IN THE SUPREME COURT FOR THE STATE OF ALASKA

In the Matter of the 2021 Redistricting Cases (Alaska Redistricting Board/Girdwood Plaintiffs/East Anchorage Plaintiffs)	)	Supreme Court No. S-18419

Trial Court Case No. 3AN-21-08869CI (consolidated)

PETITION FOR REVIEW FROM THE SUPERIOR COURT
THIRD JUDICIAL DISTRICT AT ANCHORAGE
THE HONORABLE THOMAS A. MATTHEWS

ALASKA REDISTRICTING BOARD'S PETITION FOR REVIEW OF MAY 16, 2022 FINDINGS OF FACTS AND CONCLUSIONS OF LAW

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I. INTRODUCTION

Despite the Girdwood Plaintiffs' concession that Senate District E is a facially constitutional senate district,[1] the superior court's Order re Girdwood Challenge is a rambling, unprincipled, result-oriented decision that ultimately rests on the notion that "once a sinner, always a sinner." Judge Matthews recycles and rebrands many of the same erroneous concepts that this Court rejected in its March order, including his overemphasis on the "weight" of public testimony, second-guessing the Board's judgment, and invalidating Board actions not based on the Board's plan itself, but instead on the identity of Board members and their political affiliations. To uphold Article VI of the Alaska Constitution and avoid turning Alaska redistricting into an impossible task for future Boards, the superior court's rulings must be reversed.

In his prior order invalidating the senate pairing of Eagle River and Muldoon, Judge Matthews emphasized a lack of public process, regional partisanship in pairing a conservative district with a swing district, and lack of adequate explanation for splitting communities of interest. This time around, the judge acknowledged that the Board's public process was appropriate, that there was no evidence of regional partisanship in pairing Eagle River with the Anchorage Hillside, and that the Board had explained its reasoning. Yet, in his "heads I win, tails you lose" approach, Judge Matthews still found

[1] Exc. 499, May 12, 2022 Oral Argument 60:5-14 (Ms. Gardner: "**[W]e're not saying that it would be impossible for a Board to adopt this pairing. It could be possible for a different Board to adopt this pairing** in a different context, where it had not been found guilty of gerrymandering, but this Board, the way it did it the first time and the way that it did it the second time and the -- the type -- the inaccuracies and nature of the reasons that it put on the record, which were contradicted by the public testimony, make it inappropriate.") (emphasis added).

Senate District E invalid.

In his order invalidating Senate District E, Judge Matthews ignores this Court's established equal protection analysis, Balkanizes the neighborhoods of the Municipality of Anchorage contrary to this Court's precedent, and generally criticizes the majority of the Board for having political affiliations and leanings. The superior court's decision is the antithesis of this Court's holdings in prior cases that judicial review is limited to reviewing the constitutionality of the districts actually adopted by the Board, and not hypothetical districts that the Board did not approve. The superior court went beyond questioning the sagacity and wisdom of Senate District E; it impugned the motives of individual Board members while ignoring the manifest political motivations of others. There is no precedent in Alaska redistricting caselaw akin to the attacks that have been leveled against Board members and in some cases their spouses. The lower court's decision is the antithesis of deference to an independent constitutional entity.

Judge Matthews' contortion of the law is prevalent throughout his opinion. Specifically, the trial court:

- continued to apply its novel weight-of-public-testimony test despite this Court rejecting that test in the Skagway appeal less than two months ago;
- erroneously held that neighborhood boundaries and school attendance zones within the Municipality of Anchorage constitute "local political boundaries";
- ignored *In re 2001 Redistricting Case*'s holding that Eagle River and the Anchorage Hillside may be in an election district together;
- shifted the burden to the Board to affirmatively demonstrate that it had removed any lingering taint of discriminatory intent, while reasoning that the Board could only do so by segregating the voters

in Eklutna/Chugiak/Eagle River from all other election districts;

- ignored direct evidence in the record concerning the proper purpose of the Board in creating Senate District E; and
- refused to apply *Kenai Peninsula Borough v. State*'s neutral factor test and dismissing the increased proportionality Senate District E effectuates across Anchorage senate districts as *de minimus* and irrelevant.

Most egregiously, the trial court exceeded its authority under Article VI, usurped the process that Alaskans, through the Constitution, vested with the Board, and effectively selected its preferred plan by ordering the Board to adopt senate pairings crafted by the Senate Minority Leader and texted to a Board member in November 2021.

This Court has long recognized its proper role in redistricting is not to substitute its preferences or judgment for the Board's. Senate District E is constitutional under the Constitution and precedent. The superior court ignored that existing law because it *believed* that the Board members had improper motives. No proper legal framework was used because Senate District E survives such an analysis. The Board respectfully requests this Court reverse the trial court's sweeping rulings and reaffirm the proper roles of the courts and the Board in redistricting.

II. STATEMENT OF FACTS AND PROCEEDINGS

A. The Board Adopted Its Original Redistricting Plan, Challenges Were Filed, and Ultimately the Courts Ordered the Board to Fix the "Cantwell Appendage" and Senate District K

On November 10, 2021, the Board adopted its 2021 Redistricting Plan.[2] Multiple

[2] Exc. 548.

legal challenges were filed against the 2021 Redistricting Plan,[3] and after a trial on those challenges, on February 15, 2022, the superior court issued its Findings of Fact and Conclusions of Law, upholding all but two house districts (House Districts 3 and 4) and one senate district (Senate District K).[4]

On March 25, 2022, the Alaska Supreme Court reversed the superior court's decision about House Districts 3 and 4, and upheld the superior court's invalidation of Senate District K.[5] After this Court remanded the case to the superior court, on March 30, 2022, the superior court ordered the Board:

> 1) To correct the Constitutional errors identified by this Court and the Supreme Court in Senate District K; 2) To redraw House District 36 to remove the "Cantwell Appendage"; and 3) To make other revisions to the proclamation plan resulting or related to these changes.[6]

It is with this guidance that the Board undertook its remand actions.

B. On Remand, the Board Fixed Senate District K

The Board met between April 2 and April 13, 2022, to fulfill the remand orders. Section II of the superior court's May 16, 2022 order, "The Board's Work Following Remand," summarizes the Board's process and is incorporated herein. [Exc. 550-555]

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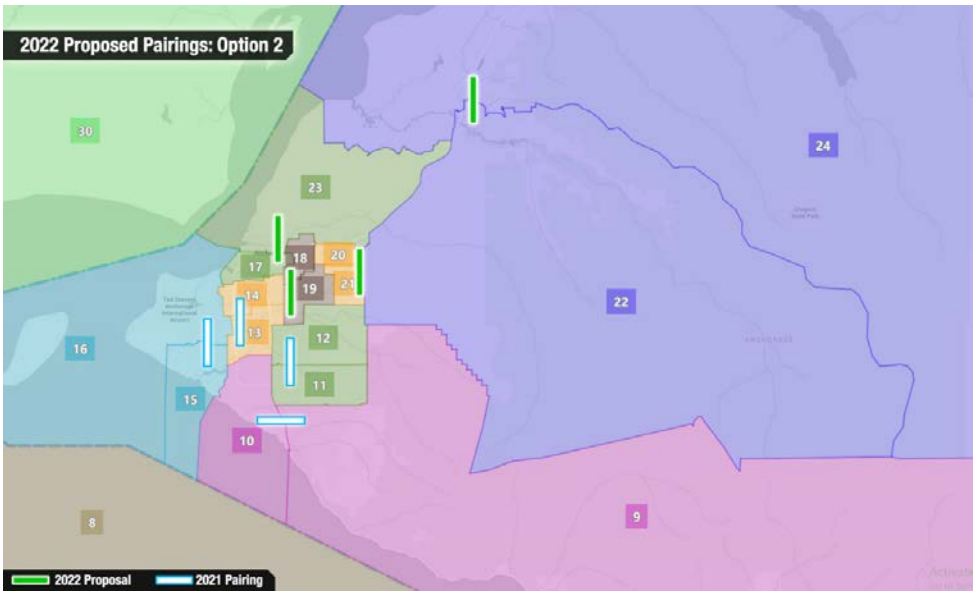
3 Exc. 548.

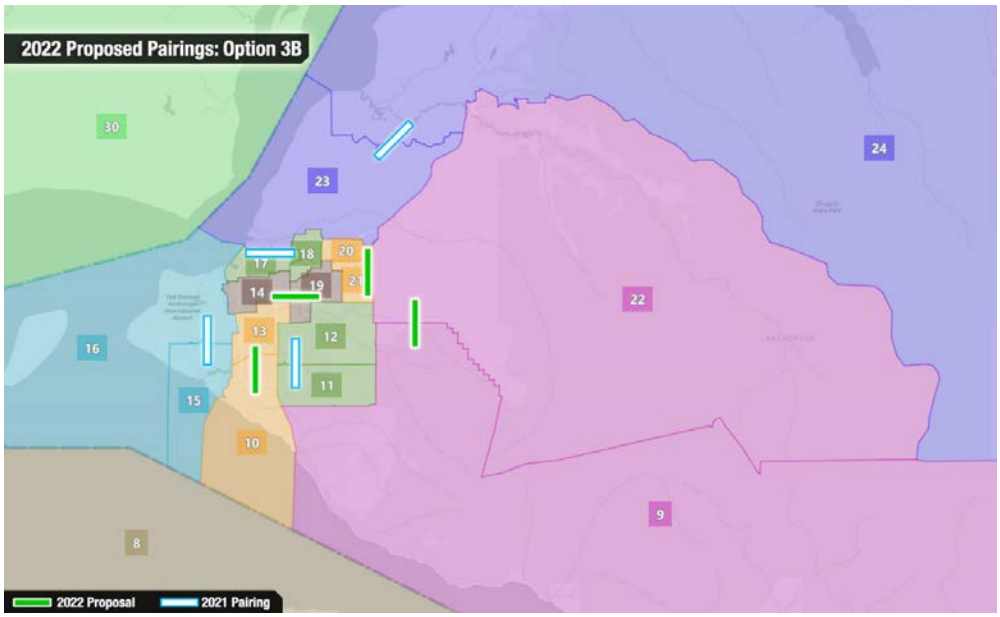
4 Exc. 548.

5 Order on Pets. for Review, S-18332 (Mar. 25, 2022). The Alaska Supreme Court also ruled unconstitutional House District 36 because the "Cantwell Appendage" made that district "non-compact without adequate justification." *Id*., at 3. But, the Supreme Court offered an easy fix: move Cantwell from House District 36 to House District 30, where the remainder of the Denali Borough was placed. *Id*., at 4. The Supreme Court noted that if the Board made that move, the resulting populations of House Districts 30 and 36 would be "well within constitutionally allowable parameters under our case law." *Id*., at 4.

6 Exc. 146-147.

Ultimately, the Board adopted for consideration two proposed plans for Anchorage Senate Pairings: Option 2 and Option 3B, shown below:[7]





On April 13, the Board met and debated the competing plans for Anchorage senate

[7] Exc. 75-76.

pairings.[8] The Board voted to adopt proposed plan "Option 3B" as its new Anchorage senate pairings.[9] Members Binkley, Marcum and Simpson voted in favor of Option 3B, and Members Bahnke and Borromeo voted against it.[10] Each member stated their rationale for their vote on the record.[11]

The Board issued its Amended Proclamation of Redistricting the same day. Attached as **Appendix A** to this brief are the proclamation maps for all of the Anchorage house districts (House Districts 9 through 24), which show the four new Anchorage senate districts that are changed from the 2021 Redistricting Plan: Senate Districts E, G, I, and K.[12] The Board adopted, deliberated and approved its revised Anchorage senate districts during open public meetings, and never entered executive session.[13]

C. Girdwood's Challenge to Senate District E

On April 25, 2022, Plaintiffs Louis Theiss, Ken Waugh, and Jennifer Wingard (collectively the "Girdwood Plaintiffs") filed a complaint challenging Senate District E,

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8 ARB2000083 (April 13 Meeting Agenda); *see also* ARB2000947-001083 (April 13 Meeting Tr.).

9 Exc. 142-143 (April 13 Meeting Tr.).

10 Exc. 142-143 (April 13 Meeting Tr.); *see* Alaska Const. art. VI, § 10(b).

11 *See* Exc. 104-110 (Member Bahnke); Exc. 112-124 (Member Simpson); Exc. 125-130 (Member Borromeo); Exc. 130-131 (Member Marcum); Exc. 131-141 (Member Binkley).

12 *See* ARB2000007-000008; 2000011 (maps of election districts within the Municipality of Anchorage) (attached as **App. A**).

13 *See* Exc. 226, ¶ 15; *see also* ARB2000084-000177 (April 2 Meeting Tr.); ARB20000178-000284 (April 4 Meeting Tr.); ARB20000285-000445 (April 5 Meeting Tr.); ARB20000446-000599 (April 6 Meeting Tr.); ARB2000600-000696 (April 7 Meeting Tr.); ARB2000697-000813 (April 8 Meeting Tr.); ARB2000814-000946 (April 9 Meeting Tr.); and ARB2000947-001083 (April 13 Meeting Tr.).

which is comprised of House Districts 9 and 10, as shown in **Appendix A**.[14] Girdwood Plaintiffs asserted that Senate District E violated their equal protection rights under the Alaska Constitution by denying them "an equally powerful and geographically effective vote and ignor[ing] the demographic, economic, political and geographic differences between the Eagle River and Girdwood communities."[15] They also claimed that Senate District E is non-compact, "falsely contiguous," and ignores geographic features.[16]

On May 16, the trial court issued its Order re Girdwood Challenge to Amended Plan. That opinion adopted a new, federal equal-protection burden of proof,[17] and applied inferences of unconstitutional motives to Senate District E based on third-party communications to Board members, emails about webinars, and Board members' affiliation with political organizations.[18] The trial court engaged in a proportionality analysis but dismissed it as *de minimus* and unimportant after concluding Senate District E **increased** proportionality across Anchorage senate districts.[19] As to contiguity of the house districts comprising Senate District E, the trial court rejected the Girdwood Plaintiffs' arguments about transportation contiguity and held that it was a visual concept

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14 Exc. 148-158.

15 Exc. 156, ¶ 30.

16 Exc. 156.

17 Exc. 558 (citing *Abbott v. Perez*, 138 S. Ct. 2305 (2018), but ignoring the Supreme Court's directive that "The allocation of the burden of proof and the presumption of legislative good faith are not changed by a finding of past discrimination. 'Past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful.'")(quoting in part *Mobile v. Bolden*, 446 U.S. 55, 74 (1980)).

18 Exc. 598.

19 Exc. 577.

that was fulfilled if census blocks from each house district touched.[20] Finally, the trial court issued a mandamus directing the Board to adopt Option 2 senate pairings that the Board voted to reject.

D. The East Anchorage Motion and Order

On April 18, 2022, the East Anchorage Plaintiffs moved the trial court to reject the amended redistricting proclamation plan and to order the Board to adopt Option 2.[21] They argued the "Board corrected only one of the two senate pairings that resulted in the unconstitutional Senate District K. As a result, the Board preserved, and in many ways exacerbated, the unconstitutional political gerrymander rejected by this Court."[22]

The trial court rejected these arguments, and denied East Anchorage's motion. In an opinion that should be read alongside the superior court's contrary reasoning on Senate District E, the trial court held that it could not direct the Board which senate pairings to adopt: "The Court cannot mandate that the Board draw districts with specific boundaries or pair particular house districts."[23]

III. WHY IMMEDIATE REVIEW IS APPROPRIATE

June 1, 2022—less than two weeks from submission of this petition—is the Alaska Primary Election candidacy filing deadline. The superior court's expansive ruling below seeks to set those election districts for the upcoming election by forcing the Board

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20 Exc. 563.

21 Mot. to Reject Am. Redistricting Proclamation Plan and for Modification of Order on Remand, Case No. 3AN-21-08869CI (Apr. 18, 2022).

22 *Id*., p. 2.

23 Exc. 536.

to adopt the court's preferred senate districts that the Board already rejected because of its negative impact on JBER voters. Immediate appellate review is necessary to resolve the important constitutional questions in this matter.[24] The Board respectfully requests that this Court grant this Petition for Review and reverse the superior court's order.

IV. DISCUSSION

A. The Trial Court's Unprincipled Decision Fails to Correctly Apply Equal Protection Law

Judge Matthews' lengthy order is a result in search of a reason. In taking a result-oriented approach, the superior court made numerous reversible errors of law.

1. Miscellaneous Errors Pervading Judge Matthews' Order Invalidating Senate District E

Some foundational errors in the superior court's equal protection analysis must be immediately corrected so they are not perpetuated in future redistricting cycles.

i. The Superior Court Continues to Apply its Defunct Weight-of-Public-Testimony Rule

On remand, the superior court continued to fixate on how many public testifiers desired specific districts and dinged the Board for not adopting the districts most desired by the public.[25] The superior court applied its weight-of-public-testimony rule to Senate District E, despite this Court's rejection of that rule in regard to the Southeast Alaska house districts encompassing Juneau, Haines, Skagway and Gustavus (House Districts 3 and 4). There, a majority of the public testimony sought differently arranged house

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24 *See* Alaska R. App. P. 402(b)(1)-(4).

25 Exc. 585-586.

districts for Skagway and Juneau.[26] Judge Matthews reasoned that the "hard look" standard required the Board to adopt districts desired by the weight of public testimony "unless state or federal law requires otherwise."[27] The State was so troubled by this iteration of the "hard look" standard that it urged this Court to clarify that such a rule did not apply to agency decision-making.[28] This Court unanimously reversed: "We REVERSE the superior court's remand to the Board for further proceedings under the superior court's 'hard look' analysis relating to public comments on the house districts. There is no constitutional infirmity with House Districts 3 and 4 and no need for further work by the Board."[29]

But, on remand, Judge Matthews recycled his weight-of-public-testimony standard. Pages of Judge Matthews' decision invalidating Senate District E are dedicated to public testimony regarding social and economic connections between different portions of Anchorage.[30] Repeatedly, Judge Matthews stated that the "majority of testimony" was in favor different senate pairings than those adopted by the Board.[31]

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26 Alaska Redistricting Board's Pet. for Review, at 33 and App. A (Mar. 02, 2022).

27 *Id*.

28 State's Resp. to Pets. for Review, at 1-6, S-18332 (Mar. 10, 2022).

29 Order on Pets. for Review, S-18332, 2-3.

30 *See* Exc. 554 & n.38, 585-586, 589-590, 595-597.

31 Exc. 586 ("For purposes of this decision, the Court simply notes the weight of the substantive public testimony appeared to favor Option 2 rather than Option 3B. And as for respecting the boundaries of Eagle River, the Board offers no arguments as to why North Eagle River could not be paired with South Eagle River."); Exc. 596-597 ("While a few individual commenters supported a District 23/24 pairing or a District 9/10 pairing, the majority of the testimony was against it.").

The Alaska Constitution contains the substantive requirements for election districts.[32] Public testimony and the hard-look standard cannot change constitutional requirements. All communities within the Municipality of Anchorage are socially and economically integrated no matter how many political activists claim otherwise in public testimony. *In re Redistricting 2001* confirmed that "communities within the Municipality of Anchorage are socio-economically integrated **as a matter of law**[.]"[33]

The Board asks this Court to again remind lower courts that public testimony cannot change the constitutional requirements of the Alaska Constitution. This is an important point because the communities within the Municipality of Anchorage are either socio-economically integrated as a matter of law or they are not.

ii. The Superior Court Ignored the Holding *In re 2001 Redistricting Cases* that Eagle River and Hillside can be Districted Together

This Court expressly held in the 2001 redistricting cycle that the Board was not required to district Eagle River separate from the rest of Anchorage and that it was constitutional in all respects to place Eagle River and Hillside in a house district.[34] The superior court ignored this dispositive holding and never distinguished it. The Board must be permitted to follow established precedent without concern for reversal by a superior court second-guessing the wisdom of the Board's plan that is substantially

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32 Alaska Const. art. VI, § 6.

33 *In re 2001 Redistricting Cases*, 47 P.3d 1089, 1091 (Alaska 2002) (upholding Eagle River Valley and South Anchorage hillside district 32 as nothing being "unconstitutional in any respect.") (emphasis added).

34 *Id*.

similar to past plans upheld by this Court. If *In re 2001 Redistricting Cases*'s reasoning that "respect for neighborhood boundaries" within Anchorage "is not constitutionally required" is no longer good law, this Court should so expressly hold.

iii. The Superior Court Continued to Find New "Communities of Interest" within Anchorage Despite Not Defining a Community of Interest

In this redistricting cycle, the superior court has now established three "communities of interest": Eagle River, Muldoon, and South Anchorage. Yet Judge Matthews has never explained what constitutes a "community of interest." Judge Matthews also chastised the Board for recognizing a community of interest involving the over 11,000 active military residents of JBER and the many retired and active military in North Eagle River and Chugiak.[35] Despite the obvious fact that military personnel share the same employer, the same noble mission, the same workplace, and the same shopping and medical facilities, it is unclear whether these things satisfy Judge Matthews' undefined concept of "community of interest." Before an election district is invalidated for splitting a community of interest, the reviewing court should at least define the term.

As discussed in the Board's petition for review on the original redistricting plan, every legal commentator that has looked at what constitutes "communities of interest" has concluded the same thing: "communities of interest" is a synonym for areas that are socio-economically integrated, i.e., where people share significant social and economic

[35] Exc. 586 ("But this court never found that JBER was a 'community of interest.' The Board has never presented *any* expert testimony on that issue.") (emphasis added).

interaction.[36] Every community within the Municipality of Anchorage shares sufficient social and economic interactions to be in election districts together, as a matter of law.[37] Under this rubric, Eagle River and South Anchorage are not separate communities of interest that cannot be combined with other areas of Anchorage and cannot be split. They are part of the same socio-economic unit that is the Municipality of Anchorage. If this Court is going to accept that Eagle River, South Anchorage, and Muldoon are separate communities of interest, then portions of *Hickel* and *In re 2001 Redistricting Cases* must be overturned. Judge Matthews also suggests that the Board lacks expertise to identify communities of interest and that it should defer to communities of interest identified by judges. Under this logic, the Board is subject to reversal if it splits a community of interest, but the Board lacks the ability to identify them.

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[36] ARB Pet. for Review, at 50-51 & nn. 223-225, S-18332 (Mar. 2, 2022) (quoting from Stephan J. Malone, *Recognizing Communities of Interest in a Legislative Apportionment Plan*, 83 Va. L. Rev. 461, 466 (1997); Brennan Center for Justice, *Communities of Interest* (available at: https://www.brennancenter.org/sites/default/files/analysis/6%20Communities%20of%20Interest.pdf)); Other state courts have recognized that a community of interest is analogous to a socio-economically integrated community. In California, a "community of interest" is an area of residents with common "social and economic interests." *Legislature v. Reinecke*, 516 P.2d 6, 16 (Cal. 1973) (en banc) (reapportionment of the California Legislature); *see also* Karin MacDonald and Bruce Cain, *Community of Interest Methodology and Public Testimony*, 3 U.C. Irvine L. Rev. 609, 612-13 (2013). Colorado law requires the consideration of "communities of interest" in its redistricting process, and court decisions interpreting that phrase make clear it is analogous to Alaska's phrase "socio-economic integration" by requiring election districts to be comprised, as much as possible, with people who share economic, living, and recreational pursuits. *See Hall v. Moreno*, 270 P.3d 961, 971 (Colo. 2012).

[37] *Hickel v. Southeast Conference*, 846 P.2d 38, 51 (Alaska 1992); *In re 2001 Redistricting Cases*, 47 P.3d 1089, 1091 (Alaska 2002).

iv. Judge Matthews Erroneously Concluded that Neighborhood Boundaries and School-Attendance Areas are "Local Government Boundaries"

The superior court held that the Board ignored local government boundaries by breaching "the boundaries of Eagle River."[38] Eagle River does not have a local government, and does not have any defined local-government boundaries. Neither does Girdwood. These are simply two neighborhoods within the Municipality of Anchorage. As *In re 2001 Redistricting Cases* makes clear, community council boundaries within the Municipality of Anchorage are of *no constitutional import*: "As Judge Rindner observed, 'respect for neighborhood boundaries is an admirable goal,' but 'it is not constitutionally required and must give way to other legal requirements.'"[39]

The superior court's conclusion that Senate District E "disregarded local government boundaries" because it split "school zones" makes even less sense.[40] As an initial matter, high school attendance boundaries within the Anchorage School District are not "local government boundaries" because all students within the Anchorage School District are governed by the same political entity: the Anchorage School District School Board.[41] Members of the school board are elected on an at-large basis from across the

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38 Exc. 585.

39 *In re 2001 Redistricting Cases*, 47 P.3d at 1091.

40 Exc. 596.

41 *See* Article VI of the Anchorage Municipal Charter (available at: https://library.municode.com/ak/anchorage/codes/code_of_ordinances?nodeId=PTICH_ARTVIED_S6.01PUSCSY) ("The system of public schools for the municipality shall be operated by a school board of seven persons elected at-large from seats designated as seat A, seat B, seat C, seat D, seat E, seat F, and seat G.").

municipality so that each member serves all of the municipality's schools, and not just one region of Anchorage.[42] Because the Anchorage School District governs and operates all public schools within the Municipality of Anchorage, attendance boundaries for elementary, middle, and high schools within the district are not separate "local political boundaries." Nothing in the state constitution or case law suggests that the Board must consider where non-voting minor children go to school when the Board adopts legislative districts for adult voters.

2. Senate District E Does Not Violate Equal Protection

Application of this Court's established test for determining whether discriminatory intent renders districts unconstitutional shows Senate District E is constitutional and rational. Alaska courts employ the "neutral factors" test. Indeed, the superior court employed the neutral factors test from *Kenai Peninsula Borough v. State* in adjudicating equal protection claims to Senate District K in the last round of litigation.[43] And even where a purpose is determined illegitimate under the first half of the test set out above, as stated in *Kenai Peninsula Borough*, "the Board's 'purpose in redistricting will be held illegitimate unless that redistricting **effects** a greater proportionality of representation.'"[44]

The trial court concluded Senate District E provides greater proportionality across Anchorage senate districts: "Therefore, Option 3B leads to slightly more proportional

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42 *See* Art. VI, Sec. 6.01 of the Anchorage Municipal Charter.

43 Exc. 548.

44 *Id*., at 54 (quoting *Kenai Peninsula Borough*, 743 P.2d at 1372) (emphasis added).

representation."[45] But Judge Matthews chose to ignore this result by dismissing it as *de minimus* and irrelevant after-the-fact rationalization: "Thus, any argument that Senate Districts are more proportional are ultimately after-the-fact rationalizations rather than legitimate justifications."[46] There is no point to applying the proportionality doctrine if its results do not matter to the court.

The Girdwood Plaintiffs' equal protection claim fails because Senate District E was adopted through a transparent public process (without a single executive session), where the Board engaged in reasoned decision-making, articulated its rationale for the district on the record, and adopted a senate map that happens to optimize the Girdwood vote. The superior court's ruling to the contrary improperly focuses on the political leanings of certain Board members and election-return data, rather than the constitutional criteria in Article VI, Section 6 and equal protection.

i. There is No Equal Protection Violation because Senate District E Optimizes Girdwood Residents' Voting Strength

Article I, Section 1 of the Alaska Constitution provides "that all persons are equal and entitled to equal rights, opportunities, and protection under the law."[47] The Girdwood Plaintiffs' allegation that Senate District E violates their right to fair and equal representation does not withstand scrutiny. U.S. Census data demonstrates that residents of the Girdwood area of Anchorage do not have their vote diluted in any way by Senate

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45 Exc. 575.

46 Exc. 577.

47 Alaska Const. art. I, § 1.

District E. In fact, the opposite is true: Senate District E maximizes Girdwood's voice in the Alaska Senate beyond any other legal pairing.[48]

The U.S. Supreme Court and the Alaska Supreme Court look at the "voting age population" (VAP) of an area to determine whether dilution of voter power has occurred.[49] According to the 2020 U.S. Census, the Girdwood area of the Municipality of Anchorage has a total population of 2,144 residents and a voting age population of 1,722.[50] Because Girdwood is not incorporated as a separate political unit—it is part of the Municipality of Anchorage—the Board defines the "Girdwood Area" as the area encompassed by the Girdwood Community Council (aka the Girdwood Board of Supervisors).[51]

Below is a chart of the relevant populations contained in Senate District E. It demonstrates that under Senate District E, House District 9 in which Girdwood is located has the greater influence over who is elected senator at 51.3% of the VAP, and

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48 Exc. 220-229.

49 *See Thornburg v. Gingles*, 478 U.S. 30, 46-51 (1986) (discussing how multi-member districts may operate to "minimize or cancel out the voting strength of racial minorities in the *voting population*.") (emphasis added). *See also In re 2011 Redistricting Cases*, 294 P.3d 1032, 1042-43 & n.36 (Alaska 2012) (looking to the voting age population or "VAP" of districts when assessing majority-minority house districts under the Voting Rights Act of 1965 for potential retrogression of minority voting strength); *Hickel v. Southeast Conference*, 846 P.2d 38, 49 (Alaska 1992).

50 Exc. 220-221.

51 *See* Girdwood Community Council Map (available at: http://www.communitycouncils.org/servlet/content/girdwood_cc_map.html). As the Girdwood Plaintiffs explain in their Complaint, the Girdwood Valley Service Area Board of Supervisors (GBOS) is the Girdwood Community Council for the Girdwood area of the Municipality of Anchorage. Exc. 162-164. Girdwood is not a "political subdivision" of its own. *Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1363 (Alaska 1987).

Girdwood voters have the most influence over who is elected senator at 6.33% of the VAP.[52]

April 2022 Amended Redistricting Plan – Senate District E				
House District	**Total Population**	**Voting Age Population**	**VAP Population of Senate District**	**VAP Percentage of Senate District**
9	18,284	13,957	27,198	51.3%
10	18,205	13,241		48.7%
Girdwood	2,144	1,722		6.33%

The Girdwood Plaintiffs asked the superior court to order the Board to pair House District 9 with either House Districts 13 (Board proposed plan "Option 2") or 11 (Board withdrawn proposed plan "Option 1"). Below is a chart showing Girdwood voters' percentage control of the Girdwood Plaintiffs' preferred senate districts:

Board Proposed Plan "Option 2"				
House District	**Total Population**	**Voting Age Population**	**VAP Population of Senate District**	**VAP Percentage of Senate District**
9	18,284	13,957	27,943	49.9%
13	18,523	13,986		50.1%
Girdwood	2,144	1,722		6.16%

Pairing House District 9 with House District 13, as contemplated by Board proposed plan "Option 2" reduces Girdwood's control of who is elected as its senator from 6.33% to 6.16%.[53] Thus, Judge Matthews' Order *reduces* Girdwood's proportional voting strength.

Simple math dictates that Senate District E maximizes, not usurps, the influence of the Girdwood area of Anchorage in selecting their senator. This maximization of the

52 Exc. 222-223.

53 Exc. 223.

minority interest in the area (Girdwood) also disproves that improper intent was responsible for its creation.

ii. Senate District E Does Not Discriminate Against Any Politically Salient Class of Voter because House District 9 Selects the Same Candidates as House District 10

Senate District E does not usurp the voting strength of any "politically salient class" of voters.[54] To adjudicate an equal protection vote dilution claim, the superior court was required to "make findings on the elements of a voter dilution claim, including whether a politically salient class of voters existed and whether the Board intentionally discriminated against that class."[55] In invalidating Senate District K previously, the superior court noted that Muldoon voters and Eagle River voters had different voting preferences. The superior court could not make such findings with regard to Senate District E's pairing of Eagle River and the Anchorage Hillside, because Senate District E combines two districts that vote the same.

As a preliminary matter, Girdwood lacks the population to control *any* state election. Girdwood has a VAP of 1,722, which means it has 12.33% control over the election of the candidate who will represent House District 9 (VAP 13,957) in the Alaska

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[54] *In re 2001 Redistricting Cases*, 47 P.3d 1089, 1094 (Alaska 2002) (rejecting partisan gerrymandering claim because "there is no evidence that the Amended Final Plan invidiously minimizes the right of any politically salient class to an equal effective vote.").

[55] *In re 2011 Redistricting Cases*, 274 P.3d 466, 469 (Alaska 2012) (quoting *In re 2001 Redistricting Cases*, 44 P.3d 141, 144 (Alaska 2002)).

House of Representatives.[56] Girdwood has only minimal say in who is elected to represent it in the Alaska House. And as shown above, Senate District E maximizes, as compared to the pairings in Option 2, Girdwood's influence over who is elected to represent it in the Alaska Senate.

Senate District E does not dilute the group voting power of House District 9 because that district votes similarly to House District 10.[57] Election return data from 2018 and earlier was used to conduct this analysis because the coronavirus pandemic caused a massive shift to mail-in ballots in 2020 which skew the most-recent statewide precinct-level election data.[58]

Girdwood's voting preference for Democratic candidates is an outlier in House District 9. In 2018, the Girdwood voting precinct voted 75.41% versus 24.34% in favor of Democratic candidate for U.S. Congress Alyse Galvin who ran against Republican

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[56] Challenges to House District 9, of which Girdwood is a part, and that was a district in the Board's 2021 Redistricting Plan that was not challenged for error, are time-barred. *See In re 2001 Redistricting Cases*, 47 P.3d 1089, 1091–92, n.16 (Alaska 2002) (holding that the challenge to the amended proclamation was not timely when the challenged appendages existed in the original proclamation).

[57] The Board remains uncomfortable with analyzing election return results, and its members did not consider election results in adopting its four new Anchorage senate districts in its April 2022 Amended Redistricting Plan. However, because this Court credited the East Anchorage Plaintiffs' expert witness Dr. Chase Hensel's testimony comparing the election results between the house districts that comprised Senate District K in the 2021 Redistricting Plan, *see* FFCL and Order, at 68-69 ("Dr. Hensel testified that South Muldoon is a swing district, though it does lean Republican, while Eagle River is firmly Republican. This usurps South Muldoon's voting strength in the event it chooses to elect a Democratic senator."), the Board's executive director reviewed that election return data at the request of counsel. *See* Exc. 220, 223-224.

[58] Exc. 223 & n.1.

Don Young.[59] For governor, Girdwood voters preferred Democrat Mark Begich 73.54% versus 23.16% to Republican Mike Dunleavy.[60] Seven other precincts in House District 9 voted overwhelmingly for Republican Don Young over Democrat Alyse Galvin (57.28% versus 42.63%)[61] and Republican Mike Dunleavy over Democrat Mark Begich (55.95% versus 41.55%).[62]

Voters in the 2022 Proclamation House District 10 have similar candidate preferences to the Anchorage Hillside. They voted in favor of Don Young (R) to Alyse Galvin (D) on a 60.66%-38.76% basis, and in favor of Mike Dunleavy (R) to Mark Begich (D) on a 61.57%-35.17% basis.[63] Like the voters of House District 9, the voters in House District 10 strongly preferred Republican candidates.

Pairing House District 9 with House District 13, as the superior court has ordered the Board to do, will not help elect the Democratic candidates that Girdwood prefers. Voters in House District 13 (Oceanview) voted in favor of Don Young on a 54.97%-44.71% basis.[64] They voted in favor of Mike Dunleavy on a 53.57%-43.93% basis.[65]

To the extent that this Court reads Alaska's equal protection clause to require the

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59 Exc. 229. 598 Girdwood residents voted for Alyse Galvin and 193 voted for Don Young. A total of 793 Girdwood residents voted at the Girdwood precinct.

60 Exc. 229. 581 Girdwood residents voted for Begich and 183 voted for Dunleavy.

61 Exc. 229. The remainder of House District 9 cast 3,002 votes for Don Young and only 2,234 for Alyse Galvin.

62 Exc. 229. The remainder of House District 9 cast 2,932 votes for Mike Dunleavy and only 2,177 votes for Mark Begich.

63 Exc. 229.

64 Exc. 229.

65 Exc. 229.

Board to create senate districts out of house districts that vote similarly, Senate District E does that. This puts Senate District E in stark contrast to the Senate District K that this Court previously invalidated in its March 2022 Order.

iii. The Board's Process Easily Passes the Neutral Factors Test Under the Equal Protection Analysis: the Board Deliberated and Adopted Senate District E in Public Meetings, Considered Alternatives, and Identified the Support Upon which Each Members' Rational Decision was Made

Judge Matthews disregarded the neutral factors test because it did not allow him to reach the desired result. That test looks to whether there is evidence of secretive proceedings, regional partisanship, and meandering district boundaries.

On remand, the Board performed its work transparently. All eight meetings of the Board were properly noticed and publicly held.[66] Not a single executive session was held on remand.[67] All deliberations of the Board occurred in public,[68] and the public was able to view and provide comment to the Board on the plans considered by the Board.[69] There is no evidence in the record of any secret meetings outside of the public eye or prearranged decisions relating to adoption of senate districts that occurred off the record.[70] Given the accusations made against the Board previously, the Board made sure

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66 Exc. 550-555.

67 Exc. 226.

68 *See* Exc. 205.

69 Exc. 550-555.

70 Exc. 122-123 (Member Borromeo during motion to adopt Option 2 at April 13 meeting: "I'm not sure where Budd lies at this point, so I'll welcome everybody into the discussion.").

there was no room for reasonable assumptions and speculation. Despite acknowledging that the Board's process was appropriate, and based on no more than the fact that three members continued to vote the same, Judge Matthews speculated that there was some measure of ongoing secrecy.

The Board considered and weighed the testimony received from the public as to both options.[71] There was persuasive public testimony that the Hillside (HD 9) and Eagle River Valley (HD 10) shared common characteristics and interests. Below the Board cites to much of that testimony,[72] but a few examples are illustrative. Dan Saddler of Eagle River testified:

> Residents of these districts of -- their lives are characterized by their life on the foothills and the upper slopes of the Chugach mountains. That means they share a lot of common interests. While lots of the rest of Anchorage residents rely on local or state road maintenance, people in these districts rely on their local road service boards to provide for maintenance of their roads.
>
> . . .
>
> You know, residents of Districts 9 and [10] face a lot of similar living conditions and hazards. They live on the urban one at the interface. It means they face the risk of wildfires and of bears getting into their houses and threatening their household and their families. They face the challenge of less reliable utility service, extremes of weather, wind, and snow, as the recent avalanche on the Hiland Road dramatically demonstrates.[73]

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71 *See generally* ARB2001094-001798; Exc. 123 (Member Simpson at April 13 meeting: "I'm sure, like the rest of you, I've gone through and read the written testimony and the transcripts of the oral testimony and have tried my best to keep up to speed on all of that and to take into consideration what -- what everybody said. . . . so I just want to let the people that submitted written testimony know that I consider that as important as somebody who came in person.").

72 *See* Exc. 211.

73 Exc. 004-064 (April 5 Board Meeting Tr.).

Others voiced concern that the Board's proposed plan "Option 2" would usurp the ability of JBER residents to elect a senator of their choosing by not pairing it with an Eagle River district and instead pairing it with downtown Anchorage. For example, Peters Creek resident Steven Todd testified:

> I am a resident of Chugiak-Eagle River in the Peters Creek neighborhood, 99567. I am also a veteran of the U.S. Military. As a proud citizen of this country, and resident of Alaska, I'm sure to vote. But I'm not deeply involved in the political processes. I've never held office in any political party. I was prohibited from doing so while I was on active duty. Now that I'm a veteran, I could, but it's not how I choose to use my free time. I guess you could say I'm just a normal voter. However, I felt compelled to call today to testify because I was made aware of something which greatly disturbs me. I saw that proposal #2 is being considered which would link together the JBER military base with the neighborhoods in downtown Anchorage for a state Senate seat. I cannot think of any combination which would be more disrespectful to us as veterans. Active duty operations are 24/7 while in state, being sent TDY out of state for training, and long deployments overseas, makes it tough for military members to get ballots mailed in on time. But we do our best, because it is yet another way that we serve our communities, state and country. Downtown Anchorage is a world away from JBER. Downtown is comprised of mostly white collar workers with very high incomes worried about which restaurant to dine out. JBER is middle to low income families clipping coupons to buy groceries at the commissary, or even sometimes taking out payday loans in order to fill the gas tank. There is just no justification for combining these distinct and separate communities. In my twenty plus years living in Eagle River and Chugiak, the majority of my neighbors have been active duty and veterans. I see there is another better alternative senate plan, 3B, which is based upon logic. **I am one of thousands of veterans and military members who live in Eagle River-Chugiak, Peters Creek is the only reasonable pairing for JBER is with my district, #24.** This is simply pairing the military in district 23 with the military in district 24. Choosing to separate us by sticking us with a district that is widely different than us would be a great disservice. I urge you to reject the disjointed proposal, #2, and instead support the alternative plan, #3B. Thank you.[74]

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[74] Exc. 144 (emphasis added).

And Chugiak resident Elyce Santerre shared similar concerns:

> I hadn't commented previously because I didn't think Chugiak had a dog in the fight about whether south Eagle River paired with South Anchorage (although I have to say, that seems to make sense culturally). I didn't realize that the other alternative being proposed was not to pair them with another section of Muldoon, or with the bases, but to take the bases away from pairing with us and pairing them with a downtown Anchorage district. That's just blatant gerrymandering. The bases have historically leaned conservative, but with low turnout. Democrat planners apparently can't stand the thought of them being paired with another conservative district, never mind the close cultural links between the bases and all the military retirees and off-base personnel in Eagle River/Chugiak. They're trying to nab an "extra" liberal senator for Anchorage, at the cost of the greater Eagle River/Chugiak area. I thought such concerns weren't allowed? I thought decisions were supposed to be made based on cultural affinity and contiguous geography? I and many of my neighbors work or worked for years on the bases. I still shop there. I don't want to see them "hijacked" for a political agenda. That's just not right. I'd testify in person, but I'm home sick and don't want to bring my coughing and sneezing out in public.[75]

Suzanne Fischetti further offered support for Option 3B:

> But I do support a Chugach Mountain district as laid out in Map 3B. When you look at the map, it's clear that the rest of Anchorage is cut into little blocks, but Districts 22 [HD 10] and 9 are the two large districts with thousands of acres of parks and mountains. There are none others like these.
>
> The Upper Hillside of Anchorage has been combined with Eagle River Valley in the past, both as a House and a Senate pairing. That's because there are legitimate, logical reasons to do so. That is just as true today as it was in the past, maybe even more so because parts of Anchorage have become even more urbanized. Those in the outer areas, like Eagle River Valley and Hillside, have chosen for -- a more suburban experience, surrounded by mountains and wildlife instead of the city life. That's why bringing together Districts 22 [HD 10] and 9 makes sense, and I urge you to choose Map 3 which does this.
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> . . .

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75 Exc. 077. *See also* Exc. 092-095 (Lance Pruitt Testimony).

> Maps that carve away portions of the military base from its primary district would also be a mistake. JBER belongs with JBER. That means Districts 23 [JBER] and 24 [North Eagle River/Chugiak/Eklutna] belong together, as shown in the map called 3B. That's the one to support if you care about our military. You've already broken up JBER into separate House districts. We owe it to the military to put the base back together by pairing Districts 23 and 24, which makes the base whole again.[76]

All Board members explained their rationale on the record during the April 13 Board meeting. The majority of the Board selected Option 3B, which included Senate District E, because Option 2 resulted in pairing JBER with downtown Anchorage, which they believed was a poor pairing.

Member Simpson articulated the considerations that went into his decision to select Option 3B that included Senate District E:

> So on the -- as far as the motion before us on option No. 2, I personally find the pairing of 23 and 24, being the military with Chugiak, to be the more compelling version or solution.
>
> I think pairing the military bases with downtown overlooks JBER as a significant community of interest, and I think that, in itself, could expose us to a constitutional challenge from that constituency.
>
> We heard a lot of testimony about interactions between Eagle River, Chugiak, and JBER, that that area has essentially developed as a bedroom community for -- for the military families. They send their kids to middle school and high school there.
>
> . . .
>
> And there's nothing wrong with the pairing of 9 and 22. They have -- they are contiguous. You look at the map, they have a lengthy, maybe 35-mile, border that is shared. They consist of two districts that are, I think, socioeconomically and demographically similar in many ways.
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> . . .
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> To kind of wrap up, I want to briefly address the charges of partisan gerrymandering that have been tossed around with some frequency

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[76] Exc. 078-081 (Suzanne Fischetti Testimony).

throughout this process.

> The final day of testimony, on Saturday, two Republican senators and a member from Governor Dunleavy's administration spoke out against option 3B.
>
> And I can note here that I am an appointee of the governor's and yet I find myself kind of lining up in favor of option 3, even though somebody from that office apparently has -- thinks the other one is a better idea.
>
> If the board's option 3 is some kind of naked partisan attempt to gerrymander the map to protect Republicans, as some have claimed, then why is it that Republican Senators Lora Reinbold and Roger Holland have testified so vehemently against it? Apparently they feel that something in option 3 harms them in some way. But if it does, that fact obviously clearly goes against the argument that any of the drafters of option 3 made any effort to protect or enhance Republican seats of interests.
>
> So having considered all of that, I have -- I believe that if there's anything partisan in either of these two maps, the most partisan is the proposed pairing of JBER and downtown. I believe this would diminish the voice of our valued Alaska military personnel. I can't support that, and I am, just to be clear, going to be voting for option 3B.[77]

Member Marcum similarly voiced her support for Option 3B, which arose at least in part, out of the concerns raised by the senate pairings in Option 2:

> So I'm very uncomfortable with proposal 2, and that's primarily because it moves District 23, JBER, from its current pairing with District 24 by linking it with downtown, which is District 17. Downtown has almost nothing in common with the military base. It absolutely makes the least sense of any possible pairing for District 23, JBER. Downtown is the arts, right? It's tourism, it's lots of professional services, and that is not what makes up JBER. So I really fear that a District 17 and District 23 pairing could be viewed -- could be viewed as, like, an intentional action to break up the military community.[78]

Chairman Binkley also articulated the reasons he felt Option 3B had the more

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77 Exc. 118-124.

78 Exc. 130-131; *see also* Exc. 099 (Saddler testimony).

appropriate pairings, and which were supported by the public testimony received[79]:

> [W]e've already heard that there are significant similarities between District 22, Eagle River, and District 9, the Hillside. And we heard many, many people testify that both Eagle River and the Upper Hillside in Anchorage are generally more rural parts of the municipality. They have larger lots sizes, mostly single-family homes.
>
> Many of these areas, it was indicated in testimony, are served by road service districts, which is different than the other more core areas of the municipality. They share the Chugach Mountains and the Chugach State Park, which are really defining geographic features.
>
> And these people, it was also testified that they're close to the mountains. They deal with wildlife closer to their homes. There are higher snow loads that they deal with in the mountains, and also wildfire dangers, as well, that they share.
>
> So I can also appreciate that these similarities really could be important to a senator[.]
>
> . . .
>
> And I think District 22 and District 9 are both those large, more rural, and share a really long, physical border. And that, to me, makes them contiguous, as pointed out by everybody, that's required by our

[79] Exc. 130-131 (Suzanne Fischetti Testimony); Exc. 092-095 (Lance Pruitt Testimony); Exc. 066-068 (discussing preference for Option 3B, communities both maintain their own roads, economic similarities, neighborhood settings, and snow management); Exc. 069-074 (fire management and firefighting limitations, as well as shared Bicentennial Park); Exc. 079-081 (discussing that Districts 22 and 9 are the only two large districts with several acres of parks and mountains within Anchorage, have been paired previously, offer suburban lifestyle, and challenges with wildlife); Exc. 082-083 (supporting option 3B as more rural districts and indicating she believes pairing JBER with downtown would diminish the voting strength of JBER); Exc. 089-091 (discussing JBER residents sending children to school in Eagle River, sharing a 35 mile border between the districts, and similar demographics); Exc. 096-100 (both districts semi-rural areas with people living on the Chugach Mountains, and also discussing disagreement with pairing JBER with downtown); Exc. 084 (zoning similarities); Exc. 085 (fire, water systems, lot size, roads and lack of roads, recreation); Exc. 086 (Girdwood resident in support); Exc. 102 (discussing long history of shared senate representation with Anchorage or Mat-Su); Exc. 101 (Eagle River resident supporting option 3B).

constitution.[80]

Chairman Binkley also described his extensive experience with downtown Anchorage and the dissimilarities between it and JBER.[81] Sharing concerns expressed by two other board members, Chairman Binkley reiterated: "We've also heard concerns that putting the more conservative or swing district of the military base with downtown would drown out the military voters. That really echoes a concern that the Superior Court, I think, had in its decision about regional partisanship."[82]

Even though Member Bahnke preferred proposed plan "Option 2," she acknowledged the similarities between House Districts 9 and 10: "I don't disagree that there are things in common between Eagle River and Hillside and Eagle River and JBER. We heard from a lot of folks that there are actually a lot of things in common."[83] The other Board member that voted in favor of Option 2, Member Borromeo, also noted commonalities between District 22 and 9.[84]

In selecting a map that is consistent with binding legal authority, acknowledges similarities between the paired districts, and seeks to maintain a military community of interest, the Board acted rationally.

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80 Exc. 134-136.

81 Exc. 137-138.

82 Exc. 139.

83 Exc. 105-106.

84 Exc. 072 (stating in response to testimony in support of Option 3B: "Fantastic. You offered some specific examples, and I appreciate it because I'm learning a lot more about the commonalities between 22 and 9.").

iv. The Trial Court Erred in Applying an Expanded Equal Protection Test Inconsistent with Alaska Law

The superior court skirted the neutral factors test by adopting a new test from federal law. Contrary to this Court's decision in *Kenai Peninsula Borough v. State*, which rejected heightened scrutiny in favor of the neutral factors analysis, the trial court cites inapposite federal caselaw and ultimately required the Board to prove that it no longer had discriminatory intent.

The only federal case cited by the trial court that concerns equal protection in the redistricting setting is *Abbott v. Perez*.[85] Yet that case concerns *fundamental* rights, and therefore applied a heightened equal protection analysis not applicable to a political gerrymandering claim under the Alaska Constitution.

Abbott was about claims of racial (as opposed to political) gerrymandering by the Texas Legislature when it relied on maps that had previously been determined to be racially-motivated.[86] Based partially on the trial court's analysis that required Texas to demonstrate its prior illegitimate intent had been cured, the U.S. Supreme Court held:

> The allocation of the burden of proof and the presumption of legislative good faith are not changed by a finding of past discrimination. Past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful.[87]

In other words, *Abbott* holds the opposite of Judge Matthews' core conviction that "once a sinner, always as a sinner." Instead, *Abbott* directs that courts are not to presume

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85 *Abbott v. Perez*, 138 S. Ct. 2305, 2305 (2018).

86 *Id*. at 2313.

87 *Id*. at 2324 (internal quotation marks and citation omitted).

another branch of government is still purposefully discriminating when it fixes districts on remand.

To support his conclusion that the Board was discriminating against the Anchorage hillside, the trial court improperly focused on evidence of Board members' political affiliations and webinar solicitations from political organization, as if Board members are stripped of their constitutional rights to associate with groups of their choosing or to read and write emails. It similarly seized upon a handful of text messages between majority board members,[88] while ignoring text messages between majority and minority board members,[89] to cobble together a strained basis to conclude the Board's discriminatory purpose lived on during the remand proceedings.[90] The superior court paints Member Simpson as a diehard partisan, but overlooks that he voted with Members Bahnke and Borromeo to adopt an Anchorage house district plan which Members Binkley and Marcum opposed. A curious strategy for a member who the superior court attacks as being part of a secret redistricting "coalition" with Binkley and Marcum.[91]

The direct evidence in the record suggests that the Board's intent on remand was

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88 Exc. 597.

89 Exc. 001 (texts between Members Binkley and Borromeo); Exc. 002; Exc. 087 (text message from Member Borromeo to Member Simpson asking for call).

90 In the 2001 Redistricting cycle, Judge Rindner specifically *endorsed* members of the Board meeting with a wide variety of public and private individuals concerning redistricting. *In re 2001 Redistricting*, 2002 WL 34119573, at 18, 21 (Alaska Super. Ct. Feb. 1, 2002) (citing *Gaffney v. Cummings*, 412 U.S. 735, 752-54 (1973)) ("[A] plan [is not] invalid merely because districts are drawn with a political agenda or with an awareness of the likely political consequences.").

91 Exc. 569.

legitimate. The Board sought to comply with the remand order.[92] The Board paired the two Muldoon districts as desired by the East Anchorage Plaintiffs,[93] sought to minimize disruption to the portions of the original plan that had already been through litigation and had been endorsed by the Courts as constitutional, and conducted a transparent, open process on remand.[94]

The fact that the majority of the Board also rejected the call from minority board members to push through an amended plan without public testimony further cuts against a finding of illegitimate or bad faith. The Board should not be damned if they do and damned if they do not.

The trial court's reliance on distinguishable inapposite federal equal protection law is misplaced, and does not support imputing discriminatory intent on a Board that chose rational Anchorage senate pairings but upset the Democratic party by not segregating voters they disfavor (Eagle River) from Anchorage's other election districts.

B. The Superior Court Overstepped Its Role Under Article VI by Ordering the Board to Adopt Senate Districts It had Rejected

Alaska courts should not draw election districts, but that is what Judge Matthews did in ordering "the Board to adopt Option 2 on an *interim* basis for the 2022 general

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92 The Board unanimously removed Option 1 from consideration on remand because it required more alterations than the other two proposed options, and could result in additional litigation. Exc. 075-076 (April 6 Meeting Tr.).

93 Exc. 0145 (ARB Website Showing Options 2 and 3B both including district pairing north and south Muldoon house districts to form senate district).

94 *See* Exc. 205-206.

election."[95]

Alaska courts do not dictate the boundaries of any election districts; instead, they adjudicate claims brought to them and *invalidate* unlawful election districts. The Alaska Constitution gives the Board, not the courts, the authority to draw the district lines for house and senate districts. Article VI, Section 4 unambiguously states:

> The Redistricting Board shall establish forty house districts, with each house district to elect one member of the house of representatives. The board shall establish twenty senate districts, each composed of two house districts, with each senate district to elect one senator.[96]

Under Article VI, Section 11, the Board's redistricting plan is subject to judicial review for "error": "Any qualified voter may apply to the superior court to compel the Redistricting Board, by mandamus or otherwise, to perform its duties under this article or to correct any error in redistricting."[97]

This constitutional structure is why in previous redistricting cycles, since Section 11's enactment in 1998, no Alaska court has mandated the Board adopt ***any*** specific house or senate district. Such a ruling runs afoul of separation of powers and the explicit language of Article VI.

During the 2011 redistricting cycle, the Alaska Supreme Court invalidated the Board's first redistricting plan because the Board did not follow the *Hickel* process, and remanded the case "to the superior court with instructions to further remand to the Board

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95 Exc. 600 (emphasis in original).

96 Alaska Const. art. VI, § 4.

97 Alaska Const. art. VI, § 11.

to formulate a plan . . . ."[98] The Board adopted a second plan, legal challenges were filed, and again the Supreme Court invalidated the second plan as failing to comply with the *Hickel* process.[99] Notably, however, after invalidation of the Board's second redistricting plan the Supreme Court did not direct that the court system should promulgate a third plan. The Court remanded the case for the Board to create a third plan: "We affirm the decision of the superior court and require the board to draft a new plan for the 2014 elections."[100] This history of deference to the Board is consistent with the Alaska Constitution's text that the Board, not the courts, "shall establish forty house districts . . . [and] twenty senate districts."[101]

In this redistricting cycle, this Court ruled that the "Cantwell Appendage" rendered House District 36 unconstitutionally non-compact and told the Board to fix it: "We therefore REVERSE the superior court's determination [that House District 36 was compact including the Cantwell Appendage], and remand to the superior court to remand this aspect of the house districts to the Board to correct the constitutional error."[102] Like prior redistricting cycles, the Supreme Court adjudicated the constitutionality of House District 36, invalidated it, and remanded the matter to the Board to create a new redistricting plan. This Court did not draw a new district.

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

99 *In re 2011 Redistricting Cases*, 294 P.3d 1032, 1033 (Alaska 2012).

100 *Id*. at 1033.

101 Alaska Const. art. VI, § 4.

102 Order on Pets. for Review, S-18332, at 4-5.

Judge Matthews erred by compelling the Board to adopt specific senate pairings that it had already rejected. The Alaska Constitution does not permit Alaska courts to dictate the boundaries of election districts, including whether areas within the Municipality of Anchorage like Chugiak and Eagle River must be paired together in a senate district. That authority is reserved to the Board.[103]

V. CONCLUSION

The Girdwood Plaintiffs' concession that the Board's plan would be allowable if it had been adopted by different people should have been fatal to their claim, because a legislative district is either constitutional or it is not. In playing along with the notion that an equal protection challenge can be decided based on determining the political affiliations of Board members and looking at what newsletters they read, the trial court adopted an approach that will make future redistricting tasks nearly impossible. All Board members bring with them their personnel values, ideas, and experiences. The Board's work product must be evaluated based on its constitutional merit, and on that standard Senate District E should be upheld and the Board's plan should be approved. The trial court's "once a sinner, always a sinner" analysis will turn future Redistricting litigation into an even uglier mudslinging contest to impugn Board members and spouses so that partisans can obtain through the courts outcomes they did not achieve through the Board.

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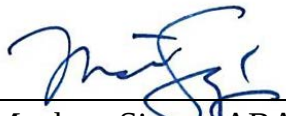
[103] *In re 2001 Redistricting Cases*, 2002 WL 34119573, at 18 (Alaska Super. Ct. Feb. 1, 2002) (citing *Gaffney v. Cummings*, 412 U.S. 735, 750-51 (1973)).

DATED at Anchorage, Alaska, this 18th day of May, 2022.

SCHWABE, WILLIAMSON & WYATT, P.C.
Attorneys for Alaska Redistricting Board

By: 

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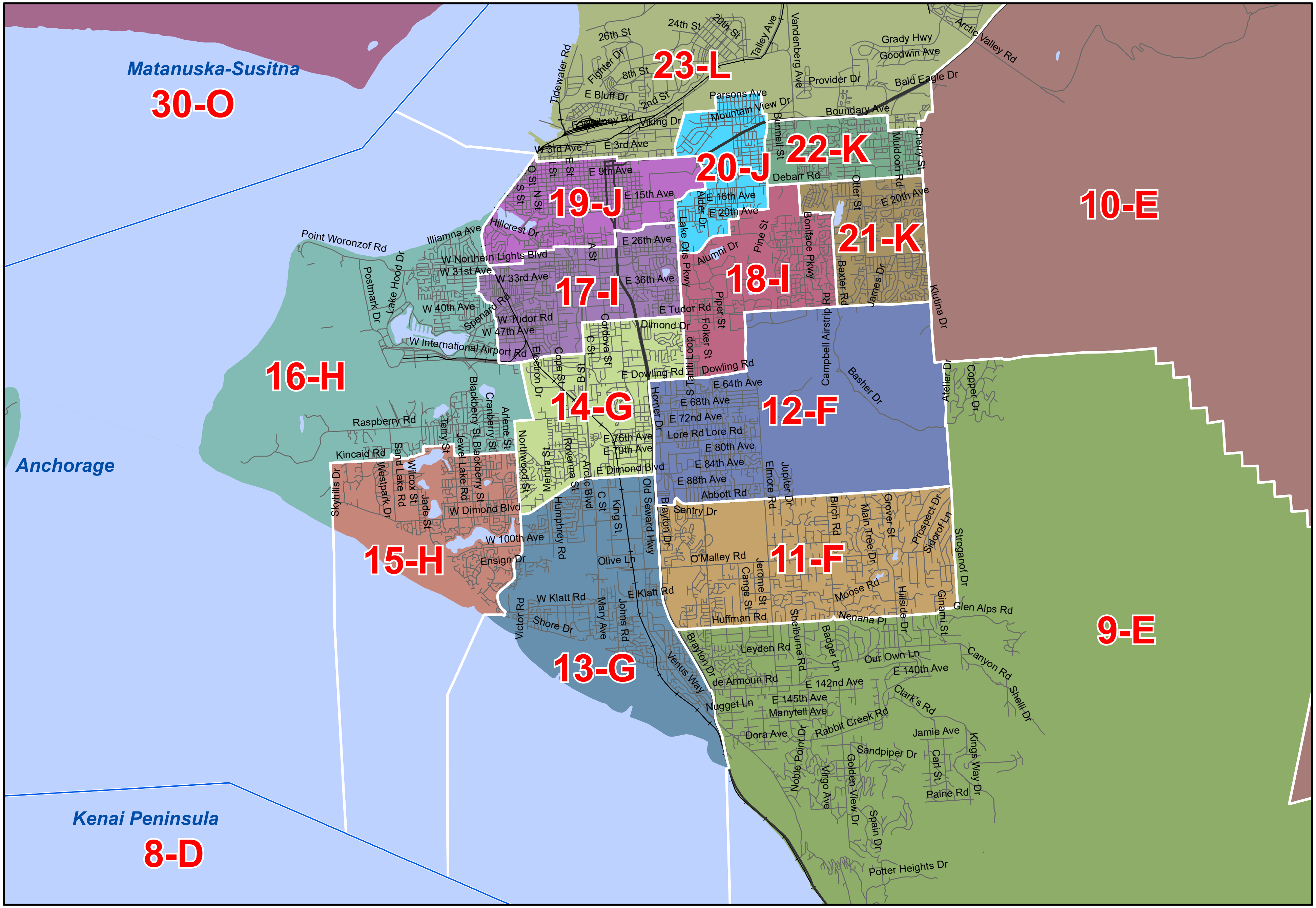
April 2022 Board Proclamation Anchorage

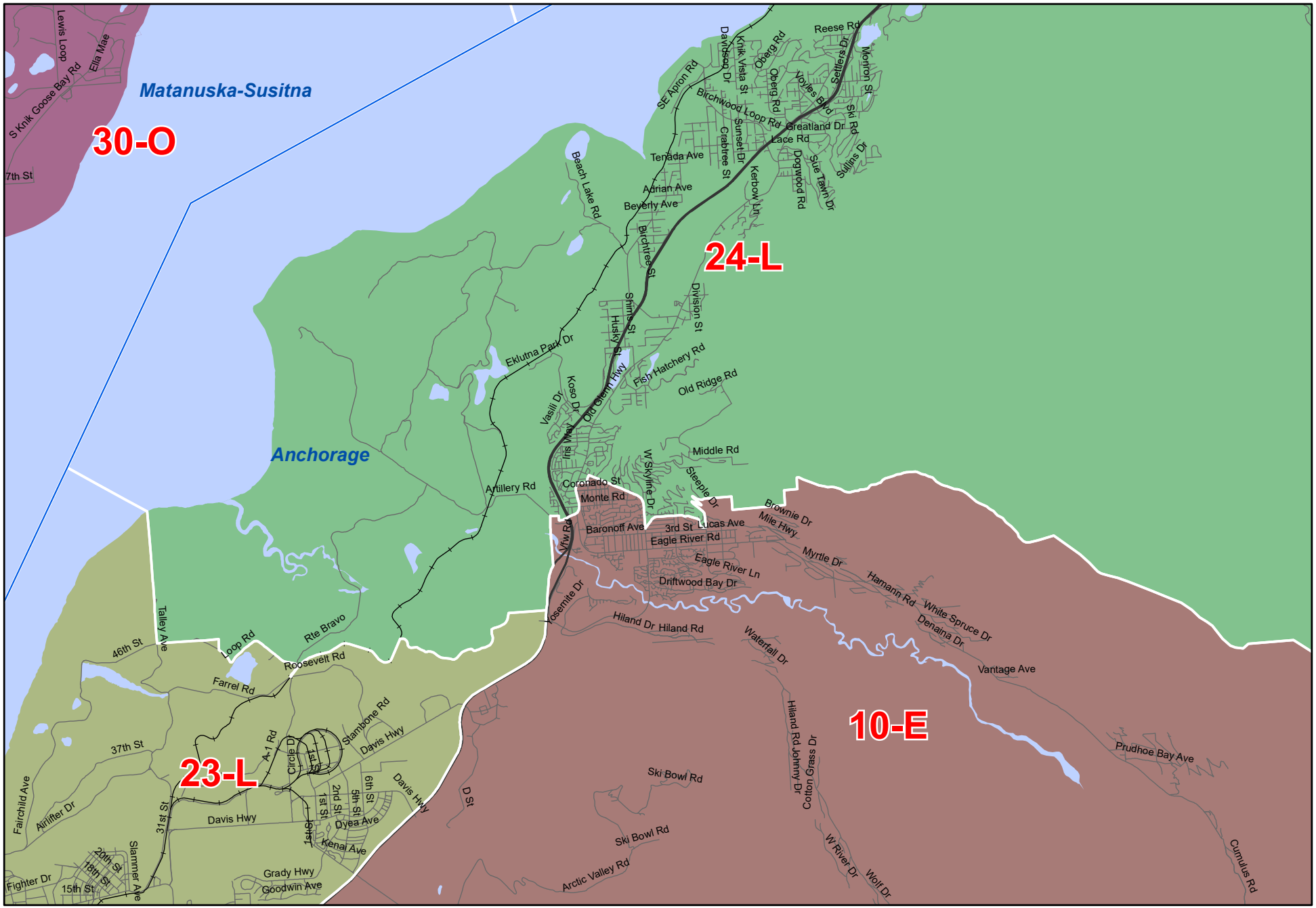
Redistricting Plan Adopted by the Alaska Redistricting Board 04/13/2022



Based on 2020 Census Geography and 2020 PL94-171 Data; Map Gallery link: www.akredistrict.org/maps

April 2022 Board Proclamation Eagle River

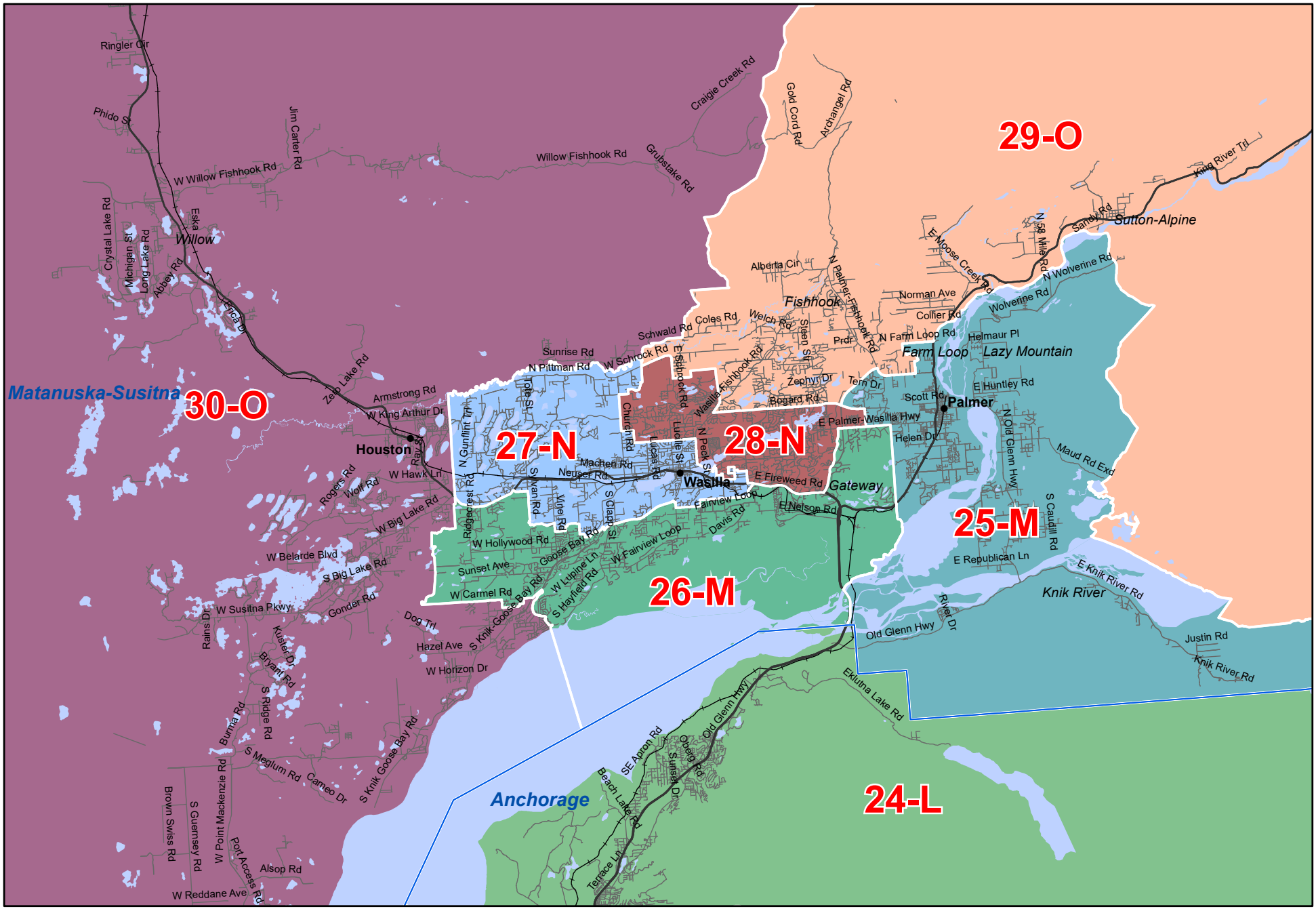
Redistricting Plan Adopted by the Alaska Redistricting Board 04/13/2022



Based on 2020 Census Geography and 2020 PL94-171 Data; Map Gallery link: www.akredistrict.org/maps

April 2022 Board Proclamation Mat-Su

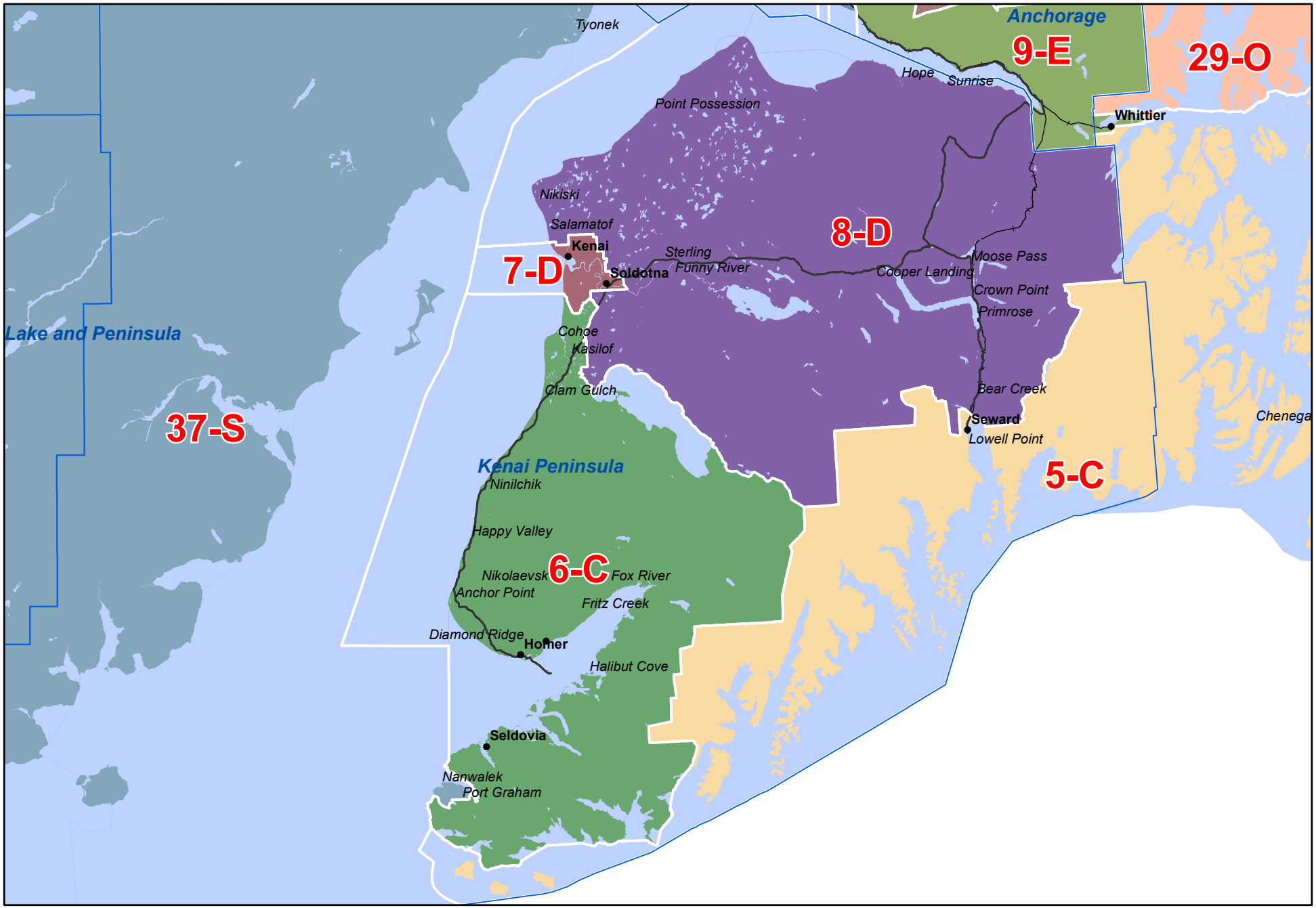
Redistricting Plan Adopted by the Alaska Redistricting Board 04/13/2022



Based on 2020 Census Geography and 2020 PL94-171 Data; Map Gallery link: www.akredistrict.org/maps

April 2022 Board Proclamation Kenai Peninsula

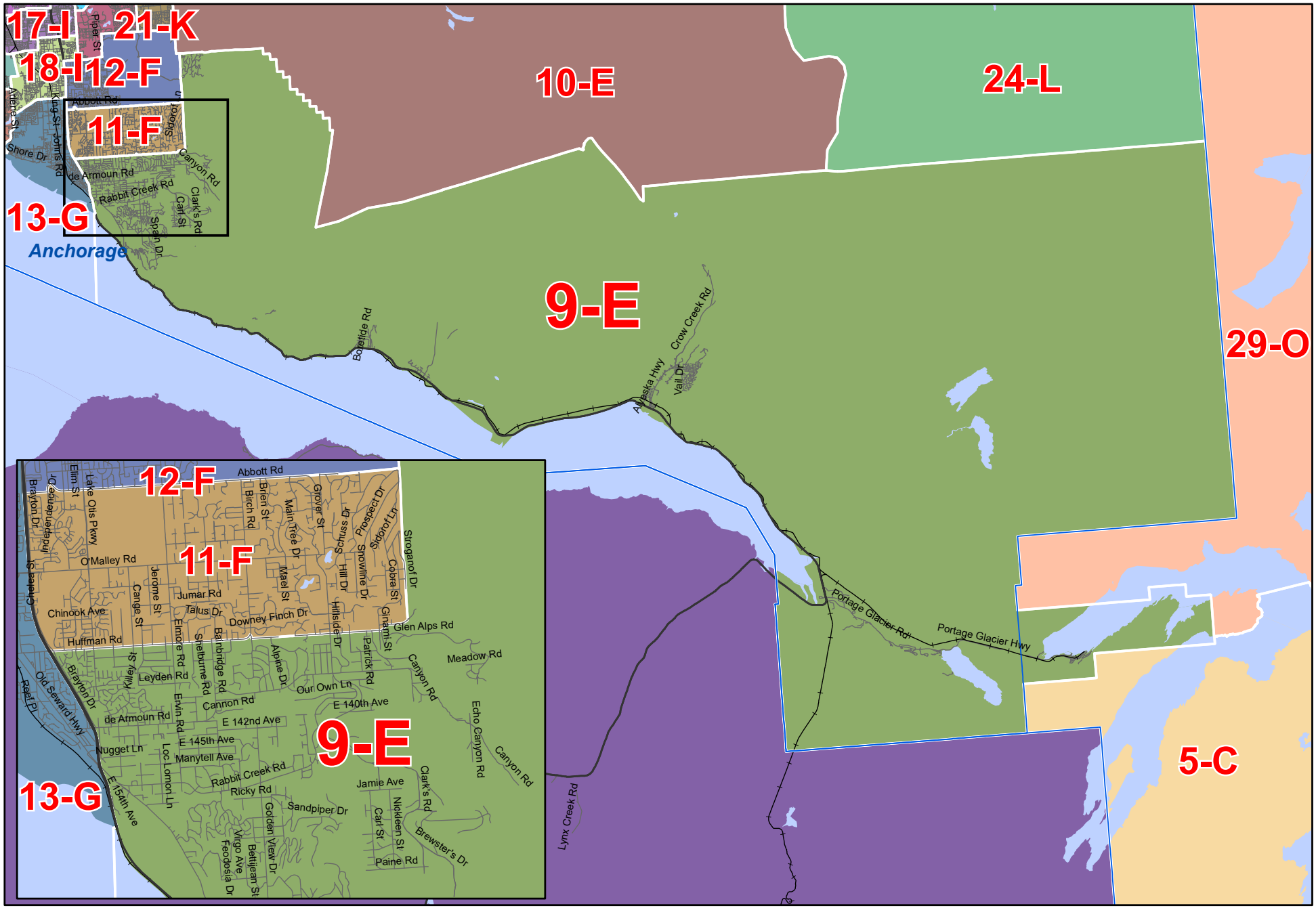
Redistricting Plan Adopted by the Alaska Redistricting Board 04/13/2022



Based on 2020 Census Geography and 2020 PL94-171 Data; Map Gallery link: www.akredistrict.org/maps

April 2022 Board Proclamation District 9-E

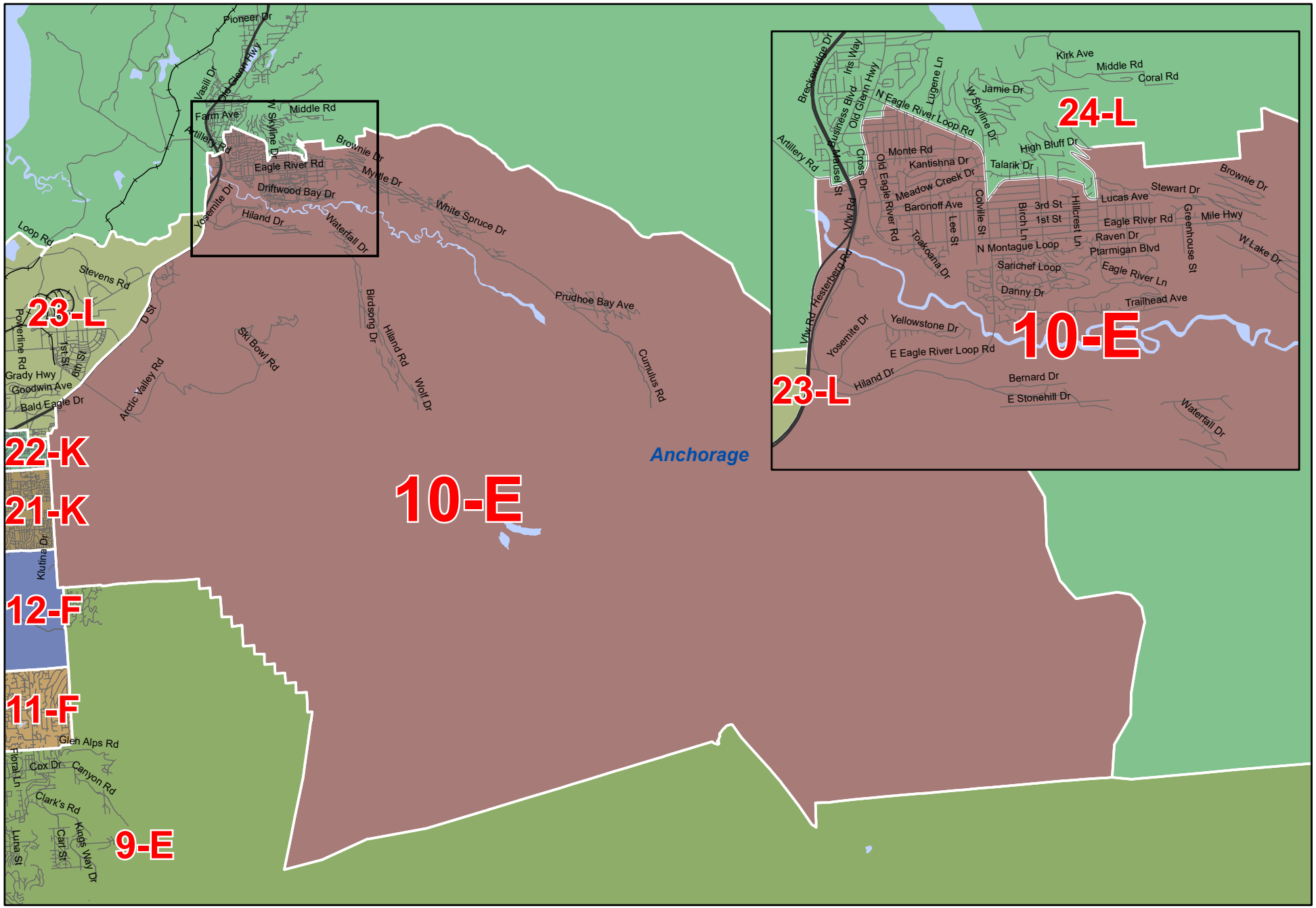
Redistricting Plan Adopted by the Alaska Redistricting Board 04/13/2022



Based on 2020 Census Geography and 2020 PL94-171 Data; Map Gallery link: www.akredistrict.org/maps

April 2022 Board Proclamation District 10-E

Redistricting Plan Adopted by the Alaska Redistricting Board 04/13/2022



Based on 2020 Census Geography and 2020 PL94-171 Data; Map Gallery link: www.akredistrict.org/maps