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

REPLY IN SUPPORT OF 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

I. INTRODUCTION

The Challengers'[1] reading of Article VI, Section 10 of the Alaska Constitution ("Section 10") confirms that their Section 10 claims are not cognizable. Challengers ignore Section 10's simple requirements and read into it requirements that would result in the Alaska Redistricting Board ("Board") having to engage in a cycle of public testimony that would never end or that would require the Board to take public testimony it had no intention of acting upon. Because Section 10 does not require public testimony on the Board's final map, the Challengers' Section 10 claims founded on the Board not taking that testimony are non-cognizable legal claims that should be dismissed.

[1] "Challengers" in this motion refer to the City of Valdez, Mark Detter, Municipality of Skagway, Brad Ryan, the Matanuska-Susitna Borough, Michael Brown, Felisa Wilson, George Martinez, and Yarrow Silvers collectively.

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The Board asks this Court to uphold Section 10's plain meaning and dismiss Challengers' Section 10 claims. Section 10 requires the Board to: adopt at least one proposed redistricting plan within 30 days of receipt of U.S. Census data, hold public hearings where the public can testify about proposed plans, and adopt its final redistricting plan within 90 days of that receipt. Because the public records show the Board did this, and the Challengers' Section 10 claims do not assert violations of any of these requirements (they assert the Board failed to do things not required by Section 10), these claims must be dismissed.

II. DISCUSSION

A. This Motion to Dismiss Should be Decided Assuming the Challengers' Facts are True and with Judicial Notice to the Undisputed Public Record that the Board Adopted Proposed Plans Within 30 Days, Took Public Testimony, and then Issued a Final Redistricting Plan within 90 days

Only the Challengers' complaints and the public record are needed to resolve this motion. Both are appropriate materials for the Court to review in adjudicating this motion to dismiss. The Challengers do not dispute that the Board adopted a proposed redistricting plan within 30 days (it actually adopted two), that the Board adopted additional proposed plans the following week (including one that paired South Muldoon residents with Eagle River residents), that the Board held numerous public testimony sessions on its six proposed redistricting plans, and that the Board adopted a final plan within 90 days. On the face of the Challengers' complaints and the public record, the Challengers do not have a viable Section 10 claim.

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Realizing the fatal flaw in their reading of Section 10, the Challengers try to stave off an unfavorable ruling by asserting factual matters preclude dismissal of their claims. This is not true. As recognized in the Board's opening brief, at this stage all allegations in the pleadings are accepted as true. And accepting all of the Challengers' allegations about Section 10 as true results in dismissal of their Section 10 claims because a second round of public hearings on the final adopted redistricting plan urged by Challengers is not required by Section 10. The Constitution either requires a second hearing on the final approved and adopted map or it does not. This pure question of law is ripe for adjudication by this Court and it should dismiss Challengers' Section 10 claims.

Here are the facts that the Challengers do not dispute that are in the public record:

- On August 12, 2021, the United States Census Bureau reported the results of the 2020 U.S. Census to the State of Alaska.
- On September 9, 2021 (28 days later), the Board adopted two proposed redistricting plans. The Board held public hearings where the public was permitted to testify.
- On September 20, 2021, the Board adopted six proposed plans. The Board held public hearings where the public was permitted to testify.
- The Board then convened public hearings around the State of Alaska.
- On November 10, 2021 (90 days after August 12), the Board adopted its Final Redistricting Plan.

None of these publically available facts are disputed. The Court should take judicial notice, in accordance with Rule 201(b) of the Alaska Rules of Evidence, of these

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generally known and readily confirmable in-the-public-record facts. As the Board's opening brief notes, the Court's reference to these matters of public record do not morph its motion to dismiss into a motion for summary judgment.[2]

Tellingly, not one of the oppositions disputes that judicially noticed facts are properly considered for purposes of ruling on Rule 12 motions. Instead, Challengers point to the routine transformation of motions to dismiss to motions for summary judgment when the motion requires consideration of facts outside of the pleading without addressing judicial notice. This is a red herring that should not distract the Court from the pertinent issue of law because (1) the Constitution either requires a public hearing on the final adopted plan or does not, which can be determined without reference to any judicially noticed facts, and (2) the Alaska Supreme Court has recognized the use of judicially noticed facts as proper in resolving motions to dismiss so long as the court provides notice of its intent to notice the facts and provides opportunity for the opposing party to respond.[3] Even without taking judicial notice of

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[2] Alaska Redistricting Board's Motion to Dismiss for Failure to State a Claim at 5-6 (Dec. 21, 2021).

[3] *See Pedersen v. Blythe*, 292 P.3d 182, 184-85 (Alaska 2012) ("[C]ourts may consider materials outside the pleadings on a motion to dismiss if those materials are subject to strict judicial notice") (internal quotations omitted); *Forrer v. State*, 471 P.3d 569, 583-85 (Alaska 2020) (recognizing matters of public record can be properly judicially noticed and considered in resolving motion to dismiss). *Cf. Alleva v. Municipality of Anchorage*, 467 P.3d 1083, 1087-88 (Alaska 2020) ("Documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion without converting the motion to one for summary judgment.") (internal quotations omitted).

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any facts, the legal question is ripe for determination: does Section 10 require the final redistricting plan receive a public hearing.

The Valdez and Skagway Plaintiffs contend that there are issues of fact surrounding each of the following that have some bearing on interpretation of Section 10's public hearing requirement:

- Where the Final Plan came from;
- The evolution of the Final Plan over time;
- Whether the Final Plan or a similar version of it was published for public comment and discussed by the Board at its public meetings;
- Whether modifications to prior plans are considered minor; and
- Whether modifications constitute a serious departure from a plan that had been the subject of public comment.

Setting aside that a number of these alleged questions of fact are clearly answered by judicially noticeable maps and documents within the public record, the more important point is that they have no bearing on (1) whether Section 10 requires a public hearing on the final map, or (2) whether the Board held public testimony on its proposed redistricting plans prior to adoption of its final plan.[4]

[4] *See* Mot. Dismiss nn. 7-9, 30-41. Even if the Court goes beyond the plain reading of Section 10—which it need not (and should not) do to dismiss Challengers' claims—and takes judicial notice of the Board's proposed and final maps, the Challengers' Section 10 claims still fail because there is no radical departure from the proposed plans that were available to the public and its comment and scrutiny since their adoption on September 20, 2021.

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B. Challengers' Section 10 Claims are Fatally Flawed because They Read into the Alaska Constitution a Public Hearing Requirement that Plainly Does Not Exist

Instead of pleading a valid Section 10 claim, the Challengers simply make up a new requirement not in Section 10. Challengers want this Court to read into Section 10 a requirement that the Board must take a second round of public testimony on the Board's final redistricting plan. Section 10 simply does not require that.[5] It only requires public testimony on the Board's adopted proposed plan or plans. Section 10 does not require public testimony on the final redistricting plan. Nor is there time for a second round of hearings in the mere 90 days the Board has to go from receiving the U.S. Census data to adopting its final plan.[6] Challengers' desires for more public testimony have no bearing on what public testimony Section 10 actually requires.

Valdez's opposition shows why Section 10 only requires the public hearings after adopting proposed plans. Valdez complains about the lack of public testimony prior to the Board's adoption of one of the Board's proposed plans (version 4).[7] Valdez's flippant disregard of the actual language of Section 10 would turn the task of

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[5] Alaska Const. art. VI, § 10.

[6] *In re 2001 Redistricting Cases*, 44 P.3d 141, 147 (Alaska 2002) ("The challenge of creating a statewide plan that balances multiple and conflicting constitutional requirements is made even more difficult by the very short time-frame mandated by article VI, section 10 of the Alaska Constitution.").

[7] Valdez Opp'n at 8-9.

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redistricting from one of "Herculean proportions"[8] to an impossible one. There are limitations on what can be accomplished within 90 days and Section 10 recognizes that. Section 10 does not require public testimony *prior* to the Board's adoption of a proposed plan and it does not require a public hearing *after* selection of the final plan. Therefore, the Challengers' complaints that the Board violated Section 10 when it adopted its final plan without public testimony is not a cognizable claim under Section 10 and must be dismissed.

Dismissal of Challengers' flawed Section 10 claims does nothing material to their cases or their ability to obtain discovery. While the Challengers lament that motions to dismiss are disfavored, each Challenger asserts multiple other causes of action—including claims that the final plan was developed in violation of the Open Meetings Act and contrary to due process—that will afford them their day in court. There is no entitlement to a trial on meritless claims that are not recognized at law.

As the Alaska Supreme Court recently reminded, "[caselaw disfavoring motions to dismiss], must be exercised in light of Rule 12's goal of promoting the efficient resolution of cases that can be decided early and without great expense to either side."[9] There is no constitutional requirement that the final redistricting plan adopted by the Board must have a public hearing, and the Challengers have pointed the Court to no

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[8] *See In re 2001 Redistricting Cases*, 44 P.3d at 147 ("Redistricting in Alaska is a task of Herculean proportions.") (internal quotations omitted).

[9] *Alleva v. Municipality of Anchorage*, 467 P.3d 1083, 1088 (Alaska 2020).

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authority, binding or otherwise, that imposes such a requirement. The Court must either judicially create a final hearing requirement by re-writing the plain text of the Constitution or the Court must uphold the requirements as set out in Section 10.

In their opposition, Felisa Wilson, George Martinez, and Yarrow Silvers (the "Muldoon Challengers") double down on their assertion that the public had no notice that the Board could pair South Muldoon with Eagle River to create a senate district. This is demonstrably false. The AFFER plan that was an adopted proposed plan of the Board on September 20, 2021, shows the combination of Eagle River residents and South Muldoon residents to create AFFER's proposed Senate District J. The final map's combination of Eagle River residents and Muldoon Residents to create a senate district was not a radical new pairing that escaped public view. The Muldoon Challengers want to quibble about how close the AFFER proposed Senate District J is to the Final Plan's District I. But that is not what Section 10 states or what Judge Rindner held in *In re 2001 Redistricting Cases*. Section 10 requires only that the Board adopt a proposed plan and take public testimony on the proposed plan. The Board indisputably did that here. Challengers' Section 10 claims should be dismissed.

C. The Court Should Dismiss Challengers' Section 10 Claims and Not Waste Discovery and Trial Time on Those Meritless Claims

The Board opposes Valdez's request that this Court allow the development of the factual record on its Section 10 claims even if the Court dismisses those claims. The extreme time limitations imposed in this matter militates against wasting time and

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resources on discovery into, and argument, briefing, and testimony on, a non-cognizable claim. Doing so would rob the Board of the benefit of its successful motion to dismiss—dismissal of unsustainable claims.

Under the position advanced by the Challengers, either within the first 30 days after receiving the census the Board must adopt proposed plans that cannot be altered thereafter, or, based on the public testimony received, the Board is required to restart public hearings after it adopts a final plan that incorporates alterations after holding and taking public comment all within the very limited 90 days provided to the Board to adopt its finalized plan. The Constitution cannot possible contemplate either of these mechanisms. One ignores public comment outright by not permitting changes after adopting a proposed plan, and the other requires hearings that would amount to no more than a rubber stamp as deadlines bear down on the adoption deadline. Article VI, Section 10 is clear and provides that a proposal(s) be adopted, the public has opportunity to weigh-in, and then the Board must make a final decision. At some point, a decision must be made and testimony would no longer serve the purpose of informing a final decision. It would serve only as a check-the-box hearing. The Constitution does not mandate such a waste of the public and Board's time.

III. CONCLUSION

The Board respectfully requests this Court dismiss Challengers' Section 10 claims for failing to plead a claim upon which this Court could grant relief. The public hearings that Challengers demand are not required by Section 10, as demonstrated by

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the plain language of that constitutional provision and Challengers' inability to cite to a single case that supports their fanciful addition to Section 10's public hearing requirement. Judge Rindner appropriately adjudicated this issue 20 years ago and his reasoning remains correct today.

DATED at Anchorage, Alaska, this 29th day of December, 2021.

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