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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

In the Matter of the 2021 REDISTRICTING PLAN.	Case No. 3AN-21-08869CI

OPPOSITION TO BOARD'S MOTION TO DISMISS EAST ANCHORAGE PLAINTIFFS' ART. VI, § 10 CLAIM PURSUANT TO CIVIL RULE 12(B)(6)

Applicants Felisa Wilson, George Martinez, and Yarrow Silvers (the "East Anchorage Plaintiffs"), by and through undersigned counsel, file this opposition to the Alaska Redistricting Board's motion to dismiss the East Anchorage Plaintiffs' Art. VI § 10 claim (the "Motion to Dismiss East Anchorage Plaintiffs' Claim").[1] The East Anchorage

[1] The Redistricting Board's motion to dismiss is entitled "Alaska Redistricting Board's Motion to Dismiss (1) The City of Valdez and Detter's Third Claim, (2) Wilson, Martinez, and Silvers' Art. VI § 10 Claim, (3) Matanuska-Susitna Borough and Brown's Count III, and (4) The Municipality of Skagway Borough and Ryan's Third Claim For Failure to State a Claim. This motion will be referred to, when referenced in its entirety,

Plaintiffs' Application to Compel the Alaska Redistricting Board to Correct its Senate District Pairings in Anchorage (the "Application") very clearly and expressly stated its claim that the Alaska Redistricting Board (the "Board") violated Art. VI § 10 of the Alaska Constitution. The Board's attempt to suggest otherwise ignores all relevant law, the express language in the East Anchorage Plaintiffs' Application, and the Superior Court's pretrial orders regarding motion practice. As a result, the East Anchorage Plaintiffs respectfully request that the Board's Motion to Dismiss the East Anchorage Plaintiffs' Claim be denied.[2]

I. The East Anchorage Plaintiffs Clearly Stated their Art. VI § 10 Claim in their Application Compelling Anchorage Senate District Corrections

The East Anchorage Plaintiffs' Application Compelling Anchorage Senate District Corrections stated very clearly and expressly that the Board violated Art. VI § 10 of the Alaska Constitution and the East Anchorage Plaintiffs' bases for alleging this violation. More precisely, the Application states the following:

> [1] Art. VI § 10 of the Alaska Constitution provides that the '[B]oard shall hold public hearings on the proposed plan, or, if no single proposed plan is agreed on, on all plans proposed by the [B]oard.'
>
> [2] While the Board plan complied with this provision with regard to the house districts, no proposed plan including the East Anchorage/Eagle River Pairings was properly and timely presented to the public before its adoption, which resulted in a violation of this constitutional provision.

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as the "Consolidated Motion to Dismiss" and, when referenced specific to claims against the East Anchorage Plaintiffs, the "Motion to Dismiss East Anchorage Plaintiffs' Claim."

[2] The East Anchorage Plaintiffs take no position as to the propriety of the other Plaintiffs' factually and legally distinct Art. VI, § 10 claims but do recognize that the Board's motion against the other parties is separate and distinct from the Board's allegations against the East Anchorage Plaintiffs' Art. VI § 10 Claim.

> [3] Instead, the Board exited executive session and, without discussion, adopted new pairings proposed by Marcum that changed every one of the pairings in Marcum's previous proposal but three. In other words, five of the eight Anchorage pairings were changed without public input, notice or discussion.
>
> [4] The failure to comply with this constitutional mandate precluded the public from effectively and meaningfully informing or challenging the Board's proposed pairings before they were adopted, and the Board from curing the violations of procedural and process requirements that occurred during the meetings and work sessions held by the Board on senate pairings.[3]

In addition to the stated claim, the East Anchorage Plaintiffs provided substantial background facts upon which its Application was based, detailing the presentation of senate pairings by the Board and the adoption and discussion process as presented in the Board's public documents.[4]

The East Anchorage Plaintiffs' Application accurately summarizes the requirements of Art. VI § 10 of the Alaska Constitution and asserts that the Board failed to adopt a proposed plan for senate pairings prior to adopting a final redistricting plan, *and* identifies the harm to the public and the East Anchorage Plaintiffs as members of the public resulting from the Board's violation.[5]

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[3] The East Anchorage Plaintiffs' Application to Compel the Alaska Redistricting Board to Correct its Senate District Pairings in Anchorage, ¶¶ 38-41, 10-11.

[4] *See e.g.* East Anchorage Plaintiffs' Application to Compel, ¶¶ 8-32.

[5] *See* First Amended Application to Compel the Alaska Redistricting Board to Correct its Senate Pairings In Anchorage.

II. The Board's Motion to Dismiss the East Anchorage Plaintiffs' Art. VI § 10 Claim is, in Effect, a Motion for Summary Judgment, Prohibited by and Filed in Violation of the Superior Court's Second Pretrial Order

Perhaps due to the clarity of the East Anchorage Plaintiffs' Art. VI § 10 Claim and the Board's inability to justify dismissal of it on the pleadings, the Board instead challenges the merits of the East Anchorage Plaintiffs' Art. VI § 10 Claim, even attempting to submit evidence supporting its substantive challenge. Consequently, the Board's motion against the East Anchorage Plaintiffs is by its nature a motion for "summary judgment," not dismissal, under Alaska Civil Rule 12(b)(6). Accordingly, the Court need not consider the merits of the Board's motion against the East Anchorage Plaintiffs at this time since summary judgment motions are prohibited under the pretrial order[6], the Board's motion is effectively seeking summary judgment and thus, at least as to the East Anchorage Plaintiffs, has been filed in violation of the Court's order.[7]

A Rule 12(b)(6) motion to dismiss is "grounded on the 'failure to state a claim upon which relief can be granted.' Such a motion tests the legal sufficiency of the complaint's allegations."[8] Because 12(b)(6) motions test the sufficiency of allegations made within the four corners of a complaint, Civil Rule 12(b) provides that "if a Rule 12(b)(6) motion

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[6] December 15, 2021 Pretrial Order ¶ 10 ("[t]he Court will permit no motions for summary judgment"). At the December 20, 2021 scheduling hearing, Judge Morse reiterated this decision, stating that although he would permit motions for judgment on the pleadings, motions for summary judgment would not be permitted in this expedited proceeding because such motions are disfavored under Alaska law and will require weighing issues of fact that are best left for trial in light of the short timeline of this case.

[7] *Id.*

[8] *Dworkin v. First Nat'l Bank of Fairbanks,* 444 P.2d 777, 779 (Alaska 1968) (quoting Alaska R. Civ. P. 12(b)(6)).

... involves presentation to the court of matters outside the pleadings, and if these outside matters are not excluded by the court, then the motion must be treated as one for summary judgment under Civil Rule 56."[9] Extraneous evidence and materials outside the complaint may be considered only in the context of a Rule 12(b) motion where the contents of such documents are referenced in or attached to the complaint **and** their authenticity is unquestioned.[10]

The Board's sole basis for seeking dismissal of the East Anchorage Plaintiffs' Art. VI, § 10 claim — in contrast to its Motion to Dismiss as to the other Plaintiffs' Art. VI, § 10 claims — is that "the AFFER Proposed Plan included a senate pairings table [that contemplated pairing House District 21 (South Muldoon) with House District 22 (Eagle River Valley), and House District 23 (JBER) with House District 24 (North Eagle River) to create senate districts]." In support of this proposition, the Board provides a portion of AFFER's proposed map depicting the Anchorage area which is contained in the Board's record.[11] This document is not included in or referenced in East Anchorage Plaintiffs' Application. Therefore, in relying on this document to substantiate its motion to dismiss, the Board now asks the Court to engage in the very pretrial weighing of evidence which Judge Morse foreclosed.

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[9] *See, e.g.*, *Alleva v. Municipality of Anchorage*, 467 P.3d 1083 (Alaska 2020) (citing *Brice v. State, Div. of Forest, Land & Water Mgmt*., 669 P.2d 1311, 1314 (Alaska 1983)).

[10] *Alleva*, 467 P.3d at 1088-89 (citing with approval and adopting a rule articulated by the Ninth Circuit in *Branch v. Tunnell*, 14 F.3d 449 (9th Cir. 1994), overruled on other grounds by *Galbraith v. Cty. of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002)).

[11] Mot. to Dismiss for Failure to State a Claim at 19.

In what appears to be an effort to stay within compliance with the pretrial order, the Board asserts that the Court can take judicial notice of both the map's existence, and of the procedural implications thereof.[12] As described below, the mere existence of AFFER's map does not mandate dismissal of the East Anchorage Plaintiffs' claim because it does not demonstrate either that the Board adopted a senate pairings proposal which paired Muldoon and Eagle River, or that public hearings were held regarding *any* proposed senate pairings adopted by the Board.

Judge Morse's ruling is well-taken and consistent with long-standing Alaska precedent. Alaska Civil Rule 12(b)(6) permits moving parties to seek dismissal of their opponent's complaint or counterclaims in the event such claims fail to state a claim upon which relief can be granted.[13] However, Alaska appellate courts have been emphatic that "motions to dismiss for failure to state a claim are viewed with disfavor and should rarely be granted."[14] Therefore, to survive a challenge under Civil Rule 12(b)(6), "it is enough that the complaint set forth allegations of fact consistent with and appropriate to some

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[12] *Id.* at 5-6. Courts may consider materials outside the pleadings in the context of a motion to dismiss only if those materials are subject to "strict judicial notice." This encompasses "statutes and regulations, matters of public record … and matters of common knowledge." Whether matters fall "outside the pleading" depends on the nature of those matters: a "court's inquiry on a motion under Rule 12(b)(6) essentially is limited to the content of the complaint, while summary judgment involves the use of pleadings, depositions, answers to interrogatories, and affidavits." *Phillips v. Gieringer*, 108 P.3d 889, 892 (Alaska 2005) (quoting *Martin v. Mears*, 602 P.2d 421, 426 n.5 (Alaska 1979)).

[13] Alaska R. Civ. P. 12(b)(6).

[14] *See, e.g., Reed v. Municipality of Anchorage,* 741 P.2d 1181, 1184 (Alaska 1987); *Knight v. American Guard & Alert, Inc.*, 714 P.2d 788, 791 (Alaska 1986).

enforceable cause of action."[15] Conversely, "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts that would entitle him or her to relief."[16]

Because Alaska law requires only notice pleading, the burden of proof to survive a motion for judgment on the pleadings is not high: "[i]f, within the framework of the complaint, evidence may be introduced which will sustain a grant of relief to the plaintiff, the complaint is sufficient."[17] The Court "must presume all factual allegations of the complaint to be true and [make] all reasonable inferences ... in favor of the non-moving party."[18] The purpose of a Rule 12(b)(6) motion is not to consider and weigh "unwarranted factual inferences and conclusions of law."[19]

III. The Board Is Not Entitled to Summary Judgment as to the East Anchorage Plaintiffs' Art. VI § 10 Claim Because the Senate Pairings Proposed by the AFFER Plan do Not Pair Eagle River with South Muldoon

Even if the Court converts the Board's motion into a motion for summary judgment, the Board fails to meet its burden of proof and thus cannot prevail. The Board has not proven that there are no genuine disputed issues of material fact and absolutely cannot

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15 *Odom v. Fairbanks Mem'l Hosp.,* 999 P.2d 123, 128 (Alaska 2000).

16 *Roberson v. Southwood Manor Assoc., LLC*, 249 P.3d 1059, 1060 (Alaska 2011) (alteration omitted) (quoting *Adkins v. Stansel*, 204 P.3d 1031, 1033 (Alaska 2009)), emphasis added.

17 *See* Alaska R. Civ. P. 8(a); *see also State v. Recall Dunleavy,* 491 P.3d at 357.

18 *Adkins v. Stansel*, 204 P.3d 1031, 1033 (Alaska 2009) (quoting *Belluomini v. Fred Meyer of Alaska, Inc.,* 993 P.2d 1009, 1014 (Alaska 1999)).

19 *Dworkin* 444 P.2d at 779.

prove that it is entitled to judgment as a matter of law."[20] Once the moving party has made that showing, the burden then shifts to the non-moving party "to set forth specific facts showing that he could produce evidence reasonably tending to dispute or contradict the movant's evidence and thus demonstrate that a material issue of fact exists."[21] Summary judgment does not require the non-moving party to prove factual issues according to the applicable evidentiary standard: Rule 56 requires only "a showing that a genuine issue of material fact exists to be litigated, and not a showing that a party will ultimately prevail" at trial.[22]

Here, the Board has not met its initial burden of proving that there are no genuine disputed issues of material fact or that it is entitled to judgment as a matter of law. The Board seeks dismissal of the East Anchorage Plaintiffs' Art. VI, § 10 Claim on only one ground: that "the AFFER Proposed Plan included a senate pairings table [that contemplated pairing House District 21 (South Muldoon) with House District 22 (Eagle River Valley), and House District 23 (JBER) with House District 24 (North Eagle River) to create senate districts]."[23] In support of this proposition, the Board provides the following portion of AFFER's proposed map:

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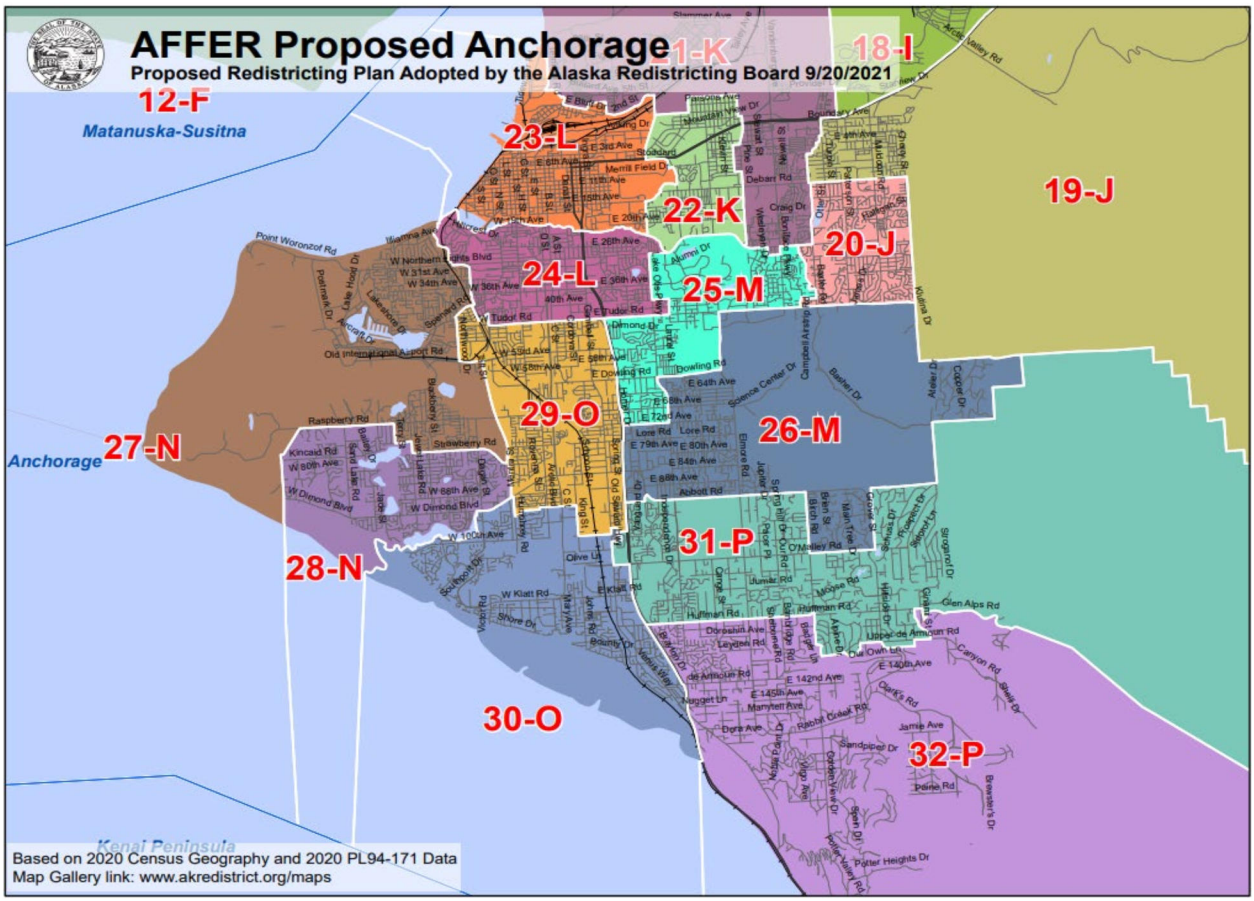
[20] *Christensen v. Alaska Sales & Service, Inc.,* 335 P.3d 514, 517 (Alaska 2014) (quoting *Mitchell v. Teck Cominco Alaska Inc.*, 193 P.3d 751, 760 n.25 (Alaska 2008) (string citation omitted)).

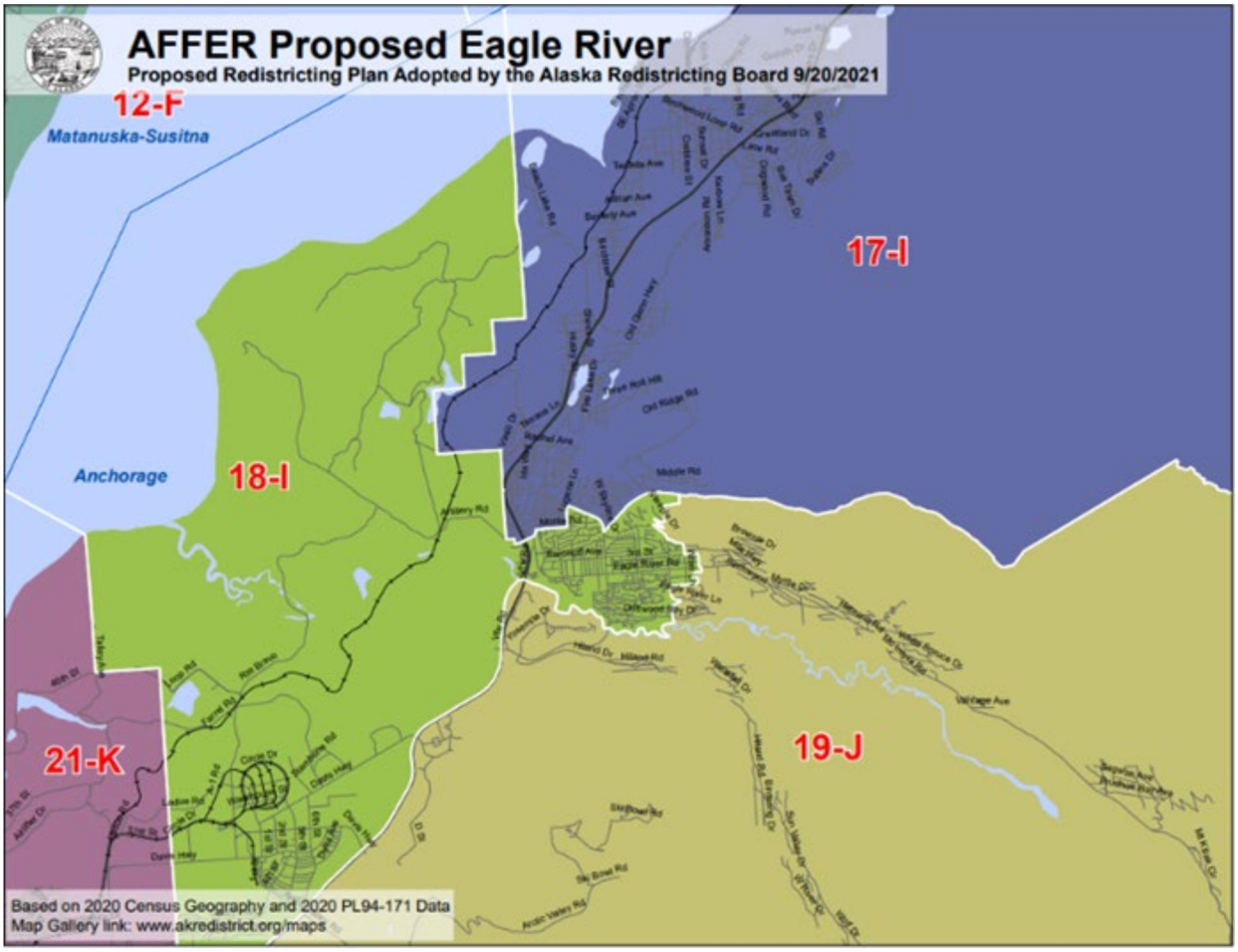
[21] *See, i.e., State, Dep't of Highways v. Green,* 586 P.2d 595, 606 n.32 (Alaska 1978).

[22] *Christensen,* 335 P.3d at 519; *Lockwood v. Geico Gen. Ins. Co.,* 323 P.3d 691, 697 (Alaska 2014).

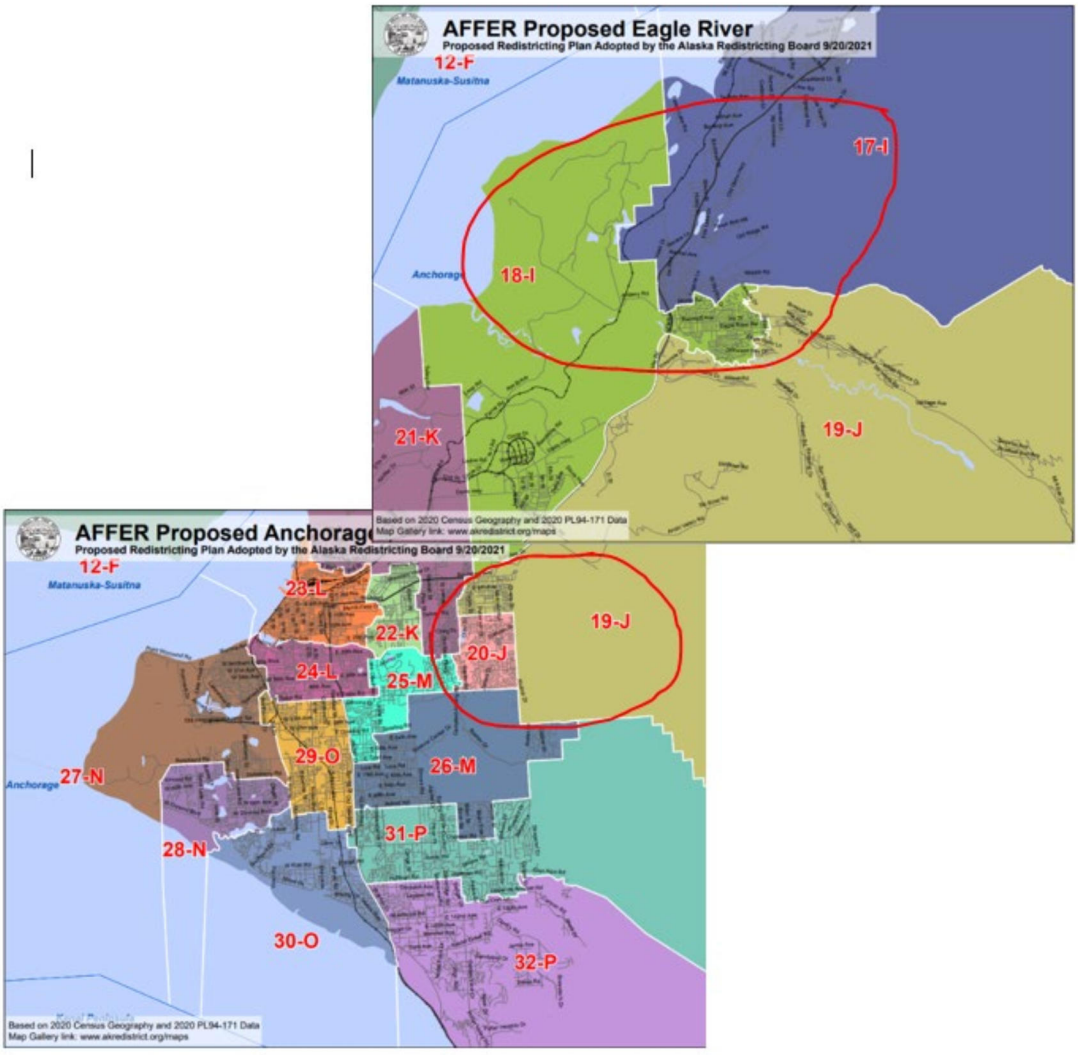
[23] Mot. to Dismiss for Failure to State a Claim at 18.



The Board states that this plan included a match-up between East Anchorage districts and Eagle River districts. The Board is mistaken — as is evident when one views the portion of AFFER's proposed map which actually includes Eagle River:



As the "AFFER Proposed Eagle River" map demonstrates, AFFER's proposal carves out the vast majority of Eagle River and places it together with JBER in a single house district, which is then paired North with Chugiak to create a senate district. Under AFFER's proposal, Eagle River is *not* placed in the same senate district as either North or South Muldoon. In fact, North and South Muldoon are correctly paired together under this proposal to form a single, meaningfully contiguous senate district:



Consistent with its skewed depiction of its own record, the Board's Motion also fails to mention that other proposed maps included suggested senate pairings: AFFR's proposed map, the Doyon Coalition's proposed map, and the Senate Minority Coalition's proposed map all included suggested senate pairings. However, not one of these suggested pairings grouped Eagle River with Muldoon. Because no plan adopted or considered by the Board during its public hearing process paired Eagle River with either North or South Muldoon, the Board violated the procedural requirements of Art. VI, § 10

of the Alaska Constitution. On this basis, and because the sole rationale underpinning the Board's Motion to Dismiss the East Anchorage Plaintiffs' Art. VI § 10 claim is demonstrably false, the Motion must be denied. Indeed, the map relied upon by the Board ***supports*** rather than undermines the East Anchorage Plaintiffs' Art. VI § 10 Claim and to the extent summary judgment is warranted here, both the law and the facts support judgment in favor of the East Anchorage Plaintiffs, not the Board.

IV. The Trial Court's Decision in the *In re 2001 Redistricting Cases* is Irrelevant Where, as here, the Board Never Adopted any Proposed Senate Pairings, and therefore does Not Support Dismissal of the East Anchorage Plaintiffs' Art. VI § 10 Claim

Even if any of the proposed plans *had* included suggested senate pairings which paired Eagle River with Muldoon, the Board still would not have satisfied the process mandated by Art. VI § 10 of the Alaska Constitution because the Board failed to hold hearings on the proposed senate pairings.

When the Board adopted six proposed redistricting plans on September 20, 2021, the Board issued an announcement presenting the plans it adopted to the general public. The announcement included a statement by Board member Nicole Borromeo stating that "[w]e look forward to hearing feedback from Alaskans on our new draft maps, as well as the four adopted third-party draft maps, as we present them in public meetings in communities across the state."[24] Notably, the announcement was devoid of any mention of proposed senate pairings, emphasizing instead that the Board was only adopting

[24] Although the Board represented at the December 22, 2021 status hearing before this Court that it had included all the content from its website in the administrative record, this announcement was omitted. However, it remains accessible at https://www.akredistrict.org/news/board-approves-proposed-redistricting-plans/.

proposed *maps* for house districts. Consistent with this focus on house district maps, the announcement stated that "detailed *maps* will be posted on the Alaska Redistricting Board's website at https://www.akredistrict.org/map-gallery when they are available" (emphasis added).

Indeed, after the Board adopted these proposed house district maps, it precluded mention of senate pairings at its statewide public hearings, as it had done in previous cycles. As Plaintiff Yarrow Silvers remarked in her October 4, 2021 online public testimony, the Board did not publish any proposed senate pairings together with the proposed house district maps, or provide the public with any meaningful opportunity to provide input as to senate pairings. Ms. Silvers wrote: "I have concerns that the board maps do not show senate pairings and I would like to request that the board allow public testimony on these pairings before adopting a map."[25] The Board did not do so: as the East Anchorage Plaintiffs will establish at trial, no proposed senate pairings were presented for review at any of the Board's public hearings. While all proposed maps were printed and hung on the walls at every in-person hearing, and otherwise well-publicized, proposed senate pairings simply were not. Thus, this confusion regarding the Board's inability to publish its proposed senate pairings persisted throughout the public hearing process — on October 30, for example, Martha Roberts testified, asking "when will the Board release the senate pairings?"[26]

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25 R. at ARB003890.

26 R. at ARB003561.

The Board's steadfast refusal to publish its proposed senate pairings appears to have been a deliberate effort to postpone consideration of senate pairings until *after* it decided on the contours of its finalized house districts. This objective was apparently shared by the drafter of the AFFER plan, Randy Reudrich (former Chair of the Alaska Republican Party); on the evening of November 7, 2021, Mr. Reudrich sent the Board an email with the subject line "attached please find my proposed Senate Pairing."[27] Mr. Reudrich stated "I will present these pairings formally Monday Morning. Map is provided for your reference this evening."[28] However, no attachments are preserved together with the copy of this email contained in the record.[29] While Mr. Reudrich's November 7, 2021 pairings may have paired Muldoon with Eagle River, to the best of the East Anchorage Plaintiffs' knowledge and belief, the Board *never* adopted or otherwise published to the public its intent to rely upon these pairings. Rather, Mr. Reudrich brought these proposed pairings to the attention of the Board in the same manner as would any other member of the public — by submitting an online comment. Such online comments were not made immediately available to the public, and do not evidence that the Board adopted or approved of Mr. Reudrich's proposal for purposes of compliance with Art. VI § 10.

In the absence of the adoption of *any* proposed senate pairing plan, the Board's reliance on the trial court's holding in the *In re 2001 Redistricting Cases* is misplaced. As

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27 R. at ARB003589.

28 *Id.*

29 *Id.*

Judge Ridner remarked in the trial court decision upon which the Board relies, "Article VI, Section 10 requires the Board to adopt one or more proposed redistricting plans within thirty days after the official reporting on the decennial census."[30] As described above, the Board's adoption of its six house district plans did *not* involve a similar adoption of proposed senate pairings. While Judge Ridner held — and the Alaska Supreme Court affirmed — that the mandates of Art. VI § 10 are satisfied when the Board holds public hearings on "the plan or plans adopted by the Board within [30] days of the reporting of the census,"[31] Judge Ridner's decision, and the ensuing appellate decision, contain no guidance applicable to a situation where the Board does not adopt any senate pairings during that time period. In fact, the plain language of Judge Ridner's decision would seem to imply that the East Anchorage Plaintiffs pled a prima facie case that the Board violated Art. VI § 10 by failing to adopt any proposed senate pairings within 30 days of the official reporting on the decennial census. Once again, the law and the facts in no way support the Board's motion, whether considered a summary judgment motion or a motion to dismiss. To the contrary, the law and the facts, even when taken in the light most favorable to the Board, overwhelmingly support the merits of the East Anchorage Plaintiffs' Art. VI § 10 Claim.

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30 *In re 2001 Redistricting Cases,* No. 3AN-01-8914CI, 2002 WL 34119573 at *24 (Alaska Super. Feb. 01, 2002).

31 *Id.; In re 2001 Redistricting Cases,* 44 P.3d 141, 142 (Alaska 2002) ("Except insofar as they are inconsistent with this order, the orders of the superior court challenged by petitioners are AFFIRMED").

V. The Alaska Supreme Court has Supported the Court's Decision to Preserve a Claim in an Expedited Proceeding by Addressing the Claim at Trial and in Findings Despite its Dismissal

The East Anchorage Plaintiffs recommend that, in the event that the Board's motion, or any part of it, is granted, the Court both require the parties to address the dismissed claim on its merits and issue findings of fact and law regarding that claim. While this process will undoubtedly require additional work by the parties, that work will be minimal given the scope of the trial and the evidence that the parties will be presenting and defending. Conversely, in the event the Alaska Supreme Court upholds the Superior Court's findings in all areas except the dismissal of an Art. VI § 10 claim, the remand and resulting trial process may severely derail the redistricting efforts, negatively impacting the public at large and the interests of all parties.

The East Anchorage Plaintiffs would also recommend this approach for all dispositive claims raised by the parties. This approach permits the adoption of a more relaxed briefing schedule for dispositive motions in the future, protecting all parties from the use of a motion by one party to derail trial preparation of another.

In *Pruitt v. Office of Lieutenant Governor,*[32] a similar expedited election contest case, the Superior Court dismissed claims within the plaintiff's complaint for failure to state a claim but, in light of the very short timeline for resolving the dispute, required the parties to try the disputed claim and issued findings of fact and conclusions of law regarding the substance of the dismissed claim. This procedure permitted the Alaska Supreme Court to quickly and efficiently consider the merits of the plaintiff's case on

[32] 498 P.3d 591 (Alaska 2021).

appeal, without the necessity of remand for additional proceedings. The Alaska Supreme Court stated in its written decision, which was issued after the expedited oral decision was rendered: "Given the expedited timeline of this case, we commend the superior court for its foresight in taking evidence in the alternative to ensure this case could be swiftly resolved."[33]

Accordingly, the East Anchorage Plaintiffs respectfully request this Court adjudicate the Art. VI § 10 claim on the merits in order to facilitate efficient and timely appellate review, regardless of its decision in response to the Board's motion.

VI. Conclusion

The Board's Motion to Dismiss the East Anchorage Plaintiffs' Art. VI § 10 Claim is made in contravention of Court Order, misstates the content of its own administrative record, and fails to demonstrate that the Board is entitled to judgment as a matter of law. For all of these reasons, the East Anchorage Plaintiffs respectfully request that the Court deny the Motion to Dismiss the East Anchorage Plaintiffs' Art. VI § 10 Claim.

RESPECTFULLY SUBMITTED this 27th day of December, 2021.

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33 *Pruitt,* 498 P.3d at 594, n.1.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 27th day of December, 2021, a true and correct copy of the foregoing document was served electronically on the following:

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