IN THE SUPREME COURT OF THE STATE OF ALASKA

In the Matter of the 2021 Redistricting Cases (Alaska Redistricting Board/Girdwood Plaintiffs/East Anchorage Plaintiffs)	)	Supreme Court No. **S-18419**
	)	Trial Court Case No. **3AN-21-08869CI**

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

LOUIS THEISS, KEN WAUGH, AND JENNIFER WINGARD'S OPPOSITION TO ALASKA REDISTRICTING BOARD'S PETITION FOR REVIEW OF MAY 16, 2022 FINDINGS OF FACTS AND CONCLUSIONS OF LAW

ASHBURN & MASON P.C.
LAWYERS
1227 WEST 9TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
TEL 907.276.4331 • FAX 907.277.8235

TABLE OF CONTENTS

I. INTRODUCTION 1

II. STATEMENT OF FACTS AND PROCEEDINGS 3

A. The Superior Court Found Evidence of a Secret Coalition between Majority Board Members. 3

B. The Superior Court Found Evidence of Partisan Objectives. 8

III. IMMEDIATE REVIEW IS APPROPRIATE 9

IV. ARGUMENT 9

A. The Superior Court Conducted a Careful and Proper Equal Protection Analysis. 10

1. The Superior Court Properly Applied the Neutral Factors Test to Determine that the Board Majority Had an Illegitimate Purpose. . 10

2. The Superior Court's Discussion of Federal Law Was Reasonable and Supported Its Decision to Consider the Record as a Whole in Its Analysis. 13

3. The Superior Court Properly Considered the Board's Decision to Ignore Public Testimony and Conduct a Public Process for Show as Evidence of the Board's Improper Intent. 16

4. The Superior Court Properly Considered the Board's Decision to Ignore Local Boundaries, Local Government Preferences, and Communities of Interest as Evidence of the Board's Improper Intent. 17

5. The Superior Court Correctly Found, Based on Expert Testimony, that Option 3B Led to Dilution of District 9's Vote. 24

6. A House District Created in 2001 Has Little Relevance to a Senate District Created for Partisan Reasons in 2022. 26

B. The Superior Court Ordered an Appropriate Interim Remedy and Remanded the Proclamation to the Board. 28

V. CONCLUSION 32

ASHBURN & MASON P.C.
LAWYERS
1227 West 9th Avenue, Suite 200
Anchorage, Alaska 99501
Tel 907.276.4331 • Fax 907.277.8235

TABLE OF AUTHORITIES

Cases

Abbott v. Perez, 138 S.Ct. 2305 (2018) 14

Anderson v. Dep't of Admin., Div. of Motor Vehicles, 440 P.3d 217 (Alaska 2019) 31

Hickel v. Se. Conf., 846 P.2d 38 (Alaska 1992) 29, 30

In re 2001 Redistricting Cases, 47 P.3d 1089 (Alaska 2002) 20

In re 2011 Redistricting Cases, 294 P.3d 1032 (Alaska 2012) 30

Kenai Peninsula Borough v. State, 743 P.2d 1352 .... 13, 21, 25, 26, 29, 31

N. Carolina State Cont. of NAACP v. McCrory, 831 F.3d 204 (4th Cir. 2016) 14

Village of Arlington Heights v. Metropolitan Housing Development Corp, 429 U.S. 252 (1977) 14

Constitutional Provisions

Alaska Const. art. VI, § 11 30

ASHBURN & MASON P.C.
LAWYERS
1227 WEST 9TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
TEL 907.276.4331 • FAX 907.277.8235

I. INTRODUCTION

Louis Theiss, Ken Waugh, and Jennifer Wingard ("Girdwood Parties") oppose the Alaska Redistricting Board's ("Board") Petition for Review.

On February 16, 2022, the superior court ruled that the Board—the entity charged under the Alaska Constitution with making fair, equitable, representative legislative maps for the State of Alaska—had engaged in partisan gerrymandering in violation of the Alaska Constitution's Equal Protection Clause. Specifically, it found that the Board intentionally and illegitimately divided the two Eagle River house districts to increase Eagle River's Senate representation and dilute the vote in East Anchorage for partisan political reasons. Notably, the superior court determined that the Board had reached a secret agreement not on the entirety of the Senate map, but on a single component of it: the division of the Eagle River districts. That determination was upheld on review by this Court and the Anchorage senate pairings were remanded to the Board.

The Board majority, however, entered the remand process with the same secret goal it had on November 10, 2021: to split Eagle River to increase its preferred party's representation in the Alaska Senate. The Board majority again engaged in secret communications, again pushed through a shared agenda of splitting Eagle River for partisan advantage, and again ignored communities of interest, local boundaries, community preferences, and in some instances the actual borders and geography of the districts at issue. Overwhelmingly, the public asked the Board to keep Eagle River together, to keep South Anchorage together, to keep downtown together. The Board

ASHBURN & MASON P.C.
LAWYERS
1227 WEST 9TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
TEL 907.276.4331 • FAX 907.277.8235

disregarded all of this, and instead held up a pretextual, manufactured community of interest as a pretext for its partisan goal of providing Eagle River—a community that contains less than 5% of Alaska's population—the ability to elect 10% of Alaska's senators. Although the precise pairings were different, the Board *did exactly what it had done before*, at the expense of South Anchorage, Girdwood, and Turnagain Arm communities in District 9.

The Board did this because it has never accepted the courts' rulings. Since February 16, 2022, the date the superior court issued its first decision, the Board majority and Board counsel have studiously avoided any reference to the courts' findings that the Board engaged in partisan gerrymandering. Instead, in litigation summaries at its public meetings, in e-mail newsletters, and even in its post-remand briefing to the superior court, the Board blandly characterized the courts' East Anchorage rulings as "invalidating Senate District K".[1] The superior court noted this in its April 16 decision, remarking that "the Board … selectively ignores this court's prior findings on discriminatory intent."[2]

The Board's Petition for Review is no different. It mentions the courts' prior findings on intent only in its efforts to distance them from the present case. The only lesson the Board appears to have learned is the importance of saying the words it believes

---

[1] *See*, e.g., Pet. at 4; ARB2000153-54 (April 2, 2022 meeting) (counsel stating the Board was ordered to "address the constitutional deficiency in Senate District K").

[2] Exc. 0572.

ASHBURN & MASON P.C.
LAWYERS
1227 WEST 9TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
TEL 907.276.4331 • FAX 907.277.8235

the courts want to hear—as the superior court put it, to "parrot the language" from court orders.[3]

The superior court was rightfully "wary of an order that effectively lights a path both legally and procedurally to creating a gerrymandered map."[4] The Girdwood Parties ask this Court to approach this case with the same caution, and to ensure that future Boards cannot launder their gerrymanders through the courts.

II. STATEMENT OF FACTS AND PROCEEDINGS

The Girdwood Plaintiffs largely agree with the Board's recitation of the facts and proceedings leading up to its Petition—such as it is. The Board's version is notable less for what it says than for what it omits. The Board's recitation of the facts omits the significant behind-the-scenes narrative that the superior court found to be compelling evidence of secretive procedures and partisan objectives.

A. The Superior Court Found Evidence of a Secret Coalition between Majority Board Members.

In its May 16 order, the superior court referenced its prior finding of secretive procedures in the East Anchorage challenge, and noted that the Girdwood Parties had "present[ed] evidence that some secretive procedures were continually used following remand, suggesting the Board created the April 2022 Senate pairings with illegitimate purpose."[5] After reviewing the evidence, the superior court found that its "observation

---

[3] Exc. 0593.

[4] Exc. 0572.

[5] Exc. 0569.

ASHBURN & MASON P.C.
LAWYERS
1227 WEST 9TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
TEL 907.276.4331 • FAX 907.277.8235

from the first round of this litigation appears once again to be true: 'The public portion of the record leads to only one reasonable inference: some sort of coalition or at least a tacit understanding between Members Marcum, Simpson, and Binkley.'"[6]

This finding was based on evidence presented by the Girdwood Parties demonstrating that substantive private communications between the three majority Board members continued throughout the remand process. Concerningly for a public body that already once been found to have engaged in improper secretive procedures, the Board appeared to have been counseled to avoid putting things in writing. In an e-mail on April 1, Member Borromeo referenced this obliquely, stating: "And before we go down the 'don't put this or that in email' all of what I'm saying is public record."[7] While Member Borromeo appeared eager to have her comments made public, other Board members were more circumspect. While the record does not reveal exactly what the majority Board members said to each other in their private side communications, it does establish they engaged in those side communications, and that those communications led to coordination between those Board members on everything from the timing of the remand process to the ultimate decision on which map to support.

With regard to timing, on March 25, the Board's executive director circulated draft agendas to the Board that showed the Board adopting a new proclamation by April 6.[8]

---

[6] Exc. 0597 (May 16, 2022, Order Re Girdwood Challenges to Amended Plan) (quoting February 16, 2022 FFCL).

[7] Exc. 0809.

[8] Exc. 0802.

ASHBURN & MASON P.C.
LAWYERS
1227 WEST 9TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
TEL 907.276.4331 • FAX 907.277.8235

These were based on an anticipated April 1 ruling from this Court, but the ruling in fact came later in the day on March 25. Early on March 28, Member Borromeo e-mailed the Board to propose a sooner meeting time in light of the early ruling.[9]

Chair Binkley and Member Simpson had a private phone conversation on March 28, after receiving Member Borromeo's proposal.[10] Subsequently, on March 31, Member Simpson sent an e-mail to the group that urged for a lengthier public process.[11] Mr. Torkelson reminded the Board that the public notices indicated the Board would adopt a revised plan on April 6.[12] Early the next day, April 1, 2022, Members Binkley and Marcum had a private phone call.[13] Many e-mails followed, with Members Borromeo and Bahnke objecting to drawing out the remand process.[14] Board counsel participated in these conversations, but his comments, and certain Board member comments, were redacted. Ultimately, at its April 4 meeting, the Board majority settled on a lengthy public process lasting until April 13 or 14.

ASHBURN & MASON P.C.
LAWYERS
1227 WEST 9TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
TEL 907.276.4331 • FAX 907.277.8235

---

[9] Exc. 0803.

[10] Exc. 0804.

[11] Exc. 0811.

[12] Exc. 0811-12.

[13] Exc. 0813.

[14] Member Bahnke observed that drawing out the process could "smack [of] delay tactics" and lead to accusations that "the board majority will try to delay as much as possible to force an e[l]ection under the current proclamation." Exc. 0809. At one point, Chair Binkley attempted to cancel the April 2 meeting, Exc. 0810, but Members Borromeo and Bahnke insisted it take place so that the public testimony process could begin. Exc. 0808.

The record contains evidence of other private phone calls that took place between the three majority Board members.[15] Phone records were not provided, so additional conversations may have taken place; these are merely the ones referenced in the members' disclosed text messages.

Notably, neither Member Borromeo nor Member Bahnke were included in *any* of these post-remand phone conversations.[16] The Board can point to only two instances of side communications between the majority and minority Board members. One of these involved Member Borromeo asking Member Simpson for a call on February 16, prior to the original appeal and remand, and then later asking if he would be attending a meeting in person.[17] The other was limited correspondence by text between Chair Binkley and Member Borromeo largely on meeting details such as technological and audio issues.[18] There is no other evidence of side communications between the majority and minority Board members and certainly none rising to the level of the frequent calls, resulting in observable coordination, that occurred within the Board majority.

---

[15] Exc. 0813; Exc. 0934.

[16] The Board has cited to only two instances of side communications between the majority and minority Board members. One of these involved Member Borromeo asking Member Simpson for a call on February 16, prior to the original appeal and remand, and then asking if he would be attending a meeting in person. Exc. 087. The other was limited correspondence by text between Chair Binkley and Member Borromeo largely on meeting details such as technological and audio issues. Exc. 002. There is no other evidence in the record suggesting there were side communications between the majority and minority Board members and certainly none rising to the level of the frequent calls, resulting in observable coordination, that occurred within the Board majority.

[17] Exc. 087.

[18] Exc. 002.

ASHBURN & MASON P.C.
LAWYERS
1227 WEST 9TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
TEL 907.276.4331 • FAX 907.277.8235

Additional evidence supported the superior court's finding that the three majority Board members had reached a side consensus on the outcome of the remand process. On April 13, 2022, in the midst of the Board's public deliberations, right after he had shared his comments favoring Option 3B and while the other Board members were commenting, Member Simpson had a text exchange with a family member, where they made comments such as "John is doing well" and "Bethany doing well too"[19]—language that implies those Board members' comments were being made in service of a pre-arranged and pre-discussed common goal.

A recent development further supports the superior court's finding that the Board majority engaged in secretive processes and side agreements. On May 18, 2022, Member Borromeo sent an e-mail to the Court filing e-mail address, copying all parties, stating that the Board had filed its Petition for Review without authority and without calling a public meeting, based solely on the decision of Chair Binkley, Member Simpson, and Board counsel; and that the full Board had not even been informed of the appeal until they received a copy of the already-filed Petition.[20] Member Borromeo further noted that the Board majority and Board counsel were not communicating with her or returning her calls. Member Borromeo's message, if true (as it appears to be based on the lack of any public Board meeting since April 13, 2022), demonstrates a lack of respect for the minority Board members and an even more brazen disregard for the Alaska Constitution,

[19] Exc. 0805.

[20] The Girdwood Parties included this message in their Notice to the Court filed May 19, 2022.

ASHBURN & MASON P.C.
LAWYERS
1227 WEST 9TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
TEL 907.276.4331 • FAX 907.277.8235

which explicitly states in Article VI, § 9 that "[c]oncurrence of three members of the Redistricting Board is required for actions of the Board[.]"[21] The Girdwood Parties acknowledge that Member Borromeo's e-mail is not part of the trial court record but, as it was presented directly to this Court, feel compelled to mention it here.

B. The Superior Court Found Evidence of Partisan Objectives.

The superior court found that "the evidence is quite clear that a pattern of markedly partisan correspondence between specific Board Members occurred, and aligns with the intent found during the first round of litigation."[22] This "clear" evidence included e-mails showing that "Member Marcum was subscribed to the mailing list of the National Republican Redistricting Trust ("NRRT")[,]" an organization devoted to preserving "'shared conservative values for future generations' through the redistricting process[.]"[23] The Court determined that "the only reasonable inference that can be drawn is that Member Marcum's stated partisan goal from the first round of redistricting remained paramount in her work on the Board."[24] The superior court also noted its prior finding that Member Simpson had been appointed because of his Republican party affiliation, and cited evidence the Girdwood Parties had presented regarding Member Simpson's ongoing preoccupation with partisan politics.[25] The superior court concluded that its

---

[21] The Girdwood Parties intend to address the authority issue by separate motion.

[22] Exc. 0571.

[23] Exc. 0571.

[24] Exc. 0597.

[25] Exc. 0570. This evidence included e-mails showing that Member Simpson was reading partisan blog posts, including posts that focused on the partisan political effects of the two proposed maps—such as a post from conservative blog Must Read Alaska

ASHBURN & MASON P.C.
LAWYERS
1227 WEST 9TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
TEL 907.276.4331 • FAX 907.277.8235

"previous illegitimate intent finding renders such partisan and behind-the-scenes correspondence all the more suspect."[26]

The superior court also found that Board's own statements prove its partisan political intent. It found that "Board members either knew or assumed that JBER residents preferred the same political candidates as Eagle River, i.e., Republicans. The Board thus candidly admits that its decision to pair JBER with North Eagle River was to amplify conservative voices by creating a safe Republican senate seat."[27]

III. IMMEDIATE REVIEW IS APPROPRIATE

The Girdwood Plaintiffs agree with the Board that immediate review is appropriate.

IV. ARGUMENT

The superior court engaged in a detailed, multi-layered analysis that provided an orderly approach to the evidence presented by the parties. While the Girdwood Plaintiffs agree that clarity from this Court on the applicable legal standards and tests would be helpful to future Boards, they disagree that the superior court's decision was riddled with errors. Rather, on an extraordinarily short timeframe, the superior court properly considered the entire record, identified the issues and controlling law to apply to this situation, and correctly conducted an equal protection analysis to find that the Board had,

titled "Conservatives needed to support Redistricting Board as it considers two maps of Senate pairings for Anchorage." Exc. 0477.

[26] Exc. 0571.

[27] Exc. 0592.

ASHBURN & MASON P.C.
LAWYERS
1227 WEST 9TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
TEL 907.276.4331 • FAX 907.277.8235

once again, adopted a map intended to provide Eagle River with twice the representation its population warrants—but this time, at the expense of District 9 voters.

A. The Superior Court Conducted a Careful and Proper Equal Protection Analysis.

1. The Superior Court Properly Applied the Neutral Factors Test to Determine that the Board Majority Had an Illegitimate Purpose.

The Board repeatedly asserts that the superior court ignored this Court's "neutral factors" test[28]—but this assertion suggests that the Board may not have actually read the superior court's decision. The superior court in fact devoted an entire section of its Equal Protection analysis to the neutral factors test.[29] The superior court considered the totality of the circumstances and listed factors that this Court has deemed relevant to the analysis into the legitimacy of a Board's purpose, including, e.g., "secretive procedures" and "boundaries that selectively ignore political subdivisions and communities of interest."[30]

The superior court was familiar with the neutral factors test because, as the Board notes, it had applied it in the East Anchorage challenge. But it acknowledged a complexity in the Girdwood challenge: this Court has no precedent addressing what weight a prior finding of discriminatory intent should be given in a later proceeding.[31]

---

[28] Pet. at 3 (superior court "refused to apply *Kenai Peninsula Borough v. State*'s neutral factors test…"), 22 ("Judge Matthews disregarded the neutral factors test…"), 30 ("The superior court skirted the neutral factors test…").

[29] Exc. 567-577.

[30] Exc. 0566.

[31] Exc. 0568-69.

ASHBURN & MASON P.C.
LAWYERS
1227 WEST 9TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
TEL 907.276.4331 • FAX 907.277.8235

The superior therefore addressed, in detail, the new post-remand facts that supported its finding that the prior illegitimate intent carried over into the remand: specifically, new evidence that the Board majority continued to have secret communications; that they continued to act in concert, suggesting an ongoing coalition; and that they continued to have partisan objectives. The superior court further noted Member Marcum's false insistence—contrary to the record and to its prior factual findings—that she had never looked at incumbent data[32] and Chair Binkley's refusal to vote to correct the Cantwell appendage because he disagreed with this Court's ruling,[33] finding it "unacceptable" for "any Board member [to feel] it was appropriate to act contrary to the clear direction of the highest Court of this State[.]"[34]

The Court next addressed the Board's approach to communities of interest, noting that Senate District E's boundaries "ignore the Eagle River and South Anchorage communities of interest"[35] and the mere fact that there are certain similarities between the districts "does not inform the analysis for Equal Protection purposes."[36] The superior court concluded that the evidence showed that the Board majority "insisted continuously that Senate District L remain intact" and that District E was another "down-the-road consequence" of the Board majority's desire to split Eagle River.[37] It noted that ignoring

[32] Exc. 0570-71.

[33] Exc. 0571.

[34] Exc. 0571.

[35] Exc. 0573.

[36] Exc. 0573.

[37] Exc. 0573.

ASHBURN & MASON P.C.
LAWYERS
1227 West 9th Avenue, Suite 200
Anchorage, Alaska 99501
Tel 907.276.4331 • Fax 907.277.8235

the communities of interest was not necessary; it was the "product of a majority of the Board's preference."[38] It found the fact that "other pairings that did not split communities of interest were available" to undercut the Board's argument.[39]

At each stage of its analysis, the superior court identified which direction each factor weighed: in favor of the Girdwood challenge, or against. Ultimately, it concluded that the neutral factors, taken as a whole, supported a finding of illegitimate intent.[40] It then shifted the burden to the Board to demonstrate that it intended for the map to result in more proportional representation.[41] After reviewing the numbers, the superior court concluded that the difference between the two map options was, on average, just 18 people—a difference the superior court properly found to be a de minimus increase that had not played any role in the Board's decision, in accordance with *Kenai Peninsula Borough*'s guidance.[42]

The Board contends that this finding of de minimus increased proportionality is fatal to the Girdwood Plaintiffs' Equal Protection claim, but this overlooks that *Kenai Peninsula Borough* held that once the burden is shifted to the Board, the Board does not merely need to prove that the map increases representation—it "the Board has the burden of proving that it intentionally discriminated *in order to increase the proportionality* of

[38] Exc. 0574.

[39] Exc. 0574.

[40] Exc. 0574.

[41] Id.

[42] Exc. 0575-77 (Option 2, -0.83% average deviations; Option 3B, -0.73% average deviations).

ASHBURN & MASON P.C.
LAWYERS
1227 WEST 9TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
TEL 907.276.4331 • FAX 907.277.8235

geographic representation in the legislature."[43] The superior court expressly found that "there is no evidence that greater proportionality was a factor the Board considered when crafting Senate pairings" and that any arguments about increased proportionality were "ultimately after-the-fact rationalizations rather than legitimate justifications."[44]

Overall, the superior court carefully applied the neutral factors test, including the burden-shifting, and found it weighed in favor of the Girdwood Parties.

2. The Superior Court's Discussion of Federal Law Was Reasonable and Supported Its Decision to Consider the Record as a Whole in Its Analysis.

In conducting its neutral factors test, the superior court was sensitive to the fact that its prior findings regarding the Board majority's intent were what tipped the scale—i.e., that if the Girdwood challenge had not followed the East Anchorage challenge, the outcome of the test may have been different. It acknowledged that this situation was a first in Alaska and that it had made its decision to consider the prior intent "without clear guidance from the Alaska Supreme Court establishing the legal framework to apply."[45] Seeking guidance, the superior court therefore turned to federal case law, which provided a framework for situations involving prior discriminatory intent.[46]

The superior court's turn to federal law was a belt-and-suspenders approach that recognized the unprecedented situation we are in: a Board, found by two courts to have

[43] *Kenai Peninsula Borough v. State*, 743 P.2d 1352,1372-73.

[44] Exc. 0576-77.

[45] Exc. 0576.

[46] Exc. 0577-78.

ASHBURN & MASON P.C.
LAWYERS
1227 WEST 9TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
TEL 907.276.4331 • FAX 907.277.8235

engaged in partisan gerrymandering, that goes back and does *the exact same thing* on remand, with similar evidence of secret agreements and discriminatory intent. The Board attacks the court's federal analysis on two grounds: first, for relying on federal case law (*Village of Arlington Heights v. Metropolitan Housing Development Corp*.[47]) that did not involve redistricting; and second, for relying on a federal case (*Abbott v. Perez*[48]) that involved a different level of right.[49]

The Board's first criticism is flat-out wrong. As the superior court explained, federal courts routinely apply the *Arlington Heights* framework in redistricting cases; the case itself, and other cases interpreting it, are thus appropriate as a source of guidance.[50] The Board's second criticism is overly formulaic. The superior court made clear that it considered the federal cases to "provide[] useful guidance in addressing the board's prior bad intent."[51] The superior court went through a lengthy federal analysis to confirm that the result it reached under Kenai, giving weight to the Board's prior intent, was not outside of legal norms. The superior court should be praised, not faulted for this careful approach.

[47] 429 U.S. 252 (1977).

[48] 138 S.Ct. 2305 (2018).

[49] Pet. at 30.

[50] Exc. 0578 and n.144 (citing *Miller v. Johnson*, 515 U.S. 900, 913-14 (1995) (applying Arlington Heights factors to Georgia redistricting plan); *N. Carolina State Cont. of NAACP v. McCrory*, 831 F.3d 204, 220-33 (4th Cir. 2016) (invalidating redistricting plan based on North Carolina's history of discrimination and other factors).

[51] Exc. 0581.

ASHBURN & MASON P.C.
LAWYERS
1227 WEST 9TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
TEL 907.276.4331 • FAX 907.277.8235

However, the superior court need not have conducted its federal analysis. The Board cannot credibly argue that the superior court was obligated to ignore the prior history. The Girdwood Parties intervened in the same lawsuit, with the same case caption and case number, and the Board did not oppose their intervention.[52] The same three Board members voted to adopt Option 3B as had voted to adopt the 2021 Proclamation. The superior court made clear, both in its decision and on the record at a hearing shortly after the Girdwood challenge was filed, that it would be considering *the entirety of the record* from the prior challenges in rendering its decision.[53] The superior court's prior finding about the Board's intent does not just go to intent; it goes to the credibility of the three Board members, who testified in multiple formats in the prior litigation. Preventing the superior court from considering this history, and its prior findings on intent and credibility of the Board members, would hamstring its ability to render a fair decision as fact-finder. Worse, it would allow future boards to gerrymander simply by withstanding the first round of lawsuits.

The Girdwood Parties have not argued for a "once a sinner, always a sinner" rule, as the Board suggests, and that is not the rule the superior court applied. The superior court was clear that its decision was based on its finding that the original discriminatory intent, secretive agreements, and partisan objectives *persisted* on remand. The superior

[52] Exc. 0953.

[53] Exc. 0557 ("In this case, the record includes the full court record from the first round of this litigation, the record from the Board's remand process as filed on April 28 and supplemented on May 2, and all materials submitted by the parties to the Girdwood challenge."

ASHBURN & MASON P.C.
LAWYERS
1227 West 9th Avenue, Suite 200
Anchorage, Alaska 99501
Tel 907.276.4331 • Fax 907.277.8235

court cited specific salient facts from the remand to support its state and federal analyses, and moreover cited numerous other less-dispositive "inconsistencies and peculiarities in the Board's process [that], in the aggregate, also support this Court's conclusions that the Board acted with discriminatory intent and improper purpose."[54]

3. The Superior Court Properly Considered the Board's Decision to Ignore Public Testimony and Conduct a Public Process for Show as Evidence of the Board's Improper Intent.

The Board misconstrues the superior court's findings regarding public testimony and communities of interest. The superior court did not find the pairing to be unconstitutional because it was contrary to the weight of the public testimony. Rather, the superior court considered the Board's disregard for public testimony in context, and concluded that it was *further* evidence of illegitimate intent.

The superior court observed that the Board majority, in public meetings, made a point of advocating for increased public process, insisting it was necessary "to meaningfully implement the findings of the Supreme Court, " "to give the public their due," and "allow the public to engage and look at that plan."[55] Member Simpson even said: "I refuse to be badgered into a decision made on partial information before I'm ready to do it."[56] But despite this purported dedication to public process, the Board majority appeared not to listen. As the superior court put it:

[54] Exc. 0594-98.

[55] Exc. 0597.

[56] Exc. 0597.

ASHBURN & MASON P.C.
LAWYERS
1227 WEST 9TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
TEL 907.276.4331 • FAX 907.277.8235

> The communications and statements suggest the majority board members approached the process with a predetermined outcome in mind. The record indicates a disregard for the weight of public testimony, and lack of geographic awareness of what was in the districts at issue. Instead, [the] totality of the circumstances indicates a goal-oriented approach; they paid attention to the details only as much as they needed to say the right words on the public record when explaining their choice.[57]

As an example, Board members' comments before and at the April 13 meeting make clear that the public process was for show. Less than half an hour before the final meeting, Members Simpson and Binkley revealed that they did not really know which districts Chugiak and the Chugach mountains were in, or even where they were geographically located relative to Eagle River.[58] In other words, they appear to have paid no attention to the days of written and live testimony from innumerable members of the public about these very districts, focusing on the location of these very communities and geographic features, as part of the lengthy public process they had insisted was so important.

4. <u>The Superior Court Properly Considered the Board's Decision to Ignore Local Boundaries, Local Government Preferences, and Communities of Interest as Evidence of the Board's Improper Intent.</u>

The superior court noted that while all the house districts in question are within the Municipality of Anchorage, the Board ignored other local boundaries in its decision. The superior court noted that numerous community councils and community organizations in the affected districts wrote in opposing the 23/24 and 9/10 pairings. The

[57] Exc. 0598.

[58] Exc. 0804.

ASHBURN & MASON P.C.
LAWYERS
1227 WEST 9TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
TEL 907.276.4331 • FAX 907.277.8235

Downtown Community Council ("DCC"), Government Hill Community Council ("GHCC"), and Anchorage Downtown Partnership ("ADP") all formally supported pairing downtown with the North Anchorage district (District 23).[59] Similarly, the Girdwood Board of Supervisors ("GBOS") passed a resolution in favor of a pairing with South Anchorage and against a pairing with Eagle River.[60] All of these entities have defined legal boundaries and, in the case of ADP and DCC, those boundaries were broken by the Option 3B. Each entity supported its stated preference with specific facts.[61]

In addition, the Board had at its disposal the record from a recent Municipality of Anchorage ("MOA") Reapportionment process, which contained extensive additional evidence of community preferences. Assembly Member Christopher Constant, who had chaired the MOA reapportionment process, submitted a letter to the Board explaining the process.[62] He explained that MOA had considered an option that would pair Eagle River with a South Anchorage neighborhood, and that it had been a "lightning rod" for overwhelming opposition from both South Anchorage and Eagle River.[63]

---

[59] Exc. 0596.

[60] Id.

[61] Exc. 0467 (DCC Resolution, noting that the Board had divided the "downtown core" into separate house districts and that placing them in separate senate districts as well would "further dissolve[]" downtown's voice); Exc. 0959 and Exc. 0468-0473 (ADP Resolution urging the Board to keep the Assembly-created Downtown Improvement District together in one senate district and not pair downtown with "rural and residential" Eagle River); Exc. 0958 (GHCC written comment, noting District 24 "is rural Alaskan in distance, lifestyles, and values, and does not represent Government Hill, JBER, or downtown Anchorage.").

[62] Exc. 0554.

[63] Exc. 0554 (citing Exc. 0820-910).

ASHBURN & MASON P.C.
LAWYERS
1227 WEST 9TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
TEL 907.276.4331 • FAX 907.277.8235

The Board majority not only disregarded these communities' preferences, but at least in the case of downtown, appear *not to have even read the resolutions*. Chair Binkley, Member Simpson, and Member Marcum, during the April 13 meeting, emphasized District 23's "differences" from downtown as a reason that the district could never be paired with downtown and instead must be paired with Eagle River[64]—even though the Board itself had already placed JBER in a house district with downtown, as these resolutions (and ample other public testimony) made clear.

Indeed, the superior court found it notable that no formal resolutions or messages were received from community councils or other community government bodies in any Eagle River communities, and no resolutions or messages were received from any community government body or entity representing the JBER population.[65] But the Board majority was so focused on manufacturing justifications for its preferred pairing that it did not even look at District 23's actual boundaries or its residents' preferences.

The Board's reliance on *In re 2001 Redistricting Cases*[66] to support its argument that local boundaries are irrelevant is misplaced, as the superior court's order does not

---

[64] Exc. 0949-50. (Binkley stating that he had an office and condo downtown and had been involved with the Alaska Railroad, and that based on his experience JBER should not properly be paired with downtown—despite the fact that the Alaska Railroad, his office, and his condo were all already in District 23 with JBER); Exc. 0948. (Marcum stating that "[d]owntown has almost nothing in common with the military base"); Exc. 0946. (Simpson stating pairing the military bases with downtown overlooks JBER as a significant community of interest[.]").

[65] Exc. 0596.

[66] Pet. at 11-12 (citing *In re 2001 Redistricting Cases*, 47 P.3d 1089, 1091 (Alaska 2002)).

ASHBURN & MASON P.C.
LAWYERS
1227 WEST 9TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
TEL 907.276.4331 • FAX 907.277.8235

run afoul of that precedent. If anything, that case supports the Girdwood Parties' argument. It stated that "respect for neighborhood boundaries is an admirable goal," though because "it is not constitutionally required," it "must give way to other legal requirements."[67] The Board selectively quotes this holding to suggest that "respect for neighborhood boundaries" is an improper consideration—but the case actually suggests that it is an "admirable" one that is appropriate to consider when it does not conflict with "other legal requirements." On remand, the Board identified no other "legal requirements" that would prevent adoption of Option 2. As the superior court found, the Board's disregard of neighborhood boundaries and neighborhood preferences is suspicious.

The Board's disregard for established communities of interest is similarly suspect. Although the Board implies that "communities of interest" are legally irrelevant to the Board's work, that position is not supported by this Court's precedents. In *Kenai Peninsula Borough v. State*, this Court held that when evaluating illegitimate purpose under a neutral factors test, "[d]istrict boundaries which meander and selectively ignore political subdivisions and *communities of interest*, and evidence of regional partisanship are also suggestive."[68] While breaking apart a community of interest may not, on its own, be a constitutional violation, it is directly relevant to the legitimacy of the Board's purpose.

---

[67] *In re 2001 Redistricting Cases*, 47 P.3d at 1091.

[68] *Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1372 (Alaska 1987) (emphasis added).

ASHBURN & MASON P.C.
LAWYERS
1227 WEST 9TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
TEL 907.276.4331 • FAX 907.277.8235

The superior court's February 16 order found that the Eagle River districts constituted a community of interest.[69] Dr. Hensel provided expert testimony establishing that Girdwood and South Anchorage constituted a community of interest, which the superior court found compelling,[70] especially in conjunction with the "extensive testimony during the public hearing process after remand that House District 9 is a community of interest with South Anchorage as a whole, and is markedly distinct and removed from Eagle River."[71] Numerous individuals testified to the close connection between Girdwood and South Anchorage and the lack of connection with Eagle River. A Girdwood resident testified to the Board that based on his phone's location data, in the prior four years, he had been to Eagle River once—but had visited South Anchorage at least weekly, often multiple times a week.[72] Others testified to the close connections between Girdwood and South Anchorage, explaining that the areas "link together well" because they share schools, shops, and infrastructure.[73] Some District 9 residents testified to their concern that being paired with Eagle River would deprive them of a voice, leaving them unrepresented.[74] In their affidavits before the superior court, the Girdwood Parties expanded on these themes as they related to Girdwood.[75]

---

[69] Exc. 0572 (citing prior order).

[70] Exc. 0572.

[71] Exc. 0572.

[72] Exc. 0939.

[73] Exc. 0819.

[74] *E.g.*, Exc. 0940; Exc. 0941.

[75] Exc. 0262-0273.

ASHBURN & MASON P.C.
LAWYERS
1227 WEST 9TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
TEL 907.276.4331 • FAX 907.277.8235

The Board thus disregarded the Eagle River community of interest, the downtown community of interest, and the Girdwood/South Anchorage community of interest—all to serve its ostensible purpose of protecting the "JBER community of interest." But the superior court emphasized that JBER had never been established as a "community of interest" and that *not a single JBER resident* had even testified about the pairings:

> [T]his court never found that JBER was a "community of interest." The Board has never presented any expert testimony on that issue. And the record does not appear to contain specific public comment from *any* JBER resident. On the other hand, this court did find that Eagle River was a "community of interest," and yet the Board made no effort to preserve its boundaries. Not only is the Board's stated purpose not supported by the weight of the record, it is also contrary to precedent.[76]

The superior court separately noted, in its order on the East Anchorage motion, that "JBER is largely self-contained within its own house district, so there is no danger of it being split and paired with other districts in such a way as to dilute its voting strength.[77] The superior court, noting the inconsistency between the Board's insistence on protecting the un-established JBER community of interest, and its silence on protecting the Eagle River community of interest, determined the "Board's stated motivations about protecting the JBER connection and supporting military voters" to be "pretextual."[78]

---

[76] Exc. 0586. In addition, the record contained significant evidence that military families live all over Anchorage—not just on JBER and in Eagle River. Military families live in many places in the Municipality of Anchorage. Exc. 0937-38, Exc. 920, Exc. 925-26, Exc. 0921, Exc. 0944.

[77] Exc. 0541. *See also* Exc. 0937-38 (testimony of Denny Wells that the corner of JBER within District 24 is actually unpopulated).

[78] Exc. 0587.

ASHBURN & MASON P.C.
LAWYERS
1227 WEST 9TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
TEL 907.276.4331 • FAX 907.277.8235

Even the public testimony the Board cites in its Petition—which is presumably the best it could find in the record—is either demonstrably inaccurate or selectively ignores portions of the testimony. For example, the Board quotes a Peters Creek resident who supported Option 3B because JBER "is middle to low income families" "taking out payday loans in order to fill the gas tank" and better matched with Eagle River as opposed to Downtown Anchorage "with very high incomes"—but the Board presented no evidence to support this testimony,[79] and the record in fact contradicts it. Another member of the military community, whom the Board majority selectively ignored, provided research from the Council on Foreign Relations showing that Eagle River's median and average income are $111,388 and $126,943, respectively[80] One of the individuals the Board quotes was actually referenced in the superior court's recent decision—the superior court noted that in the prior Board proceeding, Member Marcum had selectively read public comments into the record to elide her partisan motivations, removing the words "more conservative" from that citizen's comment describing Eagle River as "a somewhat friendlier, safer, and more conservative part of Anchorage."[81] Yet another citizen the Board quotes, who advocated later in the remand process for the District 9/10 pairing, had testified *to the exact opposite* on April 2, when she told the Board the historical

[79] Pet. at 24.

[80] Exc. 0960-62 (testimony of Andrew Gray).

[81] Exc. 0589-90.

ASHBURN & MASON P.C.
LAWYERS
1227 WEST 9TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
TEL 907.276.4331 • FAX 907.277.8235

Turnagain Arm/Eagle River pairing had been a "geographical nightmare" that led to ineffective representation.[82]

As a final comment on inconsistency, the Board's present argument before this Court that "communities of interest" are undefined, irrelevant, and have no place in senate pairing decisions is disingenuous in light of the Board majority's own repeated, explicit invocation of the "JBER community of interest" as the justification for Option 3B. While Board counsel may now take a different view, the Board itself clearly understands what a community of interest is, and clearly considered it important. The superior court properly considered the Board's decision to selectively ignore known communities of interest, while pretextually favoring another whose existence had not even been established, as evidence of its improper intent.

5. <u>The Superior Court Correctly Found, Based on Expert Testimony, that Option 3B Led to Dilution of District 9's Vote.</u>

As discussed above, the superior court properly found that the Board intentionally discriminated. Accordingly, the Board has the burden of proving it discriminated "*in order to increase the proportionality of geographic representation in the legislature*."[83] While the superior court recognized a *de minimis* increase totaling 18 people in South Anchorage's proportionality under Option 3B, it found "there is no evidence that greater proportionality was a factor the Board considered when crafting Senate pairings" and "any argument that Senate Districts are more proportional are ultimately after-the-fact

[82] Pet. at 25; Exc. 0817.

[83] *Kenai Peninsula Borough v. State*, 742 P.2d 1352, 1372-73 (Alaska 1987).

ASHBURN & MASON P.C.
LAWYERS
1227 WEST 9TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
TEL 907.276.4331 • FAX 907.277.8235

rationalizations rather than legitimate justifications."[84] Indeed, the Board does not even try to argue that its decision to split Eagle River was for the intentional purpose of increasing South Anchorage's proportionality.[85] A coincidental and *de minimis* increase in proportionality does not sanitize the Board's second attempt to split Eagle River for an illegitimate purpose.

Rather, the superior court properly found that Senate District E dilutes the voting power of more moderate South Anchorage by splitting the Eagle River community of interest and pairing "solidly and predictably Republican" District 10 with District 9.[86] It reached this conclusion in its role as the trier of fact, after considering the evidence submitted by both parties. The Girdwood Parties submitted expert testimony from Dr. Hensel, who described District 9 as a "majority-leaning but not always majority-electing" swing district that would be overpowered, and converted into a safe Republican seat, by a pairing with Eagle River.[87] The Board relied on the testimony of its executive director Peter Torkelson, who focused narrowly on Girdwood, rather than District 9 as a whole, to assert that Girdwood lacks the population to control any senate district and that District 9 was already Republican-leaning, so any pairing with Eagle River is harmless.[88] The superior court noted that the Board failed to present any expert testimony[89] and Dr.

---

[84] Exc. 0575-77.

[85] *See* Pet. at 16-19.

[86] Exc. 0582; Exc. 282-283.

[87] Exc. 0582; Exc. 0276-0283 (Hensel Report).

[88] Exc. 0582.

[89] Exc. 0583.

ASHBURN & MASON P.C.
LAWYERS
1227 WEST 9TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
TEL 907.276.4331 • FAX 907.277.8235

Hensel noted in his Supplemental Report the problems with Mr. Torkelson's narrow approach.[90]

The Board argues in its Petition that "Girdwood" is better off under Option 3B because 3B confers a miniscule improvement in Girdwood's proportionality.[91] This argument repeats Mr. Torkelson's error and misses the point, which is the proven dilution of District 9's vote.[92]

The superior court correctly concluded, after reviewing the party's evidence,[93] that there was a reasonable possibility that pairing District 9 with another more moderate community could still lead to election of a Republican candidate—but, significantly, that outcome would not be a *certainty*, as it would in an Eagle River pairing.[94] This is the very definition of a swing district: one that could go either way, but is free to decide its own destiny. The Board's adoption of Option 3B converted District 9 from a swing district to a "safe Republican senate seat," thus diluting the voting power of District 9.

6. <u>A House District Created in 2001 Has Little Relevance to a Senate District Created for Partisan Reasons in 2022</u>.

---

[90] Exc. 0440-0443 (Hensel Supplemental Report). After oral argument, Dr. Hensel learned of an error in his JBER calculations and submitted a letter to the court with a correction, which prompted a response from Mr. Torkelson, which in turn prompted another letter from Dr. Hensel. Exc. 0518-0533.

[91] Pet. at 16-19.

[92] *Kenai Peninsula Borough v. State*, 742 P.2d 1352, 1371-72 (Alaska 1987).

[93] The superior court had received testimony from both Dr. Hensel and Mr. Torkelson in the prior litigation and was familiar with their qualifications, experience, and credibility.

[94] Exc. 0583.

ASHBURN & MASON P.C.
LAWYERS
1227 WEST 9TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
TEL 907.276.4331 • FAX 907.277.8235

The Board's insistence that "precedent" establishes that Turnagain Arm and Eagle River can be in a district together is misplaced. Although geographic similarities may exist between a house district drawn twenty years ago and the Board's 2022 senate district E, the record contained no evidence—and the Board cited no facts—to indicate that the region's population in the 2000 Census was at all numerically, demographically, or socially similar to the region's population now. There is a reason the Constitution charges the Board with the task of *re*-districting every 10 years: populations grow, shrink, shift, and change. And even some historically constitutional districts may not function well in practice: indeed, one of the first members of the public to testify before the Board on remand was a 40-year Eagle River resident who described the 2001 house district as a "geographical nightmare" that created representation problems, as the representatives "never really connected with what was important to the community out here."[95]

Moreover, the mere congruity of map lines is irrelevant in analyzing whether the Board acted with illegal intent. As this Court has already ruled and the superior court has now ruled twice, a senate district composed of constitutional house districts and that meets the Article VI, §6 contiguity requirement can still be unconstitutional, if it is made with illegitimate purpose to benefit one population at the expense of another.[96]

[95] Exc. 0817.

[96] *See* Feb. 16, 2022 FFCL at 42-71; Exc. 0563-67; March 25, 2022, Interim Order of the Alaska Supreme Court at 5-6 (S-18332).

ASHBURN & MASON P.C.
LAWYERS
1227 WEST 9TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
TEL 907.276.4331 • FAX 907.277.8235

Overall, the fact that a prior Board created a house district stretching from Hope to Eagle River twenty years ago is irrelevant to the constitutionality of the present senate district E.

B. The Superior Court Ordered an Appropriate Interim Remedy and Remanded the Proclamation to the Board.

The superior court ordered an appropriately tailored remedy that is well within the bounds of the Alaska Constitution and consistent with relevant caselaw.

On February 16, 2022, after trial, the superior court found that the Board's 2021 Proclamation intentionally discriminated in favor of the Eagle River community of interest at the expense of the Muldoon community of interest, and constituted a partisan gerrymander.[97] This Court agreed in its March 25, 2022, *Interim Order*.[98] On remand, the Board ignored aspects of the superior court's and this Court's orders and perpetuated *the same political gerrymander*, this time with different downstream consequences,[99] that had been struck down by the courts by selectively and disingenuously interpreting the

---

[97] Feb. 16, 2022 FFCL at 70. The Court found that there was "substantial evidence of secretive procedures, regional partisanship, and selective ignorance of political subdivisions and communities of interest[,] [and] that the Board intentionally discriminated against residents of East Anchorage in favor of Eagle River, and [that] discrimination had an illegitimate purpose."

[98] March 25, 2022, Interim Order of the Alaska Supreme Court at 6 (S-18332).

[99] Exc. 0587 (May 16, 2022, Order Re Girdwood Challenges to Amended Plan at 41 n.196 ("The Board cites only superficial similarities between South Eagle River and Girdwood, such as being 'close to the mountains' and 'generally more rural.' Instead, the Board admits that new Senate District E is essentially another downstream consequence of pairing North Eagle River with JBER." (citing Board's [Proposed] Findings of Fact and Conclusions of law at 7–8; Exc. 0949))).

ASHBURN & MASON P.C.
LAWYERS
1227 WEST 9TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
TEL 907.276.4331 • FAX 907.277.8235

controlling court orders.[100]

The superior court once again rejected the Board's partisan gerrymander and exercised its mandamus power under article VI, section 11 to order that the Board adopt Option 2, the alternative that the Board itself had adopted for public consideration on an *interim* basis.[101] The superior court properly declined to allow an election to move forward under politically gerrymandered senate districts in the Municipality of Anchorage.[102]

Article VI, section 11 of the Alaska Constitution provides in relevant part: "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

---

[100] Exc. 0590 (May 16, 2022, Order Re Girdwood Challenges to Amended Plan at 44 ("The Board knew that this court found that Senate District K was the result of intentional discrimination. And the Board knew that the Alaska Supreme Court affirmed this court's findings in the East Anchorage challenge on equal protection grounds. Yet the Board has proceeded through the remand as though this court reversed Senate District K on a procedural technicality.")).

[101] Exc. 0953 ("Ultimately, I found that both option 2, I believe, and option 3 are valid approaches." Statement of Chair Binkley at the April 13, 2022, Board meeting.).

[102] *Cf. Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1373 (Alaska 1987) (holding that declaratory relief was an appropriate remedy where the effect of the Board's intentional discrimination was de minimus). Here, the Board's intentional political gerrymander invidiously undermined article VI, section 6 of the Alaska Constitution and the framers' intent that the redistricting process be nonpartisan, foreclosing the Girdwood Plaintiffs' rights to fair and effective representation. *See, e.g.*, *Hickel v. Se. Conf.*, 846 P.2d 38, 45 (Alaska 1992), *as modified on reh'g* (Mar. 12, 1993) ("The requirements of contiguity, compactness and socio-economic integration were incorporated by the framers of the reapportionment provisions to prevent gerrymandering." (citing 3 PACC 1846 (January 11, 1956)). The superior court properly "determined that Option 3B was an unconstitutional political gerrymander" and appropriately ordered the Board to adopt Option 2 on an interim basis.

ASHBURN & MASON P.C.
LAWYERS
1227 WEST 9TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
TEL 907.276.4331 • FAX 907.277.8235

redistricting."[103] In past redistricting cycles, prior to the 1998 constitutional amendment to article VI, court-appointed masters have instituted interim redistricting plans while legal challenges were addressed by the courts.[104] When the legislature drafted the amendment, one of its "primary concerns was removing partisan politics from the redistricting process . . . requiring Board Members to be appointed 'without regard to political affiliation.' "[105] Nonetheless, the Board chose to flout the order of the superior court and this Court and willfully perpetuate a political gerrymander contrary to the intentions of both the framers and the 1998 legislature.

The Board argues that "since Section 11's enactment in 1998, no Alaska court has mandated the Board adopt *any* specific house or senate district[,]" and, in any event, the superior court lacked the power to correct the Board's error.[106] The problem with the Board's argument is that the Alaska Constitution expressly contemplates in article VI, section 11 that instances may arise where a court must exercise its mandamus power "to correct any error in redistricting."[107] The fact that past courts have not needed to exercise

---

[103] Alaska Const. art. VI, § 11; *In re 2011 Redistricting Cases*, 294 P.3d 1032, 1044 n.22 (Alaska 2012) (Matthews, J., dissenting).

[104] *See, e.g.*, *Hickel v. Se. Conf.*, 846 P.2d 38, 65 nn.11–12 (Alaska 1992), *as modified on reh'g* (Mar. 12, 1993) (incorporating Memorandum and Order in Case No. 1JU–91–1608 Civil (Consolidated) (discussing appointment of special masters to implement an interim plan during legal challenges following the 1991 redistricting and referencing the appointment of special masters in 1972 for the same purpose)).

[105] Feb. 16, 2022 FFCL at 133–134 (quoting Minutes, H. Judiciary Comm. Hearing on H.J.R. 44, 20th Leg., 2d Sess., Tape 98-15 Side B No. 0016 (Feb. 11, 1998) (statement of Rep. Brian Porter, Joint-Sponsor).

[106] Board's Petition for Review at 33.

[107] Alaska Const. art. VI, sec. 11; *see also Anderson v. Dep't of Admin., Div. of Motor Vehicles*, 440 P.3d 217, 220 (Alaska 2019) ("Traditionally, a suit asking the court

ASHBURN & MASON P.C.
LAWYERS
1227 WEST 9TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
TEL 907.276.4331 • FAX 907.277.8235

their mandamus authority does not mean the constitutional remedy is unavailable; it merely means that no prior board has been so derelict as to require mandamus.

In this case, there was not time to remand for a third Board process before the June 1 primary election candidate filing deadline. The superior court was therefore faced with a choice between two imperfect options: (1) allowing the next election cycle to proceed on Option 3B, an unconstitutional, gerrymandered map;[108] or (2) exercising its mandamus power to order the Board to adopt Option 2, an apparently constitutional alternative that the Board itself developed, that a majority of the Board indicated was a valid alternative, and that had been presented by the public through public process.[109] The superior court chose the better of these two options: the apparently constitutional map, not the definitively unconstitutional map. The superior court was, however, sensitive to the Alaska Constitution's delegation of redistricting authority to the Board, and ordered that Option 2 be adopted *only on an interim basis*. The superior court remanded the

---

to order a government official to act in a certain way is an action for mandamus. The writ of mandamus was abolished in Alaska many decades ago by court rule, but the type of relief once provided by the writ may still be obtained by appropriate action or by appropriate motion under the practice prescribed in the Alaska Civil Rules." (internal citations and quotation marks omitted)). It should be beyond dispute that where mandamus powers are expressly authorized by the Alaska Constitution, the writ may still be obtained by an action under same.

[108] *See, e.g.*, *Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1372 (Alaska 1987) ("We consider a voter's right to an equally geographically effective or powerful vote, while not a fundamental right, to represent a significant constitutional interest.").

[109] The overwhelming majority of the public testimony by the residents of districts affected by the Board's political gerrymander spoke out in favor of Option 2. *See, e.g.,* Exc. 0934; Exc. 0806; Exc. 0807; Exc. 0818; Exc. 0819; Exc. 0913; Exc. 0914; Exc. 0915; Exc. 0916; Exc. 0917; Exc. 0918; Exc. 0919; Exc. 0920; Exc. 0922; Exc. 0923; Exc. 0924; Exc. 0927; Exc. 0929; Exc. 0935; Exc. 0945; Exc. 0946; Exc. 0954.

ASHBURN & MASON P.C.
LAWYERS
1227 WEST 9TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
TEL 907.276.4331 • FAX 907.277.8235

proclamation to the Board for adoption of a permanent map. This was a prudent, modest use of its constitutional mandamus power that balanced the realities of the situation with respect for the Board's delegated authority.

The superior court's remedy will ensure that the next election does not occur on an unconstitutional map, while the Board works a third time to complete its task of adopting fair, impartial, nonpartisan senate pairings.

V. CONCLUSION

The Board characterizes the superior court's order as "a result in search of a reason"—an unusual accusation to level against an impartial member of the judiciary, especially one whose work the Board respected and, in part, defended in the last round of litigation. Based on the record, this characterization is far more apt when applied to the Board itself.

The Board has twice proven that it cannot be trusted to draw a fair, impartial Senate map for Anchorage. This situation is precisely why article VI, §11 of the Alaska Constitution gives the courts the authority "to compel the Redistricting Board, by mandamus or otherwise, to perform its duties under this article or to correct any error in redistricting." The Girdwood Parties ask this court to affirm the superior court's invocation of its mandamus power to correct the error the Board made in adopting a second unconstitutional gerrymandered map and impose Option 2 on an interim basis for the upcoming election.

ASHBURN & MASON P.C.
LAWYERS
1227 West 9th Avenue, Suite 200
Anchorage, Alaska 99501
Tel 907.276.4331 • Fax 907.277.8235

ASHBURN & MASON, P.C.
Attorneys for Louis Theiss, Ken Waugh,
and Jennifer Wingard

DATED: May 20, 2022

By: s/*Eva R. Gardner*
Eva R. Gardner
Alaska Bar No. 1305017
Michael S. Schechter
Alaska Bar No. 1405044
Benjamin J. Farkash
Alaska Bar No. 1911095

ASHBURN & MASON P.C.
LAWYERS
1227 WEST 9TH AVENUE, SUITE 200
ANCHORAGE, ALASKA 99501
TEL 907.276.4331 • FAX 907.277.8235