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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

EAST ANCHORAGE PLAINTIFFS' PRETRIAL BRIEF AND OPENING STATEMENT

A bench trial in the above-captioned matter is set to commence on January 21, 2022. Holly Wells and Mara Michaletz of Birch Horton Bittner & Cherot represent Plaintiffs Felisa Wilson, George Martinez, and Yarrow Silvers in this trial and in the case *Felisa Wilson v. Alaska Redistricting Board*, Case No. 3AN-21-08869CI prior to consolidation. Matthew Singer, Lee Baxter and Kayla Tanner of Schwabe, Williamson & Wyatt represent Defendants the Alaska Redistricting Board (the "Board"), Board members Melanie Bahnke, Nicole Borromeo, Bethany Marcum and Budd Simpson, and Board Director Peter Torkelson. Thomas Flynn and Cheryl Burghart represent the State

of Alaska. As instructed by the Court, this brief outlines the claims of East Anchorage Plaintiffs and the evidence that the East Anchorage Plaintiffs anticipate will be presented at trial and will supplement existing facts from the Board's record in support of the findings of fact and conclusions of law East Anchorage Plaintiffs will present to the Court on or before February 9, 2022.

I. OPENING STATEMENT

"The goal of an apportionment plan is simple: the goal is adequate and true representation by the people in their elected legislature, true, just, and fair representation." *Hickel v. Southeast Conference.*[1] The Alaska Supreme Court in *Hickel v. Southeast Conference* reminded Alaska's leaders:

> in deciding and in weighing this plan, never lose sight of that goal, and keep it foremost in your mind; and the details that we will present are merely the details of achieving true representation, which, of course, is the very cornerstone of a democratic government."[2]

The East Anchorage Plaintiffs will present this Court with substantial evidence that the Board systematically deprived the voters in the East Anchorage communities of interest adequate and true representation in the Alaska State Senate. The evidence will demonstrate that the pairing of House District 21 with House District 22 and House District 23 with House District 24 was arbitrary, unreasonable, and in direct violation of the due process clause of the Alaska Constitution. Both the record and testimony will demonstrate that the Board's process and procedure regarding the senate pairings violated Art. VI, Section 10 of the Alaska Constitution as well as the Alaska Open

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[1] 846 P.2d 38 (Alaska 1993).

[2] *Hickel,* 846 P.2d at 44 (*quoting from* 3 Proceedings of the Constitutional Convention (PACC) 1835 (January 11, 1956)).

Meetings Act.[3] The East Anchorage Plaintiffs will submit evidence both from the record and testimony demonstrating that Board members intentionally misrepresented their considerations of partisan motivations, misrepresented their use of partisan data to select their pairings, concealed their analysis of the risk of dilution in the districts at issue on the basis of race and minority status, misconstrued testimony by East Anchorage community members to serve their impermissible objective, and held secret deliberations and meetings to veil their partisan and discriminatory goals. The evidence will demonstrate that the Board's intentional pairing of Eagle River districts with East Anchorage Districts favored one geographical area, community of interest, and political party over another despite overwhelming testimony from both communities detailing their lack of shared interests, goals, and commonalities before the Board, and reiterated by East Anchorage witnesses from Eagle River and East Anchorage alike.

Upholding the adopted senate pairings not only muffles the voices of East Anchorage communities of interest, as so aptly stated by Board member Melanie Bahnke, it would confirm for future boards that partisanship and discrimination are "fair game" in the senate pairing realm. Under the underlying principles of the redistricting process, the Alaska Constitution, and the most basic tenets of fairness, the Board's pairing of the South Muldoon and Eagle River Valley house districts and the pairing of the Government Hill/JBER/Northeast Anchorage and North Eagle River/Chugach house districts cannot stand.

[3] Evidence will also show that the Board's violations in process were not limited to Article VI, Section 10 of the Alaska Constitution and the Open Meetings Act, but also included violations of Robert's Rules of Order.

II. EAST ANCHORAGE PLAINTIFFS' TRIAL WITNESSES AND SCOPE OF TESTIMONY

The East Anchorage Plaintiffs expect to present and rely on the testimony of all witnesses identified in their previously-filed witness list, with the exception of Randy Ruedrich, subject to further notice or review of additional discovery yet produced.

III. AGENCY RECORD

The Record in this case consists of documents ARB000001-ARB007232[4] as supplemented by ARB007233-ARB010821.[5] In addition, pursuant to the Court's order on the record on January 16, 2022 and Civil Rule 90.8, the East Anchorage Plaintiffs understand that each Board member's deposition testimony has been lodged with the Court in the form of both a certified transcript and video recording and will be substantively considered as part of the record in this case.

Additionally, in accordance with the principles articulated in the Court's January 12, 2022 Order Re: Motion to Dismiss, the East Anchorage Plaintiffs intend to introduce at trial various documents obtained from governmental agencies which are appropriate for judicial notice.[6] These documents will be listed in the East Anchorage Plaintiffs' Exhibit List.

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[4] *See* Alaska Redistricting Board's Notice of Filing Redistricting Record, December 21, 2021.

[5] *See* Alaska Redistricting Board's Notice of Supplementing Record, January 14, 2022, at 1-3.

[6] *See* Order Re: Motion to Dismiss at 6 (citing *Pederson v. Blythe,* 292 P.3d 182, 185 (Alaska 2012) (stating that "matters of public record" are subject to "strict judicial notice") (internal citations omitted)).

IV. OUTLINE OF EAST ANCHORAGE PLAINTIFFS' CLAIMS

A. Standard Of Review

The general standard of review applied by the courts in exercising jurisdiction under Article VI, Section 11 of the Alaska Constitution involves a careful balance between deference and protection. While the standard of review was established before the law transferred redistricting responsibility from the executive branch to an independent body, it remains unchanged. In *Groh v. Egan*, 526 P.2d 863 (Alaska 1974), the Alaska Supreme Court stated:

> It cannot be said that what we may deem to be an unwise choice of any particular provision of a reapportionment plan from among several reasonable and constitutional alternatives constitutes 'error' which would invoke the jurisdiction of the courts. We view a plan promulgated under the constitutional authorization of the governor to reapportion the legislature in the same light as we would a regulation adopted under a delegation of authority from the legislature to an administrative agency to formulate policy and promulgate regulations. We have stated that we shall review such regulations first to insure that the agency has not exceeded the power delegated to it, and second to determine whether the regulation is reasonable and not arbitrary. Of course, additionally, we always have authority to review the constitutionality of the action taken, but we have stated that a court may not substitute its judgment as to the sagacity of a regulation for that of the administrative agency, and that the wisdom of a given regulation is not a subject for review.[7]

The Alaska Supreme Court has instructed that, "in determining whether a regulation is reasonable and not arbitrary courts are not to substitute their judgment for the judgment of the agency. Therefore review consists primarily of ensuring that the

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[7] *Carpenter v. Hammond*, 667 P.2d 1204, 1214 (Alaska 1983) (quoting *Groh v. Egan*, 526 P.2d 863, 866-67 (Alaska 1974)). *See also Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1358 (Alaska 1987).

agency has taken a hard look at the salient problems and has generally engaged in reasoned decision making."[8]

B. Article I, Section 7 of the Alaska Constitution; Due Process

The Board's record, the deposition testimony of its Board members, and the testimony submitted by its members and staff all demonstrate intentional violations of due process. Evidence developed at trial will also show the Board's failure to comply with process requirements under the Alaska Constitution and State statute. More specifically, the evidence will demonstrate the following impermissible Board actions:

1. Holding executive sessions that are not permitted under the Open Meetings Act (AS 44.62.310, *et.seq.*);
2. Adopting final senate pairings that were not presented to the public during the public hearing process in violation of Article VI, Section 10 of the Alaska Constitution;
3. Adopting final senate pairings that were not developed in accordance with the guidelines adopted by the Board for development of its final pairings;
4. Adopting senate pairings which the public did not have access to view;
5. Adopting final senate pairings that were not one of the senate pairings options published by the Board for public comment and testimony; and
6. Adopting pairings without regard to public testimony or relying upon misrepresentation of public testimony to justify pairings.

1. <u>Due Process: General Principles of Law</u>

According to the Alaska Supreme Court, "[t]he crux of due process is opportunity to be heard and the right to adequately represent one's interests."[9] In order to determine

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[8] *Interior Alaska Airboat Ass'n, Inc. v. State, Bd. of Game*, 18 P.3d 686, 690 (Alaska 2001).

[9] *In the Matter of K.L.J.*, 813 P.2d 276, 279 (Alaska 1991).

what procedural process is due, the Alaska Supreme Court has generally considered three factors:

1. "[T]he private interest affected by the official action;"
2. "[T]he risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and"
3. "[T]he government's interest, including the fiscal and administrative burdens that additional or substitute procedural requirements would entail."[10]

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

The Court has also recognized that due process entails not only a procedural component, but also a substantive one.[11] Substantive due process protections insulate the public from unfair or unfounded state action: "A due process claim will stand if the state's actions 'are so irrational or arbitrary, or so lacking in fairness, as to shock the universal sense of justice.'"[12] The Board's record and the evidence admitted at trial will

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10 *Id.*

11 "The due process clause guarantees more than fair process ... it also includes a substantive component that provides heightened protection against government interference with certain fundamental rights and liberty interests." *Squires v. Alaska Bd. of Architects, Eng'rs & Land Surveyors*, 205 P.3d 326, 340 (Alaska 2009) (omission in original) (quoting *Treacy v. Muni. of Anchorage*, 91 P.3d 252, 268 (Alaska 2004)).

12 *Ross v. State, Dep't of Revenue,* 292 P.3d 913 (Alaska 2012) (quoting *Church v. State, Dep't of Revenue,* 973 P.2d 1125, 1130 (Alaska 1999); *Application of Obermeyer*, 717 P.2d 382, 386–87 (Alaska 1986)).

demonstrate that the Board's actions in pairing Eagle River house districts with East Anchorage house districts was violative of the public's substantive due process rights.

2. Open Meetings Act

The Open Meetings Act[13] (the "OMA") provides that the meetings of a government body are open to the public unless the meeting falls within certain enumerated exceptions. Executive sessions are permitted under the OMA only in very specific circumstances, and must be initiated pursuant to certain procedures. The use of an executive session is strictly construed by the courts in favor of open sessions. The record and evidence presented at trial will demonstrate that the Board, on numerous occasions, did not enter executive session for a lawful reason under AS 44.62.310. When entering into executive session the Board was vague about the purpose of the sessions and did not provide any reason for justifying the use of executive sessions to select senate pairings outside the public purview.

The attorney-client privilege certainly exists and "operates concurrently with AS 44.62.310 although it is not an expressed exception."[14] The attorney-client privilege is, however, necessarily a narrower privilege in the OMA context and cannot be used as a blanket protection to discuss legislative matters. A broader application of the attorney-client privilege to cloak the Board's unvetted decision-making would violate the policies codified in the purpose of the Act, which are set forth in AS 44.62.312. One of the most basic tenets of the OMA, as expressly acknowledged by the legislature, is that "the

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[13] Alaska Statute 44.62.310.

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

people's right to remain informed shall be protected so that they may retain control over the instruments they have created."[15] The Alaska Supreme Court has determined that:

> It is not enough that the public body be involved in litigation. Rather, the rationale for the confidentiality of the specific communication at issue must be one which the confidentiality doctrine seeks to protect: candid discussion of the facts and litigation strategies. The principles of confidentiality in the lawyer-public body relationship should not prevail over the principles of open meetings unless there is some recognized purpose in keeping the meeting confidential.[16]

The Court goes on to state that:

> [p]ublic board members, sworn to uphold the law, may not arbitrarily or unnecessarily inflate confidentiality for the purpose of deflating the spread of the public meeting law. Neither the attorney's presence nor the happenstance of some kind of lawsuit may serve as the pretext for secret consultations whose revelation will not injure the public interest. … The exception is not appropriate for 'the mere request for general legal advice or opinion by a public body in its capacity as a public agency.'[17]

At the time the Board entered its problematic executive sessions, there was no pending litigation. The action of identifying senate pairings is not intrinsically and categorically subject to legal vulnerability, and thus is an inappropriate topic for an executive session. The existence of and reasons for the pairings must be discussed in a meeting open to the public, not in executive session.

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15 Alaska Statute 44.62.312(a)(5).

16 *Cool Homes,* 860 P.2d at 1262 (citing *Channel 10, Inc. v. Independent School Dist. No. 709, St. Louis County,* 215 N.W.2d 814, 825–26 (1974); *City of San Antonio v. Aguilar,* 670 S.W.2d 681, 686 (Tex.App. 1984) (holding that a conference on decision to appeal deserves confidentiality); *Hui Malama Aina O Ko'olau v. Pacarro*, 4 Haw.App. 304, 666 P.2d 177, 183–84 (1983) (holding that a settlement conference deserves confidentiality)).

17 *Id.* at 1261-62 (quoting *Minneapolis Star & Tribune Co. v. The Housing & Redevelopment Authority in and for Minneapolis*, 246 N.W.2d 448, 454 (Minn.1976)).

The Board did not simply violate OMA: its adoption of policies seemed to create the stage for these violations by distancing the Board from its mandates under the OMA. Board policies indicate that the Board believes that as a "constitutionally created" board, it is not necessarily subject to the Open Meetings Act.[18] This position is suspect in light of the very clear precedent set by the Alaska courts in each previous redistricting cycle that the OMA does in fact apply to the Board. At the very least, it demonstrates the Board's mistaken belief that the OMA is an Act to be used at its convenience rather than a law to be followed.

3. Open Meetings Act Remedy

While actions taken contrary to the Open Meetings Act are voidable under Alaska law, Alaska courts have been reticent to declare a redistricting plan void on the basis of an OMA violation. The courts have, when faced with missteps by previous redistricting boards, weighed the harm to the public of a voided plan against the nature and scope of the violation and determined instead that the mere declaration of the violation and direction to the offending board to correct the improper conduct was sufficient. While East Anchorage Plaintiffs find no fault with these past findings, the evidence in the record and presented at trial will demonstrate that, in this case, the balancing test that usually preserves Board action in this instance demands the remand of the plan with regard to the senate pairings.

[18] *See* Board Policies, adopted January 2021 ("The [ARB] is established by constitution and is not an agency of the executive branch and can therefore 'choose' to adopt a hybrid code that includes pieces of both the legislative and executive branch open meetings and public notice…")

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

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

2. the disruption that may be caused to the affairs of the public entity, other governmental bodies, and individuals if the action is voided;

3. the degree to which the public entity, other governmental bodies, or individuals may be exposed to additional litigation if the action is voided;

4. the extent to which the governing body, in meetings held in compliance with the Open Meetings Act, has previously considered the subject;

5. the amount of time that has passed since the action was taken;

6. the degree to which the public entity, other governmental bodies, or individuals have come to rely on the action;

7. whether and to what extent the governmental body has, before or after the lawsuit was filed to void the action, engaged in or attempted to engage in the public reconsideration of matters originally considered in violation of the Open Meetings Act;

8. the degree to which violations of the Open Meetings Act were willful, flagrant, or obvious; and

9. the degree to which the governing body failed to adhere to the policy under AS 44.62.312(a).[19]

The evidence the East Anchorage Plaintiffs plan to present and the record itself will show that the Board's conduct and the harm caused by its OMA violations justify remand.

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[19] Alaska Statute 44.62.310(f).

4. Article VI, Section 10 of the Alaska Constitution

Article VI, Section 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."

While the Board plan complied with this provision with regard to the house districts, no proposed plan including the East Anchorage/Eagle River Senate Pairings was properly and timely presented to the public before its adoption, which resulted in a violation of this constitutional provision. The record and evidence introduced at trial will demonstrate that, after the Board adopted its proposed house district maps and engaged in a statewide hearing tour regarding its house district maps, it precluded mention of senate pairings at its statewide public hearings.

Thus, in contrast to the robust public participation permitted by the Board as to house pairings, the Board never held hearings regarding any adopted senate pairings. Instead, its deliberations regarding senate pairings were kept in confidence from the public and not presented for public hearing prior to adoption in their final form. Instead, on November 9, 2021, the Board exited executive session and, without discussion, adopted new pairings proposed by Board member 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.

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. The East Anchorage Plaintiffs will demonstrate that the failure to comply with the mandates of Article VI, Section 10

precluded the public from effectively or 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.

5. Art.VI, Section 10 Remedy

Once again, the East Anchorage Plaintiffs recognize that voiding the senate district plan causes very real harm to the public at large as it greatly reduces the likelihood that the public will have certainty in its election process in the upcoming election and it results in the substantial dedication of resources by the State of Alaska to continue to fund and staff the Board. The evidence will show, however, that unlike with house districts, the Board need only convene for a short period to adopt new senate pairings and to follow the constitutional and statutory mandates in doing so. Thus, while East Anchorage Plaintiffs recognize that a balancing test likely applies to determining the appropriate remedy for violations of Article VI, Section 10 of the Alaska Constitution, the East Anchorage Plaintiffs intend to demonstrate that the appropriate remedy specific to senate pairings, as a matter of law and based upon the facts, is in fact voiding the senate pairings adopted unconstitutionally, and remanding to the Board with direction to employ proper procedure and all other governing principles of law as presented or will be presented in the Application, this Pretrial Brief, the East Anchorage Plaintiffs' closing briefing, and their proposed findings of fact and conclusions of law.

C. Article I, Section 1 of the Alaska Constitution: Equal Protection

Article I, Section 1 of the Alaska Constitution — the equal protection clause — guarantees to each citizen the equal protection of the law. Alaska's equal protection

clause — more protective than its federal counterpart — provides that "all persons are equal and entitled to equal rights, opportunities, and protection under the law."[20] "In the context of voting rights in redistricting and reapportionment litigation," the Alaska Supreme Court has held that "there are two principles of equal protection, namely that of 'one person, one vote' — the right to an equally weighted vote — and of 'fair and effective representation' — the right to group effectiveness or an equally powerful vote."[21] The former is quantitative, or purely numerical, in nature; the latter is qualitative.[22]

The Board's decision to create two senate seats for Eagle River by fragmenting East Anchorage communities violated this fundamental constitutional provision because the adopted senate districts intentionally, effectively, and non-speculatively dilute the vote and community voices of Anchorage residents in HD 2 – S. Muldoon and HD 23 – Government Hill/JBER/Northeast Anchorage in order to amplify the vote and voice of Eagle River voters in the Alaska Senate. Because of this dynamic, the Board's Anchorage senate pairings deny East Anchorage voters their right to an equally powerful and geographically effective vote and completely disregard the inherent demographic, economic, and geographic differences between the Eagle River and East Anchorage communities.

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

[21] *Kenai Peninsula Borough,* 743 P.2d at 1366.

[22] *Hickel*, 846 P.2d 38 (citing *Kenai Peninsula Borough*, 743 P.2d at 1366-67).

To that end, the East Anchorage Plaintiffs will demonstrate, both from testimony and based upon the record itself, that the Board's creation of two separate Eagle River senate districts constitutes unlawful political gerrymandering, by intentionally increasing majority senate districts while systematically circumscribing the voting power and influence of Anchorage residents in HD 2 – S. Muldoon, HD 23 – Government Hill/JBER/Northeast Anchorage, as well as the East Anchorage districts with which these districts would have been paired but for the Board's irrational decision-making and the resulting unlawful gerrymandering.

The East Anchorage Plaintiffs will also demonstrate, through reliance on the record and testimony, that these equal protection violations mandate overturning the Board's unconstitutional senate pairings in East Anchorage. Both the Alaska and federal due process clauses impose a guarantee of fair representation which mandates overturning certain apportionment schemes that "systematically circumscribe the voting impact of specific voter groups" even where these schemes would otherwise be "mathematically palatable."[23] This principle recognizes the danger that certain groups – community, political, racial, or of other varieties – may be "fenced out of the political process and their voting strength invidiously minimized" by redistricting and reapportionment schemes which violate the Equal Protection clause.[24]

While the United States Supreme Court has indicated that "a mere lack of proportional representation will be insufficient to support a finding of unconstitutional vote

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23 *Id.* at 48-49.

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

dilution,"[25] and that Plaintiffs must prove a pattern of intentional discrimination against a group and discriminatory effect on that group,[26] the Alaska Equal Protection clause imposes a stricter and more protective standard than its federal counterpart.[27]

In *Kenai Peninsula Borough v. State,* the Alaska Supreme Court expressly held that "Senate districts which meander and ignore political subdivision boundaries and communities of interest will be suspect under the Alaska Equal Protection clause."[28]

Further, the Court has approved of and incorporated trial court dicta explaining that "[t]here is an Alaska equal protection guarantee against hodge-podge senate pairings."[29] Indeed, the Court in the *Kenai Peninsula Borough* case found a senate district unconstitutional under the Alaska Equal Protection clause where it was the product of "intentional geographic discrimination" such that the district "tend[ed] toward disproportionality of representation and its purpose [was] therefore illegitimate."[30]

In *Kenai Peninsula Borough*, looking to both "the process followed by the Board in formulating its decision" and to "the substance of the Board's decision," the Court found that "it [was] evident that the Board sought to prevent another Anchorage senate seat in the state legislature," thereby demonstrating that the Board impermissibly acted against

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

26 *Id*. at 133.

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

28 *Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1365 n. 21 (Alaska 1987).

29 *Hickel*, 846 P.2d at 73.

30 *Kenai Peninsula Borough*, 743 P.2d at 1371-72.

"the interest of individual members of a geographic group or community in having their votes protected from disproportionate dilution by the votes of another geographic group or community."[31] This precedent creates protection for the interest of communities in their "right to an equally powerful and geographically effective vote in the state legislature."[32] Notably, this right protects *community interests* — not merely interests stemming from race, political affiliation, or other suspect classes.

The Court also established a rule: "upon a showing that the Board acted intentionally to discriminate against the voters of a geographic area, the Board must demonstrate that its plan will lead to greater proportionality of representation."[33] Because of this stricter standard, the Court deliberately does not require a showing of a pattern of discrimination, and does not consider *any* effect of disproportionality *de minimis* when determining the legitimacy of the Board's purpose.[34]

Here, the record will demonstrate and Board Member Marcum publicly stated that the pairing of Eagle River house districts with Anchorage districts would "give Eagle River the opportunity to have more representation" and that Eagle River residents would "certainly not … be disenfranchised by this process."[35] The converse of this statement is that, while the voices and interests of Eagle River residents will be amplified by their two senate seats, the voices of those who live in Muldoon will be diluted as they are forced to

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31 *Id.*

32 *Id.*

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

34 *Id*.

35 Alaska Redistricting Board's Answer to Felisa Wilson, George Martinez, and Yarrow Silvers' First Amended Complaint at ¶ 22.

share a senate seat with members of a disparate community with whom they have little in common. This dilution is evident in — but not exclusive to — the proportion of the senate seat made up by minority voters. As the Affidavit of Kevin McGee demonstrates, the Board's senate pairings combine historically white, more conservative districts with minority districts which have historically voted for more progressive candidates.[36] When the two Muldoon House districts are paired together, a majority of the district is composed of diverse minority voters. When, however, House Districts 21 and 22 are paired together, the minority population within the district plummets. While a district composed of the two geographically-aligned Muldoon districts would permit these diverse voices to effectively advocate for the interests of their community, their ability to do so when paired with predominately white, economically advantaged Eagle River residents is minimized. This deprives Muldoon residents of the right to a powerful, geographically effective vote in the state legislature which they are guaranteed by the Alaska Equal Protection Clause.

D. Article VI, Section 6 of the Alaska Constitution: Senate District Criteria

Article VI, Section 6 of the Alaska Constitution provides that "[e]ach senate district shall be composed as near as practicable of two contiguous house districts. Consideration may be given to local government boundaries. Drainage and other geographic features shall be used in describing boundaries wherever possible."

Prior to 1998, the Alaska Constitution provided at Article XIV "fixed" or "frozen" senate seats. In 1966, these were found to be unconstitutional by the United States Supreme Court in *Baker v. Carr.*[37] In light of that unconstitutionality, it became the job of

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36 Affidavit of Kevin McGee at ¶¶ 16-17, 23-32.

37 369 U.S. 186 (1962).

the Governor, and eventually the Board, to designate senate districts through the redistricting process. Thereafter, a body of case law emerged in which the Courts extended the Constitutional requirements for house districts to those for senate pairings in an effort to create some ascertainable criteria for evaluating the work of the Board as to senate districts.[38]

In 1998 voters amended the Alaska Constitution to address the creation of senate districts. The amendment revised the text of Article VI, Section 6, and inserted into the Constitution the sentence highlighted below in bold, with the consequence that the Constitution now requires: (1) that senate districts be composed as nearly as practical of two "contiguous house districts"; (2) that, when creating Senate districts, the Board may consider "local-government boundaries"; and (3) that "drainage and other geographical features shall be used" in describing boundaries "wherever possible":

> The Redistricting Board shall establish the size and area of house districts, subject to the limitations of this article. Each house district shall be formed of contiguous and compact territory containing as nearly as practicable a relatively integrated socio-economic area. Each shall contain a population as near as practicable to the quotient obtained by dividing the population of the state by forty. **Each senate district shall be composed as near as practicable of two contiguous house districts**. Consideration may be given to local government boundaries. Drainage and other geographic features shall be used in describing boundaries wherever possible.[39]

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[38] *See Groh v. Egan,* 526 P.2d 863, 880 (Alaska 1974) ("[s]ince the senate districts combined house districts and utilized the same boundaries, the identical reasons for approving or disapproving the disparities are applicable"); *see also Kenai Peninsula Borough v. State,* 743 P.2d 1352, 1365 (Alaska 1987) ("[w]e decline to sever the compactness and contiguity requirements from article VI, section 6 and to find them applicable to senate districts, although ... senate districts which meander and ignore political subdivision boundaries and communities of interest will be suspect under the Alaska equal protection clause.").

[39] Alaska Const. Article VI, Section 6.

Before 1998, the Alaska Supreme Court noted "contiguous territory" is, formally "territory which is bordering or touching."[40] And the Court quoted with favor a practical definition: "[a] district may be defined as contiguous if every part of the district is reachable from every other part without crossing the district boundary (i.e., the district is not divided into two or more discrete pieces)."[41]

The 1998 changes to the Alaska Constitution did not require senate districts to be "compact," or to contain an "integrated socio-economic area." But they did require senate districts to be composed, as near as practicable, "of two contiguous house districts," which the additional guidance that: (1) consideration may be given to local government boundaries; and (2) drainage and other geographic features shall be used in describing boundaries wherever possible.

The East Anchorage Plaintiffs will demonstrate through the record, their exhibits subject to judicial notice, and testimony, that the inhabited portion of the South Muldoon district is not practically "reachable" from the inhabited portions of the Eagle River Valley district "without crossing the district boundary." For example, as Sean Murphy and Yarrow Silvers testified in their affidavits, it is impossible to travel from South Muldoon to Eagle River without leaving the senate district.[42] Likewise, as Ms. Silvers and Felisa Wilson's

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40 *Hickel*, 846 P.2d at 45, *as modified on reh'g* (Mar. 12, 1993).

41 *Id*. (citing Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L.Rev. 77, 84 (1985)).

42 Affidavit of Yarrow Silvers at ¶¶ 10, 59 ("the reality is that our two communities of interest are completely separate both physically and in every other way"); Affidavit of Sean Murphy at ¶ 5 ("[T]he physical separation between Eagle River Valley and South Muldoon is very real. Not only are these two areas separated by about 15 miles and a stretch of highway, two bodies of water (a creek and Eagle River and a sizable valley),

affidavits demonstrate, residents of East Anchorage rarely travel to Eagle River, and do not shop, socialize, or get gas there.[43] Likewise, residents of Eagle River do not shop or recreate in Muldoon.[44] Similarly, the evidence will also show that the pairing completely disregards local governmental boundaries and drainage and geographic features, and fails to comply with the spirit of the constitutional requirement.

Testimony by anthropologist Chase Hensel will demonstrate that as a result of a detailed analysis of the districts at issue, East Anchorage and Eagle River are distinct communities: to travel between them, one would need to leave the senate district, drive through two other districts, and arrive at the destination 9 miles later. There is no meaningful or practical contiguity between the two regions, which comprise distinct and separate communities of interest. Likewise, the communities are in different local-government assembly districts, and East Anchorage is served by the North East Community Council, whereas Eagle River is served by three local community councils unique to Eagle River. Finally, the East Anchorage Plaintiffs will present geographic evidence in its exhibits confirming that South Muldoon and Eagle River Valley are divided by mountains, and are not in adjacent watersheds: evidence presented will demonstrate that South Muldoon is in the Chester Creek drainage; Eagle River is in the Eagle River drainage; and the two are separated by the Ship Creek Drainage.

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there is no way to get from here to there, or vice versa, without going through another district.

[43] Affidavit of Felisa Wilson at ¶¶ 14-21; Affidavit of Yarrow Silvers at ¶¶ 59-61.

[44] *Id.*

As supported by the record and as will be further confirmed through testimony, the Board placed on the record no reasons for pairing two practically dis-contiguous house districts into Senate District K, nor any reasons for disregarding the Alaska Constitution's invitation to consider local-government boundaries, or its command to consider drainage and other geographic features. Deposition testimony and Board comments during its November 8 and 9, 2021 meetings will also show that the absence of *any* justification to support those departures is all the more constitutionally problematic given that the Board had before it the option of alternate pairings that would have resulted in senate districts that *were* constitutionally contiguous, *would not* have required residents of a house district to drive out of their senate district to reach other residents of the senate district, and *would* have properly respected local government and drainage boundaries, and better accord with sensible geographic considerations.

V. CONCLUSION

As summarized above, the East Anchorage Plaintiffs will prove at trial, through citation to the Board's record, lay witness and expert testimony, and documentary evidence, that the Board's violations in procedure, process, and substance combined in its 2021 redistricting proceedings in such a manner as to result in an erroneous outcome: senate district pairings between Eagle River and East Anchorage house districts which serve to disenfranchise and dilute the community voices of East Anchorage voters. These pairings are violative of the equal protection and due process rights of these voters, in contravention of protections provided by both controlling case law and the Alaska Constitution. In light of the gravity of this error — and the ease with which it may be corrected — the East Anchorage Plaintiffs will demonstrate that they are entitled to the

relief sought in their First Amended Application to Compel the Alaska Redistricting Board to Correct Its Senate District Pairings in Anchorage.

RESPECTFULLY SUBMITTED this 18th day of January, 2022.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 18th day of January, 2022, a true and correct copy of the foregoing document was served electronically on the following:

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