsula Borough*¹²⁶ and *Braun v. Borough*,¹²⁷ this is an illegitimate purpose which impairs the significant constitutional interest of East Anchorage voters to a geographically equally effective vote. Having proven this actual discriminatory intent, East Anchorage has proven that this error in the Board's proclamation plan is violative of Alaska's equal protection guarantee and must be corrected. The Board's secretive process in deliberating and evaluating these senate pairings, together with its decision to disregard the wealth of public testimony submitted in opposition to East Anchorage/Eagle River senate pairings, provides additional evidence from which the Court can infer an intent to discriminate against the East Anchorage community of interest.

79. In light of this totality of circumstances, the burden of proof shifts to the Alaska Redistricting Board to justify its decision as having been taken to ensure

¹²⁵ Findings of Fact ¶ 178.

¹²⁶ 743 P.2d at 1372.

¹²⁷ 193 P.3d 719 (Alaska 2008).

proportionate representation.¹²⁸ The Board had provided not one piece of evidence to meet this burden. No one at any stage of this proceeding has offered an explanation as to why the splitting of two distinct, defined communities of interest was necessary to achieve proportionate representation, and no case precedent protects this unreasonable pairing when other, constitutionally palatable options are available. For these reasons, this Court must find that the decision of the Alaska Redistricting Board to pair East Anchorage and Eagle River house districts into senate districts was made with an improper purpose, and has the effect of diluting the voices of voters from the East Anchorage Community of Interest in favor of Eagle River voters. This decision is violative of the equal protection rights of East Anchorage voters, and cannot stand.

C. THE BOARD’S EAGLE RIVER/EAST ANCHORAGE SENATE PAIRING VIOLATED ARTICLE VI, SECTION 6 OF THE ALASKA CONSTITUTION BECAUSE THE PAIRINGS DID NOT SATISFY THE CONTIGUITY CRITERION “AS NEARLY AS PRACTICABLE”

1. Senate District K is an Unconstitutional Senate District Because it Geographically is Not “Composed as Near as Practicable of Two Contiguous House Districts”

80. Article VI, § 6 of the Alaska Constitution provides:

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.¹²⁹

When interpreting provisions of the Alaska Constitution, courts “look to the plain meaning and purpose of the provision and the intent of the framers.”¹³⁰

¹²⁸ See *Kenai Peninsula Borough*, 743 P.2d at 1372.

¹²⁹ Article VI, Section 6, Alaska Constitution (emphasis added).

¹³⁰ *Wielechowski v. State*, 403 P.3d 1141, 1146 (Alaska 2017).

81. The Alaska Supreme Court has quoted with favor a practical definition of contiguity in the context of house districts: “[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).”¹³¹ As the article from which the definition that was selected by the Court notes, “there may be a dispute about contiguity if the only route between two places in the district is via roads which do not lie entirely within the district.”¹³²

82. The Redistricting Board apparently believed the only express requirement of the Alaska Constitution applicable to senate districts is that they be composed of house districts that “touch.”¹³³ That narrow view ignored the Constitution’s command that the board must use “drainage” and “geographic features” when describing boundaries, and it failed to account for the fact that the Alaska Supreme Court has held that constitutional contiguity is not a bright line rule satisfied by the mere intersection of lines on a map.

83. In *Hickel*, the Alaska Supreme Court addressed house districts that encompass archipelagos and open sea. Despite the fact that open sea could make every portion of single district theoretically “reachable” from any other portion, the Court held

¹³¹ *Hickel*, 846 P.2d at 45 (citing Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L. Rev. 77, 84 (1985)) (emphasis added).

¹³² Grofman, 33 UCLA L. Rev. at 184 n.37.

¹³³ See, e.g., Findings of Fact at ¶ 106; see also ARB007049 (transcript of November 9, 2021 Board meeting) (comments of Executive Director Torkelson: “The Board has adopted Senate pairing assignments. That’s where you take two of the new House districts, and they must be touching, and you assign those to one Senate seat”; cf. ARB006684 (transcript of November 8, 2021 Board meeting) (comments of Member Marcum: “So all three of those are physically contiguous too. And, as we know, that is the primary constitutional requirement we have in our state Constitution for determining Senate pairings”).

that it would recognize limits on the broadest interpretation of contiguity to avoid concluding, for instance, that “any part of coastal Alaska could be considered contiguous with any other part of the Pacific Rim.”¹³⁴

84. The Court’s conclusion in *Hickel* that contiguity is “not without limits,”¹³⁵ comports with minutes from the 1955 Alaska Constitutional convention that indicate “contiguity” was viewed as something different than mere adjacency.¹³⁶ It also made practical good sense.

85. In this case, Senate District K violates the Supreme Court’s previous interpretation of contiguity. For all practical purposes for the voters of Senate District K, their district is “divided into two . . . discrete pieces.” The inhabited portion of House District 21-K South Muldoon is not practically “reachable” from the inhabited portions of House District 22-K Eagle River Valley portions “without crossing the district boundary.”

86. Indeed, public roads that connect the house districts paired in Senate District K require travelers to leave the senate district to transit from one house district to the other, as is evident from the Board’s maps.¹³⁷ No road or trail contained entirely within Senate District K connects any residential address in House District 21 with a residential

¹³⁴ *Hickel*, 846 P.2d at 45.

¹³⁵ *Id.*

¹³⁶ See Proceedings of the Alaska Constitutional Convention (1956) at 1838 (comments of Delegate Hellenthal, who introduced the Article on Reapportionment) discussing how, in a specific scenario, a district could be “combined with a district adjacent to it and contiguous to it until its population again grows”, available at: <http://www.akleg.gov/pdf/billfiles/ConstitutionalConvention/Proceedings/Proceedings%20-%20Complete.pdf>.

¹³⁷ Findings of Fact ¶¶ 110-111.

address in House District 22.¹³⁸ Moreover, the populated portions of the house districts paired in Senate District K are separated from one another by restricted-access military lands.¹³⁹

87. Further, in violation of the Constitution’s express command, there is no evidence that the Board used “drainage” or “geographic features” to identify or describe the boundaries of Senate District K. The inhabited areas within Senate District K are located in separate drainages: House District 21 South Muldoon is in the Chester Creek drainage; House District 22 Eagle River Valley is in the Eagle River drainage; and the two are separated by the Ship Creek drainage.¹⁴⁰ Perhaps most clearly illustrating the Board’s disregard of “geographic features,” House Districts 21 and 22 are also separated by the Chugach Mountain Range, as a dissenting Board Member noted.¹⁴¹

88. The “drainage” and other “geographic features” that separate House District 21-K South Muldoon from House District 22-K Eagle River Valley are in no practical or legally relevant sense different from the portions of “open sea” that the Alaska Supreme Court has expressly held cannot be including in a single contiguous district “without limit.”

¹³⁸ See East Anchorage Plaintiffs’ Ex. 6015.

¹³⁹ See East Anchorage Plaintiffs’ Ex. 6017.

¹⁴⁰ See East Anchorage Plaintiffs’ Ex. 6015.

¹⁴¹ See ARB007041 (transcript of November 9, 2021 Board meeting) Comments of Member Borromeo:

It defies logic that we would do a minority reach into South Muldoon and pair it with a very right district eight miles away on a highway that crosses one mountain range and expect the court to believe with any satisfaction that we have satisfied the public trust in the process.

See *also* ARB006685, (transcript of November 9, 2021 Board meeting), pp. 19-20 (comments of Member Borromeo).

Indeed, while geographical contiguity does not itself turn on questions of socio-economics, socioeconomic realities are probative of whether particular geographic features actually have effectively divided an area: as the East Anchorage plaintiffs' expert has averred, the Eagle River community developed as a separate and distinct community of interest, in part, because it was physically separated from other parts of Anchorage.¹⁴² That the geographic separation was occasioned by mountains (the Chugach front range) and a fresh-water river drainage (Ship Creek), as opposed to a salt-water "open sea" feature, should not change the analysis. The Constitution contains no language to support such a distinction.

89. The plain meaning of the Constitution's command that senate districts be composed "as nearly as practicable" of "contiguous" house districts required the Board, when viable alternatives were available, to avoid creating from two house districts a single senate district that, for all practical purposes and from the perspective of drainage other geographical features, is composed of two separate and "discrete" pieces.

90. Senate District K as defined by the Final Redistricting Map fails to meet the criteria under Art. VI, §6 of the Alaska Constitution and should be invalidated. Senate District K is not composed as "near as practicable of two . . . house districts" that are constitutionally "contiguous."

¹⁴² See C. Hensel Aff. at ¶¶ 11-31.

2. The Board had No Rational Basis for its East Anchorage/Eagle River Pairing

91. It is undisputed that absolute contiguity means “territory which is bordering or touching.”¹⁴³ The Board, through its majority members, suggests both through its actions during the redistricting process and now at trial, that house districts that touch automatically satisfy Article VI, Section 6 of the Alaska Constitution. Despite the Board’s understandable desire for bright line rules, Alaska redistricting cannot and does not deal in absolutes. Instead, the Alaska legislature has consistently grounded its redistricting criteria in standards that are possible to achieve and informed the application of these standards through general statements of purpose and common-sense expectations. To this end, both house districts and senate districts must meet their respective constitutional criteria as nearly as practicable. House District 21-South Muldoon may “touch” House District 22-Eagle River Valley, but the senate district created through their pairing certainly does not meet the constitutional criteria “as nearly as practicable.”

92. The court has repeatedly determined that the Board’s obligation to meet the constitutional criteria in Article VI, Section 6 of the Alaska Constitution is infused with the ultimate goal of redistricting, which is the creation of “fair and effective” election districts.¹⁴⁴ Accordingly, the constitutional qualifier “as near as practicable” serves two juxtaposed purposes; It permits the Board to deviate from constitutional criteria when

¹⁴³ See *Hickel*, 846 P.2d at 45.

¹⁴⁴ See, e.g., *Hickel*, 846 P.2d at 44-45, n.25 (footnote 25 of the Superior Court’s Memorandum and Order notes that “requirements of compactness and contiguity are meant to be read to avoid geographic manipulation of districts for voter dilution or enhancement. By requiring physical limits, those requirements avoid sacrificing groups for the benefit of those doing reapportionment. Contiguity is widely recognized as an important consideration in redistricting”).

necessary to maximize constitutionality while also obligating the Board to make choices, when such choices exist, to advance the constitutional goals of redistricting. In essence, the “as near as practicable” language gives the Board some breathing room when the challenges of redistricting Alaska force them to draw otherwise non-ideal districts. At the same time, the court relies on this qualifier to protect the voter’s right to a “fair and effective” vote by obligating the Board to make decisions that further the ultimate goals of the constitution.

93. In practice, the balancing act between flexibility for the Board and protection for the voters often results in the court deferring to the Board’s decisions so long as these decisions demonstrate a genuine “hard look” by the Board of its options and rational considerations for making its specific choice. In other words, like due process and equal protection considerations, the Board’s process, rather than its policy, directly impacts its compliance with Article VI, Section 6 of the Alaska Constitution.

94. In *In Re 2001 Redistricting Cases*, the court found that because the Board mistakenly limited the options it considered in its pairings, remand was necessary.¹⁴⁵ The court was careful to explicitly recognize that it was not directing the board to join parts of Anchorage with the Mat-Su Borough in a single house district.¹⁴⁶ The court only wanted to ensure that the board gave its pairings the “hard look” required by law and it could not perform this “hard look” if the Board failed to consider certain pairing options because it mistakenly believed such options to be unlawful.¹⁴⁷ In the same case, *In Re 2001*

¹⁴⁵ 44 P.3d 141, 143 (Alaska 2002).

¹⁴⁶ *Id.* at 144.

¹⁴⁷ *Id.*

Redistricting Cases, the board's decision to divide the Lake and Peninsula Borough among two house districts was challenged.¹⁴⁸ The court ultimately determined that the board's decision was permissible because the board took the action for a specific reason, namely because the Kodiak Island Borough did not have sufficient population to support its own house district and thus the board had to take population from either Lake and Peninsula Borough or Kenai Peninsula Borough.¹⁴⁹ The court noted that:

the board offered an uncontroverted, non-discriminatory motivation for its action-it needed the population to complete District 36-and made a reasonable decision to favor dividing the Lake and Peninsula Borough over further fragmenting the Kenai Peninsula Borough.¹⁵⁰

The court that heard the challenges to the 1991 redistricting plan applied a similar analysis, invalidating districts where the Board "needlessly nullified Alaska constitutional requirements' in its attempt to reach its various policy goals."¹⁵¹

95. Similarly, in *Hickel v. Southeast Conference*, the Alaska Supreme Court overturned the superior court's finding of an equal protection clause violation where the board failed to exclude non-resident military personnel from the population considerations. The Court found that while the impact of non-resident military personnel registered to vote outside Alaska was certainly a challenge, the board had considered "alternatives and expert advise [sic]" before including all military personnel in its population count thereby satisfying the "hard look" requirement.¹⁵²

148 *Id.* at 145.

149 *Id.*

150 *Id.*

151 *Hickel*, 846 P.3d at 43 (quoting the Superior Court's Order below).

152 *Id.* at 56.

96. Here, unlike the election districts previously upheld by the courts, the Board has presented no rational basis for pairing House District 21-South Muldoon with House District 22-Eagle River Valley. Neither the geographic factors (discussed below) nor the promotion of fair and effective voter representation supports the pairing. While the Board's absolutist and reductive approach to contiguity would permit the Board to discard these considerations, the constitutional parameters of Article VI, Section 6 and the court's consistent interpretation of those parameters do not.

3. Marcum's Reliance on Eagle River's Relationship with JBER, Above all else, was Irrational

97. The Board failed to consider any alternatives to Board Member Marcum's Eagle River/East Anchorage pairing. In fact, Member Marcum made it clear that the only consistent pairing she was proposing across her four senate pairing configurations was Eagle River with East Anchorage.¹⁵³ Member Marcum irrationally emphasized the connection between Eagle River and Joint Base Elmendorf/Fort Richardson over East Anchorage residents. The majority Board members ignored volumes of testimony opposing the pairing and the vehement objections from the minority Board members who warned of dilution and disenfranchisement as a result of the pairing. Board Member Marcum even went so far as to bifurcate a statement made by East Anchorage Plaintiff Wilson adamantly opposing the pairing to recast it as a statement of support.¹⁵⁴

98. The Board's consideration of contiguity was complicated by the Board's irrational reliance and consideration of the relationship between Eagle River with the

¹⁵³ Findings of Fact at ¶ 132.

¹⁵⁴ Findings of Fact at ¶¶ 88, 134-137, 160.

military base. Board Member Marcum’s emphasis on that relationship above and at the expense of the Muldoon community of interest was also without reason and turned basic principles of redistricting on their head. Historically, the proper treatment and consideration of military bases in the redistricting process has been a challenge for Alaska redistricting boards. Although the Superior Court in *Hickel v. Southeast Conference* upheld the redistricting board’s decision to include the non-resident military personnel in the population base, it recognized that military bases function, in many ways, separately and distinctly from the election districts that surround them.¹⁵⁵ Board Member Marcum’s sole expressed reason for pairing Eagle River with Muldoon, despite the public outcry and evidence against such a pairing, was the connections between Eagle River and Joint Base Elmendorf/Fort Richardson¹⁵⁶.

99. While there are many active and engaged Alaska residents living and working on Alaska’s military bases, as demonstrated by East Anchorage Plaintiff Major (ret.) Felisa Wilson, there are also realities associated with military bases that impact the districts with which they are included. As explained by the Superior Court in *Hickel v. Southeast Conference*, “including non-resident military personnel in the population base (people who, because they claim residency elsewhere, may have little interest in Alaska affairs), creates odd situations, with legislators representing large populations on paper

¹⁵⁵ See *Hickel*, 846 P.2d at 70-71.

¹⁵⁶ Findings of Fact ¶ 132.

but relatively few actual voters.”¹⁵⁷ The court noted that this issue “could perhaps be profitably addressed by the legislature.”¹⁵⁸

100. The *Hickel* court further explained that the Adak Native Air Station is a military outpost on the Aleutian Chain.¹⁵⁹ In 1993 over 5,300 people lived on Adak but only 2,000 were registered to vote in Alaska.¹⁶⁰ Voter turnout was “abysmal” with fewer than 400 voters going to the polls in a regular election.¹⁶¹ The court acknowledged that military bases are “US Government reservations with limited access. Airplanes cannot land without prior permission. Because federal law prohibits government employees from standing for state or national office, only a dependent of a military or civilian employee could run for state office from the three bases.”¹⁶² The court went on to explain “Adak, Shemya, and Attu have little or no socio-economic integration with any place else on the Aleutians. In many ways residents of these islands have more in common with military personnel on Elmendorf Air Force Base or Ft. Richardson near Anchorage or even with those at Eielson Air Force Base or Ft. Wainwright near Fairbanks than they do with the residents of the Aleutian Islands and the Alaska Peninsula.”¹⁶³ Interestingly, the court referenced a letter from the commander of Adak recommending the placement of Adak

¹⁵⁷ *Hickel*, 846 P.2d at 70.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* at 846 P.2d at 70-71.

¹⁶³ *Id.*

with Elmendorf.¹⁶⁴ Similarly, Dr. Chase Hensel, a cultural anthropologist retained by East Anchorage Plaintiffs and qualified as an expert to define and discuss the Eagle River and Muldoon communities of interest and the impact of the East Anchorage/Eagle River senate pairings on these districts.

101. Ultimately, the 2021 Redistricting Board needlessly adopted Eagle River/East Anchorage Pairings despite alternative pairings that had much greater contiguity. The Board's intent and objectives in adopting these pairings served no public purpose or constitutional principle. The Board not only failed to take a "hard look" at the pairings, it made every effort to prevent the public and the court from doing so as well.

VI. CONCLUSION

102.. The Board's decision to pair the House District 21–South Muldoon with the geographically and demographically distinct House District 22–Eagle River Valley to create Senate District K resulted in arbitrary and unreasonable decisions regarding senate pairings that constitute unlawful political gerrymandering and violate the equal protection clauses of the Alaska Constitution as well as Article VI of the Alaska Constitution. The failure of the Board to follow a lawful process and procedure coupled with its decisions to reject the only constitutional senate pairings before it for the Eagle River and East Anchorage Districts justifies the remand of the plan to the Board to correct its errors.

¹⁶⁴ *Id.* 846 P.2d at n.24.

DATED this 9th day of February, 2022.

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